

Calendar No. 94

114TH CONGRESS }
1st Session }

SENATE

{ REPORT
114-52

SURFACE TRANSPORTATION BOARD
REAUTHORIZATION ACT OF 2015

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 808



MAY 21, 2015.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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SURFACE TRANSPORTATION BOARD REAUTHORIZATION ACT OF 2015

MAY 21, 2015.—Ordered to be printed

Mr. THUNE, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 808]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 808) to establish the Surface Transportation Board as an independent establishment, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of this legislation is to reauthorize the Surface Transportation Board for fiscal years (FYs) 2016 through 2020, and for other purposes.

BACKGROUND AND NEEDS

The U.S. freight railroad industry has undergone a remarkable transformation since the enactment of the Staggers Rail Act of 1980.¹ In the decades preceding the enactment of the Staggers Act, railroads experienced traffic losses due in part to regulatory policies and procedures that prevented railroads from easily adjusting their rates to reflect changing market or cost environments. These policies and procedures led to financial strain in the industry, ultimately resulting in the bankruptcy of many railroads by the 1970s.² The Staggers Act permitted railroads to have more freedom to set rates for rail service. Specifically, it permitted the railroads

¹P.L. 96-448

²Palley, Joel, "Impact of the Staggers Act of 1980," Federal Railroad Administration, March 8, 2011, at <http://www.fra.dot.gov/eLib/Details/L03012>

to charge lower rates to their customers who operate in a competitive environment and higher rates to customers who are “captive” to one railroad carrier for transportation service (i.e., demand-based differential pricing). The Staggers Act also lowered many regulatory barriers to help the railroads more easily rationalize their networks, such as easing the requirements for railroads to abandon unprofitable lines. Despite these extensive regulatory changes, the Staggers Act still envisioned a role for the Federal Government to ensure that captive shippers were not subject to unreasonable rates or poor service and charged the Interstate Commerce Commission, and later the Surface Transportation Board, with the authority to oversee the railroad industry.³

Since the Staggers Act was enacted, the industry has evolved and the railroads’ financial viability has drastically improved.⁴ There have been numerous acquisitions and consolidations among the larger railroads and a proliferation of short line railroads. There are currently seven Class I railroads (BNSF Railway Company, Canadian National Railway Company, Canadian Pacific Railway, CSX Transportation Inc., Kansas City Southern Railway Company, Norfolk Southern Corporation, and Union Pacific Railroad). In 2014, Class I railroads were categorized as those with operating annual revenue of \$467 million or more. As recently as 2013, the 7 Class I railroads reported approximately \$71 billion in freight revenues.⁵ Overall, Class I railroads account for 69 percent of freight rail mileage, 90 percent of employees, and 94 percent of revenue.⁶ In addition to the Class I railroads, there are more than 550 Class II and Class III railroads.

The U.S. freight rail industry continues to be integral to the Nation’s economy and global competitiveness. In 2014, the Association of American Railroads (AAR) reported that rail carload plus intermodal traffic volume was about 29 million units, which represents a 4.5 percent increase over the same period the prior year and the highest year-to-date total since 2007.⁷ According to the AAR, October 2014 was the best month in history for U.S. rail intermodal traffic.⁸

Surface Transportation Board

The Federal agency charged with economic oversight of the Nation’s freight rail system is the Surface Transportation Board (STB or Board). The three-member, bipartisan Board has regulatory jurisdiction over railroad rate reasonableness, mergers, line acquisitions, new rail-line construction, abandonments of existing rail lines, and the conversion of rail rights-of-way into hiking and biking trails.

³ Ibid.

⁴ U.S. Congress, Senate Committee on Commerce, Science and Transportation, Oversight and Investigations Majority Staff Report, Update on the Financial State of the Class I Freight Rail Industry (Washington, DC: 2013)

⁵ Association of American Railroads, “U.S. Freight Railroad Statistics,” July 15, 2014, at <https://www.aar.org/Documents/Railroad-Statistics.pdf>

⁶ Association of American Railroads, “Overview of America’s Freight Railroads,” April 2014, at [https://www.aar.org/BackgroundPapers/Overview of Americas Freight Railroads.pdf](https://www.aar.org/BackgroundPapers/Overview%20of%20Americas%20Freight%20Railroads.pdf)

⁷ Association of American Railroads, “AAR Reports Increased Freight Rail Traffic for 2014,” January 8, 2015, at <https://www.aar.org/newsandevents/Press-Releases/Pages/2015-01-08-railtraffic.aspx>

⁸ Association of American Railroads, “AAR’s Hamberger: America’s Rail Industry Taking on Changing Economy,” November 20, 2014, at <https://www.aar.org/newsandevents/Press-Releases/Pages/AARs-Hamberger-Americas-Rail-Industry-Taking-on-Changing-Economy.aspx>

The Board is decisionally independent, although it is administratively housed within the Department of Transportation (DOT). Since the economies of freight rail regulation are so important to the national economy and involve a national network, Congress gave the STB sole jurisdiction over rail mergers and consolidations, regulating everything from Federal antitrust laws to State and municipal laws. The STB also has exclusive authority to determine whether railroad rates and services are reasonable.⁹

The STB's authorization expired in 1998, and it has remained unauthorized since that time, each year submitting a budget request directly to Congress for necessary appropriations. It has 156 full-time equivalent employees and receives an annual appropriation that is partially offset with collections from filing fees.¹⁰ In the Consolidated and Further Continuing Appropriations Act of 2015, the STB received \$31.375 million for its operations and staffing, partially offset by \$1.25 million in fees.¹¹

The STB's major responsibilities related to railroads include: overseeing and monitoring railroad commercial practices nationally; enforcing the railroads' common-carrier obligation; ensuring that charged rates to captive shippers (those with no other transportation options) are reasonable; monitoring rail carriers to ensure they are able to earn adequate returns necessary for the health of the rail system; calculating the rail carriers' cost of capital; and approving construction and abandonments of rail lines.

In addition to formal cases brought by shippers, the STB has several other programs to help resolve shipper and carrier disputes, including complaints lodged against railroads for service inadequacies, rates, and car supply concerns. The STB's Rail Consumer and Public Assistance (RCPA) program helps address these concerns through a more informal process. The STB sees this program as beneficial to both shippers and carriers, because it places shipper concerns immediately before the involved railroad, which can facilitate a prompt response and is less burdensome for both parties than a formal proceeding. With this program, the parties have an opportunity to resolve their issues in an environment that can produce a timely and cost-effective result.¹²

Rail service issues

The United States Department of Agriculture (USDA) has reported that in 2013 and 2014 a combined record harvest of corn, soybeans, and wheat, and increased demand to ship intermodal containers, energy products, and crushed stone, challenged the capacity of the United States rail network.¹³ In addition, the harsh winter weather conditions often required rail operators to cut train lengths by as much as 50 percent, directly limiting the availability of rail services.¹⁴ Specifically, rail carriers noted that the weather conditions exacerbated existing congestion in Chicago, a crucial

⁹Surface Transportation Board, "Budget Request for FY 2016," February 2015, at <http://www.dot.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-STB.pdf>

¹⁰Ibid.

¹¹P.L. 113-235

¹²Surface Transportation Board, "Budget Request for FY 2016," February 2015, at <http://www.dot.gov/sites/dot.gov/files/docs/FY2016-BudgetEstimate-STB.pdf>

¹³United States Department of Agriculture, "Rail Service Challenges in the Upper Midwest: Implications for Agricultural Sectors," January 2015, at

¹⁴Ibid.

network hub.¹⁵ Broad increases in demand and service available issues resulted in significant service problems in the industry.¹⁶

Agricultural commodities— particularly in the Upper Midwest States of Minnesota, Montana, North Dakota, and South Dakota — were hit especially hard by rail service issues. Farmers in that region have limited local markets for their products, less access to barge or other transportation alternatives, and more limited crop storage relative to the recent expansion of corn production.¹⁷ The region experienced significant grain car backlogs, storage issues, and rail car premiums increases. For example, the USDA found capacity and service issues caused shippers to pay record-high car premiums, 28 to 150 percent above the average previous levels for roughly 65 consecutive weeks.¹⁸ The extra costs of transportation and storage drove down crop prices throughout the region.¹⁹

The agricultural sector was not the only sector that experienced rail service issues. Coal-fired utilities, ethanol manufacturers, propane shippers, and others in the energy industry voiced concerns throughout 2014 about unreliable service and growing wait times for rail cars.²⁰ The auto industry has also alleged that rail service delays cost manufacturers millions of dollars in storage fees, alternate transport costs, and vehicle shortages at dealerships.²¹ While a particularly severe winter has been responsible for some rail service delays, the auto industry contends that additional factors exacerbated the service disruptions, including a shortage of railcars and an inadequate response to ameliorate this shortage, the annual month-over-month growth in auto production and auto exports, and the boom in crude oil shipped by rail.

Passenger rail operators have stated they have also faced delay issues. For example, Amtrak has stated that the harsh weather conditions and increased demand for freight services has caused delays for its Empire Builder train service.²² In addition, on August 29, 2014, Amtrak filed a complaint against Canadian National Railway (CN) for causing unacceptable train delays on the Illini/Saluki service that uses the CN line from Chicago to Carbondale, Illinois.²³

The service issues of 2013 and 2014 prompted increased oversight from STB. In March of 2014, the STB's members wrote to Canadian Pacific and BNSF Railway Company representatives to express their concerns that poor rail service was negatively affecting agricultural, coal, passenger, and other traffic.²⁴ On April 10, 2014,

¹⁵ Surface Transportation Board, "United States Rail Service Issues—Data Collection," Ex Parte 724, October 8, 2014, at <http://www.stb.dot.gov/decisions/readingroom.nsf/WebDecisionID/43850?OpenDocument>

¹⁶ *Ibid.*

¹⁷ United States Department of Agriculture, "Rail Service Challenges in the Upper Midwest: Implications for Agricultural Sectors," January 2015, at http://www.thune.senate.gov/public/index.cfm/files/serve/?File__id=3777bd24-0350-4894-a654-48a800fcbce

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Xcel Energy Comments, "United States Rail Service Issues," Ex Parte 724, July 31, 2014

²¹ Alliance of Automobile Manufacturer Comments, "United States Rail Service Issues, Ex Parte 724, April 17, 2014

²² Franz, Justin. "Amtrak's Empire Builder struggles in freight boom," Washington Times, August 15, 2014, at <http://www.washingtontimes.com/news/2014/aug/15/amtraks-empire-builder-struggles-in-freight-boom/?page=all>.

²³ Amtrak, "Amtrak Calls on Surface Transportation Board to Investigate Canadian National Railway," press release, September 2, 2014, at <http://www.amtrak.com/ccurl/306/662/Amtrak-STB-Investigation-CN-ATK-14-078.pdf>

²⁴ Letters from Daniel R. Elliott III, Chairman, and Ann D. Begeman, Vice Chairman, STB, to Carl Ice, President and Chief Executive Officer, BNSF Railway. Company, February 5, 2014

in response to a significant decline in reliable rail service for shippers over the preceding months, the STB held a public hearing in Washington, D.C. to address service problems affecting the U.S. freight rail network. Given that service problems have been particularly acute on the systems of Canadian Pacific and BNSF Railway Company, representatives from those two companies testified at the hearing.²⁵ During the hearing, railroad representatives described several factors that contributed to the deterioration of rail service, including strained track capacity, unexpected volume growth, crew shortages, lack of locomotives, severe weather, and congestion in major corridors, particularly the Chicago corridor.²⁶

At the hearing, farmers and agricultural producers also expressed concern about delayed fertilizer deliveries, backlogged grain car orders, and delayed shipments of loaded grain cars. There were a number of impacts as a result, including: little to no storage capacity at many grain elevators; stored grain spoiling; lost sales; penalties incurred by grain shippers for products not delivered on time; and buyers shifting to foreign suppliers.²⁷ Also at the hearing, representatives from other industries, such as coal, chemicals, feed, sugar, and paper expressed similar supply chain disruptions.²⁸

Subsequent to the hearing, on April 15, 2014, the STB directed Canadian Pacific and BNSF Railway Company to provide plans to ensure delivery of fertilizer shipments, as well as provide status reports of the fertilizer shipments over a six-week period.²⁹ In response, BNSF Railway Company added rail cars to the existing fertilizer service fleet and allowed locomotives to remain with fertilizer cars during loading and unloading in an effort to reduce potential delays and expedite turn-around times.³⁰

Since the directive in April, the STB has closely monitored Canadian Pacific's and BNSF Railway Company's progress in moving the 2013/2014 crop. In May 2014, STB representatives conducted meetings in Sioux Falls, SD, Malta, MT, Bloomington, MN, and other cities in the region.³¹ On June 20, 2014, in recognition of the limited amount of time until next harvest and the large quantities of grain that still needed to be moved, the Board again directed Canadian Pacific and BNSF Railway Company to provide and/or update their plans to reduce unfilled grain car orders, to resolve grain car delays, and to provide weekly status reports on the movement of grain on their networks.³²

On October 8, 2014, the Board expanded on the June 2014 action and required all Class I rail carriers and the Chicago Transportation Coordination Office (CTCO), through its Class I members, to

and E. Hunter Harrison, Chief Executive Officer and Director Canadian Pacific Railway Company, March 6, 2014

²⁵ Surface Transportation Board, "Surface Transportation Board to Hold Hearing on Rail Service Issues," press release, April 1, 2014, at http://www.stb.dot.gov/_85256593004F576F.nsf/0/B9B95D1200B9D81985257CAD006A133A?OpenDocument

²⁶ Surface Transportation Board, "United States Rail Service Issues—Grain," August 18, 2014, at <http://www.stb.dot.gov/decisions/readingroom.nsf/WebDecisionID/43956?OpenDocument>

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Surface Transportation Board, "U.S. Rail Service Issues," Ex Parte 724, April 15, 2014

³⁰ *Ibid.*

³¹ Doering, Christopher, "Improved rail service is a start, S.D. senators say," Argus Leader, May 14, 2014, at <http://www.argusleader.com/story/news/2014/05/14/thune-johnson-see-improvement-freight-rail-service-urge-railroads/9098043/>

³² Surface Transportation Board, "U.S. Rail Service Issues-Grain," Ex Parte 724, June 20, 2014

submit weekly performance reports.³³ In making the decision, the Board noted that the United States rail system is an interconnected network, and one carrier's service issues can affect the performance of other carriers.³⁴ Further, although severity differed, shippers reported problems on multiple carriers. On December 30, 2014, the STB issued a notice of proposed rulemaking soliciting comment on new regulations requiring all Class I railroads and the CTCO, through its Class I members, to report certain service performance metrics on a weekly basis.³⁵

The Committee has conducted active oversight to better understand and address current and emerging service issues. For example, in July 2014 Senator Thune requested that the STB collect additional performance measures on locomotive use and grain car backlogs, and in August the STB required those additional measures.³⁶ The Committee also held oversight hearings in September 2014 and January 2015, where grain, chemical, automobile, and fertilizer company representatives provided detailed testimony on rail service issues.³⁷ Throughout 2014, Committee members also engaged with railroads, shippers, and the STB to ensure service improvement.

Following the recent actions, outreach, and changing conditions, rail carriers have made considerable progress across a variety of service metrics, including dwell times and turn times.³⁸ For example, according to the STB, BNSF Railway Company has reduced not only the number of backlogged orders but also the average number of days late for these orders.³⁹ In 2014, BNSF Railway Company invested about \$5.5 billion in its capacity, expanding its locomotive, railcar, workforce, and double track miles.⁴⁰ BNSF Railway Company decreased their grain car orders past due from 6,166 as of October 18, 2014, to 550 cars as of April 11, 2015, though some of this decrease occurred as a result of usual seasonal variability.⁴¹ Across the industry, AAR estimated that in 2014 freight railroads spent a total of \$27 billion on infrastructure and equipment, and it estimates investments in 2015 will exceed \$29 billion.⁴²

³³ Surface Transportation Board, "U.S. Rail Service Issues-Data Collection," Ex Parte 724, October 8, 2014, at <http://www.stb.dot.gov/decisions/readingroom.nsf/WebDecisionID/43850?OpenDocument>

³⁴ *Ibid.*

³⁵ Surface Transportation Board, "U.S. Rail Service Issues-Performance Data Reporting," Ex Parte 724, December 30, 2014, at [http://www.stb.dot.gov/RailServiceIssues.nsf/358097664f8d5cae85257e0500747798/dd91cdf262293ab985257dbf00680321/\\$FILE/44168.pdf](http://www.stb.dot.gov/RailServiceIssues.nsf/358097664f8d5cae85257e0500747798/dd91cdf262293ab985257dbf00680321/$FILE/44168.pdf)

³⁶ Office of U.S. Senator John Thune, "Following Request from Thune, STB Issues Reporting Requirements to Improve Rail Service," press release, August 18, 2014, at <http://www.thune.senate.gov/public/index.cfm/2014/8/following-request-from-thune-stb-issues-reporting-requirements-to-improve-rail-service>

³⁷ U.S. Congress, Senate Committee on Commerce, Science, and Transportation, Freight Rail Service: Improving the Performance of America's Rail System, hearings, 113th Cong., 2nd sess., September 10, 2014 (Washington, DC: GPO, 2014). U.S. Congress, Senate Committee on Commerce, Science, and Transportation, Freight Rail Transportation: Enhancing Safety, Efficiency, and Commerce, hearings, 114h Cong., 1st sess., January 28, 2015 (Washington, DC: GPO, 2015)

³⁸ Surface Transportation Board, "EP 724: Rail Service Issues," April 11, 2015, at <http://www.stb.dot.gov/stb/railserviceupdateslanding.html>

³⁹ BNSF Status Report, Attachment C, "U.S. Rail Service Issues-Grain," Ex Parte 724, August 8, 2014

⁴⁰ BNSF Railway Company, "Improving Our Network Performance: BNSF Service Update," April 2015, at <http://www.bnsf.com/customers/service-page/pdf/bnsf-service-deck.pdf>

⁴¹ Surface Transportation Board, "Rail Service Issues Reports," Ex Parte 724, BNSF reports posted on April 15, 2015 and October 22, 2014, at http://www.stb.dot.gov/stb/railserviceissues/rail_service_reports.html#loaded

⁴² Association of American Railroads, "Freight Railroad Capacity and Investment," January 2015, at [https://www.aar.org/BackgroundPapers/Freight Railroad Capacity and Investment.pdf](https://www.aar.org/BackgroundPapers/Freight%20Railroad%20Capacity%20and%20Investment.pdf)

While STB has worked diligently to address service issues, and rail carriers have improved performance, the recent challenges have highlighted inefficiencies at the agency. Congressional oversight, including extensive communication with STB leadership and the Committee hearings in September 2014 and January 2015, has identified several areas for improvement. Some inefficiencies result from insufficient authority. For example, the STB currently does not have authority to proactively investigate rail issues on its own initiative. Other inefficiencies result from burdensome processes. For example, though STB has taken action to improve simplified rate review methodologies, it recently found the litigation costs for the “Simplified Stand-Alone Cost” are about \$4 million.⁴³ The STB’s previous authorization expired in 1998, and S. 808 includes provisions to improve the efficiency of the agency.

SUMMARY OF PROVISIONS

S. 808, the Surface Transportation Board Reauthorization Act of 2015, would establish the STB as an independent agency outside of DOT. It would authorize the DOT Office of Inspector General (OIG) to review financial management, property management, and business operations of the STB. It also would authorize the STB for fiscal year 2016 through fiscal year 2020.

To address inefficient quorum requirements, it would expand membership of the STB from three members to five members, and it would allow for limited instances in which a majority of Board members can communicate without requiring a full public meeting. It would set disclosure requirements for those meetings.

To better allow for proactive engagement, S. 808 would allow the STB to initiate certain investigations on its own initiative and set restrictions on those investigations. It also would set notification requirements, timelines, and other due process requirements for parties under investigation.

To improve review processes, S. 808 would set rate review timelines for full stand-alone cost rate challenges to ensure the STB efficiently decides on petitioned relief. It also would require the STB to maintain one or more streamlined processes for rate cases in which the full stand-alone cost presentation is too costly, given the value of the case.

To increase the efficiency of dispute resolution, S. 808 would expand existing work at the STB to encourage and provide voluntary arbitration processes. S. 808 would maintain the current practice in which arbitration process may be commenced only when both relevant parties opt-in, and it would set the issues, such as rates and practices, that are eligible for arbitration. It also would set conditions for arbitration, such as only if the rail carrier has market dominance. It would cap relief from arbitration at \$2 million for practice disputes and \$25 million for rate dispute damages. It would allow the STB to review arbitration decisions based on specified factors.

To improve transparency and accountability, S. 808 would include several reporting requirements. It would require quarterly re-

⁴³Surface Transportation Board, “Rate Regulation Reforms,” Ex Parte 715, March 13, 2015, at [http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/C945E11FDC839C5A85257E06006D3D45/\\$file/44230.pdf](http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/C945E11FDC839C5A85257E06006D3D45/$file/44230.pdf)

ports that describe the STB's progress toward addressing the issues raised in unfinished regulatory proceedings. It also would require quarterly reports of rail rate review cases pending or completed by the STB during the previous quarter. In addition, it would require the STB to post on its public website quarterly reports formal and informal service complaints received by the STB during the previous quarter. Further, it would require the STB to submit an annual report on its activities, including each instance where it initiates an investigation on its own initiative.

S. 808 would require studies on important rail issues. It would require the Government Accountability Office to commence a study of rail transportation contract proposals containing multiple origin-to-destinations movements. It also would require the STB to complete a report that indicates whether current large rate case methodologies are sufficient, not unduly complex, and cost effective. The report must also indicate whether alternative methodologies exist, or could be developed, to streamline, expedite, or address the complexity of large rate cases.

S. 808 would make other technical corrections, minor changes, and clarifications. It would remove various obsolete provisions. It also would allow for a rail carrier's agent to be located outside of Washington, D.C. S. 808 also would clarify that a carrier's capability to meet its current and future service needs is relevant when considering revenue adequacy.⁴⁴

LEGISLATIVE HISTORY

S. 808 was introduced on March 19, 2015, and is sponsored by Senators Thune and Nelson. On March 25, 2015, the Committee met in Executive Session during which S. 808 was considered. The bill was reported favorably by voice vote.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 808—Surface Transportation Board Reauthorization Act of 2015

Summary: S. 808 would authorize appropriations for the programs of the Surface Transportation Board (STB), establish the STB as a government agency independent of the Department of Transportation (DOT), and authorize other changes in the agency's operations. Based on information from the STB, CBO estimates that implementing the bill would cost \$198 million over the 2016–2020 period, assuming the appropriation of the amounts authorized and estimated to be necessary.

Enacting S. 808 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

⁴⁴ Interstate Commerce Commission, "Coal Rate Guidelines Nationwide," Ex Parte 347 (Sub-No. 1) (1985), 535-6 (acknowledging the relevance of "current and future service needs" when determining the financial soundness of carriers). Concerned Shipper Associations Comments, "Railroad Revenue Adequacy," Ex Parte 722, September 5, 2014

S. 808 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary effect of S. 808 is shown in the following table. The costs of this legislation fall within budget function 400 (transportation).

	By fiscal year, in millions of dollars—					
	2016	2017	2018	2019	2020	2016–2020
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Operation of the Surface Transportation Board:						
Authorization Level	33	35	36	36	36	176
Estimated Outlays	30	34	36	36	36	172
Additional Activities by the Surface Transportation Board:						
Estimated Authorization Level	6	6	6	6	6	30
Estimated Outlays	3	5	6	6	6	26
Total Changes:						
Estimated Authorization Level	39	41	42	42	42	206
Estimated Outlays	33	39	42	42	42	198

Basis of estimate: For this estimate, CBO assumes the bill will be enacted late in fiscal year 2015 and that the amounts authorized and estimated to be necessary will be appropriated.

S. 808 would specifically authorize the appropriation of an additional \$176 million for the operation of the STB over the 2016–2020 period. The STB received an appropriation of \$31 million in fiscal year 2015.

According to the STB, the requirements in the bill to expand the number of board members and their associated staff, to allow it to initiate proceedings against companies, and to make it independent of DOT would impose additional costs on the board. CBO estimates those additional responsibilities would cost \$6 million a year in addition to the amounts specifically authorized in the bill. Those additional amounts would primarily cover salaries and benefits for additional employees needed over the 2016–2017 period and to modify information technology systems. In total, CBO estimates that implementing S. 808 would cost \$198 million over the 2016–2020 period.

Pay-As-You-Go considerations: None.

Intergovernmental and private-sector impact: S. 808 contains no intergovernmental mandates or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Sarah Puro; Impact on state, local, and tribal governments: Melissa Merrell; Impact on the private sector: Amy Petz.

Estimate approved by: Theresa Gullo, Assistant Director for Budget Analysis.

REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

S. 808 is intended to improve the efficiency of the STB by making modifications to the STB's existing statutory authority. The bill would codify actions already undertaken by the STB, improve the processes for rate and practice cases, and expedite review timelines, which would have no effect on the number of individuals regulated. For railroads and shippers, the efficiencies at the STB may reduce the cost of compliance. S. 808 also would give the STB the authority to initiate certain investigations; however, the investigations would still need to be within the scope of their existing authority, which would not expand the persons or entities covered. S. 808 would expand the number of Board members, which would not have any foreseeable effect on the issues or entities regulated by the STB. While S. 808 would require certain studies and reports on rail issues, such as on multiple origin-to-destination pairs, and on rate case procedures and methodologies these provisions do not prescribe any particular finding or any action as a result of those findings.

ECONOMIC IMPACT

S. 808 is expected to have a positive impact on the U.S. economy. The bill would improve inefficiencies at the STB and reduce delays in the case review process. The bill would allow for the STB to better assist shippers and railroads, helping to ensure rail service problems are addressed in a balanced and timely manner. These improvements would have helpful economic benefits, such as helping businesses to get goods to market more efficiently.

PRIVACY

The reported bill is not expected to have any impact on the privacy rights of individuals.

PAPERWORK

It is not anticipated that there would be a major increase in paperwork burdens resulting from the enactment of S. 808.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; table of contents.

This section titles the bill, the "Surface Transportation Board Reauthorization Act of 2015."

Section 2. References to title 49, United States Code.

The section would explain that changes made in this bill, except where expressly provided otherwise, are made to title 49 of the United States Code.

Section 3. Establishment of Surface Transportation Board as an independent establishment.

This section would amend administrative provisions to clarify STB's role as an independent body and require that submissions or transmissions of budgetary or legislative matters be submitted concurrently to the President and the Office of Management and Budget, the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Transportation and Infrastructure of the House of Representatives. This section also would repeal a requirement that the DOT provide administrative support to the STB. The section would make other technical amendments re-organizing the location of text in the United States Code.

Section 4. Surface Transportation Board membership.

This section would expand membership of the STB from three members to five in order to address inefficient quorum requirements.

The nonpublic collaborative discussions provisions in section 5 of this bill are intended to apply for any number of STB board members, with or without the expansion to five members.

Section 5. Nonpublic collaborative discussions.

This section would allow for limited instances in which a majority of Board members can communicate without requiring a full public meeting. During such communications, no vote may be taken, the STB General Counsel must be present, and only Board members or staff may attend. In addition, the STB would be required to disclose meeting topics and participants within two business days of the meeting, unless the discussion relates to an ongoing proceeding, in which case the disclosure must be made on the date of the final Board decision. This section would also require the STB to provide a summary with as much general information as possible on any sensitive matter withheld from the public based on current law.

Section 6. Reports.

This section would require the STB to submit an annual report on its activities, including each instance where it initiates an investigation on its own initiative.

This section would also require the STB to post on its public website quarterly reports of rail rate review cases pending or completed by the STB during the previous quarter. To help with compliance monitoring of the rate case procedures in section 11 of this Act, such a report must include summary information and key dates involved in the case.

This section would also require the STB to post on its public website quarterly reports of formal and informal service complaints received by the STB during the previous quarter. The database must include the type, geographic origin, and resolution of each complaint.

Section 7. Authorization of appropriations.

This section would authorize STB appropriations for fiscal year 2016 through 2020 at \$33 million, \$35 million, \$35.5 million, \$35.5

million, and \$36 million, respectively. Current STB funding in fiscal year 2015 is \$31.4 million.

Section 8. Agent in the District of Columbia.

This section would allow for a rail carrier's agent to be located outside of Washington, D.C.

Section 9. Department of Transportation Inspector General authority.

This section would authorize the DOT OIG to review financial management, property management, and business operations of the STB. It would require the DOT OIG to keep the appropriate congressional committees informed, issue findings and recommendations, and report on STB progress in addressing problems. It would allow the DOT OIG to use investigative powers (e.g., subpoenas), authorize DOT to use necessary sums for DOT OIG activities, and authorize reimbursable agreements.

All activities subject to this section are to be paid for by DOT.

Section 10. Amendment to table of sections.

This section would make conforming technical amendments to the table of sections.

Section 11. Procedures for rate cases.

This section would require the STB to maintain one or more streamlined processes for rate cases in which the full stand-alone cost presentation is too costly, given the value of the case. This requirement would build on existing work at the STB, and it would ensure the simplified reviews are accompanied by expedited handling.

This section would also set rate review timelines for full stand-alone cost rate challenges to ensure the STB efficiently decides on relief. Timelines would apply to: discovery (150 days); development of evidentiary record (155 days); closing brief (60 days); and final Board decision (180 days). The section would provide an option for a Board-granted extension upon request or in the interest of due process.

Finally, the section would require the STB to initiate a proceeding to assess other procedures, including procedures common in other litigation settings, to help expedite rate cases.

Section 12. Investigative authority.

This section would allow the STB to initiate investigations on its own initiative and set restrictions on those investigations. Current law only allows investigations upon complaint. For STB-initiated investigations, the STB would be required to: provide 30-day notice to parties under investigation; only investigate issues of national or regional significance; permit parties under investigation to file a written statement on the matter subject to investigation; make available to parties under investigation and Board members any recommendations and a summary of findings; dismiss any investigation that is not concluded by the STB with administrative finality within 1 year after the date on which it was commenced; would require the STB to separate investigating and decision-making functions of staff to the maximum extent practicable; and, within

90 days of receiving findings or recommendations, dismiss an investigation or initiate a proceeding to determine whether a violation has occurred.

The requirement to dismiss any investigation that is not concluded by the Board with administrative finality within 1 year after the date on which it was commenced would only include the time period needed to generate recommendations and summary of findings. The time period needed to complete a proceeding, after receipt of the recommendations and summary of findings, would not be included in the 1 year time limitation for investigations.

For STB-initiated investigations, if the Board determines a violation has occurred, this section would allow for de novo review of the Board's order and provide authority for the United States court of appeals to affirm, modify, or set aside all or part of the order or remand the proceeding. This section also would limit any Board-ordered remedies to be prospective-only.

Finally, this section would require, not later than 1 year after the date of enactment of this act, the STB to issue rules for the investigations that it initiates.

Section 13. Arbitration of certain rail rates, practices, and common carrier service expectation disputes.

This section would expand existing work at the STB to encourage and provide arbitration for dispute resolution. This section would require, not later than 1 year after the enactment of this Act, the STB to promulgate regulations establishing a voluntary and binding arbitration process for certain rate and practice disputes. Among other issues, this arbitration process would apply to rates, accessorial charges, and rules and practices as applied to particular rail transportation, but it would not apply to labor protective conditions, issues of industry-wide applicability, certain license issues, and disputes solely between two or more carriers.

This section would require arbitration process only to be commenced when relevant parties opt-in. The process is available only if the rail carrier has market dominance. This section would set forth terms that require any arbitration decision to: be consistent with sound principles of rail regulation economics; be in writing; contain findings of fact and conclusions; bind the parties; and not have any precedential effect. It would limit the STB from separately reviewing cases, and it requires that arbitrators give due consideration to certain rail rate regulation issues.

This section would specify timelines for the: arbitrator selection (14 days after initiation); evidentiary process (90 days); and decision (30 days after evidentiary record closes). It would allow certain discretionary extensions. The section would also set a selection process for arbitrators and establishes equal sharing for the cost of the arbitrators, but not other associated arbitration costs.

This section would cap relief at \$2 million for practice disputes and \$25 million for rate dispute damages. It would limit rate prescription from arbitration to not longer than five years from the date of the decision. The Board would only be able to review an arbitration decision if there is a clear abuse of arbitral authority or discretion, it does not comply with statute, the relief award cap, or sound principles of rail regulation economics.

Section 14. Effect of proposals for rates from multiple origins and destinations.

This section would require, within 90 days of the date of the enactment of this Act, the Government Accountability Office to commence a study of rail transportation contract proposals containing multiple origin-to-destinations movements and to report results to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

Section 15. Reports.

This section would require the STB to submit, within 1 year of the enactment of this Act, a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives that indicates whether current large rate case methodologies are sufficient, not unduly complex, and cost effective. The report would also be required to indicate whether alternative methodologies exist, or could be developed, to streamline, expedite, or address the complexity of large rate cases. Any alternative methodologies must be consistent with sound economic principles.

This section would require the STB to provide, within 60 days of the date of enactment of this Act, quarterly reports to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives that describe the STB's progress toward addressing the issues raised in unfinished regulatory proceedings.

Section 16. Criteria.

This section would clarify standards and procedures for evaluating revenue adequacy and emphasizes the infrastructure needed in order for rail carriers to be able to meet the present and future demand for rail service. This section would not require any change to how the STB determines railroad revenue adequacy.

Section 17. Construction.

This section would clarify that nothing in the bill affects any cases being considered by the STB at the time of enactment.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 49. TRANSPORTATION

SUBTITLE I. DEPARTMENT OF TRANSPORTATION

【CHAPTER 7.】 CHAPTER 13. SURFACE TRANSPORTATION BOARD

SUBCHAPTER I. ESTABLISHMENT

§ 【701】1301. Establishment of Board

【(a) ESTABLISHMENT.—There is hereby established within the Department of Transportation the Surface Transportation Board.】

(a) ESTABLISHMENT.—The Surface Transportation Board is an independent establishment of the United States Government.

(b) MEMBERSHIP.—

(1) The Board shall consist of 【3 members】 *5 members*, to be appointed by the President, by and with the advice and consent of the Senate. Not more than 【2 members】 *3 members* may be appointed from the same political party.

【(2) At any given time, at least 2 members of the Board shall be individuals with professional standing and demonstrated knowledge in the fields of transportation or transportation regulation, and at least one member shall be an individual with professional or business experience (including agriculture) in the private sector.】

(2) At all times—

(A) at least 3 members of the Board shall be individuals with professional standing and demonstrated knowledge in the fields of transportation, transportation regulation, or economic regulation; and

(B) at least 2 members shall be individuals with professional or business experience (including agriculture) in the private sector.

(3) The term of each member of the Board shall be 5 years and shall begin when the term of the predecessor of that member ends. An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, shall be appointed for the remainder of that term. When the term of office of a member ends, the member may continue to serve until a successor is appointed and qualified, but for a period not to exceed one year. The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.

【(4) On January 1, 1996, the members of the Interstate Commerce Commission serving unexpired terms on December 29, 1995, shall become members of the Board, to serve for a period of time equal to the remainder of the term for which they were originally appointed to the Interstate Commerce Commission. Any member of the Interstate Commerce Commission whose term expires on December 31, 1995, shall become a member of the Board, subject to paragraph (3).】

【(5)】(4) No individual may serve as a member of the Board for more than 2 terms. In the case of an individual 【who becomes a member of the Board pursuant to paragraph (4), or an individual】 appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that indi-

vidual was appointed, such individual may not be appointed for more than one additional term.

[(6)](5) A member of the Board may not have a pecuniary interest in, hold an official relation to, or own stock in or bonds of, a carrier providing transportation by any mode and may not engage in another business, vocation, or employment.

[(7)](6) A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board. The Board may designate a member to act as Chairman during any period in which there is no Chairman designated by the President.

(c) CHAIRMAN.—

(1) There shall be at the head of the Board a Chairman, who shall be designated by the President from among the members of the Board. The Chairman shall receive compensation at the rate prescribed for level III of the Executive Schedule under section 5314 of title 5.

(2) Subject to the general policies, decisions, findings, and determinations of the Board, the Chairman shall be responsible for administering the Board. The Chairman may delegate the powers granted under this paragraph to an officer, employee, or office of the Board. The Chairman shall—

(A) appoint and supervise, other than regular and full-time employees in the immediate offices of another member, the officers and employees of the Board, including attorneys to provide legal aid and service to the Board and its members, and to represent the Board in any case in court;

(B) appoint the heads of offices with the approval of the Board;

(C) distribute Board business among officers and employees and offices of the Board;

(D) prepare requests for appropriations for the Board and submit those requests to the President and Congress with the prior approval of the Board; and

(E) supervise the expenditure of funds allocated by the Board for major programs and purposes.

§ [702]1302. Functions

Except as otherwise provided in the ICC Termination Act of 1995, or the amendments made thereby, the Board shall perform all functions that, immediately before January 1, 1996, were functions of the Interstate Commerce Commission or were performed by any officer or employee of the Interstate Commerce Commission in the capacity as such officer or employee.

§ [703]1303. Administrative provisions

[(a)] EXECUTIVE REORGANIZATION.—Chapter 9 of title 5, United States Code, shall apply to the Board in the same manner as it does to an independent regulatory agency, and the Board shall be an establishment of the United States Government.

[[b)](a) OPEN MEETINGS.—For purposes of section 552b of title 5, United States Code, the Board shall be deemed to be an agency.]

(a) OPEN MEETINGS.—

(1) *IN GENERAL.*—*The Board shall be deemed to be an agency for purposes of section 552b of title 5.*

(2) *NONPUBLIC COLLABORATIVE DISCUSSIONS.*—

(A) *IN GENERAL.*—*Notwithstanding section 552b of title 5, a majority of the members may hold a meeting that is not open to public observation to discuss official agency business if—*

(i) no formal or informal vote or other official agency action is taken at the meeting;

(ii) each individual present at the meeting is a member or an employee of the Board; and

(iii) the General Counsel of the Board is present at the meeting.

(B) *DISCLOSURE OF NONPUBLIC COLLABORATIVE DISCUSSIONS.*—*Except as provided under subparagraph (C), not later than 2 business days after the conclusion of a meeting under subparagraph (A), the Board shall make available to the public, in a place easily accessible to the public—*

(i) a list of the individuals present at the meeting; and

(ii) a summary of the matters discussed at the meeting, except for any matters the Board properly determines may be withheld from the public under section 552b(c) of title 5.

(C) *SUMMARY.*—*If the Board properly determines matters may be withheld from the public under section 555b(c) of title 5, the Board shall provide a summary with as much general information as possible on those matters withheld from the public.*

(D) *ONGOING PROCEEDINGS.*—*If a discussion under subparagraph (A) directly relates to an ongoing proceeding before the Board, the Board shall make the disclosure under subparagraph (B) on the date of the final Board decision.*

(E) *PRESERVATION OF OPEN MEETINGS REQUIREMENTS FOR AGENCY ACTION.*—*Nothing in this paragraph may be construed to limit the applicability of section 552b of title 5 with respect to a meeting of the members other than that described in this paragraph.*

(F) *STATUTORY CONSTRUCTION.*—*Nothing in this paragraph may be construed—*

(i) to limit the applicability of section 552b of title 5 with respect to any information which is proposed to be withheld from the public under subparagraph (B)(ii); or

(ii) to authorize the Board to withhold from any individual any record that is accessible to that individual under section 552a of title 5, United States Code.

[(c) INDEPENDENCE.—*In the performance of their functions, the members, employees, and other personnel of the Board shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department of Transportation.]*

[(d)](b) REPRESENTATION BY ATTORNEYS.—*Attorneys designated by the Chairman of the Board may appear for, and represent the Board in, any civil action brought in connection with any function*

carried out by the Board pursuant to this chapter or subtitle IV or as otherwise authorized by law.

[(e)](c) ADMISSION TO PRACTICE.—Subject to section 500 of title 5, the Board may regulate the admission of individuals to practice before it and may impose a reasonable admission fee.

[(f) BUDGET REQUESTS.—In each annual request for appropriations by the President, the Secretary of Transportation shall identify the portion thereof intended for the support of the Board and include a statement by the Board—

[(1) showing the amount requested by the Board in its budgetary presentation to the Secretary and the Office of Management and Budget; and

[(2) an assessment of the budgetary needs of the Board.

[(g) DIRECT TRANSMITTAL TO CONGRESS.—The Board shall transmit to Congress copies of budget estimates, requests, and information (including personnel needs), legislative recommendations, prepared testimony for congressional hearings, and comments on legislation at the same time they are sent to the Secretary of Transportation. An officer of an agency may not impose conditions on or impair communications by the Board with Congress, or a committee or Member of Congress, about the information.]

(d) SUBMISSION OF CERTAIN DOCUMENTS TO CONGRESS.—

(1) IN GENERAL.—*If the Board submits any budget estimate, budget request, supplemental budget estimate, or other budget information, legislative recommendation, prepared testimony for a congressional hearing, or comment on legislation to the President or to the Office of Management and Budget, the Board shall concurrently submit a copy of such document to—*

(A) *the Committee on Commerce, Science, and Transportation of the Senate; and*

(B) *the Committee on Transportation and Infrastructure of the House of Representatives.*

(2) NO APPROVAL REQUIRED.—*No officer or agency of the United States has any authority to require the Board to submit budget estimates or requests, legislative recommendations, prepared testimony for congressional hearings, or comments on legislation to any officer or agency of the United States for approval, comments, or review before submitting such recommendations, testimony, or comments to Congress.*

§ [704]1304. [Annual report] Reports

(a) ANNUAL REPORT.—The Board shall annually transmit to the Congress a report [on its activities.] *on its activities, including each instance in which the Board has initiated an investigation on its own initiative under this chapter or subtitle IV.*

(b) RATE CASE REVIEW METRICS.—

(1) QUARTERLY REPORTS.—*The Board shall post a quarterly report of rail rate review cases pending or completed by the Board during the previous quarter that includes—*

(A) *summary information of the case, including the docket number, case name, commodity or commodities involved, and rate review guideline or guidelines used;*

(B) *the date on which the rate review proceeding began;*

(C) *the date for the completion of discovery;*

(D) *the date for the completion of the evidentiary record;*

- (E) the date for the submission of closing briefs;
- (F) the date on which the Board issued the final decision;
- and
- (G) a brief summary of the final decision;
- (2) WEBSITE POSTING.—Each quarterly report shall be posted on the Board's public website.
- (c) COMPLAINTS.—
 - (1) IN GENERAL.—The Board shall establish and maintain a database of complaints received by the Board.
 - (2) QUARTERLY REPORTS.—The Board shall post a quarterly report of formal and informal service complaints received by the Board during the previous quarter that includes—
 - (A) the date on which the complaint was received by the Board;
 - (B) a list of the type of each complaint;
 - (C) the geographic region of each complaint; and
 - (D) the resolution of each complaint, if appropriate.
 - (3) WRITTEN CONSENT.—The quarterly report may identify a complainant that submitted an informal complaint only upon the written consent of the complainant.
 - (4) WEBSITE POSTING.—Each quarterly report shall be posted on the Board's public website.

§ [705]1305. Authorization of appropriations

There are authorized to be appropriated for the activities of the Board—

- [(1) \$8,421,000 for fiscal year 1996;
- [(2) \$12,000,000 for fiscal year 1997; and
- [(3) \$12,000,000 for fiscal year 1998.]
- (1) \$33,000,000 for fiscal year 2016;
- (2) \$35,000,000 for fiscal year 2017;
- (3) \$35,500,000 for fiscal year 2018;
- (4) \$35,500,000 for fiscal year 2019; and
- (5) \$36,000,000 for fiscal year 2020.

§ [706]1306. Reporting official action

(a) REPORTS ON PROCEEDINGS.—The Board shall make a written report of each proceeding conducted on complaint or on its own initiative and furnish a copy to each party to that proceeding. The report shall include the findings, conclusions, and the order of the Board and, if damages are awarded, the findings of fact supporting the award. The Board may have its reports published for public use. A published report of the Board is competent evidence of its contents.

- (b) SPECIAL RULES FOR MATTERS RELATED TO RAIL CARRIERS.—
 - (1) When action of the Board in a matter related to a rail carrier is taken by the Board, an individual member of the Board, or another individual or group of individuals designated to take official action for the Board, the written statement of that action (including a report, order, decision and order, vote, notice, letter, policy statement, or regulation) shall indicate—
 - (A) the official designation of the individual or group taking the action;
 - (B) the name of each individual taking, or participating in taking, the action; and

- (C) the vote or position of each participating individual.
- (2) If an individual member of a group taking an official action referred to in paragraph (1) does not participate in it, the written statement of the action shall indicate that the member did not participate. An individual participating in taking an official action is entitled to express the views of that individual as part of the written statement of the action. In addition to any publication of the written statement, it shall be made available to the public under section 552(a) of title 5.

§ [721]1321. Powers

(a) IN GENERAL.—The Board shall carry out this chapter and subtitle IV. Enumeration of a power of the Board in this chapter or subtitle IV does not exclude another power the Board may have in carrying out this chapter or subtitle IV. The Board may prescribe regulations in carrying out this chapter and subtitle IV.

(b) INQUIRIES, REPORTS, AND ORDERS.—The Board may—

- (1) inquire into and report on the management of the business of carriers providing transportation and services subject to subtitle IV;
- (2) inquire into and report on the management of the business of a person controlling, controlled by, or under common control with those carriers to the extent that the business of that person is related to the management of the business of that carrier;
- (3) obtain from those carriers and persons information the Board decides is necessary to carry out subtitle IV; and
- (4) when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5.

(c) SUBPOENA WITNESSES.—

- (1) The Board may subpoena witnesses and records related to a proceeding of the Board from any place in the United States, to the designated place of the proceeding. If a witness disobeys a subpoena, the Board, or a party to a proceeding before the Board, may petition a court of the United States to enforce that subpoena.
- (2) The district courts of the United States have jurisdiction to enforce a subpoena issued under this section. Trial is in the district in which the proceeding is conducted. The court may punish a refusal to obey a subpoena as a contempt of court.

(d) DEPOSITIONS.—

- (1) In a proceeding, the Board may take the testimony of a witness by deposition and may order the witness to produce records. A party to a proceeding pending before the Board may take the testimony of a witness by deposition and may require the witness to produce records at any time after a proceeding is at issue on petition and answer.
- (2) If a witness fails to be deposed or to produce records under paragraph (1), the Board may subpoena the witness to take a deposition, produce the records, or both.
- (3) A deposition may be taken before a judge of a court of the United States, a United States magistrate judge, a clerk of a district court, or a chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of

a county court, or court of common pleas of any State, or a notary public who is not counsel or attorney of a party or interested in the proceeding.

(4) Before taking a deposition, reasonable notice must be given in writing by the party or the attorney of that party proposing to take a deposition to the opposing party or the attorney of record of that party, whoever is nearest. The notice shall state the name of the witness and the time and place of taking the deposition.

(5) The testimony of a person deposed under this subsection shall be taken under oath. The person taking the deposition shall prepare, or cause to be prepared, a transcript of the testimony taken. The transcript shall be subscribed by the deponent.

(6) The testimony of a witness who is in a foreign country may be taken by deposition before an officer or person designated by the Board or agreed on by the parties by written stipulation filed with the Board. A deposition shall be filed with the Board promptly.

(e) WITNESS FEES.—Each witness summoned before the Board or whose deposition is taken under this section and the individual taking the deposition are entitled to the same fees and mileage paid for those services in the courts of the United States.

§ [722]1322. Board action

(a) EFFECTIVE DATE OF ACTIONS.—Unless otherwise provided in subtitle IV, the Board may determine, within a reasonable time, when its actions, other than an action ordering the payment of money, take effect.

(b) TERMINATING AND CHANGING ACTIONS.—An action of the Board remains in effect under its own terms or until superseded. The Board may change, suspend, or set aside any such action on notice. Notice may be given in a manner determined by the Board. A court of competent jurisdiction may suspend or set aside any such action.

(c) RECONSIDERING ACTIONS.—The Board may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances—

- (1) reopen a proceeding;
- (2) grant rehearing, reargument, or reconsideration of an action of the Board; or
- (3) change an action of the Board.

(1) An interested party may petition to reopen and reconsider an action of the Board under this subsection under regulations of the Board.

(d) FINALITY OF ACTIONS.—Notwithstanding subtitle IV [49 USCS §§ 10101 et seq.], an action of the Board under this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

§ [723]1323. Service of notice in Board proceedings

(a) DESIGNATION OF AGENT.—A carrier providing transportation subject to the jurisdiction of the Board under subtitle IV shall designate an agent [in the District of Columbia,] on whom service of

notices in a proceeding before, and of actions of, the Board may be made.

(b) **FILING AND CHANGING DESIGNATIONS.**—A designation under subsection (a) shall be in writing and filed with the Board. The designation may be changed at any time in the same manner as originally made.

(c) **SERVICE OF NOTICE.**—Except as otherwise provided, notices of the Board shall be served on its designated agent at the office or usual place of residence **[in the District of Columbia]** of that agent. A notice of action of the Board shall be served immediately on the agent or in another manner provided by law. If that carrier does not have a designated agent, service may be made by posting the notice in the office of the Board.

(d) **SPECIAL RULE FOR RAIL CARRIERS.**—In a proceeding involving the lawfulness of classifications, rates, or practices of a rail carrier that has not designated an agent under this section, service of notice of the Board on an attorney in fact for the carrier constitutes service of notice on the carrier.

§ [724]1324. Service of process in court proceedings

(a) **DESIGNATION OF AGENT.**—A carrier providing transportation subject to the jurisdiction of the Board under subtitle IV shall designate an agent **[in the District of Columbia]** on whom service of process in an action before a district court may be made. Except as otherwise provided, process in an action before a district court shall be served on the designated agent of that carrier at the office or usual place of residence **[in the District of Columbia]** of that agent. If the carrier does not have a designated agent, service may be made by posting the notice in the office of the Board.

(b) **CHANGING DESIGNATION.**—A designation under this section may be changed at any time in the same manner as originally made.

[§ 725. Administrative support

[The Secretary of Transportation shall provide administrative support for the Board.]

§ [726]1325. Railroad-Shipper Transportation Advisory Council

(a) **ESTABLISHMENT; MEMBERSHIP.**—There is established the Railroad-Shipper Transportation Advisory Council (in this section referred to as the “Council”) to be composed of 19 members, of which 15 members shall be appointed by the Chairman of the Board, after recommendation from rail carriers and shippers, within 60 days after December 29, 1995. The members of the Council shall be appointed as follows:

(1) The members of the Council shall be appointed from among citizens of the United States who are not regular full-time employees of the United States and shall be selected for appointment so as to provide as nearly as practicable a broad representation of the various segments of the railroad and rail shipper industries.

(2) Nine of the members shall be appointed from senior executive officers of organizations engaged in the railroad and rail shipping industries, which 9 members shall be the voting mem-

bers of the Council. Council action and Council positions shall be determined by a majority vote of the members present. A majority of such voting members shall constitute a quorum. Of such 9 voting members—

(A) at least 4 shall be representative of small shippers (as determined by the Chairman); and

(B) at least 4 shall be representative of Class II or III railroads.

(3) The remaining 6 members of the Council shall serve in a nonvoting advisory capacity only, but shall be entitled to participate in Council deliberations. Of the remaining members—

(A) 3 shall be representative of Class I railroads; and

(B) 3 shall be representative of large shipper organizations (as determined by the Chairman).

(4) The Secretary of Transportation and the members of the Board shall serve as ex officio, nonvoting members of the Council. The Council shall not be subject to the Federal Advisory Committee Act. A list of the members appointed to the Council shall be forwarded to the Chairmen and ranking members of the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

(5) Each ex officio member of the Council may designate an alternate, who shall serve as a member of the Council whenever the ex officio member is unable to attend a meeting of the Council. Any such designated alternate shall be selected from individuals who exercise significant decision-making authority in the Federal agency involved.

(b) **TERM OF OFFICE.**—The members of the Council shall be appointed for a term of office of 3 years, except that of the members first appointed—

(1) 5 members shall be appointed for terms of 1 year; and

(2) 5 members shall be appointed for terms of 2 years,

(1) as designated by the Chairman at the time of appointment. Any member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of his term until his successor has taken office. Vacancies on the Council shall be filled in the same manner in which the original appointments were made. No member of the Council shall be eligible to serve in excess of two consecutive terms.

(c) **ELECTION AND DUTIES OF OFFICERS.**—The Council Chairman and Vice Chairman and other appropriate officers of the Council shall be elected by and from the voting members of the Council. The Council Chairman shall serve as the Council's executive officer and shall direct the administration of the Council, assign officer and committee duties, and shall be responsible for issuing and communicating the reports, policy positions and statements of the Council. In the event that the Council Chairman is unable to serve, the Vice Chairman shall act as Council Chairman.

(d) **EXPENSES.**—

(1) The members of the Council shall receive no compensation for their services as such, but upon request by the Council Chairman, based on a showing of significant economic burden,

the Secretary of Transportation or the Chairman of the Board, to the extent provided in advance in appropriation Acts, may provide reasonable and necessary travel expenses for such individual Council members from Department or Board funding sources in order to foster balanced representation on the Council.

(2) Upon request by the Council Chairman, the Secretary or Chairman of the Board, to the extent provided in advance in appropriations Acts, may pay the reasonable and necessary expenses incurred by the Council in connection with the coordination of Council activities, announcement and reporting of meetings, and preparation of such Council documents as are required or permitted by this section.

(3) The Council may solicit and use private funding for its activities, subject to this subsection.

(4) Prior to making any Federal funding requests, the Council Chairman shall undertake best efforts to fund such activities privately unless the Council Chairman determines that such private funding would create a conflict of interest, or the appearance thereof, or is otherwise impractical. The Council Chairman shall not request funding from any Federal agency without providing written justification as to why private funding would create any such conflict or appearance, or is otherwise impractical.

(5) To enable the Council to carry out its functions—

(A) the Council Chairman may request directly from any Federal agency such personnel, information, services, or facilities, on a compensated or uncompensated basis, as the Council Chairman determines necessary to carry out the functions of the Council;

(B) each Federal agency may, in its discretion, furnish the Council with such information, services, and facilities as the Council Chairman may request to the extent permitted by law and within the limits of available funds; and

(C) each Federal agency may, in its discretion, detail to temporary duty with the Council, such personnel as the Council Chairman may request for carrying out the functions of the Council, each such detail to be without loss of seniority, pay, or other employee status.

(e) MEETINGS.—The Council shall meet at least semi-annually and shall hold other meetings at the call of the Council Chairman. Appropriate Federal facilities, where available, may be used for such meetings. Whenever the Council, or a committee of the Council, considers matters that affect the jurisdictional interests of Federal agencies that are not represented on the Council, the Council Chairman may invite the heads of such agencies, or their designees, to participate in the deliberations of the Council.

(f) FUNCTIONS AND DUTIES; ANNUAL REPORT.—

(1) The Council shall advise the Secretary, the Chairman, the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Transportation and Infrastructure of the House of Representatives with respect to rail transportation policy issues it considers significant, with particular attention to issues of importance to small shippers and small railroads, including car supply, rates, competition, and

effective procedures for addressing legitimate shipper and other claims.

(2) To the extent the Council addresses specific grain car issues, it shall coordinate such activities with the National Grain Car Council. The Secretary and Chairman shall cooperate with the Council to provide research, technical and other reasonable support in developing any reports and policy statements required or authorized by this subsection.

(3) The Council shall endeavor to develop within the private sector mechanisms to prevent, or identify and effectively address, obstacles to the most effective and efficient transportation system practicable.

(4) The Council shall prepare an annual report concerning its activities and the results of Council efforts to resolve industry issues, and propose whatever regulatory or legislative relief it considers appropriate. The Council shall include in the annual report such recommendations as it considers appropriate with respect to the performance of the Secretary and Chairman under this chapter, and with respect to the operation and effectiveness of meetings and industry developments relating to the Council's efforts, and such other information as it considers appropriate. Such annual reports shall be reviewed by the Secretary and Chairman, and shall include the Secretary's and Chairman's views or comments relating to—

(A) the accuracy of information therein;

(B) Council efforts and reasonableness of Council positions and actions; and

(C) any other aspects of the Council's work as they may consider appropriate.

The Council may prepare other reports or develop policy statements as the Council considers appropriate. An annual report shall be submitted for each fiscal year and shall be submitted to the Secretary and Chairman within 90 days after the end of the fiscal year. Other such reports and statements may be submitted as the Council considers appropriate.

§ 727. Definitions

[All terms used in this chapter that are defined in subtitle IV shall have the meaning given those terms in that subtitle.]

§ 1326. Authority of the Inspector General

(a) *IN GENERAL.*—*The Inspector General of the Department of Transportation, in accordance with the mission of the Inspector General to prevent and detect fraud and abuse, shall have authority to review only the financial management, property management, and business operations of the Surface Transportation Board, including internal accounting and administrative control systems, to determine the Board's compliance with applicable Federal laws, rules, and regulations.*

(b) *DUTIES.*—*In carrying out this section, the Inspector General shall—*

(1) *keep the Chairman of the Board, the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Transportation and Infrastructure of the House of Representatives fully and currently informed about problems re-*

lating to administration of the internal accounting and administrative control systems of the Board;

(2) issue findings and recommendations for actions to address the problems referred to in paragraph (1); and

(3) submit periodic reports to the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Transportation and Infrastructure of the House of Representatives that describe any progress made in implementing actions to address the problems referred to in paragraph (1).

(c) ACCESS TO INFORMATION.—In carrying out this section, the Inspector General may exercise authorities granted to the Inspector General under subsections (a) and (b) of section 6 of the Inspector General Act of 1978 (5 U.S.C. App.).

(d) AUTHORIZATION OF APPROPRIATIONS.—

(1) FUNDING.—There are authorized to be appropriated to the Secretary of Transportation for use by the Inspector General of the Department of Transportation such sums as may be necessary to cover expenses associated with activities pursuant to the authority exercised under this section.

(2) REIMBURSABLE AGREEMENT.—In the absence of an appropriation under this subsection for an expense referred to in paragraph (1), the Inspector General and the Board shall have a reimbursement agreement to cover such expense.

SUBTITLE IV. INTERSTATE TRANSPORTATION

PART A. RAIL

CHAPTER 107. RATES

SUBCHAPTER I. GENERAL AUTHORITY

§ 10701. Standards for rates, classifications, through routes, rules, and practices

* * * * *

(d)(1) If the Board determines, under section 10707 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

(2) In determining whether a rate established by a rail carrier is reasonable for purposes of this section, the Board shall give due consideration to—

(A) the amount of traffic which is transported at revenues which do not contribute to going concern value and the efforts made to minimize such traffic;

(B) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

(C) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues, recognizing the policy of this part that rail carriers shall earn adequate revenues, as established by the Board under section 10704(a)(2) of this title.

[(3) The Board shall, within one year after January 1, 1996, complete the pending Interstate Commerce Commission non-

coal rate guidelines proceeding to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.】

(3) *The Board shall maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.*

§ 10704. Authority and criteria: rates, classifications, rules, and practices prescribed by Board

(a)(1) When the Board, after a full hearing, decides that a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board under this part, or that a classification, rule, or practice of that carrier, does or will violate this part, the Board may prescribe the maximum rate, classification, rule, or practice to be followed. The Board may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Board.

(2) The Board shall maintain and revise as necessary standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction under this part that are adequate, under honest, economical, and efficient management, *for the infrastructure and investment needed to meet the present and future demand for rail services and to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business.* The Board shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph. Revenue levels established under this paragraph should—

(A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and

(B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

(3) On the basis of the standards and procedures described in paragraph (2), the Board shall annually determine which rail carriers are earning adequate revenues.

* * * * *

【(d) Within 9 months after January 1, 1996, the Board shall establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates.】 *(d)(1) The Board shall maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates.* The procedures shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings and exemption or revocation proceedings, including appropriate sanctions for such delay, and for ensuring prompt disposition of motions and interlocutory administrative appeals.

(2)(A) *Except as provided under subparagraph (B), in a stand-alone cost rate challenge, the Board shall comply with the following timeline:*

(i) *Discovery shall be completed not later than 150 days after the date on which the challenge is initiated.*

(ii) *The development of the evidentiary record shall be completed not later than 155 days after the date on which discovery is completed under clause (i).*

(iii) *The closing brief shall be submitted not later than 60 days after the date on which the development of the evidentiary record is completed under clause (i).*

(iv) *A final Board decision shall be issued not later than 180 days after the date on which the evidentiary record is completed under clause (i).*

(B) *The Board may extend a timeline under subparagraph (A) after a request from any party or in the interest of due process.*

§ 10709. Authority and criteria: rates, classifications, rules, and practices prescribed by Board

* * * * *

[(h)(1) Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities (including forest products, but not including wood pulp, wood chips, pulpwood or paper) involving the utilization of carrier owned or leased equipment not in excess of 40 percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC).

[(2) The Board may, on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of paragraph (1) of this subsection as the Board considers appropriate, if it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 11101 of this title.

[(3)(A) This subsection shall cease to be effective after September 30, 1998.

[(B) Before October 1, 1997, the National Grain Car Council and the Railroad-Shipper Transportation Advisory Council shall make recommendations to Congress on whether to extend the effectiveness of or otherwise modify this subsection.]

SUBTITLE IV. INTERSTATE TRANSPORTATION

PART A. RAIL

CHAPTER 117. ENFORCEMENT: INVESTIGATIONS, RIGHTS, AND REMEDIES

§ 11701. General authority

(a) Except as otherwise provided in this part, the Board may begin an investigation under this part [only on complaint] *on the Board's own initiative or upon receiving a complaint pursuant to subsection (b)*. If the Board finds that a rail carrier is violating this

part, the Board shall take appropriate action to compel compliance with this part. *If the Board finds a violation of this part in a proceeding brought on its own initiative, any remedy from such proceeding may only be applied prospectively.*

(b) A person, including a governmental authority, may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part. The complaint must state the facts that are the subject of the violation. The Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Board may not dismiss a complaint made against a rail carrier providing transportation subject to the jurisdiction of the Board under this part because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun.

(d) *In any investigation commenced on the Board's own initiative, the Board shall—*

(1) *not later than 30 days after initiating the investigation, provide written notice to the parties under investigation, which shall state the basis for such investigation;*

(2) *only investigate issues that are of national or regional significance;*

(3) *permit the parties under investigation to file a written statement describing any or all facts and circumstances concerning a matter which may be the subject of such investigation;*

(4) *make available to the parties under investigation and Board members—*

(A) *any recommendations made as a result of the investigation; and*

(B) *a summary of the findings that support such recommendations;*

(5) *to the extent practicable, separate the investigative and decisionmaking functions of staff;*

(6) *dismiss any investigation that is not concluded by the Board with administrative finality within 1 year after the date on which it was commenced; and*

(7) *not later than 90 days after receiving the recommendations and summary of findings under paragraph (4)—*

(A) *dismiss the investigation if no further action is warranted; or*

(B) *initiate a proceeding to determine if a provision under this part has been violated.*

(e)(1) *Any parties to an investigation against whom a violation is found as a result of an investigation begun on the Board's own initiative may, not later than 60 days after the date of the order of the Board finding such a violation, institute an action in the United States court of appeals for the appropriate judicial circuit for de novo review of such order in accordance with chapter 7 of title 5.*

(2) *The court—*

(A) shall have jurisdiction to enter a judgment affirming, modifying, or setting aside, in whole or in part, the order of the Board; and

(B) may remand the proceeding to the Board for such further action as the court may direct.

§ 11708. Voluntary arbitration of certain rail rates and practices disputes

(a) *IN GENERAL.*—Not later than 1 year after the date of the enactment of the Surface Transportation Board Reauthorization Act of 2015, the Board shall promulgate regulations to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints subject to the jurisdiction of the Board.

(b) *COVERED DISPUTES.*—The voluntary and binding arbitration process established pursuant to subsection (a)—

(1) shall apply to disputes involving—

(A) rates, demurrage, accessorial charges, misrouting, or mishandling of rail cars; or

(B) a carrier's published rules and practices as applied to particular rail transportation;

(2) shall not apply to disputes—

(A) to obtain the grant, denial, stay, or revocation of any license, authorization, or exemption;

(B) to prescribe for the future any conduct, rules, or results of general, industry-wide applicability;

(C) to enforce a labor protective condition; or

(D) that are solely between 2 or more rail carriers; and

(3) shall not prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes the parties may have.

(c) *ARBITRATION PROCEDURES.*—

(1) *IN GENERAL.*—The Board—

(A) may make the voluntary and binding arbitration process established pursuant to subsection (a) available only to the relevant parties;

(B) may make the voluntary and binding arbitration process available only—

(i) after receiving the written consent to arbitrate from all relevant parties; and

(ii)(I) after the filing of a written complaint; or

(II) through other procedures adopted by the Board in a rulemaking proceeding;

(C) with respect to rate disputes, may make the voluntary and binding arbitration process available only to the relevant parties if the rail carrier has market dominance (as determined under section 10707); and

(D) may initiate the voluntary and binding arbitration process not later than 40 days after the date on which a written complaint is filed or through other procedures adopted by the Board in a rulemaking proceeding.

(2) *LIMITATION.*—Initiation of the voluntary and binding arbitration process shall preclude the Board from separately reviewing a complaint or dispute related to the same rail rate or practice in a covered dispute involving the same parties.

(3) *RATES.*—In resolving a covered dispute involving the reasonableness of a rail carrier's rates, the arbitrator or panel of arbitrators, as applicable, shall consider the Board's methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under section 10704(a)(2)).

(d) *ARBITRATION DECISIONS.*—Any decision reached in an arbitration process under this section—

(1) shall be consistent with sound principles of rail regulation economics;

(2) shall be in writing;

(3) shall contain findings of fact and conclusions;

(4) shall be binding upon the parties; and

(5) shall not have any precedential effect in any other or subsequent arbitration dispute.

(e) *TIMELINES.*—

(1) *SELECTION.*—An arbitrator or panel of arbitrators shall be selected not later than 14 days after the date of the Board's decision to initiate arbitration.

(2) *EVIDENTIARY PROCESS.*—The evidentiary process of the voluntary and binding arbitration process shall be completed not later than 90 days after the date on which the arbitration process is initiated unless—

(A) a party requests an extension; and

(B) the arbitrator or panel of arbitrators, as applicable, grants such extension request.

(3) *DECISION.*—The arbitrator or panel of arbitrators, as applicable, shall issue a decision not later than 30 days after the date on which the evidentiary record is closed.

(4) *EXTENSIONS.*—The Board may extend any of the timelines under this subsection upon the agreement of all parties in the dispute.

(f) *ARBITRATORS.*—

(1) *IN GENERAL.*—Unless otherwise agreed by all of the parties, an arbitration under this section shall be conducted by an arbitrator or panel of arbitrators, which shall be selected from a roster, maintained by the Board, of persons with rail transportation, economic regulation, professional or business experience, including agriculture, in the private sector.

(2) *INDEPENDENCE.*—In an arbitration under this section, the arbitrators shall perform their duties with diligence, good faith, and in a manner consistent with the requirements of impartiality and independence.

(3) *SELECTION.*—

(A) *IN GENERAL.*—If the parties cannot mutually agree on an arbitrator, or the lead arbitrator of a panel of arbitrators, the parties shall select the or lead arbitrator from the roster by alternately striking names from the roster until only 1 name remains meeting the criteria set forth in paragraph (1).

(B) *PANEL OF ARBITRATORS.*—If the parties agree to select a panel of arbitrators, instead of a single arbitrator, the panel shall be selected under this subsection as follows:

(i) *The parties to a dispute may mutually select 1 arbitrator from the roster to serve as the lead arbitrator of the panel of arbitrators.*

(ii) *If the parties cannot mutually agree on a lead arbitrator, the parties shall select a lead arbitrator using the process described in subparagraph (A).*

(iii) *In addition to the lead arbitrator selected under this subparagraph, each party to a dispute shall select 1 additional arbitrator from the roster, regardless of whether the other party struck out the arbitrator's name under subparagraph (A).*

(4) *COST.—The parties shall share the costs incurred by the Board and arbitrators equally, with each party responsible for paying its own legal and other associated arbitration costs.*

(g) *RELIEF.—*

(1) *IN GENERAL.—Subject to the limitations set forth in paragraphs (2) and (3), an arbitral decision under this section may award the payment of damages or rate prescriptive relief.*

(2) *PRACTICE DISPUTES.—The damage award for practice disputes may not exceed \$2,000,000.*

(3) *RATE DISPUTES.—*

(A) *MONETARY LIMIT.—The damage award for rate disputes, including any rate prescription, may not exceed \$25,000,000.*

(B) *TIME LIMIT.—Any rate prescription shall be limited to not longer than 5 years from the date of the arbitral decision.*

(h) *BOARD REVIEW.—If a party appeals a decision under this section to the Board, the Board may review the decision under this section to determine if—*

(1) *the decision is consistent with sound principles of rail regulation economics;*

(2) *a clear abuse of arbitral authority or discretion occurred;*

(3) *the decision directly contravenes statutory authority; or*

(4) *the award limitation under subsection (g) was violated.*