



ASSOCIATION OF AMERICAN RAILROADS

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Rachel D. Campbell
Director, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

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Dear Director Campbell:

The Association of American Railroads ("AAR"), on behalf of its freight railroad members, is writing to you in your capacity as the Board's designated Regulatory Reform Officer pursuant to Executive Order No. 13777 (Feb. 24, 2017) ("EO 13777"). EO 13777 directs each agency to establish a Regulatory Reform Task Force charged with: (1) recommending regulations for repeal, replacement, or modification; and (2) reporting to the agency head on its progress by May 25, 2017. Section 2(e) of EO 13777 contemplates that entities significantly affected by Federal regulations, including trade associations like AAR, provide input to the Regulatory Reform Task Force in identifying such regulations. While the Board is an independent agency that may be outside the scope of the specific mandates of EO 13777, we applaud the Board for designating a Regulatory Reform Officer and for engaging in this important initiative.

By reference to Executive Order No. 13771, EO 13777 broadly defines "regulations" to include any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency." EO 13777 places a special priority on identifying regulations that create certain undesirable effects, including those that: (i) eliminate jobs or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed benefits; or (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies. There are several existing and proposed STB regulations that fall into one or more of these categories. The Regulatory Reform Task Force should identify regulations that fit within these categories to allow the STB to take action when a full complement of members have been confirmed by the Senate and are seated on the Board.

REGULATIONS THAT ARE INCONSISTENT WITH REGULATORY REFORM INITIATIVES AND POLICIES¹

As the Board knows, perhaps the single greatest regulatory reform initiative in our industry's history occurred over 35 years ago—deregulation via the Staggers Act. The STB,² Congress,³ the Government Accountability Office (“GAO”),⁴ and USDOT⁵ all have recognized the wisdom of the policies embodied in the Staggers Act and the success of those policies in revitalizing the nation's railroads. As the STB has observed,

The Staggers Act granted railroads freedom from an overly restrictive and burdensome regulatory regime, enabling them to compete more effectively with each other and with other transportation modes, most notably motor carriers and barge lines. . . . The competitive process unleashed by the Staggers Act has been one of the most significant public policy successes of this century.⁶

As a direct result of the deregulatory purpose and sound economic principles behind the Staggers Act, railroads have been able to positively contribute to the overall health of the national economy, as confirmed by a recent study performed by Towson University. The study concluded that in 2014 “Class I Railroads’ operations and capital investment supported approximately 1.5 million jobs (1.1 percent of all U.S. workers), \$273.6 billion in output (1.6 percent of total U.S. output), and \$88.4 billion in wages (1.3 percent of total U.S. wages).”⁷ And a vibrant railroad industry supports critical national infrastructure. Between 2011 and 2014,

¹ Because the current and proposed regulations listed in this section undermine the deregulatory policy of the Staggers Rail Act of 1980, which, as discussed below, has led to a financially viable railroad industry that has created economic growth and now supports approximately 1.5 million jobs, AAR believes these regulations also “eliminate jobs or inhibit job creation” within the meaning of EO 13777.

² See, e.g., *Review of Rail Access and Competition Issues*, 3 S.T.B. 92 (1998) (“There is no dispute that the Staggers Rail Act of 1980 . . . as implemented and administered first by the Interstate Commerce Commission . . . and now by the Board, has revitalized American railroads.”).

³ See, e.g., H. REP. NO. 104-311, at 91 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 803 (“The Staggers era has produced a renaissance in the railroad industry.”). See also H.R. REP. NO. 96-1035, at 39 (1980) (“The Committee understands the necessity of such differential pricing, and has designed a regulatory system which allows for such pricing decisions. In the absence of the regulatory flexibility which permits differential pricing, all shippers would be harmed.”).

⁴ 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 (May 1990) (finding that the Staggers Act made railroads “more competitive” and that “[s]hippers have benefited from reduced railroad regulation”).

⁵ See *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte No. 658, Hr'g Tr. at 14-15 (Oct. 19, 2005) (testimony of USDOT) (“The Department of Transportation considers the Act a resounding success. We do so because in sum the statute did what it was designed to do. It revitalized the railroad industry and by so doing benefitted shippers and consumers throughout the economy.”)

⁶ *Union Pac. Corp. – Control and Merger – S. Pac. Corp.*, 1 S.T.B. 233, 384 (1996).

⁷ Irani, et al., *Economic and Fiscal Impact of Class I Railroads*, at 4 (May 16, 2016).

spending by Class I railroads on infrastructure and equipment has averaged nearly \$26 billion per year.⁸ Subsequent legislation, including the ICC Termination Act of 1995 and the STB Reauthorization Act of 2015, continued the deregulatory framework for the Board and does not support any proposed re-regulatory initiatives.

Unfortunately, some regulatory actions taken by the STB and the Interstate Commerce Commission (“ICC”) since the passage of the Staggers Act have gradually eroded the broad deregulatory purpose and sound economic principles behind that transformational legislation. And recently proposed STB initiatives threaten to reverse the industry’s success along with the jobs, economic growth, and infrastructure investment railroads have contributed or helped to create over the last 35 years.

Therefore we urge the STB’s Regulatory Reform Task Force to identify the following proposed regulations for withdrawal and existing regulations for repeal, replacement or modification.

Reregulation of Commodity Groups (Proposed)

Source of the Proposed Regulation:

Review of Commodity, Boxcar, and TOFC/COFC Exemptions, EP 704 (Sub-No. 1) (STB served Mar. 23, 2016).

Why the Proposed Regulation Should be Withdrawn:

Congress’s central goal in enacting Staggers was to *deregulate* the rail industry by allowing the private market to establish rates to the maximum extent possible and minimizing the need for regulatory control over the rail transportation system. As Acting Chairman Begeman explained in a recent dissent from the STB’s decision to reexamine exemptions for five commodity groups,

The law directs the Board to exercise its exemption authority broadly, and that directive was unchanged with passage of the recent STB Reauthorization Act, P. L. 114-110. Therefore, we shouldn’t narrow or revoke exemptions granted under that authority absent compelling circumstances. Instead, the majority is proposing changes without really knowing whether the revocations are justified.⁹

The STB based its proposal almost entirely upon a superficial review of changes to R/VC-based metrics that do not reflect true market conditions. The Board has not made the legally required findings to support the wholesale *reregulation* of these commodity groups, which cover a huge number of individual commodities.

⁸ *Id.* at 11.

⁹ *Review of Commodity, Boxcar and TOFC/COFC Exemptions*, EP 704 (Sub-No.1), slip op. at 16 (STB served Mar. 23, 2016).

The proposal is a solution in search of a problem, but it is also something far worse – a reversal of a successful deregulatory initiative. Commodity exemptions enable railroads to respond more quickly to market conditions, and generally position them to more effectively compete with other transportation modes. To revoke the exemptions for these five commodity groups would be wholly unjustified. We urge the STB’s Regulatory Reform Task Force to recommend withdrawing this proposed regulation.

Revenue Adequacy Constraint

Source of the Regulation:

Coal Rate Guidelines – Nationwide, 1 I.C.C.2d 520 (1985).

Why the Regulation Should be Repealed, Replaced, or Modified:

As explained in the comments filed by AAR in EP 722, another goal of the Staggers Act was to require the economic regulator to promote railroad revenue adequacy, thus ensuring a safe and efficient rail transportation system. Congress did not direct the ICC to intensify its regulation of railroad rates once revenue adequacy was achieved, nor did Congress establish firm-wide revenue adequacy as a ceiling on revenues that a railroad could earn. Indeed, the STB’s annual revenue adequacy determination, while a useful benchmark for the financial health of the industry, is not sufficiently accurate to be used as a rate regulatory tool. For practical considerations, the STB uses the book value of a railroad’s assets to calculate return on investment, but as both the ICC and the STB have recognized, the proper measure of the value of a railroad’s assets for purposes of determining revenue adequacy is replacement cost.

If revenue adequacy were to be used as a rate constraint to limit railroad returns to the industry cost of capital, it would do great harm to the public interest. Such a constraint would discourage capital expenditures to add capacity, to innovate, or to improve service because increasing returns would expose total revenue to reductions or caps. Increasing demand for rail transportation in such an environment likely would not be met. Congress intended revenue adequacy to be a measurement of railroad financial health, not the establishment of utility-like rate of return regulation. The STB should return to the core deregulatory principles of the Staggers Act and formally reject the theory of revenue adequacy as a rate constraint.

Limit Price Test

Source of the Regulation:

M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123 (STB served Sept. 27, 2012).

Why the Regulation Should be Repealed, Replaced, or Modified:

A fundamental tenet of the deregulatory regime created by the Staggers Act is the notion that natural competition and demand for service should establish rail transportation rates.

Only where a railroad is market dominant is the government regulator permitted to examine a rate and determine whether it is unreasonable.¹⁰ Market dominance is therefore a crucially important concept when rail rates are challenged. The use of formulaic approaches designed to “short-cut” market dominance determinations erodes the sound economic principles behind the STB’s Stand-Alone Cost procedure for assessing the reasonableness of rates and does a disservice to railroads and shippers alike.

As Acting Chairman Begeman explained in a recent dissent from the STB’s application of the limit price approach in a rate case,

I am opposed to applying a ‘theoretical’ price calculation--indeed, an artificial ratio--to the Board's rate case processes, particularly when it comes to an issue as important as market dominance. I also continue to have strong reservations about using RSAM and introducing the concept of revenue adequacy in the market dominance determination when the agency has yet to decide how the revenue adequacy constraint will be applied long term. (Citations omitted). We learned from the public comments allowed in the M&G case, although not allowed here, that the limit price approach is highly objectionable to shippers and carriers.¹¹

We agree. This wholly arbitrary standard is completely without economic foundation and serves only to expand the agency’s regulatory reach beyond the authority granted to it by Congress. We urge the STB’s Regulatory Reform Task Force to recommend discontinuing use of the limit price test.

Forced Switching (Proposed)

Source of the Proposed Regulation:

Reciprocal Switching, EP 711(Sub-No. 1) (STB served July 27, 2016).

Why the Proposed Regulation Should be Withdrawn:

One of Congress’ principal objectives in enacting the Staggers Act was to minimize the federal government’s role in regulating rail transportation markets. As explained in the comments filed by AAR in EP 711 (Sub-No.1), Congress directed the economic regulator to intervene in the private marketplace only to remedy abuses. Giving the federal government the power to force Class I railroads to switch traffic for their competitors in the absence of anticompetitive conduct is directly at odds with Congress’ directive. Indeed, Congress has repeatedly been asked to adopt such a regime and it has repeatedly refused.

¹⁰ 49 U.S.C. §§ 10701(a), (d)(1), 10707(a).

¹¹ *Total Petrochemicals and Refining USA, Inc. v. CSX Transp., Inc.*, 2013 STB LEXIS 400 (STB served Dec. 19, 2013).

The STB's proposal to subvert Congress' intent would create artificial competition and undermine the existing rate reasonableness regime. It would also harm the efficiency of the rail network, increasing the risk of service failures. And it would result in funding shortfalls for maintenance and capital improvements, causing rail service to deteriorate and capacity to be lost. The STB should not reverse the progress achieved over the last 35 years by imposing regulations that restructure the rail industry. We urge the STB's Regulatory Reform Task Force to recommend withdrawing this proposal.

REGULATIONS THAT IMPOSE COSTS EXCEEDING BENEFITS

While we think the Task Force's first priority should be repealing, replacing, modifying (or, in the case of proposals, withdrawing) those regulations that undermine the deregulatory purpose of the Staggers Act, burdensome reporting regulations also should be examined by the Task Force. The list of these regulations should include the performance data reporting requirements that were made permanent earlier this year.¹² Network-level data regarding system fluidity have long been made publicly available by the AAR and customers receive information about their particular shipments directly from their carriers. Compiling micro-level data and reporting it to the Board wastes valuable railroad time and resources without any benefit and without any increase in STB or stakeholder ability to identify potential service disruptions.

Additionally, the continued reporting of agricultural contract summaries under 49 C.F.R. § 1313 should be repealed. Norfolk Southern Railway Company ("NS") and CSX Transportation, Inc. ("CSXT") demonstrated in Ex Parte 725 that "these contract summaries have never been relied on by the Board in any matter. And NS and CSXT have not been able to locate an instance in which these summaries have been used by a party to a Board proceeding."¹³ Yet, carriers spend hundreds of hours a year generating thousands of summaries that will only be accessed a handful of times each.¹⁴

REGULATIONS THAT ARE OUTDATED, UNNECESSARY, OR INEFFECTIVE

The Task Force should also finish the work begun when the Board initiated a proceeding in 2011 in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," and Executive Order 13579, "Regulation and Independent Regulatory Agencies," to review its existing regulations and sought public comments on whether any of its regulations may be outmoded, ineffective, insufficient, or excessively burdensome, and how to modify or repeal

¹² See *United States Rail Service Issues – Performance Data Reporting*, EP 724 (Sub-No. 4) (STB served Nov. 30, 2016).

¹³ *Petition of Norfolk Southern Railway Company and CSX Transportation, Inc. to Institute a Rulemaking Proceeding to Exempt Railroads from Filing Agricultural Transportation Contract Summaries*, EP 712 (filed May 12, 2014) at 7.

¹⁴ *Id.*

them, as appropriate.¹⁵ As a result, the Board made a few clean-up changes to its rules, but, as Acting-Chairman Begeman expressed in her dissent, this action did not reflect the input provided by stakeholders and much more can be done to revise the Board's rules in accordance with the Executive Orders.¹⁶ In addition to the regulations identified by the AAR in EP 712, an example of a regulation that is outdated, unnecessary, or ineffective is the maintenance cost benchmark used in abandonment proceedings.¹⁷

PROMOTING REGULATORY REFORM: MODIFYING EX PARTE COMMUNICATION RULES

As noted above, Section (e) of EO 13777 calls on agencies to seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations. In furtherance of this goal, the Board should reform its rules regarding ex parte communications to allow increased dialogue between stakeholders and Board members and staff in the policy, reporting, and rulemaking context. The Board has strictly interpreted its rules on ex parte communications in the past, but there is no legal requirement that prohibits the Board from engaging in the types of contacts with stakeholders that other agencies routinely conduct. The Board's interpretation of its rules has been a self-imposed restriction that is not mandated by their text, any statutory provision, or the Constitution.

On their face, neither the Board's ex parte rules nor its Canons of Ethics for practitioners prohibit communications in in policy and rulemaking contexts.¹⁸ Further, there is nothing in the Administrative Procedure Act that would act as a bar to relaxing the interpretation of the ex parte rules in such contexts. The APA¹⁹ only prohibits ex parte communications in hearings conducted as part of formal rulemakings or adjudicatory proceedings, not the informal notice and comment rulemaking proceedings the Board conducts.²⁰ The Court of Appeals for the D.C. Circuit has noted that the APA is silent on ex parte communications in informal rulemakings.²¹

¹⁵ See *Improving Regulation and Regulatory Review*, EP 712 (STB served Oct. 12, 2011); Exec. Order No. 13563, 76 Fed. Reg. 3,821 (Jan. 21, 2011); Exec. Order No. 13579, 76 Fed. Reg. 41,587 (Jul. 14, 2011).

¹⁶ See *Improving Regulation and Regulatory Review*, EP 712, slip op. at 7 (STB served Oct. 12, 2011).

¹⁷ See AAR Comments, EP 729 (filed Dec. 5, 2016) at 8 & n.4 (noting that the benchmark adopted in *Florida East Coast Railway Co. – Abandonment – in St. Johns and Putnam Counties, FL*, ICC Docket No. AB-70 (Sub-No. 3) (ICC served Feb. 18, 1988) has not been updated or indexed).

¹⁸ See 49 CFR § 1102.2 and § 1102.2(a) and (c). See also AAR Reply, EP 724 (Sub-No. 4) (filed Dec. 21, 2015).

¹⁹ Pub. L. No. 94-409 (1976) (adding the definition of ex parte communications and prohibiting such communications in formal rulemakings and adjudications).

²⁰ 5 U.S.C. § 557(d)(1).

²¹ *Sierra Club v. Costle*, 657 F.2d 298, 402 n. 507 (D.C. Cir. 1981) (“Congressional intent not to restrict ex parte contacts in informal rulemaking under the APA . . . could not be clearer.”); *Action for Children's Television v. FCC*, 564 F.2d 458, 474 n. 28 (D.C. Cir. 1977) (“If Congress wanted to forbid or limit ex

Similarly, the Interstate Commerce Act, as amended by ICCTA and the STB Reauthorization Act, does not contain a prohibition on ex parte communications.²²

In modifying or relaxing its interpretation of the ex parte rules, the Board could simultaneously impose suitable disclosure requirements to ensure that due process and notions of fundamental fairness can be assured.²³ For example, the courts have not found that due process requires a blanket prohibition on ex parte communications in notice and comment rulemaking proceedings.²⁴ In the words of the Administrative Conference of the United States (“ACUS”) Recommendation 77-3, “Informal rulemaking should not be subject to the constraints of the adversary process. Ease of access to information and opinions, whether by recourse to published material, by field research and empirical studies, by consultation with informed persons, or by other means, should not be impaired.”²⁵ The Board’s efforts to improve its processes that depend on technical information, such as proceedings regarding the Uniform Railroad Costing System, demonstrate the limits and drawbacks of formal filings and would be facilitated by a more direct exchange of information.

Indeed, many other agencies, including independent agencies like the Board, regularly accept ex parte communications subject to disclosure rules.²⁶ The AAR submits that the Board and its staff would greatly benefit from dialogue with stakeholders, particularly in areas where technical expertise of railroad operations are implicated. Recent Board efforts in this regard have been positive, and the AAR encourages you to lead the Regulatory Reform Task Force forward consistent with EO 13777.

parte contacts in every case of informal rulemaking it certainly had a perfect opportunity of doing so when it enacted the Government in the Sunshine Act.”).

²² The only reference to ex parte communications in the ICA *allows* such communications in certain circumstances in merger proceedings. 49 U.S.C. § 11324(f)(2) and (3).

²³ *Compare Home Box Office v. Federal Communications Commission*, 567 F.2d 9 (D.C. Cir. 1977) (finding secret ex parte comments in an informal rulemaking violated due process) *with Courtaulds (Alabama) Inc. v. Dixon*, 294 F.2d 899 (D.C. Cir. 1961) (finding no evidence that the Federal Trade Commission “improperly did anything in secret or gave any interested party advantages not shared by all.”).

²⁴ *Electric Power Supply Ass’n v. FERC*, 391 F.3d 1255, 1263 (D.C. Cir. 2004); *Sierra Club*, 657 F.2d 398, 400 (quoting *Sangamon Valley Television Corp. v. United States*, 268 F.2d 221 (D.C. Cir. 1959).

²⁵ Esa L Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking Final Report to the Administrative Conference of the United States* (May 1, 2014).

²⁶ *Id.* at 40-64 (summarizing agencies’ policies regarding ex parte communications in informal rulemaking proceedings). For example, the Federal Communication Commission’s rules contemplate three categories of proceedings: (1) exempt proceedings, in which ex parte presentations may be made and no notice is required; (2) permit-but-disclose proceedings, in which ex parte presentations are allowed but disclosure is required in the form of a copy of the written presentation and a summary of the oral presentations must be filed in the record; and (3) restricted proceedings, in which ex parte presentations are generally prohibited. See <https://www.fcc.gov/proceedings-actions/ex-parte>.

ADVANCING A DEREGULATORY AGENDA: FEDERAL PREEMPTION

Finally, the Board should advance a deregulatory agenda by actively defending its jurisdiction and the public interest in federal preemption matters. The STB plays a critical role in the federal statutory scheme to promote a safe and efficient national rail system.²⁷ Congress's decision to deregulate broad aspects of rail transportation to achieve this goal did not create a vacuum for states and localities to fill.²⁸ Yet, railroads and their customers alike have sought the aid of the Board in defending the public interest from unlawful encroachment by state and local regulation, with mixed success.²⁹

The STB is vested with the critical mission of ensuring the “uniform regulatory scheme” that Congress has deemed “necessary to the operation of the national rail system.”³⁰ To help achieve that uniformity, ICCTA “defines rail transportation expansively” and gives the STB exclusive jurisdiction over it. Indeed, “[c]ourts have recognized that Congress intended to give the [STB] extensive authority in this area.”³¹ If states and cities are permitted to impose their own separate schemes of rules and regulations, the result will be a patchwork of conflicting local regulations that would burden interstate commerce and threaten to bring the national rail network to a halt.

There is a Federal policy of occupying the entire field of the regulation transportation by rail carrier.³² Indeed, ICCTA's preemptive mandate is so strong that preemption is not optional or discretionary. As the Ninth Circuit emphasized in upholding an exercise of ICCTA preemption, “[p]reemption of state law is *compelled* if Congress' command is explicitly stated in the federal statute's language or implicitly contained in its structure or purpose.”³³ As the Fifth Circuit has put it, state regulation which either “could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized” or is “of matters

²⁷ 49 U.S.C. § 10101(3).

²⁸ See *Fayus Enterprises v. BNSF Railway Co.*, 602 F.3d 444, 452 (D.C. Cir. 2010) (holding that application of state antitrust laws to rail transportation would “subject [shipments] to fluctuating rules as they crossed state lines” and “easily lead to balkanization” that “directly interfere[s]” with the objective of national uniformity and “ICCTA's *deregulatory* objectives.”) (emphasis added).

²⁹ See, e.g., *Valero Refining Co. – Petition for Declaratory Order*, FD 36036 (STB served Sept. 20, 2016).

³⁰ *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 688 (1982).

³¹ *City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005).

³² See H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807-08 (“[T]he Federal scheme of economic regulation and deregulation is intended to address and encompass all regulation and to be completely exclusive. Any other construction would undermine the uniformity of federal standards and risk the balkanization and subversion of the federal scheme of minimum regulation for this intrinsically interstate form of transportation.”).

³³ *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (emphasis added) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983)).

directly regulated by the Board” is “by its very nature ... unreasonable interference with interstate commerce and *must* be preempted.”³⁴

Thus, the Board has a crucial role to play to protect the public interest from parochial efforts by states and localities to restrict or prevent rail transportation. The agency should actively promote and defend the regulatory structure that Congress has devised—a structure aimed at ensuring the national uniformity in regulation that is critical to a sound rail transportation system capable of meeting the needs of the public and the national defense.³⁵

The AAR recognizes that the Board is in a period of transition now as it awaits the confirmation of two new members. In light of the important issues before the Board, the AAR believes that it is appropriate for major regulatory actions to wait until a full complement of Board members is seated. However, with the appointment of a Regulatory Reform Officer, we are encouraged that the Board’s Regulatory Reform Task Force will guide the Board to action consistent with the Administration’s direction and Congress’ deregulatory mandate. The Administration’s current focus on regulatory reform should remind the Board of the first principles of economic regulation: “to minimize the need for Federal regulatory control over the rail transportation system . . .” and “to allow, to the maximum extent possible, competition and the demand for rail services to establish reasonable rates for transportation by rail.”³⁶

Sincerely,



Timothy J. Strafford
Counsel for the Association
of American Railroads

cc: The Honorable Ann D. Begeman
The Honorable Debra Miller
The Honorable Daniel R. Elliott, III

³⁴ *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 411 (5th Cir. 2010) (emphasis added; quotation omitted).

³⁵ See 49 U.S.C. § 10101(4).

³⁶ 49 U.S.C. § 10101(2) and § 10101(1).