BEFORE THE
SURFACE TRANSPORTATION BOARD

JOINT PETITION FOR RULEMAKING TO ESTABLISH A VOLUNTARY ARBITRATION PROGRAM FOR SMALL RATE DISPUTES

Docket No. EP 765

CSX TRANSPORTATION, INC.'S PETITION FOR RECONSIDERATION

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CSX Transportation, Inc. ("CSXT") seeks reconsideration[1] of the Board's decision to force railroads opting into its new arbitration program to consent to arbitration of claims based on a systemwide revenue adequacy constraint.[2] The Final Rule erred by conditioning entry to the arbitration program on a global agreement to arbitrate a methodology that is contrary to statute, that is economically discredited, and that has been thoroughly controverted in Board proceedings that have been pending for nearly a decade.[3] Members of Congress have also expressed grave concerns about rate regulation based on systemwide revenue adequacy, describing the revenue adequacy constraint as a "market-distorting regulatory action[]," an "artificial price cap," and "price fixing."[4] Their statements explain that any use of "rate caps and revenue reductions based solely on a railroad earning returns on investment above its cost of capital," would

[1] CSXT seeks reconsideration pursuant to 49 C.F.R. § 1110.10, which allows "[a]ny person [to] file a petition for reconsideration of the Board's decision in a rulemaking proceeding … within 20 days of the date that the final decision is published in the Federal Register ..." Here, the Final Rule was published in the Federal Register on January 4, 2023. 88 Fed. Reg. 700 (Jan. 4, 2023). Because this petition is governed by § 1110.10, neither the procedural nor the substantive standards of 49 C.F.R. § 1115.3 apply. *See* Decision, *Dispute Resolution Procedures Under the Fixing America's Surface Transportation Act of 2015,* Docket No. EP 734, at 2 (STB served Mar. 22, 2017). Even if those standards were to apply, however, the issues identified herein would constitute "material errors" within the meaning of § 1115.3(b)(2).

[2] *See* Final Rule, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765 (STB served Dec. 19, 2022) ("Final Rule").

[3] CSXT also fully joins the petition for reconsideration filed in this proceeding by Union Pacific Railroad Company ("UP") and Norfolk Southern Railway Company ("NS"), which identifies other improvements that the Board should make to the Final Rule.

[4] Exhibit 1, Letters of Concern Filed by U.S. Senators in Docket Nos. EP 722 & EP 761.

"negatively "affect railroads' incentives to invest in new infrastructure and enhance rail service."[5] Certain U.S. Senators also recognized the fact that "issues related to long-term revenue adequacy could have far-reaching effects" and need to be "grounded in sound economic principles" and supported by "data-driven empirical analyses" in light of the "significant" and "lasting" "impacts" such issues would have "on the rail network and the shippers they serve."[6] This is precisely why pending "issues related to long-term revenue adequacy" do not belong in a fast-track arbitration process.

CSXT strongly supports the use of alternative dispute resolution to resolve disputes between railroads and shippers. For example, CSXT is one of only three Class I railroads that has consented to arbitrate demurrage disputes under the Board's Ex Parte 699 voluntary arbitration program.[7] And CSXT invested significant effort and resources in working with other railroads and shipper groups to craft a voluntary arbitration program for smaller rate disputes that would achieve a longtime goal of the Board's—a forum for resolving smaller rate disputes that is fair, quick, consistent with the Board's governing statute, and economically sound. CSXT continues to believe strongly in the program the Joint Carriers proposed to the Board in their July 31, 2020, Petition for Rulemaking.

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[5] *Id.*

[6] *Id.*

[7] CSXT Notice of Intent to Participate, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699 (filed June 28, 2019).

However, the Board's decision makes a fundamental error in delegating to arbitration panels the establishment and development of an earnings regulation methodology that is the subject of multiple pending proceedings before the Board. Methodological flexibility can be achieved without forcing railroads to consent to fast-track arbitration decisions on systemwide revenue adequacy—an undeveloped "earnings regulation" discredited by a chorus of economists and abandoned by modern regulators due to its destructive incentives. The Board has been grappling with the highly contested and highly complex revenue adequacy constraint for nearly a decade.[8] A proceeding to bring its annual revenue adequacy determinations more in line with the statute has been pending without action for over two years.[9] None of these proceedings has an estimated date for Board action.[10] It is inappropriate for the Board to delegate these multiple complex legal and policy issues—with their broad industry and economic impacts—to arbitrators before the Board has resolved them. Such critical decisions must be addressed by the Board utilizing its expertise and be based on a full record, with public and expert input. As Joint Carriers proposed, until the Board has determined those multiple questions, the complexities of earnings regulation based on revenue

[8] *See, e.g.*, Notice, *Railroad Revenue Adequacy*, Docket No. EP 722, et al. (STB served Apr. 2, 2014); Notice of Public Hearing, *Hearing on Revenue Adequacy*, Docket No. EP 761, et al. (STB served Sept. 12, 2019).

[9] *See* Decision, *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*, Docket No. EP 766 (STB served Dec. 30, 2020) (opening rulemaking proceeding and seeking comments).

[10] *See* Surface Transp. Bd., Report on Pending STB Regulatory Proceedings, Fourth Quarter 2022.

adequacy should be kept out of the new arbitration program, which is designed to sacrifice procedural and substantive protections for the sake of efficiency.

While the Board suggests that its ability to review arbitration decisions on appeal would enable it to adequately address issues surrounding revenue adequacy, both the arbitration record and the appellate standard of review will substantially circumscribe the Board's role. Arbitration evidentiary records developed in 45 days hardly can be expected to adequately address the many legal and policy issues surrounding revenue adequacy; and arbitration panel decisions that must be issued 30 days after close of the record cannot be expected to resolve questions that the Board has grappled with for over a decade. The Board is likely to be left with arbitration records and arbitration decisions that overlook or give short shrift to significant legal and policy issues, with no ability for the Board in its appellate role to request further development of the record or investigation of critical issues. An arbitration process intended to be quick and simple is not set up to allow the Board to effectively address the legal and policy questions surrounding revenue adequacy in a way that is lawful and consistent with the statutory framework intended by Congress. And the combination of a limited arbitration record and the Board's deferential standard of review for arbitration decisions could mean that hugely consequential decisions about the revenue adequacy methodology and its application could be effectively insulated from meaningful review in any federal court of appeals to which shippers or railroads may wish to bring such decisions.

When it comes to revenue adequacy, the stakes are too high to allow for a patchwork of new applications and precedent to unfold in this manner.

The Board's decision to invite revenue adequacy claims will undermine both the Board's rate regulatory scheme as well as the arbitration program it is seeking to establish. It is also legally flawed for two specific additional reasons. First, the Final Rule did not address reasonable alternatives to its decision to force arbitration of a systemwide revenue adequacy constraint. One such alternative was presented by the Joint Carriers in their Reply Comments, which proposed that the Board bar use of "a systemwide revenue adequacy constraint" until the ambiguities surrounding such a constraint had been addressed by the Board. This narrower proposal—that the arbitration program exclude the use of a particular methodology of which the scope, contours, and validity remain pending under Board review—solves the Board's stated concerns that a bar on certain forms of evidence would be vague or unduly restrictive. Indeed, this methodological bar would be no different from the Board's decision to bar arbitrators from considering product and geographic competition and the Limit Price Test.[11] Yet the Final Rule does not address this easily administrable bright-line proposal, and instead asserts incorrectly that the Joint Carriers failed to explain how the Board could administer a "partial evidentiary ban."

[11] Final Rule at 79.

Second, the Board's decision to delegate the resolution of substantial legal and policy questions about the systemwide revenue adequacy constraint to arbitrators is a material error. Section 572(b) of Title 5 provides guidance on the factors that agencies should use in deciding what issues are appropriate for arbitration. Those factors weigh overwhelmingly in favor of resolving the critical issues surrounding a systemwide revenue adequacy constraint in public Board proceedings—not in delegating unresolved issues to arbitrators operating in a confidential setting, on an accelerated schedule, and with a limited record.

ARGUMENT

I. THE BOARD SHOULD NOT FORCE CARRIERS TO ARBITRATE A DISCREDITED SYSTEMWIDE REVENUE ADEQUACY METHODOLOGY.

As CSXT and the rest of the rail industry have repeatedly told the Board, top-down earnings regulation is an economically unsound and thoroughly discredited concept. Multiple leading economists have appeared before the agency to detail the known public policy problems that flow from earnings regulation. At its core, earnings regulation curtails the incentive of the regulated entity to invest, to innovate, to improve service, and to operate more efficiently. This is why modern regulators have moved away from earnings regulation and the known evils that plague its use. Simply put, when an entity's overall earnings are capped by regulations, the entity has no incentive to grow business, to be more efficient, or to compete effectively.

All of these issues with any revenue adequacy constraint have been before the Board for years, without resolution. Nonetheless, the STB in the Final Rule would force carriers who want to enter the arbitration program to also agree to arbitrate claims based on this deeply flawed methodology, in effect delegating to arbitrators the formation and evolution of a revenue adequacy constraint which itself is a deviation from the rate review process and regulatory framework established by Congress.

In declining to exclude such methodologies from the arbitration program, the STB made two basic points. First, it recharacterized such an exclusion as a bar on revenue-adequacy evidence and found that excluding all such evidence would be impractical because numerous accepted methodologies rely in part on evidence of carrier revenue needs. Second, the STB found that exclusion of revenue adequacy evidence could unduly restrict complainants' flexibility in designing new methodologies and "try[ing] out revenue adequacy approaches that would clearly be permissible in a FORR case."[12]

CSXT asks the STB to reconsider. First, the Board's focus on an "evidentiary ban" was misguided and failed to consider the methodological ban proposed by the Joint Carriers. Second, the Board's justification for allowing experimentation with earnings regulation in simplified arbitration proceedings failed to meaningfully grapple with the core argument—that resolving whether, when, and how to deploy a

[12] Final Rule at 48.

discredited rate methodology must be done by the STB. Respectfully, earnings regulation is not a concept the STB should be letting shippers "try out" in fast-track proceedings that are not equipped to grapple with the debilitating legal and economic problems that have been presented to the STB in multiple pending proceedings over the past decades.

CSXT elaborates on each point below.

A. The Board Should Adopt the Methodological Ban that Joint Carriers Proposed in Reply Comments.

The Final Rule did not address reasonable alternatives to the Board's decision to force arbitration of claims based on a systemwide revenue adequacy constraint. In response to the Board's concerns in the NPRM that a ban against any evidence regarding "revenue adequacy" would be unworkable because it would implicate accepted methodologies like Three-Benchmark,[13] Joint Carriers proposed a narrower methodology ban—that "the use of a system-wide revenue adequacy constraint, including the so-called revenue adequacy constraint under *Coal Rate Guidelines*, should be excluded from the Proposed Program—*until the Board has addressed the ambiguities surrounding it*."[14] The Final Rule does not meaningfully

[13] *See* Notice of Proposed Rulemaking, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 39–40 (STB served Nov. 15, 2021) ("NPRM").

[14] Joint Carriers' Reply Comments, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 9 (filed Apr. 15, 2022) ("Joint Carriers' Reply Comments").

address that proposal to exclude the systemwide revenue adequacy methodology from arbitrations.

Specifically, the Final Rule asserts incorrectly that Joint Carriers provided "no additional detail" on Reply about how the Board could administer a partial evidentiary ban. But that is a strawman argument that does not consider what Joint Carriers actually proposed on Reply—that the Board ban the use of a "system-wide revenue adequacy constraint" in arbitrations until the Board has resolved the pending proceedings about that constraint. This Reply proposal—a bright-line rule that banned a particular and easily defined methodology (*i.e.*, methodological ban)—redefined the initial proposal (an evidentiary ban). The Final Rule failed to address that Reply proposal and instead incorrectly focused on the idea that Joint Carriers were arguing for an undefined "partial revenue adequacy evidentiary prohibition."[15]

The Reply proposal would be easy to apply, with no risk of ambiguity. "System-wide revenue adequacy constraint" has a clearly defined meaning in the Board's precedents. As the ICC said in *Coal Rate Guidelines*, it is a constraint under which a finding that a railroad has a "reasonable level of profitability" would be sufficient to constrain its rates.[16] This is fundamentally earnings regulation, in which a finding that a railroad has "excessive" earnings on a system-wide basis is

[15] Final Rule at 48.

[16] *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 535 (1985) ("Our revenue adequacy standard represents a reasonable level of profitability for a healthy carrier …. Carriers do not need greater revenues than this standard permits, and we believe that, in a regulated setting, they are not entitled to any higher revenues.").

used to award rate relief to individual shippers (without any finding, as required by statute, that the particular rate charged to that particular shipper is unreasonably high). The Board heard extensive testimony about the problems with earnings regulation in Ex Parte 722 and 761, and there was no serious question in those proceedings about defining what a systemwide revenue adequacy constraint is.

The economic literature provides an equally clear definition of a "system-wide revenue adequacy constraint": a rate constraint triggered by, and predicated on, a railroad's system-wide earnings.[17] For example, in a 2016 article from a peer-reviewed economic journal, renowned economists, David Sappington, Ph.D. and John Mayo, Ph.D., discuss the serious problems with earnings regulation and equate "revenue adequacy regulation" with earnings regulation, pointing expressly to the language from *Coal Rate Guidelines*—that "[c]arriers do not need any greater revenues than this standard permits, and … in a regulated setting, … are not entitled to any higher revenues."[18] A ban on arbitrating claims predicated on this easily defined methodology is what Joint Carriers proposed on Reply.

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[17] Supplemental Comments of the Association of American Railroads, *Hearing on Revenue Adequacy*, Docket No. EP 761, at 23–25 (filed Feb. 13, 2020) (explaining that "'old-style' rate-of-return (*i.e.*, earnings) regulation means any [rate] constraint based on system-wide earnings," and noting that Professor Kalt and Dr. Reishus explain that "rate caps … triggered by a putative finding of revenue adequacy … cannot identify if a railroad is realizing supra-competitive levels of earnings in either the short- or long-run," while, at the same time, because revenue adequacy would be the "*trigger* for the imposition of rate regulation," "carriers would face … distortionary incentives" to avoid efficiencies and quality improvements, or make wasteful or insufficient investments) (emphasis added) (internal quotation marks omitted).

[18] John W. Mayo & David E. M. Sappington, *Regulation in a 'Deregulated' Industry: Railroads in the Post-Staggers Era*, 49 REV. OF INDUS. ORG. (SPECIAL ISSUE) 203, 213 (2016) (recognizing "the possibility that … earnings regulation (that we sometimes refer to as 'revenue adequacy regulation') might be imposed in the rail industry"). Other renowned

The scope of rate methodologies based on a "systemwide revenue constraint" is not in doubt; it encompasses any methodology in which a railroad's overall profitability, earnings, or revenues are used to determine whether a rate for a particular movement is unreasonably high. That scope would include the "revenue adequacy constraint" broadly discussed in *Coal Rate Guideline*s. It would include the Rate Increase Constraint ("RIC") set forth in the Board's Rate Reform Task Force Report, which would find certain rate increases to be automatically unreasonable if the railroad was currently deemed long-term revenue adequate.[19] It would include the version of RIC advanced by certain shipper groups in Ex Parte 722.[20] It would include the "Benchmark Method" advanced by the American Chemistry Council in Ex Parte 722, which again would use a finding of systemwide revenue adequacy as the single factor justifying rate reductions and use a complicated econometric formula to allocate the allegedly excess revenues to

economists have likewise defined revenue-adequacy-based earnings regulations as "using measures of overall firm-wide revenues and concomitant firm-wide rates of return in excess of a firm's cost of capital *to trigger limitations on rates and overall revenues*" and have characterized these kinds of methodologies as "'old-style' and discredited approach[es] to regulation" that "ha[ve] been largely abandoned in at least developed countries because of its many distortions and inefficiencies." Comments of the Association of American Railroads, *Hearing on Revenue Adequacy*, Docket No. EP 761 (filed Nov. 26, 2019), Verified Statement of Joseph P. Kalt, Ph.D, at 7 (emphasis added).

[19] Rate Reform Task Force, Report to the STB (Apr. 25, 2019).

[20] *See* Statement of the Western Coal Traffic League, *Hearing on Revenue Adequacy*, Docket No. EP 761, et al. (filed Nov. 26, 2019).

individual movements.[21] And it would include any newly crafted methodologies that would use a carrier's systemwide "revenue adequacy" to constrain rates.

But this definition plainly would NOT exclude shippers from relying on accepted methodologies—like Simplified SAC or Three Benchmark and its use of RSAM,[22] or experimental methodologies that seek to prove a rate is unreasonable based on the particularities of the rate in question and not on systemwide earnings.[23] The bottom line is that any new methodology that operates as earnings regulation (*i.e.*, one that ties rate relief to systemwide revenue adequacy) should be excluded from the arbitration program unless and until the Board validates such a methodology and that Board action survives judicial appeal. While arbitration will allow for flexible evidentiary presentations, earnings regulation is not a concept that is appropriate for experimentation in expedited arbitrations—particularly when the Board itself has not yet acted in multiple pending proceedings concerning revenue adequacy.

Despite Joint Carriers' proposal for a defined methodological ban, in the Final Rule, the Board merely repeated its concerns from the NPRM about problems with a vague evidentiary ban without explaining why Joint Carriers' clearer

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[21] *See* Written Testimony of the American Chemistry Council, *Hearing on Revenue Adequacy*, Docket No. EP 761, et al. (filed Nov. 26, 2019).

[22] *See* Joint Carriers' Opening Comments, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, Docket No. EP 765, at 18 (filed Jan. 14, 2022).

[23] For example, while the accepted and economically sound methodologies of SAC and Simplified SAC both incorporate a hypothetical railroad's revenue needs, that analysis is still tied to the route under review, not a railroad's systemwide revenues.

methodology-based ban would not work. Joint Carriers' bright-line rule would not lead to disputes over whether new methodologies are acceptable.[24] Rather, it is directed specifically and solely at methodologies based on a systemwide revenue adequacy constraint, which are easily distinguishable from non-earnings regulation methodologies, have enormous policy implications, and are the subject of regulatory proceedings that remain pending. Claims based on such methodologies should not be subject to arbitration; shippers are free to bring them directly to the Board. This narrower proposal that the arbitration program exclude use of a particular methodology that remains under Board review solves the Board's stated concerns that a bar on certain forms of evidence would be vague or unduly restrictive. Indeed, this methodological bar would be no different from the Board's proposal to bar arbitrators from considering product and geographic competition or the Limit Price Test.[25]

The Board should fully address Joint Carriers' Reply proposal on reconsideration and impose their narrow and easily defined methodological ban unless and until the Board decides the highly consequential disputes regarding revenue adequacy in either a rulemaking or a formal complaint proceeding subject to full appellate review.

B. The Board Committed Material Error by Requiring Railroads to Accept in an Arbitration Program a Complex and Seriously Contested Methodology with Broad Policy Implications.

[24] Final Rule at 47.

[25] Final Rule at 79.

Joint Carriers argued that it was inappropriate for the Board to allow parties to arbitrate a system-wide revenue adequacy constraint with wide-reaching policy implications when the Board has failed to resolve disputes regarding the definition and use of the constraint in multiple proceedings still pending before the Board.[26] Joint Carriers even pointed to Board precedent recognizing that questions that are "'complicated or implicate significant policy or regulatory issues … are better suited for resolution using the Board's formal adjudicatory procedures.'"[27] But in the Final Rule, the Board failed to adequately address these arguments, including how its decision comports with that prior precedent or the factors in 5 U.S.C. § 572(b)—the latter of which the Board must address in light of its assertion in the Final Rule that it is acting, in part, under its authority in 5 U.S.C. §§ 571 *et seq*.[28] That statute provides guidance on the factors that agencies should use in deciding what issues are appropriate for arbitration. Those factors overwhelmingly weigh in favor of resolving the critical issues surrounding a systemwide revenue adequacy constraint in public Board proceedings—not in delegating unresolved issues to arbitrators operating on an accelerated schedule with a limited record.

1. Unresolved legal and policy issues regarding a systemwide revenue adequacy constraint make it uniquely unsuited to arbitration.

[26] Joint Carriers' Reply Comments at 10–11.

[27] Joint Carriers' Reply Comments at 11 (quoting Final Rules, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699, slip op. at 10 (STB served May 13, 2013)).

[28] Final Rule at 68 (authority for Part 1108 includes 5 U.S.C. § 571 *et seq.*, as well as 49 U.S.C. § 11708 and 49 U.S.C. § 1321(a)).

In prior filings the Joint Carriers explained the multiple unresolved issues with a systemwide revenue adequacy constraint, which have been well documented in the pending proceedings in Ex Parte 722, 761, and 766. But it is worth referring back to these issues to illustrate why a systemwide revenue adequacy constraint is so inappropriate for use in fast-track arbitration.

First, the very notion of a systemwide revenue adequacy constraint involves serious policy questions that are best decided by the Board—not delegated to arbitration panels. The Board has been presented with extensive economic testimony showing that a railroad's attainment of revenue adequacy on a systemwide basis is not a policy problem for the Board to solve or a basis for Board intervention. Revenue adequacy results from many pro-competitive reasons and thus does not mean that railroads are acting improperly or abusing market power. Other well-functioning industries—including the shipper organizations that have most prominently argued for a revenue adequacy constraint—routinely earn accounting returns on investment higher than their cost of capital. Indeed, almost all U.S. industries earn accounting returns above the cost of capital. Revenue adequacy is a widespread, normal, and expected outcome in the economy—not a sign of market power abuse that warrants regulatory action.[29]

[29] Opening Comments of the Association of American Railroads, *Railroad Revenue Adequacy*, STB Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Joseph P. Kalt ("Kalt Sept. 5, 2014 V.S."), at 32 ("[T]here is no way in which one can look at accounting rates of return and infer anything about relative economic profitability or, a fortiori, about the presence or absence of monopoly profits.").

Second, a systemwide revenue adequacy constraint is a utility-style regulation of systemwide earnings that is outside the Board's statutory authority. As the Board has explained, "Congress deliberately chose to move away from a public utility model of regulation for the railroad industry."[30] Rather, "[i]n enacting the Staggers Act, Congress concluded that unnecessarily burdensome and rigid public utility-style regulation have prevented the railroads from responding to changing market conditions, as other businesses could, and taking actions that could help them to recover their costs and earn adequate revenues. The Staggers Act was intended to loosen this tight regulatory grip…."[31] Any form of revenue adequacy constraint is effectively rate-of-return regulation that Congress has not authorized.[32] These statutory problems with a systemwide revenue adequacy constraint were well explained in Ex Parte 722 and 761, but the Board has not yet addressed them. It should not leave that statutory issue for arbitrators to address.

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[30] Decision, *Western Coal Traffic League—Petition for Declaratory Order*, Docket No. FD 35506, at 16 (STB served July 25, 2013); *see also Groome & Assocs., Inc. v. Greenville Cnty. Econ. Dev. Corp.*, Docket No. NOR 42087, at 12 (STB served July 27, 2005) ("Congress directed [in the Staggers Act] that railroads be treated more like ordinary businesses than like public utilities.").

[31] *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 201(a) of the Trucking Industry Regulatory Reform Act of 1994*, 1994 MCC LEXIS 104, at *275–76 (I.C.C. Oct. 25, 1994).

[32] *Ark. Power & Light Co., et al. Petition to Institute Rulemaking Proceeding—Implementation of Long-Cannon Amendment to the Staggers Rail Act*, 365 I.C.C. 983, 989 (1982) ("The Commission does not regulate the overall rate of return for railroads.").

Third, the agency's measurement of annual revenue adequacy is flawed, and the agency has a pending proceeding to address its annual calculations.[33] The Board's annual findings do not provide for a "reasonable and economic profit" as required by statute.[34] Experts have testified in EP 766 that a "reasonable and economic profit" means (i) some amount of profit over and above the cost of capital when (ii) the cost of capital is measured using replacement costs.[35] The Board's current measure of revenue adequacy reflects neither.[36] In concluding that a carrier is "revenue adequate" when its accounting returns equal the industry cost of capital, the Board's annual measurements do not satisfy the statutory requirement to include in any measure of revenue adequacy a "reasonable and economic profit or return (or both)." 49 U.S.C. § 10704(a)(2). Moreover, the failure to use actual economic costs of assets in the annual determinations and the distorting effect of the agency's treatment of deferred taxes create long-running concerns about the accuracy of the annual determinations.[37] Again, the Board should resolve these

[33] *See* Decision, *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*, Docket No. EP 766 (STB served Dec. 30, 2020) (opening rulemaking proceeding).

[34] 49 U.S.C. § 10704(a)(2).

[35] *See, e.g.*, Joint Petition for Rulemaking to Modernize Annual Revenue Adequacy Determinations, Docket No. EP 766 (filed Sept. 1, 2020); Petitioners' Response to Replies, *Joint Petition for Rulemaking to Modernize Annual Revenue Adequacy Determinations*, Docket No. EP 766 (filed Oct. 13, 2020); Reply Comments of Joint Carriers, *Joint Petition for Rulemaking—Annual Revenue Adequacy Determinations*, Docket No. EP 766 (filed Aug. 16, 2021).

[36] *See supra* note 35.

[37] *See supra* note 35.

complex issues itself, and not punt them to arbitrators who will be working on an expedited basis with a limited record.

Fourth, even if a carrier's revenue adequacy were a policy problem (which it isn't), and even if the Board had authority to regulate systemwide earnings (which is not the case), and even if the Board were measuring revenue adequacy accurately (which it isn't), there is no economically valid basis for determining the reasonableness of a rate based purely on system-wide revenue levels of a carrier.[38] As the D.C. Circuit correctly observed, a test of "system-wide revenue need" provides "no guidance" on the rates a customer should be charged for the particular facilities and services it uses.[39] Thus, system-wide revenue levels, deemed "adequate" or not, cannot determine the reasonableness of a rate—more specificity is required under "sound principles of rail regulation economics."[40]

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[38] *See, e.g.*, Kalt Sept. 5, 2014 V.S. at 5 ("overall revenue supra-adequacy, itself, would not justify the constraining of rates on specific traffic even if that traffic is found to be subject to rail market dominance"); Opening Comments of Norfolk Southern Railway Company, *Railroad Revenue Adequacy*, Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Bradford Cornell ("Cornell Sept. 5, 2014 V.S."), at 13 ("revenue adequacy reflects a railroad's *overall* financial health without informing how particular rates for specific traffic should be regulated"); Opening Comments of Union Pacific Railroad Company, *Railroad Revenue Adequacy*, Docket No. EP 722 (filed Sept. 5, 2014), Verified Statement of Kevin M. Murphy, at 27 ("Changes in [a railroad's] overall rate of return provide little or no economic basis for the Board to conclude that there is a lack of competition or for a complaining shipper to petition successfully for reduced rates on (potentially market dominant) … shipments").

[39] *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 481 (D.C. Cir. 2006).

[40] 49 U.S.C. § 11708(d)(1); *see, e.g.*, Cornell Sept. 5, 2014 V.S. at 30 ("[P]roperly measured revenue adequacy … would not serve the regulator's need to identify the appropriate rate that should be charged for *particular* traffic. More basic, a constraint based on this measure would not even convey whether a railroad is overcharging … any *particular* shipper."); Reply Comments of the Association of American Railroads, *Railroad Revenue Adequacy*, Docket No. EP 722 (filed Nov 4, 2014), Verified Statement of Joseph P. Kalt, at 22

In short, a systemwide revenue adequacy constraint is categorically different from other existing or proposed rate methodologies. While other methodologies have been criticized as being too complex, taking too long, or needing improvement, there is no methodology that is subject to the same kind or number of serious unanswered questions—from questions about its fundamental economic validity to its lack of statutory authority to the calculation errors in the annual determinations. There is eminently good reason for the Board to decide these questions, rather than forcing arbitration of issues that involve regulatory policy. The Board should decide these questions, and it could do so by either acting in pending ex parte proceedings or in resolving any individual revenue adequacy case that a shipper might choose to bring to the Board. But the Board should not sidestep these critical threshold policy issues by pushing them to arbitration panels.

2. The statutory factors of 5 U.S.C. § 572(b) counsel against arbitrating revenue adequacy issues.

The compelling policy reasons for the Board to resolve issues around the systemwide revenue adequacy constraint, rather than forcing participating railroads to consent to arbitrating them, are buttressed by the statutory considerations that the Board must take into account when deciding whether issues are appropriate for arbitration. Title 5 section 572(b) states in relevant part:

An agency shall consider not using a dispute resolution proceeding if—

("[S]hippers cannot now properly assert that individual regulated rates … are *unreasonable* simply because the railroad as a whole is putatively revenue adequate. … [T]he specific market conditions and cost-of-service attributes of each movement or relevant group of movements must be analyzed ...").

> (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
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> (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
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> (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
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> (4) the matter significantly affects persons or organizations who are not parties to the proceeding; [or]
>
> (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; …

5 U.S.C. § 572(b).[41]

Nowhere in the Final Rule does the Board "consider not using a dispute resolution proceeding" to resolve the disputes regarding the definition, use, and validity of a system-wide revenue adequacy constraint, despite the fact that factors 1–5 of § 572(b) collectively weigh against such an issue being resolved in an arbitration proceeding. While the considerations in § 572(b) are discretionary, a U.S. district court may vacate an arbitration award "if the use of arbitration or the

[41] *See* 101 S. Rep. 543, 582 (1990) ("The section also provides guidelines on when ADR techniques should not be used. The section lists six factors which, if one or more is present, make use of ADR techniques inappropriate. If one or more of these factors is present, an agency can still use ADR, but only if it has first carefully analyzed the situation and made a specific decision that the ADR proceeding can be structured to avoid the identified problem or because other concerns significantly outweigh the factors that normally make ADR inappropriate.").

award is clearly inconsistent with the factors set forth in section 572 of title 5."[42] Other federal agencies considering the use of dispute resolution processes have addressed these factors when acting under the authority of 5 U.S.C. § 571 *et seq*.[43] Because the Board is acting under its authority in 5 U.S.C. § 571 *et seq*., it must consider and provide a rationale for why ADR is an appropriate forum to resolve the definition, use, and validity of a system-wide revenue adequacy constraint despite § 572(b)'s factors.

When the Board considers those factors, it must grapple with the reality that they strongly point away from arbitration of claims based on a systemwide revenue adequacy constraint, particularly when the Board has not resolved the many legal and policy issues surrounding such claims. For example, the questions surrounding a systemwide revenue adequacy constraint "involve[] or … bear upon significant

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[42] 9 U.S.C. § 10(c).

[43] *See, e.g.*, Notice of Alternative Dispute Resolution ("ADR") Policy, *Alternative Dispute Resolution Policy Statement*, Docket No. 93-07, 1993 WL 275441, at *1, *3 (F.M.C. served July 13, 1993) (Federal Maritime Commission served July 13, 1993) (Federal Maritime Commission noting factors in 572(b) when acting under the authority of the ADRA and requiring at prehearing conference a determination "whether the use of ADR would be appropriate"); Request for Comments, *Alternative Dispute Resolution Policy*, File No. 57-2-93, 1993 WL 17654, at *11, n.48 (S.E.C. Jan. 22, 1993) (noting that the Commission "litigate[s] matters … to establish precedent" and asking commenters to "address all of the factors that [5 U.S.C. § 572(b)] sets forth as potential reasons for not using ADR"); Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (Equal Employment Opportunity Commission, July 10, 1997), in 2 Disability Law Compliance Manual Appendix B3 (Dec. 2022 Update) (noting the factors in 5 U.S.C. § 572(b) and highlighting that because arbitration decisions are confidential, with limited appellate rights, "there is virtually no opportunity for meaningful scrutiny of arbitral decision-making" such that arbitration "does not allow for the development of the law" and should not be used where "the case involves complex or novel legal issues" or "in cases that represent tests of significant legal principles").

questions of Government policy that require additional procedures before a final resolution may be made," such as the opportunity for interested parties and experts to weigh in, and an arbitration forum "would not likely serve to develop a recommended policy"[44] for the Board to answer such complex and contested questions because the record in the arbitration process is extremely limited, as is the Board's standard of review. In the same vein, disparate arbitration panels are likely to produce "variations among individual decisions," despite the need to "maintain[] established policies"[45] with regard to the complex and disputed questions surrounding a system-wide revenue adequacy constraint. And the Board's decisions on appeals from arbitrations would "significantly affect[] persons or organizations who are not parties to the proceeding,"[46] given the precedential nature of the Board's decisions and the otherwise wholly undefined bounds of a systemwide revenue adequacy constraint.

In short, a systemwide revenue adequacy constraint poses complex questions in need of clarifying Board precedent based on the Board's expertise explored in formal proceedings. These questions are difficult, as evidenced by the fact that EP 722, EP 761, and EP 766 remain unresolved. But "matter[s] involv[ing] … significant questions of Government policy"[47] should be addressed by the

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[44] 5 U.S.C. § 572(b)(2).

[45] 5 U.S.C. § 572(b)(3).

[46] 5 U.S.C. § 572(b)(4).

[47] 5 U.S.C. § 572(b)(2); *see* Final Rules, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699, at 10 (STB served May 13, 2013).

presidentially-nominated, Senate-confirmed members of the Surface Transportation Board and subjected to meaningful appellate review.

3. The Board's rationales in the Final Rule fail to harmonize the Board's decision with its prior precedents and § 572(b) factors.

None of the Board's rationales in the Final Rule rebut the fact that questions surrounding the definition and use of a system-wide revenue adequacy are "complicated or implicate significant policy or regulatory issues" and thus "are better suited for resolution using the Board's formal adjudicatory procedures"[48] and inappropriate for use in an arbitration context.[49]

For example, the Board reasoned that, "if an arbitration decision is appealed, the Board will be able to review the arbitration panel's decision pursuant to the standard set forth in 49 U.S.C. § 11708(h), including that the decision is consistent with sound principles of rail regulation economics."[50] This appellate role provides no solace because opportunities for appeal would be constrained by the inadequate factual and economic record before the arbitration panel and the discretionary standard of review applied by the Board. Arbitration appeals would not be *de novo* proceedings in which the Board could seek additional evidence, investigate alternatives, or develop the record. They would be deferential proceedings limited to reviewing the arbitration panel's decision in light of the record developed below.

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[48] Joint Carriers' Reply Comments at 11 (quoting Final Rules, *Assessment of Mediation and Arbitration Procedures*, Docket No. EP 699, slip op. at 10 (STB served May 13, 2013)).

[49] *See* 5 U.S.C. § 572(b).

[50] Final Rule at 48.

Determining whether a decision about a system-wide revenue adequacy constraint is "consistent with sound principles of rail regulation economics" on an extremely limited record, with no input from other interested parties, is not how the Board should make policy in this critical and contested area.

In addition, the Board argued that it would "take a context-specific approach to reviewing arbitration decisions, including decisions that consider a revenue adequacy methodology."[51] But every decision the Board makes in an adjudication is "context-specific." That does not prevent precedential adjudication decisions from having wide implications for other cases and parties. This would certainly be true for arbitration appeals involving revenue adequacy questions. (Indeed, even if the Board were to reconsider its decision to make its decisions in arbitration appeals precedential, Board statements in non-precedential revenue adequacy appeals could effectively change policy with wide impact across the rail industry.)

And in response to Joint Carriers' arguments that arbitrating a system-wide revenue adequacy complaint would be too complex for a fast-track arbitration forum, the Board reasoned, "the very purpose of the arbitration process is to force parties to streamline their cases to reduce this complexity."[52] But simply saying that parties to an arbitration will be "forced" to simplify any revenue adequacy presentations does not make complex issues go away. Indeed, the core of the problem is that important issues related to the definition, use, and validity of a

[51] *Id.*

[52] *Id.*

system-wide revenue adequacy constraint—which have filled *thousands of pages* of record evidence in the relevant proceedings devoted to those questions—cannot reasonably be simplified for decision in a fast-track arbitration. A professor could certainly ask her students to summarize the works of William Shakespeare in a three-page essay. But one would not expect the essays to be particularly insightful. Likewise, one cannot expect "streamlined" revenue adequacy evidence presented to arbitration panels to somehow provide a clear path to resolve questions that have languished before the agency for almost a decade.

For all these reasons, the Board should not require railroads participating in the voluntary arbitration program to arbitrate claims of systemwide revenue adequacy. These important policy matters should be decided by the Board, either in its pending rulemaking proceedings or individual adjudications before the Board.

CONCLUSION

For the foregoing reasons, the Board should grant this petition for reconsideration and prohibit the use of a systemwide revenue adequacy constraint in arbitrations under the new voluntary arbitration program.

Respectfully submitted,

/s/ Matthew J. Warren
Matthew J. Warren
Morgan B. Lindsay
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

Counsel for CSX Transportation, Inc.

Dated: January 24, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January 2023, a copy of the foregoing CSX Transportation, Inc.'s Petition for Reconsideration was served by email or first-class mail on the service list for Docket No. EP 765.

/s/ Matthew J. Warren
Matthew J. Warren
SIDLEY AUSTIN LLP

EXHIBIT 1

Letters of Concern Filed by United States Senators in Docket Nos. EP 722 & EP 761

300079

ENTERED
Office of Proceedings
December 3, 2019
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United States Senate
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
WASHINGTON, DC 20510–6125
WEBSITE: http://commerce.senate.gov

December 2, 2019

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Martin J. Oberman
Board Member
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

Dear Chairman Begeman, Vice Chairman Fuchs, and Commissioner Oberman:

I am writing regarding the Surface Transportation Board's hearing in *Railroad Revenue Adequacy*, Docket No. EP 722 to consider issues related to long-term revenue adequacy. Thank you for soliciting feedback on this important matter. I appreciate your efforts to continue making the agency's processes transparent and efficient for shippers and railroads.

As you consider staff recommendations related to long-term revenue adequacy, I ask you to keep in mind the impacts on the rail network and the shippers they serve. As you know, many of the issues related to long-term revenue adequacy could have far-reaching effects. Specifically, staff recommendations related to rate caps and revenue reductions based solely on a railroad earning returns on investment above its cost of capital appear to have the potential to affect railroads' incentives to invest in new infrastructure and enhance rail service. I, therefore, ask the Board to consider the potential implications of staff recommendations, if adopted, related to long-term revenue adequacy, including their potential effects on freight railroads' investment in our nation's network and the quality of service that can be provided to shippers.

Thank you for your focus on this important issue and consideration of this request. Your continued partnership in promoting a competitive, efficient, and reliable national rail system is truly appreciated.

Sincerely,

Roger F. Wicker
Chairman

SHELLEY MOORE CAPITO
WEST VIRGINIA

COMMITTEES:
APPROPRIATIONS
COMMERCE, SCIENCE, AND TRANSPORTATION
ENVIRONMENT AND PUBLIC WORKS
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510

February 13, 2020

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Patrick J. Fuchs
Board Member
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Martin J. Oberman
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

RE: Docket No. EPP 722, Railroad Revenue Adequacy

Dear Chairman Begeman, Vice Chairman Oberman, and Commission Fuchs,

The freight rail industry is a critical part of our nation's transportation system and is an engine that drives our nation's competitiveness. Our nation depends on a healthy railroad network to move goods safely and efficiently. As the Surface Transportation Board (STB) continues to consider issues related to the long-term revenue adequacy of railroads, I urge you to continue to balance the needs of railroads and shippers through a balanced economic framework.

A safe, efficient, and reliable freight network is key to fostering West Virginia's economic development. We depend on railroads to carry our abundant natural resources and manufactured goods to markets around the world. Several of the issues currently before the STB, such as revenue reductions or rate caps, could have significant impacts on both railroads as well as the shippers they serve.

As you finalize this process, I urge you to consider the economic impacts – supported by sound data-driven analysis – on the freight rail network, and the consequences those proposals may have on railroads and on shippers. Thank you for your thoughtful consideration.

Sincerely,

Shelley Moore Capito

Shelley Moore Capito
United States Senator

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United States Senate

EP 722
EP 761

300374

COMMITTEES
APPROPRIATIONS
ENERGY AND NATURAL RESOURCES
FINANCE
INDIAN AFFAIRS

ENTERED
Office of Proceedings
February 13, 2020
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February 5, 2020

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Patrick J. Fuchs
Board Member
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Martin J. Oberman
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

RE: Docket No. EPP 722, Railroad Revenue Adequacy

Dear Chairman Begeman, Vice Chairman Oberman, and Commissioner Fuchs,

Freight rail is a critical part of our transportation system, and ensures that hard-working Montana farmers, ranchers, and businesses are able to get their goods to market. As the Surface Transportation Board (STB) continues to consider issues related to the long-term revenue adequacy of railroads, I urge you continue the balanced economic framework between railroads and the shippers of my state.

As you know, unlike other modes of transportation, freight railroads are almost entirely privately owned and operated and must use their own capital to invest in new infrastructure and maintain safety. In fact, freight railroads invest an average of $25 billion per year doing so. Many of the issues you are currently considering, such as revenue reductions or rate caps, could have significant impacts on not only railroads, but the farmers, ranchers, and other shippers they serve. It is crucial that railroads are able to continue to compete on an equal playing field with other forms of transportation. Particularly for those in the agriculture sector, where at times in Montana it may not be feasible to use methods other than rail to get goods to market. Proposals moving through the regulatory process should continue to be grounded in sound economic principles, give full consideration to the impact on agricultural users, and be supported by data-driven empirical analyses.

As you finalize this process, I would urge that the regulatory structure continue to recognize the importance of the railroads' ability to improve and maintain their world-class networks while meeting their shippers' demands at economically reasonable rates. Thank you for your consideration.

Sincerely,

Steve Daines

STEVE DAINES
United States Senator

DEB FISCHER
NEBRASKA

COMMITTEES:
ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
AGRICULTURE, NUTRITION, AND FORESTRY
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510

13 February 2020

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Patrick J. Fuchs
Board Member
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

300390

The Honorable Martin J. Oberman
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

Dear Chairman Begeman, Vice Chairman Oberman, and Board Member Fuchs,

I write to you today about the Surface Transportation Board's (STB) work on railroad revenue adequacy, Docket No. EP 722.

As you continue to discuss proposals related to long-term revenue adequacy, specifically proposals related to potential rate caps and revenue reductions based on overall railroad earnings, I urge you to maintain a balanced economic framework that recognizes the importance of the freight rail system to the economy. It is important that railroads can continue to effectively invest in their networks and innovate. The Board should also ensure shippers have access to STB oversight to protect against potential market failures or abuses of market power.

As you are aware, many of the issues the STB is considering will have a lasting impact on the rail network and the shippers they serve, including agriculture and utility shippers. Any proposals from the Board should continue to be grounded in sound economic principles, be supported by data-driven empirical analyses, and, to the maximum extent possible, allow competition and demand in the marketplace to determine reasonable rates for the transportation of freight. This approach will ensure that railroads and the customers they serve have confidence in decisions or changes made by the Board. I ask that the STB fully consider and weigh the implications of pending proceedings and the impact they could have on railroads and shippers alike.

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☐Kearney Office
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(308) 234–3684 (Fax)

http://fischer.senate.gov

Thank you for your consideration of this letter. I also want to express my appreciation for your efforts to make the STB more efficient, transparent, and accessible for shippers and railroads alike.

Sincerely,

Deb Fischer
United State Senator

TED CRUZ
TEXAS

United States Senate

COMMITTEES:
COMMERCE
JUDICIARY
FOREIGN RELATIONS
RULES AND ADMINISTRATION
JOINT ECONOMIC COMMITTEE

February 20, 2020

The Honorable Ann D. Begeman
Chairman
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The Honorable Martin J. Oberman
Board Member
Surface Transportation Board
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Washington, D.C. 20423

EP 722
EP 761

300417

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
February 20, 2020
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Public Record

Dear Chairman Begeman, Vice Chairman Fuchs, and Commissioner Oberman:

Freight rail is a critical part of our nation's transportation system—ensuring our states, communities, workers, farmers, families, and businesses have access to the goods and markets they need to grow and succeed. As the freight railroads' economic regulatory agency, the Surface Transportation Board (STB) plays an important role in ensuring that the railroads can continue to provide the safe, reliable, and sustainable service the constituencies they serve rely upon. As part of this role, however, it is incumbent on the commissioners to avoid capricious, unnecessary regulatory actions that could artificially distort the freight rail market and stymie a meaningful return on investment for freight railroads.

As you know, many of the issues the STB is considering could have far reaching effects on the rail network and the shippers they serve. It is for this reason that I was especially concerned with the STB's December 12, 2019 hearing on revenue adequacy and other related actions that could potentially result in the STB imposing an artificial price cap or engaging in price fixing of the rates freight railroads can charge their customers. Not only would such a decision undermine the competitive environment that the freight railroad industry has flourished under since the enactment of the Staggers Act, likely causing the industry to withhold important capital investments in infrastructure, but more fundamentally it would fly in the face of the free market principles that have made the United States' economic system great. While I understand the STB has an important role to play in the regulation of interstate commerce, it is crucial that any proposals moving through the process continue to be grounded in sound economic principles and supported by data-driven empirical analyses.

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The principles that the STB has relied on to date have allowed the rail industry to improve safety and invest an average of $25 billion annually to maintain and improve their operations and private infrastructure, including the implementation of positive train control. Furthermore, these investments have led to rail being recognized as the highest graded form of infrastructure by the American Society of Civil Engineers. It would be a mistake for the STB to engage in market-distorting regulatory actions that threaten the economic viability of the freight railroad industry. It is crucial that any regulatory structure continue to recognize the importance of the railroads' ability to improve and maintain their world-class networks in order to meet their customers' and the nation's freight transportation demand today and in the future. Thank you for your consideration.

Sincerely,

Ted Cruz
United States Senator

MICHAEL S. LEE
UTAH

ALLYSON BELL
CHIEF OF STAFF

United States Senate

WASHINGTON, DC 20510–4404

COMMITTEES:
JUDICIARY
ENERGY AND NATURAL RESOURCES
COMMERCE, SCIENCE, AND TRANSPORTATION
JOINT ECONOMIC COMMITTEE

February 27, 2020

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

The Honorable Martin J. Oberman
Board Member
Surface Transportation Board
395 E Street Southwest

Dear Chairman Begeman, Vice Chairman Fuchs, and Board Member Oberman:

I write regarding the Surface Transportation Board's (STB) ongoing consideration of issues related to long-term railroad revenue adequacy.

As you know, the United States' freight rail network is a world leading transportation system that enables consumers to have efficient access to cost-effective goods. The successful lowering of freight rates and increases in efficiency are largely due to Congressional efforts over the last four decades to push policies that aim to deregulate the rail industry.

It is concerning to hear that the STB is now moving away from Congressional deregulatory efforts and considering proposals related to rate caps and revenue reductions that are based solely on a railroad earning returns on investment above its capital. Not only would this harm railroad investments and innovation, but it would harm businesses and consumers who benefit from deregulatory reforms. Fostering a free market environment that eliminates government intervention, promotes market competition, and increases consumer choice is the best recipe for a successful transportation network.

As the STB continues its consideration of long-term railroad revenue adequacy, I urge you to carry out reforms that champion market competition and reject efforts to institute price controls.

Thank you for considering this request and I look forward to your response.

Sincerely,

Michael S. Lee
United States Senator

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COMMITTEES:
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JUDICIARY
VETERANS' AFFAIRS

United States Senate

February 25, 2020

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street, SW
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The Honorable Martin J. Oberman
Board Member
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Dear Chairman Begeman, Vice Chairman Fuchs, and Commissioner Oberman:

I write regarding the Surface Transportation Board's (STB) proposals related to revenue adequacy, Docket No. EP 722. As you continue to work on this issue and discuss it among your staff, I urge you to maintain a balanced economic framework that recognizes the importance of the freight rail system to the U.S. economy.

Freight rail is vital to the economy, and Tennessee is ranked in the top 15 for freight railroads, rail tons, freight rail employment, and freight rail wages by state. Our farmers, businesses, and families rely on the goods transported throughout the state via rail. Without the presence of freight rail, rural Tennesseans would have less access to markets they need to grow and succeed.

I appreciate the STB's efforts to make itself more efficient and transparent for shippers and railroads. That being said, I am worried this proposal could have unintended effects on the rail network and the shippers they continue to serve. Freight rail operators depend on consistency in order to invest an average of $25 billion annually to maintain and improve their operations. I ask the STB to consider any economic implications of this pending proceeding and the impact it could have on railroads and sippers alike.

Thank you for your time and consideration on this important matter. I appreciate your continued partnership to ensure a safe and reliable rail system in Tennessee and across the country.

Sincerely,

Marsha Blackburn

Marsha Blackburn
United States Senator

DAN SULLIVAN
ALASKA

SUITE 702
HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

United States Senate

COMMITTEES

ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
ENVIRONMENT AND PUBLIC WORKS
VETERANS' AFFAIRS

February 14, 2020

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

The Honorable Martin J. Oberman
Board Member
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

EP 722
EP 761

300470

ENTERED
Office of Proceedings
March 9, 2020
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Dear Chairman Begeman, Vice Chairman Fuchs, and Board Member Oberman:

As the Surface Transportation Board (STB) works to ensure railroads are able to continue to provide the safe, reliable, and sustainable service to the customers and communities they serve, I ask your due diligence to consider the potential impacts of decisions that may undermine the viability of the railroads to invest in new infrastructure, enhance rail service, and improve safety.

As you know, many of the issues under the consideration of the STB could have far reaching effects on the rail network and the shippers they serve. It is crucial that any proposals moving through the regulatory process continue to be grounded in sound economic principles and supported by data-driven empirical analyses. Concerns have come to my attention regarding proposals related to rate caps and revenue reductions based solely on a railroad earning returns on investment above its cost of capital. These concerns point to the vulnerability that using revenue adequacy to constrain an individual railroad's rates will undermine the ability to investment in infrastructure, conduct the requisite long-term planning, potentially harming safety and the overall economy.

It is crucial that any regulatory structure continue to recognize the importance of the railroads' ability to improve and maintain their world-class networks in order to meet their customers' and the nation's freight transportation demand today and in the future.

Thank you for your consideration.

Sincerely,

DAN SULLIVAN
United States Senator

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FOREIGN RELATIONS
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

United States Senate

WASHINGTON, DC 20510

March 12, 2020

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Martin J. Oberman
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Patrick J. Fuchs
Board Member
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

Dear Chairman Begeman, Vice Chairman Oberman, and Commissioner Fuchs,

I am writing in regard to the Surface Transportation Board's (STB) current review of railroad revenue adequacy.

Before I was elected to the United States Senate, I was a plastics manufacturer for over 30 years who relied on America's freight rail system in my supply chain. I understand that an efficient, reliable and safe national transportation system, including freight rail, is critical for ensuring the free flow of commerce.

As the STB considers the way in which it evaluates railroad revenue adequacy, I urge you to take into account the possible wide-reaching impacts of any new regulations on the overall freight rail system and its many stakeholders. If the STB does not take a balanced approach on this matter, it could unintentionally curb investment in freight rail infrastructure maintenance and expansion. Reductions in freight rail system infrastructure investment could in turn result in the disruption of freight rail service that rail customers depend upon. For these reasons, it is imperative that the STB perform a careful and comprehensive review of this issue that analyzes all of the potential effects.

Thank you for your consideration as the STB continues to assess railroad revenue adequacy. I look forward to your response.

Sincerely,

Ron Johnson
United States Senator

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