

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 711

**PETITION FOR RULEMAKING TO ADOPT REVISED
COMPETITIVE SWITCHING RULES**

INITIAL COMMENTS OF OLIN CORPORATION

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Olin Corporation, through its Chlor Alkali Products Division (“Olin”), respectfully submits these brief comments in response to the July 25, 2012 decision of the Board (the “Decision”) as to (1) the impact on a shipper’s ability to file a rate case if the revised competitive switching rules under the National Industrial Transportation League (“NITL”) proposal (the “Proposed Rules”) fail to cure demonstrable market abuse and (2) the continued need for comprehensive regulatory reform to increase actual rail-to-rail competition. However, Olin would first like to refute certain arguments made by the railroads in their initial replies in this matter.

The Need for Actual Competition

The railroads assert that the record in EP 705 does not justify this proceeding, and claim that “sustainable competition” exists among them, by which they agree to switch traffic for one another “on terms and for reasons they find to be mutually beneficial.”¹ But the record in EP 705 and Olin’s experience show that this “sustainable” competition is no competition at all for some shippers, particularly captive shippers. Each of Olin’s five chlor alkali plants has just one set of rail tracks

¹ Reply of Norfolk Southern Railway Company filed July 27, 2011 at pp. 1-2; Reply of the Association of American Railroads filed July 27, 2011 at p. 5.

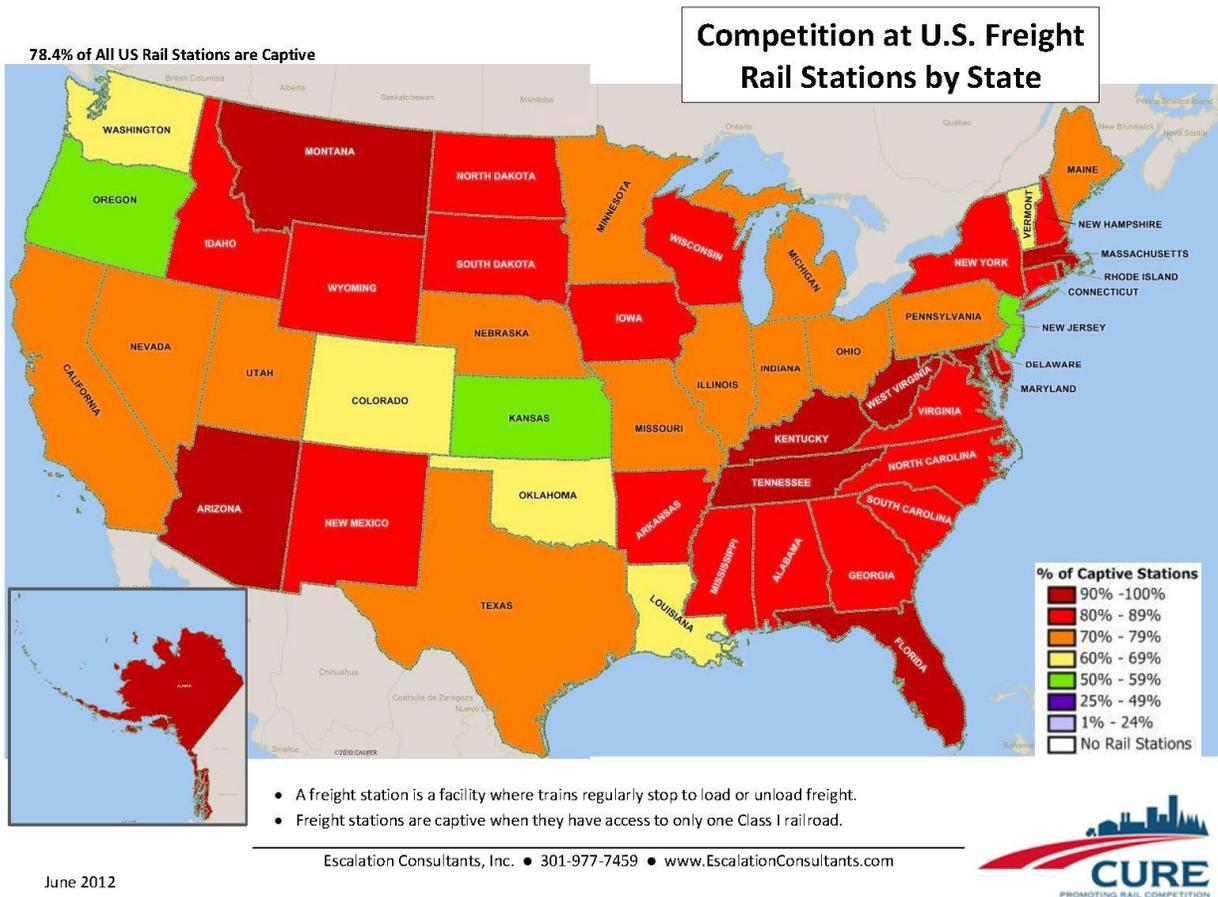
leading to it, and the fact that not one competing railroad reaches any Olin plant does not result from any physical or legal barrier, but from the railroads' refusal to share their physical assets with each other for a fair fee.² As Olin noted in EP 705, while the Staggers Act has resulted in some positive reform, its ultimate goal of a competitive, viable rail system that provides reliable service at reasonable rates remains unfulfilled (particularly with respect to many captive shippers) and adopting change to further encourage competition and allow market pricing based on the record in EP 705 is consistent with the deregulation that began with the Staggers Act.

This lack of competition is illustrated in freight railroad “captive” maps commissioned by Consumers United for Rail Equity and prepared by Escalations Consultants Inc. for the United States and individual states (the “Maps”). The Maps were prepared based on an analysis of whether access to more than one Class I railroad is available at 28,000 locations in the U.S. where a freight railroad picks up or delivers freight. The Maps show that four of Olin’s five chlor alkali facilities are located in a parish or county where at least 90% of freight rail stations are captive (having access to only one Class I railroad), while the fifth plant is located in a county where more than 80% of stations are captive.³ This problem is not limited to the areas where Olin’s chlor alkali facilities are located. The United States Map set out below⁴ shows that at least 78.4% of freight rail stations in the United States are served by a single major railroad, without including in that percentage “competitive” stations that are effectively captive due to paper barriers and the like.

² The Board recently indicated that interchange commitments that last in perpetuity or that completely eliminate the ability of a lessee or purchaser railroad to interchange with a third-party carrier raise significant concerns. (November 1, 2012 Decision, EP 714, p. 6).

³ See Maps for Alabama, Louisiana, Nevada, New York, and Tennessee attached as Exhibit A, which show data for Olin’s facilities located in Washington County, Iberville Parish, Clark County, Niagara County, and Bradley County, respectively.

⁴ Color version also attached under Exhibit A.



Mandated access must occur, as the Maps directly refute the railroads’ argument that a “robust state of surface transportation competition” does not demonstrate a need or justification for forced access regulation as a matter of policy and economics.⁵

The effects of this lack of competition are worsening for chemical shippers like Olin. A December 2012 Analysis of Freight Rail Rates for Chemical Shippers (the “Report”) found that 75% of all chemical traffic originating or terminating in the United States moved under rates with revenue-to-variable cost ratios (“RVCs”) greater than 180%, increased from 60% in 2005.⁶

⁵ Reply of CSX Transportation, Inc. filed July 27, 2011 at p. 2.

⁶ Accessible at <http://www.americanchemistry.com/RailResearch>. Prepared by Escalation Consultants, Inc. for the American Chemistry Council “to assess revenue-to-variable cost ratios (RVCs) for chemical traffic, and to quantify

Chemical carloads with an RVC above 300% increased by 63.6% during the same time, while premiums for carloads with 300%+ RVCs increased by 88.7%.⁷ The findings of the Report are consistent with Olin's experience as a captive shipper of TIH commodities, as documented by Olin in EP 705.⁸

While the Board should invite the railroads to compete by mandating access, it should also require the railroads to compete by requiring that access be used. Can there be any doubt, based on the record in this proceeding and in EP 705 and other proceedings, that the railroads have no incentive or desire to compete with one another for market share? This is particularly true for captive TIH shippers. Through public statements made by senior executives in previous Board hearings, railroads have made clear that they would refuse to transport TIH materials if not for the common carrier obligation.⁹ Any Board action inviting the railroads to compete without requiring additional competition is a hollow action that will merely expend the resources of the Board and the parties with no benefit to either shippers or competition among railroads.

the economic cost to the chemical industry from rail rates that exceed the [STB] jurisdictional threshold." Executive Summary of Report at p. 1.

⁷ Executive Summary of Report at p. 2; Report at p. 7.

⁸ Comments filed by Olin in EP 705 on April 11, 2011, Exhibit A. See also Comments of PPG Industry in EP 705 filed April 12, 2011, at p. 3 (noting that PPG saw the cost per ton to ship chlorine through its system increase over 100% (excluding mileage income) since 2004, while the cost to ship non-TIH chemicals increased slightly more than 20% (excluding mileage income) during the same time); Supplemental Filing by PPG in EP 705, filed July 15, 2011 (noting that in determining whether to file a rate case when contract rates proposed by a Class I rail carrier would have resulted in increases that PPG thought unreasonably high, PPG determined that in addition to the cost of the case itself, it would also have to outlay capital during the case to pay tariff rates with RVCs ranging from 786% to 1167%, well over 100% higher than contract rates).

⁹ See e.g. Oral Testimony by John M. Gibson, Norfolk Southern Corporation and James A. Hixon, Association of American Railroads made before Panel 1 in EP 677 (April 25, 2008); Opening Evidence and Argument of Norfolk Southern Railway Company filed January 25, 2012 in FD 35504, at p. 18 (noting that transportation providers who have the option refuse outright to participate in the transportation of TIH commodities, but railroads "do not have that privilege"); Written Testimony of Union Pacific Railroad Company in EP 677, given by Diane Duren, filed July 10, 2008, at p. 6 ("The government requires UP and other railroads to transport TIH chemicals. Even though we prefer not to carry TIH commodities, this government policy makes sense, in the absence of safer alternatives"); Opening Argument and Evidence of Union Pacific Railroad Company in FD 35504 filed January 25, 2012, at p. 17 ("As a common carrier, [UP] must accept any TIH shipment its customer tenders and must transport it between origin and destination specified by the shippers. Thus, shippers can force UP to take on the risk of transporting TIH, whether or not UP would choose to do so.")

The Need to Preserve the Right to a Rate Case

Because the Proposed Rules are premised on the false assumption that the railroads are actually interested in competing for business, it is difficult for Olin to provide the empirical information requested by the Board in its Decision. Although mandated competitive switching is currently available under 49 U.S.C. § 11102(c) as a remedy for the railroads' abuse of market power, this statute has been rendered meaningless by the rules currently governing its application. As noted by NITL, and despite the high percentage of captive shippers noted above, there has not been a single request for reciprocal switching filed in well over a decade.

The Proposed Rules would have the Board move from a competitive-abuse standard to a market-power standard, with competitive switching mandated where four specific conditions are met. If met, there would be a conclusive presumption as to the lack of effective competition, without any separate showing required of anticompetitive behavior or of behavior contrary to statutory competition policies.¹⁰ A competitor would then be required to provide switching services and an alternative rate for transportation services from the shipper's origin to its destination, which would theoretically promote more rail-to-rail competition and greatly reduce the agency's role in regulating the reasonableness of transportation rates by relying on "competitive market forces to discipline railroad pricing from origin to destination, and regulate only the access price for the first (or last) 30 miles."¹¹ But while revised rules are necessary to return meaning to the statutes enacted to encourage competition, and while the Proposed Rules are meant to encourage natural competition, the state of competition among the railroads is so poor that unless a shipper utilizing the Proposed Rules retains its ability to obtain regulatory review of unreasonable rates, or some other measure that would force

¹⁰ Decision at p. 4.

¹¹ Decision at pp. 1-2.

railroads to compete, the logical result is that the Proposed Rules cannot promote more rail-to-rail competition.

That is, even if a second railroad is required to submit a bid, the Proposed Rules alone cannot effectively discipline railroad pricing because there is no certainty that the bid will be competitive, particularly for a TIH product like chlorine. Yet the railroads would submit bids with the knowledge that they are effectively immune to challenge based on an unqualified “assumption that competition between Railroad 1 and Railroad 2 would ensure reasonable rates and service.”¹² If shippers are unable to challenge the reasonableness of rates resulting from mandated switching, a reduction in rail-to-rail competition and weakening of the existing statutory competition policies would result, and shippers would in each instance be forced to reconsider pursuing relief under the Proposed Rules for fear of waiving their ability to obtain protection from subsequent market abuse through a rate case.

The Board notes that the presumption of market abuse is preferable to the complexity, cost, and time-consuming nature of litigating competitive switching, but under the Proposed Rules, this presumption is tied to four specific findings, while no finding is required as to the reasonability of the resulting rates.¹³ Therefore, Olin respectfully submits that any final rules based on the NITL proposal must specifically provide that where an otherwise captive shipper utilizes the revised rules to obtain two rates from railroads, the existence of the non-litigated rate shall not be considered as “effective competition” for purposes of 49 U.S.C. § 10707; accordingly, the shipper would retain its right under 49 U.S.C. § 10701(d)(1) to challenge the reasonability of any rate offered by either railroad so long as the Board finds that the rate charged results in a RVC for the transportation to which the rate applies that is equal to or greater

¹² Decision at p. 6.

¹³ Decision at p. 4.

than 180%.

The Primary Need: Comprehensive Regulatory Reform

The Proposed Rules are premised on the false assumption that the railroads will compete for a captive shipper's business, including TIH shippers. Even with the protection of a shipper's right to bring a rate case against the incumbent railroad or second railroad, a captive shipper's utilization of the Proposed Rules would lead it back to the complex, costly, and time-consuming litigation that the Proposed Rules were meant to avoid. As a result, Olin respectfully submits that the need for comprehensive reform should remain this Board's primary focus, as it pointed out in EP 705. The recognized need to promote a "competitive and economically viable rail network" is not served if the Board is distracted or delayed from pursuing comprehensive reform by this single matter, which may not provide any protections for captive shippers. Olin reiterates its continued support of the additional measures it proposed in its EP 705 filings, and based on the extensive and sufficient information available in that record, including an RVC limit on the rates that railroads are permitted to charge captive shippers, and limitations on practices such as the bundling of rates for various lanes that weaken rail-to-rail competition.

Respectfully submitted,

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EXHIBIT A

Maps on Following Pages

United States

Alabama (AL)

Louisiana (LA)

Nevada (NV)

New York (NY)

Tennessee (TN)

Competition at U.S. Freight Rail Stations by State

78.4% of All US Rail Stations are Captive



- A freight station is a facility where trains regularly stop to load or unload freight.
- Freight stations are captive when they have access to only one Class I railroad.

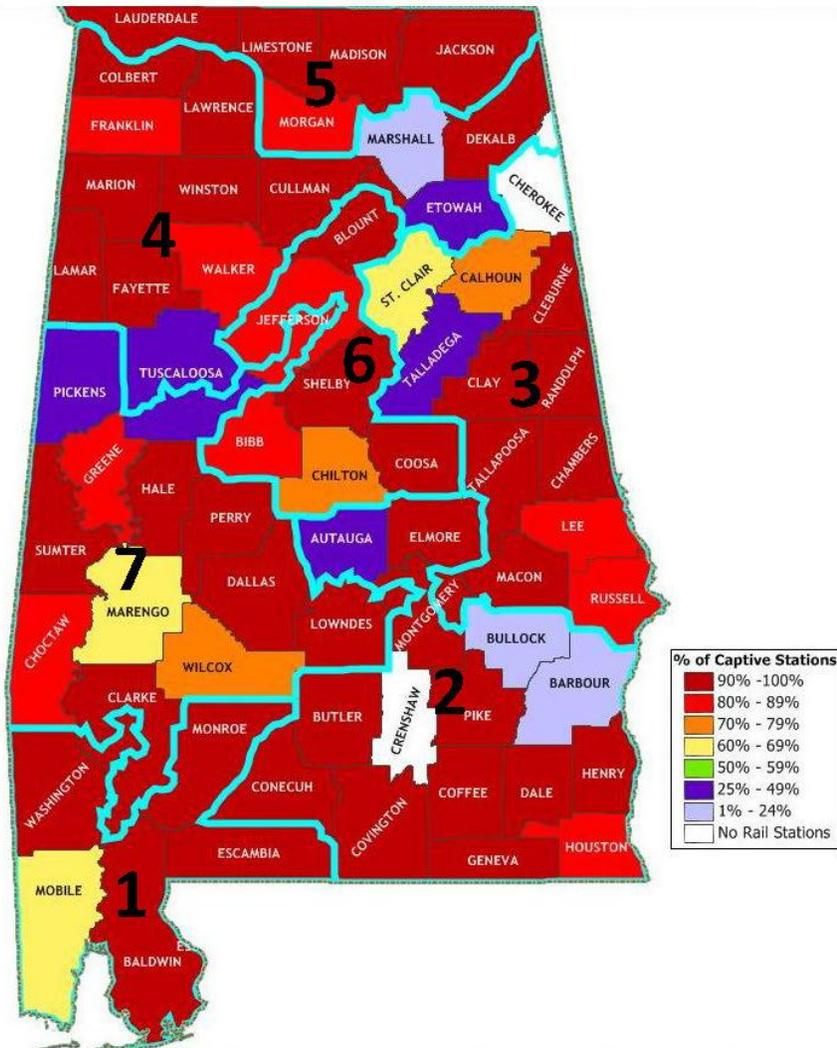
June 2012

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Competition at Freight Rail Stations in the Congressional Districts of Alabama

Average Alabama Rail Station Captivity 82.6%



- Numbers indicate Congressional District numbers, Congressional Districts are outlined by a heavy blue line.
- A freight station is a facility where trains regularly stop to load or unload freight.
- Freight Stations are captive when they have access to only one Class I railroad



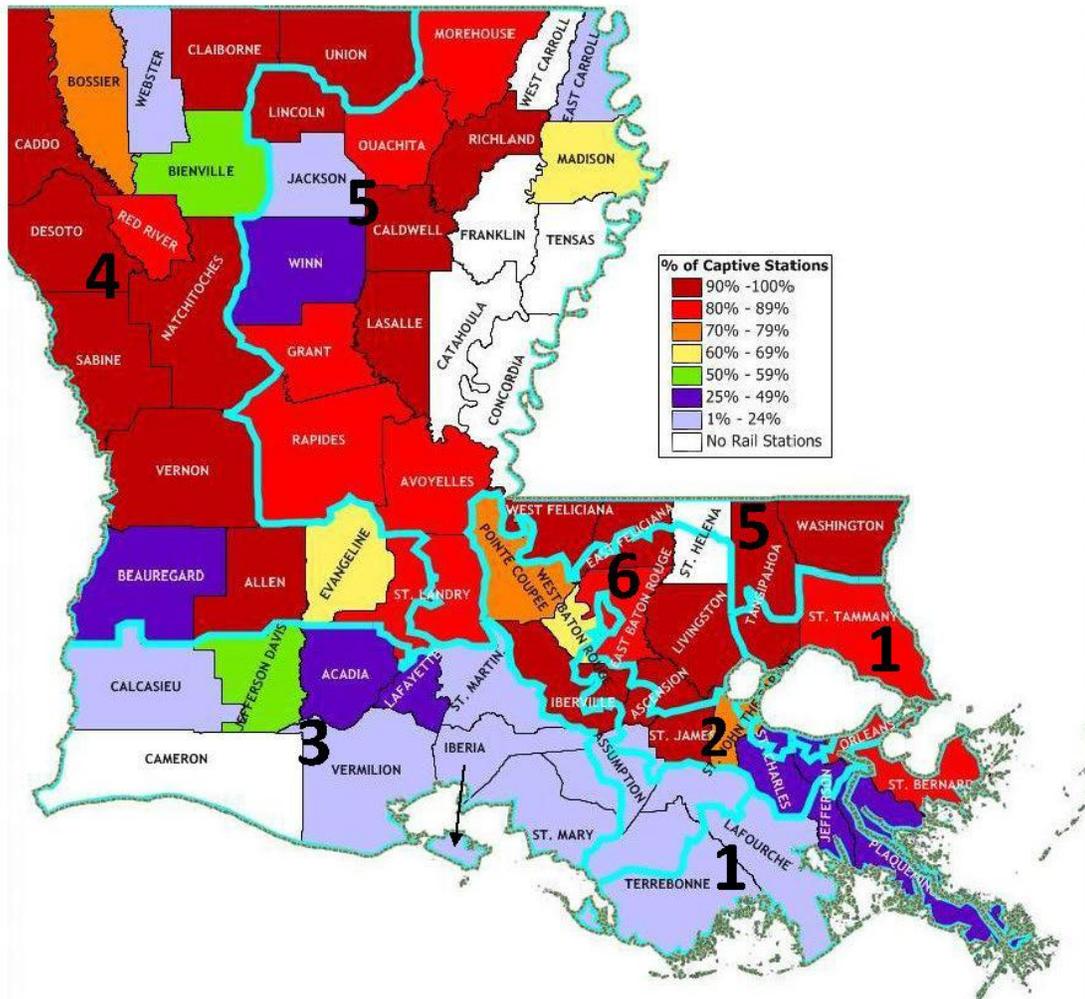
January 2013



Escalation Consultants, Inc.

Competition at Freight Rail Stations in the Congressional Districts of Louisiana

Average Louisiana Rail Station Captivity 65.1%



- Numbers represent Congressional District numbers, Congressional Districts are outlined by a heavy blue line.
- A freight station is a facility where trains regularly stop to load or unload freight.
- Freight Stations are captive when they have access to only one Class I railroad



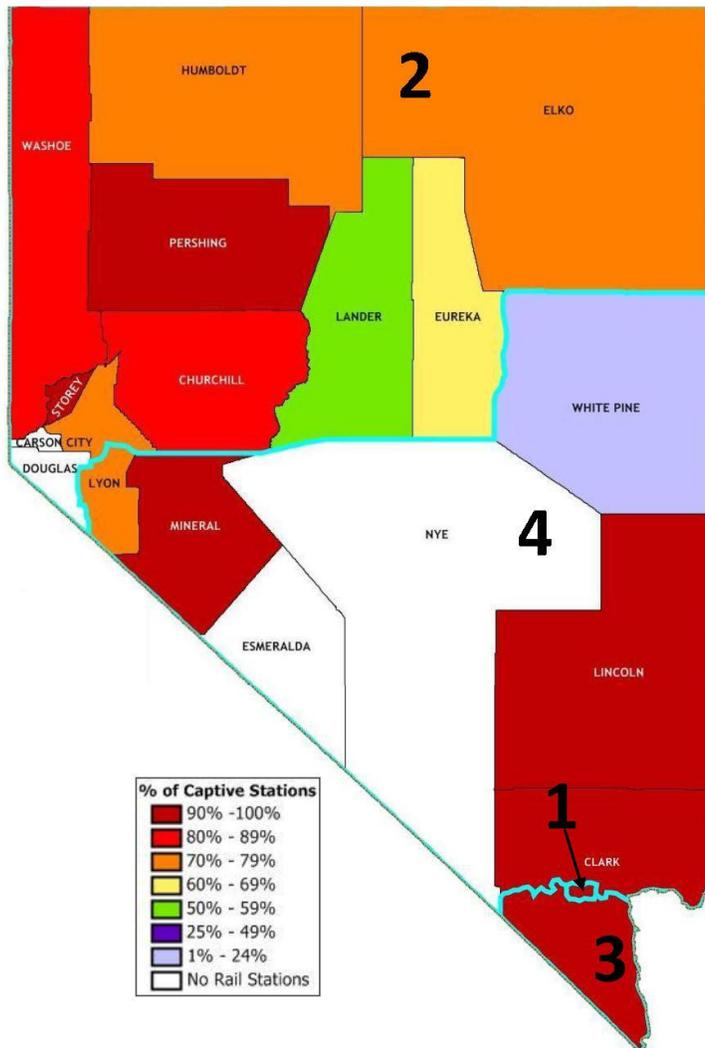
January 2013



Escalation Consultants, Inc.

Competition at Freight Rail Stations in the Congressional Districts of Nevada

Average Nevada Rail Station Captivity 76.2%



- Numbers represent Congressional District numbers, Congressional Districts are outlined by a heavy blue line.
- A freight station is a facility where trains regularly stop to load or unload freight.
- Freight Stations are captive when they have access to only one Class I railroad

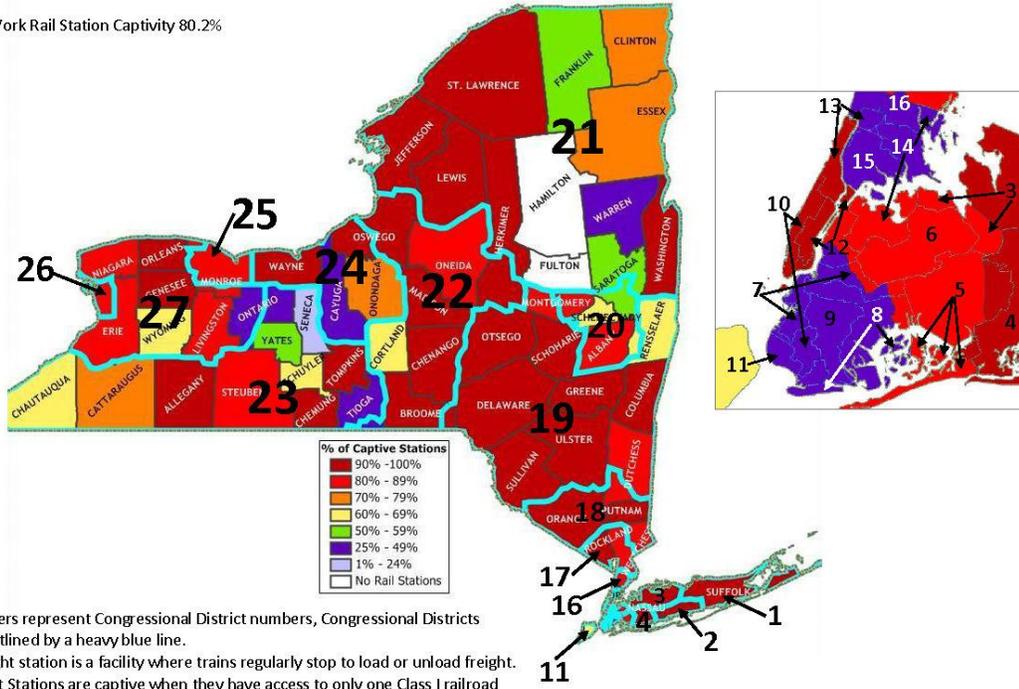


January 2013



Competition at Freight Rail Stations in the Congressional Districts of New York

Average New York Rail Station Captivity 80.2%

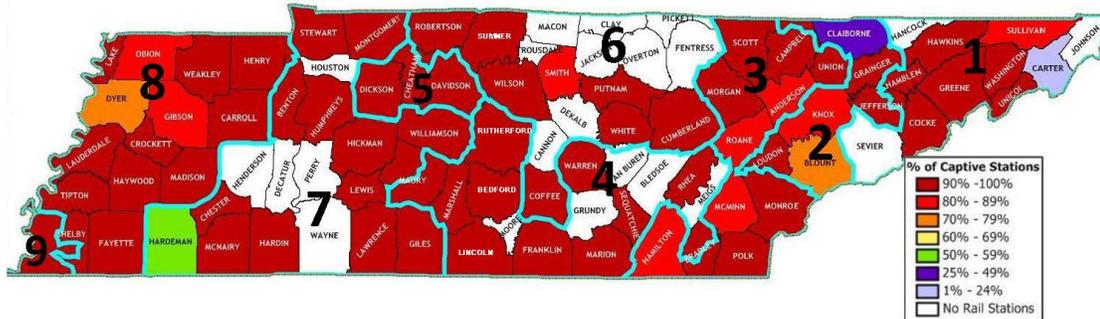


January 2013



Competition at Freight Rail Stations in the Congressional Districts of Tennessee

Average Tennessee Rail Station Captivity 92.5%



- Numbers represent Congressional District numbers, Congressional Districts are outlined by a heavy blue line.
- A freight station is a facility where trains regularly stop to load or unload freight.
- Freight Stations are captive when they have access to only one Class I railroad



January 2013



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