

**BEFORE THE SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35964**

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**AMERICAN CHEMISTRY COUNCIL, THE CHLORINE INSTITUTE,  
AND THE FERTILIZER INSTITUTE  
– PETITION FOR DECLARATORY ORDER –  
POSITIVE TRAIN CONTROL**

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**REPLY OF THE ASSOCIATION OF AMERICAN RAILROADS**

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## EXHIBITS

- Exhibit 1                   Memorandum in Support of Defendants' Motion to Dismiss, *American Chemistry Council et al. v. CSX Transp. et al.*, No. 1:15-cv-01584 (D.D.C. Oct. 19, 2015) (ECF No. 37-1).
- Exhibit 2                   *Nomination of Sarah Feinberg Before the Senate Comm. on Commerce, Science, and Transportation, 114th Cong. (2015)* (Statement of Sarah Feinberg, Acting Administrator, FRA).
- Exhibit 3                   Oral Argument Tr., *Chlorine Institute, Inc. v. FRA*, 718 F.3d 922 (D.C. Cir. 2013).
- Exhibit 4                   AAR, *Positive Train Control* (Aug. 2015).
- Exhibit 5                   AAR, *PTC Implementation: The Railroad Industry Cannot Install PTC on the Entire Nationwide Network by the 2015 Deadline* (April 15, 2015).
- Exhibit 6                   Chlorine Institute Brief, *Chlorine Institute, Inc. v. FRA*, 718 F.3d 922 (D.C. Cir. 2013).

## GLOSSARY

AAR	Association of American Railroads
CAB	Civil Aeronautics Board
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
FRA	Federal Railroad Administration
<i>FRA 2012</i>	Federal Railroad Administration, <i>Positive Train Control Implementation Status, Issues, and Impacts</i> (Aug. 2012) available at <a href="https://www.fra.dot.gov/eLib/details/L03718">https://www.fra.dot.gov/eLib/details/L03718</a>
<i>FRA 2015</i>	Federal Railroad Administration, <i>Status of Positive Train Control</i> (Aug. 2015) available at <a href="https://www.fra.dot.gov/eLib/details/L16962">https://www.fra.dot.gov/eLib/details/L16962</a>
GAO	Government Accountability Office
<i>GAO 2013</i>	U.S. Govt. Accountability Office, GAO-13-720, <i>Positive Train Control: Additional Authority Could Benefit Implementation</i> (Aug. 2013) available at <a href="http://gao.gov/assets/660/656975.pdf">http://gao.gov/assets/660/656975.pdf</a>
<i>GAO 2015</i>	U.S. Govt. Accountability Office, GAO-15-739, <i>Positive Train Control: Additional Oversight Needed As Most Railroads Do Not Expect to Meet 2015 Implementation Deadline</i> (Sept. 2015), available at <a href="http://gao.gov/assets/680/672320.pdf">http://gao.gov/assets/680/672320.pdf</a>
Petitioners	Petitioners American Chemistry Council, The Chlorine Institute, and The Fertilizer Institute
PTC	Positive Train Control
RSIA	Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4854 (Oct. 16, 2008).
TIH materials	Toxic-by-inhalation and Poisonous-by-inhalation materials

The Association of American Railroads (“AAR”) respectfully submits this Reply to the Petition for Declaratory Order (“Petition”) filed on September 30, 2015, by the American Chemistry Council, The Chlorine Institute, and The Fertilizer Institute (collectively, “Petitioners”). In particular, this Reply is expressly joined and supported by BNSF Railway Company, Canadian National Railway Company, CSX Transportation, Inc., The Kansas City Southern Railway Company, Norfolk Southern Railway Company, Soo Line Railroad Company d/b/a/ Canadian Pacific, Union Pacific Railroad Company, and all rail carrier affiliates and subsidiaries of those railroads that are subject to the Positive Train Control (“PTC”) law.

Petitioners ask the Board to declare that the freight railroads must continue to transport toxic-by-inhalation (“TIH”) materials after December 31, 2015, even if doing so would place the railroads and their employees in direct violation of federal safety law.<sup>1</sup> But the common carrier obligation to provide service on reasonable request does not require a railroad and its employees to break the law in order to serve a customer. On the contrary, it is unreasonable to request that a railroad and its employees transport TIH materials in violation of federal safety law. The Board therefore should deny the Petition.

### **EXECUTIVE SUMMARY**

The railroad industry and its customers have been placed in an untenable situation that requires a legislative solution. In the Rail Safety Improvement Act of 2008, Congress directed railroads to develop and install undeveloped PTC technology over tens of thousands of miles of track that carry TIH materials or that host passenger trains by the end of 2015.<sup>2</sup> Congress believed that PTC would reduce the risk of passenger

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<sup>1</sup> Toxic-by-inhalation materials and poisonous-by-inhalation materials collectively are referred to herein as “TIH materials.”

<sup>2</sup> Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4854 (Oct. 16, 2008) (“RSIA”).

accidents and accidents involving the release of TIH materials. But the technology did not exist, and railroads have faced extraordinary obstacles in developing and installing PTC. These obstacles include technological and logistical challenges, as well as unanticipated regulatory barriers that forced the industry through a maze of tangled federal approvals and consumed precious time. Indeed, the final rules for identifying the lines on which PTC must be installed were not published until 2014.<sup>3</sup> In the end, the statutory deadline was unrealistic, and the statute gave federal regulators no discretion to extend the deadline.

Despite the many obstacles, railroads have – in the words of the Federal Railroad Administration’s (“FRA’s”) Acting Administrator – worked “diligently” to develop and install this new safety technology.<sup>4</sup> They already have spent over \$5 billion dollars and devoted millions of hours to the effort. But railroads could not achieve the impossible, and there is no question that the industry will not meet the deadline. All stakeholders agree that the only solution is for Congress to extend the unrealistic deadline it imposed and to do so as soon as possible. To its credit, Congress appears poised to act on pending legislation that would moot this entire controversy – but as of the date of this filing, no extension has been passed.

Unless Congress acts first, the Board will have to decide the question presented by the Petition.<sup>5</sup> At its core, the Petition requires the Board to determine whether the

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<sup>3</sup> See 79 Fed. Reg. 49693 (Aug. 22, 2014).

<sup>4</sup> *Rail and Pipeline Oversight Before the Subcomm. on Railroads, Pipelines, and Hazardous Materials of the H. Comm. on Transp. and Infrastructure*, 114th Cong. (2015) (Statement of Sarah Feinberg, Acting Administrator, FRA), available at <http://transportation.house.gov/uploadedfiles/2015-04-14-feinberg.pdf> (“Although the railroads subject to the mandate are working diligently towards implementation of PTC systems, FRA is concerned that the vast majority of these railroads will not be able to meet the deadline.”).

<sup>5</sup> A day before their filing with the Board, Petitioners also filed a nearly identical complaint and request for a preliminary injunction in the United States District Court for the District of Columbia. See Compl. for Declaratory and Injunctive Relief &

common carrier obligation requires a railroad to transport TIH materials when providing such service would force the railroad and its employees to violate federal safety law. The answer is “No.” As the D.C. Circuit has explained, the obligation to transport goods under the common carrier obligation “must fall within the outer perimeters of safety marked out by” the pertinent federal safety agency. *Delta Air Lines, Inc. v. Civil Aeronautics Bd.*, 543 F.2d 247, 252 (D.C. Cir. 1976) (emphasis added).

It is axiomatic that the common carrier obligation is not absolute; rather, it only requires railroads to provide transportation in response to a reasonable request. Here, Petitioners’ request is unreasonable because it is predicated on a demand that a railroad transport TIH materials in violation of federal safety law. Indeed, Petitioners’ request is analogous to many other circumstances in which the common carrier obligation does not require a railroad to provide transportation. For example, railroads do not have a common carrier obligation to carry illegal contraband; to violate federal routing protocols and speed restrictions; or to accept loads that are tendered in railcars that violate minimum federal safety standards. The unifying theme is compelling and undeniable – it is necessarily unreasonable to ask a railroad to violate federal safety laws.

Petitioners do not deny that it would be unreasonable to request that a railroad transport TIH materials in violation of federal safety law. Instead, Petitioners claim that

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Application of Plaintiffs American Chemistry Council *et al.* for Preliminary Injunction, *American Chemistry Council et al. v. CSX Transp. et al.*, No. 1:15-cv-01584, ECF No. 1 & 5 (D.D.C. filed Sept. 29, 2015). Nonetheless, as the named railroad defendants have argued in their recently filed Motion to Dismiss in that forum, this dispute is properly resolved by the STB, rather than in federal court, because the STB has exclusive authority to address a request for injunctive or declaratory relief under the regulatory regime it administers, and because the issues here are properly reserved to the STB’s primary jurisdiction. *See* Defendants’ Memorandum in Support of Mot. to Dismiss at 16-24, *American Chemistry Council et al. v. CSX Transp. et al.*, No. 1:15-cv-01584, ECF No. 37.1 (D.D.C. Oct. 19, 2015) (Ex. 1).

“fulfillment of a request for TIH transportation over a main line not equipped with PTC does not require a Class I railroad to violate the law or subject it to civil penalties.” Pet. at 10. But that premise is demonstrably false. FRA’s PTC regulations make clear that a railroad that is not in compliance with the PTC law would violate multiple penalty provisions by transporting TIH materials after December 31, 2015. *See* 49 C.F.R. Part 236, App. A, Subpart 1. And FRA has made clear that it intends to fine railroads that “choose to operate” after December 31, 2015, without PTC.<sup>6</sup>

AAR is keenly aware of the need for swift congressional action to solve the current problem. AAR does not contest that the safe and secure transportation of TIH materials is important to the nation’s economy.<sup>7</sup> But while Petitioners are correct that congressional inaction could lead to significant economic harm, they are asking the Board to ignore the law and take matters into its own hands. Petitioners are asking the Board to order railroads to violate federal safety requirements and by implication to ask their employees to operate in violation of those safety requirements. The Board should apply the law it is charged with administering and rule that a request to transport TIH materials in violation of federal safety law is not reasonable.

Indeed, one Petitioner previously has conceded that a request to transport TIH materials in violation of the PTC law would not be a reasonable request. In oral argument in *Chlorine Institute, Inc. v. FRA*, 718 F.3d 922 (D.C. Cir. 2013), one of the Chlorine Institute’s counsel in this proceeding told the Court: “I submit to you, Your

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<sup>6</sup> *See, e.g.,* *Nomination of Sarah Feinberg Before the Senate Comm. on Commerce, Science, and Transportation*, 114th Cong., at 9 (2015) (Statement of Sarah Feinberg, Acting Administrator, FRA) (Ex. 2) (“[O]n January 1st, [2016,] if railroads that have not implemented PTC choose to operate, we will take enforcement actions.”); *id.* at 14 (“[W]e believe the fines will be significant. Each violation has a maximum fine of \$25,000 per day.”) (hereinafter “Feinberg Tr.”).

<sup>7</sup> While AAR’s members have acknowledged that the consequences of a failure to extend the PTC deadline would be significant, the railroads do not concede that there is no alternative transportation for many of the commodities that might be affected.

Honor, that if I were to go and ask the STB to order a railroad to provide service over track that is not PTC equipped in violation of federal law, that would not be a reasonable . . . request.”<sup>8</sup> Counsel went on to acknowledge: “I do not think it would be considered reasonable to say I want you to violate this federal statute.”<sup>9</sup> AAR agrees entirely.

Accordingly, consistent with the well-established principles explained below, the STB should deny this Petition and find that it would be unreasonable to ask a railroad and its employees to transport TIH materials in violation of federal safety law.

## BACKGROUND

### 1. Congress Adopted A PTC Law With A Deadline That Proved To Be Unattainable.

The PTC deadline is the product of legislation that made unattainable technological and logistical demands on the rail industry. On September 12, 2008, a Metrolink commuter train in Los Angeles ran a red signal and crashed head-on into a freight train that had been given the right-of-way by the dispatcher.<sup>10</sup> Twenty-five people were killed and 135 were injured.<sup>11</sup> In the wake of this tragedy, Congress passed the RSIA, which required the railroads to develop and install PTC technology on main lines used to transport TIH materials and on main lines over which intercity rail or commuter rail passenger transportation is regularly provided.<sup>12</sup>

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<sup>8</sup> *See id.*, Oral Argument Tr. at 7 (Ex. 3).

<sup>9</sup> *Id.* at 8-9.

<sup>10</sup> *See* National Transportation Safety Board, *Collision of Metrolink Train 111 with Union Pacific Train LOF65-12*, Accident Report NTSB/RAR-10/01, at vii, available at <http://www.nts.gov/investigations/AccidentReports/Reports/RAR1001.pdf>.

<sup>11</sup> *See id.*

<sup>12</sup> 49 U.S.C. § 20157(a)(1)(A)-(B). For purposes of this proceeding, the AAR assumes that the RSIA is a valid law – as the Board must also do. Nothing herein waives the right of AAR or any of its members to contest the validity of any aspect of the RSIA in a separate forum.

PTC is “a computer-based technology that uses a communications system to monitor and control train movements to minimize human factor errors.”<sup>13</sup> As the Government Accountability Office (“GAO”) has explained:

PTC’s communications-based system links various components, namely locomotive computers, wayside units along the side of the track, and dispatch systems in centralized office locations []. Through these components, PTC is able to communicate a train’s location, speed restrictions, and movement authorities, and can slow or stop a train that is not being operated safely.<sup>14</sup>

The RSIA created rigid deadlines for PTC implementation. Railroads were required to submit implementation plans to FRA within eighteen months, and PTC was required to be fully implemented by December 31, 2015.<sup>15</sup> The RSIA authorized the Secretary of Transportation to “assess civil penalties pursuant to chapter 213 for a violation of this section.”<sup>16</sup>

FRA promulgated rules governing PTC implementation in January 2010, which were later amended in May 2012, and again in August 2014.<sup>17</sup> FRA’s regulations set forth penalties for noncompliance, including multiple penalties for operations conducted in violation of the PTC law.<sup>18</sup>

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<sup>13</sup> U.S. Govt. Accountability Office, GAO-13-720, *Positive Train Control: Additional Authority Could Benefit Implementation* at 7 (Aug. 2013) (“GAO 2013”).

<sup>14</sup> *Id.* at 7-8.

<sup>15</sup> 49 U.S.C. § 20157(c). The RSIA was signed into law on October 16, 2008. Implementation plans were due on April 16, 2010. *See id.* § 20157(a)(1).

<sup>16</sup> *Id.* § 20157(e).

<sup>17</sup> *See* 75 Fed. Reg. 2598 (Jan. 15, 2010); 77 Fed. Reg. 28285 (May 14, 2012); 79 Fed. Reg. 49693 (Aug. 22, 2014).

<sup>18</sup> *See* 75 Fed. Reg. 2598, 2716 (Jan. 15, 2010), *codified at* 49 C.F.R. Part 236 Appendix A.

## 2. Railroads Have Worked Diligently To Develop And Implement PTC.

Developing and implementing PTC has proven to be an unprecedented technological challenge.<sup>19</sup> The technological challenge of developing the software and equipment necessary for PTC have been exacerbated by other logistical challenges and even by regulatory stumbling blocks posed by other federal regulations. In an effort to meet these enormous challenges, railroads have made an extraordinary investment in time and resources.

PTC is not a simple, off-the-shelf product; it is an interlocking set of programs and equipment that must be able to communicate with each other seamlessly if PTC is to function safely and effectively.<sup>20</sup> Locomotives must be upgraded to transmit and receive wireless information; wayside interface units must be installed to transmit information from signals and switches; and back office equipment and software must be developed to receive and process data from the field. All systems must be installed, tested, and functional for PTC to work.<sup>21</sup>

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<sup>19</sup> See AAR, *Positive Train Control*, at 2 (Ex. 4).

<sup>20</sup> As GAO detailed in a recent report, a functioning PTC apparatus requires multiple interlocking components to work together smoothly, including the following: (1) Back office server; (2) Security application for message integrity; (3) Locomotive messaging system to route messages off the locomotive; (4) Train management computer; (5) Interoperable train control messaging system; (6) GPS sensors onboard the locomotive; (7) Interoperable electronic train management system software; (8) Radio for base station communication; (9) Crash hardened memory module onboard the locomotive; (10) Authentication systems to verify users; (11) Data radio for locomotive communication and for switch and signal communication; (12) Onboard network devices for communications; (13) Track database of over 200 characteristics of track and trackside assets; (14) Communication switching network for interoperable back office communication; (15) Switch position monitors; (16) Interface and enhancements to the dispatch system; (17) Computer display units for onboard the locomotive; and (18) Integrated and stand-alone wayside interface units. *GAO 2015* at 5.

<sup>21</sup> *Id.* at 14 (“successful PTC implementation will require numerous components to work together, many of which are first-generation technologies being designed and developed for PTC”).

The challenges are all the greater because each railroad is developing and implementing its own PTC system but Congress required that PTC systems be “interoperabl[e],” such that a railroad’s PTC system can communicate with and control both that railroad’s locomotives and the locomotives of other railroads operating on its tracks. 49 U.S.C. § 20157(a)(2), (i)(1). The U.S. rail network is highly interconnected, and thousands of locomotives regularly operate over the tracks of other railroads. For PTC to be fully and seamlessly interoperable, all of these “guest” locomotives operating on another railroad’s track must be able to communicate with the “host” railroad’s PTC system, and they must be able to respond to commands from the “host” PTC system.<sup>22</sup> Substantial work has been necessary to develop interoperability standards and to ensure that software and equipment will be fully and seamlessly connected. Developing interoperable PTC systems is thus far more difficult than it would be to develop a single stand-alone system.

Moreover, implementing PTC is not simply a matter of creating and deploying technology. For PTC to function, railroads must perform a complete physical survey and highly precise geo-mapping of the more than 82,000 track-miles (60,000 route-miles) on which PTC will be implemented, including geo-mapping of nearly 460,000 field assets along the right-of-way (*e.g.*, mileposts, curves, grade crossing, switches, and signals). Similarly, wireless radio spectrum for the transmission of PTC data had to be acquired.<sup>23</sup> Railroads were required to obtain spectrum on the secondary market and four Class I railroads created a consortium, PTC 220 LLC, for that purpose, which was later joined by the remaining Class I carriers.<sup>24</sup>

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<sup>22</sup> AAR, *Positive Train Control*, at 3 (Ex. 4).

<sup>23</sup> See *FRA 2012* at 15.

<sup>24</sup> *Id.* at 16.

The challenges created by the RSIA were therefore immense and unprecedented. FRA has observed that “PTC implementation, on the scale required by the RSIA, has never been attempted anywhere in the world.” *FRA 2012* at 2.

Nevertheless, the railroads have committed themselves to meeting these challenges and have made demonstrable progress. As of April 2015, railroads had invested over \$5 billion and devoted millions of man-hours to the deployment of PTC.<sup>25</sup> But more time is needed for railroads to complete this massive undertaking. By the end of 2015, AAR projects that 39% of locomotives will be fully equipped; 76% of wayside interface units will be installed; 67% of base station radios will be installed; and 34% of required employees will be trained.<sup>26</sup>

### **3. Technical, Logistical, And Regulatory Obstacles Have Made It Impossible For Railroads To Implement PTC By December 31, 2015.**

In spite of the efforts by AAR’s member railroads, implementation of interoperable PTC systems by December 31, 2015, is simply impossible.<sup>27</sup> FRA and GAO have recognized this fact and have cited many factors beyond the railroads’ control as reasons why the statutory deadline is unattainable.

FRA has recognized for several years that the statutory deadline is beyond reach. In 2012, it concluded that “the majority of railroads will not be able to complete PTC

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<sup>25</sup> AAR, *PTC Implementation: The Railroad Industry Cannot Install PTC on the Entire Nationwide Network by the 2015 Deadline* at 13 (April 15, 2015) (Ex. 5); see also Attachment A, Table 10 (table of railroad investment levels through 2013).

<sup>26</sup> *Id.* at 9.

<sup>27</sup> *Rail and Pipeline Oversight Before the Subcomm. on Railroads, Pipelines, and Hazardous Materials of the H. Comm. on Transp. and Infrastructure*, 114th Cong. at 6 (2015) (Statement of Sarah Feinberg, Acting Administrator, FRA) (“Although the railroads subject to the mandate are working diligently towards implementation of PTC systems, FRA is concerned that the vast majority of these railroads will not be able to meet the deadline.”).

implementation by the 2015 deadline.”<sup>28</sup> In large part, FRA believed this inability was due to technical and programmatic obstacles that it recognized would not be solved in time to permit 2015 implementation.<sup>29</sup> FRA’s 2015 report repeated the concern, stating that the agency “has advised Congress that most railroads have not made sufficient progress to meet the December 2015 implementation deadline.”<sup>30</sup> FRA’s 2015 report also listed “ongoing challenges” experienced by the railroads, including lack of wireless spectrum availability; capacity of PTC supplies; and potential radio interference.<sup>31</sup>

GAO concurred with FRA’s 2012 assessment in a 2013 report, where it observed the difficulty of the railroads meeting the deadline:

We, along with the Federal Railroad Administration (FRA), have noted the challenges railroads face in implementing PTC by the 2015 deadline. In December 2010, we reported that much work remained for railroads to meet the 2015 implementation deadline. Likewise, in August 2012, FRA issued a report to Congress and concluded that, due to many obstacles, the majority of railroads will be unable to meet the deadline. Congress has considered, but has not passed, extensions to this deadline.<sup>32</sup>

GAO’s 2013 report focused on three major obstacles:

- (1) the need to develop and install PTC components, because some PTC components such as the new back office servers were still in development and some components required thousands of time-consuming installations;
- (2) system integration and field testing, which required multiple rounds of testing and the resolution of differences in results between laboratory and field testing; and

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<sup>28</sup> See FRA 2012 at 2.

<sup>29</sup> See *id.* at 1.

<sup>30</sup> FRA 2015 at 9.

<sup>31</sup> *Id.* at 6-7.

<sup>32</sup> See GAO 2013 at 2 (internal footnotes omitted).

- (3) constrained FRA resources which limited FRA's ability to verify field testing and approve safety plans, as required by law.<sup>33</sup>

More recently, in a 2015 report to Congress on PTC implementation, GAO again found that most "railroads report that they continue to face challenges and do not expect to meet the December 31, 2015, PTC implementation deadline."<sup>34</sup>

In addition, unanticipated regulatory obstacles have delayed PTC development and implementation and placed the RSIA deadline even farther outside the realm of possibility. In particular, GAO noted the significant delay caused by the Federal Communication Commission's ("FCC's") involvement in PTC deployment. After installing over 10,000 wayside poles, the railroads were ordered to halt work in May 2013 by the FCC, pending FCC action to develop a streamlined review process for PTC under the National Historic Preservation Act.<sup>35</sup> FRA has acknowledged that it "had not anticipated this issue."<sup>36</sup> Not until a year later, in May of 2014, did the FCC announce adoption of a process for review of PTC radio wayside poles that allowed the railroads to continue their installation work.<sup>37</sup> But even that process has required a pole-by-pole review of thousands of wayside poles. The resulting delays have been a major blow to the implementation efforts of all railroads.

In short, AAR's member railroads have worked, and continue to work, diligently to develop and implement PTC, and have spent billions of dollars in the effort. But it is not possible to implement fully functional PTC systems before the December 31, 2015, deadline set forth in the RSIA. After that date, therefore, railroads that transport TIH

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<sup>33</sup> See GAO 2013 at 19-20 (internal footnotes omitted).

<sup>34</sup> See GAO 2015 at 33.

<sup>35</sup> *Id.* at 20.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; Public Notice, *Wireless Telecommunications Bureau Announces Adoption of Program Comment to Govern Review of Positive Train Control Wayside Facilities*, WT Docket No. 13-240 (May 19, 2014).

materials on lines where PTC is required to be installed would be violating federal law.<sup>38</sup>

#### **4. Only Congress Can Correct The Problems Created By The PTC Law's Statutory Deadline.**

All rail stakeholders stand united in urging Congress to take action to extend the PTC deadline. The freight railroads, passenger railroads, and Amtrak support an extension.<sup>39</sup> A consortium of over 100 shipper associations has urged Congress to act by “pass[ing] legislation that will ensure that rail service will not be disrupted as a result of the PTC implementation deadline.”<sup>40</sup> Signatories to the letter were representatives of

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<sup>38</sup> Petitioners' contention that TIH transportation in the absence of PTC would somehow not violate the law flies in the face of both the text of FRA's regulation and FRA's clear statements that it would consider such conduct to be a violation. *See* Section I.C. below.

<sup>39</sup> *See, e.g.,* AAR, *Positive Train Control*, at 4 (Ex. 4) (“[R]ailroads support an extension of the statutory deadline for nationwide PTC installation to at least the end of 2018.”); Press Release, American Public Transportation Association, “APTA Says GAO Report Provides Further Evidence That Congress Should Act Now to Extend Positive Train Control Deadline” (Sept. 17, 2015) *available at* [http://www.apta.com/mediacenter/pressreleases/2015/Pages/150917\\_Positive-Train-Control.aspx](http://www.apta.com/mediacenter/pressreleases/2015/Pages/150917_Positive-Train-Control.aspx); Letter from MTA to Chairman Thune (Sept. 14, 2015) *available at* [http://www.commerce.senate.gov/public/\\_cache/files/ab291475-2127-40be-b07b-7a7da654da2a/B3CABF09902EEC755757C09900CCD394.mta-response-to-sen-thune.pdf](http://www.commerce.senate.gov/public/_cache/files/ab291475-2127-40be-b07b-7a7da654da2a/B3CABF09902EEC755757C09900CCD394.mta-response-to-sen-thune.pdf); Letter from Metra to Chairman Thune (Sept. 10, 2015) *available at* [http://www.commerce.senate.gov/public/\\_cache/files/6cb484e0-9ca9-4c8c-8b4f-83f9fa1c638d/2CDF0B3116203135B3E2D66DC704D685.metra-response-to-sen-thune.pdf](http://www.commerce.senate.gov/public/_cache/files/6cb484e0-9ca9-4c8c-8b4f-83f9fa1c638d/2CDF0B3116203135B3E2D66DC704D685.metra-response-to-sen-thune.pdf); Letter from VRE to Chairman Thune (Sept. 14, 2015) *available at* [http://www.commerce.senate.gov/public/\\_cache/files/b43a42bd-897f-46a3-89b2-71b71955b476/BFC53814B25AFBC611046201AC94E527.vre-response-to-sen-thune.pdf](http://www.commerce.senate.gov/public/_cache/files/b43a42bd-897f-46a3-89b2-71b71955b476/BFC53814B25AFBC611046201AC94E527.vre-response-to-sen-thune.pdf); Letter from Amtrak to Chairman Thune (Oct. 5, 2015) *available at* [http://www.commerce.senate.gov/public/\\_cache/files/c6ce9305-d1ac-47f6-a28c-b47af102dfa9/B9F3640B7EADD1161E35164BD0FF0041.amtrak-letter.pdf](http://www.commerce.senate.gov/public/_cache/files/c6ce9305-d1ac-47f6-a28c-b47af102dfa9/B9F3640B7EADD1161E35164BD0FF0041.amtrak-letter.pdf).

<sup>40</sup> *See* Letter from Shippers to Congress (Oct. 2, 2015) *available at* <http://www.americanchemistry.com/Policy/Rail-Transportation/Positive-Train-Control-PTC/Letter-From-Over-100-Trade-Associations-Urging-Congress-to-Extend-PTC.pdf>.

major sectors of the American economy, including the agricultural, manufacturing, retail, energy, and chemical industries. And both FRA and GAO have similarly urged Congress to extend the deadline.<sup>41</sup>

There are signs that Congress may act soon. The Senate passed a bill including provisions that would extend the PTC deadline.<sup>42</sup> Legislation that would extend the PTC deadline also has been approved by the House Transportation and Infrastructure Committee and the Railroads, Pipelines, and Hazardous Materials Subcommittee, and it is currently pending.<sup>43</sup> In the House, over 150 House members wrote a letter to the Speaker of the House and the Minority Leader asking that Congress act “to extend the upcoming PTC deadline.”<sup>44</sup> In addition, 43 Senators from both sides of the aisle wrote a letter to the Senate Majority and Minority Leaders asking that Congress “immediately” take action to extend the PTC deadline.<sup>45</sup> This issue is therefore in Congress’s hands, and there are strong indications that Congress is prepared to act.

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<sup>41</sup> *FRA 2012* at 50; *see also GAO 2015* at 23 (“In our 2013 report on PTC implementation, we suggested that Congress consider providing FRA with additional authority to extend the deadline on individual rail lines – when the need to do so can be demonstrated by the railroad and verified by FRA – on a case-by-case basis. We noted that given the uncertainties in implementing PTC and the unexpected delays already encountered by railroads, additional challenges could prevent railroads from meeting a new deadline. Thus, we concluded that providing FRA with the authority to grant extensions on a case-by-case basis would provide some needed flexibility and could also assist FRA in managing its limited staff resources and help railroads mitigate risks and ensure PTC is implemented in a safe and reliable manner. Congress has not yet provided such authority, and we continue to believe that such authority is needed.”).

<sup>42</sup> *See Developing a Reliable and Innovative Vision for the Economy (DRIVE) Act*, H.R. 22, 114th Cong. (passed by Senate July 30, 2015).

<sup>43</sup> *Surface Transportation Reauthorization and Reform Act of 2015*, Sec. 7014, H.R. 3763, 114th Cong. (introduced Oct. 20, 2015).

<sup>44</sup> Letter from House Members to House Leaders (Sept. 29, 2015) *available at* <http://static.politico.com/d1/34/bbac99ef4404bca0bd0e91ca3a6c/house-ptc-letter.pdf>.

<sup>45</sup> Letter from Senators to Senate Leaders (Sept. 30, 2015) *available at* <http://static.politico.com/ce/b4/24f4e06f47d888bd9f5785974068/bipartisan-senate-ptc-letter.pdf>.

The possibility of congressional inaction, however, offers no basis for the Board to exceed its authority or to ignore bedrock principles of common carrier law. The Board may not, and should not, re-write federal safety law – or declare that the general common carrier obligation somehow overrides that law – even if federal safety law poses an obstacle to certain rail service. The only issue for the Board to determine is whether carriers may refuse, as unreasonable, a request to transport TIH materials in violation of a federal safety law. As discussed below, the Board should find that any such refusal by a carrier would be reasonable.

### ARGUMENT

All railroads have a common carrier obligation to provide transportation on “reasonable request.” 49 U.S.C. § 11101(a). As the United States Supreme Court has recognized, the common carrier obligation “is not absolute, and the law exacts only what is reasonable of the railroads under the existing circumstances.” *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981) (internal quotation omitted); see also *Midland Valley R.R. v. Barkley*, 276 U.S. 482, 485 (1928) (“The law exacts only what is reasonable . . .”). In this case, Petitioners seek a declaration from the Board that a request to transport TIH material on non-PTC-compliant lines after the PTC deadline is nonetheless required by the common carrier obligation.

Such a request is unreasonable because it asks the railroads and their employees to violate federal safety law. The common carrier obligation imposes no such requirement on railroads or their employees. Rather, under fundamental principles of transportation law and the rulings of the Board, a common carrier’s duty to transport necessarily is bounded by the limits imposed by federal rail safety law. It would not be reasonable within the meaning of the regulatory scheme that the Board administers to require railroads to provide transportation that would violate a federal rail safety law.

**I. IT IS UNREASONABLE TO REQUEST A RAILROAD AND ITS EMPLOYEES TO VIOLATE A FEDERAL SAFETY LAW.**

**A. *It Is A Clear Violation Of Federal Safety Law To Transport TIH Materials Over Rail Lines That Must Be Compliant With The PTC Law.***

This case turns upon whether transporting TIH materials on lines and in trains that are not in compliance with the PTC law is a violation of federal law. Petitioners say, “No.” They argue that a request for service would be “reasonable” because the law only requires the railroads to have PTC networks up and running – merely operating non-compliant TIH trains, say Petitioners, is acceptable.<sup>46</sup> Petitioners’ interpretation of federal safety law is wrong. FRA’s regulations prescribe specific violations for transporting TIH materials on non-compliant lines and in non-compliant trains. Moreover, the FRA Acting Administrator has made clear that railroads that operate in violation of the PTC laws do so at their own peril.<sup>47</sup>

For example, FRA’s PTC regulations specify that the following operational activities would constitute violations:

- Commencement of revenue service prior to obtaining PTC System Certification (49 C.F.R. § 236.1005);
- Operating in PTC territory a controlling locomotive without a required and operative PTC onboard apparatus (49 C.F.R. § 236.1006);
- Non-compliant operation of unequipped trains in PTC territory (49 C.F.R. § 236.1006);
- Operation of freight trains at speed equal to or greater than 50 mph on non-PTC-equipped territory where required (49 C.F.R. § 236.1007);
- Revenue operations conducted in non-compliance with the limited operations exception (49 C.F.R. § 236.1019); and

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<sup>46</sup> According to Petitioners, “While there are penalties associated with a failure to implement PTC in accordance with a carrier’s [Positive Train Control Implementation Plan], there is not a single penalty for transporting TIH materials on a main line without PTC.” Pet. at 17. As AAR explains in this section, this reading of the PTC laws is mistaken.

<sup>47</sup> “[O]n January 1st, [2016,] if railroads that have not implemented PTC choose to operate, we will take enforcement actions.” Feinberg Tr. at 9 (Ex. 2).

- Non-compliant train operation within PTC-equipped territory with inoperative PTC onboard apparatus (49 C.F.R. § 236.1029).<sup>48</sup>

A railroad that operates a single train carrying TIH materials after December 31, 2015, without an operable PTC system thus would violate multiple federal regulations. Civil penalties for each violation range from \$2,500 to \$25,000 for a willful violation.<sup>49</sup>

Moreover, FRA stated unambiguously its intent to cite railroads for these violations if they operate in defiance of the PTC law. Acting Administrator Feinberg confirmed that FRA would be unbending in its enforcement of the PTC law: “if railroads that have not implemented PTC choose to operate, we will take enforcement actions.” *Id.* at 9. Acting Administrator Feinberg further cautioned that “[i]t is reasonable for railroads to take a close look at how and if to operate on a date when . . . they will be operating in violation of the law.” *Id.* at 11.

Petitioners suggest in the alternative that railroads should not be concerned about the language of the PTC laws because FRA regulations permit TIH materials to be transported over certain main lines while PTC is being installed, “even for installations after December 31, 2015.” Pet. at 15 (citing provisions in 49 C.F.R. 236.1005(b)(3)). But that provision says nothing about operations over lines that have already been identified as main lines over which sufficient traffic density moves to trigger the PTC requirement. Pursuant to its clear terms, subsection (b)(3) contemplates implementation

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<sup>48</sup> 49 C.F.R. Part 236, Appendix A.

<sup>49</sup> See 49 C.F.R. Part 236, Appendix A, Subpart I, Positive Train Control Systems. For the purposes of this proceeding, AAR and its members take the language of these provisions at face value. If Congress does not extend the unattainable deadline, the AAR or one of its members may challenge the PTC statute, FRA regulations, and any issued fines as unconstitutional or otherwise unlawful. For present purposes, however, it is well established that federal agencies lack the authority to rule a federal statute unconstitutional and generally must, instead, assume the lawfulness of all governing federal statutes. See *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) (citing the “well known principle that regulatory agencies are not free to declare an act of Congress unconstitutional”).

of PTC on “addition[al] track segment” in the event that subsequent increases in TIH freight traffic trigger the PTC requirement with respect to those additional segments. The two-year grace period would permit a railroad to install PTC on a main line segment that – sometime in the future – exceeds the traffic density baseline that then triggers the PTC requirement. This provision will enable railroads to adapt to customer needs and traffic changes after December 31, 2015, while still complying with the PTC law. But no such grace period or similar relief is available with respect to the issue presented here – continued operations on lines already designated for PTC installation.

Moreover, Petitioners’ contention is again belied by the FRA Acting Administrator’s clear statements that FRA will take enforcement action against railroads that operate in violation of the PTC law.<sup>50</sup> Petitioners’ conjecture that former Administrator Joseph Szabo would not have imposed fines upon the railroads for violations of the PTC laws, Pet. at 17, is beside the point given plain text of the law and the current Administrator’s statement of FRA’s intent to enforce the PTC law.

Finally, Petitioners assert that the only reason that the railroads have expressed concern about requests for handling TIH materials in violation of the law is that they will be subject to financial penalties. See Pet. at 9. What is at issue here is not mere financial penalties, but an unreasonable request to carry goods in violation of federal safety law. Moreover, as discussed below in Section I.D., the consequences of violating federal safety law would go far beyond FRA’s civil penalties.

**B. *The Common Carrier Obligation Does Not Require A Railroad To Violate A Federal Safety Law.***

AAR is not aware of another circumstance in which the Board has been asked to take the extraordinary step of ordering a common carrier to flout federal safety laws

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<sup>50</sup> Feinberg Tr. at 9 (Stating that FRA will “enforce the PTC deadline. And so on January 1, if railroads that have not implemented PTC choose to operate, we will take enforcement actions.”) (Ex. 2).

that explicitly prohibit a course of conduct. Nevertheless, principles espoused by the courts and agencies make clear that it would be unreasonable to mandate service that would require a railroad to violate a federal safety law.

The D.C. Circuit has considered the interplay between the common carrier obligation and federal safety law in the analogous context of air carriers. In *Delta*, the Court addressed the relationship between the airline industry's then economic regulator (the Civil Aeronautics Board ("CAB")) and its safety regulator (the Federal Aviation Administration ("FAA"))—and the distinct regulatory duties of those agencies with respect to the carriage of dangerous goods by air, holding that the common carrier obligation is circumscribed by federal safety requirements.

At issue in *Delta* was the process by which the CAB would determine the reasonableness of tariff revisions filed by airlines that put limits on the carriage of radioactive and other hazardous materials. The D.C. Circuit concluded that, in conducting its analysis, the CAB was required to “consider economic costs, safety hazards (accepting the outer limits of safety as found by the FAA), common carrier responsibilities, and other factors affecting the transportation of hazardous cargo.” *Id.* at 261 (emphasis added). Thus, the CAB's discretion in assessing common carrier obligations was cabined by the FAA's safety regulations.

As the Court explained, “the FAA . . . decides what the air lines may carry under safety regulations” and the “CAB decides what the air lines must carry under . . . their obligations as common carriers.” *Delta*, 543 F.2d at 252 (emphasis in the original). Under this rubric, the CAB's determination of what commodities the airlines reasonably must transport, and under what terms, pursuant to their common carrier duty “must fall within the outer perimeters of safety marked out by the FAA.” *Id.* (emphasis added).

The principles explained in *Delta* apply with equal force here. Just as it would not have been reasonable for the CAB to have insisted that an airline transport materials that violate the FAA's safety determinations, here it would not be reasonable for the

Board to insist that railroads transport TIH materials in violation of FRA's safety rules. In short, the common carrier obligation cannot require actions inconsistent with safety determinations made by Congress and the pertinent federal agency.

The Board's predecessor applied these principles and determined that a request for transportation that would violate state law is unreasonable. As the Interstate Commerce Commission ("ICC") explained, "a railroad does not violate its common carrier obligation by refusing shipments where the transportation would violate state law."<sup>51</sup> Because the shipment of fireworks by motor carrier was illegal in certain states, the ICC determined that UPS did not have a common carrier duty to transport those commodities. In an earlier decision in that same matter, the ICC also noted that it is "unreasonable" to require a carrier to "subject itself to State and local sanctions as a consequence of shipping . . . to localities where delivery is illegal." *B.J. Alan. Co., Inc. v. United Parcel Service, Inc.*, 5 I.C.C. 2d 700, 714 (1989), *aff'd*, 897 F.2d 561 (D.C. Cir. 1990). The ICC further noted that safety regulations administered by the Department of Transportation also must be complied with when tendering shipments. *Id.* Just as it is unreasonable to ask a carrier to violate a state or local law, it likewise is unreasonable to ask a railroad to violate a federal safety law. In other words, compliance with applicable laws and regulations is the backstop to the inquiry whether a request for service is reasonable.<sup>52</sup>

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<sup>51</sup> *B.J. Alan Co., Inc., et al. v. United Parcel Service, Inc.*, MC-C-30093, 1991 WL 55372, at \*5 n.4 (I.C.C. Apr. 5, 1991) (citing *Louisville & Nashville R.R. v. Cook Brewing Co.*, 223 U.S. 70 (1912)).

<sup>52</sup> This limiting principle has been addressed by scholars for more than a century. *See, e.g.*, Bruce Wyman, *Illegality as an Excuse for Refusal of Public Service*, 23 HARV. L. REV. 577, 579 (June 1910) ("A public service company cannot be required to furnish a service which it is not authorized to perform. Thus it cannot be called upon to render any sort of service which it is not empowered to perform."); *id.* at 580-81 ("Wherever there is a statute directly applying to the service in question and expressly stating the conditions under which alone service can be given, there is of course a resulting excuse whenever a service is asked which comes within its prohibitions.").

The federal government – through the courts, agencies, and Congress – establishes laws by which citizens are expected to abide. It would be incongruous to tell a law-abiding citizen that his actions violate ICCTA precisely because of his compliance with federal safety law. Indeed, the Supreme Court has held that a practice could not be deemed unreasonable where a carrier is obligated by federal law to take that action. For example, the Court determined that the practice of recovering undercharges could not be deemed “unreasonable” by the ICC because the carrier was obligated by federal law to charge and collect the published tariff rate. *See Maislin Indus., U.S., Inc v. Primary Steel, Inc.*, 497 U.S. 116 (1990). The same holds true for the PTC law. A railroad’s refusal to transport TIH materials cannot be deemed unreasonable when the railroad is simply abiding by the restrictions imposed upon it by Congress and the pertinent federal safety agency.

The proposition that it is necessarily unreasonable to ask anyone to violate a federal law is uncontroversial in other areas as well. *Cf. Williams v. N.Y. City Hous. Auth.*, 879 F. Supp. 2d 328, 338 (E.D. N.Y. 2012) (rejecting as “patently unreasonable” a requested accommodation requiring the housing authority to violate its own policies, federal regulations, and the Fair Housing Act); *Assenberg v. Anacortes Hous. Auth.*, No. C05-1836RSL, 2006 WL 1515603, at \*5, n. 7 (W.D. Wash. May 25, 2006), *aff’d*, 268 F. App’x 643 (9th Cir. 2008) (noting that “the ADA and FHA only [require] ‘reasonable’ accommodation, and therefore [do] not require entities to violate federal law as an accommodation”); *Herschaft v. New York Board of Elections*, No. 00 CV 2748, 2001 WL 940923, at \* 6 (E.D.N.Y. Aug. 13, 2001), *aff’d on other grounds*, 37 Fed. App’x. 17 (2d Cir. 2002) (finding that the plaintiff’s requested accommodation of New York Election Laws was “unreasonable simply because it would require the Board of Elections to violate a state statute”); *Aughe v. Shalala*, 885 F. Supp. 1428, 1431–33 (W.D. Wash. 1995) (finding that since the plaintiff’s requested accommodation of a statutory age requirement “would essentially rewrite the statute, it must be seen as a fundamental alteration in the

nature of the program [and]. . . could impose an undue financial burden on the program”).

Indeed, if the Board went down the path urged by Petitioners and determined that the common carrier obligation trumps the RSIA, where would it stop? Could the Board order the railroads to ignore speed restrictions imposed by FRA in order to improve service metrics? Could the Board mandate a 14-hour work day for employees in violation of the hours of service laws in order to address a shortage of service? Could the Board require a railroad to haul commodities in outdated tank cars that do not conform to current regulations, or require a railroad to violate federal routing protocols for TIH traffic, or tell a railroad to transport illegal contraband? The Board should not go down a path that pits safety laws against the common carrier obligation. The reasonableness inquiry provides ample basis to avoid these anomalous results.

Additional support for the conclusion that the Board cannot order railroads to violate a federal safety law is found in the Board’s emergency powers, which allow it to act to preserve service in emergency situations. Specifically, Section 11123 of title 49 allows the Board to direct the “handling, routing, and movement of the traffic of a rail carrier” or to “give directions for” the stoppage of service for a period of 30 days where it determines an “emergency situation of such magnitude as to have substantial adverse effects on shippers” exists. Nevertheless, even that considerable power is curtailed by the limitation that the Board cannot “take action . . . that would cause a rail carrier to operate in violation of this part.” 49 U.S.C. § 11123(c)(2)(A).

Thus, even in emergency situations – where arguably the powers of the Board would be at their apex – Congress took pains to make it clear that the Board may not require a railroad to violate the Interstate Commerce Act. The specific restriction of Section 11123(c)(2) is a reflection of the broader principle that it is Congress’s responsibility to correct statutory problems – not the responsibility of a court or

administrative agency.<sup>53</sup> Congress understood that in an emergency situation, parties would bring pressure on the Board to issue an order that would override federal laws that stood as an obstacle to renewed service. But, even as to the statute that the Board is charged with administering, Congress has made clear that such action would be inappropriate. Even in an emergency of national significance, the Board's considerable power is bounded by the core limiting principle that it may not order the violation of federal law.

**C. *A Request That Would Require Railroads To Ask Their Employees To Violate A Federal Safety Law Is Unreasonable.***

There is a further problem with Petitioners' request of the Board and the industry. Railroads cannot – and should not – be put in a position in which they would be obligated to ask their employees to violate the PTC law. Such requests could do immeasurable harm to railroads' safety culture and employee relations. No request for service that would place railroads and their employees in this dilemma is reasonable.

Railroads and their employees have spent decades developing a powerful culture of safety that expects railroad employees to follow all operating and federal safety rules. That culture of safety is responsible for the dramatic improvements in rail safety over the past three decades since the passage of the Staggers Act. The rail accident rate in 2014 was the lowest ever, down 80% from 1980 and down 44% from

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<sup>53</sup> See, e.g., *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) (“If Congress erred, however, it is for that body, and not this Court, to correct its mistake.”); *Comm’r of Internal Revenue v. Fink*, 483 U.S. 89, 103-04 (1987) (“If Congress lacked the power to amend statutes to rectify past mistakes, . . . it would be clear that a court or agency should feel free at any time to reject a past erroneous interpretation and replace it with the one it believes to be correct. But neither of these propositions is true . . .”).

2000.<sup>54</sup> Cultures can change quickly, however. Asking employees to violate a federal safety law would turn that safety culture upside down.

Recently, the Board recognized that it was unreasonable for a shipper to demand that a railroad provide service to a plant in the midst of a labor dispute resulting in a lockout of the employees and picket line at that plant.<sup>55</sup> The Board acknowledged that in evaluating the shippers' request for service, the railroad could properly take into consideration its relationship with its own employees and the fact that the railroad should not be required to compel its own employees to cross a picket line.<sup>56</sup> The facts of *Sherwin Alumina* were compelling; the circumstances here are even more so, where Petitioners want the Board to require railroads and their employees to violate the law.<sup>57</sup>

The railroad industry and its employees have together developed and maintained a remarkable safety record and powerful culture of safety. Rail employees work hard every day to be vigilant and to elevate their own safety and that of their colleagues, customers, and the public generally by following all federal safety laws. Yet an ill-advised ruling from the STB could undermine the efforts and accomplishments of the railroads and their employees. If the STB embraces the legal position urged by the

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<sup>54</sup> See AAR, *Railroads: Moving America Safely* (Aug. 2015) at 1, available at <https://www.aar.org/BackgroundPapers/Railroads%20Moving%20America%20Safely.pdf>.

<sup>55</sup> *Sherwin Alumina Co., LLC v. Union Pac. R.R. Co.*, STB Docket No. 42143 (served Sept. 29, 2015).

<sup>56</sup> *Id.* at 7.

<sup>57</sup> Such a requirement also would implicate a thicket of other complex issues. For example, employees have certain legal protections against being required to take actions that would constitute a "violation of any Federal law, rule, or regulation relating to railroad safety or security." 49 U.S.C. § 20109(a)(2). Moreover, in some instances individuals can be held personally responsible for safety violations. See 49 C.F.R. Part 209, Appendix A ("The RSIA amended the penalty provisions of the railroad safety statutes to make them applicable to any 'person (including a railroad and any manager, supervisor, official or other employee or agent of a railroad). . . .'" ).

Petitioners — that federal safety standards can be set aside if they present a sufficient obstacle to providing transportation to a customer — the repercussions for the industry and the public will ripple well beyond the contours of this controversy.

**D. *Transporting TIH Materials In Violation Of The PTC Law Could Expose Railroads To Expanded Tort Liability And Could Impact Insurance Coverage.***

Petitioners' insistence that railroads be ordered to transport TIH materials in violation of a federal safety law invites multiple other adverse consequences for railroads. A request for service that would create such severe consequences is by definition unreasonable. Open and persistent violations of a federal safety law risk putting the railroads in a difficult position with their insurance providers. The increase in civil litigation risks to the railroads could limit their access to or increase the cost of liability insurance coverage. In addition, transporting TIH materials in knowing violation of federal safety law could have potential implications for the railroads in civil litigation arising from any accidents. A knowing violation of a safety regulation or statute may, in some instances, be a basis for a punitive damages claim. More broadly, unlawful transportation of TIH materials, even if ordered by a government agency, would damage the railroads' corporate reputations and culture of safety and potentially compromise their credibility with jurors in future civil litigation.<sup>58</sup>

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<sup>58</sup> Considerations of the impact of a request for service on liability risk are relevant to the reasonableness of that request for service. *See Akron, Canton & Youngstown R.R. v. I.C.C.*, 611 F.2d 1162, 1170 (6th Cir. 1979). By pointing out potential arguments that could be made as a result of a railroad transporting TIH materials in violation of rail safety law, AAR and its members do not concede that any such argument would be valid, and AAR's members do not waive their right to contest any such argument.

E. *Petitioners Previously Have Acknowledged The Unremarkable Principle That A Request To Transport TIH Traffic In Violation Of The PTC Law Is Unreasonable.*

Petitioners assert that the AAR, FRA, or federal courts somehow already have decided that railroads have a common carrier obligation to transport TIH materials after December 31, 2015, even if PTC is not yet operational.<sup>59</sup> Not so. FRA has never considered the issue presented by the Petition, and indeed FRA has made clear that “the STB is the agency ultimately responsible for the enforcement of the common carrier obligation” and “conflicts between railroad carriers and railroad shippers relating to common carrier obligations are best resolved by the STB.”<sup>60</sup> The only issue FRA addressed in the rulemaking and subsequent appeal was whether a railroad that had already implemented PTC could reasonably refuse to accept new TIH traffic that would require expansion of the railroad’s PTC network. FRA suggested that a railroad could not refuse to handle that traffic, because the PTC regulations provide a 24-month window in which a railroad can legally transport new traffic while implementing PTC on lines used by that new traffic.<sup>61</sup> The core of FRA’s reasoning, therefore, was that a railroad likely could not refuse to accept traffic that it could lawfully transport under the PTC law. That is not the case here, where a railroad that has not implemented PTC cannot lawfully transport TIH materials after December 31, 2015.

In the same vein, the AAR amicus brief that Petitioners cite as somehow relevant to the current situation was directed to specific claims by the Chlorine Institute that railroads would use the PTC rule to limit shipping options for chlorine shippers in an unreasonable way or unreasonably increase rates for those shippers.<sup>62</sup> AAR’s repetition in that context of the general proposition that railroads have a common carrier

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<sup>59</sup> See Pet. at 18.

<sup>60</sup> Positive Train Control Systems, 77 Fed. Reg. 28285, 28292 (May 14, 2012).

<sup>61</sup> *Id.* at 28292-93; 49 C.F.R. § 236.1005(b)(3)(iii).

<sup>62</sup> See Pet. at 16.

obligation to serve TIH shippers is irrelevant to the question presented here, which is whether that common carrier obligation requires railroads to violate FRA safety requirements and thus literally break the law to comply with a shipper's request.

Petitioners' notion that AAR has made an "about-face" is thus demonstrably false. It also is ironic. As noted above, at least some of the parties seeking the instant declaratory order previously have recognized that the common carrier obligation must yield to federal safety laws in this specific scenario. In particular, in *Chlorine Institute, Inc. v. FRA*, 718 F.3d 922 (D.C. Cir. 2013), a challenge to FRA's PTC rules, counsel for the Chlorine Institute asserted that "[m]ain line tracks not equipped with PTC will not be allowed to carry either passengers or TIH materials after December 31, 2015."<sup>63</sup> At oral argument, counsel noted that not only does the RSIA make it illegal to move chlorine shipments over main line tracks that are required to be PTC compliant after the deadline, but that it would not be a reasonable request for a shipper to make such a request:

- "I submit to you, Your Honor, that if I were to go and ask the STB to order a railroad to provide service over track that is not PTC equipped in violation of federal law, that would not be a reasonable . . . request."<sup>64</sup>
- "I do not think it would be considered reasonable to say I want you to violate this federal statute."<sup>65</sup>
- "[The] common carrier obligation expires on January 1, 2016, because there is no PTC on the line."<sup>66</sup>
- "[T]he AAR and its members [are regulated by the RSIA in that] after January 1, 2016 [they] cannot move TIH materials over main line tracks unless they are equipped with [PTC and] . . . member[s] of the

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<sup>63</sup> Chlorine Institute Brief at 2 (Ex. 6).

<sup>64</sup> See Oral Argument Tr. at 7 (Ex. 3).

<sup>65</sup> See *id.* at 7-8.

<sup>66</sup> See *id.* at 18.

Chlorine Institute are also regulated in that after January 1, 2016, they cannot request transportation over main line tracks that are not equipped with [PTC].”<sup>67</sup>

AAR agrees with the Chlorine Institute’s acknowledgment.<sup>68</sup> Nothing has changed to make this prior interpretation of the law inconsistent with current requirements.

### CONCLUSION

The Board’s role in this matter is to determine the correct result under applicable law, leaving the broader policy question for congressional resolution. The duty to provide rail service is not absolute. The law only exacts what is reasonable of the railroads in the existing circumstances. It is not reasonable to request service that would require the railroads to violate a federal safety law, or to ask their employees to violate the law. Accordingly, the STB should deny this Petition.

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<sup>67</sup> See *id.* at 3.

<sup>68</sup> The D.C. Circuit did not reach the merits of The Chlorine Institute’s contentions, finding the matter unripe. *Chlorine Inst., Inc. v. FRA*, 718 F.3d at 922.

Respectfully submitted,

A handwritten signature in cursive script, reading "Raymond A. Atkins", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of October 2015, I served a copy of the foregoing Reply by first class mail or more expeditious means upon the parties of record in this proceeding.



Jake Thorn

# **EXHIBIT 1**

**to**

**Reply of AAR to American Chemistry Council,  
the Chlorine Institute, and the Fertilizer  
Institute—Petition for Declaratory Order—  
Positive Train Control**

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**STB Finance Docket No. 35964**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CHEMISTRY COUNCIL,  
CHLORINE INSTITUTE, AND  
FERTILIZER INSTITUTE,

Plaintiffs,

Case No. 1:15-cv-01584-RBW

v.

BNSF RAILWAY COMPANY, et al.,

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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## MEMORANDUM OF LAW

Defendants BNSF Railway Company, CSX Transportation, Inc., The Kansas City Southern Railway Company, Norfolk Southern Railway Company, Union Pacific Railroad Company, Canadian National Railway, Grand Trunk Corporation, Illinois Central Railroad Company, Wisconsin Central Ltd., Grand Trunk Western Railroad Company, Chicago Central & Pacific Railroad Company, Soo Line Corporation, Soo Line Railroad Company, Delaware and Hudson Railway Company, Inc., and Dakota, Minnesota & Eastern Railroad Corporation respectfully submit this memorandum of law in support of their motion to dismiss Plaintiffs' first amended complaint ("FAC") (Doc. No. 22).

## INTRODUCTION

Plaintiffs ask this Court to inject itself into a dispute over rail transportation policy that Congress has committed to the jurisdiction of the Surface Transportation Board ("STB"). In fact, the STB is currently adjudicating the very issues Plaintiffs have invited this Court to resolve through the instant declaratory-judgment action. One day after filing their original complaint in this Court, Plaintiffs filed a virtually identical action with the STB. The STB has already accepted jurisdiction and issued a briefing schedule that contemplates a fast-track, expedited resolution. Defs.' Ex. A.<sup>1</sup>

This case involves technology known as Positive Train Control ("PTC"), a system designed "to prevent train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position." 49 U.S.C. § 20157(i)(3). In 2008, Congress enacted a law requiring the nation's largest freight

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<sup>1</sup> "Defs.' Ex." refers to the exhibits attached to the Declaration of Thomas H. Dupree, Jr.

railroads to install PTC on lines used to transport passengers or toxic-by-inhalation (“TIH”) hazardous materials no later than December 31, 2015. *Id.*, § 20157(a).

The PTC requirement is the most complex and expensive mandate in the history of American railroading. PTC is not an off-the-shelf product that can be purchased and bolted on to a rail network. To the contrary, the railroads have spent years—and billions of dollars—in developing the first-generation hardware and software components, and the related open-industry standards, necessary to build PTC systems. They have tested the new technology on their own tracks and for interoperability with the PTC systems of other railroads, and have attempted to navigate the bureaucratic hurdles to acquire the permits needed for a wireless communication system required by PTC.

Despite the railroads’ herculean efforts to develop and install PTC by December 31, 2015, experts throughout the industry—and the Government itself—have recognized for many years that the deadline is unrealistic and effectively impossible to meet. In an August 2012 report to Congress, the Federal Railroad Administration acknowledged that “the majority of railroads will not be able to complete PTC implementation by the 2015 deadline.” Defs.’ Ex. B at 50. The agency emphasized “the novel nature of the issues” raised by the PTC mandate, and underscored that “PTC implementation, on the scale required by [Congress], has never been attempted anywhere in the world.” *Id.* at 2.

Although the freight railroads have made great progress in installing PTC, implementation will not be complete as of December 31, 2015 across the nationwide rail network. The Acting Administrator of the Federal Railroad Administration (“FRA”) has advised the freight railroads that they will face substantial fines for “choosing to operate past the date of January 1st without having implemented PTC.” Defs.’ Ex. C at 39. In her recent testimony to

Congress, she issued a blunt warning that “if the December 31 deadline remains in place and railroads choose to operate in violation of the law, we will take enforcement actions on January 1st, or on the day that they operate.” *Id.* at 13.

Plaintiffs are trade organizations representing shippers of TIH materials. They are concerned that the freight railroads, in order to comply with federal law, will cease transporting TIH materials on tracks where PTC is not yet operational as of January 1, 2016. Plaintiffs argue that federal safety laws must yield to their business needs. They urge this Court to issue a preliminary injunction commanding the freight railroads to ship TIH materials throughout the nation in violation of federal safety laws, contending that the railroads are obligated to do so pursuant to their common carrier obligation to transport goods upon “reasonable” request. *See* 49 U.S.C. § 11101(a) (“A rail carrier providing transportation or service subject to the jurisdiction of the [STB] under this part shall provide the transportation or service on reasonable request.”).

Defendants will demonstrate in their forthcoming opposition to Plaintiffs’ preliminary injunction motion that asking the railroads to transport TIH materials in violation of federal safety laws is not a “reasonable” request for service. But for purposes of this motion to dismiss, the key point is that this dispute raises a question of national transportation policy that Congress has committed to the agency best equipped to analyze the complicated technical questions and weigh the competing policy concerns—the Surface Transportation Board.

Having filed a virtually identical action before the STB, Plaintiffs appear to concede that the Board is the proper tribunal to resolve this dispute. For its part, the STB has accepted jurisdiction. Its chairman has publicly stated that this case raises important policy questions of “first impression” for the agency. *Defs.’ Ex. D* at 2. And within days of receiving Plaintiffs’

filing, the Board established briefing deadlines and fast-tracked the case for expedited resolution. Defs.' Ex. A.

This Court should dismiss this lawsuit for many reasons.

*First*, this case falls within the STB's exclusive jurisdiction because Plaintiffs are seeking only injunctive and declaratory relief. Federal law grants the STB the exclusive power to issue such relief, 49 U.S.C. § 721(b)(4); *id.*, § 10501(b), and limits the jurisdiction of federal courts to complaints seeking money damages, *id.*, § 11704(b)-(c); *see Blanchard Sec. Co. v. Rahway Valley R.R.*, 2004 U.S. Dist. LEXIS 25647, at \*20 (D.N.J. Dec. 22, 2004) (dismissing complaint for injunctive and declaratory relief against rail carrier because "Congress granted exclusive jurisdiction of such claims to the STB"), *aff'd* 191 F. App'x 98 (3d Cir. 2006).

*Second*, even if this Court were somehow to conclude that the STB does not have *exclusive* jurisdiction, the STB plainly has *primary* jurisdiction. When the central issue in a case is whether a request for common carrier rail service is "reasonable," federal courts have "applied the doctrine of primary jurisdiction to defer claims to the STB." *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 912 (8th Cir. 2015); *see also Kessler v. Surface Transp. Bd.*, 637 F.3d 369, 373 (D.C. Cir. 2011) ("Congress intended that an aggrieved shipper should seek relief in the first instance from the Commission."). Deferring to the STB's primary jurisdiction is especially appropriate in a case that, like this one, raises complicated questions that draw upon the agency's expertise and that implicate broader issues of the nation's transportation policy.

*Third*, Plaintiffs bring this action under the Declaratory Judgment Act, which gives this Court "unique and substantial discretion in deciding whether to declare the rights of litigants," *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995), or to abstain in favor of another tribunal, such as the STB. Where, as here, the STB is already adjudicating the very questions Plaintiffs

invite this Court to resolve through a declaratory judgment—and where imminent congressional action to extend the PTC deadline may moot this dispute or render it unripe—there are strong prudential reasons for this Court to stay its hand.

*Fourth*, the amended complaint suffers from a fundamental and fatal defect: Plaintiffs have failed to allege facts sufficient to establish personal jurisdiction in the District of Columbia. The FAC should be dismissed against most of the Defendants for that reason.<sup>2</sup> There is no basis for general jurisdiction over these Defendants because Plaintiffs do not allege that any of them is incorporated or headquartered in the District. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-61 (2014). And there is no basis for specific jurisdiction because Plaintiffs have not alleged facts establishing that these Defendants’ “suit-related conduct” creates a “substantial connection” with the forum. *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

“[A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.” *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (internal quotation marks omitted). There are many such threshold grounds here and the Court should dismiss this lawsuit.

## STATEMENT OF FACTS

### **1. In 2008, Congress Requires PTC Implementation By The End Of 2015.**

The Rail Safety Improvement Act of 2008 (“RSIA”) mandated that Class I railroads—the nation’s largest freight railroads—implement PTC by December 31, 2015 on main lines that are

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<sup>2</sup> The Defendants seeking dismissal based on a lack of personal jurisdiction are: The Kansas City Southern Railway Company, Norfolk Southern Railway Company, Union Pacific Railroad Company, Canadian National Railway, Grand Trunk Corporation, Illinois Central Railroad Company, Wisconsin Central Ltd., Grand Trunk Western Railroad Company, Chicago Central & Pacific Railroad Company, Soo Line Corporation, Soo Line Railroad Company, Delaware and Hudson Railway Company, Inc., and Dakota, Minnesota & Eastern Railroad Corporation.

used to transport poison- or toxic-by-inhalation (“TIH”) hazardous materials or for regularly-scheduled intercity or commuter rail passenger train service. 49 U.S.C. § 20157(a). Congress vested the FRA with enforcement and rulemaking authority under the statute. *Id.*, § 20157(e), (g); *id.*, § 103(g); 49 C.F.R. § 1.89.

Congress required railroads to submit for FRA approval, by April 2010, a plan for implementing an interoperable PTC system by the 2015 deadline, and to “implement a positive train control system in accordance with the plan.” 49 U.S.C. § 20157(a)(1), (2). Prior to operation of a PTC system or component in revenue service, the FRA must certify that the system or component has been approved pursuant to FRA regulations. *Id.*, § 20157(h).

In January 2010, the FRA promulgated regulations governing PTC implementation, which are published at 49 C.F.R. Part 236, Subpart I. These regulations were later amended in 2012 and 2014. *See* 77 Fed. Reg. 28285 (May 14, 2012); 79 Fed. Reg. 49693 (Aug. 22, 2014).

## **2. The Railroads Face Immense Technological Challenges In Designing And Implementing PTC Nationwide.**

PTC must be “designed to prevent train-to-train collisions, over-speed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position.” 49 U.S.C. § 20157(i)(3). Installing PTC requires integrating thousands of components along tens of thousands of miles of track. Defs.’ Ex. E. The software must continuously relay critical information such as speed limits, train movement authorization, switch positions, work zone locations, and other operational data. *Id.* It must also factor in locomotive and rail-car mix, train length, weight, speed, track conditions, and terrain to determine safe stopping distances. *Id.* Based on this data, the system must calculate, multiple times a second, all of these measurements to be able to stop the train and prevent the types of incidents described in the statute. *Id.*

PTC requires locomotives to communicate wirelessly, frequently, and securely using specialized communication components and subsystems with wayside signaling equipment and through communication towers to back office dispatch and control centers. Defs.’ Ex. F. To implement PTC, the railroads must design, install, and test those subsystems on more than 68,000 miles of track and more than 23,000 locomotives. *Id.* at 15.

PTC “isn’t just about installing a number of widgets, or ‘plugging in’ or ‘turning on’ components.” *Id.* at 1. To the contrary, “[i]mplementing a PTC system is a complex *process*, both in terms of safety engineering and deployment implementation.” *Id.* What is more, “PTC must work across multiple railroads, regardless of which vendor’s system the railroad deploys or how many different vendors’ components a railroad deploys.” *Id.* at 2.

In their 2010 implementation plans, the railroads contemplated that they would meet the December 31, 2015 implementation deadline. But as the FRA informed Congress in August 2012, “all of the plans were based on the assumption that there would be no technical or programmatic issues in the design, development, integration, deployment, and testing of the PTC systems they adopted.” Defs.’ Ex. B at 1. In fact, the railroads have confronted severe technical and operational challenges, as well as unanticipated bureaucratic delays. To name just a few:

- Development of new technology. PTC is a complex and interconnected system that relies upon first-generation technologies. Only some of the components making up a PTC system even existed prior to Congress’s 2008 mandate. Thus, the railroads had no choice but to use first-generation technologies. The railroads had to develop many of these technologies from concept to implementation, and they experienced a higher failure rate than proven technologies. *Id.* at 44. Moreover, the interconnected nature

of a PTC system means that “[a]ll of these components must function correctly and reliably, or the entire PTC system will fail.” *Id.*

- Iterative process of testing and modification. PTC must undergo rigorous and exhaustive testing before it can be deployed. After the many components of a PTC system are designed and developed, they are subjected to a complex, iterative testing process to ensure all of them work together. *See id.* When testing reveals flaws in the components or the system, “research must be conducted to determine the cause, the software or hardware must be modified, and new testing must take place.” *Id.* “Defects found during field testing can be problematic and cause significant delays.” *Id.*
- Interoperability. Ensuring the interoperability of PTC systems among railroads operating in the United States poses immense challenges. Each railroad’s PTC system must be designed to ensure “interoperability of the system with movements of trains of other railroad carriers over its lines.” 49 U.S.C. § 20157(a)(2). “Specifically, they must be able to communicate with one another and provide for seamless movement between sections of track owned by different railroads.” Defs.’ Ex. G at 11. “Forty-one freight and commuter railroads have to implement PTC, and dozens more shortlines will have to equip their locomotives and make enhancements to their back offices to have PTC interoperability.” Defs.’ Ex. F at 25.
- FCC delays. The FCC delayed the railroads’ installation of infrastructure necessary to implement PTC. The Federal Communications Commission (“FCC”) determined, unexpectedly, that the PTC radio wayside poles would have to be reviewed under the agency’s “environmental evaluation process, including tribal notice.” Defs.’ Ex. H at

20. As the Government Accountability Office (“GAO”) explained, “FRA officials told us they had not anticipated this issue.” *Id.* Because of the vast number of wayside poles that had to go through the FCC review process, the “FCC requested that railroads halt construction on radio wayside poles . . . while FCC considered ways to streamline the process.” *Id.* Although the FCC eventually settled on a more streamlined approach, the GAO calculated that railroads “lost at least a year waiting to install PTC radio wayside poles while the permitting process was resolved.” *Id.* And even the new FCC process requires a painstaking pole-by-pole review resulting in further delays.

To meet these technical, operational, and bureaucratic challenges, the “[r]ailroads have invested billions in designing, developing and installing this system of systems, and will invest billions more before it is ready.” Defs.’ Ex. F at 4; *see also id.* at 27 (noting that the freight railroads had “spent over \$5 billion to date”). The railroads have hired thousands of workers dedicated to implementing PTC. Defs.’ Ex. I at 5. They have created new companies to obtain spectrum. Defs.’ Ex. J at 2. And they have completely or partially equipped more than 13,000 locomotives, installed nearly 20,000 wayside interface units, completed more than 8,000 signal replacement projects, and mapped tens of thousands of miles of track. Defs.’ Ex. I at 4-5, 8.

**3. The Government Recognizes That The PTC Deadline Is Unrealistic And Will Not Be Met.**

Despite the vast commitment of resources by the railroads, which have been working tirelessly for seven years to implement PTC, the government has long recognized that the December 31, 2015 deadline is unrealistic and will not be met.

In **December 2010**, the GAO submitted its first report to Congress warning that the deadline may not be feasible. Defs.’ Ex. G. The GAO explained that “PTC implementation

requires the completion of a specific sequence of steps,” and “any delay in one step could affect the entire implementation schedule.” *Id.* at 20. The GAO observed that the system components, software, and interoperability standards had not yet been developed—and once developed, they would need to be tested and implemented on thousands of physical devices and over approximately 75 percent of the nationwide rail network. *Id.* at 20-23. Problems encountered at any step in that process “could contribute to missing the PTC implementation deadline.” *Id.* at 22. The GAO identified a long list of risks to timely implementation, including the stunning cost of PTC, the many technological challenges, the ongoing regulatory uncertainty, and the lack of interoperability with existing systems and equipment. *Id.* at 31-32.

In a **July 2012** report, the Congressional Research Service determined that it was “uncertain whether all affected railroads will be able to comply with the December 31, 2015, deadline,” and that “[t]he most obvious way to mitigate implementation risk would be to extend the 2015 deadline, giving railroads and FRA additional time to make sure PTC will work as intended.” Defs.’ Ex. K at 14, 16.

The FRA acknowledged, in an **August 2012** report to Congress, that “the majority of railroads will not be able to complete PTC implementation by the 2015 deadline.” Defs.’ Ex. B at 2. The agency explained that “both freight and passenger railroads have encountered significant technical and programmatic issues that make accomplishment of these plans questionable.” *Id.* at 1. Although the agency assured Congress that the “FRA and the railroads are working together to find solutions that support the completion of PTC system installation as soon as possible” and that “all attempts are being made to accelerate” the installation process, it cautioned that their joint efforts have been “hampered by the novel nature of the issues.” *Id.* at 2. The FRA explained that “PTC implementation, on the scale required by [Congress], has never

been attempted anywhere in the world.” *Id.* In comparison to the European Rail Traffic Management System, the FRA noted, “the U.S. railroads that are required to implement PTC systems have been mandated to do more, at their [own] expense . . . , and in less time than the next largest worldwide PTC system deployment.” *Id.* at 13. The FRA concluded by recommending that Congress provide an extension to the PTC deadline and grant the agency authority to approve the use of alternative safety technologies in lieu of PTC where appropriate. *Id.* at 47.

In **August 2013**, the GAO issued a second report to Congress. Defs.’ Ex. L. The GAO reiterated the findings of its 2010 report, explaining that the “[c]hallenges to meeting the 2015 deadline are complex and interrelated”; that “many of the PTC components had not been developed before RSIA was enacted, and some continue to be in various stages of development”; and that once developed, those components would need to “be assembled and integrated to achieve the overall safety function of PTC.” *Id.* at 17-18. The GAO warned that “[b]y attempting to implement PTC by the 2015 deadline while key components are still in development,” the railroads risked “making choices that could introduce financial and operational risks to PTC implementation.” *Id.* at 22. The GAO therefore recommended that Congress extend the deadline, but cautioned that “it is not clear [that] 2018 will be sufficient time for railroads to fully implement PTC.” *Id.* at 33.

In **August 2014**, FRA Administrator Joseph C. Szabo reaffirmed these conclusions in a letter to the President of the Chlorine Institute, in which he explained that “there are several legitimate practical and legal reasons that may preclude full deployment [of PTC] by the deadline.” Defs.’ Ex. M.

In a **September 2015** report to Congress, the GAO observed that although “railroads have made progress installing PTC components since [the GAO’s] last report on the implementation of PTC,” most railroads “continue to face challenges and do not expect to meet the December 31, 2015 deadline.” Defs.’ Ex. H at 12, 33.

At her nomination hearing in **September 2015**, Acting FRA Administrator Sarah Feinberg acknowledged that the deadline would not be met. But she recognized that railroads “are making a good-faith effort and . . . have been working diligently towards PTC implementation.” Defs.’ Ex. C at 8.

#### **4. Congress Considers Extending The PTC Deadline.**

There is widespread recognition in Congress that the PTC deadline must be extended. The Senate has already passed legislation to extend the deadline, FAC ¶ 49, and the House is considering similar legislation. *See* H.R. 3651, 114th Cong. (Sept. 30, 2015) (proposing to extend the implementation deadline to “December 31, 2018, or the deadline determined appropriate” by the FRA).

On August 28, 2015, Senator John Thune, the Chairman of the Senate Committee on Commerce, Science, and Transportation, wrote to STB Chairman Daniel Elliott: “Despite a large commitment of private funds, railroads have encountered immense technical and programmatic challenges, including delays in government reviews and communication tower permitting, which have collectively rendered the current statutory deadline unrealistic.” Defs.’ Ex. N at 1.

The STB Chairman wrote in response to acknowledge that the unachievable deadline raised the possibility that the freight railroads might declare embargos rather than violate federal safety laws. He stated that this situation presented an issue of first impression for the Board, noting that prior STB cases “assessing the reasonableness of service embargos have been very

fact-specific, examining the reasons for the service suspension, the length of the suspension, and the impacted traffic (among other factors).” Defs.’ Ex. D at 2. “Sometimes the Board has found that a railroad’s actions in initiating and maintaining an embargo were reasonable, but other times the agency has concluded that a carrier acted improperly by refusing to serve.” *Id.*

“Because prior safety-related curtailment-of-service cases often involved services that complied with comprehensive safety regimes administered by FRA . . . , a carrier-initiated curtailment of service due to a failure to comply with RSIA would present a case of first impression before the Board. I cannot predict the outcome of such a case.” *Id.* (emphasis omitted).

On September 9, 2015, senior executives from seven major freight railroads wrote separate letters in response to an inquiry from Senator Thune. The senior executives described their extensive efforts to implement PTC and the immense obstacles they faced in doing so. They too urged Congress to extend the deadline. *See* Defs.’ Ex. E, J, O, P, Q, R, S.

On September 29, 2015, a bipartisan coalition of 164 Representatives wrote House leadership. They stated that Congress “must act now to extend the upcoming PTC deadline,” noting that “when this technology was mandated in the Rail Safety Improvement Act of 2008, the arbitrary deadline set by Congress for implementation did not reflect the high costs and technological challenges of developing and deploying the new technology on approximately 60,000 miles of track around the country.” Defs.’ Ex. T. They concluded that, as “numerous government agencies have warned for years[,] the upcoming statutory deadline is unrealistic, and despite the best efforts of freight and passenger rail, implementing PTC nationwide by the end of this year is simply impossible.” *Id.*

On September 30, 2015, a bipartisan coalition of 43 Senators wrote Senate leadership. Echoing their colleagues in the House, the Senators emphasized the importance of “extend[ing] this deadline,” and demanded “that Congress take up this issue immediately.” Defs.’ Ex. U.

On October 2, Politico reported that bicameral negotiations to extend the PTC deadline had begun, and that negotiators were “pretty much in agreement on extending the year-end deadline through 2018.” Defs.’ Ex. V (“After a bipartisan huddle on [October 1], Senate Commerce Chairman John Thune says the lawmakers want to work through their differences in the next few weeks and clear that extension by month’s end.”).

**5. The FRA Warns That It Will Punish Railroads For “Choosing To Operate” Without Having Installed PTC.**

Despite the widespread recognition throughout the government and industry that the December 31, 2015 deadline was unrealistic, the FRA has publicly declared its intent to “vigorously enforce the deadline.” Defs.’ Ex. C at 24. In her recent testimony before the House Committee on Transportation and Infrastructure, Acting Administrator Feinberg stated that:

Starting on January 1, FRA will impose penalties on railroads that have not fully implemented PTC. Fines will be based on FRA’s PTC penalty guidelines which establish different penalties depending on the violation. The penalties may be assessed per violation per day. The total amount of penalty each railroad faces depends upon the amount of implementation progress the railroad has made.

Defs.’ Ex. W.

The Acting FRA Administrator has stated that the agency will penalize railroads not simply for failing to meet the PTC implementation deadline—but for “*choosing to operate* past the date of January 1st without having implemented PTC.” Defs.’ Ex. C at 39 (emphasis added). Feinberg warned that “if the December 31 deadline remains in place and railroads choose to operate in violation of the law, we will take enforcement actions on January 1st, or on the day that they operate.” *Id.* She explained that the FRA “will issue fines,” and “will likely impose

additional requirements on these railroads that will raise the bar [on] safety if they choose to operate without PTC implemented.” *Id.*

The FRA’s penalty schedule provides for penalties ranging from \$15,000 to \$25,000 for the following violations: “Commencement of revenue service prior to obtaining PTC System Certification”; “Operating in PTC territory a controlling locomotive without a required and operative PTC onboard apparatus”; “Non-compliant operation of unequipped trains in PTC territory”; and “Operation of freight trains at speed equal to or greater than 50 mph on non-PTC-equipped territory where required.” *See* Defs.’ Ex. X at 15-17; 49 C.F.R. Part 236, App. A. These penalties “can be assessed per violation per day.” Defs.’ Ex. X at 14; 49 C.F.R. Part 236, App. A. Feinberg has explained that “the fines will be significant” because “[e]ach violation has a maximum fine of 25,000 per day.” Defs.’ Ex. C at 13. Moreover, if a railroad is “choosing to operate past the date of January 1st without having implemented PTC . . . this would be multiple violations dependent on locomotives and segments that [the railroad is] operating on.” *Id.*

When asked whether she thought it was reasonable for railroads to conclude that they could not operate without PTC after December 31, Feinberg responded: “I absolutely think it’s reasonable to be contemplating whether or not it’s appropriate to operate [by] that day.” *Id.* at 37.

**6. Plaintiffs File This Lawsuit, Then File a Virtually Identical Action With The STB The Next Day.**

Plaintiffs filed this lawsuit on September 29, 2015. The next day, they filed a virtually identical action before the STB. Defs.’ Ex. Y.

Within days, the STB accepted jurisdiction and placed Plaintiffs’ action on an expedited schedule. The Board issued an order directing that briefing be completed by November 2. *See* Defs.’ Ex. A.

On October 9, 2015, the STB published a notice in the Federal Register alerting the public that Plaintiffs had asked the STB to issue an order “declaring that the common carrier obligation, codified at 49 U.S.C. 11101(a), requires a Class I railroad to transport toxic inhalation hazard (‘TIH’) materials over main lines, as defined at 49 U.S.C. 20157(i)(2), although the Class I railroad has not equipped, or will not equip, such lines with an operable positive train control (‘PTC’) system by the December 31, 2015 deadline specified by 49 U.S.C. 20157(a).” 80 Fed. Reg. 61271, 61271 (Oct. 9, 2015).

On October 13, 2015, Plaintiffs filed an amended complaint. Plaintiffs do not mention their STB filing, or the ongoing STB proceedings, in any of their papers to this Court.

## ARGUMENT

### **I. This Lawsuit Should Be Dismissed Because This Dispute Is Within The Province Of The Surface Transportation Board.**

#### **A. The STB Has Exclusive Jurisdiction Over Plaintiffs’ Claims For Injunctive And Declaratory Relief.**

Plaintiffs ask this Court to grant injunctive and declaratory relief based on the railroads’ common carrier obligations under the ICC Termination Act of 1995 (“ICCTA”). But the plain text of the statute makes clear that federal courts may only entertain actions for *damages* against rail carriers in cases arising under the ICCTA. Federal courts do not have jurisdiction over claims seeking injunctive or declaratory relief. The STB has exclusive jurisdiction over such claims. Accordingly, Plaintiffs’ complaint—which requests only injunctive and declaratory relief, and makes no claim for damages—must be dismissed.

Congress has vested the STB with “exclusive regulatory authority over transportation conducted over the interstate rail network.” *Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 344 (D.C. Cir. 2013); *see also McCarty Farms, Inc. v. Surface Transp. Bd.*, 158 F.3d 1294, 1299 (D.C. Cir. 1998) (same). That exclusive authority is reflected in the statute’s pre-emption

provision, 49 U.S.C. § 10501(b), which states: “Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are *exclusive* and preempt the remedies provided under Federal or State law.” *Id.* (emphasis added). Thus, any remedy other than one expressly specified in the ICCTA is pre-empted.

The ICCTA vests the STB with exclusive jurisdiction to grant injunctive or declaratory relief. Under 49 U.S.C. § 721(b)(4), the STB “may . . . when necessary to prevent irreparable harm, issue an appropriate order without regard to” the procedural requirements in the Administrative Procedure Act. The ICCTA provides for no comparable remedy in federal court cases against rail carriers.

Instead, the ICCTA limits federal courts to awarding *money damages*. The statute provides: “A person may file a complaint with the Board . . . or bring a civil action under subsection (b) of this section to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” *Id.*, § 11704(c)(1). Subsection (b), in turn, provides that a rail carrier “is liable *for damages* sustained by a person as a result of an act or omission of that carrier.” *Id.*, § 11704(b) (emphasis added); *see also Pejepscot Indus. Park, Inc. v. Me. Cent. R.R.*, 215 F.3d 195, 202 (1st Cir. 2000) (“The most natural reading of [Section 11704] is that it authorizes a person who has suffered damages as a result of a rail carrier’s violation of the ICCTA either to file a complaint with the STB or to bring a civil action.”); *Aluminum Co. of Am. v. United States*, 867 F.2d 1448, 1451 (D.C. Cir. 1989) (noting that the predecessor statute of Section 11704 “allow[ed] civil actions to recover damages sustained for illegal acts or omissions of a carrier”). Legislative history confirms that Congress intended to restrict federal court jurisdiction to actions for damages. *See* H.R. Conf. Rep. No.

104-422, at 195 (1995) (explaining that Section 11704 provides “authority . . . to seek damages for a violation of the statute”).<sup>3</sup>

Federal courts have recognized that the ICCTA prevents them from entertaining actions for injunctions against railroads. For example, in *Blanchard Securities Co. v. Rahway Valley Railroad Co.*, 2004 U.S. Dist. LEXIS 25647 (D.N.J. Dec. 23, 2004), *aff’d* 191 F. App’x 98 (3d Cir. 2006), the court dismissed a complaint for injunctive and declaratory relief against a rail carrier because “Congress granted exclusive jurisdiction of such claims to STB.” *Id.* at \*20. That reasoning applies with full force to this case, where the remedy Plaintiffs demand—an injunction prohibiting the railroads from ceasing TIH service—is at the heart of the STB’s exclusive jurisdiction. As the Supreme Court has recognized, Congress “granted to the [STB] plenary authority to regulate . . . rail carriers’ cessations of service on their lines.” *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323 (1981).

Plaintiffs argue that granting injunctive relief is warranted to preserve the status quo. FAC ¶¶ 70-72. But the STB is currently considering the issue presented by this lawsuit and has the power to issue “appropriate order[s]” when “necessary to prevent irreparable harm.” 49 U.S.C. § 721(b)(4). Thus, “[t]o grant interim injunctive relief would represent an undesirable interference in the orderly exercise of the [STB’s] power.” *United States v. SCRAP*, 412 U.S. 669, 697 (1973) (concluding that district court lacked power to issue injunction); *see also In re*

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<sup>3</sup> In fact, a parallel section of the ICCTA provides that “[a] person may bring a civil action for injunctive relief” against *motor carriers* for certain violations. 49 U.S.C. § 14704(a)(1). If Congress wanted to allow a similar remedy against railroads, it knew how to do so. “Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.” *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015). Indeed, the provision authorizing civil actions for injunctive relief in motor-carrier cases would be superfluous if federal courts possessed a general equitable power to issue injunctions under the ICCTA.

*United Parcel Serv., Inc.*, 839 F.2d 1195, 1196 (6th Cir. 1988) (granting writ of mandamus and vacating district court injunction that was intended to “to maintain the status quo pending full [STB] review” of a common carrier’s decision to cease transport of fireworks).

In sum, because Congress provided that the remedies in the ICCTA are exclusive and pre-empt all other remedies available under federal law—and because the ICCTA gives the STB the power to issue injunctions and limits federal courts to awarding damages—this Court does not have jurisdiction over Plaintiffs’ claims.

**B. The Court Should Dismiss This Lawsuit Because The STB Has Primary Jurisdiction Over Whether A Particular Request For Common Carrier Service Is “Reasonable.”**

Even if this Court were to conclude that the STB’s jurisdiction is not exclusive, there can be no serious dispute that the STB has *primary* jurisdiction. Dismissal is warranted on that basis as well.

At the heart of this lawsuit is the question whether asking the railroads to move TIH shipments over tracks that lack PTC as of January 1, 2016—and thus are not in compliance with federal safety laws and regulations—is a “reasonable” request for service. *See* 49 U.S.C. § 11101(a) (“A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.”). As the STB Chairman has already noted in the context of this dispute, “the common carrier obligation is not absolute, and railroads can lawfully suspend service for various reasons, including safety.” Defs.’ Ex. D at 2.

“[T]he primary jurisdiction doctrine requires initial submission to the [STB] of questions that raise ‘issues of transportation policy which ought to be considered by the [STB] in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act.’” *I.C.C. v. Atl. Coast Line R.R.*, 383 U.S. 576, 579 (1966) (quoting *United States v. W. Pac.*

*R.R.*, 352 U.S. 59, 65 (1956)). It was precisely because “[n]ational transportation policy reflects many often-competing interests” that Congress *created* the STB’s predecessor agency, the Interstate Commerce Commission—“an administrative agency that has developed a close understanding of the various interests and that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case.” *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 820-21 (1973) (plurality opinion).

A dispute over whether a request for service is “reasonable” under the ICCTA is a textbook example of a dispute that must be resolved by the STB rather than by a federal court. As the Eighth Circuit recently explained, “where the central issue was reasonableness,” courts have “applied the doctrine of primary jurisdiction to defer claims to the STB.” *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 912 (8th Cir. 2015); *see also, e.g., Chi. & N.W. Transp. Co.*, 450 U.S. at 325 (holding, in ICC case, that “[t]he judgment as to what constitutes reasonableness” with respect to a rail carrier’s common carrier obligations “belongs exclusively to the Commission”); *Chlorine Inst.*, 792 F.3d at 911 (noting that “the STB is better positioned to address the issue” of the reasonableness of a rail carrier’s restrictions on common carrier service); *Kessler v. Surface Transp. Bd.*, 637 F.3d 369, 373 (D.C. Cir. 2011) (“Congress intended that an aggrieved shipper should seek relief in the first instance from the Commission.”); *Pejepsco*, 215 F.3d at 205 (referring claim that defendants unlawfully refused to provide service on reasonable request to the STB under the doctrine of primary jurisdiction); *DeBruce Grain, Inc. v. Union Pac. R.R.*, 149 F.3d 787, 789-90 (8th Cir. 1998) (“The question of the reasonableness of a railroad’s response [is] one best left for agency resolution due to the need for specialized expertise and uniform national treatment.”).

Indeed, in *Chlorine Institute*, the district court emphasized the inability of the Plaintiff—one of the same Plaintiffs in this case—to identify “a single case in which a federal district court faced with a similar challenge to a rail carrier’s practices [pursuant to 49 U.S.C. § 11101(a)] declined to abstain in favor of the STB.” *Chlorine Inst., Inc. v. Soo Line R.R.*, 2014 WL 2195180, at \*2 (D. Minn. May 27, 2014) (emphasis added).

There are many reasons why federal courts invariably defer to the STB in common carrier “reasonableness” disputes. First, “[d]etermining whether a [carriage] request is reasonable is a complex, fact-intensive inquiry.” *Chlorine Inst.*, 792 F.3d at 912. Accordingly, this task is “best left to the STB—the agency most experienced in evaluating the particular circumstances of each case.” *Id.*; see also *Pejepscot*, 215 F.3d at 205 (“[T]he STB’s expertise is clearly involved in the question of whether [a rail carrier’s] actions constitute unlawful refusal to ‘provide . . . service on reasonable request.’”); *Chlorine Inst.*, 2014 WL 2195180, at \*3 (explaining that the STB is better positioned than a federal court to consider how “the economic, safety, and logistical issues implicated by the shipment of TIH materials affect numerous other parties and the public at large”). As the STB Chairman has noted with regard to this dispute, “[p]rior agency cases assessing the reasonableness of service embargoes have been very fact-specific, examining the reasons for the service suspension, the length of the suspension, and the impacted traffic (among other factors).” Defs.’ Ex. D at 2.

Second, “the STB’s ability to solicit comments from all interested parties—including, most importantly, the [FRA] and other federal agencies—is a considerable institutional advantage.” *Chlorine Inst.*, 2014 WL 2195180, at \*2. In fact, that is exactly how the STB is handling the ongoing proceeding in this case. The STB has already published a notice in the Federal Register alerting interested governmental and private parties to the deadlines for

submissions. *See* Defs.’ Ex. A. And the STB Chairman has publicly stated that his “expectation is that the views of the FRA” on rail safety issues will be a “critical consideration” in his agency’s resolution of this dispute. Defs.’ Ex. D at 2.

Third, deferring to the STB “will promote uniformity in the standards governing refusals to provide service.” *Pejepscot*, 215 F.3d at 206. Particularly since most of the Defendants are not even subject to personal jurisdiction in this case, a decision by this Court would govern some but not all carriers, thus leading to potentially conflicting results in the event the STB reaches a different conclusion than this Court. By centralizing important policy-driven questions before a single expert tribunal with nationwide jurisdiction, the doctrine of primary jurisdiction helps ensure uniformity in national rail policy.

Plaintiffs have acknowledged the STB’s jurisdiction over this dispute in the most telling way possible: The day after they filed this lawsuit, they filed a virtually identical action in the STB. Plaintiffs made the decision not to tell this Court about their STB filing; it is not mentioned in their complaint, in their amended complaint, in their motion for preliminary injunction, or anywhere in their papers. But the fact that Plaintiffs have invoked the STB’s jurisdiction on this very issue—and are actively litigating their case before that tribunal—is yet another reason for this Court to defer to the Board. As the Supreme Court has emphasized: “The need to protect the primary authority of an agency to determine its own jurisdiction is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the agency. While the agency’s decision is not the last word, it must assuredly be the first.” *Fed. Power Comm’n v. La. Power & Light Co.*, 406 U.S. 621, 647 (1972) (internal quotation marks and alterations omitted).

Were this Court to assert jurisdiction, it would create an untenable situation in that two tribunals would be adjudicating the same issue at the same time. Aside from the massive inefficiencies and the needless consumption of the resources of the parties, the Board, and this Court, it would raise the troubling prospect of conflicting rulings. Moreover, if the Court were to grant Plaintiffs' request for a preliminary injunction, it would almost certainly become enmeshed in the fact-specific and highly complex task of formulating a national transportation policy, on a case-by-case basis, that preserves "the delicate balance . . . between the competing interests of shipper and carrier"—a task exclusively reserved to the STB. *Burlington N., Inc. v. United States*, 459 U.S. 131, 140 (1982). For example, this Court would likely be called upon to decide whether a railroad could decline to accept a particular shipment in light of its injunction. This Court is not well positioned to serve as the nation's transportation policy czar by monitoring the daily flow of rail traffic throughout the nation and responding to disputes over shipping that inevitably arise.

Although federal courts sometimes stay cases pending a referral to the STB under the doctrine of primary jurisdiction, dismissal is the more appropriate disposition here because the same action is currently proceeding before the STB and Plaintiffs will not be prejudiced by dismissal. *See Chlorine Inst.*, 792 F.3d at 913 (finding that dismissal is appropriate where STB's resolution will dispose of the case and plaintiffs will suffer no prejudice).

**C. The Court's Broad Discretion To Abstain From Resolving Disputes Under The Declaratory Judgment Act Is Further Reason To Defer To The STB.**

Plaintiffs have sued under the Declaratory Judgment Act, which gives district courts broad discretion whether to entertain the case. "Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995).

The statute provides that a court “*may* declare the rights and other legal relations of any interested party seeking such declaration.” 28 U.S.C. § 2201(a) (emphasis added). “The statute’s textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface.” *Wilton*, 515 U.S. at 286-87.

The need for abstention is particularly compelling where, as here, Plaintiffs seek a declaration concerning issues that Congress has assigned to the STB for resolution. “Federal declaratory judgments . . . are not to be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal.” *Allnet Commc’n Serv. v. Nat’l Exch. Carrier Ass’n*, 965 F.2d 1118 (D.C. Cir. 1992). In addition, as discussed below, this Court does not even have personal jurisdiction over all Defendants, a fact that further warrants abstention.

An additional, prudential reason for deferring resolution is that Congress is poised to act legislatively in a way that would moot this dispute. As Plaintiffs note in their complaint, the Senate has already passed legislation to postpone the PTC implementation deadline. FAC ¶ 49. Bipartisan coalitions in the House and Senate have written their leadership to urge the immediate extension of the deadline. Defs.’ Ex. T, U. And as of early October, bicameral negotiations to extend the PTC deadline had begun, and negotiators were “pretty much in agreement on extending the year-end deadline through 2018.” Defs.’ Ex. V.

This Court should refrain from issuing a declaratory judgment and deciding this case in the face of pending legislative action. If the Court does “not decide it now,” it “may never need to.” *Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996). (“Article III courts should not make decisions unless they have to.”).

## **II. The Claims Against Most Defendants Must Be Dismissed For Lack Of Personal Jurisdiction.**

Plaintiffs “bear the burden of establishing a factual basis for the Court’s exercise of personal jurisdiction” and “must demonstrate that *each* defendant is subject to personal jurisdiction in the forum.” *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 13, 22 (D.D.C. 2014) (emphasis added) (alterations omitted). To carry this burden, Plaintiffs “must provide sufficient factual allegations, apart from mere conclusory assertions, to support the exercise of personal jurisdiction.” *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 243 (D.D.C. 2015).

There are two categories of personal jurisdiction: “general or all-purpose jurisdiction, and specific or case-linked jurisdiction.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). General jurisdiction permits a court to hear “any and all claims” against a defendant, whereas specific jurisdiction “is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.” *Id.* (internal quotation marks omitted).

Here, Plaintiffs have not alleged facts establishing that most of the Defendants are subject to general or specific personal jurisdiction in the District of Columbia. The Defendants that are *not* subject to personal jurisdiction include: The Kansas City Southern Railway Company, Norfolk Southern Railway Company, Union Pacific Railroad Company, Canadian National Railway, Grand Trunk Corporation, Illinois Central Railroad Company, Wisconsin Central Ltd., Grand Trunk Western Railroad Company, Chicago Central & Pacific Railroad Company, Soo Line Corporation, Soo Line Railroad Company, Delaware & Hudson Railway Company, Inc.,

and Dakota, Minnesota & Eastern Railroad Corporation. Accordingly, the claims against these Defendants must be dismissed.<sup>4</sup>

**A. There Is No General Jurisdiction Because These Defendants Are Not “At Home” In The District Of Columbia.**

“Federal courts ordinarily follow [forum] law in determining the bounds of their jurisdiction over persons.” *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014) (citing Fed. R. Civ. P. 4(k)(1)(A)). “Even though subject-matter jurisdiction is here predicated upon a federal question, [Plaintiffs] must rely on D.C. law to sue nonresident [D]efendants.” *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 424 (D.C. Cir. 1991). Here, the District of Columbia’s long-arm statute extends general jurisdiction to the maximum extent allowed by due process.<sup>5</sup>

As the Supreme Court recognized in *Daimler*, the Constitution does not permit general jurisdiction unless the defendant’s contacts with the state are so extensive that they render the defendant “at home” in the state. 134 S. Ct. at 761. The Court held that in all but “exceptional” cases, a corporate defendant will be at home *only* in its “place of incorporation and principal place of business.” *Id.* at 760-61 & n.19. Engaging “‘in a substantial, continuous, and systematic course of business’ in the forum is *not*, in and of itself, enough for general jurisdiction

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<sup>4</sup> These railroads have submitted declarations attesting to their limited contacts with the District of Columbia. *See* Decl. of M. Novak (CN Defendants); Decl. of O. Chouc (CN Railway); Decl. of W. Tuttle (CP Defendants); Decl. of W. Erdman (KCS); Decl. of W. Galanko (NS); Decl. of L. Rinn (UP).

<sup>5</sup> The D.C. long-arm statute uses different tests for general jurisdiction depending on whether the defendant was served within the District. If service of process is effected within the District, D.C. law permits the exercise of general jurisdiction over a corporation that is “doing business in the District,” D.C. Code § 13-334(a), which has been interpreted to be “co-extensive with the reach of constitutional due process.” *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1092 (D.C. Cir. 2008). If service of process is not effected within the District, the District’s long-arm statute permits general jurisdiction over a corporation “organized under the laws of, or maintaining . . . its principal place of business in the District.” D.C. Code § 13-422. That is equivalent to the due process test under *Daimler*, as discussed below.

to comport with due process.” *Alkanani*, 976 F. Supp. 2d at 29 (emphasis added) (quoting *Daimler*, 134 S. Ct. at 757-58).

Here, the complaint alleges that all Defendants are incorporated and headquartered in states other than the District of Columbia. *See* FAC ¶¶ 9-13. Thus, under the District’s long-arm statute and a straightforward application of *Daimler*, no Defendant is subject to general jurisdiction in the District of Columbia.

**B. There Is No Specific Jurisdiction Because Plaintiffs’ Claims Do Not Arise From Defendants’ Contacts With The District Of Columbia.**

Nor does the complaint allege facts sufficient to establish specific jurisdiction. Plaintiffs have cut-and-pasted the same sentence as to each Defendant: “[The Defendant] routinely conducts business in this District before Congress and regulatory agencies with jurisdiction over its rail operations.” *See* FAC ¶¶ 9, 10, 11, 12, 13. The complaint’s “JURISDICTION” section likewise alleges that certain Defendants belong to a Washington, D.C.-based trade association that has advocated on matters related to PTC and that certain Defendants “are actively engaged in lobbying activities related to [PTC] within the District of Columbia.” *Id.* ¶¶ 18-19. And the complaint alleges that four Defendants “are registered foreign corporations authorized to transact business within the District of Columbia.” *Id.* ¶ 20.

None of this is sufficient to establish personal jurisdiction under the District’s long-arm statute, which provides: “A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person’s . . . transacting any business in the District of Columbia.” D.C. Code § 13-423(a). “With limited exceptions, the Code’s ‘transacting any business’ clause has been interpreted to provide jurisdiction to the full extent allowed by the Due Process Clause.” *United States v. Ferrara*, 54 F.3d 825, 828 (D.C. Cir.), *amended* (July 28, 1995).

Specific jurisdiction requires that Plaintiffs allege facts establishing that Defendants' "suit-related conduct" creates a "substantial connection" with the forum. *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). As this Court put it in *Alkanani*, "specific jurisdiction requires a nexus between a foreign corporation's particular contact with the forum state and the claim that the plaintiff asserts." 976 F. Supp. 2d at 21. Defendants must have "purposefully directed [their] activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation and internal quotation marks omitted).

Here, Plaintiffs base their personal jurisdiction claim on the Defendants' lobbying activities and their efforts to petition government officials. But it is well settled that "entry into the District of Columbia by nonresidents for the purpose of contacting federal governmental agencies is *not* a basis for the assertion of in personam jurisdiction." *Companhia Brasileira Carbureto De Calcio v. Applied Indus. Materials Corp.*, 35 A.3d 1127, 1131 (D.C. 2012) (quoting *Env'tl. Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc.*, 355 A.2d 808, 813 (D.C. 1976) (en banc)) (emphasis added); *see also id.* at 1133 ("To hold that people have the right to petition their government but then to subject them to personal jurisdiction in the District of Columbia merely because they have exercised that right would pose a threat to free public participation in government." (internal quotation marks omitted)).

Likewise, although Plaintiffs note that many Defendants are members of the Association of American Railroads—a Washington, D.C.-based trade association—"it is established that the 'government contacts' exception extends 'to non-resident contact with trade associations located with[in] the District of Columbia.'" *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 139 (D.D.C. 2004). Thus, membership in a trade organization based in the District is not

sufficient to establish personal jurisdiction. *Id.*; *see also Lapointe v. Van Note*, 2004 WL 3609346, \*5 (D.D.C. Nov. 9, 2004) (same). In fact, one court in this District has specifically found that membership in the Association of American Railroads is not a sufficient basis for exercising personal jurisdiction over an out-of-state defendant. *Armco Steel Co., L.P. v. CSX Corp.*, 790 F. Supp. 311, (D.D.C. 1991).

Finally, the act of registering to transact business within the District is not sufficient to support the exercise of personal jurisdiction. *See* D.C. Code § 29-104.14 (“The designation or maintenance in the District of a registered agent shall not by itself create the basis for personal jurisdiction over the represented entity in the District.”); *see also Armco Steel Co., L.P.*, 790 F. Supp. at 320.

In sum, under both District of Columbia law and the Due Process Clause, Plaintiffs’ allegations fail to satisfy the requirements for specific jurisdiction.

### CONCLUSION

This Court should dismiss Plaintiffs’ complaint.

Dated: October 19, 2015

Respectfully submitted,

/s/ Thomas H. Dupree, Jr.

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## **EXHIBIT 2**

**to**

**Reply of AAR to American Chemistry Council,  
the Chlorine Institute, and the Fertilizer  
Institute—Petition for Declaratory Order—  
Positive Train Control**

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**STB Finance Docket No. 35964**



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SEN. JOHN THUNE HOLDS A HEARING ON THE NOMINATION OF SARAH  
FEINBERG TO BE ADMINISTRATOR OF THE FEDERAL RAILROAD  
ADMINISTRATION

September 17, 2015 Thursday

**EVENT DATE:** September 17, 2015

**TYPE:** COMMITTEE HEARING

**LOCATION:** WASHINGTON, D.C.

**COMMITTEE:** SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

**SPEAKER:** SEN. JOHN THUNE, CHAIRMAN

**WITNESSES:**

SEN. JOHN THUNE, R-S.D. CHAIRMAN

SEN. JOE MANCHIN III, D-W.VA.

SEN. BILL NELSON, D-FLA. RANKING MEMBER

WITNESS: SARAH FEINBERG, NOMINATED TO BE ADMINISTRATOR OF THE FEDERAL RAILROAD  
ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

SEN. CLAIRE MCCASKILL, D-MO.

SEN. ROY BLUNT, R-MO.

SEN. DEB FISCHER, R-NEB.

SEN. GARY PETERS, D-MICH.

SEN. ROGER WICKER, R-MISS.

SEN. AMY KLOBUCHAR, D-MINN.

SEN. STEVE DAINES, R-MONT.

SEN. RICHARD BLUMENTHAL, D-CONN.

SEN. MARIA CANTWELL, D-WASH.

WITNESS: SARAH FEINBERG, NOMINATED TO BE ADMINISTRATOR OF THE FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

**TEXT:**

**THUNE:** The table is settled. All right, good.

**MANCHIN:** Is this on purpose today (ph)?

**THUNE:** Yeah. They do that to me, too, Joe.

Want to welcome our nominee here this morning, and get this confirmation hearing underway.

Today, we're going to consider the nomination of Sarah Feinberg, the next administrator, of the Federal Railroad Administration. The F.R.'s mission is to oversee the safe, reliable and efficient movement of people and goods throughout our nation's rail network.

That rail network is absolutely vital to the nation's economy. So it's important that those who directly oversee the safety and efficiency of this network have the requisite skills and experience.

Ms. Feinberg has been serving as the acting FRA administrator since January, prior to her current assignment. She served as chief of staff of Transportation Secretary Anthony Foxx from 2013 to 2014.

From 2011 to 2013, Ms. Feinberg was the policy and crisis communications director of Facebook. And from 2009 to 2010, she served as special assistant to the president, and senior adviser to then White House Chief of Staff Rahm Emanuel.

Before that, she served as Mr. Emanuel's communications director for the House Democratic caucus.

While Ms. Feinberg clearly has substantial communications experience and an admirable commitment to public service, some have raised concern that her background does not include a deep expertise or experience on issues regarding railroads or railroad safety.

As noted in an April 11, 2015 article in Politico, at this crucial moment, this is, quote, "The nation's top railroad safety regulator as a former Facebook executive and White House adviser, whose resume is long on communications and policy posts, and noticeably short on railroad experience," end quote.

So in addition to asking Ms. Feinberg to respond to those concerns, I'll be also asking her about the looming deadline for railroads to implement positive train control. As those in the rail industry are well aware PTC is a communication system designed to prevent rail collisions, overspeed derailments and other accidents by automatically slowing or stopping a train that's not being operated safely by locomotive engineers.

The Rail Safety Improvement Act of 2008 mandated implementation of PTC systems by December 31st of 2015. However, complex and interrelated implementation challenges have prevented most railroads from meeting this deadline, which is rapidly approaching.

Yesterday, the Independent Government Accountability Office issued an updated report that found the freight and passenger railroads continue to face significant challenges in implementing PTC. And the vast majority of railroads would need one to five years to complete implementation. Even the small fraction of railroads that will be able to install PTC on their own tracks by December 31 of 2015, will face testing, certification and interoperability issues prior to full implementation.

This profile that many hearings convened by this committee, PTC is not an off-the-shelf technology. The GAO attributed implementation difficulties to the development of first-generation components, the limited number of manufacturers of those components, and complex system integration and testing, among other challenges.

Some of the implementation issues have also been government- created. The GAO pointed out that as a result of permitting review issues, this Federal Communications Commission halted the construction of critical communication towers for a year, effectively delaying implementation.

The GAO also pointed out that FRA's review of safety plans has been slow, and its oversight efforts have been insufficient.

GAO ultimately found that railroads pushing to meet the current unrealistic deadline, installing components before defects are identified and addressed, could be counter-productive to successful implementation. These findings should not come as a surprise.

The FRA, itself, issued a report in 2012 that identified several technical and programmatic issues affecting implementation, such as spectrum availability, installation and engineering challenges, and technical capacity. It has said for years, the vast majority of railroads will not meet the current deadline.

Railroads have spent billions of dollars working through these challenges. CSX testified at a Commerce Committee hearing in January that the freight railroad industry has spent over \$5 billion in private funds on PTC development deployment. And they expect to spend at least \$9 billion to make PTC fully operational nationwide.

The reality is that, if only a few railroads could not meet the deadline, perhaps we could conclude there is an issue with those railroads. But if nearly every railroad in the country will not meet the deadline, we need to acknowledge that there is an issue with the deadline. Congress has a responsibility to fix the issue.

That's why legislative action is needed to extend the deadline and provide operating authority for railroads that have not completed PTC implementation, while still motivating compliance and enhancing safety. The Surface Transportation Reauthorization Bill, which passed the Senate by a vote of 65 to 34, includes a bipartisan proposal to extend the PTC deadline on a case-by-case basis, with enforceable milestones and metrics, and sets common-sense safety requirements such as cameras and speed limit action plans for passenger trains while PTC is being implemented.

I believe that failing to extend the PTC deadline will result in large-scale disruptions to the nation's economy that would make the West Coast port disruption, or the 2013 to 2015 rail service problems that impacted a large portion of the country, look small in comparison. That's why I recently sent letters to the Surface Transportation Board, all seven class I railroads and all cover (ph) commuter railroads inquiring about the effects of failing to extend the PTC deadline.

Responses to my letters indicate tremendous risk of service disruption, including the cessation, passenger rail traffic and major delays that will impact freight railroads, including the inability to ship critical chemicals such as chlorine for water treatment plants across the country, and anhydrous ammonia for the fertilizer that our agriculture sector requires.

MTA in New York responsible for Metro-North and the Long Island Railroad, two of the three largest commuter railroads in the country that collectively provide nearly a 180 million rides annually stated and I quote, "Railroads face serious potential disruptions to operations and exposure to unacceptable risks of liability and civil fines, all of which would divert railroad resources from the critical task of speeding final implementation of PTC," end quote.

Union Pacific, the largest freight railroad in the country, clearly stated in its response to my letter that it will embargo all passenger in toxic by inhalation chemical traffic starting on January 1st of 2016.

This includes chemicals essential for clean drinking water and healthy crops. In fact, the chairman of the Surface Transportation Board stated in his response to me that railroads may not be obligated to ship such TIH chemicals after the December 31st deadline, which could redirect them to other modes that are less efficient and importantly, less safe.

We cannot wait until the last minute to act. I believe, absent Congressional action, we will begin to see the effects of the deadline four to six weeks prior to the December 31st deadline, as railroads begin to cycle traffic off their lines.

This is a looming economic and safety disaster that is completely avoidable.

So now, more than ever, I believe that Ms. Feinberg, as the acting administrator of the FRA, has a responsibility to work with us in Congress to avoid the potential service disruptions.

The time for anyone to play politics with the PTC deadline is past. And we, as policymakers, must work together to avoid disrupting the nation's economy.

And having said all this, I want to thank Ms. Feinberg for her willingness to serve at the DOT. Despite some of the criticisms that I mentioned earlier, Ms. Feinberg has received many compliments for her willingness to be transparent and responsive to Congress, which will be essential if she is confirmed.

With that, I want turn now to the ranking member of the committee, distinguished senator from Florida, and recognize him for any remarks that he would like to make before we turn to our -- our nominee.

Senator Nelson?

**NELSON:** Mr. Chairman, you've laid out a lot of the issues. And I would be duplicative to repeat. And therefore, what I am going to do is insert into the record my opening statement.

Let me say, at a critical time, a time in which there are questions of safety, the millions of people that use commuter rail, at a time of essential to the economy of this country, that we have healthy railroads, that they can be competitive, they can operate safely, reliably and efficiently, and with safety being central to the FRA's mission -- indeed, we've seen train accidents decline and fatalities decline.

But then, we have huge incidents of fatalities that bring it back to the fore.

And so, Ms. Feinberg, for you to be willing to step in to the breach and try to offer the leadership that is so desperately needed, of the Federal Railroad Administration, which oversees the safety and development of the nation's freight and inner city passenger rail networks. So, it's a critical appointment.

It's a critical time. It's a time that the FRA cannot let anything be slack and drop. So, I'll insert my opening statement in the record.

**THUNE:** Thank you, Senator Nelson. And we'll make sure that that's all included for the record.

We have with us today one of our very distinguished colleagues and a member -- a very active member of this committee, I might add, and the home state Senator of Ms. Feinberg to -- to introduce her. And so, we want to welcome to the other panel, well, he's normally up here on the dais, our colleague from West Virginia, Senator Manchin.

Senator Manchin, you want to proceed? Thank you (ph).

**MANCHIN:** Well, first of all, to my colleagues and to you, Mr. Chairman, for allowing me this -- this opportunity to introduce a most accomplished, you know (ph), it is truly an honor to introduce acting administrator of the Federal

Railroad Administration and a friend of mine, Sarah Feinberg.

As you know, she's from West Virginia, grew up in the most common sense nonpartisan state, if you will. As a native West Virginian, she has the same pragmatic approach to problem-solving that you see among our congressional delegation everyday.

In West Virginia, it doesn't matter if you're Republican or Democrat. You just got to get something done.

People expect you to do your job. I want to tell you, when I first was introduced to this young lady, in 1983, her daddy was in the state legislature with me, Lee Feinberg, and he brought this little girl, six years old -- five or six, I think at the time.

And we all bring our kids and show our kids off, you all remember that -- that state legislature. And here comes this little girl, this rambunctious, jumping around and running around this -- the chamber and everything. That was my first introduction to Sarah.

I watched her grow into young lady, and then to a most accomplished young woman. And she has done such a fantastic job, was so proud.

She comes all the same. She's cut from the same cloth as -- as we have and Sylvia Burwell, a West Virginia native, I think it's -- you found to be very pragmatic and responsive to all of us.

But today, she sits before the committee, seeking to continue her public service as administrator of the Federal Railroad Administration. Over the past nine months, I believe she has proven herself to be an effective and engaged leader with the courage to make tough decisions and the character to accept criticism that they often incite.

She was baptized by fire after being appointed to this position January 9th of this year, leading the agency's response to five major incidents within her first 60 days on the job. On February the 3rd, six people were killed when a commuter train hit an SUV at a grade crossing in Valhalla -- Valhalla, New York.

On February 4th, 14 tank cars carrying ethanol derailed just north of Dubuque -- Dubuque, Iowa, three of them caught fire. On February 16, 27 tank cars derailed outside Mount Carbon, West Virginia.

They released 378,000 gallons of crude oil and ignited a fire that destroyed a nearby house -- could've wiped out a whole community that have been down (ph) -- down the track. On February 24th, the commuter train in Oxnard, California hit a tractor trailer at a grade crossing and jumped the tracks.

On March 6, 21 cars derailed outside of Galena, Illinois near the border with -- with Wisconsin. Five of them caught fire.

I'm a firm believer that elected officials need to be on the ground in emergency situations, supporting first responders and assisting those in need. And I was impressed by Sarah's response to the Mount Carbon derailment in West Virginia, which I witnessed firsthand.

Five weeks into her new job, she executed an efficient and effective federal response that was one of the best I've ever seen in my experience as elected official -- I've been through many tragedies in my state. There are a lot of smart policy people here in Washington, D.C., but the best policy in the world want me to think, if it doesn't translate into the real world.

Sarah's response to the Mount Carbon accident showed me that she understood that, and gave me faith in her ability, not just to lead, but to listen to the people that we're here to serve. Over the past 10 years, the increase of domestic energy production has been an engine of economic growth for our great country.

And the Energy Information Administration predicts that growth to continue through 2020. From 2009 to 2014, crude oil production in the United States increased by more than 62 percent, up from 5.35 million barrels per day in 2009 to 8.68 million barrels per day in 2014.

And the majority of this product is moved by rail. In 2008, our railroads moved a meager 9,510 cars carrying crude oil.

Remember this figure, in just 2008, only 9,500 tankers were carrying crude oil. Last year, the number grew to 500,000 tank cars -- 500,000 from less than 10,000, over a 5,000 percent increase.

Unprecedented challenges come along with the new economic opportunities presented by the growth in domestic energy production. And Mrs. Feinberg -- Ms. Feinberg's experience makes her uniquely qualified to lead the FHRA through this transition.

As chief of staff to secretary Foxx, she helped the Department Transportation develop a holistic strategy to improving the safety and security of crude by rail that required coordination between multiple administrations within the department. The tough new tank car safety regulations that were finalized in May were dependent on close collaboration between the FRA and the Pipeline Hazardous Material Safety -- Safety Administration.

Sarah's experience in secretary's office existing relationships throughout the department allowed her to cut through red tape, and get the right people in the room to get the job done. And that's what it's about, putting people together that want to get something done.

While the new rules do not solve every problem, they represent a major step in the right direction. They satisfied all or part of the 10 outstanding National Transportation Safety Board's recommendations, and including all four recommendations that were made in April this year.

So since taking the helm at the FRA earlier this year, I've been impressed with Ms. Feinberg's willingness to tackle difficult issues and engage stakeholders about realistic solutions, taking politics out of the equation completely. And May, she convene the PTC taskforce to try to identify opportunities for the FRA to help railroads meet the December 31, 2015 deadline and become a real partner in the process.

I think her proactive approach to problem-solving will be an asset to the FRA and the entire Department of Transportation, and to all of us sitting here responsible for the safety of our citizens in our respective states.

So, without further ado, I want to introduce to you not only an accomplished young professional committed to public service -- and she inherited that in her genes, in her bones.

It's with her everyday in a bipartisan way to get things done and move this country forward. My friend, Sarah Feinberg.

**THUNE:** Thank you, Senator Machin. And that just underscored how old you are trying when you describing that, so.

(LAUGHTER)

But thank you for being here. Thank you for that introduction. And we now look forward to hearing from our nominee.

Ms. Feinberg, please proceed.

**FEINBERG:** Chairman Thune, Ranking Member Nelson and members of the committee, thank you for the opportunity to appear before you today.

Senator Manchin, thank you for your kind introduction. I'm grateful for your friendship, your decades of service to our state and your strong support. I'll just briefly note that I'm so pleased that my brother Matthew (ph) is here with me today, and that other members of my family are here with me in spirit.

It is an honor to have been nominated by President Obama to service the administrator for the Federal Railroad Administration, and to have earned the confidence of Secretary Foxx. It is also a great responsibility and one that I take seriously.

Just one month after I became acting administrator, a Metro-North train traveling out of New York City hit a car at a grade crossing. Six people were killed doing what millions of Americans do everyday, traveling home from work, visiting friends, or on their way to see their family.

Days later, in Senator Manchin's and my home state of West Virginia, a mile and a half long train carrying 109 tank cars loaded with crude oil derailed near the town of Montgomery. One person was injured. Multiple small communities were evacuated and a fire burned for days. And anyone you visited the scene would agree that we got lucky.

In May, an Amtrak train traveling significantly over the speed limit derailed in Philadelphia. The horrific accident took the lives of eight people.

These accidents are searing reminders that millions of Americans depend on the railroads and FRA's diligent oversight to transport them safely to their jobs each morning, to their homes and families each night, and to deliver goods and products safely everyday.

Next year, FRA will turn half century old. The agency has a proud history and a long list of accomplishments, most notably a significant contributions to improving rail safety. Rail deaths and injuries are down dramatically. Worker injuries are down. Derailments are down. And those decreases are very much a testament to the work of the men and women of the FRA.

But in some ways, safety in the rail industry has also plateaued. Improvements are generally not as dramatic as they used to be.

And we occasionally even see spikes in the wrong direction. And that calls for action.

The American people expect every federal agency to adapt to new conditions and new realities, to be willing to change, to be open to criticism. Over the last eight months, I have seen FRA do just this -- they've shown a willingness to adapt to change. We've headed in a new direction, and we've brought new thinking to old challenges. We've tried new solutions aimed at addressing the old challenge of grade crossing incidents.

We've partnered with police around the country to step up enforcement. And in June, Google agreed to integrate our grade crossing data to add crossing alerts to Google maps.

We've taken a new approach to the way we handle NTSB recommendations. When I arrived at FRA in January, there were more than 70 NTSB recommendations awaiting action. We've take action on more than half of them, reducing the number of outstanding recommendations by nearly 15 percent. And we await word on another 30 from the NTSB.

Some of these recommendations had been sitting for more than five years. FRA listened to the frustrations that members of this committee expressed about the railroad rehabilitation and improvement financing program. And we've acted. This year, we've completed two loans and expect to complete two more shortly. The risk program is very much open for business.

While working to try to bring new solutions to these old challenges, the men and women of FRA have stayed laser-focused on our ongoing safety priorities and have delivered significant results. During the last two years, the United States have seen more than a dozen crude oil train derailments.

In May, with our sister DOT agency, FINSAs, we completed the high hazard flammable train rule, a final comprehensive rule that aims to prevent these types of accidents and lessen their impact if they do occur. We've prioritized PTC implementation, hiring staff and creating a taskforce that reports to me regularly on progress and the performance of each railroad.

We were also proud to work with many here today and in the greater New York City region to provide a nearly \$1 billion loan to implement PTC on MTA's system. Both the administration's budget and its GROW AMERICA Act have requested significant funding to assist commuter railroads on PTC.

And Chairman Thune, Ranking Member Nelson, I want to thank you and members of this committee, in particular, for the recently passed legislation that seeks to leverage nearly \$200 million to cover some of the costs and expenses railroads face when taking out a RRIF loan to implement PTC. All of this activity is in addition to our continued focus on making sure the agency's partners deliver high-speed, intercity passenger rail projects for the American people.

None of this success would have been possible without the tireless work of the nearly 900 public servants at the agency who are dedicated to rail safety. And it has been an honor to lead them as an acting administrator.

Chairman Thune and Ranking Member Nelson, I am pushing FRA each day to be diligent -- vigilant in the proceed of safety, open to paths of innovation from any source. The agency is engaged, enthusiastic and driven because we know the gravity of our responsibilities and the size of our opportunities.

If confirmed, I would eagerly work with all members of this committee and all members of Congress to build a stronger and safer rail system, and one that we can all be proud of.

Thank you, and I look forward to taking your questions.

**THUNE:** Thank you, Ms. Feinberg.

As I mentioned, and I'll start with some questions, and we'll go round with the five-minute rounds here, just to alert members of the committee. As I mentioned, the committee has conducted extensive outreach with freight commuter railroads to understand the effects of failing to extend the deadline to implement PTC.

And it's clear that there will be widespread rail service reduction if Congress fails to act. For example, Metro in Chicago, with over 70 million riders annually, has stated that there's a strong possibility that it will cease service all together, a concern that is echoed by Long Island Railroad, Metro-North in New York and Connecticut.

And so, I want to just get a couple of numbers on the record. Based on your outreach to railroads, approximately how many have informed the FRA that they may suspend or reduce service?

**FEINBERG:** Senator, I think that you have the most recent numbers, because they've been responding to your most recent letter. But to put it this way, I have not have a recent conversation with the railroad that has informed me that they do intend to operate on January 1st.

So I believe you have the most recent numbers. But we are well into the 20s at this point.

**THUNE:** OK. Have you or has DOT, I should say, evaluated the extent to which there will be an increase in congestion, or potentially lives lost from commuters taking alternative options to -- or alternative modes of transportation, I should say?

**FEINBERG:** We have not done a specific study that would look at the effects on January 1st or on January 2nd. But I have said that I have -- I do have significant concerns about the consequences of railroads choosing not to operate on January 1st.

I think it would lead to significant congestion. And that does also lead to safety impacts.

**THUNE:** Have you had any discussions with -- is FRA having discussions with FTA to determine whether transit buses have the capacity to carry displaced riders who might otherwise be on commuter railroads?

**FEINBERG:** The most -- the FRA and FTA are in constant communication about a variety of PTC issues. I don't we've had the specific bus conversation, though I don't think there's an expectation that buses can -- would be able to take that load.

**THUNE:** How about the smaller railroads, class twos and class threes? Some of those are, you know, frequently overlooked, that the mandate also applies to them.

And they happen to use, in many cases, class one railroad track. Roughly, how many of these small railroads will be required to equip their locomotives as a result of the PTC requirements?

And are you hearing of any difficulties these railroads may be experiencing?

**FEINBERG:** Certainly. We have heard generally from the Short Line Association, and from individual short lines and from -- from other individual entities. I mean, we can get you specific numbers if you need it.

But -- significant -- but most are watching the Congress and keeping an eye on what is likely to come out of here.

**THUNE:** The -- our colleague on the committee, who I'm sure you hear from in a moment, Senator Blumenthal, has noted that entities like the Connecticut DOT should not be subject to penalties for making a good-faith effort to implement PTC, even though Connecticut will not implement until at least 2018. He's also noted that it is possible that Metro-North could be spared fines if they showed a good-faith effort.

If Connecticut DOT and Metro-North are considered to be making a good-faith effort, are there others that are as well?

**FEINBERG:** Well, there are many railroads that are making a good-faith effort and have -- we believe, have been working diligently towards PTC implementation. But the law and the statute, the deadline is very black and white and does not give -- in our read, does not give flexibility to railroads that are working diligently versus ones that are not.

**THUNE:** If a line's not currently handling toxic-by-inhalation materials or passenger traffic, does the PTC requirement apply?

**FEINBERG:** It depends on where in the country we're talking about. But it is aimed at lines that are handling hazardous materials and passenger service.

**THUNE:** And would the FRA consider continued movement of non-TIH and non-passenger traffic over such lines after December 31 of 2015 to be in violation of the 2008 statute?

**FEINBERG:** Yes.

**THUNE:** Does the FRA intend to impose fines or penalties related to non-TIH and non-passenger operation on such lines after December 31 of 2015?

**FEINBERG:** We will -- we will enforce the law as of the deadline on December 31. On January 1st, we will enforce the deadline and the law.

**THUNE:** How does the FRA define the common carrier obligations that real carriers have under existing law? Well, let me ask you this way, do you believe the common carrier requirement is in conflict with the current PTC deadline?

**FEINBERG:** Well, I would defer to the STB on that. And I have their recent letter, which I think that you've seen as well, in which they deferred to us on and safety.

**THUNE:** Right.

**FEINBERG:** And so -- but it's a partnership between the two organizations.

**THUNE:** OK. My time has expired. I'll hand it off to the senator from Florida, Senator Nelson for questions.

**NELSON:** Well, you've heard of the old saying, "we're between the devil and the deep blue sea." So if we don't extend positive train control, which most everyone at this dais wants to get positive train control, install this fast as possible, but under the law, you have to impose fines.

But the railroads say they can't comply. And therefore, they will not carry certain traffic.

So what do we do if PTC is not extended?

**FEINBERG:** Well, sir, we've said that we feel that's it's our obligation to enforce the PTC deadline. And so on January 1st, if railroads that have not implemented PTC choose to operate, we will take enforcement actions.

**NELSON:** You formed a taskforce on this. And it's getting information to be used to monitor the progress and guide enforcement efforts.

Tell us about that.

**FEINBERG:** Yes, sir. We've had a number of FRA staff members working on PTC for years. But more recently, I have formed within the FRA a taskforce that is working on PTC across the board, they are in close touch with railroads.

They're offering technical assistance. They are monitoring testing.

But one of the things they are also doing is collecting data about PTC implementation, how that implementation is going from railroads that were tracking that -- that progress regularly.

**NELSON:** If the Congress extends the deadline for PTC, what would your recommendation be? How long of an extension?

**FEINBERG:** Sir, I don't think it's appropriate for me to recommend a certain amount of time. I would be deferential to the Congress on what they believe the right action would be to take in terms of the deadline.

But we would, as we have in the past, offer as much technical assistance and our expertise as we possibly can, and try to be helpful to the Congress as they contemplate moving the deadline.

**NELSON:** One of the things that we did in the highway bill was we got the number up to \$200 million to help the commuter railroads install the positive train control. Now, it'd be nice to have PTC installed sooner.

I want to thank the chairman for this. So, how would you go about the use of this funding?

**FEINBERG:** Well, we would want to coordinate with this committee and take guidance from you. But as I view it, \$199 million would be used as an offset for CRP -- I'm sorry, for the credit risk premium for commuter railroads that are applying for PTC loans, or could be used as a grant program for those same commuter railroads.

**NELSON:** Grade crossing safety -- it's a problem all over the country. Can you talk about your efforts to partner with local law enforcement and technology companies on this grade-crossing issue?

**FEINBERG:** Yes, Senator. Thank you for the question.

Following the Metro-North grade crossing incident, we, the FRA, launched a grade crossing campaign, which would seek to try to bring some new thinking to this old problem.

And one of the first things we did was partner with law enforcement to ask for increased enforcement at grade crossings, so ticketing in an effort to prevent people from beating the train, if you will. We've also reached out to tech -- to tech companies to ask them to take our grade crossing data, which is the location of more than 240, 250,000 grade crossings across the country, integrate that data into their maps, so that when passengers or drivers are actually within a mapping application, they would be alerted that a grade crossing is -- that they are approaching a grade crossing.

**NELSON:** So back to the pregnant question before us, do you have a recommendation on what we do on an extension on PTC?

**FEINBERG:** I don't have a specific recommendation for a length of time. I'm grateful to this committee, and the leadership of this committee for being so focused on this problem.

I am worried about the consequences that come on January 1st. And I'm grateful for your attention to it.

I do not have a specific amount of time that I would recommend. But as I said, we would continue to work with this committee to offer technical assistance, or expertise and any assistance that we can to be helpful as you, as you work on this.

**THUNE:** Thank you, Senator Nelson.

Up next, you get the Missouri double-team, Senator Blunt followed by Senator McCaskill.

**MCCASKILL:** Fact (ph).

**BLUNT:** There you go. There you go. Well, the Missouri double team's sometimes pretty tough.

We're glad you're here. Thanks for the work you've already done on this. I appreciate the discussion this morning has not been about who's at fault or whether the government is at fault, or -- but we're not going to make this deadline. I think you mentioned, Ms. Feinberg, that over 20 railroads have told you they would not operate on January the 1st.

Some of those railroads also, obviously, commuter traffic runs over those rails as well. I think Burlington Northern has said that their contract with commuter traffic may -- requires them to have their rail system in compliance with federal law. In your view, that commuter traffic could not use those rails as well?

Do you have a view of that? The chair -- it's what Burlington Northern thinks. Is that what you think?

**FEINBERG:** No, no, that's -- I mean, that's correct. The class ones are right to be also thinking about the commuter service that functions on their -- on their track.

And to be clear, the commuters are thinking about that as well.

**BLUNT:** And do you think it's reasonable, these 20 railroads that have told you they might not be able to function? Do you think it's -- or won't function -- do you think it's reasonable that they believe that they cannot function if they're not in compliance with the PTC standard?

**FEINBERG:** Well, to be clear, they've actually communicated that to -- to Senator Thune -- to Chairman Thune. But they've also...

**BLUNT:** Right.

**FEINBERG:** ... put a (ph) copy on to us on those communications as well. I think it is reasonable for railroads to take a close look at how and if to operate on a date when they will become -- when they will be operating in violation of the law.

I think that's an appropriate thing to look at. And frankly, that's something that we would expect them to look at regularly.

**BLUNT:** So you think it's reasonable for them to assert that they cannot or should not operate in knowing violation of the PTC deadline?

**FEINBERG:** Each railroad is going to have to make that decision individually. But I absolutely think it's reasonable to be contemplating whether or not it's appropriate to operate that day (inaudible).

**NELSON:** And of course, one of the reasons for this is the toxic- by-inhalation freight concerns. But of course, if that freight, along with lots of other freight isn't part of the commerce system, there are major problems in commerce for water treatment, for plastic, for whatever else.

Those chemicals go into -- anybody doing a study of the economic impact of what happens if railroads aren't operating on January 1?

**FEINBERG:** We have not done a study into the economic impact. I can't speak for the STB.

We have not done that specifically. But -- and our obligation is to think about this in terms of safety versus economic impact. But I'm certainly concerned about the consequences in terms of congestion and the safety impacts of increased congestion as well.

**BLUNT:** And...

**FEINBERG:** And those products will likely moved by truck. They don't move by rail.

**BLUNT:** And so that creates safety concerns in another -- not only the traffic -- the advanced traffic, but then you just move that same problem to another place.

**FEINBERG:** That's right.

**BLUNT:** That same concern to another place. In terms of the passenger rail, do you know of any discussion they're having about whether they think they should be able to operate on lines that don't meet the standard?

**FEINBERG:** It is an active conversation that's happening across the industry. So it's not just the freights that commuters are absolutely having this conversation.

We are in close touch with them, just like we are with the freights. They are very anxious and keeping a close eye on this body to see what happens next.

**BLUNT:** And you been thoughtful in not giving any indication of exactly how long an extension would be. But do you think -- is your view is that there needs to be some sort of extension beyond January 1?

**FEINBERG:** I mean, to echo the ranking member, I think he said between the devil and the deep blue sea, I would say, we're between a rock and a hard place. The deadline is not going to be met.

That is disappointing to me. And I think it has safety consequences that I'm concerned about.

The railroads not operating also have consequences. And I would -- we would want to work very closely with this committee to try to assist in any way we can in offering technical assistance and expertise as you look at the deadline.

**BLUNT:** Thank you, Chairman.

**THUNE:** Senator McCaskill?

**MCCASKILL:** You are here to -- for us to ask questions for you to be the boss. So I'm going to ask you some tough boss questions.

GAO has a follow-up that just was issued yesterday on the PTC implementation. I'm going to read a paragraph.

"Providing FRA with the authority to grant extensions on a case- by-case basis would provide some needed flexibility, and could also assist FRA in managing its limited staff resources, and help railroads mitigate risks and ensure PTC is implemented in a safe and reliable manner." Do you agree with that?

**FEINBERG:** We are willing -- we...

**MCCASKILL:** That's not my question. I want to know whether you agree with that statement, "providing FRA with the authority to grant extensions on a case-by-case basis would provide some needed flexibility and could also assist FRA in managing its limited staff resources."

**FEINBERG:** It would certainly -- it would certainly give us flexibility. I am less worried about the staff resources, because we have plans in place to staff up quickly with contractors.

And we've had these plans in place for quite some time. I am anxious about the prospects of entering into negotiations with 40 different railroads on a case-by-case basis, which would result in a choose-your-own deadline back-and-forth.

**MCCASKILL:** OK, so you're not comfortable on a -- with a case-by- case basis approach?

**FEINBERG:** I think that...

**MCCASKILL:** You would rather have a set deadline?

**FEINBERG:** Well, I just think that we have to be aware of the consequences of entering into negotiations with 40 different entities.

**MCCASKILL:** Yes. And so that's what I'm trying to figure out, Ms. Feinberg, is you know, which is the best of bad choices? And you're going to have to make that decision, potentially.

**FEINBERG:** Ultimately, I -- unfortunately, FRA does not have the authority to make that.

**MCCASKILL:** OK, well, you do have the authority on this subject. We know that the railroads will not be PTC compliant by the end of year, correct?

**FEINBERG:** Correct.

**MCCASKILL:** No controversy there, no question?

**FEINBERG:** Most of them will not. A few will make it, correct.

**MCCASKILL:** OK. A few will be, but most will not? We've heard that they're not going to operate.

But really, what they want to know is what you're going to do. So if you know they're not going to be compliant at the end of the year, can you tell this committee what you're going to do on January 1?

You gave us a memo that gave you all the enforcement options.

**FEINBERG:** Right.

**MCCASKILL:** Why is it that you will not say these railroads are trying to decide what to do, if Congress, for some inexplicable reason, will not face the reality that an extension is necessary? They have to make a tough decision, and so do you.

The sooner you make your decision, the more informed their decision will be.

When will you make the decision on what you're going to do when they are not compliant if Congress fails to act?

**FEINBERG:** Actually, I feel like we've been pretty clear on what we will do on January 1st if they're not compliant.

**MCCASKILL:** And what is that?

**FEINBERG:** We will -- if the -- if the December 31 deadline remains in place and railroads choose to operate in violation of the law, we will take enforcement actions on January 1st, or on the day that they operate. So we will issue fines.

And we will likely impose additional requirements on these railroads that will raise the bar and safety if they choose to operate without PTC implemented.

**MCCASKILL:** Have you discussed what the fines will be, because you know this is going to happen? I mean, if -- I mean, what I'm trying to figure out is we're going to have a huge mess if nobody operates on January 1st.

I mean, I don't know any other more artful way to put it other than a huge mess. It's going to be dangerous. It's going to be very damaging to our economy. It's going to cost jobs.

It's going to be exhibit A of why Congress is so unpopular. Because we can't manage to do something simple than recognize the obvious here.

So we know what the situation is going to be. Why can't you be more specific, so the railroads can make an analysis about the cost- benefit of the penalties they might incur versus operating?

**FEINBERG:** So, let me -- let me try to explain it this way. The railroads continue to make progress every day.

So we're currently about three and a half months out from the deadline. Some railroads make progress everyday.

They're equipping new locomotives. They are -- they are testing PTC. They are getting additional equipment.

They are obtaining spectrum. And so, to give a railroad a specific amount that we will fine them today has -- may well have nothing to do with where they are three and a half months from now.

What we've said is, we believe the fines will be significant. Each violation has a maximum fine of \$25,000 per day.

But if you are choosing to operate past the date of January 1st without having implemented PTC, I guess is this would be multiple violations dependent on locomotives and segments that you're operating on. So we have said is, we believe those fines will be very significant, and that we will, on top of that, impose additional requirements on the railroad, whether that's additional crew members requiring as additional crew members to communicate, put potential speed restrictions.

So we've been as clear as we can be. I believe the railroads do deserve transparency and clarity on what will happen on January 1st.

And but we've -- we've tried to be pretty clear about that.

**MCCASKILL:** I think you think that if you tell them what it's going to be, that somehow, that will slow them down, and I don't think that's true.

I think you do need to be more specific than significant fines. And you know, I think also what I would really appreciate is analysis, which is going to be more dangerous than not operating on January 1, or continuing to operate without fully implementing PTC because I think there's a real question, which is going to more dangerous?

And it sure would be a shame if that analysis hadn't been made transparent before that date.

Thank you, Mr. Chairman.

**THUNE:** Thank you, Senator McCaskill.

Senator Blunt? And let me just point out, too -- I think the administration did point out an extension proposal in their GROW Act. and the other point I want to make is an important one.

Everybody is focused on January 1 here, which is, of course, the deadline. But the effects of this are being felt sooner than that, particularly with the freight railroads.

I mean, we're talking about probably a November timeframe. So the sense of urgency attached to doing something on this is very apparent.

And I think we have to recognize that we don't have a lot time to work with. And Senator from Missouri is exactly right.

I mean, if you look at what could happen, the potential effect, this is -- this is a -- this is a huge disaster in the making, which as I said before, is totally avoidable.

So, Senator Fischer is up next.

**FISCHER:** Thank you, Mr. Chairman. I'd like to follow up on the fines that you were talking about and the penalties.

You mentioned that they're going to be significant. And before that you said that the railroads are making progress everyday, but we all know that they're not going to get there. I mean, they have been very open about that.

They have given us quite a bit of information on the problems that we're going to be seeing all across this country, and as Senator McCaskill said, the tremendous negative impact we're going to see on our country's economy, and the safety of our citizens by a shutdown, basically, from our railroads.

When we're looking at these significant fines, what system have you established that will determine what the fines are?

Does that offer any clarity to the railroads, or to us on this committee? Do you have a system in place?

**FEINBERG:** We do have a system in place. We have a long-standing system for enforcement against railroads, which has been in place for many years.

But then more specifically, following the 2008 legislation, we finalized a rulemaking in 2010 that included all of the ways that we would enforce against PTC. So it's -- we can certainly get it to you.

It's several pages. And it basically details, the various enforcement actions that we would take.

**FISCHER:** What are a couple of the specific actions that would happen?

**FEINBERG:** So there are many. They involve failure to equip of a locomotive...

**FISCHER:** But what's the penalty?

**FEINBERG:** They started -- I think for that one, it's \$15,000. But it depends on if it's a willful violation, so much like any other enforcement agency.

There are basic violations, and then there are willful violations.

**FISCHER:** OK, but that then -- that then leads me to the idea that there are companies that are working in a good-faith effort. And they've invested, really, billions of dollars in trying to meet these deadlines that they're not able to meet.

Are you -- are you going to be looking at those companies differently? I think earlier, you said you wouldn't.

**FEINBERG:** I think that may have been a reference between freights and commuters. But -- but we've -- if I understand your question, we certainly do not want to just disincentivize progress.

And we do not want to punish railroads that are making progress and working hard each day to reach the deadline and to make progress on PTC implementation. It's also important for the enforcement mechanisms to be fair.

**FISCHER:** Would you be looking -- a follow up with Senator McCaskill's question again? And would you be looking -- with that comment, I would think you would look at treating companies differently and making accommodations for them individually and not as a group.

**FEINBERG:** So, let me give an example. Some railroads have been unable the spectrum that they needed in order to implement PTC.

My point is that and as we look at enforcement actions, we want to prioritize both the ones that have the largest impact on safety, but also the ones that railroads actually had control over versus something that was out of their control.

**FISCHER:** OK. I'd like to switch gears here and talk about the ECP breaking requirements, and that would also cost billions of dollars. But two class one railroads, Union Pacific and Norfolk Southern, they've tried those systems.

They've abandoned them. They didn't feel that there was a substantial benefit to safety. When you look at the crude by rail and the rulemaking there, it's my understanding that the FRA did not conduct a real-world study.

Is that right?

**FEINBERG:** Well, we use modeling for the ECP braking for the cost-benefit -- for the impact of the ECP brakes as we do in most rulemaking. I mean, you're correct that those braking systems are in place on some railroads, that they're actually being used each day.

But to actually take one train equipped with ECP and one train non-equipped, and then involve them in an incident, even in a testing, is not something that we do.

**FISCHER:** So, no hard science was really used at all in determining those regulations?

**FEINBERG:** Well, I do think there is hard science involved. And there is math involved as well.

But we did not actually go out and involve trains in a real-world incident.

**FISCHER:** I understand that math's used in modeling. But wouldn't you think that hard science would be more helpful, especially when you had two class one railroads that did have information on it?

**FEINBERG:** Well, we'd be more than happy to do testing like that. We have -- we have said to this committee that, while funding is important for testing like that, we are always anxious to collect more data, particularly on things like braking systems.

You know, I understand that the railroads are concerned about the cost of implementing this braking system. I would also note that prior to the rule being finalized, some of them were actually advertising that they were using it.

So, I am aware that they are unhappy with the cost. And we always want to collect more data about braking systems.

But I also am -- you know, we're very focused on whether the braking system works as opposed to logistics and cost.

**FISCHER:** I would say that all of us up here, and including the railroads who were intimately involved in this, are concerned a lot more than just about the cost. We're concerned that if it works, we're concerned about the safety.

We want to make sure that investments have a -- have a return that will keep our population, our citizens safe. So to imply that this is all based on cost, I think is a comment that did not need to be made.

Thank you, Mr. Chairman.

**THUNE:** Thank you, Senator Fischer. And we have up next -- if he's ready, Senator Manchin.

You want to go? OK, we'll go, Senator Peters next.

**PETERS:** Thank you. Thank you, Mr. Chairman.

Ms. Feinberg, thank you for willing to take on this job. Obviously, it's a very big job.

And I know you are putting a great deal of good faith effort and working hard, and appreciate your efforts and appreciate the opportunity to meet earlier to talk about some issues.

And before I get into the positive train control, which I have some questions related to that, and I would like to

first mention a personal incident that I had with a good friend in an accident that you mentioned and some of the follow-up related to that accident.

You mentioned in your opening testimony, the Amtrak accident outside of Philadelphia, 188, and I had some personal contact with that had the fact that I had some very good friends of mine who lost their daughter in that very tragic accident.

And their first contact with Amtrak was a very impersonal cold call from a claims adjuster of some sort, who said that they would be willing to pay reasonable funeral costs. I didn't (ph) know that was Amtrak's response, which did not sit well with the family, as you can imagine through a very traumatic time.

Now, Amtrak is under statutory requirements to have a family assistance plans. And I have inserted an amendment in the Railroad Reform, Enhancement and Efficiency Act, which is part of the comprehensive transportation bill, which hopefully will pass.

I know my colleagues seem to be concerned if that's going to pass. And we're going to be dealing with some issues with positive train control and others.

But in that amendment, that is part of that, I require your agency and then NHTSA, too, and others, NTSB, to take a hard look at the adequacy of Amtrak's family assistance plans, and determine whether or not there were followed.

But I'd like to hear from you, if anyone else in FRA, as the rail safety regulars, have looked into Amtrak's response to both the victims of the derailment and their families to determine whether or not they have complied with some of their statutory requirements, and kind of your assessment of it.

**FEINBERG:** And that will certainly all be a part of the investigation into the incident. As I know that you know, Senator, the NTSB is the lead investigative agency on that accident.

But the FRA also plays a role in that as well. The NTSB has specific guidelines about family assistance planning.

And I know that they're -- they will take a very close at that. And we will as well.

**PETERS:** And you will as well? You have not had an opportunity to do that?

**FEINBERG:** In my role as a member of the Amtrak board, we have had some conversations about the accident and the response. I have reiterated the importance that I put on making sure that families are communicated to quickly and appropriately.

But it will ultimately be a part of the investigation the NTSB leads. And I can't get ahead of them.

**PETERS:** Well, especially as a member of the Amtrak board, I hope you take a strong interest in this and understand the seriousness of it. And I look forward to working with you in the months and years ahead as we take a look at that before making improvements of it in the future.

So things do not -- like that do not happen again.

**FEINBERG:** Absolutely.

**PETERS:** And now to the positive train control, Senator McCaskill mentioned the GAO report that came out yesterday. And if we are able to pass the comprehensive highway transportation bill or if we do a separate bill that allows us to move forward and push back some of the time requirements for PTC, you will have to oversee some of the implementation of their work over these -- in their plans in the future.

But in the GAO report, they noted that there were deficiencies in the reports that talked about how they were going to meet some of those deadlines, some of their milestones, how they were going to reach those milestones. Yes, in fact, it says they lacked any meaningful detail and could not give the FRA a clear understanding of a railroad's PTC implementation progress.

So if the reports that they're providing you are deficient, what do you plan to do to make these reports more substantive and ones that you can actually work on? Do you agree with the GAO's assessment?

And how do you plan to fix it?

**FEINBERG:** Well, we have agreed with the GAO's recommendations and agreed that there are important recommendations to implement. Most of them were being integrated into FRA's approach to PTC implementation prior to the GAO report.

But we take their recommendation seriously and will -- and will take action on them. The GAO report registered some concerns about the amount of data that we were collecting from the railroads and the kind of data that we are collecting from the railroads.

I believe that over the last several months, we have ramped up our effort on that front, which are not necessarily reflected in the GAO report. But think of it as a much better sense of how railroads are doing and the progress that they're making on their safety plans, which they owe to us on their plans for implementing PTC.

We have tried to give significant guidance to the railroads on what we're looking for and how we can go back and forth with them to make sure that their plans for implementation are safe and efficient as possible.

**PETERS:** All right. Thank you.

**FEINBERG:** Thank you.

**THUNE:** Senator Manchin?

Thank you, Senator Peters.

**MANCHIN:** Mr. Chairman, appreciate very much.

And I hope they've been kind to you and since I've been gone.

Anyway, Ms. Feinberg, everything that, you know, that I've read about the Amtrak train, the 188 derailment earlier this year, it sounds to me that in your lost situational awareness, that's just as a pilot, you know, you have to be where you are at all times. And be able to report that and they're following you.

I've went over and was able to go over to look at some of the newest Amtrak locomotives over at Amtrak. I did the Acela and I did in Northeast Regional, just to get a better understanding of what was happening in the cockpit. I'm going to call the -- I'm going to call the engine a cockpit, OK?

I was amazed to find out that we're still using technology that's 50, 80, 100 years old. Simple, in our cars, we have more information in our front seat of our driver's car than we do in an engine.

I just kept asking a question over and over, can't we at least -- because they were telling me how much -- how costly it was and on and on, and how much time it would take. I said, just to have situational awareness would be something, knowing where you're at.

And that's pretty easy, pretty simple technology. Did you find that to be, I mean, where the pushback -- I don't

think anybody -- I don't care on what side of the fence people may be, whether it's the railroad companies themselves and whether it's people passing.

But we all want it to be safe. Everybody does. But if we're not moving towards a new technology, and our whole country depends on it, why would we not be using some of the easiest, latest, greatest advanced technologies for train traffic?

**FEINBERG:** Well, we could not be more supportive of making sure that railroads are integrating technology that will improve safety and save lives. I mean, that starts with PTC, obviously, but you can take that all the way to our encouragement of tech companies to integrate our grade crossing data and to tech features, so that we're communicating both with, you know, engineers, but also with drivers who are just approaching a grade crossing. So...

**MANCHIN:** Are they looking at different technology? I mean, I don't know, I was asking the questions from the -- and they were very kind over there to show me everything and look through the whole scenario.

But I did not get the feeling they're moving in that direction, we call a glass -- a glass (ph) panel, a glass cockpit, if you will. What I saw was basically pretty antiquated light system and sound system if you're certain areas and this and that, and it just didn't make any sense, I mean, I just -- I was flabbergasted by it.

**FEINBERG:** Well, there is also a beauty to the simplicity of a locomotive, or of the cab. But I think probably the most important technology that railroads can integrate at this moment is PTC, which is incredibly complicated, well worth the complication I think but...

**MANCHIN:** You are working through the deadlines. You are working with the industry, and making sure that we're doing everything we can to expedite this along?

You understand they're time-consuming, there right? Basically in the intricacies of this?

**FEINBERG:** Yes, sir. And we have -- we have tried to do as much as we can to be helpful as railroads are attempting to implement this technology.

So we have offered technical assistance. We have built a test- bed (ph) facility in Pueblo, Colorado for testing purposes.

We have hired additional staff. We have tried to proactively help on safety plans. And we'll continue to do all of that because it's obviously in our interest to get PTC implemented as safely and efficiently as possible.

**MANCHIN:** The other thing, being a former governor, I was acutely aware of, you know, making sure that anything and everything that happens in the state of West Virginia and every other governor in our state does so with the utmost concern about the safety of the citizens.

The things I actually get complaints years ago when I was Governor, is that basically, our first responders didn't know what was (ph) traveling to their state.

Well, they didn't know to after-the-fact. And God forbid, an accident would happen.

And I sit on Mount Carbon, you know pretty well that area. If it happened just an hour or two down the track, it will wipe out Montgomery, the whole town.

Hard to tell how many people have lost their lives, what we saw happened just outside the town. And those are the things I'm concerned.

Have you all been able to better coordinate with first responders and with state coordinators and first

responders?

**FEINBERG:** We have. And we have -- I have said to the railroads that I think notifications of first responders should be a priority, that they are -- we have an emergency order that went into place in May of 2014.

That remains in place. We've reiterated its importance with the railroads.

I recently wrote them a letter reminding them that the expectation is that they are to be sharing that information with first responders, so that those individuals have as much information as possible.

**MANCHIN:** Are you getting pushback on that whatsoever? Are the states saying we still don't have the info we need in time enough that make sure that they have the proper equipment and people available in case, God forbid, something would happen?

**FEINBERG:** It depends on the state. Some states have said they want more. And we are asking the railroads to please work with them to give them...

**MANCHIN:** Yes.

**FEINBERG:** ... to give them all of the information they could possibly need. Some are satisfied.

And then, depending on whether that information was made public frequently depends on the state's (inaudible).

**MANCHIN:** And finally, I think you've put a working group together, working with the railroad executives and engineers and the people on the frontline and all the people that are on the -- on the rails, trying to get input from them to try to better this or do the things that basically are acceptable and can be done?

**FEINBERG:** Yes, sir, we have a taskforce within FRA that's seeking to do that.

**MANCHIN:** Thank you. My time has expired.

**FEINBERG:** Thank you.

**THUNE:** Thank you, Senator Manchin.

I have Senator Wicker followed by Senator Klobuchar, Senator Blumenthal, told we have a vote at 11:00, if we can get everybody in before we have to bust over to that.

That would probably be a good thing. And I'm sure Ms. Feinberg would appreciate that, too.

(LAUGHTER)

Senator Wicker?

**WICKER:** Thank you, Ms. Feinberg, I think we're -- I think we've been kind today. But I do think the committee on both sides of the aisle, the members are a little confused and frustrated by a lack -- the lack of a specific proposal concerning the extension.

Now, that the chairman came in and clarified that apparently, the FRA still stands by the GROW AMERICA recommendation concerning extensions on a case-by-case basis. Is that -- is that your position?

**FEINBERG:** What we asked (ph) -- what we asked for in the GROW AMERICA Act was not a blanket extension but flexibility to work with railroads so that we could prioritize where PTC would be turned on. So for -- so the statute is very black and white, and offers literally really no wiggle room.

And so what we ask for in the GROW AMERICA Act was flexibility to work with railroads post-January 1st, to turn on portions of PTC before waiting for an entire system.

**WICKER:** Well, you know, if I were railroad and struggling to meet this deadline, I would find that so uncertain that I don't know if I could develop a business plan. It seems to me that what that would do is leave it up entirely to the discretion of the FRA.

And the people trying to get this thing done in good faith would be so frustrated that they wouldn't know where they stood.

You know, it seems to me, Ms. Feinberg, that we're going to have to extend this for a period of time just to give people out there in the country the ability to know where they stand. And so to me, it would be helpful -- I don't think this -- I think we can all acknowledge that a GROW AMERICA Act is not going to be passed by the House and Senate, passed out of committees, signed by the president of the United States before the end of this year.

And so. I would appreciate you coming back to us -- the administration coming back to us about what vehicle we might have -- do we need to put on the C.R. (ph) if we do. We need to move it pretty quick.

And I understand the C.R., that the folks designing are intending for it to be very, very clean and not have a lot of new provisions. Do we need to put it -- can we wait until the omnibus (ph) at the end of the year because it looks like -- looks like that's where we're headed is the reauthorization of the transportation bill in an appropriate way?

But I would appreciate a specific recommendation as to the length of time that might be appropriate. Is it six months? Is it a year? Is it two years? You deal with this everyday. We're trying to deal with a hundred things.

So I really would ask you to get back to us and provide some leadership there in terms of letting us know how industry can get this done. And I realize we've spent a lot of time on this topic.

So let me -- let me switch, let me be provincial then, and ask you about Gulf Coast service. You know, we -- the House and Senate -- we haven't quite gotten a bill to the president's desk yet.

But I think -- would you acknowledge that we've made it clear in legislation that it is federal intent to have a working group formed to restore the Gulf Coast passenger service that we lost after Hurricane Katrina. What -- would you -- would you agree that congressional intent is becoming clearer based on the legislation so far?

**FEINBERG:** Yes, sir.

**WICKER:** And are you aware that a working group is proposed to develop and answer the question of how we implement this?

**FEINBERG:** Yes, sir.

**WICKER:** And will you -- will you acknowledge that FRA doesn't have to wait until the legislation is actually enacted to form such a working group?

**FEINBERG:** Yes, sir. And I have met with your staff on this. I am supportive of Gulf service being -- of Gulf shore service being restored.

We have had a good conversation. And I will actually be down there next month. I have met with the Southern Rail Commission.

They've lovely and excellent and...

**WICKER:** Where's down there?

**FEINBERG:** I'm sorry, I'll be Louisiana and Mississippi.

**WICKER:** Oh, good. Well, wonderful. You know, Governor Bryant, Senator Cochran and I would like to host you on a ride along that proposed route with the other members of the delegation with Amtrak President Boardman and CSX CEO Ward and others to assess the line's condition.

So are you willing to join us...

**FEINBERG:** Absolutely.

**WICKER:** ... on that ride if we can work out a convenient date?

**FEINBERG:** Absolutely. Look forward to it.

**WICKER:** Wonderful. Thank you and I look forward to working with you on that, and wish you the best.

Thank you for your service.

And Senator Klobuchar, I believe, is next.

**KLOBUCHAR:** Right. Thank you very much, Senator Wicker.

And thank you, Ms. Feinberg. Congratulations. Any friend of Senator Manchin is a friend of ours.

So first, I wanted to just talk to you about the blocked crossing issues. As I travel across Minnesota, I hear from people all over the state who have spent an excessive amount of time, sometimes hours, stuck waiting at a blocked rail crossing.

Blocked rail crossings not only inconvenience drivers, but they delay emergency vehicles. In July, I was in Ranier, Minnesota, which is on the Canadian border. It's a major crossing but a very small town. And there are rail crossing blockings, six to eight hours a day in the town.

So in the DRIVE Act, we actually put a provision in there to direct the secretary of transportation to develop highway rail crossing action plans, including tools and data, safety risks, other things. And that is the amendment that's in there.

Acting Administrator Feinberg, as this process moves forward, what steps can the FRA take to minimize blocked rail crossings? And do you think you have the best practices in place?

**FEINBERG:** Thank you for the question. We are also very concerned about blocked crossings.

We do not actually have regulations in place that govern how long a train can block a crossing. But we frequently hear from communities in Minnesota and elsewhere, where you have folks who are waiting for some time while a train is blocking a crossing.

And it can sometimes lead to safety concerns as well, when you have first responders who are stuck on one side of a crossing and can't get to the other side of a crossing. So, we frequently work with railroads individually to address specific problems.

We've also suggested that we do a study so that we can understand the impact of blocked crossings. And -- but we are also worried about this and attempting to resolve their...

**KLOBUCHAR:** Well, some of this is -- would be dictated by this bill once -- I know we're going to pass it eventually this year.

Also, I hear from communities that they don't have the capacity to prepare to respond to a derailment, or a hazardous materials spill. Firefighters and first responders, in some cases, simply don't have the resources to purchase the equipment.

What is the FRA doing to ensure local units of government have these resources to be able to properly prepare? And do you need any additional authority for that?

**FEINBERG:** I don't know that we need additional authority. We have -- we have worked closely with our sister agency, Pipelines and Hazardous Materials on programs that will assist with training first responders, making sure that they have the information that they need, the resources they need. There are trainings that frequently happen at our training and testing facility in Pueblo, Colorado, which is an excellent facility for training.

So we will continue to look for resources where we can assist first responders with that, and appreciate your focus on it as well.

**KLOBUCHAR:** And then one last question. I'm going to end short here, and give you the rest in writing so my colleagues can ask questions before the vote.

Would you support leaders from local government and first responders serving in the Railroad Safety Advisory Committee? That isn't happening now and we think that would be helpful.

**FEINBERG:** Certainly, I will say that they are more -- that they can certainly present to the RSAC at any point. They can come in and reach out to us.

And we can make sure that they are -- they have a role in RSAC meetings and process. And we're happy to do that and follow up and make sure that they -- that they feel like they are welcome and listen to RSAC meetings.

**KLOBUCHAR:** OK, we'd like them on the board and so we can discuss that later. And I'll put the rest of my questions in writing, and turn it over to Senator Blumenthal.

**FEINBERG:** Thank you.

**KLOBUCHAR:** Thank you.

**FEINBERG:** OK.

**THUNE:** Well, actually, Senator Daines is next.

**KLOBUCHAR:** Oh, OK. There you are.

**DAINES:** Thank you, anyway. Thank you. Thank you. Appreciate that.

Ms. Feinberg, congratulations on your nomination. It's nice to see you here again.

As you know, Montana is home to nearly 3,200 miles of railroad track that moves our ag commodities, record amounts of crude oil, coal and other manufactured products across our rail system everyday. In fact, we export the majority of our energy in ag production.

Eighty percent of our wheat harvest goes to Asia, and most of that by rail. Last summer, there were challenges to rail capacity and delays in shipping some of our goods.

Our phones were ringing a lot, a lot of concerns about this. This year, you know, the Burlington Northern Santa Fe has made significant investments in Montana to increase capacity, enhance safety.

And we expect smooth and efficient shipments of this year's harvest, as well as other commodities. Additionally, you've got the infamous Amtrak Empire Builder that runs along Montana's highline, providing much needed transportation and connectivity for our rural communities.

In fact, last year, nearly 120,000 people boarded and alighted Amtrak trains in Montana. I recall as a kid hearing stories about how my great-grandparents would take passenger rail from Shelby (ph) where the Empire Builder stops there.

That's how my family got back-and-forth when they first, in fact, came out to Montana a century ago. Needless to say, it's imperative to Montana we continue to move these passengers and commodities in a safe and efficient manner.

So my question is going to be probably the same horse have been beating here during this hearing, which is regarding PTC. We all saw in the report released yesterday that GAO has recommended again that Congress extend the December 31, 2015 PTC deadline.

The largest railroad in my home state in Montana is BNSF. They've been working diligently.

They've invested \$1.5 billion, in fact, and another \$500 million investment is planned to implement PTC across the nation, including the nearly 2,000 miles of track in Montana.

As we all know, this deadline is approaching. The Senate Highway bill contains an extension on a case-by-case basis. I think we must continue to move passengers and commodities in a safe and efficient manner.

Without these rail connections, we are in big trouble in Montana. So, my question as administrator, what would you do in the immediate future to ensure our railroads do not come to a grinding halt on January 1st, 2016 beyond the threat of fines?

**FEINBERG:** Well, Senator, it's good to see you again. I cannot give the railroads individual legal advice.

I just don't think that's an appropriate role for the FRA administrator. We have said, as clearly as we can possibly say, that we will enforce the deadline.

I know that many railroads are considering not operating, starting on January 1st because they will not be in compliance with the PTC law. But...

**DAINES:** Would you have your cellphone -- we could forward the calls from Montana to you so you can take them?

**FEINBERG:** Oh, sir, I am getting the calls, yes. Yes, I'm happy to take yours, as well, yes.

**DAINES:** I'm talking from the people of Montana. The phones will be ringing.

This will be a crisis. I'm sorry, I interrupted you. Go ahead.

**FEINBERG:** I am also worried about the crisis that can ensue on January 1st as well. We have tried to be as clear as we can possibly be.

We will continue to try to assist this committee and the Congress in any way that we can to contemplate the possible extension of the deadline. And we will work with you in any way that we possibly can.

**DAINES:** Yes, so we're down to about a 100 days...

**FEINBERG:** Yes.

**DAINES:** ... plus or minus. There is something called Thanksgiving in a way. There's the Christmas holidays.

So the time is of the essence. And given everything else going on in this town, it tends to be crisis-driven.

It should be nice to avoid yet another crisis-driven event.

**FEINBERG:** Sir, I completely agree. I do not have the authority to extend the deadline. And the secretary of transportation does not.

And we will work with this committee in any way that we can, but are not able to do it ourselves.

**DAINES:** On your testimony, you mentioned there's a \$1 billion loan from FRA to New York's Transit Authority to help implement safety measures. Often, the focus of passenger rail is on the northeast corridor.

And I understand the reason why, because of the dense populations. But it sometimes perpetuates this urban world divide that we see across our country.

As administrator, what efforts would FRA take to ensure that passenger rail service is not diminished in rural America, places like Montana? What loans are being made available to passenger rail in these rural areas?

**FEINBERG:** Well, the RRIF program is certainly available and has -- is frequently -- sort of gets the most interest from short lines which tend to be functioning in these rural areas. As a West Virginian, as someone from rural America, I can tell you that I'm a strong supporter of the importance of passenger service between rural areas.

We are working closely with Amtrak all the time. Because the Northeast Corridor is important. It's 50 million people. It's \$100 million dollars a day in economic impact. But -- so it gets a lot of attention. But it, in no way, takes our -- takes all of our attention. And we are laser-focused on the state routes as well.

**DAINES:** OK. Thanks, Ms. Feinberg.

**FEINBERG:** Thank you.

**THUNE:** Thank you, Senator Daines. And we are still waiting for passenger rail to come to South Dakota.

So have it -- or Montana. Wyoming and South Dakota, I think the only two of the 48 lower that don't have it.

Senator Blumenthal is up and Senator Cantwell and that vote has just been called. So we have...

**BLUMENTHAL:** I'll be quick, Mr. Chairman. My main reason for speaking is to say how fervently I support passenger rail in South Dakota.

(LAUGHTER)

**FEINBERG:** I agree.

**BLUMENTHAL:** First of all, Ms. Feinberg, I want to thank you for the breath of fresh air that you've already brought to the FRA. Your diligence and determination have made significant efforts already in the enforcement, and the vigilance and vigor of oversight by an agency that has been asleep at the switch for much too long.

There are still 64 recommendations, I believe, from the NTSB, that have not been closed by your agency. But

you have made a lot of progress over a short period of time.

And I hope that you will continue to focus not only on positive train control, but on very significant other rail safety issues, closed call reporting redundant (ph), signal protection, commuter rail inspection practices, cameras, speed restrictions, fatigue and so many other issues. I think your agency obviously can focus on more than one issue at once.

And these other challenges are as important as positive train control and a lot less expensive. .

So I hope that you will continue this effort, because rail safety in the United States is sorely lacking. And there will continue to be catastrophes, often with fatal results and tremendous costs, if the nation fails to do better.

And you are at the tip of the spear, so far as real safety is concerned. So I hope you'll continue your efforts in that regard.

There is a vast difference in different kinds of extensions of PTC. I strongly support the railroad-by-railroad, year-by-year vigilant oversight approach, which I believe was embodied in the GROW Act as opposed to the unlimited, indeterminate open-ended approach, which is currently embodied in the DRIVE Act.

And I will oppose that kind of extension, if it is incorporated in any sort of continuing resolution or a short-term fix. I believe that approach is simply an invitation to disaster.

And I know that you have walked a fine line in your testimony today in a very understandable effort to be accommodating for the different views that are on this committee. But I'd like a commitment from you, that you will vigorously enforce whatever PTC extension is adopted, if one is adopted by this committee and Congress.

**FEINBERG:** Absolutely. We intend to vigorously enforce the deadline that's in front of us now.

And should it be moved, we will vigorously enforce that one.

**BLUMENTHAL:** And I take it, you would favor the more limited and year-by-year, case-by-case approach embodying the GROW Act. That's in the administration's policy, is it not?

**FEINBERG:** Well, the GROW Act -- our purpose in the GROW Act was to ask for -- ask for flexibility for railroads that had made progress and that we -- where we were trying to prioritize PTC implementation in certain places. Certainly, we are supportive of getting PTC implemented as safely and as efficiently as humanly possible.

**BLUMENTHAL:** I want to focus in the short time I have remaining on the need for greater oversight on the Hartford Line. I want to thank you and Secretary Foxx for hosting a meeting, including myself and the Connecticut delegation and our governor.

I'd like you to commit, as you did in the meeting, that you will ensure that Amtrak manages this project more ably and efficiently.

**FEINBERG:** You have my commitment that we will remain very vigilant over that project. It's one of the most important projects in the country.

And as we said in the meeting, we are lucky to have good partners in Connecticut that are actually prioritizing this kind of work. And some people remain very focused on it.

**BLUMENTHAL:** And there really is an opportunity and obligation for more collaboration and cooperation here. The contention and disagreements that have occurred really are regrettable, and ultimately, will contribute to delay and cost overruns of this line.

Would you agree?

**FEINBERG:** Yes, sir.

**BLUMENTHAL:** Thank you very much.

Mr. Chairman, thanks for the opportunity.

**THUNE:** Thank you, Senator Blumenthal.

Senator Cantwell?

**CANTWELL:** Thank you, Mr. Chairman.

Ms. Feinberg, we've had a chance to talk many times about railroad issues and particularly as the Northwest experiences more and more train traffic.

Do you believe that oil volatility is an issue that needs to be addressed and that the DOT working with DOE should resolve this issue by doing the amount of testing required to say what vapor pressure really should be on trains?

**FEINBERG:** I certainly think that it will be helpful to determine what oil volatility plays. As you know, the Department of Energy is -- has partnered with our situation (inaudible) and with us to do a study of the Bakken crude, which is that I think you're referring to, to determine the volatility and what impact that volatility has.

So does it -- does it matter and how much, which will guide a lot of our thinking and be helpful.

**CANTWELL:** I know that it's astounding to me that neither FRA or FINSA thinks that they have the ability to regulate this vapor pressure, which we do in other areas that somebody is waiting for a catastrophic accident to then say, we should regulate this.

But are you concerned that these vapor pressure readings are as much as 18.5 pounds per square inch, when in reality, a lot of people have concerns above 10?

So we're not only seeing North Dakota saying, well, let's set a standard at 13.5, which -- or 13.7, which I have a concern about. But that we're finding that they're not even meeting that, that there's no regulation or oversight, whether the train traffic is actually meeting that standard. In fact, some people are finding much higher vapor pressures, which I think volatility comes into play.

**FEINBERG:** It's hard for me to -- to comment on what FINSA's authority is. Our authority is clearly the vehicle that that product is traveling in on its own rails at the tank.

So assisting FINSA with the tank car, but also the way the train has operated. But I have been a loud proponent of asking the energy industry to play a role in assisting us with the safety of transporting crude oil across the country.

I think it's important for the rail industry to be accountable. But I have been very vocal about my interest in having the energy industry have some skin in the game as well.

**CANTWELL:** The energy industry meaning?

**FEINBERG:** Meaning the shippers.

**CANTWELL:** Do you think the federal government needs to resolve this issue and weigh in, whatever agency it is, whoever has the authority? I mean, I don't think the general public cares, like, what we're all doing back here as it relates to this agency and then this doctrine and this regulation.

And it was falling through a loophole. People want to know whether volatility is going to be addressed or not.

And you think the administration should address volatility?

**FEINBERG:** I think if the -- if the studies that are being done by the Department of Energy suggest that we need to address volatility before it's placed into transport, we should do that. We should absolutely do that.

**CANTWELL:** Thank you. Thank you very much.

**THUNE:** Thank you, Senator Cantwell. I just want to point out for the record that the GROW Act had an open-ended extension.

There wasn't any deadline in the GROW Act. The DRIVE Act, which passed the Senate here a few weeks ago, has a three-year deadline through 2018 for installation and then a course certification is dependent upon working with the DOT.

And in addition, the DRIVE Act also included a number of other safety-related measures, including requiring inward-facing cameras on all passenger railroads, requiring speed-limit action plans to address automatic train control modifications crew, communication, other speed enforcement issues, improving the safety of the rail, transport of hazardous materials with real-time information for the first responders and comprehensive oil spill response plans; a requirement for grade crossing action plans to facilitate improved state-grade crossing safety efforts.

And it included another -- a number of other safety issues, such as signage alerters (ph) and track inspection.

So the DRIVE Act does have a number of safety provisions in there in addition to the PTC extension.

So, Ms. Feinberg, thank you for appearing today. And we will keep the hearing record open. If I can find my act for (ph) open for two weeks during which time Senators are asked to submit any questions for the record upon receipt.

We'd be asked to request to submit the written answers to the committee as quickly as possible. And as you can tell today, obviously, a lot of focus on the PTC. We've got a big problem.

You're coming in at a very important and critical time to try and help solve what most of us, I think, recognize is going to be a major, major crisis if we don't get some fairly quick action here. And your role is going to be important in the administration role is going to be important in trying to build the necessary bipartisan coalition that will take to pass legislation that gets us to where we need to go.

So, thank you for your time today and for your willingness to serve. And we will, with that, adjourn the hearing.

END

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\$60:SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

\$65:WASHINGTON, D.C.

\$70: SEN. JOHN THUNE HOLDS A HEARING ON THE NOMINATION OF SARAH FEINBERG TO BE ADMINISTRATOR OF THE FEDERAL RAILROAD ADMINISTRATION

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SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

HOLDS A HEARING ON THE NOMINATION OF SARAH FEINBERG TO BE

ADMINISTRATOR OF THE FEDERAL RAILROAD ADMINISTRATION

SEPTEMBER 17, 2015

**SPEAKERS:** SEN. JOHN THUNE, R-S.D. CHAIRMAN SEN. ROGER  
WICKER, R-MISS. SEN. KELLY AYOTTE, R-N.H. SEN. ROY BLUNT, R-MO. SEN.  
MARCO RUBIO, R-FLA. SEN. DEAN HELLER, R-NEV. SEN. TED CRUZ, R-TEXAS  
SEN. DEB FISCHER, R-NEB. SEN. RON JOHNSON, R-WIS. SEN. STEVE DAINES, R-MONT.  
SEN. CORY GARDNER, R-COLO. SEN. JERRY MORAN, R-KAN. SEN. DAN SULLIVAN,  
R-ALASKA

SEN. BILL NELSON, D-FLA. RANKING MEMBER SEN. MARIA  
CANTWELL, D-WASH. SEN. CLAIRE MCCASKILL, D-MO. SEN. AMY KLOBUCHAR,  
D-MINN. SEN. RICHARD BLUMENTHAL, D-CONN. SEN. BRIAN SCHATZ, D-HAWAII  
SEN. EDWARD J. MARKEY, D-MASS. SEN. CORY BOOKER, D-N.J. SEN. JOE MANCHIN III,  
D-W.VA. SEN. GARY PETERS, D-MICH. SEN. TOM UDALL, D-N.M.

**WITNESS:** SARAH FEINBERG, NOMINATED TO BE ADMINISTRATOR OF THE  
FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

**THUNE:** The table is settled. All right, good.

**MANCHIN:** Is this on purpose today (ph)?

**THUNE:** Yeah. They do that to me, too, Joe.

Want to welcome our nominee here this morning, and get this confirmation hearing underway.

Today, we're going to consider the nomination of Sarah Feinberg, the next administrator, of the Federal Railroad Administration. The F.R.'s mission is to oversee the safe, reliable and efficient movement of people and goods throughout our nation's rail network.

That rail network is absolutely vital to the nation's economy. So it's important that those who directly oversee the safety and efficiency of this network have the requisite skills and experience.

Ms. Feinberg has been serving as the acting FRA administrator since January, prior to her current assignment. She served as chief of staff of Transportation Secretary Anthony Foxx from 2013 to 2014.

From 2011 to 2013, Ms. Feinberg was the policy and crisis communications director of Facebook. And from 2009 to 2010, she served as special assistant to the president, and senior adviser to then White House Chief of Staff Rahm Emanuel.

Before that, she served as Mr. Emanuel's communications director for the House Democratic caucus.

While Ms. Feinberg clearly has substantial communications experience and an admirable commitment to public service, some have raised concern that her background does not include a deep expertise or experience on issues regarding railroads or railroad safety.

As noted in an April 11, 2015 article in Politico, at this crucial moment, this is, quote, "The nation's top railroad safety regulator as a former Facebook executive and White House adviser, whose resume is long on communications and policy posts, and noticeably short on railroad experience," end quote.

So in addition to asking Ms. Feinberg to respond to those concerns, I'll be also asking her about the looming deadline for railroads to implement positive train control. As those in the rail industry are well aware PTC is a communication system designed to prevent rail collisions, overspeed derailments and other accidents by automatically slowing or stopping a train that's not being operated safely by locomotive engineers.

The Rail Safety Improvement Act of 2008 mandated implementation of PTC systems by December 31st of 2015. However, complex and interrelated implementation challenges have prevented most railroads from meeting this deadline, which is rapidly approaching.

Yesterday, the Independent Government Accountability Office issued an updated report that found the freight and passenger railroads continue to face significant challenges in implementing PTC. And the vast majority of railroads would need one to five years to complete implementation. Even the small fraction of railroads that will be able to install PTC on their own tracks by December 31 of 2015, will face testing, certification and interoperability issues prior to full implementation.

This profile that many hearings convened by this committee, PTC is not an off-the-shelf technology. The GAO attributed implementation difficulties to the development of first-generation components, the limited number of manufacturers of those components, and complex system integration and testing, among other challenges.

Some of the implementation issues have also been government- created. The GAO pointed out that as a result of permitting review issues, this Federal Communications Commission halted the construction of critical communication towers for a year, effectively delaying implementation.

The GAO also pointed out that FRA's review of safety plans has been slow, and its oversight efforts have been insufficient.

GAO ultimately found that railroads pushing to meet the current unrealistic deadline, installing components

before defects are identified and addressed, could be counter-productive to successful implementation. These findings should not come as a surprise.

The FRA, itself, issued a report in 2012 that identified several technical and programmatic issues affecting implementation, such as spectrum availability, installation and engineering challenges, and technical capacity. It has said for years, the vast majority of railroads will not meet the current deadline.

Railroads have spent billions of dollars working through these challenges. CSX testified at a Commerce Committee hearing in January that the freight railroad industry has spent over \$5 billion in private funds on PTC development deployment. And they expect to spend at least \$9 billion to make PTC fully operational nationwide.

The reality is that, if only a few railroads could not meet the deadline, perhaps we could conclude there is an issue with those railroads. But if nearly every railroad in the country will not meet the deadline, we need to acknowledge that there is an issue with the deadline. Congress has a responsibility to fix the issue.

That's why legislative action is needed to extend the deadline and provide operating authority for railroads that have not completed PTC implementation, while still motivating compliance and enhancing safety. The Surface Transportation Reauthorization Bill, which passed the Senate by a vote of 65 to 34, includes a bipartisan proposal to extend the PTC deadline on a case-by-case basis, with enforceable milestones and metrics, and sets common-sense safety requirements such as cameras and speed limit action plans for passenger trains while PTC is being implemented.

I believe that failing to extend the PTC deadline will result in large-scale disruptions to the nation's economy that would make the West Coast port disruption, or the 2013 to 2015 rail service problems that impacted a large portion of the country, look small in comparison. That's why I recently sent letters to the Surface Transportation Board, all seven class I railroads and all cover (ph) commuter railroads inquiring about the effects of failing to extend the PTC deadline.

Responses to my letters indicate tremendous risk of service disruption, including the cessation, passenger rail traffic and major delays that will impact freight railroads, including the inability to ship critical chemicals such as chlorine for water treatment plants across the country, and anhydrous ammonia for the fertilizer that our agriculture sector requires.

MTA in New York responsible for Metro-North and the Long Island Railroad, two of the three largest commuter railroads in the country that collectively provide nearly a 180 million rides annually stated and I quote, "Railroads face serious potential disruptions to operations and exposure to unacceptable risks of liability and civil fines, all of which would divert railroad resources from the critical task of speeding final implementation of PTC," end quote.

Union Pacific, the largest freight railroad in the country, clearly stated in its response to my letter that it will embargo all passenger in toxic by inhalation chemical traffic starting on January 1st of 2016.

This includes chemicals essential for clean drinking water and healthy crops. In fact, the chairman of the Surface Transportation Board stated in his response to me that railroads may not be obligated to ship such TIH chemicals after the December 31st deadline, which could redirect them to other modes that are less efficient and importantly, less safe.

We cannot wait until the last minute to act. I believe, absent Congressional action, we will begin to see the effects of the deadline four to six weeks prior to the December 31st deadline, as railroads begin to cycle traffic off their lines.

This is a looming economic and safety disaster that is completely avoidable.

So now, more than ever, I believe that Ms. Feinberg, as the acting administrator of the FRA, has a responsibility

to work with us in Congress to avoid the potential service disruptions.

The time for anyone to play politics with the PTC deadline is past. And we, as policymakers, must work together to avoid disrupting the nation's economy.

And having said all this, I want to thank Ms. Feinberg for her willingness to serve at the DOT. Despite some of the criticisms that I mentioned earlier, Ms. Feinberg has received many compliments for her willingness to be transparent and responsive to Congress, which will be essential if she is confirmed.

With that, I want turn now to the ranking member of the committee, distinguished senator from Florida, and recognize him for any remarks that he would like to make before we turn to our -- our nominee.

Senator Nelson?

**NELSON:** Mr. Chairman, you've laid out a lot of the issues. And I would be duplicative to repeat. And therefore, what I am going to do is insert into the record my opening statement.

Let me say, at a critical time, a time in which there are questions of safety, the millions of people that use commuter rail, at a time of essential to the economy of this country, that we have healthy railroads, that they can be competitive, they can operate safely, reliably and efficiently, and with safety being central to the FRA's mission -- indeed, we've seen train accidents decline and fatalities decline.

But then, we have huge incidents of fatalities that bring it back to the fore.

And so, Ms. Feinberg, for you to be willing to step in to the breach and try to offer the leadership that is so desperately needed, of the Federal Railroad Administration, which oversees the safety and development of the nation's freight and inner city passenger rail networks. So, it's a critical appointment.

It's a critical time. It's a time that the FRA cannot let anything be slack and drop. So, I'll insert my opening statement in the record.

**THUNE:** Thank you, Senator Nelson. And we'll make sure that that's all included for the record.

We have with us today one of our very distinguished colleagues and a member -- a very active member of this committee, I might add, and the home state Senator of Ms. Feinberg to -- to introduce her. And so, we want to welcome to the other panel, well, he's normally up here on the dais, our colleague from West Virginia, Senator Manchin.

Senator Manchin, you want to proceed? Thank you (ph).

**MANCHIN:** Well, first of all, to my colleagues and to you, Mr. Chairman, for allowing me this -- this opportunity to introduce a most accomplished, you know (ph), it is truly an honor to introduce acting administrator of the Federal Railroad Administration and a friend of mine, Sarah Feinberg.

As you know, she's from West Virginia, grew up in the most common sense nonpartisan state, if you will. As a native West Virginian, she has the same pragmatic approach to problem-solving that you see among our congressional delegation everyday.

In West Virginia, it doesn't matter if you're Republican or Democrat. You just got to get something done.

People expect you to do your job. I want to tell you, when I first was introduced to this young lady, in 1983, her daddy was in the state legislature with me, Lee Feinberg, and he brought this little girl, six years old -- five or six, I think at the time.

And we all bring our kids and show our kids off, you all remember that -- that state legislature. And here comes this little girl, this rambunctious, jumping around and running around this -- the chamber and everything. That was my first introduction to Sarah.

I watched her grow into young lady, and then to a most accomplished young woman. And she has done such a fantastic job, was so proud.

She comes all the same. She's cut from the same cloth as -- as we have and Sylvia Burwell, a West Virginia native, I think it's -- you found to be very pragmatic and responsive to all of us.

But today, she sits before the committee, seeking to continue her public service as administrator of the Federal Railroad Administration. Over the past nine months, I believe she has proven herself to be an effective and engaged leader with the courage to make tough decisions and the character to accept criticism that they often incite.

She was baptized by fire after being appointed to this position January 9th of this year, leading the agency's response to five major incidents within her first 60 days on the job. On February the 3rd, six people were killed when a commuter train hit an SUV at a grade crossing in Valhalla -- Valhalla, New York.

On February 4th, 14 tank cars carrying ethanol derailed just north of Dubuque -- Dubuque, Iowa, three of them caught fire. On February 16, 27 tank cars derailed outside Mount Carbon, West Virginia.

They released 378,000 gallons of crude oil and ignited a fire that destroyed a nearby house -- could've wiped out a whole community that have been down (ph) -- down the track. On February 24th, the commuter train in Oxnard, California hit a tractor trailer at a grade crossing and jumped the tracks.

On March 6, 21 cars derailed outside of Galena, Illinois near the border with -- with Wisconsin. Five of them caught fire.

I'm a firm believer that elected officials need to be on the ground in emergency situations, supporting first responders and assisting those in need. And I was impressed by Sarah's response to the Mount Carbon derailment in West Virginia, which I witnessed firsthand.

Five weeks into her new job, she executed an efficient and effective federal response that was one of the best I've ever seen in my experience as elected official -- I've been through many tragedies in my state. There are a lot of smart policy people here in Washington, D.C., but the best policy in the world want me to think, if it doesn't translate into the real world.

Sarah's response to the Mount Carbon accident showed me that she understood that, and gave me faith in her ability, not just to lead, but to listen to the people that we're here to serve. Over the past 10 years, the increase of domestic energy production has been an engine of economic growth for our great country.

And the Energy Information Administration predicts that growth to continue through 2020. From 2009 to 2014, crude oil production in the United States increased by more than 62 percent, up from 5.35 million barrels per day in 2009 to 8.68 million barrels per day in 2014.

And the majority of this product is moved by rail. In 2008, our railroads moved a meager 9,510 cars carrying crude oil.

Remember this figure, in just 2008, only 9,500 tankers were carrying crude oil. Last year, the number grew to 500,000 tank cars -- 500,000 from less than 10,000, over a 5,000 percent increase.

Unprecedented challenges come along with the new economic opportunities presented by the growth in domestic energy production. And Mrs. Feinberg -- Ms. Feinberg's experience makes her uniquely qualified to lead the

FHRA through this transition.

As chief of staff to secretary Foxx, she helped the Department Transportation develop a holistic strategy to improving the safety and security of crude by rail that required coordination between multiple administrations within the department. The tough new tank car safety regulations that were finalized in May were dependent on close collaboration between the FRA and the Pipeline Hazardous Material Safety -- Safety Administration.

Sarah's experience in secretary's office existing relationships throughout the department allowed her to cut through red tape, and get the right people in the room to get the job done. And that's what it's about, putting people together that want to get something done.

While the new rules do not solve every problem, they represent a major step in the right direction. They satisfied all or part of the 10 outstanding National Transportation Safety Board's recommendations, and including all four recommendations that were made in April this year.

So since taking the helm at the FRA earlier this year, I've been impressed with Ms. Feinberg's willingness to tackle difficult issues and engage stakeholders about realistic solutions, taking politics out of the equation completely. And May, she convene the PTC taskforce to try to identify opportunities for the FRA to help railroads meet the December 31, 2015 deadline and become a real partner in the process.

I think her proactive approach to problem-solving will be an asset to the FRA and the entire Department of Transportation, and to all of us sitting here responsible for the safety of our citizens in our respective states.

So, without further ado, I want to introduce to you not only an accomplished young professional committed to public service -- and she inherited that in her genes, in her bones.

It's with her everyday in a bipartisan way to get things done and move this country forward. My friend, Sarah Feinberg.

**THUNE:** Thank you, Senator Manchin. And that just underscored how old you are trying when you describing that, so.

(LAUGHTER)

But thank you for being here. Thank you for that introduction. And we now look forward to hearing from our nominee.

Ms. Feinberg, please proceed.

**FEINBERG:** Chairman Thune, Ranking Member Nelson and members of the committee, thank you for the opportunity to appear before you today.

Senator Manchin, thank you for your kind introduction. I'm grateful for your friendship, your decades of service to our state and your strong support. I'll just briefly note that I'm so pleased that my brother Matthew (ph) is here with me today, and that other members of my family are here with me in spirit.

It is an honor to have been nominated by President Obama to service the administrator for the Federal Railroad Administration, and to have earned the confidence of Secretary Foxx. It is also a great responsibility and one that I take seriously.

Just one month after I became acting administrator, a Metro-North train traveling out of New York City hit a car at a grade crossing. Six people were killed doing what millions of Americans do everyday, traveling home from work, visiting friends, or on their way to see their family.

Days later, in Senator Manchin's and my home state of West Virginia, a mile and a half long train carrying 109 tank cars loaded with crude oil derailed near the town of Montgomery. One person was injured. Multiple small communities were evacuated and a fire burned for days. And anyone you visited the scene would agree that we got lucky.

In May, an Amtrak train traveling significantly over the speed limit derailed in Philadelphia. The horrific accident took the lives of eight people.

These accidents are searing reminders that millions of Americans depend on the railroads and FRA's diligent oversight to transport them safely to their jobs each morning, to their homes and families each night, and to deliver goods and products safely everyday.

Next year, FRA will turn half century old. The agency has a proud history and a long list of accomplishments, most notably a significant contributions to improving rail safety. Rail deaths and injuries are down dramatically. Worker injuries are down. Derailments are down. And those decreases are very much a testament to the work of the men and women of the FRA.

But in some ways, safety in the rail industry has also plateaued. Improvements are generally not as dramatic as they used to be.

And we occasionally even see spikes in the wrong direction. And that calls for action.

The American people expect every federal agency to adapt to new conditions and new realities, to be willing to change, to be open to criticism. Over the last eight months, I have seen FRA do just this -- they've shown a willingness to adapt to change. We've headed in a new direction, and we've brought new thinking to old challenges. We've tried new solutions aimed at addressing the old challenge of grade crossing incidents.

We've partnered with police around the country to step up enforcement. And in June, Google agreed to integrate our grade crossing data to add crossing alerts to Google maps.

We've taken a new approach to the way we handle NTSB recommendations. When I arrived at FRA in January, there were more than 70 NTSB recommendations awaiting action. We've take action on more than half of them, reducing the number of outstanding recommendations by nearly 15 percent. And we await word on another 30 from the NTSB.

Some of these recommendations had been sitting for more than five years. FRA listened to the frustrations that members of this committee expressed about the railroad rehabilitation and improvement financing program. And we've acted. This year, we've completed two loans and expect to complete two more shortly. The risk program is very much open for business.

While working to try to bring new solutions to these old challenges, the men and women of FRA have stayed laser-focused on our ongoing safety priorities and have delivered significant results. During the last two years, the United States have seen more than a dozen crude oil train derailments.

In May, with our sister DOT agency, FINSAs, we completed the high hazard flammable train rule, a final comprehensive rule that aims to prevent these types of accidents and lessen their impact if they do occur. We've prioritized PTC implementation, hiring staff and creating a taskforce that reports to me regularly on progress and the performance of each railroad.

We were also proud to work with many here today and in the greater New York City region to provide a nearly \$1 billion loan to implement PTC on MTA's system. Both the administration's budget and its GROW AMERICA Act have requested significant funding to assist commuter railroads on PTC.

And Chairman Thune, Ranking Member Nelson, I want to thank you and members of this committee, in particular, for the recently passed legislation that seeks to leverage nearly \$200 million to cover some of the costs and expenses railroads face when taking out a RRIF loan to implement PTC. All of this activity is in addition to our continued focus on making sure the agency's partners deliver high- speed, intercity passenger rail projects for the American people.

None of this success would have been possible without the tireless work of the nearly 900 public servants at the agency who are dedicated to rail safety. And it has been an honor to lead them as an acting administrator.

Chairman Thune and Ranking Member Nelson, I am pushing FRA each day to be diligent -- vigilant in the proceed of safety, open to paths of innovation from any source. The agency is engaged, enthusiastic and driven because we know the gravity of our responsibilities and the size of our opportunities.

If confirmed, I would eagerly work with all members of this committee and all members of Congress to build a stronger and safer rail system, and one that we can all be proud of.

Thank you, and I look forward to taking your questions.

**THUNE:** Thank you, Ms. Feinberg.

As I mentioned, and I'll start with some questions, and we'll go round with the five-minute rounds here, just to alert members of the committee. As I mentioned, the committee has conducted extensive outreach with freight commuter railroads to understand the effects of failing to extend the deadline to implement PTC.

And it's clear that there will be widespread rail service reduction if Congress fails to act. For example, Metro in Chicago, with over 70 million riders annually, has stated that there's a strong possibility that it will cease service all together, a concern that is echoed by Long Island Railroad, Metro-North in New York and Connecticut.

And so, I want to just get a couple of numbers on the record. Based on your outreach to railroads, approximately how many have informed the FRA that they may suspend or reduce service?

**FEINBERG:** Senator, I think that you have the most recent numbers, because they've been responding to your most recent letter. But to put it this way, I have not have a recent conversation with the railroad that has informed me that they do intend to operate on January 1st.

So I believe you have the most recent numbers. But we are well into the 20s at this point.

**THUNE:** OK. Have you or has DOT, I should say, evaluated the extent to which there will be an increase in congestion, or potentially lives lost from commuters taking alternative options to -- or alternative modes of transportation, I should say?

**FEINBERG:** We have not done a specific study that would look at the effects on January 1st or on January 2nd. But I have said that I have -- I do have significant concerns about the consequences of railroads choosing not to operate on January 1st.

I think it would lead to significant congestion. And that does also lead to safety impacts.

**THUNE:** Have you had any discussions with -- is FRA having discussions with FTA to determine whether transit buses have the capacity to carry displaced riders who might otherwise be on commuter railroads?

**FEINBERG:** The most -- the FRA and FTA are in constant communication about a variety of PTC issues. I don't we've had the specific bus conversation, though I don't think there's an expectation that buses can -- would be able to take that load.

**THUNE:** How about the smaller railroads, class twos and class threes? Some of those are, you know, frequently overlooked, that the mandate also applies to them.

And they happen to use, in many cases, class one railroad track. Roughly, how many of these small railroads will be required to equip their locomotives as a result of the PTC requirements?

And are you hearing of any difficulties these railroads may be experiencing?

**FEINBERG:** Certainly. We have heard generally from the Short Line Association, and from individual short lines and from -- from other individual entities. I mean, we can get you specific numbers if you need it.

But -- significant -- but most are watching the Congress and keeping an eye on what is likely to come out of here.

**THUNE:** The -- our colleague on the committee, who I'm sure you hear from in a moment, Senator Blumenthal, has noted that entities like the Connecticut DOT should not be subject to penalties for making a good-faith effort to implement PTC, even though Connecticut will not implement until at least 2018. He's also noted that it is possible that Metro-North could be spared fines if they showed a good-faith effort.

If Connecticut DOT and Metro-North are considered to be making a good-faith effort, are there others that are as well?

**FEINBERG:** Well, there are many railroads that are making a good-faith effort and have -- we believe, have been working diligently towards PTC implementation. But the law and the statute, the deadline is very black and white and does not give -- in our read, does not give flexibility to railroads that are working diligently versus ones that are not.

**THUNE:** If a line's not currently handling toxic-by-inhalation materials or passenger traffic, does the PTC requirement apply?

**FEINBERG:** It depends on where in the country we're talking about. But it is aimed at lines that are handling hazardous materials and passenger service.

**THUNE:** And would the FRA consider continued movement of non-TIH and non-passenger traffic over such lines after December 31 of 2015 to be in violation of the 2008 statute?

**FEINBERG:** Yes.

**THUNE:** Does the FRA intend to impose fines or penalties related to non-TIH and non-passenger operation on such lines after December 31 of 2015?

**FEINBERG:** We will -- we will enforce the law as of the deadline on December 31. On January 1st, we will enforce the deadline and the law.

**THUNE:** How does the FRA define the common carrier obligations that real carriers have under existing law? Well, let me ask you this way, do you believe the common carrier requirement is in conflict with the current PTC deadline?

**FEINBERG:** Well, I would defer to the STB on that. And I have their recent letter, which I think that you've seen as well, in which they deferred to us on and safety.

**THUNE:** Right.

**FEINBERG:** And so -- but it's a partnership between the two organizations.

**THUNE:** OK. My time has expired. I'll hand it off to the senator from Florida, Senator Nelson for questions.

**NELSON:** Well, you've heard of the old saying, "we're between the devil and the deep blue sea." So if we don't extend positive train control, which most everyone at this dais wants to get positive train control, install this fast as possible, but under the law, you have to impose fines.

But the railroads say they can't comply. And therefore, they will not carry certain traffic.

So what do we do if PTC is not extended?

**FEINBERG:** Well, sir, we've said that we feel that's it's our obligation to enforce the PTC deadline. And so on January 1st, if railroads that have not implemented PTC choose to operate, we will take enforcement actions.

**NELSON:** You formed a taskforce on this. And it's getting information to be used to monitor the progress and guide enforcement efforts.

Tell us about that.

**FEINBERG:** Yes, sir. We've had a number of FRA staff members working on PTC for years. But more recently, I have formed within the FRA a taskforce that is working on PTC across the board, they are in close touch with railroads.

They're offering technical assistance. They are monitoring testing.

But one of the things they are also doing is collecting data about PTC implementation, how that implementation is going from railroads that were tracking that -- that progress regularly.

**NELSON:** If the Congress extends the deadline for PTC, what would your recommendation be? How long of an extension?

**FEINBERG:** Sir, I don't think it's appropriate for me to recommend a certain amount of time. I would be deferential to the Congress on what they believe the right action would be to take in terms of the deadline.

But we would, as we have in the past, offer as much technical assistance and our expertise as we possibly can, and try to be helpful to the Congress as they contemplate moving the deadline.

**NELSON:** One of the things that we did in the highway bill was we got the number up to \$200 million to help the commuter railroads install the positive train control. Now, it'd be nice to have PTC installed sooner.

I want to thank the chairman for this. So, how would you go about the use of this funding?

**FEINBERG:** Well, we would want to coordinate with this committee and take guidance from you. But as I view it, \$199 million would be used as an offset for CRP -- I'm sorry, for the credit risk premium for commuter railroads that are applying for PTC loans, or could be used as a grant program for those same commuter railroads.

**NELSON:** Grade crossing safety -- it's a problem all over the country. Can you talk about your efforts to partner with local law enforcement and technology companies on this grade-crossing issue?

**FEINBERG:** Yes, Senator. Thank you for the question.

Following the Metro-North grade crossing incident, we, the FRA, launched a grade crossing campaign, which would seek to try to bring some new thinking to this old problem.

And one of the first things we did was partner with law enforcement to ask for increased enforcement at grade

crossings, so ticketing in an effort to prevent people from beating the train, if you will. We've also reached out to tech -- to tech companies to ask them to take our grade crossing data, which is the location of more than 240, 250,000 grade crossings across the country, integrate that data into their maps, so that when passengers or drivers are actually within a mapping application, they would be alerted that a grade crossing is -- that they are approaching a grade crossing.

**NELSON:** So back to the pregnant question before us, do you have a recommendation on what we do on an extension on PTC?

**FEINBERG:** I don't have a specific recommendation for a length of time. I'm grateful to this committee, and the leadership of this committee for being so focused on this problem.

I am worried about the consequences that come on January 1st. And I'm grateful for your attention to it.

I do not have a specific amount of time that I would recommend. But as I said, we would continue to work with this committee to offer technical assistance, or expertise and any assistance that we can to be helpful as you, as you work on this.

**THUNE:** Thank you, Senator Nelson.

Up next, you get the Missouri double-team, Senator Blunt followed by Senator McCaskill.

**MCCASKILL:** Fact (ph).

**BLUNT:** There you go. There you go. Well, the Missouri double team's sometimes pretty tough.

We're glad you're here. Thanks for the work you've already done on this. I appreciate the discussion this morning has not been about who's at fault or whether the government is at fault, or -- but we're not going to make this deadline. I think you mentioned, Ms. Feinberg, that over 20 railroads have told you they would not operate on January 1st.

Some of those railroads also, obviously, commuter traffic runs over those rails as well. I think Burlington Northern has said that their contract with commuter traffic may -- requires them to have their rail system in compliance with federal law. In your view, that commuter traffic could not use those rails as well?

Do you have a view of that? The chair -- it's what Burlington Northern thinks. Is that what you think?

**FEINBERG:** No, no, that's -- I mean, that's correct. The class ones are right to be also thinking about the commuter service that functions on their -- on their track.

And to be clear, the commuters are thinking about that as well.

**BLUNT:** And do you think it's reasonable, these 20 railroads that have told you they might not be able to function? Do you think it's -- or won't function -- do you think it's reasonable that they believe that they cannot function if they're not in compliance with the PTC standard?

**FEINBERG:** Well, to be clear, they've actually communicated that to -- to Senator Thune -- to Chairman Thune. But they've also...

**BLUNT:** Right.

**FEINBERG:** ... put a (ph) copy on to us on those communications as well. I think it is reasonable for railroads to take a close look at how and if to operate on a date when they will become -- when they will be operating in violation of the law.

I think that's an appropriate thing to look at. And frankly, that's something that we would expect them to look at regularly.

**BLUNT:** So you think it's reasonable for them to assert that they cannot or should not operate in knowing violation of the PTC deadline?

**FEINBERG:** Each railroad is going to have to make that decision individually. But I absolutely think it's reasonable to be contemplating whether or not it's appropriate to operate that day (inaudible).

**NELSON:** And of course, one of the reasons for this is the toxic- by-inhalation freight concerns. But of course, if that freight, along with lots of other freight isn't part of the commerce system, there are major problems in commerce for water treatment, for plastic, for whatever else.

Those chemicals go into -- anybody doing a study of the economic impact of what happens if railroads aren't operating on January 1?

**FEINBERG:** We have not done a study into the economic impact. I can't speak for the STB.

We have not done that specifically. But -- and our obligation is to think about this in terms of safety versus economic impact. But I'm certainly concerned about the consequences in terms of congestion and the safety impacts of increased congestion as well.

**BLUNT:** And...

**FEINBERG:** And those products will likely be moved by truck. They don't move by rail.

**BLUNT:** And so that creates safety concerns in another -- not only the traffic -- the advanced traffic, but then you just move that same problem to another place.

**FEINBERG:** That's right.

**BLUNT:** That same concern to another place. In terms of the passenger rail, do you know of any discussion they're having about whether they think they should be able to operate on lines that don't meet the standard?

**FEINBERG:** It is an active conversation that's happening across the industry. So it's not just the freights that commuters are absolutely having this conversation.

We are in close touch with them, just like we are with the freights. They are very anxious and keeping a close eye on this body to see what happens next.

**BLUNT:** And you been thoughtful in not giving any indication of exactly how long an extension would be. But do you think -- is your view is that there needs to be some sort of extension beyond January 1?

**FEINBERG:** I mean, to echo the ranking member, I think he said between the devil and the deep blue sea, I would say, we're between a rock and a hard place. The deadline is not going to be met.

That is disappointing to me. And I think it has safety consequences that I'm concerned about.

The railroads not operating also have consequences. And I would -- we would want to work very closely with this committee to try to assist in any way we can in offering technical assistance and expertise as you look at the deadline.

**BLUNT:** Thank you, Chairman.

**THUNE:** Senator McCaskill?

**MCCASKILL:** You are here to -- for us to ask questions for you to be the boss. So I'm going to ask you some tough boss questions.

GAO has a follow-up that just was issued yesterday on the PTC implementation. I'm going to read a paragraph.

"Providing FRA with the authority to grant extensions on a case- by-case basis would provide some needed flexibility, and could also assist FRA in managing its limited staff resources, and help railroads mitigate risks and ensure PTC is implemented in a safe and reliable manner." Do you agree with that?

**FEINBERG:** We are willing -- we...

**MCCASKILL:** That's not my question. I want to know whether you agree with that statement, "providing FRA with the authority to grant extensions on a case-by-case basis would provide some needed flexibility and could also assist FRA in managing its limited staff resources."

**FEINBERG:** It would certainly -- it would certainly give us flexibility. I am less worried about the staff resources, because we have plans in place to staff up quickly with contractors.

And we've had these plans in place for quite some time. I am anxious about the prospects of entering into negotiations with 40 different railroads on a case-by-case basis, which would result in a choose-your-own deadline back-and-forth.

**MCCASKILL:** OK, so you're not comfortable on a -- with a case-by- case basis approach?

**FEINBERG:** I think that...

**MCCASKILL:** You would rather have a set deadline?

**FEINBERG:** Well, I just think that we have to be aware of the consequences of entering into negotiations with 40 different entities.

**MCCASKILL:** Yes. And so that's what I'm trying to figure out, Ms. Feinberg, is you know, which is the best of bad choices? And you're going to have to make that decision, potentially.

**FEINBERG:** Ultimately, I -- unfortunately, FRA does not have the authority to make that.

**MCCASKILL:** OK, well, you do have the authority on this subject. We know that the railroads will not be PTC compliant by the end of year, correct?

**FEINBERG:** Correct.

**MCCASKILL:** No controversy there, no question?

**FEINBERG:** Most of them will not. A few will make it, correct.

**MCCASKILL:** OK. A few will be, but most will not? We've heard that they're not going to operate.

But really, what they want to know is what you're going to do. So if you know they're not going to be compliant at the end of the year, can you tell this committee what you're going to do on January 1?

You gave us a memo that gave you all the enforcement options.

**FEINBERG:** Right.

**MCCASKILL:** Why is it that you will not say these railroads are trying to decide what to do, if Congress, for some inexplicable reason, will not face the reality that an extension is necessary? They have to make a tough decision, and so do you.

The sooner you make your decision, the more informed their decision will be.

When will you make the decision on what you're going to do when they are not compliant if Congress fails to act?

**FEINBERG:** Actually, I feel like we've been pretty clear on what we will do on January 1st if they're not compliant.

**MCCASKILL:** And what is that?

**FEINBERG:** We will -- if the -- if the December 31 deadline remains in place and railroads choose to operate in violation of the law, we will take enforcement actions on January 1st, or on the day that they operate. So we will issue fines.

And we will likely impose additional requirements on these railroads that will raise the bar and safety if they choose to operate without PTC implemented.

**MCCASKILL:** Have you discussed what the fines will be, because you know this is going to happen? I mean, if -- I mean, what I'm trying to figure out is we're going to have a huge mess if nobody operates on January 1st.

I mean, I don't know any other more artful way to put it other than a huge mess. It's going to be dangerous. It's going to be very damaging to our economy. It's going to cost jobs.

It's going to be exhibit A of why Congress is so unpopular. Because we can't manage to do something simple than recognize the obvious here.

So we know what the situation is going to be. Why can't you be more specific, so the railroads can make an analysis about the cost- benefit of the penalties they might incur versus operating?

**FEINBERG:** So, let me -- let me try to explain it this way. The railroads continue to make progress every day.

So we're currently about three and a half months out from the deadline. Some railroads make progress everyday.

They're equipping new locomotives. They are -- they are testing PTC. They are getting additional equipment.

They are obtaining spectrum. And so, to give a railroad a specific amount that we will fine them today has -- may well have nothing to do with where they are three and a half months from now.

What we've said is, we believe the fines will be significant. Each violation has a maximum fine of \$25,000 per day.

But if you are choosing to operate past the date of January 1st without having implemented PTC, I guess is this would be multiple violations dependent on locomotives and segments that you're operating on. So we have said is, we believe those fines will be very significant, and that we will, on top of that, impose additional requirements on the railroad, whether that's additional crew members requiring as additional crew members to communicate, put potential speed restrictions.

So we've been as clear as we can be. I believe the railroads do deserve transparency and clarity on what will happen on January 1st.

And but we've -- we've tried to be pretty clear about that.

**MCCASKILL:** I think you think that if you tell them what it's going to be, that somehow, that will slow them down, and I don't think that's true.

I think you do need to be more specific than significant fines. And you know, I think also what I would really appreciate is analysis, which is going to be more dangerous than not operating on January 1, or continuing to operate without fully implementing PTC because I think there's a real question, which is going to be more dangerous?

And it sure would be a shame if that analysis hadn't been made transparent before that date.

Thank you, Mr. Chairman.

**THUNE:** Thank you, Senator McCaskill.

Senator Blunt? And let me just point out, too -- I think the administration did point out an extension proposal in their GROW Act. and the other point I want to make is an important one.

Everybody is focused on January 1 here, which is, of course, the deadline. But the effects of this are being felt sooner than that, particularly with the freight railroads.

I mean, we're talking about probably a November timeframe. So the sense of urgency attached to doing something on this is very apparent.

And I think we have to recognize that we don't have a lot time to work with. And Senator from Missouri is exactly right.

I mean, if you look at what could happen, the potential effect, this is -- this is a -- this is a huge disaster in the making, which as I said before, is totally avoidable.

So, Senator Fischer is up next.

**FISCHER:** Thank you, Mr. Chairman. I'd like to follow up on the fines that you were talking about and the penalties.

You mentioned that they're going to be significant. And before that you said that the railroads are making progress everyday, but we all know that they're not going to get there. I mean, they have been very open about that.

They have given us quite a bit of information on the problems that we're going to be seeing all across this country, and as Senator McCaskill said, the tremendous negative impact we're going to see on our country's economy, and the safety of our citizens by a shutdown, basically, from our railroads.

When we're looking at these significant fines, what system have you established that will determine what the fines are?

Does that offer any clarity to the railroads, or to us on this committee? Do you have a system in place?

**FEINBERG:** We do have a system in place. We have a long-standing system for enforcement against railroads, which has been in place for many years.

But then more specifically, following the 2008 legislation, we finalized a rulemaking in 2010 that included all

of the ways that we would enforce against PTC. So it's -- we can certainly get it to you.

It's several pages. And it basically details, the various enforcement actions that we would take.

**FISCHER:** What are a couple of the specific actions that would happen?

**FEINBERG:** So there are many. They involve failure to equip of a locomotive...

**FISCHER:** But what's the penalty?

**FEINBERG:** They started -- I think for that one, it's \$15,000. But it depends on if it's a willful violation, so much like any other enforcement agency.

There are basic violations, and then there are willful violations.

**FISCHER:** OK, but that then -- that then leads me to the idea that there are companies that are working in a good-faith effort. And they've invested, really, billions of dollars in trying to meet these deadlines that they're not able to meet.

Are you -- are you going to be looking at those companies differently? I think earlier, you said you wouldn't.

**FEINBERG:** I think that may have been a reference between freights and commuters. But -- but we've -- if I understand your question, we certainly do not want to just disincentivize progress.

And we do not want to punish railroads that are making progress and working hard each day to reach the deadline and to make progress on PTC implementation. It's also important for the enforcement mechanisms to be fair.

**FISCHER:** Would you be looking -- a follow up with Senator McCaskill's question again? And would you be looking -- with that comment, I would think you would look at treating companies differently and making accommodations for them individually and not as a group.

**FEINBERG:** So, let me give an example. Some railroads have been unable the spectrum that they needed in order to implement PTC.

My point is that and as we look at enforcement actions, we want to prioritize both the ones that have the largest impact on safety, but also the ones that railroads actually had control over versus something that was out of their control.

**FISCHER:** OK. I'd like to switch gears here and talk about the ECP breaking requirements, and that would also cost billions of dollars. But two class one railroads, Union Pacific and Norfolk Southern, they've tried those systems.

They've abandoned them. They didn't feel that there was a substantial benefit to safety. When you look at the crude by rail and the rulemaking there, it's my understanding that the FRA did not conduct a real-world study.

Is that right?

**FEINBERG:** Well, we use modeling for the ECP breaking for the cost-benefit -- for the impact of the ECP brakes as we do in most rulemaking. I mean, you're correct that those braking systems are in place on some railroads, that they're actually being used each day.

But to actually take one train equipped with ECP and one train non-equipped, and then involve them in an incident, even in a testing, is not something that we do.

**FISCHER:** So, no hard science was really used at all in determining those regulations?

**FEINBERG:** Well, I do think there is hard science involved. And there is math involved as well.

But we did not actually go out and involve trains in a real-world incident.

**FISCHER:** I understand that math's used in modeling. But wouldn't you think that hard science would be more helpful, especially when you had two class one railroads that did have information on it?

**FEINBERG:** Well, we'd be more than happy to do testing like that. We have -- we have said to this committee that, while funding is important for testing like that, we are always anxious to collect more data, particularly on things like braking systems.

You know, I understand that the railroads are concerned about the cost of implementing this braking system. I would also note that prior to the rule being finalized, some of them were actually advertising that they were using it.

So, I am aware that they are unhappy with the cost. And we always want to collect more data about braking systems.

But I also am -- you know, we're very focused on whether the braking system works as opposed to logistics and cost.

**FISCHER:** I would say that all of us up here, and including the railroads who were intimately involved in this, are concerned a lot more than just about the cost. We're concerned that if it works, we're concerned about the safety.

We want to make sure that investments have a -- have a return that will keep our population, our citizens safe. So to imply that this is all based on cost, I think is a comment that did not need to be made.

Thank you, Mr. Chairman.

**THUNE:** Thank you, Senator Fischer. And we have up next -- if he's ready, Senator Manchin.

You want to go? OK, we'll go, Senator Peters next.

**PETERS:** Thank you. Thank you, Mr. Chairman.

Ms. Feinberg, thank you for willing to take on this job. Obviously, it's a very big job.

And I know you are putting a great deal of good faith effort and working hard, and appreciate your efforts and appreciate the opportunity to meet earlier to talk about some issues.

And before I get into the positive train control, which I have some questions related to that, and I would like to first mention a personal incident that I had with a good friend in an accident that you mentioned and some of the follow-up related to that accident.

You mentioned in your opening testimony, the Amtrak accident outside of Philadelphia, 188, and I had some personal contact with that had the fact that I had some very good friends of mine who lost their daughter in that very tragic accident.

And their first contact with Amtrak was a very impersonal cold call from a claims adjuster of some sort, who said that they would be willing to pay reasonable funeral costs. I didn't (ph) know that was Amtrak's response, which did not sit well with the family, as you can imagine through a very traumatic time.

Now, Amtrak is under statutory requirements to have a family assistance plans. And I have inserted an amendment in the Railroad Reform, Enhancement and Efficiency Act, which is part of the comprehensive

transportation bill, which hopefully will pass.

I know my colleagues seem to be concerned if that's going to pass. And we're going to be dealing with some issues with positive train control and others.

But in that amendment, that is part of that, I require your agency and then NHTSA, too, and others, NTSB, to take a hard look at the adequacy of Amtrak's family assistance plans, and determine whether or not there were followed.

But I'd like to hear from you, if anyone else in FRA, as the rail safety regulars, have looked into Amtrak's response to both the victims of the derailment and their families to determine whether or not they have complied with some of their statutory requirements, and kind of your assessment of it.

**FEINBERG:** And that will certainly all be a part of the investigation into the incident. As I know that you know, Senator, the NTSB is the lead investigative agency on that accident.

But the FRA also plays a role in that as well. The NTSB has specific guidelines about family assistance planning.

And I know that they're -- they will take a very close at that. And we will as well.

**PETERS:** And you will as well? You have not had an opportunity to do that?

**FEINBERG:** In my role as a member of the Amtrak board, we have had some conversations about the accident and the response. I have reiterated the importance that I put on making sure that families are communicated to quickly and appropriately.

But it will ultimately be a part of the investigation the NTSB leads. And I can't get ahead of them.

**PETERS:** Well, especially as a member of the Amtrak board, I hope you take a strong interest in this and understand the seriousness of it. And I look forward to working with you in the months and years ahead as we take a look at that before making improvements of it in the future.

So things do not -- like that do not happen again.

**FEINBERG:** Absolutely.

**PETERS:** And now to the positive train control, Senator McCaskill mentioned the GAO report that came out yesterday. And if we are able to pass the comprehensive highway transportation bill or if we do a separate bill that allows us to move forward and push back some of the time requirements for PTC, you will have to oversee some of the implementation of their work over these -- in their plans in the future.

But in the GAO report, they noted that there were deficiencies in the reports that talked about how they were going to meet some of those deadlines, some of their milestones, how they were going to reach those milestones. Yes, in fact, it says they lacked any meaningful detail and could not give the FRA a clear understanding of a railroad's PTC implementation progress.

So if the reports that they're providing you are deficient, what do you plan to do to make these reports more substantive and ones that you can actually work on? Do you agree with the GAO's assessment?

And how do you plan to fix it?

**FEINBERG:** Well, we have agreed with the GAO's recommendations and agreed that there are important recommendations to implement. Most of them were being integrated into FRA's approach to PTC implementation prior

to the GAO report.

But we take their recommendation seriously and will -- and will take action on them. The GAO report registered some concerns about the amount of data that we were collecting from the railroads and the kind of data that we are collecting from the railroads.

I believe that over the last several months, we have ramped up our effort on that front, which are not necessarily reflected in the GAO report. But think of it as a much better sense of how railroads are doing and the progress that they're making on their safety plans, which they owe to us on their plans for implementing PTC.

We have tried to give significant guidance to the railroads on what we're looking for and how we can go back and forth with them to make sure that their plans for implementation are safe and efficient as possible.

**PETERS:** All right. Thank you.

**FEINBERG:** Thank you.

**THUNE:** Senator Manchin?

Thank you, Senator Peters.

**MANCHIN:** Mr. Chairman, appreciate very much.

And I hope they've been kind to you and since I've been gone.

Anyway, Ms. Feinberg, everything that, you know, that I've read about the Amtrak train, the 188 derailment earlier this year, it sounds to me that in your lost situational awareness, that's just as a pilot, you know, you have to be where you are at all times. And be able to report that and they're following you.

I've went over and was able to go over to look at some of the newest Amtrak locomotives over at Amtrak. I did the Acela and I did in Northeast Regional, just to get a better understanding of what was happening in the cockpit. I'm going to call the -- I'm going to call the engine a cockpit, OK?

I was amazed to find out that we're still using technology that's 50, 80, 100 years old. Simple, in our cars, we have more information in our front seat of our driver's car than we do in an engine.

I just kept asking a question over and over, can't we at least -- because they were telling me how much -- how costly it was and on and on, and how much time it would take. I said, just to have situational awareness would be something, knowing where you're at.

And that's pretty easy, pretty simple technology. Did you find that to be, I mean, where the pushback -- I don't think anybody -- I don't care on what side of the fence people may be, whether it's the railroad companies themselves and whether it's people passing.

But we all want it to be safe. Everybody does. But if we're not moving towards a new technology, and our whole country depends on it, why would we not be using some of the easiest, latest, greatest advanced technologies for train traffic?

**FEINBERG:** Well, we could not be more supportive of making sure that railroads are integrating technology that will improve safety and save lives. I mean, that starts with PTC, obviously, but you can take that all the way to our encouragement of tech companies to integrate our grade crossing data and to tech features, so that we're communicating both with, you know, engineers, but also with drivers who are just approaching a grade crossing. So...

**MANCHIN:** Are they looking at different technology? I mean, I don't know, I was asking the questions from the -- and they were very kind over there to show me everything and look through the whole scenario.

But I did not get the feeling they're moving in that direction, we call a glass -- a glass (ph) panel, a glass cockpit, if you will. What I saw was basically pretty antiquated light system and sound system if you're certain areas and this and that, and it just didn't make any sense, I mean, I just -- I was flabbergasted by it.

**FEINBERG:** Well, there is also a beauty to the simplicity of a locomotive, or of the cab. But I think probably the most important technology that railroads can integrate at this moment is PTC, which is incredibly complicated, well worth the complication I think but...

**MANCHIN:** You are working through the deadlines. You are working with the industry, and making sure that we're doing everything we can to expedite this along?

You understand they're time-consuming, there right? Basically in the intricacies of this?

**FEINBERG:** Yes, sir. And we have -- we have tried to do as much as we can to be helpful as railroads are attempting to implement this technology.

So we have offered technical assistance. We have built a test- bed (ph) facility in Pueblo, Colorado for testing purposes.

We have hired additional staff. We have tried to proactively help on safety plans. And we'll continue to do all of that because it's obviously in our interest to get PTC implemented as safely and efficiently as possible.

**MANCHIN:** The other thing, being a former governor, I was acutely aware of, you know, making sure that anything and everything that happens in the state of West Virginia and every other governor in our state does so with the utmost concern about the safety of the citizens.

The things I actually get complaints years ago when I was Governor, is that basically, our first responders didn't know what was (ph) traveling to their state.

Well, they didn't know to after-the-fact. And God forbid, an accident would happen.

And I sit on Mount Carbon, you know pretty well that area. If it happened just an hour or two down the track, it will wipe out Montgomery, the whole town.

Hard to tell how many people have lost their lives, what we saw happened just outside the town. And those are the things I'm concerned.

Have you all been able to better coordinate with first responders and with state coordinators and first responders?

**FEINBERG:** We have. And we have -- I have said to the railroads that I think notifications of first responders should be a priority, that they are -- we have an emergency order that went into place in May of 2014.

That remains in place. We've reiterated its importance with the railroads.

I recently wrote them a letter reminding them that the expectation is that they are to be sharing that information with first responders, so that those individuals have as much information as possible.

**MANCHIN:** Are you getting pushback on that whatsoever? Are the states saying we still don't have the info we need in time enough that make sure that they have the proper equipment and people available in case, God forbid,

something would happen?

**FEINBERG:** It depends on the state. Some states have said they want more. And we are asking the railroads to please work with them to give them...

**MANCHIN:** Yes.

**FEINBERG:** ... to give them all of the information they could possibly need. Some are satisfied.

And then, depending on whether that information was made public frequently depends on the state's (inaudible).

**MANCHIN:** And finally, I think you've put a working group together, working with the railroad executives and engineers and the people on the frontline and all the people that are on the -- on the rails, trying to get input from them to try to better this or do the things that basically are acceptable and can be done?

**FEINBERG:** Yes, sir, we have a taskforce within FRA that's seeking to do that.

**MANCHIN:** Thank you. My time has expired.

**FEINBERG:** Thank you.

**THUNE:** Thank you, Senator Manchin.

I have Senator Wicker followed by Senator Klobuchar, Senator Blumenthal, told we have a vote at 11:00, if we can get everybody in before we have to bust over to that.

That would probably be a good thing. And I'm sure Ms. Feinberg would appreciate that, too.

(LAUGHTER)

Senator Wicker?

**WICKER:** Thank you, Ms. Feinberg, I think we're -- I think we've been kind today. But I do think the committee on both sides of the aisle, the members are a little confused and frustrated by a lack -- the lack of a specific proposal concerning the extension.

Now, that the chairman came in and clarified that apparently, the FRA still stands by the GROW AMERICA recommendation concerning extensions on a case-by-case basis. Is that -- is that your position?

**FEINBERG:** What we asked (ph) -- what we asked for in the GROW AMERICA Act was not a blanket extension but flexibility to work with railroads so that we could prioritize where PTC would be turned on. So for -- so the statute is very black and white, and offers literally really no wiggle room.

And so what we ask for in the GROW AMERICA Act was flexibility to work with railroads post-January 1st, to turn on portions of PTC before waiting for an entire system.

**WICKER:** Well, you know, if I were railroad and struggling to meet this deadline, I would find that so uncertain that I don't know if I could develop a business plan. It seems to me that what that would do is leave it up entirely to the discretion of the FRA.

And the people trying to get this thing done in good faith would be so frustrated that they wouldn't know where they stood.

You know, it seems to me, Ms. Feinberg, that we're going to have to extend this for a period of time just to give

people out there in the country the ability to know where they stand. And so to me, it would be helpful -- I don't think this -- I think we can all acknowledge that a GROW AMERICA Act is not going to be passed by the House and Senate, passed out of committees, signed by the president of the United States before the end of this year.

And so. I would appreciate you coming back to us -- the administration coming back to us about what vehicle we might have -- do we need to put on the C.R. (ph) if we do. We need to move it pretty quick.

And I understand the C.R., that the folks designing are intending for it to be very, very clean and not have a lot of new provisions. Do we need to put it -- can we wait until the omnibus (ph) at the end of the year because it looks like -- looks like that's where we're headed is the reauthorization of the transportation bill in an appropriate way?

But I would appreciate a specific recommendation as to the length of time that might be appropriate. Is it six months? Is it a year? Is it two years? You deal with this everyday. We're trying to deal with a hundred things.

So I really would ask you to get back to us and provide some leadership there in terms of letting us know how industry can get this done. And I realize we've spent a lot of time on this topic.

So let me -- let me switch, let me be provincial then, and ask you about Gulf Coast service. You know, we -- the House and Senate -- we haven't quite gotten a bill to the president's desk yet.

But I think -- would you acknowledge that we've made it clear in legislation that it is federal intent to have a working group formed to restore the Gulf Coast passenger service that we lost after Hurricane Katrina. What -- would you -- would you agree that congressional intent is becoming clearer based on the legislation so far?

**FEINBERG:** Yes, sir.

**WICKER:** And are you aware that a working group is proposed to develop and answer the question of how we implement this?

**FEINBERG:** Yes, sir.

**WICKER:** And will you -- will you acknowledge that FRA doesn't have to wait until the legislation is actually enacted to form such a working group?

**FEINBERG:** Yes, sir. And I have met with your staff on this. I am supportive of Gulf service being -- of Gulf shore service being restored.

We have had a good conversation. And I will actually be down there next month. I have met with the Southern Rail Commission.

They've lovely and excellent and...

**WICKER:** Where's down there?

**FEINBERG:** I'm sorry, I'll be Louisiana and Mississippi.

**WICKER:** Oh, good. Well, wonderful. You know, Governor Bryant, Senator Cochran and I would like to host you on a ride along that proposed route with the other members of the delegation with Amtrak President Boardman and CSX CEO Ward and others to assess the line's condition.

So are you willing to join us...

**FEINBERG:** Absolutely.

**WICKER:** ... on that ride if we can work out a convenient date?

**FEINBERG:** Absolutely. Look forward to it.

**WICKER:** Wonderful. Thank you and I look forward to working with you on that, and wish you the best.

Thank you for your service.

And Senator Klobuchar, I believe, is next.

**KLOBUCHAR:** Right. Thank you very much, Senator Wicker.

And thank you, Ms. Feinberg. Congratulations. Any friend of Senator Manchin is a friend of ours.

So first, I wanted to just talk to you about the blocked crossing issues. As I travel across Minnesota, I hear from people all over the state who have spent an excessive amount of time, sometimes hours, stuck waiting at a blocked rail crossing.

Blocked rail crossings not only inconvenience drivers, but they delay emergency vehicles. In July, I was in Ranier, Minnesota, which is on the Canadian border. It's a major crossing but a very small town. And there are rail crossing blockings, six to eight hours a day in the town.

So in the DRIVE Act, we actually put a provision in there to direct the secretary of transportation to develop highway rail crossing action plans, including tools and data, safety risks, other things. And that is the amendment that's in there.

Acting Administrator Feinberg, as this process moves forward, what steps can the FRA take to minimize blocked rail crossings? And do you think you have the best practices in place?

**FEINBERG:** Thank you for the question. We are also very concerned about blocked crossings.

We do not actually have regulations in place that govern how long a train can block a crossing. But we frequently hear from communities in Minnesota and elsewhere, where you have folks who are waiting for some time while a train is blocking a crossing.

And it can sometimes lead to safety concerns as well, when you have first responders who are stuck on one side of a crossing and can't get to the other side of a crossing. So, we frequently work with railroads individually to address specific problems.

We've also suggested that we do a study so that we can understand the impact of blocked crossings. And -- but we are also worried about this and attempting to resolve their...

**KLOBUCHAR:** Well, some of this is -- would be dictated by this bill once -- I know we're going to pass it eventually this year.

Also, I hear from communities that they don't have the capacity to prepare to respond to a derailment, or a hazardous materials spill. Firefighters and first responders, in some cases, simply don't have the resources to purchase the equipment.

What is the FRA doing to ensure local units of government have these resources to be able to properly prepare? And do you need any additional authority for that?

**FEINBERG:** I don't know that we need additional authority. We have -- we have worked closely with our sister

agency, Pipelines and Hazardous Materials on programs that will assist with training first responders, making sure that they have the information that they need, the resources they need. There are trainings that frequently happen at our training and testing facility in Pueblo, Colorado, which is an excellent facility for training.

So we will continue to look for resources where we can assist first responders with that, and appreciate your focus on it as well.

**KLOBUCHAR:** And then one last question. I'm going to end short here, and give you the rest in writing so my colleagues can ask questions before the vote.

Would you support leaders from local government and first responders serving in the Railroad Safety Advisory Committee? That isn't happening now and we think that would be helpful.

**FEINBERG:** Certainly, I will say that they are more -- that they can certainly present to the RSAC at any point. They can come in and reach out to us.

And we can make sure that they are -- they have a role in RSAC meetings and process. And we're happy to do that and follow up and make sure that they -- that they feel like they are welcome and listen to RSAC meetings.

**KLOBUCHAR:** OK, we'd like them on the board and so we can discuss that later. And I'll put the rest of my questions in writing, and turn it over to Senator Blumenthal.

**FEINBERG:** Thank you.

**KLOBUCHAR:** Thank you.

**FEINBERG:** OK.

**THUNE:** Well, actually, Senator Daines is next.

**KLOBUCHAR:** Oh, OK. There you are.

**DAINES:** Thank you, anyway. Thank you. Thank you. Appreciate that.

Ms. Feinberg, congratulations on your nomination. It's nice to see you here again.

As you know, Montana is home to nearly 3,200 miles of railroad track that moves our ag commodities, record amounts of crude oil, coal and other manufactured products across our rail system everyday. In fact, we export the majority of our energy in ag production.

Eighty percent of our wheat harvest goes to Asia, and most of that by rail. Last summer, there were challenges to rail capacity and delays in shipping some of our goods.

Our phones were ringing a lot, a lot of concerns about this. This year, you know, the Burlington Northern Santa Fe has made significant investments in Montana to increase capacity, enhance safety.

And we expect smooth and efficient shipments of this year's harvest, as well as other commodities. Additionally, you've got the infamous Amtrak Empire Builder that runs along Montana's highline, providing much needed transportation and connectivity for our rural communities.

In fact, last year, nearly 120,000 people boarded and alighted Amtrak trains in Montana. I recall as a kid hearing stories about how my great-grandparents would take passenger rail from Shelby (ph) where the Empire Builder stops there.

That's how my family got back-and-forth when they first, in fact, came out to Montana a century ago. Needless to say, it's imperative to Montana we continue to move these passengers and commodities in a safe and efficient manner.

So my question is going to be probably the same horse have been beating here during this hearing, which is regarding PTC. We all saw in the report released yesterday that GAO has recommended again that Congress extend the December 31, 2015 PTC deadline.

The largest railroad in my home state in Montana is BNSF. They've been working diligently.

They've invested \$1.5 billion, in fact, and another \$500 million investment is planned to implement PTC across the nation, including the nearly 2,000 miles of track in Montana.

As we all know, this deadline is approaching. The Senate Highway bill contains an extension on a case-by-case basis. I think we must continue to move passengers and commodities in a safe and efficient manner.

Without these rail connections, we are in big trouble in Montana. So, my question as administrator, what would you do in the immediate future to ensure our railroads do not come to a grinding halt on January 1st, 2016 beyond the threat of fines?

**FEINBERG:** Well, Senator, it's good to see you again. I cannot give the railroads individual legal advice.

I just don't think that's an appropriate role for the FRA administrator. We have said, as clearly as we can possibly say, that we will enforce the deadline.

I know that many railroads are considering not operating, starting on January 1st because they will not be in compliance with the PTC law. But...

**DAINES:** Would you have your cellphone -- we could forward the calls from Montana to you so you can take them?

**FEINBERG:** Oh, sir, I am getting the calls, yes. Yes, I'm happy to take yours, as well, yes.

**DAINES:** I'm talking from the people of Montana. The phones will be ringing.

This will be a crisis. I'm sorry, I interrupted you. Go ahead.

**FEINBERG:** I am also worried about the crisis that can ensue on January 1st as well. We have tried to be as clear as we can possibly be.

We will continue to try to assist this committee and the Congress in any way that we can to contemplate the possible extension of the deadline. And we will work with you in any way that we possibly can.

**DAINES:** Yes, so we're down to about a 100 days...

**FEINBERG:** Yes.

**DAINES:** ... plus or minus. There is something called Thanksgiving in a way. There's the Christmas holidays.

So the time is of the essence. And given everything else going on in this town, it tends be crisis-driven.

It should be nice to avoid yet another crisis-driven event.

**FEINBERG:** Sir, I completely agree. I do not have the authority to extend the deadline. And the secretary of

transportation does not.

And we will work with this committee in any way that we can, but are not able to do it ourselves.

**DAINES:** On your testimony, you mentioned there's a \$1 billion loan from FRA to New York's Transit Authority to help implement safety measures. Often, the focus of passenger rail is on the northeast corridor.

And I understand the reason why, because of the dense populations. But it sometimes perpetuates this urban world divide that we see across our country.

As administrator, what efforts would FRA take to ensure that passenger rail service is not diminished in rural America, places like Montana? What loans are being made available to passenger rail in these rural areas?

**FEINBERG:** Well, the RRIF program is certainly available and has -- is frequently -- sort of gets the most interest from short lines which tend to be functioning in these rural areas. As a West Virginian, as someone from rural America, I can tell you that I'm a strong supporter of the importance of passenger service between rural areas.

We are working closely with Amtrak all the time. Because the Northeast Corridor is important. It's 50 million people. It's \$100 million dollars a day in economic impact. But -- so it gets a lot of attention. But it, in no way, takes our -- takes all of our attention. And we are laser-focused on the state routes as well.

**DAINES:** OK. Thanks, Ms. Feinberg.

**FEINBERG:** Thank you.

**THUNE:** Thank you, Senator Daines. And we are still waiting for passenger rail to come to South Dakota.

So have it -- or Montana. Wyoming and South Dakota, I think the only two of the 48 lower that don't have it.

Senator Blumenthal is up and Senator Cantwell and that vote has just been called. So we have...

**BLUMENTHAL:** I'll be quick, Mr. Chairman. My main reason for speaking is to say how fervently I support passenger rail in South Dakota.

(LAUGHTER)

**FEINBERG:** I agree.

**BLUMENTHAL:** First of all, Ms. Feinberg, I want to thank you for the breath of fresh air that you've already brought to the FRA. Your diligence and determination have made significant efforts already in the enforcement, and the vigilance and vigor of oversight by an agency that has been asleep at the switch for much too long.

There are still 64 recommendations, I believe, from the NTSB, that have not been closed by your agency. But you have made a lot of progress over a short period of time.

And I hope that you will continue to focus not only on positive train control, but on very significant other rail safety issues, closed call reporting redundant (ph), signal protection, commuter rail inspection practices, cameras, speed restrictions, fatigue and so many other issues. I think your agency obviously can focus on more than one issue at once.

And these other challenges are as important as positive train control and a lot less expensive. .

So I hope that you will continue this effort, because rail safety in the United States is sorely lacking. And there will continue to be catastrophes, often with fatal results and tremendous costs, if the nation fails to do better.

And you are at the tip of the spear, so far as real safety is concerned. So I hope you'll continue your efforts in that regard.

There is a vast difference in different kinds of extensions of PTC. I strongly support the railroad-by-railroad, year-by-year vigilant oversight approach, which I believe was embodied in the GROW Act as opposed to the unlimited, indeterminate open-ended approach, which is currently embodied in the DRIVE Act.

And I will oppose that kind of extension, if it is incorporated in any sort of continuing resolution or a short-term fix. I believe that approach is simply an invitation to disaster.

And I know that you have walked a fine line in your testimony today in a very understandable effort to be accommodating for the different views that are on this committee. But I'd like a commitment from you, that you will vigorously enforce whatever PTC extension is adopted, if one is adopted by this committee and Congress.

**FEINBERG:** Absolutely. We intend to vigorously enforce the deadline that's in front of us now.

And should it be moved, we will vigorously enforce that one.

**BLUMENTHAL:** And I take it, you would favor the more limited and year-by-year, case-by-case approach embodying the GROW Act. That's in the administration's policy, is it not?

**FEINBERG:** Well, the GROW Act -- our purpose in the GROW Act was to ask for -- ask for flexibility for railroads that had made progress and that we -- where we were trying to prioritize PTC implementation in certain places. Certainly, we are supportive of getting PTC implemented as safely and as efficiently as humanly possible.

**BLUMENTHAL:** I want to focus in the short time I have remaining on the need for greater oversight on the Hartford Line. I want to thank you and Secretary Foxx for hosting a meeting, including myself and the Connecticut delegation and our governor.

I'd like you to commit, as you did in the meeting, that you will ensure that Amtrak manages this project more ably and efficiently.

**FEINBERG:** You have my commitment that we will remain very vigilant over that project. It's one of the most important projects in the country.

And as we said in the meeting, we are lucky to have good partners in Connecticut that are actually prioritizing this kind of work. And some people remain very focused on it.

**BLUMENTHAL:** And there really is an opportunity and obligation for more collaboration and cooperation here. The contention and disagreements that have occurred really are regrettable, and ultimately, will contribute to delay and cost overruns of this line.

Would you agree?

**FEINBERG:** Yes, sir.

**BLUMENTHAL:** Thank you very much.

Mr. Chairman, thanks for the opportunity.

**THUNE:** Thank you, Senator Blumenthal.

Senator Cantwell?

**CANTWELL:** Thank you, Mr. Chairman.

Ms. Feinberg, we've had a chance to talk many times about railroad issues and particularly as the Northwest experiences more and more train traffic.

Do you believe that oil volatility is an issue that needs to be addressed and that the DOT working with DOE should resolve this issue by doing the amount of testing required to say what vapor pressure really should be on trains?

**FEINBERG:** I certainly think that it will be helpful to determine what oil volatility plays. As you know, the Department of Energy is -- has partnered with our situation (inaudible) and with us to do a study of the Bakken crude, which is that I think you're referring to, to determine the volatility and what impact that volatility has.

So does it -- does it matter and how much, which will guide a lot of our thinking and be helpful.

**CANTWELL:** I know that it's astounding to me that neither FRA or FINSA thinks that they have the ability to regulate this vapor pressure, which we do in other areas that somebody is waiting for a catastrophic accident to then say, we should regulate this.

But are you concerned that these vapor pressure readings are as much as 18.5 pounds per square inch, when in reality, a lot of people have concerns above 10?

So we're not only seeing North Dakota saying, well, let's set a standard at 13.5, which -- or 13.7, which I have a concern about. But that we're finding that they're not even meeting that, that there's no regulation or oversight, whether the train traffic is actually meeting that standard. In fact, some people are finding much higher vapor pressures, which I think volatility comes into play.

**FEINBERG:** It's hard for me to -- to comment on what FINSA's authority is. Our authority is clearly the vehicle that that product is traveling in on its own rails at the tank.

So assisting FINSA with the tank car, but also the way the train has operated. But I have been a loud proponent of asking the energy industry to play a role in assisting us with the safety of transporting crude oil across the country.

I think it's important for the rail industry to be accountable. But I have been very vocal about my interest in having the energy industry have some skin in the game as well.

**CANTWELL:** The energy industry meaning?

**FEINBERG:** Meaning the shippers.

**CANTWELL:** Do you think the federal government needs to resolve this issue and weigh in, whatever agency it is, whoever has the authority? I mean, I don't think the general public cares, like, what we're all doing back here as it relates to this agency and then this doctrine and this regulation.

And it was falling through a loophole. People want to know whether volatility is going to be addressed or not.

And you think the administration should address volatility?

**FEINBERG:** I think if the -- if the studies that are being done by the Department of Energy suggest that we need to address volatility before it's placed into transport, we should do that. We should absolutely do that.

**CANTWELL:** Thank you. Thank you very much.

**THUNE:** Thank you, Senator Cantwell. I just want to point out for the record that the GROW Act had an

open-ended extension.

There wasn't any deadline in the GROW Act. The DRIVE Act, which passed the Senate here a few weeks ago, has a three-year deadline through 2018 for installation and then a course certification is dependent upon working with the DOT.

And in addition, the DRIVE Act also included a number of other safety-related measures, including requiring inward-facing cameras on all passenger railroads, requiring speed-limit action plans to address automatic train control modifications crew, communication, other speed enforcement issues, improving the safety of the rail, transport of hazardous materials with real-time information for the first responders and comprehensive oil spill response plans; a requirement for grade crossing action plans to facilitate improved state-grade crossing safety efforts.

And it included another -- a number of other safety issues, such as signage alerters (ph) and track inspection.

So the DRIVE Act does have a number of safety provisions in there in addition to the PTC extension.

So, Ms. Feinberg, thank you for appearing today. And we will keep the hearing record open. If I can find my act for (ph) open for two weeks during which time Senators are asked to submit any questions for the record upon receipt.

We'd be asked to request to submit the written answers to the committee as quickly as possible. And as you can tell today, obviously, a lot of focus on the PTC. We've got a big problem.

You're coming in at a very important and critical time to try and help solve what most of us, I think, recognize is going to be a major, major crisis if we don't get some fairly quick action here. And your role is going to be important in the administration role is going to be important in trying to build the necessary bipartisan coalition that will take to pass legislation that gets us to where we need to go.

So, thank you for your time today and for your willingness to serve. And we will, with that, adjourn the hearing.

END

**LOAD-DATE:** September 21, 2015

# **EXHIBIT 3**

**to**

**Reply of AAR to American Chemistry Council,  
the Chlorine Institute, and the Fertilizer  
Institute—Petition for Declaratory Order—  
Positive Train Control**

---

**STB Finance Docket No. 35964**

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 ----- X  
4 CHLORINE INSTITUTE, INC., :  
5 Petitioner, :  
6 v. : No. 12-1298  
7 FEDERAL RAILROAD :  
8 ADMINISTRATION, ET AL., :  
9 Respondents. :  
10 ----- X

Thursday, April 4, 2013

Washington, D.C.

11  
12  
13 The above-entitled matter came on for oral argument  
14 pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES HENDERSON, BROWN, AND KAVANAUGH

17 APPEARANCES:

18 ON BEHALF OF THE PETITIONER:

19 PAUL M. DONOVAN, ESQ.

20 ON BEHALF OF THE RESPONDENTS:

21 MARK W. PENNAK, ESQ.  
22  
23  
24  
25

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

Paul M. Donovan, Esq.  
On Behalf of the Petitioner

3; 36

Mark W. Pennak, Esq.  
On Behalf of the Respondents

22; 44

P R O C E E D I N G S

1  
2 THE CLERK: Case number 12-1298, Chlorine  
3 Institute, Inc., Petitioner v. Federal Railroad  
4 Administration, et al. Mr. Donovan for Petitioner; Mr.  
5 Pennak for Respondents.

6 JUDGE HENDERSON: Mr. Donovan, good morning.

7 ORAL ARGUMENT OF PAUL M. DONOVAN, ESQ.

8 ON BEHALF OF THE PETITIONER

9 MR. DONOVAN: Thank you, Your Honor, and may it  
10 please the Court. Under the terms of the Rail Safety  
11 Improvement Act of 2008 Toxic-Inhalation-Hazard materials,  
12 TIH, or PIH as the Government chooses to call it, including  
13 chlorine cannot move after January 1st, 2016 except over  
14 rail line, main line rail lines that are equipped with  
15 Positive Train Control. Accordingly, we really have two  
16 parties before this Court that are regulated by that  
17 statute, one is, of course, the railroads, the AAR and its  
18 members who after January 1st, 2016 cannot move TIH  
19 materials over main line tracks unless they're equipped with  
20 Positive Train Control; secondly, the member of the Chlorine  
21 Institute are also regulated in that after January 1st, 2016  
22 they cannot request transportation over main line tracks  
23 that are not equipped with Positive Train Control.

24 JUDGE KAVANAUGH: I think the Government says the  
25 Surface Transportation Board would have to allow it in those

1 circumstances, I'm going to ask them about this, but what's  
2 your response to that?

3 MR. DONOVAN: Well, I think, Your Honor, there's  
4 two responses there, number one, the Government, here the  
5 FRA, has no expertise in the administration of the Surface  
6 Transportation Board statute, the ICC Termination Act; so  
7 when they say that, they just say it, they don't interpret  
8 the statute in question. The statute in question is 49  
9 U.S.C. 11101, which provides, and it's provided for 100  
10 years, really, that a railroad must provide common carrier  
11 transportation services upon reasonable request. Now, I  
12 asked the question rhetorically is it reasonable to request  
13 transportation over a line of railroad that the federal  
14 statute, the RSIA08, says you can't move it over because  
15 it's not equipped with Positive Train Control. In the  
16 alternative, can I go to the Surface Transportation Board  
17 and say I want you to order the railroad to put Positive  
18 Train Control on that track so that you can comply with the  
19 statute, when in fact it's the FRA that determines what  
20 tracks are equipped with Positive Train Control, it's not  
21 the Surface Transportation Board. I don't think that such  
22 an action would last very long in front of this Court if the  
23 Board were, the Surface Transportation Board were to take  
24 such an aggressive interpretation of its statute that it now  
25 can trump the Positive Train Control requirements of the

1 RSIA08.

2 JUDGE KAVANAUGH: On the merits what's --

3 MR. DONOVAN: The merits of this case --

4 JUDGE KAVANAUGH: -- what's the violation?

5 MR. DONOVAN: Well, the merits of this case are  
6 intriguing, Your Honor, for this reason, number one, we have  
7 two --

8 JUDGE KAVANAUGH: Can I just interrupt you? I'm  
9 sorry --

10 MR. DONOVAN: Absolutely.

11 JUDGE KAVANAUGH: -- to say, the way I see it is  
12 you had a more favorable interpretation going in 2010, they  
13 pulled back and it's a less favorable interpretation now,  
14 but I'm having trouble seeing where the violation of law is  
15 in there, change, and, or alteration.

16 MR. DONOVAN: Fair enough, Your Honor. Fair  
17 enough. Number one, the interpretation you make reference  
18 to in 2010, two of them, actually, the initial final rule  
19 and a second final rule, but it's the same interpretation,  
20 basically say that we understand that cost benefit analysis  
21 is normally relied upon in regulatory proceedings like this  
22 one, but we interpret this statute as requiring that we not  
23 yield to that. We have seen cost benefit analysis for a  
24 long, long time with respect to Positive Train Control, we  
25 have never been able to justify Positive Train Control,

1 installation or implementation, based upon a cost benefit  
2 analysis tied to safety benefits. We've never been able to  
3 do that, and we can't do it now, but it is our  
4 interpretation of this statute that Congress wants us to  
5 impose Positive Train Control implementation on a snapshot  
6 of rail lines that existed in 2008, and if you're going to  
7 depart from that by pulling back, so to speak, and allowing  
8 the railroads to no longer transport over that base year  
9 period, 2008 period, you've got to pass two tests, and those  
10 two tests are risk-based, they're based upon are you going  
11 to be more safe or less safe after you withdraw and re-route  
12 that traffic? Secondly, they go out of their way in both of  
13 those rule-makings to point out that the railroads have long  
14 wanted to get TIH off their rails, there's no question about  
15 that. And testimony presented before the FRA -- I'll get to  
16 your question in a moment, Your Honor, this is by the way of  
17 background to it.

18 JUDGE KAVANAUGH: It's helpful.

19 MR. DONOVAN: In the testimony presented by Mr.  
20 Kaplan, Dr. Kaplan, of U.S. Magnesium, that's in the Joint  
21 Appendix at page 132 and following he points out that they  
22 have a plant located in Salt Lake City, near Salt Lake City,  
23 and it produced chlorine, and the produced magnesium using  
24 brine from the Great Salt Lake, so it's going to be there,  
25 the Great Salt Lake isn't going to move, so they have to

1 produce it there. They ship the chlorine to various places,  
2 and they can't be in business without shipping it by rail,  
3 the only railroad that serves that plant is Union Pacific.  
4 Union Pacific came to the Surface Transportation Board and  
5 said we don't want to give them rates into Texas because  
6 chlorine is dangerous, we don't like to carry it, so we  
7 don't want to give them rates into Texas. Because we say  
8 that there are producers closer to Texas then there will be  
9 less risk if we move it in from someplace other than from  
10 Salt Lake City, the STB said no, you can't do that. The STB  
11 then relied upon the section that I referred to, 49 U.S.C.  
12 11101, and said that request by U.S. Magnesium for rates  
13 into Texas is reasonable. Everybody knows chlorine is  
14 dangerous, the statutes have been adopted, interpreted, and  
15 progressed for years, in fact, FRA has testified and did  
16 testify in that case that chlorine had to move, and it was  
17 vital to the national economy, and vital to the national  
18 interests, so that request for transportation was  
19 reasonable. But I submit to you, Your Honor, that if I were  
20 to go and ask the STB to order railroad to provide service  
21 over track that's not PTC equipped in violation of federal  
22 law that would not be a reasonable interpretation, or a  
23 reasonable request. If it were determined to be a  
24 reasonable request that would take some legislative and/or  
25 judicial action that I do not anticipate, I don't think it

1 would be considered reasonable to say I want you to violate  
2 this federal statute, and it wouldn't be reasonable to say  
3 to the STB I want you to order them to impose Positive Train  
4 Control when the FRA said you don't have to.

5 JUDGE KAVANAUGH: Your concern, I think, is that  
6 they looked at costs here, that's one of your concerns,  
7 right?

8 MR. DONOVAN: Well, now it's -- you reminded me of  
9 your question, thank you --

10 JUDGE KAVANAUGH: Yes.

11 MR. DONOVAN: -- Your Honor.

12 JUDGE KAVANAUGH: And let me just say on that, I  
13 thought the way this worked is they were looking forward to  
14 2016, and for track and 2016 that's not going to have  
15 passengers or hazardous materials they thought well, we  
16 perhaps shouldn't impose the obligation on those tracks  
17 because in part it's going to cost so much to the railroad  
18 industry, and I'm trying to figure out why that's legally  
19 impermissible.

20 MR. DONOVAN: Okay. And going back to my original  
21 point, the initial interpretation on those first two final  
22 orders said we want this to be put upon the 2008 base year  
23 snapshot of the rail system. If you're going to change it  
24 you've got to justify why you're changing it, and the way  
25 you justify it is by using this two part test, otherwise if

1 you just allow them to change it the 2008 year base year  
2 means nothing, they can just change it, they can ignore what  
3 happened in 2008, it doesn't matter. If it didn't happen on  
4 January 30th --

5 JUDGE KAVANAUGH: But wasn't the problem that was  
6 identified that in 2016 some of, and you know more than I  
7 do, but in 2016 some of this track that in 2008 had  
8 hazardous material or passengers wasn't going to in 2016.

9 JUDGE HENDERSON: Yes.

10 MR. DONOVAN: If I may, Your Honor --

11 JUDGE KAVANAUGH: Yes.

12 MR. DONOVAN: -- the difference between hazardous  
13 material and TIH is quite dramatic.

14 JUDGE KAVANAUGH: Okay.

15 MR. DONOVAN: Okay. Okay. Well, they're just --

16 JUDGE KAVANAUGH: Well, let me use your -- I was  
17 using a term that I use --

18 MR. DONOVAN: No, no, no.

19 JUDGE KAVANAUGH: -- TIH I'll use.

20 MR. DONOVAN: Okay, because TIH is a very small  
21 percentage of the rail --

22 JUDGE KAVANAUGH: Right.

23 MR. DONOVAN: -- traffic. And I go to the U.S. --

24 JUDGE KAVANAUGH: Should I use PIH or TIH? TIH  
25 you like?

1 MR. DONOVAN: Take your choice.

2 JUDGE KAVANAUGH: Okay, TIH.

3 MR. DONOVAN: They're interchangeable.

4 JUDGE HENDERSON: But it's very dangerous.

5 MR. DONOVAN: You're right it's very dangerous, as  
6 you know from the *Williams v. CSX* case, of course it's very  
7 dangerous, Your Honor.

8 JUDGE HENDERSON: Well, the Graniteville was a  
9 terrible, terrible --

10 MR. DONOVAN: And Graniteville would have  
11 prevented by PTC.

12 JUDGE HENDERSON: Right. Right.

13 MR. DONOVAN: And that's why the statute was  
14 passed, among other reasons.

15 JUDGE HENDERSON: Well, I just said where you said  
16 it's very different from hazardous materials, I didn't know  
17 what you meant because it --

18 MR. DONOVAN: Well, it's --

19 JUDGE HENDERSON: -- it's clearly hazardous.

20 JUDGE KAVANAUGH: It's very hazardous.

21 MR. DONOVAN: TIH is very hazardous, there's no  
22 question about that, and nobody argues about that, that's  
23 why the Chlorine Institute exists.

24 JUDGE KAVANAUGH: But the point was looking ahead  
25 at 2016, I think, you tell me why this is wrong, there was

1 some anticipation that certain track wasn't going to have  
2 this TIH, and therefore because it would cost so much to put  
3 the Positive Train Control on why put it on track that  
4 wasn't going to have any TIH?

5 MR. DONOVAN: Well, there you go back to the first  
6 two orders where the Agency recognized that the incentive on  
7 the part of the railroads is to limit tracks over which TIH  
8 is going to move, because every mile they don't move it is a  
9 mile they don't have to put PTC on it. So, the incentive,  
10 the economic incentive is overpowering to the railroads to  
11 limit TIH to as few routes as possible, they already tried  
12 to do that with U.S. Magnesium and couldn't do it, they  
13 could in 2016 --

14 JUDGE HENDERSON: Right.

15 MR. DONOVAN: -- because they wouldn't put --

16 JUDGE KAVANAUGH: But because of the --

17 MR. DONOVAN: -- PTC on that line.

18 JUDGE KAVANAUGH: But isn't there some method  
19 that's being used to predict what's going to be the state of  
20 the play in 2016?

21 MR. DONOVAN: Well, there's an interesting point,  
22 Your Honor, the railroads say there's 10,000 miles of track  
23 that are not going to carry TIH in 2016. They say that on  
24 10,000 miles of track they can't pass the two car test,  
25 therefore don't impose it on us because we can't pass it.

1 Well, implicit in that is we can't pass it because we're not  
2 going to be safe, we're not going to be comparatively safe  
3 with that re-routed traffic, we're going to be less safe, or  
4 we'd be able to pass the test. So, here you have a result  
5 oriented, as you're pointing out, Your Honor, we want to  
6 save the money therefore everything else is okay; we don't  
7 have to show we're safer; we don't have to show an  
8 equivalent level of safety; we don't have to show as 2015782  
9 says, you've got to assess areas of greater risk before you  
10 assess areas of lesser risk. You don't even have to look at  
11 risk assessment in this third final rule. The first two  
12 final rules depended entirely upon risk assessment. We're  
13 evaluating risk, we're trying to prevent incidents, we're  
14 trying to prevent accidents, at the same time, said the  
15 Agency correctly, Congress never intended to drive PIH  
16 traffic off the rails by the imposition of the statute.

17 JUDGE BROWN: Well, is your argument that there  
18 can't be any cost benefit analysis?

19 MR. DONOVAN: Of course not.

20 JUDGE BROWN: Okay. So, you agree that it's  
21 appropriate for FRA to look at the cost of this and to try  
22 to give the railroads as much relief as possible?

23 MR. DONOVAN: Of course.

24 JUDGE BROWN: Okay.

25 MR. DONOVAN: Provided, Your Honor, provided they

1 do so consistent with their interpretation of the statute.

2 And Your Honor, you suggest --

3 JUDGE BROWN: Well, okay, I --

4 MR. DONOVAN: I'm sorry.

5 JUDGE BROWN: -- just want to understand --

6 JUDGE KAVANAUGH: Yes.

7 JUDGE BROWN: -- this because --

8 MR. DONOVAN: Yes. Yes.

9 JUDGE BROWN: -- this is odd to me, because as I  
10 understand what FRA says about this statute it's that you  
11 really can't do any useful cost benefit analysis because  
12 it's always cost more to do Positive Train Control than the  
13 benefits that you would reap.

14 MR. DONOVAN: That's what they said, and that's  
15 accurate.

16 JUDGE BROWN: Okay.

17 MR. DONOVAN: And they justify that conclusion --

18 JUDGE BROWN: So, what is the point then, I mean,  
19 isn't that just another way of saying no cost benefit  
20 analysis?

21 MR. DONOVAN: No, I don't think so, Your Honor,  
22 because, and the railroads argue that in their appeal of  
23 this rule, the first two rules which are pending before this  
24 Court, they haven't been dismissed, they argue that the FRA  
25 totally disregarded cost benefit, I don't think that's true.

1 All other things being equal obviously cost benefit is very  
2 important, but the other things that are equal are the  
3 safety considerations and the security considerations that  
4 Congress was relying upon when they passed this statute.

5 JUDGE BROWN: Okay. Well --

6 MR. DONOVAN: Now, we may argue -- I'm sorry, I  
7 didn't mean to interrupt.

8 JUDGE BROWN: Well, I just, I'm just trying to  
9 understand the parameters here. It sounds like that even  
10 under this new 2012 rule they're only taking out about  
11 10,000 miles of track out of 70,000-something, something  
12 like that.

13 MR. DONOVAN: That's -- well --

14 JUDGE BROWN: Okay.

15 MR. DONOVAN: -- the railroads say 14,000 or  
16 7,000, and FRA says 10,000, but we don't know what 10,000 --

17 JUDGE BROWN: Okay.

18 MR. DONOVAN: -- that's never been identified.  
19 So, it's -- I don't know what that number really is, or  
20 would be.

21 JUDGE BROWN: All right. So, that at least sounds  
22 like a fairly modest amount, but you seem to be saying that  
23 those are going to be the miles that your clients are  
24 worried about, right?

25 MR. DONOVAN: Well, there's 10,000 miles of track

1 that's carrying, that's main line track that's --

2 JUDGE BROWN: Right.

3 MR. DONOVAN: -- carrying TIH.

4 JUDGE BROWN: Now.

5 MR. DONOVAN: Now.

6 JUDGE BROWN: Okay.

7 MR. DONOVAN: That's 10,000 miles of track that I  
8 can't use to serve my customers. That's not insignificant.

9 JUDGE BROWN: Well, okay, one question that I  
10 have, though is if we don't know what that is, we don't even  
11 know exactly how much of it there is, how are you injured  
12 until you know?

13 MR. DONOVAN: Your Honor, I know I'm injured on  
14 10,000 miles, because by definition it's moving over that  
15 10,000 miles now, and it's not going to be moving over that  
16 10,000 miles in 2016. And I know the railroad say they  
17 can't pass the two-part test, so I know there's going to be  
18 a reduction in safety as a result of that. I know those two  
19 things. So, I know that my client is not going to be able  
20 to ship over 10,000 miles of track, and I know that if it  
21 can't ship over some alternative route it's going to be less  
22 safe and less secure. So, I think Chamber of Commerce, I  
23 think we're looking right down the throat of a recognizable  
24 injury that's caused directly by the change in position of  
25 the FRA, not the change in interpretation, Your Honor. In

1 their settlement agreement with the AAR they say their  
2 interpretation was right in the first two final orders,  
3 they've never taken that back, they've never said our  
4 interpretation was wrong, or that President Obama's  
5 Executive Order which says essentially the same thing as  
6 President Clinton's Executive Order 18 years before, they  
7 never recanted that, they never said oh, we were wrong, and  
8 now we've got to look at cost benefit, their position is  
9 we're going to look at cost benefit, but they never say  
10 their original interpretation was wrong. So, when I say  
11 that they misinterpreted a statute I think I'm wrong, I  
12 think they interpreted it correctly in the first two rules  
13 and then they ignored it in the third rule. They didn't  
14 misinterpret it, they just ignored it.

15 JUDGE KAVANAUGH: I thought what was going on is  
16 that they would, this was track that by some reliable  
17 method, and I want to ask the Government about this, by some  
18 reliable method it was established that there wouldn't be  
19 TIH traveling in 2016, and therefore it wouldn't be equipped  
20 with a Positive Train Control, but that you may want to use  
21 in the future but wouldn't be able to.

22 MR. DONOVAN: No.

23 JUDGE KAVANAUGH: That's not what's going on?

24 MR. DONOVAN: That's not what's going on.

25 JUDGE KAVANAUGH: Okay. Okay.

1 MR. DONOVAN: The fact is it's moving now.

2 JUDGE KAVANAUGH: I understand it's moving now.

3 MR. DONOVAN: And they're just going to stop it.

4 JUDGE KAVANAUGH: Okay. And that's what I, I  
5 guess I should ask the Government how that's going to  
6 happen.

7 MR. DONOVAN: They just going to stop it. They're  
8 just going to do --

9 JUDGE KAVANAUGH: What about the --

10 MR. DONOVAN: -- what they tried to do in *U.S.*  
11 *Magnesium.*

12 JUDGE KAVANAUGH: What about the common carrier  
13 obligation?

14 MR. DONOVAN: What common carrier obligation?  
15 There's not a reasonable request if I don't have PTC on that  
16 line I can't violate the law.

17 JUDGE KAVANAUGH: But they can't avoid the PTC  
18 obligation so long as there's continuing traffic on the  
19 line, TIH traffic.

20 MR. DONOVAN: They're the ones who move the  
21 traffic, they just say no, I'm not going to move it.

22 JUDGE KAVANAUGH: They can't.

23 MR. DONOVAN: Yes, they can.

24 JUDGE KAVANAUGH: With the common carrier  
25 obligation?

1           MR. DONOVAN: Common carrier obligation expires on  
2 January the 1st, 2016 because there's no PTC on the line.

3           JUDGE KAVANAUGH: I understand that. Well, maybe  
4 I should talk to the Government.

5           JUDGE BROWN: Yes.

6           JUDGE HENDERSON: I want to ask one question, I  
7 think it's the same thing Judge Kavanaugh's asking, and that  
8 is when you say in 2016 the 10,000 miles -- oh, wait. Go  
9 back and say what you say is going to happen in 2016, and  
10 the question I have is when you said it's going to be less  
11 safe, it's going to be less secure, are you saying because  
12 it's going to be shipped other than by rail, or it's going  
13 to be shipped on lines that are not equipped with TIH, or  
14 what do you mean when you say it's going to be --

15           MR. DONOVAN: Well --

16           JUDGE HENDERSON: -- less safe and secure?

17           MR. DONOVAN: -- for purposes of this case, Your  
18 Honor, I cannot say the former, I think it's true, but I  
19 can't argue that, I can't say that anybody did an analysis,  
20 this is all going to move by truck, and that's not safe.  
21 That wasn't part of this case. But I think it's true, and  
22 the FRA implies that --

23           JUDGE HENDERSON: Well, but aren't you saying  
24 that, though, because you're saying there's this gap between  
25 the STB who can required common carriage but only the, but

1 only if it's --

2 JUDGE BROWN: That Positive Train Control.

3 JUDGE HENDERSON: Yes, the Positive Train Control,  
4 if it's met that, and it can't beat that, and in 2016, and  
5 the STB cannot make that decision, that's got to be made by  
6 the FRA, I mean, it's almost got to go by something other  
7 than rail.

8 MR. DONOVAN: Well, no, Your Honor, for this  
9 reason --

10 JUDGE HENDERSON: Okay.

11 MR. DONOVAN: -- the two part test really compares  
12 one rail route versus another rail route --

13 JUDGE HENDERSON: Okay.

14 MR. DONOVAN: -- it doesn't compare one rail route  
15 versus truck.

16 JUDGE BROWN: Okay.

17 MR. DONOVAN: So, the --

18 JUDGE HENDERSON: I know that, but I'm just saying  
19 if you --

20 MR. DONOVAN: So, but the railroads in their  
21 testimony before Congress, the testimony that the FRA relies  
22 upon in its third rule says they can't meet that test, so  
23 they're going to have to ship TIH over track that is less  
24 safe than the track it's moving over now.

25 JUDGE HENDERSON: But it --

1 JUDGE KAVANAUGH: Why is it less safe?

2 MR. DONOVAN: Because they can't make the two part  
3 test, and that's all a two part test does.

4 JUDGE HENDERSON: Then they can't move it if they  
5 don't have the Positive Train Control.

6 MR. DONOVAN: They'll put Positive Train Control,  
7 what they'll do is they'll run it right through the middle  
8 of Washington, D.C. because it's got Positive Train Control  
9 on it because there's passenger traffic here.

10 JUDGE HENDERSON: Well, they've done that. We had  
11 a case, I don't know, three or four years ago --

12 MR. DONOVAN: I know, that's the *Williams v. CSX*  
13 case.

14 JUDGE HENDERSON: Oh, okay. Okay.

15 MR. DONOVAN: Yes, Your Honor.

16 JUDGE HENDERSON: Yes.

17 MR. DONOVAN: I watched you on the screen in that  
18 case. No, that's the problem, and FRA recognizes in their  
19 initial final rule that the result of allowing them to  
20 simply abandon TIH on lines where it's currently moving,  
21 and --

22 JUDGE BROWN: Okay.

23 MR. DONOVAN: -- reduce the cost of Positive Train  
24 Control, there's no question they're going to have to put  
25 PTC on main line tracks that carry passengers.

1           JUDGE BROWN: All right. Can I ask you because it  
2 seems to me there was a third agency here that they were  
3 relying on which has an acronym, I'm not sure --

4           MR. DONOVAN: PHMSA, I think it's referred to.

5           JUDGE BROWN: PHMSA, okay. PHMSA, which  
6 restricts, you know, which has to deal with the  
7 transportation of hazardous materials, right? So, between  
8 all three of these agencies we can't get this resolved?

9           MR. DONOVAN: Well, I'm sure the Government will  
10 argue yes, but in reality the Surface Transportation Board  
11 is an independent organization, they were never asked for  
12 their opinion on this, they could have been, but they  
13 weren't, it's routine for these agencies to talk to one  
14 another about what's your interpretation of this statute or  
15 this provision, they didn't ask for that here. The PHMSA  
16 rule in the first two final rules the FRA determined that  
17 the PHMSA rule was done for an entirely different reason,  
18 security in the main, to be sure safety is involved, but  
19 it's mostly security, and the PHMSA security rules were not  
20 transparent, they're based upon privileged information --

21           JUDGE HENDERSON: Right.

22           MR. DONOVAN: -- TSA type information, secure  
23 information, so you really can't rely upon that to evaluate  
24 anything in the public domain about whether this is going to  
25 be more or less safe.

1 JUDGE BROWN: Well, I can --

2 MR. DONOVAN: So, and they --

3 JUDGE BROWN: -- understand --

4 MR. DONOVAN: -- say that, they say that in  
5 their --

6 JUDGE BROWN: Yes.

7 MR. DONOVAN: -- own rule. And they're the ones  
8 who enforce the PHMSA rule, so they ought to know.

9 JUDGE BROWN: But doesn't it seem like they would  
10 probably not send TIH through Washington, D.C. for security  
11 reasons?

12 MR. DONOVAN: I can't really say that, Your Honor.

13 JUDGE BROWN: Okay.

14 MR. DONOVAN: They have done it for a long time.

15 JUDGE HENDERSON: Okay. We'll give you --

16 JUDGE BROWN: All right.

17 JUDGE HENDERSON: Any more questions? We'll give  
18 you a few minutes in response.

19 MR. DONOVAN: Thank you, Your Honor.

20 ORAL ARGUMENT OF MARK W. PENNAK, ESQ.

21 ON BEHALF OF THE RESPONDENTS

22 MR. PENNAK: May it please the Court, Mark Pennak,  
23 Department of Justice, I represent the Department of  
24 Transportation, and the FRA in this litigation.

25 Once this Court understands how this statutory

1 scheme works this becomes a really easy case. It's not  
2 often I get to say that, particularly in this Court, but it  
3 really is, and it's easy on both standing, and on the  
4 merits. The claimed injury here is the claim of inability  
5 to ship chlorine, completely hypothetical, the way the  
6 system works is that each of the railroads must submit a PTC  
7 implementation plan, Positive Train Control implementation  
8 plan that will identify those track segments that are going  
9 to be removed from PIH traffic, and those which are not.  
10 Those implementation plans are placed on the public docket,  
11 or open to all, including the chlorine shippers to examine.  
12 The chlorine shippers have a statutory right to insist on  
13 the common carriage of their chlorine, no one disputes that,  
14 least of all Department of Transportation. The Agency went  
15 to great lengths to address the comments saying that we are  
16 not intending to trump the Surface Transportation Board's  
17 authority to enforce that common carriage, so when they're  
18 suggesting that the PTC regulations somehow trump those  
19 obligations, the common carriage obligation, this is quite  
20 to the contrary, the Surface Transportation's jurisdictions  
21 and enforcement, now that statutory provision, which is not  
22 repealed, trumps. So, if the Surface Transportation says  
23 you must carry that shipper of chlorine, then PIH, Positive  
24 Train Control equipment will have to be installed.

25 JUDGE KAVANAUGH: That'll take awhile.

1 MR. PENNAK: Well, there's a two year period here,  
2 one would say under the regulations, which they are allowed  
3 to, so there is, certainly it may take awhile.

4 JUDGE KAVANAUGH: What happens in those two years?  
5 They went --

6 MR. PENNAK: They are allowed to ship chlorine.

7 JUDGE KAVANAUGH: Immediately?

8 MR. PENNAK: Yes.

9 JUDGE KAVANAUGH: Are you authorized to say that  
10 for the --

11 MR. PENNAK: Yes.

12 JUDGE KAVANAUGH: -- Surface Transportation Board?

13 MR. PENNAK: I think it's in the regulations. I  
14 can give the Court the cite later. But there's a lot of  
15 slack built into this for incidental carriage, for de  
16 minimus carriage, for carriage over main lines by class two  
17 carriers, for temporary carriage of these materials, so if  
18 we have an order from the Surface Transportation Board that  
19 makes it clear that certain, this track will in fact have to  
20 be used, then that track's going to be equipped.

21 JUDGE KAVANAUGH: One of my questions is how is  
22 the track being identified, this 10,000 miles, that's not  
23 going to be carrying TIC as of 2016?

24 MR. PENNAK: That track was identified to the FRA  
25 during the hearings, the administrative, they conducted

1 administrative proceedings, and the Agency was satisfied  
2 that in fact that that track could be abandoned by routing  
3 different places, and we're talking about, you know, there's  
4 60,000 miles of track that are still going to have Positive  
5 Train Controls --

6 JUDGE KAVANAUGH: That's 10,000 miles that would  
7 have to be equipped with PTC that won't be.

8 MR. PENNAK: Well, no. The way this works is that  
9 in 2008 we take a snapshot, where did PHI, or Poisonous by  
10 Inhalation materials, travel in 2008, now there's nothing  
11 magic about that, the Agency selected that, and that remains  
12 the rule. The implementation plan that each railroad must  
13 file has to use that as a baseline for identifying what  
14 track it won't be using for PIH traffic in 2016.

15 JUDGE KAVANAUGH: Right. Okay. And how do they  
16 make that showing?

17 MR. PENNAK: Well, they make it by reference to  
18 the requirements that they have to have common carriage,  
19 they have to make it by reference to the requirements  
20 imposed upon them for safe routing by the Pipeline Hazardous  
21 Materials Safety Administration --

22 JUDGE KAVANAUGH: So, where do the 10,000 miles  
23 come from if TIH is being carried over it still now?

24 MR. PENNAK: Well, the 10,000 miles is by  
25 different routes. Now, there's no doubt that --

1           JUDGE KAVANAUGH: I guess my point is are they  
2 unilaterally selecting the 10,000 miles that they don't want  
3 to carry TIH on and therefore won't have to --

4           MR. PENNAK: Unilaterally, only in the sense that  
5 they are still controlled by existing administrative  
6 regulatory scheme that requires certain services be  
7 provided, and certain routing be employed by the Surface  
8 Transportation --

9           JUDGE KAVANAUGH: I'm not sure --

10          MR. PENNAK: -- Board and by PHMSA. So, yes, the  
11 Agency elected to abandon the two part test, and there's  
12 nothing magic about the two part test --

13          JUDGE KAVANAUGH: Right, I --

14          MR. PENNAK: -- there's, it's not in the statute,  
15 so it's one that the Agency came up with at the time, and it  
16 subsequently realized, for example, this is footnote 11 on  
17 page 44 of our brief, that the residual risk test was  
18 utterly unworkable, nobody could figure out how to make it  
19 work.

20          JUDGE KAVANAUGH: Let me ask a hypo to try to  
21 understand this, because I'm not really understanding it.  
22 Suppose there's track right now that the, I'll call it very  
23 hazardous material is being carried over, and they say we're  
24 not going to be carrying that very hazardous material over  
25 that track in 2016 because we don't want to?

1 MR. PENNAK: Well, it's not so much that they  
2 don't want to is that they can satisfy their common carriage  
3 and routing obligations by --

4 JUDGE KAVANAUGH: By taking them to a different  
5 route.

6 MR. PENNAK: -- by taking them to a -- now,  
7 there's no doubt that the actual number of tracks employing  
8 Poisonous by Inhalation usage will shrink, that's  
9 contemplated by the statute itself.

10 JUDGE KAVANAUGH: Yes.

11 MR. PENNAK: That's perfectly permissible.  
12 Congress didn't intend to impose maximum costs on the rail  
13 industry.

14 JUDGE KAVANAUGH: Isn't this re-routing going to,  
15 this might be more of the standing point, won't the re-  
16 routing that comes from pulling track have a system that can  
17 carry very hazardous material increase the costs for  
18 shippers?

19 MR. PENNAK: It may or may not, we don't know  
20 until you actually look at a particular implementation plan,  
21 and that's been challenged. The claimed injury here is not  
22 being able to ship at all, and that's utterly hypothetical,  
23 and not only hypothetical, but to the extent that there is a  
24 desire to ship, they have a right under the statute to  
25 demand shipment, and the very case that my Opposing Counsel

1 cites the Surface Transportation says you must provide that  
2 carriage. So, the common carriage obligation doesn't go  
3 away, and the FRA said as much in this very rule, that  
4 obligation trumps.

5 JUDGE KAVANAUGH: But it does go away in the sense  
6 that right now they're carrying very hazardous material over  
7 certain track that they're going to pull out and no longer  
8 do so as of 2016, and the FRA is saying fine, therefore you  
9 don't have to do Positive Train Control on that track.

10 MR. PENNAK: Correct. But certainly they still  
11 have to be able to provide common carriage to the shipper  
12 upon reasonable request, and contrary to my Opposing  
13 Counsel's statement that does not get trumped by this  
14 system.

15 JUDGE KAVANAUGH: Is the re-routing, does the re-  
16 routing satisfy the common carriage obligation?

17 MR. PENNAK: Of course it does, but that, again,  
18 will be subject --

19 JUDGE KAVANAUGH: Okay. Now, I understand.

20 MR. PENNAK: That will be subject to a  
21 determination by the Surface Transportation Board who has  
22 control over race, over good service, and that is a fully  
23 capable of administering those allegations which remain  
24 fully in effect.

25 JUDGE KAVANAUGH: So, I think the re-routing, and

1 I guess this is for both of you, on rebuttal, too, the re-  
2 routing seems to me that's obviously going to increase cost,  
3 that probably gives it standing, but I'm not sure why that  
4 violates any statute, so --

5 MR. PENNAK: It doesn't violate the statute --

6 JUDGE KAVANAUGH: -- helps you on the merits, at  
7 least as I'm seeing it.

8 MR. PENNAK: -- and it may or may not increase  
9 costs, you don't have any record on that, and none was  
10 submitted to the Agency, so it's purely hypothetical for  
11 purposes of standing.

12 JUDGE KAVANAUGH: Isn't it just check your common  
13 sense?

14 MR. PENNAK: No, Your Honor, I don't think  
15 anything about this industry --

16 JUDGE BROWN: Is common sense goaled.

17 MR. PENNAK: -- could be done by reference to  
18 common sense because this is so complicated, and there are  
19 so many tens of thousands of miles of track that you simply  
20 don't know what costs are going to be in 2016. So, I don't  
21 think you can assume anything with respect to how costs are  
22 going to be allocated, and it's certainly not part of this  
23 case because this is a facial challenge, not a cost based  
24 challenge, and the Surface Transportation Board will be able  
25 to assess the rates whether they're reasonable or not

1 reasonable.

2           JUDGE KAVANAUGH: What about the idea that the  
3 Agency changed its position without sufficiently explaining  
4 that?

5           MR. PENNAK: Oh, my word, did the Agency explain  
6 its position or not? They set out a whole new rule where  
7 they'd say we're changing our position and this is why.  
8 Now, this Court has only required the Agency to acknowledge  
9 a prior rule and explain why it's changing it, and it  
10 certainly did that here, they had multiple reasons, and  
11 let's go through them. President Obama's Executive Order,  
12 2011, and that is different than President Clinton's Order,  
13 all you have to do is look at Section 6 of that Executive  
14 Order of President Obama and you'll see that there's an  
15 absolute imposition, have a retroactive and a retrospective  
16 review of existing regulations, and you don't find that in  
17 President Clinton's order. And the Agency did that not only  
18 for this rule, but for a whole bunch of other rules that the  
19 Federal Railroad Administration was also administering.  
20 There's nothing untold about that. It also had new evidence  
21 that imposition of the two part test would result in  
22 hundreds of millions of dollars of additional costs on the  
23 railroads, that, it's not just on the railroads, that's on  
24 the U.S. economy because all those costs would have to be  
25 passed through. So, the statute was not designed to create

1 Positive Train Control requirements on tracks for which  
2 Poisonous by Inhalation materials is not moving, or on which  
3 passenger traffic is not moving.

4 JUDGE KAVANAUGH: That's kind of question  
5 (11:06:11) because it is moving on that track now, they want  
6 to pull it off that track.

7 MR. PENNAK: Well, Congress said moving as  
8 January, 2016.

9 JUDGE KAVANAUGH: Right, so they gave them time to  
10 move it off the track, therefore limit the cost of the  
11 obligation, which is fine.

12 MR. PENNAK: Which is fine, because Congress  
13 anticipated in saying that date --

14 JUDGE KAVANAUGH: It's going to be a pain for the  
15 industry and --

16 MR. PENNAK: Well, yes.

17 JUDGE KAVANAUGH: -- cost to --

18 MR. PENNAK: Yes.

19 JUDGE KAVANAUGH: -- get its stuff from point A to  
20 point B because it's going to be re-routed --

21 MR. PENNAK: Yes, it is.

22 JUDGE KAVANAUGH: Right.

23 MR. PENNAK: But Congress didn't say you have to  
24 ship it on rails as they existed in 2008 --

25 JUDGE KAVANAUGH: Yes.

1 MR. PENNAK: -- Congress said we'll give you till  
2 2016 to create a system, and gave enormous amount of  
3 discretion --

4 JUDGE KAVANAUGH: Yes.

5 MR. PENNAK: -- to the Secretary of Transportation  
6 to figure out how that system would work. And that is  
7 perfectly reasonable because that contemplates that the  
8 whole narrowing of track will take place because Congress  
9 understood that this was extremely expensive, and that cost  
10 would be passed onto the rest of the economy. Now, there is  
11 fully remedies that the shippers have for any failure to  
12 provide common carriage, nothing in this regulation disturbs  
13 that in the slightest.

14 JUDGE HENDERSON: All right. Let me take you back  
15 to something you said in the very beginning, if in 2016 the  
16 STB imposes a common carriage requirement on a track that is  
17 no longer going to have the Positive Train Control, and I  
18 thought you said and STB will, of course, require, however  
19 you put it, I don't know, that it meet the, anything the FRA  
20 sets down on the Positive --

21 MR. PENNAK: No. No, Your Honor, if the --

22 JUDGE HENDERSON: All right. Then tell me which  
23 is it because --

24 MR. PENNAK: If the Surface Transportation Board  
25 says carrier Y, you have a common carriage obligation to

1 serve this shipper, and we're going to enforce it.

2 JUDGE HENDERSON: Okay. Now, let me stop you  
3 there. And then I thought you said and also you're going to  
4 have to comply in order to do it with the FRA PTC  
5 requirements.

6 MR. PENNAK: At that point the carrier is going to  
7 have to bring himself into compliance with those rules  
8 regarding --

9 JUDGE HENDERSON: Okay. And what --

10 MR. PENNAK: -- PTC compliance, absolutely.

11 JUDGE HENDERSON: And what if he, and what if the  
12 carrier says it's impossible?

13 MR. PENNAK: Well, it's not impossible, it's just  
14 a matter of cost. No one's suggesting here --

15 JUDGE HENDERSON: All right. All right. Okay.

16 MR. PENNAK: -- that it's impossible.

17 JUDGE HENDERSON: Okay. So, it's just a matter of  
18 cost.

19 MR. PENNAK: It's just a matter of cost. And to  
20 the extent that the carrier says well, we have to comply  
21 with PHMSA's routing regulations, that's fine, the idea here  
22 is to provide common carriage, not by a particular route or  
23 a particular track segment, but by reference to the carriage  
24 of the chlorine in the first place, so at that point the  
25 carrier has to comply because --

1 JUDGE HENDERSON: All right.

2 MR. PENNAK: -- he's got an order from the  
3 Surface --

4 JUDGE HENDERSON: Okay, but --

5 MR. PENNAK: -- Transportation Board.

6 JUDGE HENDERSON: -- when you said it's just cost  
7 you also said that's the reason you changed, or FRA changed,  
8 because it was going to be hundreds of millions of dollars  
9 in cost to meet the first two rules.

10 MR. PENNAK: Yes, right. But you see --

11 JUDGE HENDERSON: Well, do we know what it would  
12 cost in 2016 if STB says you've got to provide common  
13 carriage, and the railroad says it's too costly to do it  
14 down this line, it's too costly to do it down that line --

15 MR. PENNAK: Well, the routing will be controlled  
16 by the PHMSA regulations, the actual obligation to provide  
17 carriage will be by reference to those routes that now will  
18 have to have, unless there's an exception otherwise provided  
19 for in the rules, will now have to have Positive Train  
20 Control technology installed, and the cost at that point  
21 becomes irrelevant, because Congress --

22 JUDGE HENDERSON: No matter the --

23 MR. PENNAK: -- has made that choice already.

24 JUDGE HENDERSON: I mean, no matter the cost?

25 MR. PENNAK: No matter the cost.

1 JUDGE HENDERSON: All right. All right.

2 MR. PENNAK: So, if they got an order, and it  
3 requires X amount of money to reach that order then the  
4 carrier bears it.

5 JUDGE KAVANAUGH: But the STB is most likely going  
6 to order the carriage over the lines already equipped with  
7 Positive Train Control --

8 MR. PENNAK: Well --

9 JUDGE KAVANAUGH: -- as opposed to the simplest  
10 direct route --

11 MR. PENNAK: Well, the STB --

12 JUDGE KAVANAUGH: -- that's not equipped.

13 MR. PENNAK: -- over rates and service, but the  
14 PHMSA, the Pipeline --

15 JUDGE KAVANAUGH: Yes.

16 MR. PENNAK: -- and Hazardous Materials Safety  
17 Administration controls the routes.

18 JUDGE KAVANAUGH: They control the routes.

19 MR. PENNAK: So, those routes will have to  
20 coordinate with PHMSA. So, the, you have a complex  
21 regulatory system here, but it does work because you have  
22 people who are looking at safety considerations to keep  
23 chlorine from D.C., for example, it will also enforce a  
24 common carriage obligations, and you have an intermission  
25 with Positive Train Control, but Positive Train Control

1 takes a backseat to the common carriage requirement, it just  
2 does, and that's what the Agency has said over and over  
3 again. Now, I understand that the Chlorine Institute  
4 doesn't believe us, but that's the law, nobody repealed the  
5 common carriage statute, nobody repealed --

6 JUDGE KAVANAUGH: So, if we say that in our  
7 opinion you're good with that?

8 MR. PENNAK: I'm absolutely good with that. You  
9 may indeed say that in your opinion.

10 JUDGE HENDERSON: Okay. Any more questions?

11 MR. PENNAK: I see my time has more than expired,  
12 if there any further questions I'd be happy to take them.

13 JUDGE HENDERSON: I think the more everybody talks  
14 the more confusing it is.

15 JUDGE KAVANAUGH: Yes.

16 JUDGE HENDERSON: But, all right.

17 MR. PENNAK: Thank you, Your Honor.

18 JUDGE HENDERSON: Thank you. Does Mr. Donovan  
19 have -- no, he doesn't. Why don't you take a couple of  
20 minutes.

21 ORAL ARGUMENT OF PAUL M. DONOVAN, ESQ.

22 ON BEHALF OF THE PETITIONER

23 MR. DONOVAN: Thank you, Your Honor. I'm  
24 fascinated by your question if they say, if you say in your  
25 opinion that the STB has the statutory authority to order

1 Positive Train Control be placed on a line in order to meet  
2 common carrier obligations, FRA is okay with that. FRA may  
3 be okay with that, but our brethren at the AAR aren't. That  
4 case will be on certiorari before the opinion comes out.  
5 There's just no way, number one. Number two, if you do say  
6 that I will take great pleasure in declaring this a victory,  
7 which will make my clients very happy. I don't think it's  
8 going to stand up, but okay. The --

9 JUDGE KAVANAUGH: Why not? I guess the theory  
10 is --

11 MR. DONOVAN: The statute in question, 49 U.S.C.  
12 11101, says you can only demand transportation upon  
13 reasonable request, and requiring the carrier to impose PTC  
14 over a line of rail that FRA says they don't have to put it  
15 on is not a reasonable request. It's blatantly  
16 unreasonable. Require them to put PTC on a line of track  
17 that FRA says they don't need it on?

18 JUDGE HENDERSON: Regardless of the cost.

19 MR. DONOVAN: Regardless of the cost.

20 JUDGE HENDERSON: I mean --

21 MR. DONOVAN: Yes. Number one. Number two, the  
22 re-routing that Your Honor suggests kind of anticipates that  
23 somehow or another you can get there --

24 JUDGE KAVANAUGH: Right.

25 MR. DONOVAN: -- a different way --

1 JUDGE KAVANAUGH: No.

2 MR. DONOVAN: -- you can't, there's only one  
3 railroad that goes to U.S. Magnesium in Salt Lake City, and  
4 a PTC isn't installed on that track coming out of that plant  
5 it ain't coming out.

6 JUDGE HENDERSON: By rail.

7 MR. DONOVAN: By rail.

8 JUDGE KAVANAUGH: So, what does the STB do with  
9 that?

10 MR. DONOVAN: Not a thing, what are they going to  
11 do --

12 JUDGE KAVANAUGH: The common --

13 MR. DONOVAN: -- say come in -- there's the  
14 question, can the STB then come in and stick out its chin  
15 and say we order you to put PTC on there even though --

16 JUDGE KAVANAUGH: Well, we order you to give the,  
17 provide the carriage, and then in turn the PTC has to be  
18 installed.

19 MR. DONOVAN: If Your Honor thinks that that's  
20 within the statute, statutory interpretation of the STB one  
21 wonders why the FRA didn't ask the STB that question, they  
22 could have, whether that would be -- they just say it, they  
23 didn't ask the STB what their interpretation was. So, you  
24 know, that's one problem with this argument. The other  
25 thing about this two years that Counsel refers to, the two

1 year request for continuing the move over non-PTC equipped  
2 track is only at the behest of the railroads. If the  
3 railroad wants to move traffic for two years it can, if a  
4 shipper wants to move it for two years, no. The regulation  
5 in point, and we quote it in the brief, we cite it in the  
6 brief, simply doesn't permit that, it permits the railroad  
7 to request a two year hiatus for implementation, but it  
8 doesn't allow the shipper to do it, and I suggest to you  
9 given the incentive that the railroad has not to install PTC  
10 on track that otherwise wouldn't be required to have it,  
11 they're not going to ask for the two years, they're not  
12 going to require, they're not going to request that they be  
13 allowed to put PTC on a line of track, that would be insane  
14 for them to do that. Their whole purpose here is to  
15 eliminate as much track as possible from the PTC  
16 requirement, they've been arguing that for a generation.  
17 And it's all over the FRA first two final rules. The FRA  
18 knows that you cannot justify Positive Train Control  
19 strictly on safety benefits using a cost benefit analysis,  
20 and Congress knew it.

21 JUDGE KAVANAUGH: I guess I shouldn't be asking  
22 you this, but I thought their incentive was, the railroad's  
23 incentive was to funnel this kind of material onto as few  
24 tracks as possible.

25 MR. DONOVAN: Their incentive is to eliminate it,

1 that's what they want to do, that's what they've been trying  
2 to do.

3 JUDGE KAVANAUGH: Assuming they can't --

4 JUDGE BROWN: They can't do that.

5 JUDGE KAVANAUGH: -- do that.

6 MR. DONOVAN: They can put it on the passenger  
7 track. They can put it on the track that otherwise would be  
8 equipped.

9 JUDGE KAVANAUGH: Right. So, maybe I'm missing  
10 it, I just want to make sure I'm clear, assuming they can't  
11 just eliminate carriage of it, they're trying to funnel it  
12 into as few tracks as possible --

13 MR. DONOVAN: And the result --

14 JUDGE KAVANAUGH: -- is that --

15 MR. DONOVAN: -- of that --

16 JUDGE KAVANAUGH: -- correct? Is that your  
17 understanding?

18 MR. DONOVAN: Yes.

19 JUDGE KAVANAUGH: Okay.

20 MR. DONOVAN: And the result of that is going to  
21 be eliminate a lot of destinations. For example, U.S.  
22 Magnesium, even if they're not shut out from getting out of  
23 their plant isn't going to be able to move it to Texas.  
24 Chlorine will get to Texas, but it's not going to be from  
25 U.S. Magnesium.

1           JUDGE KAVANAUGH: Maybe we'll have to ask the  
2 Government this, again, but I thought there was under the  
3 way the system is going to work as the Government was  
4 describing it to us, no destinations could be eliminated.

5           MR. DONOVAN: Well, Counsel says that, but FRA  
6 didn't say that. And since FRA didn't even tell us what  
7 10,000 miles they're talking about I don't know how anybody  
8 can make that conclusion.

9           JUDGE KAVANAUGH: Well, that suggests it's not  
10 right.

11          MR. DONOVAN: Well, the whole rule may not be  
12 right.

13          JUDGE KAVANAUGH: Uh-huh.

14          MR. DONOVAN: I think our injury is imminent  
15 because we're threatened with this. I think this is clearly  
16 within the four corners of *Chamber of Commerce*, most recent  
17 standing case here. I think we're looking down the barrel  
18 of an incentive on the part of the railroads, which they  
19 have admitted over the years, which the FRA has noted in  
20 their first two final orders, they say the railroads do well  
21 not to contend that they don't want TIH off their lines  
22 because we know better. So, the railroad incentive is to  
23 cause us injury, and to do themselves financial good,  
24 there's nothing illegal in the sense that that's somehow  
25 thievery, but it does cause us injury, and it's only

1 possible because the interpretation, or the lack of  
2 interpretation that the FRA is now engaged in.

3 JUDGE HENDERSON: I've got two questions, one, if  
4 you know, what can be shipped, how can chlorine be shipped  
5 by truck? Or can it?

6 MR. DONOVAN: It can be, there are about 100  
7 chlorine trucks in the country to carry three or four  
8 million tons --

9 JUDGE HENDERSON: Okay.

10 MR. DONOVAN: -- so obviously, you have to throw  
11 away the entire rail fleet, which we own --

12 JUDGE HENDERSON: Right.

13 MR. DONOVAN: -- the railroads don't supply the  
14 cars, so we'd have to get rid of the rail cars and then go  
15 get trucks. And then you're going to have trucks moving  
16 thousands of miles with four and a half trucks for every car  
17 load of rail.

18 JUDGE HENDERSON: Right.

19 MR. DONOVAN: That makes no sense.

20 JUDGE HENDERSON: Well, the trucks, the number you  
21 mentioned just now, where do they carry it from?

22 MR. DONOVAN: That is in large part, there are a  
23 couple in other places, there's always an off situation, in  
24 large part that happens in Southern California where the  
25 Department of -- I'm sorry, I've forgotten the name of the

1 exact department, but the water purification people in  
2 Southern California do not want rail cars of chlorine coming  
3 into Los Angeles, so they require it to be offloaded outside  
4 of L.A. --

5 JUDGE HENDERSON: Okay.

6 MR. DONOVAN: -- and brought in by truck.

7 JUDGE HENDERSON: Okay.

8 MR. DONOVAN: And that's why there's, I think  
9 there are 80 or 90 trucks there, and maybe 10 scattered  
10 around the country in other unique applications.

11 JUDGE HENDERSON: I see.

12 MR. DONOVAN: Probably where you need water  
13 purification in volume, but you don't have any rail tracks.

14 JUDGE HENDERSON: Okay. I've got one last  
15 question, and that is I heard you say that if STB can  
16 require common carriage and can force PTC regardless of the  
17 cost then, I want to ask this question, and it's a serious  
18 question, but then what is the function of the FRA? I mean  
19 --

20 MR. DONOVAN: Well --

21 JUDGE HENDERSON: -- if STB can do that --

22 MR. DONOVAN: -- the FRA is making this up, Your  
23 Honor, they're just making it up as they go along --

24 JUDGE HENDERSON: Well, then -- okay.

25 MR. DONOVAN: -- that the STB can order this. The

1 STB can't order this, this would never get past your review.  
2 The statute, the STB the last time they looked at this said  
3 the common carriage obligation is not absolute, it has to be  
4 a reasonable request, and U.P. in the case we referred to  
5 involving U.S. Magnesium said this was not a reasonable  
6 request because you're moving chlorine farther than you had  
7 to. The STB said no, that's not far enough, but they're  
8 still looking at the issue of whether TIH traffic is so  
9 dangerous that maybe common carrier obligation doesn't apply  
10 to it. Hopefully we don't get to that or I'll be back here,  
11 but it clearly is within some discretionary authority for  
12 them to say something is so dangerous you can't move it.

13 JUDGE KAVANAUGH: Can I ask him a couple of more  
14 questions?

15 JUDGE HENDERSON: Sure. Yes, I was going to. We  
16 want to ask the Government one more question.

17 MR. DONOVAN: Thank you, Your Honor.

18 JUDGE HENDERSON: Thank you.

19 MR. DONOVAN: I appreciate it.

20 ORAL ARGUMENT OF MARK W. PENNAK, ESQ.

21 ON BEHALF OF THE RESPONDENTS

22 MR. PENNAK: Thank you, Your Honor.

23 JUDGE KAVANAUGH: On that point about destinations  
24 being eliminated, is that possible?

25 MR. PENNAK: That's a determination that would lay

1 solely within the discretion and function of the Surface  
2 Transportation Board. As far as I know that's never been  
3 ordered; as far as I know that's not an imminent risk, or a  
4 substantially probable risk; it's certainly not a risk  
5 created by this regulatory scheme. I mean, I reiterate, the  
6 Surface Transportation Board won't order the railroad to  
7 install --

8 JUDGE KAVANAUGH: Why isn't it a risk created by  
9 this scheme, because they're going to pull track out so it's  
10 no longer going to carry this material, and I think the  
11 representation is, and it's not going to just be re-routed  
12 to get to the destination, there's going to be no way to get  
13 to certain destinations.

14 MR. PENNAK: With all due respect to my Opposing  
15 Counsel, that's nonsense. The common carriage requirement  
16 requires that the common carrier provide shipment upon  
17 reasonable request, that statutory requirement has not  
18 changed, it's administered by the Surface Transportation  
19 Board. There will be common carriage if there's a  
20 reasonable request, that's just the law as it stands right  
21 now.

22 JUDGE KAVANAUGH: Why wouldn't the STB say it's  
23 not a reasonable request because there's no train, Positive  
24 Train Control?

25 MR. PENNAK: That's because he seems to have this

1 conception that the Positive Train Control regulation trumps  
2 common carriage, when the opposite is actually true.

3 JUDGE KAVANAUGH: And we know that, other than you  
4 saying that how do we know that?

5 MR. PENNAK: We know that because one, it's in the  
6 regulatory rule-making that the Agency itself said that; we  
7 know that because 49 --

8 JUDGE KAVANAUGH: We don't know that the STB  
9 agrees with that.

10 MR. PENNAK: I don't -- there's no indication that  
11 it does not, and it's not my burden to prove the negative.  
12 It is their burden to prove that somehow they're not going  
13 to get carriage, and right now because it's a facial  
14 challenge and they have not challenged any actual  
15 implementation plan it's utterly hypothetical.

16 JUDGE KAVANAUGH: If I'm on the STB in five years  
17 and I get a request to carry chlorine over a track that  
18 doesn't have PTC I'm going to say that's nuts, that's  
19 unreasonable, right?

20 MR. PENNAK: That's not true.

21 JUDGE KAVANAUGH: You don't think so?

22 MR. PENNAK: I do not think so.

23 JUDGE KAVANAUGH: Okay.

24 MR. PENNAK: I think if the FRA will then require  
25 by its regulations, as they require now, that if you're

1 going to carry Poisonous by Inhalation materials over that  
2 track segment because of an STB order then you must comply  
3 with all the regulations, those regulations exist entirely  
4 separate from the STB's jurisdiction, and the STB doesn't  
5 administer them, the FRA administers them to require  
6 Positive Train system components to be installed where there  
7 has to be Poisonous by Inhalation --

8 JUDGE HENDERSON: All right, so --

9 MR. PENNAK: -- carriage.

10 JUDGE KAVANAUGH: You don't here represent the  
11 STB, though?

12 MR. PENNAK: I'm here representing the Department  
13 of Transportation, Your Honor, the STB is an independent  
14 regulatory board. So, I cannot represent to the Court that  
15 I'm here speaking on behalf of the STB.

16 JUDGE KAVANAUGH: I understand. I just wanted to  
17 make clear as a formal matter.

18 MR. PENNAK: That's certainly true, Your Honor.

19 JUDGE KAVANAUGH: Yes.

20 JUDGE HENDERSON: And so, it is not your position  
21 that it would be, that the STB would order the imposition of  
22 the PTC requirements?

23 MR. PENNAK: What the STB would order is common  
24 carriage.

25 JUDGE HENDERSON: Right.

1           MR. PENNAK: The FRA would order the installation  
2 of the Positive Train Control system components on the track  
3 necessary for the railroad to provide the common carriage,  
4 that's how it works.

5           JUDGE KAVANAUGH: And during the delay?

6           MR. PENNAK: There's a two year slack. Now,  
7 because --

8           JUDGE KAVANAUGH: He says the railroads can deny  
9 it during the two years.

10          MR. PENNAK: The railroads can't deny it because  
11 the railroads have to comply with the Surface Transportation  
12 Board order, so the railroads of course are going to make  
13 the request for that two year standard because they have no  
14 other means to provide the common carriage. Common carriage  
15 trumps, not the other way around, that's how this whole  
16 system works, and once you understand that it's really easy.

17          JUDGE HENDERSON: You said that at the beginning.

18          JUDGE KAVANAUGH: That's -- no, it's not that  
19 easy.

20          MR. PENNAK: It is easy, Your Honor. It is.

21          JUDGE HENDERSON: You said that --

22          JUDGE KAVANAUGH: I thought you were going to --

23          JUDGE HENDERSON: -- an hour ago.

24          MR. PENNAK: I did. And I'm still trying to say  
25 it.

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JUDGE HENDERSON: All right.

MR. PENNAK: Thank you, Your Honor.

JUDGE BROWN: You're done.

JUDGE HENDERSON: Thank you.

(Whereupon, at 11:23 a.m., the proceedings were  
concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



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Paula Underwood

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October 20, 2015

DEPOSITION SERVICES, INC.

# **EXHIBIT 4**

**to**

**Reply of AAR to American Chemistry Council,  
the Chlorine Institute, and the Fertilizer  
Institute—Petition for Declaratory Order—  
Positive Train Control**

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**STB Finance Docket No. 35964**

# Positive Train Control

ASSOCIATION OF AMERICAN RAILROADS

AUGUST 2015

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**WHAT SHOULD BE DONE?**

Extend the deadline to install and activate positive train control (PTC) to at least the end of 2018.

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**WHY?**

Legislation passed by Congress in 2008 mandates that PTC be put into service by the end of 2015 on rail lines used to transport passengers or toxic-by-inhalation materials. Since enactment of the legislation, railroads have devoted enormous human and financial resources to develop a fully functioning PTC system, and progress to date has been substantial. However, despite railroads' best efforts, the immense technological hurdles have been such that a safe, reliable, nationwide, and interoperable PTC network will not be completed by the current deadline.

Railroads remain committed to implementing PTC as early as possible and are doing all they can to address the challenges that have surfaced, but more time is needed to ensure safe and effective implementation on the nation's vast freight and passenger rail networks.

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## What is Positive Train Control?

- “Positive train control” (PTC) describes technologies designed to automatically stop a train before certain accidents caused by human error occur. Specifically, PTC as mandated by Congress must be designed to prevent:
  - ✓ Train-to-train collisions;
  - ✓ Derailments caused by excessive speed;
  - ✓ Unauthorized incursions by trains onto sections of track where maintenance activities are taking place; and
  - ✓ The movement of a train through a track switch left in the wrong position.<sup>1</sup>
- The Rail Safety Improvement Act of 2008 (RSIA) requires passenger railroads and Class I freight railroads to install PTC by the end of 2015 on main lines used to transport passengers or toxic-by-inhalation (TIH) materials.<sup>2</sup>
- The PTC systems that will be installed to meet the statutory mandate are overlay systems, meaning they supplement, rather than replace, existing train control systems.

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<sup>1</sup> A switch is equipment that controls the path of trains where two sets of track diverge.

<sup>2</sup> TIH materials are gases or liquids, such as chlorine and anhydrous ammonia, that are especially hazardous if released into the atmosphere. Class I railroads are railroads with 2013 operating revenue of at least \$467.1 million.

## Positive Train Control is an Unprecedented Technological Challenge

- A properly functioning PTC system must be able to determine the precise location, direction, and speed of trains; warn train operators of potential problems; and take immediate action if the operator does not respond to the warning provided by the PTC system. For example, if a train operator fails to begin stopping a train before a stop signal or slowing down for a speed-restricted area, the PTC system would apply the brakes automatically before the train passed the stop signal or entered the speed-restricted area.
- Such a system requires highly complex technologies able to analyze and incorporate the huge number of variables that affect train operations. A simple example: the length of time it takes to stop a freight train depends on train speed, terrain, the weight and length of the train, the number and distribution of locomotives and loaded and empty freight cars on the train, and other factors. A PTC system must be able to take all of these factors into account automatically, reliably, and accurately in order to safely stop the train.
- **PTC development and implementation constitute an unprecedented technological challenge**, on a scale that has never been attempted anywhere in the world. Tasks that freight railroads must complete include:
  - ✓ A complete physical survey and highly precise geo-mapping of the more than 82,000 track-miles (60,000 route-miles) on which PTC technology will be installed, including geo-mapping of nearly 460,000 field assets (mileposts, curves, grade crossings, switches, signals, and much more) along that right-of-way.
  - ✓ Installing PTC technology on more than 22,000 locomotives.
  - ✓ Installing 32,600 “wayside interface units” (WIU) that provide the mechanism for transmitting information to locomotives and the train dispatching office from signal and switch locations along the right-of-way.
  - ✓ Installing PTC technology on more than 2,600 switches in non-signaled territory and completing signal replacement projects at 15,100 locations.
  - ✓ Developing, producing, and deploying a new radio system specifically designed for the massive data transmission requirements of PTC at approximately 4,000 base stations, 30,000 trackside locations, and on more than 22,000 locomotives.
  - ✓ Developing back office systems and upgrading dispatching software to incorporate the data and precision required for PTC systems.
- **In all these areas, railroads have made substantial progress.** As of mid-2015, 14,300 locomotives were at least partially equipped with PTC, out of more than 22,000 that will require it; nearly 19,000 WIUs have been deployed, out of 32,600 that will be required; and more than 1,800 of the approximately 4,000 base station radios have been installed.



PTC locomotive cab display unit

- Freight railroads have been working tirelessly to meet the PTC mandate. As of mid-2015, they've spent \$5.7 billion (of their own funds, not taxpayer funds) on PTC development and deployment. The estimated total cost to freight railroads for PTC development and deployment is \$9 billion, with hundreds of millions of additional dollars needed each year after that to maintain the system.<sup>3</sup>
  - Much of the railroads' efforts to date has been directed toward developing and testing technology that can be scaled to the huge requirements of a national system. This task is made particularly complex by the need to ensure that PTC systems are fully and seamlessly interoperable across all of the nation's major railroads. It is not unusual for one railroad's locomotives to operate on another railroad's tracks. When that happens, the "guest" locomotives must be able to communicate with, and respond to commands from, the "host" PTC system. That's much easier said than done, and ensuring this interoperability has been a significant challenge.
- A photograph showing a freight train with several colorful shipping containers (red, blue, and yellow) on tracks. The train is moving away from the viewer. In the background, a city skyline with several tall skyscrapers is visible under a clear sky. The foreground shows the gravel tracks and some dry grass on the right side.
- The many potential failure points in PTC systems must be identified, isolated, and corrected — all without negatively impacting the efficient movement of goods by rail throughout the country. The PTC systems railroads ultimately develop must work flawlessly, day in and day out, or risk shutting down key parts of the U.S. freight rail network. The damage that would cause to the economy would be enormous.
  - In addition, the Federal Railroad Administration must review each railroad's PTC safety plan and certify each railroad's PTC systems after the development and testing of the components are complete. Only then can a railroad's PTC installation be completed and placed into operation.
  - In the spring of 2013, the Federal Communications Commission ordered railroads to cease the installation of the thousands of wayside antenna poles needed for PTC communications while the Commission sought to develop a process for historic preservation review of the wayside structures. The FCC announced its new process in May 2014. The new process is functional and installation of antenna structures is now going forward, but the 2013 construction season and part of the 2014 construction season were essentially lost for PTC installation.

### **More Time is Needed to Ensure Safe and Effective PTC Implementation**

- Railroads' aggressive installation of PTC will continue. However, it will not be complete by the end of 2015. Adjusting the timeline would more accurately reflect railroads' considerable efforts to design, test, approve, produce, distribute, and install this incredibly complex technology and train nearly 115,000 employees in its use.

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<sup>3</sup> The cost of PTC installation for U.S. passenger railroads is estimated at an additional \$3.5 billion.

- For that reason, railroads support an extension of the statutory deadline for nationwide PTC installation to at least the end of 2018.
- Rushing PTC development and installation and foregoing a logical plan for sequencing its implementation would sharply increase the likelihood that it would not work as it should. Making the PTC implementation deadline more realistic would help ensure that a fully-interoperable PTC system is deployed in a logical manner and thoroughly tested prior to implementation. A reasonable and responsible extension is consistent with the fact that PTC should be implemented as well as possible, not as quickly as possible.

### **The “Business Benefits” of Positive Train Control**

- Some have claimed that railroads will achieve billions of dollars in “business benefits” from PTC because PTC will allow trains to be more tightly spaced, thereby reducing train delays and increasing a rail line’s capacity without the need to install new track. Any industry that invests billions of dollars in a new technology will try to leverage those investments into operational improvements. That said, the rail industry has yet to identify any substantial “business benefits” for the foreseeable future attributable to PTC deployment as mandated under RSIA.
- Mainly because of the urgency to comply with an extremely challenging statutory deadline, railroads have not had the luxury of developing and implementing supplemental PTC technologies that, in addition to safety benefits, have the most promising potential operational benefits. It is far less likely that the first-generation PTC systems being deployed now will yield meaningful business benefits compared with second- or third-generation PTC systems that might come a decade or two from now.
- Many of the business benefits some have claimed will be achieved by PTC actually have little or nothing to do with PTC. For example, many of the claims that PTC will reduce train delays and allow more trains to move over a rail line presuppose the use of “precision dispatching.” This term refers to the use of complex computer algorithms to analyze a variety of factors (such as the priority levels of different trains, train crew availability, and the location and schedules of other trains) to decide in what order and when trains on a railroad’s network should travel. But there is no direct relationship between the use of precision dispatching and PTC implementation: the development of precision dispatching has begun and would continue if PTC did not exist.
- In fact, it’s possible that PTC could actually make existing rail operations less efficient, especially if it is put into place without adequate testing. The PTC systems freight railroads have been developing have essentially had to be created from scratch — they don’t exist anywhere in the world. By necessity, a fully functioning PTC system is enormously complex, and the failure of a single part within that complex system means the entire PTC system will not work as it should. If that happened, the affected rail line would be operationally degraded until the failure was corrected. The inefficiencies this would create, and the damage it would cause to our economy, are best avoided. That’s another key reason why the PTC development and implementation process should not be rushed.

# **EXHIBIT 5**

**to**

**Reply of AAR to American Chemistry Council,  
the Chlorine Institute, and the Fertilizer  
Institute—Petition for Declaratory Order—  
Positive Train Control**

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**STB Finance Docket No. 35964**

**PTC Implementation:  
The Railroad Industry Cannot Install PTC on the  
Entire Nationwide Network by the 2015 Deadline**

**April 2015 Update**

**Association of American Railroads**

**April 15, 2015**

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**PTC Implementation:  
The Railroad Industry Cannot Install PTC on the  
Entire Nationwide Network by the 2015 Deadline  
March 2015 Update**

**I. Introduction and Executive Summary**

On January 18, 2012, the Association of American Railroads (AAR) submitted a status paper to the Federal Railroad Administration (FRA) titled “PTC Implementation: The Railroad Industry Cannot Install PTC on the Entire Nationwide Network by the 2015 Deadline” (“ISP,” Attachment C). The ISP discussed the challenges faced in developing an interoperable PTC system and provided detailed data showing the progress that had been made.<sup>1</sup> The ISP concluded by stating that a nationwide, interoperable PTC network cannot be completed by the December 31, 2015, statutory deadline.

On February 10, 2012, the American Public Transportation Association (APTA) filed a companion paper with FRA, concurring with AAR that a nationwide interoperable PTC network is not achievable by December 31, 2015. In addition, in August 2012 FRA issued a report to Congress titled, “Positive Train Control Implementation Status, Issues, and Impacts.” In this report, FRA reached a similar conclusion, stating, “[b]ased on the results of this report, FRA believes that the majority of railroads will not be able to complete PTC implementation by the 2015 deadline.” One year later, in August 2013 the United States Government Accountability Office issued a report acknowledging the problems posed by the 2015 deadline, stating that by “attempting to implement PTC by the 2015 deadline while key components are still in development, railroads could be introducing financial and operational risks.”

AAR has provided annual updates to the January 2012 status report, and updated the tables attached to the report semiannually since 2013. This paper is the 2015 update.<sup>2</sup>

The railroads have made great strides towards completion of the nationwide interoperable PTC network. For example, they have installed or partially installed PTC equipment on over 50 percent of the locomotives that will need to be equipped; deployed over 50 percent of the wayside units required; replaced over half the signals that need to be replaced; and mapped most of the track that will be equipped with PTC. Accomplishments in the last year include:

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<sup>1</sup> This paper, except for chapter 7, is based on information provided by the following eight railroads, which have to install PTC on routes over which TIH or passengers, or both TIH and passengers, are transported: Alaska Railroad (ARR), BNSF Railway (BNSF), Canadian National (CN), Canadian Pacific (CP), CSX Transportation (CSX), Kansas City Southern (KCS), Norfolk Southern (NS), and Union Pacific (UP). Chapter 7 was supplied by the American Short Line and Regional Railroad Association (ASLRRA).

<sup>2</sup> This 2015 Update is intended to be read in conjunction with and as a supplement to the 2012 ISP and the previous updates. Attachment A updates the information in the various tables that were included in the ISP.

- Continued progress on the PTC Safety Plans that railroads must submit to FRA before a PTC system can be certified (there have been two submittals for the I-ETMS system);
- Submittal of a revised PTC Development Plan to include FRA required enhancements to the I-ETMS system;
- Resolution of the issues surrounding installation of FCC regulated PTC communications towers;
- Continued field qualification testing of the PTC system on several Class I roads
- Establishment of AAR committees to manage PTC standards;
- Approval from FRA in April to utilize shared brake testing results and the resources of TTCI to further validate the I-ETMS brake algorithm in lieu of extended live field brake tests of “worst case” conditions; and
- FRA preliminary review of the comprehensive I-ETMS Final Human Factors Study.

Notwithstanding all the progress that has been made towards a nationwide, interoperable PTC system and the spending to date of over \$5 billion to install PTC, significant challenges remain to completing a nationwide, interoperable PTC system. The most significant are:

- Wayside implementation continues to be constrained by the limited number of firms that provide signal design services and the scope of the redesign task. The signal system must still be redesigned and replaced at approximately 6,400 unique locations before PTC wayside technology can be installed at those locations. Approximately 15,100 wayside interface units (WIUs) remain to be installed. This work must be accomplished without compromising signal system safety or the ability of the railroads to efficiently move the nation’s freight. Based on current experience and available resources, it remains likely that wayside design and installation will extend into 2018.
- The track database, including critical features such as the presence of signals and switches, must be validated asset by asset and mile by mile. The railroads must ensure that what is displayed to the train crew via the track database and onboard system reflects what is shown by railroad signals and what is actually present on the ground. It is not unusual for a 100-mile line segment to have more than 2,000 attributes that must be verified. Furthermore, construction and validation of the track database is a continuous process as almost all changes to the railroad infrastructure require its modification and re-validation. Validation of the database is a time-consuming and labor-intensive process. The validation process is also operationally intrusive, requiring track time that can be problematic on busy segments of track. Many railroads established new functional teams and develop extensive back office controls to ensure accuracy.
- There is limited expertise available to accelerate design and development of the many facets of PTC. The railroads have been developing expertise as they build the onboard, wayside, and back office segments.
- Railroads do not expect final release of the I-ETMS Back Office Server (BOS) core software until late 2015. BOS compatibility with the railroad’s proprietary dispatch

system and the PTC onboard system is a prerequisite to end lab testing and begin field testing.

- Full system testing will continue during 2015, as will the need to address problems with PTC components and software identified by the testing.
- Sixty percent of the Class I railroads' employees must receive PTC training. From the perspective of the employee retaining the material and understanding its relevance, the optimal time to train an employee is when PTC is about to be rolled out on the employee's territory. Many railroads are delivering training via simulator and CBT (computer based training) to give the employee realistic and detailed training modules specific to the work they perform.
- Once testing is complete, the limited number of FRA personnel available to work on PTC must still review each railroad's individual Safety Plan and certify the PTC system. FRA must:
  - review PTC Safety Plans (typically 3000+ page filings that while similar to some extent, are not the same because a the PTCSP must be specific as to a railroad's implementation of its PTC system);
  - review revised PTC Implementation Plans and their corresponding amendments updating plans, goals and metrics for implementing PTC;
  - review field testing plans and reports for functional testing, wayside testing and critical feature testing;
  - review product safety plans (PSPs) for new and novel wayside devices;
  - review updated rail safety program plans (RSPPs) and any related informational filings to enable use of new and novel wayside products;
  - review and approve requests to begin revenue service demonstrations;
  - review and approve requests to conduct verification and validation outside of pilot territories; and
  - review revenue service demonstration reports .
- As the potential for failure of individual components became clear, systems have been designed with more redundancy, thus lengthening the design process.
- PTC cannot be rolled out on an entire railroad all at once. Implementation of PTC must occur in phases and location by location, starting with less complex areas and proceeding to the more operationally complex areas, incorporating lessons learned at each step.

Furthermore, the railroads are working through a backlog of submissions to the Federal Communications Commission (FCC) for historic preservation review of the wayside antenna structures. After a year-long moratorium on submissions by the FCC that halted construction of antenna structures, the FCC put a new process in place for historic preservation review. While much improved over the previous process, the environmental and historic review procedures for PTC infrastructure still require a location-by-location review and consultations with Tribal Nations and State Historic Preservation Officers, which takes about two months per submission.

It is abundantly clear that the railroad industry cannot install interoperable PTC on the entire nationwide network by the December 31, 2015, deadline.

## II. PTC Components

### A. Locomotives

Over 23,000 locomotives must be equipped with PTC technology. The ISP identified several reasons why equipping locomotives with PTC technology is taking longer than projected in the railroads' original implementation plans.<sup>3</sup> However, several of those challenges have been resolved or become less of a concern:

- vendor supply chain issues and capacity have improved and available hardware components are generally being delivered on time;
- production of the 220 MHz locomotive radio began in 2012 and sufficient numbers of radios have been supplied to the railroads; and
- hardware design changes necessary to support the messaging system on some railroads have been completed.

These positive developments have aided the railroads in making significant progress on their “double touch” strategy for equipping locomotives.<sup>4</sup> Over 13,000 locomotives have been equipped or partially equipped to date. While the good news is that the number of equipped or partially equipped locomotives has continued to climb, many locomotives have only been partially equipped and will have to be cycled back through a shop to complete installation and perform PTC commissioning tests.

Particularly problematic has been the development of the onboard software that runs on the Train Management Computer (TMC) for the railroads using I-ETMS. The complexity of the software, combined with the many interfaces with other components of the PTC system, resulted in multiple reviews of the design and subsequent modifications to ensure correct operation of the interoperable system. The delivery date for this critical software component slipped several times. The vendor has been issuing frequent corrective software versions while field qualification testing and revenue service demonstrations take place. Note that within the last year two safety-critical defects were identified in the onboard software during lab testing that resulted in the suspension of revenue service demonstrations.

The railroads have been able to equip over 3,300 locomotives with all the necessary PTC hardware rather than continuing to partially equip locomotives now and “touch” them a second time to complete the installation (the “double-touch strategy”). While much work remains to be

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<sup>3</sup> ISP, p. 4.

<sup>4</sup> “Double touch” refers to shopping locomotives twice to equip them with PTC, partially installing PTC equipment at the first shopping.

done in regard to equipping locomotives, approximately 40 percent of the locomotives required to be equipped with PTC technology should be fully equipped by December 31, 2015.<sup>5</sup>

#### B. Wayside Technology

For the reasons described in the ISP, tens of thousands of miles of existing signal system infrastructure still need to be replaced. Each of the approximately 14,700 replacement projects is complicated and lengthy, requiring individual analysis and design and signal replacements or upgrades before the WIU's can be installed at these locations.<sup>6</sup>

Qualified signal personnel are needed for design, installation, and validation, both in the lab and in the field. The limited number of qualified signal design firms and personnel available to the railroad industry continues to constrain how quickly railroads can complete the design, upgrade, installation, and testing required for PTC signal projects. The railroads have hired over 2,400 signal personnel specifically for PTC.<sup>7</sup> However, a great majority of these new hires provide assistance only with the installation of PTC at wayside locations, not with the more complicated analysis and design work that is typically handled by established signal design firms. Personnel hired for installation work are, of course, limited to performing work at locations where designs have been completed. Product availability has improved, although it continues to be a concern along with the extensive lab and field testing required for these products to ensure they are configured accurately for each signal location.

Despite these factors, the railroads have made considerable progress in installing wayside technology. Over 19,200 WIU's have been installed. Approximately 15,100 WIU's remain to be installed.<sup>8</sup> Over 8,300 signal replacement projects have been completed, with approximately 6,400 signal replacement projects remaining.<sup>9</sup> The sheer volume and complexity of this safety-critical work, which impacts the functioning of railroad signal systems as well as PTC, is one of the most significant reasons that the railroad industry cannot meet the 2015 deadline. This work is expected to extend into 2018.

#### C. Switches

Most of the work involved in upgrading switches in non-signaled territory to make them PTC compatible remains. This includes bringing electrical power to the site, which is cumbersome. In analyzing the technology required for switches, railroads have determined that these will be mostly turnkey solutions currently under development by several suppliers. To date power and WIUs have been installed at 588 hand-throw switches; and 402 have been

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<sup>5</sup> See Table 1 in Attachment A.

<sup>6</sup> ISP, p. 6.

<sup>7</sup> See Table 2 in Attachment A.

<sup>8</sup> See Tables 3 and 4 in Attachment A.

<sup>9</sup> See Table 5 in Attachment A.

equipped with switch monitors. Over 2,700 switches still need to be equipped with power and WIUs, and approximately 2,500 switch position monitors still need to be installed.<sup>10</sup>

#### D. Communications

As explained in the ISP, all PTC wayside locations and all PTC-enabled locomotives must be equipped with a complex, interoperable, wireless communications infrastructure.<sup>11</sup> Railroads have created a private radio frequency network capable of transmitting and receiving the data necessary to support an interoperable PTC network using spectrum in the 220 MHz band as the interoperability communications standard. To date, the seven Class I railroads have invested approximately \$40 million in acquiring and managing 220 MHz spectrum.

A major problem that arose in 2013 was the FCC's initial directive to cease installation of over 20,000 antennas that are needed for PTC and subsequent directive that the process for installing only a limited number of antennas within a small geographic area could proceed. The FCC decided its historic preservation rules apply to wayside antenna installation sites. The FCC has now devised a new process for approving the installation of PTC antennas, but installation of the antenna structures was delayed by approximately a year while the FCC deliberated. The required process for the environmental and historic reviews adds at least two months to each set of structures per county.

Over 1,500 base station radios, 11,700 wayside radios, and 5,500 locomotive radios have been installed. Over 2,500 base station radios, 19,500 wayside radios, and 17,500 locomotive radios need to be manufactured and installed.<sup>12</sup> In parallel, railroads have undertaken numerous associated activities, including coverage analyses, site selection, antennae installation, and upgrading power supplies. Particularly frustrating is that railroads now have to go back to the sites where radios have been installed and install wayside antennas. This is not an efficient process, viewed from the perspective of both the time it takes to install radios and antennas and the cost.

One of the key challenges that has emerged is deploying a national 220 MHz communications network for PTC that provides sufficient coverage to operate PTC and avoids interference, particularly in congested metropolitan areas. Complete signal wayside design, GIS data, and train movement data are all necessary to properly design the radio network; each of these elements must be taken into account to ensure there is adequate capacity to handle all the data. In addition, as new users roll out their PTC systems in locations where other railroads are already testing or using PTC, railroads will likely have to re-engineer their radio networks to address potential interference and ensure the additional demand for data can be met.

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<sup>10</sup> See Table 6 in Attachment A.

<sup>11</sup> ISP, p. 8.

<sup>12</sup> See Table 7 in Attachment A.

The design of the 220 Mhz network has been under development for several years. Over forty radio network engineers from multiple railroads coordinate the design of this nationwide radio network. As an example of the complexity, the radio network design in the Los Angeles area is still not complete after thousands of hours of effort by three railroads over three years.

Another complexity is the need to coordinate with radio license holders who operate adjacent to the railroads. In particular, special tools and coordination procedures are required for the many public electric utility companies who operate radio monitoring and smart-grid technology on adjacent 220 Mhz frequencies.

Finally, in 2012 railroads studied spectrum needs in congested metropolitan areas and confirmed that additional spectrum was needed in Chicago, which was procured. The railroads plan on acquiring additional spectrum needed in New York in 2015.

#### E. PTC Back Office

The need to test thoroughly the PTC back office systems, including the BOS, and address issues and defects identified during the testing process also significantly impact the pace of development. Lab testing of the back office components will generally find some defects requiring subsequent revisions of the software to fix the defects, as was the case with the initial software release for the BOS. Unavailability of the final production version of the BOS is one of the critical factors preventing the railroads from installing PTC on the entire nationwide network by the current 2015 implementation date.

##### 1. Back Office Server

The I-ETMS BOS vendor delivered BOS software versions that meet a subset of currently-defined requirements sufficient to allow railroads to conduct, but not complete, field testing. A software version of the I-ETMS BOS will be delivered in May that should allow for the completion of field testing and the beginning of revenue service demonstration. The railroads now expect that a software version meeting all currently-defined requirements for vital overlay PTC system certification will be ready for testing in mid-2015, although a letter sent by FRA in January 2015 casts uncertainty on what will be required for a PTC system to qualify as vital. That it is 2015 and uncertainty still exists as to what FRA will require could prove problematic. A production version of the BOS software will be unavailable until after the required lab testing, likely late 2015 at the earliest. As with the software for the locomotive, the complexity of the BOS software combined with the many interfaces with other components of the PTC system has required detailed design and analysis to ensure proper operation.

##### 2. Geographic Information System (GIS)

The railroads have made substantial progress with respect to the GIS component of PTC systems. The industry developed a common approach to validation and verification of the data to ensure all essential data elements are captured. A common approach facilitates review by

FRA and also provides non-Class I railroads a template they can use. The railroads have mapped over 75,000 GIS miles; processed over 72,000 track miles; and converted over 23,000 track miles of GIS data to PTC subdivision files. However, much work remains to be done. Still to be done: approximately 9,100 track miles remain to be GIS mapped; approximately 12,700 miles remain to be data processed; and approximately 62,000 miles remain to be converted to the PTC subdivision files needed for the locomotive's PTC system.<sup>13</sup> Furthermore, substantial work remains to be done to develop and implement sustainable processes to document and update the GIS coordinates every time one of the 440,000 critical PTC assets are moved by more than 1 foot. Updating the PTC track database is a continuous process as almost all changes that occur in the railroad infrastructure require reconstruction and revalidation. Many back office business processes must be altered to establish strict controls around data and changes. Railroads are making a considerable investment in the development of change management processes and hiring the personnel necessary to execute them.

### 3. Dispatch

The dispatch system must interact with the PTC system via an interface with the BOS. This interface is unique to each railroad because of each railroad's unique dispatch system. For some railroads, the enhancements needed for the dispatch system to support PTC are extensive and have taken considerable analysis and effort to design, code, and test. Additionally, changes made to the BOS require an analysis of the effect on the interface of the dispatch system with the PTC system. By the end of the first quarter of 2015, all the railroads supplying data for this report are expected to have a PTC-capable dispatch system.<sup>14</sup>

## **III. The Integration and Testing Challenge**

There were many challenges and risks associated with integrating and testing the many components of PTC. Many of the 20 plus PTC components have been tested by the supplier and most "nearest neighbor" testing of interfacing components has been completed. However, end-to-end testing of the final system of interoperable software, with all known hazards mitigated, will take more time to complete.

Railroads have been nimble in adjusting to the testing challenge. As component releases are delayed due to the complexity of the design or the need to fix defects, the interaction of those components can quickly get out of sync on the release cycle timeline. Nevertheless, railroads have revised test plans and realigned resources to conduct nearest neighbor testing with intermediate versions of software as software delivery schedules have slipped. They have taken advantage of opportunities to test releases of software and hardware to ferret out defects and issues early in the release continuum, when more extensive integration testing is not yet possible. To keep the schedule moving forward to the extent possible, railroads undertook preliminary

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<sup>13</sup> See Table 8 in Attachment A.

<sup>14</sup> See Table 9 in Attachment A.

testing using software written to interim versions of “interface control documents” (ICDs) and written translators to bridge the gap between the different ICDs.<sup>15</sup> In some cases these stop-gap assemblages of software have been tested in the field with a hi-rail vehicle. To illustrate, in 2014 I-ETMS railroads received eight releases of onboard software, eight releases of BOS software, releases of CAD software (the number varying by railroad), and one release of the ITC messaging and radio communication software, resulting in 20 potential combinations of release cycles. Each of these releases had to be correctly installed and then matched for requirements compatibility to permit testing.

Full system testing will continue during 2015, as will the need to address problems with PTC components and software identified by the testing. Any additional defects discovered will have to be analyzed and remediated, further delaying the time at which widespread PTC implementation can proceed.

#### **IV. The Certification Process Could Take Considerable Time**

AAR remains concerned that the certification process could take a considerable amount of time and that FRA will not have the resources to review and certify PTC systems expeditiously. As FRA acknowledged in its August 2012 Report to Congress, FRA will need at least 6 to 9 months to review PTC Safety Plans, and approximately 38 railroads will need certification.<sup>16</sup> In an attempt to expedite final review, in 2012 the Class I railroads’ Joint Railroad Safety Team (JRST) developed a format and common portions of a PTC Safety Plan and submitted drafts for FRA review and comment. In addition, in 2012 and continuing through 2014, FRA and the JRST began holding quarterly meetings to facilitate communications between the parties, discuss FRA’s concerns about implementation, and clarify FRA’s interpretation of the PTC regulations. The meetings foster a good working relationship between the industry and FRA. However, while this joint effort of the railroads and FRA is helpful, each railroad will have a unique PTC safety plan that FRA will need to review and approve. Furthermore, while railroads have been and will continue partial installation of PTC equipment prior to certification, the time required for FRA certification is one of the critical elements impacting the date by which the PTC mandate can be implemented.<sup>17</sup>

As FRA also noted in its Report to Congress, the shortage of qualified people extends to FRA. FRA noted that its PTC staff, as of the time of the report, consists of 10 PTC specialists

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<sup>15</sup> ICDs contain the format for how systems communicate with each other.

<sup>16</sup> FRA Report to Congress, p. 41. Based upon the nearly 18 months that it took for FRA to first approve the PTC Development Plan, a less complex document, the approval period could take even longer than estimated by FRA.

<sup>17</sup> FRA in its August 2012 Report to Congress suggested a legislative change that would permit FRA to provisionally certify PTC systems. Once provisionally certified, a railroad could operate its PTC system pending final review. While a constructive suggestion that could assist in evaluating PTC systems in operation, this change would not alter the fact that the railroads cannot install PTC on the entire nationwide network by the 2015 deadline. Even provisional certification will require a review and approval process for FRA. It is difficult to imagine that process will take less than 6 months.

and one supervisor, who are responsible for monitoring PTC system installation and testing nationwide and for the technical review and approval of all documentation associated with the statutorily-required PTC system certification.<sup>18</sup> Railroads will be submitting for FRA review and approval PTC Safety Plans; amendments to their PTC Implementation Plans and PTC Development Plans; informational filings and safety program plans for new and novel PTC wayside devices; PTC Annual Reports; and track database test plans. FRA, as do the railroads, faces the challenge of key personnel retiring and other resource constraints that impact the agency's ability to review, comment, and approve the required documentation. As FRA noted in its Report to Congress, the industry remains concerned that the continued shortage of FRA resources could delay the implementation of an interoperable PTC system.

In addition to the issue of FRA resources, the give and take of the certification process could take considerable time. FRA continues to require design changes or additional mitigations as a condition to final certification, requiring railroads and their vendors to design, develop, test, and regression test to deploy software changes or additional system functions. For example, the PTC Development Plan for I-ETMS is on its third version since 2010, with another revision anticipated in the near future to address FRA comments. Complexity rises as railroads roll out a conditionally certified and tested system while continuing to change its functions and software. The result could be an extended timeline.

## **V. Interoperability: The Current Implementation Schedules Could Adversely Affect the Reliability and Effectiveness of PTC**

### **A. Phasing in PTC**

Attachment B to the ISP discussed problems that could arise from implementation schedules under which PTC is deployed first in locations presenting complex interoperability issues. The railroads suggested a phased approach to PTC under which PTC will be implemented in less operationally complex areas first, which is a departure from current implementation plans. FRA has indicated that it agrees with this general approach.

The PTC Reliability Study provided by AAR to FRA raises significant concerns over the reliability of the fully assembled PTC system. The Study underscores the need for a phased approach for implementation that will allow the railroads to assess the PTC system in operation so that failures, while they will occur, can be reduced and the efficiency of the railroad network maintained to the greatest extent feasible. The time needed to phase in PTC is another significant reason why the industry cannot meet the current 2015 deadline to implement PTC on the entire nationwide network.

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<sup>18</sup> FRA Report to Congress, p. 41.

## B. Interoperability Standards

Ensuring the interoperability of PTC requires numerous interoperability standards. AAR and its member railroads have made considerable progress towards developing those standards. Attachment B describes the status of the interoperability standards required for PTC. Of the 34 standards being developed, 27 have been finalized. All of the critical standards for PTC have been published.

The railroads also need to adopt industry standards for the ongoing use and operation of PTC. These standards are necessary in order for the railroads operating a PTC system to ensure that updates to PTC hardware and software are acceptable. In the absence of such standards, there is no assurance that upgraded PTC components and software will be compatible with and continue to work with other components of the PTC system or that interoperability will be maintained.

Accordingly, AAR has established the PTC Interoperability Committee (PTCIC). The PTCIC is responsible for adopting Positive Train Control Interchange Standards including, but not limited to, hardware and software standards, configuration management, maintenance requirements, minimum service levels, schedules for phasing in new standards and phasing out obsolete standards, and periodic reporting requirements for standards compliance.

## **VI. Rolling Out PTC**

As noted above and in the ISP, PTC cannot be rolled out on an entire railroad system at the same time. It must be implemented in phases and location by location, typically on a subdivision basis.

Furthermore, as also stated in the ISP, training employees remains a daunting task that places practical limits on the speed with which PTC can be safely and effectively rolled out across a railroad system. Engineers, conductors, signal employees, dispatchers, mechanics, electricians, and supervisors will need to be trained. Table 11 shows the number of employees that will need to be trained on the Class I railroads, approximately 96,000 employees. While training courses and materials continue to be developed, the railroads recognize that this training must occur in a phased approach. Employees on each subdivision will have to receive significant training immediately prior to activation of PTC on the subdivision where they work. Delays in designing and installing PTC affect the pace of training railroad employees.

## **VII. The Short Line Perspective**

The short line railroad industry is composed of many railroads, perhaps 80 of which will be affected by the PTC mandate. While there is a great deal of variety in the ways in which short lines will need to address PTC, the following observations generally apply.

In its final PTC rule, FRA recognized the potential heavy operating and financial burden PTC implementation imposes on small railroads whose operations do not otherwise require the installation of PTC systems on their track or locomotives, but do require them to travel short distances over PTC equipped class I lines to interchange traffic or reach customer facilities. Sections 236.1006(b)(4) and ((b)(5) of the PTC regulations grant Class II and Class III railroads conditional permission to operate locomotives not equipped with an onboard PTC system on PTC equipped track segments.

Even where PTC is not mandated by FRA for short line railroads, short line railroads might be required to install PTC as a result of their commercial arrangements with Class I railroads. Given that short lines have the aforementioned exclusion there is great uncertainty over what will ultimately be required insofar as PTC is concerned.

Short lines have concerns about their ability to provide and fund back office functions where they must equip their locomotives with PTC. Even where short lines carry regularly scheduled passenger service or significant amounts of TIH/PIH and know they must equip their locomotives, they are particularly concerned about their ability to provide back office functions. Back office functions are very complex, highly technical, and very expensive. Leaving aside the technical problems associated with short lines providing their own back offices, if they must do so the timeline for obtaining that capability is extremely uncertain. In addition there are other factors which must be considered.

Another problem for short lines is the age of their locomotive fleet. Most short lines have older locomotives that are not the processor-based type that the Class 1 railroads operate. The cost to install microprocessor-based PTC equipment in older locomotives, many of which are 25 year old or older, is estimated to be between approximately \$70,000 to \$175,000 a locomotive, depending on the age and model of the locomotive. An expensive solution that holding company railroads are using is to reposition GP-Dash-2's and 3's among their railroads that need PTC, with an eye towards equipping those locomotives with PTC in the future.

Other concerns include the availability of PTC expertise and the communications network required for PTC operations. Given the relative scarcity of PTC expertise nationwide, short lines have been priced out of hiring their own PTC expertise and must rely on vendors and suppliers for expertise. Short lines have concerns about communications capability as they are currently not included in the Class 1 communications network.

Finally, the financial hurdle for the short lines must not be underestimated. Short line railroads expend large sums of capital to maintain their infrastructure in a safe operating condition. It is difficult to see how they will be able to afford PTC. Neither financial institutions nor the federal Railroad Infrastructure and Improvement Financing ("RIFF") program are likely sources to fund PTC installation since PTC equipment (which can be removed from a locomotive) would be worth more than the locomotive, leaving nothing of value for a bank or the

federal government to look for as a security interest. The cost of PTC for small railroads with an unfunded mandate directly impacts railroad employees and customers because the cost of doing business is being dramatically compromised. ASLRRA believes that an extension of the PTC deadline is absolutely necessary. Given that DOT and the Congress both realized the enormous cost and complexity of PTC for short line railroads, an extension should be high priority for both.

### **VIII. Conclusion**

The railroad industry has invested a tremendous amount of time, effort and money to complete a nationwide interoperable PTC-system as quickly as possible. As of the end of 2014, the railroads had invested over \$5 billion and devoted millions of man-hours to the development of PTC.<sup>19</sup> However, as demonstrated above, the railroads will not be able to implement PTC on the entire nationwide network by December 31, 2015.

Because of all the uncertainties associated with the development and installation of PTC, it is impossible to set forth a precise timeline for completion of a nationwide, interoperable PTC network. Factors that affect a railroad's timeline for completion of PTC on its system include variations in geography; type and age of the railroad's wayside signaling infrastructure (legacy relay technology must be converted to solid state technology); the density of train operations; the number of rail-to-rail interlockings; the number of connections with other railroads; and the number of operating environments (with different combinations of these factors) that must be addressed. In addition, until a railroad tests and installs its PTC system, it is impossible to know what other difficulties will be encountered and how they might affect progress in completing the railroad's PTC network. As discussed previously, a production version of the critical software for the back office server for I-ETMS will not be available until mid-2015 at the earliest and there is uncertainty regarding what FRA will require for vital systems.

The railroads providing data for this report now project that by December 31, 2018, the wayside equipment for all PTC routes will be installed, as will the PTC locomotive equipment. The railroads project that PTC will be fully operational on the nationwide PTC network by December 31, 2020.<sup>20</sup>

This paper shows that the railroad industry has done its utmost to install a nationwide, interoperable PTC network. There is still considerable work to be completed. While the industry continues to make substantial progress toward completing the network, a nationwide, interoperable network will not be complete by December 31, 2015.

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<sup>19</sup> See Table 10 in Attachment A.

<sup>20</sup> Some antennas have been installed on other routes. However, all the antennas must be installed on a subdivision before PTC can be implemented on that subdivision.

ATTACHMENT A

PTC Data<sup>1</sup>

Table 1. Equipping Locomotives with PTC

Railroad	ARR	BNSF	CN	CP	CSX	KCS	NS	UP	Total
# to be equipped	54	6000	1,546	1000	3900	614	3400	6532	<b>23,046</b>
# partially equipped to date	27	671	298	225	1825	301	1993	4394	<b>9734</b>
# fully equipped	17	2389	12	146	812	0	0	0	<b>3376</b>

Table 2. Railroad Signal Personnel Hired or Retained Due to PTC

ARR	4
BNSF	447
CN	117
CP	35
CSX	554
KCS	36
NS	659
UP	569
<b>Total</b>	<b>2421</b>

<sup>1</sup> The data in this Attachment is based on estimates as of December 31, 2014, current PTC implementation plans on file with FRA (including amendments to plans that have been approved by FRA), and the regulations in existence on December 31, 2014.

Table 3. Integrated WIU Installation

Railroad	ARR	BNSF	CN	CP	CSX	KCS	NS	UP	Total
# integrated WIUs required to be deployed	55	6648	1546	591	4702	658	4951	11399	<b>30550</b>
# integrated WIUs deployed to date	14	4171	41	475	1915	363	1851	8700	<b>17530</b>
# integrated WIUs remaining to be deployed	41	2477	1505	116	2787	295	3100	2699	<b>13020</b>

Table 4. Stand-alone WIU Installation

Railroad	ARR	BNSF	CN	CP	CSX	KCS	NS	UP	Total
# stand-alone WIUs required to be deployed	36	417	227	339	500	148	528	1615	<b>3810</b>
# stand-alone WIUs deployed to date	5	262	0	47	122	56	56	1167	<b>1715</b>
# stand-alone WIUs remaining to be deployed	31	155	227	292	378	92	472	448	<b>2095</b>

Table 5. Signal Replacement Projects

Railroad	ARR	BNSF	CN	CP	CSX	KCS	NS	UP	Total
# locations of signal replacement required	0	4707	366	63	2100	391	2851	4252	<b>14730</b>
# locations replaced to date	0	2579	29	52	1134	304	975	3262	<b>8335</b>
# locations remaining to be replaced	0	2128	337	11	966	87	1876	990	<b>6395</b>

Table 6. Switches in Non-Signal PTC Territory

Railroad		ARR	BNSF	CN	CP	CSX	KCS	NS	UP	Total
# non-sigaled switch locations needing power & WIUs	# needed	36	417	227	225	700	133	617	974	<b>3329</b>
	# equipped with power to date	5	262	0	41	130	54	38	58	<b>588</b>
	# remaining to be equipped with power	31	155	227	184	570	79	579	916	<b>2741</b>
	# equipped with WIUs to date	5	262	0	41	130	54	38	58	<b>588</b>
	#remaining to be equipped with WIUs	31	155	227	184	570	79	579	916	<b>2741</b>
# non-sigaled switch locations needing switch position monitors	# needed	31	0	227	248	700	133	617	974	<b>2930</b>
	# equipped to date	5	0	0	117	130	54	38	58	<b>402</b>
	# remaining to be equipped	31	0	227	131	570	79	579	916	<b>2533</b>

Table 7. Communications Deployment

Railroad		ARR	BNSF	CN	CP	CSX	KCS	NS	UP	Total
# Base station 220 MHz radios	# needed	36	731	181	113	1285	160	736	847	<b>4089</b>
	# installed	10	530	26	19	395	0	242	282	<b>1504</b>
	# of future installations needed	26	201	155	94	890	160	494	565	<b>2585</b>
# Wayside location 220 MHz radios	# needed	77	6015	1773	663	5299	806	4763	11877	<b>31273</b>
	# installed	15	4098	184	28	2160	0	1147	4136	<b>11768</b>
	# of future installations needed	62	1917	1589	635	3139	806	3616	7741	<b>19505</b>
Locomotive 220 MHz radios	# needed	54	6000	1546	1000	3900	614	3411	6532	<b>23057</b>
	# installed	16	2389	72	75	812	0	310	1855	<b>5529</b>
	# of locomotives remaining to be equipped	38	3611	1474	925	3088	614	3101	4677	<b>17528</b>

Table 8. Status of PTC GIS Projects

Railroad		ARR	BNSF	CN	CP	CSX	KCS	NS	UP	Total
# PTC assets to be* mapped and extracted for GIS consumption		2800	88447	25630	16468	114731	9641	52000	130000	<b>439717</b>
# track miles required to be GIS mapped	# miles mapped to date	600	19886	257	1515	21565	0	10904	21150	<b>75877</b>
	# miles to be mapped	0	2164	4043	696	0	2227	0	0	<b>9130</b>
# track miles required to be data processed	# miles processed to date	600	16318	257	1183	21565	293	10904	21150	<b>72270</b>
	# miles remaining to be processed	0	5732	4043	1028	0	1934	0	0	<b>12737</b>
# track miles GIS data to be converted to PTC subdiv files	# converted to date	130	14888	257	1162	5809	154	608	300	<b>23308</b>
	# remaining to be converted	470	7162	4043	1049	15756	2073	10296	20850	<b>61699</b>

\*The calculation of assets to be mapped includes the following: integer mileposts; signals; crossings; switches; interlockings/control point locations; permanent speed restrictions; the beginning and ending limits of track detection circuits in non-signaled territory; clearance point locations for every switch location installed on the main and siding tracks; and inside switches equipped with switch circuit controllers.

Table 9. Status of PTC Dispatch System Projects

Railroad	Date System will be PTC-capable
ARR	Completed
BNSF	Completed
CN	3rd quarter 2015
CP	March 2015
CSX	Completed
KCS	1 <sup>st</sup> quarter 2015
NS	Completed
UP	Completed

Table 10. PTC Investment

Railroad	PTC investment through December 31, 2014 (\$M)
ARR	103
BNSF	1,230
CN	105
CP	197
CSX	1,178
KCS	82
NS	814
UP	1,481
<b>Total</b>	<b>5,190</b>

Table 11. Training

Railroad	Category 1	Category 2	Category 3	Category 4	Category 5	Total
ARR	82	9	175	250	30	<b>546</b>
BNSF	1234	728	12018	7054	859	<b>21893</b>
CN	857	240	2550	1120	200	<b>4967</b>
CP	550	100	1600	900	250	<b>3400</b>
CSX	1315	465	12496	900	1275	<b>16451</b>
KCS	202	44	1526	493	130	<b>2395</b>
NS	2150	445	12000	4000	1780	<b>20375</b>
UP	2324	710	13546	8450	914	<b>25944</b>
<b>Total</b>	<b>8714</b>	<b>2741</b>	<b>55911</b>	<b>23167</b>	<b>5438</b>	<b>95971</b>

Categories of employees requiring training (49 C.F.R. 236.1041):

- (1) Persons whose duties include installing, maintaining, repairing, modifying, inspecting, and testing safety-critical elements of the railroad's PTC systems, including central office, wayside, or onboard subsystems;
- (2) Persons who dispatch train operations (issue or communicate any mandatory directive that is executed or enforced, or is intended to be executed or enforced, by a train control system subject to this subpart);
- (3) Persons who operate trains or serve as a train or engine crew member subject to instruction and testing under part 217 of this chapter, on a train operating in territory where a train control system subject to this subpart is in use;
- (4) Roadway workers whose duties require them to know and understand how a train control system affects their safety and how to avoid interfering with its proper functioning; and
- (5) The direct supervisors of persons listed in paragraphs (a)(1) through (a)(4) of this section.

April 15, 2015

**ATTACHMENT B**

<b>ITC Sourced Specifications</b>	<b>Total</b>	<b>Started</b>	<b>Delivered to AAR and Published for Comment</b>	<b>Revised and Sent to Railway Electronics Committee for Adoption</b>	<b>Final Version Released by AAR</b>
Interface Control Document	8	8	7	7	6
Requirements Specification	18	18	17	17	16
Architectural Specification	2	2	2	2	2
Database Definitions	2	2	2	2	2
Protocol Specifications	3	3	3	3	3
Recommended Practices	1	1	1	1	1
Test Plans	1	1	1	1	1
Test reports	0	0	0	0	0
<b>Total Specifications</b>	<b>35</b>	<b>35</b>	<b>33</b>	<b>33</b>	<b>31</b>

# **EXHIBIT 6**

**to**

**Reply of AAR to American Chemistry Council,  
the Chlorine Institute, and the Fertilizer  
Institute—Petition for Declaratory Order—  
Positive Train Control**

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**STB Finance Docket No. 35964**

NOT YET SCHEDULED FOR ORAL ARGUMENT

**United States Court of Appeals  
for the District of Columbia Circuit**

**No. 12-1298**

CHLORINE INSTITUTE, INC.,

*Petitioner,*

vs.

FEDERAL RAILROAD ADMINISTRATION; UNITED STATES  
DEPARTMENT OF TRANSPORTATION; UNITED STATES OF AMERICA,

*Respondents*

ASSOCIATION OF AMERICAN RAILROADS,

*Amicus Curiae for Respondent*

*On Appeal from the Federal Railroad Administration in  
Case No. FRA-1: FRA-77FR28285*

**BRIEF OF PETITIONER**

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OCTOBER 29, 2012

## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

The undersigned counsel of record for Petitioner furnishes the following information in compliance with Circuit Rule 28(a)(1):

### **A. Parties and Amici**

#### **1. Participants before the Federal Railroad Administration**

In March of 1996, the Federal Railroad Administration (“FRA”) established the Railroad Safety Advisory Committee (“RSAC”) which provides a forum for collaborative rulemaking and program development. The RSAC includes representatives from the agency’s major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, other government agencies, and other interested parties. Following enactment of the Rail Safety Improvement Act of 2008 (“RSIA”) the RSAC, on December 10, 2008, accepted a task from FRA and created the RSAC Positive Train Control (“PTC”) Working Group to advise the FRA on the details of the implementation of PTC systems required by the RSIA. Among the organizations participating on the PTC Working Group were: American Association of State Highway and Transportation Officials; American Chemistry Council; American Public Transportation Association; American Short Line and Regional Railroad Association; Association of American Railroads; Association of State Rail Safety Managers; Brotherhood of Maintenance of Way Employees Division; Brotherhood of Locomotive Engineers and Trainmen

Division; Federal Transit Administration; International Brotherhood of Electrical Workers; National Rail Construction and Maintenance Association; National Railroad Passenger Corporation; National Transportation Safety Board; Railway Supply Institute; Transport Canada; Tourist Railway Association and United Transportation Union. From January through April of 2009 FRA met with the entire RSAC PTC Working Group on five occasions.

On July 21, 2009, FRA issued a Notice of Proposed Rulemaking and accepted comments until August 20, 2009. A public hearing was also held on August 13, 2009. At the public hearing statements were made by the Association of American Railroads; Amtrak; Burlington Northern Santa Fe Railway; CSX Transportation; Union Pacific Railroad and Norfolk Southern Railway. Oral statements were also made by six railroad unions. Subsequent written comments were filed by the American Shortline and Regional Railroad Association; Amtrak; American Public Transit Association; Association of American Railroads; Burlington Northern Santa Fe; Caltrain; Canadian Pacific; CSXT; the Chlorine Institute; Friends of the Earth, GE Transportation; HCRQ, Inc.; and Cattron Group International; Invensys Rail Group-Safetran Systems; National Transportation Safety Board; New York State Metropolitan Transportation Authority; New Jersey Transit; Northern Indiana Commuter Transportation District; Pacific Southwest Railway Museum; RLO; Railroad Passenger Car Alliance, San Bernardino

Railway Historical Society; Southern California Regional Rail Authority; The Fertilizer Institute; Tourist Railway Association; Trinity Railway Express; Utah Transit Authority and a number of unspecified individuals.

FRA issued its initial final rule on January 15, 2010, (75 Fed. Reg. 2598) which became effective on March 16, 2010 but FRA also reserved some points for additional rulemaking procedures. Following notice and comments the FRA issued another final rule on September 27, 2010 (75 Fed. Reg. 59108) amending the initial final rule. On August 24, 2011 (76 Fed. Reg. 52918) FRA issued another Notice of Proposed Rulemaking seeking comments on further amendments to the final rule. This Notice led to the order of May 14, 2012, that is the subject of this proceeding.

## 2. Petitioner and Respondents

The Chlorine Institute, Inc. (a trade association within the meaning of Rule 26) is the only petitioner in this case. The United States Department of Transportation, the Federal Railroad Administration and the United States are respondents.

## 3. Intervenors

There are no Intervenors in this case.

## 4. Amici

The Association of American Railroads (a trade association within the meaning of Rule 26) has filed a notice of intent to participate as amicus curiae.

B. Rulings Under Review

Petition seeks review of the order of the Federal Railroad Administration issued May 14, 2012 (77 Fed. Reg. 28285) *Positive Train Control Systems (RRR)* Docket No. FRA-2011-0028, Notice No. 3.

C. Related Cases

The order under review has not previously been before this Court or any other court. The initial final rule of January 15, 2010 and the amended rule of September 17, 2010 are the subject of appeals in *Association of American Railroads v. DOT*, D.C. Circuit case nos. 10-1198 & 10-1308.

/s/ Paul M. Donovan

Paul M. Donovan  
Attorney for Petitioner

**DISCLOSURE STATEMENT IN COMPLIANCE WITH RULE 26.1**

The undersigned counsel of record for the Chlorine Institute, Inc., furnishes the following information in compliance with Rule 26.1 of the Rules of this Court:

The Chlorine Institute, Inc., is a trade association within the meaning of Rule 26.1(b). It is an association of numerous individual companies, and is operated for the purpose of promoting the general commercial, professional, legislative or other interests of its members. The Chlorine Institute, Inc., has no outstanding securities in the hands of the public, and has no publicly owned parent, subsidiary or affiliate.

/s/ Paul M. Donovan

Paul M. Donovan

Attorney for the Chlorine Institute, Inc.

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**GLOSSARY**

AAR	Association of American Railroads
DOT	United States Department of Transportation
FRA	Federal Railroad Administration
NTSA	National Transportation Safety Board
PHMSA	Pipeline and Hazardous Materials Safety Administration
PIH	Poison-Inhalation-Hazard
PTC	Positive Train Control
PTCIP	Positive Train Control Implementation Plan
RSIA08	Rail Safety Improvement Act of 2008
TIH	Toxic-Inhalation-Hazard

In the  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12-1298

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The Chlorine Institute, Inc.

Petitioner,

v.

United States Department of Transportation, et al.

Respondents

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BRIEF OF PETITIONER

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**STATEMENT OF JURISDICTION**

**A. Agency Jurisdiction**

This is a petition for review of an order of the Secretary of Transportation issued pursuant to 49 U.S.C. § 20157 and 49 C.F.R. Part 236, Subpart I.

**B. Appellate Jurisdiction**

The orders on review are final agency actions, and this Court has jurisdiction pursuant to 49 U.S.C. § 20114(c) and 28 U.S.C. § 2342(7).

### **C. Timeliness of Appeal**

The final order was published in the Federal Register on May 14, 2012, 77 Fed. Reg. 28285, and the petition for review was timely filed on July 13, 2012.

### **D. Standing of Petitioner**

The Rail Safety Improvement Act of 2008 (“RSIA08”) provides that the Nation’s Class I railroads, i.e. the seven major railroads operating within the United States, are required to install positive train control (“PTC”) on their main line tracks<sup>1</sup> by December 31, 2015. Main line tracks not equipped with PTC will not be allowed to carry either passengers or TIH materials after December 31, 2015. The statute also requires that the Class I railroads develop implementation plans for the installation of PTC by the end of 2010, and submit those implementation plans to the Secretary of Transportation (“the Secretary”).

On January 15, 2010, the Federal Railroad Administration (“FRA”), which had been delegated the responsibility for PTC implementation by the Secretary, issued its first final order in this matter. (“Initial Final Rule”) In its Initial Final Rule, FRA determined that 2008 should be the year used to determine which track segments were carrying passengers and TIH materials, and therefore must be equipped with PTC by the end of 2015.

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<sup>1</sup> Main line tracks are defined as those of Class I railroads carrying 5 million gross tons of freight annually or those carrying regularly scheduled intercity or commuter passenger service.

FRA gave four reasons for selecting 2008 as the year to determine whether PTC should be required on a given track segment. (75 Fed. Reg. 2617-2624; JA) First, “in order to reach completion by December 31, 2015, as required by law, the railroads and FRA need to identify the relevant route structure very early in the short implementation period.... Second, 2009 traffic levels will be notably atypical as a result of the recession.... Third, the burden of installing PTC, which the statute applies obligatorily to very large railroads but not to others, may create an incentive to further ‘spin off’ certain lines to avoid installing PTC on lines Congress intended to cover. Finally, FRA was concerned about responsive and anticipatory actions being taken by some railroads in the face of emerging regulatory influences.” (75 Fed. Reg. 2617; JA ) FRA went on to expand on what it meant by these “emerging regulatory influences.” “The freight railroads do not pretend that FRA is wrong in perceiving that the freight railroads wish to remove PIH<sup>2</sup> traffic from the network. That is wise, since the public record is replete with pleas from the Class I railroads to remove their common carrier obligation to transport PIH traffic.” (*Ibid.* )

On September 27, 2010, FRA issued its second final order in this matter (“Second Final Order”). In its Second Final Order, FRA adopted procedures for

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<sup>2</sup> Poison-inhalation-hazard (“PIH”) and toxic-inhalation-hazard (“TIH”) are commonly used interchangeably. This brief will refer to TIH which is the common chemical industry and shipping designation.

determining if the cessation of TIH traffic over a given segment of track after 2008 could be used to avoid the requirement to install PTC. Those criteria contained in a “two-part test,” are commonly referred to as the alternative route analysis test and the residual risk test. Under the alternative route analysis test the subject railroad must demonstrate and FRA must determine whether any rerouting of TIH traffic from the subject segment is justified based upon the route analysis submitted, which “shall assume that each alternative route will be equipped with PTC, and shall take into consideration any significant interline routing impacts; or the next preferred alternative route in the analysis is shown to be substantially as safe and secure as the route segment in question.” (77 Fed. Reg. 28287; JA)

Under the residual risk test the subject railroad must demonstrate and FRA must determine whether, after cessation of TIH traffic on the subject segment, “the remaining risk associated with PTC-preventable accidents per route mile on the track segment will not exceed the average comparable risk per route mile on Class I lines required to be equipped with PTC....” (Ibid) The impact of the two-part test was to maintain the 2008 base year to determine whether PTC would be required on a given segment of track and to provide for objective criteria in determining which track segments could be excluded from PTC requirements of the RSIA08 without undermining the essential provisions of the statute. At the same time, the two-part test gave affected TIH shippers the right to oppose any

“gaming” of the system that could be used by the railroads to exclude TIH traffic from their tracks as FRA had noted they had long been attempting to do.

Following both the Initial Final Rule and the Second Final Rule, the Association of American Railroads (“AAR”) filed actions before this Court challenging FRA’s adoption of the 2008 base year for PTC implementation and then challenging the “two-part test” used to determine what track segments could be excluded from the base year so as to avoid PTC implementation. These cases were consolidated and fully briefed, but before argument, FRA and the AAR entered into a “settlement agreement”. This settlement agreement was purely a private matter with no input from any party submitting comments in the rulemaking proceedings. While the settlement agreement, on its face, called only for the institution of a further rulemaking proceeding to consider elimination of the two-part test, the AAR was allowed to wait until resolution of the rulemaking before withdrawing its two cases before this Court.

Chlorine is a TIH material that is heavily dependent on rail for transportation services. The Chlorine Institute, Inc. (“the Institute”) is a trade association of approximately 200 members whose primary mission is the safe and secure manufacture, distribution and use of chlorine and related products. (JA ) Many of the Institute’s members ship and receive chlorine by rail, truck and barge, and own or lease specially designed chlorine rail cars that are approved by the U.S. DOT.

Olin Corporation, DuPont, PPG Industries and U.S. Magnesium Corporation are all Institute members and all ship and or receive chlorine by rail. Those four companies each presented comments or oral testimony in connection with the order here under review, and all raised the same issues that the Institute raised during the proceedings and is now raising before this Court, including the obvious desire of the railroads to use PTC requirements to restrict or eliminate chlorine from the rail network. (JA )

Under Article III of the Constitution, an association such as the Institute has standing to sue on behalf of its members only if (1) at least one of its members would have standing to sue in its own right, (2) the interests the association seeks to protect are germane to its purpose and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir, 2002) The Chlorine Institute meets each of these requirements in this matter.

The four Institute members filing comments and presenting oral testimony before the FRA are directly injured by FRA's policy decision to no longer rely upon traffic movements during 2008 as the basis for PTC Implementation Plans ("PICIP") and by the elimination of the two-part test and the resulting ability of the railroads to restrict or eliminate chlorine transportation by rail. The mission of the Institute is to promote and protect the ability of its members and its members'

customers to ship and receive chlorine by rail.<sup>3</sup> As the record below clearly reflects, chlorine transportation is heavily dependent on rail, while truck and barge transportation is a small and limited segment of chlorine surface transportation. Because the Institute is fully capable of representing the interests of its members in this proceeding, there is no need for its individual members to participate directly in the case.

Article III of the Constitution provides that a party must establish three constitutional minima: (1) that the party has suffered an “injury in fact,” (2) that the injury is “fairly traceable” to the challenged action of the defendant, and (3) that it is “likely as opposed to merely speculative that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Grocery Manufacturers Ass’n v. EPA*, 2012 U.S. App. Lexis 17303 (D.C. Cir. 2012); *Sierra Club v. EPA*, 292 F.3d 895 898 (D.C. Cir., 2002). The Institute meets all three of these requirements in this matter.

The Institute’s members are not merely collateral victims of the injury imposed by FRA in eliminating 2008 as the base year for determining track segments requiring PTC, and eliminating the two-part test allowing the nation’s

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<sup>3</sup> The Institute is, and has been for more than a generation, very active in all forms of chlorine rail transportation regulation by participating in virtually every rulemaking activity before the FRA and other forums dealing with chlorine transportation and by serving on the AAR Tank Car Committee that is charged with making recommendations to the DOT regarding chlorine rail tank car designs.

major railroads to reduce the trackage over which they carry chlorine and other TIH materials; instead they are the intended victims of this injury, at least insofar as the railroads are concerned. It is axiomatic that if track segments are not equipped with PTC by December 31, 2015, chlorine or other TIH materials cannot move over those segments. It is also recognized by FRA, Institute members, railroads and all others involved that the railroads, individually and through the AAR, have long advocated the elimination of chlorine shipments by rail. Until now those efforts have been of limited success. But with the passage of the RSIA08 the railroads were inadvertently given the perfect opportunity to restrict or eliminate chlorine shipments by rail.<sup>4</sup> The railroads, individually and collectively, simply would refuse to install PTC on track segments not handling passengers and from which they had eliminated TIH shipments in the period between 2008 and 2015. With no PTC on the segments chlorine, or other TIH materials could not be shipped, and the railroads' desired outcome of eliminating some or all TIH shipments by rail would be achieved. This plan was frustrated when FRA recognized the danger to chlorine and other TIH shipments by rail, and employed 2008 as the year to determine which track segments had carried TIH products.

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<sup>4</sup> There is nothing in either the RSIA08 or its legislative history to suggest that Congress had any intention of reducing or eliminating rail transportation of chlorine or any other TIH material.

It is evident that the reason for the AAR petitions to review both the FRA Initial Final Rule requiring 2008 as the base year for determining which track segments must be equipped with PTC, and Second Final Rule, imposing a two-part test before allowing track segments to be excluded from PTC installation, was to avoid the requirement that 2008 be used as the year to determine which track segments should be required to install PTC. There can also be no doubt that a primary, if not the primary, reason for these petitions was to reduce or eliminate the tracks over which chlorine and other TIH materials could be shipped. The causal relationship between the elimination of the 2008 base year and the two-part test was to injure chlorine and other TIH shippers by limiting or eliminating their ability to ship their products by rail.

The imposition of the two-part test protected chlorine and other TIH shippers from the reduction or elimination of their ability to ship by rail, by preventing the uncontested and unrestricted elimination of TIH shipments over various track segments. While the elimination of the two-part test would have serious safety and security implications, its most immediate impact on TIH shippers, including chlorine shippers, would be to severely limit or eliminate their ability to ship product by rail, and thus to remain in the chlorine manufacturing and consuming business. No one can predict the result of each and every application of the two-part test to any track segment, but the application of the test would have at

least a chilling effect on the ability of the railroads to unilaterally eliminate TIH traffic from various track segments. Thus, chlorine shipping members of the Institute can expect redress from their injury by restoration of the 2008 base year and the two-part test.

The RSIA08 deals specifically with the risks associated with the movement of TIH traffic such as chlorine over the tracks of the national rail system. Congress could have reduced or even eliminated that risk by simply prohibiting TIH rail movements or by deliberately limiting the track segments over which it could move. But that option was never considered or even mentioned during the Congressional deliberations of RSIA08. What Congress did do was to provide for the additional safety of TIH movements by mandating that PTC be installed on tracks over which it moved. Thus, TIH shippers, such as the Institute's members, were intended to be benefited by PTC installation on a widespread basis by allowing them to ship their products on a safer rail system, one protected by PTC, while at the same time being regulated by the PTC requirements in that they could not ship their products over track segments not so equipped. Accordingly, TIH shippers, including the Institute's members are plainly within the zone of interests to be protected and regulated by the RSIA08 and its provisions. *Grocery Manufacturers Ass'n. v. EPA, supra.*

In view of the above, the Institute has standing to challenge the actions of FRA here under review.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

In its Initial Final Rule for Implementation of Positive Train Control (“PTC”) issued in January of 2010 pursuant to the Railroad Safety Improvement Act of 2008 (“RSIA08”) the Federal Railroad Administration (“FRA”) interpreted the will and intent of Congress in passing that Act, and of requiring PTC to be installed on various track segments. (75 Fed. Reg. 2598 et seq.; JA) The FRA repeatedly noted that the major concern of Congress, and of FRA, was to improve safety, and to require PTC implementation as the method to provide for that increase in safety. To be sure, FRA was cognizant of the cost of PTC but FRA viewed cost as a secondary concern not to stand in the way of the will of Congress to provide for a safer core rail network.

FRA noted that the initial implementation of PTC was required by Congress on lines moving 5 million gross tons of freight per year and handling TIH traffic, and on those lines providing passenger service. FRA concluded that Congress had intended to use 2008 as the base year in determining whether TIH traffic was moving over a particular rail line. At the same time, FRA noted that the absence of TIH (or, as FRA calls it, PIH) traffic on a line carrying 5 million gross tons of freight would not automatically mean that PTC was not required. Throughout the

Initial Final Rule, FRA noted that the railroads had long sought to limit or eliminate their common carrier obligation to carry TIH traffic and could be expected to use PTC implementation as a tool to accomplish that result if the FRA did not prevent such actions. Further, FRA was highly skeptical of the value of the Surface Transportation Board (“STB”) or the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) rules or procedures to protect the TIH shippers from anti-TIH railroad tactics. FRA noted that, in part at least, it had selected the year 2008 as the year to determine whether TIH was moving on a rail line to prevent the railroads from gaming the system by eliminating TIH traffic after 2008 but before the final 2015 implementation date, and thus remove the PTC implementation requirement.

Following implementation of the Initial Final Rule, the AAR filed suit in this Court claiming that the Rule was arbitrary and capricious. The AAR was particularly upset by the use of 2008 as a base year. After that suit was filed, FRA amended its Initial Final Rule. The Second Final Rule would have provided for a two-part test to assess whether the elimination of PTC on a given track segment, because TIH no longer moved over that track segment after the 2008 base year was a legitimate action not designed to foreclose TIH movements; it also provided for an equivalent level of safety on the track segment(s) now handling that TIH

traffic. This “two-part test” was again challenged by the AAR in a separate suit before this Court.

While both suits were pending, the House of Representatives changed from Democratic to Republican control and Congressman Oberstar, the lead sponsor of PTC, lost his seat and his Chairmanship of the Transportation and Infrastructure Committee in the House. The new Chairman of the Committee, Congressman Mica and the Chairman of the railroad sub-committee, Congressman Schuster, called for hearings entitled “Federal Regulatory Overreach in the Railroad Industry: Implementing the Rail Safety Improvement Act.”<sup>5</sup> Two weeks before the hearings were held, but after they had been announced, FRA and the AAR entered into a settlement agreement. The agreement provided that while FRA continued to believe that its interpretation of the statute and its legislative purposes was correct, it would nonetheless issue a notice of proposed rulemaking eliminating 2008 as the base year for PTC installation requirements and withdrawing the two part test. Other details of the settlement discussions or agreements have not been made public but the settlement agreement did provide that the AAR would not withdraw the two pending suits until after conclusion of the rulemaking procedures. The issues on appeal are:

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<sup>5</sup> The hearings were held on March 17, 2011.

1. Whether FRA, in reversing its initial determinations that any railroad operating routes carrying TIH shipments after 2008 would be required to meet a two-part test to avoid installing PTC on such routes, improperly ignored the provisions of 49 U.S.C. § 20157 (a) (2) requiring that any Positive Train Control Implementation Plan shall address areas of greater risk before areas of lesser risk.

2. Whether FRA, in changing its interpretation of the intent of Congress as expressed in the RSIA08 that rail routes carrying chlorine and other TIH materials in 2008 should be required to install PTC on or before December 31, 2015, did so without giving adequate reasons for its reversal of position and statutory interpretation, thus acting in a manner that was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and

3. Whether FRA, in reversing its initial determination that any railroad operating routes carrying TIH shipments after 2008 would be required to meet a two-part test to avoid installing PTC on such routes, without giving adequate reasons for its reversal of position and statutory interpretation, acted in a manner that was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

### **STATUTES AND REGULATIONS**

The Rail Safety Improvement Act of 2008 (“RSIA08”), 49 U.S.C. § 20157, provides in relevant part:

## § 20157, Implementation of positive train control systems

(a) In general.—

(1) Plan required.—Not later than 18 months after the date of enactment of the Rail Safety Improvement Act of 2008, each Class I railroad carrier and each entity providing regularly scheduled intercity or commuter rail passenger transportation shall develop and submit to the Secretary of Transportation a plan for implementing a positive train control system by December 31, 2015, governing operations on—

(A) its main line over which intercity rail passenger transportation or commuter rail passenger transportation, as defined in section 24102, is regularly provided;

(B) its main line over which poison-or-toxic-by-inhalation hazardous materials, as defined in parts 171.8, 173.115, and 173.132 of title 49 Code of Federal Regulations, are transported; and

(C) such other tracks as the Secretary may prescribe by regulation or order.

(2) Implementation.—The plan shall describe how it will provide for interoperability of the system with movements of trains of other railroad carriers over its lines and shall, to the extent practical, implement the system in a manner that addresses areas of greater risk before areas of lesser risk. The railroad carrier shall implement a positive train control system in accordance with the plan.

The Federal Railroad Administration's final rule concerning positive control systems, 49 C.F.R. § 236.1005, currently provides in relevant part:

### § 236.1005 Requirements for Positive Train Control Systems

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(i) Routing Changes. In a PTCIP or an RFA, a railroad may request review of the requirement to install PTC on a track segment where a PTC system is otherwise required by this section, but has not yet been installed based upon changes in the rail traffic such as reductions in total traffic volume to a level below 5 million gross tons annually, cessation of passenger service or the approval of an MTEA, or the cessation of PIH materials traffic. Any such request shall be accompanied by estimated traffic projections for the next 5 years (e.g., as a result of planned rerouting, coordinations, or location of new business on the line).

(ii) FRA will approve the exclusion requested pursuant to paragraph (b)(4)(i) of this section if the railroad establishes that, as of December 31, 2015:

(A) No passenger service will be present on the involved track segment or the passenger service will be subject to an MTEA approved in accordance with 49 CFR 236.1019; and

(B) No PIH traffic will be present on the involved track segment or the gross tonnage on the involved track segment will decline to below 5 million gross tons annually as computed over a 2-year period.

## **STATEMENT OF THE CASE**

### **Statement of Facts**

The facts of this case do not begin with the Notice of Proposed Rulemaking giving rise to the order here on review. As previously noted, the final order here on review is actually the third final order dealing with the implementation of PTC. This matter began with the Initial Final Order of January 15, 2010. (75 Fed. Reg. 2598-2722) In its Initial Final Rule, FRA took pains to note that PTC or variations thereof has been available in some form or forms for many years. It also noted that railroad opposition coupled with the widely held belief that the railroads could not afford to implement PTC had kept FRA from mandating its implementation, even

though it would have been advisable from a safety standpoint, and permitted under the then existing law. (75 Fed. Reg. 2626; JA) FRA also noted that PTC never could and cannot now be cost justified solely on a safety basis. *Ibid.*

FRA observed that PTC implementation is initially limited to main line tracks carrying either passengers or TIH traffic. It also observed, however, that limiting PTC to passenger and TIH lines might incorrectly be read to suggest that Congress cared only about those trains. As FRA stated: “One could conclude that the Congress set the value only with respect to passenger trains and PIH releases, but that would assume that the interest expressed by the Congress over much more than a decade and a half was so limited. In fact, longtime congressional interest stemmed in large part from the loss of life among railroad crew members in collisions, as well as, the potential for release of other hazardous materials. Most of the NTSB investigations and investigations pertaining to its ‘most wanted’ transportation safety improvement in fact derived from such events.” (75 Fed. Reg. 2617)

In addition, in a statutory interpretation and policy determination vigorously opposed by the railroads, FRA made the determination in the Initial Final Rule, to select 2008 as a base year for determining what freight lines needed to be PTC equipped because of passengers or TIH movements over those lines during that year. 2008 was not selected simply because it was the most recent year for which

data was available. FRA noted that the looming deadline of December 31, 2015 for PTC installation, coupled with the decline in 2009 traffic levels due to the recession could unduly affect normal shipping patterns and render 2009 an atypical year. FRA went on to state at 75 Fed. Reg. 2616-7:

Third, the burden of installing PTC, which the statute applies obligatorily to very large railroads but not to others may create an incentive to further “spin off” certain lines to avoid installing PTC on lines Congress intended to cover.<sup>6</sup> Finally, FRA was concerned about responsive and anticipatory actions being taken by some railroads in the face of emerging regulatory influences. Accordingly, FRA sought in the NPRM to take a snapshot of the Class I system at the time Congress directed the implementation of PTC and then, using its discretionary authority under the statute, to evaluate what adjustments may be in order.(Emphasis supplied; footnote added)

\* \* \* \* \*

FRA understands the arguments surrounding PTC costs and benefits having filed three congressionally required reports since 1994 with information on the subject, having worked through the RSAC [Rail Safety Advisory Committee] for several years evaluating this issue, having funded PTC technology development and overseen PTC pilot projects from the State of Washington to the State of South Carolina, and having provided testimony to the Congress on many occasions. However, FRA believes that the issue is now presented in a different light than before. The Congress was aware that the monetized safety benefits of PTC were not large in comparison with the loss of life and injuries associated with PTC preventable accidents. With the passage of

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<sup>6</sup> Remarkably, in its new Final Rule, FRA does not discuss or even mention this “spin off” concern.

RSIA08, Congress has in effect set its own value on PTC and directed implementation of PTC without regard to the rules by which costs and benefits are normally evaluated in rulemaking.

(Emphasis supplied)

\* \* \* \* \*

Thus, FRA was provided latitude to require PTC system installation and operation on lines beyond those specifically prescribed by Congress. While FRA has enjoyed the same latitude under pre-existing authority, RSIA08 indicates Congress' elevated concern that FRA ensure the more serious and thoughtful proliferation of PTC system technologies. Although, as noted above, FRA would expect to exercise any such authority with significant reserve, given the high costs involved, it would be an abdication of the agency's responsibility not to determine that the basic core of the Class I system is addressed, as would be the case based on the 2008 traffic patterns. (Underscoring supplied, italic in the original)

The tone of the Class I freight railroad comments justified FRA's concerns that railroads might take the wrong lesson from the statutory mandate. The lesson FRA perceives that the core of the national rail system, which carries passenger and PIH traffic, needs to be equipped with PTC and that Congress used 5 million gross tons of freight traffic, the presence of PIH traffic, and the presence of passenger service as readily perceptible markers identifying the core lines on which Congress wants PTC to be installed. In making its judgments, Congress was necessarily looking at the national rail system as it existed in 2008 when the statute was passed. A corollary of that lesson is that the later disappearance or diminution of one of those markers from a line does not necessarily mean that Congress would no longer see that line as part of the core national rail system meriting PTC. An alternative response would be to adopt policies and tactics that penalize rail passenger service and attempt to drive PIH traffic off the network, consolidating the traffic that remains on the

smallest possible route structure for PTC. (Emphasis supplied)

The freight railroads do not pretend that FRA is wrong in perceiving that the freight railroads wish to remove PIH traffic from the network. That is wise, since the public record is replete with pleas from the Class I railroads to remove their common carrier obligation to transport PIH traffic. Rather, they contend, in effect, that FRA should not trouble itself with this issue, since the Congress and the Surface Transportation Safety Board [sic] (STB) will ensure that PIH shippers receive fair treatment, and the Pipeline and Hazardous Materials Safety Administration (PHMSA) Rail Route Analysis will determine whether the traffic goes on the safest and most secure routes.

There are significant problems with this contention. First, while the Congress shows no interest in relieving the carriers of duty [sic] to transport PIH commodities, and the STB has likewise brushed back a recent attempt by a Class I railroad to avoid this duty [UP Declaratory Order Petition re U.S. Magnesium citation], it is by no means yet determined how the cost burden associated with PTC will be borne. A railroad seeking to make the most favorable case for burdening a PIH shipper with the cost of PTC installation would first clear a line of overhead traffic through rerouting and then seek to surcharge the remaining shipper(s) for the incremental cost of installing the system. Under those circumstances, would the STB decide that the railroad should transfer all of those costs to shippers, or would the STB uphold the surcharge in whole or in part, thereby potentially making the cost of transportation unsupportable? (Emphasis supplied)

\* \* \* \* \*

As it happens, FRA has good reason to be concerned with rail routing of PIH commodities (as well as explosives and high level radioactive waste, which are also covered by the PHMSA rule), both on the merits of the routing decisions (as the agency responsible for administering the rule) and in relation to the incidental

impacts of re-routing decisions on the network of lines that will be equipped with PTC technology. Because the Rail Route Analysis Rule addresses both security and safety risks, operations under that rule necessarily lack transparency typically afforded to safety risks.

FRA also dealt with the issue of changes in circumstances warranting a change in PTC installation requirements on those lines upon which passenger and TIH traffic might not move after the 2008 base year. FRA determined at 75 Fed. Reg. 2620:

Even if a line has not or will not carry PIH traffic after the 2008 base year or later time period prior to filing of the PTCIP [Positive Train Control Implementation Plan] (i.e. for those filing PTCIP for new service initiated after the statutory deadlines), the final rule requires an additional test that fleshes out the “consistent with safety” notion contained in the proposed rule with the desired objective of providing greater predictability, transparency, and consistency in decision making. This test requires that, in order for a track segment to be excluded, the remaining risk on the line not exceed the average risk extant on lines required to be equipped with PTC because they meet the threshold for tonnage of 5 million gross tons and carry PIH traffic. The effect of this test should be to allow a majority of lines that formerly carried PIH, which has been removed for legitimate reasons, to be removed from the PTCIP. (Emphasis supplied)

On September 27, 2010, FRA issued amendments to the Initial Final Rule regarding development, testing, implementation and the use of PTC systems for railroads as mandated by the RSIA. This Second Final Rule was issued with respect to the establishment additional criteria for removing track segments that

had yet to install PTC, but no longer moved TIH materials after 2008 but before the end of 2015. In issuing the amendments, FRA restated many of the propositions contained in the Initial Final Rule and disputed several of the arguments made by the AAR in its most recent comments. It also expanded its rationale for using the 2008 base year and requiring compliance with the two-part test for those lines no longer carrying TIH traffic after 2008 but before the end of 2015.

For example, at 75 FR 59112 the FRA stated:

As PTC becomes fully effective on rail lines over the coming years, those routes will come to carry the overwhelming bulk of PIH materials traffic. If only a small network of PTC lines built out on each railroad, impacts on PIH materials routing could be dramatic. Routing alternatives would diminish. Unlike today, when the great majority of the PIH materials traffic that takes the most direct route to destination with the least amount of switching and least exposure to derailment hazards, constricting PIH materials to a small PTC network has the potential to drive circuitous routings that could increase switching, introduce delays in transportation related to marshalling of trains, increase derailment and miscellaneous hazards, and even increase security risks due to routing through high threat urban areas. The final rule limits these potential adverse consequences by asking that—for planning purposes only—the railroads submit alternative routing analysis to support any requests to drop lines from the 2008 base (a period during which, it is undisputed, that most of the subject PIH materials traffic was moving by the most direct and expeditious route).

Here, FRA has clearly stated its opinion that the 2008 base year and the two-part test is a safety and security related concept in addition to being an economic concept protecting TIH shippers from being driven off the rail lines.

FRA was also cognizant of the overall Congressional purpose of protecting the public and railroad workers from greater dangers than TIH releases or passenger train collisions. Again at 75 FR 59111 the FRA stated:

Congress obviously wanted to make sure that passenger and PIH materials lines were addressed in FRA's PTC rule, and we did so in the final rule. But there is no reason to believe that the Congress was indifferent to the safety of employees or other members of the public or to communities whose water supplies might be polluted by non-PIH hazardous materials or spilled diesel fuel. Moreover, deaths of crew members from train collisions have exceeded deaths from release of PIH commodities over the past two decades. The public interest requires FRA to take this and other factors into consideration in determining whether to require the installation of PTC on lines from which PIH materials traffic is being removed consistent with RSIA08 statutory authority. At a future date, FRA may also examine the appropriateness of requiring PTC to be installed on other rail lines not covered by the final rule.

The two-part test adopted in the Second Final Rule provided that FRA would approve an exclusion of a line from the PTCIP (determined on the basis of 2008 traffic levels) upon a showing by a railroad that:

[e]ither any rerouting of PIH traffic from the subject track segment is justified based upon the route analysis submitted which shall assume that each alternative route will be equipped with PTC, and shall take into

consideration any significant interline routing impacts; or the next preferred alternative route in the analysis is shown to be substantially as safe and secure as the route employing the track segment in question and demonstrated considerations of practicability indicate consolidation of the traffic on that next preferred alternative route; and [a]fter cessation of PIH traffic on the subject line, the remaining risk associated with PTC-preventable accidents per route mile will not exceed the average comparable risk per route mile on Class I lines in the United States required to be equipped with PTC....If the railroad making the application for removal of the track segment from the PTCIP offers no compensating extension of PTC or PTC technologies from the minimum required to be equipped, FRA may deny the request. (75 Fed. Reg. 59110; JA )

Section 20157 (a) (2) of the RSIA08 (49 U.S.C. § 20157 (a) (2))

provides that a railroad's PTCIP will "provide for interoperability of the system with movements of trains of other railroad carriers over its lines and shall, to the extent practical, implement the system in a manner that addresses areas of greater risk before areas of lesser risk. The railroad carrier shall implement a positive train control system in accordance with the plan." Without an analysis of an alternative route to be used in the event of the discontinuance of the route being used in 2008, there is no way that FRA or the subject railroad could determine if the risk of the proposed alternative route is greater or lesser than the risk of the route that is proposed to be excluded from PTC installation. In the Initial Final Rule, FRA made exactly that determination when pointing out that the railroads' desire to

concentrate TIH shipments on only a relative few track segments could force that traffic onto lines of higher risk or in high threat urban areas. And the National Transportation Safety Board (“NTSB”) noted in its comments opposing elimination of the two-part test:

But NTSB is concerned that by eliminating the requirements for an alternative route analysis and a residual risk analysis as currently required by the final rule in order for railroads to avoid PTC system implementation, the FRA’s ability to identify other high-risk corridors will be hampered. The NTSB strongly encourages the FRA to maintain the railroads current PTC implementation Plan so that the traveling public, railroad employees, and communities near rail lines receive the maximum safety benefits. (JA)

Following issuance of the Initial Final Rule, the AAR filed a Petition for Review in this Court, and following the amendments to the Final Rule contained in the Second Final Rule, the AAR filed a second Petition. These Petitions challenged the 2008 base year and then the two-part test. After these cases were fully briefed and awaiting oral argument the AAR and FRA entered into private settlement negotiations that resulted in the elimination of the two-part test and in fact resulted in the abandonment of the 2008 base year concept. (JA) The settlement agreement stated that the AAR contended that the PTC rule’s 2008 base year provision was developed based on legal error and the two-part test was arbitrary and capricious. FRA and DOT disagreed with these contentions, (JA) and yet, agreed to enter a Notice of Proposed Rulemaking eliminating the 2008

base year and the two-part test. The Settlement Agreement provides: “the Parties have determined that it is mutually desirable to resolve the matters in the above-described Petition for Review through settlement, but without conceding in any way the validity of any claim or defense asserted or that might be asserted by any of the Parties with regard to the issues raised in the Petition for Review . . . .” (JA) (Emphasis supplied) It is hard to imagine a more disingenuous process in the drafting and issuance of rulemaking orders than the expert administrative agency agreeing to a statutory interpretation, policy determination and course of conduct with which it so fundamentally disagreed.

### STANDARD OF REVIEW

This Court has long recognized and consistently followed the two-step test set forth in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) when reviewing agency decisions interpreting their enabling statutes.<sup>7</sup> See, for example, *National Mining Assn. v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995), and

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<sup>7</sup> “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” 467 U.S. 837, 842-3 (1984) Footnotes omitted.

*Detroit/Wayne County Port Authority v. ICC*, 59 F.3d 1314 (D.C. Cir. 1995). The first step, of course, is to determine if there is clear Congressional direction as to the interpretation of the statute or if there is some ambiguity that requires the administrative agency to arrive at a permissible interpretation.

At the same time, this Court has also consistently followed the ruling in *Motor Veh. Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29 (1983). In *State Farm*, the Court set forth the criteria for determining whether an agency's interpretation of a statute it administers is arbitrary and capricious. Although decided the year before *Chevron*, the *State Farm* criteria have been consistently held to be the equivalent of the unreasonableness test of step two of *Chevron*. See, for example, *Animal Legal Defense Fund v. Glickman*, 204 F.3d 229, 234 (D.C. Cir. 2000).<sup>8</sup>

In *State Farm*, the Court reiterated the long-established requirement that “the courts may not accept appellate counsel’s post hoc rationalizations for agency action” stating “[I]t is well established that an agency’s actions must be upheld, if at all, on the basis articulated by the agency itself.” 463 U.S. at 50, see also, *Hill v. Norton*, 275 F.3d 98, 105 (D.C. Cir. 2001).

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<sup>8</sup> In *Glickman* this Court cited with approval a passage from the Supplement to the third edition of Pierce, Administrative Law Treatise as follows: “There is complete overlap between *Chevron* step two and *State Farm*...a rule that adopts an ‘unreasonable’ interpretation of a statute within the meaning of *Chevron* step two is ‘arbitrary and capricious’ within the meaning of *State Farm*.”

In *State Farm* the Court also explained that when an agency seeks to reverse its prior regulatory policy, it is obligated to supply a reasoned explanation of why it is choosing that revised course.

This Court has consistently held that when an agency changes its course it must give a reasoned analysis for that change. In *Williams Gas v. FERC*, 475 F. 3d 319 (D.C. Cir. 2006) the Court quoted from its earlier decision in *ConAgra, Inc. v. NLRB*, 117 F. 3d 1435, 1443 (D.C. Cir. 1997):

[a]n agency is free to discard precedents or practices it no longer believes correct. Indeed, we expect that an [ ] agency may well change its past practices with advances in knowledge in its given field or as its relevant experience and expertise expands. If an agency decides to change course, however, we require it to supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. 475 F. 3d at 326

The standard of review in this case is simply whether FRA improperly disregarded the clear mandate of Congress to compare and evaluate the relative risks of track segments contained in a railroad PTCIP, thereby failing the first step of the *Chevron* test, and then failed the second step by failing to give sufficient reasons, explanation and analysis as to why it changed course and abandoned 2008 as the base year for PTC installation, and why it then abandoned the two-part test to justify removal of track segments from the requirement to install PTC on those segments.

## SUMMARY OF ARGUMENT

Methods for preventing high-speed derailments and collisions of rail freight and passenger trains have been available for many years. Both the Interstate Commerce Commission, and the FRA as its successor safety regulator have had the statutory authority to impose these methods, commonly referred to as Positive Train Control or PTC, for most of that period. However, prior to 2008--notwithstanding numerous studies, reports to Congress, and demonstration projects--the high cost of implementing and installing PTC consistently trumped its acknowledged safety benefits.

Following high-speed collisions of trains at Graniteville, South Carolina releasing chlorine gas and resulting in nine fatalities and Chatsworth, California resulting in 25 fatalities--both of which would have been prevented by PTC--Congress acted and acted decisively. Congress enacted the Rail Safety Improvement Act of 2008 (“RSIA08” or “the Act”) and mandated that PTC must be installed on all main line track segments<sup>9</sup> operated by the seven large U.S. rail carriers (Class I railroads”) that transported either passengers or toxic-inhalation-hazard chemicals (“TIH”) such as chlorine. The Act also mandated that these installations be accomplished by December 31, 2015, and that Positive Train

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<sup>9</sup> Main line is defined as those segments handling over 5 million gross tons of freight per year.

Control Implementation Plans (“PTCIP”) be submitted by the Class I railroads by April 16, 2010.

The RSIA08 provided that the implementation plans submitted by the railroads “shall, to the extent practical, implement the system in a manner that addresses areas of greater risk before areas of lesser risk”<sup>10</sup> and that the railroad at issue shall implement a PTC system in accordance with the plan submitted.<sup>11</sup>

Other than requiring the risk based criteria for evaluating which tracks should be PTC equipped, the RSIA08 is silent as to the contents of the plans; nor does the Act specifically state what time period should be used to determine whether TIH or passenger traffic is moving over a particular track segment.

Congress passed the RSIA08 with full knowledge that it could never be justified strictly on a safety related cost-benefit basis. The cost of PTC far outweighs its safety benefits when using the traditional cost-benefit analysis regularly applied in rulemaking proceedings. FRA relied upon that Congressional intent when issuing its Initial Final Rule in January of 2010 and its Second Final Rule in September of that same year. Notwithstanding this obvious Congressional intent, the Class I railroads, through their trade association the AAR filed two subsequently consolidated petitions before this Court challenging the first two final rules based largely upon the contention that PTC was too costly.

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<sup>10</sup> 49 U.S.C. § 20157 (a) (2).

<sup>11</sup> *Ibid.*

In its first two final rules, FRA noted that the Class I railroads covered by the PTC mandate would have strong incentives to reduce PTC implementation and installation costs by shedding rail lines and by concentrating TIH traffic onto the absolute minimum of rail lines or by eliminating it entirely. FRA's response to these incentives was to make 2008 the base year for the determination of PTC installation. Using 2008 as the base year allowed FRA to deal with the incentive of the Class I railroads to "spin off" lines that Congress had intended to be covered by PTC to smaller local or regional rail carriers to which PTC did not apply. Of course, this spinning off would not reduce risk, and might possibly even increase it, by avoiding PTC installation while continuing to move the same materials over the same lines. Similarly, using 2008 as the base year also addressed the issue of the Class I railroads shifting TIH traffic from one track segment to another in order to concentrate it on the fewest number of track segments thereby reducing PTC implementation costs, or by eliminating TIH traffic altogether.

FRA discussed at some length that it was not imagining the desire of the railroads to eliminate TIH traffic from their respective systems. It noted that the public record was replete with the railroads' efforts to be rid of TIH traffic. The FRA has long taken the position that rail is the safest mode for moving chlorine and other TIH materials over longer distances, and that getting it off the rails is neither an economically feasible nor a safety-based alternative.

In adopting the 2008 base year, FRA also recognized that there might be “legitimate reasons” for TIH traffic to no longer move on a particular track segment after 2008 but before the end of 2015. FRA accommodated these legitimate reasons by establishing a risk-based two-part test to review applications to determine whether to allow the elimination of TIH traffic from a particular track segment. Part one of that test was the alternative route analysis test by which FRA would examine whether the line to which TIH traffic is shifted had substantially the same risk characteristics as the line from which the traffic was diverted. Part two of the test was the residual risk test, by which FRA would require an examination to determine if the risk on the track segment from which TIH traffic was diverted would be less than the national average risk per equivalent route mile on track segments required to be equipped with PTC. The two-part risk-based test was a clear reflection of the Congressional instruction to insure that railroad implementation plans were risk-based, and that those plans insure that areas of greater risk are PTC-equipped before any areas of lesser risk. Absent the two-part test or its equivalent there is no way for FRA to meet that statutory requirement.

FRA maintained its position regarding the propriety and lawfulness of the 2008 base year and the two-part test through its final brief filed before this Court on January 12, 2011. Then its position changed, but its reasoning did not. In the March 2, 2011 settlement agreement with the AAR, FRA insisted that its statutory

interpretations and public policy conclusions of the Initial Final Rule and Second Final Rule remained valid. However, it then proceeded to adopt the contrary policies set forth by the AAR. Perhaps the obviously hostile hearings before the House Subcommittee on Railroads, Pipelines and Hazardous Materials of the Committee on Transportation and Infrastructure had some impact on FRA but, remains unknown because aside from mentioning that the hearings occurred, FRA does not discuss them further. Nor does FRA discuss the substance of its settlement discussions with the AAR that led to the adoption of the settlement agreement.

Petitioner and this Court are left to speculate why FRA would change its position without changing its mind as to the statute or the merits of its prior conclusions. Leaving the Petitioner to speculate is of no real consequence but leaving the Court to speculate requires a “remand to the agency for additional investigation or explanation.” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985); *Safe Extensions, Inc. v. FAA*, 509 F. 3d 593, 599 (D.C. Cir. 2007).

## ARGUMENT

### **I. IN ABANDONING THE TWO-PART TEST FOR DETERMINING WHAT TRACK SEGEMENTS COULD BE RELIEVED OF THE REQUIREMENT TO INSTALL PTC, FRA IMPROPERLY DISREGARDED THE COMPARATIVE RISK EVALUATION PROVISIONS OF THE RSIA08**

In its Initial Final Rule, FRA discussed the long and contentious history of Positive Train Control. FRA noted that PTC, in various forms and formats, had been available for many years and that FRA, under the law pre-dating the RSIA08, had the legal authority to impose PTC on the nation's railroads. FRA noted that it had studied PTC and PTC implementation and reported to Congress on several occasions as to its feasibility and availability, and also noted that the National Transportation Safety Board ("NTSB") had consistently recommended that PTC be installed on railroad lines. However, FRA "continued to believe that an immediate regulatory mandate for widespread PTC implementation could not be justified based upon traditional cost-benefit principles relying on direct railroad safety benefits." (75 Fed. Reg. 2598-2602)

Notwithstanding the substantial costs to the railroads of installing PTC, H.R. 2095 was introduced into the House of Representatives on May 1, 2007. The bill passed the House on October 17, 2007 and passed the Senate on August 1, 2008. While the bill was awaiting final passage in both Houses, on September 12, 2008, a fatal train collision occurred in Chatsworth, California killing 25 people and

seriously injuring more than 130. The NTSB investigation of this collision between a Union Pacific freight train and a Metrolink commuter train indicated that the collision would have been prevented by PTC. On September 24, 2008, the Congress finally passed the RSIA08.

In the Initial Final Rule, FRA stated:

Prior to the accidents in Graniteville<sup>12</sup> and Chatsworth, the railroad's slow incremental deployment of PTC technologies—while not uniformly agreed upon by the railroads, FRA and NTSB—was generally deemed acceptable by them in view of the tremendous costs involved. Partially as a consequence and severity of these very public accidents, coupled with a series of other less publicized accidents, Congress passed the RSIA08 and it was signed into law by the president on October 16, 2008, making a public policy decision that, despite the implementation costs, railroad employee and general public safety warranted mandatory and accelerated installation and operation of PTC systems. (Footnote and emphasis supplied) (75 Fed. Reg. 2602)

The public policy decision of Congress is clearly reflected in 49 U.S.C. § 20157 (a) (2) which provides:

(2) Implementation.—The plan shall describe how it will provide for interoperability of the system with movements of trains of other railroad carriers over its lines and shall, to the extent practical, implement the system in a manner that addresses areas of greater risk

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<sup>12</sup> At Graniteville, South Carolina on January 6, 2005, 9 people were killed when a Norfolk Southern train crossed a switch that was improperly left open and collided with another parked Norfolk Southern train. The fatalities, and several injuries were the result of chlorine gas that was released when a tank car was breached and chlorine escaped.

before areas of lesser risk. The railroad carrier shall implement a positive train control system in accordance with the plan.

Congress plainly sought to have the Positive Train Control Implementation Plan (“PTCIP”) filed by each subject railroad to be based on the relative safety and security of each route upon which PTC is to be installed or not installed. In turn, FRA is responsible to oversee those implementation plans and the installation of PTC in such a manner as will provide for the greatest safety and security of railroad employees and the general public. In providing for the 2008 base year for implementation planning, and in establishing the alternative route analysis test and the residual risk test, FRA was complying, or attempting to comply, with the Congressional directive to create and execute implementation plans that assessed greater risk versus lesser risk and act accordingly with respect to PTC installation.

The Class I railroads subject to PTC have long and consistently opposed widespread PTC installation based upon the simple fact that it costs money to implement these safety and security programs. Those cost-benefit arguments carried the day and prevented PTC implementation even though the technology was available, and even though FRA could have mandated PTC under the law as it existed prior to RSIA08. But, Congress firmly and undeniably decided that following Graniteville and Chatsworth, and other accidents that the time for widespread PTC installation had arrived. At the same time, Congress did

recognize that some form or prioritization for PTC installation was necessary. It therefore established a process in § 20157 (a) (2) to evaluate implementation plans based on relative risks. By abandoning the 2008 base year and the two-part test, however, FRA has completely disregarded any relative risk analysis and put the determination of which rail lines to equip with PTC wholly in the hands of the railroads which should be expected to act in their economic self-interest, not in the interest of reducing risk as mandated by Congress. Further, the Class I railroads have consistently positioned that they would not haul TIH materials at any price due to the “ruinous liability” exposure. Removing the 2008 base year and the two-part test has removed the checks and balances intended to prevent the railroads from manipulating routing protocol to eliminate TIH lines, consolidating TIH traffic over fewer lines (even if it increases risk and miles traveled), and artificially increasing variable cost on TIH lines to justify their objective of moving rates to economically unsupportable levels.

To be sure, FRA has considerable discretion in interpreting the statutes that it administers. But that discretion does not and cannot include ignoring the plainly stated will of Congress in such a fundamental way as eliminating any oversight it would otherwise have in accomplishing the safety and security goals of the RSIA08. The FRA decision to eliminate the 2008 base year for PTC

implementation planning and eliminating the alternative analysis test and the residual risk test should be reversed under step one of *Chevron*.

## **II. THE FRA HAS FAILED TO ARTICULATE THE LEGAL, FACTUAL AND POLICY REASONS FOR ITS REVERSAL OF POSITION REGARDING THE USE OF 2008 AS THE BASE YEAR FOR PTC INSTALLATION OR FOR ITS REVERSAL REGARDING RAILROADS MEETING THE TWO-PART TEST TO AVOID PTC INSTALLATION**

In its Initial Final Rule, FRA gave an extensive explanation as to why it chose to interpret the RSIA08 the way it did. It concluded, among other things, that unless it used 2008 as the base year for PTC installation, the railroads, which had been long attempting to drive chlorine and other TIH materials off their tracks, would be able to selectively limit or eliminate the movement of those products. Further, it found that absent the 2008 base year, those same railroads would be able to spin off track segments to smaller railroads not subject to PTC requirements and thereby eliminate PTC from track segments on which Congress had meant to require PTC. As discussed and quoted above, this explanation was not a passing reference in the Initial Final Rule. It was the core of the FRA's reasoning for why the 2008 base year was essential to fulfilling the Congressional intent with respect to the installation of PTC.

In the Second Final Rule of September 27, 2010, FRA maintained the 2008 base year for PTC installation, but allowed for the alternative route analysis test and the residual risk test to provide the "legitimate reasons"<sup>13</sup> for not installing

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<sup>13</sup> 75 Fed. Reg. 2620

PTC on tracks that carried TIH traffic in 2008, but would not carry it in 2015. In the Preamble to this Second Final Rule the FRA stated: “The RSIA08 was signed into law by President George W. Bush on October 16, 2008, marking a public policy decision that, despite the implementation costs, railroad employee and general public safety warranted mandatory and accelerated installation and operation of Positive Train Control (PTC) systems.” Thus, as in the Initial Final Rule, FRA recognized in the Second Final Rule that PTC could not be justified based on the cost-benefit tests normally employed in rulemaking proceedings. Congress had decreed otherwise.<sup>14</sup>

The Third Final Rule published on May 14, 2012, and here on review marks a startling departure from the first two Final Rules. While the first two Final Rules specifically noted that the Congress was mandating PTC without the type of cost-benefit analysis normally required in rulemaking proceedings, the Third Final Rule relies almost entirely upon costs that railroads would face if PTC were to be installed on a widespread basis. The only real explanation for this change in course is not a change in its interpretation of the RSIA08, but rather a settlement agreement entered into between FRA and the AAR. This private settlement

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<sup>14</sup> “However, FRA believes that the issue is now presented in a different light than before. The Congress was aware that the monetized safety benefits of PTC were not large in comparison with the loss of life and injuries associated with PTC preventable accidents. With the passage of RSIA08, Congress has in effect set its own value on PTC and directed implementation of PTC without regard to the rules by which costs and benefits are normally evaluated in rulemaking.” (75 Fed. Reg. 2616)

agreement (JA) recites that FRA and the DOT do not agree with the contentions raised by the AAR in the Petition for Review then pending before this Court. Specifically, AAR had contended that the PTC rule's 2008 base year was developed on legal error and was otherwise arbitrary and capricious. FRA and DOT disagreed with that contention and yet agreed to enter into a new rulemaking to abolish the 2008 base year and to thereby abolish the two-part test that was to be applied to justify departures from the 2008 base year requirements for PTC installation. The agreement also provided that the AAR Petition for Review was not to be dismissed upon publication of the proposed rule but only after conclusion of the rulemaking, thus making it quite clear that the agreement was not merely to publish an agreed upon proposed rule but to adopt the agreed upon rule regardless of the comments made during the rulemaking process.<sup>15</sup>

Following the settlement agreement, the FRA published a proposed rule eliminating the 2008 base year requirement and eliminating the alternative route analysis and residual risk tests to obtain relief from that base year requirement. That proposal is the basis for the Third Final Rule here on review.

In the Third Final Rule, FRA estimated that some 10,000 miles of track that would have been subject to PTC installation if 2008 were to be used as the base year, would not need to be PTC equipped based on TIH movements as of

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<sup>15</sup> The propriety, or lack of propriety, of this procedure will be discussed below.

December 31, 2015. The railroads would save between \$620 million and \$818 million over the first 20 years of the Third Final Rule as a result of not installing PTC on these 10,000 miles of track. FRA goes on to state: “FRA believes that the lines impacted by this final rule pose significantly less risk because they generally do not carry passengers trains or PIH materials and generally have a lower accident exposure.”

Of course, if the tracks involved didn't carry either TIH or passengers in 2008, they cannot be “impacted by” the Third Final Rule. Thus, FRA must be saying that it has concluded that lines impacted must have carried either passengers or TIH in 2008 but no longer or would no longer carry passengers or TIH by December 31, 2015. That was the purpose of the settlement agreement and of the Third Final Rule.

Left wholly unexplained is how FRA could possibly come to this conclusion regarding tracks that did carry passengers or TIH in 2008 but would no longer carry either in 2016. Because no railroad would be required to file an application to remove a track segment from its Positive Train Control Implementation Plan which had been based on the 2008 base year, how would FRA even know what track would no longer require PTC? Further, how could FRA make the determination that 49 U.S.C. § 20157 (a) (2) requires PTCIP's to address areas of greater risk before areas of lesser risk without employing the alternative route

analysis test or the residual risk test? FRA could not know where the traffic formerly moving on that now excluded track segment had gone. It might have gone to higher risk track segments or tracks located in high threat urban areas, as FRA noted in the Initial Final Rule. This is precisely the basis for employing the alternative route analysis test and the residual risk test in the first place.

To be sure, an agency is free to discard precedents or practices it no longer believes correct. But, if an agency decides to change course “we require it to supply reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319 (D.D. Cir. 2006) quoting *Nuclear Energy Inst., v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004). See also, *Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006) (“Nor can our Court fill in critical gaps in [an agency’s] reasoning. We can only look to the [agency’s] stated rational. We cannot sustain its action on some other basis the [agency] did not mention.”)

FRA gave a combination of reasons for its change in policy, but none of them survive close analysis. First, FRA noted that PTC was expensive and could not be justified on traditional cost-benefit bases. That issue was well known to FRA at the time of the Initial and Second Final Rules and was properly dismissed as contrary to the express will of Congress in enacting the RSIA08, regardless of normal cost-benefit considerations limited to safety concerns.

Second, FRA addressed the concerns of TIH shippers at some length. But it never recanted its reasoning in the Initial Final Rule as to how its Third Final Rule would provide any protection from railroads intent upon removing TIH traffic from their respective rail lines. For example, in the Initial Final Rule FRA clearly stated that it was aware of the desire of railroads to eliminate TIH traffic movements stating that neither the Surface Transportation Board nor the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) routing rule would prevent the railroads from reducing or severely limiting TIH shipments by rail.

In its Initial Final Rule, FRA stated:

The freight railroads do not pretend that FRA is wrong in perceiving that the freight railroads wish to remove PIH traffic from the network. That is wise, since the public record is replete with pleas from the Class I railroads to remove their common carrier obligation to transport PIH traffic. Rather, they contend, in effect, that FRA should not trouble itself with this issue, since the Congress and the Surface Transportation Safety Board [sic] (STB) will ensure that PIH shippers receive fair treatment, and the Pipeline and Hazardous Materials Safety Administration (PHMSA) Rail Route Analysis will determine whether the traffic goes on the safest and most secure routes.

There are significant problems with this contention. First, while the Congress shows no interest in relieving the carriers of duty [sic] to transport PIH commodities, and the STB has likewise brushed back a recent attempt by a Class I railroad to avoid this duty [UP Declaratory Order Petition re U.S. Magnesium citation], it is by no means yet determined how the cost burden associated with PTC will be borne. A railroad seeking to make the most favorable case for burdening a PIH

shipper with the cost of PTC installation would first clear a line of overhead traffic through rerouting and then seek to surcharge the remaining shipper(s) for the incremental cost of installing the system. Under those circumstances, would the STB decide that the railroad should transfer all of those costs to shippers, or would the STB uphold the surcharge in whole or in part, thereby potentially making the cost of transportation unsupportable? (Emphasis supplied) (75 Fed. Reg. 2618; JA )

In the Third Final Rule here on review the FRA arrives at a dramatically different conclusion without ever acknowledging its prior conclusions quoted above:

Each of the arguments made by the Trade Associations<sup>16</sup> and other railroad shippers rests on the premise that, by rerouting PIH materials traffic to avoid the installation of PTC systems, railroad carriers will somehow be able to “lock in” certain routes as the only routes available to carry PIH materials after 2016. Ultimately, however, this premise is incorrect...FRA does not view the PTC mandate as limiting the common carrier obligation as enforced by the STB, and consequently does not view a smaller map of PTC equipped line segments as restricting the availability of rail transportation for PIH materials in the future. Footnote supplied) (77 Fed. Reg. 28291; JA )

Remarkably, FRA does not mention its Initial Final Rule conclusions that are so plainly at odds with those of the Third Final Rule. There is no explanation and no implication that the facts have somehow changed or that the Initial Final Rule was in error.

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<sup>16</sup> The Trade Associations include the Chlorine Institute, Inc., the American Chemistry Council and the Fertilizer Institute. (JA)

Following adoption of the AAR/DOT settlement agreement, FRA also changed its opinion of PHMSA's routing rule and its ability to protect TIH shippers, and--without ever mentioning its previous concerns quoted above--FRA stated:

FRA agrees with AAR that the rerouting of PIH materials traffic is properly constrained by the PHMSA rail routing rule. FRA also agrees with AAR that PIH materials traffic will continue to move on rail lines that do not have PTC systems consistent with the requirements of 49 CFR 1005 (b) (3),<sup>17</sup> and that the elimination of the two qualifying tests does not effect the railroads common carrier obligation with respect to the transportation of PIH materials.<sup>18</sup>(Footnotes supplied) (77 Fed. Reg. 28291)

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<sup>17</sup> Reliance on 49 CFR 236.1005 (b) (3) is particularly curious. That provision allows a railroad, not a shipper or other party, to petition the FRA to allow the movement of TIH traffic over a line segment that is not PTC equipped for a period of two years while the railroad petition FRA for the installation of PTC. Since the whole purpose of the railroads is to eliminate TIH traffic the prospect of the railroad petitioning to allow for the new movement of TIH pending PTC installation is patently absurd.

<sup>18</sup> FRA's interpretation of the common carrier obligation of rail carriers set forth in 49 U.S.C. § 11101 is contained in the Interstate Commerce Commission Termination Act, and is not administered by DOT or FRA. In any case, the common carrier obligation simply states that a rail carrier must provide rail service upon reasonable request. The STB that administers the ICCTA has never addressed the question of whether a request for transportation of TIH traffic over a line that is not PTC equipped would be a reasonable request, but one might well assume that it is not. In any case, the FRA's interpretation of the STB's enabling legislation is not entitled to *Chevron* deference. *Hoffman Plastic Compounds*, 535 U.S. 137 (2002); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F. 3d 1306 (D.C. Cir. 2007)

Agreeing with an unsupported legal conclusion of the AAR cannot pass as a clearly articulated reason for the contradiction of the clearly articulated reasons set forth in detail in the Initial Final Rule and the Second Final Rule.

The absence of a cogent explanation as to why FRA would reverse its Initial Final Rule and its Second Final Rule in so fundamental a way without even addressing its prior statutory interpretations and public policy conclusions makes it impossible to discern the agency's reasoning. It is insufficient to state that the reason is the AAR settlement agreement and the wish of the FRA to terminate litigation regarding its interpretations and conclusions. It is precisely for that lack of clarity and demonstrated reasoning that the FRA Third Final Rule should be remanded for further procedures.

## CONCLUSION

The Court should remand the Third Final Rule to the FRA with instructions to reinstate the 2008 base year and the two-part test for PTC implementation.

Respectfully submitted;

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October 29, 2012  
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*Counsel for Petitioner*

**United States Court of Appeals  
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