

May 17, 2023

President Joseph R. Biden
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear President Biden:

We write with concerns about the leadership of the Surface Transportation Board (STB). As you know, the STB is the independent adjudicatory agency with broad regulatory oversight of railroads, among other modes of surface transportation. At the outset of your administration, you elevated then-Vice Chairman Martin J. Oberman to become the Chairman of the STB.

Several crises in the freight rail industry (including high-profile derailments) and approval of ill-advised consolidation within the railway sector leads us to the conclusion that the STB is in sore need of new leadership at the highest levels. We ask you to immediately designate a new chair. For reasons outlined below, we suggest that current board member Robert Primus be selected to replace Chairman Oberman.

A few weeks ago, in the midst of industry-wide crises, Chair Oberman and a majority of the STB unwisely gave final approval to Canadian Pacific Railway's acquisition of Kansas City Southern, the nation's sixth- and seventh-largest railroads, respectively. As a result of industry consolidation, the number of Class I Railroads in the United States had already shrank from 26 in 1980 to just seven today. When the merger is complete, that number will be six.

Mr. President, your 2021 [Executive Order on Promoting Competition in the American Economy](#) explicitly called on the STB to initiate rulemaking that would protect against anti-competitive practices by railroads. The STB's decision to allow the CP-KCS merger flies in the face of that executive order and your administration's broader efforts to promote competition across the economy.

Chairman Oberman was well aware of [the negative impacts](#) the merger is likely to have on the rail sector and the economy at large, including higher shipping prices, reduced service, job cuts, and impairment to small businesses. In fact, the STB received more than [2,000 public comments](#) about the merger, from industry experts, researchers, lawmakers, and the general public. Members of Congress from both chambers also [raised significant concerns](#). And three of the five members of the Federal Maritime Commission (who themselves tend to be [quite dovish on corporate power](#)), urged the STB to reject the merger, [writing](#): "In our view, the proposed consolidation does not ensure that the anticompetitive effects of the transaction outweigh the public interest in meeting significant needs."

Notably, STB Member Robert Primus dissented over a year ago when the Surface Transportation Board decided to [consider](#) this transaction under the pre-2001 rules, forfeiting its responsibility to impose an appropriate degree of regulatory scrutiny. Primus also [dissented](#) from the decision to approve the merger, once again pointing out the “special treatment for this proposed merger” and argued that it “runs counter to the Board’s statutory responsibility to review such major mergers and to protect the public interest.”

Board Member Primus further [wrote](#):

“First, the transaction will further concentrate control over the nation’s railroads, which have already experienced massive consolidation in recent decades – a development that has not been favorable to rail customers or the network as a whole. Second, in the absence of a service assurance plan (which would have been required under the current rules), the decision does not adequately guard against merger-related service disruptions, at a time when rail service in general has been historically poor. Third, the transaction will harm communities along the path of the newly combined network. Because these detriments to the public interest outweigh the expected benefits, I dissent.”

Mr. Primus’s views echoed concerns raised by the Antitrust Division of your Department of Justice, which [stated](#):

“Even beyond the elimination of head-to-head competition, mergers that increase market power can harm competition in several ways. The merger can empower the merged railroad to deny shippers access to the lowest cost or fastest end-to-end routings. Likewise, in the absence of a complete refusal to interchange traffic, mergers may enable firms to foreclose competition in other ways, such as raising costs for their rivals through control over inputs or access. [...] The railroad sector in particular, with its relatively high fixed and sunk costs, often enjoys substantial structural entry barriers and advantages that may facilitate or incentivize anticompetitive behavior.”

The STB’s decision to approve the merger cannot be viewed in a vacuum. As the Washington Post [highlighted](#) in a recent article, the high profile February derailment of a train carrying hazardous materials in East Palestine, Ohio, “spurred calls for more scrutiny” of the CP-KCS deal. The Post further reported that the STB’s own analysis concluded the merger would result in “a slightly increased risk of derailment, including hazmat releases.” In fact, the two railroads reported a combined 233 incidents involving hazardous materials between 2015 and 2019, according to the Post.

Yet even following the East Palestine derailment and additional derailments in Louisiana, Detroit, and Nebraska, Chairman Oberman refused to defer the approval process for the merger. Indeed, the spate of high-profile derailments raises serious concerns about safety within the freight rail industry writ large, which is why Transportation Secretary Pete Buttigieg has [called](#) for “immediate, common sense steps” to improve safety, and for Congress to increase fines for safety violations.

Unfortunately, it is clear that Chairman Oberman is not the leader that this moment demands. We believe that the time is now for you to designate a new chair, one who has a proven track record, who understands the risks posed by industry consolidation, and who has demonstrated independence from industry actors. We believe Board Member Primus meets those criteria. We therefore ask that you heed the concerns raised by the undersigned, your Antitrust Division, your Federal Maritime Commission, and your Secretary of Transportation and immediately designate Member Primus as chair of the STB.

If, despite the urgency this moment requires, you choose not to re-designate the chair, then we urge you not to re-nominate Chair Oberman when his current term expires in December 2023. In that case, we would ask that you designate Board Member Primus as chair, and fill the resulting vacancy with a new member who has a proven track record and understanding of fighting against monopolies and willingness to take on big rail companies.

Thank you for your attention to this urgent matter.

Sincerely,

FreedomBLOC
Revolving Door Project
RootsAction