Subcommittee on Railroads, Pipelines, and Hazardous Materials

of the

House Transportation and Infrastructure Committee

Hearing:

"***Stakeholder Views on Surface Transportation Board Reauthorization***"

Tuesday, March 8, 2022

10:00am Est

Written Testimony

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National Industrial Transportation League

INTRODUCTION

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

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

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

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

COMPETITION

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

A free-market economy works best if there is vigorous competition. Where a market has become highly concentrated due to a series of mergers, it is incumbent upon the government, and in this case the STB per the ***Rail Staggers Act of 1980***, to instill or facilitate competition in the marketplace. For instance, the Board is considering revising its decades-old reciprocal or competitive switching rules in its EP Docket No. 711 (Sub.-1), *Reciprocal Switching*. The Board's current reciprocal switching rules were adopted more than 30 years ago when the rail industry was struggling financially. The STB has never granted a reciprocal switching request, and no new requests have been made for decades, because it is impossible for a shipper to meet the requirements due to the high legal standard – an insurmountable barrier in seeking relief. Not only does NITL strongly support the Board's efforts in this proceeding, but NITL was the organization who filed the initial petition before the Board in 2011 requesting the Board to adopt new reciprocal switching rules to give meaning to the provision in the ***Staggers***

Rail Act of 1980 that authorizes the Board to grant reciprocal switching arrangements that are “practical and in the publics best interest” or “necessary to provide competitive rail service.”[1]. Some railroads claim that, even where direct rail competition is lacking, there is ample competition via truck, and/or, by water barge or even air. While competition offered by other transportation modes is vital to our supply chain, it often cannot replace the need for railroad-to-railroad competition when a manufacturing or other facility is configured for rail shipments, or their customer requires rail deliveries.

Many shippers are prohibited from shipping by truck, water, or air due to numerous factors including commodity type, location, and infrastructure investments already made or needed to support rail. It is not easy to change transport options for each mode of transportation requires its own infrastructure and there are needs unique to each commodity. Shippers invest in their infrastructure to support freight rail transportation, based in large part, on what the rail carriers require to service our facilities – plant, manufacturing facilities, distribution centers, and the like.

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

[1] 49 U.S.C. § 11102(c).

prevented the railroads from responding adequately or proactively to mitigate ahead of time.

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

SERVICE

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

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

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

- Do not have a complete picture of the overall functioning of the rail network that shippers need for planning and operational purposes.

- Lack data to assess whether any service problems are specific to them or broader in scope, and whether service is improving, deteriorating, or remaining stable over time.

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

RATES

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

COMMON CARRIER OBLIGATION

One area where Congress can assist the Board with addressing service challenges is to clarify the definition of railroads' "common carrier obligation." Currently, the statute requires railroads "to provide transportation or service on reasonable request."[2] The "reasonableness" standard, however, is elusive. Although it requires railroads to provide a level a service that meets a shipper's reasonable needs, in practice, railroads have been able to provide service that is poor while still asserting that they are meeting the "common carrier obligation." The railroads have been able to circumvent their obligation to service the needs of the shipping public by using pricing to prioritize what commodities they prefer to serve while "demarketing" others. With service performance continuing to be unreliable and unsatisfactory to many shippers, the League believes that now is an appropriate time for Congress to re-evaluate the meaning of the "common carrier obligation" to ensure that it applies not only to service refusals but also material service reductions and deficiencies, combined with consequences when it is not met.

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

[2] 49 U.S.C. § 11101(a).

as individually and are not providing adequate and economical service to their customers.

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

COMMODITY EXEMPTIONS

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

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

- Promptly complete its consideration of commodity exemptions in its pending proceeding, EP Docket No. 704, *Notice of Proposed Rulemaking, Review of Commodity, Boxcar, and TOFC/COFC Exemptions*. It is important to note, however, that this proceeding only involves five to six commodity groups and there are many other exempt commodities for which a review is warranted.

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

- Interpret its revocation authority more broadly given today's far more concentrated market conditions than existed when the exemptions were adopted and the railroads' financial health.

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

RAILROAD INDUSTRY'S STRONG FINANCIAL STANDING

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

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

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

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

STB OPERATIONS

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

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

LENGTH AND FUNDING LEVELS OF NEXT AUTHORIZATION

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

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

- Demands placed on the STB are unprecedented given its regular adjudicatory responsibilities in addition to pending rail merger proceedings – all of which pose significant service and rate issues for captive shippers, and questions concerning the structure of a freight rail industry that promises to be even more consolidated than what it is today.
- Number of formal and informal railroad performance service complaints are increasing.

- Continued reliance on data transparency, including access by all stakeholders, remains where continued data and analytical capabilities are needed by the Board to enhance its evidence-based decision-making.
- Board is charged with implementing the new passenger On-Time Performance Standards for passenger rail.
- Board operating with a full complement of Members.

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