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The Surface Transportation Board (STB): Background and Current Issues

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The Surface Transportation Board (STB) was created by Congress in 1995 to replace the Interstate Commerce Commission (ICC) as the economic regulator of providers of interstate land and water transportation. It most often deals with issues facing the railroad industry. STB is smaller in size and more limited in regulatory reach than its predecessor, and the powers that it inherited upon its creation are more limited than those the ICC possessed prior to the deregulatory initiatives of the 1970s and 1980s.

Railroads are generally far freer to set their own cargo carriage rates under STB than they were under the ICC. However, STB retains the power to impose maximum rates in situations where the railroad is considered "market dominant," and if the rate quoted by the railroad is deemed unreasonable. The definition of market dominance is a mathematical one, based on complex assumptions about railroad operating and capital costs, and the process to challenge the reasonableness of a rate can be costly and time-consuming.

Related to the rate reasonableness issue is the potential for customers to obtain service from a competing railroad that may offer a better rate but lacks access to the shipper's facilities. STB has the authority to prescribe such arrangements, but has rarely done so. Procedures to expedite the determination of market dominance, to reduce the burdens associated with minor rate disputes, and to reexamine competitive access and reciprocal switching policies are currently under consideration by STB. A perennial concern is the treatment of shippers that claim to have no other economically viable alternatives for freight transportation than a single railroad company. These so-called captive shippers frequently complain about what they characterize as monopolistic behavior on the part of railroads. One behavior to come under scrutiny more recently is the approach railroads take to assessing "demurrage" fees on customers who exceed allotted time for loading or unloading of railcars. In 2021, STB ordered large railroads to disclose demurrage fees more clearly to shippers.

In addition to its limited powers to set maximum rates, STB has authority over railroad corporate mergers and acquisitions. It may approve such transactions only when it finds them to be "in the public interest." Following a surge in activity during the 1970s and 1980s, which saw competing railroads consolidate their networks to take advantage of economies of scale and shed redundant capacity, no major railroads have successfully combined since the mid-1990s. STB updated its merger policies in 2001, setting a somewhat higher bar for major railroad mergers. Two railroad mergers involving at least one large railroad are currently pending before the board.

STB occupies a limited but growing role in the regulation of passenger rail. The creation of Amtrak and commuter rail authorities in the 1970s and 1980s helped return the private rail sector to profitability, but resulted in passenger rail carriers depending on access to tracks they do not own, with dispatching outside their control. If disputes arise between Amtrak and a freight railroad over the terms of access to tracks and facilities, STB is empowered to adjudicate them, but Amtrak's network has seen little change in recent decades, so this power has been rarely exercised. The American Infrastructure and Jobs Act (IIJA) of 2021 (P.L. 117-58) directs STB to hire additional staff to handle passenger rail issues; it also provides funding for expansion of passenger rail service, potentially creating additional conflicts between Amtrak and freight railroads that STB may be asked to adjudicate. In the Passenger Rail Improvement and Investment Act of 2008 (P.L. 110-432), Congress empowered STB to monitor the on-time performance of Amtrak trains on freight tracks and penalize host railroads for obstructing passenger traffic, something it could not previously do. A series of court challenges effectively prevented these provisions from taking full effect until 2021, and STB has yet to render decisions under this authority.

STB also retains some regulatory power over interstate commerce by motor carrier, water carrier, and pipeline, though these represent a small fraction of its annual workload.

SUMMARY

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Introduction

The Surface Transportation Board (STB) is an independent federal agency tasked with economic regulation of common carriers engaged in interstate commerce.[1] It most often deals with issues facing the railroad industry (which will be the focus of much of this report), but its authority also extends to motor carriers, waterborne carriers, and pipelines under certain circumstances.

Railroads have been regulated at the federal level since 1887, when Congress created the Interstate Commerce Commission (ICC).[2] When many large railroads began to fail in the 1960s and 1970s amid intense competition from truckers and airlines, Congress began relaxing some of the rules governing the industry, granting railroads considerable freedom to set freight rates and terminate unprofitable services.[3] In 1995, Congress replaced the ICC with STB, a new agency smaller in size and more limited in regulatory reach.[4]

The law that abolished the ICC and created STB, the Interstate Commerce Commission Termination Act of 1995 (P.L. 104-88), began with a 13-point articulation of national policy that included, among other elements,

> In regulating the railroad industry, it is the policy of the United States Government [...] to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; [...] to minimize the need for Federal regulatory control over the rail transportation system [and] to reduce regulatory barriers to entry into and exit from the industry [...].[5]

The environment surrounding the railroad industry in the 2020s is considerably different from that of half a century ago. At that time, a series of bankruptcies threatened the ability of the rail system to reliably move freight, to the extent that several failed railroads serving the Northeast and the Midwest were taken into federal ownership[6] and regulators gave priority to the railroads' ability to operate self-sufficiently. In recent decades, the railroad industry, having shed excess capacity and transferred responsibility for passenger transportation to Amtrak or public authorities, has consolidated into a handful of consistently profitable companies. The extent of railroads' power over freight shippers has arguably become a larger issue for STB than ensuring the survival of the industry.

In recent years, Congress has commissioned studies and solicited input from carriers, shippers, and others concerning STB's role and procedures:

- The Safe, Accountable, Flexible, Efficient Transportation Act of 2005 directed the Secretary of Transportation and the Transportation Research Board (TRB) of the National Academy of Sciences to publish a comprehensive study of the

[1] A "common carrier" is a person or corporation that holds itself out to the general public to transport property or passengers for compensation and must do so upon reasonable request for service.

[2] Interstate Commerce Act, 24 Stat. 379.

[3] The main deregulatory law was the Staggers Rail Act (P.L. 96-448) of 1980.

[4] STB is one of several agencies that inherited powers once held by the ICC. Many former ICC functions have been transferred to modal administrations at the U.S. Department of Transportation, including the Federal Railroad Administration (in 1970) and the Federal Highway Administration (in 1980, until a separate Federal Motor Carrier Safety Administration was created in 2000).

[5] 49 U.S.C. §10101(1), (2), and (7).

[6] This process was initiated under the Regional Rail Reorganization Act of 1973 (P.L. 93-236), which led to the creation of the federally owned Consolidated Rail Corporation (Conrail) pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210).

nation's railroad system since 1980, including the future role of STB in regulating the industry (P.L. 109-59, §9007). Funding for the study was appropriated in 2011, and the study report was published in 2015.[7]

- The STB Reauthorization Act of 2015 (P.L. 114-110, §15) commissioned a study of the sufficiency, complexity, and cost-effectiveness of STB's methodologies to resolve major rail rate disputes, and of whether additional methodologies might constitute an improvement while remaining consistent with sound economic principles. The study report was published in 2016.[8]
- The Fixing America's Surface Transportation Act of 2015 (P.L. 114-94, §11311) directed the Secretary of Transportation to evaluate passenger and freight rail systems' shared use of railroad rights-of-way and the operational, institutional, and legal structures—including the current and future role of STB in these structures—that would best support improvements to such arrangements. The study report was published in 2017.[9]

STB Governance and Structure

At its inception, STB was an agency administratively aligned to the U.S. Department of Transportation, though it had independent decisionmaking ability. It became an independent agency under the Surface Transportation Board Reauthorization Act of 2015 (P.L. 114-110), which also increased the number of board members from three to five and amended some of the agency's powers and requirements. Despite the new seats, no more than three members served concurrently until 2021, when the last two vacancies were filled.

The five members of STB, called commissioners in a continuation of ICC-era practice, issue decisions after weighing filings by one or more parties. By statute, board members are appointed by the President (subject to confirmation by the Senate), may serve a maximum of two five-year terms, and may remain in office for up to one year after the expiration of a term if a replacement has not yet been confirmed. Not more than three members may belong to the same political party.

The board can be likened to some degree to a court, in that commissioners consider petitions brought by various parties and hear arguments and motions offered by attorneys for the parties, and a concurring majority issues decisions based on legal tests and following agency precedent. However, the board also has the power to initiate its own proceedings in some cases, conduct investigations, and carry out a number of support functions relevant to its rulings (e.g., STB may serve as the lead federal agency managing an environmental review pursuant to the National Environmental Policy Act). Some proceedings may require oral hearings, while others involve only written submissions. When a case docket is open, outside parties such as Members of Congress, local officials, or members of the public may enter written comments into the records of the proceedings.

Certain railroad actions expressly require STB review and approval under federal law, while others may be challenged in an STB proceeding. Before 1980, many proposed changes to railroad operations, pricing, or ownership or control were likely to require ICC approval. By comparison,

[7] National Academies of Sciences, Engineering, and Medicine, *Modernizing Freight Rail Regulation*, Washington, DC, 2015, at http://nap.edu/21759.

[8] InterVISTAS Consulting Inc., *An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification*, Surface Transportation Board, September 14, 2016, at https://prod.stb.gov/wp-content/uploads/STB-Rate-Regulation-Final-Report.pdf.

[9] Federal Railroad Administration, *Report to Congress: Shared-Use of Railroad Rights-of-Way*, Washington, DC, July 2019.

far fewer actions—mainly those involving a change in ownership or control—now require STB approval, and the threshold for approval tends to be lower. Moreover, many STB decisions are determinations that an action is exempt from further STB review, as is often the case with proposed service discontinuations or track abandonments. In FY2020, the most recent year for which data are available, STB issued 419 decisions, of which 156—37%—concerned exemptions from further STB review (**Table 1**).

Table 1. STB Decisions Issued, FY2018-FY2020

Decision Type	FY2018	FY2019	FY2020
Complaints	46	32	31
Rate	*16*	*7*	*0*
Non-Rate	*30*	*25*	*31*
Declaratory Orders	53	40	33
Ex Parte Proceeding Decisions	43	53	57
Rulemakings	*21*	*25*	*32*
Other	*22*	*28*	*25*
Licensing	310	377	266
Applications/Petitions	*57*	*85*	*70*
Notices of Exemption	*185*	*224*	*156*
Other (incl. Grant Stamps)	*68*	*68*	*40*
Nonrail Decisions	9	3	4
Other	20	10	28
All Decisions	**481**	**515**	**419**

Source: STB Budget Requests.

Notes: STB introduced the current classification of the agency's workload for reporting purposes in FY2018; figures for prior years unavailable.

STB has consistently employed between 100 and 200 personnel since its founding. By contrast, the ICC employed over 2,000 personnel at its peak, though at the time of its dissolution it employed roughly 400. A portion of STB's operating budget, which was just under $37 million in FY2020, is derived from the fines it collects (see **Table 2**).

Table 2. STB Operating Budget, FY2016-FY2020

(in thousands of nominal dollars)

	FY2016	FY2017	FY2018	FY2019	FY2020
Salaries & Expenses	31,390	32,257	34.998	35,258	36,625
Offsetting Collections	643	633	458	736	814

Source: STB Budget Requests.

Authority to Set Maximum Rates

Historically, railroads' status as common carriers meant that they could not be arbitrary or discriminatory in the rates they charged their customers or in the services they provided. Under the ICC, freight rates were tightly controlled and made to comply with pricing guidelines ("tariffs") that applied broadly to most railroads and commodities. The commission frequently considered complaints that a railroad was unreasonably favoring one shipper, one community, or one commodity over another, and it was empowered to initiate inquiries into pricing compliance. A 1976 law gave railroads limited flexibility to set rates without ICC approval and to enter into contracts with customers using a negotiated rate instead of using a common carriage rate.[10] Since 1980, such contracts have been confidential, giving railroads further flexibility to customize rates for individual customers. However, not all rail freight is handled in this manner.

STB retains authority to set a "reasonable" maximum price for common carriage, but only in response to customer complaints (it cannot initiate its own rate inquiries) and only in cases where the railroad company is "market dominant"—that is, where no economically viable other transportation option exists. In such cases, STB is constrained by law to impose a rate no greater than 180% of the railroad's "variable cost" of providing the service in question. STB determines the variable cost by employing the Uniform Railroad Costing System (URCS) adopted by the ICC in the 1980s.

There have been 51 rail rate cases brought before STB since its creation. STB has issued a reasonableness ruling in under half of these; the remainder were either withdrawn or settled by the parties before STB issued a decision (**Table 3**).

Table 3. STB Rail Rate Case Outcomes Since 1996

Outcome	Number of Cases
Rates reasonable	11
Rates unreasonable	11
Settlement reached	27
Complaint withdrawn	2
Total	**51**

Source: STB, Report on Rate Case Review Metrics, Third Quarter, October 1, 2021, https://prod.stb.gov/wp-content/uploads/Report-on-Rate-Case-Review-Metrics-Third-Quarter-October-1-2021.pdf.

Table 4. STB Rail Rate Case Methods Used Since 1996

Method	Number of Cases
Stand-Alone Cost (SAC)	37
Simplified SAC	5
Three-Benchmark	5
Stipulated 180% rate-to-variable-costs (R/VC)	4
Total	**51**

Source: STB, Report on Rate Case Review Metrics, Third Quarter, October 1, 2021, https://prod.stb.gov/wp-content/uploads/Report-on-Rate-Case-Review-Metrics-Third-Quarter-October-1-2021.pdf.

Even though shippers occasionally file rate- or service-related complaints with STB, no formal rate cases have been argued before the board in several years. Some shippers complain that the process of formally challenging a rate is too costly to pursue. Using what is known as the Stand-Alone Cost (SAC) method, a shipper challenging a rate must essentially design a hypothetical, completely new railroad capable of handling its traffic and calculate the rates that railroad would charge given the costs associated with operating the route (including other hypothetical revenue-

[10] Railroad Revitalization and Regulatory Reform Act (P.L. 94-210).

generating traffic it would carry). If STB were to find that the real-world railroad is charging a shipper more than this hypothetical railroad would, it would rule the rate unreasonable, and the hypothetical rate would become the new maximum allowable rate.[11]

The SAC process is very detailed, requires extensive documentation, depends on assumptions derived from the URCS, and frequently results in prolonged litigation. When it established STB, Congress directed the newly formed agency to develop ways to resolve rate disputes that would be more accessible to shippers in cases where a full SAC process would be too costly to pursue.[12] In 1997, STB established two alternative methods of determining whether a rate is unreasonable, the Simplified SAC and Three-Benchmark methods. These alternatives, which have been revised several times since their creation, are notionally simpler than the Stand-Alone Cost method in that they require less evidence to be submitted by the shipper, rely on less-intricate calculations, and impose stricter timelines on when a decision must be reached. Alternatively, the parties may stipulate that STB should simply impose the maximum rate allowed, equal to 180% of the variable cost of providing the service, instead of a hypothetical competitor's rate. The SAC method has been used in the majority of rate complaints adjudicated by STB (**Table 4**).

There is dispute as to whether the statutory definition of market dominance blocks STB from granting relief to shippers who claim to have no economically viable alternative to transportation other than a single railroad. These entities often refer to themselves as "captive shippers," and they generally tend to be customers who cannot ship their product economically by truck because of its bulk and who lack viable access to a navigable waterway to ship by barge.[13] The term "captive shipper" is not defined in law, however, and shippers in a wide variety of situations have asserted that they are captive to a single railroad.[14]

Proposals for Reform in Rate Reviews

Proposals to reform the rate review process have ranged from subtle adjustments to near-total overhauls. The 2015 TRB report recommended abandoning the uniform rail costing system, repealing the 180% variable cost ratio threshold for market dominance, and replacing the entire rate reasonableness hearing process with a new system of accelerated arbitration.[15] (Repealing the

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[11] Related to the concept of rate reasonableness, but not an explicit factor in STB's power to set maximum rates, is revenue adequacy. A railroad can be considered revenue adequate if its operating revenues are enough to cover the necessary costs of providing service. STB publishes an annual list of which railroads qualify as being revenue adequate, including an annual recalculation of the Railroad Cost of Capital, a measure of return on investment that is one component of STB's revenue adequacy formula and also a component of SAC calculations.

[12] P.L. 104-88, 49 U.S.C. §10701(d)(3).

[13] See CRS Report RL34117, *Railroad Access and Competition Issues*, by John Frittelli.

[14] For example, DuPont, a chemical company, has asserted in the past that its Spruance plant was captive to CSX Transportation. The plant is located just south of the city of Richmond, VA, along CSX tracks. Bordering the other side of the plant is Interstate 95. Across the highway is the Port of Richmond on the James River. This port provides a 25-foot deep shipping channel to Norfolk. Three miles downriver from the Port of Richmond, DuPont owned a wharf along the river where it received bulk material by vessel. The river terminal was also served by CSX. CSX's competitor, Norfolk Southern Railroad, can be accessed approximately 6 miles north of the plant in Richmond or about 15 miles south of the plant in Petersburg. DuPont's definition of captivity would appear to have been based on the claim that none of these nearby alternatives was economically viable for shipping some of the plant's inputs or outputs. See written testimony of Gary Spitzer, Vice President/General Manager DuPont Chemical Solutions Enterprises, House Transportation and Infrastructure Committee Hearing 110-70, *Rail Competition and Service*, September 25, 2007, p. 648.

[15] National Academies of Sciences, Engineering, and Medicine, *Modernizing Freight Rail Regulation*, Washington, DC, 2015, pp. 5-6, at http://nap.edu/21759.

statutorily defined 180% threshold can only be accomplished by Congress, not by STB.) The 2016 InterVISTAS report found that the SAC process, while often difficult to justify in terms of time and expense, is nonetheless an appropriate process to follow in large rate cases, and that the existing alternative methods (simplified SAC and three-benchmark) offer viable alternatives and may not benefit from further streamlining.[16] In January 2018, STB convened a Rate Reform Task Force to recommend options for more accessible and less burdensome ways to challenge rail rates. The task force report, published in April 2019, made several recommendations, including providing less costly ways of resolving small rate disputes.[17]

STB has begun to act on some of these recommendations. In 2019, it initiated rulemakings that would (1) streamline the process by which a complaining shipper could demonstrate a railroad's market dominance and (2) establish a new dispute resolution procedure known as Final Offer Rate Review (FORR).[18] The market dominance proposal would establish six "prima facie factors" that, when demonstrated to exist by a complaining shipper, would constitute sufficient evidence to show market dominance, effectively bypassing the need for STB to conduct its own qualitative analysis. Under FORR, parties would furnish STB with a packet of evidence and documentation to support their demanded rates, and STB would select a single party's package when rendering a decision. The parties could reply to each other's submissions, but would not be permitted to alter their offers or supporting materials. Both arrangements would be intended to provide a shorter and more predictable time frame for moving through the various steps in resolving rate disputes, and would limit opportunity to extend costly and time-consuming litigation.

The streamlined market dominance regulation was adopted in 2020; no rate cases pursuant to the new regulation have been opened yet. A supplementary notice was published in 2021 to solicit additional feedback on the FORR program, alongside a new proposed rulemaking that would create a voluntary third-party arbitration process for small rate claims.[19] STB lacks the authority to compel the use of third-party arbitration of rate disputes. STB regulations have permitted the use of voluntary arbitration to resolve certain other types of disputes, although this procedure has been used infrequently.

The largest railroads have generally opposed the FORR proposal but have generally supported the creation of a voluntary arbitration pilot program for small rate disputes.

"Captive Shippers" and Competitive Service

Besides imposition of maximum rates, shippers have sought expanded access to other remedies that STB is authorized to grant, including competitive access and reciprocal switching (also referred to, usually by opponents, as Forced Access and Forced Switching). The central idea of each remedy is similar: a customer who is physically served by only one railroad would be able to solicit service from a different railroad to reduce costs and/or improve service. Under competitive access, a competing railroad would be granted access to the incumbent railroad's infrastructure to allow it to serve the customer's premises directly; under reciprocal switching, the incumbent railroad would be directed to haul the customer's freight as far as an interchange point with a

[16] InterVISTAS Consulting Inc., *An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification*, Surface Transportation Board, September 14, 2016, pp. 157-158.

[17] Rate Reform Task Force, *Report to the Surface Transportation Board*, April 25, 2019, p. 11, at https://www.stb.gov/wp-content/uploads/Rate-Reform-Task-Force-Report-April-2019.pdf.

[18] 84 *Federal Register* 48872 and 48882, September 17, 2019.

[19] 86 *Federal Register* 67588 and 67622, November 26, 2021.

competing railroad and then hand it off to the competitor. Under either arrangement, the incumbent railroad would receive a fee, but much of the revenue would go to the competing railroad. Either remedy would give shippers greater bargaining power with respect to rail carriers.

Under existing standards, adopted by the ICC in 1985, STB can authorize a reciprocal shipping agreement only if the shipper can show that it is necessary "to prevent an uncompetitive act."[20] This has proven to be a high bar, as few reciprocal switching petitions have been filed since 1985 and none have ever been granted. The 2015 TRB report recommended that reciprocal switching agreements be included among the remedies STB can prescribe during rate disputes.

STB proposed a new standard for reciprocal switching agreements in 2016, which would instead require that shippers show the proposed arrangement is "practicable and in the public interest" or "necessary to provide competitive rail service," in line with STB's statutory authorities.[21] STB's proposal was roundly opposed by the railroad industry, and it has not been adopted. A hearing on reciprocal switching is scheduled for 2022, signaling that STB remains interested in the issue.

Demurrage Charges and the Railcar Supply

While many rail customers own their own or lease their own railcars, customers sometimes use railcars that are owned by the rail carriers themselves. Customarily, a rail carrier will allow its railcars to remain at a customer's facility for a certain amount of time ("free time") for loading and unloading, but if the customer keeps the railcars for longer than initially stipulated ("demurrage time"), it will incur a fee. During deregulation in the 1970s and 1980s, railroads gained flexibility to establish individual free time and demurrage charges instead of complying with a set of uniform rules for all customers. Demurrage charges offset costs that delays pose to rail carriers, and serve to incentivize the efficient utilization of the pool of available railcars.[22] In recent years, however, customers have complained of demurrage policies that feature higher fees and less "free time." This has coincided with the rise in popularity of "precision scheduled railroading" (PSR), a set of industry practices designed to maximize efficient use of railroad assets, among the largest railroads.

STB held a hearing on this issue in May 2019, and issued a proposed policy statement the following October detailing how it would assess the reasonableness of demurrage policies.[23] In response to shipper complaints that railroads provide little notice for them to prepare for changes in free time or demurrage rates, STB concurrently adopted a rule in April 2021 requiring Class I railroads—those with annual operating revenues above $504 million[24]—to more clearly and consistently disclose certain information in demurrage invoices.[25] Starting in 2018, STB has also asked all Class I railroads to disclose the amount of demurrage fees they collect on a quarterly basis. Though this is not a regulatory requirement, all Class I railroads have so far complied, and STB makes their submissions available to the public on its website.[26]

[20] 49 C.F.R. §1144.2(a)(1).

[21] 81 *Federal Register* 51149, August 3, 2016; see also 49 U.S.C. §11102(c).

[22] Maintenance of an adequate supply of railcars is in fact a statutory requirement; see 49 U.S.C. §10746.

[23] STB Docket No. EP 757, decision no. 47133, decided October 4, 2019, at https://dcms-external.s3.amazonaws.com/MPD/48301/7EBA2E5972A0ECE8852584AC00138BED/47133.pdf.

[24] Class I railroads were defined by the ICC in 1992 as those having annual operating revenues of at least $250 million, and the amount is adjusted for inflation each year.

[25] 86 *Federal Register* 17735, April 6, 2021.

[26] Surface Transportation Board, Demurrage & Accessorial Charges: Board Letters and Quarterly Reports, at https://www.stb.gov/reports-data/demurrage-accessorial-charges/.

Freight Railroad Mergers and the Public Interest

Railroad company mergers and acquisitions (or "changes in control"), including the acquisition of one company's railroad line(s) by another, must be approved by STB. This approval depends on different factors according to the complexity of the transaction:

- Any merger involving more than one Class I railroad is automatically considered a "major" transaction subject to the highest level of STB scrutiny.
- Other transactions can be deemed "significant" (entailing an elevated level of scrutiny) or "exempt" (no longer requiring STB review prior to approval) if certain conditions are met.
- All other transactions are considered "minor."

Federal law holds that STB "shall approve and authorize a transaction [...] when it finds the transaction is consistent with the public interest," and may impose conditions on the transaction.[27] In minor or significant transactions, STB is essentially directed to approve all transactions unless there is likely to be a substantial lessening of competition, or if any anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.[28] Determining what is and is not in the public interest is therefore central to STB's review of proposed mergers and acquisitions.

The 1970s and 1980s saw many railroad mergers. In some cases, these transactions enabled the surviving railroads to consolidate their networks by abandoning or selling off parallel lines. In other instances, end-to-end mergers allowed railroads to improve profitability by carrying long-haul traffic greater distances, often leading to the divestiture of lightly used lines to smaller "short line" railroads. This merger wave left seven Class I carriers controlling almost all long-distance freight traffic in the United States and Canada.

STB revised its merger regulations in 2001, creating a higher bar for transactions involving multiple Class I railroads. Under the previous standards, Class I carriers intending to merge had to demonstrate to STB that the level of competition would remain unchanged following the transaction, but since 2001 such transactions will be approved only if the parties can demonstrate that competition will be enhanced as a result. Since the revised regulations were implemented, most railroad mergers and acquisitions have involved smaller carriers, as potential mergers among Class I carriers have triggered strong enough objections that the parties never formally applied for STB approval. For example, Canadian Pacific Railway explored mergers with CSX Transportation in 2014 and with Norfolk Southern in 2020, but neither was consummated.

The Acquisition of Kansas City Southern (KCS)

In March 2021, Class I railroads Canadian Pacific (CP) and Kansas City Southern (KCS) announced a merger agreement. In April, another Class I carrier, Canadian National (CN), submitted a competing proposal to acquire KCS, which KCS accepted in May before ultimately accepting another counteroffer from CP in September.

When STB adopted new merger regulations in 2001, it granted KCS—the smallest of the Class I railroads—a waiver that allows it to meet the less stringent pre-2001 standards in the event of a merger proposal. The reasoning at the time was that KCS was small enough that its involvement

[27] 49 U.S.C. §11324(c).

[28] 49 U.S.C. §11324(d).

in a merger would present fewer anticompetitive effects than a merger between any two of the six larger railroads. On April 23, 2021, STB affirmed that it would allow KCS and CP to invoke this waiver, noting that the combined system would still be the smallest Class I railroad based on U.S. operating revenue and that the merger would join two railroads whose routes meet end-to-end without major overlap. The overlap of CN's and KCS's existing routes factored into STB's May 17 decision to apply the newer set of rules in CN's case, as an overlapping network could reduce options for some shippers and therefore might not be in the public interest. (A combined KCS-CN system would have become the third-largest Class I railroad.) When KCS accepted CP's counterproposal, STB clarified that it would continue to abide by its decision to honor the waiver and apply the older set of rules.

The merger application of KCS and CP is still awaiting final STB approval. In December 2021, shareholders of both companies approved the deal, and shares have been placed into a "voting trust" that consolidates ownership in anticipation of final approval.

Acquisition of Pan Am Railways by CSX Transportation

CSX Transportation announced an agreement to purchase Pan Am Railways,[29] a smaller Class II railroad in New England, in November 2020. CSX has limited access to markets in New England, where Pan Am, which operates over 1,200 miles of track in five New England states and New York, is an important player. In its initial filing, CSX described the acquisition as a "minor" transaction, but STB determined in March 2021 that it would be evaluated as a "significant" one.

This merger is also awaiting final STB approval. Though a "significant" transaction does require a more thorough evaluation process than a "minor" one, STB has affirmed that no environmental or historical reviews will be needed to complete the deal. CSX anticipates being able to close the transaction in May 2022, but this is far from certain. For comparison, Class I railroad Canadian National proposed in September 2007 to acquire the Elgin, Joliet and Eastern, a Class II carrier in Illinois, in what STB termed a "minor" transaction, but CN was required to agree to a number of measures, such as building several road bridges over its tracks to mitigate local concerns, before receiving final STB approval in December 2008.

Passenger Rail

The prevailing model of passenger rail service involves the national intercity carrier Amtrak or a commuter rail authority operating trains over tracks owned by some other entity. On the Northeast Corridor (NEC) line connecting Boston, New York City, and Washington, DC, much of the infrastructure is owned by Amtrak, and it is heavily used by commuter trains making local stops. Outside the NEC, tracks are generally owned by freight railroads, or at least shared with freight rail traffic. Limited-stop intercity trains, commuter trains, and freight trains all have distinctly different operating patterns and infrastructure needs. This occasionally results in disputes between freight rail owners and passenger operators over the terms of shared use. STB is the agency with jurisdiction to resolve these disputes.

This role may take on additional importance as Congress makes large infusions of funding available for states to expand passenger rail service. The Infrastructure Investment and Jobs Act

[29] Pan Am was known as the Guilford Transportation System until 2006. It acquired the branding rights from the defunct Pan American World Airways in 1998.

(IIJA) of 2021 directs STB to hire up to 10 employees to staff a new passenger rail program to carry out the board's passenger rail responsibilities.[30]

Track Access

Plans for expanded passenger rail service have generally assumed that Amtrak would operate trains over existing freight tracks, but freight railroads often demand that additional infrastructure be constructed at public expense on the grounds that without added capacity the passenger traffic would interfere with freight trains.

One such dispute involves service along the Gulf Coast. This route was previously served by the long-distance *Sunset Limited* train, which ran once daily in each direction between Los Angeles, CA and Orlando, FL prior to the suspension of all service east of New Orleans, LA as a result of Hurricane Katrina in 2005. Amtrak has proposed to restore service over a portion of the route by operating two daily trains in each direction between New Orleans and Mobile, AL. Congress created a grant program intended to fund a portion of the restored route's operating costs in 2015. The route was selected to receive federal funds from this program in 2020, but progress has been slowed due to claims by the intended host railroads, Norfolk Southern Railway and CSX Transportation, that Amtrak's service will delay freight trains unless Amtrak pays for additional infrastructure. The dispute has come before STB for adjudication, in an early test of the board's attitude toward passenger rail expansion plans to be paid for with funds authorized in the IIJA.

Once a passenger service is operational, federal law provides that Amtrak trains shall receive "preference over freight transportation in using a rail line, junction, or crossing unless the [Surface Transportation] Board orders otherwise [...]."[31] In practice, however, Amtrak has frequently complained of delays to its trains from freight train interference.[32] The freight railroads that own the tracks generally control train movements, and Amtrak has asserted that they often give priority to their own freight trains while requiring passenger trains to wait for clearance to move.

Unlike Amtrak, commuter railroads and potential private-sector passenger train operators do not have a statutory right of access to freight rail infrastructure or preference over freight traffic. They face many of the same issues related to access charges and schedule reliability, but must seek to resolve those through negotiations with track owners.

On-Time Performance

The Passenger Rail Investment and Improvement Act of 2008 (PRIIA; P.L. 110-432, Div. B) directed the Federal Railroad Administration and Amtrak, in consultation with STB and other railroads, to establish metrics and standards for on-time performance of Amtrak trains operating on freight railroad tracks. As enacted, the law contained a provision—Section 207(d)—allowing STB to resolve disputes between the parties negotiating these standards by appointing an

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[30] P.L. 117-58 , §22309.

[31] 49 U.S.C. §24308(c).

[32] For example, "A legislative fix is necessary to remedy poor on-time performance and ensure host railroad compliance with existing Federal law which requires that Amtrak passenger trains be given preference over freight transportation. [...] In addition, legislation is needed to provide a fair and expeditious process for determining appropriate compensation for the use of host railroad infrastructure to support the expansion of Amtrak service to underserved communities." Amtrak, *General and Legislative Annual Report & Fiscal Year 2020 Grant Request*, March 19, 2019, p. 33, at https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/reports/Amtrak-General-Legislative-Annual-Report-FY2020-Grant-Request.pdf.

arbitrator after an initial deadline had passed, but that provision was eventually "severed" in a set of federal court rulings.[33] A set of standards issued in 2010 (but never enforced) was therefore voided, and new standards were issued by regulation in 2020.[34]

Under the regulation, STB can initiate an investigation at the request of Amtrak, of a host railroad, or on its own accord if an intercity passenger train fails to meet the on-time performance standards for two consecutive quarters. If STB finds that on-time performance has suffered as a result of host railroads' failure to honor Amtrak's statutory priority over other types of rail traffic, it may award damages to Amtrak.

The new standards—which measure the percentage of riders who arrive at their ticketed destinations on time ("customer on-time performance") rather than the percentage of passengers or trains arriving at the train's final destination on time—did not enter into effect until July 1, 2021, two full calendar quarters after the publication of the final rule. During that time, host railroads and Amtrak were free to renegotiate schedules. Host railroads specifically requested a grace period to negotiate new schedules during the rulemaking process on the grounds that prior schedules were not formulated with the new metrics in mind.

Some passenger rail supporters have cautioned that renegotiated schedules could be "padded" with extra time to prevent cascading delays or allow trains to make up lost time, improving the train's on-time performance but effectively slowing down the trip. For example, the revised 2021 schedule of the New Orleans-New York City *Crescent* long-distance train, hosted primarily by Norfolk Southern Railway, lengthened end-to-end trip times by 90 minutes southbound and 120 minutes northbound compared to pre-pandemic timetables. The route's on-time performance in FY2020 was 46%, which would have made it subject to penalties under the new performance standards. It is possible that under the new schedule, Norfolk Southern may be better positioned to avoid future enforcement action from STB, while Amtrak may feel that advertising a more reliable service will offset the longer trip time.

STB Authority in Nonrail Modes

Some STB authority extends to transportation providers other than railroads due to their interstate nature. Although nonrail decisions make up a relatively small share of the agency's overall workload, STB has a statutory duty "to promote the public interest" in carrying out federal regulatory policy over certain nonrail modes and industries.

Motor Carriers

Certain interstate trucking and motor coach companies were brought under the jurisdiction of the ICC by the Motor Carrier Act of 1935, a policy the railroad industry—already facing intense competition from highway modes—strongly supported. However, the trucking industry was largely deregulated by the Motor Carrier Act of 1980, and there were few authorities left for STB to inherit upon the agency's creation. As a result, trucking is essentially unregulated in terms of freight charges and services provided. STB regulations do require carriers of household goods to maintain publicly available tariffs pursuant to 49 U.S.C. §13704, and for carriers contracted by the U.S. Postal Service to publicly disclose their contracts upon request.

[33] United States Court of Appeals for the District of Columbia Circuit, *Association of American Railroads v. United States Department of Transportation*, Decision of July 20, 2018.

[34] These standards are codified in Part 273 of Title 49 of the *Code of Federal Regulations*.

Mergers, acquisitions, and other changes in control of passenger motor carriers engaged in interstate commerce are subject to an approval process similar to the one for the railroad industry. A separate process exists for the approval of "pooling" arrangements, where revenue or assets are shared by multiple carriers without a formal acquisition or merger.

Water Carriers

The STB authorizing statutes state that it is the policy of the United States, "in overseeing transportation by water carrier, to encourage and promote service and price competition in the noncontiguous domestic trade"—that is, transportation from the contiguous 48 states to Alaska, Hawaii, Puerto Rico, Guam, or any U.S. territory or possession.[35] Waterborne transportation in the noncontiguous domestic trade is subject to the Jones Act, which bars foreign-controlled ships and requires that the master, all of the officers, and 75% of the remaining crew must be U.S. citizens. In most cases, the vessels must be built in the United States.[36]

Under 49 U.S.C. §13701 and §13702, water carriers operating in the noncontiguous domestic trade are required to maintain and file public tariffs containing their rates, charges, rules, and service terms with STB. In accordance with a final rule issued in 2019, STB permitted water carriers to post their tariffs electronically on the internet and required them to file an annual certification in accordance with the terms of the final rule. For FY2021, 20 carriers filed certifications and tariffs with STB, the same number as filed in FY2020 and one more than filed in FY2019.

The House report accompanying H.R. 7616 (116th Congress), an appropriations bill for U.S. Department of Transportation agencies, directed the Government Accountability Office (GAO) to report to Congress on how STB exercises its authority over these carriers, especially concerning how it evaluates rate reasonableness.[37] The report is due to be completed in June 2022, 18 months after the enactment of the Consolidated Appropriations Act, FY2021 (P.L. 116-260).

Pipelines

STB's jurisdiction over the pipeline industry is limited to pipelines carrying commodities other than oil, gas, or water.[38] As stated by a 1998 GAO report (issued pursuant to a statutory requirement),

> The ICC Termination Act of 1995 limited the Surface Transportation Board's role in regulating pipelines by specifying that the Board can investigate pipeline issues only in response to a complaint by a shipper or other interested party. The act also eliminated the requirement for pipeline carriers to file the rates they charge to transport commodities, which was the sole reporting requirement for pipelines under the Interstate Commerce Commission's regulation.[39]

Given this narrow jurisdiction, GAO found that fewer than two dozen pipelines were subject to STB regulations, transporting five commodities—anhydrous ammonia, carbon dioxide, coal slurry, hydrogen, and phosphate slurry. These pipelines are required by STB regulations to

[35] 49 U.S.C. §13101(a)(4).

[36] The Jones Act is Section 27 of the Merchant Marine Act of 1920; see CRS Report R45725, *Shipping Under the Jones Act: Legislative and Regulatory Background*, by John Frittelli.

[37] H.Rept. 116-452, pp. 149-150.

[38] 49 U.S.C. §15301(a).

[39] Government Accountability Office (formerly the General Accounting Office), *Surface Transportation: Issues Associated With Pipeline Regulation by the Surface Transportation Board*, GAO/RCED-98-99, April 1998, p. 2.

publicly disclose their shipping rates upon request, and are subject to certain conditions if they intend to establish a new rate or raise an existing one.

Brokers and Freight Forwarders

Freight brokers and freight forwarders are businesses that arrange the movement of cargo by several different carriers, though they themselves may not be directly responsible for the transportation of goods. A freight forwarder might take possession of cargo at a warehouse or transfer facility, and might own the shipping containers used in some or all of a freight journey, while a broker generally does not take physical possession of the cargo for which it is coordinating transportation. These entities are subject to STB jurisdiction in some cases, and can be affected by changes in STB policy. Furthermore, where STB tariff requirements remain in place for certain carriers, those requirements also apply to freight forwarders who contract with those carriers.

While certain functions of a freight broker or forwarder may be the subject of an STB proceeding, one issue of frequent interest to the industry—the enforcement of insurance and bonding requirements—is the responsibility of the Federal Motor Carrier Safety Administration, not STB.

Executive Order on Competition

STB was one agency encouraged—though not required—to take actions to protect or enhance competition by President Biden's executive order of July 9, 2021.[40] The chair of the board was directed to:

- Consider commencing or continuing a rulemaking to strengthen regulations pertaining to reciprocal shipping.[41]
- Consider rulemakings pertaining to any other relevant matter of competitive access, including bottleneck rates, interchange commitments, or other matters.
- Ensure that passenger rail is not subject to unwarranted delays and interruptions in service due to host railroads' failure to comply with statutory requirements for passenger rail access and preferential use of facilities, and "vigorously enforce" the new on-time performance requirements that took effect on July 1, 2021.
- Consider a carrier's fulfillment of its responsibilities relating to Amtrak's statutory rights to host railroad tracks when determining whether a proposed merger/acquisition is consistent with the public interest.

The last two items have little to do with promoting competition among rail carriers, but rather are primarily related to enhancing Amtrak's ability to compete with airlines, motor carriers, or automobiles for intercity passenger traffic.

In response to the executive order, Board Chair Martin J. Oberman stated,

> [W]hile underscoring that the STB is an independent agency and that maintaining its independence is vital, I welcome the nationwide policy contained in this new Executive Order. [...]
>
> In harmony with the White House's policy that the federal government should seek to boost competition nationwide, as I have previously indicated since being named as Chairman, I

[40] E.O. 14036, "Protecting Competition in the American Economy," July 9, 2021, §5(n).

[41] For the 2016 proposed rulemaking that has not yet been finalized, see note 21.

> intend to urge my fellow Board members to prioritize and strongly consider the concepts embodied in several measures which are already pending or have been recommended by Board staff or stakeholders, including but not limited to reforming the Board's competitive access policies; enhancing shipper visibility into first mile/last mile service; and increasing the practical accessibility of rate relief measures to shippers in market dominant situations.[42]

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Disclaimer

[42] Statement From STB Chairman Martin J. Oberman on Executive Order on Competition, July 9, 2021, at https://www.stb.gov/news-communications/latest-news/pr-21-29/.