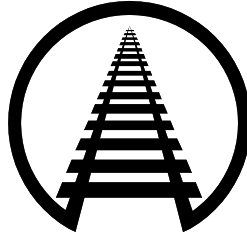


**TESTIMONY OF**  
**IAN N. JEFFERIES**  
**PRESIDENT & CHIEF EXECUTIVE OFFICER**  
**ASSOCIATION OF AMERICAN RAILROADS**



**BEFORE THE**  
**U.S. HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**  
**SUBCOMMITTEE ON RAILROADS, PIPELINES AND**  
**HAZARDOUS MATERIALS**  
**HEARING ON EXAMINING**  
**THE SURFACE TRANSPORTATION BOARD'S ROLE IN**  
**ENSURING A ROBUST PASSENGER RAIL SYSTEM**

**NOVEMBER 18, 2020**

**Association of American Railroads**  
**425 Third Street SW**  
**Washington, D.C. 20024**  
**202-639-2100**

## Introduction

On behalf of the members of the Association of American Railroads (AAR), thank you for the opportunity to testify. The AAR's freight railroad members account for the vast majority of U.S. freight rail mileage, employees, and traffic. The AAR's passenger railroad members, which include Amtrak and various commuter railroads, account for more than 80 percent of U.S. passenger railroad trips.

The U.S. freight transportation market is intensely competitive, and shippers choose to use rail because of the superior value that railroads offer. Railroads know they must continue to earn their customers' business. For railroads, this takes many forms, including:

- Focusing on safety. Railroads are a safe way to move people and freight, and the past decade has been the safest in rail history. Railroads are working with policymakers, their employees, suppliers, and customers to identify new technologies, operational enhancements, training techniques, and other ways to make railroads even safer.
- Recognizing capacity is key. The U.S. freight rail network today is in its best condition ever. Unlike trucks, barges, and airlines, America's privately-owned freight railroads operate overwhelmingly on infrastructure that they own, build, maintain, and pay for themselves. Railroads have poured more than \$710 billion back into their networks since 1980, including an average of more than \$26 billion per year over the past five years. These investments will help ensure America's freight rail infrastructure remains world-class and that adequate rail capacity exists to meet our freight transportation needs.
- Emphasizing customer service. Railroads know their customers operate in intensely competitive markets and demand fast, reliable, and cost-effective service. In response, railroads are continually launching new initiatives to improve customer service.

- Enhancing sustainability. Freight railroads have a much smaller carbon footprint than other modes of transportation. Freight railroads today account for only 2.1 percent of transportation-related greenhouse gas emissions while accounting for 40 percent or more of long-distance freight volume. Today’s railroads continue to leverage technology and modernize their operations to further improve their sustainability.
- Advocating for sound public policy. Key policies that are essential for maintaining and enhancing the safe, reliable service that freight railroads provide include:
  1. Maintaining the existing balanced regulatory structure covering rail rates and service;
  2. Replacing the outdated regulatory framework regarding the incorporation of new technologies with one that continues to protect the public but also fosters innovation and does not “lock in” inferior technologies and processes;
  3. Addressing modal equity, so that the marketplace — not the government — picks winners and losers among transportation modes and so that infrastructure financing is equitable across transportation modes; and
  4. Undertaking more rail-related public-private partnerships.

## **Railroads and COVID-19**

When I testified to this committee on March 4 of this year, none of us knew how profoundly COVID-19 would impact our nation and the world.

I am proud of the men and women of the railroads and other transportation industries who have been working tirelessly with skill and determination, day-in and day-out, behind the scenes. It is remarkable how well our supply chains have functioned over the past eight months, maintaining the flow of goods needed to preserve public health, sustain families, and keep essential businesses in operation.

Early on, America’s freight railroads established three main goals in their response to the pandemic. First and foremost: keep their employees safe. Teleworking is now widely available

for employees able to work remotely, while social distancing, rigorous cleaning protocols, and the use of protective devices are now ubiquitous to protect employees who work on-site. My understanding is that the number of COVID-19 cases among rail employees has remained relatively low.

The railroads' second imperative has been to continue to provide high levels of safe, reliable service. I am aware of no instances in which Class I railroads have had meaningful business interruptions due to pandemic-related crew shortages. Railroads' efforts have not gone unnoticed. For example, in a joint letter from the Federal Railroad Administration (FRA) and Surface Transportation Board (STB) to each Class I railroad, the agencies noted that “[w]e...appreciate efforts to provide reliable service and enhanced communication to rail shippers and note that...we have received many positive reports from across the country.”<sup>1</sup>

Railroads' third imperative is to continue to preserve their financial stability so they are able to meet our nation's freight transportation demands into the future. One way railroads have done this, starting before the pandemic, has been to re-examine and continually focus on improving their operating practices. The result has been a more resilient rail network that is better able to adapt to market changes. This is one reason why Class I freight railroads have neither requested, nor received, pandemic-related financial assistance from Congress.

When much of the economy shut down during the second half of March 2020, U.S. GDP, consumer spending, and industrial output all plunged. U.S. rail volumes followed suit. Total U.S. rail carloads fell 25 percent in the second quarter of 2020 compared to the same quarter in 2019, the biggest quarterly decline on record. Rail intermodal volume fell 13 percent.

---

<sup>1</sup> Letter dated Aug. 24, 2020, from Ronald Batory, Administrator, Federal Railroad Administration, et al., to Jean-Jacques Ruest, President and Chief Executive Officer, Canadian National Railway Company. The same letter was sent to each Class I railroad.

However, rail volumes have been improving in recent months as the economy has reopened. On the intermodal side, volumes are now well above pre-pandemic levels, thanks to surging activity at ports and robust consumer spending on goods. On the carload side, rail volumes are significantly higher than they were in the second quarter and in many cases are close to, or even above, where they were prior to the pandemic.

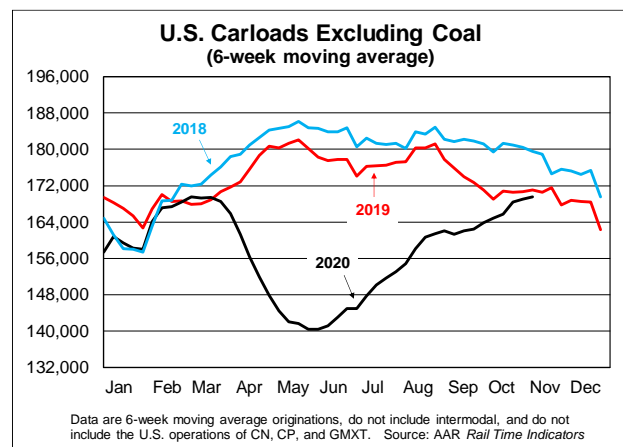
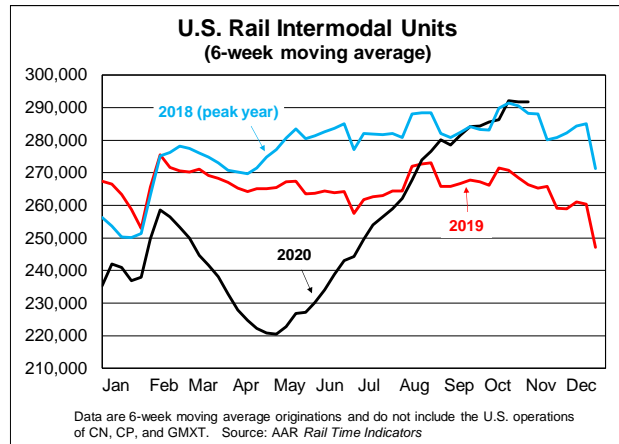
### Freight and Passenger Rail Partnerships

Today, freight railroads provide the infrastructure over which many of our nation's

passenger railroads operate. The vast majority of the nearly 22,000 miles on which Amtrak operates are on track owned by freight railroads. In addition, hundreds of millions of trips occur each year on commuter rail systems that operate at least partially over tracks or right-of-way owned by freight railroads.

Freight railroads want passenger railroads to succeed. This is more likely to happen if four overarching principles are followed.

First and foremost, safety is always most important. Railroads are an extremely safe way to move people and freight, and we must keep it that way.



Second, passenger rail use of freight rail corridors must be balanced with freight railroads' need to provide safe, reliable service to present and future customers. Current as well as future capacity needs of freight railroads must be protected.

Third, policymakers should provide passenger railroads with the dedicated funding they need to operate safely and effectively, and to pay for expanded capacity when required. Freight railroads should not be expected to subsidize passenger operations.

Fourth, preference for Amtrak's trains does not mean there will never be delays to Amtrak trains. We all know that when we set out driving somewhere or book an airline flight, delays might happen because of congestion, weather, accidents, or other reasons. It's no different for passenger trains on freight rail tracks. Transparency and good data shared by Amtrak with the host freight railroad can help identify causation and potentially assist in avoiding a similar situation in the future. This is discussed in further detail below.

### **On-Time Performance Metrics**

As members of this committee know, Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) requires FRA and Amtrak to jointly develop metrics and minimum standards to measure performance, including on-time performance (OTP), of Amtrak's intercity passenger trains. Section 213 of PRIIA authorizes interested parties to initiate an investigation at the STB if the average OTP of a train is less than 80 percent for two consecutive calendar quarters. The FRA first issued its metrics and standards rule in 2009, but numerous courts, including the Supreme Court, found it to be unconstitutional or otherwise problematic. The administrative process to finalize a new ruling on metrics and standards is near completion, given that the Office of Management and Budget last week completed its review.

Keeping both Amtrak and freight trains running on time is a tremendously complex issue, but bringing finality to the statutory mandate with an appropriate metric measured against accurate and attainable schedules will create certainty for Amtrak, the host railroads, and, most importantly, the traveling public. The AAR, on behalf of its freight railroad members, has been participating in the FRA rulemaking process since its inception to help ensure this desirable outcome is achieved.

While the proposed rule uses published schedules to measure the customer on-time performance of an Amtrak train, unless the schedules are updated to reflect current conditions and the new metric proposed by FRA, they will give rise to misleading OTP measurements, create unrealistic expectations, and lead to unnecessary litigation at the STB — something the STB expressed concern about in its comments on the proposed rule. More broadly, none of the Amtrak schedules in use today were designed around FRA’s proposed metric, something FRA acknowledged in its proposed rule. If underperforming trains (from an on-time point of view) are to be identified based on an OTP metric, their schedules — against which the metric is measured — must be revised and updated as necessary to ensure the metric is reasonably achievable. This may require a modest lengthening of total Amtrak schedules, but that would result in greater certainty for the traveling public and improved OTP for Amtrak. Several passenger rail advocates, including the Southern Rail Commission and Transportation for America, have noted that “many riders would accept slight schedule adjustments if it meant their train could run on time more often.” We hope Amtrak will work with our host freight railroad members to do so where needed.

The proposed rule also fails to adequately assess the performance of each individual host railroad on a route with multiple hosts. Therefore, if one host continually delivers a train late to

another host, the OTP metric would not be satisfied, and the receiving host could be subject to an STB investigation. Indeed, the FRA acknowledges in the rule that any individual Amtrak customer may travel over the lines of multiple individual host railroads, and that “the customer OTP metric does not easily distinguish performance on individual host railroads.” Although the proposed rule includes other metrics that more directly focus on host-specific performance, such as measuring minutes of delay, it is the OTP standard that determines when hosts may be subjected to an STB investigation. Other factors come into play too in evaluating proposed OTP metrics. For example, when track conditions require it, freight railroads temporarily reduce allowable operating speeds for safety reasons. These “slow orders” can delay trains of all types, but safety must take precedence over everything else. Similarly, railroads must devote sufficient time to track and signal maintenance. This often produces unavoidable delays in the short term for freight and passenger trains, but enhances safety and improves reliability in the long term. Freight railroads should not be penalized for making sure their tracks are safe. Put another way, delays caused by what in one way or another are safety enhancements should not count against host freight railroads under an OTP metric. In addition, Amtrak delays are often caused by factors completely outside freight railroad control, including delays caused by Amtrak’s own actions. Freight railroads should not be penalized for delays they did not cause and cannot alleviate.

Finally, for host railroads to monitor their performance against an OTP metric, identify improvement opportunities, and take corresponding corrective action, they need a close-to-real-time electronic feed of recent, current, and forecasted station-specific ridership data, as well as historical data for analyzing schedules.



Freight railroads will continue to work cooperatively with the FRA, Amtrak, and others in the rulemaking process to ensure that the new metrics and standards are appropriate, realistic, and fair to all parties.

### **Amtrak and Private Right to Action**

Amtrak's relationship with host railroads is governed, first and foremost, by bilateral operating agreements that are negotiated between Amtrak and a host freight railroad. Key terms, such as train schedules, metrics for evaluating performance, and related incentives and penalties, are included in those agreements. Some of the bilateral agreements are decades old and are showing their age, as the schedule issue discussed above makes clear.

When Amtrak and a host freight railroad are unable to agree on terms for a new operating agreement, either railroad can ask the STB to resolve the matter. Furthermore, if there are disagreements about the operation of additional trains by Amtrak over the hosts' rail line, the statute provides that the STB may resolve that dispute. This is consistent with the intent of Congress that disputes in this area be resolved by the agency with relevant expertise.

Once an operating agreement between a host railroad and Amtrak is in place, disagreements over the interpretation and application of those terms are resolved through binding arbitration before a standing panel of qualified arbitrators. The process works: nearly 100 of these disputes have been filed and resolved by arbitrators in the 50 years since Amtrak was created.

Congress has granted Amtrak additional enforcement rights related specifically to OTP. As noted, if OTP falls below a certain statutory threshold, Amtrak has the right to file a complaint at the STB against the host railroad and to seek relief. Moreover, if the STB determines that poor OTP was due to the freight railroad's failure to give Amtrak trains

preference, damages can be awarded to Amtrak. In recent years, Amtrak has filed two such cases against three host railroads. Congress's choice of the STB, rather than the courts, to resolve such questions was intentional. The STB's broad understanding of how the freight rail network operates gives it a unique ability to understand and properly weigh the operational and other evidence each railroad presents.

In addition to being able to pursue relief from the STB, Amtrak, like other government entities, can also bring complaints to the Department of Justice (DOJ) when Amtrak thinks freight railroads are not affording it proper preference. In its history, only one such case has been brought by DOJ.

Amtrak believes it should have a third means of redress beyond the STB and DOJ: a private right of action — that is, filing suit against a host freight railroad in a court of law.

Freight railroads strongly oppose granting Amtrak a private right of action, for several reasons. First, as discussed above, Amtrak already has other options to enforce its rights. Second, it would be premature, given that the metrics and standards rulemaking has not yet been completed by the FRA and ample time has not been provided to allow for implantation and operation of the new standard. Third, it would give Amtrak the freedom to ignore the terms of its negotiated contracts and evade the expert eye of the STB.

Fourth, granting Amtrak a private right of action would open the door to wildly inconsistent decisions by district courts (which, unlike the STB, are not experts on rail transportation policy), as each court would apply its own assessment of how freight and passenger interests should be balanced. The result would likely be an unworkable patchwork of differing standards across different judicial districts and host railroad obligations that varied by jurisdiction. Such a confusing outcome would harm passenger and freight railroads alike.

Amtrak, the host railroads, and the public all have the same goals: efficient, on-time passenger service coupled with efficient, reliable freight service. The best way to achieve these goals is not by creating a third option for legal enforcement, but to focus on enforcement of negotiated service obligations with the option for expert rail agency review as a backstop, and, when needed, access to courts through the Department of Justice.

### **Current STB Rulemakings**

The global superiority of U.S. freight railroads is the direct result of a balanced regulatory system that emanates from the Staggers Act, a bill passed with overwhelming bipartisan support by Congress and signed by President Carter 40 years ago. Today, thanks to the Staggers Act, railroads are able to base nearly all of their rates and service offerings on the dictates of the market and are far more responsive to customer needs than they were previously permitted to be.

Importantly, the Staggers Act did not completely deregulate railroads. The STB has the authority to set maximum rates if a railroad is found to have “market dominance” over a particular movement and the rate is determined to be unreasonable. The STB also retains the ability to take other actions if a railroad engages in anticompetitive behavior.

The success of the Staggers Act was reaffirmed a few weeks ago when more than 1,000 people, of all political persuasions, signed a letter in support of protecting the current balanced regulatory framework. Signatories include eight former U.S. Secretaries of Transportation, more than 550 state and local officials, more than 200 business leaders, representatives of nearly 90 think tanks, and 25 former administration officials and congressional leaders. (The letter is included with this testimony as a separate document.)

The freight rail industry is not complacent, though. Looking ahead, our nation’s recovery from the pandemic in the short term and our economic prosperity in the long term will depend on the viability and effectiveness of our freight railroads.

That’s why freight railroads are troubled by several proceedings underway at the STB that could derail many of the tremendous gains that have accrued to railroads, rail customers, and the broader economy since Staggers was passed.

First, decades ago, as part of a Staggers-inspired effort to reinvigorate railroads, rail regulators exempted certain rail commodities from rate regulation on the grounds that, because these commodities could easily move by truck or barges, railroads would always face pervasive competition for their movement.

Unfortunately, the STB is considering revoking existing exemptions for some of these products. The STB instituted this proceeding on its own — not because Congress asked it to, but because firms producing or using these commodities asked the STB for it, despite the fact that there’s no evidence that railroads even possess meaningful market power, much less have abused such power, in their transportation of these commodities. Revoking the exemptions would conflict with the clear directive from Congress that rail regulators should regulate railroad rates and service only when market forces are not up to the task.

Another second proceeding before the STB involves what the STB calls “final offer rate review” (FORR). It’s complicated, but in a nutshell the STB is proposing a new rate-resolution process for small cases in which both a railroad and a low-volume rail customer would submit a rail rate — a “final offer” — to the STB, which would then choose one of the two offers.

Railroads are sensitive to the desire to make the STB more accessible to rail customers, but FORR is not an appropriate way to accomplish that goal. To our knowledge, no other regulatory

agency uses an arbitration process similar to what the STB proposes, and FORR conflicts in numerous serious ways with statutes that govern the STB. The AAR has offered the STB ideas regarding ways to ensure small shippers have access to the existing rate reasonableness processes in ways that are practical and consistent with existing law.

A third STB proceeding currently underway involves railroad revenue adequacy. A railroad is deemed “revenue adequate” by the STB when the railroad’s rate of return on net investment (ROI) equals or exceeds the rail industry’s cost of capital (COC). The concept of revenue adequacy is consistent with the unassailable point that, in our economy, firms and industries must produce sufficient earnings over the long term or capital will not flow to them. The subject of the STB proceeding is what, if anything, revenue adequacy means in terms of rail rates.

Some rail industry critics say that a finding of revenue adequacy is evidence that the railroad is already earning as much revenue as it needs. According to this view, when a rail customer challenges a railroad’s rate as too high, if the railroad is revenue adequate, the railroad’s rates should be subject to more stringent regulation than they otherwise would be, possibly up to and including a hard cap. Put another way, this view says that once a railroad is revenue adequate, it can longer raise rates and may have to lower them.

That’s wrong. Revenue adequacy should not be seen as a ceiling for rail earnings; if anything, it’s better seen as a floor. The statute’s plain meaning intends for the STB to assist railroads in achieving revenue adequacy, not to cap their revenues or more aggressively regulate rates once the railroads become revenue adequate.

Finally, a fourth proceeding underway at the STB involves “mandated switching.” Mandated switching is when a railroad that can carry freight all the way from origin to

destination by itself is ordered to switch, or interchange, traffic with another railroad that has replaced the incumbent for part of the move. Under established law and regulatory policy, the STB must first find that a railroad engaged in anti-competitive conduct before the STB can order the railroad to switch traffic to another railroad. However, the proposal being considered by the STB would allow it to order mandated switching without showing that the incumbent railroad did anything anti-competitive at all.

Mandated switching is a short-sighted attempt to obtain lower rail rates for a group of favored rail customers at the expense of all other rail customers. It would lead to sharp reductions in rail operational efficiency and in the quality of rail service. It would mean an incumbent railroad that invested in infrastructure and other assets needed to serve a customer could be forced to use those assets for the benefit of another railroad who is taking the customer away — like forcing UPS to use its fleet of local delivery trucks to deliver packages for FedEx. And it would likely mean sharply lower rail revenue caused not by fair competition in the marketplace but by unpredictable and arbitrary regulatory dictates.

### **Moving Forward Act**

Back on July 1 of this year, the U.S. House of Representatives passed H.R. 2, the “Moving Forward Act.” The railroad industry wants to help find solutions to genuine problems that are out there. Regrettably, H.R. 2 includes many provisions that would undermine freight railroads’ ability to offer the safe, reliable, and environmentally-friendly service that their tens of thousands of customers require – and in so doing would also negatively affect passenger rail service.

For example, the bill mandates two-person railroad crews in most rail operations. Yet FRA data show no correlation between train safety and the number of crew members in a

locomotive cab. A two-person crew mandate would stifle the adoption of new technologies that would enhance safety and reduce the need for a second crew member in many circumstances. Railroads and rail unions should have the option — as they always have in the past — to negotiate crew sizes as part of the collective bargaining process.

Another provision of H.R. 2 that freight railroads oppose would mandate STB mediation when a commuter railroad wants access to a freight railroad's right of way and the two parties cannot come to terms on that access.

Many existing and proposed commuter railroads in the United States operate (or hope to operate) at least partially on tracks or corridors owned by freight railroads. Before it can operate on freight-owned property though, a commuter railroad must first reach voluntary agreement with the freight railroad on various issues, such as hours of passenger operations, the number of commuter trains, access fees, liability protections, track modifications, and more. These issues can often be resolved, as the significant growth in commuter rail over the years shows. Sometimes, though, an agreement is not reached.

Mandated STB mediation in these cases creates the misperception that there is mandated commuter rail access to freight rail facilities. Absent voluntary agreement, private freight railroads should not be forced to allow commuter trains to use freight rail assets any more than any other private business should be forced to grant another company use of its assets without its consent and without just compensation. That said, freight railroads will continue to engage in good faith with commuter railroads whenever there is a credible proposal that involves commuter rail access to freight facilities.

The recently-passed one-year extension of the FAST Act provides Congress with time to forge a longer-term reauthorization addressing critical transportation issues. With total freight

traffic expected to grow by close to 40 percent by 2045, the challenges of operating a rail system capable of meeting future needs is daunting and will require the benefit of effective public policy. We believe it's possible to craft a bill that meets Congress's objective without compromising the safe and reliable freight railroad network our nation depends on. Freight railroads look forward to working with this committee and others in Congress to develop a surface transportation reauthorization which best meets this country's transportation needs.

### **Positive Train Control (PTC) Update**

Finally, I'm proud to say that each Class I freight railroad has 100 percent of required PTC route-miles in operation, 100 percent of required PTC-related hardware installed, 100 percent of their PTC-related spectrum in place, and 100 percent of required employee training completed. They are continuing to work to ensure full interoperability by the end of this year.