Date: July 25, 2017

Case: Regulatory Reform Task Force Listening Session

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BEFORE THE SURFACE TRANSPORTATION BOARD

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REGULATORY REFORM TASK   :   Docket No. EP 738

FORCE LISTENING SESSION   :

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                            Washington, DC

                            Tuesday, July 25, 2017

REPORTED BY:

    CARMEN SMITH

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1   P R O C E E D I N G S

2   DIRECTOR CAMPBELL: Good morning,

3   everyone.

4   UNIDENTIFIED SPEAKER: Good morning.

5   DIRECTOR CAMPBELL: Thank you, thanks for

6   that. Energy in the room, I like that. I'm Rachel

7   Campbell, the director of the Office of Proceedings,

8   and more important for today's purposes, the Board's

9   regulatory reform officer.

10   I am here with the Regulatory Reform Task

11   Force, so I will ask them to introduce themselves in

12   just a moment.

13   We are here today for a listening session

14   regarding this initiative.

15   The task force was formed to comply with

16   the spirit of Executive Order 13777. Today we look

17   forward to hearing from all of you, to help us

18   identify and address rules and practices that are

19   burdensome, unnecessary or outdated, or anything

20   else you would like to share with us that is within

21   the spirit of that executive order.

22   Because our regulations have a direct

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1   impact on you, our stakeholders, we are particularly

2   interested in your perspective and what you have to

3   share with us. So we are ready to listen, which

4   means we are not going to be asking a lot of

5   questions. We really are going to be listening. We

6   may just ask you to clarify a thing or two, but

7   don't take our quiet listening posture as

8   disinterest. We are very, very interested in what

9   we're hearing.

10   There will be a transcript prepared today,

11   so you'll all be able to see that. It will be

12   posted to the Web site.

13   As you came in today, you signed in. I

14   have a list of that sign-in sheet. We are going to

15   be having you speak in the order in which you signed

16   in. Given the number of speakers, we ask that you

17   limit your remarks to no more than 10 minutes.

18   We're not going to have our timers running, so don't

19   look -- for those of you familiar with our hearings,

20   don't look for our lights. But I will have my handy

21   dandy iPhone timer running. So I will give you a

22   little sign if you're going to be exceeding your 10

1   minutes and ask you to wrap up.

2   And so procedurally, that's what we've got

3   for you today.

4   And now I'm going to ask the members of

5   the task force to introduce themselves.

6   MS. GOSSELIN: Hi. I'm Danielle Gosselin,

7   I'm an attorney in the Office of Environmental

8   Analysis.

9   DIRECTOR MARVIN: Hi. I'm Lucy Marvin,

10   I'm Director of the Office of Public Assistance,

11   Governmental Affairs, and Compliance.

12   DIRECTOR KEATS: I'm Craig Keats, general

13   counsel.

14   MS. BROWN: I'm Cynthia Brown, Chief of

15   the Section of Administration in the Office of

16   Proceedings.

17   MR. O'CONNOR: Frank O'Connor, Section

18   Chief in the Office of Economics.

19   DIRECTOR CAMPBELL: Okay. So when I call

20   you, if you will just come up to the podium and

21   speak, that will be great.

22   So we'll have our first speaker, Barbara

1 Cataneo from the Private Railcar Food and Beverage

2 Association.

3   MS. CATANEO: Thank you. Good morning,

4 ladies and gentlemen of the STB Regulatory Reform

5 Task Force. My name is Barbara Cataneo, and I'm the

6 Secretary of the Board for the Private Railcar Food

7 and Beverage Association.

8   The Private Railcar Food and Beverage

9 Association was formed in January of 2016 as a

10 result of a group of frustrated food and beverage

11 rail shippers that felt that their voices as

12 individual companies were not being heard by the

13 North American Railroad Network, nor by the STB.

14   The PRFBA members formed this group with

15 the following objectives in mind, to provide private

16 railcar food and beverage shippers a

17 forum/organization that will allow them to

18 collectively advocate for rail reform regulation,

19 including reciprocal switching, rate competitiveness

20 and performance KPIs.

21   Additionally, the association members

22 share best practices for the management of their

1   private railcar fleets, they share common issues and

2   concerns regarding the underlying rail terms and

3   conditions of service, they explore supply chain

4   efficiencies within the group and work with the

5   railroad providers directly and then collaborate

6   with each other to develop efficient railroad

7   network opportunities such as empty private railcar

8   backhaul programs.

9   Unreliable rail service in the U.S. and

10   the effects of the current outdated deregulation

11   surrounding railroad service directly and greatly

12   impact our membership on a daily basis.

13   The member companies that comprise PRFBA

14   are McCain USA, PepsiCo, which includes Pepsi,

15   Tropicana, Frito-Lay, Quaker and Gatorade, National

16   Frozen Foods, Borden Foods, Land O'Lakes, Bonduelle

17   USA and Canada, Kraft Heinz, Kellogg's, Pinnacle

18   Food Group, Twin City Foods, G3 Enterprises, which

19   is Gallo Wine, Martin-Brower, which is McDonald's,

20   and Cavendish Farms.

21   The board of directors for the PRFBA

22   organization are Charles Penrow III, chairman of the

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1   board for McCain Foods, Brian Watson, board director

2   from National Frozen Foods, Patrice Legare, board of

3   directors, Bonduelle USA and Canada, and Herman

4   Haksteen, board director ex officio, Cryo-Trans.

5   While PRFBA has been very successful in

6   achieving many of our goals and be objectives as set

7   forth above, ultimately the association members are

8   handcuffed by the antiquated regulations that

9   encompass the rail industry today.

10   As we know, the Staggers Rail Act, which

11 was made into law in 1980, deregulated the American

12 rail industry to a significant extent and replaced

13 the regulatory structure that existed since the 1887

14 Interstate Commerce Act.

15   At that time, 37 years ago, the regulatory

16 reform was needed and changes were made in order for

17 railroads to compete with the growing truck and

18 airline transportation services available to

19 shippers, and in an effort to allow the railroads to

20 earn adequate revenue.

21   It is no secret to anyone in this room

22 that railroads have had the home team advantage when

1   it comes to rates and services that are provided to

2   the food and beverage railcar shippers.

3   The current railroad regulations lean

4   heavily on the railroad side. Our members are stuck

5   with whichever railroad services they are shipping

6   or receiving facility and they have absolutely no

7   options for rail competition.

8   Just like in 1980, when Congressman Harley

9   Staggers recognized that the regulations surrounding

10   the rail industry need to be updated from their

11   93-year-old origins, it is now time to revisit the

12   railroad regulations and once again, in order to

13   provide healthier and more productive economy in the

14   United States.

15   All of the PRFBA members are major

16   manufacturers and producers of food and beverage in

17   the United States. The current state of the

18   railroad industry has adversely affected our members

19   as rates have skyrocketed, services left unaccounted

20   for and food processing plants have been shut down

21   because inbound products have not arrived as

22   anticipated.

1   The current Staggers Rail Act through

2 which the railroads operate today has many policies

3 that are antiquated and do not represent the current

4 trends or market expectations that our PRFBA members

5 are faced with on a daily basis.

6   Each of our member companies provides a

7 food or beverage to consumers in the United States,

8 Mexico and Canada. Without reform regulations that

9 are more balanced between shippers and the

10 railroads, the consumer pays the price.

11   Today's railroad industry is eerily

12 reminiscent of a monopoly. With two railroads on

13 the East Coast and primarily two Class 1 railroads

14 on the West Coast, there is little competition

15 available to the shipper, particularly when a

16 shipper is captive to only one railroad.

17   There are several avenues through which

18 regulatory reform can take place, which provide a

19 fair and level playing field for both the shippers

20 and the railroads. Either through the STB's reforms

21 directly, such as reciprocal switching proposal, or

22 through a modification of the Staggers Act as

1   presented by Senator Tammy Baldwin through the Rail

2   Shipper's Fairness Act in 2017, however the

3   regulatory reform takes place, the PRFBA members

4   support any reform and reregulating certain aspects

5   of the rail industry that provide the shippers with

6   a more competitive rail marketplace and allows the

7   shippers to explore more than one railroad option.

8   Allowing reciprocal switching throughout

9   the U.S. rail network would be a positive and

10   progressive commitment on the part of the STB and

11   would most certainly be in line with President

12   Trump's EO 13777 identifying regulations for repeal,

13   replacement or modification.

14   Implementing and enforcing rail

15   regulations that will allow food and beverage rail

16   shippers of the United States to have multiple

17   railroad options instead of being captive to one

18   railroad ultimately will trickle down to the end

19   consumer. The more options available in the rail

20   industry, the more cost-effective and reliable

21   services will be, and in the end, the consumer will

22   pay less at the store or restaurant for the food and

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1   beverages.

2   In 2013, the Canadian government made a

3   bold move when they started to enforce a law that

4   had been on the books for many years. The Canadian

5   Transportation Act, and in particular

6   interswitching, which is provided for at S127 of the

7   Act, the Canadian government heard the concerns

8   shared by the Canadian rail shippers and they

9   implemented a mandatory switching law which allows

10   either railroad, Canadian Pacific or Canadian

11   National, the opportunity to quote rates and service

12   to the shipper regardless of which railroad owns the

13   track.

14   Interswitching, or in the United States

15   reciprocal switching, in Canada guarantees that a

16   shipper with direct access to only one railroad at

17   the origin or destination of a move can have the

18   shipment transferred to another carrier at a rate

19   prescribed by regulation if the origin or

20   destination is with a certain radius of the exchange

21   point.

22   Interswitching is available

1   unconditionally to all shippers having direct access

2   to one railway.

3   In the U.S., the STB can require terminal

4   facilities owned by one carrier to be used by

5   another carrier, terminal traffic rights, or the

6   railroad owning terminal facilities to transport the

7   traffic on behalf of the other carrier, reciprocal

8   switching, if it finds this to be practical and in

9   the public interest.

10   Since 1985, the meaning of public interest

11 and the context has been greatly narrowed to mean

12 determining whether the incumbent carrier has acted

13 in an anticompetitive manner.

14   The U.S. food and beverage rail shippers

15 need the same opportunity as their Canadian

16 counterparts, unconditional reciprocal switching to

17 all shippers having direct access to one railroad.

18   In the U.S., the policy to allow the

19 maximum extent possible competition and demand for

20 services to establish reasonable rates and to

21 minimize the need for regulation of a rail system.

22 In Canada, it is instead stated the objectives of

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1   the policy are more likely to be achieved when

2   competition and market forces are the prime agents

3   for providing transportation services.

4   Clearly, the focus on U.S. regulations

5   needs to change to be more in line with the Canadian

6   approach, where rates are not even a part of the

7   objective of the policy.

8   The CP and CN railways furnished their

9   2016 annual earnings earlier this year, and it is

10   apparent that the best operating ratio -- that they

11   have the best operating ratio of all Class 1

12   railroads in North America. CP recording an

13   operating ratio of 58.6 percent and CN reporting an

14   operating ratio of 55.9 percent, interswitching or

15   reciprocal switching has clearly not eroded their

16   profitability.

17   Our friends at the American Association of

18   Railroads state that we do not need more regulation

19   and we would agree with that statement. However,

20   there must be reform of the current rules.

21   Today's monopolistic environment created

22   by the railroads requires that reciprocal switching

1   be allowed. Reciprocal switching does not yield

2   more regulation. In fact, it creates more freedom

3   for all parties.

4   In conclusion, the Private Railcar Food

5   and Beverage Association strongly supports

6   regulatory -- railroad regulatory reform and

7   modifying Staggers Act of 1980 with respect to

8   multiple rail acts for shippers, reciprocal

9   switching, advocating for real railroad options for

10   shippers, advocating less of a monopolistic hold on

11   food and beverage rail shippers, and supporting a

12   more balanced approach between shippers and

13   railroads with regard to the current railroad

14   regulations or outdated deregulations.

15   Thank you again for your time today and

16   allowing the Private Railcar Food and Beverage

17   Association this opportunity to share our feedback

18   on the importance of regulatory reform in the rail

19   industry. We appreciate your listening to our

20   concerns, ideas and solutions and we would be

21   agreeable to assist in the Regulatory Reform Task

22   Force, the STB or any other governmental agency or

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1   person that wishes to support the agenda of railroad

2   regulatory reform.

3   Thank you.

4   DIRECTOR CAMPBELL: Thank you.

5   Our next speaker is Gordon MacDougall of

6   Smart TD New York.

7   MR. MAC DOUGALL: Good morning, everyone.

8   I'm Gordon MacDougall. I am appearing on behalf

9   of Samuel Nasca, who is the New York State

10   Legislative Director for Smart Transportation

11   Division.

12   Mr. Nasca has been in many proceedings

13   before this Board, and it rarely takes more than

14   five minutes, and I will not take more than five

15   minutes today, I guarantee you, probably only two

16   minutes. And the reason for that is I submitted an

17   11-page comments filed yesterday, and I think a

18   large number of subjects raised by the AAR in its

19   petition and the five subjects to be finished by the

20   task force makes it kind of unwieldy to use the oral

21   process.

22   Therefore, AAR's 10-page or 11-page

1   comments, and then I filed an 11-page comments.

2   The principal point is I don't think the

3   executive order applies to this agency. I made a

4   check this morning to the FCC, FERC and all the

5   others, independent agencies, and I didn't see

6   anything on the Web site. Our memorandum points out

7   that this agency -- this executive order does not

8   apply to them. And the AAR finally in their filing

9   has also pointed out that it may not apply to you.

10   If it doesn't apply to you, I think you

11   should discontinue the proceeding, and if possible,

12   if you want, take the record of this case and put it

13   in an Ex Parte 712, which Mr. Nasca is a party to

14   that, which is pending. You would have to have a

15   more expanded notice, let people file additional

16   comments in this case and also an Ex Parte 712. But

17   this subject you have here dovetails with that

18   proceeding, where there is a separate response to

19   the President which really doesn't apply to you.

20   Thank you.

21   DIRECTOR CAMPBELL: Thank you.

22   Our next speaker is Ed Hamberger from AAR.

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1   MR. HAMBERGER: Good morning. I'm here

2   representing the Association of American Railroads.

3   On behalf of the AAR and our members, I want to

4   thank the Board for establishing a rail regulatory

5   officer, for impanelling this committee today to

6   hear us, and I take exception with Mr. MacDougall.

7   I believe that your announcement that you are

8   adhering to the spirit of the executive order is

9   exactly, exactly what you should be doing. Thank

10   you for doing it.

11   We believe that reforming the nation's

12   regulatory system is a crucial and timely

13   undertaking that will help unleash the power of the

14   American economy. Indeed, the rail industry is

15   evidence that eliminating unnecessary, burdensome

16   and outdated regulation can be tremendously

17   beneficial to the economy.

18   The single greatest regulatory event in

19   our industry's history occurred at the Staggers Act.

20   By passing Staggers, Congress recognized that

21   America's freight railroads, the vast majority of

22   which are private companies that operate on an

1   infrastructure that they own, build, maintain and

2   pay for themselves, faced intense competition for

3   most of their traffic, but excessive regulation

4   prevented them from competing effectively.

5   To survive, railroads needed a common

6   sense regulatory system that allowed them to act

7   like most other businesses in terms of managing

8   their assets and pricing their services.

9   This agency and its predecessor agency,

10   the ICC, personified a balanced regulatory approach

11   and implementing a deregulatory statute that

12   Congress passed in 1980.

13   Since the act was passed, average rail

14   rates have fallen approximately 45 percent, accident

15   rates are down 78 percent, and the industry has

16   invested more than $635 billion, that's private

17   sector money, not government money, not taxpayer

18   money, $635 billion back into our network so that we

19   can give our customers the service they need and

20   demand.

21   These results strongly suggest that

22   balanced regional regulation works for rail

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1   customers, railroads and America at large.

2   And I will emphasize Congress has taken

3   note of that. There are some who say it's time to

4   revisit the Staggers Act. I would draw your

5   attention to the fact that in 2015, Congress did

6   just that. And they rejected calls for further

7   regulation. They rejected calls for forced

8   switching. And they passed the 2015 STB

9   Reauthorization Act.

10   I suggest it is your duty to follow

11   Congress's lead. Congress rejected some of the same

12   things that are being called -- that you are being

13   called upon to do, and I believe it is your job to

14   follow Congress's lead.

15   Let me just skip down here a little bit.

16   There are three categories of regulations that I

17   would like to draw your attention to.

18   First, the Board should withdraw pending

19   proposals that are inconsistent with deregulation.

20   We outlined several of these in the 11 pages that

21   Mr. MacDougall referred to, but let me quickly

22   summarize a couple of them.

1   First, the proposal to regulate certain

2   exempt commodities is a solution in search of a

3   problem.   It is troubling because it is a reversal

4   of a spectacularly successful deregulatory

5   initiative and relies almost exclusively on RVC

6   ratios instead of the market.

7   Second, the forced switching proposal runs

8   directly counter to what Congress's direction is to

9   this agency.

10   Third, the concept of revenue adequacy as

11   a rate constraint was first formulated by the ICC in

12   1985.   It is not a congressional mandate.   In fact,

13   Congress did not establish firm-wide revenue

14   adequacy as a ceiling on revenues that a railroad

15   could earn.   Such a constraint would discourage

16   railroad efforts to act capacity, innovate, improve

17   service and improve safety.

18   Fourth, the limit price test for market

19   dominance applied in recent rate cases violates the

20   fundamental tenet of the deregulatory regime created

21   by the Staggers Act that natural competition and

22   demand for service should establish rail

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1   transportation rates. The statute mandates that

2   only where a railroad is market dominant should the

3   government regulate or examine a rate and determine

4   whether it is unreasonable.

5   The use of formula approaches designed to

6   short-cut market dominance determinations erodes the

7   sound economic principles behind the STB stand-alone

8   cost procedure for assessing the reasonableness of

9   rates, and does a disservice to railroads and

10   shippers alike.

11   The second category of regulations that

12   the board should repeal are regulations that impose

13   costs exceeding new benefits. Two examples here are

14   the performance data reporting requirements that

15   were made permanent earlier this year and the

16   continued reporting of agricultural contract

17   summaries.

18   A third category occurs where the Board

19   should repeal regulations that are outdated,

20   unnecessary and ineffective. This task force has

21   already recognized that the Board should finish the

22   work it began in 2011 to review its existing

1   regulations.

2   We identified many ineffective and

3   burdensome regulations in 2011 that have yet to be

4   addressed. One that I would draw your attention to

5   is the maintenance cost benchmark used in

6   abandonment proceedings.

7   The Board recently declined to index this

8   benchmark for inflation and postpone updates to a

9   future proceeding, even though the benchmark has not

10   been updated since 1970.

11   In addition to these three categories of

12   regulations, we believe the Board can become more

13   responsive to stakeholders while furthering

14   deregulatory agenda by modifying its ex parte

15   communication rules, to allow increased dialogue

16   between stakeholders, Board members and staff in the

17   policy reporting and rulemaking context. The

18   Board's efforts to improve its processing and

19   gathering technical information, such as proceedings

20   regarding URCS, demonstrate the limits and drawbacks

21   of formal filings and would be facilitated by a more

22   direct exchange of information.

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1   Indeed, many other agencies, including

2   independent agencies like the Board, regularly

3   accept ex parte communications subject to disclosure

4   rules.

5   Recent Board efforts in this regard,

6   including this meeting this morning, are steps in

7   the right direction, and we encourage you to proceed

8   along that path.

9   Finally, the Board should advance a

10   deregulatory agenda by actively defending its

11   jurisdiction in the public interest and federal

12   preemptive matters. The STB plays a critical role

13   in the federal statutory scheme to promote a safe

14   and efficient national rail system.

15   Congress's decision to deregulate broad

16   aspects of rail transportation to achieve this goal

17   did not create a vacuum for states and localities to

18   fill. Unfortunately, many states and local

19   governments around the country haven't gotten that

20   message, and so railroads and their customers alike

21   have had to seek the aid of the Board in defending

22   the public interest from these unlawful

1   encroachments by state and local regulators with

2   only mixed success.

3   The Board has a crucial role to play to

4   protect the public interest from parochial efforts

5   by states and localities to restrict or in some

6   cases prevent rail transportation.

7   The agency should actively promote and

8   defend the regulatory structure that Congress has

9   devised, a structure aimed at ensuring the national

10   uniformity and regulation that is critical to a

11   sound rail transportation system capable of meeting

12   national needs.

13   We recognize the Board is in a period of

14   transition now, as it awaits the confirmation of two

15   new members. In light of the important issues

16   before the Board, the acting chair's plan to defer

17   major regulatory actions to wait until a full

18   complement of Board members is seated is appropriate

19   and reasonable.

20   However, your task force can complete

21   important work that can guide the Board to action

22   consistent with the administration's direction on

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1   the regulatory reform and Congress's deregulatory

2   mandate.

3   The AAR and our members look forward to

4   working with the Board and you as you complete your

5   important mission.

6   Thank you for the opportunity to be here.

7   DIRECTOR CAMPBELL: Thanks very much.

8   Our next speaker is Jeff Sloan with the

9   ACC.

10   MR. SLOAN: Good morning. I am Jeff

11   Sloan, Senior Director of Regulatory and Technical

12   Affairs from the American Chemistry Council. ACC

13   commends the work and goals of the Regulatory Reform

14   Task Force and appreciates this opportunity to

15   provide our views on the STB's regulatory reform

16   priorities.

17   ACC represents the leading companies in

18   the business of chemistry. The U.S. chemical

19   industry is a nearly $800 billion enterprise, one of

20   the largest exporting sectors and one of the largest

21   customers of the U.S. freight rail system.

22   Our industry is experiencing tremendous

1   growth with over 260 announced new manufacturing

2   projects representing a total of more than $180

3   billion in new capital investment.

4   In fact, last year, investments in the

5   chemical manufacturing represented nearly half of

6   total construction spending on manufacturing

7   projects in the U.S. This growth drives further

8   need for efficient and competitive transportation

9   options.

10   Improving STB procedures and reducing

11   unnecessary regulatory burdens will help support our

12   industry's growth as well as the broader American

13   manufacturing renaissance.

14   Well before President Trump issued

15   Executive Order 13777, STB initiated several key

16   initiatives intended to streamline procedures and

17   reduce regulatory burdens. Two initiatives in

18   particular, STB's proposal to revise its reciprocal

19   switching rules and its exploration of alternative

20   rate case methodologies, are critical to the

21   administration's objective of reducing burdensome,

22   unnecessary and outdated rules and practices that

1   inhibit job creation.

2   The ACC urges the task force to focus on

3   the completion of these initiatives as STB

4   regulatory reform priorities.

5   To the first of these, the Board's

6   proposed changes to reciprocal switching rules would

7   remove regulatory barriers and provide greater

8   market choices to rail customers. Reciprocal

9   switching empowers rail customers to choose a

10   freight rail carrier that provides the most

11   competitive rates and best service. While Congress

12   has expressly authorized switching as a tool to

13   advance competitive markets, the STB's existing

14   rules are so burdensome and unworkable that no

15   shipper has ever successfully gained access to

16   switching.

17   As stated by the Board itself, these rules

18   have effectively operated as a bar rather than as a

19   standard under which switching could be granted.

20   The Board's long-awaited reforms proposed in Ex

21   Parte 711 would remove these regulatory barriers and

22   provide market choices for regulatory customers that

1   currently have no competitive transportation

2   options.

3   I would like to emphasize three points.

4   STB's proposal is deregulatory. It would allow many

5   current and captive shippers to rely on competition

6   rather than regulation to address rate rail -- to

7   address rail rate and service issues. By reducing

8   regulatory barriers to competition, the need to

9   protect and cap some reasonable rates would shrink

10   to just a short distance from a facility to an

11   interchange point, rather than for the entire

12   long-distance move.

13   Second, STB is not creating new

14   regulations here. It's proposing to replace

15   existing regulations with less onerous ones. And

16   workable competitive switching rules would reduce

17   the need for STB rate regulation.

18   And finally, competitive rail service will

19   help promote growth and jobs in a broad range of

20   manufacturing, agriculture and energy-producing

21   industries.

22   Second major area I would like to touch on

1   is the STB's rate case procedures. The stand-alone

2   cost rate case procedures are really the epitome of

3   unnecessarily burdensome regulation.

4   The STB is charged with resolving disputes

5   between freight rail shippers and railroads, is

6   stymied by its own outdated and overly burdensome

7   rules. And as acting chairman, Ann Begeman

8   perfectly encapsulated these concerns. The STB's

9   rate review process is too costly, too

10   time-consuming and too unpredictable. And the heart

11   of the problem is the Board's arcane stand-alone

12   cost rate standard.

13   To successfully challenge a rate, a

14   shipper must design on paper an entire railway

15   business and prove that this railroad can serve same

16   traffic at a lower cost than the rates charged by

17   the existing railroad. Because of the incredible

18   complexity involved, this act has been characterized

19   as a full employment bill for economists.

20   Recent SAC cases for chemical shippers

21   have taken an average of five years to complete and

22   cost the shipper well over $5 million. Some claim

1   that these burdens are necessary, calling SAC the

2   gold standard for reviewing rates. However, SAC

3   fails on economic grounds as well.

4   In fact, Professor Gerald Faulhaber, the

5   economist who first defined the SAC concept, has

6   testified at the Board that the use of the

7   stand-alone cost test for STB ratemaking has "no

8   economic validity."

9   ACC supports STB's ongoing efforts to

10   streamline and improve its rate case procedures.

11   The Board's current proposals would provide some

12   incremental improvements. However, in order to

13   truly address burdensome, unnecessary and outdated

14   rules and practices that inhibit job creation, the

15   STB must prioritize efforts to develop alternatives

16   to SAC that are more economically sound and not so

17   inherently complex, costly and time-consuming.

18   Thank you again for holding this session

19   and for this opportunity to provide ACC's views.

20   DIRECTOR CAMPBELL: Thank you.

21   Next, Jennifer Hedrick from NITL.

22   MS. HEDRICK: Good morning. I'm Jennifer

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1   Hedrick, Executive Director of the National

2   Industrial Transportation League. On behalf of the

3   League, I want to thank the Board's Regulatory

4   Reform Task Force for inviting industry stakeholders

5   to share our view on regulatory reforms that would

6   streamline STB processes and eliminate or improve

7   outdated and burdensome regulations.

8   We commend the task force for your efforts

9   and look forward to working with you on this

10 important matter. The league is no stranger to the

11 Board. Our organization and members routinely

12 participate in Board proceedings representing the

13 voice of the shipper community. League members

14 range from some of the largest purchasers of

15 transportation services to smaller companies engaged

16 in the shipment and receipt of goods.

17   The league's rail shippers are from a

18 multitude of industries, including chemicals,

19 petroleum, agricultural and forest products and

20 paper, among others.

21   Railroads are vitally important partners

22 to NITL rail shippers. Our members strongly support

1   a robust and financially sound rail industry that

2   can invest in the national rail network for the

3   benefit of the railroads, their customers and the

4   American economy.

5   However, our members also need a

6   competitive and efficient rail industry that can

7   meet the demands of increasingly complex supply

8   chains and support American manufacturing and

9   business growth.

10   When problems arise between railroads and

11   their customers that require the Board's assistance,

12   our members also need an agency that is readily

13   accessible and a regulatory system that is more user

14   friendly and cost-effective.

15   Thus, we applaud your efforts to improve

16   and streamline the Board's regulations and

17   procedures.

18   A number of the Board's current regulatory

19   initiatives, such as its proposals to repeal and

20   replace its reciprocal switching rules in EP 711, to

21   revoke certain commodity exemptions from EP 704, and

22   to consider alternative rate case procedures in EP

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1   722 are all consistent with the task force mission

2   to "identify rules and practices that are

3   burdensome, unnecessary or outdated," which can be

4   repealed, replaced or modified.

5   Accordingly, within the spirit of

6   President Trump's Executive Order 13777, we urge the

7   Board to take the following actions. First, the

8   Board should move forward expeditiously to repeal

9   and replace its outdated, burdensome and unworkable

10 reciprocal switching rules. The Board's existing

11 reciprocal switching rules were adopted over 30

12 years ago, before the major rail mergers in the

13 1990s that dramatically consolidated the rail

14 industry and reduced competitive rail service for

15 many American businesses.

16   Although Congress envisioned a competitive

17 switching would be available when "practicable or in

18 the public interest or when necessary for

19 competitive rail service" the current rules have

20 never resulted in the establishment of new

21 competitive switching arrangements.

22   In fact, no shipper has even attempted to

1 bring a competitive switching case in many years,

2 despite the strong concerns voiced by captive

3 shippers of their lack of competitive rail service.

4   In its EP 711, subnumber 1, reciprocal

5 switching rulemaking decision issued in July 2016,

6 the Board granted in part a petition filed in July

7 2011 by the league which asked the Board to adopt

8 new switching rules consistent with the governing

9 statute.

10   In that decision, the Board proposed new

11 switching rules based on its findings that the rail

12 market has changed substantially and the current

13 rules impose insufferable regulatory barriers that

14 inhibit competitive switching arrangements.

15   Specifically, the Board determined that

16 applying a single competitive abuse standard in

17 order to obtain a switching remedy "makes less sense

18 in today's regulatory and economic environment." It

19 also found that its current reciprocal rules have

20 "effectively operated as a bar to relieve rather

21 than a standard under which relief could be

22 granted."

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1   The league strongly agrees with these

2   conclusions, which demonstrate that the current

3   reciprocal switching rules are outdated and

4   burdensome and must be modified.

5   The league urges the board to act

6   expeditiously to provide reciprocal switching rules

7   to eliminate the "competitive abuse, regulatory

8   barrier, and allow the competitive marketplace to

9   establish railroad practices."

10   Despite the railroad industry's claims,

11   facilitating reciprocal switching arrangements would

12   be deregulatory and not reregulatory, because it

13   would eliminate STB regulation over the entire

14   origin to destination movement, reducing rate

15   regulation, if any, to the shorter switching

16   movement.

17   Thus, revising the current switching rules

18   would not only be consistent with the President's

19   executive order, it would be consistent with the

20   national transportation policies "to allow to the

21   maximum extent possible competition and demand for

22   services to establish reasonable rates for

1   transportation by rail," and to "minimize the need

2   for federal regulatory control over the rail

3   transportation system."

4   Second, the Board should revoke outdated

5   and unnecessary commodity exemptions as proposed in

6   EP 704, subnumber 1, review of commodity boxcar

7   NTFC/COFC exceptions.

8   In the Ex Parte 704 proceeding, the Board

9   has proposed to revoke a number of commodity

10   exemptions that were determined to be outdated and

11   no longer necessary, and representatives of exempt

12   paper and forest products have asked the Board to

13   revoke these commodity exemptions based on the

14   submitted evidence.

15   Citing its own economic analysis, the

16   Board determined that EP 704 that "the dynamics of

17   the particular transportation markets appear to have

18   changed so significantly since the exemptions were

19   first promulgated as to warrant the application of

20   the Interstate Commerce Act in order to carry out

21   the rail transportation policy."

22   The Board's finding that certain commodity

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1   exemptions were no longer warranted was also

2   supported by "an increased likelihood of railroad

3   market power featuring specific commodity groups."

4   It is important to note that the exempt

5   members are also forced to endure unnecessary

6   regulatory burden and costs since they must first

7   file and litigate petitions to revoke an exemption

8   at the Board before they can access the Board's

9   procedures to address rail pricing and service

10 concerns or unreasonable practices.

11   Certainly, eliminating outdated regulatory

12 exemptions that subject American manufacturers,

13 producers and receivers of goods to railroad market

14 power and unnecessary costs would be consistent with

15 President Trump's executive order.

16   Third, the Board should revise or develop

17 an alternative standard to the burdensome and

18 unworkable stand-alone cost rate case procedures,

19 hereafter referred to as SAC. Large SAC rate cases

20 are widely recognized for being incredibly complex,

21 time-consuming and costly. The league supports the

22 Board's ongoing efforts to improve SAC cases based

1   on its evaluation of court procedures that could

2   expedite such litigations at the Board.

3   However, recent SAC cases have

4   demonstrated that this remedy is unworkable for car

5   load or noncoal traffic and simply expediting SAC

6   cases will not address this problem.

7   The Transportation Research Board recently

8   completed a comprehensive study of the current

9   freight rail regulatory structure modernizing

10   freight rail regulation, in which it was found "that

11   more appropriate, reliable and usable procedures for

12   resolving rate disputes are needed to fulfill the

13   regulatory interests and protecting the shippers in

14   the marketplace, in markets that lack effective

15   competition from unreasonably high rates."

16   The Transportation Research Board

17   suggested that a practical and pro-competitive

18   benchmarking methodology be developed to replace

19   SAC. The league and other shipper organizations

20   supported the development of such an alternative

21   approach and the Board's pending EP 722, subnumber 2

22   revenue adequacy proceeding.

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1   Accordingly, the league encourages the

2   Board to not only look for ways to improve the

3   working of its large rate case proceedings but to

4   develop a more workable, effective and less

5   burdensome alternative to the SAC standard itself.

6   Finally, I would like to note that the

7   league submitted additional regulatory reform

8   recommendations in the Board's ex parte number 712,

9   improving regulation and regulatory review

10   proceeding established in 2011, and continues to

11   support those comments to the extent not already

12   addressed by the Board or Congress.

13   I would also ask that my statement today

14   be included in the Ex Parte 738 docket, and we will

15   submit a copy to the Board today.

16   Again, the league greatly appreciates the

17   efforts of the Board's Regulatory Reform Task Force.

18   Thank you for the opportunity.

19   DIRECTOR CAMPBELL: Thank you.

20   Our next speaker is Eddie Johnston from

21   the Chemours Company.

22   MR. JOHNSTON: Good morning. My name is

1   Eddie Johnston, and as was stated, I work for the

2   Chemours Company. We're headquartered in

3   Wilmington, Delaware, a 2015 spinoff from The DuPont

4   Company.

5   It's a pleasure to speak to you today.

6   This is not my first time before the Board, but I do

7   count it an honor to be here.

8   I'd like to begin my comments by thanking

9   the STB for holding this listening session and

10   commend the Board for taking the first steps on a

11   path toward long overdue regulatory reforms.

12   Chemours relies heavily on rail

13   transportation for receipt of raw materials and

14   shipment of products to customers. 96 percent of

15   Chemours's loaded shipments are captive, with no

16   access to competitive rail service.

17   The United States needs, and thankfully

18   has, a strong, financially secure rail system in

19   2017. There's never been a better time to be a

20   railroader. Just read their reports to

21   shareholders.

22   It is not a good time to be a captive rail

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1   customer. The freight railroads enjoy unprecedented

2   market power over captive shippers like Chemours.

3   The simple fact that rail service continues to

4   decline while rates continue to increase should tell

5   you everything you need to know about the state of

6   competition, or lack thereof, in the rail industry.

7   And my experience is not unique. It's

8   typical of other captive shippers.

9   Recognizing that your decisions regulate

10   not just the railroads but rail customers too, what

11   should your regulatory reform agenda be? Let me

12   suggest a threefold approach.

13   First, regulatory reform should encourage

14   greater competition between railroads, where

15   possible. I'm talking about real competition where

16   railroads fight for business, something that does

17   not exist today, for captive shippers.

18   The Board's proposed rule to expand

19   reciprocal switching is a modest but positive step

20   in encouraging competition between railroads where

21   structural competition is nonexistent.

22   The Board has our ideas on how the

1   proposal can be improved. I encourage the Board to

2   proceed with rulemaking on reciprocal switching, and

3   also to examine other policies that encourage

4   greater competition.

5   The electric utility industry and

6   telecommunications industries faced similar

7   structural barriers, yet developed models for

8   increasing competition. These models might be

9   instructive and might have parallels for railroads.

10   Secondly, shippers must have recourse when

11   railroads exert their monopoly power in setting the

12   rates. Because of the structure of the rail

13   network, you must anticipate that measures put in

14   place to encourage competition will be inadequate in

15   many cases.

16   The Board must have a rate complaint

17   process that reflects sound economic principles and

18   recognizes the realities of the 21st century U.S.

19   rail network.

20   The Board has commented in numerous

21   decisions in recent years, including the DuPont

22   case, later assigned to Chemours, that the

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1   stand-alone cost methodology does not, indeed

2   cannot, offer a viable way for captive car load

3   shippers to challenge unreasonable rates. The rate

4   complaint process must change.

5   Last year, a panel of economists provided

6   economically sound alternatives to SAC. I urge you

7   to actively take this back up, make it a priority

8   for action, and bring forward a complaint process

9   that will give shippers hope that justice and equity

10   can be found here.

11   A fair method that results in fair rates

12   will not bankrupt freight railroads. You need not

13   fear that.

14   The current process for computing revenue

15   adequacy should be abandoned and replaced by the

16   financial reports railroads make to their

17   shareholders. Investors make decisions every day

18   based on these reports. There's no reason the Board

19   cannot rely on them too, saving the Board and the

20   railroads countless time and effort and costs in

21   preparing a fictitious metric.

22   Third and finally, the Board must be more

1 proactive when it comes to addressing service

2 failures, and act decisively when carriers fail to

3 correct problems they create for their customers.

4   There are chronic failures occurring

5 across the eastern United States, as we speak.

6 Chemours has had to take extraordinary steps at

7 increased risk and cost to keep our customers' U.S.

8 manufacturing plants supplied and operating, simply

9 because CSX has repeatedly failed to pick up and

10 deliver cars. One of our own plants came within

11 hours of shutting down because the railroad is not

12 delivering raw materials.

13   Service failures began in late May when

14 sweeping, unannounced changes were made to operating

15 plants. Despite our repeated complaints, service

16 has only worsened.

17   Dealing with CSX has become impossible, as

18 person after person we work with one day are gone

19 without replacement the next. Problems are now

20 being communicated directly to a CSX vice president.

21 Still, I have a plant located on the CSX mainline

22 that got no rail service for two consecutive days

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1   late last week. This is a plant that runs 24/7. No

2   rail service for two days.

3   This behavior is inexcusable, period.

4   Last week, after announcing record profits, CSX told

5   financial analysts that customers might have to

6   endure a little pain and suffering to get over a

7   bump in the road. They told the analysts this, not

8   us, their customer. We had to read about it in the

9   newspaper.

10   The remarks lack any genuine concern for

11   customers, underscoring the operation's centric

12   obsession of a railroad.

13   Why would a supplier ever treat a customer

14   like this? There is only one answer. Because they

15   can.

16   You will need to understand service

17   failures from the customers' point of view.

18   Railroad operational metrics matter, but so does

19   communicating openly about changes before they

20   happen, being responsive when problems arise, and

21   working aggressively to correct those problems, and

22   being easy to communicate with and do business with.

1   The irony is these are nonnegotiables for

2   businesses like Chemours who must compete, who face

3   the real prospect of losing the next order if they

4   fail to deliver the expected service.

5   Poor to mediocre service, high rates and

6   other indifference from rail suppliers we depend

7   upon, that's what it is like to be a captive rail

8   shipper in 2017.

9   I told you earlier that 96 percent of my

10   company's loaded shipments are captive. Sadly, the

11   railroads have no fear of losing my business. The

12   antidote is for the Board to encourage competition

13   between railroads, where possible, to finish the

14   work of reforming the rate complaint process, and to

15   make the Board's oversight of rail service more

16   robust.

17   I've given you an ambitious but sensible

18   threefold assignment, but I've also asked Congress

19   to give the Board the resources needed to do it. A

20   strong STB, one that is fully funded and fully

21   staffed to deliver on these priorities is in the

22   public interest and necessary to fulfill the Board's

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1   statutory mandate.

2   It is essential if America's farmers and

3   manufacturers are to prosper and grow.

4   Thank you again for holding this session

5   and for the opportunity to discuss these important

6   issues with you today. The STB has wisely

7   challenged outdated regulations that are hurting

8   many large and small businesses across America. I

9   encourage you to keep moving forward on reform.

10   Thank you.

11   DIRECTOR CAMPBELL: Thank you.

12   Next speaker is Adam Weiskittel from BNSF

13   Railway.

14   MR. WEISKITTEL: Good morning. Good

15   morning, my name is Adam Weiskittel, I'm Senior

16   General Attorney at BNSF in Fort Worth, Texas. On

17   behalf of BNSF, I want to thank the Board for

18   creating this task force and for giving stakeholders

19   like us the chance to invite comments today.

20   Let me start by saying BNSF supports the

21   initial list of potential proposals that the task

22   force identified in its May 25th memo to acting

1 Chairman Begeman, in particular we support efforts

2 to modernize and digitize the Board's filing

3 processes, which we believe can only lead to more

4 efficient, environmentally-friendly administration

5 Board proceedings.

6   In addition to work being done by this

7 task force, BNSF supports the other efforts that

8 have been made by the Board recently to reexamine

9 and streamline its procedures, including the review

10 of the rate case procedures in Ex Parte 733 and

11 review of Board regulations in Ex Parte 712.

12   While it may not appear on its face to be

13 directly related to those streamlining efforts, I

14 did also want to mention the benefits BNSF has seen

15 from the work done by the Board's rail customer

16 public system group in recent years. BNSF has found

17 that the RPCA is usually informed of the U.S. issue

18 customers that might otherwise have unnecessarily

19 consumed Board resources through more formal

20 avenues.

21   We support and join in the comprehensive

22 comments we heard from Mr. Hamberger from AAR

1   earlier. I'm here because BNSF wants to emphasize

2   two issues we think the task force should focus on

3   and continue to support.

4   The first is the Board's pending

5   exemptions proceeding Ex Parte 704 sub-1, and second

6   is the Board's approach to ex parte communications

7   with stakeholders.

8   Regarding exemptions, Executive Order

9   13777 directs agencies to identify regulations that

10   create a serious inconsistency or otherwise

11   interfere with regulatory reform initiatives and

12   policies. This, of course, in addition to our

13   national rail transportation policy to minimize the

14   need for federal regulatory control over the rail

15   industry and to allow competitive market forces to

16   establish rail rates to the maximum extent possible.

17   From BNSF's perspective, the one thing

18   this task force can do that would most clearly

19   resonate with the administration's deregulation

20   policy and this task force would be to recommend to

21   the Board that the exemptions proceeding be

22   abandoned.

1   In that proceeding, the Board proposes to

2   reregulate five categories of commodities that have

3   been transported by rail carriers on a exempt basis

4   for more than 20 years. As we described in our

5   filing, in that time, BNSF has offered innovative

6   and competitive service options that enable us to

7   successfully compete in those markets. We built

8   upon that success by joining with our customers to

9   make significant investments in our network that

10   will allow us to compete and grow together into the

11   future.

12   But contrary to that deregulatory success

13   story, the Board theorized the dynamics of those

14   transportation markets have changed so significantly

15   that reregulation is now necessary to protect

16   shippers from abuse of market power by railroads.

17   The Board's conclusion was built on a

18   record that essentially consisted of a review of

19   changes to industry average revenue variable cost

20   ratios for those commodities over time. As BNSF

21   pointed out in its comments, RVC ratios are not

22   reliable indicators of what's happening in complex

1 markets where BNSF participates.

2 To the contrary, changes in RVC ratios can

3 often falsely signal that a railroad is exercising

4 increased market power by charging higher rates

5 when, in reality, that railroad is actually lowering

6 rates in response to competitive pressures.

7 Justifying regulatory intervention with

8 RVC base metrics also has the perverse effect to be

9 less cost efficient and to refrain from making

10 capital investments in places where market forces

11 would otherwise suggest they should be made.

12 We believe that the Board's exemptions

13 proposal would be an unnecessary intervention and in

14 fully functioning markets where there's no evidence

15 that reregulation is needed. At a time when the

16 administration has tasked agencies with identifying

17 and eliminating unnecessary regulations, the Board's

18 proposal would instead represent perhaps the largest

19 expansion of the Board's regulatory reach. We urge

20 the task force to take on that inconsistency in

21 formulating its recommendations to the Board.

22 Turning to the issue of the Board's

1 approach to ex parte communications, BNSF

2 understands and agrees that the Board must follow

3 processes and rulemakings in other nonadjudicatory

4 proceedings that guard the Board's independence and

5 ensure the credibility of the Board's actions and

6 satisfy the Board's obligations under the

7 Administrative Procedure Act. But it can also be

8 tremendously valuable for Board members and Board

9 staff to have the benefit of experience and

10 technical knowledge of all relevant stakeholders

11 when formulating its rules and decisions. We think

12 the Board's current approach to ex parte

13 communications is overly restrictive and

14 unnecessarily hinders that beneficial flow of

15 information.

16   Enabling the Board to have access to more

17 information can only further its understanding of

18 complicated issues and should produce decisions that

19 take a more streamlined approach to achieving the

20 Board's policy goals.

21   In short, the Board should not view

22 maximizing the flow of information with its

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1   stakeholders, all of its stakeholders, as something

2   that is in conflict with its ethical or legal

3   obligations.

4   We saw benefits of a more reasonable

5   approach to ex parte communications in the Board's

6   2015 service reporting proceeding. In that

7   proceeding, written filings revealed to the Board

8   that railway data collection practices were

9   technically complicated and varied across the

10   industry.

11   The Board rightly recognized a chance to

12   talk to stakeholders in person would help Board

13   staff develop a better understanding of the issues

14   than could otherwise have been achieved only through

15   filings. By waiving its normal ex parte rules for

16   that proceeding, the Board was able to craft service

17   reporting regulations that more closely tracked the

18   realities of railroad operations and thus achieved

19   the Board's policy goals in a more efficient and

20   less burdensome manner.

21   Even though the Board has occasionally

22   taken a less restrictive approach to ex parte

1   communications over the years, we think it can and

2   should do more. Specifically, BNSF recommends that

3   this task force investigate possible revisions to

4   the Board's default ex parte prohibition found in

5   its ethics, to instead create a standardized process

6   allowing for increased ex parte communications in

7   weighing in on nonadjudicatory issues. We think

8   revised process should allow for increased

9   stakeholders communications not also with just the

10   Board staff but also with Board members itself.

11   The approach taken in the Ex Parte 711

12   reciprocal switching proceeding is a good starting

13   point, allowing stakeholders to meet with the Board

14   on an ex parte basis and then having high level

15   summaries of those discussions filed in the record

16   nicely balances the Board's ability to continue

17   important dialogue with stakeholders with its

18   obligations under the APA.

19   In closing, BNSF is encouraged by the

20   Board's decision to create this task force and we

21   thank you for the opportunity to provide these

22   comments.

1   DIRECTOR CAMPBELL: Thank you.

2   Our next speaker is Lawrence Spiwak from

3   The Phoenix Center.

4   MR. SPIWAK: Good morning. My name is

5   Lawrence Spiwak. I am the president of Phoenix

6   Center For Advanced Legal and Economic Public Policy

7   Studies. By way of quick background, in case you

8   may not have heard of us, we are a small but

9   influential think tank, we're a 501(c)(3) and we

10   study broad policy issues with a particular emphasis

11   in providing academic level work on law in economics

12   of regulated industries. All of our work is freely

13   available on our Web site, www.phoenix-center.org or

14   on the research network.

15   Given our interest in economic regulation,

16   I would like to commend the STB for holding this

17   listening session. It is always welcome to see an

18   administrative agency proactively asking the public

19   both how it can improve its regulatory procedures,

20   as well as to help identify regulations, in the

21   STB's own words, for "repeal, replacement and

22   modification."

1   So while there are many topics that I am

2   sure that we can discuss, and many have come up,

3   given our interest in economic regulation, I think a

4   good place to start and where I would like to focus

5   on is the potential return of the increased price

6   regulation on the freight rail industry in

7   reciprocal switching.

8   Under its statutory mandate, the STB faces

9   significant hurdles in regulating the prices of rail

10   service. Despite noticeable tensions, it is widely

11   acknowledged that the regulatory powers held and

12   actions taken by the Interstate Commerce Committee

13   and the predecessor to the STB nearly destroyed the

14   rail industry in this country. In response we had

15   the Staggers Act, a legislative action aimed at

16   revitalizing the rail industry by substantially

17   curtailing regulatory influence. In fact, I would

18   submit that the law charged the ANC with assisting

19   railroads achieving adequacy, essentially requiring

20   the regulatory agency to monitor carefully the

21   financial implications of its actions on railroads.

22   The STB over the years has established

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1   stringent costs and competition-based requirements

2   for rate regulation and consequently rate remedies

3   have been few and far between.

4   Fortunately, as the heavy hand of

5   regulation of the rail industry subsided following

6   the Staggers Act, the financial condition of the

7   industry has improved. Still with vigorous

8   competition from alternative transportation

9   modalities, it's hard to make money in the rail

10   business.

11   So even as the rail industry is beginning

12   to recover, we are starting to show signs of

13   financial health, nonetheless this factor of

14   aggressive price regulation looms large on the

15   horizon with the STB's notice of proposed rulemaking

16   on reciprocal switching, which came out last year.

17   For over 30 years, the federal government

18   posed reciprocal switching only if determined that

19   it was, and it's "necessary to remedy or prevent an

20   act that is contrary to competition policies of the

21   Staggers Act or is otherwise anticompetitive."

22   That is reciprocal switching was never

1   intended to function as direct price regulation, but

2   rather as an attempt to remedy anticompetitive

3   actions by rail companies.

4   So consistent with the deregulatory

5   intention of the Staggers Act, the bar for

6   regulatory intervention for reciprocal switching was

7   appropriately set high, and for good reason. While

8   railroads involved in such rates have an opportunity

9   to arrive at a negotiated rate, reciprocal

10   switching, failure to come to terms bring in the STB

11   to regulate prices. And since the federal

12   government first promulgated the standard in 1985,

13   only a few requests for switching were filed and

14   none were granted.

15   However, although the NPRN concedes the

16   Staggers Act provisions were "not designed to

17   provide shippers with full and open access routing,"

18   the NPRN nonetheless proposes to abandon the STB's

19   30-year-old standard in favor of a more permissive

20   standard which, in the STB's view, would "encourage

21   the availability of reciprocal switching where

22   appropriate."

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1   Now, although it is well established that

2   an administrative agency can change its policy so

3   long as it provides a reasoned explanation for doing

4   so, I believe there are several important

5   shortcomings with the STB's logic for abandoning its

6   long-standing anticompetitive test.

7   First, the NPRN asserts that the dearth of

8   reciprocal switching brought over the last 30 years

9   and automatically follows that requiring a finding

10   of anticompetitive harm is "effectively operated as

11   a bar to relief rather than a standard under which

12   relief could be granted."

13   So we are understanding the logic of the

14   NPRN correctly, the STB does not have to demonstrate

15   a market failure before it can intervene in the

16   market.

17   However, if there is no market failure to

18   remedy, then what is the point of government

19   regulation?

20   Second, the NPRN argues that it's

21   important to weaken the anticompetitive standard due

22   to the increased concentration of the industry.

1 Well, I find this argument a bit puzzling in light

2 of the fact that no rail merger can be approved

3 unless the STB approves it first.

4   More importantly, as the NPRN observes,

5 the Board approves such consolidation in order to

6 remedy "decades of inefficiency and serial

7 bankruptcies." So apparently, we seem to be at the

8 appropriate equilibrium, as approved by the

9 government.

10   Which brings me to the NPRN's third

11 argument. Now that the rail industry has returned

12 some modicum of financial health, again made

13 possible by reduced regulation by the government of

14 consolidation, lowering the reciprocal switching

15 standard will allow the STB to, and again I quote,

16 "avoid obsolescence of the Board's regulatory

17 policies."

18   Okay. The obsolescence of regulation is

19 good policy, right. That's what we want. It

20 indicates that market forces are now adequate to

21 ensure acceptable performance of the industry.

22   So given the three points I just made, I

1   think it begs some interesting policy questions.

2   Why use such complex schemes such as

3   reciprocal switching in the first instance. Why

4   don't you just redirect price regulation supposedly

5   if the price is too high.

6   I think unfortunately the answer is

7   straightforward. Because the STB's own rate

8   regulation standards rooted in valid economic and

9   financial concepts represent a hurdle and a

10   legitimate one to direct price regulation, using

11   reciprocal switching alternatively grants the

12   flexibility for the STB to craft new, less rigorous

13   and less economically justified approach to price

14   regulation. However, as the courts have constantly

15   recognized, price regulation is an inexact science,

16   I'm not sure having a softer standard really serves

17   the public interest.

18   So in sum, the STB is proposing to expand

19   reciprocal switching vastly, even though it concedes

20   that there's no market failure and the regulations

21   are obsolete. However, if the STB is truly

22   interested in using this listening session to

1   identify and ultimately eliminate, again using STB's

2   own words, "burdensome, outdated or cumbersome

3   regulations," it would seem dropping reciprocal

4   switching is an excellent place to start. With

5   that, I thank you for your time.

6   DIRECTOR CAMPBELL: Thank you.

7   Next we have Lou Anne Rinn from Union

8   Pacific.

9   MS. RINN: Good morning, Director Campbell

10   and the other respected members of this task force.

11   I'm Lou Anne Rinn of the Union Pacific Railroad.

12   Union Pacific really appreciates both the

13   efforts and the initiative of this task team, as

14   well as this listening session. I personally have

15   gained a greater appreciation of the importance and

16   the art of listening by attending a CLE program

17   called Better Lawyering Through Better Listening,

18   cosponsored by the International Listening

19   Association. Who knew.

20   Listening well can be a really valuable

21   foundation for your reform efforts, and we

22   appreciate the fact that you're holding this session

1   today.

2   I'm going to start by looking back at how

3   changes that the STB has made have enhanced

4   listening that therefore improved its process and

5   its results, and how those that impede or limit

6   communication have not. Then looking forward, I

7   will conclude with some specific recommendations

8   that Union Pacific believes would be beneficial for

9   this body to pursue.

10   Looking back, when the STB has increased

11   opportunities for listening, there have been very

12   positive results. Mediation in rate cases and

13   complaint proceedings has facilitated several early

14   settlements and laid the groundwork for later

15   settlements.

16   Referring discovery disputes to FERC ALJs,

17   those discovery hearings allow clarification and

18   narrowing of discovery disputes. Consequently,

19   parties have been able to compromise many of those

20   disputes and the relatively few remaining ones are

21   then promptly decided by the ALJ.

22   Adding face-to-face meetings with

1   shareholders in rulemakings, these provide

2   interactive, informal opportunities for

3   stakeholders, besides lawyers, to discuss concerns

4   with the Board and its staff. They are a particular

5   virtue to allow questions and answers, to clarify

6   facts and to build understanding of the issues are,

7   I think, intangible but very real benefits.

8   I believe that such sessions ultimately

9   improve the final result in Ex Parte 724 as

10   described by counsel for BNSF.

11   And the creation, the stakeholders and the

12   Board have opportunities to learn more about complex

13   topics and its changes. When the STB increases the

14   opportunities for its stakeholders to listen to each

15   other, as in mediation, discovery hearings and

16   advisory committees, the possibility of resolving or

17   avoiding disputes is increased.

18   When the STB enhances the channels of

19   communication between the stakeholders and its board

20   members and staff, its greater understanding of the

21   issues and consequences improve the likelihood of

22   the decision to be correct.

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1   As Chief Justice Marshall observed, to

2   listen well is as powerful a means of communication

3   and influence as to talk well.

4   But when the STB has made decisions that

5   shut off or unduly limit communication on important

6   topics for procedural simplicity, the unfortunate

7   result has been too often to expand regulation where

8   there has been no showing of market failure,

9   contrary to its congressional mandate.

10   For example, the decision to bar any

11   evidence of products of geographic competition and

12   market dominance determination. Followed by the

13   summary rejection of an AAR petition to consider

14   natural gas competition for coal without even a

15   rulemaking, built a wall in front of a locked door.

16   But can there be any doubt that natural

17   gas is placing profound pressure on rail coal rates?

18   The adoption of a quantitative limit price test to

19   drive decisions on qualitative market dominance on

20   competition effectively covers the STB's fears to

21   economic evidence widely accepted by other agencies

22   and in favors focusing its eyes on an arbitrary and

1   irrelevant ratio.

2   The justification for not limiting -- or

3   not listening to relevant market evidence has been

4   to simplify a rate case process, not to improve the

5   economic validity of the decisions. But the

6   undoubted substantive effect of those procedural

7   changes is at the core of the Staggers Act reform.

8   Combined with other proposals pending

9   before the Board whose primary virtue, according to

10   proponents, would be to expand STB regulation over

11   rates or the surface, this failure to listen to

12   economic evidence of competition can become even

13   more serious.

14   So to sum up, if you look back on the

15   experience, it leads to this general recommendation.

16   Pursue reform proposals that enhance communication

17   between and among the Board and its stakeholders.

18   And please avoid procedural improvements that

19   restrict or eliminate communication about market

20   forces or rail operation or service that will inform

21   the Board's decisions.

22   Looking forward, Union Pacific does have

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1   some specific recommendations for regulatory reform.

2   And while these will be informed by comments that

3   have been made by prior rail speakers, I'm not going

4   to repeat that or go into pending proceedings, but

5   we do have these suggestions for specific things

6   that this task force could pursue.

7   Expand and use face-to-face meetings

8   between stakeholders and Board members or Board

9   staff to allow the exchange of information and

10   interactive discussion on a more regular basis,

11   subject of course to appropriate disclosure rules,

12   so that there is a fair and transparent process.

13   You should also explore incorporating

14   technical conferences and proceedings, especially

15   when dealing with technical subjects such as URCS or

16   stand-alone costs.

17   Rely on E filing and drop the requirement

18   for parties to provide paper copies for written

19   submissions. This will save time and money for all

20   of your stakeholders and possibly the Board itself,

21   without limiting substantive communication. And

22   it's good for the environment.

1   Please discontinue limited price test and

2   adopt guidelines for the presentation of qualitative

3   market evidence including types of objective

4   information such as price comparisons, market share,

5   negotiation and communications that other agencies

6   have found useful in assessing competition, so that

7   you can balance coming up with an appropriate record

8   with an expeditious and efficient procedure.

9   Open declaratory board proceedings in

10   states or localities block or delay rail

11   construction for rail line projects or otherwise try

12   to impose operating restrictions. Railroads and our

13   customers are encountering increasing hostility to

14   certain commodities, chemicals and fossil fuels lead

15   the list. This hostility is increasingly expressed

16   in efforts to impose preconstruction clearance

17   requirements or restrictions on how trains are to be

18   operated.

19   While we try to work with communities we

20   serve to address their concerns, environmental

21   activists have increasingly adopted tactics that

22   effectively deprive us of an opportunity to present

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1   the preemption argument to have a court heard or to

2   rule on, and deprive us of a hearing on the

3   preemption, while expecting us to comply with

4   clearly unlawful permitting procedures.

5   If the Board were to be more proactive or

6   develop a record, they would be able to deliver a

7   stronger message to those agencies that such

8   regulation is not permitted.

9   Thank you for this opportunity to be heard

10   in this effort. Thank you.

11   DIRECTOR CAMPBELL: Thank you.

12   Our next speaker is John Scheib, Norfolk

13   Southern.

14   MR. SCHEIB: Good morning to you all.

15   It's a pleasure to be with you. I'm John Scheib,

16   Vice President Law, Norfolk Southern Corporation.

17   Let me start by thanking Chairwoman

18   Begeman for her leadership in implementing a process

19   to follow the spirit of Executive Order 13777, and

20   thanks to you all for serving on this task force.

21   It's important that the task force make

22   recommendations to set an agenda for the agency that

1   is consistent with both the deregulatory message of

2   the executive order and the deregulatory direction

3   of your governing statute.

4   During our time this morning, I'd like to

5   focus on three main points. First, Executive Order

6   13777 is very different and affirmatively

7   deregulatory, as compared to other executive orders.

8   Which means this task force is asked to do

9   more than simply repeat some of the unfinished work

10   of Ex Parte 712, although I would note that most of

11   the unfinished work in 712 were the railroad's

12   proposals.

13   Second, because Executive Order 13777

14   directs that "applicable law" should guide and

15   sometimes stay the Agency's hand in choosing those

16   regulations that ought to be repealed, replaced or

17   modified, the task force should take time to remind

18   itself that the governing statutes for the STB are

19   themselves deregulatory.

20   And third, the STB should use this task

21   force to correct its course back to the directives

22   of the Staggers Act and the Interstate Commerce

1   Commission Determination Act.

2   First, this shouldn't be a repeat of Ex

3   Parte 712. The Board conducted a retrospective

4   analysis of its regulations several years ago in Ex

5   Parte 712, which was initiated in response to the

6   2011 Executive Order 13563 issued by President

7   Obama. That executive order directed agencies to

8   modify, streamline, expand or repeal those

9   regulations that were outmoded, ineffective,

10   insufficient or excessively burdensome.

11   13777 goes much further. It creates a

12   Regulatory Reform Task Force which is charged with

13   two things, to recommend ways to improve upon the

14   implementation of regulatory reform policies,

15   including the Obama executive order, and two, to

16   recommend regulations that ought to be repealed,

17   replaced or modified "consistent with applicable

18   law." And applicable law as I have emphasized twice

19   is an important phrase and we'll come back to that.

20   If I were to summarize the difference

21   between the Obama era executive order and the one

22   we're discussing today, it's this. The purpose of

1   Executive Order 13563 was to achieve regulatory

2   objectives more efficiently. While the purpose of

3   Executive Order 13777 is to deregulate. Don't take

4   it from me. It's right in the preamble.

5   "To lower regulatory burdens on the

6   American people by implementing and enforcing

7   regulatory reform." Which makes some of the

8   comments this morning ironic, given that they seek

9   more regulation.

10   So Executive Order 13777 should result in

11   a much broader, more sweeping deregulatory action

12   than was contemplated in Ex Parte 712. In short,

13   this task force's efforts should not merely be 712

14   reduction.

15   Second, the applicable law for the Surface

16   Transportation Board is deregulatory. The

17   deregulatory focus of Executive Order 13777 should

18   be taken especially seriously by an agency that

19   carries the deregulatory mandate from Congress.

20   Of course the applicable law that is the

21   load star of this agency is one of the most

22   extraordinary examples of deregulation in the

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1   country's history. The Staggers Rail Act of 1980,

2   which is widely regarded as one of the greatest

3   public policy achievements of the 20th Century. The

4   task force should search for ways to reorient the

5   STB back towards its deregulatory load star.

6   While good government and achieving

7   regulatory efficiency are always laudable goals and

8   we should never stop striving for them, I would

9   encourage the members of this task force to think

10   bigger, to reverse the Agency's back sliding since

11   Staggers and return to the deregulatory vision laid

12   out by Congress nearly four decades ago.

13   Third, course correction is necessary to

14   get back to the deregulatory aims of the STB's

15   governing statutes. It's important to give back to

16   those deregulatory principles enacted by Congress.

17   By the 1970s, excessive regulations had

18   taken their toll and the freight railroads were in

19   financial crisis. As the Department of

20   Transportation said at that time, railroading had

21   fallen on difficult times, in large part because

22   regulators could not keep up with the changes that

1   were occurring in the marketplace with the

2   development of the interstate highway system and

3   trucking competition about which we've not heard

4   much this morning.

5   There was insufficient capital to support

6   service and safety. It was the decade of the 1970s

7   closed, the regulatory scheme had taken its toll and

8   we know railroads were going bankrupt.

9   The root cause of the problem was an

10   economic system -- regulatory system that was

11   smothering the industry and could not keep up with

12   the marketplace.

13   Congress responded, as we know, and

14   Mr. Hamberger went through the great successes of

15   the Staggers Act. Productivity and volume increased

16   while rail rates declined. In a recent study by

17   Jerry Ellig and Patrick McLaughlin showed that

18   safety improvements were driven solely by the

19   Staggers Act and not by safety regulation.

20   Seeing these results, Congress has doubled

21   down on deregulation with the Interstate Commerce

22   Commission Termination Act, in which it further

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1   expanded the STB's ability to exempt railroads from

2   regulation.

3   The genius of Congress in enacting the

4   Staggers Act is in recognizing that government

5   regulation was not nimble enough to keep up with the

6   changing market dynamics and competitive pressure

7   facing the railroad industry. That principle is as

8   valid today as it was in the 1980s. Only a

9   deregulated railroad industry can react in time to

10   changing events, whether the creation of interstate

11   highway system in the rise of truck competition

12   following World War II, the recent developments of

13   new technologies and natural gas production that

14   affect coal pricing, or other forms of competition

15   that are constantly changing that we are dealing

16   with in the marketplace.

17   This task force needs to help the STB to

18   stop succumbing to the temptation to regulate. For

19   example, the Agency's proposed rule that Congress

20   has repeatedly considered and rejected, forced

21   access. Congress has been clear and consistent on

22   this point. The Board should intervene in the

1   private marketplace only to remedy abuses.

2   But the Board has proposed a rule that

3   would depart from the law and forced one railroad to

4   switch to competitors traffic even in the absence of

5   anticompetitive conduct. If adopted, this rule

6   would undermine the financial health of the

7   industry, reduce investment and erode hard-gained

8   operational efficiencies.

9   To be called a deregulatory action,

10   as we've heard this morning, is a joke.

11   If regulators went in and told Coke that

12   they had to use their facilities to produce for

13   Pepsi, it would never be called a deregulatory action.

14   The task force should recommend that the STB

15   withdraw this proposal immediately and others like

16   it that threaten to return to a failed, active

17   regulatory philosophy.

18   But you shouldn't stop there. There are

19   other opportunities, and one of them is to look at

20   existing regulations that are antiquated or

21   outdated. That examination must begin with revenue

22   adequacy.

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1   Profit regulation like revenue adequacy

2   restraint creates a cloud of uncertainty over the

3   regulated entity. That uncertainty has the

4   potential to stifle innovation, productivity and

5   competition while hampering investment.

6   Accordingly, regulatory history has proven

7   that that type of regulation is ill-advised as

8   Professor Sappington explained to the Board at the

9   hearing on the proceeding on revenue adequacy.

10   This task force should recommend that the

11   STB modify its proposed rule immediately by

12   withdrawing the revenue adequacy -- modify its

13   regulations immediately by eliminating the revenue

14   adequacy constraint.

15   There are plenty of other areas that are

16   ripe for exploration by the task force. Reporting

17   regulations such as contract summaries that serve no

18   regulatory purpose should be repealed.

19   Environmental regulations should be modified or

20   streamlined. You should jettison the limited price

21   test, which shippers and railroads alike have

22   expressed concern with and objected to.

1   It may even be time to examine whether

2   railroads should be exempt from filing anything more

3   than a notice in an abandonment proceeding, and if

4   not, you certainly should update the costs

5   associated -- the cost inputs into the abandonment

6   proceeding as maintenance costs and those

7   proceedings haven't been updated since the '70s.

8   The Board should take Norfolk Southern's

9   request in the exemptions proceeding and look to

10   find more traffic that should be exempted from

11   regulation, not trying to reimpose regulation.

12   In short, this task force should be

13   exploring bold actions to further use 49 USC 10-502

14   in light of the extreme competition in the economy

15   from all sources that have made regulation not

16   necessary to carry out the transportation policy of

17   the United States, and where regulation is not

18   needed to protect shippers from an abuse.

19   In conclusion, the task force is charged

20   with conducting a wide-ranging examination of the

21   Board's regulations, much broader than what occurred

22   in 712.

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1   All the points that I have made are

2   highlighted not just by me but by articles and

3   academics, and we have put together a primer that we

4   will leave with Ms. Graab of supporting articles

5   that demonstrate all the points that I have made

6   this morning.

7   In short, I hope you as a task force can

8   seize this opportunity you've been given and stay

9   true to the deregulatory focus of the executive

10 order and the deregulatory focus of your governing

11 statute. Thank you.

12   DIRECTOR CAMPBELL: Thank you.

13   Our next speaker is Raymond Atkins from

14 Sidley.

15   MR. ATKINS: Good morning. My name is Ray

16 Atkins and I'm a partner with the law firm of Sidley

17 Austin. I am here today speaking on my own behalf

18 as a practitioner and a former STB staffer, although

19 I do represent several railroad parties in ongoing

20 regulatory matters before the STB.

21   This task force has a tremendous

22 opportunity to help guide the STB on a path towards

1 further deregulation of the freight rail industry.

2 And it's a bit of deja vu. The impressive steps

3 that Congress took with the Staggers Act were

4 sparked by federal staffers who wrote detailed

5 reports that were encouraging old deregulatory

6 action. It took staffers who were steeped in the

7 regulatory history, who understood the industry and

8 were willing to reexamine their own roles.

9   Fast-forward four decades, and you're in

10 their shoes. You are being called upon to develop

11 new and bold ideas for further deregulation.

12   And the STB has the tools it needs to

13 effect huge change. As you know, Congress gifted

14 the STB with virtually unlimited power to

15 deregulate. The section is Provision 105-02, and

16 with the exception of labor protection, it empowers

17 the STB to exempt virtually anyone from anything in

18 the statute.

19   The STB can remove any federal regulation

20 that is no longer needed to promote the national

21 transportation policy or to protect shippers from

22 the abuse of market power. And Congress instructed

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1   the agency to deregulate aggressively, to the

2   maximum extent possible, while providing a safety

3   valve where the STB could revoke an exemption where

4   needed for special circumstances.

5   But having sat in your seats, I can

6   appreciate that I offer you little help by shouting

7   carpe diem without offering you framework for

8   further deregulation or any specific ideas.

9   And in my view, the framework is the easy

10 part. Almost every economist on the planet will

11 agree that federal regulation is only justified

12 where there is a clear market failure, where you've

13 got a well-functioning marketplace there is simply

14 no justification for federal intervention.

15   This concept is not only a bedrock of

16 modern regulatory theory, but it has been compelled

17 by Congress for this industry. The primary policy

18 of the United States government when it comes to the

19 freight rail industry is to minimize the need for

20 federal control and to allow the marketplace to

21 govern.

22   Well, if the framework is the easy part,

1   the specifics are clearly harder. But if you follow

2   this framework, then I think this task force should

3   explore at least four ideas that in combination

4   would trim away a lot of the unnecessary and

5   antiquated federal regulations and focus the STB on

6   its core mission.

7   First, as the paramount goal should be to

8   intervene only where there's a market failure, then

9   it's obviously terribly important that the Agency

10   have a sound way to decide whether there is or is

11   not effective competition.

12   If the STB does not perform that gate

13   keeping function appropriately, then it's doomed to

14   interject itself where it doesn't belong.

15   And as someone who must bear some

16   responsibility for the current state of affairs, I

17   will have to say that the Agency dominance inquiry

18   is in disarray. First, you've excluded product

19   and geopraphic competition. What that means is as

20   a result today the Board would ignore the formidable

21   effect that natural gas prices is having on the

22   transportation of coal.

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1   Then you've got the DMIR decision, where

2   even competition from other railroads is ignored if

3   it doesn't match the interchange point and the

4   origin of the challenged rate.

5   And then enters the limit price test,

6   whose opponents are legion and fans are few.

7   Time has revealed that that test placed

8   its integrity on a benchmark that has no correlation

9   to whether there is or is not effective competition.

10   And I have taken to heart the words of the

11   great Justice Frankfurter who said "wisdom too often

12   never comes," so it ought not be rejected merely

13   because it comes late.

14   The cumulative effects of this erosion of

15   the Agency's market dominance analysis leaves little

16   left of this important gate keeping function but the

17   statutory threshold.

18   Second, where there is a marketplace

19   failure, the Agency must follow sound regulatory

20   principles when it intervenes in the marketplace.

21   And on this second point, the revenue adequacy

22   constraint described in the coal rate guidelines is

1   the clearest example of an antiquated and

2   discredited form of rate regulation that should be

3   on the very top of your list to be discarded.

4   Finally, all of the remaining STB

5   regulations should be viewed through the lens of

6   whether any of them is needed to address a market

7   failure. And I'll offer you two final thoughts for

8   how the STB could use its broad regulatory --

9   deregulatory powers to exempt railroads from federal

10   regulations whose time has run its course.

11   First, there is no remaining justification

12   for any regulatory approval for an abandonment other

13   than perhaps to oversee the OFA process.

14   This is a leftover from when the ICC would

15   force a railroad to operate an unprofitable line to

16   in effect cross-subsidize rural regions or to leave

17   a shipper with leverage that it can use against

18   trucking companies. That idea is long since dead.

19   There is clearly no market failure that

20   would justify putting a railroad through any hoop

21   and hurdle before it decides to cease operation and

22   abandon a line.

¹ The railroad itself is far better situated

² and has the proper incentives to make informed

³ business judgment about whether a line is or is not

⁴ profitable.

⁵ And exempting railroads from having to

⁶ obtain regulatory approval for abandonment would

⁷ avoid future situations like what we're witnessing

⁸ with the Harsimus case. I'm not casting any blame

⁹ on the STB, but that's a proceeding to abandon a

¹⁰ line that's been ongoing for eight years, where the

¹¹ line in question has not seen any traffic in over 30

¹² years.

¹³ Second, the Board should consider

¹⁴ exempting all traffic with rates that fall below 180

¹⁵ percent of variable costs. As Congress has declared

¹⁶ that this traffic has effective competition, there's

¹⁷ no market failure that can justify any federal

¹⁸ regulation. Might there be some rare exceptions,

¹⁹ some circumstance where federal regulation was

²⁰ needed to protect a shipper from the abuse of the

²¹ market power, notwithstanding the fact that his rate

²² fell below 180 percent? Perhaps.

1   But Congress contemplated that possibility

2   when it created the safety valve whereby such a

3   uniquely situated shipper could seek to have a

4   revocation revoked if federal intervention were

5   needed to address the market failure.

6   Let me wind up by commending this idea of

7   having a public listening session. You have a rare

8   opportunity to put the Board on a better path, one

9   that conserves your own scarce resources and further

10 minimizes the degree of federal regulatory control.

11   You can seize this opportunity by

12 forgetting about how long the Agency has regulated a

13 certain activity, but ask yourself instead whether

14 federal control remains necessary to address a

15 market failure today.

16   Congress cut away a lot of regulatory fat

17 with Staggers and ICTA, but there's a lot more that

18 you can propose for the members to do today. And

19 just to recap, that list should include revisiting

20 and reforming your market dominance guidelines,

21 abandoning the antiquated and discredited revenue

22 adequacy constraints, exempting carriers from the

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1   need to obtain agency approval for abandonment and

2   exempting all traffic from federal regulation where

3   the rates in question demonstrate there is effective

4   competition.

5   Thank you for this opportunity, and I look

6   forward to reading your final report to the members.

7   DIRECTOR CAMPBELL: Thank you.

8   Our next speaker is Charlie Delacruz from

9   NGFA.

10   MR. DELACRUZ: Good morning, Director

11   Campbell and members of the task force. I am

12   Charlie Delacruz, Senior Vice President and General

13   Counsel of the National Grain and Feed Association.

14   We commend the Board for establishing this task

15   force and for the work this task force has already

16   done. We especially commend the task force for

17   conducting this listening session this morning, in

18   which we are proud and honored to participate. I

19   will do my best to provide a quick snapshot of the

20   written comments that we intend to follow up on

21   today.

22   NGFA consists have more than a thousand

1   grain feed processing exporting and other

2   grain-related companies that operate more than 7000

3   facilities and handle more than 70 percent of all

4   U.S. grain and oil seeds. NGFA also has 34

5   affiliated state and regional agribusiness

6   associations and strategic alliances with a number

7   of groups, including the North American Export Grain

8   Association and the Pet Food Institute.

9   We urge the task force to reject any

10 attempt by other stakeholders to rescind or weaken

11 the few remaining statutory protections afforded to

12 rail users under the Staggers Rail Act and other

13 federal statutes.

14   There are numerous references in Staggers

15 Act rail transportation policy that call upon the

16 Board to foster effective competition in the freight

17 rail sector.

18   Several of these statutory protections are

19 the subject of ongoing active proceedings at the

20 Board. The statutory obligation of the Board to

21 foster competition and prevent abuse of market power

22 is needed more strongly now than ever.

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1   U.S. agricultural shippers and receivers

2   in 2016 depended on just four Class 1 carriers to

3   transport 84 percent of grain and oil seed rail

4   traffic. That's compared to only 53 percent when

5   the Staggers Act was enacted in 1980.

6   The executive orders made clear, each

7   Regulatory Reform Task Force shall evaluate the

8   existing regulations and make recommendations to the

9   Agency head regarding their repeal, replacement or

10   modification, consistent with applicable law.

11   Thus, we urge the task force to reject

12   recommendations that are inconsistent or contradict

13   the governing federal statutes.

14   NGFA supports several proposals contained

15   in the May 25 status report prepared by the task

16   force for acting Board Chairman Begeman, namely

17   those addressing outdated environmental rules,

18   antiquated procedural and filing rules and

19   regulations that may be outmoded, ineffective,

20   insufficient or excessively burdensome that were the

21   subject of Ex Parte 712.

22   Unfortunately, the Ex Parte 712 proceeding

1   resulted only in a February 2016 decision that made

2   nonsubstantive, inconsequential changes. NGFA

3   concurs with then-Commissioner Begeman's assessment

4   in that 2016 decision that more substantive changes

5   to the Board's rules should have been considered

6   during the four-year time span of that proceeding.

7   And NGFA supports this task force's decision to

8   review the comments received in that proceeding.

9   Many of the suggestions of rail shipper

10   stakeholders in that proceeding follow the Board's

11   rules and procedures governing rate reasonableness,

12   revenue adequacy, reciprocal switching, market

13   dominance and other rules and procedures continue to

14   be relevant and apply today.

15   NGFA also respectfully requests the task

16   force consider including the following

17   recommendations in its report to the Board.

18   First, the Board should be redirected to

19   redouble its efforts to revamp rate reasonableness

20   rules to create a cost-effective, workable

21   methodology for agricultural shippers to challenge

22   unreasonable freight rail rates. The record is

1 clear, the Board's three existing rate challenge

2 methodologies are too complex, too cumbersome and

3 too costly, particularly for agricultural shippers.

4   The concerns of agricultural shippers

5 about unreasonably high rail rates were borne out

6 most recently in a June 15, 2017 report by the U.S.

7 Department of Agriculture. It found "grain rates

8 have consistently risen over the past half decade,

9 even accounting for inflation, with a few brief

10 exceptions, particularly for wheat, USDA's analysis

11 found the changes in rates and rate spreads are

12 significant and puzzling, relative to the price

13 received for wheat at its destination, which has

14 declined over the same time period."

15   As an example, USDA cited average rail

16 rates for wheat, for shuttle service between the

17 same origin and destination pairs of Wichita, Kansas

18 and Houston, Texas, which are more than $1000 per

19 car greater than the rate charged for corn.

20   USDA concluded that during a time when

21 wheat and other grain shippers have been struggling

22 against falling grain prices and rising rail rates,

1   wheat shippers in particular have found it difficult

2   to compete in export narcotics, as they face higher

3   rail rates than other grain shippers over similar

4   corridors and rates that have not declined in

5   response to changes in world wheat markets. And

6   that's again a quote from the USDA report.

7   Since the Board should revise outdated

8   rules governing reciprocal switching, that's my

9   second recommendation, the Board's existing rules

10   and precedent are the epitome of outdated

11   regulations since no party has attempted to use them

12   for nearly 30 years.

13   NGFA and other agricultural interests have

14   joined with other shipper interests in urging the

15   Board to replace its current, unworkable Class 1

16   competitive switching rules, to provide a fairer,

17   more reasonable way for shippers to access the lines

18   of competing carriers to reach customer markets.

19   Action by the Board would at the end of

20   the day merely replace a wrongly decided Agency

21   precedent and an outdated and ineffective

22   regulation.

1   Updating and reforming the Board's

2   competitive switching rules are more important than

3   ever in today's consolidated rail marketplace.

4   Next, we strongly urge the task force to

5   not tamper with the Board's existing regulations

6   that require Class 1 railroads to import service

7   performance metrics and to file summaries of

8   agricultural transportation contracts.

9   We already are witnessing service declines

10   by at least one significant Class 1 carrier this

11   year, and both the reporting of service metrics and

12   agricultural contract summaries are beneficial to

13   agricultural shippers and to the Board itself.

14   In addition, NGFA notes that comments

15   submitted as part of the Board's Ex Parte 712

16   proceeding in 2011 regarding potential changes to

17   the Agency's rules for determining railroad revenue

18   adequacy and application of the railroad -- of the

19   revenue adequacy constraint in rate reasonableness

20   cases continue to be relevant. Since the Board

21   still has not addressed its rules and policies

22   related to revenue adequacy in a substantive manner.

1   NGFA believes rail shippers and shipper

2   organizations have provided considerable evidence

3   demonstrating a Class 1 railroads have reached or

4   exceeded revenue adequacy.

5   NGFA encourages the task force and the

6   Board to continue the efforts begun in Ex Parte 712

7   and Ex Parte 722 to develop policies and regulations

8   to comply railroads found to be revenue adequate.

9   Finally, there is one recommendation in

10   this proceeding in which the NGFA and the AAR are

11   aligned, and that regards the need for the Board to

12   reform its rules regarding ex parte communications,

13   to allow increased dialogue and information exchange

14   between the stakeholders and Board members and

15   staff.

16   Recent efforts by the Board to begin to

17   reform and modernize its ex parte rules have been

18   beneficial and appreciated.

19   We believe the task force should recommend

20   that they be continued and expanded.

21   In conclusion, NGFA again appreciates the

22   opportunity to highlight these recommendations, as

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1 well as the task force's consideration of our more

2 detailed written statement to follow, and of course,

3 we remain willing and happy to assist the task force

4 in its project at any point in any manner. Thank

5 you.

6   DIRECTOR CAMPBELL: Thank you.

7   Our next speaker is Justin Sutton from the

8 Hydrogen Super Highway.

9   MR. SUTTON: Good morning, everyone. I

10 admire the work that you do. We definitely have a

11 huge burden to manage all these problems so

12 articulated today. And I also greet everyone who

13 has attended.

14   I represent the Interstate Traveler

15 Company, which is the builder of what is called the

16 Hydrogen Super Highway. If you haven't heard of it,

17 don't be surprised. We were told by very

18 influential people back in 2004 that such a

19 revolution in transportation technology was not for

20 our time.

21   However, I can explain to you today that I

22 spent the last 10 years as subject matter expert in

1   the United States Air Force, I just spent the last

2   two days with the United States Navy, who are very,

3   very concerned about not just transportation safety

4   and security but energy security, of which the

5   Hydrogen Super Highway, for all to see, provides a

6   very adequate and exciting industrial revolution

7   that affects all of us one way or another.

8   So I would like to just read the opening

9   paragraph here. So what is the Hydrogen Super

10   Highway? It is a collection of vital municipal

11   utilities bundled into a conduit cluster providing

12   its first of its kind full integration of

13   solar-powered hydrogen production and distribution

14   system technology that provides the energy to

15   operate at high speed magnetic levitation on demand

16   public transportation network, along with any

17   permissible -- or along any permissible

18   right-of-way, private, public or such as highways,

19   local roads, power corridors, the U.S. interstate

20   highway system and, of course, our many, many

21   railroad rights of way that are currently used.

22   This gives the United States economy an

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1   opportunity to create an industrial revolution that

2   will greatly exceed the current automotive and

3   aerospace industries. It will require many millions

4   of tons of steel over the course of 10 years to

5   build the interstate highway. There's about 800

6   million tons of steel that would go into the rail

7   alone.

8   There are about 11,000 highway

9   interchanges on the U.S. interstate highway system.

10   At each location, we plan to build a pair of

11   buildings, so that people can access the system,

12   anywhere the interstate highway happens to be.

13   By using this as a public transportation

14   medium, it resolves the issues which everyone in

15   every state and every county that we've communicated

16   with, they all face, how do you build a public

17   transportation system on a rail network that's

18   already either overburdened or is really in

19   disrepair?

20   So this provides an entirely new

21   right-of-way that the public has access to, that the

22   railroad companies can take advantage of, that the

1   shippers will also be able to take advantage of.

2   As a public access railroad network, you

3   will be able to have vehicles of any type, scale,

4   size, purpose, that would operate on this brand-new

5   rail system, which was originally designed as an

6   upgrade to the interstate highway network, hence the

7   name of the company, the interstate traffic company.

8   Now, I have with me a set of booklets to

9   provide to you, along with the formal testimony

10   provided to the Federal Railroad Administration a

11   number of years ago, which gives an adequate

12   technical summary of how the system will work.

13   But for your visual reference, if you see

14   here, there is an elevated rail system that's

15   covered in solar panel material. It is not really

16   for us to decide what type of solar panels are used.

17   It is our job to create the new manufacturing

18   standard. That is a standard that would be launched

19   in the United States and will be very quickly

20   adopted globally, as our largest export of

21   industrial products in the history of the United

22   States.

1   It is a very important transition that

2   will be taking place in the future. Not just for

3   transportation but also for communications,

4   pipelines for data, for chemicals, for fuels, for

5   any commodity liquid, vapor or gas, quite frankly,

6   that would operate within the conduit cluster that

7   you see inside of the rail.

8   It may look small, but it's actually quite

9   large. The rail gauge is 12 feet, it's three times

10   wider than the standard rail gauge.

11   The United States obviously made the

12   decision quite a long time ago to go with the

13   standard rail gauge. However, other places in the

14   world have a broad gauge, which can take much larger

15   vehicles, which adds to the serviceability of the

16   rail line and of course the comfort of the

17   passengers that might be riding it.

18   We provide the ability to support vehicles

19   that are as wide as 16 feet and as long as 60 feet

20   and as much as 24 feet tall. So you can literally

21   have a tri-level structure that can be used as a

22   mobile hospital, a mobile office, a mobile

1   residence, or really a mobile hospital one is the

2   most important to me.

3   As a statistic, the interstate highway

4   system is one of the deadliest places in the United

5   States. About 35,000 people a year enter the

6   interstate highway and either leave in an ambulance

7   or don't leave at all. And out of those 35,000

8   people that perish because of a car accident, about

9   half of them die on the way to the hospital.

10   We provide an opportunity for this rail

11 system to be down the sides of the interstate

12 highway where we can bring the critical care

13 surgical team to the scene of the accident, and

14 statistically we expect to be able to save at least

15 10,000 lives a year. If I can save one life, it's

16 worth doing, which is a part of my motivation

17 standing here before you today.

18   With that note, there is quite a bit of

19 information we can talk about. I understand you're

20 not asking questions today. But I will be in

21 Washington, D.C. for the rest of the week. We'll be

22 up on the Hill for the next couple of days.

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1   I have these to provide to you, and if you

2   have any further questions, please don't hesitate to

3   contact us. And we will certainly be -- Andre

4   Sauvageot, who you saw a moment ago, our director

5   for Washington, D.C., he has had several political

6   appointments, very influential having to do with

7   international commerce and specifically the

8   revolution of the Vietnamese economy when the trade

9   embargo was reduced. He brought in General Electric

10   and a couple of other very large American companies.

11   We are a private limited liability company

12   from the state of Michigan. We are made up of about

13   400 members, and our trade missions include about

14   the top 50 countries in the world. So our

15   international clients are waiting to see American

16   leadership, and hopefully we will see that here soon

17   in the United States with the system to be built in

18   the state of Indiana, which was permitted last year.

19   So with that, I thank you very much for

20   your time. Thank you, Justin. Thank you, all.

21   DIRECTOR CAMPBELL: Thank you.

22   Our next speaker is Pete Shudtz, CSX.

1   MR. SHUDTZ: Well, I would not be

2   addressing 711 today. I may be the only speaker who

3   isn't.

4   Good morning. I am Pete Schudtz, and I am

5   here today on behalf of CSX. CSX thanks the Board

6   for convening this listening session which promotes

7   the further improvement of the Board stakeholder

8   relations. We have submitted written comments today

9   for your consideration. Those comments lay out

10 several proposals that we will briefly summarize

11 this morning.

12   CSX also supports and adopts the AAR

13 comments delivered today by Mr. Ed Hamberger. CSX's

14 proposals are all based on our belief that the

15 Board's regulations work best when they are focused

16 on the Board's core mission, and most importantly,

17 directed at those areas that promote Congress's goal

18 for a financially healthy rail industry.

19   This teaches us that eliminating

20 unnecessary regulation is often the best way to

21 serve the interest of all stakeholders. It creates

22 a stable, naturally healthy rail system that

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1   provides rail service to shippers at reasonable

2   rates.

3   We are all familiar with the great success

4   story of deregulation resulting from Staggers. That

5   Act, the rail industry's efforts and the Board's

6   implementing regulations all led to increased

7   productivity and volumes, more investment, safer

8   operations and lower rates for shippers.

9   Mr. Hamberger's statement both demonstrates that

10 success story today.

11   But there's more that the rail industry

12 and Board can do. The Board's regulations still

13 impose unnecessary burdens that restrict

14 efficiencies, create needless transaction costs and

15 discourage investments, all of which are contrary to

16 the Staggers goals and those of the Board and the

17 rail industry.

18   Our written comments focus on three areas

19 which we believe will improve the Board's

20 regulations, the elimination of the revenue adequacy

21 constraint and improvements to the Board's

22 abandonment and environmental rules.

1   This morning I will briefly address these

2   three topics.

3   First, as Mr. Hamberger and Mr. Scheib

4   also recommend, the Board should remove revenue

5   adequacy constraint. That constraint is an outdated

6   and unnecessary form of regulation. It discourages

7   investment and innovation and most importantly, the

8   Board has other, better methodologies than SAC that

9   are economically sound. We submit that this

10   constraint is exactly the type of antiquated

11   regulation that the Board should eliminate.

12   Another area that the Board should examine

13   are its regulations governing applications for

14   abandonments in discontinuation of service. The

15   Board's 27 pages of application requirements wreak

16   substantial and unnecessary regulatory hurdles that

17   discourage abandonment of like lines even when these

18   lines satisfy the Board's standards for abandonment.

19   The Board has long recognized that it's contrary to

20   the public interest to force railroads to operate

21   unprofitable lines and for shippers to

22   cross-subsidize those lines.

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1   This policy is already encouraged by the

2   Board's efficient, timely exemption process. By

3   contrast, the Board's regulations for applications

4   were so arduous as to discourage almost any

5   abandonment that cannot be accomplished through an

6   exemption. The Board's docket clearly reflects the

7   wide use of exemptions and the absence of

8   applications.

9   The 1920 abandonment law goes back to the

10   steam era, the beginnings of truck transportation.

11   The Board's application requirements today remain at

12   essentially pre-Staggers construct. Although the

13   Board has updated many of its regulations over the

14   years, the application requirements still set forth

15   arduous processes that take several years to

16   adjudicate and/or coupled with uncertain results and

17   lengthy post-decision conditions.

18   The Agency should reform its regulations,

19   specifically the Board should consider a new cost

20   exemption allowing railroads to abandon or

21   discontinue service of all unprofitable lines by

22   notice of class exemption. The new class exemption

1 could be modeled on the Board's very successful out

2 of service class exemption.

3   Like that exemption, you protect the

4 interest of any shippers on the line by providing

5 opportunities for offers of financial assistance to

6 continue rail service, thereby placing the burden of

7 unprofitable operations on the beneficiary of those

8 services.

9   At the same time, this suspended exemption

10 process will allow the Board to focus on the

11 financial assistance requirements of the Act and the

12 other public uses for unprofitable lines which the

13 Board encourages so well.

14   Finally, the Board's ongoing efforts to

15 update its environmental rules should employ new

16 thresholds for determining whether or not it would

17 result in significant changes to carrier operations.

18 Specifically, the Board should reconsider its eight

19 trains a day and three trains a day thresholds for

20 traffic increases on lines served. These are

21 thresholds that most commonly trigger environmental

22 review.

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1   In the first place, the Board should

2   consider whether it makes any sense to have the

3   lower three trains a day threshold for environmental

4   review in nonattainment areas. It is well

5   recognized that shifting traffic from trucks to

6   rail, has environmental benefits, both because of

7   decreased emissions and decreased highway traffic.

8   In light of these benefits, it's

9   counterproductive to have lower threshold for

10   competing rail operations in nonattainment areas.

11   Moreover, the Board should change the

12   thresholds that automatically deem any increase of

13   three or eight trains per day to be significant

14   traffic increases. On a daily basis, those

15   operational changes are completely unrelated to any

16   transaction the Board makes.

17   Our written comments further outline these

18   two options for changing the Board's metrics that

19   would better focus the Board's environmental review

20   on treating significant changes resulting from the

21   transaction.

22   Lastly, the Board should consider whether

1 certain categories of Board decisions, like exempt

2 abandonments, administerial acts -- do not require

3 environmental review.

4   In conclusion, CSX thanks the Board and

5 its staff for instituting this proceeding, and for

6 considering ways it can eliminate unnecessary

7 regulations. CSX appreciates the opportunity to

8 submit its written comments on these important

9 issues and looks forward to the Board's continued

10 deregulation efforts.

11   That concludes my comments, and kindly let

12 me know if I may provide any additional information

13 to the group or to the Board.

14   And I would also lastly like to just

15 comment on some of the earlier commenters on service

16 issues. I must note that we always try to be

17 responsive to our customers, and we appreciate very

18 much Ms. Marvin's office to help assist us in our

19 communications with our shippers on an informal

20 basis. Thank you again.

21   DIRECTOR CAMPBELL: Thank you.

22   According to my list, we are through all

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1   the speakers for today. But is there anyone who had

2   intended to speak who somehow didn't make it on the

3   list? I just want to make sure everyone had an

4   opportunity before we close.

5   Okay. As I said, the transcript of this

6   will be available and will be placed in the docket,

7   the EP738 docket. Also, the status reports of the

8   task force are on the Board's Web site under a

9   landing page for the Regulatory Reform Task Force.

10   Right now there's just one up there that I know a

11   number of you referred to, so I know you found it.

12   But as we have more status reports, those will be

13   posted there as well, so you can keep an eye out for

14   that.

15   Thank you so much for coming here today,

16   providing your comments. I'm sure they are going to

17   be tremendously helpful to us, and we're all looking

18   forward to getting into a conference and sorting it

19   all. So thank you very much. We appreciate it.

20   (Whereupon, at 11:59 a.m., the hearing was

21   concluded.)

22

1   CERTIFICATE OF NOTARY PUBLIC & REPORTER

2

3   I, CARMEN SMITH, the officer before whom the

4   foregoing hearing was taken, do hereby certify that

5   the witness whose testimony appears in the foregoing

6   hearing was duly sworn; that the testimony of said

7   witness was taken in shorthand and thereafter

8   reduced to typewriting by me or under my direction;

9   that said hearing is a true record of the testimony

10   given by said witness; that I am neither counsel

11   for, related to, nor employed by any of the parties

12   to the action in which this hearing was taken; and,

13   further, that I am not a relative or employee of any

14   attorney or counsel employed by the parties hereto,

15   nor financially or otherwise interested in the

16   outcome of this action.

17

18

19   ---------------------------

20   Notary Public in and for the

21   District of Columbia

22   Commission Expires: MARCH 31, 2018

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