

Issue Brief

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Rail Policy – Taxpayers & Consumers Are Watching and Worried

Introduction

National Taxpayers Union (NTU) has been an active participant in transportation-related tax, spending, and regulatory issues since its founding over 50 years ago. Throughout that time, the organization has seen policy’s worst moments, among them the Amtrak passenger rail system’s creation and tens of billions in subsequent taxpayer support (\$14 billion during 2019-2022 alone). On the brighter side, NTU has seen the freight rail system emerge from similar economic doldrums thanks to the Staggers Act and the sale of the federally backed Conrail entity.¹

Taxpayers have an abiding interest in federal policy toward freight rail, one that allows both railroads and their customers to prosper. Railroads must have the resources to continue private

¹ For general background on rail and other transportation issues, see, e.g., <https://www.ntu.org/publications/detail/in-air-or-on-rails-taxpayers-deserve-smarter-regulation>; <https://www.ntu.org/publications/detail/airline-deregulation-at-40>; <https://www.ntu.org/publications/detail/a-primer-on-infrastructure-roadmap-for-a-bipartisan-package>; <https://www.ntu.org/publications/detail/bipartisan-infrastructure-deal-leaves-much-to-be-desired>.

Key Facts:



The threat of a rail strike should never have reached this point: federal dispute resolution should have ensured a smoother labor deal.



Federal rail issues remain: the Surface Transportation Board needs to be reauthorized in a taxpayer-friendly manner without introducing onerous new regulations.



Proposals for the STB and the Federal Railroad Administration to be more heavy-handed towards rail must be avoided for the sake of the economy.

investment, and customers must be able to secure affordable, market-based shipping services. Without this synergy, taxpayers will witness another decline in one of the nation's most vital infrastructure components, and with it, increased pressure for direct federal involvement through loans, subsidies, and other strictures.

In weeks to come, leaders in Congress and the Executive Branch face decisions that could have dramatic impacts on rail policy. These include whether to intervene in a potential labor strike that could still occur if a tentative agreement falls through, how to reauthorize the Surface Transportation Board (STB, a major railroad regulator), and whether to advance legislation called the Freight Rail Shipping Fair Market Act, which combines reauthorization with several new STB powers.

With the well-being of taxpayers, consumers, and the overall economy in mind, National Taxpayers Union offers the following recommendations to policymakers, many of which have been drawn from our experience and comments to Congress as well as STB.

Avoid the Wrong Takeaways on Strike Threat

Little else Washington does around freight rail policy would matter if a prolonged strike of some 115,000 workers creates severe supply ripples throughout the economy. At the time of this writing, the Biden administration had announced that a tentative agreement had been reached between railroad and labor representatives to avoid this situation, though the outcome was not assured.

Prior to the news of the tentative deal, ominous warnings of strike consequences were already appearing, with Amtrak canceling some long-term route services to avoid stranded passengers on lines they share with freight rail. Of much greater importance was the suspension of shipment on freight lines for certain materials classified as hazardous. These materials can often be part of the chemical manufacturing process, which impacts all manner of manufacturing industries.

Now Washington is breathing a collective sigh of relief that an apparent squabble over time-off benefits has been resolved, freight can keep flowing on the rails, and all is well again. It would be a mistake, however, to simply declare "crisis over" and move on. There are important takeaways that policymakers should bear in mind for the future when the core issues behind this labor dispute may surface somewhere else.

For one, the negotiation process need not have reached such a contentious point. In mid-June, the federally sanctioned National Mediation Board declared an end to its attempts to reach a settlement amongst the twelve labor organizations (dominated by two large unions) on a new rail contract, prompting a one-month "cooling off" period and appointment of a Presidential Emergency Board (PEB) to continue negotiations through September 15. Although ten of the twelve unions have agreed to a contract framework, the two largest holdouts remain adamant about issues surrounding sick leave for their workers. This concern, in an era of mutating COVID strains and other health matters, is valid; yet the PEB, empaneled by the labor-friendly Biden Administration, has pointed out that such bargaining details should never have escalated to this point in the process. As PEB's mandated [124-page report](#) notes:

The Board appreciates how deeply the Organizations and the membership feel about the manner in which the Carriers are applying their attendance policies. Disputes over those issues, however, are best resolved in the grievance and arbitration process, not by an overly broad and very costly proposal that would create 15 paid days a year that, while nominally labeled as sick leave days, would be structured to be used on demand as a means of permitting employees to better balance work-life needs and would effectively be personal days that could not be denied for any reason by the Carriers.

Although its report is not binding on either the railroads or the unions, PEB's respected arbitrators recommended a generous compensation package, retroactive to 2020 and continuing through 2024. It includes total pay increases of 22 percent, with \$1,000 bonuses each year (among other adjustments putting the average annual compensation and benefit total for rail workers above \$150,000). Remaining issues, such as whether "sick days" are actually counted as "personal days" under human resources policy, could and should have been worked out according to PEB's prescription.

Should the last-minute accord fall apart—and there is a chance it could—policymakers should be ready to immediately invoke safeguards against a crippling strike. This could mean direct Congressional intervention, binding arbitration, or declaration of yet another "cooling off" period.

Even if these options prove unnecessary in this case, it is important to mark for the future the high degree of unity among both rail carriers and their customers—not always the most amicable of parties—to avoid a strike. As just one of many rail shipping concerns, the National Grain and Feed Association, recently [pointed out](#), "[t]he economic damages across the food and agricultural supply chain would be swift and severe" from a strike. Taxpayers would concur. Under a strike situation, many fiscal impacts could manifest themselves, including strain on roads from more trucks, more unemployment benefits to laid-off workers down the supply chain, and of course lower revenues due to economic slowdowns. Our nation should never have to confront these stresses when they are readily avoidable.

Reauthorize STB Thoughtfully

The Surface Transportation Board's 2022 reauthorization, which has been a topic in hearings this year, has highlighted surprising and not-so-surprising developments. A mixture of both qualities appeared in the candid comments from STB's Chairman Martin J. Oberman to lawmakers at a May hearing before the House Transportation and Infrastructure Committee. While quick to offer [his assessment](#) that "the problems in the railroad industry are self-inflicted," Oberman also sounded some words of caution over suggestions by Committee Chair Peter DeFazio (D-OR) that STB move more quickly on restrictive common carrier regulations that would impose additional service and price obligations on railroads.

Although he welcomed collaboration with the Committee on such language, Chairman Oberman described the challenges of developing new regulations that would survive constitutional muster while being sufficiently applicable. Furthermore, he specifically stated in his [testimony to the Committee](#) that "the Board presently has sufficient appropriations to carry out its mission." He also said, "while the problems facing the rail industry today are significant, in my view, the Board can use its existing authority to mitigate those problems in a meaningful way."

Two topics at the hearing might be all too familiar to taxpayers. The first is that workforce reductions by railroads in the years prior to the pandemic led to labor shortages that are contributing to service slowdowns today. Regardless of how contributory this factor is to present supply chain woes, such actions are commonplace across many supply chain industries – not only among carriers, but also shippers. The "[just in time](#)" delivery concept, for example, requires extremely diligent adjustments to a company's labor force and service to keep prices at levels that consumers demand, similar to the [precision scheduled railroading](#) concept employed for freight rail. Chairman Oberman's call for greater redundancy in rail labor capacity may have currency in hindsight, but being answerable to the demands of the marketplace, private companies have fewer options for keeping extra staff on hand than taxpayer-funded agencies do.

A second argument, that Class I railroads inappropriately engaged in stock buybacks instead of building capacity, has far less currency. Long a [talking point of the political left](#) in justifying tax hikes and other punitive measures, stock buybacks are natural economic reactions to investment conditions at a given time. Andrew Wilford, a Director at NTU's research arm, [explained](#):

Stock buybacks are better analogized as a corporation putting spare cash into its savings account. It is true that by reducing the amount of shares owned by stockholders, corporate

stock buybacks increase share values. But they also give corporations flexibility to raise cash in the future should opportunities for productive investments become available.

And there's strong evidence that corporations only engage in share buybacks when all other opportunities for productive investments are exhausted. Despite progressive claims that corporations are rewarding shareholders instead of investing, there's simply no evidence of any connection between increases in share buybacks and decreased economy-wide investment. In short, corporations are taking the revenue left over after making all available productive investments and saving it for later.

Benefits to stock price values also provide more benefits to the average American than one might think. In 2016, 52 percent of Americans owned stock either directly or through a retirement account, mutual fund, or pension.

Fortunately, even Chairman Oberman wondered if stock buyback complaints were out of STB's and the Committee's depth, remarking that "[t]o me the way to go is to change the incentives and not try to micromanage how they operate the actual railroad."

From a taxpayer's perspective, political detours such as these do not serve STB reauthorization well. What does? NTU has previously provided lawmakers with guidance² toward this end; namely, reauthorization language could direct STB to:

- Examine why the voluntary arbitration procedures established for STB (and refined in subsequent reauthorizations) continue to be underutilized.
- Establish, at the "working level," an ongoing dialogue among stakeholders on the type of information-gathering for rate dispute procedures that can be commonly acknowledged for large numbers of cases. This could be achieved by adapting the Internal Revenue Service's own "job aid" process.
- Form a "rail advocate" office, housed at the Department of Transportation level, patterned after the Small Business Administration Office of Advocacy. Standing apart from and outside the Railroad-Shipper Transportation Advisory Council, this entity could establish, with feedback from the public and private sectors, a knowledge base of the practical regulatory considerations across the spectrum of government that affect all private entities with an interest in rail's future. The results will be useful in a number of applications, from gaining a better appreciation of how STB's rulemaking interconnects with other regulations, to providing clearer rules of the road as to what should be evidential in all types of rate cases.

These steps should be viewed as a way to keep STB's own reauthorization bill relatively "clean," for reasons described below.

Be Cautious and Build Consensus on Any Recent Legislation or Rulemakings

Rather than pursuing a more conventional and measured approach to STB reauthorization, Transportation Subcommittee on Railroads, Pipelines, and Hazardous Materials Chair Donald Payne (D-NJ), joined by Chairman DeFazio, recently initiated a legislative push for a bill known as the Freight Rail Shipping Fair Market Act (H.R. 8649). They believe that their bill can address urgent service shortfalls in the freight rail system.

Fiscal conservatives in Congress should be wary about both the short- and long-term effects of this bill, which combines reauthorization with controversial new powers for STB. Provisions include effectively

² See National Taxpayers Union Comments to the Subcommittee on Railroads, Pipelines, and Hazardous Materials, Committee on Transportation and Infrastructure, U.S. House of Representatives, "Hearing: Board Member Views on Surface Transportation Board Reauthorization," May 12, 2022.

writing minimum common carriage (freight service) standards into contract law for STB to oversee (with attendant fines) and providing STB with service emergency designation authority that would include imposition of price caps. How these new prerogatives would affect any industry's decision to invest more in its infrastructure ought to be thoroughly explored.

Assuming H.R. 8649 could get through the Senate, as well as any resolution of differences between the two chambers by the end of a rapidly dwindling legislative year, the question remains of whether the bill could meaningfully address major concerns of rail customers more productively than what STB has planned. From a taxpayer standpoint, serious circumspection is needed to avoid both regulatory and legislative outcomes that could prove counterproductive.

For example, STB has already mandated, over the objections of some, greater data collection from railroads on their service performance from several angles (e.g., "first mile/last mile" measurements) that may or may not reveal shippers' concerns over key performance metrics being missed. The point is, the effort is well underway and, according to Chairman Oberman, appears to be proceeding as planned. Legislative intervention is not necessary at this time and might be counterproductive if STB's actual experience requires adjustments to the data collection strategy going forward.

Furthermore, STB has noted that it is nearing a final decision on a rule that could allow reciprocal switching (what opponents call "forced access") in certain cases where a rail customer faces higher prices or slower service provided by a single carrier.

NTU has discussed³ the hurdles that the reciprocal switching concept would have in translation to a practical application. If, for example, future decisions involving reciprocal switching create fluctuations in demand for other modes of freight transportation – such as businesses being more inclined to ship their products over roadways – would there be a long-term effect on often-fluid Highway Trust Fund finances? How would other road users and the general taxpaying public be impacted as a result?

In a reciprocal switching environment, STB would also need to account for whether its decisions would have an impact on reliability of commuter and passenger service. If passenger rail users were to seek different modes of transportation for travel, another decline in ridership – or a prolonged level of depressed ridership – could clearly harm revenues of commuter rail agencies that are already struggling to be in the black.

In fact, these concerns were presented in recent comments to the Board by commuter rail operators in California, where they noted this rule "would risk the progress we have made as a state and nation in sustainable passenger rail infrastructure investments and add unneeded complexity to passenger railroad operations."⁴ As NTU can attest, one political response to decreasing ridership or routes that become less economical has often been to increase taxpayer subsidies for passenger rail operations.

Nonetheless, other upcoming rule finalizations at STB could, if properly structured, offer the promising policy environment that the Staggers Act originally envisioned: an economically vibrant freight rail system whose competitiveness likewise benefits its customers. Based on its experience in designing pro-taxpayer grievance procedures when interacting with the IRS, NTU provided extensive comments⁵ on proposals for Final Offer Rate Review (FORR) and Alternative Dispute Resolution (ADR). The latter offers the prospect of an enhanced arbitration system that is voluntary to enter but ultimately binding.

This structure could not only avoid reliance on schemes with much greater potential for harm to consumers and taxpayers (e.g., reciprocal switching), it could also foster confidence among all actors in the sector that disputes need not be hopelessly adversarial.

³ See, for example, <https://www.ntu.org/publications/detail/ntu-offers-comments-to-the-surface-transportation-board-on-reciprocal-switching>; and <https://www.ntu.org/publications/detail/biden-executive-order-on-markets-raises-big-concerns-over-rail-competition>.

⁴ Ibid.

⁵ See <https://www.ntu.org/publications/detail/letter-to-stb-railroad-infrastructure-must-work-for-taxpayers>. For broader discussion from NTU on related issues concerning revenue adequacy and other calculations driving rate proceedings, see <https://www.ntu.org/publications/detail/letter-to-stb-railroad-infrastructure-must-work-for-taxpayers>.

No parties to an arbitration process are thrilled at the lack of certainty over outcomes; yet, over time, the process itself becomes institutionalized as those outcomes show a basis on the merits of each case. Accepting Chairman Oberman's recent comment that STB does not suffer from "polarization and tribalism," the Board should be capable of designing FORR and ADR plans that are fair and impartial. Congress should provide the time and space for both FORR and ADR proposals to be issued, after which all stakeholders (including taxpayers) can offer their final assessment.

H.R. 8649 may have a few new elements with merit, among them the creation of a Passenger- Freight Rail Transportation Advisory Council. While the structure may need to be modified from current legislation's approach, one major concern for taxpayers has been the hidden cost that the passenger rail schemes they already directly subsidize. For example, when STB grants Amtrak's trains priority right-of-way on privately maintained freight rail tracks, scheduling and other delays could impose downstream expenses on freight railroads, shippers, small businesses, and consumers. The Council would have to be properly constituted to confront issues like these and avoid favoritism to an already heavily-taxpayer-subsidized passenger rail sector.

One especially crucial point in H.R. 8649 that should not escape discussion is contained in Section 103 of the bill, which states 17 principles – good and bad from the taxpayer's view – on federal rail policy. Sitting squarely in the "good" category is "8) to reduce regulatory barriers to entry into and exit from the industry."

Many commentators would consider those barriers to be considerable, ranging from environmental permitting constraints against expanding track, to crew-size minimums (see below). In NTU's eye, a major, often undiscussed barrier to mobility within rail is the Tax Code itself.

The full Committee on Transportation and Infrastructure certainly has a major voice in how taxes are levied for the Highway Trust Fund – an issue whose urgency has [only been delayed](#) a few years by a \$118 billion general fund cash infusion through the Infrastructure Investment and Jobs Act (IIJA). Furthermore, last year the Committee and its counterpart in the Senate had a leading role in the development of Superfund excise tax increases that offset part of IIJA – which directly (and negatively) impacted some of the largest customers of freight rail.⁶

There are other taxes affecting both railroads and shippers whose incidence can dramatically affect the economics of the rail sector. For example, short line and regional railroads were recently buoyed by the Consolidated Appropriations Act of 2021, which made permanent the Section 45G federal tax credit for track maintenance. However, even though the credit is embedded in statute, the law calls for a reduction in its value from 50 percent this year to 40 percent in 2023. The less generous credit will cause short line and regional railroads to make financial adjustments to their operations. What could be the impact of STB's decisions on these business plans?

More broadly, railroads and shippers could soon be affected by the January 31, 2022 expiration of changes made by the Tax Cuts and Jobs Act (TCJA) of 2017 to Sections 163(j) and 174.⁷ Unless these sections – affecting limits on businesses' interest tax deductions and full expensing for research and development costs – are addressed before the year ends, many industrial sectors could be hit with higher tax bills at a particularly sensitive point in the nation's economic trajectory.

In so many areas of the economy – health care, energy, and financial services, and railroads – no one agency is a regulatory island. Yet, they too often act without sufficient appreciation of this fact. Congress and STB can work together to ensure this sufficient appreciation is reflected in more policy decisions.

⁶ See NTU-led coalition letter at <https://www.ntu.org/publications/detail/coalition-opposes-business-tax-hike-included-in-senate-infrastructure-bill>.

⁷ See NTU analysis at <https://www.ntu.org/publications/detail/not-all-tax-extendors-are-created-equal-2021>.

In the rulemakings category, all policymakers should be wary of Federal Railroad Administration (FRA) actions regarding automated track inspection as well as a proposal to mandate crew-size requirements on freight trains. These stunning turnabouts from FRA, which had previously endorsed automated track inspection and (barely three years ago) saw no safety connection to larger crew sizes, likewise contain threats to taxpayers. An [NTU analysis](#) from June 17 observed:

FRA's edicts create burdens on rail carriers that raise overhead costs ... thereby potentially affecting the shipping rates with which STB, more of an economic than a safety regulator, is concerned. Shipping rates, in turn, impact supply chain economics and the financial stability of both railroads and shippers – raising concerns among taxpayers that they could be on the hook if this sector's health declines. Such is also case with FRA's recent move to propose a new rule mandating minimum crew sizes on trains. Here again, the added labor costs from this dictate would be passed along to shippers and their customers. Or, equally troubling, these higher costs could artificially shift shipping decisions to favor other transportation modes, creating additional economic and fiscal repercussions.

A public comment period of FRA's crew size rulemaking will close later this month, leaving a great deal of speculation over the agency's next moves. Given detractors' accusations that the rail industry created its own labor shortage (see above), it seems all the more bizarre that federal policy through FRA could arbitrarily worsen the situation, whatever its initial underlying causes.

Conclusion

The commentary presented here provides only a beginning to necessary discussions about STB, the Staggers Act, infrastructure policy, and the impact of government on the rail economy. Through them all, taxpayers deserve a seat at the table, especially on reforms that fiscal conservatives in Congress should be championing right now. These include open competition for materials, greater usage of Life Cycle Cost Analysis, and addressing problematic "Buy American" rules.⁸ Billions in taxes, government spending, and regulatory burdens are at stake, and smart policy should take them into account first rather than last.

About the Author

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⁸ See, e.g., <https://www.ntu.org/library/doclib/2021/05/L21-05-25-NTU-Letter-on-Surface-Transportation-Reauthorization-EPW-Markup.pdf>.



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