THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

October 18, 2021

By Electronic Submission
The Honorable Pete Buttigieg
Secretary of Transportation
U.S. Department of Transportation
Attention:

Re: National Industrial Transportation League's Comments on DOT-OST-2021-0106-- *America's Supply Chains and the Transportation Industrial Base; Docket No. DOT-OST-2021-0106*

Dear Secretary Buttigieg:

The National Industrial Transportation League ("NITL" or the "League") hereby submits its comments in response to the U.S. Department of Transportation ("DOT" or "Department") request for information regarding America's Supply Chains and the Transportation Industrial Base.[1] NITL is a trade association whose mission includes advancing the views of shippers on industrial freight transportation policy matters. NITL members include U.S. companies across a wide variety of industries who rely on efficient, competitive, and safe maritime, rail, and highway transportation systems within the United States and beyond to meet their supply chain requirements and the needs of their customers.

NITL appreciates the Biden administration's efforts to address supply chain challenges to increase the resiliency, diversity, and security of U.S. companies' supply chains, and to revitalize and rebuild domestic manufacturing capacity. NITL also appreciates the opportunity to comment on the important supply chain issues raised in DOT's Notice requesting information from industry stakeholders.

NITL's comments address the rail, maritime, and truck transportation aspects of certain areas identified in the DOT Notice, including major infrastructure and operational bottlenecks, major risks to resiliency, technology and workforce issues, and recommendations concerning legislative/regulatory actions. NITL seeks the development of a sound federal policy that will help to promote transportation infrastructure investment, reduce bottlenecks, and promote an efficient multi-modal freight transportation system in the United States.

President Biden's February 24, 2021 Executive Order 14017 ("EO 14017") set, as a policy of the United States, "to strengthen the resilience of America's supply chains."[2] EO 14017 also ordered the Secretary of Transportation ("Secretary") to submit a report on supply

[1] America's Supply Chains and the Transportation Industrial Base, Notice of Request for Information, 86 Fed. Reg. 51719 (Sept. 16, 2021) ("DOT Notice").
[2] Executive Order 14017, America's Supply Chains, 86 Fed. Reg. 11849 (March 1, 2021).

chains for the transportation industrial base.[3] DOT's Notice requested information concerning important issues regarding the supply chain to assist the Department in preparing the report required by EO 14017. NITL strongly believes that the issues and recommendations identified in these comments will further the administration's policy of improving the freight transportation delivery network and the resiliency of U.S. company supply chains, thereby improving the economic activity that takes place in other sectors. Hence, NITL urges DOT to add the recommendations detailed here to its supply chain report for the transportation industrial base.

In general, NITL believes that the current transportation bottlenecks and capacity crisis have been long coming. Congested railyards and ports, a lack of adequate infrastructure and equipment, labor shortages, and dramatically rising rates for transportation services, are prevalent in each step of the supply chain. While the pandemic has exposed the weaknesses in our nation's multi-modal transportation systems, the challenges facing our nation's freight transportation delivery network are not episodic but rather are systemic in nature. The present-day crisis has uncovered in dramatic fashion how the lack of needed investment and focus on the importance of the freight delivery network for decades can cripple our nation's supply of critical goods. Thus, NITL believes that the DOT should take action to address these significant problems to prevent a further decline of the resiliency of U.S. supply chains and the related adverse economic impacts.

I. Major Infrastructure and Operational Bottlenecks and Other Issues Affecting the Resiliency of U.S. Supply Chains.

Obstacles to the efficient movement and delivery of cargo, and transportation capacity issues, have been developing for years to the detriment of robust and resilient supply chains. In the maritime containerized trades, the number of ocean carriers serving U.S. businesses has been reduced dramatically from mergers and acquisitions in the sector since the passage of Ocean Shipping Reform Act of 1998 ("OSRA"). Indeed, there are no remaining U.S. flagged carriers providing service in this trade. Today, roughly 80% of all ocean container traffic into or out of the United States is handled by the top ten foreign ocean carriers, which also operate within three shipping alliances.[4] As witnessed during the current-day shipping crisis, this situation allows the global shipping companies to exercise far too much control over which U.S. industries can obtain adequate vessel bookings when capacity becomes scarce. Allowing foreign entities to determine the "winners and losers" amongst U.S. industry needs to be reversed.

Similarly, despite the resounding success of deregulation of the rail industry under the Staggers Rail Act of 1980 ("Staggers Act"), substantial concentration of the major Class I service providers has occurred in the rail sector to the detriment of U.S. manufacturers and industries whose supply chains depend on competitive and efficient rail service. Prior to the

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[3] *Id*. at 11851.

[4] *See e.g*., The New Oligopoly of Container Shipping (July 4, 2019) available at https://www.joc.com/maritime-news/container-lines/new-oligopoly-container-shipping_20190704.html (last accessed October 13, 2021).

Staggers Act, approximately 35 Class I railroads operated within the United States.[5] Today, there are seven Class I railroads which collect 94% of all rail freight revenue in the United States.[6] The highly concentrated rail market has not improved on-time rail deliveries or resulted in competitive and cost-effective service. Rather, quite the opposite has occurred for many industries whose facilities are now "captive" to a single railroad—they face highly inconsistent rail service priced at unreasonably high freight rates. Increasing rail-to-rail competition is essential to improving service and promoting innovation in the U.S. freight rail sector.

As noted above, the COVID-19 pandemic has exposed the substantial weaknesses in the U.S. multi-modal freight delivery network which is essential to ensuring the adequate, efficient and cost-effective supply of raw materials needed for goods production in the U.S. and the importation of consumer goods that fill our retail and grocery stores. At the onset of the pandemic in March 2020, carriers across transportation modes reacted rationally to the substantial drop in economic activity by reducing their capacity significantly. However, when demand for ocean shipping, and related inland rail and truck transportation, services picked up in the summer of 2020, carriers were not able to react quickly to restore capacity to meet the increasing demand. U.S. importers and exporters began to experience "blanked sailings." By the fourth quarter of 2020, the volumes of U.S. imports and exports continued to accelerate rapidly, fueled by the post-COVID recovery, which fueled the race to secure adequate vessel capacity. Ocean carriers were unable to bring sufficient capacity into the market, and by early 2021, ships were forced to anchor at sea waiting to berth at our nation's seaports and thousands of containers began to pile up at the terminals causing substantial congestion. Truckers were unable to efficiently pick up and deliver containers due to the congestion and a lack of availability of chassis needed for cargo movement. Fanning the flames, were workforce shortages exacerbated by the pandemic. These challenges have continued for months unabated and have culminated into the crisis we are living today.

Adding to the supply chain problems are cargo receiving dates for U.S. exports, as set by ocean carriers and marine terminal operators, that have not been managed with consideration for the needs of the exporter. Instead, ocean carriers and marine terminal operators provide unreasonably short and inconsistent receiving windows that have a detrimental impact throughout the supply chain, reducing efficiencies and adversely impacting manufacturing, warehousing, and trucking operations.

Excessive dwell times at the ports and destination rail ramps that have also been unable to consistently manage volume spikes to ensure prompt collection of arriving containers by

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[5] *See* GAO Report on Railroad Revenues – Analysis of Alternative Methods to Measure Revenue Adequacy (Oct. 1986) at 27 (ICC made on revenue adequacy determination in December 1979, finding that "13 of the 35 Class I railroads were revenue adequate.") available at https://www.gao.gov/assets/rced-87-15br.pdf (last accessed October 13, 2021).

[6] Association of American Railroads, Overview of America's Freight Railroads July 2021 available at https://www.aar.org/wp-content/uploads/2020/08/AAR-Railroad-101-Freight-Railroads-Fact-Sheet.pdf (last accessed October 13, 2021).

truckers are also significant problems. According to information provided by ocean carriers to their importer customers, this is caused by inadequate capacity and/or frequency of rail service coupled with a lack of management to remove the containers in a timely manner. In addition, terminal appointment systems, shortage of truck power, lack of chassis availability, and unreasonable demurrage practices by ocean carriers impede the timely collection of container cargo from the pier, overwhelming an already weak transportation system.

The on-going discrepancy between supply and demand for ocean services has also caused increasing ocean freight rates and resulted in the failure by ocean carriers to honor their contractual commitments to their customers. Indeed, these dynamics have resulted in prices at previously unimaginable levels for shipping a container of goods to and/or from the United States and ocean carriers are thereby incentivized to require their customers to purchase vessel capacity in the spot market to maximize their profits.

Supply chain challenges due to delays of inbound raw materials are disrupting production and create risks of plant shutdowns. The ability of manufacturers, including those who manufacture COVID-19 critical supplies, to deliver commodities to their customers on a timely basis has been impeded by this crisis. This has ripple effects throughout the supply chain as U.S. manufacturers, importers, and exporters are experiencing substantially rising freight, demurrage and other transportation-related costs which they must absorb or pass through to their customers and U.S. consumers.

In rail transportation, increased volumes, as well as labor shortages, have caused significant railyard congestion and service deficiencies, especially for the first and last miles of a movement. The nation's railyards, and particularly yards in the Chicago and Memphis areas, have experienced severe congestion, preventing shippers/consignees from picking up their cargo timely and often resulting in the assessment of storage charges even when the delays are caused by congestion beyond the receiver's control.[7] Similarly, slow train velocity also had a negative impact on the efficient use of private car fleets.

Additionally, Class I railroads have, in recent years, implemented Precision Scheduled Railroading ("PSR"), which resulted in significant cutbacks on their labor force and reduced the railroads' ability to respond to natural disasters. Consequently, railroads are experiencing longer recovery periods in the face of natural disasters, as they do not have the manpower and resources to tackle these problems efficiently. This has caused additional pressures on the resiliency of U.S. company supply chains.

As explained herein, shippers are experiencing significant disruptions in every aspect of transportation service due to inadequate and aging transportation infrastructure, as well as operational bottlenecks and inefficiencies. NITL seeks the development of a sound federal

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[7] *See e.g.,* https://www.wsj.com/articles/supply-chain-backlogs-turn-chicago-into-new-chokepoint-11627064719 (last accessed October 12, 2021).

policy that will help to promote transportation infrastructure investment, reduce bottlenecks, and promote an efficient multi-modal freight transportation system in the United States. Accordingly, NITL urges DOT to work on such a policy that will help address the systemic problems impeding the competitiveness and resiliency of supply chains throughout the nation.

II. Recommendations.

As a general principle, the legislative and regulatory process should always look at both what legislation and regulatory changes may be needed to deal with modern supply chain challenges, as well as which should be eliminated because they are out of date. Among other things, NITL believes that the following actions can be taken to help address today's freight delivery challenges and to increase the resiliency of U.S. supply chains.

1. Infrastructure Investment:

NITL has long been a supporter of the need to modernize our nation's infrastructure. NITL supports legislation that would increase substantially our nation's investment in our roads, seaports, airports, railways, bridges, and other infrastructure required to support an efficient and resilient multi-modal network for our freight delivery system. Investment that is designed to increase capacity and velocity of the freight system, and improve data sharing, are also important to NITL members.

2. 24/7 Port Operations:

NITL strongly supports the recent actions by the Biden administration to promote 24/7 operations at our nation's seaports to assist with the backlog of vessels and containers that are log-jammed and impacting the critical supply of raw materials and finished goods needed to meet manufacturing and consumer demand. Increasing port operations through a coordinated approach amongst the involved stakeholders, i.e. ports, terminals, labor, truckers, rail, and importers and exporters, to help ensure improved efficiencies in the freight delivery network should be evaluated for implementation on a more permanent basis. Other port complexes around the world have long used 24/7 operations to meet their nation's freight demands and the DOT should promote similar actions in the U.S.

3. Ocean Shipping Reform Act of 2021:

NITL is proud to have been instrumental in recommending legislative reforms that consider the needs of U.S. businesses using international ocean transportation, and that are now included in the bi-partisan Ocean Shipping Reform Act of 2021 (H.R. 4996), introduced in August 2021 by Congressmen Garamendi (D-CA) and Johnson (R-SD).[8] OSRA 2021 is specifically designed to address service deficiencies and unfair business practices that have

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[8] *See* H.R. 4996 – Ocean Shipping Reform Act of 2021 available at https://www.congress.gov/bill/117th-congress/housebill/4996/actions?q=%7B%22search%22%3A%5B%22Ocean+Shipping+Reform+Act+of+2021%22%2C%22Ocean%22%2C%22Shipping%22%2C%22Reform%22%2C%22Act%22%2C%22of%22%2C%222021%22%5D%7D&r=1&s=1 (last accessed October 13, 2021).

reduced supply chain efficiencies of U.S. exporters and importers and resulted in unreasonably high demurrage, detention and other costs. NITL is hopeful that the bill, as well as initiatives by the Federal Maritime Commission and other federal agencies will bring about improvements to ocean transportation business practices that are choking the ability of U.S. businesses to effectively engage in international trade by ocean.

4. Workforce Shortages:

NITL supports federal policies that will help address the systemic workforce shortages impacting the U.S. freight delivery network, including insufficient port, rail, and warehousing labor, as well as the long-standing problem of truck driver shortages. NITL supports DOT/FMCSA pilot programs to evaluate whether CDL driver age limits can be reduced without adversely impacting safety on the nation's highways, including whether to allow 18 year old drivers of commercial vehicles in intrastate commerce to also drive such vehicles in interstate commerce.

In connection with the rail industry, Positive Train Control ("PTC") regulations were promulgated to improve rail safety. Now that the technology is mostly implemented, NITL believes that it is time to consider updating current freight labor policies to improve efficiency. The Department should, with an open mind, examine which labor regulations can be modernized to meet today's supply chain needs while also maintaining momentum on improvements in safety.

For example, NITL is aware that at least one Class I railroad is currently analyzing the benefits of making the conductor role a field office position, rather than one that needs to be on the train. PTC makes that possible and safe. This idea would not eliminate the conductor role but would rather reassess where that work gets done. If successful, it would lead to lifestyle improvements and make that role more attractive to a broader demographic, providing opportunities to diversify the employment base, create jobs that meet expectations of the modern workforce, and allow supply chains across the country to grow.

Additionally, DOT should consider promoting increased funding for supply chain and logistics education across the transportation modes perhaps through community colleges to improve the labor shortages that we see in the rail industry today. Some jobs are good paying jobs, but they require a difficult lifestyle, including long-haul trucking and train engineers and conductors. By increasing the funding for education, industrial freight jobs can be made attractive to the next generation of the workforce, helping to resolve shortages.

5. Trucking Weight and Length Regulations:

The current weight and length regulations for the trucking industry were implemented long before significant technological improvements related to, among other things, tires, suspensions, braking systems, trailers, lights. Heavier weight loads have proven to be safe in Western states that allow exemptions. The Department should modernize its regulations to permit heavier weight loads for the trucking industry on the federal level. While the railroads are likely to oppose this initiative for competitive reasons, NITL believes that these improvements would also benefit the railroads, given that the railroads depend on truckers for intermodal loads, which has been a source of growth.

Specifically, NITL urges DOT to support a change in the national twin trailer standard from 28 feet to 33 feet as part of any infrastructure policy proposals it submits to Congress. Freight traffic has grown exponentially in recent years and such growth is projected to continue. In fact, DOT has forecasted a 45 percent increase in freight volume by 2040.[9] This increase will further stretch already-thin freight capacity and workforce levels and result in more highway congestion, greater fuel consumption, and higher freight transportation costs. Twin 33-foot trailers would immediately improve the efficiency and safety of truck operations across the nation's congested freight network and benefit taxpayers and travelers. A new national standard for twin 33-foot trailers will add instant capacity while reducing congestion and improving the safety and efficiency of the roadways. Making efficiency improvements in the trucking industry is long overdue, can be done safely, and is critical to U.S. supply chain growth and resiliency.

6. Surface Transportation Board Regulation:

NITL also believes that allocating more resources to the Surface Transportation Board ("STB" or the "Board") should be a top priority. The STB has been backlogged for years, as evidenced by the quantity of *ex parte* proceedings currently pending before the Board which concern critical freight rail policy matters.[10] Two significant and long-standing proceedings that are particularly important to NITL members are Ex Parte 711—*Petition for Rulemaking to Adopt Revised Competitive Switching Rules* and Ex Parte 704—*Review of Commodity, Boxcar & TOFC/COFC Exemptions*.

EP 711 has been pending more than 10 years before the Board and the proceeding was initiated by the NITL's petition for rulemaking in 2011.[11] The Board issued a notice of proposed rulemaking in 2016 and has been holding *ex parte* meetings with industry since 2017. NITL believes that it is critical for the Board to proceed with issuing a final rule, because allowing captive rail shippers to access another railroad through reciprocal switching has the potential to improve service when the incumbent railroad is having service failures, and to motivate monopoly railroads to be more efficient and cost-effective in their service offerings.

Additionally, EP 704 was initiated by the Board in a notice of proposed rulemaking on March 23, 2016, which proposed to revoke the existing class exemptions under 49 C.F.R. Part 1039 for (1) crushed or broken stone or rip rap; (2) hydraulic cement; (3) coke produced from

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[9] TheBluePaper.pdf (transportation.gov).

[10] Report on Pending STB Regulatory Proceedings, Third Quarter 2021 available at https://www.stb.gov/wp-content/uploads/Report-on-Pending-Regulatory-Proceedings-third-quarter-October-1-2021.pdf (Last accessed October 12, 2021).

[11] *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Docket No. EP 711 (July 7, 2011).

coal; (4) primary iron or steel products; and (5) iron or steel scrap, wastes, or tailings.[12] The paper and forest products industry also requested that the Board revoke certain of its commodity exemptions to apply STB regulation over such rail shipments. NITL believes that a final rule revoking the exemptions on these commodities is long overdue so that Board oversight can be established for rail transportation of these commodities.

There has also been renewed interest in rail mergers with two important merger proceedings currently pending before the Board. NITL believes that, in an already highly concentrated industry, the Board should view additional merger requests with skepticism. Otherwise, approving these mergers will undoubtedly result in railroads gaining more market power, adversely impacting the supply chain resiliency and national security.

Clearly, the Board needs more resources to address these significant issues which have major implications on rail competition and service, rising rail rates, and the overall health of the U.S. supply chain. The Board's *ex parte* proceedings aimed to deal with the railroads' anticompetitive behavior and to eliminate bottlenecks are especially critical to improve the resiliency of the supply chain. Thus, the Department should coordinate with the Board and encourage a timely resolution to these proceedings to help alleviate the ongoing supply chain crisis and to increase the resiliency of the supply chain.

7. <u>DOT – DOJ Joint Study on Investor Pressures on Railroads</u>:

NITL believes that DOT, in conjunction with the Department of Justice ("DOJ"), should study the impact of investor pressure on railroads that ultimately negatively impacts U.S. supply chains and national security. In today's climate, investors are greatly influencing the railroads' strategies around assets, service, investment, and staffing. The operating ratios of Class I railroads have been steadily improving while service and reliability has been questionable at best. This investor pressure appears to be causing railroads to sacrifice service quality and reliability in order to achieve better metrics for Wall Street. NITL believes that a DOT-DOJ joint study to assess the impact of investor pressure on railroads would inform the government and the public of potential actions that can be taken to address this issue with an objective toward improving U.S. supply chains.

8. <u>Railroad Tax Credits</u>:

As noted previously, with the implementation of PSR, railroads have cut-back spending on critical manpower and resources. This has directly impacted the ability of railroads to respond effectively to natural disasters, as they lack critical resources. Congress can provide tax credits for railroads that could be tied to their direct spending on labor and equipment required to respond to natural disasters.

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[12] *Review of Commodity, Boxcar & TOFC/COFC Exemptions* (NPRM), EP 704 (Sub-No. 1) (STB served Mar. 23, 2016).

9. Technology:

Railroads should be required to provide shippers and regulators with first mile/last mile performance as well as on time delivery statistics, broken down by commodity class. This information will allow shippers to analyze and compare how railroads are performing against their trip plans. The transparency provided by online retailers, such as Amazon, on the movement of products is a great example that railroads can follow.

Similarly, in the maritime side, major supply chain players, including the shippers, rail carriers, truckers, and warehouses should have increased visibility on, among other things, when the intended vessel will reach the destination port, when the container will become available for collection, and what the last free day for collection will be. While major incidents, such as weather events, will disrupt scheduling, these events should be the exception rather than the rule. Increasing supply chain visibility would allow the involved stakeholders to plan accordingly. The right technology can easily support this. Responsible parties' commitment to the reported dates/times will increase the other stakeholders' ability to address any bottlenecks needing remedial action and reduce disruption and inefficiencies. Accordingly, the League supports the development and investment in improved technologies that will increase supply chain visibility.

10. Passenger Trains:

Clearly, the idea of more people commuting via passenger trains, as opposed to automobiles, has widespread support from an environmental perspective. DOT should consider, however, the cost-benefit analysis and the impacts on freight rail transportation, before promoting priority passenger rail service routes. NITL believes that adding priority passenger service routes will impede freight rail service, increase the bottlenecks in the rail transportation system, exacerbate the current capacity crisis, and inhibit the service recovery critical to U.S. supply chain growth.

11. State Actions:

Additionally, the DOT should be wary of State actions exacerbating an already weak transportation system. For example, California has recently enacted Assembly Bill 5 ("AB-5"), which requires companies that hire independent contractors to reclassify them as employees, unless the companies can prove otherwise.[13] Under the AB-5 classification standards, truck owner-operators are not eligible to be classified as independent contractors. AB-5 is currently subject to litigation involving possible federal preemption, and most recently review by the Supreme Court was requested.[14] If AB-5 survives the appeals process, the trucking industry and

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[13] California Assembly No. 5 available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5 (last accessed October 13, 2021).

[14] *See* Petition for Writ of Certiorari in *California Trucking Association, Inc. et al. v. Robert Bonta et al.* available at https://www.supremecourt.gov/DocketPDF/21/21-194/187057/20210809173054562_Certiorari%20Petition%20Cal%20Trucking%20Assn%20v%20Bonta.pdf (last accessed October 13, 2021). NITL notes that, while the Supreme Court recently denied the review of the other AB-5

interstate commerce will be significantly impeded without the flexibility provided by owner-operators to satisfy fluctuating demand. Owner-operators are more than truck drivers, they are entrepreneurs that take pride in the ownership of their business and it is reasonable to expect that many such operators will not convert to employee status. Naturally, eliminating the supply of trucking services provided by many owner-operators will reduce capacity and increase costs, with an ultimate impact of disrupting supply chains that require efficient and cost-effective truck transportation.

Respectfully submitted,

E. Nancy O'Liddy

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Executive Director

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related case in *Cal Cartage Transportation Express, LLC, et al. v. California*, *et al.*, California Trucking Association's petition for writ of certiorari is currently pending before the Supreme Court.