



# 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* 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*, P.L. 114-110, 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 Commerce Committee Chairman John Thune (R-SD) and 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.

#### Congressional Oversight Hearing

The Senate Commerce, Science, and Technology (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 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 via <http://www.commerce.senate.gov/public/index.cfm/hearings?ID=6F6B3366-9CF7-4D1F-8E7A-708611011DB5>

## 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).

This letter can be accessed via

<https://www.stb.gov/stb/docs/Reauthorization/Monthly%20Implementation%20Reports/U.S.%20Senate%20Committee%20on%20Commerce,%20Science%20and%20Transportation,%20March%2031,%202016.pdf>

This action 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).

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 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*]. 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 *Surface Transportation Board Reauthorization Act of 2015* (P.L. 114-110) which was signed into law on December 18, 2015.

The report, “*Freight Rail Pricing: Contracts Provide Shippers and Railroads Flexibility, but High Rates Concern Some Shippers*” released December 7, 2016, 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.

Please refer to the FRCA position paper, “*Freight Rail Pricing and Contracts*”, for additional information.

## Rate-Reasonableness Standards

On June 14, 2016, the STB issued an Advanced Notice of Proposed Rulemaking (ANPRM), EP Docket No. 733, *Expediting Rate Cases*. This rulemaking is required by the *STB Reauthorization Act of 2015* where the

Board is reviewing comments on proposals that the STB asserts may expedite its handling of major rail rate cases.

Please refer to the FRCA position paper, “***Rate-Reasonableness Standards***”, for more information.

### **Investigative Authority**

The Board issued its Final Rules on implementing its new authority to self-initiate investigations on December 14, 2016. These went into effect January 13, 2017. [Docket No. 731, *Rules Relating to Board-Initiated Investigations.*]

### **(Small) Rate Cases**

The STB issued an Advanced Notice of Proposed Rulemaking (ANPRM) in Docket No. 665 (Sub-No.2), *Expanding Access to Rate Relief* on August 30, 2016. This ANPRM is aimed to streamline rate reasonableness ceases intended to be used by small shippers. Reply comments were due by December 19, 2016; initial comments were due by November 14, 2016. The STB is aiming for its next action in June 2017.

### **Status**

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 most recent report was distributed on January 4, 2021. This, and the previous reports, to Congress can be accessed via <https://prod.stb.gov/wp-content/uploads/Report-on-Unfinished-Regulatory-Proceedings-Fourth-Quarter-December-31-2020.pdf>

The ***STB Reauthorization Act of 2015*** expired on September 30, 2020.