



Freight Rail Customer Alliance

Congressional Oversight Implementation of the Surface Transportation Board Reauthorization Act of 2015

FRCA Position

FRCA supported the development and enactment of the [*Surface Transportation Board \(STB\) Reauthorization Act of 2015*](#), P.L. 114-110, during the 114th Congress.

Moreover, FRCA continues to support proactive Congressional oversight of how the STB is implementing this law.

Issue Background

On December 18, 2016, the [*STB Reauthorization Act of 2015*](#) was signed into law marking the first time the STB (or Board) had been reauthorized since 1998. The legislation establishes basic reforms and process enhancements for the Board.

Introduced by then Senate Commerce, Science and Transportation (Commerce) Committee Chairman John Thune (R-SD) and then Ranking Member Bill Nelson (D-FL), the law:

- Increases the number of authorized Board members from three to five and allows non-public meetings.
- Creates authority for the Board to initiate investigations on its own initiative without shipper complaints and creates new guidelines for the investigations.
- Requires a report on rate case methodologies by the STB looking at whether rate cases are too complex and expensive, and whether alternative methods could be used to address the complexity and expense.
- Creates new monthly and quarterly public reports for the Board on pending cases, and a compilation of complaints on the public website.
- Creates timelines for rate cases.
- Creates a new voluntary arbitration process at the Board that can be used for rate cases with judgments up to \$25 million.
- Requires a study by the Government Accountability Office (GAO) of rail contracts proposals containing multiple origin and destination pairs.
- Accompanying report language, Section 16 (Criteria), clarifies standards and procedures for evaluating revenue adequacy and emphasizes the infrastructure needed in order for rail carriers to be able to meet the present and future demand for rail service. This section does not require any change to how the STB determines railroad revenue adequacy.

Actions

✓ [Congressional Oversight Hearing](#)

The Senate Commerce Committee held a field hearing on implementation of the [*STB Reauthorization Act of 2015*](#) on August 1, 2016 in Sioux Falls, SD.

Convened by then Committee Chairman, Senator John Thune (R-SD), the hearing provided an opportunity for shippers, including FRCA Board member Thomas Heller and CEO of Missouri River Energy Services (MRES), to share their views on the law's implementation. The three STB Members also testified, describing the actions the Board has taken to date to implement the law in the eight months since it was enacted.

In his opening statement, Chairman Thune described South Dakota's dependence on rail to get products to market, create jobs, and grow incomes. "That's why it's so important that, when problems arise in our nation's rail system, we have efficient and effective oversight," he said.

Chairman Thune said he called the hearing "to examine completed and ongoing implementation work at the STB and hear about ways to maximize the law's benefits for the businesses that depend on rail." He expressed interest in STB's work in three areas of the new law:

- Improvements to the way rate cases are handled.
- Implementation of STB's new authority to launch investigations based on its own initiative.
- Efforts to make the STB more functional and collaborative, including expanding the Board from three to five members

Chairman Thune expressed satisfaction with the Board's actions to implement the new law. "The Board is on track to meet all deadlines, a feat not often accomplished by other agencies," he said.

The first panel of witnesses was comprised of officials representing diverse shipping interests:

- Michael Skuodas, vice president of distribution and business develop for POET, LLC, one of the nation's leading bio refinery companies.
- Troy Knecht, a farmer representing the South Dakota Corn Growers Association.
- Thomas J. Heller, CEO of Missouri River Energy Services (MRES) and member of FRCA's Board.
- Dan Mack, vice president, transportation and terminal operations of CHS Inc., representing the Fertilizer Institute.
- Shipper witnesses expressed their strong appreciation to Chairman Thune and the Commerce Committee for taking the lead on reauthorizing the STB and praised the efforts being made by the STB to implement the new law.
- Heller described the decade-long rate case battle that MRES and other utilities fought over rates charged by the BNSF Railway to haul coal from the Powder River Basin to the Laramie River Station (LRS) to serve customers to illustrate the need for rate case reform. "In 2004, the LRS contract with BNSF to deliver coal expired," Heller said. "We were unable to renegotiate an acceptable agreement with BNSF and they filed a rate tariff at the STB. LRS participants then filed for rate relief with the STB. After 10 years and at a cost to LRS owners of over \$10 million for legal and consulting fees, we still had no settled rate."

"In May of 2015 we successfully negotiated a settlement agreement with BNSF ending our dispute at STB, Heller said. "Without our settlement, we believe we still may be fighting this case at the STB."

On behalf of FRCA, Heller praised Chairman Thune and the Commerce Committee for provisions in the law establishing new requirements or encouraging the completion of longstanding pending procedures before the STB.

Additional hearing information can be found [here](#).

✓ Section 16 (Criteria)

On March 31, 2016, Senator Thune sent a letter to the STB Members providing various observations on how the new law is being implemented. Of note, the Chairman emphasized that Section 16 does not require any

change in how STB evaluates railroad revenue adequacy – either in statutory language or accompanying report language (or via congressional intent). The Senator’s letter to the STB can be read [here](#).

This letter responds to CSX Transportation falsely asserting that Section 16 of the [STB Reauthorization Act of 2015](#) directs the STB to use replacement cost methodologies when evaluating revenue adequacy in its evidence filed March 7, 2016 in the Consumers Energy Company Rate Case (Docket No. NOR 42142). This docket can be accessed [here](#).

FRCA reached out to staff of the Senate Commerce and House Transportation and Infrastructure committees, expressing continued concern over the correct interpretation and implementation of the law, including Section 16. In addition to emphasizing that CSX’s Section 16 assertion was incorrect and a clarification is needed for future rate cases, FRCA further noted that the provisions of the [STB Reauthorization Act of 2015](#), P.L. 114-110, do not apply to proceedings initiated before the date of enactment, which was December 18, 2015. The Consumers rate case started well before this enactment date.

During the development of the [STB Reauthorization Act of 2015](#), S. 808, FRCA expressed concerns to key Senators and staff that Section 16 could allow the STB to utilize “replacement cost methodologies” when evaluating current and future needs for railroad revenue adequacy purposes. On July 21, 2015, FRCA submitted written testimony to the STB stating opposition to using “replacement cost methodologies” [July 22-23, 2015 Hearing; Docket No. EP 722, [Railroad Revenue Adequacy](#) where this docket can be accessed [here](#)]. FRCA received repeated assurances, even before the March 31, 2016 letter, that no such shift was intended with Section 16.

U.S. Senator Tammy Baldwin (D-WI), a longtime champion of freight rail shippers and particularly captive or rail-dependent shippers, had similar concerns over Section 16. She stopped legislative movement on S. 808 until she received assurances from Senate Commerce Committee Leaders, including Chairman Thune, and various STB Members that Section 16 did not require the STB to use replacement cost methodologies when evaluating revenue adequacy.

✓ [Freight Rail Pricing and Contracts](#)

The Government Accountability Office (GAO) conducted a study on freight rail shipping contracts as required by the [STB Reauthorization Act of 2015](#).

The report, “[Freight Rail Pricing: Contracts Provide Shippers and Railroads Flexibility, but High Rates Concern Some Shippers](#)” was released on December 7, 2016. It presents information on similarities and differences in shipper freight rates under a tariff versus a contract, and the potential benefits of using each. It also provides valuable insights into pricing relationships between freight railroads and their customers, particularly on captive shippers who often are hit with higher rates.

✓ [Rate-Reasonableness Standards](#)

➤ [Market Dominance](#)

On Aug 3, 2020, the STB released its Final Rule (FR) establishing a streamlined approach for pleading market dominance in rate reasonableness proceedings in Docket No. EP 756, [Market Dominance Streamlined Approach](#). This proceeding can be accessed [here](#).

This FR can be read [here](#). It reflects various recommendations made by [FRCA when submitting comments](#) on November 12, 2019.

➤ [Rate Reform Task Force Report](#)

The STB Market Dominance FR follows one of the recommendations put forth in the [Rate Reform Task Force Report](#) which was issued on April 25, 2019 – for the Board to develop “a standard for pleading market

dominance that will reduce the cost and time of bringing a rate case,” stating that the current market dominance inquiry for rate reasonableness cases was a “costly and time consuming undertaking.”

Rate Reform Task Force was established by then STB Chair Ann Begeman in January 2018. Members of the RRTF spent about a year holding informal meetings with stakeholders, including FRCA on June 18, 2018.

✓ Small Alternative Voluntary Arbitration and Small Rate Cases

➤ Small Alternative Voluntary Arbitration

On November 24, 2020, the STB established a proceeding Docket No. EP 765, *Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rate Disputes*. This proceeding, which can be accessed [here](#), responds to a petition for rulemaking submitted by five Class I rail carriers on July 21, 2020, to begin a proceeding that would establish an alternative voluntary arbitration process.

➤ Small Rate Cases

This proposal advanced by several Class Is, is viewed by FRCA and other aligned shipper groups as a response to STB’s proceeding, Docket No. EP 755, *Final Offer Rate Review* and Document No. EP 665 (Sub-No. 2), *Expanding Access to Rate Relief*, which both dockets can be accessed [here](#). In these proceedings, the Board proposes a new procedure for challenging the reasonableness of railroad rates in smaller cases. In this procedure, the Board would decide a case by selecting either the complainant’s or the defendant’s final offer, subject to an expedited procedural schedule that adheres to firm deadlines.

In October 2020, the Board drafted a decision adopting a final rule in Docket Nos. EP 755 and EP 665 (Sub-No. 2). Please note that the Board initially issued its Advanced Notice of Proposed Rulemaking in Docket No. 665 (Sub-No.2), *Expanding Access to Rate Relief* on August 30, 2016.

✓ Expediting Rate Cases

On Nov 20, 2017, the STB issued its [Final Rule](#) in EP Docket No. 733, *Expediting Rate Cases*. It adheres to coal shippers’ primary objective stated early-on in this proceeding when the Board, at the group’s urging, decided not to pursue substantive proposals that would have blocked coal shippers’ ability to obtain STB rate relief. This docket can be accessed [here](#).

Previously on March 31, 2017, FRCA joined with the Western Coal Traffic League, American Public Power Association, Edison Electric Institute, National Association of Regulatory Utility Commissioners, and the National Rural Electric Cooperative Association and filed comments. These comments can be read [here](#).

✓ Investigative Authority

The Board issued its Final Rules (FRs) on implementing its new authority to self-initiate investigations on December 14, 2016, Docket No. 731, *Rules Relating to Board-Initiated Investigations*. These rules went into effect January 13, 2017 and can be read [here](#).

Status

The STB continues to consider its proposals for Final Offer Rate Review and Expanding Access to Rate Relief in Docket Nos. EP 755 and EP 665 (Sub No. 2) along with the rail carrier-proposed arbitration petition for rulemaking submitted by several Class I carriers in Docket No. EP 765.

As required by the law, the Board provides monthly and quarterly reports to the U.S. Congress on the status of not just implementing the [STB Reauthorization Act of 2015](#), but also the status on other rulemakings and proceedings before the Board. The quarterly reports can be accessed [here](#).

There is no legislation pending before the U.S. Congress that would reauthorize the STB. The [STB Reauthorization Act of 2015](#) expired on September 30, 2020.