STAKEHOLDER VIEWS ON SURFACE TRANSPORTATION BOARD REAUTHORIZATION

(117–42)

REMOTE HEARING

BEFORE THE

SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

MARCH 8, 2022

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U.S. House of Representatives
Washington, DC 20515

Peter A. DeFazio
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Sam Graves
Ranking Member

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MARCH 2, 2022

SUMMARY OF SUBJECT MATTER

TO:	Members, Subcommittee on Railroads, Pipelines, and Hazardous Materials
FROM:	Staff, Subcommittee on Railroads, Pipelines, and Hazardous Materials
RE:	Stakeholder Views on Surface Transportation Board Reauthorization

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PURPOSE

The Subcommittee on Railroads, Pipelines, and Hazardous Materials will meet on Tuesday, March 8, 2022, at 10:00 a.m. in 2167 Rayburn House Office Building and via Zoom to hold a hearing titled "Stakeholder Views on Surface Transportation Board Reauthorization." The purpose of this hearing is to learn from railroad stakeholders about the Surface Transportation Board's role in regulating the freight railroad industry. Participants in the hearing include the American Chemistry Council, Amtrak, the Association of American Railroads, the Brotherhood of Locomotive Engineers and Trainmen, the National Industrial Transportation League, and the Private Railcar Food and Beverage Association.

BACKGROUND

I. THE SURFACE TRANSPORTATION BOARD

The Surface Transportation Board (STB or Board) is the economic regulator of freight railroads [1], which carry one third of the nation's freight.[2] The STB is a five-member independent agency whose members are appointed by the President with the advice and consent of the Senate, serving staggered five-year terms. Currently, all five members are installed (three Democrats and two Republicans). The STB's predecessor, the Interstate Commerce Commission (ICC), was created in 1887 by the Interstate Commerce Act.[3] The STB was created by the ICC Termination Act of 1995 (ICCTA) to maintain federal economic oversight of rail carriers.[4] Congress last reauthorized the STB in the Surface Transportation Board Reauthorization Act of 2015 through Fiscal Year 2020.[5]

The STB's jurisdiction includes overseeing and monitoring railroad commercial practices nationally; enforcing the railroads' common carrier obligations; evaluating challenges to the reasonableness of rail rates; reviewing proposed railroad mergers; ensuring rail carriers provide fair employee protective arrangements in certain transactions; monitoring rail carriers to ensure they are able to earn revenues that are adequate for the infrastructure and investment needed to meet the present and future demand for rail services; investigating rail service matters of regional and national significance; authorizing construction, operation, discontinuance, and abandonment of rail lines and service; and more recently, passenger rail regulation.[6]

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[1] Congressional Research Service, "The Surface Transportation Board (STB): Background and Current Issues." January 19, 2022 (R47013).

[2] U.S. Department of Transportation, Pocket Guide to Transportation 2019, Page 3.

[3] P.L. 49–41.

[4] P.L. 104–88.

[5] P.L. 114–110.

[6] STB also has jurisdiction over certain trucking company, moving van, and noncontiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission. https://www.stb.gov/about-stb/.

In 2005, Congress asked the National Academy of Sciences to conduct a comprehensive study of the nation's railroad transportation system since the enactment of the Staggers Rail Act of 1980. The study [was to] address and make recommendations on—

"(1) the performance of the Nation's major railroads regarding service levels, service quality, and rates;

(2) the projected demand for freight transportation over the next two decades and the constraints limiting the railroads' ability to meet that demand;

(3) the effectiveness of public policy in balancing the need for railroads to earn adequate returns with those of shippers for reasonable rates and adequate service; and

(4) the future role of the Surface Transportation Board in regulating railroad rates, service levels, and the railroads' common carrier obligations, particularly as railroads may become revenue adequate."[7]

These core considerations remain relevant to the reauthorization of the STB.

II. Railroad Shippers

Railroad shippers range from large, multi-national corporations to small operations. They also vary in the commodities they ship, such as corn, wheat, and soybeans; fertilizers, and various chemicals; cement, sand, and crushed stone; lumber, pulp, and paper products; various food products; crude oil, coal, and other petroleum and energy products; and scrap recycling products, among others.

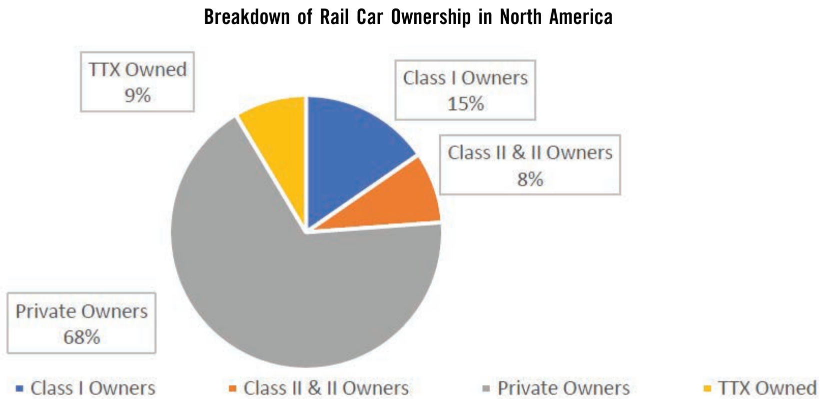
Rail carriers have a common carrier obligation to quote rates and provide service to shippers upon reasonable request.[8] Carriers also must maintain reasonable connections with adjacent rail carriers' networks to allow for the free flow of rail traffic. When a route involves more than one carrier, the carriers may participate in a joint rate to collect a single combined price from the shipper for the transportation being provided.[9]

Numerous commodities are exempt from STB's regulations governing the provision of common carrier service, maintenance of reasonable practices and rates, and provision of adequate service. Exempt commodities include a range of agricultural products, such as fresh fish and meat, cheese and special dairy products, as well as other commodities, including lumber or wood products, chemical waste, and coke produced from coal, among others.[10] The Board is permitted to exempt commodities when there is sufficient transportation competition to protect shippers from market manipulation, and it may also revoke exemptions when it finds that regulation is necessary to carry out the Rail Transportation Policy.[11]

According to some shippers, an estimated 78 percent of freight rail customers are "captive" to or dependent on a single major railroad (i.e., that there is no intramodal competition).[12] While only served by a single major railroad and depending on the movement, some shippers can use other modes, such as truck or barge, to transport their products (intermodal competition). A shipper may not challenge a rail rate unless it is without feasible transportation alternatives. Whether a shipper has feasible transportation alternatives, in the form of intramodal or intermodal competition, is a qualitative analysis undertaken by the STB in a particular case.[13]

Numerous shippers have purchased or lease their own rail equipment since Staggers.[14] According to *The Official Railway Equipment Register* and as outlined in the chart below, in 2019 nearly 70% of railcars were privately owned by rail customers, rather than the railroads.[15]

[7] P.L. 109–59. Sec. 9007.
[8] 49 U.S.C. 11101.
[9] 49 USC 10705.
[10] 49 CFR part 1039.
[11] 49 USC 10502.
[12] Freight Rail Customer Alliance, https://railvoices.org/the-issue/rail-dependent-shipper/.
[13] Surface Transportation Board, prepared by InterVISTAS Consulting, Inc. "An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification," September 2016. https://www.stb.gov/wp-content/uploads/STB-Rate-Regulation-Final-Report.pdf
[14] PSR and the rail car: Commentary by Richard Kloster. Progressive Railroading. February 2019.
[15] The Official Rail Car Register, April 2019. https://www.progressiverailroading.com/resources/editorial/2019/PR0819-CarOwners.jpg



A. Shipping Rates

Since the Staggers Rail Act of 1980 (Staggers), the STB is authorized to set a "reasonable" maximum price for common carriage, but only in response to customer complaints and only in cases where the railroad company is "market dominant"—that is, where no other economically viable transportation option exists.[16] The STB adjudicates rate reasonableness only for rates that exceed a minimum jurisdictional threshold established in statute of 180 percent of revenue to variable cost.[17] In acting as adjudicator, the STB seeks to determine the fair rate based on balancing the goal of protecting shippers from unreasonably high rates with the goal of railroads having as much pricing flexibility as possible to earn adequate revenues to attract private capital and reinvest in their networks.[18]

A shipper seeking to challenge a rate must file an administrative complaint with the STB. In January 2018, the STB established the Rate Reform Task Force to recommend improvements to the existing rate review processes for both small and large cases, and to propose new rate review methodologies to reflect the current state of the industry.[19] In its April 2019 report to the STB, the Task Force wrote that many small shippers find rate cases too complex and/or too costly to pursue.[20] This finding echoed the same finding from a 2015 Transportation Research Board panel.[21] In November 2021, while not yet final, the STB advanced two rulemakings to establish rate reasonableness processes for small rate disputes: a voluntary arbitration program for small rate disputes, and a final offer rate review procedure.[22]

From 1996 to the present, 51 rate cases were brought before the STB. Of those cases, 27 settled; 11 were found to have unreasonable rates; 11 were found to have reasonable rates; and 2 were withdrawn.[23] No rate cases have been filed for the last

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[16] Congressional Research Service, "The Surface Transportation Board (STB): Background and Current Issues." January 19, 2022 (R47013).

[17] 49 U.S.C. § 10707(d)(2): "A finding by the Board that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than 180 percent does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation; or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

[18] Congressional Research Service, "The Surface Transportation Board (STB): Background and Current Issues." January 19, 2022 (R47013).

[19] Surface Transportation Board, "Surface Transportation Board Releases Report from the Rate Reform Task Force," April 2019. https://www.stb.gov/news-communications/latest-news/pr-19-06/

[20] Rate Reform Task Force, Report to the Surface Transportation Board, April 25, 2019, page 9.

[21] Transportation Research Board Special Report 318: Modernizing Freight Rail Regulation, June 2015, https://onlinepubs.trb.org/onlinepubs/sr/sr318highlights.pdf

[22] Surface Transportation Board, https://www.stb.gov/news-communications/latest-news/pr-21-47/

[23] Surface Transportation Board, Quarterly Status of Rate Complaint Cases Before the STB, Report-on-Rate-Case-Review-Metrics-Fourth-Quarter-December-31-2021.pdf (stb.gov), page 2.

three years.[24] At the same time, a commensurate number of informal complaints have been filed.[25]

Since the enactment of Staggers, railroads have been allowed to enter voluntary rate contracts with shippers to provide service on specific terms and conditions.[26] With very limited exceptions, contract rates are not subject to STB jurisdiction and do not require equal treatment of similarly situated shippers as common carrier rates do.[27]

B. Reciprocal Switching

Under reciprocal switching, an incumbent rail carrier transports a shipper's traffic to an interchange point where the cars are switched to a competing carrier. The competing carrier pays the incumbent carrier a switching fee for bringing (or taking) the cars from the shipper's facility to the interchange point (or vice versa). That fee is incorporated into the competing carrier's total rate to the shipper.[28] In doing so, a competing carrier can offer a single-line rate even if its lines do not physically reach a shipper's facility, thereby establishing a competing rate.[29] Reciprocal switching may also be called "competitive switching" by shippers or "forced access." Reciprocal switching is known as "interswitching" in Canada.[30]

Staggers authorized the STB to require rail carriers to enter reciprocal switching agreements under certain circumstances.[31] In 1985, the ICC adopted regulations specifying that reciprocal switching would only be prescribed if the agency determines it is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive, and otherwise satisfies the criteria of 49 U.S.C. § 11102(c).[32]

In July 2016, the STB issued a notice of proposed rulemaking on reciprocal switching.[33] The proposal included a two-pronged approach, pursuant to which the Board would have the ability to order reciprocal switching either when (1) it is practicable and in the public interest, or (2) when it is necessary to provide competitive rail service.[34] Under the proposal, reciprocal switching arrangements would not be permitted if either rail carrier involved in the arrangement showed the switching arrangement is not feasible or is unsafe, or that the presence of switching would unduly hamper the ability of that carrier to serve its shippers.[35] The STB received public comment on the proposal and has not issued a final rule. The STB will hold a public hearing on the issue on March 15, 2022.[36]

C. Demurrage and Accessorial Charges

Railroads may charge shippers fees called "demurrage charges" when the shipper detains rail cars beyond the time permitted for loading or unloading rail cars ("free time").[37] Demurrage is subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill

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[24] *Id.*
[25] Surface Transportation Board, Quarterly Report on Formal and Informal Service Complaints, https://www.stb.gov/wp-content/uploads/Report-on-Formal-and-Informal-Service-Complaints-4Q-December-31-2021.pdf
[26] P.L. 96–448.
[27] *Id.*
[28] Surface Transportation Board Federal Register Notice, Reciprocal Switching, 87 Fed. Reg. 62 (January 2, 2022) https://www.federalregister.gov/documents/2022/01/03/2021-28396/reciprocal-switching.
[29] Surface Transportation Board, Petition For Rulemaking To Adopt Revised Competitive Switching Rules, Decision, Docket No. EP 711 (Sub-No. 1) Reciprocal Switching, Service Date July 27, 2016, Page 2.
[30] Marsh, Joanna. "The Itch to Switch: Railroad Swapping in Canada vs. the U.S." FreightWaves, August 24, 2021. https://www.freightwaves.com/news/the-itch-to-switch-railroad-swapping-in-canada-vs-the-us
[31] 49 U.S.C. § 11102(c).
[32] Surface Transportation Board, Notice of Proposed Rulemaking, Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching, Docket No. EP 711, Vol 81, No. 149, August 3, 2016, page 51150.
[33] Surface Transportation Board, Notice of Proposed Rulemaking, Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching, Docket No. EP 711, Vol 81, No. 149, August 3, 2016.
[34] *Id.* at 51156, 49 CFR Section 1145.2.
[35] *Id.* at 51165, 49 CFR Section 1145.2.
[36] Surface Transportation Board, Press Release, "STB Chairman Announces Three Upcoming Public Hearings." https://www.stb.gov/news-communications/latest-news/pr-21-46/, November 12, 2021.
[37] 49 USC 10746.

national needs related to freight car use and distribution and maintenance of an adequate car supply. Demurrage charges have both compensatory and punitive aspects and are intended to promote efficient use of rail resources.[38] Shippers and railroads may enter into contracts pertaining to demurrage, or, in the absence of such contracts, demurrage is governed according to the railroad's demurrage tariff.[39]

Railroads also may assess "accessorial charges." Not defined in statute or regulation, accessorial charges are generally understood to include charges other than line-haul and demurrage charges, according to the STB.[40] Accessorial charges include those assessed for diverting a shipment in transit, ordering a railcar but releasing it empty, weighing a railcar, tendering one railroad's car to another railroad without a line-haul move, special train or additional switching services, or releasing a railcar with incomplete or incorrect shipping instructions, among other causes.[41]

In July 2021, STB Chairman Martin Oberman sent a letter to all Class I freight railroads requesting that they report storage (demurrage) charges at their ten largest intermodal facilities, to better understand the revenues these charges generate for the railroads.[42] The Class I freight railroads answers varied. Below is a table showing the demurrage and accessorial charges collected by the Class I railroads in 2021:

2021 Demurrage and Accessorial Revenues[43]

	BNSF	Canadian National	Canadian Pacific	CSX	Kansas City Southern	Norfolk Southern	Union Pacific
Demurrage Revenue	$207,476,000	$61,299,000	$77,563,000	$442,600,000	$38,143,000	$520,608,000	$340,147,000
Accessorial Revenue	$308,002,000	$309,415,000	$11,383,000	$144,300,000	$16,536,000	$83,423,000	$88,575,000

D. First Mile / Last Mile

In response to a congressionally mandated study, experts recommended in 2015 that the STB regularly collect usable data demonstrating the quality of service rail carriers provide as a means to monitor their response to common carrier service requests.[44] In September 2021, and after hearing concerns raised by shippers and requests for transparency of first-mile and last-mile data, the STB sought input from rail stakeholders to determine whether collecting first-mile and last-mile data is feasible and whether the benefits to rail customers and oversight of the national rail system fluidity is balanced by the increased reporting burden to the Class I freight rail carriers.[45] According to the STB, they have received numerous letters about the need for first-mile and last-mile data over the last year, though the Association of American Railroads indicated this information would not be practical to collect or meaningful to analyze service issues.[46] First-mile and last-mile refers to the movement of railcars between a local railroad serving yard and a shipper or receiver facility.

III. RAIL LABOR

With the Class I railroads' adoption of precision scheduled railroading, the railroads have reduced their workforce. In 2015, the Class I workforce averaged 169,478 workers.[47] By 2019 and pre-COVID, some 29,000 jobs were eliminated, a 17 percent

[38] *Demurrage Liability*, EP 707, slip op. at 2 (STB served April 11, 2014); 49 C.F.R. § 1333.1.
[39] 49 CFR 1333.
[40] Surface Transportation Board, Oversight Hearing on Demurrage and Accessorial Charges, Notice of Public Hearing, Docket No. EP 754, Federal Register Vol. 84, No. 73, April 16, 2019, page 15662.
[41] *Id.*
[42] Surface Transportation Board, Press Release, "STB Chairman Expresses Concern Over Intermodal Supply Chain Issues; Requests Information From Class I Railroads." https://www.stb.gov/news-communications/latest-news/pr-21-30/, July 22, 2021. In addition, prior Surface Transportation Chairman Ann Begeman sent similar correspondence dated December 17, 2018. https://www.stb.gov/stb/elibrary/NDP__Correspondence.html
[43] Surface Transportation Board, https://www.stb.gov/reports-data/demurrage-accessorial-charges/reports
[44] Transportation Research Board Special Report 318: Modernizing Freight Rail Regulation, June 2015, https://onlinepubs.trb.org/onlinepubs/sr/sr318highlights.pdf
[45] Surface Transportation Board Press Release, "Surface Transportation Board Seeks Comment on First-Mile / Last-Mile Service Issues" https://www.stb.gov/news-communications/latest-news/pr-21-38/
[46] *Id.*
[47] Surface Transportation Board, Economic Data, Employment Data, https://www.stb.gov/reports-data/economic-data/employment-data/

decrease.[48] By the end of 2021, the Class I workforce averaged 114,701 workers, or approximately one-third fewer than 2015.[49] Concurrently, the U.S. Class I railroads moved roughly the same volume of traffic during that period. In 2015, total rail traffic volume in the U.S. was 27.9 million carloads and intermodal units, peaking in 2018 at 28.1 carloads and intermodal units, and totaling 26.2 total carloads and intermodal units in 2021.[50]

Rail shippers voiced concern over the workforce cuts and their subsequent impact on service reliability, raising questions about whether the railroads are able to meet common carrier obligations.[51] STB Chairman Oberman sent letters to the Class I railroads asking whether shipper service complaints may be related to or exacerbated by the trend of reduced railroad personnel.[52] During the COVID–19 recovery, railroads have attempted to re-hire some furloughed workers and train new employees, though according to shippers and the STB, they have been unsuccessful at hiring or retaining an adequate workforce following the reduction in forces described above.[53]

IV. AMTRAK

Since Amtrak's creation in 1970, Congress has continually refined the Surface Transportation Board's role in Amtrak matters. When Congress created Amtrak to relieve the freight railroads of their intercity passenger rail common carrier obligation in 1970, Congress granted Amtrak certain rights including access to freight railroads, preference, and additional trains.[54] In 2008, Congress expanded the STB's passenger rail responsibilities to mediate cost allocation methodologies between Amtrak and the states and to enforce Amtrak on-time performance.[55] In 2021, the Infrastructure Investment and Jobs Act explicitly authorized the STB to create a 10-person passenger rail office to carry out the Board's passenger rail responsibilities.[56] The STB is currently considering an Amtrak application to restore Gulf Coast intercity passenger rail service between New Orleans, Louisiana and Mobile, Alabama.[57]

V. PENDING MERGERS & ACQUISITIONS

Railroad transactions can have broad implications for the shape of the nation's transportation system going forward. Since enactment of Staggers, the freight rail industry has consolidated from 33 Class I railroads in 1980 to the seven Class I freight railroads that operate in the U.S. today.[58] The STB is currently considering two significant railroad transactions—the merger of Canadian Pacific Railway (CP) and Kansas City Southern Railway Company (KCS) and CSX's acquisition of Class II Pan Am Railways in New England. The STB has exclusive authority to review these proposed transactions and to determine whether to issue approvals.[59] Public comments on the CP–KCS merger were due to the Surface Transportation Board by February 28, 2022. If it goes forward, the merger would reduce the number of Class I railroads operating in the United States from seven to six and would create the first North American railroad that operates in all three countries—Canada, Mexico and the United States.[60] On the CSX-Pan Am acquisition, the STB held a

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[48] *Id.*
[49] *Id.*
[50] Association of American Railroads, Weekly Rail Traffic Data: https://www.aar.org/aar_news/weekly-rail-traffic-data/
[51] U.S. House of Representatives, Committee on Transportation and Infrastructure, Railroad Shippers Roundtable, July 2019. https://transportation.house.gov/committee-activity/hearings/roundtable-titled-railroad-shippers-roundtable
[52] See "Chairman Oberman Rail Service Letter" to the seven Class I railroads dated May 27, 2021: https://www.stb.gov/news-communications/non-docketed-public-correspondence/
[53] Paul Ziobro, The Wall Street Journal. "Shortage of Railroad Workers Threatens Recovery." July 22, 2021. https://www.wsj.com/articles/shortage-of-railroad-workers-threatens-recovery-11626953584
[54] Federal Railroad Administration, "Shared-Use of Railroad Rights of Way," https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/18863/Report%20to%20Congress%20Shared-Use%20of%20Railroad%20Rights-of-Way%20July%202019.pdf, July 2019, page 3 and 49 USC 24308.
[55] The Passenger Rail Investment and Improvement Act, P.L. 110–432, Sections 209, 212 and 213, respectively.
[56] P.L. 117–58, Section 22309.
[57] Surface Transportation Board, FD 36496, Application of the National Railroad Passenger Corporation Under 49 U.S.C. 24308(e)—CSX Transportation, Inc. and Norfolk Southern Railway Company. https://www.stb.gov/proceedings-actions/filings/
[58] United States Department of Agriculture, "Railroad Concentration, Market Shares, and Rates," February 2014. https://www.ams.usda.gov/sites/default/files/media/Railroad%20Concentration%2C%20Market%20Shares%2C%20and%20Rates.pdf
[59] 49 USC 11324.
[60] Surface Transportation Board, "STB Accepts CP/KCS Merger Application for Consideration," November 23, 2021. https://www.stb.gov/news-communications/latest-news/pr-21-48/

two-day public hearing on January 13 and 14, 2022.[61] The docket for public comments on this transaction has closed.[62]

WITNESS LIST

- Chris Jahn, President and CEO, American Chemistry Council
- Dennis Newman, Executive Vice President of Planning, Strategy and Accessibility, Amtrak
- Ian Jefferies, President and CEO, Association of American Railroads
- Dennis Pierce, President, Brotherhood of Locomotive Engineers and Trainmen
- Brad Hildebrand, Member, National Industrial Transportation League and former Vice President of Cargill—Rail and Barge Lead
- Herman Haksteen, President, Private Railcar Food and Beverage Association

[61] Surface Transportation Board, "STB Chairman Announces Three Upcoming Public Hearings," November 12, 2021. https://www.stb.gov/news-communications/latest-news/pr-21-46/
[62] Surface Transportation Board, "Surface Transportation Board Issues Decisions in CSX/Pan Am Merger Application Review," December 10, 2021. https://www.stb.gov/news-communications/latest-news/pr-21-50/

STAKEHOLDER VIEWS ON SURFACE TRANSPORTATION BOARD REAUTHORIZATION

TUESDAY, MARCH 8, 2022

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:04 a.m. in room 2167 Rayburn House Office Building and via Zoom, Hon. Donald M. Payne, Jr. (Chair of the subcommittee) presiding.

Members present: Mr. Payne, Mr. DeFazio, Mr. Malinowski, Mr. Moulton, Ms. Newman, Mrs. Napolitano, Ms. Titus, Mr. Lynch, Mr. Auchincloss, Mr. Carter of Louisiana, Mr. Crawford, Mr. Perry, Mr. Rodney Davis of Illinois, Mr. Weber of Texas, Mr. Balderson, Mr. Stauber, Mr. Burchett, Mr. Johnson of South Dakota, Mr. Nehls, and Mrs. Steel.

Mr. DEFAZIO [presiding]. The subcommittee will come to order.

I ask unanimous consent the chair be authorized to declare a recess at any time during today's hearing.

Without objection, so ordered.

I also ask unanimous consent that Members not on the subcommittee be permitted to sit with the subcommittee at today's hearing and ask questions.

Without objection, so ordered.

As a reminder, please keep your microphone muted unless speaking. If you make noise, I will yell at you.

To insert a document into the record, please have your staff email it to DocumentsT&I@mail.house.gov.

All right. We don't go through as many formalities at the beginning as we used to, which is good.

Well, Chairman Payne is delayed, so, I will be chairing here today.

So, I want to thank all of our witnesses for being here. It is kind of an unusual thing, having been on the committee a long time and observed these hearings, but I haven't seen too many times when rail labor, railroad shippers, and Amtrak are all raising similar concerns about the way the freight rail industry is operating. And to say that I am concerned and share their concerns is an understatement.

The STB, Surface Transportation Board, is heavily focused on ensuring the economic vitality of the railroads, when it should be supporting a balanced national freight rail system that serves its customers well. Forty-two years after Staggers—at that point, the freight industry was in very dire straits—and 27 years after Congress replaced the ICC, Interstate Commerce Commission, with the Surface Transportation Board, the balance of power has swung too far.

Wall Street is destroying the freight rail industry, as they are many other industries in the United States of America, as they did when they put pressure on Boeing, and we ended up with horrible tragedies.

I used to say, well, we have the greatest freight network in the world, and it cannot be incompatible with a decent passenger rail network. Unfortunately, the state of the freight rail industry is deteriorating, all after the model of the not-mourned Hunter Harrison, who came up with the idea of Precision Scheduled Railroading—i.e., just look at the bottom line, not the efficiency for shippers, not the safety of your railroad. And it has spread like a disease through the industry since he corrupted CSX. And it is just very sad.

I mean, you can't just infinitely increase your quarterly profits with ever-decreasing operating ratios. So far, freight rail has laid off nearly one-third of their workforce since 2015. They have parked locomotives and closed rail yards, causing a number of shippers to temporarily close plants and facilities due to erratic rail service. The rail workforce strains under pressures to do more with less, the shrunken employee count contributes to unreliable shipper service, worker fatigue, and low morale.

At the same time, the investors on Wall Street have demanded stock buybacks and nonstop returns on investment. The pandemic has exacerbated the effects of pressure that began years ago to cut, cut, cut. Now, after years of shrinking footprints and workforce, Class I's find they have cut too far. They are reopening facilities they closed to save costs and desperately trying to rehire workers who have seen the industry change before their eyes.

The Class I's left themselves so little cushion, and have been unable to adjust for winter in Chicago, flooding in the Midwest and Southeast, and wildfires in the West. Weather events like these happen every year. They are getting worse, due to climate change, and yet they are consistently used as an excuse for degraded or degrading service.

Our national policy to reduce the transport sector's carbon emissions cannot be achieved if the freight railroads are cutting service to less lucrative shippers. We need the freight railroads to be serving more customers at a time when the overall volume of goods transport in the country is skyrocketing.

Railroads consistently tell us how, if 25 percent of the truck traffic moving at least 750 miles went by rail instead, greenhouse gas emissions would fall. I agree with that goal. We have all seen the ads on television. They are more efficient, but you can't be part of the solution if you are following just the stock ticker price and the pressures of Wall Street.

According to the Surface Transportation Board, outside of coal the railroads have lost market share to trucks for the past 15 years. They are cherry-picking only the most profitable routes, working to make the less-profitable routes as unappealing as possible, and forcing that freight to trucks. I have spent my career raising concerns about Wall Street and its attack on American industry and American workers. And, unfortunately, now it has come to freight rail.

I want to have a healthy and the best, most robust freight rail market in the world, keeping trucks off the road. And I do want to have a viable passenger rail network. These two things do not need to be incompatible, and I believe the Surface Transportation Board is going to play a very key role in moving us in that direction.

[Mr. DeFazio's prepared statement follows:]

Prepared Statement of Hon. Peter A. DeFazio, a Representative in Congress from the State of Oregon, and Chair, Committee on Transportation and Infrastructure

Thank you to all of our witnesses for being here today. Something must really be wrong when rail labor, railroad shippers, and Amtrak have similar concerns about the way the freight rail industry is operating. To say I am concerned is an understatement.

The Surface Transportation Board is heavily focused on ensuring economic vitality of the railroads when it should be supporting a balanced national freight rail system that serves its customers well. Forty-two years after the Staggers Act, and 27 years after Congress replaced the Interstate Commerce Commission with the STB, the balance of power has swung too far. Wall Street is extracting wealth from the deregulated railroads at the expense of poor service to railroad customers and on the backs of railroad workers.

This change has been driven by activist investors on Wall Street who demand ever-increasing quarterly profits through ever-decreasing operating ratios. The railroads have been forced to lay off nearly one third of their workforce since 2015. Railroads have also parked locomotives and closed rail yards causing a number of shippers to temporarily close plants and facilities due to erratic rail service. Meanwhile, as the rail workforce strains under pressures to do more with less, the shrunken employee count contributes to unreliable shipper service, worker fatigue, and low morale.

All the while, the same investors on Wall Street have demanded stock buybacks and nonstop returns on investment. The pandemic exacerbated the effects of pressure that began years ago to cut, cut, cut. Now, after years of shrinking footprints and workforces, the Class I railroads find they've cut too far. They are reopening facilities they previously closed to save costs and desperately trying to rehire workers who have seen the industry change before their eyes. The Class I railroads have left themselves so little cushion that they have been unable to adjust for winter in Chicago, flooding in the Midwest and Southeast, and wildfires in the West. Weather events like these occur every year—and are getting worse due to climate change—and yet they are consistently used as an excuse for degrading service.

Our national policy goal to reduce the transport sector's carbon emissions cannot be achieved if the freight railroads are cutting service to less lucrative shippers. We need the freight railroads to be serving more customers at a time when the overall volume of goods transported across the country is skyrocketing.

Railroads consistently tell us how, if 25 percent of the truck traffic moving at least 750 miles went by rail instead, annual greenhouse gas emissions would fall by approximately 13.1 million tons. I agree with their stated goal: to encourage modal shift so that freight railroads can truly be part of our climate solution. They talk a good game. They consistently highlight what we want to hear: rail is three to four times more energy efficient than truck. But they can't really be a part of the solution if Wall Street is pushing the Class I railroads to consistently focus on increasing short-term profits instead of expanding long-term service.

According to the Surface Transportation Board, outside of coal, the railroads have lost market share to trucks for the past 15 years. They are instead cherry picking only the most profitable routes and working to make the less profitable routes as unappealing as possible, thus shifting that freight to trucks.

I've spent my career raising concerns about the greed on Wall Street and its detrimental impacts to Main Street. The challenges in the freight rail industry remind me of what happened at Boeing with the 737 MAX where a storied company, with a proud workforce, changed direction to focus more on the bottom line than on safety, and warnings from employees were ignored. This committee is sounding the alarm today. Activist investors out to make short-term profits with the railroads have gotten nearly $200 billion in stock buybacks since 2010, and I am concerned about the long-term viability of America's freight railroads.

My goal is to foster a healthy freight rail market that boosts the overall economy and reduces carbon emissions. Wall Street's goal is to get wealthier—no matter the impact on our economy, environment, transportation system, or workforce.

The pendulum has swung too far. I hope we can course correct before it is too late. I look forward to hearing the testimony of our witnesses today.

Mr. DEFAZIO. With that, I yield back the balance of my time, and I would now recognize Ranking Member Crawford's opening statement.

Mr. CRAWFORD. Thank you, Mr. Chairman. I appreciate you covering for your colleague, Mr. Payne. I thank him for holding this hearing, and thank you to our witnesses for participating today.

Today's hearing will examine stakeholder perspectives on the Surface Transportation Board's role in regulating the freight railroad industry, and thoughts on the STB's reauthorization.

The STB is an independent agency that generally ensures that freight railroads operate in an efficient and economically competitive manner that serves the interests of freight carriers, shippers, and other interested parties. This year, the STB is busier than ever as it reviews an important reciprocal switching rule, a merger between two Class I freight railroads, and potential expansion of Amtrak service.

The STB must always weigh any consideration of further industry regulations with the deregulatory spirit of the Staggers Act, which opened the freight industry to increased competition, lower rates, and efficiencies that benefit all interested parties.

The STB was last authorized in 2015 through fiscal year 2020. It has subsequently received funding through continuing resolutions.

I commend the chair for holding this hearing today and look forward to hearing from our witnesses.

[Mr. Crawford's prepared statement follows:]

Prepared Statement of Hon. Eric A. "Rick" Crawford, a Representative in Congress from the State of Arkansas, and Ranking Member, Subcommittee on Railroads, Pipelines, and Hazardous Materials

Thank you, Chair Payne, for holding this hearing, and thank you to our witnesses for participating.

Today's hearing will examine stakeholder perspectives on the Surface Transportation Board's role in regulating the freight railroad industry, and thoughts on the STB's reauthorization.

The STB is an independent agency that generally ensures that freight railroads operate in an efficient and economically competitive manner that serves the interests of freight carriers, shippers and other interested parties.

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I commend the Chair for holding this hearing today and look forward to hearing from our witnesses.

Mr. CRAWFORD. And with that, Mr. Chairman, I yield the balance of my time.

Mr. DEFAZIO. OK, I thank the gentleman for his brevity, and since we have no ranking member, I guess we will now proceed to witnesses.

The first witness will be Chris Jahn, the president and CEO of the American Chemistry Council.

Mr. Jahn, you are recognized for 5 minutes.

TESTIMONY OF CHRIS JAHN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN CHEMISTRY COUNCIL; DENNIS NEWMAN, EXECUTIVE VICE PRESIDENT OF STRATEGY, PLANNING, AND ACCESSIBILITY, NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK); IAN JEFFERIES, PRESIDENT AND CHIEF EXECUTIVE OFFICER, ASSOCIATION OF AMERICAN RAILROADS; DENNIS R. PIERCE, NATIONAL PRESIDENT, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN; BRAD HILDEBRAND, MEMBER, NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, AND FORMER VICE PRESIDENT, CARGILL—GLOBAL RAIL AND BARGE LEAD; AND HERMAN HAKSTEEN, PRESIDENT, PRIVATE RAILCAR FOOD AND BEVERAGE ASSOCIATION

Mr. JAHN. Thank you, Mr. Chairman, and good morning to everyone, Ranking Member Crawford, and other members of the subcommittee. I appreciate the opportunity to talk to you today about the Surface Transportation Board.

Freight rail is critical to supporting the everyday operations of ACC member companies. Our industry is one of the largest customers of freight rail, both by volume and revenue, and we are on track to be an even bigger customer in the future.

Now, during his State of the Union Address last week, the President talked about a number of new factories being built across the country, and the growth of manufacturing jobs here in the United States. [Inaudible] industry is playing a major role in the revitalization of American manufacturing by making historic levels of investment.

Our industry has announced expenditures of more than $200 billion, and over 350 chemical manufacturing projects here in the United States. And as a result of this growth, we will need to transport 200,000 additional railcar shipments per year by 2030. These shipments are important to every segment of the economy and the supply chain.

Now, the Staggers Act set a course that helped put the rail industry on the road to recovery and thrive. And that is certainly a good thing. Our members need railroads to be safe, innovative, and successful, and this should give the Board the confidence to move ahead on other equally important objectives also mandated by the Staggers Act: number one, to ensure effective competition among railroads; number two, maintain reasonable rates in the absence of competition.

Fulfilling this mission is vitally important. The railroads, again, need to be financially strong to serve their customers and invest for future growth. At the same time, rail customers need reliable service and reasonable rates. Competition and market forces provide the best means to balance these goals.

Policies that promote greater competition within the railroad industry help make it a more attractive and viable option to move freight. However, most ACC members and other rail customers do not have competitive options, leaving them without market remedies and solely dependent on the STB when faced with unreasonable rates or service failures.

The railroad industry of today looks very different than it did in the 1980s, when STB policies were first adopted. And as we go forward, we need to make changes and modernize these rules to adapt along with the rail industry. So, let me give you a couple of examples.

Consolidation has significantly reduced the number of Class I railroads. This, in turn, has greatly limited access to competitive rail service and led to sharp increases in prices for shipping goods by rail. As one expert recently pointed out, competitive pricing is no longer the norm, and rail customers have to pay a substantial price for the consolidation of railroads' market power. And in fact, the STB's most recent analysis shows that, since 2004, rates have increased by 30 percent more than inflation. Rail rates also outpace increases in long-haul trucking rates over that same time period.

In addition to consolidation of mergers, railroads have dramatically changed their operations under the adoption of Precision Scheduled Railroading. These changes have negatively impacted service, and harmed many shippers and their customers through additional costs and service failures. Given the impact of these changes, the Board must adopt changes that are better equipped to address current challenges and current problems.

We commend STB Chairman Oberman and the other members of the Board for working with all stakeholders to develop sensible policy changes. There are several helpful reforms currently underway at the STB, but there is one that I would specifically like to mention today.

ACC supports the Board's proposal to update its rules on reciprocal switching. This long-overdue change would help fulfill one of the primary goals of the Staggers Act by providing greater access to competitive rail service. Canada has demonstrated that a similar approach can promote competition without harming the financial health of the rail companies or the resiliency of the network. We hope that this committee also values the importance of the STB. The new approaches being considered by the Board can help support American manufacturing and successful railroads.

We would like to work with you to help ensure the Board has the resources it needs to help fulfill its congressional mandate. As the committee moves forward with legislation to reauthorize the STB, ACC urges you to consider the following recommendations.

Number one, ensure the Board has adequate staff and funding to keep pace with changes to the rail network.

Number two, create a better process for collecting data on rail rates.

And number three, provide meaningful remedies for rail service failures.

We appreciate your leadership on freight rail issues, and we want to work with you in any way we can to help serve shippers and railroads. Thank you.

[Mr. Jahn's prepared statement follows:]

Prepared Statement of Chris Jahn, President and Chief Executive Officer, American Chemistry Council

Chairman Payne, Ranking Member Crawford and Members of the Subcommittee, my name is Chris Jahn. I am the President and Chief Executive Officer of the American Chemistry Council (ACC). I appreciate the opportunity to discuss the importance of the Surface Transportation Board (STB) and reforms that will provide greater access to economical and reliable freight rail service.

About ACC

The American Chemistry Council is an industry trade association that represents more than 190 of America's leading chemical companies. Our members produce and manufacture a wide variety of chemicals, polymers, and related products that make our lives and our world healthier, safer, more sustainable, and more productive. The business of chemistry supports over 25% of the U.S. gross domestic product and directly touches nearly all manufactured goods. In addition to supporting a vast supply chain, our members help create more than half a million skilled, good-paying American jobs.

Freight rail is critical to ACC's members and chemical manufacturing. Our industry is one of the largest freight rail customers, shipping 2.1 million carloads in 2020. And the expansion of U.S. chemical manufacturing means our transportation needs are growing. With announced investments of more than $200 billion and over 350 chemical manufacturing projects, we expect to add 200,000 railcar shipments per year by 2030.

We also rely on the Surface Transportation Board to help maintain a reliable, resilient and efficient rail network that is responsive to shipper needs. We are committed to working with Congress to pass legislation that will reauthorize the STB and ensure that the Board has the resources and tools needed to fulfill its vital mission.

Rail Customer Coalition

Because of the importance of freight rail issues to chemical manufacturing, ACC is a member of the Rail Customer Coalition (RCC). Members of the coalition include trade groups representing automobile manufacturers, farmers, steel manufacturers, investor-owned electric companies, and rural electric cooperatives, among others. Collectively, the coalition members represent industries that provide more than 7 million jobs and contribute $4.8 trillion in economic output.

The members of RCC are major transportation stakeholders and the largest users of freight rail. They account for more than half of the total volume of cargo shipped by rail and generate more than three quarters of the revenues collected by the railroads. The RCC is committed to modernizing the Surface Transportation Board (STB) so that it works better for both the railroads and the large and small American businesses that rely on them.

The STB Plays a Crucial Role for ACC Members and Other Shippers

When Congress passed the *Staggers Rail Act of 1980*, it created the STB to help foster a healthy and competitive freight rail system, and it gave the Board sole authority to resolve commercial issues between railroads and shippers. The Staggers Rail Act set a course for the STB that has helped the rail industry recover and thrive, which is a good thing. This success story should give the Board the confidence to follow through on the other important objectives mandated by Staggers—ensure effective competition among rail carriers and maintain reasonable rates in the absence of competition.

Fulfilling this mission requires a balanced approach. Railroads need to be financially strong to serve their current customers and invest for future growth. At the same time, rail customers need reliable service and reasonable rates. Competition and market forces provide the best means to balance these goals. Policies that promote greater competition within the rail industry help make it an attractive and viable option to move freight.

However, many ACC members and other rail customers do not have competitive transportation options and, therefore, no market remedies when faced with unreasonable rates or service failures. For them, the STB is the only recourse to address freight rail issues. Too often, however, the Board's policies and procedures are too complex, costly, and burdensome to provide timely and meaningful solutions.

The Rail Industry Has Changed and STB Must Change Too

The railroad industry of today looks very different than it did in the 1980s when many key STB rules and policies were adopted. Forty years later, consolidation has reduced the number of Class I railroads, which has greatly limited access to competitive rail service leaving many shippers captive to a single railroad. Following this consolidation, the cost to ship goods by rail has increased significantly.

As one expert on freight rail rate trends recently pointed out, "Non-competitive pricing has become the norm, not the exception. Rail customers continue to pay a substantial price for the consolidation of the railroad's market power." [1] In fact, the STB's most recent analysis shows that since 2004, real rail rates (adjusted for inflation) have increased by 30%.

In addition, railroads have dramatically changed their operations and the level of service they provide to shippers following the implementation of Precision Scheduled Railroading (PSR). These changes have harmed many companies through additional costs and service issues.

Given the massive changes within the freight rail industry and their ramifications for the economy, the STB can't stand still. The Board must follow suit and adopt new approaches that are better equipped to address the current environment.

In its report, the National Academy of Sciences' Transportation Research Board concluded, "while the U.S. freight railroad industry has become modernized and financially stable since the Staggers Rail Act of 1980, some of the industry's remaining economic regulations have not kept pace and should be replaced with practices better suited for today's modern freight rail system." [2]

Smart Reforms Must be Adopted

We're encouraged that the STB has recognized that its current polices need to be reexamined. It has taken several important steps to gain a better understanding of the problems and potential solutions, including convening its Rate Reform Task Force, holding numerous hearings, and collecting public comments. Now it must act on that information and move forward on the reforms the Board has carefully crafted with input from many stakeholders.

Specifically, ACC supports the STB's proposal to change its restrictive rules on reciprocal switching. This key reform, which has been pending since 2016, would finally provide greater access to competitive rail service as envisioned by Congress more than 40 years ago. Reciprocal switching will unlock market forces to help provide competitive transportation rates, open up more service options, and ease congested routes.

We also support the Board's efforts to streamline its procedures by adopting a policy known as Final Offer Rate Review. This new policy would provide a more useful alternative to the Board's outdated and burdensome rate review standards that have proven to be unworkable for most shippers.

In addition, we support the Board's efforts to collect and report more meaningful data on service performance to rail customers known as "first mile/last mile service." Collecting this critical data would provide the STB and rail customers with better insight into some of the most disruptive service problems so they can be effectively addressed.

We commend STB Chairman Oberman and the other Board members for focusing on these priorities and encourage them to finalize these needed reforms. We hope that this Committee also recognizes the importance of these reforms and how they can help support American manufacturing.

Congress Must Build on the STB Reauthorization Act of 2015

When Congress reauthorized the STB in 2015 with bipartisan support, it provided the Board with additional tools and resources so it could act quicker and be more proactive in addressing freight rail issues. The law expanded membership from

[1] Escalation Consultants analysis: Rail Rates Climb Higher as Competition Gets More Scarce
[2] TRB report: Modernizing Freight Rail Regulation

three to five members and allowed Board members more flexibility to discuss pending matters. It gave the STB the authority to initiate its own investigations on rail service and other significant issues. And it required the Board to study more efficient and simplified rate review methodologies.

These changes have produced results. For example, the STB was better positioned to tackle the service and demurrage issues that resulted from operational changes adopted under Precision Scheduled Railroading. It has also allowed the Board to develop some of the reforms currently under consideration, including Final Offer Rate Review.

Just like the STB, Congress should not stand still on freight rail reform. As the Committee moves forward with legislation to reauthorize the STB, ACC urges you to consider the following recommendations:

- *Ensure the Board has adequate funding and staff*. The STB must fulfill a broad range of responsibilities, including new oversight of Amtrak service. Congress must provide the Board with the necessary resources to meet its ongoing obligations and to keep pace with changes to the rail network.
- *Improve data on rail rates*. To help the STB meet its mandate to maintain reasonable rates in the absence of effective competition, Congress should commission the Transportation Research Board to develop a new economic model that uses real world data to compare the rates paid by captive shippers to the rates paid for similar shipments in competitive markets. Currently, the Board has no way to measure how much extra a rail shipper pays solely because it lacks competitive transportation options. Creating a new model could serve as a more accurate and realistic starting point for evaluating whether a rate is "reasonable."
- *Provide remedies for rail service failures*. The Board currently lacks authority to provide meaningful remedies for customers facing railroad service failures. Congress should provide the Board with authority to require and enforce a service recovery plan if a railroad fails to provide adequate service. In addition, Congress should authorize relief and damages where a carrier has failed to provide adequate service.

CONCLUSION

A robust and responsive freight rail network is important to the continued growth of U.S. chemical manufacturing. We appreciate the strong interest this Committee has shown on this important issue, and we look forward to working with you on legislation that reauthorizes the STB so that it serves both shippers and railroads.

Mr. DEFAZIO. Exactly 5 minutes. The gentleman is to be congratulated, and thank you for that substantive testimony.

Now we will hear from Dennis Newman, executive vice president of strategy, planning, and accessibility for Amtrak.

Mr. Newman, you are recognized for 5 minutes.

Mr. NEWMAN. Good morning, Chairman DeFazio, Ranking Member Crawford, and members of this subcommittee. My name is Dennis Newman, and I am Amtrak's executive vice president for strategy, planning, and accessibility. On behalf of Amtrak's over 17,000 hard-working and dedicated employees, thank you for allowing me to testify before this subcommittee and share with you Amtrak's views on the reauthorization of the Surface Transportation Board.

When Congress created the STB in 1995, passenger rail was simply not top of mind. However, many things have changed since then.

First, Congress has made several important updates to the law, providing the STB with new responsibilities regarding Amtrak.

Second, the on-time performance of Amtrak trains has deteriorated due to some host railroads ignoring Amtrak's statutory preference rights over freight trains.

And third, some railroad mergers have had lasting service impacts on Amtrak train performance, and have even jeopardized the continued operation of certain Amtrak routes.

Therefore, given what has happened over the past 26 years, and how your constituents are often delayed or ignored by some freight railroads, it is critical that the STB be equipped with the tools and the resources necessary to help ensure a modern, well-functioning passenger rail network in America.

While my written testimony includes a number of STB-related reauthorization proposals, I would like to highlight three particular items for this subcommittee to consider.

First, the STB passenger rail program. In the IIJA, Congress explicitly said that the STB shall establish a passenger rail program, and hire up to 10 additional employees to assist the Board in doing this important work. Now that the IIJA is law, we need Congress to provide the STB with the Federal funds necessary to hire the staff to focus on its responsibilities with respect to passenger rail, such as conducting investigations into substandard performance.

That brings me to the second priority I would like to highlight. It is important to clarify that when a complaint is brought to the Board to look into substandard on-time performance, the Board will not just treat it as another adversarial proceeding, but rather actively investigate the causes and remedies for that poor performance. This will strengthen an enforcement tool that already exists, and clarify the key role that the Board can and should play in remedying chronic on-time performance issues.

And finally, to complement the authority the STB has to investigate substandard performance, the U.S. Attorney General has the authority to bring a case to enforce provisions of the Rail Passenger Service Act, including the preference law. However, as you may expect, the Department of Justice is very busy with a number of other pressing matters. And unfortunately, DOJ has brought only one preference case in 49 years. Therefore, in order to ensure freight railroads are not ignoring the law and delaying your constituents, Amtrak is requesting that we be provided with the ability to also bring a case to district court when our rights are being violated by a host railroad.

I want to thank Chairman DeFazio for his hard work on this issue, and for including preference enforcement in the Moving Forward Act. As we know, this important provision was ultimately not included in the IIJA. But we cannot give up this fight.

I also want to thank Chairman Payne for introducing a standalone bill, H.R. 2937, the Rail Passenger Fairness Act. And I ask members of this subcommittee to support this critical piece of legislation if they are tired of their constituents being delayed by certain freight railroads.

With these additional tools and resources, Amtrak believes our passengers and your constituents could finally have the service that they deserve.

Now, before I end, I want to stress one really important point. There is absolutely no reason why this Nation cannot have both a world-class freight rail network and a modern, expanded intercity passenger rail service. Amtrak wants both to succeed. There are many examples of Amtrak and our State partners working cooperatively with host railroads to deliver performance improvements and network expansion with publicly funded investments that benefit all rail users. We have supported rail mergers that will benefit Amtrak performance and facilitate service expansion, like the proposed CP/KCS merger. With this subcommittee's help, we believe that building a system that works for both freight and passenger rail is possible.

Thank you for all your support thus far, and for your time this morning. I look forward to your questions.

[Mr. Newman's prepared statement follows:]

Prepared Statement of Dennis Newman, Executive Vice President of Strategy, Planning, and Accessibility, National Railroad Passenger Corporation (Amtrak)

Good morning, Chairman Payne, Ranking Member Crawford, and Members of this Subcommittee. Thank you for inviting me to testify on behalf of Amtrak about the reauthorization of the Surface Transportation Board (STB). My name is Dennis Newman, and I am Amtrak's Executive Vice President, Strategy, Planning, and Accessibility.

THE NEED FOR STB REAUTHORIZATION

When Congress was drafting the ICC Termination Act of 1995 (ICCTA) that created the STB, passenger rail issues were not top of mind. The ICCTA made no mention of Amtrak. The 15-part Rail Transportation Policy the ICCTA directed the STB to follow in exercising its regulatory powers did not say anything about passenger rail.

Perhaps that is not surprising. At the time the STB was created, its recurring role with regard to passenger rail was limited to resolving, under 49 U.S.C. 24308(a), the relatively infrequent disputes between Amtrak and its host railroads over terms and conditions for Amtrak's access to their lines and issuing orders to allow Amtrak trains to operate in an emergency under 49 U.S.C. 24308(b). Railroad mergers were viewed as necessities to rid the industry of excess capacity and combine financially precarious railroads with stronger ones that did not affect passenger rail.

Many things have changed in the ensuing 26 years. First, several statutory changes have given the STB important new responsibilities regarding Amtrak:

- Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) gave the STB power to investigate poor on-time performance of Amtrak trains and enforce Amtrak's longstanding right to preference over freight trains.
- PRIIA also shifted from the U.S. Department of Transportation to the STB the responsibility for resolving disputes between Amtrak and its host railroads over the operation of Amtrak trains at accelerated speeds under 49 U.S.C. 24308(d), and over Amtrak's operation of additional trains under 49 U.S.C. 24308(e).
- Section 11204(a) of the Fixing America's Surface Transportation (FAST) Act of 2015 gave the STB ongoing responsibility for adjudicating disputes regarding application of the cost allocation methodology for state-supported trains developed pursuant to Section 209 of PRIIA.

Second, the on-time performance of Amtrak trains operating over our host freight railroads has deteriorated, driven by the fact that some host railroads are ignoring Amtrak's statutory preference over freight trains. During Amtrak's Fiscal Year 2021, only 52% of passengers on our long-distance routes arrived at their destinations on time, seven percentage points worse than the year before. Only one of our 15 long-distance routes, and just 12 of 26 state-supported routes, met the standard of 80% customer on-time performance established by the FRA's metrics and standards during 2021.

And third, while railroad mergers and line sales have helped large U.S. freight railroads achieve record profits, implementation of many mergers has triggered rail service meltdowns with lasting adverse impacts on Amtrak train performance and in some cases has jeopardized the continued operation of Amtrak routes.

The Surface Transportation Board (STB) plays an essential role both in meeting national transportation needs and in Amtrak's fulfillment of its statutory goals and directives. Approximately 97% of Amtrak's 22,300 route-mile network is on rail lines owned by freight railroads and regional transportation authorities. Over 70% of Amtrak's train-miles in pre-pandemic 2019 operated over the lines of these host railroads.

Absent agreements between Amtrak and its host railroads, it is the STB that determines whether and on what terms Amtrak may operate its National Network of state-supported and long-distance routes over host railroad lines, and the compensation Amtrak must pay for those operations. While nearly all such operations are conducted pursuant to negotiated agreements, it is Amtrak's ability to obtain STB adjudication of disputes that ensures such agreements are reasonable, and that existing and additional Amtrak services can operate. The statutory and other changes since enactment of the ICCTA that I have described have greatly increased the STB's importance to passenger rail. Few things are more important to the continued operation, performance, and expansion of Amtrak's National Network than a well-functioning and adequately funded STB.

THE IIJA

For Amtrak and passenger rail, the reauthorization of the STB could not come at a more opportune time. The Infrastructure Investment and Jobs Act (IIJA) enacted in November will transform intercity passenger rail service to a much greater extent than any previous legislation since Amtrak's creation more than 50 years ago. The IIJA provides the significant, multiyear federal funding requested by the Administration and long supported by many members of this Subcommittee: $58 billion in advance appropriations over the next five years for investment in Amtrak and intercity passenger rail. That funding will allow us to begin the modernization of Amtrak's assets and initiate significant expansion of Amtrak's route network.

The IIJA directs the Federal Railroad Administration (FRA), in consultation with Amtrak and other stakeholders, to establish a Corridor Identification and Development Program to identify specific corridors for improvement and expansion of intercity passenger rail service. It also tasks FRA with leading a two-year study of long-distance service expansion.

Amtrak's participation in the corridor development effort will be informed by Amtrak Connects US, a vision for developing and expanding corridor services throughout the United States over the next 15 years that Amtrak released last April. Amtrak Connects US identified 39 new corridors with high demand and potential for intercity passenger rail service, and an additional 25 existing corridors that are prime candidates for service expansion. Many of these corridors are in fast growing states and regions that Amtrak's current route network does not serve well, or in many cases at all, today. Amtrak's current network is about the same size as it was in 1971, even though the U.S. population has increased by roughly 120 million since that time.

The enactment of the IIJA will greatly increase the importance of the role the STB plays with respect to Amtrak and its existing and future operations over host railroad lines. Access to all host railroad lines on reasonable terms, without lengthy delays or exorbitant and unjustified demands for capital investments when Amtrak seeks to operate additional trains, is an essential prerequisite to using the funding provided by the IIJA to grow our network.

REAUTHORIZATION PROPOSALS

I would like to focus my testimony on several issues affecting Amtrak that we believe should be addressed as the Committee develops its STB reauthorization bill. Thanks to the Committee's work, provisions addressing some of these matters were included in the Moving Forward Act, the infrastructure bill adopted by the House last year, but unfortunately were not part of the IIJA that ultimately became law.

Enforcement of Amtrak's Preference Rights

A high level of on-time performance on trains operating over Amtrak's host railroads is crucial to attracting customers and realizing the benefits of public investments in rail. Although Amtrak's statutory preference over freight trains has been the law since 1973, it has increasingly been ignored by host freight railroads because there has been no means to enforce it. Only the U.S. Attorney General is empowered to bring a case to enforce provisions of the Rail Passenger Service Act, including the preference law provision. In the 49 years since enactment of the preference provision, the U.S. Department of Justice has brought only one case to enforce Amtrak's preference rights.

Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), codified at 49 U.S.C. 24308(f), gave the STB authority to conduct investigations of Amtrak routes with poor on-time performance; to determine whether the cause was the host railroads' failure to give preference to Amtrak trains; and to award damages and other relief to Amtrak where that was the case. By giving the STB authority to enforce preference, Congress intended to remedy the lack of enforcement problem. Unfortunately, that did not happen for two reasons.

First, the Association of American Railroads (AAR), acting on behalf of its freight railroad members, launched what became a decade-long legal challenge to the constitutionality of Section 213's grant of preference enforcement power to the STB. While that challenge ultimately failed, it effectively prevented the STB from exercising its investigatory and enforcement powers during the more than 13 years since PRIIA's enactment.

Second, the STB was never given the resources necessary to investigate and take action against preference violations. Funding was never appropriated for the additional STB staff positions that Section 24308(f) authorized. As a result, when Amtrak did bring complaints of preference violations to the STB, which were ultimately withdrawn due to the AAR's legal challenge, the STB was forced to treat them as adversarial adjudicatory proceedings rather than investigations by STB staff as Section 213 contemplated. The protracted litigation resulting from this approach benefits poor performing railroads that seek to drag out legal proceedings while Amtrak passengers continue to experience delays and makes preference violation complaints extremely expensive to pursue.

Amtrak is gratified that the STB is finally empowered to begin exercising the authority it was given by PRIIA Section 213 to investigate substandard Amtrak on-time performance and to take action if poor performance is a result of preference violations. However, when that happens, there is nothing to prevent freight railroads from launching yet another legal challenge to the STB's authority. In the meantime, Amtrak passengers will continue to suffer unnecessary and protracted delays when freight railroads violate the law and give preference to their freight trains over Amtrak trains. In the interest of providing effective relief to Amtrak and its passengers as soon as possible, Amtrak recommends that the STB reauthorization bill:

- Ensures that the STB's Passenger Rail Program, created by Section 22309 of the IIJA and authorized for ten full-time staff positions, is adequately funded, preferably by specifying that at least five percent of the total funding appropriated for the STB in each year the bill authorizes is to be made available to fund salaries, investigations, and other activities of that program;
- Authorizes Amtrak to seek enforcement of its preference rights in federal court, as did the Moving Forward Act and the Rail Passenger Fairness Act sponsored by Rail Subcommittee Chairman Payne, which we deeply appreciate;
- Specifically directs the STB to conduct investigations rather than initiate adversarial proceedings when Amtrak or another authorized party files a complaint alleging a preference violation with the STB;
- Specifies that, at any time during a preference investigation, the STB may utilize its authority under 49 USC 1321(b)(4) to issue injunctive orders where the facts warrant and as necessary to avoid irreparable harm to Amtrak passengers from continuing preference violations; and
- Specifically provides that, under the broad power Section 213 confers upon the STB to award relief for preference violations, the STB may require that rail lines on which continuing preference violations are found be dispatched jointly by the railroad and Amtrak or by an independent third party.

Operation of Long Freight Trains

The implementation of so-called "Precision Scheduled Railroading" by many Class I railroads has, among other things, led to the operation of very long freight trains, some more than three miles in length. In many cases, these trains are too long to fit in most passing sidings on the single-track rail lines that are predominant on the national rail network. Amtrak trains are often required to follow long freight trains at slow speeds for considerable distances, sometimes a hundred miles or more, before these behemoths reach a siding long enough to accommodate them. When two very long freight trains are operating in opposite directions, they can effectively shut down a rail line. The operation of such trains also produces lengthy grade crossing blockages, and concerns have been expressed that they can create safety risks.

To address these problems, Amtrak believes that the STB reauthorization bill should require that railroads that operate very long freight trains develop Long Train Operating and Safety Plans and submit them to the STB and FRA for review and approval following public comment. These plans would be similar to the plans for implementation of positive train control that railroads are required to submit to FRA, and the approach followed in regulating heavy trucks that are allowed to operate on designated highways after obtaining special permits. The plans would detail how the railroad would ensure safe operation of long trains, and the operational practices and/or infrastructure investments railroads would implement so that the operation of these trains would not negatively impact passenger rail service or communities.

Consistent Application of Federal Railroad Laws

Passenger and freight railroads over which the STB has regulatory jurisdiction are subject to a number of important federal laws governing railroads, including the Railway Labor Act and the Railroad Retirement Tax Act. Although Amtrak is exempt from most STB regulation, Congress specified in the Rail Passenger Service Act that Amtrak is also subject to these federal railroad laws.[1]

However, as a result of a 2012 STB decision determined by a single vote,[2] intercity passenger railroads that operate within a single state are deemed not to be part of the interstate rail network—even though they operate over the interstate rail network on tracks shared with and owned by STB-regulated railroads—as long as they do not connect with Amtrak. It makes no difference whether, like the applicant in the 2012 case, these railroads connect directly with interstate and international airlines and cruise lines, or benefit from federal railroad loans and federal railroad grant programs. As a result, these railroads are not subject to STB jurisdiction, or to the federal railroad laws that apply to Amtrak and to passenger and freight railroads that are subject to STB jurisdiction.

Congress should eliminate this loophole. All railroads operating intercity passenger rail service over the interstate rail network should be subject to federal railroad laws. A federal regulatory scheme that discourages other intercity passenger railroads from connecting with Amtrak contravenes current federal transportation policy reflected in the IIJA. It also gives a few for-profit passenger rail companies an unfair advantage over railroads subject to federal railroad laws and deprives the employees of these companies of the rights and benefits enjoyed by other railroad employees.

Railroad Mergers

The statutory provisions governing the STB's review of railroad mergers and line sales and leases predate the STB. They are largely unchanged since enactment of the Staggers Act in 1980, when federal policy encouraged railroad mergers to rationalize the railroad network and alleviate the railroad industry's severe financial distress. Additionally, they do not specify that the STB must consider impacts on passenger rail when reviewing rail mergers.

Indeed, the statutory provisions that apply to mergers not involving two Class I railroads have essentially been construed to require the STB to rubber stamp such transactions absent severe anti-competitive effects, regardless of whether a merger is in the public interest. Some have even asserted that the STB is also prohibited from imposing conditions on mergers that are required by the public interest to avoid harm to passenger rail service or to ensure safe operations.

Since enactment of the ICCTA in 1995, implementation of railroad mergers has produced rail service meltdowns that have lasted for many months or years. Like freight shippers, Amtrak passengers have been severely impacted by the resulting rail network gridlock, which has triggered multi-hour delays on some routes on nearly every trip. On many routes, the performance of Amtrak trains has never fully recovered to pre-merger levels. In at least two cases, a railroad merger or rail line lease has produced changes in freight traffic flows or track maintenance responsibility that threatened the continued operation of Amtrak routes.

While the STB revised its regulations governing mergers between Class I railroads almost 20 years ago to reflect the vastly changed condition of the railroad industry, the old statutory provisions governing railroad mergers remain on the books. When the STB is reauthorized:

- Impacts on passenger rail service should be added to the statutory criteria the STB is required to consider in reviewing *all* railroad mergers and line sales/leases;
- The STB's authority to impose conditions on all transactions to protect passenger rail service and safety should be reaffirmed; and
- The STB should be empowered to disapprove any railroad merger, line sale, or lease transaction that is not in the public interest.

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[1] 49 U.S.C. 24301(c)

[2] *All Aboard Florida—Construction and Operation Exemption*, STB FD No. 35680, Decision served Dec. 21, 2012.

Rail Transportation Policy

The preservation, improvement, and expansion of passenger rail service should be added to the Rail Transportation Policy, codified at 49 U.S.C. 10101, that guides the STB's actions.

Operation of Additional Trains

I also wanted to mention briefly the STB's authority, codified at 49 U.S.C. 24308(e), to issue orders requiring host railroads to allow the operation of additional Amtrak trains.

Nearly a year ago, Amtrak for the first time initiated a proceeding under that provision, seeking an order that would allow restoration of state-supported Amtrak service between New Orleans and Mobile. The second of two STB hearings in that proceeding will take place in early April, and the STB will issue a decision thereafter. We are gratified by the support for Amtrak's position in that case that was expressed at the first hearing last month by the FRA and members of Congress from both parties, particularly Chairman DeFazio who testified at the hearing.

Congress enacted Section 24308(e) in 1980 to provide Amtrak with an "expedited procedure" to add additional trains in the face of some host railroads' "intransigence" and demands for "inordinate capital improvements."[3] The enactment of the IIJA last year, with its focus on service expansion and unprecedented funding to make it a reality, reaffirmed that Congress intends for Amtrak to be able to expand its network without impedance or unnecessary delay. After the STB issues its decision in the pending case, we will advise the Committee if we believe any further legislative action is necessary to effectuate Congress's intent.

DEVELOPING A WORLD CLASS FREIGHT AND PASSENGER RAIL NETWORK

Finally, I wanted to debunk the myth that improvement and expansion of Amtrak service will result in the degradation of freight rail service. Those who assert that either seek to mislead or are unfamiliar with the U.S. railroad network.

Improving our nation's rail network is not a zero-sum competition between passengers and freight. There is absolutely no reason why this nation cannot have both a world class freight rail network *and* modern, expanded intercity passenger rail service.

Amtrak wants both freight and passenger rail to succeed. Amtrak and shippers have the same interest in freight railroads providing good service and maintaining their infrastructure. We know that some freight railroads, driven by a myopic focus on operating ratios and short-term financial performance, are not making the infrastructure investments they should be making. It also bears noting that the freight railroads that are providing good service to Amtrak, as measured by Amtrak's Host Railroad Report Card that ranks Class I railroads based upon relative minutes of host railroad-responsible delays to Amtrak trains, are not generally the railroads whose service freight shippers are complaining to the STB about.

Another reason why freight railroads and freight shippers should welcome expansion of Amtrak service is the public investment in rail infrastructure that passenger rail service brings to the table. Over the last few decades, Amtrak, our state partners, and the federal government have invested billions of dollars in public funding to add capacity and upgrade tracks, signals, and other infrastructure on the freight railroad-owned lines over which Amtrak operates. One recent example is the $3.7 billion that the Commonwealth of Virginia and Amtrak have recently committed for passenger rail-driven infrastructure investments along CSX's Washington-to-Richmond/Petersburg rail corridor and for acquisition of CSX rail lines and right-of-way throughout Virginia. Virtually every regional and short line railroad over which Amtrak operates has benefited from significant public funding to upgrade tracks and other infrastructure that it would not have received otherwise.

Amtrak accounts for only approximately 4% of train miles on Class I railroads. That percentage would not significantly increase even if all of the expansion contemplated in the Amtrak Connects US vision occurred over the next 15 years, and that expansion would be accompanied by huge investments of IIJA and other public funding in freight railroad-owned lines to accommodate the additional Amtrak service. Amtrak expansion, and the investment in the U.S. rail network it will bring, can provide a "win/win" for Amtrak and its passengers *and* for freight railroads and their shippers.

[3] House Rep. No. 96–839, Mar. 20, 1980, p. 21; House Conf. Rep. No. 96–1041, May 20, 1980, p. 42.

CONCLUSION

I thank the members of the Subcommittee for your time today and for your support for Amtrak. We look forward to your work to develop an STB reauthorization bill that serves the interests of Amtrak passengers and all rail users.

Mr. DEFAZIO. OK, I thank the gentleman.

We would now turn to Mr. Ian Jefferies, president and CEO of the Association of American Railroads.

Mr. Jefferies, you are recognized for 5 minutes.

Mr. JEFFERIES. Chairman DeFazio, Ranking Member Crawford, members of the committee, thank you for the opportunity to be here before you today.

The past few years have reinforced a key truth: railroads are an integral part of not only domestic commerce, but also global supply chains. This is no accident. For decades, railroads have invested heavily in their top-rated infrastructure, people, and technology, operating 24/7 to keep goods moving.

The numbers tell the story: average annual investments of $25 billion a year, the train accident rate down 31 percent since the year 2000, and record or near-record volumes of intermodal containers, chemicals, grain, and others in the year 2021. Rail transportation also reduces overall emissions, accounting for just 2 percent of transportation-related greenhouse gas emissions, while moving 40 percent of goods. And Class I freight rail employees earn total compensation more than 30 percent higher than the average U.S. employee.

As we discuss the STB and economic regulation, let me be clear about one key point: the current regulatory structure makes sense. Rail rates are 44 percent lower than they were in 1980. And true, rates are modestly higher than they were years ago, today roughly equal to where they were in 1990, 32 years ago. According to the Bureau of Labor Statistics, since 2017 through the end of 2021, the cost to ship by rail has risen at a level of approximately half that of long-haul trucking, even though trucks compete on infrastructure subsidized by taxpayer expense.

The focus at the STB should be a policy environment to meet projected future freight movement needs without sacrificing the industry's ability to make progress towards safety and environmental goals. DOT projects a 50-percent increase in freight by 2050. The more of that freight that moves by rail, the better for the environment, for congestion, and for highway degradation. But sufficient capacity is critical to meet this demand.

As the statute states, railroads must be able to earn the necessary revenues for the infrastructure and investment needed to meet the present and future demand for rail service. The current market-based regulatory framework, developed on a bipartisan basis, has been fundamental to the railroad's ability to meet demands to date. This system provides the requisite balance. Railroads can compete for business with an appropriate regulatory backstop where markets fail.

Therefore, the current push by some for the STB to enact re-regulatory policies, like forced switching, is backwards-looking and wrongheaded. Make no mistake: forced switching would undermine fluidity, disincentivize investment, and increase emissions, all at a time when supply chains are still experiencing disruptions from the pandemic. Railroads already switch traffic today, where it makes sense, and customers can petition for a switch if a railroad shows anticompetitive conduct. The current proposal at the Board would remove that standard, transforming switching from a remedy into a right.

Some point to rail profitability as justification for a new regulation. This is absurd. Penalizing success is bad public policy and shortsighted, especially when that success has led to consistently high investment levels back into our networks, levels that far exceed other industries represented here today as a percentage of revenue. And that level of investment is necessary to meet forecasted demand.

While some members of the fewest largest trade groups might benefit in the short term from forced access, many customers would be harmed, as would the health of the overall rail network. Fortunately, the public record shows broad opposition from leading economists from rail labor, from passenger rail, environmental advocates, and State and local leaders. Most notably, I sincerely thank the 41 committee members represented here today, both Democrats and Republicans, who wrote to the STB in opposition to a forced switching rule, or urged extreme caution in this area.

Re-regulation proponents argue that the STB's rate adjudication processes are cumbersome, time consuming, and expensive. Then Congress should encourage the STB to identify commonsense measures that would streamline rate case procedures, while also remaining consistent with underlying economic principles and statutory requirements. At the same time, Congress should push the STB to implement cost-benefit analyses to its proceedings, as nearly all other agencies currently do to understand the real-world impacts of their deliberations.

In closing, railroads operate in a highly complex and dynamic market, and we continue to work toward the top-line goals of policymakers, specifically maximizing goods movement, and doing so safely. Now is not the time for ill-conceived policy changes that would result in a decrease in freight fluidity and investment. Thank you for your time.

[Mr. Jefferies' prepared statement follows:]

Prepared Statement of Ian Jefferies, President and Chief Executive Officer, Association of American Railroads

On behalf of the members of the Association of American Railroads (AAR), thank you for the opportunity to testify on these important matters related to the Surface Transportation Board (STB). AAR's members include the seven Class I freight railroads and many other railroads that together account for the vast majority of U.S. freight railroad mileage, revenue, employees, and traffic. Amtrak is also a member of AAR, as are various commuter railroads that, in aggregate, account for more than 80 percent of U.S. commuter railroad trips.

Freight railroads form an integrated, continent-wide network and provide a 24/7 critical link in our nation's supply chains. Freight railroads are doing their part to maintain network fluidity and ensure there is sufficient capacity to deliver the goods upon which our economy depends through significant investments in their infrastructure and equipment, development of innovative technologies, cooperation with customers and supply chain partners, and operational enhancements.

Overreaching, unnecessary regulations by the STB put our nation's rail advantage at risk. Congress must continue to make clear that a return to an unbalanced regulatory environment for railroads would ultimately diminish the quality of rail service and undermine the efficiency of supply chains.

FREIGHT RAILROADS ARE PROUD OF THEIR CONTRIBUTIONS TO OUR NATION

America's freight rail network spans close to 140,000 route-miles, serving nearly every industrial, wholesale, retail, and resource-based sector of our economy. Unlike trucks, barges, and airlines, freight railroads operate almost exclusively on infrastructure they build, maintain, and improve themselves. Since 1980, freight railroads have spent roughly $765 billion of their own—not taxpayer—funds on capital expenditures and maintenance related to infrastructure and equipment. It takes an enormous amount of money to keep our freight rail network in best-in-the-world condition—more than 40 cents of every revenue dollar since 1980, which is six times more than the average U.S. manufacturer.

"Crumbling" might describe some forms of U.S. infrastructure, but not freight rail. The American Society of Civil Engineers recognized the impact of the industry's investments in its 2021 assessment of U.S. infrastructure by again awarding rail the highest grade of all infrastructure.[1] These investments have helped the rail industry meet the nation's freight transportation demand during recent supply chain dislocations. In fact, a report released by the Northwestern University Transportation Center found that railroads recently showed significant agility in their response to rises in intermodal traffic throughout the COVID–19 pandemic.[2]

Freight railroads could not be successful without the skill and professionalism of their employees, who are heavily unionized and among America's most highly compensated workers. In 2020, the average U.S. Class I freight rail employee earned total compensation of $135,700. By contrast, the average compensation of a U.S. employee in 2020 was $87,000, just 64 percent of the rail industry's compensation.

FREIGHT RAIL WILL PLAY A CRITICAL ROLE IN MEETING FUTURE DEMAND AND OTHER GOALS

Railroads have played a critical role in America's growth and development for more than 190 years. In the years ahead, railroads will be called upon to do even more. Consider:

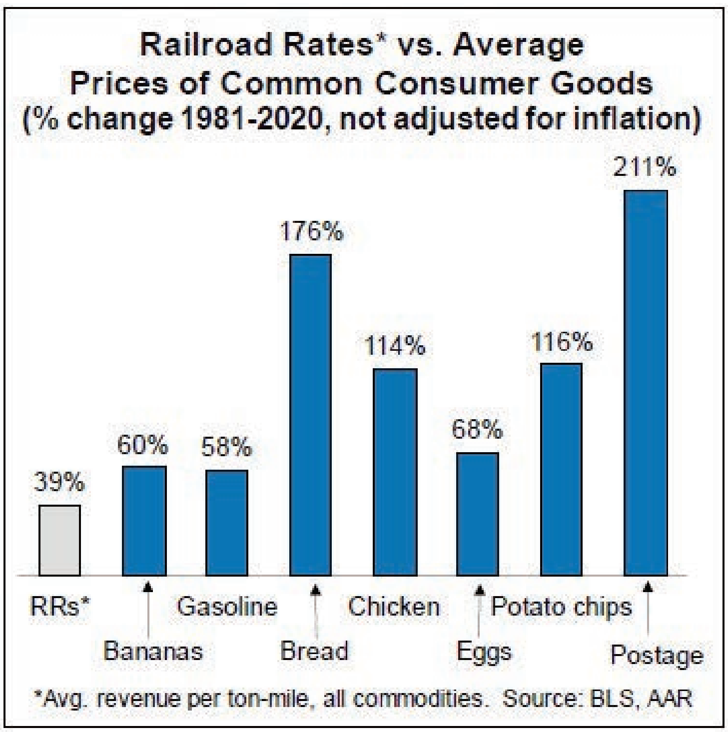
- The Federal Highway Administration and Bureau of Transportation Statistics recently estimated that demand for freight transportation will increase by 50

[1] https://infrastructurereportcard.org/

[2] https://www.transportation.northwestern.edu/research/featured-reports/us-railroad-covid19-report.html

percent by 2050.[3] Railroads will continue to work to ensure they have sufficient capacity and capability to meet this demand.

- To combat climate change, our nation must reduce its greenhouse gas emissions. On average, railroads are three-to-four times more fuel efficient than trucks, meaning moving freight by rail reduces greenhouse gas emissions by up to 75 percent. Railroads are not resting on these laurels, however, and are working with their suppliers to develop and further incorporate a variety of alternatives to traditional diesel fuel—including the use of batteries, renewable fuels, biofuels, and hydrogen fuel cells—that could further reduce the industry's carbon footprint.
- Moving freight by rail is extremely safe. From 2000 to 2021, the train accident rate fell 33 percent; the rail employee injury rate fell 49 percent; and the grade crossing collision rate fell 23 percent. Maintaining and improving safety will always be the industry's top priority, and railroads will not stop in their efforts to continually reduce the occurrence of accidents and injuries.
- In a typical year, highway congestion costs Americans $166 billion in wasted time and fuel. However, a single train can take the freight of several hundred trucks off of our nation's highways and significantly reduce congestion.
- The affordability of freight rail saves rail customers billions of dollars each year. Average rail rates (measured by inflation-adjusted revenue per ton-mile) were 44 percent lower in 2020 than in 1981.



- Today, more than 70 percent of the miles traveled by Amtrak trains are on tracks owned by other entities—mainly freight railroads. In addition, approximately half of America's commuter rail systems operate at least partially on rights-of-way owned by freight railroads.

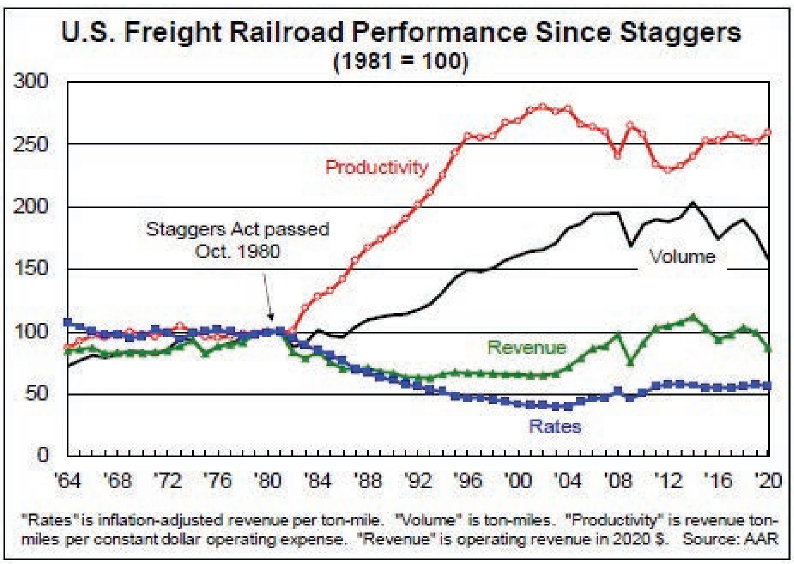
[3] https://www.bts.gov/faf

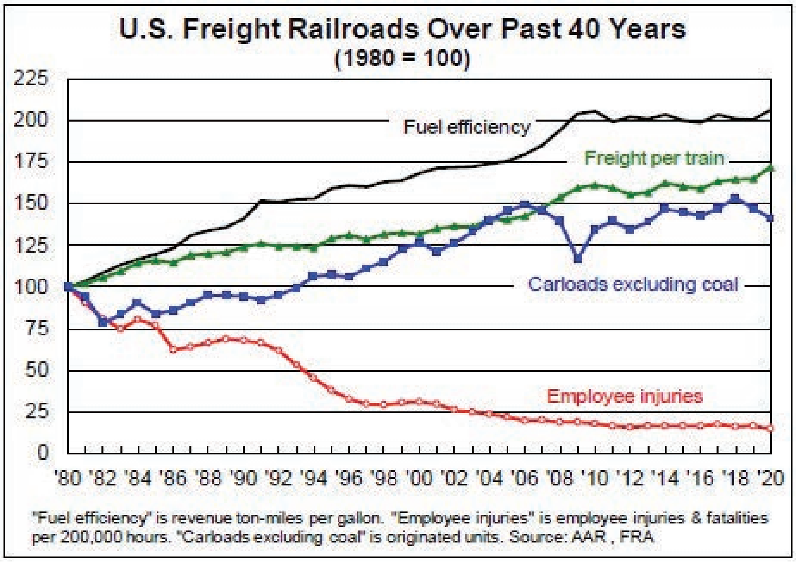
BALANCED REGULATION OF THE FREIGHT RAIL INDUSTRY IS CRUCIAL

Railroads work constantly to improve the safety, efficiency, and competitiveness of their operations, and Congress can help railroads reach their shared goals through oversight of the STB's rate and service regulatory efforts.

Throughout history, the degree of government control over rail operations has tremendously impacted the industry's vibrancy and effectiveness. Prior to the enactment of the Staggers Act of 1980, excessive regulation—some of which is similar to the re-regulation being proposed today—was preventing railroads from earning adequate revenues and competing effectively in the freight transportation market. Congress recognized the need for a new regulatory scheme that allowed railroads to establish their routes and tailor rates based on market conditions and demand. Importantly, however, the Staggers Act did not completely deregulate railroads. The STB retained authority to set maximum rates if a railroad was found to have "market dominance" over a particular movement and the rate was determined to be unreasonable. The STB was also permitted to take other actions if a railroad engages in anti-competitive behavior. Effectively, under today's balanced regulations, the market is allowed to govern, unless and until it is determined to have failed.

The balanced economic regulation included in the Staggers Act was necessary for railroads' very survival. Since the passage of the Staggers Act, railroad capital spending has increased dramatically, resulting in greater efficiency, improved safety, better service, and sharply lower average rates. These improvements are exactly what Congress hoped for.



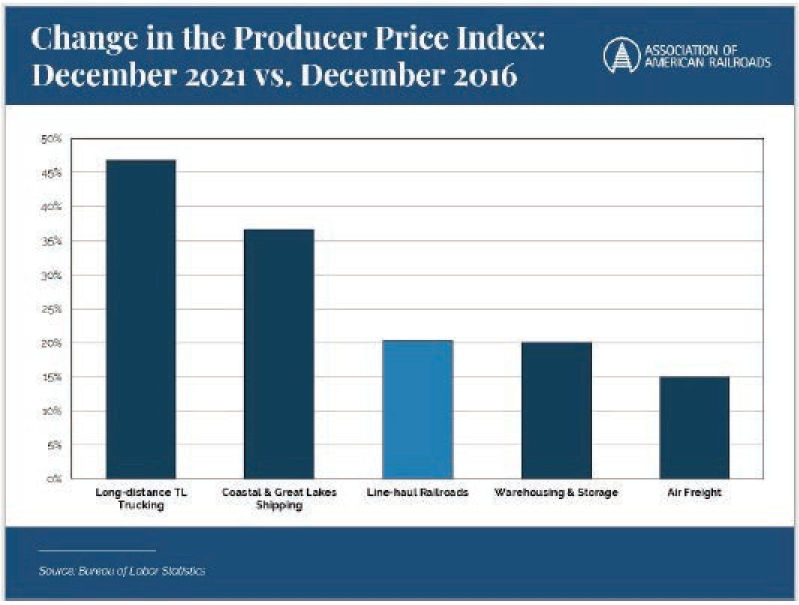


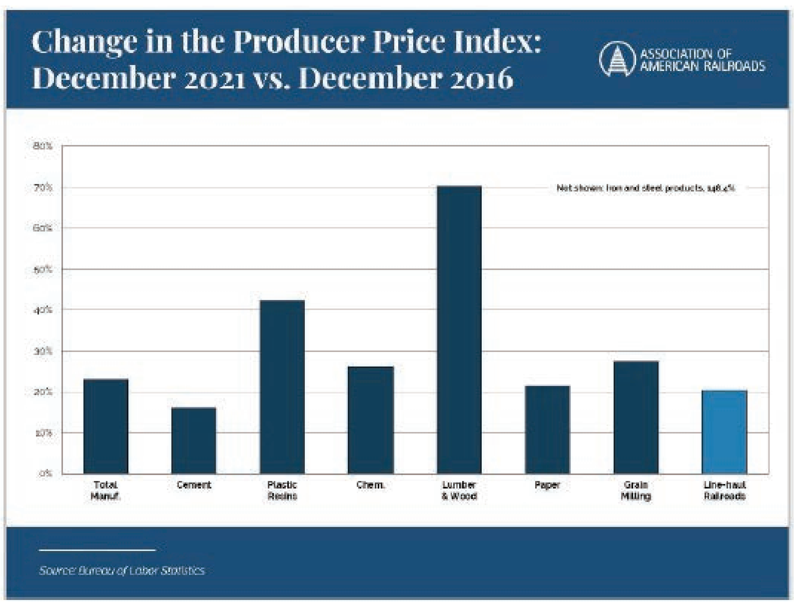
Railroads' progress back to financial health doe doesn't mean the need for regulatory balance has gone away. A return to pre-Staggers unbalanced regulation would put railroad health back at serious risk. The industry would not disappear overnight, but over time the industry's infrastructure would deteriorate, needed new capacity would not be added, and rail service would become slower, less responsive, and less reliable—all at a time when supply chain fluidity needs to be increased, not throttled.

The lessons learned from the industry's recovery post-Staggers Act were acknowledged in late 2020 when more than 1,000 public figures—Democrats and Republicans—signed a letter in support of protecting the current balanced regulatory framework.[4] Signatories included a bipartisan group of eight former U.S. Secretaries of Transportation, more than 550 state and local officials, more than 200 business leaders, nearly 90 think tanks, and 25 former administration officials and congressional leaders.

Some now claim that railroads are doing so well financially that they can, in essence, "afford" more onerous regulations and that the STB should effectively transfer the financial benefits of the railroads' hard- and long-fought financial stability to certain shippers. Penalizing success is bad public policy. Additionally, it is worth noting that rail industry rate increases trail the price increases of other industries, including many of the shipper industries who are among railroads' most strident critics. In fact, changes in producer price indexes, which measure the average selling prices for outputs of industries, show that freight railroads' 20.3 percent increase over the past 5 years is far below price increases implemented in many comparable freight transportation and shipper industries, including long-distance trucking (46.8 percent).

[4] https://gorail.org//wp-content/uploads/Staggers-Anniversay-Letter-to-STB.pdf

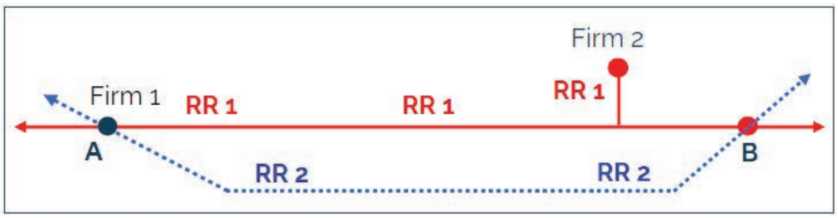




Under the misleading call for more "competition," some of these same shippers support re-imposing excessive, counterproductive regulations on railroads. While only two of these re-regulatory proposals—forced switching and final offer rate review—are discussed below, those and many others would, in one way or another, put price controls on railroads and limit the ability of railroads to reinvest in their networks, simply to increase shippers' profits. If successful, these re-regulatory changes would make it much more difficult for railroads to provide the safe, efficient, and reliable service their customers and our economy need to prosper. The lesson learned from comparing the pre- and post-Staggers freight railroad industry in this country is not stale: more regulation does not result in healthy railroads.

Forced Switching

The STB will be holding a hearing next week to consider a proposed reciprocal or "forced" switching regulation that would require a railroad to use its own tracks and equipment to hand over freight to a competing railroad. For example, in the figure below, suppose firm 1 wants freight shipped to firm 2. Railroad 1 could handle the move all by itself (on infrastructure that it invested in and maintains precisely to serve firm 2), or the freight could move on railroad 2 from point A to point B, then be switched at point B and carried by railroad 1 to firm 2.



Longstanding precedent holds that a railroad will not be *required* by the STB to switch traffic with another railroad unless that railroad is determined to have engaged in anti-competitive conduct. Absent such a showing, railroad 1 could choose to handle the shipment from firm 1 to firm 2 by itself, or it could agree to a joint movement with railroad 2. Regardless of which option railroad 1 chooses, however, rail customers would remain protected by the STB from unreasonably high rates and anti-competitive conduct.

However, the STB is now proposing to remove the requirement that a shipper show a railroad engaged in anti-competitive conduct before the STB can order a railroad to switch certain traffic with another railroad. This would transform forced switching from a *remedy* for railroad abuses of market power into a *right* enjoyed by shippers. While a few industry groups might benefit in the short term from this open-ended restructuring of the rail industry, most would be harmed—all in the pursuit of the STB providing a few what the free market would not.[5] Congress should urge the STB to not implement its forced switching proposal for numerous reasons.

Forced Switching Would Harm Operational Efficiency and Network Fluidity

Railroads have built their networks and honed their routing practices over decades, investing huge amounts of capital to maximize network fluidity and efficiencies. These efforts have benefited rail customers tremendously through improved service, asset utilization, and cost effectiveness.

Switching railcars is costly and time-consuming and increases the accident and injury risk exposure for rail employees who perform such tasks.[6] If switching were mandated by the STB to occur more frequently and wherever a customer desires, interchanges would be required to occur in areas where such activity is not efficient and where appropriate infrastructure investments have not been made. This would seriously disrupt traffic patterns, clog rail yards, and impact the functionality of supply chains.[7]

The Intermodal Association of North America, which represents the combined interests of the intermodal freight industry, shared these concerns in a letter to the STB, emphasizing that the outcomes of forced switching, such as "a decline in rail infrastructure, decreased network velocity, a deterioration in domestic intermodal service, and an adverse impact on intermodal's ability to compete with over-the-road trucking[,]" are "troubling given the supply chain challenges that continue, both do-

[5] https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1644418195748/303762.pdf (The Small Business & Entrepreneurship Council, in a letter to the STB, noted: "Forced switching would undermine the efficiency of the rail system, and raise costs for customers . . ., including small businesses, and consumers overall. This regulatory measure would allow large companies, who simply do not wish to pay market rates for shipping, and competitors to lobby so that government would mandate that railroads hand over traffic to competitors.").

[6] For additional information on the switching of railcars, please visit: https://www.youtube.com/watch?v=pH0oafZKiDY&t=1s.

[7] For additional information on railroads' efforts to address supply chain challenges, please visit: https://www.aar.org/supply-chain.

mestically and internationally."[8] Ultimately, forced switching would undermine freight railroads' efforts to work with customers and other transportation modes to find solutions to supply chain challenges, add significant, unnecessary complexity to rail operations, and harm the efficiency and quality of rail service.[9]

Forced Switching Would Create Disincentives for Railroads to Invest in Their Infrastructure

Forced switching would create disincentives for railroads to invest in their networks and equipment, as railroads could then be mandated to use those same assets for the benefit of other railroads. To remain competitive in the freight transportation market and better serve customers, railroads must continually improve their networks by making significant investments in infrastructure, equipment, training, and technology. Forced switching will ultimately harm the quality of rail service at a time when the benefits of freight rail—including cost effectiveness and environmental responsibility—are more important than ever.

Forced Switching Would Increase Transportation-Related Greenhouse Gas Emissions

Forced switching would add countless unnecessary rail movements, which would increase emissions. Furthermore, the resulting operational inefficiencies may cause rail customers to shift freight from rail to more carbon-intensive modes of transportation, such as trucking. This would mean more greenhouse gas emissions and more congestion on already-crowded highways. The National Wildlife Federation, ConservAmerica, Third Way, and the Conservative Coalition for Climate Solutions also raised these concerns in a letter[10] urging the STB to exercise caution when considering new regulations in order to ensure additional freight does not shift from the most environmentally friendly way to move freight over land—rail.[11]

Forced Switching Would Distort Competition in Freight Transportation Sector

While proponents say this proposal would have a very limited impact on rail operations, expert analysis has found that an estimated 76 to 92 percent of all regulated carload traffic—millions of carloads each year—could be eligible for forced switching under the proposal the STB is currently considering.[12] Because the proposal has such broad application and rail customers' impetus for pursuing forced switching is obtaining below-market rates for rail service, implementation could result in sharp reductions in rail revenue—not due to a loss in traffic stemming from fair market competition, but instead from governmental intervention and interruption of competition in the freight transportation market.

Inadequate earnings would put America's best-in-the-world freight rail network at serious risk. Railroads compete fiercely in intermodal markets and with trucks, barges, and other modes. And as previously discussed, to remain competitive, railroads must earn sufficient revenues to continually make significant investments in infrastructure, equipment, training, and technologies, including locomotives that use low- or no-carbon alternatives to traditional diesel fuel, such as batteries, hydrogen fuel cells, biodiesel, and renewable diesel. By reducing revenues and adding significant operational complexities, railroads would be less competitive for the broad base of business needed to make these investments. If railroads are unable to make such infrastructure investments, there could be cascading impacts on the health of the rail network.

[8] https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1644526735279/303789.pdf

[9] https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1644851310562/303812.pdf (Dr. Michael Mandel, Chief Economist and Vice President of the Progressive Policy Institute, in a letter to the STB, also raised similar concerns: Forced switching would "divert resources away from the optimization of supply chains. Railroads would have to give a high priority to moving goods in a way that met the reciprocal switching requirements, rather than lowering costs and speeding goods to their ultimate customers. The result would be more supply chain disruptions, and higher inflation.")

[10] https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1644942581038/303853.pdf

[11] https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1643216781771/303587.pdf (In a recent filing with the STB, the American Consumer Institute (ACI) also expressed concerns regarding a potential increase in greenhouse gas emissions due to an increased shift to road transportation. ACI concluded that the STB should withdraw this forced switching proposal until it collects and publishes an empirically based analysis of the costs and benefits, including to consumer welfare, public safety, and rail investment, of implementing such a proposal.)

[12] https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1644958413241/303903.pdf, pp. 67–70

Forced Switching Ignores the Intense Competition Railroads Face Every Day

A fundamental tenet of the economics of competition says that where competition exists, there should be no regulatory intervention. Today, the vast majority of rail freight movements are subject to strong competitive forces: competition from other railroads, trucks, and barges,[13] product competition,[14] and geographic competition.[15] In addition, railroads are navigating technological, regulatory, and structural changes that have disrupted the freight transportation market and will continue to do so (*e.g.*, autonomous and/or platooned trucks).

To give an idea of the intense competition railroads face every day, consider the freight transportation markets for intermodal, chemical, and grain shipments, which are the three largest rail markets, together accounting for around 50 percent of rail revenue. Intermodal is the movement of shipping containers and truck trailers by rail. By definition, *every* intermodal unit carried by rail could theoretically move solely by truck. Rail also accounts for just 19 percent of chemical transport, behind trucks and waterborne carriers, while railroads account for 25 percent of grain shipments, less than half of the share of trucks. These are hardly the market shares one would expect for a transportation mode that did not face strong competition.[16]

Forced Switching Would Impact Passenger Railroad Operations

The majority of the train-miles operated by Amtrak and other passenger and commuter railroads are on tracks owned by other entities—almost always freight railroads. As previously noted, implementation of forced switching and the resultant increase in interchanges of railcars would add operational complexity to, and undermine the efficiency and fluidity of, freight rail operations. This increased network congestion would also impact intercity passenger and commuter railroads that rely on fluidity to stay on schedule. Furthermore, if railroads are unable to make sufficient investments to maintain and improve the health of their networks, the service offered to customers by intercity passenger or commuter rail would also be impacted.

Metra[17] and California's Rail Corridors Linking Everyone (CIRCLE),[18] an organization made up of the Capitol Corridor Joint Powers Authority (CCJPA), the Los Angeles-San Diego-San Luis Obispo (LOSSAN) Rail Corridor Agency, and the San Joaquin Joint Powers Authority, have all urged the STB to ensure freight rail operations remain as efficient and fluid as possible in order to maintain on-time performance and encourage continued and new investments in passenger rail networks, especially during a time of historic federal investment.

Freight Railroads Appreciate Congress' Efforts to Protect the Health of Their Networks

Congress should be concerned with the impacts stemming from the STB's implementation of forced switching.[19] The railroads appreciate the 91 Republican[20] and 39 Democratic[21] members of the House of Representatives, including Ranking Member Graves and 40 of this Committee's 69 members, who have already urged the STB not to take any regulatory action that would undermine the ability of railroads to make their annual capital infrastructure investments and emphasized that such

[13] For additional information on competition faced by railroads, please visit: https://www.aar.org/article/railroads-face-fierce-competition/.

[14] This includes the substitution of one product for another in a production process (*e.g.*, generating electricity from natural gas instead of coal).

[15] The ability to obtain the same product from, or ship the same product to, a different geographic area. For example, clay used for taconite pelletization in Minnesota is available from Wyoming mines served by one railroad and from Minnesota mines served by another.

[16] https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1644440817654/303765.pdf (A large coalition, led by the Competitive Enterprise Institute and supported by organizations like Americans for Prosperity, Club for Growth, and Heritage Action for America, sent a letter to the STB stating, "At a time when the question of competition policy is a matter of significant national debate, it is odd that the [STB] seeks to remove any discussion of competitive effects from this aspect of rail regulation." The letter also urges the STB to withdraw this proposal, noting "the [STB] has made no findings of anticompetitive practices that would justify any mandated switching.")

[17] https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1644592484755/303799.pdf

[18] https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1644442887130/303778.pdf

[19] For additional information on forced switching, please visit: https://www.aar.org/article/freight-rail-forced-access/ and https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1644958413241/303903.pdf.

[20] https://www.aar.org/wp-content/uploads/2022/02/Final-STB-EO-Letter-July-2021.pdf

[21] https://www.aar.org/wp-content/uploads/2022/02/8.30.21-Surface-Transportation-Letter-on-Climate-and-Freight-Rail.pdf

investments are essential for railroads to continue to compete in a dynamic freight transportation market, enhance safety, and offer more cost-effective, efficient, and sustainable service.

Adjudication of Small Rate Cases

In September 2019, the STB published a proposal, referred to as "final offer rate review" (FORR), in an attempt to address what shippers alleged to be inadequate access to rate adjudication processes for small rate cases. Under this proposal, after a short discovery period, a complaining shipper and the relevant railroad would simultaneously submit "final offers" for the rate at issue. In preparing their offers, the parties would be free to choose any methodology to support their proposed rate.

Despite protections in the law requiring a hearing on the maximum lawful rate, the STB would simply select one of the offers.[22] The STB has declined to elaborate on a paradigm or framework that would guide its decisionmaking. As far as the railroads are aware, no other U.S. industry is required by the government to utilize binding final offer arbitration to establish maximum rates. In fact, a similar proposal by one agency—the U.S. Forest Service—was struck down in court.[23] Congress should urge the STB to reject FORR for several reasons.[24]

FORR Would Remove Market-Driven Principles from the STB's Review of Challenged Rates

Similar to forced switching, FORR would represent a radical departure from longstanding STB standards and precedent. Historically, the STB has judged the reasonableness of a challenged rate and, if such rate was found to be unreasonably high, prescribed a maximum rate after a full hearing that gives proper consideration to a variety of statutorily-required factors. Under its FORR proposal, however, the STB would disregard these factors entirely and simply select whichever of the two proposed rates the STB felt was the "more reasonable"—not a "reasonable" rate necessarily, just more reasonable than the rate proposed by the other party. This means FORR could produce results that are totally divorced from statute and market-driven outcomes and principles.

FORR Conflicts with Governing Law

During adjudication of rate cases, the STB is required to provide due process to both railroads and shippers and protect their statutory rights to a "full hearing,"[25] which requires an adjudicator with full decisionmaking powers, not one who must choose only one of the two options presented by the respective parties. Moreover, the rule of law requires clear legal standards that are known in advance, not standards that are developed ad hoc and inconsistently applied.

FORR Is Not Limited Solely to Small Rate Cases

The STB claims that FORR is intended to provide a means for rail customers to bring "small" rate challenges, and the proposal arbitrarily caps available relief at $4 million per case. However, FORR would not prevent large shippers from simultaneously filing numerous cases, resulting in railroads facing liability well in excess of $4 million. There is simply no justification for expanding a highly expedited and simplified process to effectively include large rate disputes.

Congress Should Work with the STB to Find a Better Solution

Congress should encourage the STB to identify solutions that provide an additional simplified, expedited dispute resolution procedure for rail customers with small rate disputes, while also remaining consistent with underlying economic principles and statutory requirements. A potential option is the STB's November 2021 notice of proposed rulemaking to establish a new voluntary arbitration program for small rate cases. If structured properly, this new procedure could offer cost savings and flexibility to stakeholders. Freight railroads agree that a workable voluntary arbitration program could be a potentially game-changing addition to the menu of options currently available for resolving small rate disputes.

[22] The process is similar to "baseball-style arbitration."

[23] *Stone v. U.S. Forest Service*, 2004 WL 1631321 at *3 (D. Ore. July 16, 2004) ("In essence, this was a 'baseball-arbitration'-style procedure, in which the decisionmaker simply chooses between the two reports, even though the actual fair market value may be somewhere in between those two values.").

[24] For additional information on FORR, please visit: https://www.aar.org/article/final-offer-rate-review-forr/ and https://dcms-external.s3.amazonaws.com/DCMS_External_PROD/1642196240931/303531.pdf.

[25] *See* 49 U.S.C. §§ 10704, 10707; 5 U.S.C. § 556.

INCORPORATE COST-BENEFIT ANALYSIS INTO STB REGULATORY PROCEDURES

While executive agencies have long been required by the Office of Management and Budget to conduct cost-benefit analyses prior to promulgating significant rulemakings, the requirement to implement this best practice for regulatory analysis does not apply to independent agencies, such as the STB. In March 2019, AAR petitioned for the incorporation of cost-benefit analysis into the STB's rulemaking procedures, contending that such analyses would require the STB to explain the purpose of proposed regulatory actions and more fully examine potential impacts, including economic consequences and negative impacts on railroad operations and supply chain fluidity. Additionally, a formal cost-benefit analysis requirement would ensure that the STB's rulemakings fulfill its statutory objectives. Since requesting public comment in November 2019, the STB has taken no further substantive action on AAR's petition.

Freight railroads appreciate the letter sent by 52 members of the House of Representatives,[26] including Ranking Member Graves, urging the STB to incorporate a thorough cost-benefit analysis in its rulemakings. The letter further noted that the STB should "align its rulemaking proceedings with the best practices of the federal government" and "impose new regulations only where made necessary by compelling public need and after thoroughly weighing the costs and benefits of any proposed actions."

This petition is a common-sense reform that the STB should be eager to undertake, as it will only lead to better outcomes for all stakeholders. Furthermore, these changes would bring the STB in line with other federal agencies with power to substantially impact national commerce, such as the Federal Communications Commission, which voluntarily adopted new regulations that require cost-benefit analysis.

NEW AND EXPANDED PASSENGER RAIL SERVICE

America can and should have safe, effective passenger railroads and a safe, productive freight rail system. Mutual success, however, requires cooperation and recognition of the challenges faced during any negotiation for new or expanded passenger rail service. While each project is unique, projects have a better chance of success if certain principles are understood.

First and foremost, safety must always be the top priority. If any infrastructure improvements necessary to meet safety standards are identified, those projects must be completed prior to the commencement of service.

Second, current and future capacity needs of freight and passenger railroads must be properly considered and balanced. To ensure this, host freight railroads must be part of the planning process from the start. Congress recognized this in the Infrastructure Investment and Jobs Act's (IIJA) new Corridor Identification and Development Program by requiring that consultation with host railroads be weighed when awarding grants. Such actions are essential to ensure freight railroads can meet the estimated 50 percent growth in our nation's freight transportation demand by 2050.[27]

Third, expanding existing, or instituting new, passenger rail service requires detailed planning and, usually, additional infrastructure investment. Freight railroads should not be expected to pay for the additional capacity necessary for passenger trains. In the IIJA, Congress provided $21.75 billion to Amtrak for capital projects on the Northeast Corridor and the National Network and $36.25 billion specifically for projects to expand or establish new intercity passenger rail routes. It is crucial that this funding be spent where it has the greatest impact, and freight railroads are committed to helping to ensure this happens.

Finally, parties must recognize that preference for Amtrak's trains does not mean there will never be delays. Consider high occupancy vehicle (HOV) highway lanes, which give preference to automobiles with more than one person inside. In theory, motorists in HOV lanes should get where they are going with little or no delay, but bad weather, traffic, accidents, or other problems sometimes delay those motorists. The same principle applies to the rail network. Amtrak is given preference, but preference is not a guarantee.

CONCLUSION

"If it isn't broken, don't fix it" should apply at the STB. America's freight railroads save their customers, and ultimately consumers, billions of dollars each year, while

[26] https://dcms-external.s3.amazonaws.com/DCMS__External__PROD/1581692685264/300377.pdf

[27] https://www.bts.gov/faf

also reducing greenhouse gas emissions, relieving congestion, and enhancing the safety of the freight transportation sector. The existing system of privately-owned freight railroads competing fairly in an increasingly sophisticated freight transportation marketplace under balanced STB regulation has served America incredibly well. It has produced what is, by virtually any measure, the best national freight rail system in the world.

Congress should ensure that the STB does not unwisely expand rail regulation. Railroad performance and the efficiency of the nation's supply chains will only suffer if railroads' ability to maintain, replace, or improve their infrastructure, as well as provide safe and reliable service, is hamstrung by excessive operational regulations.

Mr. DEFAZIO. I thank the gentleman.

And I would urge witnesses—I know you all have written statements, but if you want to respond to anything that has been stated by another witness in your 5 minutes, that would be fine with me. It gets rather boring reading your statements before the hearing, and then listening to you read your statements again.

With that, I would turn to Dennis Pierce, president of the Brotherhood of Locomotive Engineers and Trainmen.

You are recognized for 5 minutes.

Mr. PIERCE. Good morning. Thank you, Chairman DeFazio, Ranking Member Crawford, and members of the subcommittee. I appreciate the opportunity to appear before you this morning. My name is Dennis Pierce. I am president of the oldest trade union in North America, the Brotherhood of Locomotive Engineers and Trainmen. I am also president of the Teamsters Rail Conference, of which BLET is the founding member. My comments today will focus primarily on the Class I freight railroads.

But before I get into that, I think we should recognize that our members also carry millions of passengers on Amtrak, commuter, and intercity passenger railroads. We should not forget that commuter rail carries 500 million passenger trips a year in the most congested portions of the shared national rail network.

I would like to start by telling you about the members of the BLET. We are in the front row. We are watching why shippers can't get their shipments. But our members are proud and hardworking Americans. They work long and hard careers, moving America's freight safely and efficiently. They are the ultimate essential employee.

But there are numerous problems that are forcing our members to reconsider their career choices right now: the way they are being treated on a day-in and day-out basis. And the way the railroads are being mismanaged, in our opinion, is breeding misery and contempt for Class I railroads.

The root of these changes, as has already been discussed, generally come from the business model known as Precision Scheduled Railroading, which is neither precise, it is not scheduled, and it is not railroading. Here is just one reason why: the vast majority of our members do not work scheduled jobs. That is a big misconception. They work on-call at randomly chosen times dictated by rail management. In many cases, they get little, if any, advance notice of when that call will come.

In recent years, they have been subjected to harsher and harsher attendance policies that demand they work day in and day out. These policies subject our members to disciplinary consequences, including termination, even if they take time off because they are too tired or too sick to work safely. These policies are destroying the lives of our members, even to the point of destroying their families. These policies are part of a fewer-employees-doing-more business model that is understaffing the railroads and destroying the supply chain with no regard to the impact on shippers.

In sum, today's Class I's operating model is requiring our members to work longer trains, longer hours, longer round trips with less time at home than they receive in their away-from-home terminals and in hotels, in many cases. And if personal issues come up that require them to be at home more than their legal rest, they stand to be disciplined just to tend to their family matters. But the workforce is stretched too far, and there is no elasticity to handle even the slightest unplanned event on the railroad, and those things happen daily.

The point here is that poor safety and operating practices and burned out workers only lead to poor and inefficient customer service. This is where the STB can come in.

We know the STB is here to ensure that service from the railroads meets the needs of the customers. But PSR has thrown the needs of the customers, as well as the needs of the employees, out the window. In practical terms, PSR and PSR-like strategies have led to furloughs, and most importantly, longer, slower trains, clogged ports, and a workforce stretched to work beyond the point of safe operations.

The current business model is to furlough employees and just make everyone that is left do more. This business model is delaying shipments, leaving store shelves half empty. We have all seen it. But STB can play a role in changing these business practices.

BLET believes that STB playing a more active role in regulating railroads can help by handling service complaints in a timelier and more effective manner. Addressing why shipments don't show up on time, which our members see daily, and the related impact on the Nation's supply chain is critical to the U.S. economy.

One role for Congress would also be to better define the common carrier obligation, so that the existing requirements can be effectively enforced by the Surface Transportation Board. This could also come with an attendant clarification that Congress affirms that STB is both capable and responsible for enforcement of the railroad's common carrier obligations.

BLET appreciates the opportunity to testify here today. My written comments get into much more detail, including our opposition to the so-called reciprocal switching. Congress and STB should take an interest in what PSR is doing to shippers, and because of the impact and the core impact to the shippers, what it is doing to the employees of these railroads. And this is where Congress can help give STB the legislative tools to ensure that America's freight railroads provide a world-class service.

Thank you, and I look forward to any questions you might have.

[Mr. Pierce's prepared statement follows:]

Prepared Statement of Dennis R. Pierce, National President, Brotherhood of Locomotive Engineers and Trainmen

Good morning, Chairman Payne, Ranking Member Crawford, and Members of the Subcommittee. I appreciate the opportunity to appear before you this morning.

My name is Dennis Pierce, and I am the National President of the oldest trade union in North America, the Brotherhood of Locomotive Engineers and Trainmen, which was founded in 1863 and represents 32,769 members. I am also the President of the Teamsters Rail Conference, of which the BLET is the founding Union.

The subject of today's hearing is to get the "Stakeholders Views on Surface Transportation Board Reauthorization." I have several comments and observations regarding the BLET's views on a national scale. My comments today will focus on freight rail and mostly Class I Freight Railroads. Our members also carry millions of passengers on Amtrak, commuter, and intercity passenger railroads. We should not forget that commuter rail carries 500 million passenger trips a year in the most congested portions of the shared national rail network.

I want to tell you about the members of the BLET. These people are proud and hard-working Americans. They have worked careers where pride is derived from the role they play in moving America's freight safely and on time. To call BLET members essential is as much a fact as calling a spine essential to the skeleton. The service of all railroad workers is the product that supports American commerce. But there is a problem that is forcing our members to lose pride in their work. And the pride in the service they provide America is being replace with the misery and contempt they hold for their employers at the Class 1 Railroads in the country.

There was a sea change in the economic philosophy underpinning rail service when Class 1 Railroads switched to a business model known as Precision Scheduled Railroading ("PSR"). Do not be confused by the term for this business model—it is *not precise, not scheduled, and not railroading*, that is until you focus on the members I represent. They are indeed being "railroaded." The vast majority of our members do not work scheduled jobs. They work on call at randomly chosen times dictated by rail management, and in many cases, with little if any advance notice of when that call will come. In recent years, they have been subjected to harsher and harsher attendance policies that demand they work day in and day out. These policies subject our members to disciplinary consequences, including termination, even if they take time off because they are too sick or too tired to work safely. The policies are destroying the family lives of our members, even to the point of destroying their very families.

This is all part of the railroad business philosophy of extreme "leanness", which means furloughing employees to rock-bottom staffing and forcing the remaining employees to always work without scheduled days off, without paid sick days and without access to true access to FMLA to make sure that the work that should be done by a larger workforce is done by a small but harried workforce. Our members still believe in providing the best service to the customers who rely on rail car pickup and delivery, but their opinions on how to accomplish that are not wanted. Railroad work has always been hard, but hard workers need time off with their families that they can count on. These railroad operating employees are literally the ones who bring your goods to you. If you bought it, our members brought it.

The Class 1 Railroads themselves have abandoned a customer service, pro-growth business model in exchange for a short-term growth Wall Street model. This involves pushing an operating ratio below 60% to return the other 40% to investors, managers and CEO's—which results in furloughs and risky operations.

Speaking of adding risk and strain to railroad operations, railroads are running trains with typical lengths in excess of 3 miles (15,000–17,000 ft.) and those trains can also weigh 15,000 tons or more. Some trains have reached lengths of more than 20,000 feet long. The trains are getting longer to facilitate making the work rolls shorter. Twice the train length, half the employees, with new strains added daily to an infrastructure not designed for this business model.

Simply put, PSR has transformed railroad companies into finance operations that happen to own railroads. Safety professionals are being supplanted by finance managers. Reporting unsafe conditions is discouraged because it might cause a delay that could affect a managerial bonus. The collateral damage to good service by railroads is not news to this committee. The Transportation and Infrastructure Committee has called for a study from the General Accounting Office about PSR's effects because of the myriad of complaints from labor, shippers, the public and the industry alike.[1] Not all railroads, and not all railroad managers, want to use this model.

[1] https://transportation.house.gov/imo/media/doc/2021-5-2%20Letter%20to%20GAO%20on%20PSR%20Study.pdf

Some still want to see their business grow because their customers are happy with their service and their employees are happy to do their jobs and to work for their employer. But over the past several years, it has been Wall Street that calls the shots; managers who don't go along with this approach leave or are forced out.

RAILROAD WORK FOR OPERATING CREWS

Railroad Locomotive Engineers operate trains. Conductors or Trainmen are the necessary second set of eyes and ears on the train, and they broadly handle the rest of the train operations from the ground when work on the train needs to be done. If there is an unplanned event, and most trains and their equipment experience unplanned events, the train must stop and be inspected. If that inspection requires a walk to the rear of the train, the train is stopped while the conductor dismounts the train and walks up to 3 miles to the rear inspecting one side. The conductor then switches sides and walks 3 miles back to the leading end of the train to inspect the other side—a six-mile walk. If this happens multiple times in a tour of duty, its simple math to figure how far a conductor might walk. This is not like a walk on a road or sidewalk. It is a walk-through train ballast (rocks) on uneven grades, often during the night, in darkness in poor terrain and bad weather.

Railroad operating crews are subject to the federal Hours of Service Law ("HOS") that allows them to work up to 12 hours at a time, but also allows for "limbo time," a concept invented for railroad operating crews by the Supreme Court of the United States.[2] This is important because even though a railroad crew can work 12 hours, that doesn't mean they get to go home after that. It is normal for them to be forced to wait until the railroad provides them with a ride to get off the train. They often wait for this transportation in remote areas for hours, before being picked up. This then begins another period riding in a vehicle to their final terminal. It is not rare for operating crews to experience total on-duty times of 18 hours or more. They are then routinely forced to wait for hours in the cheapest hotel available before being called to repeat that same trip to get home, in many cases days after they left home, only to be forced to repeat that cycle as soon as they are legally rested to do so. It has been said that railroad work was "a decent living, but a terrible life." This is why.

With wages stagnating while profits skyrocket, and Class 1 rail carriers refusing to come to the bargaining table with fair contract offers, engineer positions are fast becoming underpaid and overworked jobs. Railroaders are fed up with the job cutting and conscription-like attendance policies where they are forced into the terrible choice of either working sick or working tired, or getting fired. Your money or your life. Hedge fund railroading is bad for the employees, but the point here is that poor safety practices and burnt-out workers only leads to poor and inefficient customer service. Our members want to strike, and I do not blame them. The only reason they haven't is because of the law and court orders. However, our members are sick and tired of railroads not being held to the same high standards under the law as their employees (our members) are held. Railroads act this way because they are virtual and geographical monopolies. If you don't like the service on Railroad A, there is not a Railroad B down the street. It is a take it or leave it proposition for the customer/consumer. What about competition and the market forces of capitalism, one might inquire—not on the nation's Class 1 Railroads. There are too many barriers for entry to start up your own railroad to compete. This is where the STB comes in.

STB CAN HELP WITH SERVICE STANDARDS

We know the STB is here to ensure that service from the railroads meets the needs of their customers. But PSR has become a pejorative in the industry and carries with it negative connotations only, and rightfully so. Rail management weaned on pro-growth strategies saw their years of training and attempts to be a better business and provide for shippers discarded for short term cost cutting and asset extraction.

In practical terms, PSR and PSR-like strategies have led to furloughs, very long trains, clogged ports, and a workforce forced to work beyond the point of safe operations. Operational problems happen daily, such as trains too long to receive proper air-brake testing, and trains so long that they cannot be safely doubled from one

[2] Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe R. Co., 516 U.S. 152 (1996).

yard track to the other because the yard tracks are physically not long enough.[3] Some rail yards have been closed completely and employees furloughed because the rail carriers have lost interest in providing the switching operations necessary to deliver cars to shippers on time.

All things considered, the strict adherence to PSR and like business models only serves to cause serious service delays to shippers and end of the line customers by deferring or skipping maintenance and inspections, furloughing employees, and closing yards. Whenever there is an upturn in business, or an unexpected event that affects operations, the capacity of the system cannot handle the increases or impediments. The only answer the railroads have consistent with their business model is to make everybody work more, thus their harsh attendance policies forcing employees to do just that. In fact, railroads are now part of the great resignation in this country. On just one class one, over 600 well paid and highly trained employees have resigned in recent weeks as opposed to be threatened with their jobs if they will not or cannot work every time the railroad calls. People cannot work all the time; and machines cannot be made to run without maintenance and inspections. This is a vicious cycle that will only be stopped by a catastrophic accident. We do not want to see that happen and we are here to tell the Congress that the STB can play a role.

RECOMMENDATIONS

BLET believes that STB being responsible to regulate railroads can help by handling service complaints in a timelier and more effective manner without the worry that it would be interfering in commerce; rather, the Board would be helping commerce and the free flow of products carried by railroads. The Staggers Act and the Interstate Commerce Commission Termination Act of 1995 are not sufficient to protect employees, customers, and shippers against a railroad business model where endless cost cutting—at everyone's expense except the railroad itself—is the only plan.

We do not have all the answers on how to accomplish this but suffice to say the rail carriers have shown no interest in our opinions, even though we see events daily that prevent shippers from receiving their goods when they should. That said, some suggestions might be to better define the common carrier (49 USC 11101) obligation so that the existing requirements can be effectively enforced by STB. This could also come with an attendant clarification that Congress affirm that STB is both capable and responsible for enforcement of the railroad's common carrier obligations.

There are limits that railroad unions see as well to STB's role. We do not see STB to have the authority to be involved in any collective bargaining issues or mandating terms of a collective bargaining agreement. But we think that mandating and enforcing good service will result in proper employment levels which will support good rail service.

PROPOSED CHANGES: RECIPROCAL SWITCHING

BLET is also not in favor of certain proposals being considered by Congress involving the so-called concept of "reciprocal switching." This for many reasons. Among them:

We do not support legislation or regulation that expands or provides additional rights to rail carriers for "reciprocal switching," because it departs from longstanding rules and precedent under our collective bargaining agreements. The detrimental effects on rail employees from potential "reciprocal switching" legislation should outweigh the perceived benefits from "reciprocal switching" that do not actually exist. Also, there are currently regulated means for shippers to use short lines using trackage rights requests.

Another problem with reciprocal switching is that such arrangements could be used to avoid the imposition of protective conditions related to trackage rights approvals when existing workers are adversely affected.

From an operational standpoint, there is no need for any additional rights for shippers to get their goods from railroad A to railroad B. Currently, to get their traffic from one railroad to another all a shipper would need to do is an interchange at a location(s) where it is possible.

[3] Doubling a train over involves pulling train cars out of on track far enough so the train may then make a reverse move to couple to another group of train cars in another track to constitute a complete train that can then be air tested and inspected.

In addition, conferring any new rights to a rail carrier will not change the geographical layout and/or the conditions necessary to perform an interchange between rail carriers.

The use of the term "reciprocal switching," is a misnomer because interchanges are not the same thing as switching. The proper term for getting a shipment from one railroad to another is called an interchange. Interchanges only can occur where it is physically possible in a location with the proper rail infrastructure (e.g., an interlocking, wye). Neither trackage rights nor "reciprocal switching" change who is the controlling railroad operator is, i.e., dispatching delivery movements will always be managed by the owning railroad; so, allowing access to another railroad will not remedy whatever problems there are with the railroad that owns and controls the tracks.

BLET appreciates the opportunity to testify. We know well the STB cannot remedy safety problems or problems governed by other federal agencies like the Federal Railroad Administration or Department of Labor. It does not weigh in on collective bargaining issues and we do not ask it to. What we want from STB is to lay out strong markers for adequate service, and to have a clear law that can be enforced for making customer service quality a priority. All of the safety issues, risks of longer trains, taxed to the max employees, monopolistic behavior—all of them can be a drag on service. This is where STB should concern itself and this is where Congress can help give STB the legislative tools to ensure that America's freight railroads provide world class service again.

Thank you.

Mr. DEFAZIO. I thank the gentleman for his statement.

We now turn to Brad Hildebrand, member, the National Industrial Transportation League, and former vice president of Cargill—Global Rail and Barge Lead.

Mr. HILDEBRAND. Good morning, distinguished members of the House Railroads, Pipelines, and Hazardous Materials Subcommittee.

My name is Brad Hildebrand. I am a member of NIT League, and a recently retired vice president of Cargill Incorporated, where I worked for 39 years, spending the last 10 years leading Cargill's global rail and barge modes. I have also served on two different STB committees: the National Grain Car Council, where I was chair from 2013 to 2015; and the Rail Energy Transportation Advisory Committee.

I appreciate the opportunity of addressing NIT League's views on the reauthorization of the STB. As a member of NIT League, whose members include large and small rail shippers, we hope that Congress will give our recommendations thoughtful consideration.

A lot has been said about Precision Scheduled Railroading over the last 5 years. PSR is an operating methodology that has been championed by Wall Street to push railroads to improve their operating ratios and increase their bottom lines. I would be happy to take questions about PSR later, but, simply put, the STB needs greater statutory authority to provide effective oversight of the freight rail industry. This is especially true in today's inflationary market.

The implementation of PSR among nearly all Class I railroads has simply heightened the problem with the lack of railroad-to-railroad competition. A main statutory goal of the Staggers Act of 1980 is to instill competition. Today we find ourselves in a highly consolidated rail industry with, at best, duopolistic railroad behaviors and expectations.

NIT League is pleased that the Board is once again considering its reciprocal switching proposal. It has taken over 10 years to get to this point. NIT League asks that, one, Congress encourage the

Board to reach a final reciprocal switching decision as expeditiously as possible; and two, encourage additional avenues, such as gateways for the Board to consider, that would facilitate railroad-to-railroad competition.

Along with reciprocal switching, NIT League would like to point out the issues with bringing rate cases before the Board. Despite various provisions in the STB Reauthorization Act of 2015, rate cases are long, expensive, and risky for all shippers. It is encouraging that the Board is considering its proposed Final Offer Rate Review. Unfortunately, no significant action has been taken to reduce the burden and cost of bringing a large rate case to the Board. There are no current rate cases outstanding before the STB, none. This signals that the system is broken and needs attention.

For those shippers that are brave enough to bring a rate case to the STB, they have experienced the Board taking years to reach a decision, while having to spend thousands, if not millions, of dollars to conduct a case. I have personal experience where my former employer, Cargill, along with North American Freight Car Association, has a pending empty mileage case before the Board that started 7 years ago. Shippers have become so discouraged that they have about given up bringing cases to the Board.

An area that we would like to see incorporated in the reauthorization is to provide statutory definition clarifying the common carrier obligation. With no clear definition, the railroads are reducing service, demarketing lines and commodities, and dictating terms and conditions that meet the railroad's goals.

Adding more frustration is that the railroads do not incur any penalties when their service fails shippers. Having clarity around the definition of what it means to be a common carrier, combined with the STB developing a standard by which to measure common carrier service performance, should add accountability to the railroads to provide a level of service, as required by statute.

In addition, we ask Congress to increase the level of fines the Board can assess when a railroad does not meet their common carrier obligation.

NIT League asks Congress to consider removing commodity exemptions. We strongly believe that all movements falling under the Board's jurisdiction should have the opportunity to seek redress and relief without having to go through the existing protracted process of seeking a revocation of the exemption.

In conclusion, it takes a long time for the STB to issue a ruling. When they do issue a decision, NIT League believes these decisions have gone in the railroads' favor. It is as if the chickens need to convince the guard dog about what the fox is doing to them, all the while long the fox does what foxes do when given the chance.

Let me repeat that: The fox does what foxes do when given the chance.

Thank you for your time and consideration of our recommendations.

[Mr. Hildebrand's prepared statement follows:]

Prepared Statement of Brad Hildebrand, Member, National Industrial Transportation League, and Former Vice President, Cargill—Global Rail and Barge Lead

INTRODUCTION

Chairs Peter DeFazio and Donald Payne, Ranking Members Sam Graves and Rick Crawford, and Members of this Subcommittee, thank you for holding today's hearing, "*Stakeholder Views on Surface Transportation Board Reauthorization*," and for the opportunity to submit these written comments on behalf of the National Industrial Transportation League (NITL).

I am Brad Hildebrand, a longstanding Member of NITL. I also appear before you today as a former Vice President of Cargill—Global Rail and Barge Lead, Member of the Surface Transportation Board's (STB or Board) Rail Energy Transportation Advisory Committee and Member of the National Grain and Feed Association's Rail Arbitration Rules Committee.

Let me begin by acknowledging your leadership and efforts in realizing the Surface Transportation Board Reauthorization Act of 2015, P.L. 114–70, which was the first time the Board had been reauthorized since 1998. This law has helped the Board to operate more efficiently in several aspects, but most notably, by expanding the size of the Board from three Members to five Members allows the agency to become more functional and collaborative.

Especially considering the Act expired on September 30, 2020, this, combined with the continued consolidation of the railroad industry and in the environment of Precision Scheduled Railroading (PSR), it is the right time for these discussions with all stakeholders including the Board, shippers, receivers, rail carriers, and the customers we all serve.

COMPETITION

There is a lack of robust railroad-to-railroad competition in our industry. There are only seven Class I railroads with four of them responsible for moving 90% of our nation's freight. We are also facing the strong probability of that number being reduced to six Class I railroads with the pending merger of the Canadian Pacific and Kansas City Southern railroads. Given the exemption that the railroad industry enjoys from certain anti-trust protections, combined with post-merger duopolies that now exist in the western and eastern parts of the country, this creates an environment where the railroads can exert substantial market power over their customers who operate facilities served by only one railroad.

A free-market economy works best if there is vigorous competition. Where a market has become highly concentrated due to a series of mergers, it is incumbent upon the government, and in this case the STB per the Rail Staggers Act of 1980, to instill or facilitate competition in the marketplace. For instance, the Board is considering revising its decades-old reciprocal or competitive switching rules in its EP Docket No. 711 (Sub.-1), *Reciprocal Switching*. The Board's current reciprocal switching rules were adopted more than 30 years ago when the rail industry was struggling financially. The STB has never granted a reciprocal switching request, and no new requests have been made for decades, because it is impossible for a shipper to meet the requirements due to the high legal standard—an insurmountable barrier in seeking relief. Not only does NITL strongly support the Board's efforts in this proceeding, but NITL was the organization who filed the initial petition before the Board in 2011 requesting the Board to adopt new reciprocal switching rules to give meaning to the provision in the Staggers Rail Act of 1980 that authorizes the Board to grant reciprocal switching arrangements that are "practical and in the publics best interest" or "necessary to provide competitive rail service." [1]. Some railroads claim that, even where direct rail competition is lacking, there is ample competition via truck, and/or, by water barge or even air. While competition offered by other transportation modes is vital to our supply chain, it often cannot replace the need for railroad-to-railroad competition when a manufacturing or other facility is configured for rail shipments, or their customer requires rail deliveries.

Many shippers are prohibited from shipping by truck, water, or air due to numerous factors including commodity type, location, and infrastructure investments already made or needed to support rail. It is not easy to change transport options for each mode of transportation requires its own infrastructure and there are needs unique to each commodity. Shippers invest in their infrastructure to support freight

[1] 49 U.S.C. § 11102(c).

rail transportation, based in large part, on what the rail carriers require to service our facilities—plant, manufacturing facilities, distribution centers, and the like.

A lack of competition also impacts investments in capacity which affects the fluidity of the overall network. NITL members are experiencing various problems, including but not limited to, bottlenecks, under or over utilized gateways, missed switches, and doubling of trains. Then railroads' PSR routing decisions or protocols, elimination of hump yards, reduction in crews and other personnel, combined with factors beyond railroads' control such as weather events or natural disasters, have prevented the railroads from responding adequately or proactively to mitigate ahead of time.

Lastly, the current regulations and practices/protocols of the railroads substantially limit shipper gateway options thereby further constraining rail-to-rail competition.

SERVICE

NITL deeply appreciates the STB's consideration in a pending rulemaking in Ex Parte No. 767, *First Mile/Last Mile Service*, of the need for Class I railroads to report First-Mile/Last-Mile (FMLM) data, in the aggregate, to the Board.

Service problems experienced by shippers often occur during the FMLM segments of the journey. The League strongly believes that adoption of a FMLM service standard and reporting requirements is warranted and would be beneficial to rail customers, the railroads, and the Board. Adopting such a standard and metrics would improve transparency that would facilitate supply chain planning and meaningful dialogue between railroads and their customers to address service shortcomings, and it would be a crucial tool for the Board to monitor local rail service.

NITL, joined by several other aligned shipper groups, initially expressed this concern to the Board almost two years ago, and requested that the Board require the Class I railroads, in the aggregate, to submit FMLM data. Without this data, the Board, shippers, receivers, and other stakeholders:

- Do not have a complete picture of the overall functioning of the rail network that shippers need for planning and operational purposes.
- Lack data to assess whether any service problems are specific to them or broader in scope, and whether service is improving, deteriorating, or remaining stable over time.

NITL asks that Congress encourage the Board to complete, as expeditiously as possible, its consideration of requiring the submission of FMLM data, in the aggregate, from the Class I railroads.

RATES

Captive shippers pay higher rates because they lack an effective competitive option. The STB has, various rate reasonable remedies that it can use, but these do not work very well, and are applicable to a modest minority of shippers. Thanks in large part to the Act, and the recommendations made in the STB's 2019 *Rate Reform Task Force Report*, the Board is making some efforts to address this problem through its Final Offer Rate Review proposal that is also being considered in conjunction with a rail carrier-proposed voluntary arbitration process. The Board, however, has yet to take further action to flesh out its revenue adequacy constraint, rate reasonableness methodology or an alternative to the Stand-Alone Cost (SAC) test for larger rate cases. It is important to note, that per the STB's quarterly reports to Congress, there are no pending rate cases before the Board which signals that shippers continue to be wary of filing rate cases because the current processes are too long and expensive with continued uncertainty of the outcome.

COMMON CARRIER OBLIGATION

One area where Congress can assist the Board with addressing service challenges is to clarify the definition of railroads' "common carrier obligation." Currently, the statute requires railroads "to provide transportation or service on reasonable request."[2] The "reasonableness" standard, however, is elusive. Although it requires railroads to provide a level a service that meets a shipper's reasonable needs, in practice, railroads have been able to provide service that is poor while still asserting that they are meeting the "common carrier obligation." The railroads have been able to circumvent their obligation to service the needs of the shipping public by using pricing to prioritize what commodities they prefer to serve while "demarketing" oth-

[2] 49 U.S.C. § 11101(a).

ers. With service performance continuing to be unreliable and unsatisfactory to many shippers, the League believes that now is an appropriate time for Congress to re-evaluate the meaning of the "common carrier obligation" to ensure that it applies not only to service refusals but also material service reductions and deficiencies, combined with consequences when it is not met.

STB already has the statutory authority to impose fines or penalties. NITL suggests Congress expand the criteria for when the Board can assess fines or penalties that would allow shippers to recover appropriate damages to the extent the Board finds that railroads are not fulfilling their common carrier obligations, in the aggregate, as well as individually and are not providing adequate and economical service to their customers.

In addition, the Board under current statutory authority, can assess a penalty up to $8,700 per violation. The amount is not enough unless STB were to have the statutory authority to apply this to each carload, or each day that a carload is delayed.

COMMODITY EXEMPTIONS

NITL passionately believes that all commodities, whose freight rail movements fall under the purview of the STB, have the opportunity to seek redress and relief from the Board. Today, that does not exist as certain commodities are "exempt."

The STB has the authority to revoke exemptions so long as the revocation standard in the statute is met. How that authority is ultimately interpreted is still an open question. STB initiated a rulemaking to review certain commodity exemptions in 2016.[3] However, that proceeding has languished at the Board for too long, while denying many shippers of exempt commodities with direct access to the STB's remedies and procedures. NITL asks Congress to encourage the STB to:

- Promptly complete its consideration of commodity exemptions in its pending proceeding, EP Docket No. 704, *Notice of Proposed Rulemaking, Review of Commodity, Boxcar, and TOFC/COFC Exemptions*. It is important to note, however, that this proceeding only involves five to six commodity groups and there are many other exempt commodities for which a review is warranted.
- Interpret its revocation authority more broadly given today's far more concentrated market conditions than existed when the exemptions were adopted and the railroads' financial health.

Other options should Congress choose a different approach, would be to 1) require that all exemptions be periodically reviewed by the STB every five years or 2) revoke all exemptions by a date certain unless the railroads can show that the exemption is still warranted.

RAILROAD INDUSTRY'S STRONG FINANCIAL STANDING

On a positive note, one aim of the Staggers Rail Act of 1980 has been achieved: restoring the financial stability of the railroads. However, the resulting lack of railroad-to-railroad competition, enhanced by the impacts of PSR, has contributed to the current state of the railroads incredibly strong financial health.

Under PSR, the railroads have sought to improve their operating ratios by reducing capital expenditures and lowering overhead costs. The improved operating ratios also have resulted in high returns spurring an excess in capital, which the railroads have distributed through repeated dividend increases to their stockholders, and via sizeable stock buybacks. Rather than investing in their networks to improve service, the railroads (as mentioned earlier) are reducing capacity and focusing on rewarding their investors.

One measure of the financial health of a Class I rail carrier is the Board's annual determination of "revenue adequacy." The Board's website provides information on the number of Class I carriers that are deemed "revenue adequate" from 2000 through 2020 where there is a trend of a growing number of Class I railroads not only achieving "revenue adequacy" but maintaining it.

For 2020, the most current year for which determinations are available, six railroads were deemed "revenue adequate: BNSF, CSX, Grand Trunk Corp., KSC, Soo Line, and UP. The railroads' improved financial performance and the increasing number of carriers that are achieving revenue adequacy justify the Board shifting its policies from those that are designed to help the railroads achieve revenue adequacy to those that place an increasing emphasis on the national policy "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101(1).

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[3] *See* STB Docket Ex Parte 704—*Review of Commodity, Boxcar, and TOFC/COFC Exemptions*.

STB OPERATIONS

The Staggers Rail Act of 1980 configured the STB as an adjudicatory agency. This, combined with an objective of restoring the financial stability to the railroads, resulted in the burden of proof being the responsibility of the shippers in nearly all the Board's functions. It is in fact fundamental to how the Board operates. Especially given the financial health of the railroad industry, NITL encourages Congress to consider statutory changes which would require the burden of proof to rest with the railroads pertaining to service and rate complaints.

While NITL appreciates the demands placed on the Board, especially given its ever growing profile and areas of responsibility, the frustration continues in how long it takes the STB to reach decisions. The quarterly report to Congress on the status of major STB proceedings, as required by the Act, is helpful. And the STB's efforts to help streamline rate cases for particularly smaller cases combined with its efforts addressing service complaints, are helpful. It is suggested for Congress, however, to consider instilling timelines or deadlines for not just initiating a formal proceeding but for completing one. The number of resources that it takes a shipper—from the burden of proof and proceeding process standpoints—more often than not serve as a deterrent for all shippers to seek redress or relief from the Board. Another suggestion is for Congress, through both the authorization and appropriation process, is to provide the necessary funding for professional staff and administrative support.

LENGTH AND FUNDING LEVELS OF NEXT AUTHORIZATION

NITL recommends that the next authorization be a minimum of five years at funding levels commensurate with the previous enacted Fiscal Year (FY) appropriation levels.

We support the Board receiving the highest possible annual authorized and appropriated funding levels because the:

- Demands placed on the STB are unprecedented given its regular adjudicatory responsibilities in addition to pending rail merger proceedings—all of which pose significant service and rate issues for captive shippers, and questions concerning the structure of a freight rail industry that promises to be even more consolidated than what it is today.
- Number of formal and informal railroad performance service complaints are increasing.
- Continued reliance on data transparency, including access by all stakeholders, remains where continued data and analytical capabilities are needed by the Board to enhance its evidence-based decision-making.
- Board is charged with implementing the new passenger On-Time Performance Standards for passenger rail.
- Board operating with a full complement of Members.

Thank you for holding this hearing and your continued consideration of my comments on behalf of NITL. I am happy to answer any questions you may have and look forward to this discussion continuing.

ATTACHMENT

[Mr. Hildebrand submitted an attachment to his prepared statement which is retained in committee files and available online at https://docs.house.gov/meetings/PW/PW14/20220308/114465/HHRG-117-PW14-Wstate-HildebrandB-20220308-SD001.pdf]

Mr. DEFAZIO. I thank the gentleman for his statement.

And with that we would move to our final witness, Herman Haksteen, president, Private Railcar Food and Beverage Association.

Mr. Haksteen, 5 minutes.

Mr. HAKSTEEN. Thank you very much, and thank you to the subcommittee for holding this extremely important hearing. My name is Herman Haksteen. I am the president of the Private Railcar Food and Beverage Association. We call it PRFBA.

My aim this morning is to shine some light on railroad performance, service, and financial burdens that are being felt by PRFBA members, and to strongly support the STB and its role, and perhaps more active role, in railroading today.

PRFBA was formed in 2016. We have 18 global food and beverage companies that make up 100 percent of our membership. They are all major rail shippers and, uniquely, they all own rail assets. PRFBA members have railcars, and have invested millions of dollars in rail infrastructure. That uniquely makes them more committed to rail, and less able to simply move to other modes of transport when things in railroading aren't going so well. If a decision was made to go to another mode, that means parking millions of dollars of assets, which is seldom a wise decision.

However, given service of late, many of our members find themselves having to do that. PRFBA members have skin in the game, and, because of that, we deserve to be treated as such.

The underlying issue, in our opinion, is competition. When there is a lack of competition—notably railroad-to-railroad competition, for those that need that clarified, and especially at single-serve facilities or captive shippers, as they are called—the railroads are free to provide any service level at any cost. A good example of that was during the rollout of PSR, and what the railroads did to their shippers. Where there is a lack of competition in a free market economy, it is incumbent upon the Government—in this case, through the Surface Transportation Board, per the Staggers Act—to intervene.

PRFBA members are not alone. Obviously, as the chairman pointed out when we started this morning, everybody has concerns today. But we don't need to look at concerns. We can look at the real facts that the railroads are not clearly presenting, and that is, the market is speaking.

Unfortunately, freight is moving from rail to truck, and this is negatively impacting not only our supply chains, but our environment and our infrastructure. The results of a shipper survey published by Morgan Stanley that just came out in January said 30 to 40 percent of shippers surveyed are moving some or a significant portion of their freight volume from rail to truck. Data published by the American Trucking Associations indicates that, from 2017, the beginning of PSR, to 2021 final results, truck tonnage grew by 3½ percent, while rail tonnage shrunk by 5.1 percent.

Interestingly enough, even the AAR's own website publishes rail traffic information. A quick look at their website shows that, since PSR in 2017, rail carload traffic in the United States has shrunk by 11 percent. Even if you add in intermodal, rail traffic overall, in tonnage, has still shrunk by 5 percent.

Assuming that most of this traffic is moving to truck, as the data would suggest, and using a very conservative measure, which would be three trucks for every railcar, this migration is adding 4½ million truckloads of shipments onto our highway every year. That additional volume is wearing out the infrastructure faster, it is creating unnecessary greenhouse gases, and it is impacting today's transportation capacity.

Our Nation's rail advantage is hemorrhaging. The simple fact that rail volume is down and truck volumes are up illustrates that there is something wrong. That cannot be refuted. And the extra cost that our shippers are incurring because they are having to ship in other modes is a contributing factor of today's inflation.

When there is a lack in the marketplace of competition, and our railroad volumes are plummeting, it is incumbent upon the Government—and, in this case, the Surface Transportation Board, per the Staggers Act of 1980—to help us out.

The railroads are financially strong.

The Staggers Act in 1980 had two primary objectives: instill competition, stabilize the financial health of the railroads. They have certainly done the latter. We now need the help with the competition.

Railroad financials are public information. I quickly called up the fourth quarter results at the end of 2021, and it is amazing. And even in their financial results, they blatantly show all seven Class I railroads had reduced volume in the fourth quarter of 2021, and all seven increased their revenue and increased their revenue per carload. They are shipping less, and taking more.

New authorization—PRFBA supports a multiyear authorization at the highest levels for the Surface Transportation Board.

We echo the concerns of the other folks, and we are thankful that you had this hearing. If you have any questions, I am happy to answer.

[Mr. Haksteen's prepared statement follows:]

Prepared Statement of Herman Haksteen, President, Private Railcar Food and Beverage Association

INTRODUCTION

Chairs Peter DeFazio and Donald Payne, Ranking Members Sam Graves, and Rick Crawford, and Members of this Subcommittee, thank you for holding today's hearing, "*Stakeholder Views on Surface Transportation Board Reauthorization*," and for the opportunity to submit these written comments on behalf of the Private Railcar Food and Beverage Association (PRFBA).

I am Herman Haksteen, President of PRFBA. My aim this morning, is to shine a light on railroad performance, service, and financial burdens that are being passed on to PRFBA members, discuss how the Surface Transportation Board (STB or Board) are addressing these concerns, and make recommendations on what Congress can do to help stakeholders moving forward.

PRFBA is comprised of 18 global food and beverage companies and manufacturers headquartered in North America. All our members own or lease rail car equipment. These members include PepsiCo, Inc., Molson Coors Beverage Company, KraftHeinz Food Company, General Mills, Inc., McCain Foods USA, Inc, Sysco Corporation, Bonduelle America, Boardman Foods, Inc., G3 Enterprises, Inc., JD, Irving/Cavendish Farms, The Martin-Brower Corporation, Lamb Weston Holdings, Inc., Univar Solutions, Darigold, Inc., Kellogg Company, Land O' Lakes, Inc., National Sugar Marketing, LLC, and Leprino Foods. They are major rail shippers—some are captive—that rely on the railroads to distribute their food and beverage products that are vital to the health and welfare of our nation. These companies are responsible for feeding America. Without adequate rail service, their food and beverage products may not be available in all regions, at all times, and will carry a higher price to the end consumer.

PRFBA began in January 2016 because these companies were experiencing rail transportation challenges. PRFBA provided, and still provides, the forum for them to meet regularly to discuss opportunities and solutions to rail service issues. The membership collaborates with other aligned trade associations and stakeholders regarding industry changes, and proposed legislation and regulations that directly impact the food and beverage transportation needs of PRFBA members and the industry. Also, PRFBA meets with the Class I North American Railroads and the consumer group at the Surface Transportation Board where group discussions are held on rail service issues unique to its membership. PRFBA provides its members with a forum to work together to make rail work better within their supply chains.

PRFBA members own or lease railcars. As such, they absorb costs associated with equipment ownership, operation, and maintenance. Investing millions of dollars in rail cars also greatly restricts these members from other transportation modes. If a decision is made to change modes, it means "parking" assets which is seldom a wise financial decision. PRFBA members have skin in the game and deserve to be treated as such.

It is important to note that PRFBA started *before* the implementation of Precision Scheduled Railroading (PSR). Many of the service and cost issues back then were being experienced due to a lack of railroad-to-railroad competition. But with PSR implementation—notably the reduction of workforce, serving yards, and switch days has resulted in PRFBA member companies dealing with the worst service and the highest rail costs in recent history. As Fortune 500 companies, PRFBA members are relying on their association to express their growing concerns and seek help from Congress and the Administration to get our railroads back on track.

Lack of Competition

When there is a lack of competition, notably in this case a lack of railroad-to-railroad competition, and especially at single served facilities (or captive shippers), the railroads are free to provide any service level at any costs. To improve railroad financials, the railroads are even reducing capacity by limiting equipment availability. When there is reduced capacity, rates increase, service suffers, and railroad margins rise. When there is a lack of competition in a free market economy, it is incumbent upon the government, in this case the Surface Transportation Board (STB or Board) per the Staggers Rail Act of 1980, to intervene.

Today, there are only seven Class I railroads where four of them move 90 percent of our nation's rail freight. Of these four Class I rail carriers, two are predominately located in the east and 2 in the west. However, most customer locations served by these carriers are single carrier served locations. This is a far different market from when the Staggers Rail Act of 1980 was enacted, when there were 40 Class I railroads. PRFBA member companies have been adversely impacted by the consolidation of the rail industry and their increasingly captive status in many locations.

The probability of further consolidation of the rail industry, where there are merger applications before the Board including a combination of two Class I railroads, inherently will bring on even more monopolistic, or, at best duopolistic behaviors within the railroad industry.

PRFBA members are not alone when it comes to the current issues of our remaining Class I carriers. The market is speaking and unfortunately more freight is moving from rail to truck, which is negatively impacting not only our supply chains, but our environment and infrastructure are paying a heavy price also.

The results of a shipper survey published by Morgan Stanley in January of 2022 suggests that over the past year (depending on the quarter), 30–40% of shippers surveyed were moving some or a significant portion of their freight volume from rail to truck.

Data published by the American Trucking Association (ATA) indicates that from 2017 to 2021 total truckload tonnage grew by 3.5%, domestic air freight tonnage grew by 24.2% while rail tonnage declined by 5.1%.

Interestingly, the Association of American Railroad's (AAR) own data, as presented on its website, shows a grimmer picture. Since the start of PSR in 2017, total carload traffic in the United States has shrunk by 11% when compared to 2021. Even when including intermodal traffic, 2021 rail volume was down 5% from 2017 as shown in the chart below:

Rail Volumes in Millions

[AAR numbers]

	Carload	Intermodal	Total
2017	13.5	14	27.5
2018	13.6	14.4	28.1
2019	12.9	13.7	26.7
2020	11.3	13.4	23.7
2021	12	14.1	26.1
Change 2017–2021	–1.5	0.1	–1.4
% Total Change	–11.11%	0.71%	–5.09%

Assuming that most of this traffic migrated to truck as the data would indicate, at a 3–1 conversion for carload traffic, this migration to truck has added 4.5 million truck load shipments onto our highways. This additional volume is wearing out our infrastructure faster and creating unnecessary additional greenhouse gases.

This does not match with the policy objectives of the Biden Administration and some Members of Congress as possibly one way to address climate change challenges and enhance safety on our nation's highways.

It is important to note, that the increase in truck volume only pertains to those limited number of shippers who can transport their products by truck. Many shippers, however, have significant barriers to shipping by truck (or even water/barge and air) due to numerous factors including commodity type, location, and infrastructure investments already made to support a rail supply chain. For shippers that can change to another mode(s), it is not easy to change transport options—each mode of transportation requires its own infrastructure and there are needs unique to each commodity. Shippers invest in their infrastructure to support freight rail transportation, based in large part, on what the rail carriers require to service those facilities or what service the railroads offer to provide via their sales and marketing efforts. When shippers make the difficult decision to change modes, it is often a last resort to meet an immediate customer need. These changes add huge costs resulting in higher prices for the end consumer.

The simple fact that freight rail volume is down, and truck volumes are up, helps illustrate that something is wrong with our freight rail network, and the additional shipping expenses can be contributing factors to our current inflation concerns.

When there is a lack of competition in the marketplace, combined with the railroads' exemption from most antitrust protections, it is incumbent upon the government—in this case the STB per the Staggers Rail Act of 1980—to instill competition. PRFBA asks Congress to consider these three areas, affected by a lack of competition, when developing the next STB authorization:

Maintenance, Service and Rates

Maintenance. It is expected that private car owners will incur maintenance costs. But due to the limited railroad-to-railroad competition, railroads are free to make decisions that increase their profits and pass costs back to railcar owners and shippers. PSR operational decisions which include longer trains and more gravity fed hump yards, increase the wear and tear on the rail cars. Cryo Trans (a business I ran up until 2020) is the largest owner and lessor of food grade refrigerated and insulated food cars. Cryo Trans saw a 52% increase in car maintenance costs when comparing 2021 to 2017. During that same time, Cryo Trans also experienced a 330% increase in cars that were completely destroyed.

Service. A lack of railroad-to-railroad competition and profit driven decisions also impacts service. Some PRFBA member companies are experiencing record poor service levels ranging from missed switches, reduced switching service days, bunching caused by longer trains, bottlenecks primarily driven from a reduction of serving yards and crews to the reduction of cars and locomotives, which all have led to longer transit times and irregular service.

Longer transit time reduces the utilization of rail cars. For operators of private cars, this results in a significant financial hit. Depending on the car type, this expense ranges from $50 to $300, per day, per car. For a shipper with 250-cars, this can add $75,000 per day to that shipper's operating budget.

Reduced service days has resulted in shippers having to acquire their own switching equipment (track-mobiles) to reduce the impact on operations. The capital required to acquire track-mobiles is significant as is the training costs associated with the operations of this equipment.

Current service levels have strongly impacted On-Time Performance (OTP). One PRFBA member manually tracks the Class I OTP of the five Class I railroads providing it service throughout the United States. OTP is based on the railroads ability to deliver a car "door-to-door" within a day of the service schedule the railroads had previously agreed to. These results speak for themselves in the following chart:

Rail	Jan 2021	Feb 2021	March 2021	April 2021	May 2021	June 2021	July 2021	Aug 2021	Sep 2021	Oct 2021	Nov 2021	Dec 2021	Average 2021
BNSF	83.4%	68.3%	57.2%	85.0%	89.5%	83.7%	96.0%	100.0%	65.0%	75.0%	88.0%	55.0%	78.8%
UP	69.3%	61.3%	83.3%	85.4%	81.2%	83.1%	67.1%	78.0%	67.0%	62.0%	60.0%	56.0%	71.1%
NS	37.9%	41.4%	67.4%	74.2%	52.6%	76.6%	68.3%	95.0%	75.0%	67.0%	56.0%	50.0%	63.5%
CSX	50.4%	65.1%	47.6%	84.3%	58.0%	84.2%	81.2%	23.0%	63.0%	49.0%	33.0%	25.0%	55.3%
CN	100.0%	56.0%	92.0%	91.0%	75.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	92.8%

Service in the way of OTP is mostly experienced or "felt" by shippers at the first mile or last mile (FMLM) segments of a freight rail movement. The railroads, however, are not required to report this data to the Board. (The STB does, however, require in Docket No. EP 724 (Sub-No. 4) *United States Rail Service Issues—Performance Data Reporting*, FMLM for unit trains and intermodal service only.) In 2020, PRFBA joined with several other aligned shipper groups in requesting that the Class I railroads provide, in the aggregate, to the Board FMLM data.

Considering the STB has jurisdiction to provide oversight of these segments of the journey, it is nearly impossible for it to do so because without this data, the Board simply does not know "what it does not know":

- No complete picture of the overall functioning of the rail network that shippers need for planning and operational purposes.
- No assessment of whether any service problems are specific to them or more generally, whether they are being singled out for any service problems, and whether general service is improving, deteriorating, or remaining stable.
- No determination if railroads are properly executing their common carrier obligation.

PRFBA is pleased that the Board is beginning to consider requiring the reporting of FMLM data in EP Docket No. 767, *First Mile/Last Mile Service*. It would be helpful if Congress would encourage the Board to reach a final decision on this as quickly as possible requiring the collection of FMLM data by the Class I railroads, in the aggregate.

In a second effort, the Board is considering revising its decades-old reciprocal or competitive switching rules, requirements, and processes, in EP Docket No. 711 (Sub.-1), *Reciprocal Switching*. It has been decades since the STB has granted a reciprocal switching request because it is nearly impossible for a shipper to meet the current requirements. Due to railroads' effective stalling tactics, this proceeding has stalled for about a decade, or stalled for 40 years if you consider that the Staggers Rail Act of 1980 provided for competitive switching.

The Board proposal would allow PRFBA members and other shippers with access to only a single rail carrier to *request* before the Board that the carrier provide a switch for freight to be moved by a nearby rail carrier. This proposal would provide two paths for shippers to use when making the request before the Board: 1) switching must be practicable and in the public interest or 2) be necessary to provide competitive rail service.

It would be helpful for Congress to urge the Board to reach a decision on its reciprocal switching proposal as expeditiously as possible. Shippers who meet the proposed criteria should have this option in seeking competitive service and rates.

Rates and associated rail costs. It is inherent that when there is a lack of competition, rates and passed down costs increase especially for captive shippers.

Railroads, particularly when not encumbered by competition, can add demurrage fees and accessorial charges freely, further increasing the total cost of using rail. Several years ago, PRFBA's members participated in STB's proceedings regarding demurrage and accessorial charges. Shippers, including PRFBA members, were dealing with the railroads using demurrage charges, not as a method to incentivize customers to become more efficient or meet their performance expectations, but rather, raising fines and fees against shippers, imposing impossible-to-follow rules, and sending auto-invoicing fines without the railroads investigating if shippers were at fault. The amount of revenues being generated by the railroads was excessive to the point where some argued demurrage and accessorial charges were being used as revenue generators for the railroads rather than incentivizing shippers' behavior. Again, the lack of railroad-to-railroad competition, combined with PSR operating decisions that are made with little to no communication with the shippers, fosters this type of railroad behavior.

PRFBA appreciates the decisions the Board reached when issuing its 1) Final Statement of Board Policy in Docket No. EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges*; 2) Final Rule in Docket No. EP 759, *Demurrage Billing Requirements*; and 3) Final Rule in the Supplemental Notice of Proposed Rulemaking (SNPR) in Docket No. EP 759, *Demurrage Billing Requirements*. These new billing requirements went into effect on October 1, 2021. Shippers have been receiving and reviewing these new bills. While the railroads are providing the required new billing information, there are several problems which need Congressional, targeted fixes and accompanying policy modifications:

- Clarify that demurrage bills are to be sent to the shippers when railroads demonstrate that the shippers' behavior was the driver of the demurrage and not railroad service problems.
- Provide 30 days for shippers to pay demurrage bills. The 15 days allowed today by some railroads does not provide enough time for shippers to contest, research, and negotiate with railroads over questionable fees especially when the bills may be months old.
- Increase the number of "free days" allowed to unload and load rail cars and unit trains. This fix ties into the PSR practices discussed earlier. Due to reduced train crews, elimination of hump yards, increasing train lengths, and the lack of fluidity in the rail network, cars tend to get "bunched-up" at pivotal points along the route. As an example, a PRFBA member can receive, without advanced notice or even coordination from the railroads, 15 cars rather than 5 cars. It takes additional equipment and crews (which are not always readily available) for the PRFBA member to load, unload and turn around the rail cars where the typical 48 hours for loading and 72 hours for unloading is not nearly enough time before demurrage fees kick-in especially when the need for shippers to have more time is because of the railroads' poor service.
- Consider reverse demurrage, in that the railroads will pay the private car owners a daily fee when those private rail assets are held up due to railroad operating issues or allow charge backs to the railroads for daily car hire fees to offset the cost of additional transit days experienced by car owners.

These problems again correspond to the need for the Board to require the Class I railroads to provide FMLM data, in the aggregate, to the STB as PRFBA and other shippers have requested and as the Board is considering.

RAILROADS ARE FINANCIALLY STRONG

The Staggers Rail Act of 1980 had two primary objectives: instill competition and stabilize the financial health of the railroads. As discussed above, the first has yet to be accomplished—competition has not only deteriorated but it continues to weaken. When looking at the second objective, it has been met—the railroads and their shareholders are enjoying significantly strong financial health because of a lack of railroad-to-railroad competition and PSR.

Under PSR, the railroads have sought to improve their operating ratios by reducing capital expenditures and lowering overhead costs. The improved operating ratios also have resulted in high returns spurring an excess in capital, which the railroads have distributed through repeated dividend increases to their stockholders, and via sizeable stock buybacks. Rather than investing in their networks to improve service or reduce rates, the railroads are reducing capacity and focusing on rewarding their investors.

One measure of the financial health of a Class I rail carrier is the Board's annual determination of "revenue adequacy." The Board's website provides information on the number of Class I carriers that have been deemed "revenue adequate" from 2000 through 2020 where there is a trend of a growing number of Class I railroads not only achieving "revenue adequacy" but maintaining it.

For 2020, the most current year for which determinations are available, six railroads were deemed "revenue adequate: BNSF, CSX, Grand Trunk Corp., KCS, Soo Line, and UP. Kansas City Southern has been acquired by a Canadian Pacific Railway and at a massive premium.

A second measure of the financial health of the railroad industry is noted with their respective publicly available quarterly earnings reports. Per information pulled from the Class I's respective website, the following chart illustrates the financial strength of the railroads despite the reductions in railcar volume, while at the same time, driven by Wall Street, the railroads are increasing their profits every year.

4th QTR 2021 Year-to-Year Percentage Change of Class 1 Railroads

[Publicly Available Financial Results]

	BNSF	CSX	NS	UP	KCS	CN	CP	Average
Volume in Carloads	–3.10%	–1.80%	–3.60%	–3.90%	–0.30%	–10.00%	–9.90%	–4.40%
Total Revenue	10.70%	21.30%	10.80%	11.50%	7.80%	2.70%	1.40%	11.30%
Revenue per Carload	13.00%	13.00%	15.00%	14.70%	7.10%	13.60%	12.50%	12.70%
Operation Ratios	61.30%	57.60%	60.40%	57.40%	60.10%	57.90%	57.50%	59.00%

Common Carrier Obligation

Railroads are conveniently using the "common carrier obligation" to "get away with" poor service and high rates mainly because there is: 1) no clear definition of the "common carrier obligation;" 2) no standard for which to measure it by; or 3) no meaningful consequence to the railroads if the obligations are not met. As such, PRFBA asks Congress to clarify via statute, the definition of "common carrier obligation."

In theory, it means that railroads are to provide service on reasonable request—railroads are to provide a level a service that meets a shipper's reasonable needs. Considering there is no clear statutory definition, railroads have been able and continue to provide service that is poor even though asserting that they are meeting the "common carrier obligation." The railroads have been prioritizing what commodities to serve while "demarketing" others and still claiming they are meeting the "common carrier obligation."

Along with a statutory definition clarification, it would be helpful for Congress to direct the STB to develop a standard by which railroad service performance can be measured. This ties in to how important it is that the Board is beginning to consider requiring the Class Is to report, in the aggregate, FMLM data. PRFBA appreciates, to a point, that the Board would need some flexibility in applying a statutorily clarified definition with a standard that includes not just FMLM data, but other elements for meeting the common carrier obligation which might vary from one railroad to another and from one shipper to another. As such, the STB should be encouraged to also review and evaluate the extent to which railroad operating, financial, investment, marketing, and other business practices may be impairing the ability of and incentives for railroads to fulfill their common carrier obligations, in the aggregate, and provide adequate and economical service to their customers.

STB already has the statutory authority to impose fines or penalties. PRFBA suggests Congress should expand the situations when the Board can assess fines or penalties that would allow shippers to recover appropriate damages to the extent the Board finds that railroads are not fulfilling their common carrier obligations, in the aggregate, as well as individually and are not providing adequate and economical service to their customers.

In addition, the Board, under current statutory authority, can assess a penalty up to $8,700 per violation. This is far from consequential or punitive. Congress needs to consider establishing a higher penalty amount(s) and allowing the STB to apply a penalty to each carload and/or each day a carload is delayed. Another option for Congress to consider is to statutorily provide larger penalties tied to the overall level of service. This might have to be applied to both contract movements and movements that fall to the jurisdiction of the STB for if not, the railroads might use contracts to avoid their common carrier obligation.

New Authorization

PRFBA supports a multi-year authorization and at the highest authorization and appropriation funding levels possible. Our nation relies on a strong, vibrant freight rail industry—which includes the railroads, shippers, receivers, and other stakeholders—to bring food products to our homes and business in a cost-effective and reliable manner.

Along with the PRFBA recommendations discussed in this written testimony, PRFBA also encourages you to consider the results, once released, of the study underway on the impacts of PSR being conducted by the General Accountability Office (GAO). PRFBA sincerely thanks you, Chair DeFazio, and you, Chair Payne, for requesting the GAO conduct this study last Spring in preparation for the new authorization.

Conclusion

Thank you for holding this important hearing. On behalf of PRFBA, we are asking for Congress to take further steps that will provide the STB with the necessary authority—either clarifying existing authority or granting new authority—to provide effective oversight of the freight rail industry in today's environment, to further help the STB streamline its processes so it can act faster to provide our shippers with a fair marketplace. I am more than happy to answer any questions you might have.

Mr. DeFazio. I thank the gentleman. With that we would now turn to questions.

It seems like, in listening to the panel, we have one panelist presenting the view that all is well, the STB does not need enhanced powers, and the rail industry is just doing wonderfully well. In fact, they did, over the last 10 years, on an inflation-adjusted basis, buy back almost $200 billion worth of stock. So, I guess, from the perspective of Wall Street, and CEOs whose salaries are tied to the stock price and bonuses, everything is great. But all the other panelists are presenting a very disturbing view.

I would just like to know what the number-one thing the STB could do, succinctly, from each of the panelists. And then, if you can be succinct, then I will ask Mr. Jefferies to respond.

So, quickly, Mr. Jahn.

Mr. Jahn. Thank you, Mr. Chairman. Succinctly, reciprocal switching. So, as I said in my testimony, right now we are in a situation where three-quarters of our members do not have a competitive option. And so, providing that option would reduce rates significantly.

I'd also note that there is something called the Rail Customer Coalition. That is 80 trade associations representing 9 million jobs and $5 trillion worth of economic activity in ag, in energy, and in manufacturing. And they all support taking that action.

Mr. DeFazio. Well, I guess I'll interrupt. I was hoping we would move more quickly.

But Mr. Jefferies' group has said forced switching is intended to lead to rate reductions. Without a plausible explanation for non-speculative, competition-driven public benefits, these rate reductions are nothing more than a wealth transfer from the railroads to the shippers. And another, it says forced switching is not a public interest wealth transfer to more profitable entities.

Anyone else want to put up their highest priority, quickly?

Mr. Haksteen. If I may, PRFBA would like to support reciprocal switching. And we believe the ability for the STB to have enough power to be able to make these positive changes as quickly as possible, we absolutely—100 percent, reciprocal switching.

And for those who say it doesn't work, let's check with the two Class I's that operate in Canada. It has worked fine there for many years.

Mr. DeFazio. OK. We have got substantial agreement here. Anyone on the panel—other than the freight railroads—have a different view of the number-one priority?

Mr. Hildebrand. [Inaudible.]

Mr. DEFAZIO. What?

Mr. HILDEBRAND. Yes, Brad Hildebrand, NIT League.

Mr. DEFAZIO. Yes.

Mr. HILDEBRAND. One of the things that I think our members would like to see is the changing of the responsibility to prove guilt, if you will.

Today, as I mentioned in my testimony, we have to prove to the STB, as shippers, that the railroad is doing something unreasonable to us. We would like that flipped around. Given the profitability and the viability of the railroads today, we think the railroads should be the ones that have to defend what they are doing in their rates as being reasonable and competitive, versus us having to prove to the STB that they are unreasonable or uncompetitive.

Mr. DEFAZIO. OK, thank you. Actually, that is done with other monopoly industries. For instance, utilities are regulated in that manner.

Just one quick point. Two people have made the point about interswitching in Canada, and it works, but we hear here it would be a disaster. Can Mr. Jahn or Mr. Hildebrand, can you just briefly comment on Canada's provisions?

Mr. JAHN. Yes, I would be happy to jump in there.

Mr. Chairman, competition drives every single other segment of our economy. It drives innovation. It drives investment. We have seen that in Canada. As we've mentioned, those companies have increased their revenue and profits, and improved their operational efficiency while doing interswitching. And they have said that publicly.

The last thing I will say is a study recently came out and said competitive rates in the United States are up 24 percent in the last 15 years. Noncompetitive rates are up 230 percent. And so, that is why we are looking for competitive switching.

Mr. DEFAZIO. OK, thank you.

Mr. JEFFERIES. Mr. Chairman, may I comment on the——

Mr. DEFAZIO. It has got to be real quick. I have only got a few seconds left. Go ahead.

Mr. JEFFERIES. Yes, glad to. So, the Canadian rail system was built and designed with switching in mind, and the number of potential switches in Canada are remotely minuscule, compared to the number of potential switches in the regime that the STB is proposing.

Right now, switches can be ordered with the showing of anticompetitive conduct. That is the way it should be. It should not be a right to take one railroad's private property, give it to another for use at below-market rates.

Mr. DEFAZIO. OK, thank you. My time has expired. I turn now to Mr. Crawford for his questions.

Mr. CRAWFORD. Thank you, Mr. Chairman. I am going to direct this question to Mr. Jefferies.

We understand that the STB is reviewing a rule on reciprocal switching. How could reciprocal switching impact freight railroads' ability to transport goods and keep the supply chain moving?

Mr. JEFFERIES. So, right now, again, the railroads enter into switches on a voluntary basis, when it is planned out, when it is part of a strategic need. A shipper can also petition the STB for a switch when there is a demonstration of anticompetitive conduct.

Adding switches adds complexity to the rail network. It undermines fluidity. It adds complications. It potentially, if forced, if it becomes a right versus a remedy to some sort of wrongdoing, it creates a disincentive to investment. If I have a plant, and I know at any given time my competitor could be given access to that plant, that doesn't give me a lot of reason to make the long-term investments necessary.

Forced switching would provide a remedy or a right—a right—to a handful of large shippers at the behest of them, and at the cost of other customers and constituents across the entire rail network. That is why rail labor has opposed. Mr. Pierce and I probably aren't going to see eye to eye on a lot of things today. That is one area where we do have a common agreement, common understanding, and common policy view.

The environmental crowd has opposed. Passenger rails have opposed. Right-leaning groups have opposed. Left-leaning groups have opposed. Intermodal associations have opposed. It is not just Class I railroads who see this as a bad idea. It is practically every user of the freight rail system, save a few large shipper groups out there. It just doesn't make sense for the overall vibrancy and health of the system.

Again, a switch can be ordered if a railroad is demonstrated to be acting in an anticompetitive way, and that is the appropriate measure, not because a shipper wants a backdoor way to a rate cut.

Mr. CRAWFORD. One of the policy suggestions in the Biden administration's recent supply chain report is to encourage the STB to require railroads to provide additional rights-of-way to passenger rail. How would that impact freight movement on the supply chain?

Mr. JEFFERIES. So, let me start. I want to be clear. I completely agree that we can have a healthy freight rail network and a healthy passenger rail network, and that is done best when all sides sit down together, agree on the mutually agreed to outcome, agree to the resources required, agree to who is going to apply those resources. We have win-win situations all over the country.

But I have to say that including a recommendation that increasing the amount of passenger rail on the Nation's freight railroads would somehow help alleviate supply chain problems is preposterous, and it really begs the question the work that went into this report. It is silly, it is silly. And that is not an antipassenger rail statement. It is just preposterous to think that adding passenger trains somehow helps the overall supply chain.

Mr. CRAWFORD. I appreciate your comments.

Mr. Chairman, I yield back the balance of my time.

Mr. PAYNE [presiding]. The gentleman yields back, and now I will give myself 5 minutes for questioning.

Let's see. There are a number of groups that are an important part of this conversation, and have sent in their own views on STB's reauthorization. I have four statements that I would like to enter into the record.

The first comes from the Brotherhood of Maintenance of Way Employes Division; the Brotherhood of Railroad Signalmen; the International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division; and the National Conference of Firemen and Oilers.

The second comes from the Portland Cement Association.

The third comes from the Freight Rail Customer Alliance.

And the fourth comes from The Fertilizer Institute.

I want to thank these groups for submitting statements for the record.

Without objection, so ordered.

[The aforementioned statements submitted by Hon. Payne are on pages 76–94.]

Mr. PAYNE. Mr. Hildebrand, one of my top priorities as chairman of this subcommittee is to remove barriers in the rail sector. A complex and archaic rate challenge process is one of those barriers.

Can you elaborate on how STB processes could provide a level playing field for all shippers?

Mr. HILDEBRAND. Well, one of the things that the STB is working on right now is Final Offer Rate Review, or what they call FORR. That is a streamlined approach to help improve the accessibility of small rate cases. And we would definitely like to see the Board push that forward.

Now, the—certain five of the seven Class I's have come up with their own arbitrary system to look at small rate cases. The Board is also considering that. We believe that, as a shipper, you should have the right to choose either FORR or whatever comes out from the AAR in the final ruling. We should have the right to pick which way we want to go.

But clearly, that opens up an opportunity for us to bring what we call small rate cases to the Board for them to rule on. We would definitely like them to rule faster, as I said in my testimony, than what they are ruling today. Clearly, it is taking way, way too long to get a decision. So, I don't know if that is staffing or other issues that are slowing them down, but whatever we can do to streamline processes to help expedite cases to be heard and decided would be greatly appreciated by those of us that are in the shipping public.

Mr. PAYNE. Absolutely. And the technology exists now that some of these archaic systems should still not be in place. And I hope this is an opportunity to move forward in those areas.

Mr. Pierce and Mr. Jahn, I have serious concerns about the effect of Precision Scheduled Railroading, not only for the impacted workers, but also for the shippers that have to move their cargo. Running longer trains raises the possibility of safety concerns and could decrease the role of rail in the Nation's supply chain.

Can you both explain how PSR has affected your work in the rail sector?

And how do you think Congress should act in response?

Mr. Pierce, let's begin with you.

Mr. PIERCE. Thank you, Chairman Payne. I think it is really simple to explain.

Twice the train length, twice the amount of time to build that train, twice the amount of time to put that train away. If there is an unplanned emergency, twice the amount of time to walk that train. Now, we are running trains in excess of 2 to 3 miles on any given day. [Inaudible] members, if they are forced to walk that train, are out there, literally, for hours on end, just walking to the rear of the train and walking back. Radio communications don't work that well that far. It has become a safety issue.

At the same time, the railroad is, literally, shutting itself down by running trains that do not fit their physical plant. We park shorter trains to run longer trains, and then we [inaudible] because the trains that have the other crews that are parked don't have enough time to get to their terminal. All of this impacts the shipping. All of it prevents the cars from getting to where they need to go. It is as though the railroads don't really care if those cars ever get there, is our viewpoint.

And just one last thing. There is no suggestion box for the employees to tell the railroad what they think they could do better. It doesn't exist. I appreciate the opportunity to bring those issues here. We see it every day, what could be done more efficiently that is not happening right now.

Mr. PAYNE. Thank you.

Mr. Jahn?

Mr. JAHN. Thank you, Mr. Chairman. What we say about Precision Scheduled Railroading is that it is doing less with less.

Our experience there is that rates go up and velocity goes down. So, just to give you one example, we have got a member company that has got multiple facilities in the Southeast. At one plant, they have lost 110 million pounds of production in 14 months, and another site has lost 5½ million pounds of production over 6 months. These are lost sales, not only for our members—and exacerbate the inflation and the supply chain challenges we have—but they are also lost sales for the railroad, and I think that is really important. We can't ship what we can't make, and what is worse is we have no recourse under the current system.

So, I want to thank you, Mr. Chairman. I want to thank Chairman DeFazio, as well. I know you have requested a GAO report on Precision Scheduled Railroading, and we look forward to the results of that report. Thank you.

Mr. PAYNE. Thank you, as we do, as well.

Mr. Newman, as railroad subcommittee chairman and long-time passenger rail advocate, I want to ensure that the American people feel the full benefits of the historic funding the IIJA invests in our rail network. Doing so requires cooperation from all partners, since so much of the freight and intercity passenger rail systems overlap.

Can you describe the significance of the proceeding pending before the STB to restore Amtrak's gulf coast service?

Mr. NEWMAN. Yes, thank you, Chairman.

Mr. PAYNE. And we would ask you to submit that for the record, because my time has expired.

Mr. NEWMAN. OK.

Mr. PAYNE. Next we have Mr. Davis.

Mr. RODNEY DAVIS OF ILLINOIS. Thank you, Mr. Chair. Great to see the witnesses, albeit I can't wait until we get a time when we are here in the same room again, running hearings like we used to have, prior to the pandemic.

My first question is actually for Mr. Jefferies and Mr. Jahn. The railroads talk about rates decreasing more than 40 percent since the Staggers Act. However, Mr. Jahn has testified that rates have increased 30 percent in the past 20 years. Obviously, this seems contradictory. My question to both Mr. Jefferies and Mr. Jahn is about rates.

Have they been increasing or decreasing?

And do you predict rates will increase or decrease in the coming years?

Mr. Jefferies, go ahead.

Mr. JEFFERIES. Well, thank you for the question, and I could not agree more. I wish we were doing this hearing in person. I look forward to the opportunity to do that soon.

So, when you think about rates, since 1980, rail rates are down 40 percent—44 percent, to be exact. The number Mr. Jahn used, I think, is from 2002, 2004, something along those lines that says rail rates are up 30 percent. And in my opening statement, I acquiesced that rates have increased in recent years. We are back to the levels that rates were in 1990, 32 years ago.

And folks talk about the year 2017. Somebody mentioned that, I think, as this onset of PSR. Since December 2016 through December 2021, rail rates have increased roughly 20 percent writ large. That is about half that of long-haul trucking and, quite frankly, half that of many of the industries represented today. So, yes, rates are back to where they were in 1990.

Mr. RODNEY DAVIS OF ILLINOIS. Well, thank you, Mr. Jefferies. Mr. Jahn?

Mr. JAHN. Thank you, Congressman. So, rail rates did fall significantly in the 1980s and 1990s. However, that has long since reversed. Again, as Ian said, since 2001, rail rates have risen twice as fast as both long-haul trucking and inflation.

I think the most important thing here, though, is what we are talking about, and I want to be really clear about this. On competitive routes, rates have gone up relatively little over a relatively long amount of time—24 percent over the past 15 years. In noncompetitive situations, captive shippers—three-quarters of our member companies are captive—those rates have gone up 230 percent over that same time. So, it is really important to understand, when we are talking about rates overall versus competitive and noncompetitive rates.

And so, what has happened is, after massive consolidation in the industry, railroads have leveraged their market power to extract higher prices and shift costs to their customers.

Mr. RODNEY DAVIS OF ILLINOIS. I thank you, Mr.——

Mr. JEFFERIES [interrupting]. One quick point on that, Congressman Davis, I think it is important to note that no shipper went from two to one railroad as the result of a merger at any point. And so, this is thrown around a lot, but, due to merger conditions, no one ever lost access to a second shipper because of a merger.

Mr. RODNEY DAVIS OF ILLINOIS. Well, thank you. Thank you both. I got another question for both of you. If you could answer real quick, because I need some time to address an Amtrak issue that I ask about every time that I have somebody from Amtrak on at a hearing.

But Ian and Chris, most shippers have said that they support reciprocal switching. But AAR has said it will slow operations and harm shippers.

Mr. Jahn, why would shippers—really quickly, why would they support something that will harm them?

Mr. JAHN. We wouldn't support something that will harm them. In fact, again, a similar system has worked in Canada for decades.

Secondly, we have our own financial interest for the system to work quickly and smoothly. And so, we are not looking for something to gum up the works.

And third, the STB ultimately has the control of this process. They don't have to approve that application. They have the opportunity to deny it if we apply for it.

Mr. RODNEY DAVIS OF ILLINOIS. All right.

Mr. Jefferies, would you like to explain, from your point of view, why shippers will be harmed?

Mr. JEFFERIES. Sure, absolutely. Because it undermines fluidity, disincentivizes investments, and opens up one private company's network for use by another at the behest of a shipper.

I would say that there are large shippers that are pushing for this, and might benefit in the short term. But the stakeholder group of concern is much, much broader than that, including—UPS filed in 2016 an opposition; rail labor has filed an opposition; intermodal associations filed an opposition; environmental groups; passenger rail has filed an opposition. So, the list goes on and on and on.

And again, the Board can act on a reciprocal switch request right now. But there has to be a demonstration of anticompetitive conduct, and we think that is the appropriate hurdle. Thank you.

Mr. RODNEY DAVIS OF ILLINOIS. Thank you, Mr. Jefferies.

I don't need a response for this from Mr. Newman or Mr. Jefferies, but once again the Amtrak line from Chicago through Champaign, Illinois, down to Carbondale has the worst on-time performance. We have been dealing with the short shunt issue with CN and Amtrak. I have been told numerous times in hearings here by both Amtrak and the rail industry that, "We have got a solution, we are working it out." Still, I don't have an update as to when this is going to be completed.

What technology is going to be utilized, and when can we begin to see progress? I certainly hope that I can get together with both of you in the future to figure this out, because I don't want to go through another hearing where we still don't have answers.

Thank you, I yield back.

Mr. PAYNE. The gentleman's time has expired. And let's hear from the gentleman from New Jersey, Mr. Malinowski.

Mr. MALINOWSKI. Thank you. Thank you, Mr. Chairman. Thanks to our guests and witnesses.

Mr. Jefferies, it is good to see you again. I want to zoom out with you a little bit—no pun intended—and talk about capitalism. I am a capitalist. I think it is safe to assume that you are, as well.

Like you, I think that balanced regulation is the goal that we should be striving for here. And I recognize as part of that discussion that our Class I railroads are not nonprofits. You are in the business of succeeding financially, and I want you to succeed financially.

But to me, responsible capitalists do certain things. They serve their investors, obviously, and your member companies have clearly been doing a very good job serving their investors in the last few years. But responsible capitalists also serve their customers. They serve their employees, they treat them well, they treat them with respect. That is how you run a good, sustainable business. And based on what we have heard here today from your customers, from your employees, I think some of your companies are falling short here. And that is unfortunate, because it gives this system of capitalism that we all support a bad name.

Let me raise a couple of specific issues.

Employees and employment. Before the hearing, I looked at some of the transcripts of fourth-quarter earning calls from some of your companies. And what they are all telling Wall Street right now is that they don't have the workers they need, and that this is causing operational challenges. It is causing some of the supply chain difficulties that we are all experiencing in the economy.

So, I want to ask you, do you think that might have something to do with the fact that, between 2015 and 2019, the Class I railroads, as part of this unyielding, maximalist pursuit of efficiency, eliminated 29,000 jobs, 17 percent of their workforce?

Mr. JEFFERIES. So, you are absolutely right that workforces were down going into the pandemic. If you look at rail service metrics, they were actually pretty strong going in the pandemic. But certainly the pandemic created an economic shock that no one saw coming. Additional layoffs were necessary, due to the 30-percent decrease in rail traffic. Fortunately, demand has come back, it came roaring back, and that is why railroads have been hiring across all crafts for the past 12 months.

And are we where we want to be? No. Hiring continues. And I think you would be hard-pressed to find an industry that isn't having challenges bringing people on board.

Mr. MALINOWSKI. Well, it is certainly true. But I think, again, one of the arguments that we might have had in that period before the pandemic is that you need some slack in the system, that you don't want to cut down to the bare bones on the basis of sort of an efficiency-first philosophy, because you couldn't predict the pandemic, but anyone can predict that there will be crises, there will be crises in the future that we can't predict.

So, I mean, wasn't that a mistake, in effect, from a forward-planning, long-term thinking point of view?

Mr. JEFFERIES. So, I don't want to—different railroads were in different places during that timeframe. And so, I can't speak for each individual railroad's decisions on what the appropriate employment base was for that railroad, for its network.

But I can tell you, regardless of their requisite employee bases, everyone went through challenges and has gone through challenges over the past 3 years, as has every industry. And the important thing is that all railroads are actively hiring where appropriate, in regions where they need to bring on more employees. And they are taking additional steps, signing bonuses and the like, to make these careers attractive, because we do need the next generation of railroaders.

We are a fully collectively bargained industry, as you know. Wages and benefits are roughly $135,700 per employee, on average. So, these are good jobs. But it is also not a job that you can just hire somebody and they are on the street the next day. These are very skilled types of jobs——

Mr. MALINOWSKI [interrupting]. Well, exactly, which is why I think probably laying off that many skilled workers in the name of efficiency was a mistake.

With the time I have left, if I could just ask you to address the stock buyback issue, as well. I mean, the Class I's have spent about $150 billion on rail infrastructure since 2010. That is fantastic. But in that same period, nearly $200 billion in stock buybacks. Like——

Mr. JEFFERIES [interrupting]. So, I will——

Mr. MALINOWSKI [continuing]. Explain that aspect of capitalism to us, because it doesn't make sense for my maybe old-fashioned view of how capitalism should work.

Mr. JEFFERIES. So, respectfully, I can't comment on individual investor decisions or investment decisions, but what I can say is that our industry, despite what you have said, continues to invest 18 percent of revenues back into their capital plant, which far exceeds most of our peer industries.

Mr. MALINOWSKI. Well, thank you. I mean, we are making enormous public investments, as well, in infrastructure that you are using. And when we see numbers like that, it does give me pause.

I yield back, Mr. Chairman.

Mr. PAYNE. Thank you. The gentleman yields back. Now we will hear from Mr. Weber.

Mr. WEBER OF TEXAS. Thank you, Mr. Chairman, I appreciate that. My question is going to be for Chris Jahn.

A loaded question, I guess, Chris, all the interruptions in supply chain across the country. Of course, as you know, Texas is huge on energy and other things, we produce a lot of chemicals. How have your members been affected by that interruption?

Mr. JAHN. We have been significantly impacted, and that has been a significant challenge.

Earlier I had detailed an example where we had one member, in just one instance in the past year, has lost over 110 million pounds of production at one plant, and there were 6 million pounds of production at another plant, which not only cost them sales, but also cost the railroad sales, because we can't sell what we can't ship.

Mr. WEBER OF TEXAS. Right. So, now I guess the question is, are there any potential shipper concerns with Amtrak's apparent intent to expand its services on freight lines across the national network?

I know you have had that discussion. I have had to be off the line for a minute and back online for a minute, so, forgive me if it is redundant. Any concerns about that, Chris?

Mr. JAHN. So, anything that stresses what is already an overstressed rail network is a concern for us.

And so, the rail network has had challenges over the past few years. COVID has made an even more significant challenge. Putting another challenge on top of that seems to us to be a poor strategy.

Mr. WEBER OF TEXAS. What would you say is the percentage that the interruption in supply chains has impacted across you all's—across the country, I am sure, but all of your American Chemistry Council folks?

Mr. JAHN. Yes, so, it really depends, Congressman, it depends on where you are.

So, some railroads have performed better than others, in terms of their performance. And so, again, I have highlighted some places in the Southeast where we have had particular problems. I would not say that there is anywhere, though, that is up to snuff.

Mr. WEBER OF TEXAS. I am sorry, thank you for that. So, what is your response to concerns voiced by the freight railroads to the reciprocal switching rule?

Mr. JAHN. So, again, we have got a—two things I guess I would say.

One—and something I have not said yet before—is reciprocal switching was expressly contemplated by Congress in the Staggers Act. This is not something that is new. And under the Staggers Act it calls for competition among rail carriers to the extent possible. We are not getting that.

So, what we need, then, is reasonable rates when competition doesn't exist. And so, what we are trying to do is create further competition. And so, that is not something new. That is not something that is—we haven't tried in Canada already. We have talked about that previously. That has worked effectively there. And the system works, and railroads have grown.

And finally, it is an opportunity for the railroads themselves to get more traffic, and more of our work. We want to give them more business, if they are more competitive.

Mr. WEBER OF TEXAS. Let me see if I can get myself unmuted here. Well, thank you for that.

And then, finally, recommendations you might have for any potential STB reauthorization.

Mr. JAHN. Yes. So, I think a couple of things we would look at to make sure that the STB has enough staff, and enough financial resources to give them the ability to do a better job on collecting data. Those are a couple of things I would point to.

Mr. WEBER OF TEXAS. OK. Well, with that I am done my questions.

Mr. Chairman, I ask unanimous consent to get into the record an American Fuel and Petrochemical Manufacturers letter dated March 8, 2022, to you, Mr. Chairman, and the rest of the group, that says, "Stakeholder views on Surface Transportation Board reauthorization."

[No response.]

Mr. WEBER OF TEXAS. Mr. Chairman?

Mr. PAYNE. Without objection. I am sorry.

[The letter submitted by Hon. Weber of Texas is on pages 97–99.]

Mr. WEBER OF TEXAS. Thank you. That is all right, thank you. I yield back.

Mr. PAYNE. And eight other conversations going on behind me.

OK, we next have Mr. Moulton for 5 minutes.

Mr. MOULTON. I thank you, Mr. Chairman. I would like to begin with Mr. Newman.

Mr. Newman, you have an impressive background, and difficult work, obviously, for Amtrak. I wanted to ask you a question about passenger rail that actually extends a little bit beyond Amtrak.

The STB, of course, has authority beyond Amtrak, as written into the law. For example, the STB has ruled that Texas Central, the high-speed rail project between Dallas and Houston, with which Amtrak has a ticketing agreement, will qualify as part of the interstate rail network and fall under STB jurisdiction.

Can you tell me what role can STB reauthorization play in supporting private high-speed rail projects like Texas Central and Brightline West?

Mr. NEWMAN. Well, thank you for the question, Congressman Moulton.

From Amtrak's standpoint, we are very much interested in being able to see improvements and increases in intercity passenger rail in whatever provider might be able to be providing that service. So, to the extent that there is a need or recourse to the STB to encourage the growth of intercity passenger rail for other operators, we think that that would be appropriate.

Mr. MOULTON. Mr. Jefferies, over to you. Thank you very much for your thoughtful response to my questions for the record after our full committee's hearing on North American supply chain issues last November.

You probably recall that I asked how to shift more freight from highway to rail, which I think many people on the committee have acknowledged would be good for congestion, good for the environment, good for efficiency, if it is done well.

Do you agree that regulation of the freight rail industry by the STB should not inhibit, and in fact, should perhaps bolster this goal of shifting more traffic to rail?

Mr. JEFFERIES. I could not agree more with that statement. Absolutely.

Intermodal traffic is over half rail traffic right now. That is going to continue to grow. It should continue to grow, when you look at the consumer demand we are seeing in this country. Last year, over the first 6 months of 2021, freight rail moved more intermodal units than they had at any 6-month period in their history.

But we want to take on more, because we think it is good for the environment, it is good for congestion, it is good for highway degradation, and, quite frankly, a good public policy goal. So, absolutely.

Mr. MOULTON. So, you have also noted in your response that capacity is key, and there are capacity constraints on the roads today.

I have to say that when you see these numbers, that you have invested $150 billion in capacity infrastructure improvements, but, as Mr. Malinowski pointed out, $200 billion in stock buybacks, that doesn't make us feel that you are striking that balance right, because if you put that $200 billion into capacity, think about how much more we could have.

How do you think about prioritizing that balance?

Mr. JEFFERIES. So, when you are making an investment into the rail network, you are making a 50-year, if not 100-year, investment. And so, you need to invest not only for the demand today, but, of course, keep making those long-term investments.

I can't comment on investor relations decisions, but what I can say is that sustained level of investment that freight rail has been able to put back into its networks has resulted in an infrastructure that is the highest rated by the American Society of Civil Engineers. It is an investment level that far exceeds most other industries in the U.S., with 18 percent of revenues going back into the capital plant.

Mr. MOULTON. No, and——

Mr. JEFFERIES [interrupting]. And——

Mr. MOULTON [continuing]. Mr. Jefferies, I appreciate those numbers, and you have shared them before.

I am just trying to make the point here that you may not be able to comment on investor decisions, as you frame it, but those investor decisions or investor relationship decisions affect your relationships with your customers, too, when you can't deliver the service that you could if you were able to put more into the infrastructure.

I am impressed with freight rail infrastructure. My point is that I think it could be better. And I want to make sure that the STB finds its role in helping to incentivize that, because I want to see you grow your business even further. And while there is a tremendous focus on efficiency, I do share the concern of many members of this committee that we are not focused enough on growth, and I am not quite sure how we get there.

One of the things that you also said—when we were talking about Precision Scheduled Railroading—is that it doesn't have a one-size-fits-all meaning. And obviously, if you are improving efficiency, if you are getting cars to their destination with less switching, more direct routes, that is all good. But when we hear from shippers, as we have this morning on the committee, that there are others who are not getting the service that they need, they are actually seeing their service go down, I wonder whether we are really finding the right definition for Precision Scheduled Railroading here. If it is not really helping grow the business, just making what we have more efficient, is that really the ultimate goal?

Mr. JEFFERIES. Well, I think it is a—service is absolutely a top-line goal. Safety is the top-line goal. Service is a top-line goal. And we need to serve our entire customer network. We look to do that every day.

Now, are there areas where there are challenges? Absolutely. And I would probably ascertain that every industry is facing challenges in certain parts of its network right now. But——

Mr. PAYNE [interrupting]. Thank you.

Mr. JEFFERIES [continuing]. At the end of the day, we have got to try to serve all the customers we can, and growth is absolutely a key priority.

Mr. MOULTON. Thank you, Mr. Chairman.

Mr. PAYNE. Thank you. And next we will have the distinguished gentleman from Tennessee, Mr. Burchett.

Mr. BURCHETT. Thank you, Mr. Chairman. And I appreciate Ranking Member Dusty Johnson, the pride of T.F. Riggs High

School. He was the captain of the debate team and the wrestling team. Quite a combination, quite a combination.

Mr. Jefferies, my district in east Tennessee is served by the Knoxville and Holston River Railroad, and that is a short line railroad that connects both the CSX and Norfolk Southern. Can you talk about how forthcoming STB regulations might impact short line railroads?

Mr. JEFFERIES. Sure, absolutely. I would also say remind me never to get involved with the guy who is a wrestler and a debate champ, but——

Mr. BURCHETT. He will talk you to death while he is beating your head in the ground.

[Laughter.]

Mr. JEFFERIES. Exactly. But more importantly, to your question, I can tell you that the short line railroad industry has filed an opposition, and will be testifying in opposition of the reciprocal switching proposal that is pending before the STB.

Ninety percent of issues short lines and Class I's are aligned on. Certainly, there are areas where one is perhaps more important to the other. But when it comes to STB issues, by and large, the short lines see eye to eye with the Class I's on some of the larger re-regulatory efforts that have been proposed, or could be considered over—at the Board.

Mr. BURCHETT. OK, thank you. Some of the witnesses today suggested that the STB's reciprocal switching rule could actually increase competition within the rail industry and lower shipping costs. What do you make of that? Is that accurate, or inaccurate?

Mr. JEFFERIES. I would say it is wholly inaccurate.

The push for forced access, reciprocal switching, whatever you want to call it, is simply forcing one railroad to open up its network at the behest of a shipper. And that is not competition, that is just a wealth transfer, a Government-directed wealth transfer, and it doesn't make sense.

Mr. BURCHETT. All right.

Mr. Newman, what do you think the difference is between State-supported and long-distance service?

Mr. NEWMAN. I am sorry, Congressman, could you—the difference between State-supported and long distance in what dimension?

Mr. BURCHETT. I would assume in reference to Amtrak.

Mr. NEWMAN. I didn't quite hear the question.

[Pause.]

Mr. NEWMAN. Sorry, so, the question was, what is the difference between State-supported and long distance?

Mr. BURCHETT. Yes, sir.

Mr. NEWMAN. Yes, OK. Our—yes. So, routes that are over 750 miles are our long-distance services. Those under 750 miles are the ones that we operate as State-supported service. And we, therefore, contract and arrange with a State or a set of States for the operation of the service.

Mr. BURCHETT. OK. Well, is Amtrak—are you all planning on expanding the rail service?

I know you are in 20 States, is that correct, over the next 15 years? Is that what I read?

Mr. NEWMAN. Well, we currently serve 46 States.

Our vision for expanding passenger rail, which we introduced last year, Amtrak Connects US, looked to identify a number of corridors, which we think are good opportunities for the expansion of intercity passenger rail. There were roughly 20 new corridors laid out there. So, there is that number 20, as well as increased service—I am sorry, 29—increased service on another 34 existing corridors.

Mr. BURCHETT. OK. I guess what I am getting at is, when you all expand in these States, and I know you are looking for funding by the States, are you going to ask for a decrease in appropriations for Amtrak to match that, or will it be on top of that?

Mr. NEWMAN. No, we would not be looking for a decrease in appropriations. Under IIJA, we have got now the—that provides funding for expansion for the capital that is needed for expanding our network.

And although we do contract with States, and States do provide support for our State-supported services, our annual appropriations are still needed to fund our ongoing operations, both with our long-distance and State-supported service, and our Northeast Corridor.

Mr. BURCHETT. Do you ever see in the future at any time that Amtrak will actually cash flow?

Mr. NEWMAN. Well——

Mr. BURCHETT [interrupting]. A simple yes or no.

Mr. NEWMAN. I think, in the near future, it is—no, and it is very difficult to say.

Mr. BURCHETT. Thank you, Mr. Chairman. I yield back none of my time.

[Laughter.]

Mr. PAYNE. Thank you, the gentleman from Tennessee. Now we will have Mr. Auchincloss for 5 minutes of questioning.

Mr. AUCHINCLOSS. Thank you, Chairman. [Inaudible] to discuss tangible ways [inaudible] issues that are [inaudible] consumer, businesses and [inaudible]. Those issues in the Massachusetts Fourth Congressional District are represented in today's panel with 350 jobs in my district, making up a portion of the American Chemistry Council.

Mr. Jefferies, I would like to begin with a few questions for you, and really about the intersection between rail and the ports. We are all familiar with the challenge with port congestion, and how that congestion can ripple through the ports onto the rail system. What has been the biggest cause of congestion [inaudible] in containers on the railroads, and how can the STB help address that?

Mr. JEFFERIES. Thank you, Congressman. Either on my end or your end you broke up a little bit at the end of the question, so, I believe the question was about congestion at the ports, and supply chains, and what can be done to help address that.

Mr. AUCHINCLOSS. I apologize, yes. What has been the biggest cause of congestion in moving containers onto railroads, and how can STB help address that?

Mr. JEFFERIES. Sure, absolutely. So, I would say there is maybe not one cause. The supply chain challenges kind of run the gamut throughout the entire integrated supply chain, going from, whether it is a factory in Asia to the ocean carrier waiting off the coast to be able to be unloaded, trans-loaded to rail, and so forth.

So, I think we are seeing a number of different issues, some of it at the port, some of it at the rail yard, although we have been able to work through a decent amount of it, and a lot of that is well documented. It is lack of short-haul truckers, it is lack of chassis. It was—and depending on where you are, still is—a breakdown of hours available to work.

Railroads operate 24/7, always have, continue to, always will. Not every aspect of the supply chain works 24/7. We did see the news over the fall that the Ports of L.A. and Long Beach did expand, but we need a supply chain that is functioning at full throttle across the board.

Warehouse space continues to be a major challenge. You have got to have a place to take containers once they get on to the rail. Once they get to the yard, you have got to have truckers to pick them up, you have got to have chassis for the container to go on. You have got to have a warehouse to take it to.

And so——

Mr. AUCHINCLOSS [interrupting]. But Mr. Jefferies, in particular, can you just talk about what you think the STB could do for any of these specific issues that you are raising?

Mr. JEFFERIES. Sure. I think the STB and the administration writ large is taking the appropriate approach of getting people in the room together, and talking about what are solutions that interested parties can take, because most of this is private to private to private.

Mr. AUCHINCLOSS. Right.

Mr. JEFFERIES. And so, there has been some success there.

Mr. AUCHINCLOSS. Yes.

Mr. JEFFERIES. And that stakeholder engagement has been completely appropriate, in my opinion.

Mr. AUCHINCLOSS. What is your view on on-dock rail, and what role do you think it can play in lessening future port congestion?

Mr. JEFFERIES. I think it can play a very productive role, and certainly some of the port infrastructure programs that have come out of the infrastructure bill provide opportunities for additional buildout.

Of course, most of the ports are public, or public-private partnerships. But when you are able to build out on-dock rail onto a spur, you can immediately put that on the train, versus going from ship to truck to train. You can take it inland into an intermodal yard, where it can be transferred, and get rid of some of that gridlock and traffic at the port itself.

And frankly, that means more containers are going on train, versus going on truck. And we think that is a good public policy goal. It is more business for the railroads. It is more jobs for Mr. Pierce's employees and our employees. And it is good for environment, good for degradation, good for environmental justice, good for any number of things.

Mr. AUCHINCLOSS. On this point about environmental efforts, can you expand more on how you are working to modernize freight rail with electric and hydrogen-powered locomotives?

And maybe just take 15 seconds, because I—or 30 seconds, because I want to close with a question for Mr. Hildebrand.

Mr. JEFFERIES. Absolutely, great question. So, railroads are exploring battery electric, hydrogen power, increased use of biofuels. You have seen reports of revenue service activities going on across different railroads. One railroad just bought 20 battery electric locomotives to use in switching.

I will say the infrastructure bill includes a number of programs coming out of DOE that will provide funds for R&D and to furthering those objectives and those goals.

It is going to be a long-term process, not overnight, but something we are all excited about, and it is going to be necessary in order to meet our emissions goals.

Mr. AUCHINCLOSS. And Mr. Jefferies, would you be willing to follow up on the record with some more about what you are doing, as an industry, on that front?

Mr. JEFFERIES. Absolutely. I would be more than happy——

Mr. AUCHINCLOSS [interposing]. Great.

Mr. PAYNE. Fifteen seconds.

Mr. AUCHINCLOSS. All right. Final question: Mr. Hildebrand, is your organization updating your members about funding opportunities, including in the Bipartisan Infrastructure Law, for grade crossing improvement programs? And if not, will you?

Mr. HILDEBRAND. I can't speak to that, I am sorry.

Mr. PAYNE. The gentleman's time has expired.

Mr. AUCHINCLOSS. I yield back.

Mr. PAYNE. Now we will hear from Mr. Johnson for 5 minutes of questioning.

Mr. JOHNSON OF SOUTH DAKOTA. Thank you very much, Mr. Chairman. Let's start with Mr. Jefferies.

Mr. Hildebrand, in his testimony, raised the issue that some commodities are exempt from a number of the STB provisions. He suggests there could be, every 5 years, a review of those exemptions. What are your thoughts, is that workable?

Mr. JEFFERIES. Well, I would say there needs to be a demonstrated need for it. And right now, an entity can apply to have its commodity exemption revoked or removed. And so, that strikes me as the appropriate process for that.

Exemptions are there for a reason, because there is a significant level of competition between modes, and unless proven otherwise, it doesn't make a lot of sense, in my opinion, at least, to just revoke those without cause.

Mr. JOHNSON OF SOUTH DAKOTA. And you just alluded to this, but just from an educational perspective, was the rationale—because I think it was in the Staggers Act that these exemptions were allowed—is it that there was a high level of intermodal competition with this fresh dairy and fresh meat, those sorts of ag products?

Mr. JEFFERIES. Right, it is competition-based.

Mr. JOHNSON OF SOUTH DAKOTA. Yes, very good. OK, so, how about for Mr. Hildebrand?

Mr. Jefferies, in his testimony, suggested that new regulations by the STB could be subject to a cost-benefit analysis, as is the case with a number of other Federal agencies. Mr. Hildebrand, any reaction to that?

Mr. HILDEBRAND. Yes. So, while, in principle, whatever happens should make reasonable cost-benefit analysis, and should clear certain hurdles, so, on a surface, not a big issue. But I think this is just the AAR trying to delay and/or prolong some of the things that the Board is trying to get accomplished.

And if I may, real quick, about reciprocal switching, this isn't new in the United States, folks. This has been going on for many, many years. We are using it today.

Mr. JOHNSON OF SOUTH DAKOTA. Mr. Hildebrand, I am sorry, I have got to cut you off, because I think reciprocal switching, we have talked a lot about that today. I want to get to some of the areas that haven't been uncovered yet.

I will give you an opportunity, Mr. Hildebrand, if you wanted to add anything more to what Mr. Jefferies said about your suggestion of doing the commodity exemption review every 5 years. He suggested it was unnecessary.

Mr. HILDEBRAND. We think it is very important that a path forward that is much easier than what is involved today to open up and remove exemptions is necessary.

I mean, what do you have to lose, if you are trying to compete for business today? What are they hiding from? What are they afraid of?

This should be a process that is allowed by the Board to bring things for the removal of an exemption.

Mr. JOHNSON OF SOUTH DAKOTA. A number of the witnesses talked a fair amount about the Final Offer Rate Review pending, or the rule promulgation by the STB. I don't know that we have had as much discussion, anywhere near as much discussion, on the voluntary arbitration process rule promulgation. And so, maybe we will start with Mr. Jefferies, and then go to Mr. Hildebrand, and then it can be an all-play with the time we have left.

What do your all's organizations think about that pending rule?

Mr. JEFFERIES. So, I think it is widely noted that several Class I railroads proposed a paradigm for an alternative dispute resolution program through voluntary arbitration for smaller rate cases. Recognizing that, the rate case process is less accessible for some smaller shippers.

And we are encouraged that the Board reacted to that, and has put out a potential proposal that takes a lot of those ideas. I think the important thing is—and this aligns with STB Chairman Oberman's goals, as it allows private parties to work out disputes, and work out situations.

Our challenge with the FORR proposal is that the STB is absolving itself of determining what the maximum reasonable rate is. It is either picking the rail suggestion or the shipper suggestion. And quite frankly, it usurps its own statutory authority, and it doesn't have statutory authority to be a baseball-style arbitrator.

So, we think voluntary arbitration is appropriate. We are willing to make commitments. We are staying in the program, we——

Mr. JOHNSON OF SOUTH DAKOTA [interrupting]. And Mr. Jefferies, I have got to cut you off, because I do think that the FORR has been pretty well covered.

Mr. Hildebrand, your thoughts on the voluntary arbitration process?

Mr. HILDEBRAND. Yes. So, the problem with that one is that they want to keep it confidential. So, if you file one of these cases under this provision, it will never see the light of day. So, we will never see how many of these things are out there, what is the decision, what is the rationale. They want to keep this confidential. That is why we object to it.

Mr. JOHNSON OF SOUTH DAKOTA. So, you don't think that would be helpful to small shippers, and that is sort of the value proposition.

Mr. HILDEBRAND. It will not be helpful, because I don't think we will use it. Why would we use it, if we don't know anything about what has happened before, what kind of decisions were rendered? People are not going to use it.

Mr. JOHNSON OF SOUTH DAKOTA. Thank you, Mr. Chairman. I will yield back.

Mr. PAYNE. The gentleman yields back. I now have the gentlelady from Nevada, Ms. Titus, for 5 minutes.

Ms. TITUS. Thank you, Mr. Chairman.

And let me say thank you to the railroad industry for your help in trying to get the supply chain problems in line. And you have been on the front lines yourselves throughout this pandemic, and we appreciate that. And you have done it while causing much less pollution than some of our trucking friends. So, thank you to the railroads for that.

I have a question for Mr. Newman and Mr. Pierce.

Mr. Newman, you mentioned in your testimony that current statutory provisions governing the STB's review of mergers is essentially rubber-stamped. And since the 1980s we have gone from 33 railroads to 7, and it may soon be 6. So, I would ask you how that process works, how those mergers have affected passengers.

And then, Mr. Pierce, as we push for more profit for the railroads from Wall Street, how have these mergers affected our railroad workers, and what can we do, as we look to revise or reestablish or reauthorize this agency, to protect those workers?

Mr. NEWMAN. Well, thank you for the question, Congresswoman Titus.

And with the—we have seen in the past, situations where the mergers have caused increased traffic, and therefore, delays. I mean, in some cases in the past there have been—really were meltdowns as a result of the mergers. That really took quite a while for our passenger traffic to recover from those delays.

So, our concern is that the STB have the ability to take the public interest into account, and ensure that the public interest standard is a component of the STB's review, as well as that the STB have the ability to make directives to ensure that passenger rail is able to operate successfully in the wake of mergers.

Ms. TITUS. Thank you.

Mr. Pierce?

Mr. PIERCE. Thank you. I think, if you look back at the history of the big merger push of the late 1990s, there has [inaudible] said, there were multiple meltdowns, a lot of missteps in trying to integrate workforces, integrate what were once competing railroads into a single unit.

With the two primary ones on the landscape coming forward with the CP/KCS and the CSX acquisition of Pan Am, we have been very involved with the STB about trying to make sure that the protective conditions that the STB has the right to impose are included in any decisions to make sure that the workers get a fair shake when it comes to how these railroads are merged into a single entity.

Ms. TITUS. Well, I am glad to hear that, because it is not all just about profit. It is about safety, as well.

And speaking of safety, what about this tendency to put together small trains into one long train that is carrying mixed cargo?

If there is a derailment or an accident, the exposure to the environment and to the people living nearby, as well as the people on the train—I don't know, Mr. Jefferies, do you want to address that?

Mr. JEFFERIES. Sure. So, I think, when you look at train length versus incident, there has not been any correlation there. The leading cause of incidents is either human factors, track-caused incidents. In 2021, we had the lowest number of track-caused incidents in the history of the industry.

But, I think it is important to note that, again, when train lengths are—massively vary in length, and over 90 percent of trains operating on any given day are under 7,500 feet long. Are there some that are longer? Absolutely. But railroads have the infrastructure, design the infrastructure in order to meet the needs of a train length, whatever that might be.

Ms. TITUS. Do you think it would make a difference in the length of train for the number of people who are working on that train?

Mr. JEFFERIES. Well, Congresswoman, as you know, you are, I think, referring to efforts to mandate two people physically located in the cab of the locomotive at all times.

Ms. TITUS. Mm-hmm.

Mr. JEFFERIES. We are vociferously opposed to that. We don't think it makes sense, from a safety standpoint. We proposed potential alternative models, where you have crew also stationed outside of the train along the right-of-way. Should there be an unplanned event, that crew person is there, with the tools necessary in order to investigate it.

Also, working a planned schedule, predictable hours.

My point being, I don't think it makes sense to mandate any sort of current operating paradigm in perpetuity into the future, because you never know what is going to evolve over time, in order to allow for innovation, competitiveness, and related. Thank you.

Ms. TITUS. Thank you.

Mr. Pierce, you want to weigh in on that?

Mr. PIERCE. Yes, we——

Mr. PAYNE [interrupting]. Quickly.

Mr. PIERCE [continuing]. We adamantly disagree with Mr. Jefferies on the safety aspects of two-person crews. The extra set of eyes and ears in the cab of locomotives is essential to a safe railroad operation, and there is no data that shows that assigning those employees on the ground is going to come with an equal level of safety.

Ms. TITUS. Thank you.

Thank you, Mr. Chairman. I yield back.

Mr. PAYNE. Thank you. The gentlelady yields back. Next we will hear from Mr. Nehls for 5 minutes.

[Pause.]

Mr. PAYNE. Mr. Nehls?

Mr. JOHNSON OF SOUTH DAKOTA. Sheriff, we can't hear you.

[Pause.]

Mr. PAYNE. We will go to Mr. Balderson.

Mr. BALDERSON. Well, good morning, still—it is still morning. Mr. Chairman, thank you, and thank you all for being here. My first question is for Ian Jefferies.

Mr. Jefferies, thank you. In your testimony you note, "To remain competitive, railroads must earn sufficient revenues to continually make significant investments in infrastructure, equipment, training, and technologies," and that, "If railroads are unable to make such infrastructure investments, there could be cascading impacts on the health of the rail network."

Can you expand on the unintended consequences that forced switching could have on the infrastructure investments your members make every year?

Mr. JEFFERIES. Sure, I would be happy to, thank you. As this committee well knows, freight rail uses almost entirely its own funds to invest and grow and maintain its capital network. And when you have a potential switching regime that would require one railroad to open up its private assets to another at the behest of a shipper, it can result in a disincentive to maintain that network if you can't get a return on investment that supports continued investment. And that is not good for the rail network writ large, it is not good for most rail shippers. And quite frankly, it is not good for the highways, it is not good for the environment, it is not good for passenger rail.

And so, our longstanding point is and will continue to be that we need a system that allows us to earn adequate revenues to invest back into the network. We have got to grow. Growth is absolutely key in order to meet the freight movement needs of this country today and into the future.

And the STB has backstops in place. It has great dispute adjudication processes. It has service remedy options. Can they be improved? Perhaps. We have offered ways to streamline these processes. I know shippers have, as well. But let's improve what tools are there, versus continuing to add additional tools, ill thought-out tools, that will result in undermining the fluidity and health of the freight rail network.

Mr. BALDERSON. Thank you for that. My next question is for Mr. Jahn.

And I understand you and your members have different opinions on this issue than Mr. Jefferies and his members. But as rail customers and users, do you share any concerns that the proposed changes to reciprocal switching could impact future rail investments and their infrastructure or technology?

Mr. JAHN. No. The short answer is no.

So, look, competition drives investment in every sector of the economy, and that would be true here, as well. Railroads would have the incentive to earn its business going forward, and would have to invest and innovate, as our members do, in a globally competitive market. And so, we would be looking for the same thing to happen here, with this reciprocal switching proposal that has been pending for years at the STB, and already works effectively in Canada.

Mr. BALDERSON. OK, thank you very much.

Mr. Chairman, I yield back my remaining time. Thank you, both of you. I appreciate it.

Mr. PAYNE. Thank you. Next we have the gentlelady from California, Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

Mr. Newman, we were just recently notified that Amtrak will continue to operate several long-distance routes and reduce frequencies through at least May, and likely into a peak summer season. We are told that Amtrak has insufficient staff and cannot operate 7-day service, as required by the American Rescue Plan Act.

As Omicron recedes, and the Nation begins to travel substantially more in the summer, Amtrak needs to fully restore its most popular [inaudible] everyday service. What is holding Amtrak back, and what are they doing to restore full service as soon as possible?

What methodology of recruitment are you using to bring back your laid-off employees and recruit new employees?

Mr. NEWMAN. Well, thank you for the question, Congresswoman Napolitano. And we are very much interested in getting our service back to full frequency as quickly as possible, as you stated, and, of course, to be able to operate safely.

As you stated, we are, at the moment, challenged for staff, and we have really kicked up our recruiting efforts. We have, actually, long ago recalled all employees who were laid off. So, that is not our issue. But we have more than doubled the amount of our staff in talent acquisition. We have got stepped-up efforts in recruiting at trade fairs, at trade schools. We have got referral incentives for employees to refer other employees so that we can get more folks on staff.

As well as bringing in more people, we are also working on retention. So, we have got incentives to keep employees from retiring, and stay with us. So, while we would like to get that service restored—we definitely do want to get that service restored as quickly as possible——

Mrs. NAPOLITANO [interrupting]. How soon do you think——

Mr. NEWMAN [continuing]. It will take a bit of time.

Mrs. NAPOLITANO. How soon do you think you will restore the service?

Mr. NEWMAN. I think we will have better visibility here in the next month or two. As much as we are hiring, we also have got to get people through training, get equipment——

Mrs. NAPOLITANO [interposing]. I understand.

Mr. NEWMAN [continuing]. That needs to be checked, so——

Mrs. NAPOLITANO [interrupting]. Well, then would you mind letting some of us know, so that we can get the word out that you are recruiting?

Mr. NEWMAN. Yes, yes. Thank you. We can actually give you some good information on what we are up to, and we will keep you informed as we move forward. So, thank you.

Mrs. NAPOLITANO. Thank you very much. The next question will be for everybody.

I have heard from businesses in my district that have been long customers of the railroad. My constituents' businesses have said railroad service has become less reliable and less efficient. The businesses contend the railroads don't provide on-time delivery and effective schedules they were used to for many years.

The businesses also mentioned that, when they have customer complaints, railroads don't have enough customer service staff as they used to have to answer the questions.

My question for all witnesses is, why is this happening?

Mr. HAKSTEEN. If I can answer the question—this is Herman Haksteen from the Private Railcar Food and Beverage Shippers Association—I believe it is happening because the railroads have reduced their workforce, and reduced their resources by so much that they are unable, simply unable to keep up with the current demand.

And what your constituents are telling you is clearly evident in all the other facts, which is freight is moving from the rail to truck because the railroads can't service their customers.

Mrs. NAPOLITANO. Yes, and Mr. Jefferies, then——

Mr. HAKSTEEN [interrupting]. It is simply——

Mrs. NAPOLITANO [continuing]. Thank you very much. I am running short of time.

But Mr. Jefferies, I understand from a report that you have less employees and you have more cargo than many years prior. Why haven't you been able to uptick your labor force?

Mr. JEFFERIES. Well, certainly the past few years have been a challenge. We have been actively hiring across all crafts throughout the railroads and regionally, where appropriate, and continue to do that. And we will continue to work until we have the workforce that we feel is appropriate to meet demand out there.

Talent is fiercely—there is fierce competition for good talent out there, and our workforce is highly skilled, highly trained, and we need folks that are up for the task and are willing and able to put in the time necessary, because it is an industry that requires a high level of dedication, skill, and commitment. And we are proud of the employees that we have, and we are always looking for more, especially today.

Mrs. NAPOLITANO. Well, Mr. Jefferies, same thing I told Mr. Newman. If you let us know that you have openings, we might be able to get you some recruits. Thank you.

Mr. JEFFERIES. Thank you.

Mrs. NAPOLITANO. I yield back.

Mr. PAYNE. The gentlelady yields back. We now have Mr. Stauber for 5 minutes of questioning.

Mr. STAUBER. Thank you, Mr. Chair, and thank you all for coming today to speak a little bit about your industries, and about how the STB reauthorization should look.

As you all know, we are in a state of crisis when it comes to our supply chains and inflation. Each is tied to the other in many ways. So, there is no reason that a family should be stressed about how to feed their families as the cost of groceries continues to skyrocket, and we are met with bare shelves at the store. The shippers, the rail industry, and our union workforce is working to keep food on the table and get products across the country in a timely fashion.

We know that the rail industry is one of the most efficient parts of our supply chain. However, we also know that Government regulation and overreach has made this job harder. Whether this falls within the STB reauthorization or not—and this question is for anyone—what could we do tomorrow to alleviate some of your biggest Government-related stressors that make your jobs more difficult?

Mr. STAUBER. Any of the panelists.

Mr. JEFFERIES. I will take a first crack on that. I think it is all about modernizing the regulatory structure. And that—as I say, that might mean something to Mr. Jahn than it does to me, when it comes to the STB.

But, operationally, we need to promote innovation, we need to promote technological deployment. That is going to result in more efficiency. That is going to result in a higher level of safety. It is not anti-worker. It is evolving the way that the business operates, in an appropriate way that allows it to maintain competitiveness.

We need an economic regulatory regime that promotes investment that works for shippers where there is a market failure, and does so in a way that is timely and relatively less burdensome than it perhaps is today, yet grounded in core economic principles.

Mr. STAUBER. Thank you.

Mr. JAHN. I would——

Mr. STAUBER. Anybody else want to take a shot at that? Go ahead.

Mr. JAHN. Congressman, if I could, so, I would agree with Mr. Jefferies, that we do need to modernize and update the regulatory system. With all due respect, we have been trying for 40 years to make a broken system work. It is time to turn the page and try something new. In our view, that is reciprocal switching. That has been well discussed already.

But the whole point under the Staggers Act is to increase competition among rail carriers. That is what we are trying to do here. So, that would be the immediate step that has been pending at the STB for 6 years now.

Mr. STAUBER. Thank you.

Mr. HAKSTEEN. If I can please add to that, this is Herman Haksteen.

Getting effective oversight to make that competition to create a free=market-type environment needs to happen.

And to your point, what can we do quickly? I think we need to remove some of the barriers so that the STB can give us that effective oversight.

Mr. HILDEBRAND. And I would jump in real quick, if I may. Just streamline the processes we have to go through. If we are bringing up issues and/or concerns and/or problems, let's figure out how to streamline these things to make this more efficient for everybody.

Mr. PIERCE. Mr. Congressman, if I may——

Mr. STAUBER. Yes, go ahead.

Mr. PIERCE [continuing]. One of the challenges—we talk a lot about staffing. And even while Mr. Jefferies may be right, that certain railroads are having trouble finding employees, certain railroads still have people furloughed while they are forcing others to work more.

Adding insult to injury, while you are offering incentives to hire, the Nation's Class I railroad employees have been 2 years without a contract. They worked through a pandemic. The railroads are reporting record profits, and it is an insult to everyone that you are going to pay new employees more than the ones that got you through the crisis without a contract.

So, there are all sorts of things that could be done to alleviate the staffing problems.

Mr. JEFFERIES. Mr. Pierce is representing the ongoing collective bargaining process that both sides have been in and continue to negotiate in.

Mr. STAUBER. Well, thank you very much. I think that—go ahead. Was there another witness? Go ahead.

Mr. NEWMAN. Sorry, Congressman. Dennis Newman from Amtrak.

And I was just going to say, from a little different perspective, from our standpoint, being able to have the funding at the STB for the passenger rail office so that efficient investigation of any performance issues that may be brought, I think, would be helpful.

Mr. STAUBER. Well, thank you very much, as my time winds down. I appreciate those comments, and it is something that I think colleagues on both sides of the aisle within this committee are hearing.

So, I think that we need to work to alleviate some of these concerns, and just bring certainty to the industry. And I thank you all for participating today and sharing your knowledge and expertise.

Mr. Chair, I yield back.

Mr. PAYNE. Thank you. Next we'll hear from Mr. Lynch for 5 minutes of questioning.

Mr. LYNCH. Thank you, Mr. Chairman. I really appreciate it.

I, for one, I am very grateful to our rail workers, especially these last 2 years. It has been very, very difficult. They have been on the front lines, and they have performed magnificently on behalf of the American people in doing what they can to alleviate the supply chain problems that we have had.

I am deeply disappointed in the layoff that we experienced early on. As a former union president myself, I can tell you, when you have layoffs in an industry, that is a red flag to anyone who is looking to begin a career in that industry, because it signals instability.

And I also think that the rate of consolidation in rail has also limited our opportunity to attract more workers. They see Wall Street making more of the decisions to squeeze out employees. I think it has had a detrimental effect on the quality of life for those employees. And also, I worry about our ability to attract the next generation of rail workers.

President Pierce, you have been—look, I have negotiated plenty of collective bargaining agreements during my career as an iron worker, and also as a labor attorney. Can you talk to us about the fact that we have lost so many skilled employees?

Some of them are still furloughed, yet we have another effort of bringing new people into the industry. Can you talk a little bit about the perspective of our regular rail workers, and what they are dealing with on a daily basis?

Mr. PIERCE. Thank you, Congressman. I think it is a very critical part of what is wrong with the supply chain, and what is wrong with staffing.

As I said, our membership has been—and this is all rail unions, this isn't just mine—they have all been without a contract for over 2 years, while the [inaudible] records made—I mean, record profits. Every profit report that came out this spring has been best ever, and the employees see that. And the new people that want to go to work in a good industry see that.

The continuing attack on the second person on the train, how do you hire conductors when you are telling them you want to get rid of them? That is counterproductive.

Add to this these policies that the railroads are adopting as part of PSR, forcing workers to work more, taking over their family life at the expense of laying someone else off.

It is absurd to me that there is any doubt as to why people are not interested in hiring out at the railroads right now. They are having a hard time, even at job fairs. Ten people take the job, only five show up when they find out what it looks like. And that is my job, that is our job, as unions, to try to improve on that. But we need a willing partner across the table. And for 2 years we have sat across the table with no willing partners to try to address these concerns.

Mr. LYNCH. Yes. I am not in on the negotiations, obviously, but you would think, with all of the money that we have collectively in Congress sent to our rail operators, that that inducement would encourage them to be a little bit more kind to our employees.

And also, we have seen that on the passenger side in my own district, where we gave the rail authority in Massachusetts about $1.5 billion, and they turned around and laid off 50 conductors. We got that turned around, belatedly. But there just seems to be a disconnect between what we are all trying to do and some of the policies that we have observed.

From a safety standpoint, President Pierce, how important is it to have that second employee on that train, especially given the length of some of these trains?

Mr. PIERCE. I think it is critical. I think the second set of eyes and ears, the ability to, I think, address issues that happen on the fly—grade crossing accidents, derailments—these are things where the ground crew goes back in short order to make sure that we are addressing these catastrophes as fast as we can.

There is no replacement for that, where you put someone on the ground in a truck, and he can even get to the remote locations that conductors walk to every day from the head end of a train that is out there, right where the accident occurs. So, it is just one of many ways.

This is a cost-cutting mechanism. It is fewer people doing more work, and it has nothing to do with the safe operation, in our opinion.

Mr. LYNCH. Thank you very much. Well, I have family that are involved in rail, and they have got a long history there. And hopefully, you will have greater success. I just—I want to urge the rail operators to sit down and bargain in good faith with our brothers and sisters in the rail unions.

Mr. JEFFERIES. May I comment quickly before——

Mr. LYNCH. Mr. Chairman, I yield back.

Oh, I am sorry, sure, if I have time.

Mr. PAYNE. Quickly.

Mr. JEFFERIES. Very quickly.

One, I am not the negotiator. We have a separate organization that does that. Of course, we are negotiating in good faith. That is a long, gradual process. It works well under the Railway Labor Act.

Number two, even in 2016, under the Obama administration, there was a proposed two-person crew requirement. In the beginning of the rule it stated there is no data to show that this will improve safety.

And three, just as a reminder, we don't take direct funds from the Federal Government. We are almost entirely privately financed, owned, and maintained. But your point is well taken there, and we certainly supported the infrastructure bill. Thank you for your time.

Mr. LYNCH. Thank you.

Mr. PAYNE. Thank you. The gentleman yields back. And next we have Mr. Nehls for 5 minutes.

Mr. NEHLS. Thank you, Mr. Chairman.

First off, I would like to thank all of you for being here. You can consider me a friend. I support the rail industry and appreciate everything you have done throughout this pandemic, and you do a great job for America. My question is really focused more to Mr. Newman.

And I have a gentleman here. This is Special Agent Michael Garbo [indicating photograph]. Special Agent Garbo was killed on October 5th, 2021. He worked for the DEA. And he was searching an Amtrak train heading from L.A. to New Orleans when the train stopped in Tucson, Arizona. He was doing a search of that train and found some illegal substances, illegal drugs, on that train. And obviously, the suspect didn't like it and ended up getting in a firefight with Agent Garbo and took his life.

This caused me to pause and look at security apparatus, the security on our rail system, and specifically Amtrak. And I believe that Amtrak lacks basic security protocols, making it appealing to drug traffickers and other criminals. And it is possible to board a train without ID, and take on bags without any sort of screening. And the reason I say that is I have staff and others that have jumped on an Amtrak train from DC here out to New York, and they have never been asked for an ID. They can buy a ticket, but they are not asked for an ID. As a matter of fact, they can take bags on that train, and none of those bags are scanned.

And I think the American people would find this very, very difficult to understand, that when you jump on an airplane, they want everything but a blood sample, but you can jump on an Amtrak train and not need any identification whatsoever, and carry on bags without being scanned. And I find that very concerning.

In the Infrastructure Investment and Jobs Act, Congress has allocated over $50 billion—with a "b," $50 billion—to Amtrak. And Mr. Newman, you state in your testimony that Amtrak will use that funding to begin the modernization of Amtrak's assets and initiate significant expansion of Amtrak's route network. Could you tell the committee today if Amtrak is planning on using any of the $50 billion-plus to make basic security improvements, invest in the Amtrak police, or make the Amtrak experience safer for passengers by deterring crime on trains and in stations?

Mr. NEWMAN. Well, Congressman, thank you very much for the question. And the short answer is yes, so that the—some of the funding that was made available to us through the IIJA is available for us to use on modernizing and upgrading our systems, including our safety and security systems.

And we similarly are very interested in making improvements in the safety and security of our trains. Our Amtrak Police Department cooperates and works extensively with Homeland Security, TSA, and Federal and local security authorities to make sure that we have got good cooperative practices in place, that we are well coordinated, and that we can do everything that we can to ensure the safety of your constituents, our passengers, and the traveling public.

Mr. NEHLS. But your current practice doesn't support that, because you can jump on a train from here to New York and not have an ID. True or false?

Mr. NEWMAN. You can jump on a train——

Mr. NEHLS [interrupting]. That is true. You can jump on a train without having an ID, because it takes place every day.

Mr. NEWMAN. We do have——

Mr. NEHLS [interrupting]. And you can jump on——

Mr. NEWMAN. [continuing]. Open access——

Mr. NEHLS [interrupting]. A train with bags, with bags loaded with drugs or whatever, you don't know what is in it, and you can jump on a train without having any bag scanned. That is true, too.

Mr. NEWMAN. That is similar to——

Mr. NEHLS [interrupting]. And you stated that you got the $50 billion, and that money could be used for safety and security enhancements, but you don't really have a plan in place.

Well, I want to try to help you. I mean, I am concerned about America. I am concerned about our southern border. Mr. Newman, if you think about our southern border and the amount of substances and drugs coming through our southern border because we really have no border security, I think Amtrak is actually enabling the problem, because individuals with those drugs that get through our southern border can jump on one of your trains, and you don't need an ID, you can be Billy Bob, you can be anybody you want. You can jump on that train with your drugs, your substances, and move it throughout the entire country, because you're in several States.

Mr. NEWMAN. Congressman——

Mr. NEHLS [interrupting]. I think the American people should be concerned about this. I want to be proactive, instead of being reactive.

Mr. PAYNE. OK, we——

Mr. NEWMAN [continuing]. Congressman, I would be happy to get you more information, and discuss with you, and hear your ideas, give you information about what we currently do, what security practices we have in place, and talk about——

Mr. NEHLS [interrupting]. So, my last comment is that I am drafting legislation and I want to work with you. It is called the Passenger Rail Security Improvements Act of 2022, and I am planning on introducing it this month. That would improve Amtrak's ticketing and baggage processes to make it more difficult to bring illegal drugs on board. It is not going to inconvenience your riders or hamper Amtrak's operation, but I think it is important that Amtrak uses the resources it has been given to modernize its security. So, I want to work with you on this.

And so, would you like to sit down with me at some point in time, and talk about this legislation?

Mr. NEWMAN. Yes, sir. We would be happy to.

Mr. NEHLS. That is great.

Mr. NEWMAN. We would welcome that.

Mr. NEHLS. We will be reaching out to you. Thank you, Mr. Newman.

Mr. PAYNE. The gentleman's——

Mr. NEHLS [interrupting]. I yield back.

Mr. PAYNE [continuing]. Time has expired.

That concludes the hearing for today. I would like to again thank each of the witnesses for your testimony today.

I ask unanimous consent that the record of today's hearing remain open until such time that our witnesses have provided answers to any questions that may have been submitted to them in writing, and that my opening statement be put into the record, as well.

[Hon. Payne's prepared statement is on pages 75–76.]

Mr. PAYNE. I also ask unanimous consent that the record remain open for 15 days for any additional comments or information submitted by Members or witnesses to be included in the record of today's hearing.

Without objection.

This brings the subcommittee to adjournment.

[Whereupon, at 12:12 p.m., the subcommittee was adjourned.]

SUBMISSIONS FOR THE RECORD

Prepared Statement of Hon. Donald M. Payne, Jr., a Representative in Congress from the State of New Jersey, and Chair, Subcommittee on Railroads, Pipelines, and Hazardous Materials

Good morning.

As we approach the reauthorization of the Surface Transportation Board, today is an opportunity to hear from stakeholders and to determine what, if any, additional authorities are needed to improve rail service across the country.

The STB is a unique federal agency that is the primary economic regulator of freight railroads.

Among other powers, it can set maximum rates that freight railroads can charge shippers in response to complaints, and has the exclusive authority to approve mergers between railroads.

Shippers play a critical role in the national supply chain by making the goods being transported across the country.

For instance, in my district alone, there are shippers who produce everything from plastics to orange juice, automotive components, and other critical goods that are used by Americans every day.

Shippers rely on the STB to resolve disputes with railroads, and it is critically important that STB has the tools necessary to keep cargo moving.

I, myself, have asked the STB for help with the railroads on behalf of small shippers in my district, especially those who are minority and women-owned and may be not as large as their competitors, that need a level playing field to bring rate case challenges before the STB.

Currently, those who wish to bring rate challenges in most cases must use an archaic method of creating a hypothetical railroad to prove that a rate charged by a railroad is unreasonable.

This methodology is time consuming and expensive, with the STB's Rate Review Task Force concluding in April 2019 that many small shippers find rate cases too complex and costly to pursue.

This is further evidenced by the fact that since 1996, there have only been 51 rate cases brought before the STB and zero in the last three years.

Based on the stories we will hear today of the frustration shippers have with their railroad service, zero official complaints does not mean everything is fine.

Rather, there is a barrier to smaller shippers being able to bring these challenges.

I have made it a priority of my Chairmanship of this subcommittee to remove barriers that minority and women-owned businesses face in the rail sector.

Having an archaic rate challenge process that primarily benefits the railroads does not sound right to me.

I commend the STB for beginning to take action to make other options available and will be exploring legislative options to make STB oversight more accessible.

Another issue that I am concerned about is the use of Precision Scheduled Railroading, or PSR, by freight railroads.

This practice claims to make railroading more efficient by running fewer trains, but I have significant concerns that it reduces safety by cutting the number of workers and creating very long trains that can stretch for a mile or longer.

According to the STB, at the end of last year, the Class I railroad workforce was nearly a third less the size it was in 2015.

This reduction in workforce came, largely before the COVID–19 pandemic struck, and its weakness was on display at a very inopportune time.

Instead of having a robust and flexible workforce to absorb supply chain disruptions, PSR apparently created its own worker shortage when workers were needed the most.

In 2019, this committee held a shippers roundtable where shippers expressed concerns that PSR could impact service reliability and ultimately question railroads' ability to meet common carrier obligations.

Chairman DeFazio and I have requested a GAO study on the effects of PSR. I am eagerly awaiting the results of the study.

These are only a few of the issues that will come up at today's hearing.

One other specific issue I would like to hear more about is feedback on the STB's efforts to enforce Amtrak's legal right to access so we can develop more intercity passenger rail corridors as we discussed in this committee in December and Amtrak's preference on railroads so that Amtrak trains can run on-time.

It is my hope to hear from witnesses about all the things the STB is doing right and how Congress can further enhance its authorities to ensure that freight railroads are meeting their legal obligations.

I thank the witnesses for being here today and I look forward to their testimony.

Prepared Statement of Hon. Sam Graves, a Representative in Congress from the State of Missouri, and Ranking Member, Committee on Transportation and Infrastructure

Thank you, Chair Payne, and thank you to our witnesses for being here today.

The STB exercises authority over railroad commercial practices, including shipping rates and disputes between shippers and carriers.

This year alone, the STB has before it multiple important issues, including a proposed rule on reciprocal switching and a proposed merger of two Class One railroads, as well as the potential resumption of Amtrak service on the Gulf Coast.

The Surface Transportation Board Reauthorization Act of 2015 was the STB's first authorization in almost 20 years, and authorized funding through fiscal year 2020.

Despite not being reauthorized, the STB has continued to receive funding through continuing resolutions. The FY 2022 appropriations bill passed last year would provide a full year of funding for the agency.

It is important to hear from stakeholders on ways that the STB can be improved to meet their needs and to operate efficiently and effectively in the coming years.

I look forward to hearing more from our witnesses on these issues.

Thank you, Chair Payne. I yield back.

Statement of the Brotherhood of Maintenance of Way Employes Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU, Submitted for the Record by Hon. Donald M. Payne, Jr.

The Brotherhood of Maintenance of Way Employes Division/IBT; Brotherhood of Railroad Signalmen; International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU[1] commend the Subcommittee for holding hearings concerning reauthorization of the Surface Transportation Board. With the railroad industry suffering from the Class I railroads' implementation of their new cost-cutting business model (which includes so-called "Precision Scheduled Railroading") the holding of hearings on STB reauthorization is indeed timely. The STB is the agency charged with overseeing and regulating railroads and enforcing certain statutory rail service requirements, but as the statute is currently written, the STB is not well-equipped to adequately perform those functions in the context of the new operating model.

I. Summary

In recent years, the Class I railroads have changed the way they operate trains, interact with shippers, maintain their property and equipment, and staff their operations. Part of this derives from implementation of so-called Precision Scheduled Railroading ("PSR"); but the changes have been made organization-wide. There is an across-the-board effort by the railroads to reduce operating ratios (operating ex-

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[1] These unions represent railroad workers employed in various rail industry craft and classes on all of the Class I freight railroads; and on Amtrak, commuter railroads, and short line and regional railroads. In particular, BMWED and BRS represent railroad employees who construct, inspect, maintain and repair railroad track and right of way, bridges and structures; signal and communication systems; SMART MD and NCFO represent railroad employees who inspect, maintain, repair, and fuel locomotives and perform other work in rail shops.

penses as a proportion of operating income—lower ratios yield higher profits) to historic lows by ruthlessly cutting costs (and thereby dramatically increasing profits, shareholder value, and executive compensation). During this period, shipper complaints escalated, and communities expressed concerns about reductions in service and longer trains. Reductions in employment have exacerbated the service problems caused by the new business model. Congress should move expeditiously to reauthorize the STB; in doing so, Congress should clarify and better define the common carrier obligation and ensure that the Board has the tools and resources to enforce that obligation.

II. EFFECTS OF THE NEW BUSINESS MODEL ON EMPLOYEES AND SERVICE

Since 2015, Class I employment has been reduced by about 30%. In addition to furloughs that have dramatically reduced the size of the work force, railroad workers are retiring earlier than the planned and are quitting mid-career at unprecedented rates; and furloughed workers are declining recalls because they know that once the railroad has cleared whatever backlogs it has, or handled any surge in demand, they will be furloughed again, because the new business model dictates a minimal work force. Before implementation of the new business model, furloughed employees rarely declined recall to service. And employees with 8, 10, 15 years of service rarely quit; now that is commonplace because the jobs have been degraded by the railroads, as the workers are told to do more with less, are pressured to cut-corners on inspection and maintenance, and are being required to work frequent and consecutive double-shifts because the railroads are having difficulty hiring and retaining workers.

Lately, as they are criticized for their service, the railroads have tried to use the pandemic and tightness of the labor market generally to explain the worker shortages. This is a canard. The work force was substantially reduced before the pandemic. First the railroads ruthlessly cut junior workers (the future of the industry) then they ran off many senior workers [2]. The railroads also reduced the work force even more during the pandemic. Employment is down 20% since the start of the pandemic but carloadings are only down 3%; in essence 80% of the pre-pandemic work force is responsible for moving and supporting movement of 97% of the pre-pandemic freight. As a result profits are up 8%. So the Class I's continued to cut employment in excess of reductions in traffic and thereby again increased profits. The recently announced record profits are not the result of growth or better railroading, but of reducing costs.

The railroads claim that are trying to hire, but their hiring can't keep up with the departures of senior workers who are fed up with their conditions of employment. So the carriers have been unable to increase their workforces from the rock bottom levels they reached as demand increased and service problems followed. And even if they could hire to keep up with the numbers of departing workers, they would be replacing experienced, skilled workers with trainees. The railroads also complain that they are hiring but new hires are leaving after a few weeks. They say that don't understand why that is happening or criticize the work ethic of younger workers. But they fail to acknowledge that they have degraded jobs that were once ones people aspired to; and that they have assigned workloads and schedules that people find intolerable; all while they refuse to increase employee compensation and benefits. The worker shortage the Class I's face is entirely of their own making. The excuses and prevarications they offer are disingenuous and should be disregarded.

As common carriers, it is the responsibility of the railroads to maintain work forces sized to be sufficient not only for when everything is going well, but also when frequently encountered, and infrequent but anticipatable, events occur (such as snow, polar vortexes, heavy rains, seasonal demand like harvest time in the Fall and demand for petroleum products in the Winter). That means having enough Signalmen to respond to malfunctioning crossings and switch engines; enough Maintenance of Way employees to respond to right of way washouts, track obstructions and heat-buckled rails; enough shopcraft workers to do complete inspections and maintenance of equipment, especially when fleets of locomotives and cars have been reduced and much equipment has been mothballed; enough Dispatchers to handle all train movements, particularly as the railroads run longer trains and pack more cars into the same physical space; and enough operating employees so when there are delays which cause train crews to reach their Hours of Service limits, there are

[2] One Class I railroad chief operating official told a group of union officers that anyone who complains that they cannot properly do their job with the workload assigned to them is probably in the wrong business.

backup crews that can continue to move the trains to customers, and enough yard and local crews to bring cars from terminals to shippers.

The reductions in railroad workforces have dramatically affected the ability of the Class I railroads to meet reasonable customer demands for service—after all, it is the workers who provide and support the service. The railroads claim that all is fine, that their service has never been better. But their workers know it is not; and the cascading shipper complaints refute the railroads's contentions. In their filings with the STB, shippers have related their problems to job cuts by the Class I's. Shippers have cited reductions in yard and local crews (who do the actual pickup and delivery of cars in and near terminals), and the long trains which mean more cars being managed by fewer employees. They also complain about more bad order cars that result from less rigorous inspections and that there is no longer anyone they can contact regarding service issues. Shippers from whom the railroads cannot reap maximal profits face steeper costs when shipping by rail, or are subjected to service conditions or requirements that discourage them from using rail transportation, even if they have structured their businesses to ship by rail. These are not shippers who can only be served at a loss; the railroads can make a profit serving these shippers, just not the level of profits desired by Wall Street. This is at odds with the common carrier obligation and the prior business model, where railroads sought to grow the business and increase profits by increasing revenue. Now the goal is to shrink the business and cut costs.

The STB has sent letters to railroads seeking explanations for service problems and initiated several proceedings related to service problems and shipper complaints. The unions cannot recall any like inquiries or proceedings in the 15 years between complete implementation of the major merger and control transactions and adoption of the new business model.

III. What Exactly Is the New Business Model?

The new business model is based on extensive across-the-board cost-cutting to reduce operating costs in derogation of the railroads' common carrier obligations, and without regard to the impact of the strategy on employees or the quality of service to customers. Adoption of this approach is not driven by railroading imperatives or a desire to grow the business. It is driven by finance interests; by corporate officers, shareholders, predatory hedge funds and so-called "activist" investors who seek to extract value from these essential enterprises. This is readily apparent because adoption of this model was first promoted by investors at CP and CSXT (Pershing Square, Mantle Ridge) who installed Hunter Harrison to implement the cost-cutting business model. This business model was initially rejected by US rail managements (NS fought a hostile takeover by CP, the CSXT Board resisted until Mantle Ridge was able to install its Directors, BNSF's Matt Rose mobilized the industry against the CP takeover of NS and famously resisted the model as bad for the industry—instead he advocated growth). The so-called "activist investors" who promote the new model do not want to increase profits by "growing the business". They want to increase the profit margin and are happy to shrink the business and limit their customers to those that can be served most profitably.

While the railroads refer to their new way of doing business as a new mode of operations called Precision Scheduled Railroading, PSR is just one aspect of the larger cost-cutting business model. This is demonstrated by the overall reduction in engineering forces (Maintenance of Way workers and Signalmen) who inspect, maintain and repair the tracks, rights of way, structures and signal systems. If PSR was just a change in operations, it would not involve a reduction in engineering forces. Nor would it lead to a reduction in the number of Dispatchers whose jobs in juggling the movements of longer trains have become more complicated, not less complicated. The overall reduction in inspection and maintenance of the tracks, right of way, structures, signal system, and equipment (locomotives and cars) is not related to changes in operations. Maintenance of way and signal territories have been expanded as the engineering work force has been reduced; Maintenance of Way workers and Signalmen report that they are hard-pressed to do all the inspection and maintenance work required for their territories and that they have been required to defer needed repairs. Locomotive Mechanics and Carmen report that they are being rushed through inspections of locomotives and cars, with railroads moving equipment out for service before inspections are completed. These changes have nothing to do with efficient operations and everything to do with cost-cutting to boost profits.

Thus, PSR itself is not the problem; it is a symptom of the problem. PSR is just branding. It is designed to sound scientific, but it is just brutal cost-cutting. It is not "precise" it is just forceful; it is really *inflexible* scheduled railroading. It converts a model where the railroads as common carriers worked with their customers (the shippers) on pickups and deliveries, to one where the shippers have to conform their operations, their work days, their organization of supplies in and product out, to the railroad's preferences and algorithms. The industry has gone from a "customer service" model to a "customer serves us" model. PSR then is just a manifestation of a business model designed to extract value from the railroad for the benefit of its shareholders to the detriment of customers and employees, and long term to the detriment of railroads themselves once the so-called "activist investors" move on.

IV. How Did This Happen?

The changes in the industry occurred as a result of the combination of extreme deregulation followed by industry consolidation authorized by the STB. The Staggers Act and ICC Termination Act substantially de-regulated the railroads, but the ICC/STB then authorized consolidations of the major railroads. The result was two major carriers east of the Mississippi, two major carriers west of the Mississippi and two carriers running down the center of the country. All of these transactions were expressly authorized by the ICC and STB as "in the public interest".

In approving the major merger and control transactions of the 1990s that reduced the number of Class I carriers to a mere handful, the ICC and STB relied on Staggers Act amendments and the de-regulatory mandates of the Staggers Act and ICCTA. Those transactions were approved based on the notion that shippers and the public would benefit from the consolidations. The railroads asserted, and the ICC and STB agreed, that the mega-carriers would provide better and faster service through longer-end-to-end runs, reduced interchanges, and greater system velocity; that efficiencies would be achieved that would result in savings that would be passed along to shippers and the public in general; and that the economies of scale available to larger carriers would allow for increased investment in rail infrastructure.

In the post-Staggers minimal regulation environment, after the big merger and control transactions were consummated, the profits of the new mega-carriers soared. And for a while, the railroads followed-through on their representations that service would improve, and infrastructure investments would increase. But several years ago, hedge funds and private equity interests took note of railroad profitability and the very light nature of the regulatory regime.

Once the finance interests realized that they could take control of these railroads and drive operating ratios down without loss of business, or a regulatory response, they forced implementation of policies to drive down costs and increase earnings for short term gains. As rail carriers that pursued this path saw their operating ratios decline, and their stock prices increase, other railroads adopted similar business models. Shipper complaints escalated. The STB held hearings and tinkered with complaint programs, but it seemed to be of the view that there was little it could do under the post-Staggers de-regulatory regime.

So the problems with the new business model are a feature, not a bug. Shippers, communities, legislators, and employees are distressed and looking for solutions. A key question is: whether the public interest is being served as envisioned in the merger and control decisions under the carriers' new operating model? The unions submit that the answer is plainly—no. The unions signatory to this statement believe that Congress, should recognize that the consequences of the combination of deregulatory drift, and government approval of the transactions that created the current mega-Class I carriers, require changes to the STB and the statute it administers so they are appropriate for the industry that exists today, not the industry that existed in 1980 or 1996.

V. Recommendations

The Unions recommend that Congress move as quickly as possible to reauthorize the STB. In doing so Congress should clarify and better define the common carrier obligation, and bolster the STB's ability to enforce that obligation. The common carrier obligation is about service; it requires provision of reasonable and adequate service; but it is a somewhat amorphous concept rooted in British common law. Clarifying and fleshing out the obligation will benefit all industry stakeholders. First and foremost, shippers will be able to measure railroad performance against some more definite criteria, and they will be better positioned to pursue complaints of poor service. Railroads will benefit because they will have a better sense of their service obligations and will be able to resist forces pushing for relentless cost-cutting by citing more clear statutory service obligations. And rail workers will benefit because a pendulum swing back to more of a customer service philosophy will mean increased employment and an emphasis on working well and conscientiously, rather than fast and within constraints inconsistent with good railroading. Congress should also make sure that the Board has the tools and the staff necessary for it to perform its function of ensuring that the service provided by railroads satisfies the common carrier obligation; and that service is consistent with the commitments made by the railroads, and with the service expectations of the Board and the public when the Board approved the merger and control transactions that created the mega-carriers we have today.

The Class I railroads will likely charge that the modest measures proposed by the Unions will recreate the regulatory regime of the 1970s that they blame for damaging the industry. But the pre-Staggers regulatory regime was not the proximate cause of the harm to the railroads. Government creation of the interstate highway system and government support for the aviation system were the principal causes, and the effect of those policies then rendered a rail regulatory regime designed when there was no modal competition with railroads, and in response to railroad domination of transportation, inappropriate for the times. Additionally, the recommendations of the Unions concerning STB reauthorization would not reinstate the heavy regulatory regime that existed pre-Staggers. The Unions only propose clarification and a more detailed description of an existing statutory obligation. And just as it would be inappropriate to recreate the statutory environment of the 1940s–1970s, it would be inappropriate to retain a statutory environment designed in 1996, when the industry today is much different from the one that existed prior to the big merger and control transactions that made the industry what it is today.

The Class I's will also presumably argue, as they have elsewhere, that Congress and the Board should not involve themselves in service issues, that these problems can all be resolved in the "marketplace". But the Class I railroads are not actors in a free and open market. Today's Class I's are duopolies that exist as a result of ICC/STB approvals of consolidations of previously separate carriers. The merger and/or control transactions that created every one of the Class I railroads required ICC or STB approval based on findings that the transactions were consistent with the public interest. Furthermore, ICC/STB approval of those transactions came with exemption from anti-trust law and all other laws (including the Railway Labor Act) as "necessary" to the "carry[ing] out" of those transactions. 49 U.S.C. §11321. It should be remembered that the current Class I railroads would never have been allowed to come into existence (and never would have been able to ignore anti-trust restrictions and Railway Labor Act requirements) if the railroad industry existed in the sort of open market environment the railroads pretend they are part of when they protest any plan for the STB to respond to service issues.

When the railroads conjure the specter of failing railroads as a result of clarifying, and delineating elements of, the existing common carrier obligation, it should be noted that between 2004 and 2020 profits for the Class I railroads increased by 536%, stock prices for the three publicly traded Class I's increased by 1046%, with shareholder return on investment up 1374%. And since 2007, the publicly traded carriers have spent over $72 billion for stock buy-backs. Over this same period, wages have increased only 56% (14% adjusted for inflation). Rates for shippers have increased over that same period, but they are still below pre-Staggers and 1990s rates in real dollars. (Rail compensation since 1980 is up less than 2% in real dollars). And Union Pacific recently told investors that it just had its best year ever; BNSF this past week announced that its last year produced record profits. So, any alarms from the Class I's about potential disaster if their service obligations are clarified and the common carrier obligation better enforced should not be credited.

Finally, there are some who argue that the current problems can and should be remedied by competitive fixes, like reciprocal switching. But such changes would have the effect of undercutting existing collective bargaining agreements; and they would not even work as desired in the real world of railroad operations. But, even if the optimistic assumptions of proponents of required reciprocal switching are realized, that will have only minimal impact on the overall problem of decline in the quality of rail service. Instead, the railroads should be accountable to provide the quality of service historically required of, and provided by, rail common carriers; the quality of service that was promised in the mega-merger and control transaction applications of the 1990s, assumed in the ICC/STB decisions approving those transactions, and that existed prior to the railroads' implementation of the new cost-cutting business model. Rather than restructuring the industry or statutorily mandating rules that would alter products of transactions that were deemed to be in the public interest, Congress should clarify existing service requirements and give the STB the resources to see that the service provided by the Class I's is consistent with the common carrier obligation and with what was promised when the big merger and control transactions were authorized.

Respectfully,

Brotherhood of Maintenance of Way Employes Division/IBT.
Brotherhood of Railroad Signalmen.
International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division.
National Conference of Firemen and Oilers, 32BJ/SEIU.

Letter of March 4, 2022, from Sean O'Neill, Senior Vice President of Government Affairs, Portland Cement Association, Submitted for the Record by Hon. Donald M. Payne, Jr.

MARCH 4, 2022.

The Honorable DONALD PAYNE,
Subcommittee Chair,
Railroads, Pipelines, and Hazardous Materials Subcommittee, Washington, DC 20515.

The Honorable RICK CRAWFORD,
Subcommittee Ranking Member,
Railroads, Pipelines, and Hazardous Materials Subcommittee, Washington, DC 20515.

DEAR SUBCOMMITTEE CHAIR PAYNE AND RANKING MEMBER CRAWFORD:

The Portland Cement Association (PCA), which represents the majority of U.S. cement manufacturers, appreciates the opportunity to submit a statement for subcommittee's hearing entitled *Stakeholder Views on Surface Transportation Board Reauthorization*. We welcome the occasion to share the perspective of our members on rail operations and interactions with the Surface Transportation Board (Board).

Portland cement is a manufactured powder that is the primary ingredient in concrete. Portland cement acts as the bonding agent in concrete, similar to the role of flour in cake mix. As an essential construction material and a basic component of our nation's infrastructure, portland cement is utilized in virtually all construction applications, including highways, streets, bridges, bike lanes, mass transit, airports, schools, offices, homes and other commercial and residential buildings, dams, and water resource systems and facilities. The low cost and universal availability of portland cement ensures concrete remains one of the nation's most essential and widely used construction materials.

Approximately 87 million metric tons of cement were produced domestically in 2020 at the 100 cement manufacturing plants in 34 states.[1] There are distribution centers in almost every state. That volume will continue to grow as the economy recovers from the COVID–19 pandemic as well as seeks to implement the substantial levels of investments made by the Infrastructure Investment and Jobs Act.

The cement industry is regional in nature. Most cement manufacturing plants are located near large limestone deposits, the principal ingredient in producing portland cement. In recognition of the regional nature of the cement industry, it is critical that there are reliable and cost-effective transportation options. The average cement shipments range between 250 and 300 miles. Truck transportation is not economically viable beyond 100 to 125 miles. As such, the cement industry relies on railroads to deliver our product to the marketplace beyond the economical range of trucks. Several cement plants also have access to water transportation for domestic shipments. These plants look to barge, rail and trucks to transport their product. In summary, domestic cement manufacturers have historically relied heavily on rail transportation to move the majority of shipments between cement plants and distribution terminals, and that reliance has only grown in the recent years.

Most bulk cement shipments are from the manufacturing plants to the more than 300 regional distribution terminals, where the cement is then delivered by truck to the distribution network consisting primarily of local contractors and ready mixed concrete producers. It is critically important to PCA members that the railroads provide reliable, efficient, and cost-effective service to meet the widespread and growing demand for our product. What is critical to note is that eighty percent of cement manufacturing plants are captive to a single railroad. Due to the absence of competition, these plants are charged substantially higher rates and often receive less reliable service. Conversely, cement plants served by more than one railroad generally have lower rates and more reliable service.

[1] https://pubs.usgs.gov/periodicals/mcs2021/mcs2021-cement.pdf

PCA members almost universally experienced a decline in rail service when Class I railroads moved to precision scheduled railroading (PSR). With challenges already facing the logistics of consistent service, this shift has resulted in a significant increase in missed switches and increased demurrage billings. This has led to increased costs to cement manufacturers not only through increased demurrage but lost sales. One single anecdotal example represents the potential magnitude of this difficult situation. Due to poor rail service to one terminal location, a specific shipper lost between 60,000 to 100,000 tons of annual volume. This amount would be enough to build as many as 3,000 standard-sized homes. Many of our members have seen their rail service further decline over the last two years with staffing cuts and challenges associated with the COVID–19 pandemic. While large parts of the economy were impacted by the various restrictions, construction in many cases remained in place as an essential activity, and in some cases volumes and demand increased as projects were accelerated due to reduced traffic levels. Coupling a reduction in service through staffing, PSR and continued or increased demand, has left cement shippers in some very difficult situations.

Compared to other commodities shipped by rail, cement is a small percentage of any Class I rail carrier's business. None of our members can put together a whole train of cars for shipment. PCA members point to this as contributing to the especially poor rail service they experience, which is patently inequitable. Class I rail carriers should provide the same service to all customers, and this is something the Board should recognize in rulings taken related to smaller shippers.

Under law, the Board has the authority to exempt a person, class of persons, or a transaction or service from the protections of the statute. Of note, hydraulic cement has been exempted from Board oversight for nearly 27 years.[2] In making the exemption decision, the Board noted that the transportation of hydraulic cement was competitive, with intramodal, intermodal, and geographic competition existing in many markets. At the time, the feeling of the Board was that rates were at competitive levels.

However, in the more than quarter century since this exemption went into effect, the combination of vigorous competition both within the rail industry and between different modes of transportation has diminished to the point of irrelevance. Over this time, cement manufacturers have unfortunately become increasingly dependent upon rail transportation. Much has changed in the cement industry with significant energy improvements at production facilities. For example, in 1974, there were 179 cement manufacturing plants compared to the approximately 100 today. In 1974 the average capacity of a cement plant was 500,000 tons annually compared to one million tons currently. This demonstrates that while the cement industry continues to be regional in nature, the distance our members are shipping their product has increased and has led to greater reliance on Class I railroads to meet these shipping needs.

Under statute, the Board is given the authority to oversee freight railroads' rates and practices under circumstances specified in the statute. Due to the exemption of Board oversight for hydraulic cement, cement manufacturers are not able to take advantage of this oversight. For more than ten years, the cement industry has been involved in a case petitioning the Board to revoke the exemption of Board oversight of hydraulic cement shipments, as a result of these historical dynamics facing the industry. During this time, the cement industry has provided the Board ample evidence of how the shipping needs of the cement industry have changed. Specifically, that cement manufacturers do not have a cost competitive alternative to Class I railroads to move their product from manufacturing plants to terminals. We hope the Board would move forward with a favorable ruling to revoke the exemption of Board oversight of hydraulic cement.

Additionally, hydraulic cement is not unique in being exempt from Board oversight. Reauthorization of the Surface Transportation Board should require the reevaluation of all exemptions in place and a process for reviewing exemptions on a regular basis to evaluate whether competitive, intramodal and intermodal shipping options exist. This concept could inform the basis of legislative action requiring the Surface Transportation Board to enact an exemption review based on a set of objective criteria at a statutorily determined interval. A five-year period, similar to reviews conducted by other agencies for various programs, is in our opinion a reasonable interval this review can be conducted by the Board.

Finally, it is important for PCA to acknowledge that there are some actions taken by the Board that benefit all shippers, even those that are exempt from Board over-

[2] *Rail General Exemption Authority—Exemption of Hydraulic Cement*, Ex Parte No. 346 (Sub-No. 34) (ICC served July 26, 1995), 1995 WL 438371 at *4 ("Hydraulic Cement Exemption Decision").

sight. For example, with the move to more precision scheduled railroading many of PCA members have experienced an increase in demurrage billing. We appreciate the Board in 2020 releasing a policy statement clarifying the principles the Board would consider in evaluating the reasonableness and accessorial rules and charges. As part of this, we appreciate that the Board clarified that rail carrier demurrage rates and policies are subject to Board regulations even if they involve the shipment of exempt commodities, including hydraulic cement.

In closing, thank you again for the opportunity to share the cement industry's perspective on our rail service and actions the Surface Transportation Board can and should be taking. If you have any further questions, please feel free to contact Sean O'Neill, PCA's Senior Vice President of Government Affairs.

Sincerely,

SEAN O'NEILL,
Senior Vice President of Government Affairs, Portland Cement Association.

Statement of Emily Regis, Vice President, Freight Rail Customer Alliance, Submitted for the Record by Hon. Donald M. Payne, Jr.

INTRODUCTION

Chairs DeFazio and Payne, Ranking Members Graves and Crawford, and Members of the Subcommittee, thank you for holding today's hearing, "*Stakeholder Views on Surface Transportation Board Reauthorization*," and for the opportunity to submit these written comments.

I am Emily Regis. I am the Fuels Resource Manager for Arizona Electric Power Cooperative, Inc., or AEPCO, a nonprofit rural electric generation and transmission cooperative in Arizona. We serve six member nonprofit distribution cooperatives that provide retail electric power to more than 400,000 residences and business in Arizona, California, and New Mexico, predominately in lower income areas. AEPCO relies on the Union Pacific Railroad, BNSF Railway, and a short line to deliver coal for our power plants. As things stand now, we cannot keep the lights on unless the railroads deliver the coal.

I also serve as Vice President of the Freight Rail Customer Alliance or FRCA. FRCA represents large trade associations for more than 3,500 electric utility, agriculture, chemical and alternative fuel companies, and their customers in all 50 states. FRCA's members, like AEPCO, depend on railroads to be able to run their businesses and serve their customers. In addition, I serve as President of the National Coal Transportation Association (NCTA), an association of coal consumers, producers, and service providers. I also currently serve as a Member, representing the small utility sector, of the Rail Energy Transportation Advisory Committee of the Surface Transportation Board (Board or STB).

In addition, I had the privilege of participating on behalf of FRCA during the subcommittee's *Railroad Shippers Roundtable* that was held in 2019. That informal roundtable discussion and this hearing are important public venues to 1) learn more about the longstanding challenges facing freight rail shippers and 2) what Congress, the STB, and stakeholders, can do to support freight rail. It is a vital component of our nation's economy as a key element in the supply chain. It is relied upon by farmers to deliver crops to market and by utilities and propane suppliers to receive the fuel we need to serve our customers. Freight rail also enhances our global competitiveness.

THANK YOU

To begin, FRCA appreciates your leadership in realizing the Surface Transportation Board Reauthorization Act of 2015 (Act), P.L. 114–110, which marked for the first time since 1998 that the Board was reauthorized. The reauthorizing law: (1) provided much-needed reforms to the Board's process to address numerous historical shortcomings experienced by the Board and industry stakeholders; (2) improved the Board's transparency; (3) helped the Board operate more expeditiously and efficiently; and (4) better enabled the Board to strike a more equitable balance among the interests of its diverse stakeholders. The Act also expanded the size of the Board from three Members to five Members to allow the agency to become more functional and collaborative. Considering that the Act expired on September 30, 2020, FRCA again welcomes this opportunity to share its members' experiences and views as you develop the next STB authorization.

FRCA also thanks Chairs DeFazio and Payne for requesting the Government Accountability Office (GAO) to conduct a study on the impacts of Precision Scheduled Railroading (PSR). The results of this study, once finalized and released, promise to assist all stakeholders in developing the next STB authorization.

These submitted written comments will discuss: 1) continued rail carrier service performance problems that some FRCA members and many other shippers continue to experience, and 2) offer some suggestions on how Congress can assist the Board in better utilizing its existing statutory authority or by granting additional statutory authority to address those problems more effectively.

Need for a Balanced Approach if Differential Pricing Is To Work

FRCA wishes to make clear that is not calling for reregulation or a return to the pre-Staggers Act era. To the contrary, the largely captive shippers that are FRCA members appreciate the need for differential pricing and a vigorous and healthy railroad industry. We agree that one size does not fit all.

But there is a need for balance so that markets can work. When railroads face neither effective competition from other railroads, nor effective oversight, shippers and the economy suffer. In 1980 there were 40 Class I railroads. Today there are only seven Class I carriers moving 90% of our nation's freight with several pending new mergers before the Board including two Class I carriers and in an era of PSR. When there is a lack of competition in the marketplace, more specifically, the lack of competition between rail carriers where railroads enjoy immunity from most antitrust protections, it is incumbent upon the Federal government, in this case the STB per the Staggers Rail Act, to facilitate competition.

FRCA also deeply appreciates the efforts of STB Chairman Oberman and the Board to address the lack of competition and poor service in the railroad industry, particularly since the emergence of PSR. For instance, FRCA appreciates the Board's consideration in a pending rulemaking of the need to have Class I railroads report First-Mile/Last-Mile (FMLM) data, in the aggregate, to the Board. Such FMLM data is critical for measuring the end-to-end service being provided by the common carrier railroads.

Without that data, shippers and the Board: 1) lack insight into the overall functioning of the rail network that shippers need for planning and operational purposes; 2) lack data to assess whether any service problems are specific to them or more general, whether they are being singled out for any service problems, and whether service is improving, deteriorating, or remaining stable generally; 3) are hamstrung in assessments of the extent to which railroads are properly discharging their common carrier obligation. Requiring submission of the data should not unduly burden the railroads in so far as they must necessarily already collect, monitor, and utilize the data, especially to the extent they seek to adopt and utilize the principles of PSR. While the Board does require the submission of significant railroad performance data pursuant to *United States Rail Service Issues—Performance Data Reporting*, Docket No. EP 724 (Sub-No. 4), the data does not include the FMLM component except in so far as it is incorporated in the rail origin to rail destination data for unit trains and intermodal service.

FRCA also appreciates that the challenges the pandemic poses for railroads, as it does for all of us that depend on employees working in close proximity with each other to operate large, complicated physical assets. Nonetheless, railroad service and volumes appear to have been disproportionately affected, notwithstanding what should be significant advantages, particularly in the ability to operate long trains with only two train crew members.

Lack of Railroad Competition—Higher Rates for Shippers

In general, captive shippers pay higher rates because they lack an effective competitive option. The STB has, various rate reasonable remedies available in theory, but they work for only a modest minority of shippers. Thanks in large part to the Act, and the recommendations made in the STB's 2019 *Rate Reform Task Force Report*, the Board is making some efforts to address this problem through a Final Offer Rate Review process that is also being considered in conjunction with a rail carrier-proposed voluntary arbitration process. In addition, the Board issued a Final Rule on Market Dominance which was in response to another recommendation in the *Rate Reform Task Force Report* "to develop a standard for pleading market dominance that will reduce the cost and time of bringing a rate case." The Board may also be renewing its competitive access efforts in reciprocal switching, which FRCA strongly supports, but the railroads have been able to stall those efforts for now eight years, or over forty when one considers that reciprocal switching was part of the Staggers Rail Act of 1980.

The Board, however, has yet to take further action to flesh out its revenue adequacy constraint, rate reasonableness methodology or on alternatives to the Stand-Alone Cost (SAC) test for larger rate cases. The railroad industry and markets have changed vastly since 1980, and updates to these three elements are needed so that shippers can have viable options to obtain rate relief, especially when the stand-alone cost methodology is a poor fit for their circumstances. With PSR, the railroads have reduced and eliminated their ability to respond to challenges and opportunities to save costs. But rates have gone up, not down, as service has been reduced and compromised.

LACK OF RAILROAD COMPETITION—FINANCIAL HEALTH OF RAILROADS

The railroads always highlight to their investors their reduced operating ratios. Those reductions have not been achieved from growing volumes or improving service. Instead, they result from raising rates, reducing quality of service, and lowering costs, often on the backs of their workers. Under these circumstances, operating ratio reductions reflect how service reductions, not cost savings, are being passed through to customers.

A goal of the Staggers Rail Act of 1980 was to restore financial stability to the U.S. rail system. By all accounts, this goal has been achieved. The railroads have not needed to raise new equity in decades and have excellent debt capital at favorable interest rates. Under PSR, the railroads have sought to reduce their capital expenditures. The railroads' high returns have led to excess capital, which they have sought to distribute through repeated dividend increases as well as sizeable stock buybacks. Rather than invest in their networks to improve service, the railroads have sought to reduce capacity and focused instead on rewarding their investors.

One measure of the financial health of a Class I rail carrier is the Board's annual determination of "revenue adequacy." The Board's website provides information on the number of Class I carriers that have been deemed "revenue adequate" from 2000 through 2020. For the period form 2014–2020, substantial segments of the railroad industry have achieved revenue adequacy under the Board's measure, and some have done repeatedly:

- 2014, 2015, and 2016: Four.
- 2017: Five.
- 2018: Three.
- 2019: Five.
- 2020: Six (BNSF, CSX, Grand Trunk Corp., KSC, Soo Line, and UP).

Only Kansas City Southern (KCS) failed to achieve revenue adequacy in any of those years, and it has now been acquired into voting trust by Canadian Pacific Railway and at a massive premium. The Board's revenue adequacy findings confirm the railroads industry's accumulation of substantial railroad strength.

However, FRCA has long been concerned that the Board's annual determinations of "revenue adequacy" for Class I carriers do not reflect the true health of the overall railroad industry and its individual carriers. FRCA believes that the health of the rail carriers is actually much stronger than what the figures and pattern from above illustrate.

In a competitive environment, this would not happen. Volumes would flow to competitors with lower rates or better service, and the cost savings would be passed through to consumers. The lack of effective competition among railroads is why the railroads are able to raise rates, lower costs, degrade service, and increase their margins and profits.

The resulting service problems can be more severe than the rate problems that result from the lack of effective service. In particular, many electric utilities across the country have, for the past 18 months or so, faced difficult weather conditions, natural disasters, and an increase in natural gas prices (for those utilities that can burn natural gas) that has forced utilities to burn more coal. However, despite the need for more coal, utilities have been hit with poor rail carrier service performance resulting in unpredictable coal deliveries which in turn increases costs. While AEPCO and most other coal-burning utilities can stockpile coal, doing so costs money. The variability of service means that a utility can never know if its stockpile is too big or small. In addition, the quality of coal is compromised when the stockpile is too big or not big enough.

To provide an indication of the inadequacy and lack of predictability in service FRCA, along with NCTA and the National Rural Electric Cooperative Association (NRECA) have the results from its 4th *Utility On Time Performance (OTP) Metric Survey*. It should be noted that these results include both plants and utilities that are captive to a single railroad and those that have the ability to receive service from two carriers. In other words, the service problems are hardy confined to captive shippers, but extends to those that are sometimes called "competitively-served."

The data collected covers July 2021 through December 2021 representing 28 plants that ship coal in the United States on the Union Pacific Railroad, BNSF Railway and the Norfolk Southern. Coal Supply regions represented in the data include, the Southern Powder River Basin (SPRB), and Northern Powder River Basin (NPRB), Rockies, Northern Appalachia (NAPP), Central Appalachia (CAPP) and Illinois Basin (ILB):

Coal Regions	SPRB	NPRB	Rockies	NAPP	CAPP	ILB	Other
Plants	14	4	2	1	1	4	2

Service

The utilities that responded to the survey reported the following:

- 92% reported rail service issues that have impacted their company's coal transportation.
- 60% reporting railroad service as worse than it was in 2019 and 2020.
- 64% of those respondents also reporting that their company had to modify its operations in the second half of 2021 because of railroad service issues, disruptions, and delays.

1. *Utilities responded to specific questions about how their operations have been impacted by railroad service issues:*

Answer Choices	Responses	
No issues. Service has been about the same as usual	0.00%	0
Railroad service has been deteriorating for several months	58.33%	7
Coal Inventory stockpiles reduced below target levels	83.33%	10
Coal Unit Curtailment efforts were necessary to conserve coal supply	58.33%	7
Coal supply commitments for the year were not met	50.00%	6
Rail car maintenance was impacted due to loss of time	50.00%	6
Force Majeure declared	8.33%	1
Restricted from adding more train sets by the railroads	50.00%	6
Train sets had to be parked as mandated by the railroads	16.67%	2
Additional trains or leases were necessary to make up deliveries	25.00%	3

Costs

Of those utilities that responded, over 90% reported that railroad service issues have increased costs for their utility. The utilities were asked how much they estimate that railroad service issues in 2021 have increased costs in general for their company.

- 30% of the utilities reported cost increases of between $100,000 and $ 1 M.
- 50% reported cost increases of between $1 M and $10 M.
- 20% reported cost increases of over $10 M to $20 M.

2. *The utilities were asked what specifically they attribute these cost increases to:*

Answer Choices	Responses	
Extra costs for purchase power to replace coal generation	50.00%	5
Extra costs for natural gas to replace coal generation	40.00%	4
Additional train leases were necessary to make up deliveries	30.00%	3
Increased labor costs at your company to manage inventory or other production issues	70.00%	7
Had to make spot purchases of coal from other mines because railroads could not deliver from contracted mine sources	30.00%	3
Other	20.00%	2

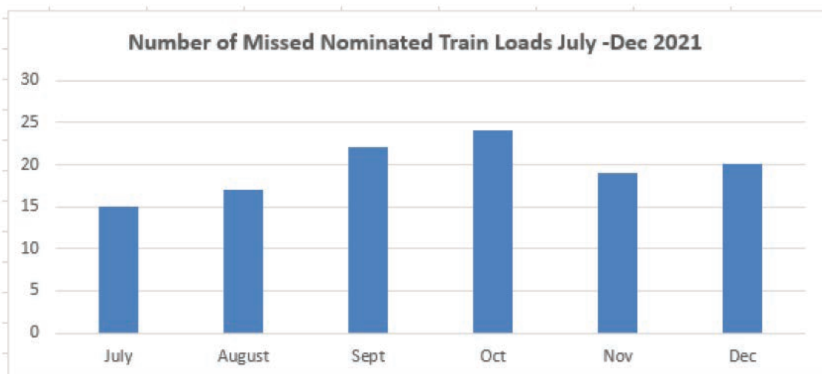
3. The utilities were also asked what type of railroad service issues they experienced:

Answer Choices	Responses	
Longer transit times	75.00%	9
Lack of railroad crews causing delays	91.67%	11
Delayed train pick ups	66.67%	8
Trains being doubled in transit	58.33%	7
Lack of locomotive power	75.00%	9
Poor communication	50.00%	6
Missed car switches	33.33%	4
Increased charges by the railroads	25.00%	3
Other (please specify)	16.67%	2

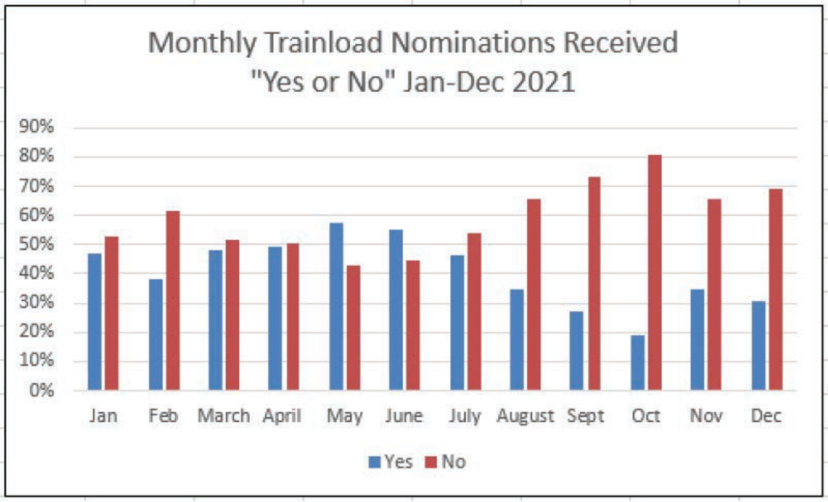
Nominations

Another area that can be challenging for both utility shippers and railroads is the nomination process. Utilities provide the railroads with information on volume nominations (anticipated supply needs) and their required train loading schedule for each month, utilities are required to provide a trainload or volume nomination request to the railroad via online interactive planning tools on each railroad's website.

For the six-month period of July–December 2021, the chart below shows that for the 28 plants that responded the number of trainloads they were short of their trainload nominations each month:



To provide a full year comparison, the chart below shows the utilities that participated in the survey for the January thru July 2021 period, combined with the 3rd *Utility OTP Metric Survey* results covering July through December 2021 survey, shows the percentage of nominated trainloads received by plants and not received.



Transit Time

For the six-month period of July–December 2021, this survey also collected monthly utility railroad performance metrics to show mine to plant transit time by railroad and mine source by month. The carriers and mine regions serving the participating plants were reported as follows:

Railroads	UPRR	BNSF	NS	Multi
Plants	6	17	3	2

Mine Region	SPRB	NPRB	Rockies	ILB	NAPP	CAPP
Plants	16	4	2	4	1	1

1. The chart below represents the group of plants shipping coal from the SPRB coal region reporting the percentage of forecasted trainload nominations received as equal to, 10% better, 10% worse, 20% worse and 30% worse than their forecast nominated trainloads.

SPRB Plants (16)	Equal to	10% Better	10% Worse	20% Worse	30% Worse
July	31%	6%	19%	25%	19%
Aug	38%	6%	19%	6%	31%
Sept	6%	6%	44%	19%	19%
Oct	6%	6%	50%	6%	31%
Nov	25%	6%	13%	44%	13%
Dec	19%	6%	25%	38%	13%

2. The chart below represents the group of plants shipping coal from the NPRB coal regions:

NPRB Plants (4)	Equal to	10% Worse	20% Worse	30% Worse
July	50%	50%	0%	0%
Aug	25%	25%	25%	25%
Sept	50%	25%	25%	0%
Oct	25%	0%	75%	0%
Nov	0%	50%	50%	0%
Dec	25%	25%	0%	50%

3. The chart below represents the group of plants shipping coal from the ILB coal regions:

ILB Plants (4)	Equal to	10% Worse	20% Worse	30% Worse
July	50%	0%	0%	50%
Aug	0%	25%	0%	75%
Sept	0%	0%	0%	50%
Oct	0%	0%	0%	75%
Nov	0%	0%	25%	75%
Dec	0%	0%	0%	100%

4. Two plants shipping coal from the Rockies reported their forecasted nominations received as the following:

Rockies (2)	July	Aug	Sept	Oct	Nov	Dec
Plant A	20% Worse	20% Worse	Equal to	Equal to	30% Worse	30% Worse.
Plant B	Equal to	10% Worse	10% Worse	20% Worse	20% Worse	20% Worse.

5. One plant shipping coal from NAPP reported its forecast nomination as 30% worse than forecasted for July, August, September, October, and December and equal to its forecast in November 2021.

Comments from Shippers

Along with the plant forecasted trainload nominations received questions, the survey also collected comments from shippers about their respective experiences with the carriers over the six-month period July through December 2021. Some of those comments are listed below.

1. Railroads seem to be worried about velocity and reducing set count on their systems. Unfortunately, even if you gain velocity and reduce equipment it still takes the same amount of crews to move forecasted coal and they all seem to be short
2. The number of permits (trainload nominations) would have been higher however the railroad elected to park half of my rail fleet which reduced the number of permits they could satisfy
3. Service issues related to locomotive power problems and lack of crews have been ongoing for several months.
4. Lack of crews may be the biggest issue, our railroad will leave an unloaded train on our site for up to 2–3 days until another set is unloaded, then they send a crew to double the trains and depart.
5. Communication was terrible.
6. Even though our railroad service was not great in 2021, our communication with the railroads was great. They were all forthcoming with their challenges, even giving us frequent updates on their efforts to hire new staff and get them trained. We could tell they were doing the best they could and were prioritizing our shipments over other traffic.
7. Increased bunching of trains caused us to incur costs to add coal to our stockpile and then pull coal off our stockpile more than in the past.
8. All 4 major providers had issues with crews, power, and communication in 2021. Reduction in employees that worked the 24-hour desks resulted in terrible communication and lack of crews kept trains sitting.

Bottom line is that July 2021–December 2021 was an incredibly challenging time for many utilities who were experiencing railroad transportation service issues in receiving coal supply to power plants.

Suggestions for Congress

Absent effective competition, we need effective oversight and truly streamlined processes. We are not asking for the Board or Congress to micromanage service. We are asking for backstops that can be enforced. As you and your Congressional colleagues consider the next authorization of the STB, FRCA asks that you consider the following:

1. Common Carrier Obligation

The common carrier obligation, to provide service on reasonable request, is supposed to require that carriers provide a level of service that meets a shipper's reasonable needs. But it has not been serving that function, as railroads have been providing service that is both poor and unreliable, For example, UP's most recent monthly announcement (CN2022–4, February 4, 2022, https://www.up.com/customers/announcements/customernews/allcustomernews/CN2022-4.html) showed trip plan compliance of 68% for manifest (reflecting an improvement of 6 percentage points) and 78% for intermodal. That's inadequate, and it is based on internal calculations that are not disclosed to the shipper, the Board, or the public.

We believe the common carrier standard needs to be something meaningful, with consequences to apply that is not met. In the reauthorization, FRCA recommends a statutorily clarified definition of "common carrier obligations" and calls upon the Board to:

- Review and evaluate the extent to which railroad operating, financial, investment, marketing and other business practices may be impairing the ability of and incentives for railroads to fulfill their common carrier obligations, in the aggregate, and provide adequate and economical service to their customers, including those shipping or receiving under contracts or exempt transportation arrangements.
- Collect data needed for that evaluation, including data regarding first-mile/last-mile service issues and the extent to which shipper and receiver investment in railroad infrastructure is not efficiently utilized by the railroads (which the Board is in its initial consideration stages in Ex Parte No. 767, *First Mile/Last Mile*).
- Impose fines and other penalties or allow shippers to recover appropriate damages to the extent the agency finds that railroads are not fulfilling their common carrier obligations in the aggregate as well as individually and are not providing adequate and economical service to their customers, including those shipping or receiving under contracts or exempt transportation arrangements. In terms of a fine or a penalty, current statute generally limits the Board's penalty authority to about $8,736 per violation. That is too little, unless applied to each carload or each day each carload is delayed.

An alternative is larger penalties tied to the overall level of service. Legislation might be needed to establish such penalties and to include contract and exempt movements in the assessment. Otherwise, railroads might use contracts to evade their common carrier obligation.

Another option for Congress to consider, is awarding damages to the injured shipper, but that almost never happens and would likely turn into a protracted and expensive proceeding for the shipper.

2. Rates

FRCA suggests that the next authorization encourage the Board to continue its proceedings on Revenue Adequacy and when determining a revenue adequate constraint commensurate with current market conditions, the Board shall consider but not limited to:

- Viable and effective revenue adequacy constraint is needed as part of the Board's oversight.
- Continued recognition that rail carriers need differential pricing to cover their costs and serve as many shippers as possible. But once rail carriers recover their costs and achieve revenue adequacy, allowing further unrestrained rate increases, does not guarantee further infrastructure investment but rather, punishes captive shippers. (The Board's predecessor, the Interstate Commerce Commission, recognized this in 1985.)
- Measuring revenue adequacy based on whether a rail carrier's return on investment exceeds the cost of capital can be a reasonable approach, but other measures should be considered.
- Not including the use of "replacement cost methodologies" when determining rail carrier revenue adequacy.
- The measurement period should be of a fixed length—five years is sufficient.
- Rate increase constraint should be a key element of a revenue adequacy constraint.
- A shipper to use the simplified road property investment analysis in a simplified SAC case against a revenue adequate rail carrier.
- Continued development of the Report's recommended use of Incumbent Network Cost Analysis (INCA) in a simplified SAC case.

3. Commodity Exemptions

The elimination of commodity exemptions should also be considered. When the exemptions were adopted, tariffs and contract summaries needed to be filed. Those requirements ended over twenty-five years ago. Exemptions are a solution to a problem that no longer exists.

4. Length and Funding Levels

FRCA recommends that the next authorization be a minimum of five years at funding levels commensurate with the previous enacted Fiscal Year (FY) appropriation levels for the STB.

The highest possible annual authorized and appropriated funding levels for the Board is made more acute by the:

- Unprecedented demand placed on STB's regular activities and resources given the pending rail merger proceedings before the Board—all of which pose significant service and rate issues for captive shippers, and questions concerning the structure of a probable more consolidated freight rail industry.
- Implementation of the On-Time Performance Standards for passenger rail.
- Number of formal and informal railroad performance service complaints
- Continued reliance on data transparency and access by all stakeholders let alone additional data and analytical capabilities to continue enhancing the Board's evidence-based decision-making.
- Board operating with a full complement of Members.

Thank you for holding this hearing, allowing FRCA to submit its comments, and for your continued consideration. We are happy to answer any questions you may have and look forward to the dialogue continuing.

ATTACHMENT

[Ms. Regis submitted an attachment to her statement which is retained in committee files and available online at https://movecoal.org/shared-files/1895/FRCA-House-Comments-3-8-22-Combined.pdf, "Attachment to Written Comments."]

Letter of March 8, 2022, from Corey Rosenbusch, The Fertilizer Institute, Submitted for the Record by Hon. Donald M. Payne, Jr.

MARCH 8, 2022.

The Honorable DONALD M. PAYNE JR.,
Chairman,
Subcommittee on Railroads, Pipelines, and Hazardous Materials, B376 Rayburn House Office Building, Washington, DC 20515.

The Honorable RICK CRAWFORD,
Ranking Member,
Subcommittee on Railroads, Pipelines, and Hazardous Materials, B376 Rayburn House Office Building, Washington, DC 20515.

The Honorable PETER A. DEFAZIO,
Chairman,
Committee on Transportation and Infrastructure, 2251 Rayburn House Office Building, Washington, DC 20515.

The Honorable SAM GRAVES,
Ranking Member,
Committee on Transportation and Infrastructure, 2264 Rayburn House Office Building, Washington, DC 20515.

Via Electronic Mail

Re: Hearing on Surface Transportation Board Reauthorization

DEAR CHAIRMAN PAYNE, RANKING MEMBER CRAWFORD AND COMMITTEE CHAIRMAN DEFAZIO AND RANKING MEMBER GRAVES:

Thank you for holding today's hearing regarding "*Stakeholder Views on Surface Transportation Board Reauthorization*." The Fertilizer Institute (TFI) appreciates the opportunity to share information on the freight rail marketplace and the critical role of the Surface Transportation Board (STB or Board).

TFI represents companies that are engaged in all aspects of the fertilizer supply chain in the United States. The fertilizer industry ensures that farmers receive the nutrients they need to enrich the soil and, in turn, grow the crops that feed our nation and the world. Fertilizer is a key ingredient in feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all food grown around the world is made possible through the use of fertilizer, hence its importance to farmers and food production.[1]

The U.S. fertilizer industry generates more than $130 billion in economic benefit each year and supports approximately 487,000 American jobs.

STATEMENT OF INTEREST

Nearly 44% of all fertilizers produced globally, or more than 200 million tons of material, are exported annually. Moving this material from production facilities to farms requires virtually every mode of transportation and a carefully orchestrated system of logistics to serve farmers on a just-in-time basis. While all fertilizer touches a truck at least once before it reaches the farm, in terms of ton-miles, *over half of all fertilizer moves by rail year-round throughout the United States*. In the agricultural sector, fertilizer appears to rely on rail the most.[2]

TFI works closely with the rail industry and regulators to promote safety for employees, the public, and first responders. We want the rail industry to be successful because its success is essential to our success.

FREIGHT RAIL MARKETPLACE AND STB OVERSIGHT

The rail industry has changed a great deal over the past 40 years following enactment of the Staggers Rail Act of 1980. For example, years of rail industry consolidation have resulted in just four railroads handling over 90 percent of the freight rail traffic in the United States. Now two-thirds of rail stations are served by just one railroad. Moreover, the rail cars used to transport shipper commodities are now approximately 73% owned, leased, and maintained *by shippers*.[3] In 1985, only 30% of rail cars were owned, leased, and maintained by shippers.[4] This shift is quite relevant as it pertains to the efficient (or inefficient) utilization of shipper assets.[5]

As we approach a half century of the Staggers Act, it is important to recognize its success and work constructively to modernize oversight of the rail marketplace to reflect the substantial changes that have taken place.

The STB is the primary regulatory agency responsible for rail rate and service matters. Practical regulatory reforms that improve STB oversight of the rail marketplace are desperately needed. The very first of 15 enumerated rail transportation policies in the Staggers Act is "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."[6] Yet this has been the least successful of these policies due to rail consolidation that has reduced the number of rail competitors and regulatory policies that have prevented application of those provisions in the Staggers Act that were intended to facilitate greater competition. STB modernization can help promote competitive freight rail service to make U.S. manufacturers and farmers more competitive in the global marketplace.

From 2005 to 2017, rail rates for carloads of anhydrous ammonia, the building block of all nitrogen fertilizers and one of the most efficient sources of nitrogen for farmers, increased 206 percent. This is three times more than the increase in the system-wide average rail rate per car. As it stands now, rate and service cases are so expensive, cumbersome and time consuming that fertilizer shippers do not have an effective forum to adjudicate such extreme increases in rail rates. The lack of meaningful oversight further distorts the market and the costs of this distortion are paid by the fertilizer industry, farmers, and everyone who consumes food.

The Transportation Research Board stated that the STB's rate review procedures are "unusable by most shippers."[7] The STB's current rate review standards were put in place for coal shippers more than three decades ago when the railroad industry was quite different and over two dozen railroads competed across the country. While rail industry fortunes have changed a great deal, the rate review process has

[1] Stewart, W.M., Dibb, D.W., Johnston, A.E. and Smyth, T.J. (2005). "*The Contribution of Commercial Fertilizer Nutrients to Food Production*." Agron. J., 97: 1–6.

[2] "*The Importance of Highways to U.S. Agriculture*." U.S. Department of Agriculture. Page 13. December 2020.

[3] "*Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*." Docket No. EP 768, Surface Transportation Board.

[4] Roman, Jay. "STB's Annual Rail Rate Index Study: A Deeper Dive." Railway Age. January 27, 2022.

[5] 100% of tank cars are owned, leased, and maintained by shippers.

[6] 49 U.S.C. § 10101(1)

[7] "*Modernizing Freight Rail Regulation*." Committee for a Study of Freight Rail Transportation and Regulation. Transportation Research Board (Special Report 318). 2015, Page 191.

not. Rate and service cases at the STB typically take five years at a cost of more than $5 million. The time and expense to file a rate case does not work.

Much to the credit of the entire Board and that of current Chairman Oberman and former Chairman Begeman, in recent years, the Board has initiated a number of efforts to reform its outdated oversight mechanisms. Likewise, the Board is also taking steps on long-pending updates for reciprocal switching,[8] which is an important way to promote more competition in the rail industry and more closely reflect the system in Canada that already allows Reciprocal Switching.[9] The Board's forthcoming March 15–16 hearing on Reciprocal Switching is helpful and TFI urges Congress to be supportive of STB's efforts on this matter. It is critical that the Board finalize the Reciprocal Switching rulemaking.

RAIL SERVICE CHALLENGES AND STATUTORY CHANGES

Rail service is not always bad. However, all too often, this is a serious challenge for the fertilizer industry. Rail carrier implementation of large cost-cutting initiatives, such as precision scheduled railroading ("PSR"), have disrupted rail service to many shippers. PSR has made it more difficult and expensive to ship fertilizer.

Most recently, rail carrier cycle times amongst all or most Class I carriers have been substantially slower in the first quarter of this year. TFI attributes the erosion of cycle times to a combination of (1) implementation of PSR, which appears to have eliminated too much rail carrier personnel, thus compromising rail carrier operational elasticity and (2) COVID-related infections causing rail labor to be unavailable. COVID infections, for example, would be less of a problem if there were more back-up crews.

Poor cycle times and service has resulted in costly, inefficient utilization of shipper assets. This has negatively affected the ability of TFI's members to ship fertilizer and pre-position the essential product for the busy Spring planting season. When rail service deteriorates—which is increasingly common—shippers often do not have enough cars to ship the product volumes that need to move. This forces shippers and producers to curtail production and raises costs on everyone, except for the rail industry, which is now the leading profit industry in the country.

As rail carriers divested themselves from rail car ownership, they have also divested themselves out of the inherent incentives that encourage the efficient use of rail cars.[10] This is a significant cost for shippers and there is little to no statutory nor regulatory remedies for it.

The Board's oversight regarding PSR and associated changes in demurrage and accessorial fees has been greatly appreciated. Likewise, TFI is pleased to be engaging with the Board as part of its proceeding on first-mile/last-mile service and data (Ex Parte 767).

While demurrage and accessorial charges are increasingly levied on shippers, there is almost no accountability when it comes to rail carrier first-mile/last-mile service. TFI recognizes the role that appropriate and fair demurrage charges have on rail network fluidity. Reciprocity is also needed. Under the current system, rail carriers have little incentive to provide reasonable and consistent rail service, hence the frequent concerns (and periodic crises) voiced by shippers on this topic. *Congress should consider statutory changes that would enforce the same principal on railroads, as poor rail service and inefficient utilization of shipper-owned assets is a serious cost for all consumers*.

CONCLUSION

STB modernization is critical to U.S. manufacturers and farmers. Especially following PSR, rail carriers no longer seem to have enough staff to consistently fulfill their obligations to shippers. These "obligations" are not just about "shippers." These are obligations to the American public and our nation, which gave at no-cost to railroads 10% of U.S. land (183 million acres[11]) so they could build a national network.

Policymakers and regulators should continue the thoughtful work that is needed to modernize rail marketplace oversight so that this critical part of our nation's sup-

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[8] *Does the AAR Fear Competition?* Railway Age, March 2, 2022.

[9] Known in Canada as Interswitching.

[10] As previously cited, shippers own or lease 73% of the cars that are used to ship commodities.

[11] Grant, Michael J. "*Railroad Land Grants*." Encyclopedia of the Great Plains. 2011.

ply chain and economic security does not languish at the short-sighted hands of Wall Street.[12]

Thank you again for holding today's hearing and for the opportunity to submit this statement. TFI looks forward to working with Congress to strengthen our nation's supply chain, including the STB's statutory authorities and oversight. Should you have any questions, please reach out to Justin Louchheim of my staff.

Sincerely,

COREY ROSENBUSCH,
The Fertilizer Institute.

Post-Hearing Comments From Witness Brad Hildebrand, Submitted for the Record by Hon. Donald M. Payne, Jr.

INTRODUCTION

Chairs Peter DeFazio and Donald Payne, Ranking Members Sam Graves and Rick Crawford, and Members of this Subcommittee, thank you for providing this opportunity for me, Brad Hildebrand, to submit additional comments following the March 8, 2022, hearing, "*Stakeholder Views on Surface Transportation Board Reauthorization*," on behalf of the National Industrial Transportation League (NITL).

RECIPROCAL SWITCHING

It was troublesome that much of this congressional hearing focused on the Surface Transportation Board's (Board or STB) reciprocal switching proposal given that the Board held a two-day public hearing on March 15 and 16, 2022 (EP 711 (Sub.-1), *Reciprocal Switching*. Further, it was disappointing that the witness testifying on behalf of the Association of American Railroads (AAR) claimed that this is a backdoor venue for shippers to force a reduction in railroad rates. The railroads are treating reciprocal switching as if it will be an existential threat to their business.

The AAR is correct that there is a process in place for shippers to request a competitive switch. However, this decades-old STB procedure does not work as it requires shippers to demonstrate anticompetitive conduct which is legally unattainable to reach. As such, shippers have not and are not bringing competitive switch requests to the Board under the current rules.

The STB proposal is about enhancing competition. It offers two new paths for shippers to request a competitive switching remedy from the Board that is 1) Practical and In the Public Interest or 2) Necessary to Provide Competitive Rail Service.

The AAR's dialogue during the hearing pointed out several misconceptions about the Board's proposal. First, the AAR wants us to believe that the operations of its entire network would be severely jeopardized because the thousands of switches that its members would be forced to make to accommodate the interchanging of traffic with a competing railroad. On the contrary, the burden of proof would rest with the requesting shippers to demonstrate there is an established working interchange between the two rail carriers. Second, the requesting shippers would have to prove that the switching request falls under one of the above-mentioned paths and the respective criteria is met. It is NITL's belief that should the proposed reciprocal switching process become a Final Rule, there would not be a wholesale move for every shipper across the country to request a new reciprocal switch—as stated in AAR's continued messaging. Under the Board's proposal, it will still be a long and costly process for shippers to pursue. Shippers would want to be certain that their request for opening-up competition to their facility would meet all of STB's criteria before they make this kind of financial commitment. Should the Board's proposal become a Final Rule, there mere fact that exists, could hopefully result in competitive service and competitive rates without shippers having to go to the Board in the first place. This competitive driver is not present under the current rule.

FINAL OFFER RATE REVIEW

I appreciate this opportunity to clarify NITL's position on the Board's proposed Final Offer Rate Review (FORR). NITL *supports* the FORR in EP 755, *Final Offer Rate Review* and EP 655, *Expanding Access to Rate Relief*. These rules would establish a series of procedural deadlines intended to allow the STB to issue a decision

[12] Ziobro, Paul. "*A Revolution Sweeping Railroads Upends How America Moves Its Stuff*." Wall Street Journal. April 3, 2019.

135 days after a rate complaint is filed when dealing with cases in which the shipper seeks rate relief of $4 million or less. The railroad and the shipper would each be required to submit a final offer (as in baseball-style arbitration). This is only after the STB has determined that the railroad has market dominance over the shipment(s) in question. The STB would only be allowed to select one of the offers without modification. NITL encourages the Board to swiftly issue a Final Rule on its FORR proposal.

In addition, NITL *opposes* the Small Alternative Voluntary Arbitration proposal put forth by several Class I railroads in a July 2020 petition filed before the Board. NITL finds several objectionable elements of this proposal including 1) an exemption from FORR for five years; 2) confidentiality of the results of the arbitrator's decision; and, 3) rail carriers would have the right to withdraw from the program under certain circumstances, such as if the Board adopts a material change to its existing rate reasonableness methodologies or creates a new rate reasonableness methodology after a shipper or railroad has opted into the program.

NITL views this rail carrier proposed Small Alternative Voluntary Arbitration process as NOT voluntary for shippers and was an 11th hour attempt by the railroads to further stall the STB's consideration of its FORR proposal.

Commodity Exemptions

NITL would like to re-affirm its request to Congress that it requires the Board to eliminate all exemptions for commodities and to do so in a streamlined, transparent process. As NITL stated in its submitted written comments, we ask Congress to encourage the STB to:

- Promptly complete its consideration of commodity exemptions in its pending proceeding, EP Docket No. 704, *Notice of Proposed Rulemaking, Review of Commodity, Boxcar, and TOFC/COFC Exemptions*. It is important to note, however, that this proceeding only involves five to six commodity groups and there are many other exempt commodities for which a review is warranted.
- Interpret its revocation authority more broadly given today's far more concentrated market conditions than existed when the exemptions were adopted and the railroads' financial health.

Other options should Congress choose a different approach, would be to 1) eliminate all exemptions by a date certain unless the railroads can show that the exemption is still warranted or 2) require that all exemptions be periodically reviewed by the STB every five years.

It is important to remind Congress, that if a commodity or a class of commodities are "exempt" that means that those shippers that ship these commodities cannot seek service or rate redress or relief from the Board unless the shippers first go through a tedious, time consuming, and costly process before the Board requesting that the exemption be revoked. In that process, the shipper is required to demonstrate before the STB that a market dominant rail carrier makes these movements. If shippers have successfully demonstrated market dominance before the Board, then the shippers can pursue informal or formal service or rate complaints or cases.

AAR is correct, and as just stated, there is already a process in place before the Board for exempted commodities to seek revocation. However, given the continued consolidation of the rail network and utilization of Precision Scheduled Railroading, exempted commodities are an answer to a problem that no longer exists.

Enhanced Statutory Authority

As you continue thinking through and developing the next STB authorization, NITL requests that Congress keeps in mind the second major commitment of the Staggers Rail Act of 1980: instill railroad-to-railroad competition in the marketplace. The Board needs additional statutory authority and tools to not just facilitate railroad-to-railroad competition, but to move the pendulum closer to the middle where all stakeholders can effectively operate in a competitive environment. The burden of proof should not always be placed on the shippers to achieve a fair and balanced hearing before the Board or before Congress.

NITL believes that if carriers are deemed revenue adequate by the Board, then they should be the ones having to prove to the STB that their service performance, rates, terms, and fees are reasonable. Formal rate and fee cases need to be heard and decided within a maximum two-year period. During this time, the Board should be allowed to put an injunction on the contested railroads' rates, terms, fees, or service practices while the case is being heard by the Board. It is simply not right that the railroads can continue to collect what shippers are asserting to be as unreasonable rates and fees. Currently, it is extremely difficult to near impossible for shippers to seek an injunction on these rates and fees. Shippers would need to prove that the railroads' action(s) would put their business into serious peril if not jeopardy. Conversely, if the Board had the statutory authority to issue an injunction, combined with a case completion time deadline, would facilitate the finalization of Board decisions.

While the STB has made some progress on considering alternate economic proposals or models to the three methods that are currently available for large shippers to pursue formal rate cases [Stand-Alone Cost (SAC), Simplified SAC, and Three Benchmark], Congress needs to provide statutory authority to the Board allowing it to shift the burden of proof from shippers to railroads. As I said in my oral remarks during the hearing, there are no new pending rate cases before the Board. This is NOT because shippers are happy with the status quo, it is because these methods are too complex and too expensive for shippers to fight with the burden of proof on the shippers.

CONCLUSION

Thank you for your continued leadership on freight rail shipper issues and consideration of our reauthorization proposals. NITL looks forward to continuing this important dialogue.

Letter of March 7, 2022, from Michael Johnson, President and Chief Executive Officer, National Stone, Sand, and Gravel Association, Submitted for the Record by Hon. Donald M. Payne, Jr.

MARCH 7, 2022.

The Honorable DONALD PAYNE, JR.,
Chairman,
House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials.

The Honorable RICK CRAWFORD,
Ranking Member,
House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials.

DEAR CHAIRMAN PAYNE AND RANKING MEMBER CRAWFORD:

The National Stone, Sand, & Gravel Association (NSSGA) respectively submits this letter to thank Chairs Peter DeFazio and Donald Payne, Ranking Members Sam Graves and Rick Crawford, and the Members of the Subcommittee on Railroads, Pipelines and Hazardous Materials (Committee) for holding this important and timely hearing on "Stakeholder Views on Surface Transportation Board (STB) Reauthorization" on March 8, 2022. NSSGA strongly supports the funding of the STB to ensure it can properly and effectively carry out its statutory duties.

NSSGA is the leading voice and advocate for the aggregates industry. Our members are stone, sand, and gravel producers and the equipment manufacturers and service providers who support them. NSSGA's member companies produce more than 90 percent of the crushed stone and 70 percent of the sand and gravel consumed annually in the United States. Aggregates are the building block that builds towns and cities and the connections in between. The industry is synonymous with infrastructure but more than that. Aggregates play a crucial role in everything we touch—roads, railways, bridges, tunnels, water supply, sewers, electrical grids, and telecommunications.

As a result, NSSGA members will play a crucial role in the success of the Infrastructure Investment and Jobs Act ("IIJA") that became effective on November 15, 2021. The IIJA will help rebuild America's roads, bridges, and rails. It will strengthen supply chains by making long overdue improvements for the nation's ports, airports, rail, and roads. The aggregates industry will supply the materials needed to make these projects happen.

Fully funding the STB to ensure it can properly regulate the rail industry is vital to the U.S. infrastructure and our members' ability to supply construction materials. Rail service delays create shortages and drive the cost of needed aggregates for important infrastructure projects, including highways, flood control, water supply, and other environmental improvement projects. The aggregates must then be supplied from other sources, which requires transporting over a longer distance and increasing cost, and increased emissions.

The current state of the rail industry has left customers captive to service provided by a single railroad, and given the nature of the rail industry, there is no possibility of new rail entrants to provide competition. The rail industry is highly consolidated, having only 7 Class I railroads compared to 40 in 1980, with the possibility that only 6 will exist by 2023. The consolidation of the industry has given railroads even less competition, creating, as some economists have pointed out, a duopoly in the East and the West. U.S. Railroads have also adopted the rail operating model called Precision Scheduled Railroading over the last five years, which has resulted in poorer service and higher rates for its customers. This model has had a direct impact on the aggregates industry and our ability to supply needed construction materials to projects.

The STB is the economic regulator of the U.S. freight rail industry and serves as a crucial backstop when railroads have market dominance. Without a fully functioning STB, railroads would be free to charge captive rail shippers more unreasonable rates and engage in unreasonable practices. Also, railroads could provide inadequate service to shippers who rely on rail without any repercussions if proper regulation is not in place. The STB presently is working on practical solutions to address the problems that currently exist in freight rail: (a) a proposed rule change on reciprocal switching to improve competition in freight rail; (b) a program to monitor rail service at the first and last mile of a route; and, (c) a new rate case process called Final Offer Rate Review, which will make the rate case process more accessible and useable for shippers. The U.S. needs a funded and functioning STB to continue this important work.

In conclusion, the NSSGA strongly supports the STB's mission and urges Congress to fully fund this agency, so its member companies can obtain these critical transportation services that are needed to build our infrastructure and sustain our communities. NSSGA encourages Congress to support STB regulatory reforms and to enact its own laws which will level the playing field between railroads and their customers.

Sincerely,

MICHAEL JOHNSON,
President and CEO, National Stone, Sand, and Gravel Association.

cc: Members of the House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials

Letter of March 8, 2022, from Chet M. Thompson, President and Chief Executive Officer, American Fuel and Petrochemical Manufacturers, Submitted for the Record by Hon. Randy K. Weber, Sr.

MARCH 8, 2022.

The Honorable PETER A. DEFAZIO,
Chairman,
Transportation and Infrastructure Committee, 2165 Rayburn House Office Building, Washington, DC 20515.

The Honorable DONALD M. PAYNE, JR.,
Chairman,
Subcommittee on Railroads, Pipelines, and Hazardous Materials, Transportation and Infrastructure Committee, 2165 Rayburn House Office Building, Washington, DC 20515.

The Honorable SAM GRAVES,
Ranking Member,
Transportation and Infrastructure Committee, 2164 Rayburn House Office Building, Washington, DC 20515.

The Honorable RICK CRAWFORD,
Ranking Member,
Subcommittee on Railroads, Pipelines, and Hazardous Materials, Transportation and Infrastructure Committee, 2164 Rayburn House Office Building, Washington, DC 20515.

RE: Stakeholder Views on Surface Transportation Board Reauthorization

DEAR CHAIRMAN DEFAZIO, RANKING MEMBER GRAVES, SUBCOMMITTEE CHAIR PAYNE, AND SUBCOMMITTEE RANKING MEMBER CRAWFORD:

On behalf of the American Fuel & Petrochemical Manufacturers (AFPM), thank you for your leadership and commitment to improving the competitiveness and efficiency of the United States freight rail system. All stakeholders would benefit from a healthier and more competitive and dependable freight rail system, and the Surface Transportation Board (STB) has a key role in achieving these goals. STB reauthorization is a top priority for AFPM and rail shippers, and this forum provides an opportunity for rail shippers to highlight potential topics for consideration in future legislation.

AFPM is a trade association representing virtually all the U.S. refining and petrochemical manufacturing capacity. Our members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. Rail transportation is vital to our members, as well as to manufacturers and customers downstream that depend on our products. Refineries and petrochemical manufacturers across the country rely on the rail network as an essential part of their supply chains.

Consolidation within the rail industry has left just four railroads in control of 90 percent of U.S. rail traffic. Due to this consolidation, rail shippers, including AFPM member companies, face escalating rates, service challenges, a lack of competitive options, and ineffective means to resolve commercial disputes with railroads. In fact, 75 percent of refiners and petrochemical manufacturers today are served by only a single railroad. With limited competition, freight rail rates have continued to increase whereas railroad costs have remained relatively flat.

Further, the widespread introduction of Precision Scheduled Railroading (PSR)—a railroad operational method focused on maximum asset utilization and reduction of operating ratios—has exacerbated rail competition issues and caused a shift in railroad focus from serving rail customers to maximizing profits. According to a recent report from Escalation consultants:

- Real rates rose more than 43 percent, while railroad costs only increased by 8 percent between 2004–2019.
- Revenue from non-competitive rates increased 230 percent, while revenue from competitive rates only increased 24 percent.
- In 2019, half of all Railroad revenue was generated from non-competitive rates.
- Rail rates have increased 2.4x more than truck rates.[1]

AFPM commends the STB for actively addressing the root causes of many of these challenges and tackling important rail competition issues. That said, STB reauthorization provides an opportunity to further update government policies that have not kept pace with these post-consolidation changes and have left many rail customers without access to competitive transportation options or an effective way to resolve problems with rates and service. Competition among railroads, or at least the realistic threat of competition, can serve as an important safeguard against inadequate service or unreasonably high prices. When considering STB reauthorization, AFPM supports reforms that:

- *Increase Competitive Options*—STB should adopt policies that will promote greater access to competitive rail service, such as reciprocal switching (STB Docket No. EP 711–1). Congress expressly granted the STB authority to require reciprocal switching in the Staggers Rail Act of 1980, which is needed now more than ever to spur greater competition within captive rail markets.
- *Reform Outdated Policies*—Current rate dispute processes are too complex and expensive to be a viable option in most cases. Congress clearly described and reaffirmed that the STB is intended to provide *multiple avenues* for rail shippers to dispute potential unfair rates.[2] Future STB reauthorization should consider additional options to dispute rates and encourage the adoption of both Final Offer Rate Review (Docket No. EP 755) and Voluntary Arbitration (Docket No. EP 765).
- *Foster a Strong Rail Network*—Market forces and sensible federal policies are needed to ensure everyone benefits from a healthy, affordable, and dependable freight rail system. STB reauthorization should consider reporting requirements that would provide critical insight into the health of the rail network. This could include first mile and last mile data reporting (STB Docket No. EP 767) as this data has the potential to identify rail network bottlenecks.

AFPM thanks the subcommittee for its time and consideration of all stakeholder viewpoints on STB reauthorization. AFPM emphasizes the need for a fair and competitive rail market for the energy and petrochemical industries and the U.S. economy and the important role the STB plays in ensuring equitable and competitive rail markets. AFPM shares Congress's goal of ensuring the flow of commerce on our nation's rail system and looks forward to continued collaboration. AFPM and our members appreciate your consideration of these reauthorization priorities.

[1] *See* Rail Rates Climb Higher as Competition Gets More Scarce (freightrailreform.com)
[2] Public Law 104–88, 109 Stat. 803, 810 and Public Law 114–110, 129 Stat. 2228.

Sincerely,

CHET M. THOMPSON,
President and CEO, American Fuel and Petrochemical Manufacturers.

APPENDIX

QUESTION FROM HON. DONALD M. PAYNE, JR., TO DENNIS NEWMAN, EXECUTIVE VICE PRESIDENT OF STRATEGY, PLANNING, AND ACCESSIBILITY, NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Question 1. Can you describe the significance of the proceeding pending before the STB to restore Amtrak's Gulf Coast service?

ANSWER. The STB's decision in the Gulf Coast case will have a major impact on whether Amtrak, USDOT and our state partners will be able to carry out Congress' direction, reflected in the Infrastructure Investment and Jobs Act (IIJA), to significantly expand Amtrak service. In order to do that, Amtrak must be able to restore or add additional routes and trains on host railroad-owned lines, without unreasonable delay or inordinate demands for capital investments, as Congress intended when it enacted the "Additional Trains" provision of the Rail Passenger Service Act (49 U.S.C. 24308(e)).

QUESTIONS FROM HON. ERIC A. "RICK" CRAWFORD TO DENNIS NEWMAN, EXECUTIVE VICE PRESIDENT OF STRATEGY, PLANNING, AND ACCESSIBILITY, NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Question 1. Please identify and explain any concerns Amtrak has about reciprocal switching.

ANSWER. While it is possible that increases in reciprocal switching could affect rail network congestion, we believe that the current Surface Transportation Board is cognizant of this issue and do not anticipate that it would adopt policy changes that would negatively impact the rail network. Other factors, such as the failure of some host railroads to fulfill their statutory obligations to give Amtrak trains preference over freight and to allow operation of additional Amtrak trains, and operational changes (such as operating freight trains too long to fit in sidings on single track lines) made by some freight railroads in recent years to implement so-called "Precision Scheduled Railroading," have had a much greater impact on rail network congestion and the performance of Amtrak trains than we anticipate might result from any changes in reciprocal switching policies.

Question 2. Does Amtrak have any advice for the Surface Transportation Board (STB) when it comes to finalizing the 2016 proposed reciprocal switching rule or abandoning the rule altogether?

ANSWER. No. We believe that the current Surface Transportation Board is well equipped to address this issue.

Question 3. Is it possible for reciprocal switching to potentially cause track congestion and service disruptions that would impact on time performance for Amtrak's trains?

ANSWER. Please see response to Rep. Crawford's question 1 above.

Question 4. What percentage of Amtrak's ridership prior to COVID was tied to state supported services versus the National Network and the Northeast Corridor? What portion of ridership has returned?

ANSWER. State supported services accounted for 47.5% of Amtrak's systemwide ridership in FY19, the last full fiscal year before COVID. As of March 2022, ridership on state supported services is at 77.6% of pre-COVID levels (vs March FY19), and systemwide ridership is at 81.9% of pre-COVID.

Question 5. How does Amtrak work with its freight partners when it wants to establish a new service?

ANSWER. When Amtrak proposes to operate new or expanded passenger rail service on a host railroad, it notifies the railroad. The host and Amtrak thereafter engage in discussions regarding the proposed operation. If Amtrak and the host cannot reach agreement, we seek to resolve differences under the terms of our operating agreement or at the Surface Transportation Board. Recent examples of agreements for new services between Amtrak (or Amtrak and a state partner) and host railroads include the agreements for additional frequencies between Chicago, IL and Milwaukee, WI and Chicago and St. Paul, MN, and new service between New Orleans and Baton Rouge, with Canadian Pacific, and with CSX and the Commonwealth of Virginia for major increases in service between Washington and Richmond and elsewhere in Virginia.

Question 6. Recently the Governor of Pennsylvania announced an agreement between Amtrak and Norfolk Southern on expanding passenger rail in the state. Please explain the agreement and specifically indicate whether it will require infrastructure investment and whether Pennsylvania utilized a study to assess current and future capacity needs.

ANSWER. The recently announced agreement to expand passenger service in Pennsylvania is between Norfolk Southern and the Commonwealth's Department of Transportation, not Amtrak. Public reports indicate that the Commonwealth will invest nearly $171 million dollars in specific NS infrastructure. Amtrak was not involved in any capacity studies that may have been performed.

Question 7. Occasionally Congressional members reference the agreement between CSX, Virginia, and Amtrak as an example of what can be accomplished when all parties work together. Did this effort require an assessment or a study on capacity?

ANSWER. The agreement among CSX, Amtrak and the Commonwealth of Virginia is part of a $3.7 billion investment that includes construction of a new bridge across the Potomac River; Virginia's purchase of 350 miles of right-of-way and 225 miles of track from CSX; and construction of additional track that will allow near hourly Amtrak service between Washington and Richmond; increased service between Richmond and Petersburg and Newport News; and a 75% increase in Virginia Railway Express Fredericksburg Line service. Capacity was assessed as part of the planning for that investment before Amtrak became involved.

Question 8. Canadian Pacific recently announced it would work with state and local governments, Amtrak, and other interested parties to restore service between New Orleans and Baton Rouge, Louisiana. State level opposition to investing in infrastructure upgrades stymied these plans in the past. What changed and who will pay for infrastructure upgrades?

ANSWER. While we defer to our partners in Louisiana state and local government to speak authoritatively to their position on this service, it is our understanding that Louisiana's current governor, John Bel Edwards, is a strong supporter of the service.

A combination of federal grant funding, such as grants included in IIJA (e.g. Federal-State Partnership for Intercity Passenger Rail and Restoration Enhancement Grant program funds), and state and local funds will likely be used to make any necessary infrastructure upgrades.

Question 9. Who pays for the infrastructure required when a new service is established? Can a new service can be established without further infrastructure investment? Please explain how Amtrak considers the needs of the current users when establishing new services. Please provide specific methodologies and examples.

ANSWER. New service can be established without infrastructure investment where there will be no unreasonable impairment of freight transportation of the rail carrier. Whether additional infrastructure should be considered to support operation of a new or expanded Amtrak service depends upon many factors. The cost of any infrastructure that Amtrak, its state partners, and the rail carrier agree on has typically been funded by the Amtrak state partner that proposed the new or expanded service and/or federal grants; in some cases, Amtrak has also provided or committed funding. Under federal law (49 U.S.C. § 24308(e)), the host railroad has the burden of demonstrating that the additional Amtrak trains would impair unreasonably its freight transportation, and that additional infrastructure may be necessary as a result.

Question 10. What is the difference between starting a new service versus restarting a service? Why did Amtrak not reinstate the Gulf Coast line after Hurricane Katrina in 2005? Why the 17-year lag on this route?

ANSWER. The differences between starting a new service and restarting a service depend upon the specific services at issue. Amtrak did not reinstate *Sunset Limited* service between New Orleans and Jacksonville/Orlando following Hurricane Katrina because the hurricane damaged Amtrak stations along the Gulf Coast and the service provided by the *Sunset Limited* had ceased to be viable due to extremely poor on-time performance, attributable primarily to freight train interference, that had eroded ridership, reduced revenues, required significant lengthening of schedules, and increased costs and equipment requirements. Amtrak has been attempting for over a decade to reinstate service on the Gulf Coast line but this proved to be impossible due to the lack of cooperation and agreement by the host railroads.

Question 11. In relation to the Gulf Coast route proposal, the proposed trip time is about three hours and 20 minutes and the average speed is less than 50 miles per hour. How competitive is the proposed passenger rail service relative to other transportation modes?

ANSWER. Amtrak and our sponsoring state partners believe that this service will be competitive. Train travel is often not the fastest alternative door-to-door, but its inherent safety, comfort, and ability for passengers to relax, work, or eat and drink more comfortably than other modes of travel make it a highly popular alternative. The average speed on many very successful Amtrak corridor services is less than 50 mph. For example, the Pacific Surfliner (2.8 million passengers in FY19); the Capitol Corridor (1.8 million passengers in FY19) and the Downeaster (557,000 passengers in FY19).

Question 12. Amtrak Connects US map identifies a vision for state-supported corridors. Do you have a similar vision, or plan to create a vision, for the long-distance, national network?

ANSWER. Section 22214 of the Infrastructure Investment and Jobs Act directs the Secretary of Transportation to lead a comprehensive study, to be completed by November 2023, on increasing long distance service. Amtrak plans to participate in and support the DOT study. Decisions regarding expansion of long distance service will be based upon the study's findings and future federal appropriations to Amtrak. Amtrak intends to continue operating its current long distance network into the future subject to ongoing federal appropriations, and has launched a comprehensive effort to develop a proposal for replacing the fleet operating the long distance network leveraging funding opportunities also made possible by the IIJA.

Question 13. Amtrak has proposed to introduce four daily trains between New Orleans, Louisiana, and Mobile, Alabama, without any infrastructure. Has Amtrak done any analysis that shows that the proposed passenger trains will consistently meet the Federal Railroad Administration (FRA) on-time performance metrics for intercity passenger trains? Please provide supporting data and analysis.

ANSWER. Since federal law (49 U.S.C. 24308(c)) requires that Amtrak trains be given preference over freight transportation, the proposed Amtrak trains will be able to meet the FRA on-time performance metrics for intercity passenger trains if the host railroads give them preference as law requires. There is no requirement that Amtrak affirmatively demonstrate this. Amtrak, the state members of the Southern Rail Commission and the federal government are prepared to invest over $60 million for infrastructure along the Gulf Coast corridor.

Question 14. According to an Amtrak Inspector General report, after Amtrak settled with the Department of Justice (DOJ) for $2.5 million that Amtrak does not anticipate being in compliance with the American Disabilities Act (ADA) within the new timeline. Is that accurate, and if you miss the timeline again will another taxpayer funded DOJ settlement be needed?

ANSWER. The provisions of the DOJ settlement agreement applicable to station compliance will be in effect until December 2030, but the agreement does not establish a specific deadline for completing all stations compliance work. It is theoretically possible for DOJ to assert new claims after the expiration of the settlement agreement, but that is highly unlikely.

Question 15. Will Amtrak keep its commitment to the State of Nevada, the County and the City of Elko, and Amtrak's passengers on the California Zephyr, which connects San Francisco to Chicago, and complete the station safety improvements agreed to by Amtrak in its letter dated January 28, 2013, to the City of Elko pursuant to its Accessible Stations Development Program?

ANSWER. Yes. Amtrak's ADA Stations Program (ADASP) team is working on designs which are at 90% after a significant period of review by Union Pacific Railroad (UPRR) and finally coming to an agreement. Amtrak has in the meantime contracted with a local transportation company to provide connectivity to both platforms to accommodate customers with a disability.

Question 16. Will Amtrak support and update (if necessary) its Memorandum of Understanding between it and the City of West Wendover, Nevada dated February 11, 2015, to provide passenger service for the city along the California Zephyr route and logistically support the city's design and construction of a new passenger rail station?

ANSWER. In 2015, Amtrak agreed to stop at West Wendover, Nevada on the California Zephyr route. Amtrak informed Union Pacific Railroad of our desire to do so, but the project came to a halt when UP informed Amtrak and the city that a station track would be required to avoid Amtrak stopping on the mainline. This was an unusual demand since Amtrak trains routinely stop at passenger stations on host railroad mainlines, but UP insisted. This significant additional cost changed the financial characteristics of the project. Amtrak continues to support this project and will connect with the city manager of West Wendover and UP to determine whether the parties' positions have changed since 2015. Amtrak will work with the city to review and update the MOU as necessary and discuss station/platform design.

Question 17. Should Amtrak ensure that a state funding partner supports appealing to the STB for host railroad on-time performance relief before seeking formal action? If not, why? Outside of STB action, are there other options available to both Amtrak and state partners to work with host railroads on on-time performance related issues?

ANSWER. The statute gives multiple parties the right to go to the Board, including entities for which Amtrak operates intercity passenger rail. While Amtrak has the independent right to bring a case to the STB regarding State-supported service, we would always consult with and seek the input of our partners before filing an action under 213.

Going to the STB is a last resort, and we believe that direct negotiations with the railroads and targeted investments to improve train movement in certain areas is a good course of action that can improve on-time performance.

QUESTIONS FROM HON. JESÚS G. "CHUY" GARCÍA TO DENNIS NEWMAN, EXECUTIVE VICE PRESIDENT OF STRATEGY, PLANNING, AND ACCESSIBILITY, NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Question 1. Mr. Newman, what will be the impact to intercity passenger rail and our ability to spend the $66 billion from the Infrastructure Investment and Jobs Act (IIJA) to expand passenger rail services if Amtrak does not win the current case at the Surface Transportation Board on the Gulf Coast rail service?

ANSWER. The Gulf Coast case is the first time the STB has been asked to resolve the issue of Amtrak's right to expand intercity passenger service free from unreasonable delay and inordinate demands by the host railroads. In order for Amtrak, USDOT and our state partners to carry out Congress' direction, reflected in the Infrastructure Investment and Jobs Act (IIJA), to significantly expand Amtrak service, there must be a remedy available when an amicable resolution cannot be reached with the host railroads.

Question 2. Mr. Newman, it has taken over a decade to get to this point on restoring the Gulf Coast rail service after its suspension following Hurricane Katrina in 2005. That timeline follows multiple Congressional directives to restore the Gulf Coast Rail service, including the creation of the Gulf Coast Working group that included the two host freight railroads.

What steps can Congress take to shorten the negotiating process of restoring passenger rail service between Amtrak and the freight railroads when the freight railroads choose to seek to appeal Amtrak's invocation of Amtrak's right to start passenger rail service on a host railroad's tracks?

ANSWER. The "Additional Trains" provision of the Rail Passenger Service Act, 49 U.S.C. 24308(e), that authorizes the Surface Transportation Board (STB) to issue orders requiring host railroads to accommodate additional Amtrak trains was intended to allow Amtrak to add or restore service in an expeditious manner without inordinate demands by host railroads for capital investments. Following years of unsuccessful negotiations with host railroads over restoration of Gulf Coast service, Amtrak initiated a proceeding under that provision for the first time last year, seeking an order that would allow Amtrak to restore service between New Orleans and Mobile. After the STB issues its decision in that proceeding, we will advise the Subcommittee whether we believe legislative action is necessary to effectuate Congress' intent.

QUESTION FROM HON. JESÚS G. "CHUY" GARCÍA TO DENNIS R. PIERCE, NATIONAL PRESIDENT, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

Question 1. Mr. Pierce, in your testimony you note the harm from Precision Scheduled Railroading to workers, including recent attendance policies implemented by railroads as a result of PSR.

Congresswoman Marie Newman and I recently sent a letter to the BNSF railroad which implemented their Hi-Viz policy earlier this year. We asked BNSF to address concerns about the Hi-Viz policy that unions raised to Rep. Newman and myself.

Can you explain the BNSF Hi-Viz attendance policy and why your members and others have strong concerns?

ANSWER. The BNSF Hi-Viz attendance policy is just one more outgrowth of PSR style railroading. At its core, the policy forces employees to work additional shifts short of termination, all part of a concerted effort to force fewer employees to do more work. Like similar policies on CSX and Union Pacific, these policies have been forced upon the employees, with all the Class 1 Rail Carriers refusing to negotiate with our Union on these workplace issues.

As background, the vast majority of BLET's members do not work scheduled jobs, nor do they have scheduled days off. They work on-call at randomly chosen times dictated by rail management, and in many cases, with little if any advance notice of when that call will come. In recent years, our members have been subjected to unfairly punitive attendance policies that demand they work around the clock every day. Like a similar policy on CSX and Union Pacific, the BNSF Hi-Viz attendance policy subjects our members to disciplinary consequences, including termination, even if they take time off because they are too sick or too tired to work safely. The policies are destroying the family lives of our members, even to the point of destroying their very families.

These policies are also understaffing the railroads and destroying the supply chain with no regard for the impact on shippers.

The workforce is stretched too far, and there is no elasticity to handle even the slightest unplanned events, and they happen daily.

While the Union Pacific policy assesses points when employees are unable to report for work, the BNSF Hi-Viz attendance policy is a point-based system that starts each employee with 30 points, and then deducts points when employees are unable to report for work. Point accrual is capped at thirty and if any employee exhausts all their points they are subject to discipline or possible dismissal. This forces an employee into a disciplinary situation just for trying to take time off. As noted above, these same employees are on call 24/7 and are now being forced to work day after day, never having access to scheduled days off.

Congress should be very concerned about the impact that policies like Hi-Viz have on the Nation's supply chain. This is not just a BNSF issue. Most, if not all, Class 1 Railroads have draconian attendance policies that put workers at risk for working in heightened states of fatigue. These policies also force workers to report for work when they are ill, as there are few if any exceptions to point deductions or points assessed when too sick to work safely.

Policies like these have led to thousands of rail workers either resigning or being terminated just to have some quality of life outside of work. Compounding the rail carriers' inability to hire new employees is the fact that the Unionized employees of Class 1 Rail Carriers have not had a negotiated wage increase since July 1, 2019, almost three years ago. Even with Rail Carriers reporting record earnings, they have stonewalled the Unions at the national bargaining table for well into the third year, refusing to recognize the contribution that these employees make to the nation's supply chain. These Rail Carriers do not care if, or how, they negatively impact the supply chain, but the entire nation pays the price when goods do not arrive on store shelves when they should.

QUESTIONS FROM HON. ERIC A. "RICK" CRAWFORD TO DENNIS R. PIERCE, NATIONAL PRESIDENT, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

Question 1. Please identify and explain your organization's position and opinion on reciprocal switching. Would you advocate for any revisions should the proposed rule be reconsidered?

ANSWER. I have attached BLET's submission to the Surface Transportation Board opposing additional rules allowing for so-called reciprocal switching.† In short, the reciprocal switching changes being discussed are not the "silver bullet" for shippers that some claim they are. Railroad infrastructure is not like the Nation's highway system. In most cases, only one rail carrier has rail access to any given shipper. Allowing shippers to force an additional rail carrier onto that singularly owned railroad does not change that the owning railroad will still manage the operation of the involved rail line. In many cases, the rail line is too congested to get any shipment to the shipper. We know this because rail carriers already have STB regulated

† Editor's note: BLET's submission to the Surface Transportation Board is retained in committee files.

"trackage rights" in certain instances where one rail carrier runs over the rails of another to service a customer. In many cases, the last train moved by the owning railroad is the train operated by the foreign carrier operating on trackage rights. Adding another layer of access at the whim of a shipper does guarantee any improvements to customer service.

Question 2. Will the reciprocal switching rule impact the movement of goods and the supply chain?

ANSWER. As noted in my previous response, allowing additional rail carriers onto another rail carrier's rail lines does not guarantee any improvement to the movement of the nation's goods. Regardless of who delivers the rail cars, it is the owning railroad that may park a 3-mile-long train on top of the only access point to a given shipper for days on end. Railroads are not like highways, and current rules governing where cars are interchanged between rail carriers come with the tools, if enforced, that better address customer service without adding any new rules. In reality, the bigger problem for shippers is that PSR style railroading doesn't actually seem to care if or when any shipper gets its rail cars delivered. Self-imposed employee shortages, coupled with the complete mismanagement of the current workforce and the operation of the owning roads will not be improved by what is being proposed.

QUESTION FROM HON. ERIC A. "RICK" CRAWFORD TO BRAD HILDEBRAND, MEMBER, NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, AND FORMER VICE PRESIDENT, CARGILL—GLOBAL RAIL AND BARGE LEAD

Question 1. Please identify and explain your organization's position and opinion on reciprocal switching. Would you advocate for any revisions should the proposed rule be reconsidered?

ANSWER. The National Industrial Transportation League (NITL) supports the reciprocal switching proposal as issued by the Surface Transportation Board in 2016, in EP Docket 711 (Sub.-1), *Reciprocal Switching*.

There is a lack of robust railroad-to-railroad competition in our industry. There are only seven Class I railroads with four of them responsible for moving 90% of our nation's freight. We are also facing the strong probability of that number being reduced to six Class I railroads with the pending merger of the Canadian Pacific and Kansas City Southern railroads. Given the exemption that the railroad industry enjoys from certain anti-trust protections, combined with post-merger duopolies that now exist in the western and eastern parts of the country, this creates an environment where the railroads can exert substantial market power over their customers who operate facilities served by only one railroad.

A free-market economy works best if there is vigorous competition. Where a market has become highly concentrated due to a series of mergers, it is incumbent upon the government, and in this case the STB per the Rail Staggers Act of 1980, to instill or facilitate competition in the marketplace.

The Board's proposed reciprocal switching rules is one avenue where the agency can instill competition in the marketplace. The STB proposal is about enhancing competition. It offers two new paths for shippers to request a competitive switching remedy from the Board that is 1) Practical and In the Public Interest or 2) Necessary to Provide Competitive Rail Service.

The Board's current reciprocal switching rules were adopted more than 30 years ago when the rail industry was struggling financially. The STB has never granted a reciprocal switching request, and no new shipper requests have been made for decades, because it is impossible for a shipper to meet the current requirements due to the high legal standard—an insurmountable barrier in seeking relief. As such, NITL was the organization who filed the initial petition to request new reciprocal switching rules to the Board in 2011. NITL, along with the support of other shipper organizations, asked the Board to give meaning to the provision in the Staggers Rail Act of 1980 that authorizes the Board to grant reciprocal switching arrangements that are "practical and in the publics best interest" or "necessary to provide competitive rail service."[1]

Adding to the elements that drove NITL to file its initial petition in 2011 is today's market environment that include:

- The financial health of the rail industry today is strong if not thriving—but only to the benefit of Wall Street and railroad shareholders.
- As noted above, the industry is highly concentrated with the probability of even more consolidations in the near-term.

[1] 49 U.S.C. § 11102(c).

- Nearly all Class Is began and continue to implement a new railroad operational method, Precision Scheduled Railroading (PSR) or at a minimum some version of it, which continues to result in dismal, costly problems for shippers.

The bottom line is that shippers continue to suffer dismal service and increasing rates—especially those shippers who are only served by one carrier. The STB's proposed reciprocal switching rules is one way the Board can foster competition in the marketplace.

Some railroads claim that, even where direct rail competition is lacking, there is ample competition via truck, and/or, by water barge or even air. While competition offered by other transportation modes is vital to our supply chain, it often cannot replace the need for railroad-to-railroad competition. Many shippers are prohibited from shipping by truck, water, or air due to numerous factors including commodity type, location, and infrastructure investments already made or needed to support rail. It is not easy to change transport options for each mode of transportation requires its own infrastructure and there are needs unique to each commodity. Shippers invest in their infrastructure to support freight rail transportation, based in large part, on what the rail carriers require to service our facilities—plant, manufacturing facilities, distribution centers, and the like.

As NITL stated previously, it does not share the messaging or opinions of the railroads notably expressed by the Association of American Railroads about the Board's competitive switching proposal. First, the operations of the railroads' entire network would *NOT* be severely jeopardized because the thousands of switches that its members would be forced to make to accommodate the interchanging of traffic with a competing railroad. On the contrary, the burden of proof would rest with the requesting shippers to demonstrate there is an established working interchange between the two rail carriers. Second, the requesting shippers would have to prove that the switching request falls under one of the above-mentioned paths and the respective criteria is met. It is NITL's belief that should the proposed reciprocal switching process become a Final Rule, there would not be a wholesale move for every shipper across the country to request a new reciprocal switch. Under the Board's proposal, it will still be a long and costly process for shippers to pursue. Shippers would want to be certain that their request for opening-up competition to their facility would meet all of STB's criteria before they make this kind of financial commitment. Should the Board's proposal become a Final Rule, there mere fact that exists, could hopefully result in competitive service and competitive rates without shippers having to go to the Board in the first place. This competitive driver is not present under the current rule.

Again, thank you for the opportunity to respond to this QFR. NITL looks forward to this important dialogue continuing.

QUESTIONS FROM HON. ERIC A. "RICK" CRAWFORD TO HERMAN HAKSTEEN, PRESIDENT, PRIVATE RAILCAR FOOD AND BEVERAGE ASSOCIATION

Question 1. If the STB were to be reauthorized, how might this impact your route operations model?

ANSWER. Regarding the first question, PRFBA supports:

Multi-Year—Congress needs to continue developing a reauthorization and working towards a final measure as soon as possible especially considering the STB Reauthorization Act of 2015, P.L. 114–10, expired on September 30, 2020.

Highest Possible Authorized Levels—PRFBA recommends that the authorization levels be commensurate with the recently enacted FY appropriation levels (including the level proposed in the Administration's FY 2023 Budget). This is needed because the: 1) demands placed on the STB are unprecedented given its regular adjudicatory responsibilities in addition to pending rail merger proceedings—all of which pose significant service and rate issues for captive shippers, and questions concerning the structure of a freight rail industry that promises to be even more consolidated than what it is today; 2) number of formal and informal railroad performance service complaints are increasing; 3) continued reliance on data transparency, including access by all stakeholders, remains where continued data and analytical capabilities are needed by the Board to enhance its evidence-based decision-making; 4) Board is charged with implementing the new passenger On-Time Performance Standards for passenger rail; and, 5) Board operating with a full complement of Members.

GAO Study on PSR—PRFBA encourages Congress to consider the results, once released, of the study underway on the impacts of Precision Scheduled Railroading (PSR) being conducted by the General Accountability Office (GAO). This study, requested last Spring, promises to help guide further discussions as Congress, the Board, and interested stakeholders debate, develop, and realize the next STB reauthorization.

Common Carrier Obligation—Railroads are conveniently using the "common carrier obligation" to "get away with" poor service and high rates mainly because there is: 1) no clear definition of the "common carrier obligation;" 2) no standard for which to measure it by; or 3) no meaningful consequence to the railroads if the obligations are not met. As such, PRFBA asks Congress to clarify via statute, the definition of "common carrier obligation."

In theory, "common carrier obligation" means that railroads are to provide service on reasonable request—railroads are to provide a level a service that meets a shipper's reasonable needs. Considering there is no clear statutory definition, railroads have been able and continue to provide service that is poor even though asserting that they are meeting the "common carrier obligation." The railroads have been prioritizing what commodities to serve while "demarketing" others and still claiming they are meeting the "common carrier obligation."

Along with a statutory definition clarification, it would be helpful for Congress to direct the STB to develop a standard by which railroad service performance can be measured. This ties in to how important it is that the Board is beginning to consider requiring the Class Is to report, in the aggregate, FMLM data. PRFBA appreciates, to a point, that the Board would need some flexibility in applying a statutorily clarified definition with a standard that includes not just FMLM data, but other elements for meeting the common carrier obligation which might vary from one railroad to another and from one shipper to another. As such, the STB should be encouraged to also review and evaluate the extent to which railroad operating, financial, investment, marketing, and other business practices may be impairing the ability of and incentives for railroads to fulfill their common carrier obligations, in the aggregate, and provide adequate and economical service to their customers.

STB already has the statutory authority to impose fines or penalties. PRFBA suggests Congress should expand the situations when the Board can assess fines or penalties that would allow shippers to recover appropriate damages to the extent the Board finds that railroads are not fulfilling their common carrier obligations, in the aggregate, as well as individually and are not providing adequate and economical service to their customers.

In addition, the Board, under current statutory authority, can assess a penalty up to $8,700 per violation. This is far from consequential or punitive. Congress needs to consider establishing a higher penalty amount(s) and allowing the STB to apply a penalty to each carload and/or each day a carload is delayed. Another option for Congress to consider is to statutorily provide larger penalties tied to the overall level of service. This might have to be applied to both contract movements and movements that fall to the jurisdiction of the STB for if not, the railroads might use contracts to avoid their common carrier obligation.

Demurrage—PRFBA appreciates the decisions the Board reached when issuing its 1) Final Statement of Board Policy in Docket No. EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges*; 2) Final Rule in Docket No. EP 759, *Demurrage Billing Requirements*; and 3) Final Rule in the Supplemental Notice of Proposed Rulemaking (SNPR) in Docket No. EP 759, *Demurrage Billing Requirements*. These new billing requirements went into effect on October 1, 2021. Shippers have been receiving and reviewing these new bills. While the railroads are providing the required new billing information, there are several problems which need Congressional, targeted fixes and accompanying policy modifications:

- Clarify that demurrage bills are to be sent to the shippers when railroads demonstrate that the shippers' behavior was the driver of the demurrage and not railroad service problems.
- Provide 30 days for shippers to pay demurrage bills. The 15 days allowed today by some railroads does not provide enough time for shippers to contest, research, and negotiate with railroads over questionable fees especially when the bills may be months old.
- Increase the number of "free days" allowed to unload and load rail cars and unit trains. This fix ties into the PSR practices discussed earlier. Due to reduced train crews, elimination of hump yards, increasing train lengths, and the lack of fluidity in the rail network, cars tend to get "bunched-up" at pivotal points along the route. As an example, a PRFBA member can receive, without advanced notice or even coordination from the railroads, 15 cars rather than 5 cars. It takes additional equipment and crews (which are not always readily available) for the PRFBA member to load, unload and turn around the rail cars where the typical 48 hours for loading and 72 hours for unloading is not nearly enough time before demurrage fees kick-in especially when the need for shippers to have more time is because of the railroads' poor service.
- Consider reverse demurrage, in that the railroads would pay the private car owners a daily fee when those private rail assets are held up due to railroad

operating issues or allow charge backs to the railroads for daily car hire fees to offset the cost of additional transit days experienced by car owners.

Commodity Exemptions—PRFBA believes that all commodities, whose freight rail movements fall under the purview of the STB, should have the opportunity to seek redress and relief from the Board. PRFBA recommends Congress eliminate commodity exemptions.

Today, that does not exist as certain commodities are "exempt" and the current revocation standard that must be met by shippers, remains ambiguous, lengthy, and costly for shippers. STB initiated a rulemaking to review certain commodity exemptions in 2016.[1] However, that proceeding has languished at the Board for too long, while denying many shippers of exempt commodities with direct access to the STB's remedies and procedures.

Moreover, when the exemptions were adopted, tariffs and contract summaries needed to be filed. These requirements ended over twenty-five years ago. Exemptions are a solution to a problem that no longer exists.

Question 2. Please identify and explain your organization's position and opinion on reciprocal switching. Would you advocate for any revisions should the proposed rule be reconsidered?

Answer. Regarding the second question, PRFBA strongly supports the reciprocal switching proposal announced by the Board in 2011, Docket EP 711 (Sub No.-1), *Reciprocal Switching*.

When there is a lack of competition, notably in this case a lack of railroad-to-railroad competition, and especially at single-served facilities (or captive shippers), the railroads are free to provide any service level at any costs. To improve railroad financials, the railroads are even reducing capacity by limiting equipment availability.

A lack of railroad-to-railroad competition with the strong probability of continued rail industry consolidation moving forward, profit-driven operational decisions (such as PSR) benefiting Wall Street and rail carrier shareholders, and the financial strength of the railroads all impact shipper service. Some PRFBA member companies are experiencing record poor service levels ranging from missed switches, reduced switching service days, bunching caused by longer trains, bottlenecks primarily driven from a reduction of serving yards and crews to the reduction of cars and locomotives, which all have led to longer transit times and irregular service.

When there is reduced capacity, rates increase, service suffers, and railroad margins rise. When there is a lack of competition in a free market economy, it is incumbent upon the government, in this case STB per the Staggers Rail Act of 1980, to intervene. The Board's proposed changes, again announced in 2016, to the existing reciprocal switching rules is one venue for the STB to instill competition in the marketplace.

It has been decades since the STB has granted a reciprocal switching request because it is nearly impossible for a shipper to meet the current requirements. Due to railroads' effective stalling tactics, this proceeding has stalled for about a decade, or stalled for 40 years if you consider that the Staggers Rail Act of 1980 provides for competitive switching.

The Board proposal would allow PRFBA members and other shippers with access to only a single rail carrier to *request* before the Board that the carrier provide a switch for freight to be moved by a nearby rail carrier. This proposal would provide two paths for shippers to use when making the request before the Board: 1) switching must be practicable and in the public interest or 2) be necessary to provide competitive rail service. Both options would instill competition in the marketplace for a free-market economy can only function when there is competition.

Again, PRFBA appreciates this opportunity to respond to the presented QFRs and looks forward to this important dialogue continuing.

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[1] *See* STB Docket Ex Parte 704—*Review of Commodity, Boxcar, and TOFC/COFC Exemptions*.