Congress of the United States
Washington, DC 20515

July 30, 2021

The Surface Transportation Board
395 E. Street S.E.
Washington, D.C. 20423

Dear Chair Oberman, Vice Chair Primus, and Members Begeman, Fuchs, and Schultz:

We write to express our concerns about President Biden's recent Executive Order (E.O.) entitled "*Promoting Competition in the American Economy*."[1] We understand that the COVID-19-related economic recovery demands continued effort to promote long-term growth and we share the commitment to protecting American consumers. However, we believe the regulatory recommendations in the E.O. addressing freight railroads are unnecessary and would needlessly impair America's freight rail industry and weaken the economy that depends upon it.

Throughout the worst health pandemic in modern times, freight railroads and their dedicated workforce helped maintain the flow of goods, including those necessary to preserve public health and sustain businesses. As America recovers, the freight transportation industry now faces historic demand for its services.[2] Given that the U.S. Department of Transportation (DOT) estimates demand for freight will grow 30 percent by 2040, railroads will prove vital to meeting these needs sustainably.[3] Railroads are an environmentally friendly way to move freight over land, and are extremely safe, efficient, and cost-effective.[4]

However, railroads operate in a highly competitive environment and are not guaranteed a slice of the freight transportation pie.[5] Instead, they must earn their business by offering affordable prices and reliable service to remain competitive. Moreover, in a dynamic transportation market

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[1] Exec. Order No. 14036, 86 Fed. Reg. 36987 (2021).
[2] *See* Greg Miller, *Mounting Evidence that Container Crunch will Persist until 2022*, American Shipper (June 21, 2021), *available at* https://www.freightwaves.com/news/mounting-evidence-that-container-crunch-will-persist-until-2022.
[3] *See* DOT, *DOT Releases 30 Year Freight Projections* (Mar. 3, 2016), *available at* https://www.transportation.gov/briefing-room/dot-releases-30-year-freight-projections.
[4] *See* Federal Railroad Administration, Freight Rail Overview (*available at* https://railroads.dot.gov/rail-network-development/freight-rail-overview).
[5] *See* Ike Brannon, *Rail Consolidation Is A False Bogeyman*, FORBES (July 15, 2021), *available at* https://www.forbes.com/sites/ikebrannon/2021/07/15/rail-consolidation-is-a-false-bogeyman/?sh=4c74c6f26b49, explaining the highly competitive freight market.

where customers' needs and expectations are constantly changing, rail services are also subject to less obvious forms of competition such as product and geographic competition.

To remain successful in such a competitive marketplace, railroads depend upon policies that allow them to continually invest back into their networks. As you know, such policies were implemented when Congress partially deregulated the industry in 1980 through the *Staggers Act* after years of stringent regulations – regulations that kept railroads from running efficient operations and competing effectively.[6] The *Staggers Act* brought railroads back from the brink of ruin and allowed them more freedom to make routing and pricing decisions, which ultimately enabled them to compete in a volatile, constantly evolving marketplace.[7]

The benefits of freight rail to shippers, the economy, and the public have been tremendous since passage of the *Staggers Act*. The law enabled railroads to make necessary ongoing investments in their private networks at a cost of nearly $25 billion annually.[8] Such a robust and meaningful investment dramatically improved safety, increased efficiency, and expanded capacity to meet customers' changing needs. Accordingly, today the train accident rate is down 33 percent from 2000, a train on average moves one ton of freight more than 480 miles on a single gallon of fuel, and rail customers pay rates that average 44 percent lower than rates in 1981.[9]

Freight railroads operate as part of a developing industry that has been regulated for more than 140 years by the federal government.[10] Assessing the presence or absence of competition and whether regulatory intervention is warranted remains the most critical task before the Surface Transportation Board (STB). Historically, the STB has appropriately focused on addressing those specific circumstances where markets do not function, avoiding unnecessary and potentially harmful

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6 Pub. L. No. 96-448 (1980).

7 *See* George S. Ford, Ph.D, *Infrastructure Investment in the Railroad Industry: An Econometric Analysis,* Phoenix Center for Advanced Legal and Economic Public Policy Studies (2019), *available at https://www.phoenix-center.org/perspectives/Perspective19-07Final.pdf); see* also DOT, *Impact of the Staggers Rail Act of 1980* (March 2011), *available at https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1645/STAGGER_%20RAIL_ACT_OF_1980_updated_31811.pdf*; *see also* H.R. REP. NO. 96-1430, 96th Cong. 2d Sess., at 80 (1980) stating that "In general, the title assures railroads substantially more rate freedom than is afforded them under existing law. It continues the policy started under the Railroad Revitalization and Regulatory Reform Act of 1976 of substantially eliminating rate regulation of railroads where there is effective competition." *emphasis added*; S. REP. NO. 96-470, 96th Cong. 1st Sess., at 7, 16-17 (1979) ("Title I of the bill provides new standards and procedures for the regulation of rail rates. It reaffirms the basic concept of the 4-R Act greater pricing flexibility for the railroads where there is effective competition from other carriers or modes of transportation…. [the goal is] to provide protection for captive shippers where necessary in the public interest and to provide pricing freedom for the railroads in the many areas where competition exists. In the latter situation, free market forces should determine the prices to be paid and the conditions of service.") *emphasis added.*

8 *See* American Society of Civil Engineers, *2021 Report Card for America's Infrastructure* (2021), *available at* https://infrastructurereportcard.org/cat-item/rail/.

9 *See* FRA, TEN YEAR ACCIDENT/INCIDENT OVERVIEW, *available at* https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/TenYearAccidentIncidentOverview.aspx; *see also* Alyssa Sporrer, *5 Rail Sustainability Trends for 2021*, Freight Waves (Nov. 20, 2020), *available at* https://www.freightwaves.com/news/5-rail-sustainability-trends-for-2021)*; see also* Association of American Railroads, *Freight Rail and Climate Change*, *available at* https://www.aar.org/wp-content/uploads/2021/02/AAR-Freight-Rail-Climate-Change-Fact-Sheet.pdf; *see also* Association of American Railroads, *The Staggers Rail Act 40th Anniversary*, *available at* https://www.aar.org/campaigns/the-staggers-rail-act-40th-anniversary/.

10 *The Interstate Commerce Act of 1887*, Pub. L. No. 49–104 (1887).

intrusion into railroad decision-making, and allowing the industry to make ongoing and significant reinvestments.[11]

We share a commitment to competitiveness, protecting customers, and improving the STB's processes. However, undertaking ill-advised policies dictated unilaterally through an E.O. to artificially create competition will not lower prices and enhance competition. Instead, we have substantial concerns that these policies will achieve the opposite by undermining the benefits of deregulation. Forcing one railroad's traffic onto another railroad's tracks would degrade service to customers, Amtrak, and commuter railroads by disrupting network fluidity, disincentivizing investment, increasing costs to shippers and consumers, and ultimately diverting freight traffic onto other modes of transportation. In short, productivity will be lost, emissions will increase, highway congestion will grow, and competition, consumers, and the economy will suffer.[12]

As the freight industry continues to recover from the pandemic, meet historic demand, and prepare for future growth, now is not the time to inject complexity, inefficiency, and uncertainty into the marketplace with new regulation. Instead, the STB should allow railroads to continue to make investments that will allow these companies to compete in an evolving marketplace. Any proposed regulations or policy changes that decrease the freight railroads' efficiency or limit their ability to reinvest in their infrastructure should be abandoned. The long history of railroad regulation in the United States prior to the *Staggers Act* provides an important "lessons learned" perspective of how overly burdensome government regulations can stifle investment, innovation, and the stability of a critical part of the supply chain.

We appreciate your consideration of our concerns. If you have any questions, please contact Drew Feeley, Republican Staff Director, Subcommittee on Railroads, Pipelines, and Hazardous Materials at (202) 225-9446.

Sincerely,

Sam Graves
Ranking Member
Committee on Transportation and Infrastructure

Eric A. "Rick" Crawford
Ranking Member
Subcommittee on Railroads, Pipelines, and Hazardous Materials

[11] *See, e.g., See Midtec Paper Corp. v. United States,* 857 F.2d 1487, 1506-07 (D.C. Cir. 1988) ("If the Commission were authorized, as Midtec's argument entails, to prescribe reciprocal switching or terminal trackage whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the Commission in this way to conform the industry more closely to a model of perfect competition. We therefore think it is entirely consistent with the purposes of the Staggers Act that [railroads] enjoy some degree of 'market power,' enabling the railroad to price its services above marginal costs.").

[12] *See* Jim Blaze, *Reciprocal Switching: Complex, Expensive, Time-Consuming (i.e. Mostly a Bad Idea),* RAILWAY AGE (July 14, 2021), *available at* https://www.railwayage.com/regulatory/reciprocal-switching-complex-expensive-time-consuming-i-e-mostly-a-bad-idea/) explaining the complexity of reciprocal switching; *see also* National Railroad Passenger Corporation Comments, *Reciprocal Switching*, EP 711 (Sub No. 1) at 1-2 (Dec. 2, 2016), expressing concern about the impact of reciprocal switching on its passenger trains, especially in terminal areas like Chicago.

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