

Common Carrier Reforms to Promote a Healthy Market in the Rail Industry

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I. Introduction

The common carrier obligation (“CCO”) requires railroads to provide transportation or service to any shipper on reasonable request.¹ Rooted in 19th-century common law, this duty historically ensured that railroads—once the dominant shipping carriers—served the public interest by hauling all manner of freight at fair rates. While the industry was partially deregulated with the Staggers Rail Act of 1980, Congress left the CCO duty intact (now codified at 49 U.S.C. § 11101 *et seq.*).²

Railroads have thrived in the decades since deregulation, as evidenced by the industry’s improved productivity and lower rates, both of which have been largely due to competitive pressures from other transportation modes. Real average rail-freight rates have dropped by roughly 44% since 1980 (inflation-adjusted), even as productivity and volumes have surged.³ By the late 1990s, the Staggers Act had succeeded in creating a more innovative and financially stronger rail industry that could better compete with trucks and better meet shippers’ needs.⁴

But trucking was also deregulated in 1980. And unlike railroads, today’s motor carriers can generally choose what loads to carry and on what terms, without a statutory duty to serve all comers. This imbalance leaves railroads bearing unique burdens.

While trucking, barges, and pipelines have flourished in a deregulated environment, today’s freight market is radically different from what prevailed in the era when the CCO evolved. Further, many of the approaches taken to apply the CCO in order to regulate rail explicitly have proven counterproductive, given the dynamic nature of today’s shipping market.

Policymakers and industry stakeholders are currently debating whether the CCO, which the U.S. Surface Transportation Board (“STB”) has called “a pillar of the railroads’ obligations,”⁵ should be updated or reinterpreted to reflect competitive realities in the modern freight market. The overarching question is how to protect shippers’ access to rail service without stifling railroads’ efficiency or their ability to compete with other modes of transportation.

This issue brief examines the CCO’s legal foundations and how it has been interpreted; the challenges it poses in the modern era; and the ways that intermodal competition has evolved under deregulation. It also explores why certain regulatory approaches have been counterproductive. It

¹ *Shippers Committee, OT-5 v. I.C.C.*, 968 F.2d 75, 76 (D.C. Cir. 1992), <https://casetext.com/case/shippers-committee-ot-5-v-icc>.

² See Jack Novak *et al.*, *Railroads’ Common Carrier Obligation (Summary)*, U.S. DEP’T. OF AGRIC. (Jun. 2020), available at <https://www.ams.usda.gov/sites/default/files/media/RailroadsCommonCarrierObligation.pdf>.

³ See Matthew Jinoo Buck, *How America’s Supply Chains Got Railroaded*, THE AM. PROSPECT (Feb. 4, 2022), <https://prospect.org/economy/how-americas-supply-chains-got-railroaded>.

⁴ See TRB Special Report 318: *Modernizing Freight Rail Regulation*, TRB TRANSP. RSCH. BD. OF THE NAT’L ACAD., available at <https://onlinepubs.trb.org/onlinepubs/sr/sr318highlights.pdf> (last visited Feb. 26, 2025).

⁵ Marybeth Luczak, *AAR Backs BNSF, Calls STB Common Carrier Obligation Decision ‘Disastrous’*, RY. AGE (Sep. 5, 2023), <https://www.railwayage.com/freight/class-i/aar-backs-bnsf-calls-stb-common-carrier-obligation-decision-disastrous>.

concludes by arguing for specific reforms to the CCO and rail regulations that would effect more market-oriented outcomes.

II. The Common Carrier Obligation

The CCO originates in common-law principles that required railroads (and other public carriers) to serve the public upon reasonable request. The Interstate Commerce Act of 1887 effectively codified these duties in broad terms.⁶ Today, 49 U.S.C. § 11101(a) provides that a rail carrier “shall provide the transportation or service on reasonable request,” encapsulating the duty to serve shippers at reasonable rates and with reasonable service. Notably, the U.S. Supreme Court has observed that the Interstate Commerce Act “codified the common-law obligations of railroads as common carriers,” and that it did so “in the most general terms.”⁷ In other words, Congress set forth the obligation but left the specifics of what is “reasonable” to be fleshed out by regulators and courts over time.

Thus, given the lack of specificity in the statutory language, the precise scope of railroads’ obligations has been defined case-by-case. The STB (and, before it, the Interstate Commerce Commission (“ICC”)) and courts have long recognized that, while a railroad must furnish service upon reasonable request, a common carrier’s obligation is not unlimited and does not require the carrier to fulfill every request without discretion.⁸ Rather, the carrier is only required to act reasonably in its dealings with its customers.⁹

Moreover, the standard of what constitutes “reasonable service” is not especially rigid; it is contingent on the specific conditions and circumstances at the time.¹⁰ This flexible approach ensures that, while railroads must provide service when warranted, they are not compelled to allocate unlimited resources in a manner that could jeopardize efficient operations. The CCO’s practical limits therefore allow railroads to tailor how they fulfill requests, so long as they do not flatly deny service without good cause.

At the same time, railroads cannot arbitrarily refuse to haul certain commodities, or arbitrarily preference certain customers.¹¹ Instead, the common-carrier duty imposes on railroads a baseline obligation to carry all goods within their common-carriage scope, barring a valid exception. Disputes have arisen at the extremes over whether railroads can even decline carriage for hazardous shipments, a matter discussed further, *infra*.

⁶ *Riffin v. Surface Transportation Board.*, No. 11-1480 (D.C. Cir. Oct. 25, 2013), <https://cases.justia.com/federal/appellate-courts/cadc/11-1480/11-1480-2013-10-25.pdf?ts=1411135459>.

⁷ *Am. Trucking Ass’ns v. A., T. & S. F. Ry. Co.*, 387 U.S. 397 (1967), at 406.

⁸ *Livestock, South, Southwest, Central and Western Territories*, 346 I.C.C. 418 (1974), at 435.

⁹ See *Pa. R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. (1915), at 133.

¹⁰ See *B.J. Alan Co. Inc. v. I.C.C.*, 897 F.2d 561 (D.C. Cir. 1990).

¹¹ *Louisville & Nashville R. Co. v. United States*, 282 U.S. 740 (1931).

In short, the CCO is a real and enforceable duty, but one whose exact contours—whether a request and/or a service is “reasonable,” how far the duty extends in special cases—are often decided through regulatory judgment.

For example, BNSF Railway, the largest U.S. freight railroad, was recently found to have breached its common-carrier duty by curtailing service to a coal shipper below “reasonable” levels.¹² In that decision, the STB issued an injunction compelling BNSF to transport millions of tons of coal that the railroad had not planned to move, citing the railroad’s statutory obligation to provide “adequate” service upon reasonable request. Such interventions underscore the continued force of the CCO: regulators will step in when a railroad’s business-driven service modifications are perceived to collide with the duty to serve the public on reasonable terms.¹³

The CCO’s legal framework establishes a baseline duty to serve shippers, but with room for interpretation. Railroads cannot flatly refuse traffic tendered in the usual course of business (especially if the shipper has no alternative), but they retain some discretion in how to meet requests, and can seek relief from truly impossible demands. The tension between carriers’ commercial interests and shippers’ reliance on rail service is built into the CCO’s general language. As discussed in the next section, this tension has only grown in the modern era, as railroads operate in a competitive and largely deregulated marketplace.

A. The CCO in the Modern Era

The governing law allows shippers and carriers to negotiate mutually agreeable terms in contracts; this has been one of the enduring benefits of the deregulatory actions of the 1970s and 1980s, even as the CCO has been preserved as a failsafe for shippers to obtain rail service where no contract has been struck. But railroads have been concerned that the recent BNSF decision may allow shippers to invoke the CCO to extract historically abnormal terms from carriers, such as by requesting the STB to set requirements about service frequency, investments for surge demand, and traffic prioritization.

Large railroads and many of their customers sometimes disagree sharply about what the CCO requires, and there is cause to be concerned about such disagreements. An expansive interpretation of the CCO might hamstring railroads’ ability to run an efficient and profitable operation. Some recent operational innovations in rail service can reduce service frequency or flexibility for some

¹² See *STB Grants Preliminary Injunction; Orders BNSF Railway Company to Transport 4.2 Million Tons of Coal for Navajo Transitional Energy Company, LLC*, SURFACE TRANSP. BD., (Jun. 23, 2022), available at <https://www.stb.gov/wp-content/uploads/PR-23-11.pdf>.

¹³ A further problematic aspect of this case was that the board effectively used service levels proposed during private-contract negotiations to establish what constituted “adequate” service under the CCO. See, e.g., *STB Decision Navajo Transitional Energy Company LLC*, Docket No. NOR 42178 (2023), at 6-7. This blurred the traditional distinction between contract service (which typically provides premium service in exchange for volume commitments and is outside the board’s jurisdiction) and common-carrier service (wherein shippers make no volume commitments but receive basic tariff service). By establishing contract-level service as the required CCO standard, without requiring corresponding shipper commitments, the board significantly expanded the scope of the common-carrier obligation beyond its historical application.

shippers, even as they serve to increase overall reliability. Such changes should largely be encouraged, as they yield much more efficient operations that benefit shippers and carriers alike.¹⁴

Indeed, the CCO should be understood as a flexible framework that encourages innovation and adaptability, rather than a rigid mandate that preserves outdated service models. It ought to empower carriers to modify or discontinue unprofitable offerings and to experiment with new technologies that improve overall efficiency, even if this means that some shippers may not receive their preferred service mix at all times. The CCO should foster an environment in which market forces and competition drive service improvements, ensuring that carriers can adjust operations to meet evolving economic realities while still providing service on reasonable terms.

This has proven all the more important in the modern freight market, as intermodal competition for shipping has become more intense. A core premise behind the common carrier obligation, as it operates today, is that market competition among transportation modes can often protect shipper interests better than regulatory mandates. The Staggers Rail Act itself was predicated on this idea: Congress explicitly sought “to ensure effective intermodal competition” in freight transport.¹⁵ Furthermore, in its statement of policy, Congress affirmed that regulation should be minimized to allow railroads to “rely on competition and the demand for services” to set rates and service terms, with a fallback to protect against abuse of market power.¹⁶

In 1980, railroads were struggling; bankruptcies were common, and rigid regulation prevented them from adapting. Staggers dramatically rolled back economic controls, allowing rail carriers to set rates more freely, enter into confidential contracts with shippers, and shed unproductive routes.¹⁷ The act retained a regulatory “backstop” for captive shippers (e.g., maximum rate relief in cases where no competition exists and rates exceed a certain threshold).¹⁸ But fundamentally, it shifted policy toward letting competition and market demand—rather than blanket obligations—govern rail-service levels.

Four and a half decades later, the results of rail deregulation have been studied extensively. Virtually all analyses conclude that rail deregulation led to lower costs, lower shipping rates, and improved service innovation, benefiting both the industry and many of its customers. Since 1980, rail productivity has skyrocketed, while average real freight rates have fallen by more than 40%.¹⁹ Railroads’ unit costs declined, and those efficiency gains were largely passed on to shippers in the form of more affordable rates.

¹⁴ *Id.*

¹⁵ See Gene C. Griffin, *Synopsis of Staggers Rail Act of 1980*, BUREAU OF TRANSP. STAT. (1981), at 1, available at https://rosap.nrl.bts.gov/view/dot/60546/dot_60546_DS1.pdf.

¹⁶ *Railroad Regulation: Economic and Financial Impacts of the Staggers Rail Act of 1980* (U.S. Gen. Acct. Off., GAO/RCED-90-80, May 1990), at 2, available at <https://www.gao.gov/assets/rced-90-80.pdf>.

¹⁷ See B. Kelly Eakin et al., *Railroad Performance Under the Staggers Act*, REGULATION (Dec. 2010), at 32, available at <https://www.cato.org/sites/cato.org/files/serials/files/regulation/2010/12/regv33n4-6.pdf>.

¹⁸ *Id.* at 33

¹⁹ *Id.* at 33; Buck, *supra* note 3, at 2.

By one estimate, rail shippers in 2019 paid about 44% less per ton-mile (inflation-adjusted) than they would have in 1980, reflecting the intense competitive pressure from trucks and other transportation modes in most markets.²⁰ The railroads' financial health also improved markedly: from a position of near collapse in the 1970s, the industry is now revenue-adequate and able to invest billions annually in maintenance and capacity.²¹ This turnaround is widely credited to the more flexible, market-driven environment post-Staggers.

In practice, the vast majority of rail freight today is inherently competitive. For many commodities and routes, shippers can choose between rail and truck transport (and sometimes waterways or pipelines). For example, most manufactured goods, consumer products, and food items can ship by either rail intermodal or by truck. Even bulk commodities like grain or coal often have alternatives: a grain elevator might have access to barge transport or employ trucks to a different rail line; a power plant might be served by two railroads or able to switch to natural gas (delivered by pipeline) if coal delivery falters.

In a major competition study, the STB found in 2009 that, while some shippers remain “captive” to a single railroad, the overall extent of captivity had been declining, as more short-line railroads and transload options emerged and as trucking became more efficient for longer distances.²² In its study of the same subject, the Government Accountability Office (“GAO”) reached a similar conclusion.²³ Thus, driven by market competition, a significant majority of rail traffic now moves at rates that indicate effective competition, while truly captive traffic (paying very high rates relative to cost) is a small and somewhat shrinking portion of the whole.²⁴

This context is vital when considering the common carrier obligation. Back in the early 1900s, if a railroad didn't serve a town or discriminated against a shipper, that customer might have had no alternative means to ship goods. Today, that scenario is far less common. Freed from route and commodity restrictions since the Motor Carrier Act of 1980, motor carriers now provide ubiquitous competition, often able to serve even remote areas by road.²⁵ For many freight categories, railroads compete not only with one another, but trucks as well.

The playing field is uneven, however, when it comes to obligations: a trucking company can generally refuse a load (perhaps it's too dangerous, unprofitable, or inconvenient) without legal penalty, whereas a railroad refusing a similar shipment could face STB enforcement under the CCO. This disparity can distort competition. As the Supreme Court has noted, “the Interstate Commerce Act

²⁰ Buck, *supra* note 3.

²¹ Eakin, *supra* note 17, at 34-35.

²² *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition*, SURFACE TRANSP. BD. (2009), at 10-11, available at <https://www.stb.gov/wp-content/uploads/files/docs/competitionStudy/Executive%20Summary.pdf>.

²³ *Id.*

²⁴ *Id.*

²⁵ See Motor Carrier Reform Act of 1980, Pub. L. No. 96-296, 94 Stat. 793.

codified the common-law obligations” of rail carriers,²⁶ but modern motor carriers and barges are not saddled with equivalent duties.

Deregulation holds the potential to harness market discipline in order to achieve efficient outcomes. In the rail context, this means allowing railroads to rationalize routes and services according to demand, which in turn lowers overall logistics costs. Indeed, one observed effect of Staggers was that railroads shed unprofitable lines.²⁷ While painful for some local shippers, this “right-sizing” of the network eliminated huge inefficiencies and enabled rail carriers to focus their investments on core routes—improving service for the majority of traffic.²⁸ By the late 1990s, rail carriers were “able to compete with trucks, invest in capacity, and respond flexibly to shippers’ needs,” thanks to the freedom granted by deregulation.²⁹ In other words, giving railroads more commercial freedom ultimately benefited shippers broadly through more competitive rates and a financially viable rail system.

The common carrier obligation was, however, one piece left largely untouched by deregulation. As discussed further below, railroads are still required to obtain agency approval to discontinue service on a line (or abandon it), and they still must quote common-carriage rates and serve traffic at those rates if requested (even though most large shippers now use confidential contracts). In a competitive environment, there is arguably less need for a broad mandatory-service obligation. In many markets, intermodal rivalry constrains railroads from behaving monopolistically; if they try, shippers will simply switch modes.

III. Specific Problems with the STB’s Interpretation of the CCO

The Surface Transportation Board’s interpretation of the common carrier obligation has created several significant tensions between the goals of regulatory policy and railroads’ need to operate viable businesses in a competitive marketplace. While the STB aims to protect shipper interests and ensure broad access to rail service, its expansive reading of the CCO often fails to adequately account for operational realities and the market conditions that rail carriers face. In particular, the board’s interpretations frequently result in mandates that can impair railroads’ ability to optimize their networks, manage risk effectively, or respond to changing market conditions.

Critically, the board’s approach often loses sight of the fundamental economic principle that should guide CCO interpretation: maximizing welfare for end consumers—the ultimate beneficiaries of freight transportation. While shippers may attempt to leverage the regulatory process for competitive advantage, the proper focus should be to ensure that CCO interpretations enhance market efficiency and ultimately benefit final consumers through lower prices and better service.

²⁶ American Trucking Assns., *supra* note 7, at 406.

²⁷ Eakin, *supra* note 17, at 33.

²⁸ *Id.*

²⁹ See TRB, *supra* note 4.

The current interpretative framework, by contrast, frequently devolves into arbitrating disputes between shippers and carriers without adequately considering whether the outcomes actually benefit end consumers, rather than simply granting advantages to particular market participants. This misaligned focus not only creates operational difficulties for railroads but potentially undermines the very consumer benefits that the CCO was intended to protect.

In several key areas, the board's decisions have created operational challenges for carriers, while potentially undermining the efficiency gains that were achieved by partial deregulation. The following sections examine four specific areas where the STB's interpretation of the CCO has produced particularly problematic outcomes: hazardous-waste transport obligations; challenges in discontinuing service on low-density lines; emergency-service orders that override private contracts; and rate-review procedures that can threaten carriers' revenue adequacy. Each of these areas illustrates ways that overly rigid or expansive interpretations of the CCO may conflict with sound business practices and market-based decision making.

A. Hazardous-Waste Transport Obligations

Under 49 U.S.C. § 11101(a), U.S. rail carriers have a CCO to transport hazardous materials upon reasonable request. They cannot pick and choose their cargo based on risk. In *Riffin v. Surface Transportation Board*, the U.S. Circuit Court of Appeals for the D.C. Circuit upheld a decision that a rail carrier may not exclude classes of dangerous shipments (such as toxic-inhalation hazards) from its services.³⁰ In that case, an applicant sought to operate a short rail line but attempted to carve out an exception to refuse chlorine and similar hazardous chemicals, citing high insurance costs and liability concerns. The STB rejected the proposal, and the court affirmed, holding that railroads have a “statutory common carrier obligation to transport hazardous materials” so long as federal safety regulations permit their movement.³¹ In other words, the duty to serve covers even extremely hazardous commodities, and this statutory mandate overrides any common-law right a carrier might claim to avoid particular cargo. The D.C. Circuit upheld the board’s authority to compel hazmat carriage as a valid interpretation of the law.³²

This obligation, however, puts railroads in a difficult bind. Hauling chemicals like chlorine, anhydrous ammonia, or other highly toxic or flammable substances entails the risk of catastrophic accidents. The potential liability from a major release—whether caused by accident or sabotage—can be enormous, and only limited insurance coverage is available in the market for such worst-case scenarios. While rail carriers must carry expensive liability insurance, they remain exposed to uninsured risks because “there is no market for insurance that would fully protect railroads” in the event of a truly catastrophic hazardous release.³³ Accordingly, railroads incur significant costs to

³⁰ Shippers Committee, *supra* note 1.

³¹ *Id.*

³² See *Riffin v. STB*, 733 F.3d 340 (D.C. Cir. 2013), at 344.

³³ See *Freight Rail & Common Carrier Obligation*, ASS'N OF AM. R.R., <https://www.aar.org/issue/common-carrier-obligation> (last visited Mar. 24, 2025).

handle hazmat safely: higher insurance premiums, specialized safety procedures, and capital investments in tank-car safety and route-risk management.³⁴ These costs can far exceed those of ordinary freight service.

Critically, railroads have only limited ability to recoup the heightened cost of bearing such risks. By law, common-carrier rates must be “reasonable,”³⁵ and the STB polices rate reasonableness. In practice, this constrains railroads from simply charging sufficient rates on dangerous shipments to cover their potential liability.

By necessity, this makes it difficult, if not impossible, to accurately price risk into the service rates charged to shippers. Railroads cannot unilaterally set rates adequate to offset worst-case risks. If challenged, such rates are likely to be struck down as unreasonable, and in competitive markets, shippers would balk. The result is a cost-recovery gap: rail carriers effectively subsidize a portion of the risk associated with mandatory hazmat service, bearing uncompensated exposure. For example, a catastrophic toxic release could theoretically bankrupt even a major railroad, yet rates for transporting such materials do not fully account for that possibility.³⁶

The CCO to haul hazardous cargo thus exemplifies the modern tension between public-service requirements and market-based risk management: railroads must shoulder outsized risks that their trucking competitors can often avoid, which in turn affects how carriers price services and insure their operations in the hazmat sector.

B. STB’s Emergency Powers and Overrides of Private Contracts

The Surface Transportation Board has broad emergency powers under 49 U.S.C. § 11123 to intervene when service disruptions threaten the public interest. In emergency situations—generally defined as circumstances like sudden network failures, severe congestion, or other failures of traffic movement—the board can issue service orders that direct railroads to take specific actions in order to alleviate the crisis. These orders can require one carrier to handle traffic for another, to prioritize certain shipments, or to temporarily reroute or share lines, even “without regard” to the normal operating arrangements.

Crucially, the STB’s emergency directives can also override private contractual arrangements between carriers and their shippers (or between connecting carriers). In effect, the board may mandate service levels or routes that differ from what the railroad originally agreed to, if the STB deems it necessary to address an urgent service shortfall.

Although such directives are meant for true emergencies (such as natural disasters or carrier shutdowns), the STB has shown in recent years that it is willing to use § 11123 powers in less

³⁴ *Id.*

³⁵ 49 U.S.C. §§ 10701(c), 10702.

³⁶ See *Common Carrier Obligation: Why Freight Railroads Must Transport Hazmat*, ASS’N OF AM. R.R. (May 2023), available at <https://www.aar.org/wp-content/uploads/2023/05/AAR-Hazmat-Common-Carrier-Obligation-Fact-Sheet.pdf>.

extraordinary (but still serious) service crises. A prominent example came in late 2022, when severe railroad-service problems left a California poultry producer (Foster Farms) without sufficient animal-feed deliveries. Foster Farms petitioned the STB for relief, and the board issued an emergency-service order directing Union Pacific Railroad to supply and prioritize the needed grain-unit trains and to adhere to a specified delivery schedule.³⁷

The order, issued under § 11123, essentially compelled the railroad, on pain of regulatory sanction, to provide capacity and service beyond what its private arrangements had guaranteed. Similarly, the board in 2023 took the unprecedented step of issuing a preliminary injunction requiring BNSF Railway to haul millions of tons of export coal for Navajo Transitional Energy Co. (NTEC) after finding that BNSF had been inadequately servicing that mine. BNSF was directed to transport 4.2 million tons of coal and, if capacity permitted, an extra 1 million tons to meet NTEC's needs.³⁸ This mandate went well beyond BNSF's own operating plan, effectively overriding the railroad's allocation of locomotives, crews, and network capacity.

Such interventions create significant legal and operational uncertainty.³⁹ When there is always the potential for an emergency-service order to drop from above, a carrier cannot be sure that its privately negotiated contracts (which might limit volumes or specify transit times) will define its actual obligations. Instead, the railroad may be unexpectedly forced by regulators to furnish extra trains or to give priority to certain traffic, potentially at the expense of other customers or its broader operating plan.

In the NTEC coal case, for instance, BNSF argued on appeal that the board's order compelled it to "stand ready to move billions of pounds of coal, never mind the effects on its network and the diversion of resources away from serving other shippers."⁴⁰ Ultimately, the parties in that dispute settled, but the STB's intervention nonetheless illustrates the rather extreme disruption that second

³⁷ See *STB Directs Up to Deliver Trains to Foster Farms*, SURFACE TRANSP. BD. (Dec. 30, 2022), <https://www.stb.gov/news-communications/latest-news/pr-22-56>. A significant concern in this case was the board's failure to clearly articulate the legal basis for its emergency-service order. Some board members expressed discomfort with what appeared to be an extension of regulatory authority without properly identifying the specific statutory grounds that empowered such intervention. This lack of clear legal foundation raised questions about the scope and limits of the STB's emergency powers, potentially creating regulatory uncertainty for railroads operating in similar circumstances.

³⁸ See *STB Grants Preliminary Injunction; Orders BNSF Railway Company to Transport 4.2 Million Tons of Coal for Navajo Transitional Energy Company, LLC*, SURFACE TRANSP. BD. (Jun. 23, 2022), available at <https://www.stb.gov/wp-content/uploads/PR-23-11.pdf>.

³⁹ Note also that the board has left the application of emergency-service order to contracts ambiguous. See *Expedited Service*, EP 628 (1998), at 10 ("However, where no transportation is being provided, we do not believe that the mere existence of a contract precludes us from providing for temporary emergency service, upon a proper showing, so that traffic can move while any contract-related issues are being litigated in the courts."); see also *Expedited Relief for Service Emergencies EP 762* ("The NPRM did not make any new proposal regarding the application of section 11123 to contract traffic. In *Expedited Relief*, EP 628, the Board concluded that any advance rejection of all authority to address situations where a contract exists in an emergency would be inappropriate and declined to include any bright-line prohibition. *Expedited Relief*, EP 628, slip op. at 10. In the NPRM, the Board made no proposals changing the status of existing law on this issue and sees no reason to revisit that position here.")

⁴⁰ Luczak, *supra* note 5.

guessing contracts can present. Because common-carrier service is provided on reasonable request, rather than guaranteed contract volumes, BNSF pointed out that NTEC itself had no firm obligation to ship the full 4 million tons, even though BNSF had to devote capacity as if it would, straining its system.⁴¹

Likewise, while the Foster Farms order was narrower in scope, it set a precedent that the board might micromanage individual supply chains whenever it perceives a looming crisis. This effectively serves to insert the regulator into the railroad's day-to-day operations and nullify the normal contract or tariff terms during the emergency period.

These emergency powers risk undermining carriers' ability to manage their own operations and capacity. Railroads carefully balance their resources among many customers; an unexpected order to prioritize one shipper can ripple throughout the network. To be sure, the statute tries to guard against abuse; for example, § 11123 instructs that the board should not issue an order that "substantially impairs" a carrier's ability to serve its other customers or to fulfill its obligations.⁴² In practice, however, these judgments are subjective.

The broader policy concern is that heavy-handed use of emergency orders could discourage private investment and planning. If railroads fear that carefully laid schedules and contracts can be upended by regulatory fiat, they may be more cautious about making capacity commitments or efficiency-driven changes (such as precision-scheduled-railroading techniques) that reduce operational slack. In short, while the STB's emergency powers may be a necessary safety valve to protect the public in dire situations, their recent use in service-quality cases has prompted debate about the proper limits of intervention, and the need for clearer standards to avoid sowing uncertainty in the rail marketplace.

C. Final-Offer Rate Review and Its Impact on Rail Carriers

Final-offer rate review (FORR), a recently introduced STB procedure to adjudicate certain rail rate disputes, has become a flashpoint for the policy debate about fairness and the STB's statutory authority. Under the CCO, rates must be reasonable; if a shipper believes they are not reasonable, they can bring a rate case. Traditionally, when a shipper believes a common-carrier rate is unreasonably high, the STB must determine a maximum reasonable rate under 49 U.S.C. §§ 10701 and 10704. In large rate cases, this has meant complex, data-intensive litigation, often employing the stand-alone-cost (SAC) test.⁴³

The FORR process was modeled loosely on the arbitration process used in Major League Baseball contract disputes. FORR allows each party to submit its final offer for what the reasonable rate should be, and the board then selects one offer or the other, without modification, as the

⁴¹ Luczak, *supra* note 5.

⁴² 49 U.S.C. § 11123 (c) (2).

⁴³ See *Union Pacific R.R. Co. v. Surface Transp. Bd.*, No. 22-3648, Slip op. (8th Cir. Aug. 20, 2024), available at https://11f458b2-df01-4ad9-ae57-300f05b7cea3.usrfiles.com/ugd/11f458_18e19593646f4491a54f708c7597b93f.pdf.

resolution.⁴⁴ The idea was to streamline decisionmaking by forgoing exhaustive economic analysis; rather than painstakingly calculating the best rate, the board would instead choose whichever side's proposal it found more reasonable.

Rail carriers criticized this approach on both legal and practical grounds. They argued that FORR exceeds the STB's authority under the Interstate Commerce Act, which requires the agency to determine and impose only reasonable rates.⁴⁵ Simply picking one of two proposals, the railroads contended, is an abdication of the board's duty to conduct a reasoned analysis. In short, the FORR rule "flatly exceeds the agency's authority" because the board would do "no independent analysis" and would abandon "sound economic principles" in favor of an arbitrary up-or-down choice.⁴⁶

This critique found a receptive ear in the courts: in 2024, the 8th U.S. Circuit Court of Appeals vacated the STB's FORR rule, holding that the process improperly prevented the board from giving due consideration to the statutory factors for rate reasonableness.⁴⁷ The court noted that the statute directs the STB to "review" challenged rates based on multiple factors (e.g., the carrier's revenues, the transport conditions, etc.) per 49 U.S.C. § 10701(d)(2)), and that simply choosing between the shipper's or railroad's final offer without adjustment failed to meet that mandate.⁴⁸ In essence, the *vacatur* confirmed the rail industry's view that FORR short-circuits the legal standard for rate review.

Further, from a policy perspective, the FORR unfairly limits carriers' ability to defend their pricing and threatens their revenue adequacy. At the very least, traditional rate cases allow carriers to present detailed evidence of their costs, investment needs, and the rationale behind a challenged rate. The final-offer approach, by contrast, forces a binary choice and often comes with tight timelines and page limits that constrain evidence. In the STB's initial proposal, small rate cases could be decided under FORR in as little as 135 days from start to finish, with each side's submission limited in length and complexity.

Such uncertainty and one-way risk (since a railroad's high final offer might simply be rejected in favor of the shipper's lower figure) can serve to chill the railroads' pricing flexibility. Carriers might preemptively restrain rate increases for fear that any aggressive pricing will be knocked down in a fast-track FORR case that they have scant ability to defend.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ AAR Preliminary Statement on STB's Final Offer Rate Review and ADR Decisions, ASS'N OF AM. R.R. (Dec. 19, 2022), <https://www.aar.org/news/aar-preliminary-statement-on-stbs-final-offer-rate-review-and-adr-decisions/#:~:text=FORR%2C%20the%20rule%20modeled%20on,shipper%20or%20by%20the%20railroad.>

⁴⁷ Union Pacific R.R. Co., *supra* note 43.

⁴⁸ Union Pacific R.R. Co., *supra* note 43.

There is also the broader concern of revenue adequacy—the principle that rail regulation should allow carriers to earn sufficient revenue to attract investment and maintain their networks.⁴⁹ If shippers can routinely leverage FORR to win rate reductions, it will erode carriers' earnings on traffic, which is often used to cross-subsidize infrastructure and service improvements systemwide.

For now, the FORR has been nullified. Going forward, the board may revisit how to craft a simplified rate review that survives legal scrutiny, perhaps by incorporating some independent analysis or making the program truly voluntary (the STB had also proposed a voluntary arbitration program alongside FORR). The risk of this sort of arbitrary intervention remains high. The FORR episode highlights the friction between expeditious shipper relief and robust procedural protection for carriers.

After decades of productive deregulation, mechanisms like FORR represent a step backward toward intrusive regulation that could hamstring pricing for the sake of a minority of disputes. The challenge for policymakers is to find a balanced solution that resolves smaller rate complaints efficiently, without undermining the economic foundation that has allowed the rail industry to achieve financial stability since deregulation.

D. Challenges in Discontinuing or Reducing Service on Low-Density Lines

Another challenge for U.S. rail carriers is the difficulty of shedding or scaling back service on lightly used, low-density branch lines. Under 49 U.S.C. § 10903, a railroad may not abandon a line (or discontinue service) without prior approval from the STB.⁵⁰ The law requires the STB to determine that an abandonment is consistent with the “public convenience and necessity” before allowing a carrier to exit a line.

Moreover, existing regulations promulgated under this law are a labyrinth of procedural requirements.⁵¹ The process is often contentious and protracted, involving detailed filings, environmental reviews, possible offers of financial assistance from interested buyers, and the opportunity for protests by shippers and communities. Railroads facing dwindling traffic on a branch cannot simply halt service; they must continue to maintain the track and operate trains (even at a loss) until they receive regulatory permission to abandon the line.⁵²

⁴⁹ 49 U.S.C. § 10704 (a) (2).

⁵⁰ While abandonment procedures can be burdensome, the STB does provide streamlined alternatives. Railroads may use an exemption proceeding under 49 C.F.R. § 1152.60, which involves fewer procedural hurdles than standard abandonment. Additionally, a special class exemption exists for out-of-service lines under 49 C.F.R. § 1152.50. Despite these options, the abandonment process still represents a regulatory constraint on railroads' operational flexibility that their intermodal competitors do not face.

⁵¹ 47 C.F.R. pt. 1152, <https://www.ecfr.gov/current/title-49/subtitle-B/chapter-X/subchapter-B/part-1152>.

⁵² See *STB to Review Small Roads' Line-Abandonment Rules*, PROGRESS. RAILR. (Aug. 18, 2003), https://www.progressiverailroading.com/rail_industry_trends/news/STB-to-review-small-roads-line-abandonment-rules-5421.

In many cases, local shippers or elected officials will oppose an abandonment out of concern for losing rail access, leading the STB to scrutinize the railroad's profitability claims and sometimes to delay or deny the request.⁵³ The railroad's common-carrier obligation thus endures unless and until the STB grants relief—effectively compelling carriers to serve “paper traffic” for public-interest reasons, even when a line is no longer economically viable.

The legal and regulatory framework governing line abandonments was somewhat liberalized by the Staggers Rail Act of 1980, but it still requires balancing carrier and public interests. The STB weighs such factors as the line's current and prospective traffic, the revenue inadequacy or losses in maintaining the line, the availability of alternative transportation for shippers, and the broader regional impacts.⁵⁴ If an abandonment is approved, interested parties may invoke 49 U.S.C. § 10904 to force the carrier to sell the line for continued operation (often at its salvage value) rather than scrap it—another mechanism that can compel continuation of service under new ownership.

From the carrier's perspective, these protections for low-density lines can impose serious economic burdens. Maintaining a stretch of track that sees only a handful of railcars (or none at all) can cost tens of thousands of dollars per-mile annually in maintenance, inspections, and taxes, with little or no revenue to offset it. Studies have found that the lowest-density rail lines face “formidable costs” to maintain or rehabilitate, far out of proportion to their traffic levels.⁵⁵

This is one reason that Class I railroads have shed so many branch lines in the past: a short line or regional operator with lower overhead might keep them marginally profitable, but for a large railroad, these light routes undermine efficiency. By one estimate, the track-maintenance cost per-car-mile on small railroads (which operate many light-density lines) is more than three times higher than on Class I mainlines.⁵⁶

STB proceedings illustrate the difficulties for carriers. In one noteworthy case, CSX Transportation sought to abandon an essentially defunct 122-mile line in West Virginia that had produced no freight revenue for more than a year.⁵⁷ The ICC (predecessor to the STB) initially denied the abandonment, relying on speculative hopes of future traffic and community opposition. The D.C. Circuit reversed that decision as unsupported by substantial evidence, noting it was undisputed that keeping the line would force the railroad to incur substantial losses with no realistic prospect of new

⁵³ *Railroad Ventures Inc. v. Surface Transp. Bd.*, 299 F.3d 523 (6th Cir. 2002).

⁵⁴ *CSX Transportation Inc. v. Surface Transportation Board*, 96 F.3d 1528 (D.C. Cir. 1996).

⁵⁵ See *Deferred Maintenance and Delayed Capital Improvements on Class II and Class III Railroads*, U.S. DEP'T OF TRANSP. (1989), [https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/14975/Deferred_Maintenance_and_Delayed.pdf#:~:text=concentration%20and%20magnitude%20of%20those,railroads%2C%20and%20assistance%20from%20communities;Testimony%20of%20Chuck%20Baker,%20President,%20American%20Short%20Line%20and%20Regional%20Railroad%20Association,%20BD.%20THE%20SURFACE%20TRANSP.%20BD.,%20Docket%20No.%20EP%20711%20\(Sub-No.1\),%20Reciprocal%20Switching%20\(Feb.%2014,%202022\),%20https://www.aar.org/wp-content/uploads/2022/02/ASLRRRA.pdf#:~:text=%20Small%20railroads%20average%20%243,%20of%20their%20light%20density%20track.](https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/14975/Deferred_Maintenance_and_Delayed.pdf#:~:text=concentration%20and%20magnitude%20of%20those,railroads%2C%20and%20assistance%20from%20communities;Testimony%20of%20Chuck%20Baker,%20President,%20American%20Short%20Line%20and%20Regional%20Railroad%20Association,%20BD.%20THE%20SURFACE%20TRANSP.%20BD.,%20Docket%20No.%20EP%20711%20(Sub-No.1),%20Reciprocal%20Switching%20(Feb.%2014,%202022),%20https://www.aar.org/wp-content/uploads/2022/02/ASLRRRA.pdf#:~:text=%20Small%20railroads%20average%20%243,%20of%20their%20light%20density%20track.)

⁵⁶ *Id.*

⁵⁷ *CSX Transportation Inc.*, *supra* note 54.

business.⁵⁸ The court instructed that the carrier's request be granted, emphasizing that regulators cannot shackle a railroad to a dead line based solely on hypotheticals.⁵⁹

In many other situations, however, railroads end up negotiating compromises—such as selling the line to a short-line operator or agreeing to provide minimal “skeleton” service—rather than endlessly hemorrhaging money under forced operation. The economic impact of prolonged service mandates can be significant: capital and manpower tied up servicing a marginal line cannot be reallocated to more productive uses.

From a policy standpoint, this raises the question of whether the public benefits of preserving rural and low-volume rail service (and preventing “rail deserts”) justifies the costs imposed on carriers. The current framework tends to err on the side of preservation, sometimes at the expense of railroads' financial health, and remains a point of contention among rail companies, shippers, and regulators.

IV. Proposals for Reform: Toward a Targeted, Deregulatory CCO

Given the dramatic evolution of freight markets and increased intermodal competition since 1980, several targeted reforms to the common carrier obligation could better align rail regulation with the deregulatory goals of the Staggers Act. While the CCO remains important as a backstop protection for shippers, its implementation should be modernized to reflect today's competitive realities.

The following proposals aim to preserve essential shipper protections, while giving railroads greater flexibility to operate efficiently in a multi-modal marketplace. These reforms would reduce regulatory burdens where competitive alternatives exist, streamline dispute resolution, and foster better incentives for both carriers and shippers—all while maintaining the CCO's core purpose of ensuring reasonable access to rail service.

A fundamental challenge in modernizing the CCO is ensuring that regulatory obligations align with market realities. Nowhere is this misalignment more evident than in the transportation of hazardous materials. Railroads face an absolute service mandate without corresponding market mechanisms to manage the associated risks and costs efficiently. While trucking companies can decline hazmat shipments that they cannot handle safely or economically, railroads must accept such traffic regardless of their risk-management capabilities or insurance costs.

One option to address this dilemma might be a federal reinsurance program to backstop hazmat transportation risks. Similar to models in nuclear power (Price-Anderson) and terrorism insurance (the Terrorism Risk Insurance Program), such a program would allow carriers to maintain primary coverage through private markets, with a federal reinsurance pool could share costs for catastrophic losses, either with the industry directly or with insurers that take on the industry's risks. Another alternative would be to cap the industry's liability and have the federal government absorb losses above a certain threshold, or simply to provide carriers with vouchers to offset the cost of insurance

⁵⁸ *Id.*

⁵⁹ *Id.*, at 3, 4.

for hazmat risks they are forced to ship unwillingly. Any of these approaches would preserve the public interest in reliable hazmat transportation, while creating more predictable economics for carriers. They would maintain essential-service requirements while employing market forces to improve efficiency and cost allocation.

Another deregulatory reform would be to make it easier for railroads to discontinue or reduce service on low-density lines or lanes, provided that shippers have intermodal alternatives. Currently, formal abandonment of a rail line requires STB approval and can be contentious. Simplifying this—especially where a trucking option exists for the affected shippers—would acknowledge that the CCO’s purpose is not to trap railroads into serving every mile of track forever.

One mechanism could be to expand the use of “offer of financial assistance”⁶⁰ processes to allow other operators or interested entities to take over service if the incumbent railroad wishes to exit. If no one is willing to operate the service at a given subsidy or acquisition price, that’s strong evidence that continued operation is not economically reasonable, and the obligation could be lifted. Essentially, this pushes the market to reveal if a service is truly needed. If it is, then perhaps a local government or short line will step in. If not, the railroad can bow out without undue delay. By relieving railroads from prolonged forced operations where there is insufficient demand, resources can be reallocated to where they are most useful—improving overall efficiency in the freight network.

One quiet revolution of the Staggers Act was allowing confidential rail-shipper contracts, which now dominate freight-rail business. Under such contracts, the common-carrier rules (including tariff-rate availability and some service obligations) largely do not apply—the terms are privately negotiated. As of 2004, approximately 60% of rail traffic by revenue moved under contracts, not common-carrier tariffs, and that number is likely higher now.⁶¹ Encouraging even greater use of contracts could effectively bypass CCO disputes, because the parties can specify service commitments, penalties for non-performance, and escape clauses as they see fit.

One reform, therefore, would be for the STB to limit the use of its own emergency powers or service orders when a contract exists, on the logic that the contract’s terms should govern instead. This would signal that, except in dire public emergencies, negotiated agreements are preferable to regulatory mandates. It also would encourage shippers to enter into contracts with realistic service requirements, rather than relying on the vague promise of CCO protection. The common-carrier tariff service could be viewed as service of last resort—available to truly small or *ad-hoc* shippers who cannot get a contract—rather than the primary regime. This is largely already the case, but formalizing it would be in line with the goals of deregulation. In regulatory parlance, this reform would maximize the domain of commercial contracts and minimize the domain of common carriage. Relatedly, the

⁶⁰ 49 U.S.C. § 10904 (b).

⁶¹ See *Rail Freight Competition Study as Provided by Montana Senate Bill (SB) 315*, R.R. INDUSTRY INC. (2004), available at <https://www.mdt.mt.gov/publications/docs/brochures/railways/railcomp-study.pdf>.

STB should make clear that it will not use evidence of contract negotiations as part of its examination of rates under the CCO.

With these guardrails in place, final-offer procedures could help to resolve service disputes more efficiently than traditional litigation, while still respecting market principles. The goal should be to create focused incentives for reasonable positions, while avoiding the coercive pressure that would force railroads to abandon legitimate defenses or accept below-market rates. This reformed approach would complement other CCO updates by providing a structured-but-fair process in cases where regulatory intervention is necessary.

The key is designing the system to achieve faster resolutions without sacrificing the economic principles that have guided rail regulation since Staggers. A careful balance must be struck between procedural efficiency and substantive protections for both carriers and shippers.

These proposals, individually and together, aim to update the common carrier obligation for the 21st century. They do not eliminate the duty outright; after all, railroads do remain important infrastructure and some check on their conduct is warranted. But the reforms would move the needle decidedly toward deregulation, relying more on competition and commercial negotiation, and less on blanket mandates. The result would be a CCO that is targeted, clear, and even-handed: it would kick in firmly where a railroad's market power is unchecked (preventing abuse) but relax where competitive market forces suffice to discipline behavior.

V. Conclusion

Railroads' common carrier obligation has long been a double-edged sword: a guardian of the public interest in freight transportation, but also a potential fetter on railroads' ability to adapt and compete. In the current era of robust intermodal competition, preserving an expansive CCO that vests enormous discretion in the STB's hands is simply neither necessary nor efficient. The spirit of deregulation that rescued the U.S. rail industry in 1980 can be extended to this last bastion of the old regulatory regime. By introducing further targeted rail reforms, we can ensure that railroads remain accountable without being overburdened.

For policymakers, the imperative is to promote a rational market. Trucks, barges, and pipelines do not operate under sweeping common-carrier duties today, yet shippers generally receive good service from those transportation modes due to competition and contract law. Rail can be governed by similar dynamics. A rebalanced CCO would let railroads say "no" or "not now" to certain traffic in certain situations, trusting that competition or alternatives will fill the gap—much as a trucking firm can decline a load and the market finds another carrier or mode to move it.

In cases where no alternative exists, a reformed CCO would ensure that the shipper is not abandoned: the railroad must still serve, but likely with greater compensation or under clearer rules that also take account of the railroad's constraints. This approach would preserve the fundamental social contract of common carriage (access to essential services at fair terms) without clinging to one-size-fits-all mandates from a bygone era.

Ultimately, aligning the common carrier obligation with deregulatory principles will strengthen intermodal competition. Unshackled from obsolete requirements, railroads will be more agile competitors to trucking—investing in service improvements, pursuing new traffic, and pricing dynamically, secure in the knowledge that they won't be penalized for rational business decisions. Shippers, in turn, would benefit from a healthier rail industry and more choices, as well as from a more transparent understanding of what service they can count on by right, and when they need to arrange alternatives.