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August 16, 2022

The Honorable Brian Schatz
Chair
The Honorable Susan M. Collins
Ranking Member
Subcommittee on Transportation, Housing, and Urban Development, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable David E. Price
Chairman
The Honorable Mario Diaz-Balart
Ranking Member
Subcommittee on Transportation, Housing, and Urban Development, and Related Agencies
Committee on Appropriations
House of Representatives

Domestic Oceangoing Shipping: Information on the Surface Transportation Board’s Regulatory Processes

Accessible Version

Almost 6-million people living in Hawaii, Alaska, Puerto Rico and other noncontiguous U.S. territories and possessions depend on maritime transportation of vital goods from the mainland (contiguous) U.S.¹ These shipments include items such as food products and other goods. By statute, it is the policy of the U.S. Government to encourage rate reasonableness for transportation services.² The Surface Transportation Board (STB), an independent federal agency, has the authority to determine the reasonableness of a rate for domestic oceangoing

¹The law commonly referred to as the Jones Act and several other statutory requirements implicated by the Jones Act collectively require that maritime transport of cargo between points in the U.S. be carried by ships that are: built in the U.S.; owned by U.S. citizens; and operated predominantly by U.S. citizens or permanent residents. See Section 27 of the Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988, 999 (codified as amended at 46 U.S.C. § 55102) and 46 U.S.C. §§ 12112(a)(2)(A), 8103(b). The purposes of the Jones Act, as amended, include providing the nation with a strong merchant marine that can serve as a naval or military auxiliary in time of war or national emergency, and providing transportation for the growth of the nation’s maritime commerce. According to the Department of Transportation’s Maritime Administration, under the Jones Act, all domestic water transportation providers compete under uniform laws and regulations, creating an even playing field. Jones Act requirements have resulted in discrete shipping markets between the mainland U.S. and Alaska, Guam, Hawaii, and Puerto Rico, with most cargo transported by a few carriers in each market.

²In general, the term “rate” means a rate or charge for transportation services.

carriers that transport cargo between the mainland U.S. and noncontiguous U.S. states and territories.³

House Report 116-452, incorporated by reference into the explanatory statement accompanying the Consolidated Appropriations Act, 2021, contained a provision for GAO to examine STB's regulation of domestic oceangoing transportation, including its process to regulate rate reasonableness. In addition, we examined selected agencies' processes related to rate reasonableness that might inform STB's processes for domestic oceangoing transportation. This report describes:

- STB's authorities and processes related to regulating domestic oceangoing transportation, and
 - the processes selected agencies have for regulating rates in other markets and contexts.
- This report provides a summary of our findings related to these objectives; for more detailed information on our findings, see the attached enclosure.

To address these objectives, we reviewed relevant statutes, regulations, STB reports, three STB rate reasonableness complaint-related cases involving domestic oceangoing carriers, and processes four selected agencies have for regulating rates, including rate reasonableness. We interviewed officials and representatives from: STB; the U.S. Department of Transportation's (DOT) Maritime Administration (MARAD); the Federal Energy Regulatory Commission (FERC); the Federal Maritime Commission (FMC); the Hawaii Public Utilities Commission (Hawaii PUC); the Hawaii Department of Transportation; the Port Authority of Guam; and industry entities, including shippers and domestic oceangoing carriers.⁴ We selected our interviewees based on multiple factors, including whether they regulate rates and geographic diversity. The information we obtained from these interviews provides a broad perspective of relevant issues but is not generalizable to all entities.

We conducted this performance audit from September 2021 to August 2022 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

STB is an economic regulatory agency with jurisdiction over aspects of several different modes of transportation, including domestic oceangoing transportation. Many of the areas STB currently regulates, such as freight rail transportation, were initially regulated by the Interstate Commerce Commission (ICC). Congress expressly provided the ICC with the statutory authority to regulate the rates that railroads could charge shippers to ensure that the rates were just and reasonable. The ICC's jurisdiction to set rates was gradually extended beyond railroads to most common carriers, including domestic oceangoing carriers. The ICC Termination Act of 1995

³49 U.S.C. § 13701. For the purposes of this report, we use the phrases "domestic oceangoing transportation" and "domestic oceangoing carriers" to refer to what federal statute refers to as water carriers engaged in the "noncontiguous domestic trade" that is defined to mean transportation subject to jurisdiction under Title 49 U.S.C. Chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States. 49 U.S.C. § 13102(17).

⁴We refer to companies that use maritime-shipping services as "shippers."

abolished the ICC and transferred ICC regulatory functions to STB,⁵ which became an independent establishment of the U.S. Government in 2015.

The oceangoing transportation industry comprises a small percentage of STB's workload. For example, as of 2022, STB was responsible for the economic regulation of over 600 freight railroads. By comparison, STB regulates rates for about 20 domestic oceangoing carriers. Though a relatively small part of STB's workload, the domestic oceangoing transportation industry is responsible for providing critical shipping services to the markets it serves. Each domestic oceangoing transportation market is served by a few of the about 20 carriers STB regulates. Given the number of carriers serving these markets, questions arise about whether there is sufficient competition to ensure fair rates. MARAD conducted a study in 2006 on competition in the domestic oceangoing shipping markets in Alaska, Guam, Hawaii, and Puerto Rico.⁶ MARAD concluded that in all four of these markets, entry and exit barriers appeared to be moderate for carriers given the size of the markets. The study noted that conditions in the four markets MARAD studied would support only a small number of carriers.

STB Has Authority to Monitor Tariff Filings and Adjudicate Complaints for Domestic Oceangoing Transportation

For domestic oceangoing transportation, STB has authority to monitor tariff filings and can also adjudicate complaints regarding a rate or related practice maintained in a tariff. Statute generally requires carriers to file tariffs with STB for their non-contract domestic oceangoing transportation routes. STB is not required to, and does not, routinely review or approve the rates, rules, or other provisions contained in the tariffs. Under statute, a complaint may be filed with STB regarding a rate or related practice maintained in a tariff that is believed to be unreasonable.⁷ According to STB officials, a complaint becomes a case. The proceedings related to these cases are publically available. STB then begins an adjudication by reviewing the complaint. STB also has an informal process through which it can help stakeholders work through issues and potentially avoid STB's formal complaint process.

STB officials described two main ways for a case involving a domestic oceangoing carrier to begin: (1) an entity could file a complaint with STB or (2) STB could initiate an adjudication related to issues in the public interest. Since its establishment in 1996, STB has received three formal rate-reasonableness-related complaints against domestic oceangoing carriers. The last formal complaint was received in 1999. STB has not self-initiated an adjudication.

STB follows an established process to adjudicate cases; this process includes an STB review of the complaint and replies of the parties involved, such as shippers and domestic oceangoing carriers. This process is applicable across all modes of transportation regulated by STB. When a case involves determining the reasonableness of a rate, STB has three methods for doing so, each of which varies in the amount of evidence required and the amount of damages that can be awarded. A complainant can specify which of the following methods it would like used:

⁵Pub. L. No. 104-88, § 201(a), 109 Stat. 803, 932 (1995).

⁶U.S. Department of Transportation, Maritime Administration, *Competition in the Noncontiguous Domestic Maritime Trades* (Washington, D.C.: May 2006).

⁷49 U.S.C. § 13701(c). See also, 49 U.S.C. § 13702(b)(6).

- **Stand Alone Cost (SAC).** Using the SAC method, the complainant would need to design a hypothetical carrier serving the same route as the carrier involved in the case. In doing so, the complainant would aim to demonstrate how much an efficient carrier would need to charge the shipper to recoup its costs and earn a profit.
- **Simplified SAC.** Rather than designing a hypothetical carrier, the simplified method restricts the evidence parties can submit to the actual operations and services provided by the domestic oceangoing carrier involved in the case.
- **Three Benchmark Test.** Under this method, STB determines the reasonableness of a challenged rate by examining three benchmarks or tests.

As of August 2022, STB has had only one case in which it carried out its process and methodology for determining rate reasonableness within the context of domestic oceangoing transportation.⁸ STB officials said this case would likely be the model for any future domestic oceangoing transportation cases. In 1998, the Government of Guam filed a complaint challenging the reasonableness of rates, among other things, of Sea-Land Services and several other carriers in domestic oceangoing transportation to and from Guam. In February 2007, STB decided to use its SAC method to determine rate reasonableness.⁹ After the Government of Guam’s petition to reconsider the use of the SAC method was denied, the Government of Guam filed a motion to dismiss the case.

Stakeholders shared their perspectives about STB and the unique aspects of domestic oceangoing transportation markets. Representatives from seven of the nine industry entities we spoke with did not identify any additional actions they believe STB should be taking to regulate domestic oceangoing transportation. Representatives from the four carriers noted that rates have generally remained stable in the domestic oceangoing transportation market, including during the COVID-19 pandemic. By contrast, they said that international carrier rates fluctuated significantly during the pandemic. In addition, the carrier representatives explained that they provide regularly scheduled services that consumers depend on. For example, three industry entities said consumers in Hawaii depend on reliable “just-in-time” service from carriers due to the lack of storage space for inventory. Representatives from seven of the nine industry entities we spoke with stated that there are an adequate number of carriers to meet the shipping needs in these small markets. Representatives from one industry entity expressed concerns about a lack of competition and thought STB should provide more oversight of domestic oceangoing transportation. These representatives also said STB should conduct more outreach to stakeholders to explain its regulatory role.

Some Selected Federal and State Agencies’ Authorities Require Them to Review Rate Changes

Agencies we selected that also regulate rates in other markets and contexts have different processes than STB for domestic oceangoing transportation based on their varying authorities, missions, and the industries they regulate. For instance, the Hawaii PUC regulates rates for essential public utilities in markets where there is little or no competition, and its regulatory process involves reviewing all rate changes. Because of differences in authorities and

⁸*Government of the Territory of Guam v. Sea-Land Service Inc., American President Lines, Ltd., and Matson Navigation Company, Inc.*, STB Docket No. WCC-101.

⁹The duration of this case was affected in part by a lack of funding from the Government of Guam to continue the case uninterrupted, according to one of the STB decisions in this case.

industries, other agencies' processes may not be directly applicable to STB's processes. For example, unlike STB, three of the four agencies review rate changes or filed agreements containing the rates of regulated entities.

Selected agencies' processes related to reviewing rates or determining rate reasonableness provide insights into how these other regulatory agencies use their specific authorities. For example, FERC and the Hawaii PUC exercise their authorities related to rates by reviewing rate changes for the service providers under their jurisdictions. Both of these agencies review rates based either on a complaint or on their own initiative, and have formal and informal processes through which they can receive complaints about service providers. FMC does not review specific rates. Rather, it reviews and monitors all filed agreements to determine if they are likely, by a reduction in competition, to produce an unreasonable increase in transportation cost or to produce an unreasonable reduction in transportation service. By contrast, MARAD provides reasonable rate advice upon receiving a request from a federal government department or agency shipping bulk food-aid cargo, according to MARAD officials.

Agency Comments

We provided a draft of this report to STB, DOT, FERC, and FMC for review and comment. We received technical comments from STB, FERC, and FMC, which we incorporated, as appropriate. DOT informed us that it had no comments.

We are sending copies of this report to the relevant congressional committees, the Chairman of the Surface Transportation Board, the Chairman of the Federal Energy Regulatory Commission, the Chairman of the Federal Maritime Commission, and the Secretary of Transportation. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-2834 or vonaha@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are Maria Edelstein (Assistant Director); Marcia Fernandez (Analyst-in-Charge); Melissa Bodeau; Stephen Brown; Melanie Diemel; Geoffrey Hamilton; Gabriel Jimenez-Barron; Alicia Loucks; Danielle Novak; Erin Pineda; and Kelly Rubin.



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Enclosure



August 2022

Domestic Oceangoing Shipping

Information on the Surface Transportation Board's Regulatory Processes

Objectives, Scope, and Methodology

House Report 116-452, incorporated by reference into the explanatory statement accompanying the Consolidated Appropriations Act, 2021, contained a provision for GAO to examine STB's regulation of domestic oceangoing transportation, including its process to regulate rate reasonableness. We also examined other agencies' processes related to rate reasonableness that might inform STB's processes for domestic oceangoing transportation.

This briefing describes: (1) STB's authorities and processes related to regulating domestic oceangoing transportation and (2) the processes selected agencies have for regulating rates in other markets and contexts.

To address these objectives, we reviewed relevant statutes, regulations, STB reports, three STB rate reasonableness complaint-related cases involving domestic oceangoing carriers, and processes selected agencies have for regulating rates. We interviewed officials and representatives from: STB; selected agencies—three federal, two state, and one territorial; and industry entities, including shippers and domestic oceangoing carriers.¹⁰ We selected our interviewees based on multiple factors, including whether they regulate rates and geographic diversity. The information we obtained from these interviews provides a broad perspective of relevant issues but is not generalizable to all entities.

View [GAO-22-105391](#). For more information, contact Andrew Von Ah at (202) 512-2834 or vonaha@gao.gov.

Introduction

Almost 6-million people living in Hawaii, Alaska, Puerto Rico and other noncontiguous U.S. territories and possessions depend on maritime transportation of vital goods from the mainland (contiguous) U.S. (see fig.1). These shipments include items such as food products and other goods. By statute, it is the policy of the U.S. Government to encourage rate reasonableness for transportation services.¹¹ The Surface Transportation Board (STB), an independent federal agency, has the authority to determine the reasonableness of a rate for domestic oceangoing carriers that transport cargo between the mainland U.S. and noncontiguous U.S. states and territories.¹²

Figure 1: Map of Noncontiguous States and Territories Where Domestic Oceangoing Carriers Transport Cargo



Source: GAO and GAO review of domestic oceangoing carriers' documentation. | GAO-22-105391

¹⁰We refer to companies that use maritime-shipping services as "shippers."

¹¹In general, the term "rate" means a rate or charge for transportation services.

¹²49 U.S.C. § 13701. For the purposes of this report, we use the phrases "domestic oceangoing transportation" and "domestic oceangoing carriers" to refer to what federal statute refers to as water carriers engaged in the "noncontiguous domestic trade" that is defined to mean transportation subject to jurisdiction under Title 49 U.S.C. Chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States. 49 U.S.C. § 13102(17).

The Jones Act

The law commonly referred to as the Jones Act¹³ and several other statutory requirements¹⁴ implicated by the Jones Act collectively require that maritime transport of cargo between points in the U.S. be carried by ships that are: built in the U.S.; owned by U.S. citizens; and operated predominantly by U.S. citizens or permanent residents.¹⁵ The purposes of the Jones Act, as amended, include providing the nation with a strong merchant marine that can serve as a naval or military auxiliary in time of war or national emergency, and providing transportation for the growth of the nation's maritime commerce. According to the U.S. Department of Transportation's (DOT) Maritime Administration (MARAD), under the Jones Act, all domestic water transportation providers compete under uniform laws and regulations, creating an even playing field.¹⁶ Jones Act requirements have resulted in discrete shipping markets between the mainland U.S. and Alaska, Guam, Hawaii, and Puerto Rico, with most cargo transported by a few carriers in each market.

Background

STB is an economic regulatory agency with jurisdiction over aspects of several different modes of transportation, including domestic oceangoing transportation. Many of the areas STB currently regulates, such as freight rail transportation, were initially regulated by the Interstate Commerce Commission (ICC). Congress expressly provided the ICC with the statutory authority to regulate the rates that railroads could charge shippers to ensure that the rates were just and reasonable. The ICC's jurisdiction to set rates was gradually extended beyond railroads to most common carriers, including domestic oceangoing carriers. Over time, the ICC's authorities were subsequently scaled back and railroads were given greater freedom to raise or lower rates for rail services in competitive markets. The ICC's regulation of rates was limited to only where the ICC determined that a rail carrier had market dominance.¹⁷

The ICC Termination Act of 1995 abolished the ICC and transferred ICC regulatory functions to STB,¹⁸ which became an independent establishment of the U.S. Government in 2015. STB has responsibilities for certain matters related to rail carriers, the interstate transportation of household goods by motor carriers, carriers engaged in domestic oceangoing transportation, and other areas. STB is comprised of five board members, with one board member serving as the chair. STB staff are divided into six offices, including the Office of Public Assistance, Governmental Affairs, and Compliance, which serves as STB's point of contact with the public, as well as the agency's outreach arm.

¹³Section 27 of the Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988, 999 (codified as amended at 46 U.S.C. § 55102).

¹⁴See 46 U.S.C. §§ 12112(a)(2)(A), 8103(b).

¹⁵For the purposes of this report we refer to this group of requirements as "Jones Act requirements."

¹⁶MARAD, *America's Marine Highway Report to Congress* (Washington, D.C., April 2011).

¹⁷Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 101(b)(3), 90 Stat. 31, 33; Staggers Rail Act of 1980, Pub. L. No. 96-448, § 201, 94 Stat. 1895, 1898.

¹⁸Pub. L. No. 104-88, §§ 101, 201(a), 109 Stat. 803, 807 (1995).

List of Entities GAO Interviewed

Federal Agencies

- Federal Energy Regulatory Commission
- Federal Maritime Commission
- U.S. Department of Transportation Maritime Administration
- Surface Transportation Board

State or Territorial Agencies

- Hawaii Department of Transportation
- Hawaii Public Utilities Commission
- Port Authority of Guam

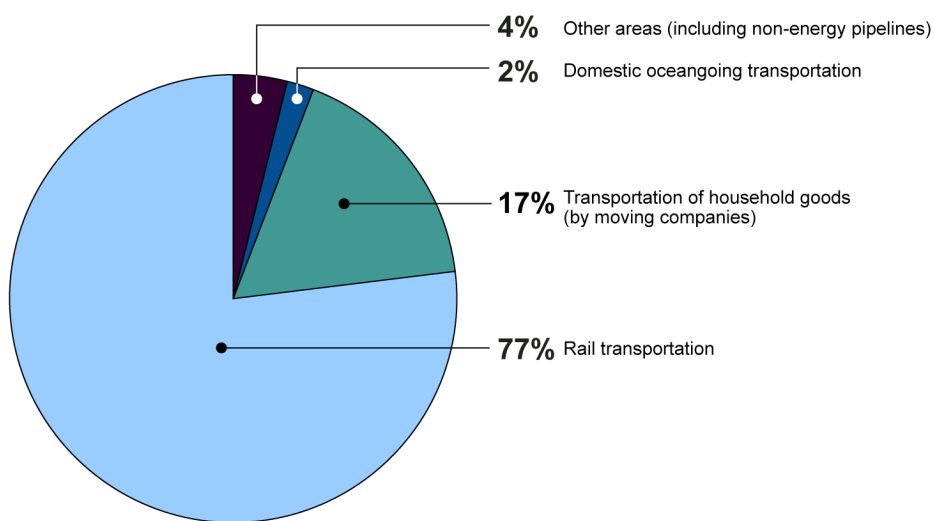
Industry

- American Maritime Partnership (carrier association)
- AJC International (shipper)
- Camara de Mercadeo, Industria y Distribucion Alimentos (shipper association)
- CBX Global (shipper)
- Crowley (carrier)
- Lynden Transport (shipper)
- Matson Navigation Company (carrier)
- Pasha Hawaii (carrier)
- TOTE (carrier)

Background (continued)

The oceangoing transportation industry comprises a small percentage of STB’s workload. For example, as of 2022, STB was responsible for the economic regulation of over 600 freight railroads. By comparison, STB regulates rates for about 20 domestic oceangoing carriers. STB has a process for stakeholders to submit service inquiries in which STB can help stakeholders work through issues and potentially avoid STB’s formal complaint process. The service inquiries and complaints that STB received in 2021, through an inquiry and complaint mechanism STB maintains, also show this dominance (see fig. 2). Specifically, STB reported receiving 14 service inquiries and no complaints related to domestic oceangoing transportation compared to 516 service inquiries and complaints for rail transportation.

Figure 2: Percentage of Service Inquiries and Complaints the Surface Transportation Board (STB) Received in 2021 by Regulated Area



Source: GAO analysis of STB quarterly service-complaint reports. | GAO-22-105391

Accessible Data for Figure 2: Percentage of Service Inquiries and Complaints the Surface Transportation Board (STB) Received in 2021 by Regulated Area

Other areas (including non-energy pipelines)	Domestic oceangoing transportation	Transportation of household goods (by moving companies)	Rail transportation
4	2	17	77

Though a relatively small part of STB’s workload, the domestic oceangoing transportation industry is responsible for providing critical shipping services to the markets it serves. Each domestic oceangoing transportation market is served by a few of the about 20 carriers STB regulates. Given the number of carriers serving these markets, questions arise about whether there is sufficient competition to ensure fair rates. MARAD conducted a study in 2006 on competition in the domestic oceangoing shipping markets in Alaska, Guam, Hawaii, and Puerto Rico.¹⁹ MARAD concluded that in all four of these markets, entry and exit barriers appeared to be moderate for carriers given the size of the

markets. The study noted that conditions in the four markets MARAD studied would support only a small number of carriers.

¹⁹U.S. Department of Transportation, Maritime Administration, *Competition in the Noncontiguous Domestic Maritime Trades* (Washington, D.C.: May 2006).

Cargo Moves under Contract or Tariff

For domestic oceangoing transportation, cargo moves under an agreement contained in either a contract or a tariff. Both documents define the route, any terms of service, and any fees such as fuel surcharges. The difference between the documents is that the terms in contracts are privately negotiated directly between a shipper and a carrier and terms within tariffs, including rates, are publicly available. STB has authority to review tariff rates for domestic oceangoing transportation but not contract rates. According to STB officials, in addition to not having authority to review such contract rates, STB has no visibility into the percentage of freight that moves under contract versus tariff rates.

STB Reporting Requirements

Under statute, STB is required to document any adjudications it pursues and the actions it takes as a result of such adjudications.²⁰ STB must publish an annual report to Congress on its regulatory activities and the status of any adjudications.²¹ These annual reports contain information about any significant complaints the agency received in areas over which it has jurisdiction. On a quarterly basis, STB electronically publishes reports that contain specific information on the number of inquiries and formal complaints from interested parties involved in domestic oceangoing transportation. The agency posts both its annual and quarterly reports on its website. For example, STB has reported three formal complaints relating to domestic oceangoing transportation since it was established in 1996.

STB Has Authority to Monitor Tariff Filings and Adjudicate Complaints for Domestic Oceangoing Transportation

Monitoring Tariff Filings

Statute generally requires carriers to file tariffs with STB for their non-contract domestic oceangoing transportation routes. When changing tariff rates, carriers must update these rates with STB within a specified number of days before any changes go into effect. To make these tariffs easier to file and easier for the public to access, carriers may publish them electronically and they are accessible via links on STB's website. According to officials, once STB receives carriers' tariffs, officials review the documents for completeness and test carriers' website links for functionality.

STB is not required to, and does not, routinely review or approve the rates, rules, or other provisions contained in the tariffs. Under statute, a complaint may be filed with STB regarding a rate or related practice maintained in a tariff that is believed to be unreasonable.²²

Adjudicating Complaints

STB officials stated that there are two main ways for a case involving a domestic oceangoing carrier to begin: (1) an entity could file a complaint with STB or (2) STB could initiate an adjudication related to issues in the public interest. As part of its adjudication, STB may determine whether a rate or business practice is reasonable. STB can take a range of actions if it determines a rate or practice to be unreasonable. Actions could include:

- (1) prohibiting carriers from collecting that unreasonable rate,
- (2) prescribing the tariff rate to be applied going forward for the shipping route in the complaint, and
- (3) awarding retroactive damages to the entity or entities that filed the complaint.

According to representatives from the two carriers we spoke to that service Hawaii, virtually all of the cargo to Hawaii moves under agreements subject to STB's purview. They explained that they may negotiate rates with the shippers but these same rates are filed with STB as their tariff rates. This practice is in contrast to other noncontiguous locations where on average the industry representatives we spoke with said about 5 percent of the cargo moves under tariff rates.

²⁰49 U.S.C. § 1304(a), (c).

²¹Id.

²²49 U.S.C. § 13701(c). See also, 49 U.S.C. § 13702(b)(6).

STB Received Two Complaints that Became Unreasonable Practice Cases

Trailer Bridge, Inc. v. Sea Star Lines, LLC.²³ In 1999, the carrier Trailer Bridge filed a complaint with STB alleging that the carrier Sea Star Lines was in violation of a statutory policy provision encouraging reasonable rates and was engaging in unreasonable practices by offering noncompensatory (below-market) rates for transportation service between the U.S. mainland and Puerto Rico in an effort to disrupt the trade. STB ruled on various motions in this case through 2001. In dismissing Trailer Bridge's claim based on the policy provision encouraging reasonable rates, STB reasoned that Trailer Bridge relied on statutory policy guidelines that did not constitute a separate right of action. In 2002, with respect to the remaining unreasonable practice claim, the case was settled and then STB dismissed the case.

STB's Process for Adjudicating Complaints

STB follows an established process to adjudicate reported concerns (see fig. 3). STB officials stated that STB's process is not specific to domestic oceangoing transportation and that STB uses the same basic process to review complaints related to any of the industries it regulates. In cases dealing with rate reasonableness, the process will involve an extra step where STB will decide which method to use to calculate the reasonableness of a rate.

A rate for domestic noncontiguous trade is considered by statute to be reasonable if it falls within a statutorily prescribed zone (i.e., if it is not more than 7.5 percent higher or 10 percent lower than what the rate was one year earlier).²⁴ In response to a complaint or upon its own initiative, STB must determine whether a rate for service on a domestic oceangoing carrier that is outside the "zone of reasonableness" is reasonable. Similarly, STB must determine whether a business practice is reasonable in response to a complaint or upon its own initiative.

Since its establishment in 1996, STB has received three formal rate reasonableness-related complaints against domestic oceangoing carriers. Of those three complaints, two became unreasonable practice cases and one became an unreasonable rate case. According to STB officials, a complaint can become a case. The proceedings related to these cases are publicly available. STB then begins an adjudication by reviewing the complaint and replies of the parties involved, such as shippers and domestic oceangoing carriers. In the past 20 years, STB has received no formal complaints related to domestic oceangoing transportation. Over this time period, STB has not self-initiated an adjudication. The process below represents the process collectively used in the three STB cases involving domestic oceangoing carriers. One case went through the full process, and the other two were dismissed and did not proceed through the full process.

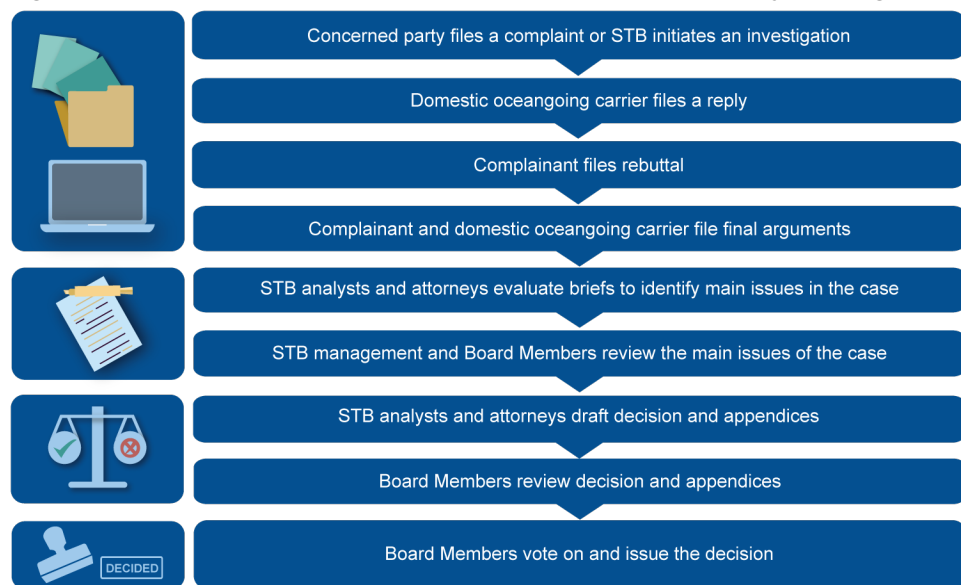
²³*Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104.

²⁴49 U.S.C. § 13701(d)(1).

STB Received Two Complaints That Became Unreasonable Practice Cases (continued)

DHX Inc. v. Matson Navigation Company and Sea-Land Service, Inc. In 1999, DHX, a freight forwarder,²⁵ filed a complaint with STB challenging the reasonableness of certain rates and practices of two carriers in the domestic oceangoing (noncontiguous) trade serving Hawaii. DHX subsequently amended its complaint to focus on unreasonable practices rather than rates by the two other domestic oceangoing carriers.²⁶ In 2004, STB denied DHX’s claims on the basis that DHX had not demonstrated that the two other carriers engaged in unreasonable practices. Following STB’s denial of DHX’s motion for reconsideration, DHX appealed STB’s ruling in federal court. The federal court of appeals upheld STB’s decision finding that STB’s ruling that DHX was not subjected to unreasonable rates or practices was not arbitrary.²⁷

Figure 3: The Surface Transportation Board’s (STB) Process for Adjudicating Cases



Source: STB report. | GAO-22-105391

Note: STB follows an established process when adjudicating cases. In cases dealing with rate reasonableness, the process will involve an extra step where STB will decide which method to use to calculate the reasonableness of a rate.

²⁵Some shipments via water carrier are arranged between the carrier and the shipper directly; others are handled through a third-party intermediary such as a freight forwarder...an entity that holds itself out to the general public to provide transportation of property for compensation, usually by assembling and consolidating shipments to take advantage of volume rates offered by the carrier actually hauling the goods. *DHX, Inc., v. Surface Transportation Board*, 501 F. 3d 1080, 1083 (9th Cir. 2007). A freight forwarder “maintains the dual status of both carrier (vis-à-vis its shippers) and shipper (vis-à-vis the underlying carrier that it uses).” Id. (citing *Exem. Of Freight Forwarders From Tariff Filing Requir.*, 2 S.T.B. 48, 50 (1997)). Therefore, freight forwarders can be both a user and a competitor of water carriers to which they tender traffic. Id. Under STB regulations, freight forwarders subject to STB’s general jurisdiction are exempted from the tariff-filing requirements applicable to carriers in noncontiguous domestic trade. 49 C.F.R. § 1319.1. According to STB officials, this exemption additionally results in such freight forwarders not being subject to rate reasonableness requirements. In its 1996 notice of proposed rulemaking, STB noted that the freight forwarder industry is highly competitive and that the underlying water carriers in noncontiguous domestic trade must file tariffs and are subject to rate reasonableness requirements. 61 Fed. Reg. 59075 (Nov. 20, 1996).

²⁶*DHX, Inc. v. Matson Navigation Company and Sea-Land Service, Inc.*, STB. Docket No. WCC-105, 2004 WL 2899185 at 3, (STB: Dec. 13, 2004).

²⁷*DHX, Inc., v. Surface Transportation Board*, 501 F. 3d 1080 (9th Cir. 2007).

STB Provides Hotline Assistance for All Areas under Its Jurisdiction

In addition to adjudicating complaints, STB officials stated that the agency provides information to the public. STB officials provide informal advice to members of the public about issues related to domestic oceangoing transportation through the Rail Customer and Public Assistance Program hotline. Despite the hotline's name, STB officials said they address inquiries from every area STB has jurisdiction over through this hotline. This hotline

- provides an informal resolution procedure that can help stakeholders work through issues and potentially avoid STB's formal complaint process.
- serves as a way that carriers or shippers could lodge an initial complaint about rate reasonableness or raise other concerns.

STB Methods for Assessing Rate Reasonableness

STB applies its Constrained Market Pricing principles when adjudicating all rate cases, regardless of industry (e.g., rail or domestic oceangoing transportation).²⁸ These principles—originally designed for rail rate cases—are designed to prevent “captive” shippers from: paying more than is necessary for the carrier involved to earn adequate returns, paying for inefficient service, and bearing the cost of facilities and services from which they derive no benefit.²⁹ STB relies on these principles in each of its three methods for determining rate reasonableness. A complainant can specify which of the following methods it would like used:

- **Stand Alone Cost (SAC).** Under the SAC method, the complainant would demonstrate how much an efficient carrier would need to charge the shipper to recoup its costs and earn a profit. To do this, the complainant would need to design a hypothetical carrier serving the same route as the carrier in the case. In this process, both the carrier against which the complaint was filed and the complainant would have the opportunity to present to STB their views as to the required scale of the service and the costs of its operation. Under this STB method, there is no specified limit on the amount of rate damages complainants can be awarded. Of the three methods, the SAC method is the most costly to use given the process both parties must undertake. This method is time consuming and labor intensive due to the expertise required to design a hypothetical domestic oceangoing carrier to ascertain a reasonable rate, according to STB reports.
- **Simplified SAC.** According to STB reports, the simplified SAC method creates a cost-effective alternative to the SAC method. Rather than designing a hypothetical carrier, the simplified method restricts the evidence parties can submit to the actual operations and services provided by the domestic oceangoing carrier involved in the case to determine whether a shipper is cross-subsidizing other parts of the carrier's business. Under this method, there is also no limit on the amount of damages complainants can be awarded.
- **Three Benchmark Test.** According to STB officials, the Three Benchmark Test is faster and less burdensome than the two methods above, but limits the damages for a successful rate challenge. STB determines the reasonableness of a challenged rate by examining three benchmarks, or tests.³⁰ Under this method, complainants cannot be awarded more than \$4 million in damages.

²⁸According to a report prepared for STB, in 1985, the ICC published a set of economic principles to determine whether rates charged by market dominant railroad carriers that are challenged by shippers are unreasonable. INTERVISTAS Consulting Inc., Project FY14-STB-157, *Surface Transportation Board: An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification* (2016). In November 2021, STB published a supplemental Notice of Proposed Rulemaking for Final Offer Rate Review that, if finalized, would offer what STB describes as a streamlined process of rate review for smaller cases. 86 Fed. Reg. 67622 (Nov. 21, 2021). The agency also published a Notice of Proposed Rulemaking in November 2021 to establish a voluntary streamlined arbitration program for small rate disputes. 86 Fed. Reg. 67588 (Nov. 26, 2021).

²⁹A captive shipper is one that does not have an effective competitive alternative to a single carrier that serves their traffic. INTERVISTAS Consulting Inc., Project FY14-STB-157, *Surface Transportation Board: An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification* (2016).

³⁰The benchmarks, or tests, are expressed as a ratio of revenue to variable costs.

Stakeholders' Comments about STB and Unique Aspects of Domestic Oceangoing Transportation Markets

Representatives from seven of the nine industry entities we spoke with did not identify any additional actions they believe STB should be taking to regulate domestic oceangoing transportation.

Representatives from the four carriers noted that rates have generally remained stable in the domestic oceangoing transportation market, including during the COVID-19 pandemic. By contrast, they said that international carrier rates have fluctuated significantly during the pandemic. In addition, the carrier representatives explained that they provide regularly scheduled services that consumers depend on. For example, three industry entities said consumers in Hawaii depend on reliable "just-in-time" service from carriers due to the lack of storage space for inventory. Representatives from seven of the nine industry entities we spoke with stated that there are an adequate number of carriers to meet the shipping needs in these small markets.

Representatives from one industry entity expressed concerns about a lack of competition and thought STB should provide more oversight of domestic oceangoing transportation. They also said STB should conduct more outreach to stakeholders to explain its regulatory role.

STB has had only one case to date in which it carried out its process and methodology for determining rate reasonableness within the context of domestic oceangoing transportation.³¹ STB officials said this case would likely be the model for any future domestic oceangoing transportation cases. In 1998, the Government of Guam filed a complaint challenging the reasonableness of rates, among other things, of Sea-Land Services and several other carriers in domestic oceangoing transportation to and from Guam.

In February 2007, in one of a series of phased decisions in the *Government of Guam* case, STB addressed procedures and methodological approaches to be used in the case.³² Among other things, STB found, that in a market with effective competition, it can conclude that the market-based rates are reasonable without having to conduct a cost-based constrained market-pricing review. As applied to the *Government of Guam* case, STB addressed the methodology to be used to assess rate reasonableness in the event that it were to find insufficient competition. The carriers argued for the application of the SAC method, whereas the Government of Guam argued for a methodology not used by STB that would decrease the reasonable profit margin for the carrier. STB decided to use its SAC method to determine rate reasonableness. After the Government of Guam's petition for reconsideration of STB's February 2007 decision to use its SAC method was denied, the Government of Guam filed a motion to dismiss the case.

³¹*Government of the Territory of Guam v. Sea-Land Service Inc., American President Lines, Ltd., and Matson Navigation Company, Inc.*, STB Docket No. WCC-101.

³²The duration of this case was affected in part by a lack of funding from the Government of Guam to continue the case uninterrupted, according to one of the STB decisions in this case.

Selected Agencies

- **Federal Energy Regulatory Commission (FERC).** FERC is an independent regulatory commission that, in general, regulates the interstate transmission or sale of electricity, natural gas, and oil by pipeline. FERC also regulates the construction and operation of non-federal hydropower projects. FERC carries out this responsibility by, among other things, issuing licenses and orders and establishing rules and policies to balance two important interests: protecting energy consumers against excessive rates and providing an opportunity for regulated entities to recover their costs and earn a reasonable return on their investments.
- **Federal Maritime Commission (FMC).** FMC is an independent establishment of the U.S. Government responsible for ensuring a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices. FMC is responsible for
 - ensuring common carriers' tariff rates and charges are published in automated tariff systems and electronically available to the public;
 - taking action to address unfavorable conditions caused by foreign governments or business practices in U.S.-foreign shipping trades and;
 - providing consumers with services to resolve challenges and disputes involving commercial cargo shipments, household good shipments, and cruise lines.

Some Selected Federal and State Agencies' Authorities Require Them to Review Rate Changes

Agencies we selected that also regulate rates in other markets and contexts have different processes than STB does for domestic oceangoing transportation based on their varying authorities, missions, and the industries they regulate. For instance, the Hawaii PUC regulates rates for essential public utilities in markets where there is little or no competition, and its regulatory process involves reviewing all rate changes. The information below provides insights into how these other regulatory agencies use their specific authorities (see table 1). Because of differences in the authorities and industries, other agencies' processes may not be directly applicable to STB's processes. For example, unlike STB, three of the four agencies review rate changes or filed agreements containing the rates of regulated entities.

Table 1: Examples of Authorities at Selected Federal and State Agencies and Processes Related to Reviewing Rates or Determining Rate Reasonableness

Agency	Authorities related to rates, including rate reasonableness	Elements of processes to review rates or determine rate reasonableness
Federal Energy Regulatory Commission (FERC)	FERC is to ensure that (1) prices by public utilities in wholesale electricity markets subject to FERC jurisdiction are just and reasonable and (2) natural gas transportation rates and charges by natural gas pipelines subject to FERC jurisdiction are just and reasonable.	<ul style="list-style-type: none"> • <i>Reviews rate changes:</i> FERC reviews a proposal for a rate change by the entity transmitting electricity or transporting natural gas and then may hold a hearing. • <i>Reviews rates based on a complaint or on the agency's own initiative:</i> FERC has formal and informal complaint processes through which the agency can receive information about any service provider violations or assist with dispute resolution and receive formal complaints. In some cases, a complaint may result in a formal investigation into a service provider's activities, including ratemaking. • <i>Assess rates based on cost of service:</i> One methodology FERC uses to establish just and reasonable rates, including where competitive market conditions do not exist or competitive forces are inadequate to protect consumers, is cost-of-service ratemaking. Under cost-of-service ratemaking, rates are designed based on a provider's cost of providing service, including an opportunity for the provider to earn a reasonable return on its investment.
Federal Maritime Commission (FMC)	FMC is to ensure that actions under filed agreements between or among common carriers and marine terminal operators that reduce competition do not result in substantial increases in transportation costs or decreases in transportation services. FMC may also monitor rates, charges, and rules of government-owned or controlled carriers to ensure they are just and reasonable.	<ul style="list-style-type: none"> • <i>Reviews all filed agreements:</i> FMC reviews and monitors filed agreements to determine if they are likely, by a reduction in competition, to produce an unreasonable increase in transportation cost or to produce an unreasonable reduction in transportation service. FMC officials noted that the agency does not have rate review authority nor does it have rate reasonableness authority. Therefore FMC does not adjudicate rates for reasonableness in filed agreements.

Selected Agencies (continued)

- Hawaii Public Utilities Commission (Hawaii PUC).** The Hawaii PUC is a state commission with the primary duty to protect the public interest by overseeing and regulating public utilities to ensure that they provide reliable service at just and reasonable rates. The Hawaii PUC regulates public utility companies, including intrastate water carriers, and is responsible for reviewing and approving rates and determining the allowable rate of earnings for utilities in establishing rates.
- MARAD.** MARAD, within DOT, is the agency responsible for the U.S. waterborne transportation system. The agency's mission is to foster, promote and develop the maritime industry of the U.S. to meet the nation's economic and security needs.

Agency	Authorities related to rates, including rate reasonableness	Elements of processes to review rates or determine rate reasonableness
Hawaii Public Utilities Commission (Hawaii PUC)	Hawaii PUC has the authority under state statute to undertake an investigation into the lawfulness of any changes to rates, fares, or charges for the transportation of passengers or property by water carrier.	<ul style="list-style-type: none"> <i>Reviews all rate changes:</i> Any rate change goes through a discovery process that includes public hearings, testimonies from the carrier, and comments from the public. <i>Reviews rates based on a complaint or the agency's own initiative:</i> The Hawaii PUC has formal and informal complaint processes through which the agency assists ratepayers to rectify complaints and requests that utilities resolve issues. In some cases, a complaint may result in an order that would initiate a formal investigation into a utility's activities. In 2021, the Hawaii PUC received four water carrier complaints. Complaints have not resulted in any rate reasonableness determinations. <i>Assesses rates based on a projection:</i> The Hawaii PUC's rate reasonableness determination is based on a forward-looking test year that projects what the carrier's rate of return will be in a future 12-month period given the proposed rate change.
Maritime Administration (MARAD)	MARAD is to perform a concurrence function for the determination of fair and reasonable rates for the carriage of U.S.-government preference cargoes in international trade on U.S.-flag commercial vessels. ^a	<ul style="list-style-type: none"> <i>Reviews rates upon request:</i> MARAD provides reasonable rate advice upon receiving a request from a federal government department or agency shipping bulk food-aid cargo, according to officials. Because MARAD receives 4-5 such requests per month, the agency maintains rate records for every type of food-aid cargo shipped by the U.S. Agency for International Development and the U.S. Department of Agriculture. <i>Assesses rates based on costs:</i> Using an established cost-based methodology, MARAD calculates fair and reasonable rates for carriage of preference cargoes on U.S.-flag commercial vessels. Carriers must provide MARAD with certain cost information, such as daily fuel consumption, for the agency's calculation. This process is laid out in a publicly available agency regulation.

Source: GAO review of selected agencies' authorities, documentation, and interviews. | GAO-22-105391

^aIn general, cargo preference laws and regulations require that specified percentages of U.S. government cargo being shipped internationally, such as military and civilian cargo, including international food aid, be transported on U.S.-flag vessels to the extent that such vessels are available at fair and reasonable rates.

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