THE CONSUMER CASE FOR REIMAGINING AND INNOVATING RAILROAD POLICY

HIGH-LEVEL SUMMARY

In order to reimagine and allow for innovative railroad policy in the United States to benefit consumers, there are simple proposals that should be adopted. These proposals aim to increase competition, generate investment, and ensure that lower costs can be passed down to consumers who rely on rail for their homes and businesses.

To achieve this, it will require a simpler and more uniform legal definition of common carrier obligations – if not a total reform – and an updated mandate for the Surface Transportation Board so that it does not act as a regulatory threat to competitive enterprise.

- Oppose the Reliable Rail Service Act (S2071)
- Congress should limit the common carrier obligation or eliminate it all together
- Congress should amend the STB Reauthorization Act to ensure the agency acts as a remedial agency and does not create its own policy

INTRODUCTION

In American lore, trains and railways have always held a type of romanticism. From the settling of the American West, to the industrialization of the large population centers on the East Coast and Midwest, locomotive technology has been a key factor in the economic development of the continental United States.

While passenger travel by train has waned in the face of competition from personal vehicles, rail freight transportation has remained robust, spread out over 140,000 miles of railways, the largest network in the world.

In the 21st century, railroads still remain an integral part of the domestic consumer economy, moving over 1.6 billion tons of commodities and goods between ports, factories, and warehouses. While container ships may bring raw materials and products to ports, freight rail is used to transport those items to trucking centers or distribution hubs before they make their final trajectory.

These "middle miles" for commodities and finished products we buy both online and in stores mean that millions of American consumers depend on a highly competitive, efficient, and productive freight rail industry to get products in our homes and businesses.

While competition for transportation of both raw and finished goods is intense – whether it be by trucking, rail, or air freight – the existing restrictions and bureaucratic requirements imposed on freight rail firms have subjected the industry and those who depend on it to an unpredictable regulatory regime and enforcement more akin to central planning than a robust system of free enterprise. As we'll learn, this is a lesson we've already had to learn in rail regulation history.

In this policy primer, we will examine the evolution of regulations on freight rail, and how new rules and enforcement ideologies held by the industry's regulator, the Surface Transportation Board (STB), threaten to harm consumers by artificially raising prices for products we depend on.

We discuss the common carrier obligation enforced on freight rail carriers by the federal government through the STB, how it unnecessarily intervenes in the free movement of goods and private contracts, and some policy suggestions that would improve the status quo on behalf of consumers.

COMMON CARRIER OBLIGATION

The rail industry holds the distinction of being the first industry to be regulated federally in the United States. Just one decade after the completion of the Transcontinental Railroad, in response to growing populist backlash against the perceived power and monopoly of railroads, Congress passed the Interstate Commerce Act in 1887. The law laid the obligation for railroads to offer prices that are "reasonable and just" to all customers, effectively creating what we dub a "common carrier obligation," an adoption from old British common law.

Rather than being able to pick and choose its customers, as well as set market rates and supervise construction of railways, railroads became de-facto public utilities forced to provide nondiscriminatory services at reasonable rates, as well as submit rail construction and supervisory plans to oversight and review by a regulator known as the Interstate Commerce Commission.

Through subsequent court rulings and agency proclamations, that common carrier obligation was expanded to include matters beyond just reasonable pricing, and led to the ICC becoming a primary actor in economic calculations for railroad companies.

FOR A RECENT PARALLEL IN 2023, WE CAN LOOK TO THE FEDERAL COMMUNICATION COMMISSION'S RESURRECTED PLAN TO CLASSIFY INTERNET SERVICE PROVIDERS AS PUBLIC UTILITIES UNDER TITLE II OF THE 1934 COMMUNICATIONS ACT, WHICH WOULD SIMILARLY ATTEMPT TO OUTLAW DISCRIMINATORY PRICING, SUPERSIZE INVESTMENTS, AND MANDATE INTERNET DELIVERY ACCORDING TO THE WHIMS OF THE AGENCY.

ACCORDING TO BIOGRAPHER AND HISTORIAN RON CHERNOW, IT WAS THE VEIL OF THE ICC AND THE COMMON CARRIER MANDATE THAT ALLOWED OIL MAGNATE JOHN D. ROCKEFELLER TO ACCUMULATE FAVORABLE TERMS WITH RAILROAD FIRMS, GROWING HIS STANDARD OIL CONGLOMERATE INTO THE LARGEST PETROLEUM COMPANY IN THE WORLD.

Throughout the Progressive Era much of the 20th century, the weight of burdensome regulations and rules aimed at reducing rail monopolies – plus the newfound competition from cars, trucks, and airplanes – ended up driving hundreds of small and independent freight and passenger firms into bankruptcy, consolidating the market into only a few players that could afford the massive imposed costs and compliance.

In his book Merging Lines: American Railroads 1900-1970, historian Richard Saunders makes the case that needless bureaucracy and regulations imposed on railroads forced many to sell to larger carriers, creating a politically dependent industry that became even more centralized and powerful, while still not immensely profitable.

Likely the most prominent attempt to halt the economic decline of American railroads came in the form of another federal law, the Staggers Rail Act of 1980, which partially deregulated the industry and gave more flexibility to rail firms to set their own prices and contracts. While it did not repeal the common carrier obligation, it did limit its scope.

According to the Congressional Budget Office's report to Congress in 2007, this reform was pivotal to revitalizing the rail industry, leading to greater competition, lower prices, and a healthy economic sector that helped lower costs for consumers dependent on goods traveling by rail.

As the growth of the automobile as a personal means of transportation on federal interstates exploded, and Amtrak was established by the government as a quasi-public passenger railroad in 1971, the business of moving commodities and goods became the primary focus of railroads. Companies shipping products from western ports to transport hubs in the east, or vice versa, could benefit from a more robust industry. Increasing profits gave way to further investment in maintaining and building additional railroads, as well as more favorable agreements when rail companies had to ship on lines owned by another firm.

While the updated reforms did provide more flexibility and competition to rail firms, the common carrier obligation and oversight remained in place, a regulatory status not imposed on the booming trucking industry, also deregulated in 1980 with the signing of the Motor Carrier Act.

Until it was replaced by the Surface Transportation Board in 1996, the ICC still set maximum prices for tonnage and freight, oversaw train terminal construction, and mediated disputes between rail shippers and rail carriers to maintain the "reasonable and just" standard outlined over 100 years prior.

Now four decades after the Staggers Act, the STB has been reinvigorated as an independent federal agency, wielding much more control over the economic decisions of rail carriers and their customers, using jawboning, rhetorical threats, and exploratory rule-making to make their presence known. The common carrier obligation remains in law, but recent actions by the STB demonstrate it is going above and beyond the reasonableness standard in ways that will prove detrimental to consumers who rely on rail services.

MODERN POLICY ISSUES

While commercial transportation in the 21st century for commodities and finished goods is highly competitive – by land, air, and sea – there have been many proposals in recent years that have sought to restrain the influence of commercialization, specifically in the rail sector.

In a highly regulated economy, it is no surprise that thousands of private industries and firms must conform to legal procedures and correspondence with government officials to provide services. The more activist role of the railroads' chief regulator, however, is seemingly growing beyond the intentions set by Congress in decades past.

Disputes on pricing, the number of train cars available, or even the timing of a delivery are subjects the Surface Transportation Board views within its remit. In any other industry or with any other regulator, we would find this not only burdensome, but unnecessarily interventionist to the point of outright exogenous control.

As more industries are relying on rail to ship their products in a timely and economic fashion – whether it be coal, chemicals, or agricultural products – the STB's power to arbitrate between these interests has only grown. Frustrations over shipping policies have created strife between various industries and rail companies that the STB has used as a pretext for more intervention.

As we've summarized here, early regulation on railroad firms arose because of concerns of market power and price to shippers and end consumers. Now, however, the impetus has changed to questions of specific rail service, which we examine in three parts below.

The reciprocal switch

One area of rail service where the STB has been eager to intervene is the practice of network switches. Network switches are hand-offs of cargo from one train company to another, depending on both the start and end destinations. These are elaborate and complex maneuvers consisting of dozens of locomotive switches carried out over several hours or days.

Because products must often travel across the country, there are often many hand-offs between train companies in order to switch to an additional railway owned by another company. When these exchanges don't make sense economically, or lead to other inconveniences, railway firms charge different rates or fees depending on supply of locomotive switchers and demand on that rail line. The same applies to shipping facilities serviced by just one rail firm. When container goods must be transferred to another rail line, the rail firms will charge an adjustable fee to facilitate the switch.

Beginning in 2016, the STB released a proposed rule to enforce reciprocal switching, meaning that railroad firms would be forced to switch train cars to other lines at below-market rates and be open to disciplinary fines or actions by the STB for "poor service". Though that proposal was scuttled, it reemerged in a new form in September 2023, focusing more on service and business conduct, and is now in the comment period before a final vote in November 2023.

Rather than allowing free negotiations and contracts between companies, such a rule would mandate price-fixing and likely limit competition by favoring certain shipper industries, which would drive prices up for consumers. This arrangement would invariably prefer rent seeking by firms shipping products

The service requirement

Another area where the STB has begun scrutinizing service-related matters between rail firms and shippers relates to the availability of container trains, the timing of deliveries and drop-offs, and demanding additional service beyond economic justification. This evolution was spawned from a June 2022 executive order from President Joe Biden, calling on the STB to be more forceful in mediating disputes and promoting competition in the freight rail industry, all the while strengthening the common carrier definition.

One such case under review by the STB is between the Navajo Transitional Energy Company, a coal company, and the railroad firm BNSF. In June 2023, the STB issued an injunction forcing BNSF to make available additional rail cars to ship coal from Montana to Canada. Navajo Energy sued the rail company in late 2022, claiming it had failed in its common carrier obligations by not providing adequate enough service. A federal judge later ruled the companies must arbitrate to reach a conclusion, and the STB will issue a final ruling on whether the company has run afoul of common carrier rules in early 2024.

By issuing the initial injunction, the STB has laid the groundwork for yet more intervention in private contracts between rail firms and shippers and even broader interpretation of common carrier obligations.

The expansion of common carrier

Not to be outdone, several federal legislators have also taken up a bill that would aim to expand the definition of common carrier obligations to further invite the STB to centrally manage rail policies. Introduced in 2023, the Reliable Rail Service Act would add more criteria for the STB to consider in every common carrier dispute or complaint.

Beyond the measure of "reasonable and just," this law would supercharge common carrier considerations to include factors such as schedule and frequency of rail travel, service time, employment considerations, equipment use, and whether the rail firm "meets the service requirements" of rail shippers.

Much beyond reasonable, such a change in common carrier would subject railroad companies to outright central planning if not constant legal action from their customers. This would increase costs, reduce competition, and have a heavy toll on shipping prices that would eventually be passed down to consumers who rely on goods traveling by rail.

POLICY PROPOSALS

To reimagine and allow for innovation in railroad policy in the United States, there are simple proposals that should be adopted. These proposals aim to increase competition, generate investment, and ensure that lower costs can be passed down to consumers who rely on rail for their homes and businesses. To achieve this, it will require a simpler and more uniform legal definition of common carrier obligations – if not a total reform – and an updated mandate for the Surface Transportation Board so that it does not act as a regulatory threat to competitive enterprise.

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CONCLUSION

Though the common carrier obligation for railroads may have been necessary at one point in American history, its modern interpretation is leading to higher costs and burdens that are making their way to consumers who rely on those goods. The activist role of the STB has led to it becoming more of a directing agency than one which provides sound and just regulations.

If we want consumers to benefit from a competitive environment with lower prices and fewer regulatory roadblocks, this will mean a reimagining of rail policy and how common carrier regulations provide guidance for trade and transport. Rather than using federal agencies as a battering ram for one industry over another, we must foster a competitive environment that will provide more innovation, investment, and choice for companies shipping products and the consumers that receive them.

The 21st century has spawned a new economic age for competition in transportation. We must ensure that our regulatory practices evolve with them at the same time.

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