



**Committee on Transportation and Infrastructure**  
**U.S. House of Representatives**  
**Washington, DC 20515**

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July 23, 2019

**SUMMARY OF SUBJECT MATTER**

**TO:** Members, Subcommittee on Railroads, Pipelines, and Hazardous Materials  
**FROM:** Staff, Subcommittee on Railroads, Pipelines, and Hazardous Materials  
**RE:** Subcommittee Railroad Shippers Roundtable

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**PURPOSE**

The Subcommittee on Railroads, Pipelines, and Hazardous Materials will meet on Thursday, July 25, 2019, at 10:00 a.m. in 2167 Rayburn House Office Building to hold a Railroad Shippers Roundtable. The purpose of this roundtable is to learn from railroad shippers about the challenges they face in moving commodities by rail. Participants of the Roundtable include International Paper; Kinder Morgan Terminals; National Grain and Feed Association; Packaging Corporation of America; Solvay; Seeler Industries; Arizona Electric Power Cooperative; and the University of Minnesota.

**BACKGROUND**

**I. THE SURFACE TRANSPORTATION BOARD**

The economic regulation of the railroads is administered by the Surface Transportation Board (STB or Board). The STB is a five-member independent agency whose members are appointed by the President with the advice and consent of the Senate, serving staggered five-year terms. Currently, three of the five members are installed (two Republicans and one Democrat), and the STB can operate with only one Board Member. The STB's predecessor, the Interstate Commerce Commission (ICC), was responsible for the economic regulation of rail carriers until Congress abolished the ICC and created the STB by passage of the *ICC Termination Act of 1995* (ICCTA) (P.L. 104-88). Congress last reauthorized the STB in the *Surface Transportation Board Reauthorization Act of 2015* (P.L. 114-110) through Fiscal Year 2020.

The STB's jurisdiction includes overseeing and monitoring railroad commercial practices nationally; enforcing the railroads' common carrier obligations; evaluating challenges to the reasonableness of rail rates; reviewing proposed railroad mergers; ensuring rail carriers provide fair employee protective arrangements in certain transactions; monitoring rail carriers to ensure they are able to earn revenues that are adequate for the infrastructure and investment needed to meet the present and future demand for rail services; investigating rail service matters of regional and national significance; and authorizing construction, operation, discontinuance, and abandonment of rail lines and service.<sup>1</sup>

## II. RAILROAD SHIPPERS

Railroad shippers range from large, multi-national corporations, to small-sized operations. They also vary in the commodities they ship, such as corn, wheat, and soybeans; fertilizers, and various chemicals; cement, sand, and crushed stone; lumber, pulp, and paper products; various food products; crude oil, coal, and other petroleum and energy products; and scrap recycling products, among others. Numerous commodities are exempt from STB's regulations governing the provision of common carrier service, maintenance of reasonable practices and rates, and provision of adequate service. Exempt commodities include a range of agricultural products, such as fresh fish and meat, cheese and special dairy products, as well as other commodities, including lumber or wood products, chemical waste, and coke produced from coal, among others.

Since enactment of the *Staggers Rail Act of 1980*, the freight rail industry has consolidated from more than 40 major railroads in 1980 to the seven Class I railroads that operate in the U.S. today. Some shippers are "captive," or dependent on a single railroad to transport their products by rail. Some shippers indicate that an estimated 78 percent of freight rail stations are captive to a single major railroad (intramodal competition).<sup>2</sup> While only served by a single major railroad, depending on the movement, some shippers can use other modes, such as truck or barge, to transport their products (intermodal competition). Whether a shipper has feasible transportation alternatives, in the form of intramodal or intermodal competition, is a qualitative analysis undertaken by the STB in a particular case.

### A. Shipping Rates

Rail carriers have a common carrier obligation to quote rates and provide service on reasonable requests. Carriers also must maintain reasonable connections with adjacent rail carriers' networks to allow for the free flow of rail traffic. When a route involves more than one carrier, the carriers may participate in a joint rate to collect a single combined price from the shipper for the transportation being provided. Since the enactment of the *Staggers Rail Act of 1980*, railroads have been allowed to enter into voluntary rate contracts with shippers to provide service on specific terms and conditions. With very limited exceptions, contract rates are not subject to STB jurisdiction and do not require equal treatment of similarly situated shippers as common carrier rates do.

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<sup>1</sup> STB also has jurisdiction over certain trucking company, moving van, and noncontiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission.

<sup>2</sup> Rail Customer Coalition, <https://www.freightrailreform.com/why/>, accessed July 17, 2019.

The STB adjudicates rate reasonableness only for common carrier rates that exceed a minimum jurisdictional threshold established in statute of 180 percent of revenue to variable cost,<sup>3</sup> and where the carrier is found to have market dominance over the traffic at issue. In acting as adjudicator, the STB seeks to determine the fair rate based on balancing the goal of protecting shippers from unreasonably high rates with the goal of railroads having as much pricing flexibility as possible to earn adequate revenues to attract private capital and reinvest in their networks.

A shipper seeking to challenge a rate must file an administrative complaint with the STB. The complainant may seek relief under one of the agency’s three methodologies: Full SAC (stand-alone cost) intended for larger cases; Simplified SAC for medium-size cases; or Three-Benchmark intended for the smallest cases.

	<b>Full SAC</b>	<b>Simplified SAC</b>	<b>3-Benchmark</b>
<b>Maximum available relief</b>	No limit (rate relief limited to 10 years)	No limit (rate relief limited to 5 years)	\$4 million (over a 5-year period)
<b>Methodology</b>	<ul style="list-style-type: none"> <li>Rate at issue cannot be higher than the rate a hypothetical, maximally efficient stand-alone railroad (SARR) would need to charge to serve the complaining shipper, while fully covering all of its costs, including a reasonable return on investment</li> <li>SARR analyzed over a 10-year time period</li> </ul>	Similar to full SAC, with notable exceptions: <ul style="list-style-type: none"> <li><b>Route:</b> Must use predominate route of the issue movements during the prior 12 months.</li> <li><b>Configuration/facilities:</b> Generally, no changes allowed, reducing amount of modeling required.</li> <li><b>Traffic Group:</b> Actual traffic. No rerouting of traffic permitted.</li> <li><b>Time period analyzed:</b> SARR analyzed over a 1-year time period.</li> </ul>	Challenged rate compared to three “benchmark” figures to determine reasonableness: <ul style="list-style-type: none"> <li><b>Revenue Shortfall Allocation Method (RSAM),</b> measuring average markup over variable cost that the defendant railroad would need to charge all of its “potentially captive” traffic (traffic priced above the 180% R/V level) in order for the railroad to earn adequate revenues as measured by the Board under, 49 U.S.C. § 10704(a)(2).</li> <li><b>R/VC &gt; 180 benchmark,</b> measuring the average markup over variable cost currently earned by the defendant railroad on its potentially captive traffic.</li> <li><b>R/VC COMP benchmark</b> compares the markup being paid by the challenged traffic to the average markup assessed on other comparable potentially captive traffic</li> </ul>
<b>Procedural Schedule</b>	17 months	Approximately 16 months	8 months

In January 2018, the STB established the Rate Reform Task Force to recommend improvements to the existing rate review processes and propose new rate review methodologies that are more reflective of the current state of the industry. In its April 2019 report to the STB, the Task Force wrote that many small shippers find the Full-SAC cases too costly, and the Three-Benchmark and Simplified-SAC too complex and costly to pursue.<sup>4</sup> The report also stated that some agricultural shippers expressed concern about their ability to bring a case to the STB and found the Three-Benchmark methodology unworkable because their shipments are not static or predictable.<sup>5</sup> On the other hand, coal shippers were generally happy with the Full SAC and argued that it should not be changed.<sup>6</sup>

<sup>3</sup> 49 U.S.C. § 10707(d)(2): “A finding by the Board that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than 180 percent does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation; or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

<sup>4</sup> Rate Reform Task Force, Report to the Surface Transportation Board, April 25, 2019, page 9.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.*

From 1996 to present, 52 rate cases were brought before the STB. Of those cases, 27 settled; 12 were found to have unreasonable rates; 11 were found to have reasonable rates; and 2 were withdrawn.<sup>7</sup>

## **B. Reciprocal Switching**

According to the STB, under reciprocal switching, an incumbent rail carrier transports a shipper's traffic to an interchange point where the cars are switched to a competing carrier. The competing carrier pays the incumbent carrier a switching fee for bringing (or taking) the cars from the shipper's facility to the interchange point (or vice versa). That fee is incorporated into the competing carrier's total rate to the shipper. In doing so, a competing carrier can offer a single-line rate even if its lines do not physically reach a shipper's facility, thereby establishing a competing rate.<sup>8</sup> Reciprocal switching may also be called "competitive switching" by shippers or "forced access" by the railroads.

The *Staggers Act of 1980* authorized the STB to require rail carriers to enter into reciprocal switching agreements under certain circumstances.<sup>9</sup> In 1985, the ICC adopted regulations specifying that reciprocal switching would only be prescribed if the agency determines it is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive, and otherwise satisfies the criteria of 49 U.S.C. § 11102(c).<sup>10</sup> In July 2011, the National Industrial Transportation League (NITL) petitioned the STB to initiate a rulemaking to modify the STB's regulations for reciprocal switching.<sup>11</sup> In comments to the STB, NITL stated that the "massive burdens of proof, denial of past relief, and substantial costs have deterred shippers from even attempting to establish reciprocal switching agreements" under the STB's existing regulations.<sup>12</sup> In its petition, NITL stated that the new regulations should simplify the burden of proof, be less complex and costly to administer, and should more effectively address competitive concerns.<sup>13</sup>

In July 2016, the STB issued a notice of proposed rulemaking (NPRM) on reciprocal switching.<sup>14</sup> The proposal included a two-prong approach, pursuant to which the Board would have

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<sup>7</sup> Surface Transportation Board, Summary of Results of Freight Rail Rate Challenges at the Surface Transportation Board, [https://www.stb.gov/stb/industry/Rate\\_Cases.htm](https://www.stb.gov/stb/industry/Rate_Cases.htm)

<sup>8</sup> Surface Transportation Board, Petition For Rulemaking To Adopt Revised Competitive Switching Rules, Decision, Docket No. EP 711 (Sub-No. 1) Reciprocal Switching, Service Date July 27, 2016, Page 2.

<sup>9</sup> 49 U.S.C. § 11102(c).

<sup>10</sup> Surface Transportation Board, Notice of Proposed Rulemaking, Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching, Docket No. EP 711, Vol 81, No. 149, August 3, 2016, page 51150.

<sup>11</sup> Ex Parte No. 711 Petition for Rulemaking.

<sup>12</sup> Comments by the National Industrial Transportation League before the Surface Transportation Board, Ex Parte No. 705, Competition in the Railroad Industry, April 12, 2011, page 11.

[https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/3b1174a20ceb148d85257870007f9e81/\\$FILE/229240.PDF](https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/3b1174a20ceb148d85257870007f9e81/$FILE/229240.PDF)

<sup>13</sup> National Industrial Transportation League, Ex Parte No. 711, Petition for Rulemaking To Adopt Revised Competitive Switching Rules, July 7, 2011, pages 5-6.

[https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/80edc553b468f44b852578c60068783b/\\$FILE/230578.PDF](https://www.stb.gov/Filings/all.nsf/d6ef3e0bc7fe3c6085256fe1004f61cb/80edc553b468f44b852578c60068783b/$FILE/230578.PDF)

<sup>14</sup> Surface Transportation Board, Notice of Proposed Rulemaking, Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching, Docket No. EP 711, Vol 81, No. 149, August 3, 2016.

the ability to order reciprocal switching either when 1) it is practicable and in the public interest, or 2) when it is necessary to provide competitive rail service.<sup>15</sup> Under the proposal, reciprocal switching arrangements would not be permitted if either rail carrier involved in the arrangement showed the switching arrangement is not feasible or is unsafe, or that the presence of switching would unduly hamper the ability of that carrier to serve its shippers.<sup>16</sup> The STB received public comment on the proposal and has not issued a final rule.

### C. Demurrage and Accessorial Charges

Railroads may charge shippers fees called “demurrage charges” when the shipper detains rail cars beyond the time permitted for loading or unloading rail cars (“free time”). Demurrage is subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill national needs related to freight car use and distribution and maintenance of an adequate car supply. Demurrage charges have both compensatory and punitive aspects and are intended to promote efficient use of rail resources.<sup>17</sup> Shippers and railroads may enter into contracts pertaining to demurrage, or, in the absence of such contracts, demurrage is governed according to the railroad’s demurrage tariff.

Railroads also may assess “accessorial charges.” Not defined in statute or regulation, accessorial charges are generally understood to include charges other than line-haul and demurrage charges, according to the STB.<sup>18</sup> Accessorial charges include those assessed for diverting a shipment in transit, ordering a railcar but releasing it empty, weighing a railcar, tendering one railroad’s car to another railroad without a line-haul move, special train or additional switching services, or releasing a railcar with incomplete or incorrect shipping instructions, among other causes.

In December 2018, STB Chairman Ann Begeman sent a letter to all Class I railroads requesting that they report quarterly revenues generated by demurrage and accessorial charges, in order to better understand the revenues these charges generate for the railroads.<sup>19</sup> Below is a table showing the demurrage and accessorial charges collected by the Class I railroads for the first quarter of 2019:

<b>2019 Quarter 1</b>							
(In Dollars) <sup>20</sup>							
	<b>BNSF</b>	<b>CN</b>	<b>CP</b>	<b>CSX</b>	<b>KCS</b>	<b>NS</b>	<b>UP</b>
<b>Demurrage</b>	56,794,000	19,640,000	11,165,860	75,300,000	7,227,000	78,029,000	50,512,000
<b>Accessorial</b>	27,915,000	30,706,000	3,012,904	26,700,000	2,970,000	21,079,000	21,058,000

<sup>15</sup> *Id.* at 51156, 49 CFR Section 1145.2.

<sup>16</sup> *Id.* at 51165, 49 CFR Section 1145.2.

<sup>17</sup> *Demurrage Liability*, EP 707, slip op. at 2 (STB served April 11, 2014); 49 C.F.R. § 1333.1.

<sup>18</sup> Surface Transportation Board, Oversight Hearing on Demurrage and Accessorial Charges, Notice of Public Hearing, Docket No. EP 754, Federal Register Vol. 84, No. 73, April 16, 2019, page 15662.

<sup>19</sup> 0Ann Begeman, Chairman, Surface Transportation Board, correspondence dated December 17, 2018.

[https://www.stb.gov/stb/elibrary/NDP\\_Correspondence.html](https://www.stb.gov/stb/elibrary/NDP_Correspondence.html)

<sup>20</sup> Class I railroads’ demurrage and accessorial revenue quarterly reports

[https://www.stb.gov/stb/elibrary/NDP\\_Correspondence.html](https://www.stb.gov/stb/elibrary/NDP_Correspondence.html)

On May 22, 2019, the STB held a two-day public hearing to receive information from railroads, shippers, receivers, third-party logistics providers, and other interested parties about their recent experiences with demurrage and accessorial charges, including matters such as reciprocity, commercial fairness, the impact of operational changes on such charges, capacity issues, and effects on network fluidity.

At the STB hearing, shippers expressed concern that several Class I railroads have made significant changes to tariffs governing demurrage and accessorial charges or begun to enforce longstanding tariffs on demurrage and accessorial charges without providing adequate prior notice, resulting in substantial costs to the shipper. Some shippers contend that while some railroads offer “credit days” to shippers when rail cars are delayed because of the railroad, ensuring the credit days are fairly accrued and applied poses challenges.

## **ROUNDTABLE PARTICIPANTS**

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