THE
NATIONAL
INDUSTRIAL
TRANSPORTATION
LEAGUE

July 15, 2016

The Honorable Daniel R. Elliott III
Chairman
Surface Transportation Board
395 E St. S.W.
Washington, DC 20423

Re: Ex Parte No. 731—Rules Relating to Board-Initiated Investigations

Dear Chairman Elliott,

The National Industrial Transportation League (NITL or League) respectfully submits these comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Surface Transportation Board (STB or Board) in a decision served on May 16, 2016 in Ex Parte No. 731-- *Rules Relating to Board-Initiated Investigations.* The League was founded in 1907 and represents companies engaged in the transportation of goods in both domestic and international commerce. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Rail transportation is vitally important to League members and their customers, and many League members depend highly upon efficient and effective rail service for the transportation of their goods.

In drafting this proposed rule, the Board has acted in a timely fashion to implement the new authorities granted by section 12 of the Surface Transportation Board Reauthorization Act of 2015 (Reauthorization Act). Among other matters, the Reauthorization Act requires that a final rule on Board-initiated investigations be completed one year from the date of enactment (December 18, 2016).

We note without comment that the Reauthorization Act included a number of explicit provisions which simultaneously empower the Board to undertake investigations on its own initiative and impose important limitations. Among these limitations are that only matters of regional or national significance may be the subject of a Board-initiated investigation; any remedy which might be applied in resolving a matter may only be prospective; and investigations must be concluded with "administrative finality" within one year. In drafting the proposed rule the Board has carefully followed the dictates of Congress, neither embellishing nor diminishing the new authority bestowed by Congress.

The League strongly supported enactment of the Reauthorization Act and welcomes this new authority for the Board to undertake investigations of potential violations of 49 U.S.C. Subtitle IV, Part A. In reviewing section 12 of the Reauthorization Act we believe the Board has considerable discretion in proposing a methodology for Board-initiated investigations. The

proposed rule sets forth a three stage process: Preliminary Fact Finding, Board Initiated Investigation, and a Formal Board Proceeding. While we respect the apparent regard for due process, we believe the Board has proposed an overly cautious and unnecessarily complicated path.

In the first stage, a Preliminary Fact Finding, Board staff conducting the fact finding would have no powers to compel the production of evidence, subpoena witnesses, or otherwise require constructive participation in the fact finding stage by parties that arguably would inform the task. Staff would have no choice but to hope that the parties will voluntarily participate in the fact finding. We are unconvinced the desired result will occur absent appropriate tools to require providing the Board staff with the information they deem necessary to conduct the preliminary fact finding.

While we expect Board staff will be diligent in the fact finding task, no timeline or time limit has been proposed in the rule for this important first phase. We believe both the Board and the entities targeted in the fact finding stage would benefit considerably from reasonable and achievable deadlines to complete the work of this first stage. Moreover, given that a second stage, more formal investigation has been proposed in this rule, the timeline for completing the initial fact finding should, in our view, be no more than 45 days.

The entire initial proceeding appears to be wrapped in an unnecessary veil of secrecy given the proposed rule's provision of a "non-public" and confidential cloak around the fact finding stage. We do not believe that section 12 of the Reauthorization Act mandates such treatment. We of course believe that information normally protected from public disclosure should always enjoy that same protection, but we question the necessity to conduct the first stage fact finding entirely behind closed doors. In particular, we believe this provision of the proposed rule may complicate determinations of whether or not the matter being investigated is of national or regional significance. If entities that are not either a party that brings a matter to the Board's attention or the target of the staff fact finding have no knowledge that a fact finding is being initiated, then opportunities for those other parties to provide relevant information that might illuminate the true scope of the alleged violation will be foreclosed. The League believes that the task of determining whether the matter rises to the level of "national or regional significance" will have been made far more difficult, as well as determining whether there has been an apparent violation. We suggest that the proposed rule be modified to include publication of a notice to the public when a determination has been made that Board staff will commence a fact finding, including an appropriately high level summary of the matter to be examined. The notice would include an invitation for other parties to provide relevant information to the Board staff conducting the fact finding.

As proposed, the rule would give Board staff total discretion to decide whether the matter being examined in the fact finding stage merits seeking authorization from the Board to commence the next, more formal stage of a Board-Initiated Investigation. The guidance given to Board staff in the proposed rule is appropriate; it closely follows the statutory guidance that matters must be of national or regional significance, and that a violation of 49 U.S.C. Subtitle IV, Part A may have occurred. However, the lack of any transparency is troubling to the League. We urge the Board to revisit this aspect of the proposed rule to include a public reporting of the

matter being examined and the staff's conclusions, at a summary level. Such reporting should include appropriate protections of any confidential information including, when necessary, the identification of the party or parties that brought the matter to the Board's attention and the target(s) of the fact finding. We are specifically not suggesting that entities not party to the fact finding stage be given the opportunity to demand that the matter be reopened for another round of fact finding. Rather, we would prefer to see the Board adopt our suggestion (above) of publication of a notice to the public when a determination has been made that Board staff will commence a fact finding.

The proposed rule would establish a "Board-Initiated Investigation" as the second phase. We agree that the decision to open an investigation should not require a fact finding stage in all cases. But as with the fact finding stage, and for the same reasons, we believe that conducting such investigations completely out of sight from any public observation is unnecessary and unhelpful. Although the Board would issue an Order of Investigation that states the basis of the investigation and identifies the Investigating Officer(s), the rule specifically declares the investigation to be "nonpublic" and that a copy of the Order will be provided to the parties under investigation. At a minimum, the Order should be made public. Likewise, closing off the investigation from any intervention or participation by non-parties would deny the investigating official potentially important and relevant information about the matter being investigated. We urge the Board to revisit this aspect of the proposed rule and provide a means to ensure greater transparency and opportunities for third parties to contribute relevant evidence that could be helpful to the Board in an investigation.

We note that a timeline that comports with the provisions of the Reauthorization Act would be established by this rule. We note also and appreciate that the investigating officer would have subpoena powers and the ability to compel production of witnesses, documents, and so on. The provision in this proposed rule that would give the investigating official discretion to first present his or her findings to the parties that are the subject of the investigation is wholly supported by the League. Indeed, we believe that by doing so the parties may be given an opportunity settle a dispute, and certainly will have the opportunity to learn whether their arguments have been fairly and accurately noted by the investigating official. We would, however, caution that this provision remain a matter of discretion for the investigating official.

We appreciate the opportunity to comment on this proposed rule.

Sincerely yours,

Jennifer Hedrick
Executive Director
National Industrial Transportation League