



**National Grain
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“Passenger and Freight Rail: The Current Status of the Rail Network and the Track Ahead”

Written Testimony of National Grain and Feed Association

Before the

**Senate Committee on Commerce, Science and
Transportation**

October 21, 2020

Chairman Wicker, Ranking Member Cantwell and members of the Committee, I am Randy Gordon, president and chief executive officer of the National Grain and Feed Association (NGFA).

NGFA greatly appreciates the leadership of this committee and its staff to organize and conduct this hearing to examine the current status of the freight rail network, as well as the regulatory framework for addressing and resolving disputes between railroads and their customers, and for the invitation to appear here today.

NGFA is the nation’s largest and most broad-based agribusiness trade association. It consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities nationwide and handle more than 75 percent of the U.S. grain and oilseed crop. A majority of NGFA’s member companies are small businesses. NGFA also has 33 affiliated state and regional agribusiness associations, as well as strategic partnerships with the North American Export Grain Association and Pet Food Institute.

Importance of Rail to Agriculture

In the agricultural market, about 24 percent of grains and oilseeds now move by rail, down from 50 percent when the Staggers Rail Act was enacted in 1980. Of remaining agricultural tonnage, 62 percent typically moves by truck and 14 percent by barge.

Rail shipments remain particularly important to certain agricultural commodities and regions. For instance, 54 percent of U.S. wheat and barley, 21 percent of soybeans and 19 percent of corn typically move by rail at some point before reaching their ultimate domestic or export destination. Further, nearly all grains and oilseeds produced in Montana, more than 70 percent of grains and oilseeds produced in North Dakota and more than half of agricultural commodities produced in Arizona, Oklahoma and South Dakota typically are transported by rail.

Another major change since enactment of the Staggers Rail Act is that most railcars used to haul agricultural and other commodities no longer are owned by railroads. For example, more than 80 percent of the grain rail hopper car fleet now is owned or leased by shippers and receivers – not by railroads – as are virtually 100 percent of the tank cars used to ship processed ag products. This largely transferred the risk of car ownership from railroads to their customers, which now incur the costs previously shouldered by the rail industry when demand or rail operations slow and the utilization rate for this equipment declines while costs for maintaining the fleet increase. This dramatic shift led to billions of dollars of investment made by rail customers that previously had been made by railroads. So, railroads are far from the only ones investing in the rail network.

The grain and oilseed industry also functions in a globally competitive market that makes it very difficult to pass transportation costs forward. Consequently, most railroad freight costs typically are reflected in the price paid to farmers for their commodities.

In addition, it is important to note that agricultural demand for rail service is more diverse and variable than some non-agricultural products, such as coal, ores and chemicals. First, grain, feed and processing facilities are dispersed geographically, given the widespread production of agricultural commodities across multiple states and regions. Second, variabilities in weather and crop growing conditions (such as drought, excess moisture, and other weather-induced aberrations) alter yields and quality, thereby affecting grain surplus and deficit areas, supply/demand fundamentals and commodity prices in ways that can and do significantly change and realign grain movements and origin-destinations pairs, often within the same crop year. Third, as has been demonstrated multiple times in recent years, changes in global trade and agricultural policies influence trade flows and producer planting decisions. Fourth, agricultural commodities on a per-unit basis are of comparatively lower value than most non-agricultural products. And finally, the uniqueness and fundamental difference of agricultural rail shipments – particularly the fluctuating demand for rail service – are explicitly exhibited and underscored by the existence of auctions and a secondary market for railcars. These factors combine to make the need for responsive, predictable and cost-competitive rail service particularly important for agricultural shippers and receivers.

Further, grain is the largest commodity group that relies upon common-carrier railroad service, accounting for about one-third of all ton-miles by tariff. This means that the rates and service terms are subject to the jurisdiction of the Surface Transportation Board (STB), rather than governed by a private contract. Given the major role that transportation costs play in determining whether U.S. grains and oilseeds are competitively priced in domestic and export markets, it is critical that the STB have standards and procedures to efficiently determine reasonable freight rail rates and establish guidance and precedent regarding what constitutes acceptable rail service. The STB commendably has made numerous attempts in recent years to improve its current processes and standards, and NGFA has participated actively in these efforts.

NGFA's Approach to Resolving Rail Issues

Philosophically, NGFA's strong preference, whenever possible, is to resolve railroad-rail customer issues through private-sector mechanisms, rather than through government regulations, mandates or intervention.

As such, NGFA and its member companies place tremendous value on having access to effective and workable mechanisms to resolve business-related disputes. That is evidenced by the existence of its Arbitration System for resolving commercial disputes involving grain, feed and grain products that has been operated by NGFA since shortly after its founding in 1896. NGFA's system also includes Rail Arbitration and Mediation Rules crafted in partnership with the Association of American Railroads in a process that involved each of the Class I railroads and several shortline carriers. Those rules took effect in 1998 and are perceived widely by both rail carriers and rail users to be working well. Indeed, all seven Class I railroads, as well as most of the principal regional and shortline railroads, are parties to NGFA's Rail Arbitration and Mediation Program. These rules created an accessible, cost-effective forum for resolving *certain types* of disputes, including application of demurrage rules and terms; misrouting of cars; rail contracts; special car or equipment program rules; application of a railroad's general car distribution rules; the mishandling of private cars or locomotives; property damage claims pertaining to sidetrack agreements; and disputes involving bills of lading, such as loss-and-damage claims. But importantly, rail carriers thus far have not agreed to compulsory arbitration of rate disputes through NGFA's Rail Arbitration System.

NGFA's experience has been that merely providing access to efficient, workable, timely and cost-effective dispute-resolution processes – whether they be regulatory- or private-sector-based – promotes business-to-business discussions that frequently lead to successful resolution of disputes between carriers and their customers.

Impacts of COVID-19

The sectors of U.S. agriculture that constitute NGFA's membership largely remained open and operational throughout the COVID-19 pandemic. The one significant exception was the ethanol sector, which idled capacity significantly in response to the precipitous decline in fuel consumption resulting from shelter-in-place rules issued by states and localities. That, in turn, disrupted the availability of distillers grains, a co-product of ethanol, as a feed ingredient for livestock and poultry producers.

The continuity of business operations within the remainder of the grain, feed and processing industry was facilitated by the issuance of useful guidance from the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency designating workers in the food and agricultural sector, as well as the transportation sector, as essential to the continued functioning of the U.S. economy and to meeting consumer needs. The U.S. Department of Agriculture's (USDA) Federal Grain Inspection Service also did a good job keeping official grain inspectors on duty, which allowed for the continued export of U.S. grains and oilseeds.

The domestic and export marketing of U.S. grains, oilseeds and grain products continued to occur, albeit with some minor disruptions attributable to what largely were short-term restrictions on truck movements across state or municipal boundaries, temporary interruptions in discharging at foreign ports and a shortage of containers returning from China that are used to ship some identity-preserved and high-value U.S. agricultural products.

NGFA also wants to commend publicly the actions of the rail industry in continuing to provide service and communicating with its agricultural customers during the pandemic. Our member companies generally have been pleased with both aspects – service and communications –from their rail carriers during this challenging time.

Freight Rail Service

In surveying NGFA's 31-member Rail Shipper/Receiver Committee in preparation for this hearing, members reported that rail service to the agricultural sector generally appears to be acceptable at this time, although several trouble spots are beginning to emerge as harvest gets underway in earnest, which is when demand for rail service typically begins to increase.

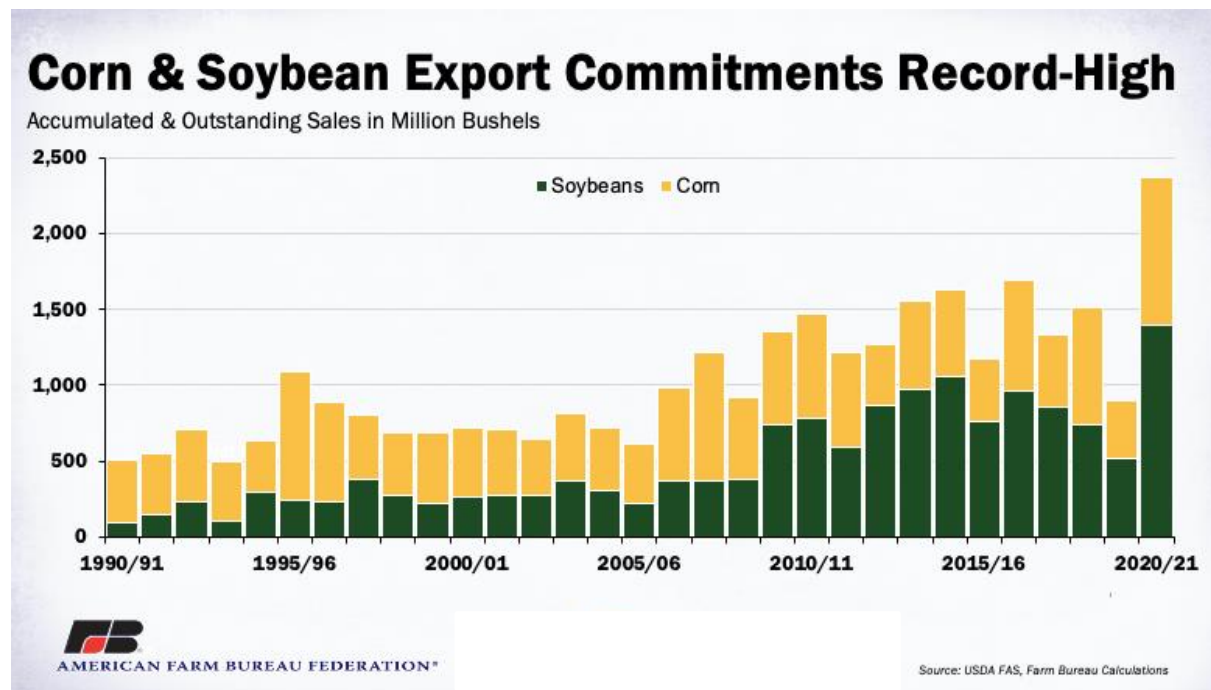
Several members noted that oilseed processing facilities in the Midwest last month curtailed production because of a lack of inbound soybeans by rail, although that situation has improved recently. More recently, NGFA members report an increasing number of trains not meeting their trip plan schedules or having loaded trains not being pulled from facilities in a timely manner because of a lack of locomotives and crews – both in the East and West. NGFA also has received reports of significant service problems with one Class I carrier serving mills in the Southeast attributable to both a lack of crews and locomotives. An increasing number of missed switches by carriers also have been reported by NGFA member companies operating in the West.

For this fall and winter, there is nervous apprehension within our industry about whether railroads will be able to keep pace with the combination of what NGFA anticipates will be a very robust demand for rail service and the vagaries of winter weather. This apprehension is fueled by two major factors. First, whether carriers will be able to redeploy quickly enough rail crews that were furloughed and locomotives that were stored during the COVID-19 transportation downturn. And second, the ongoing implementation of the so-called "precision scheduled railroad" operating model by six of the seven Class I carriers, which is discussed in more detail subsequently in this statement.

While rail movements of coal and other energy-related products are lagging, there is surging demand from industrial products, grain and intermodal. In fact, the investment bank Jefferies on Oct. 1 reported that import flows of containers destined for intermodal rail movements should remain heavy through 2021, as companies engage in what the bank’s chief economist termed “what is likely to be one of the biggest restocking cycles – if not the biggest – in U.S. history.” The bank’s report noted that the demand for consumer goods now is 6 percent greater than it was prior to the pandemic, and that manufacturers increasingly will target much higher levels of “precautionary inventory as they shift from a ‘just-in-time’ to ‘just-in-case’” strategy.

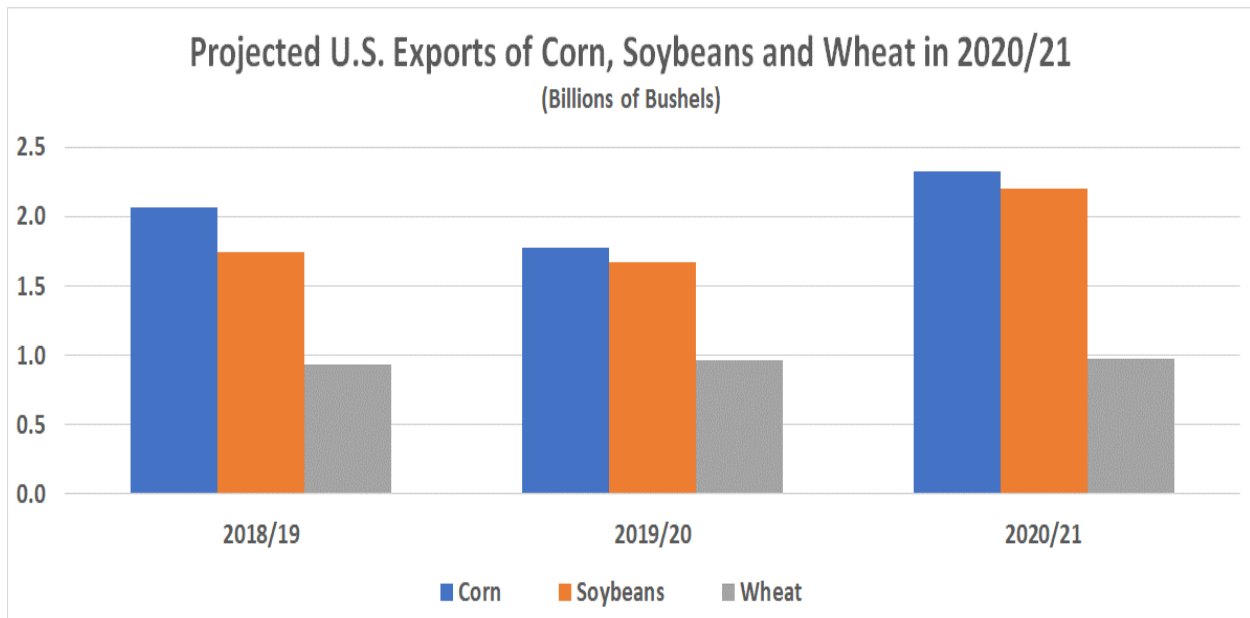
For the agricultural sector, largely because of increased purchases of soybeans, corn and other agricultural products under the Phase One trade agreement with China, U.S. exports are projected to be significantly higher in the current marketing year that began Sept. 1, 2020. Accumulated corn exports to date already are 76 percent greater than at this time in 2019/20, with China accounting for 38 percent of total U.S. corn export commitments to date. Likewise, total outstanding U.S. corn export sales are more than double those of the same time last year.

Meanwhile, for U.S. soybeans, total export sales commitments thus far are running nearly 20 percent greater than at this point in 2019, attributable largely to increased purchases from China. As noted in USDA’s Oct. 1 *Grain Transportation Report*, year-to-date outstanding sales to China “reflect possible increased future demand across all modes of transportation,” with year-to-date average barge grain shipments on the Mississippi River running 30 percent greater than at the same time last year. USDA data show that from Aug. 27 to Oct. 8, an average of 60 ocean-going grain vessels were expected to load within the next 10 days at the U.S. Gulf, compared to an average of only 39 vessels per 10 days during the previous 10 weeks.



While U.S. corn and soybeans account for about 70 percent of total U.S. grain and oilseed exports, U.S. wheat exports also are projected to increase – with sales commitments thus far running 8 percent greater than at this time last marketing year.

As demonstrated in the chart below, USDA’s export sales data indicate that U.S. exports for all three major grains are projected to increase during the 2020/21 marketing year – and dramatically so in the case of corn and soybeans. The robust grain export data is a strong leading indicator of increased rail demand this fall and winter. Reliable and competitively priced rail service will be important in enabling the United States to achieve these sales commitments.



Concerns with Current Rail Environment

While NGFA believes rail will remain an essential transportation mode for the agricultural sector, many of our member companies believe agriculture is at a “tipping point” concerning the extent to which rail service is reliable, cost-effective and reflects true competition as that term generally is defined in other markets.

There are several factors at work in this regard:

- First, there is limited rail-to-rail competition, with duopolies existing in the East and West. Four Class I railroads now haul 80 percent of grain and oilseed traffic. Many landlocked agricultural facilities are captive to a single railroad and are charged rates often exceeding the 180 percent revenue-to-variable cost threshold mandated in the Staggers Act as the point where a rate can be challenged as unreasonable. However, the STB’s current procedures and standards for determining maximum reasonable rates are not accessible to most ag shippers because of their complexity and inherent cost compared to the potential recovery of damages. No case has been brought by an ag shipper in more than 30 years.

- A second major factor, as alluded to previously, is the adoption of PSR. NGFA recognizes the need for carriers to efficiently utilize equipment and human assets to earn sufficient revenues to invest in their networks, cover capital costs and obtain reasonable profits. But the concern with PSR among rail customers is the practice of carriers to drive their operating ratios – the cost actually spent running the railroad – to perhaps unsustainably low levels to impress Wall Street investors and reward shareholders at the expense of customers. Some have characterized PSR as “doing less with less.”

For the sectors of agriculture comprising NGFA’s membership, PSR has resulted in increasingly arbitrary, abrupt and disruptive changes to operating plans, service schedules and the type of rail service offered. In some cases, these changes also have negated tens of millions of dollars of individual rail customers’ investments in rail cars, facilities, track space and other infrastructure that their serving railroads themselves previously had encouraged or demanded be made as a condition for receiving service.

For instance, soybean meal and feed ingredients that previously were shipped by unit train now are required by some carriers to move in long general merchandise (manifest) trains that transport freight other than bulk commodities. These manifest shipments often entail circuitous routes that can take twice as long and cost twice as much as the unit train service previously provided by the carrier.

PSR also has resulted in railroad crews and customer service personnel being reduced more quickly and sharply, and locomotives being placed in long-term storage, both of which hamper rail carriers’ ability to respond when demand for service returns. Both factors have raised concern within our industry about the potential lack of surge capacity in the rail industry to meet what often are fast-developing upticks in demand for service.

NGFA members also have experienced increasing instances of “demarketing” of traffic by rail carriers for movements they no longer want to handle. This is accomplished either through significant increases in freight rates or reductions in the frequency of service provided to facilities that ultimately make rail either infeasible or uncompetitive for the affected movements.

Regulatory Framework for Addressing and Resolving Rail Disputes and STB’s Policy Initiatives

NGFA commends the STB for being extremely active and making considerable strides under the leadership of Chairman Ann Begeman in implementing the STB Reauthorization Act of 2015 and attempting to create a more workable regulatory framework within the agency for addressing and resolving disputes between railroads and their customers, as necessary.

Three STB actions are particularly important to NGFA’s membership.

The first involves rail rate reform. Chairman Begeman's establishment of a Rate Reform Task Force in January 2018 enabled the agency to take a fresh look and critically evaluate its existing rail rate challenge methodologies. The Task Force produced a thoughtful and impactful report that accurately portrayed the systemic problems and flaws with each of the STB's existing rate-challenge methodologies and procedures, which for the most part create often insurmountable barriers in terms of complexity, cost and time that effectively preclude rail customers, particularly small and agricultural shippers, from exercising their legal right under the Staggers Act to challenge rates they believe are unreasonably high.

One of the outcomes of this process is a proposed new, streamlined methodology building on a concept identified by STB's task force – the Final Offer Rate Review (FORR) process – that would provide agricultural and other rail customers with a potentially more workable, timelier and more cost-effective approach for testing rail rate reasonableness. If this turns out to be the case, FORR also has potential merit in providing a necessary regulatory backstop to encourage railroads to set rates at reasonable levels in the first place.

In addition, the proposal itself prompted five Class I railroads to initiate discussions with NGFA to explore whether a comparable approach could be developed within the STB's current voluntary arbitration system, preferably, in NGFA's view, operating side-by-side with the FORR regulatory approach. While there may be additional discussions on the arbitration approach, two potentially insurmountable hurdles have emerged, namely: 1) the rail carriers' demand that they be exempt from rate challenges under FORR for as long as they participate in an arbitration program; and 2) rail carriers' demand that arbitration decisions be kept confidential to the maximum extent possible.

NGFA believes it is imperative that the STB proceed to issue a final rule on FORR this fall, and we have every expectation that the agency will do so.

A second, related STB rulemaking is the agency's development of a streamlined approach that rail customers could use to demonstrate that a rail carrier has market dominance over the traffic at issue, which is a required showing for the STB to have jurisdiction over a rate complaint. We commend the agency for issuing a final rule on July 31, 2020 on this matter. Further, we appreciate the STB's announcement when doing so that it will initiate a new proceeding to examine further its adoption of a 500-mile movement threshold for presuming whether truck transportation provides a competitive alternative to rail. NGFA believes that market dominance can be present where rail movements are much less than 500 miles in length.

Third, the STB initiated an extensive set of public hearings in April 2019 on egregious demurrage and accessorial practices and charges implemented by rail carriers. Those hearings and the evidence presented by shipper groups like NGFA shed light on these practices and ultimately resulted in the STB issuing a policy statement on April 30, 2020 that provides guideposts the agency signaled it would observe when deciding demurrage and accessorial cases brought to the agency. The STB did not go as far as we wanted. NGFA urged the agency to rule presumptively that certain rail demurrage and accessorial practices are inherently unreasonable and direct carriers to rectify them, rather than to require rail customers to file cases in each instance. But NGFA commends the agency for directing attention to this still-festering issue, and for better defining what types of practices and charges the STB likely would find unreasonable.

NGFA-member companies continue to report egregious demurrage and accessorial practices by rail carriers, including charges assessed against rail customers when carriers unpredictably “bunch” railcars on days that do not comport with the train’s trip schedule. Railroads also have reduced or eliminated altogether the amount of “free time” that customers are given to load or unload cars. Further, there remains a disparity in how railroads treat private or leased cars owned or controlled by shippers versus their own equipment when it comes to assessing demurrage and accessorial charges. In addition, there is a lack of reciprocity in that rail customers have no comparable recourse to assess charges against a railroad when privately owned rail cars are not returned in a timely manner, train arrivals are delayed, or loaded trains sit for days waiting to be pulled from facilities because of a lack of rail crews or locomotive power. Given that the stated purpose of demurrage is to promote the efficient utilization of rail assets – not to serve as a revenue-generator for railroads – NGFA believes these flaws still need to be addressed.

NGFA Rail Policy Priorities

NGFA commends Congress for making several substantive improvements when enacting the STB Reauthorization Act of 2015. These include authorizing the agency to initiate investigations of issues that have national or regional significance; requiring that the STB maintain one or more streamlined processes to challenge freight rates; allowing the STB commissioners to conduct non-public collaborative discussions under prudently prescribed rules and transparency; requiring the agency to provide quarterly reports describing the agency’s progress in addressing issues raised in uncompleted regulatory proceedings; and directing the STB to establish a voluntary and binding arbitration process to resolve rate and rail practice issues. NGFA commends the STB for promptly implementing these and other mandates contained in the 2015 reauthorization.

Regarding the new investigatory authority power granted by Congress, it is NGFA’s understanding that it has not been utilized by the STB thus far in part because the agency would be required to close off discussions with outside parties for an undeterminable time while the investigation is conducted. Alternatively, the STB commendably has launched a very active and transparent set of proceedings and public hearings on issues – like railroads’ demurrage rules and practices – that otherwise might have been prime candidates for investigation. In so doing, the STB likely accomplished in a shorter, more informed and more transparent manner the same objective as a formal investigation. But NGFA believes the investigative authority continues to be a valuable tool in providing the STB with necessary leverage with carriers in its oversight of railroad practices.

To conclude, NGFA wishes to raise two specific policy matters the Committee may wish to explore with the STB with respect to its future rail regulatory framework:

- **Clarify Common-Carrier Obligation of Railroads:** First, we believe there is a pressing need to clarify what the railroads’ common-carrier service obligation means in the current rail environment that is characterized by reduced rail competition and PSR-related operational changes that raise serious concerns about whether carriers are indeed providing

“transportation service upon reasonable request.” In its landmark 2015 study¹, the National Academies of Science’s Transportation Research Board (TRB) found that “more than 30 years after the Staggers Rail Act, the common carrier obligation remains poorly defined....Absent clear service standards,” the TRB study continued, “shippers contend a railroad has no reason to maintain a consistent common-carrier service and that consequently, it will unilaterally revise service terms and conditions.” As an example of this occurring, NGFA cited previously in this testimony the practice of carriers using various means to “demarket” traffic they no longer wish to haul.

This TRB finding was reinforced by another report, entitled *Railroads’ Common Carrier Obligation: Its Legal and Economic Context*,² conducted for USDA’s Agricultural Marketing Service that was published in April 2020. That report, which was prepared following interviews with numerous railroads, shippers, public officials and transportation professionals, stated that its “principal takeaway is that the common carrier obligation must be preserved, but there needs to be a better definition of the concept and clarification of its meaning and applicability in today’s transportation environment.” The report noted that the common carrier obligation has been retained from English common law, but has never been defined by Congress, the STB or its predecessor, the Interstate Commerce Commission.

Bringing more clarity to the common-carrier obligation will be a complex and difficult undertaking, but NGFA believes it needs to be done given the current and prospective rail environment.

- **Reprioritizing the Importance of Rail-to-Rail Competition in U.S. Rail Transportation Policy:** A second topic that NGFA believes Congress should consider is to give higher priority to the importance of rail-to-rail competition within the Staggers Rail Act’s Rail Transportation Policy. As the Committee knows, the STB rightfully looks to the Rail Transportation Policy for direction. The current policy statement references competition three times, but only once regarding the importance of “effective **competition among rail carriers** and with other modes, to meet the needs of the public and the national defense.” [*Emphasis added.*]

Forty years after enactment of the Staggers Act, NGFA believes it is important to better enshrine the importance of promoting rail-to-rail competition principles as being on a par with “allowing carriers to earn adequate revenues” within the Rail Transportation Policy so as to encourage competitive switching and other pro-competitive policies. That is needed particularly given the previously referenced consolidation within the rail industry and the vastly different economic circumstances under which five of the Class I railroads now are deemed to be revenue adequate by the STB even under what many economists believe are overly conservative metrics that understate railroads’ true profitability.

¹ *Modernizing Freight Rail Regulation*. National Academies of Science Transportation Research Board. Special Report 318, 2015.

² *Railroads’ Common Carrier Obligation: Its Legal and Economic Context*. Dr. Francis P. Mulvey and Michael F. McBride. April 2020.

Finally, there is one more significant factor that needs to be acknowledged. And that is the reluctance of most rail customers to formally challenge the behavior of their rail carriers at the STB, a court or in private-sector arbitration, even when justified, because they have no alternative competitive transportation mode and, therefore, don't want to strain the working relationship with their railroad. Plus, there is a fear the carrier will retaliate against them. Retaliation is real and can take many forms, such as reducing service frequency, threatening to or actually raising rates, and/or failing to be responsive to issues raised by the customer. NGFA believes this is a major reason more cases have not been filed at the STB challenging rail rates, demurrage and accessorial practices, poor service, and unreasonable rail practices. NGFA does not purport to have a solution to resolve this concern other than the establishment of more rail-to-rail competition so rail customers are not dependent upon a single railroad for service. But NGFA does believe this is an issue that needs to be considered by Congress and the STB if the regulatory framework ultimately is to be functional and effective.

Conclusion

Mr. Chairman, that concludes my testimony. NGFA appreciates this opportunity to provide its thoughts on this important matter, and I would be pleased to respond to any questions the Committee may have.