



Committee on Transportation and Infrastructure
U.S. House of Representatives
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March 2, 2022

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Railroads, Pipelines, and Hazardous Materials
FROM: Staff, Subcommittee on Railroads, Pipelines, and Hazardous Materials
RE: Stakeholder Views on Surface Transportation Board Reauthorization

PURPOSE

The Subcommittee on Railroads, Pipelines, and Hazardous Materials will meet on Tuesday, March 8, 2022, at 10:00 a.m. in 2167 Rayburn House Office Building and via Zoom to hold a hearing titled “Stakeholder Views on Surface Transportation Board Reauthorization.” The purpose of this hearing is to learn from railroad stakeholders about the Surface Transportation Board’s role in regulating the freight railroad industry. Participants in the hearing include the American Chemistry Council, Amtrak, the Association of American Railroads, the Brotherhood of Locomotive Engineers and Trainmen, the National Industrial Transportation League, and the Private Railcar Food and Beverage Association.

BACKGROUND

I. THE SURFACE TRANSPORTATION BOARD

The Surface Transportation Board (STB or Board) is the economic regulator of freight railroads¹, which carry one third of the nation’s freight.² The STB is a five-member independent agency whose members are appointed by the President with the advice and consent of the Senate, serving staggered five-year terms. Currently, all five members are installed (three Democrats and two Republicans). The STB’s predecessor, the Interstate Commerce Commission (ICC), was created in 1887 by the *Interstate Commerce Act*.³ The STB was created by the ICC Termination Act of

¹ Congressional Research Service, “The Surface Transportation Board (STB): Background and Current Issues.” January 19, 2022 (R47013).

² U.S. Department of Transportation, Pocket Guide to Transportation 2019, Page 3.

³ P.L. 49-41.

1995 (ICCTA) to maintain federal economic oversight of rail carriers.⁴ Congress last reauthorized the STB in the *Surface Transportation Board Reauthorization Act of 2015* through Fiscal Year 2020.⁵

The STB’s jurisdiction includes overseeing and monitoring railroad commercial practices nationally; enforcing the railroads’ common carrier obligations; evaluating challenges to the reasonableness of rail rates; reviewing proposed railroad mergers; ensuring rail carriers provide fair employee protective arrangements in certain transactions; monitoring rail carriers to ensure they are able to earn revenues that are adequate for the infrastructure and investment needed to meet the present and future demand for rail services; investigating rail service matters of regional and national significance; authorizing construction, operation, discontinuance, and abandonment of rail lines and service; and more recently, passenger rail regulation.⁶

In 2005, Congress asked the National Academy of Sciences to conduct a comprehensive study of the nation’s railroad transportation system since the enactment of the *Staggers Rail Act of 1980*. The study [was to] address and make recommendations on—

- “(1) the performance of the Nation’s major railroads regarding service levels, service quality, and rates;
- (2) the projected demand for freight transportation over the next two decades and the constraints limiting the railroads’ ability to meet that demand;
- (3) the effectiveness of public policy in balancing the need for railroads to earn adequate returns with those of shippers for reasonable rates and adequate service; and
- (4) the future role of the Surface Transportation Board in regulating railroad rates, service levels, and the railroads’ common carrier obligations, particularly as railroads may become revenue adequate.”⁷

These core considerations remain relevant to the reauthorization of the STB.

II. RAILROAD SHIPPERS

Railroad shippers range from large, multi-national corporations to small operations. They also vary in the commodities they ship, such as corn, wheat, and soybeans; fertilizers, and various chemicals; cement, sand, and crushed stone; lumber, pulp, and paper products; various food products; crude oil, coal, and other petroleum and energy products; and scrap recycling products, among others.

Rail carriers have a common carrier obligation to quote rates and provide service to shippers upon reasonable request.⁸ Carriers also must maintain reasonable connections with adjacent rail carriers’ networks to allow for the free flow of rail traffic. When a route involves more than one

⁴ P.L. 104-88.

⁵ P.L. 114-110.

⁶ STB also has jurisdiction over certain trucking company, moving van, and noncontiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission. <https://www.stb.gov/about-stb/>.

⁷ P.L.109-59. Sec. 9007.

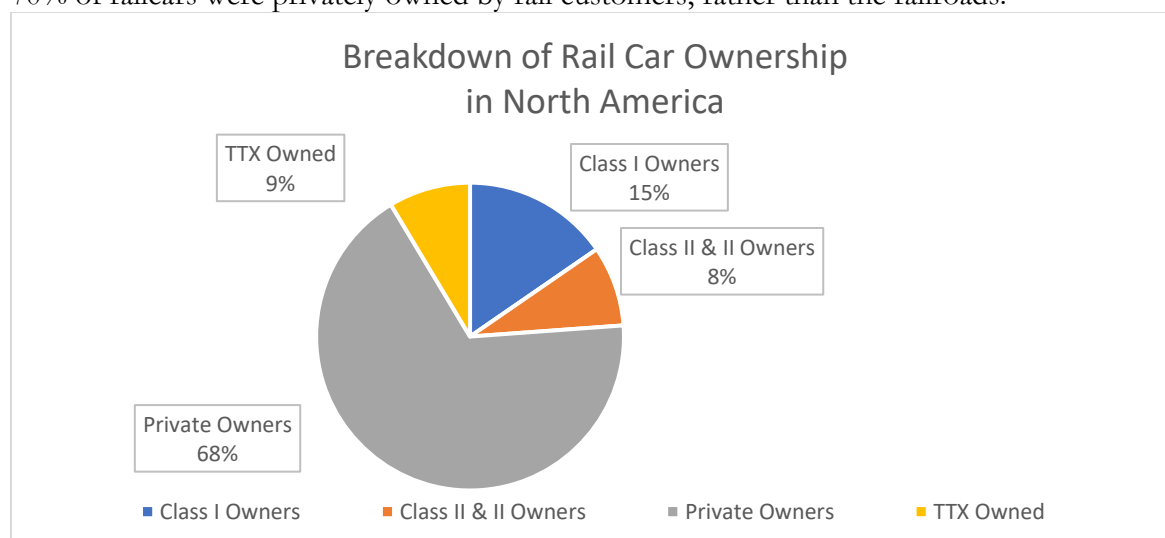
⁸ 49 U.S.C. 11101.

carrier, the carriers may participate in a joint rate to collect a single combined price from the shipper for the transportation being provided.⁹

Numerous commodities are exempt from STB's regulations governing the provision of common carrier service, maintenance of reasonable practices and rates, and provision of adequate service. Exempt commodities include a range of agricultural products, such as fresh fish and meat, cheese and special dairy products, as well as other commodities, including lumber or wood products, chemical waste, and coke produced from coal, among others.¹⁰ The Board is permitted to exempt commodities when there is sufficient transportation competition to protect shippers from market manipulation, and it may also revoke exemptions when it finds that regulation is necessary to carry out the Rail Transportation Policy.¹¹

According to some shippers, an estimated 78 percent of freight rail customers are "captive" to or dependent on a single major railroad (i.e., that there is no intramodal competition).¹² While only served by a single major railroad and depending on the movement, some shippers can use other modes, such as truck or barge, to transport their products (intermodal competition). A shipper may not challenge a rail rate unless it is without feasible transportation alternatives. Whether a shipper has feasible transportation alternatives, in the form of intramodal or intermodal competition, is a qualitative analysis undertaken by the STB in a particular case.¹³

Numerous shippers have purchased or lease their own rail equipment since *Staggers*.¹⁴ According to *The Official Railway Equipment Register* and as outlined in the chart below, in 2019 nearly 70% of railcars were privately owned by rail customers, rather than the railroads.¹⁵



⁹ 49 USC 10705.

¹⁰ 49 CFR part 1039.

¹¹ 49 USC 10502.

¹² Freight Rail Customer Alliance, <https://railvoices.org/the-issue/rail-dependent-shipper/>.

¹³ Surface Transportation Board, prepared by InterVISTAS Consulting, Inc. "An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification, September 2016. <https://www.stb.gov/wp-content/uploads/STB-Rate-Regulation-Final-Report.pdf>

¹⁴ PSR and the rail car: Commentary by Richard Kloster. Progressive Railroading. February 2019.

¹⁵ The Official Rail Car Register, April 2019. <https://www.progressiverailroading.com/resources/editorial/2019/PR0819-CarOwners.jpg>

A. Shipping Rates

Since the *Staggers Rail Act of 1980 (Staggers)*, the STB is authorized to set a “reasonable” maximum price for common carriage, but only in response to customer complaints and only in cases where the railroad company is “market dominant”—that is, where no other economically viable transportation option exists.¹⁶ The STB adjudicates rate reasonableness only for rates that exceed a minimum jurisdictional threshold established in statute of 180 percent of revenue to variable cost.¹⁷ In acting as adjudicator, the STB seeks to determine the fair rate based on balancing the goal of protecting shippers from unreasonably high rates with the goal of railroads having as much pricing flexibility as possible to earn adequate revenues to attract private capital and reinvest in their networks.¹⁸

A shipper seeking to challenge a rate must file an administrative complaint with the STB. In January 2018, the STB established the Rate Reform Task Force to recommend improvements to the existing rate review processes for both small and large cases, and to propose new rate review methodologies to reflect the current state of the industry.¹⁹ In its April 2019 report to the STB, the Task Force wrote that many small shippers find rate cases too complex and/or too costly to pursue.²⁰ This finding echoed the same finding from a 2015 Transportation Research Board panel.²¹ In November 2021, while not yet final, the STB advanced two rulemakings to establish rate reasonableness processes for small rate disputes: a voluntary arbitration program for small rate disputes, and a final offer rate review procedure.²²

From 1996 to the present, 51 rate cases were brought before the STB. Of those cases, 27 settled; 11 were found to have unreasonable rates; 11 were found to have reasonable rates; and 2 were withdrawn.²³ No rate cases have been filed for the last three years.²⁴ At the same time, a commensurate number of informal complaints have been filed.²⁵

Since the enactment of *Staggers*, railroads have been allowed to enter voluntary rate contracts with shippers to provide service on specific terms and conditions.²⁶ With very limited exceptions,

¹⁶ Congressional Research Service, “The Surface Transportation Board (STB): Background and Current Issues.” January 19, 2022 (R47013).

¹⁷ 49 U.S.C. § 10707(d)(2): “A finding by the Board that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than 180 percent does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation; or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

¹⁸ Congressional Research Service, “The Surface Transportation Board (STB): Background and Current Issues.” January 19, 2022 (R47013).

¹⁹ Surface Transportation Board, “Surface Transportation Board Releases Report from the Rate Reform Task Force,” April 2019. <https://www.stb.gov/news-communications/latest-news/pr-19-06/>

²⁰ Rate Reform Task Force, Report to the Surface Transportation Board, April 25, 2019, page 9.

²¹ Transportation Research Board Special Report 318: Modernizing Freight Rail Regulation, June 2015, <https://onlinepubs.trb.org/onlinepubs/sr/sr318highlights.pdf>

²² Surface Transportation Board, <https://www.stb.gov/news-communications/latest-news/pr-21-47/>

²³ Surface Transportation Board, Quarterly Status of Rate Complaint Cases Before the STB, [Report-on-Rate-Case-Review-Metrics-Fourth-Quarter-December-31-2021.pdf](https://www.stb.gov/quarterly-status-of-rate-complaint-cases-before-the-stb-report-on-rate-case-review-metrics-fourth-quarter-december-31-2021.pdf) (stb.gov), page 2.

²⁴ *Id.*

²⁵ Surface Transportation Board, Quarterly Report on Formal and Informal Service Complaints, <https://www.stb.gov/wp-content/uploads/Report-on-Formal-and-Informal-Service-Complaints-4Q-December-31-2021.pdf>

²⁶ P.L. 96-448.

contract rates are not subject to STB jurisdiction and do not require equal treatment of similarly situated shippers as common carrier rates do.²⁷

B. Reciprocal Switching

Under reciprocal switching, an incumbent rail carrier transports a shipper's traffic to an interchange point where the cars are switched to a competing carrier. The competing carrier pays the incumbent carrier a switching fee for bringing (or taking) the cars from the shipper's facility to the interchange point (or vice versa). That fee is incorporated into the competing carrier's total rate to the shipper.²⁸ In doing so, a competing carrier can offer a single-line rate even if its lines do not physically reach a shipper's facility, thereby establishing a competing rate.²⁹ Reciprocal switching may also be called "competitive switching" by shippers or "forced access." Reciprocal switching is known as "interswitching" in Canada.³⁰

Staggers authorized the STB to require rail carriers to enter reciprocal switching agreements under certain circumstances.³¹ In 1985, the ICC adopted regulations specifying that reciprocal switching would only be prescribed if the agency determines it is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive, and otherwise satisfies the criteria of 49 U.S.C. § 11102(c).³²

In July 2016, the STB issued a notice of proposed rulemaking on reciprocal switching.³³ The proposal included a two-pronged approach, pursuant to which the Board would have the ability to order reciprocal switching either when (1) it is practicable and in the public interest, or (2) when it is necessary to provide competitive rail service.³⁴ Under the proposal, reciprocal switching arrangements would not be permitted if either rail carrier involved in the arrangement showed the switching arrangement is not feasible or is unsafe, or that the presence of switching would unduly hamper the ability of that carrier to serve its shippers.³⁵ The STB received public comment on the proposal and has not issued a final rule. The STB will hold a public hearing on the issue on March 15, 2022.³⁶

²⁷ *Id.*

²⁸ Surface Transportation Board Federal Register Notice, Reciprocal Switching, 87 Fed. Reg. 62 (January 2, 2022) <https://www.federalregister.gov/documents/2022/01/03/2021-28396/reciprocal-switching>.

²⁹ Surface Transportation Board, Petition For Rulemaking To Adopt Revised Competitive Switching Rules, Decision, Docket No. EP 711 (Sub-No. 1) Reciprocal Switching, Service Date July 27, 2016, Page 2.

³⁰ Marsh, Joanna. "The Itch to Switch: Railroad Swapping in Canada vs. the U.S." FreightWaves, August 24, 2021. <https://www.freightwaves.com/news/the-itch-to-switch-railroad-swapping-in-canada-vs-the-us>

³¹ 49 U.S.C. § 11102(c).

³² Surface Transportation Board, Notice of Proposed Rulemaking, Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching, Docket No. EP 711, Vol 81, No. 149, August 3, 2016, page 51150.

³³ Surface Transportation Board, Notice of Proposed Rulemaking, Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching, Docket No. EP 711, Vol 81, No. 149, August 3, 2016.

³⁴ *Id.* at 51156, 49 CFR Section 1145.2.

³⁵ *Id.* at 51165, 49 CFR Section 1145.2.

³⁶ Surface Transportation Board, Press Release, "STB Chairman Announces Three Upcoming Public Hearings." <https://www.stb.gov/news-communications/latest-news/pr-21-46/>, November 12, 2021.

C. Demurrage and Accessorial Charges

Railroads may charge shippers fees called “demurrage charges” when the shipper detains rail cars beyond the time permitted for loading or unloading rail cars (“free time”).³⁷ Demurrage is subject to Board regulation under 49 U.S.C. § 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. § 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill national needs related to freight car use and distribution and maintenance of an adequate car supply. Demurrage charges have both compensatory and punitive aspects and are intended to promote efficient use of rail resources.³⁸ Shippers and railroads may enter into contracts pertaining to demurrage, or, in the absence of such contracts, demurrage is governed according to the railroad’s demurrage tariff.³⁹

Railroads also may assess “accessorial charges.” Not defined in statute or regulation, accessorial charges are generally understood to include charges other than line-haul and demurrage charges, according to the STB.⁴⁰ Accessorial charges include those assessed for diverting a shipment in transit, ordering a railcar but releasing it empty, weighing a railcar, tendering one railroad’s car to another railroad without a line-haul move, special train or additional switching services, or releasing a railcar with incomplete or incorrect shipping instructions, among other causes.⁴¹

In July 2021, STB Chairman Martin Oberman sent a letter to all Class I freight railroads requesting that they report storage (demurrage) charges at their ten largest intermodal facilities, to better understand the revenues these charges generate for the railroads.⁴² The Class I freight railroads answers varied. Below is a table showing the demurrage and accessorial charges collected by the Class I railroads in 2021:

2021 Demurrage and Accessorial Revenues ⁴³							
	BNSF	Canadian National	Canadian Pacific	CSX	Kansas City Southern	Norfolk Southern	Union Pacific
Demurrage Revenue	\$207,476,000	\$61,299,000	\$77,563,000	\$442,600,000	\$38,143,000	\$520,608,000	\$340,147,000
Accessorial Revenue	\$308,002,000	\$309,415,000	\$11,383,000	\$144,300,000	\$16,536,000	\$83,423,000	\$88,575,000

D. First Mile / Last Mile

³⁷ 49 USC 10746.

³⁸ *Demurrage Liability*, EP 707, slip op. at 2 (STB served April 11, 2014); 49 C.F.R. § 1333.1.

³⁹ 49 CFR 1333.

⁴⁰ Surface Transportation Board, Oversight Hearing on Demurrage and Accessorial Charges, Notice of Public Hearing, Docket No. EP 754, Federal Register Vol. 84, No. 73, April 16, 2019, page 15662.

⁴¹ *Id.*

⁴² Surface Transportation Board, Press Release, “STB Chairman Expresses Concern Over Intermodal Supply Chain Issues; Requests Information From Class I Railroads.” <https://www.stb.gov/news-communications/latest-news/pr-21-30/>, July 22, 2021. In addition, prior Surface Transportation Chairman Ann Begeman sent similar correspondence dated December 17, 2018. https://www.stb.gov/stb/elibrary/NDP_Correspondence.html

⁴³ Surface Transportation Board, <https://www.stb.gov/reports-data/demurrage-accessorial-charges/reports>

In response to a congressionally mandated study, experts recommended in 2015 that the STB regularly collect usable data demonstrating the quality of service rail carriers provide as a means to monitor their response to common carrier service requests.⁴⁴ In September 2021, and after hearing concerns raised by shippers and requests for transparency of first-mile and last-mile data, the STB sought input from rail stakeholders to determine whether collecting first-mile and last-mile data is feasible and whether the benefits to rail customers and oversight of the national rail system fluidity is balanced by the increased reporting burden to the Class I freight rail carriers.⁴⁵ According to the STB, they have received numerous letters about the need for first-mile and last-mile data over the last year, though the Association of American Railroads indicated this information would not be practical to collect or meaningful to analyze service issues.⁴⁶ First-mile and last-mile refers to the movement of railcars between a local railroad serving yard and a shipper or receiver facility.

III. RAIL LABOR

With the Class I railroads' adoption of precision scheduled railroading, the railroads have reduced their workforce. In 2015, the Class I workforce averaged 169,478 workers.⁴⁷ By 2019 and pre-COVID, some 29,000 jobs were eliminated, a 17 percent decrease.⁴⁸ By the end of 2021, the Class I workforce averaged 114,701 workers, or approximately one-third fewer than 2015.⁴⁹ Concurrently, the U.S. Class I railroads moved roughly the same volume of traffic during that period. In 2015, total rail traffic volume in the U.S. was 27.9 million carloads and intermodal units, peaking in 2018 at 28.1 carloads and intermodal units, and totaling 26.2 total carloads and intermodal units in 2021.⁵⁰

Rail shippers voiced concern over the workforce cuts and their subsequent impact on service reliability, raising questions about whether the railroads are able to meet common carrier obligations.⁵¹ STB Chairman Oberman sent letters to the Class I railroads asking whether shipper service complaints may be related to or exacerbated by the trend of reduced railroad personnel.⁵² During the COVID-19 recovery, railroads have attempted to re-hire some furloughed workers and train new employees, though according to shippers and the STB, they have been unsuccessful at hiring or retaining an adequate workforce following the reduction in forces described above.⁵³

⁴⁴Transportation Research Board Special Report 318: Modernizing Freight Rail Regulation, June 2015, <https://onlinepubs.trb.org/onlinepubs/sr/sr318highlights.pdf>

⁴⁵ Surface Transportation Board Press Release, "Surface Transportation Board Seeks Comment on First-Mile / Last-Mile Service Issues" <https://www.stb.gov/news-communications/latest-news/pr-21-38/>

⁴⁶ *Id.*

⁴⁷ Surface Transportation Board, Economic Data, Employment Data, <https://www.stb.gov/reports-data/economic-data/employment-data/>

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Association of American Railroads, Weekly Rail Traffic Data: https://www.aar.org/aar_news/weekly-rail-traffic-data/

⁵¹ U.S. House of Representatives, Committee on Transportation and Infrastructure, Railroad Shippers Roundtable, July 2019. <https://transportation.house.gov/committee-activity/hearings/roundtable-titled-railroad-shippers-roundtable>

⁵² See "Chairman Oberman Rail Service Letter" to the seven Class I railroads dated May 27, 2021: <https://www.stb.gov/news-communications/non-docketed-public-correspondence/>

⁵³ Paul Ziobro, The Wall Street Journal. "Shortage of Railroad Workers Threatens Recovery." July 22, 2021. <https://www.wsj.com/articles/shortage-of-railroad-workers-threatens-recovery-11626953584>

IV. AMTRAK

Since Amtrak's creation in 1970, Congress has continually refined the Surface Transportation Board's role in Amtrak matters. When Congress created Amtrak to relieve the freight railroads of their intercity passenger rail common carrier obligation in 1970, Congress granted Amtrak certain rights including access to freight railroads, preference, and additional trains.⁵⁴ In 2008, Congress expanded the STB's passenger rail responsibilities to mediate cost allocation methodologies between Amtrak and the states and to enforce Amtrak on-time performance.⁵⁵ In 2021, the *Infrastructure Investment and Jobs Act* explicitly authorized the STB to create a 10-person passenger rail office to carry out the Board's passenger rail responsibilities.⁵⁶ The STB is currently considering an Amtrak application to restore Gulf Coast intercity passenger rail service between New Orleans, Louisiana and Mobile, Alabama.⁵⁷

V. PENDING MERGERS & ACQUISITIONS

Railroad transactions can have broad implications for the shape of the nation's transportation system going forward. Since enactment of *Staggers*, the freight rail industry has consolidated from 33 Class I railroads in 1980 to the seven Class I freight railroads that operate in the U.S. today.⁵⁸ The STB is currently considering two significant railroad transactions—the merger of Canadian Pacific Railway (CP) and Kansas City Southern Railway Company (KCS) and CSX's acquisition of Class II Pan Am Railways in New England. The STB has exclusive authority to review these proposed transactions and to determine whether to issue approvals.⁵⁹ Public comments on the CP-KCS merger were due to the Surface Transportation Board by February 28, 2022. If it goes forward, the merger would reduce the number of Class I railroads operating in the United States from seven to six and would create the first North American railroad that operates in all three countries—Canada, Mexico and the United States.⁶⁰ On the CSX-Pan Am acquisition, the STB held a two-day public hearing on January 13 and 14, 2022.⁶¹ The docket for public comments on this transaction has closed.⁶²

⁵⁴ Federal Railroad Administration, "Shared-Use of Railroad Rights of Way," https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/18863/Report%20to%20Congress%20Shared-Use%20of%20Railroad%20Rights-of-Way%20July%202019.pdf, July 2019, page 3 and 49 USC 24308.

⁵⁵ *The Passenger Rail Investment and Improvement Act*, P.L. 110-432, Sections 209, 212 and 213, respectively.

⁵⁶ P.L. 117-58, Section 22309.

⁵⁷ Surface Transportation Board, FD 36496, Application of the National Railroad Passenger Corporation Under 49 U.S.C. 24308(e) – CSX Transportation, Inc. and Norfolk Southern Railway Company. <https://www.stb.gov/proceedings-actions/filings/>

⁵⁸ United States Department of Agriculture, "Railroad Concentration, Market Shares, and Rates," February 2014. <https://www.ams.usda.gov/sites/default/files/media/Railroad%20Concentration%2C%20Market%20Shares%2C%20and%20Rates.pdf>

⁵⁹ 49 USC 11324.

⁶⁰ Surface Transportation Board, "STB Accepts CP/KCS Merger Application for Consideration," November 23, 2021. <https://www.stb.gov/news-communications/latest-news/pr-21-48/>

⁶¹ Surface Transportation Board, "STB Chairman Announces Three Upcoming Public Hearings," November 12, 2021. <https://www.stb.gov/news-communications/latest-news/pr-21-46/>

⁶² Surface Transportation Board, "Surface Transportation Board Issues Decisions in CSX/Pan Am Merger Application Review," December 10, 2021. <https://www.stb.gov/news-communications/latest-news/pr-21-50/>

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