Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

June 9, 2016

Mr. Jeffrey Zients, Director
National Economic Council
The White House
1600 Pennsylvania Ave. N.W.
Washington, D.C. 20500

Re: Response of the Surface Transportation Board to Executive Order No. 13725

Dear Director Zients:

On April 15, 2016, President Obama issued an Executive Order to protect American consumers and workers and to facilitate competition in the U.S. economy, entitled "*Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy.*" Executive Order No. 13725, 81 Fed. Reg. 23,417 (April 20, 2016). The Executive Order sets forth a policy statement for advancing a fair, efficient, and competitive marketplace. The policy statement identifies harmful, anti-competitive practices, such as price-fixing, bid rigging, and unlawful collusion, and prioritizes Federal regulatory actions that promote competition and remove impediments to free markets for the overall benefit of the Nation's economy and the public.

In addition, the Executive Order outlines certain responsibilities for executive departments and agencies with respect to enhancing competition. In particular, subsection 2.d. of the order requires that agencies submit to the Director of the National Economic Council an initial list of:

(1) actions each agency can potentially take to promote more competitive markets;

(2) any specific practices, such as blocking access to critical resources, that potentially restrict meaningful consumer or worker choice or unduly stifle new market entrants, along with any actions the agency can potentially take to address those practices; and

(3) any relevant authorities and tools potentially available to enhance competition or make information more widely available for consumers and workers.

In accordance with subsection 2.d., I am providing the following list on behalf of the Surface Transportation Board (STB or Board).

(1) Actions the STB can potentially take to promote more competitive markets:

The Board's oversight of the Nation's freight railroad industry is informed by the Rail Transportation Policy (RTP) enacted by Congress, which, at various points, instructs the agency to ensure that the railroad industry is effectively competitive, but also that railroads are able to earn adequate revenues that sustain their long-term viability. Consistent with the Executive Order, the RTP states that it is Congressional policy: to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for rail transportation; to foster sound economic conditions in transportation and ensure effective competition and coordination between rail carriers and other modes; to reduce regulatory barriers to entry into and exit from the industry; to encourage honest and efficient management of the railroads; to encourage fair wages and safe and suitable working conditions in the railroad industry; and to prohibit predatory pricing and practices, avoid undue concentrations of market power, and prohibit unlawful discrimination. *See* 49 U.S.C. § 10101(1), (5), (7), (9), (11), and (12). In carrying out its mission, the Board must balance the tenets of the RTP, which are, at least to some extent, complementary and competing.

Pursuant to various statutes, the Board is empowered to facilitate competition between railroads and/or to enhance competition in the transportation industry. Among other things, the STB may:

- grant terminal trackage rights or reciprocal switching in response to a petition from a shipper (allowing "competitive access" to another railroad) – 49 U.S.C. 11102
- prescribe through routes if certain conditions are met – 49 U.S.C. 10705
- direct a railroad to move traffic over a route designated by a shipper if certain conditions are met – 49 U.S.C. 10747
- grant authority for a new entrant or an existing railroad to construct and/or operate a new railroad line (potentially resulting in greater competition between railroads or within certain markets) – 49 U.S.C. 10901
- grant authority for one railroad to operate over the lines of another railroad (trackage rights) (potentially resulting in greater efficiencies and/or access to markets) – 49 U.S.C. 11323

At the same time, the STB can use its rulemaking power or its exemption authority to issue industry-wide regulations that promote competition in a manner consistent with the RTP and its statutory mandate. Presently, the Board is involved in two such proceedings, which are directly relevant to the Executive Order:

- EP 704 (Sub-No. 1): in this proceeding, the STB has proposed to lift "exemptions" applicable to certain commodities because the STB has reason to believe that rail transportation of these commodities has, over time, become less competitive with other modes (trucks or barges); lifting the exemptions would mean that shippers of these commodities would be more easily able to seek relief before the Board for rate and service issues;
- EP 711: in this proceeding, the STB has been requested to re-examine and issue new rules governing competitive access relief for shippers that are captive to single railroad.

(2) Any specific practices, such as blocking access to critical resources, that potentially restrict meaningful consumer or worker choice or unduly stifle new market entrants, along with any actions STB can potentially take to address those practices;

The Board is not aware of prevalent practices in the rail industry, such as blocking access to critical resources that potentially restrict meaningful consumer access or worker choice or unduly stifle new market entrants. However, it is important to note that the United States' freight rail network is not an "open access" system. As such, each railroad essentially operates an exclusive franchise where it owns or leases its track, such that it can exclude another railroad from providing service to shippers on its network. To mitigate railroads' natural market power, federal law imposes various duties, obligations and limitations on railroads, notably the "common carrier" obligation to transport freight on reasonable request and to interchange traffic on fair and reasonable terms, and the requirement that railroads' rates, rules and practices must be reasonable. Despite their "closed" systems, railroads have, in some instances, agreed upon commercial arrangements that allow competitive access (for example, reciprocal switching or trackage rights) or such arrangements have been imposed by the STB or its predecessor (typically in the context of approving a railroad merger with pro-competitive mitigation measures). Additionally, as noted above, the STB is currently engaged in two rulemaking proceedings that have implications for enhancing the competitiveness of the industry.

In the area of new market entry, the STB has taken actions in the past to ensure that start-up rail operations – generally speaking, small "shortline" railroads – which are acquiring track via purchase or lease from another railroad – typically, a large, "Class I" railroad – are not subject to onerous commercial conditions that impinge upon their ability to serve customers. In this regard, the Board issued rules requiring that "interchange commitments," or "paper barriers," are publicly disclosed and potentially subject to review by the STB (EP 714). Also in the area of new market entry, STB regulations are highly streamlined, and generally impose minimal filing and review requirements on start-up operations involving existing track.

With respect to mergers and consolidations in the railroad industry, in 2001 the STB issued new rules governing review and approval of mergers between major railroads. Since that time, no major merger application has been formally filed with the STB. The new rules, which have not been tested, emphasize the need for a major merger to result in "enhanced competition" as a key benefit flowing from the transaction. Additionally, the rules state that the Board will consider whether the benefits of the proposed merger could be achieved through marketing agreements or other commercial arrangements that stop short of a consolidation.

In late 2015, Canadian Pacific Railway announced publicly that it was pursuing a merger with Norfolk Southern Railway. However, Norfolk Southern's board of directors was not receptive to the proposal, and rejected three different offers. In early 2016, Canadian Pacific submitted a petition to the Board, seeking a formal opinion on a hypothetical voting trust structure that it might use in connection with the proposed merger. Canadian Pacific withdrew its request for an opinion before the STB could rule on it.

(3) Any relevant authorities and tools potentially available to enhance competition or make information more widely available for consumers and workers.

As noted above, the STB has a number of authorities that potentially could be deployed to enhance competition.

The STB is presently engaged in a rulemaking (EP 724 Sub-No. 4) that would require Class I railroads to make certain service performance data available to the public on a weekly basis. The information will enhance the Board's ability to monitor industry operating conditions in near real-time. Additionally, the data will benefit shippers and other stakeholders by giving them information relevant to making commercial decisions about the movement of their freight.

Thank you for the opportunity to provide information in response to this Executive Order. If you have any questions or require additional information about the STB or its measures to comply with the Executive Order, please do not hesitate to contact me.

Sincerely,

Daniel R. Elliott III
Chairman