CASE NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 21-7093 & 21-7095

IN THE

United States Court of Appeals for the District of Columbia Circuit

IN RE: RAIL FREIGHT FUEL SURCHARGE ANTITRUST LITIGATION, MDL NO. 1869

DONNELLY COMMODITIES INCORPORATED ET AL.,
Plaintiffs-Appellees,

v.

BNSF RAILWAY COMPANY ET AL.,
Defendants-Appellants.

OXBOW CARBON MINERALS LLC ET AL.,
Plaintiffs-Appellees,

v.

UNION PACIFIC RAILROAD COMPANY ET AL.,
Defendants-Appellants.

On Appeals by Permission under 28 U.S.C. § 1292(b) from Orders of the United States District Court for the District of Columbia Nos. 07-misc-489 (MDL 1869), 11-cv-1049, Hon. Paul L. Friedman

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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December 22, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief filed by defendants-appellants, except for the Association of American Railroads and the American Short Line and Regional Railroad Association, who appear before this Court as amici curiae supporting defendants-appellants. In this Court, the United States and the Federal Trade Commission appear as amici curiae supporting plaintiffs-appellees.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for defendants-appellants.

C. Related Cases

A list of related cases appears in the Brief for defendants-appellants.

s/ Bryan J. Leitch
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GLOSSARY OF ABBREVIATIONS

The following abbreviations and acronyms are used in this brief:

BNSF	BNSF Railway Company
CSXT	CSX Transportation, Inc.
DOJ	Department of Justice
FTC	Federal Trade Commission
Norfolk Southern	Norfolk Southern Railway Company
STB	Surface Transportation Board
Union Pacific	Union Pacific Railroad Company

STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in ensuring that the statute at issue in these appeals, 49 U.S.C. § 10706(a)(3)(B)(ii), is interpreted correctly and consistent with the antitrust laws' goal of protecting competition. We respectfully submit this brief pursuant to Federal Rule of Appellate Procedure 29(a) and D.C. Circuit Rule 29.

STATUTORY PROVISIONS

Relevant statutes and rules are reproduced in the addendum to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rail carriers compete head-to-head in many respects. But because no single railroad serves all points in the United States, carriers work together in handling "interline" movements. Interline movements are shipments carried along two or more railroads' tracks under a common arrangement. "Single-line" or "non-interline" shipments are moved by one carrier on its own tracks. Outside of shared interline traffic, carriers operate like rival service providers in any other industry, and they cannot agree on the rates or terms of those competing services.

The statute here, 49 U.S.C. § 10706(a)(3)(B)(ii), provides carriers a limited evidentiary protection in antitrust suits. Recognizing that carriers must communicate about their interline traffic, Congress provided that "evidence of a discussion or agreement" among carriers "shall not be admissible" if the discussion or agreement "concerned an interline movement of the rail carrier," and "would not,

considered by itself, violate the [antitrust] laws." 49 U.S.C. § 10706(a)(3)(B)(ii). This provision was enacted in the Staggers Rail Act of 1980,[1] as part of Congress's decades-long effort to foster free-market competition and restore antitrust enforcement in the rail industry. While it offers carriers certain narrow protections, the statute must "be construed to insure that remedies for anti-competitive activities remain under existing laws"—especially for unregulated rail traffic, which has always been subject to "existing Federal antitrust laws." H.R. Conf. Rep. No. 1430, at 101, 114 (1980), 1980 U.S.C.C.A.N. 4110, 4133, 4146 (Conference Report).

The district court interpreted this provision correctly. It held that, while Section 10706(a)(3)(B)(ii) protects evidence of discussions and agreements among carriers about their shared interline traffic, the statute does not exclude evidence that carriers discussed or agreed on competing traffic. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 520 F. Supp. 3d 1, 28-34 (D.D.C. 2021). The court also correctly held that the statute does not dictate any particular remedy or otherwise divest courts of their discretion to redact documents or to admit evidence subject to a limiting instruction. *Id.* at 25-27, 33-34.

[1] Pub. L. 96-448, § 219(c)(3), 94 Stat. 1927 (Oct. 14, 1980) (originally codified as 49 U.S.C. § 10706(a)(3)(C)(ii)). The provision was reenacted in full with only minor changes, not relevant here, in the ICC Termination Act of 1995, Pub. L. 104-88, § 102(a), 109 Stat. 803-04, 812 (Dec. 29, 1995) (changing "carrier" to "rail carrier" in certain places, and "clause (I) or (II)" to "subclause (I) or (II)"). This brief cites to the current version of the statute.

This Court should affirm. In the antitrust laws, "Congress tasked courts with enforcing a policy of competition." *NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021). And in the Staggers Act, "Congress unambiguously expressed its interest in allowing free competition, to the maximum extent possible, to govern the financial health of the railroad industry." *ICC v. Texas*, 479 U.S. 450, 460 (1987).

Yet the carriers' expansive reading of Section 10706(a)(3)(B)(ii) strikes at the heart of competition in the rail industry by foreclosing any realistic hope of antitrust enforcement in the vast majority of cases involving railroad collusion. This Court does "not lightly conclude that Congress enacted such a self-defeating statute." *Allen v. District of Columbia*, 969 F.3d 397, 404 (D.C. Cir. 2020) (quotations omitted). And it should not do so here. Section 10706(a)(3)(B)(ii) offers a limited evidentiary protection so that carriers may continue to perform lawful interline movements. But it does not protect carriers from evidence that they discussed or agreed on the terms of competing traffic. Nor does it saddle plaintiffs with the near-impossible task of proving antitrust claims with only direct evidence unearthed in a fully admissible form with no redactions or limiting instructions.

At bottom, the carriers want Section 10706(a)(3)(B)(ii) to exclude evidence that railroads coordinated the rates and terms of competing traffic but without expressly agreeing on such matters in any particular communication. That approach should be rejected. While Congress undoubtedly understood the value of interline

traffic, it also understood the fundamental importance of the antitrust laws, particularly in the rail industry where it simultaneously sought to foster competition and limit antitrust immunity. Adopting the carriers' proposed rule, however, would create an atextual blind spot in Section 10706(a)(3)(B)(ii) that shields railroads from evidence that they committed "the supreme evil of antitrust: collusion," *Verizon Comms., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). That is not the statute Congress enacted, and the text, structure, context, and history of Section 10706(a)(3)(B)(ii) leave no doubt on that point.

STATEMENT OF THE CASE

A. Legal Background

Railroads have a long history with the antitrust laws. Some of the earliest, and most important, Sherman Act decisions struck down railroad cartels. *See, e.g.*, *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898). The Supreme Court made clear that, even as to interline traffic, the Sherman Act prohibited anticompetitive agreements "among carriers to fix rates" because the "collaboration contemplated" in setting interline rates "is of a restrictive nature." *Georgia v. Penn. R.R.*, 324 U.S. 439, 456-58 (1945) (involving coercive, discriminatory rate-fixing). Yet "[d]espite the potential for antitrust liability, railroads continued to act jointly in setting rates." *United States v. Bessemer & Lake Erie R. Co.*, 717 F.2d 593, 595 (D.C. Cir. 1983);

see United States v. Pac. & A R & Nav Co., 228 U.S. 87, 101-05 (1913) (upholding indictment of railroads and other carriers for fixing rates and excluding rivals).

For a time, Congress gave carriers antitrust immunity when setting prices in regulated "rate bureaus." Reed-Bulwinkle Act of 1948, Pub. L. 80-662, 62 Stat. 473. But this experiment only made matters worse for railroads and shippers alike. *See, e.g.*, *Am. Short Line R.R. Ass'n v. United States*, 751 F.2d 107, 109-114 (2d Cir. 1984). Realizing that this immunity-and-regulation regime was unsustainable, Congress spent the next several decades reforming the rail industry to foster competition and limit antitrust immunity. *See, e.g.*, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31; ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803.

The Staggers Act was a centerpiece of Congress's efforts "to revitalize the railroad industry" through "greater reliance on market forces." *Coal Exporters Ass'n of U.S., Inc. v. United States*, 745 F.2d 76, 80-81 (D.C. Cir. 1984). As Representative Staggers explained, the Act sent "a message" that "the American railroad industry" is like "any other business, which is best 'regulated' by the marketplace." 126 Cong. Rec. 28,431 (1980). To that end, the Staggers Act authorized carriers to provide services through unregulated private contracts, and it withdrew nearly all antitrust immunity. *See* 49 U.S.C. §§ 10706, 10709. Congress made clear that, in the absence of regulatory oversight, carriers' pricing decisions must be driven by market forces

and subject to antitrust scrutiny. *See Soc'y of Plastics Indus., Inc. v. ICC*, 955 F.2d 722, 729-30 (D.C. Cir. 1992) (emphasizing the Staggers Act's policy of carriers' setting rates through "competition and the demand for services").

Congress also gave carriers a limited evidentiary protection in antitrust cases: 49 U.S.C. § 10706(a)(3)(B)(ii). This provision states that, "[i]n any proceeding" in which rail carriers are alleged to have violated the antitrust laws, conspiracy "may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic." *Id.* It then provides that "evidence of a discussion or agreement" among "rail carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement" "concerned an interline movement of the rail carrier," and "would not, considered by itself, violate the [antitrust] laws." *Id.* The provision concludes by noting that, "[i]n any proceeding before a jury, the court shall determine whether the requirements" for inadmissibility "are satisfied before allowing the introduction of any such evidence." *Id.*

B. Factual Background

Between 2003 and 2007, BNSF, Union Pacific, Norfolk Southern, and CSXT required shippers to pay fuel surcharges. In 2007, the Surface Transportation Board found that fuel surcharges calculated as a percentage of a base rate were an

"unreasonable" practice as to regulated rail traffic, but the Board lacked jurisdiction to address that practice's legality as to unregulated traffic. *Rail Fuel Surcharges*, 2007 WL 201205, at *1, *10 (2007). Shippers then filed this suit, alleging that the carriers violated the Sherman Act by conspiring to fix those sorts of fuel surcharges for unregulated traffic. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 247-49 (D.C. Cir. 2013).

A central issue in the case is the admissibility of evidence under 49 U.S.C. § 10706(a)(3)(B)(ii). The carriers argued that the statute excludes all documents "relating to" or "bearing" on interline traffic unless they constitute "direct evidence" of conspiracy. Defendants' Motion & Memorandum, at 11-16, No. 07-mc-489 (Mar. 13, 2020), ECF No. 945. The shippers insisted, however, that the statute applies only to cases involving regulated traffic and that, even if it applied to this case involving unregulated traffic, the statute covered only discussions or agreements about individual interline movements, not multiple ones. Plaintiffs' Memorandum in Opposition, at 25-34, No. 07-mc-489 (May 7, 2020), ECF No. 958.

At the district court's invitation, and after consultation with the Federal Trade Commission, Surface Transportation Board, and Department of Transportation, the United States filed a statement of interest in support of neither party. The government contended that Section 10706(a)(3)(B)(ii), by its terms, applies "[i]n any proceeding" where carriers are alleged to have violated the antitrust laws, which

necessarily includes cases involving unregulated traffic. Statement of Interest for the United States, at 5-6, No. 07-mc-489 (July 28, 2020), ECF No. 969. It also explained that the statute excludes only evidence of lawful discussions and agreements among carriers about their shared interline traffic. *Id.* at 6-16.

The district court agreed with the carriers on some issues, and the shippers on others. It held that the statute applies to cases involving unregulated traffic. 520 F. Supp. 3d at 21-24. It also held that, "to be protected by the statute, an interline movement must be an identifiable movement or movements with identifiable circumstances." *Id.* at 29. But the court concluded that the carriers could exclude or limit objectionable evidence through redactions and limiting instructions. *Id.* at 25-27, 33-34. This interlocutory appeal under 28 U.S.C. § 1292(b) followed.

ARGUMENT

I. SECTION 10706(a)(3)(B)(ii) PROTECTS ONLY DISCUSSIONS AND AGREEMENTS AMONG PARTICIPATING CARRIERS ABOUT THEIR SHARED INTERLINE TRAFFIC

A. Discussions And Agreements About Carriers' Shared Interline Traffic "Concern[] An Interline Movement Of The Rail Carrier"

Section 10706(a)(3)(B)(ii) excludes evidence of discussions and agreements that, among other things, "concerned an interline movement of the rail carrier." The district court correctly read this language to cover discussions and agreements concerning "identifiable interline movements," but not those "involving single-line" or "competing traffic." 520 F. Supp. 3d at 29-34.

Statutes must be read as a whole, in light of their context, structure, and history. *Parker Drilling Mgt. Servs. v. Newton*, 139 S. Ct. 1881, 1888-92 (2019). Particularly as to "common words" with "more than one meaning," statutory language "may be broad in the abstract, but unambiguously narrower in context." *Truck Trailer Manufacturers Ass'n, Inc. v. EPA*, 17 F.4th 1198, 1205 (D.C. Cir. 2021) (quotations omitted). For that reason, "historical background" and "statutory context" are critical when construing terms and phrases that might otherwise be "'broad' and 'indeterminate.'" *Mellouli v. Lynch*, 575 U.S. 798, 808-13 & nn.9-11 (2015) (reading "relating to" narrowly based on structure, context, and history).

In Section 10706(a)(3)(B)(ii), "concerned" means "about," such that a discussion or agreement "concern[s]" its subject. *See Webster's Third New Int'l Dictionary* 470 (1976) (defining "concern" in part as "be about"). The word "concern[ed]" is "a connecting term, the scope and meaning of which is defined in part by the terms it modifies." *In re Pittsburgh & Lake Erie Props., Inc.*, 290 F.3d 516, 519 (3d Cir. 2002). Here, the connected terms are "discussion or agreement" and "an interline movement of the rail carrier," the latter of which refers to the shared interline traffic of participating carriers, *Rail Freight*, 520 F. Supp. 3d at 29-30.

A "discussion or agreement," then, "concern[s] an interline movement of the rail carrier" only where the subject being discussed or agreed upon is the participating carriers' shared interline traffic. While a conversation may "concern[]"

several issues in the abstract, this provision does not reach every discussion or agreement with "some general relation to" interline traffic, *cf. Mellouli*, 575 U.S. at 811-12. Nor does it cover communications discussing or agreeing on single-line traffic or rail freight generally, as those are not "an interline movement of the rail carrier," 49 U.S.C. § 10706(a)(3)(B)(ii). *See Pittsburgh*, 290 F.3d at 519-20 (holding that a statute governing bankruptcy cases "concerning a railroad" did not cover petitions filed by "former railroads seeking bankruptcy adjustment of assets and liabilities obtained while they were railroads").

The carriers read "concerned" differently (Br. 53), arguing that a discussion or agreement "concern[s] an interline movement" if it has a "relation to" interline traffic or "a practical bearing on interline movements." But Congress knew how to say "related to," *e.g.*, 49 U.S.C. § 10706(a)(3)(A), and so this provision's use of "concerned" shows that Congress intended a different meaning, *see Thryv, Inc v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1376 (2020) ("[A] departure in language suggests a departure in meaning."). Plus, the carriers themselves show why "practical bearing" fails. They admit (Br. 54) "it would be unnatural to say that World War II 'concerned' a beach in Normandy." Yet World War II undoubtedly had "a practical bearing on" the beach in Normandy where the D-Day landings occurred. By the carriers' own admission, then, their reading is "unnatural."

Statutory context also forecloses the carriers' theories. They suggest (Br. 34-35, 50-54) that a discussion about *all* rates, even single-line rates, "concern[s] an interline movement," because some conversations concern "more than one thing," and "concerned" does not mean "concerned *solely*." But single-line traffic is not merely "something else" or just another "topic" (*cf. id.* 52-59). Rail freight involves two mutually exclusive types of "movements"—interline and non-interline—and Congress knew that, while carriers collaborate on shared interline traffic, they compete for all other traffic. By limiting Section 10706(a)(3)(B)(ii) to discussions and agreements that "concerned an *interline* movement," Congress necessarily excluded from the statute's protections discussions and agreements about *non-interline* movements. Otherwise, "interline" "adds nothing to the statute," *Parker*, 139 S. Ct. at 1888, even though that "term occupies so pivotal a place in the statutory scheme," *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

The carriers effectively concede as much. They recognize (Br. 40-41) that "movement" "refers to rail traffic generally," and that the "limiting function of 'interline' is to draw a distinction between interline and single-line traffic." Yet the carriers elide that distinction by reading "concerned an interline movement" also to mean "concerned" *single*-line traffic. Statutory text "should not be read to mean the exact opposite of what the statute clearly says." *Ohio v. Wright*, 992 F.2d 616, 619 (6th Cir. 1993) (en banc). A conversation may, of course, "concern[] an interline

movement" while also touching on other topics (*e.g.*, news, personal interests, weather). But, for the word "interline" to perform its limiting function, a discussion or agreement cannot "concern[] an interline movement" if it involves *non*-interline traffic or rail freight generally—else, Congress "could have omitted the term ['interline'] altogether," *Ransom v. FIA Card Servs.*, 562 U.S. 61, 70 (2011).

Equally flawed is the carriers' reliance (Br. 58-60) on a statute immunizing "discussions or agreements" between motor carriers and agents transporting household goods "*related solely to*" motor-carrier rates, charges, allowances, and ownership. 49 U.S.C. § 13907(d) (emphasis added). That provision has no bearing on Section 10706(a)(3)(B)(ii). The district court did not read "concerned" to mean "solely concerned," and the motor-carrier provision uses a more expansive root phrase ("related to") that Congress eschewed in Section 10706(a)(3)(B)(ii), *see* pp.10-12, *supra*. *Nat'l Postal Pol'y Council v. Postal Reg. Comm'n*, 17 F.4th 1184, 1191 (D.C. Cir. 2021) (rejecting similar argument where "two provisions use different words and are not otherwise parallel").

The carriers' view also founders on the "*of the rail carrier*" phrase. As the district court correctly recognized, "of the rail carrier" limits the term "interline movement," and confirms that Section 10706(a)(3)(B)(ii) does not exclude discussions or agreements about "[all] interline movement[s]" generally, but only a particular type of "interline movement"—those handled by the participating carriers.

520 F. Supp. 3d at 29-30. The carriers concede this point (*e.g.*, Br. 66), but do not explain how discussions or agreements about single-line traffic concern *shared* traffic at all, let alone shared *interline* traffic. Nor could they. When carriers discuss single-line traffic, they inevitably discuss shipments in which one of them does not participate, which means their discussion cannot "concern[] an interline movement *of the rail carrier*." *See Farrell v. Blinken*, 4 F.4th 124, 136 (D.C. Cir. 2021) ("[W]e interpret statutes as a whole, not in convenient slices.").

Adopting the carriers' position would, moreover, undermine Congress's procompetitive objectives by insulating railroads from antitrust liability in ways that approach immunized rate bureaus before the Staggers Act. As this Court held in *Bessemer*, rate-bureau immunity did "not sweep within it" anticompetitive activity that "happen[ed] to coincide at points with the legitimate actions of a rate bureau." 717 F.2d at 595-602 (affirming carriers' convictions). Yet the carriers reframe Section 10706(a)(3)(B)(ii) to shield them from evidence that they discussed rates for unregulated competing traffic if the conversation had some *relation to* or *practical bearing on* interline traffic (Br. 53-55). This is little more than a de facto immunity for anticompetitive actions that "happen to coincide" with interline traffic—behavior Congress has *never* protected, *see Bessemer*, 717 F.2d at 600-02; *Rail Freight*, 520 F. Supp. 3d at 33 (recognizing that "it would make little sense for Congress to have limited rate bureaus' abilities to discuss, agree to, or vote on such competing traffic"

if Section 10706(a)(3)(B)(ii) protected "these very same kinds of discussions and agreements when engaged in by unregulated private contractors").

B. Discussions And Agreements Need Not List Specific Details To "Concern[] An Interline Movement Of The Rail Carrier"

The carriers next assert (Br. 37-51) that Section 10706(a)(3)(B)(ii) covers "general" discussions and agreements about interline traffic because "interline movement" does not mean "identifiable interline movements" with "identifiable circumstances, such as a specific shipper, specific shipments, and specific destinations." This argument misses the mark.

Specificity is not required, but identifiability is. The carriers admittedly have the burden to show that a discussion or agreement "concerned" shared interline traffic (Br. 25-26), which means the "risk of non-persuasion" falls on them, *see City of Winnfield v. FERC*, 744 F.2d 871, 877 (D.C. Cir. 1984). Yet the carriers cannot sustain that burden unless a court can *identify* the traffic being discussed or agreed upon as their shared interline traffic. And a court cannot do that based on ambiguous communications about unidentified traffic. *Accord, e.g.*, *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1963 (2021) (noting that the party with the burden loses if "evidence is in equipoise" (citation omitted)).

But to the extent the district court's opinion is read to require "specific routes and shippers" in all instances, this Court should clarify that more general discussions or agreements may suffice if limited to identifiable shared interline traffic. This does

not mean "the statute's principal concern" is "general discussions about the management of shared interline traffic" (*cf.* Carriers' Br. 44). Nor does it mean the Surface Transportation Board "expressly encouraged" any "general practices" for unregulated rates in generally endorsing operational alliances over major mergers (*cf. id.* 49-50). But it does suggest that even a more general discussion about shared interline traffic might "concern[] an interline movement" if it is about "identifiable" interline traffic "with identifiable circumstances," *Rail Freight*, 520 F. Supp. 3d at 29-31. The more specific the discussion is, the easier the analysis becomes, and it was thus logical for the district court to describe examples of qualifying discussions and agreements in specific terms. But the statute does not require shipment-by-shipment or route-by-route discussions and agreements in every instance.

By the same token, a discussion or agreement may concern shared interline traffic even if it addresses issues with "wider implications" (Carriers' Br. 56-57), or matters "relevant to both interline and single-line moves" (Rail Associations' Amici Br. 20-21). Seasonal variations that impact the price of two carriers' interline traffic, for example, may also impact their competing traffic. But so long as the carriers' discussions or agreements about those variations concern traffic that can be identified as their shared interline traffic, they may "concern[] an interline movement of the rail carrier," regardless of their specificity.

Indeed, when handling interline traffic, carriers act as joint venturers who generally may set the price of their joint service consistent with Section 1 of the Sherman Act, as long as they do not discuss rates *outside* the venture. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5-8 (2006) (upholding venture's "pricing policy" on venture products). This caveat is critical. Joint ventures are not "exempt from the usual operation of the antitrust laws." *Alston*, 141 S. Ct. at 2160; *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1176-79, 1183-89 (D.C. Cir. 1978) (invalidating NFL draft rule despite "joint-venture status"). That is particularly so when joint ventures limit participants' ability to compete in markets where they remain rivals. *See Alston*, 141 S. Ct. at 2155-60 (invalidating certain NCAA rules limiting competition for student-athletes); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005) (holding joint venture violated antitrust laws by agreeing not to discount non-venture products). Because carriers resemble joint venturers only as to their shared interline traffic, they must not be allowed to use discussions or agreements about unidentified traffic as a bootstrap for fixing *non*-interline rates.

This Court, therefore, should not take at face value the carriers' suggestions (Br. 39-50) that whenever their executives iron out "pricing and accounting issues" in "general terms" the discussion or agreement necessarily "concern[s] an interline movement." While the carriers' amici labor to show (Br. 18-21) the importance of interline communications, they do not deny that their own accounting rules and

payment methods allow carriers to conduct interline business without fixing single-line rates or involving nonparticipating rivals, *see Rail Freight*, 520 F. Supp. at 14 n.13; *Policy Alternatives to Increase Competition*, 2009 WL 996819, at *4 n.5 (S.T.B. 2009). Accordingly, even if Section 10706(a)(3)(B)(ii) does not demand exacting specificity in all instances, ambiguous discussions among the carriers' "top executives" about "higher-level cooperation" on unidentified traffic do not "concern[] an interline movement of the rail carrier" (*cf.* Carriers' Br. 6-7).

C. The "Considered By Itself" Clause Retains Its Full Meaning When The Statute Is Properly Limited To Discussions And Agreements About Carriers' Shared Interline Traffic

Contrary to the carriers' assertions, a proper reading of the "concerned" clause does not render any part of Section 10706(a)(3)(B)(ii) superfluous. The statute requires that, to be excluded, a "discussion or agreement" must also be one that "would not, considered by itself, violate the [antitrust] laws." The carriers maintain (Br. 38, 61-63) that this clause is "nullified" if "concerned an interline movement of the rail carrier" covers only discussions and agreements "about *specifically identified* interline movements," because such discussions and agreements are supposedly "never unlawful" by themselves.

This objection lacks merit. Because "joint ventures have no immunity from the antitrust laws," *NCAA v. Bd. of Regents*, 468 U.S. 85, 113 (1984), carriers' discussions and agreements about shared interline traffic could indeed be unlawful

by themselves, *see, e.g.*, *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 177-81 (2d Cir. 1990) (holding railroad would violate antitrust laws by refusing to handle interline traffic with smaller carrier unless it captured nearly all of their joint rates). The "laws" mentioned in Section 10706(a)(3)(B)(ii) include more than just the Sherman Act. They also include "the Clayton Act (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the [Robinson-Patman] Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a)"—as well as "any similar State law." 49 U.S.C. §§ 10706(a)(2)(A), 10706(a)(3)(B)(ii).

Discussions and agreements concerning interline traffic could, therefore, violate "the [antitrust] laws" many ways. For example, carriers might freeze out price-cutting competitors by agreeing to exclude them from three- or four-part interline movements. They might also use interline discussions to implement predatory-pricing schemes and other monopolistic practices, such as by requiring a smaller carrier to accept unreasonable rate divisions under threat of losing interline business. Additionally, when Section 10706(a)(3)(B)(ii) was enacted, it was per se illegal under the Sherman Act for parties to agree on prices if they were in, as the carriers' described their arrangements, "a vertical supply relationship," *Rail Freight*, 520 F. Supp. at 13, and today such restraints are subject to rule-of-reason scrutiny, *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). The

"considered by itself" clause is thus anything but surplusage under a correct reading of "concerned an interline movement" (*supra* Part I.A-I.B). *See Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 22-23 (2006) (holding different clauses of same statutory sentence are not superfluous where each does some "additional work").[2]

The carriers see surplusage where none exists because they reimagine the statute as an inflexible "stepwise" framework, in which the "considered by itself" clause is a mere "safety valve" requiring shippers to prove that each discussion or agreement conclusively "is unlawful." Carriers' Br. 18, 31-35, 61-63. But Section 10706(a)(3)(B)(ii) provides grounds for inadmissibility; it does not necessarily prescribe a mandatory sequence. *See United States v. Hald*, 8 F.4th 932, 941-43 (10th Cir. 2021) (holding statutory prerequisites do "not mandate a particular ordering"). Besides, had Congress wanted plaintiffs to prove illegality pretrial on a discussion-by-discussion or agreement-by-agreement basis, it would not have

[2] Contrary to the carriers' suggestions (Br. 14, 36, 62), the Department of Justice and Federal Trade Commission have not deemed interline discussions and agreements per se *lawful*. A Department official once testified that "the antitrust laws do not proscribe" such discussions and agreements "in the ordinary situation," and a Commission staff member (speaking for himself) noted that interline traffic itself did not create "antitrust problems." *Railroad Deregulation Act of 1979: Hearing on H.R. 4570*, 96th Cong. 425 (1979) (statement of Donald L. Flexner, DOJ); *see id.* 501, 513 (statement of David I. Wilson, FTC). But the latter comment was not an "FTC statement to Congress" (*cf.* Carriers' Br. 36), and neither remark suggests interline discussions and agreements are "never unlawful" (*cf. id.* 62). Nothing in the ensuing decades alters this conclusion. *See Alston*, 141 S. Ct. at 2155-60 (noting joint ventures are not "categorically exempt" from the antitrust laws).

conditioned the inadmissibility of such evidence on a showing that the "discussion or agreement *would not*, considered by itself, violate the [antitrust] laws," 49 U.S.C. § 10706(a)(3)(B)(ii) (emphasis added). *See Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1473-74 (2020) (noting Congress generally does not choose an "indirect route to convey an important and easily expressed message" (quotations omitted)).

To be sure, "considered by itself" does not mean "considered with everything else" (Carriers' Br. 64). But the statute requires courts to consider "the [antitrust] laws," which generally look to anticompetitive effects, *see NCAA*, 468 U.S. at 104 ("[T]he criterion to be used in judging the validity of a restraint on trade is its impact on competition."). While this need not entail a full rule-of-reason inquiry for each discussion or agreement, *see Alston*, 141 S. Ct. at 2155-57, it could involve analyzing a discussion or agreement in light of the carriers' market power, potential harm to competition, and any proffered justifications. In this way, the discussion or agreement is still "considered by itself" vis-à-vis other discussions and agreements in the record; it is just not considered in a vacuum, isolated from the competitive effects that could determine its legality under "the [antitrust] laws."

A contrary approach would exclude nearly all interline discussions or agreements that are not "'direct evidence' of an antitrust conspiracy," Defendants' Motion, at 16, ECF No. 945, *see* p.7, *supra*. Often called the "smoking gun," direct evidence usually means a written agreement, a recorded confession, or the testimony

of a cooperating witness. *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226 (4th Cir. 2004). But such "evidence is extremely rare in antitrust cases," *id.*, and "frequently impossible for a plaintiff to obtain." *Ne. Tel. Co. v. AT&T*, 651 F.2d 76, 85 (2d Cir. 1981). Antitrust violations are thus nearly always proven with circumstantial evidence. *See Norfolk Monument Co. v. Woodlawn Mem'l Gardens*, 394 U.S. 700, 704 (1969). After all, "were the law otherwise, such conspiracies would flourish; profit, rather than punishment, would be the reward." *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 374-75 (9th Cir. 1957) (quotations omitted).

Under the carriers' approach, however, direct evidence would likely be the only thing Section 10706(a)(3)(B)(ii) allows—evidence that is "*unlawful in itself*," as in "an agreement on rates or practices for competitive traffic," Carriers' Br. 35, 64. But "insistence upon direct proof would remove too many conspiracies from the embrace of the antitrust laws." 14A Areeda & Hovenkamp, *Antitrust Law* ¶1410c (5th ed. April 2021). Plaintiffs would be out of luck no matter how compelling their circumstantial evidence, and even if each discussion or agreement, by itself, just as likely as not violated the antitrust laws, *see* pp.19-20, *supra*. This is hardly a recipe for "reducing error" (*cf.* Carriers' Br. 36-37), much less for ensuring "that remedies for anti-competitive activities remain under existing laws," Conference Report 114.

Nothing in Section 10706(a)(3)(B)(ii) suggests Congress intended to impose such extraordinary limits on antitrust plaintiffs in a statutory scheme designed to

foster price competition and curtail antitrust immunity. *See Logan v. United States*, 552 U.S. 23, 35 (2007) ("We are disinclined to say that what Congress imposed with one hand . . . it withdrew with the other."). As the carriers emphasize (Br. 58-59), this provision affords them no immunity. Just so. That is why their interpretation fails. Allowing only "extremely rare" and "frequently impossible" evidence (*see* pp.20-21, *supra*) would twist this limited evidentiary protection into a de facto immunity for sophisticated rate-fixing cartels and "seriously undercut the effectiveness of the antitrust laws," *In re Petroleum Prod. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990) (describing consequences of requiring "direct evidence").

II. SECTION 10706(a)(3)(B)(ii) CAN BE IMPLEMENTED THROUGH REDACTIONS AND LIMITING INSTRUCTIONS

The district court correctly held that Section 10706(a)(3)(B)(ii) does not mandate "the blunt remedy of excluding entire documents." 520 F. Supp. 3d at 26. Congress legislates against a background of default adjudicatory principles that are presumptively incorporated absent clear contrary language. *Nken v. Holder*, 556 U.S. 418, 432-33 (2009) ("[W]e are loath to conclude that Congress would, 'without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review.'"). This is particularly so with the Federal Rules, which courts will harmonize with later-enacted statutes where possible. *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 66-68 (D.C. Cir. 1988) (holding corporate-

receivership statute, 12 U.S.C. § 1464, did not displace preexisting shareholder-demand requirement of Federal Rule of Civil Procedure 23.1).

Congress enacted Section 10706(a)(3)(B)(ii) against the backdrop of trial courts' "inherent authority" to manage the admission of evidence. *See, e.g.*, *Clapp v. Macfarland*, 20 App. D.C. 224, 229 (C.A.D.C. 1902) (allowing court to "order the taking of testimony, in any manner which it thinks expedient"). This authority includes the "discretionary power to delete objectionable portions" of evidence, in addition to other techniques adopted in the Federal Rules, such as "limiting instructions." *United States v. Lemonakis*, 485 F.2d 941, 949-50 (D.C. Cir. 1973) (playing audio recording with "limiting instructions" and "deletions" of hearsay). As with other "long-established and familiar principles" of judicial authority, courts retain these powers, too, unless "a statutory purpose to the contrary is evident." *See Nken*, 556 U.S. at 433 (quotations omitted).

Statutory clarity is especially crucial here. When Congress enacted Section 10706(a)(3)(B)(ii), it was well-settled that courts interpreting a statute must "avoid a construction that would suppress otherwise competent evidence." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961) (allowing disclosure of confidential census reports); *see Pierce Cty., Wash. v. Guillen*, 537 U.S. 129, 144-45 (2003) (similar, highway-safety reports). Equally well-settled was the admonition that statutes and other legal rules should not be applied to "in effect

confer" even a "partial immunity from [antitrust] liability." *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955) (claim preclusion); *United States v. Nat'l City Lines*, 334 U.S. 573, 575-97 (1948) (forum non conveniens); *see Radovich v. NFL*, 352 U.S. 445, 454 (1957) (holding courts "should not add requirements to burden the private [antitrust] litigant beyond what is specifically set forth by Congress").

Read in light of these principles, Section 10706(a)(3)(B)(ii) does not divest courts of the ability to redact documents, or displace their authority to issue limiting instructions under Federal Rule of Evidence 105. The statute does not mention documents or instructions at all. It addresses evidence. And a single passage of one document could constitute "*evidence* of a discussion or agreement" that "concerned an interline movement of the rail carrier." *See Black's Law Dictionary* 498 (5th ed. 1979) (defining "evidence" as information "offered to prove the existence or nonexistence of a fact"). But that does not render the entire document inadmissible if it otherwise discusses single-line traffic. The excludable passage can be redacted and the rest admitted. This comports with Section 10706(a)(3)(B)(ii) because the "evidence" that "shall not be admissible"—*i.e.*, the passage that "concerned an interline movement of the rail carrier"—will not, in fact, be admitted.

Similar logic counsels in favor of allowing limiting instructions where appropriate. Despite acknowledging (Br. 71-72) that Rule 105 permits such instructions, and that the statute "says nothing about" the issue, the carriers assert

that Section 10706(a)(3)(B)(ii) prohibits limiting instructions. But statutory silence rarely displaces a preexisting Federal Rule, *see Gaubert*, 863 F.2d at 66-68, and here, Rule 105 and Section 10706(a)(3)(B)(ii) can be harmonized because a document inadmissible as "evidence of a discussion or agreement" could still be admitted as evidence of, say, a carrier's state of mind. Take for example an internal agenda prepared by one interline carrier before meeting with another. Even assuming such documents could qualify for exclusion, a court could instruct the jury to consider the agenda only to determine if the carrier that created it intended to conspire, not to determine if any discussions or agreements occurred. The agenda would thus not be "evidence of a discussion or agreement" among carriers; it would be evidence of one carrier's motives or intent, which Section 10706(a)(3)(B)(ii) does not bar.

The carriers nonetheless assert (Br. 69-77) that, because the statute says "shall not be admissible," evidence must be excluded in full for all purposes. But when Congress wants to exclude evidence in full, it does so expressly, *see St. Regis*, 368 U.S. at 218 & nn.8-9, often by specifying that "[n]o *part*" of a particular document "may be admitted into evidence or *used for any other purpose*," 49 U.S.C. § 47507 (noise-exposure maps) (emphases added); *see id.* § 20903 (similar, railroad-accident reports). The absence of such language in Section 10706(a)(3)(B)(ii) undermines the carriers' efforts to engraft similar limitations onto the statute. *See Marx v. Gen.*

Revenue Corp., 568 U.S. 371, 377-84 (2013) ("[E]xplicit language in other statutes cautions against inferring a limitation.").

A contrary approach would, moreover, foist on antitrust plaintiffs unworkable evidentiary burdens that Congress did not expressly require. Private suits are critical to antitrust enforcement, but litigating them can be exceptionally difficult since "proof is largely in the hands of the alleged conspirators." *Norfolk*, 394 U.S. at 704; *see Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 805 (D.C. Cir. 2001) (recognizing private antitrust litigation "increases the likelihood that violators will be discovered"). Relegating antitrust plaintiffs to using only documents that emerge from discovery fully admissible would severely weaken antitrust enforcement and draw carriers a roadmap for evading the antitrust laws. Congress would not have buried in the Staggers Act a sub-provision that so gravely undermined the procompetitive objectives of the Act as a whole. *See Maui*, 140 S. Ct. at 1473-74 (rejecting interpretation that would create an "obvious loophole" and "facilitate evasion of the law" (quotations omitted)).

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

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December 22, 2021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), and D.C. Circuit Rule 32(e)(3), because, excluding the parts exempted by Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1), the brief contains 6,173 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in Microsoft Word 2010, using 14-point Times New Roman font, a proportionally spaced typeface.

s/ Bryan J. Leitch
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STATUTORY ADDENDUM

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(A) required under section 10741, 10742, or 11102 of this title;

(B) inclusion of those lines would make the through route unreasonably long when compared with a practicable alternative through route that could be established; or

(C) the Board decides that the proposed through route is needed to provide adequate, and more efficient or economic, transportation.

The Board shall give reasonable preference, subject to this subsection, to the rail carrier originating the traffic when prescribing through routes.

(b) The Board shall prescribe the division of joint rates to be received by a rail carrier providing transportation subject to its jurisdiction under this part when it decides that a division of joint rates established by the participating carriers under section 10703 of this title, or under a decision of the Board under subsection (a) of this section, does or will violate section 10701 of this title.

(c) If a division of a joint rate prescribed under a decision of the Board is later found to violate section 10701 of this title, the Board may decide what division would have been reasonable and order adjustment to be made retroactive to the date the complaint was filed, the date the order for an investigation was made, or a later date that the Board decides is justified. The Board may make a decision under this subsection effective as part of its original decision.

(Added Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 811.)

PRIOR PROVISIONS

Prior sections 10705 and 10705a were omitted in the general amendment of this subtitle by Pub. L. 104–88, § 102(a).

Section 10705, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1375; Pub. L. 96–296, § 22(b)–(g), July 1, 1980, 94 Stat. 813; Pub. L. 96–448, title II, § 218, Oct. 14, 1980, 94 Stat. 1925; Pub. L. 97–449, § 5(g)(4), Jan. 12, 1983, 96 Stat. 2443, related to authority for through routes, joint classifications, rates, and divisions prescribed by Interstate Commerce Commission. See sections 10705 and 13701 of this title.

Section 10705a, added Pub. L. 96–448, title II, § 217(a)(1), Oct. 14, 1980, 94 Stat. 1916; amended Pub. L. 103–272, § 4(j)(20), July 5, 1994, 108 Stat. 1369, related to joint rate surcharges and cancellations.

EFFECTIVE DATE

Section effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 1301 of this title.

§ 10706. Rate agreements: exemption from antitrust laws

(a)(1) In this subsection—

(A) the term ''affiliate'' means a person controlling, controlled by, or under common control or ownership with another person and ''ownership'' refers to equity holdings in a business entity of at least 5 percent;

(B) the term ''single-line rate'' refers to a rate or allowance proposed by a single rail carrier that is applicable only over its line and for which the transportation (exclusive of terminal services by switching, drayage or other terminal carriers or agencies) can be provided by that carrier; and

(C) the term ''practicably participates in the movement'' shall have such meaning as the Board shall by regulation prescribe.

(2)(A) A rail carrier providing transportation subject to the jurisdiction of the Board under this part that is a party to an agreement of at least 2 rail carriers that relates to rates (including charges between rail carriers and compensation paid or received for the use of facilities and equipment), classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, publication, or establishment of them, shall apply to the Board for approval of that agreement under this subsection. The Board shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy of section 10101 of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of its approval. If the Board approves the agreement, it may be made and carried out under its terms and under the conditions required by the Board, and the Sherman Act (15 U.S.C. 1, et seq.), the Clayton Act (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a) do not apply to parties and other persons with respect to making or carrying out the agreement. However, the Board may not approve or continue approval of an agreement when the conditions required by it are not met or if it does not receive a verified statement under subparagraph (B) of this paragraph.

(B) The Board may approve an agreement under subparagraph (A) of this paragraph only when the rail carriers applying for approval file a verified statement with the Board. Each statement must specify for each rail carrier that is a party to the agreement—

(i) the name of the carrier;

(ii) the mailing address and telephone number of its headquarter's office; and

(iii) the names of each of its affiliates and the names, addresses, and affiliates of each of its officers and directors and of each person, together with an affiliate, owning or controlling any debt, equity, or security interest in it having a value of at least $1,000,000.

(3)(A) An organization established or continued under an agreement approved under this subsection shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed. Such an organization may not—

(i) permit a rail carrier to discuss, to participate in agreements related to, or to vote on single-line rates proposed by another rail carrier, except that for purposes of general rate increases and broad changes in rates, classifications, rules, and practices only, if the Board finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part;

(ii) permit a rail carrier to discuss, to participate in agreements related to, or to vote on rates related to a particular interline movement unless that rail carrier practicably participates in the movement; or

(iii) if there are interline movements over two or more routes between the same end points, permit a carrier to discuss, to participate in agreements related to, or to vote on rates ex-

cept with a carrier which forms part of a particular single route. If the Board finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part.

(B)(i) In any proceeding in which a party alleges that a rail carrier voted or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

(ii) In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic. In any proceeding in which such a violation is alleged, evidence of a discussion or agreement between or among such rail carrier and one or more other rail carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement—

(I) was in accordance with an agreement approved under paragraph (2) of this subsection; or

(II) concerned an interline movement of the rail carrier, and the discussion or agreement would not, considered by itself, violate the laws referred to in the first sentence of this clause.

In any proceeding before a jury, the court shall determine whether the requirements of subclause (I) or (II) are satisfied before allowing the introduction of any such evidence.

(C) An organization described in subparagraph (A) of this paragraph shall provide that transcripts or sound recordings be made of all meetings, that records of votes be made, and that such transcripts or recordings and voting records be submitted to the Board and made available to other Federal agencies in connection with their statutory responsibilities over rate bureaus, except that such material shall be kept confidential and shall not be subject to disclosure under section 552 of title 5, United States Code.

(4) Notwithstanding any other provision of this subsection, one or more rail carriers may enter into an agreement, without obtaining prior Board approval, that provides solely for compilation, publication, and other distribution of rates in effect or to become effective. The Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a) shall not apply to parties and other persons with respect to making or carrying out such agreement. However, the Board may, upon application or on its own initiative, investigate whether the parties to such an agreement have exceeded its scope, and upon a finding that they have, the Board may issue such orders as are necessary, including an order dissolving the agreement, to ensure that actions taken pursuant to the agreement are limited as provided in this paragraph.

(5)(A) Whenever two or more shippers enter into an agreement to discuss among themselves that relates to the amount of compensation such shippers propose to be paid by rail carriers providing transportation subject to the jurisdiction of the Board under this part, for use by such rail carriers of rolling stock owned or leased by such shippers, the shippers shall apply to the Board for approval of that agreement under this paragraph. The Board shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy set forth in section 10101 of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of approval. If the Board approves the agreement, it may be made and carried out under its terms and under the terms required by the Board, and the antitrust laws set forth in paragraph (2) of this subsection do not apply to parties and other persons with respect to making or carrying out the agreement. The Board shall approve or disapprove an agreement under this paragraph within one year after the date application for approval of such agreement is made.

(B) If the Board approves an agreement described in subparagraph (A) of this paragraph and the shippers entering into such agreement and the rail carriers proposing to use rolling stock owned or leased by such shippers, under payment by such carriers or under a published allowance, are unable to agree upon the amount of compensation to be paid for the use of such rolling stock, any party directly involved in the negotiations may require that the matter be settled by submitting the issues in dispute to the Board. The Board shall render a binding decision, based upon a standard of reasonableness and after taking into consideration any past precedents on the subject matter of the negotiations, no later than 90 days after the date of the submission of the dispute to the Board.

(C) Nothing in this paragraph shall be construed to change the law in effect prior to October 1, 1980, with respect to the obligation of rail carriers to utilize rolling stock owned or leased by shippers.

(b) The Board may require an organization established or continued under an agreement approved under this section to maintain records and submit reports. The Board may inspect a record maintained under this section.

(c) The Board may review an agreement approved under subsection (a) of this section and shall change the conditions of approval or terminate it when necessary to comply with the public interest and subsection (a). The Board shall postpone the effective date of a change of an agreement under this subsection for whatever period it determines to be reasonably necessary to avoid unreasonable hardship.

(d) The Board may begin a proceeding under this section on its own initiative or on application. Action of the Board under this section—

(1) approving an agreement;

(2) denying, ending, or changing approval;

(3) prescribing the conditions on which approval is granted; or

(4) changing those conditions,

has effect only as related to application of the antitrust laws referred to in subsection (a) of this section.

(e)(1) The Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, shall prepare periodically an assessment of, and shall report to the Board on—

(A) possible anticompetitive features of—

(i) agreements approved or submitted for approval under subsection (a) of this section; and

(ii) an organization operating under those agreements; and

(B) possible ways to alleviate or end an anticompetitive feature, effect, or aspect in a manner that will further the goals of this part and of the transportation policy of section 10101 of this title.

(2) Reports received by the Board under this subsection shall be published and made available to the public under section 552(a) of title 5.

(Added Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 812; amended Pub. L. 104–287, § 5(24), Oct. 11, 1996, 110 Stat. 3390.)

REFERENCES IN TEXT

The Sherman Act, referred to in subsec. (a)(2)(A), (4), is act July 2, 1890, ch. 647, 26 Stat. 209, as amended, which is classified to sections 1 to 7 of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 1 of Title 15 and Tables.

The Clayton Act, referred to in subsec. (a)(2)(A), (4), is act Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended, which is classified generally to sections 12, 13, 14 to 19, 21, and 22 to 27 of Title 15 and sections 52 and 53 of Title 29, Labor. For further details and complete classification of this Act to the Code, see References in Text note set out under section 12 of Title 15 and Tables.

The Federal Trade Commission Act, referred to in subsec. (a)(2)(A), (4), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (§ 41 et seq.) of chapter 2 of Title 15. For complete classification of this Act to the Code, see section 58 of Title 15 and Tables.

Sections 73 and 74 of the Wilson Tariff Act, referred to in subsec. (a)(2)(A), (4), are sections 73 and 74 of act Aug. 27, 1894, ch. 349, 28 Stat. 570, which enacted sections 8 and 9, respectively, of Title 15.

Act of June 19, 1936, referred to in subsec. (a)(2)(A), (4), is act June 19, 1936, ch. 592, 49 Stat. 1526, popularly known as the Robinson-Patman Anti-discrimination Act and also as the Robinson-Patman Price Discrimination Act, which enacted sections 13a, 13b, and 21a of Title 15 and amended section 13 of Title 15. For complete classification of this Act to the Code, see Short Title note set out under section 13 of Title 15 and Tables.

PRIOR PROVISIONS

A prior section 10706, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1377; Pub. L. 96–258, § 1(7), June 3, 1980, 94 Stat. 426; Pub. L. 96–296, § 14(a), (c), (d), July 1, 1980, 94 Stat. 803, 808; Pub. L. 96–448, title II, § 219(a)–(e), 224(b), Oct. 14, 1980, 94 Stat. 1926–1929; Pub. L. 97–261, § 10(a)–(d), Sept. 20, 1982, 96 Stat. 1109, 1110; Pub. L. 98–216, § 2(12), Feb. 14, 1984, 98 Stat. 5; Pub. L. 99–521, § 7(c), Oct. 22, 1986, 100 Stat. 2995, related to exemption from antitrust laws of rate agreements, prior to the general amendment of this subtitle by Pub. L. 104–88, § 102(a). See sections 10706 and 13703 of this title.

AMENDMENTS

1996—Subsec. (a)(5)(C). Pub. L. 104–287 substituted "October 1, 1980," for "the effective date of the Staggers Rail Act of 1980".

EFFECTIVE DATE

Section effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 1301 of this title.

§ 10707. Determination of market dominance in rail rate proceedings

(a) In this section, "market dominance" means an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.

(b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Board under this part is challenged as being unreasonably high, the Board shall determine whether the rail carrier proposing the rate has market dominance over the transportation to which the rate applies. The Board may make that determination on its own initiative or on complaint. A finding by the Board that the rail carrier does not have market dominance is determinative in a proceeding under this part related to that rate or transportation unless changed or set aside by the Board or set aside by a court of competent jurisdiction.

(c) When the Board finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum.

(d)(1)(A) In making a determination under this section, the Board shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than 180 percent.

(B) For purposes of this section, variable costs for a rail carrier shall be determined only by using such carrier's unadjusted costs, calculated using the Uniform Rail Costing System cost finding methodology (or an alternative methodology adopted by the Board in lieu thereof) and indexed quarterly to account for current wage and price levels in the region in which the carrier operates, with adjustments specified by the Board. A rail carrier may meet its burden of proof under this subsection by establishing its variable costs in accordance with this paragraph, but a shipper may rebut that showing by evidence of such type, and in accordance with such burden of proof, as the Board shall prescribe.

(2) A finding by the Board that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than 180 percent does not establish a presumption that—

(A) such rail carrier has or does not have market dominance over such transportation; or

(B) the proposed rate exceeds or does not exceed a reasonable maximum.

(Added Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 815.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 10709 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, § 102(a).

Prior sections 10707 and 10707a were omitted in the general amendment of this subtitle by Pub. L. 104–88, § 102(a).

Subsec. (f). Pub. L. 112–95, § 505, added subsec. (f).

2003—Subsec. (b)(4). Pub. L. 108–176, § 189, added par. (4).

Subsec. (c)(2)(C)–(E). Pub. L. 108–176, § 306, realigned margins of subpars. (C) and (D) and added subpar. (E).

2000—Subsec. (c)(6). Pub. L. 106–181 added par. (6).

1994—Subsec. (c)(1)(A). Pub. L. 103–429, § 6(71)(A), inserted "and" after semicolon at end.

Subsec. (c)(1)(B). Pub. L. 103–429, § 6(71)(B), substituted a period for semicolon at end.

Subsec. (c)(1)(C), (D). Pub. L. 103–429, § 6(71)(C), redesignated par. (1)(C) as (2)(C) and (1)(D) as (2)(D).

Subsec. (c)(2). Pub. L. 103–305, § 119(2), added par. (2). Former par. (2) redesignated (3).

Subsec. (c)(2)(A)(iii). Pub. L. 103–429, § 6(71)(D), struck out "and" after semicolon at end.

Subsec. (c)(2)(B)(iii). Pub. L. 103–429, § 6(71)(E), substituted a semicolon for period at end.

Subsec. (c)(2)(C), (D). Pub. L. 103–429, § 6(71)(F), substituted "to an airport operator and unit of local government referred to in paragraph (1)(A) or (1)(B) of this subsection" for "an airport operator or unit of local government referred to in clause (A) or (B) of this paragraph".

Pub. L. 103–429, § 6(71)(C), redesignated par. (1)(C) as (2)(C) and (1)(D) as (2)(D).

Subsec. (c)(3). Pub. L. 103–305, § 119(1), redesignated par. (2) as (3). Former par. (3) redesignated (4).

Subsec. (c)(4). Pub. L. 103–305, § 119(3), struck out "paragraph (1) of" before "this subsection" in introductory provisions.

Pub. L. 103–305, § 119(1), redesignated par. (3) as (4). Former par. (4) redesignated (5).

Subsec. (c)(5). Pub. L. 103–305, § 119(1), redesignated par. (4) as (5).

EFFECTIVE DATE OF 2003 AMENDMENT

Amendment by Pub. L. 108–176 applicable only to fiscal years beginning after Sept. 30, 2003, except as otherwise specifically provided, see section 3 of Pub. L. 108–176, set out as a note under section 106 of this title.

EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106–181 applicable only to fiscal years beginning after Sept. 30, 1999, see section 3 of Pub. L. 106–181, set out as a note under section 106 of this title.

§ 47505. Airport noise compatibility planning grants

(a) GENERAL AUTHORITY.—The Secretary of Transportation may make a grant to a sponsor of an airport to develop, for planning purposes, information necessary to prepare and submit—

(1) a noise exposure map and related information under section 47503 of this title, including the cost of obtaining the information; or

(2) a noise compatibility program under section 47504 of this title.

(b) AVAILABILITY OF AMOUNTS AND GOVERNMENT'S SHARE OF COSTS.—A grant under subsection (a) of this section may be made from amounts available under section 48103 of this title. The United States Government's share of the grant is the percent for which a project for airport development at an airport would be eligible under section 47109(a) and (b) of this title.

(Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 1286.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
47505	49 App.:2103(b).	Feb. 18, 1980, Pub. L. 96–193, § 103(b), 94 Stat. 51; restated Sept. 3, 1982, Pub. L. 97–248, § 524(b)(3), 96 Stat. 696.

In subsection (a), before clause (1), the words "incur obligations to" are omitted as surplus.

§ 47506. Limitations on recovering damages for noise

(a) GENERAL LIMITATIONS.—A person acquiring an interest in property after February 18, 1980, in an area surrounding an airport for which a noise exposure map has been submitted under section 47503 of this title and having actual or constructive knowledge of the existence of the map may recover damages for noise attributable to the airport only if, in addition to any other elements for recovery of damages, the person shows that—

(1) after acquiring the interest, there was a significant—

(A) change in the type or frequency of aircraft operations at the airport;

(B) change in the airport layout;

(C) change in flight patterns; or

(D) increase in nighttime operations; and

(2) the damages resulted from the change or increase.

(b) CONSTRUCTIVE KNOWLEDGE.—Constructive knowledge of the existence of a map under subsection (a) of this section shall be imputed, at a minimum, to a person if—

(1) before the person acquired the interest, notice of the existence of the map was published at least 3 times in a newspaper of general circulation in the county in which the property is located; or

(2) the person is given a copy of the map when acquiring the interest.

(Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 1286.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
47506	49 App.:2107.	Feb. 18, 1980, Pub. L. 96–193, § 107, 94 Stat. 53.

In subsection (a)(2), the words "for which recovery is sought have" are omitted as surplus.

§ 47507. Nonadmissibility of noise exposure map and related information as evidence

No part of a noise exposure map or related information described in section 47503 of this title that is submitted to, or prepared by, the Secretary of Transportation and no part of a list of land uses the Secretary identifies as normally compatible with various exposures of individuals to noise may be admitted into evidence or used for any other purpose in a civil action asking for relief for noise resulting from the operation of an airport.

(Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 1287.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
47507	49 App.:2106.	Feb. 18, 1980, Pub. L. 96–193, § 106, 94 Stat. 53.

The words "land uses which are" are omitted as surplus. The words "civil action" are substituted for "suit or action" for consistency in the revised title and with other titles of the United States Code. The words "damages or other" are omitted as surplus.

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
20902(a)	45:40 (1st sentence, 2d sentence words between 1st and 2d commas). 49 App.:26(f) (words after last semicolon). 49 App.:1655(e)(1)(K).	May 6, 1910, ch. 208, §3, 36 Stat. 351; June 22, 1988, Pub. L. 100–342, §15(3), 102 Stat. 634. Feb. 4, 1887, ch. 104, 24 Stat. 379, §25(f) (words after last semicolon); added Feb. 28, 1920, ch. 91, §441, 41 Stat. 498; restated Aug. 26, 1937, ch. 818, 50 Stat. 836; Sept. 18, 1940, ch. 722, §14(b), 54 Stat. 919. Oct. 15, 1966, Pub. L. 89–670, §6(e)(1)(K), 80 Stat. 939.
20902(b)	45:40 (2d sentence less words between 1st and 2d commas).	
20902(c)	45:40 (3d, last sentences).	

In this section, the words "accident" and "incident" are used, and the words "collision" and "derailment" are omitted, for consistency in this part.

Subsection (a)(2) is substituted for the text of 49 App.:26(f) (words after last semicolon) for clarity.

In subsection (b), the words "In carrying out an investigation" are substituted for "shall have authority to investigate such collisions, derailments, or other accidents aforesaid, and all the attending facts, conditions, and circumstances, and for that purpose" to eliminate unnecessary words. The words "books, papers, orders, memoranda" are omitted as being included in "papers". The words "in coordination with" are substituted for "in connection with" for clarity. The words "The railroad carrier on whose railroad line the accident or incident occurred" are added for clarity.

In subsection (c), the words "When in the public interest" are substituted for "when he deems it to the public interest" to eliminate unnecessary words.

§ 20903. Reports not evidence in civil actions for damages

No part of an accident or incident report filed by a railroad carrier under section 20901 of this title or made by the Secretary of Transportation under section 20902 of this title may be used in a civil action for damages resulting from a matter mentioned in the report.

(Pub. L. 103–272, §1(e), July 5, 1994, 108 Stat. 887.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
20903	45:41.	May 6, 1910, ch. 208, §4, 36 Stat. 351.

The words "civil action" are substituted for "suit or action" for consistency in the revised title and with other titles of the United States Code.

CHAPTER 211—HOURS OF SERVICE

AMENDMENTS

2008—Pub. L. 110–432, div. A, title I, §108(d)(2), (e)(2)(A), Oct. 16, 2008, 122 Stat. 4864, 4865, substituted item 21102 for former item 21102 "Nonapplication and exemption" and added item 21109.

1994—Pub. L. 103–440, title II, §203(b), Nov. 2, 1994, 108 Stat. 4620, added item 21108.

§ 21101. Definitions

In this chapter—

(1) "designated terminal" means the home or away-from-home terminal for the assignment of a particular crew.

(2) "dispatching service employee" means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

(3) "employee" means a dispatching service employee, a signal employee, or a train employee.

(4) "signal employee" means an individual who is engaged in installing, repairing, or maintaining signal systems.

(5) "train employee" means an individual engaged in or connected with the movement of a train, including a hostler.

(Pub. L. 103–272, §1(e), July 5, 1994, 108 Stat. 888; Pub. L. 110–432, div. A, title I, §108(a), Oct. 16, 2008, 122 Stat. 4860.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
21101(1)	45:61(b)(4) (1st sentence).	Mar. 4, 1907, ch. 2939, 34 Stat. 1415, §1(b)(4) (1st sentence); added Nov. 2, 1978, Pub. L. 95–574, §6, 92 Stat. 2461.
21101(2)–(4)	(no source).	
21101(5)	45:61(b)(2).	Mar. 4, 1907, ch. 2939, §1(b)(2), 34 Stat. 1415; restated Dec. 26, 1969, Pub. L. 91–169, §1, 83 Stat. 463; July 8, 1976, Pub. L. 94–348, §4(c), 90 Stat. 818.

Clause (2) is added to avoid the necessity of repeating the substance of the definition every time a "dispatching service employee" is referred to in this chapter. The language in clause (2) is derived from 45:63.

Clause (3) is added to provide a definition of "employee" when the source provisions apply to all types of employees covered by this chapter.

Clause (4) is added to avoid the necessity of repeating the substance of the definition every time a "signal employee" is referred to in this chapter. The language in clause (4) is derived from 45:63a.

In clause (5), the words "train employee" are substituted for "employee" to distinguish the term from the terms "dispatching service employee" and "signal employee". The word "actually" is omitted as surplus.

AMENDMENTS

2008—Par. (4). Pub. L. 110–432 struck out "employed by a railroad carrier" after "individual".

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–432, div. A, title I, §108(g), Oct. 16, 2008, 122 Stat. 4866, provided that: "The amendments made by subsections (a), (b), and (c) [amending this section and sections 21103 and 21104 of this title] shall take effect 9 months after the date of enactment of this Act [Oct. 16, 2008]."

RECORD KEEPING AND REPORTING

Pub. L. 110–432, div. A, title I, §108(f), Oct. 16, 2008, 122 Stat. 4866, provided that:

"(1) REGULATIONS.—Not later than 180 days after the date of enactment of this Act [Oct. 16, 2008], the Secretary [of Transportation] shall prescribe a regulation revising the requirements for recordkeeping and report-

The court may direct that an offer of proof be made in question-and-answer form.

(d) PREVENTING THE JURY FROM HEARING INADMISSIBLE EVIDENCE. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) TAKING NOTICE OF PLAIN ERROR. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

(As amended Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 104. Preliminary Questions

(a) IN GENERAL. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) RELEVANCE THAT DEPENDS ON A FACT. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) CONDUCTING A HEARING SO THAT THE JURY CANNOT HEAR IT. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) CROSS-EXAMINING A DEFENDANT IN A CRIMINAL CASE. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) EVIDENCE RELEVANT TO WEIGHT AND CREDIBILITY. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

(As amended Apr. 26, 2011, eff. Dec. 1, 2011.)

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.

CERTIFICATE OF SERVICE

I certify that on December 22, 2021, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users.

s/ Bryan J. Leitch
Bryan J. Leitch
Counsel for the United States