

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

243994

Ex Parte No. 738

REGULATORY REFORM TASK FORCE

ENTERED
Office of Proceedings
July 25, 2017
Part of
Public Record

WRITTEN COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”) respectfully submits these written comments, which supplement the oral comments that it is offering today. CSXT also fully endorses today’s comments by Ed Hamberger on behalf of the Association of American Railroads (“AAR”) and the letter that AAR has submitted to the Board identifying potential areas where the Board should reform its regulations.

CSXT applauds the Board for creating a Regulatory Reform Task Force and for convening a listening session to solicit stakeholders’ views, and CSXT appreciates the opportunity to contribute to this listening session and provide its thoughts on ways that the Board could improve its regulations.

The Board’s regulations work best when they are focused on the Board’s core mission and directed at those areas where regulation may be needed to promote Congress’s policy goals. History has taught us that eliminating unnecessary regulations is often the best way to achieve Congress’s goals of a safe, stable, financially healthy rail industry that provides high-quality service to shippers at reasonable rates. As the Board-sponsored Christiansen report concluded,

The deregulation of the railroad industry ushered in increased market flexibility, competitive and differential rates for rail service, and a

climate open to innovation. In the years following the passage of the Staggers Act, the railroad industry experienced dramatic reductions in costs and increased productivity, which yielded higher returns for carriers and lower inflation-adjusted rates for shippers. Thus both railroads and their customers benefited from regulatory reform.¹

The Christiansen Report's conclusion has been echoed by the U.S. Government Accounting Office,² the Federal Railroad Administration,³ the Department of Transportation,⁴ and Congress itself.⁵

Both railroads and shippers have benefited from this agency's history of eliminating unnecessary regulatory restriction on the rail industry. In the first 20

¹ Christensen Associates, Inc., A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition, at ES-1 (Nov. 2009)

² U.S. Gov't Accountability Office, GAO/RCED-90-80, Railroad Regulation: Economic and Financial Impacts of The Staggers Rail Act of 1980 3-4 (1990) (finding that the Staggers Act made railroads "more competitive" and that "[s]hippers have benefited from reduced railroad regulation").

³ Federal Railroad Administration, Preliminary National Rail Plan: The Groundwork for Developing Policies to Improve the United States Transportation System, at 21 (Oct. 15, 2009) ("A review of the previous 29 years since the railroads were partially deregulated by the Staggers Act of 1980 reveals improvements in the railroad's physical plant (infrastructure) as well as their performance metrics. Safety and fuel efficiency have remarkably improved. Rail rates are lower today than in 1980, when compared in constant dollars.").

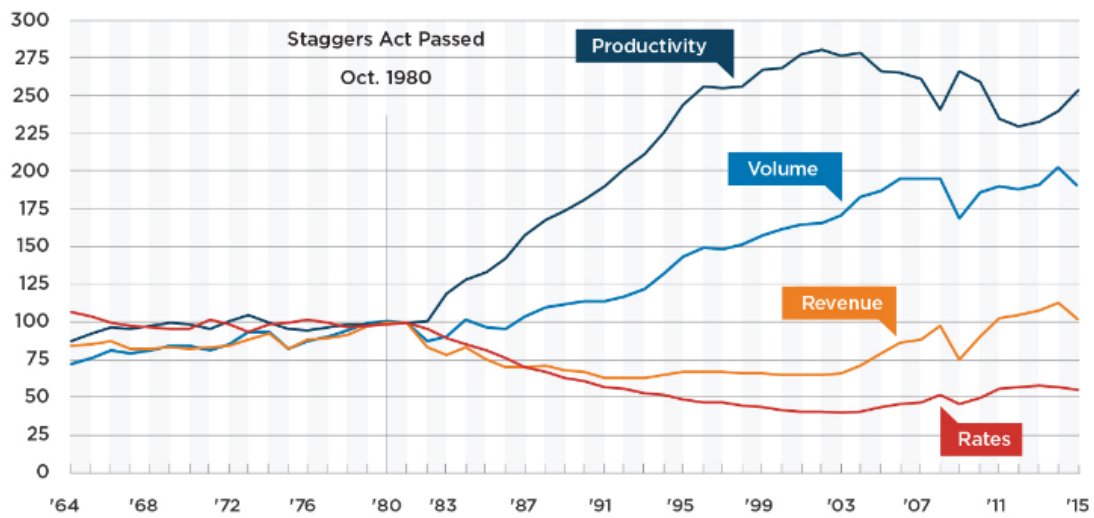
⁴ See, e.g., Comments of the U.S. Dep't of Transp., *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, STB Ex Parte No. 704, at 2 (filed Jan. 31, 2011) ("The United States Department of Transportation . . . believes that, overall, the regulatory environment since the Staggers Act was enacted has allowed the railroads to respond to market forces that demanded lower costs, greater productivity, and innovation in the form of new transportation products and services.").

⁵ See, e.g., S. Rep. No. 104-176, at 6, 8 (1995) (noting that deregulation had "led to a dramatic revitalization of the rail industry while protecting significant shipper and national interests" and that "exemptions have proven highly beneficial to shippers and railroads").

years since the passage of the Staggers Act, the benefit to shippers of increased competition and other regulatory reforms translated into a 55% decline in rail rates (in real, inflation-adjusted terms).⁶ In that same period, rail productivity and rail freight volumes increased by 172% and 100% respectively.⁷ The chart below continues to be compelling evidence showing how much railroad industry stakeholders benefited from post-Staggers deregulation.

U.S. FREIGHT RAILROAD PERFORMANCE SINCE THE STAGGERS ACT

Today's Balanced Regulatory System Has Benefited Shippers and Allowed Railroads to Flourish



In 1980, as a result of the deterioration of the U.S. freight railroad industry, Congress passed a series of regulatory reforms known as the Staggers Rail Act. These reforms allowed railroads to act like most other businesses in terms of managing their assets and pricing their services. Today, America's freight railroads are flourishing under this balanced regulatory system while rail shippers are enjoying lower rates, better service and improved safety. And, thanks largely to this balanced regulatory structure, railroads have been able to invest \$600 billion since 1980 into the nation's rail infrastructure and equipment, greatly improving rail productivity and reliability.

Source: Association of American Railroads



⁶ See Christensen Associates, Inc., An Update to the Study of Competition in the U.S. Freight Railroad Industry, at ES-I (Jan. 2010).

⁷ See *id.*

But there is more that the agency can do. The Board's regulations still impose unnecessary burdens that make it harder for railroads to improve the efficiency of their networks, that create needless transaction costs, and that disincentivize investments that the Board should be encouraging.

CSXT's comments focus on three areas in which the Board should consider removing unnecessary regulations: the revenue adequacy constraint, abandonments, and environmental review.

I. The Revenue Adequacy Constraint is Outdated, Unnecessary, Harmful, and Inaccurate, and the Board Should Remove It.

First, the Board should reform and modernize its regulations by removing the revenue adequacy constraint from *Coal Rate Guidelines*. The Board has several pending proceedings that could affect the scope of regulations and about which CSXT has commented. But particular deregulatory focus should be placed on the revenue adequacy constraint, because it is a prototypical instance of a regulation that no longer serves any useful purpose. The revenue adequacy constraint is based on an outdated and discredited regulatory approach and is unnecessary in light of multiple superior rate reasonableness methodologies. It is moreover a fundamentally harmful approach to rate reasonableness that removes incentives for efficiency improvements and capital investments, and it is an approach that is hopelessly inaccurate if it does not incorporate replacement costs and appropriately account for deferred taxes.

CSXT will not repeat here the extensive comments that CSXT and others have made about the revenue adequacy constraint in the pending Ex Parte 722

proceeding. Instead, CSXT below summarizes the main reasons why the Board should conclude that the revenue adequacy constraint is an outdated and unnecessary form of regulation that should be rejected.

The Revenue Adequacy Constraint is Outdated. The revenue adequacy constraint is an antiquated form of rate-of-return regulation that creates disincentives for investment in capital improvements and productivity gains. Evidence was presented in Ex Parte 722 by Norfolk Southern witness David Sappington that this sort of profit regulation is increasingly being rejected by regulators because it eliminated incentives for the regulated industry to improve its earnings.⁸ Simply put, if a railroad that becomes “too profitable” can have “excess” profits confiscated, what incentives would railroads have to increase profits by becoming more efficient, developing productivity improvements, or investing in new infrastructure?

The Revenue Adequacy Constraint is Unnecessary. The revenue adequacy constraint is also unnecessary in today’s regulatory environment, where the Board has multiple other rate reasonableness methodologies available that incorporate revenue adequacy concepts in a more economically accurate way. The Board’s Stand Alone Cost (“SAC”) and Simplified-SAC rate reasonableness standards are essentially “revenue adequacy” tests targeted at the section of the network used by

⁸ See, e.g., Opening Comments of Norfolk S. Ry. Co., *Railroad Revenue Adequacy*, STB Ex Parte No. 722, Verified Statement of Professor David Sappington at 2-3, 8 (filed Sept. 5, 2014) (“Sappington EP 722 Opening”).

the issue movement.⁹ As the Board recognized in *Xcel Reconsideration*, “[t]he very purpose of the SAC test is to determine what [the defendant] needs to charge to earn ‘adequate’ revenues on the portion of its system that is included in the system of the SARR.”¹⁰ SAC thus considers revenue adequacy in the rate reasonableness process in a rigorous way that focuses only on the portion of a railroad’s network used to serve the issue traffic. Such a consideration is far superior to a system-wide constraint that would create serious cross-subsidization issues.

The Revenue Adequacy Constraint is Harmful. The Board has also been presented with persuasive evidence that a system-wide revenue adequacy constraint would create uncertainties and disincentives for investment that would discourage railroads from making capital investments and efficiency improvements to improve rail service and network fluidity and meet future demand.¹¹

⁹ See Opening Comments of Ass’n of Am. R.R., *Railroad Revenue Adequacy*, STB Ex Parte No. 722, Verified Statement of Joseph P. Kalt at 26-27 (filed Sept. 5, 2014) (“Kalt EP 722 Opening”); Opening Comments of Norfolk S. Ry. Co., *Railroad Revenue Adequacy*, STB Ex Parte No. 722, Verified Statement of Professor Bradford Cornell at 4-10 (filed Sept. 5, 2014) (“Cornell EP 722 Opening”); Sappington EP 722 Opening at 5.

¹⁰ *Pub. Serv. Co. of Colorado d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42057, at 6 (served Jan. 19, 2005) (“*Xcel Reconsideration*”); see also *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 480 (D.C. Cir. 2006) (“the SAC test is designed to take into account the railroad’s need for revenue adequacy on the portion of its system that is included in the system of the SARR”) (internal quotations omitted)).

¹¹ See Opening Comments of Norfolk S. Ry. Co., *Railroad Revenue Adequacy*, STB Ex Parte No. 722, at 59-62 (filed Sept. 5, 2014) (“NS EP 722 Opening”); Opening Comments of Union Pac. R.R. Co., *Railroad Revenue Adequacy*, STB Ex Parte No. 722, at 43-50 (filed Sept. 5, 2014).

The Revenue Adequacy Constraint is Inaccurate. In addition, the methodology used to determine the Board's annual revenue adequacy findings contains serious measurement errors because it values railroad infrastructure based on accounting terms (historical book values) rather than real economic terms (current values).¹² The STB "has consistently stated its preference for using the best valuation of a carrier's assets in performing its regulation functions."¹³ And the agency has explained that "carriers cannot attract and retain capital unless they are given the opportunity to be compensated for the real value of property, not just the book value."¹⁴ Any measure of long-term revenue adequacy that relied on book values rather than replacement costs would be hopelessly flawed.¹⁵ The agency's treatment of deferred taxes in the revenue adequacy determination is a similarly serious flaw that would need to be corrected.¹⁶

In short, the revenue adequacy constraint is an outdated, unnecessary, and counterproductive regulation, and the Board should act to remove it. Doing so would

¹² See Opening Comments of CSX Transp., Inc., *Railroad Revenue Adequacy*, STB Ex Parte No. 722, at 1-13 (filed Sept. 5, 2014) ("CSXT EP 722 Opening"); Kalt EP 722 Opening at 28-31; Cornell EP 722 Opening at 13-19; Opening Comments of Union Pac. R.R. Co., *Railroad Revenue Adequacy*, STB Ex Parte No. 722, Verified Statement of Professor Kevin M. Murphy at 8-25 (filed Sept. 5, 2014) ("Murphy EP 722 Opening").

¹³ *Western Coal Traffic League—Pet. for Declaratory Order*, STB Docket No. 35506, at 23 (served July 25, 2013) ("*Berkshire Markup*").

¹⁴ *CSX Corp. – Control – Conrail, Inc.*, 3 S.T.B. 196, 265 (1998).

¹⁵ CSXT's Reply Evidence in *Consumers Energy v. CSX Transp., Inc.*, STB Docket No. 42142, contains a detailed explanation of the practical economic reasons why replacement cost is a superior measure of real economic value than accounting book values.

¹⁶ NS EP 722 Opening at 72-75.

promote the Rail Transportation Policy in multiple ways. It would allow “competition and the demand for services to establish reasonable rates” by removing a rate-of-return-style regulation and instead adhering to a regulatory approach that models the effect of a contestable market. 49 U.S.C. § 10101(1). It would “foster sound economic conditions in transportation” by eliminating an unnecessary rate reasonableness methodology. *Id.* § 10101(5). And it would allow the Board “to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital” by implementing existing rate methodologies like SAC that assess revenue adequacy on a targeted basis. *Id.* § 10101(6). The Board should rely on its existing, tested suite of rate reasonableness remedies, and it should discard the revenue adequacy constraint as an unnecessary relic of a discredited approach to regulation.

II. The Board Should Adopt a New Class Exemption for Railroad-Initiated Abandonments.

The Board should also review its regulations for abandonments and discontinuances of service. The Board has long had authority to regulate a railroad’s decision to cease providing service, but it has not substantially revisited its abandonment regulations in two decades.¹⁷ The regulatory framework for abandonments and discontinuances of service should be part of any effort to review the agency’s regulations. These regulations create substantial and unnecessary

¹⁷ The last significant revision was in 1996. *See Abandonment and Discontinuance of Rail Lines & Rail Transportation Under 49 U.S.C. § 10903*, 1 S.T.B. 894 (1996).

regulatory hurdles that discourage abandonment of light-density lines—even when these lines satisfy the Board’s substantive standards for abandonment.

One of the great successes of Staggers is Congress’s and the agency’s recognition that in most instances market forces and carriers’ own business judgments will produce better outcomes for all stakeholders than government regulation would. For example, in rate regulation the agency once required railroads to seek agency approval for every rate change—a regime that is well-recognized to have stultified innovation and unnecessarily burdened the industry.¹⁸ The replacement of this regime with a framework that both explicitly exempts multiple categories of traffic from rate regulation and gives railroads ratesetting authority in the first instance has contributed to the substantial economic revival of the rail industry that has featured both increased profitability for carriers and lower real rates for shippers.¹⁹

The Board has not yet applied those lessons to abandonments and discontinuances, however. The agency has long recognized that railroads cannot be forced to operate lines that are not profitable, and indeed that forcing railroads to operate unprofitable lines affirmatively hurts other shippers by requiring them to cross-subsidize the unprofitable line. But the agency does not trust railroads themselves to make decisions about which lines are unprofitable. Unless a railroad

¹⁸ See S. Rep. 94-499, at 2-3 (1976) (report on Revitalization and Regulatory Reform Act of 1976 finding that “[t]he cumbersome, slow process of making rates” was one of the regulations that “has drastically slowed change needed in the industry and discouraged innovation and investment in the industry.”).

¹⁹ See *supra* at pp. 1-3 & nn.1-6.

can demonstrate that a line has not seen a single car of local or nondivertable overhead traffic in two years, railroads are required to prove the unprofitability of the line to the agency through a complicated application process (or to justify an individual exemption). The agency should reform its regulations in this area by adopting a process that allows railroad to make business decisions to abandon or discontinue service without needless regulations, while maintaining avenues for shippers to preserve rail service where that is appropriate.

The Board has long recognized as a policy matter that abandonment of unprofitable lines is in the public interest. The Board “may not force a railroad to operate a line at a loss for an indefinite period of time.”²⁰ And the Board has recognized that forcing carriers to continue operating on lines that may be marginally profitable but that do not earn a reasonable return on investment is a “hidden form of cross-subsidization [that] is highly questionable as a matter of national transportation policy.”²¹ For these reasons, the Board’s precedents are clear that the public convenience and necessity will not require a railroad to operate an unprofitable line, even if the line carries some amount of traffic. In those

²⁰ *Union Pac. R. R. Co. – Abandonment – between Tekoa Fairfield in Whitman and Spokane Counties, WA*, Docket No. AB-33 (Sub-No. 62) (ICC served July 3, 1990) (“*Tekoa Fairfield*”) (citing *Chicago & North Western Transp. Co. v. U.S.*, 678 F.2d 665, 668 (7th Cir. 1982)).

²¹ *Abandonment of Rail Lines – Use Opportunity Costs*, 360 I.C.C. 571, 577 (1979); see also *Tekoa Fairfield* (“it is impermissible as a matter of public policy to permit or require a railroad to cross-subsidize its operations, that is, to support a deficit operation indefinitely on one line by draining funds from other lines. . . Rail abandonments, on the other hand, are part and parcel of the transportation policy established by Congress to permit railroads to allocate their resources efficiently and economically in order to preserve their financial integrity.”).

situations “[t]he fact that shippers [on the line being abandoned] are likely to incur some inconvenience and added expense is insufficient by itself to outweigh the detriment to the public interest of continued operations of uneconomic and excess facilities.”²² Or as the Board put it simply, “[n]o railroad should be required by the government to keep operating indefinitely a money-losing line.”²³

As a substantive matter, therefore, the agency almost never concludes that the railroad seeking abandonment in fact should be required to continue operating a line against its will. From 2001 to the present, the Board has decided 10 applications for abandonment authority that were filed by railroads and opposed by shippers or communities.²⁴ In every one of those cases, the Board concluded that the public convenience and necessity supported abandonment.²⁵ This is not surprising,

²² *Union Pac. R.R. Co.—Abandonment—In Lancaster & Gage Counties, NE & Marshall Cty., KS*, STB Docket No. AB-33 (Sub-No. 140), at 9 (served Dec. 22, 1999); *see also Union Pac. R.R. Co.—Abandonment—In New Madrid, Scott & Stoddard Ctys., MO*, STB Docket No. AB-33 (Sub-No. 261), at 7 (served June 17, 2009) (“Railroads are not required to operate an unprofitable line simply to prevent existing shippers from incurring higher transportation costs by truck.”).

²³ *Cent. Oregon & Pac. R.R., Inc.—Abandonment & Discontinuance of Serv.—In Coos, Douglas, and Lane Ctys., OR*, STB Docket No. AB-515 (Sub-No. 2), at 10 (served Oct. 31, 2008).

²⁴ Cases were identified by searching <https://www.stb.gov/home.nsf/EnhancedSearch?OpenForm> for all Applications filed in cases with “Abandonment” in the Case Title field. Adverse abandonment applications were excluded, as was one case in which the Board rejected a railroad’s application on the ground that it was substantially incomplete. *See Norfolk S. Ry. Co.—Abandonment—In Beaufort Cty., SC*, STB Docket No. AB-290 (Sub-No. 262) (served Dec. 7, 2005).

²⁵ *See Montreal, Maine & Atl. Ry., Ltd.—Discontinuance of Serv. & Abandonment—In Aroostook & Penobscot Ctys., ME*, STB Docket No. AB-1043 (Sub-No. 1), at 15 (served Dec. 27, 2010); *Union Pac. R.R. Co.—Abandonment—In Rusk Cty., TX*, STB Docket No. AB-33 (Sub-No. 275), at 7 (served Sept. 11, 2009); *Union Pac. R.R. Co.—*

because railroads are the best judges of their business interests and will not seek abandonment of a line that is profitable to operate.

But while the Board recognizes the need to allow carriers to abandon lines that are unprofitable even if they carry a marginal amount of traffic, such abandonments are impeded by the burdensome regulatory requirements for abandonment of a line that does not qualify for the out-of-service class exemption. A railroad is required to submit detailed financial calculations with an abandonment application, including estimates of deferred maintenance and rehabilitation costs,²⁶ a computation of all revenue attributable to the line and avoidable costs for the line for both a base year and a forecast year,²⁷ and an estimated subsidy payment for the line.²⁸ And all of these financial calculations must be supported by workpapers and computed in the precise form dictated by the Board's Part 1152 Subpart D

Abandonment—In New Madrid, Scott & Stoddard Ctys., MO, STB Docket No. AB-33 (Sub-No. 261), at 7 (served June 17, 2009); *Cent. Oregon & Pac. R.R., Inc.—Abandonment & Discontinuance of Serv.—In Coos, Douglas, and Lane Ctys., OR*, STB Docket No. AB-515 (Sub-No. 2), at 10 (served Oct. 31, 2008); *Union Pacific R.R. Co.—Abandonment—In Carver & Scott Ctys., MN*, STB Docket No. AB-33 (Sub-No. 255), at 5 (served Apr. 1, 2008); *Wisconsin Cent. Ltd.—Abandonment—In Ozaukee, Sheboygan & Manitowac Ctys., WI*, STB Docket No. AB-303 (Sub-No. 27), at 18 (served Oct. 18, 2004); *CSX Transp., Inc.—Abandonment—In Atkinson & Ware Ctys., GA*, STB Docket No. AB-55 (Sub-No. 640), at 6 (served Dec. 24, 2003); *Union Pac. R.R. Co.—Abandonment—In Polk Cty., IA*, STB Docket No. AB-33 (Sub-No. 170), at 7 (served Jan. 16, 2002); *Boston & Maine Corp.—Abandonment—In Suffolk Cty., MA*, STB Docket No. AB-32 (Sub-No. 92), at 5 (served Dec. 21, 2001); *Boston & Maine Corp.—Abandonment—In Essex Cty., MA, & Rockingham Cty., NH*, STB Docket No. AB-32 (Sub-No. 90), at 6 (served Oct. 3, 2001).

²⁶ 49 C.F.R. § 1152.22(b)

²⁷ *Id.* § 1152.22(d)(1)-(2).

²⁸ *Id.* § 1152.22(d)(3).

regulations, which span 27 pages of the Code of Federal Regulations.²⁹ Applicant railroads must also submit substantial amounts of other information to support an application, from detailed descriptions of the service provided on the line, to information on the population of communities on the line, to information about significant users on the line.³⁰

With application requirements as burdensome as these, it is no wonder that since 2001 railroads have filed only eleven abandonment applications.

Abandonments are instead pursued either through the class exemption for out-of-service lines or through individual exemptions that typically are used in situations where a railroad believes that abandonment will be unopposed. The regulatory requirements for seeking an abandonment application for a line with an active shipper strongly discourage such applications. Even if a line is losing money and forcing cross-subsidies from other lines on the network, the enormous transaction cost of preparing and litigating an abandonment application discourages railroads from doing so.

These complex application requirements serve no useful purpose, because railroads have no incentive to seek abandonment of lines that are profitable to operate. Railroads rather have incentives to maximize their profits and to preserve their ability to realize future profits. Where a railroad makes the decision to seek to abandon a line, the Board can assume that decision is a profit-maximizing one made by an entity in the best position to assess the line's current financial condition

²⁹ See 49 C.F.R. Part 1152 Subpart D, at pp. 207-233 (2016 ed.).

³⁰ See 49 C.F.R. § 1152.22(c), (e).

and future prospects.³¹ But in an abandonment application the Board requires a railroad to prepare extensive financial documentation designed for the Board to essentially review the railroad's business decision to seek abandonment. Some of the most labor-intensive parts of an application—calculation of avoidable costs, rehabilitation costs, attributable revenues, and subsidy payments—are prepared primarily for the Board to make its own determination about the line's financial viability. In other words, the regulations create an elaborate process for the purpose of testing whether a railroad is making a sound financial decision to seek abandonment. There is no good cause for so many resources to be devoted to second-guessing a railroad's business judgment.

Complex abandonment application requirements cause real inefficiencies that harm the transportation market. As the Board has repeatedly recognized, the cross-subsidization that occurs when railroads operate on lines that do not produce a reasonable return on investment is counter to the rail transportation policy.³² That is just as true for lines that carry insufficient amounts of traffic as it is for lines that carry no traffic at all. But the Board's regulatory structure imposes

³¹ *Cf. Exemption of Out of Service Rail Line*, 2 I.C.C.2d 146, 156 (1986) (noting that regulation of discontinuances of trackage rights on out of service lines "is not necessary . . . because carriers will follow their own self interest" and "no rail carrier would voluntarily relinquish its right to operate over certain tracks if doing so would impair its service or hinder its ability to compete").

³² *Abandonment of Rail Lines – Use Opportunity Costs*, 360 I.C.C. at 577; *see also Tekoa Fairfield* ("it is impermissible as a matter of public policy to permit or require a railroad to cross-subsidize its operations, that is, to support a deficit operation indefinitely on one line by draining funds from other lines. . . Rail abandonments, on the other hand, are part and parcel of the transportation policy established by Congress to permit railroads to allocate their resources efficiently and economically in order to preserve their financial integrity.").

substantial transaction costs to abandon a line that cannot qualify for the class exemption or for an individual exemption. These transaction costs make it harder for railroads to respond to changing market conditions and improve the efficiency of their networks.

It is certainly true that the Board must be cognizant of the interests of shippers and communities in continued rail service. But the interests of shippers in continued rail service on a particular line slated for abandonment cannot outweigh the broader public interest in not requiring railroads to operate on a money-losing line.³³ The best protection of any public interest in continued rail service is not forcing railroads to operate on lines against their will, but rather the offer of financial assistance (“OFA”) process, which allows shippers to preserve rail service on unprofitable lines.

For these reasons, the Board should consider a new class exemption allowing railroads to abandon or discontinue service by a notice of class exemption. The new class exemption could be modeled on the out-of-service class exemption at 49 C.F.R. § 1152.50.³⁴ Like that exemption, it could protect the interest of remaining shippers on the line by providing opportunities for OFAs. And it could include notice

³³ *Union Pac. R.R. Co.—Abandonment—In New Madrid, Scott & Stoddard Ctys., MO*, STB Docket No. AB-33 (Sub-No. 261), at 7 (served June 17, 2009) (“Railroads are not required to operate an unprofitable line simply to prevent existing shippers from incurring higher transportation costs by truck.”); *Union Pac. R.R. Co.—Abandonment—In Lancaster & Gage Counties, NE & Marshall Cty., KS*, STB Docket No. AB-33 (Sub-No. 140), at 9 (served Dec. 22, 1999) (“The fact that shippers [on the line being abandoned] are likely to incur some inconvenience and added expense is insufficient by itself to outweigh the detriment to the public interest of continued operations of uneconomic and excess facilities.”).

³⁴ See *Exemption of Out of Service Rail Line*, 2 I.C.C.2d at 146.

provisions to interested parties and an opportunity for such parties to file petitions to revoke the exemption if they believed they could demonstrate that the public convenience and necessity required continued service.³⁵ Also like the out-of-service class exemption, this new class exemption would apply only to railroad-initiated abandonments. Abandonment applications would still be required for adverse abandonments.

Just as the ICC found when adopting the out-of-service class exemption, the Board should conclude that full abandonment applications are not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 and that regulation is not needed to protect shippers from the abuse of market power. Deregulation of abandonments plainly promotes the Rail Transportation Policy's goals of "minimiz[ing] the need for Federal regulatory control over the rail transportation system," "foster[ing] sound economic conditions in transportation," and "reduc[ing] regulatory barriers to entry into and exit from the industry." *Id.* §§ 10101(2), (5), (7). And it does not counteract any of the Rail Transportation Policy's goals. The Board has recognized that it cannot and should not force railroads to operate unprofitable lines, and there is no sound regulatory reason for the Board to second-guess a railroad's conclusion that a line is no longer profitable. This is no longer an area in which regulation is required. As the ICC recognized when adopting the out-of-

³⁵ The Board could consider whether it was appropriate to provide notice to a broader set of parties than those required to be notified for an out-of-service class exemption. For example, it may be appropriate to require carriers to notify significant users of the line of the abandonment, as is currently required for abandonment applications.

service class exemption, “[b]y promptly liquidating burdensome properties, carriers will enhance their financial position, be more efficient, and thus be able to compete more aggressively. Accordingly, facilitating abandonment of, and discontinuance of service over, these rail lines should promote the development and continuation of a sound rail transportation system with effective competition to meet the needs of the public. . . .”³⁶

Moreover, full abandonment applications are not needed to protect shippers from the abuse of market power. Abandonment of a line does not abuse a railroad’s market power, since by definition the railroad would be exiting an unprofitable transportation market. (If anything, the railroad would be relinquishing any market power it might have had on the line being abandoned.) The ICC’s recognition in *Exemption of Out of Service Rail Lines* that a railroad’s abandonment of a line “will have no impact on a carrier’s market power” remains true today.³⁷ A railroad neither increases or decreases its market power when it chooses to exit an unprofitable market, and it certainly cannot be said to be abusing its market power by such a decision.

For these reasons, CSXT respectfully suggests that the Board consider streamlining its abandonment regulations by adopting a new class exemption for railroad-initiated abandonments.

³⁶ *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d at 152.

³⁷ *Id.* at 156.

III. The Board’s Review of Its Environmental Regulations Should Reconsider Its Thresholds for Environmental Review.

CSXT supports the Board’s ongoing efforts to update its environmental rules. It is important that the Board ensure that its environmental review process accords with the purpose of the National Environmental Policy Act (“NEPA”) and does not create unnecessary obstacles to railroads’ ability to make investments, allocate assets, and enter new agreements.

One area that the Board should examine is the threshold for considering whether an action will result in “significant changes in carrier operations. . . .”³⁸ Currently the Board considers changes to be significant if they exceed the thresholds in 49 C.F.R. § 1105.7(e)(4) or (e)(5), namely:

- a diversion from rail to motor carriage of either over 1,000 rail carloads per year or 50 rail carloads per mile per year for any part of the affected line;
- an increase in rail traffic of over 100% or eight trains per day on any segment or an increase in rail yard activity of over 100%;
- an average increase in truck traffic of more than 10 percent of average daily traffic or 50 vehicles a day on any affected road segment; or
- in a Clean Air Act nonattainment area, an increase in rail traffic of over 50% or three trains per day on any segment or an increase in rail yard activity of over 20%.

As a practical matter, the “eight trains a day” and “three trains a day” thresholds most commonly trigger environmental review. And since many rail lines

³⁸ 49 C.F.R. § 1105.6(c)(1).

traverse regions that are Clean Air Act nonattainment areas,³⁹ an increase of just three trains a day on any line segment is often all that is needed to require environmental review.

The Board should consider whether it is appropriate to have a lower threshold for environmental review in Clean Air Act nonattainment areas—and particularly a threshold as low as three trains per day. Rail transportation has significantly less environmental impact than the truck transportation with which railroads are competing, and the Board’s environmental rules should not judge rail traffic increases more harshly in nonattainment areas.

The environmental benefits of moving freight by rail rather than truck are now well recognized. On average trains are four times more fuel efficient than trucks, and a CBO study has recognized that rail movements create significantly lower emissions of particulate matter, nitrogen oxides, and carbon dioxide.⁴⁰ On balance, therefore, a shift of traffic from truck transportation to rail transportation is environmentally beneficial, particularly in a Clean Air Act nonattainment area.

The Board has good cause to rethink the value of a lower threshold in nonattainment areas, because in recent years rail movements have increasingly

³⁹ Current Clean Air Act nonattainment areas include Chicago, St. Louis, Cleveland, Baltimore, Philadelphia, Dallas-Fort Worth, Houston, and the New York City area.

⁴⁰ See Association of American Railroads, *The Environmental Benefits of Moving Freight by Rail* (June 2017), <https://www.aar.org/BackgroundPapers/Environmental%20Benefits%20of%20Moving%20Freight%20by%20Rail.pdf>; David Austin, *Pricing Freight Transport to Account for External Costs* (Congressional Budget Office Working Paper 2015-03, 2015), <https://www.cbo.gov/publication/50049>.

become a substitute for truck movements. Since the ICC adopted the current environmental thresholds in 1990, U.S. rail intermodal volume has more than doubled.⁴¹ With intermodal revenues now the largest single source of U.S. freight rail revenue and with intermodal an increasingly competitive and environmentally friendly alternative to excessive use of highway transportation,⁴² the Board should reconsider whether it makes sense to more closely regulate rail traffic increases in nonattainment areas.

Moreover, the Board should consider eliminating both the “eight trains per day” and “three trains per day” threshold for environmental review. A change of three trains a day or eight trains a day is not a “significant” change on many lines. Traffic demand and operational changes often result in substantially larger changes to train volume on individual line segments in the ordinary course of business. Under the Board’s rules, a transaction that increased the number of trains per day from fifty trains to fifty-eight trains on a segment would trigger automatic environmental review, even though that change is immaterial in any practical sense.

It may be instructive for the Board to consider the environmental review regulations that other federal agencies have adopted. While multiple federal agencies have adopted NEPA categorical exclusions by regulation as the Board has

⁴¹ See Association of American Railroads, *Rail Intermodal Keeps American Moving* (April 2017), <https://www.aar.org/BackgroundPapers/Rail%20Intermodal.pdf> (U.S. rail intermodal volume was 5.9 million in 1990 and 13.5 million in 2016).

⁴² See *id.*

done, CSXT is not aware of any that have adopted low, rigid numerical definitions of significance akin to the eight trains per day/three trains per day standard.

The Federal Railroad Administration (“FRA”) is a particularly relevant example. FRA has adopted several categorical exclusions that are applicable for projects that do not “significantly alter traffic density” or cause a “substantial increase in rail traffic beyond existing or historic levels.” For example, FRA’s categorical exclusion for minor rail line additions applies when such additions “do not significantly alter the traffic density characteristics of the existing rail lines or rail facilities.”⁴³ And its categorical exclusion for track improvements within an existing right of way similarly applies to improvements that are not expected to “cause a substantial increase in rail traffic beyond existing or historic levels. . . .”⁴⁴

⁴³ See FRA Categorical Exclusion 16, *available at* 81 Fed. Reg. 35437, 35438 (2016) (emphasis added):

Minor rail line additions including construction of side tracks, passing tracks, crossovers, short connections between existing rail lines, and new tracks within existing rail yards provided that such additions are not inconsistent with existing zoning, do not involve acquisition of a significant amount of right of way, and *do not significantly alter the traffic density characteristics of the existing rail lines or rail facilities.*

⁴⁴ See FRA Categorical Exclusion 27, *available at* 81 Fed. Reg. 35437, 35438 (2016) (emphasis added):

Track and track structure maintenance and improvements when carried out predominantly within the existing right-of-way *that do not cause a substantial increase in rail traffic beyond existing or historic levels*, such as stabilizing embankments, installing or reinstalling track, re-grading, replacing rail, ties, slabs and ballast, installing, maintaining, or restoring drainage ditches, cleaning ballast, constructing minor curve realignments, improving or replacing interlockings, and the installation or maintenance of ancillary equipment.

FRA’s significance threshold is thus tied to a substantial change to the current traffic density of the track in question, not a fixed numerical threshold.

Under FRA’s standards, a three-train increase to a line segment averaging fifty trains per day in a nonattainment area would almost certainly not be judged significant, just as it would not be deemed a significant traffic change under the common-sense understanding of that term. But under the Board’s rules such an increase would automatically require environmental review.

The Board therefore should consider eliminating the “eight trains a day” and “three trains a day” thresholds. One option would be to delete the “eight trains a day” and “three trains a day” clauses from 49 C.F.R § 1105.7(e)(5)(i)(A) and (ii)(A), and instead use the existing percentage thresholds to identify rail traffic increases that warrant environmental review. In other words, the only traffic increase that should trigger environmental review would be a 100% increase (or a 50% increase in a nonattainment area).⁴⁵ Another option would be for the Board to adopt some

⁴⁵ This change could be made by deleting the following language from the current regulations (deletions are indicated in strikethrough text):

(5) Air.

(i) If the proposed action will result in either:

(A) An increase in rail traffic of at least 100 percent (measured in gross ton miles annually) ~~or an increase of at least eight trains a day~~ on any segment of rail line affected by the proposal,
or

(ii) If the proposed action affects a class I or nonattainment area under the Clean Air Act, and will result in either:

higher trains per day threshold for action that comes closer to representing a “significant” increase than the current eight trains per day/three trains per day threshold does.

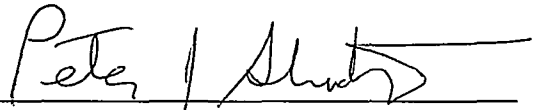
Finally, the Board’s review of its environmental regulations should consider whether certain categories of Board decisions are ministerial acts that do not require environmental review. The Board’s regulations recognize that actions like financial assistance arrangements, trail use agreements, and certain Conrail abandonments are ministerial and thus not a major federal action under NEPA. 49 C.F.R. § 1105.5(c). Other actions are similarly ministerial and lack the characteristics of a major federal action. For example, exempt out-of-service abandonments are a class of action that the Board has categorically found to not require regulation and for which the Board has established a process in which it exercises no discretion. And the environmental impact of abandoning a rail line that is already unused is minimal.

* * *

In conclusion, CSXT thanks the Board and its staff for instituting this proceeding and for considering ways that it can eliminate unnecessary regulations. CSXT appreciates the opportunity to submit its thoughts on these important issues and looks forward to the Board’s progress on these issues.

(A) An increase in rail traffic of at least 50 percent (measured in gross ton miles annually) ~~or an increase of at least three trains a day~~ on any segment of rail line[. . .]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter J. Shudtz", written over a horizontal line.

Peter J. Shudtz
John P. Patelli
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Counsel to CSX Transportation, Inc.

July 25, 2017