



KAPLAN KIRSCH

RAIL LAW UPDATE

Presented by:

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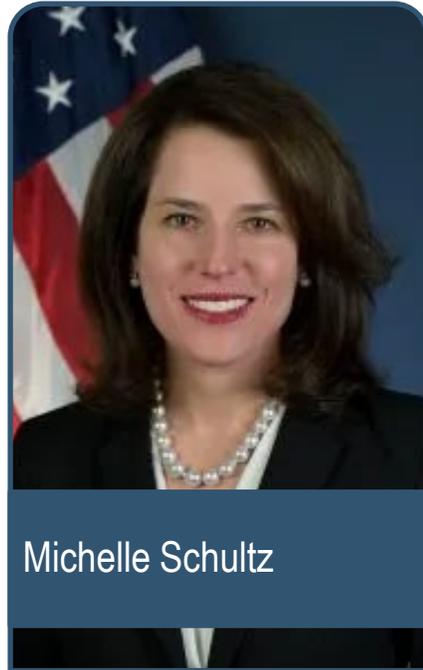
Grant Glovin, Kaplan Kirsch LLP

The views expressed in this presentation are solely those of the presenter and are not attributable to APTA.

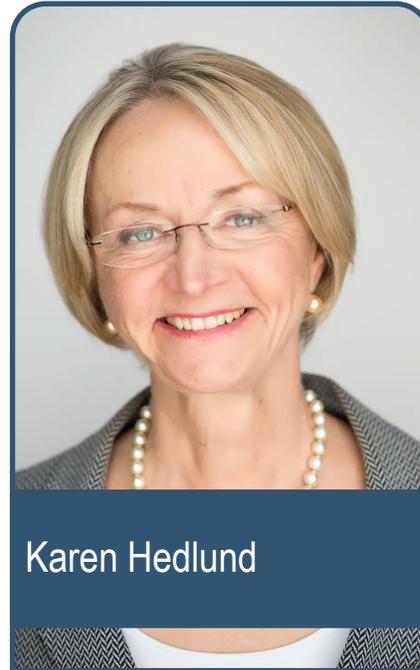
Surface Transportation Board



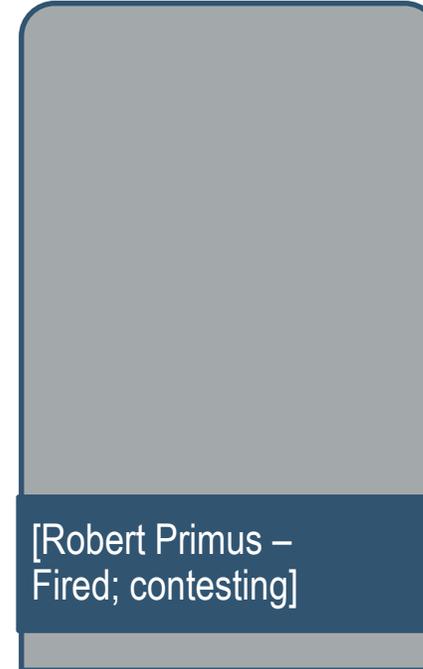
Patrick Fuchs
(Chair)



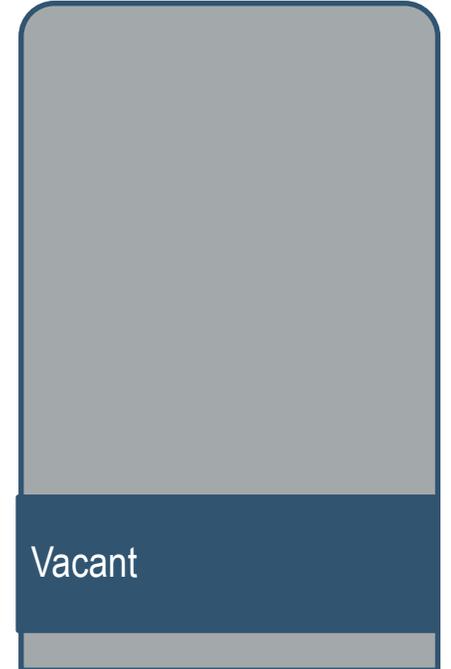
Michelle Schultz



Karen Hedlund



[Robert Primus –
Fired; contesting]



Vacant

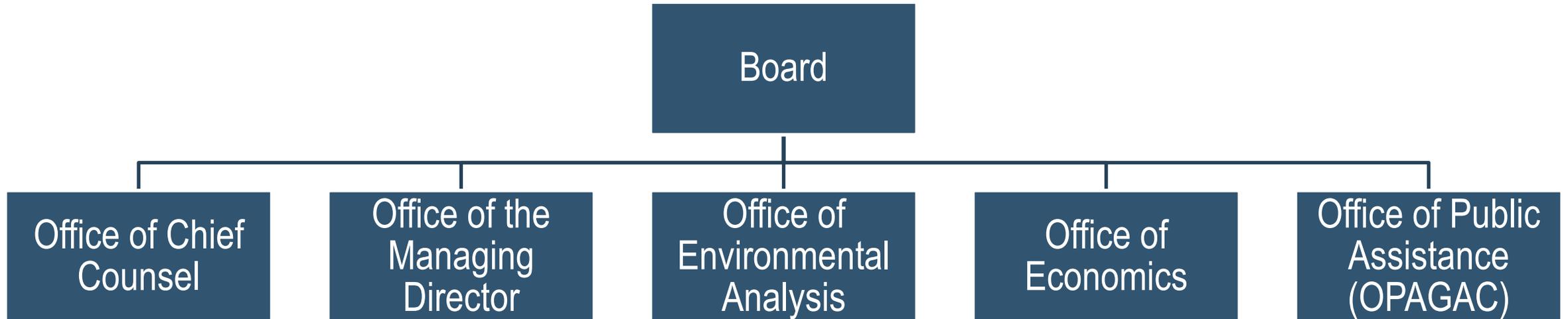
Union Pacific/Norfolk Southern Merger



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Today: Surface Transportation Board



Issues Before the Surface Transportation Board

- Railroad mergers.
- Railroad line construction, abandonment approvals.
- “State of Maine” transactions (normally used to allow for passenger rail on a freight line).
- “Railbanking” – allowing a disused rail line to be turned into a recreational trail for “interim trail use”.
- Preemption of state and local laws and regulation (e.g. land use and zoning enforcement, adverse possession claims).



STB Jurisdiction's Preemptive Effect Generally

ICCTA > STATE/LOCAL LAWS

“The jurisdiction of the Board over . . . Transportation by rail carriers . . . Is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b).



STB's Merger Approval Powers

- Approval by the STB exempts transaction from all other merger laws.
- STB standard for approval: “consistent with the public interest.” 49 U.S.C. § 11324(c).
 - Main focus is on competition, but also consideration of passenger rail, community impacts.
- STB may impose conditions to ensure merger is in the public interest, e.g. capital investments, competitor trackage rights, priority/capacity.



STB Approval of Mergers

STB APPROVAL > OTHER LAWS

“A rail carrier, corporation, or person participating in that approved or exempted transaction is **exempt from the antitrust laws and from all other law, including State and municipal law**, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.” 49 U.S.C. § 11321.

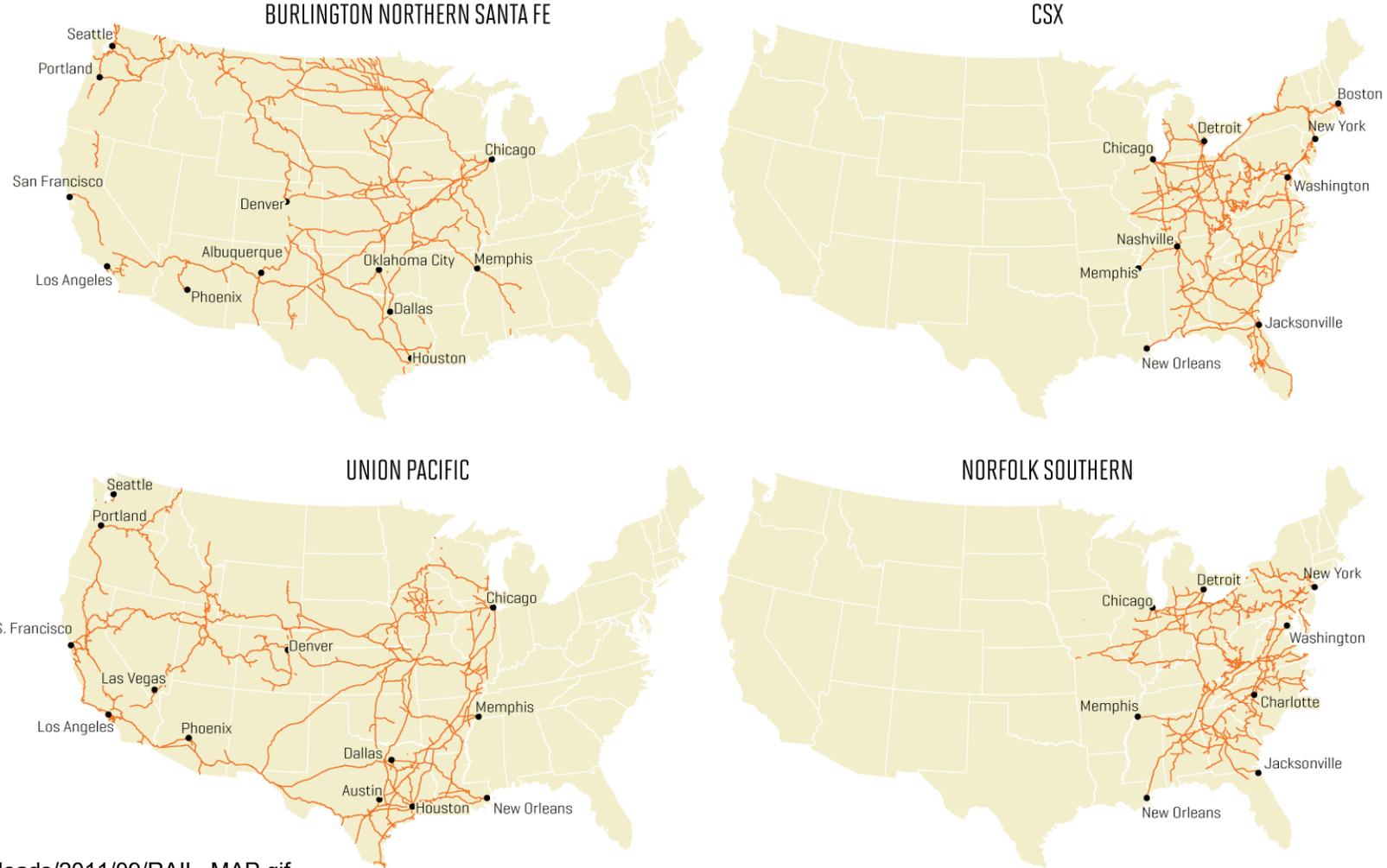


STB's Current Major Merger Criteria

- In 2001 STB introduced new merger criteria (49 CFR 1180).
 - Raised the bar for demonstrating merger was in the public interest
 - Included express consideration of harm to “essential service”. which has been interpreted to include passenger service.
- Only major merger since 2001 (CP-KCS 2023) was an exception to the new 2001 rules, so this is the first time they will be applied.



Today: Interstate Rail Network



https://ritholtz.com/wp-content/uploads/2011/09/RAIL_MAP.gif



UP-NS Merger: The Pitch

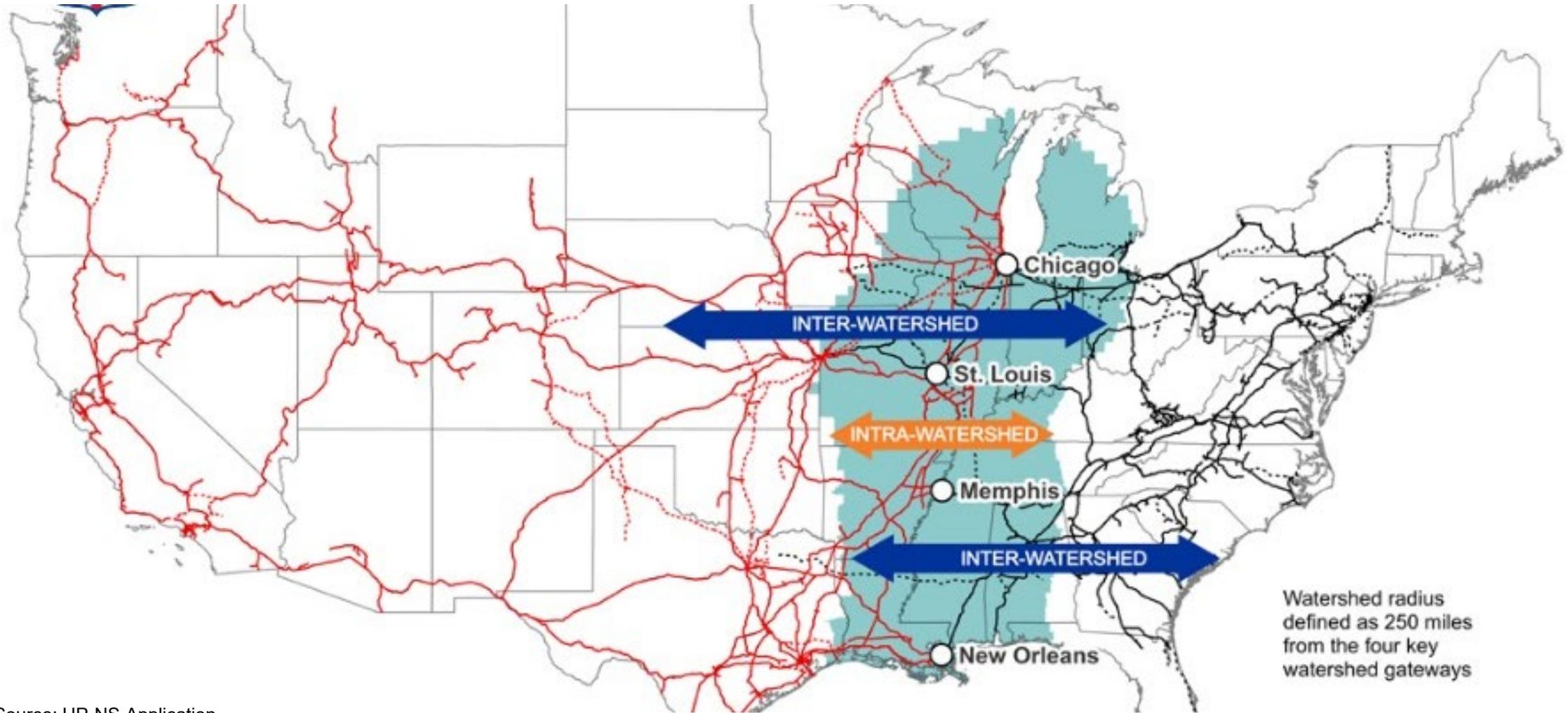


Image Source: UP-NS Application



UP-NS Merger: Application Organization

- Requirements are provided in the STB regulations (49 C.F.R. Part 1180)
- Key areas:
 - Impacts on Passenger Operations.
 - Maps.
 - Operating Plan – how merged railroad will work.
 - Train “Density” Data (spreadsheets).
 - Environmental Impact Statement (forthcoming).
 - “Workpapers” – Applicants’ homework – often technical.



Original Proposed Merger Schedule

Event	Days after application	Estimated date
Application filed.	0	December 19, 2025
STB approves application (or not?).	+30	January 19, 2026
Notice of intent to participate due from third parties.	+45	February 2, 2026
Comments, protests, requests for conditions, and any other evidence and argument in opposition of the Application.	+120	April 18, 2026
Responses to comments, protests, requests for conditions, and other opposition due.	+210	July 17, 2026
Final briefs due.	+270	September 15, 2026
Public hearing (if necessary). (Close of the record, required to be within one year of the date of FR publication)	TBD	(January 18, 2027)
Service date of final decision. (required to be 90 days after close of the record).	TBD	(April 18, 2027)



Merger Impacts

- Reduction in passenger rail capacity, access, reliability
- Future expansion opportunities
- Blocked grade crossings
- Noise and other community impacts
- Less oversight
- Shifting economic patterns
- Environmental risks



Merger Impacts

Rail Safety:

Freight Trains Are Getting Longer, and Additional Information Is Needed to Assess Their Impact

GAO-19-443

Published: May 30, 2019. Publicly Released: Jul 01, 2019.



<https://www.gao.gov/products/gao-19-443>



-Araceli

@Shelly_Rivers



Replying to @metraMDW

Why do freight trains always interfere at the Franklin park station? Shouldn't they stop before the walkways when there is a metra train scheduled to arrive?

16:06 · 7/31/18 · [Twitter for iPhone](#)



Protecting Transportation and Communities

- Investigate, question, research Application, seek discovery
- File objections with STB
- Raise concerns and objections with government officials
- Request mitigations
- Negotiate directly with UP/NS



Resources on the STB website

- “View Filings” or “View Decisions”
- “Search STB Records”
- “UP-NS Merger Resources”
- Resources → Legal Resources tab
- Proceedings & Actions → E-filing

The screenshot shows the official website of the Surface Transportation Board (STB). At the top, there is a navigation bar with the STB logo and the text "Surface Transportation Board". To the right of the logo is a search bar with the placeholder text "Search for:" and a magnifying glass icon. Below the navigation bar, there are several menu items: "Proceedings & Actions", "Reports & Data", "Resources", "News & Communications", and "About STB". The main content area features a large banner with the text "Supporting an efficient, competitive, and sound surface transportation network" and a sub-header "We promote and protect the nation's economy by resolving surface transportation disputes, overseeing the flow of commerce, and facilitating infrastructure development." Below this text are three buttons: "Search STB Records", "About the STB", and "UP-NS Merger Resources". The background of the banner is a photograph of a train track stretching into the distance. Below the banner, there are two sections: "QUICK LINKS" and "LATEST BOARD DECISIONS". The "QUICK LINKS" section contains six buttons: "View Filings", "View Decisions", "Rail Service Data", "Economic Data", "Search STB Records", and "Need Assistance?". The "LATEST BOARD DECISIONS" section contains three entries, each with a date, a brief description, and a docket number. The entries are: "JANUARY 12: UNION PACIFIC RAILROAD COMPANY— ABANDONMENT EXEMPTION—IN JEFFERSON COUNTY,..." (DOCKET AB_33_354_X), "JANUARY 9: CSX TRANSPORTATION, INC.— ABANDONMENT EXEMPTION— IN ALACHUA COUNTY, FLA." (DOCKET AB_55_824_X), and "JANUARY 8: SMOKY RIDGE RAILROAD, L.L.C. — ACQUISITION AND OPERATION EXEMPTION —..."



Other resources

- STB Rail Map Depot (maps)
 - <https://www.stb.gov/resources/railroad-map-depot/>
- FRA Rail Safety Map (maps)
 - <https://experience.arcgis.com/experience/b6c12fd0a4774f38a303e3d034775854>
- Progressive Railroading (news publication)
- “Rail fan” websites (subject to verification)



Additional Passenger Rail Updates



Other STB Proceedings

- *Commuter Rail Division of the Regional Transportation Authority d/b/a Metra—Terminal Trackage Rights—Union Pacific Railroad Co.*, FD 36844 (STB served Sept. 3, 2025)
 - Metra sought trackage rights for commuter rail service on 3 UP lines Follows UP's (litigated) termination of Metra service.
 - The STB granted Metra's request and directed the parties to negotiate terms and compensation.
 - This is a novel use of the terminal trackage rights statute.
 - Metra has requested the STB establish conditions of use and compensation. UP opposed the request.
 - Negotiations are ongoing.



Amtrak Preference Disputes

STB

- Sunset Limited (primarily UP)
- First-of-its-kind investigation under PRIIA
- Brought by Amtrak
- Key issues:
 - Meaning of “preference”
 - Scope of Board’s authority
 - Remedies
 - Impact on commuter railroads
- Settled August 6, 2025

D.D.C.

- Crescent (Norfolk Southern)
- Second ever suit to enforce preference
- Brought by DOJ
- Key issues:
 - Meaning of “preference”
 - Jurisdiction and venue
- Settled September 9, 2025



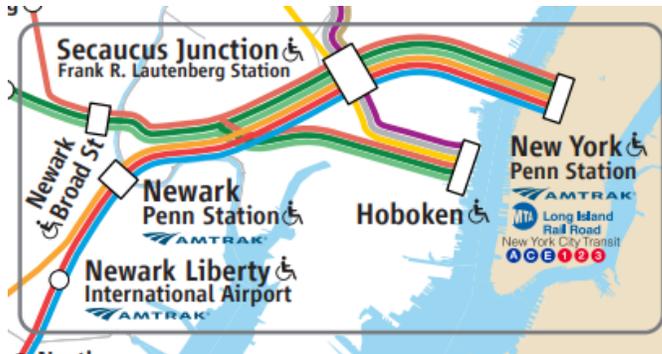
Galette v. NJ Transit Corp.

- NJ TRANSIT sought to use sovereign immunity to dismiss two suits arising from bus accidents in New York and Philadelphia
- Supreme Court: NJ TRANSIT is not an arm of the state entitled to sovereign immunity



Galette v. NJ Transit Corp.: Impacts

- Direct impact to interstate commuter railroads housed outside of state agencies



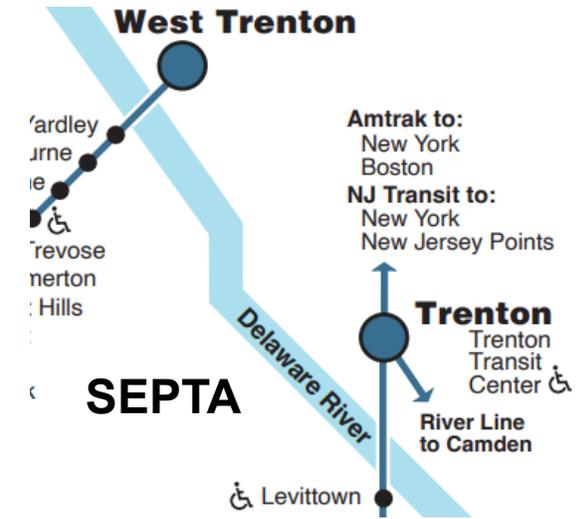
NJ TRANSIT



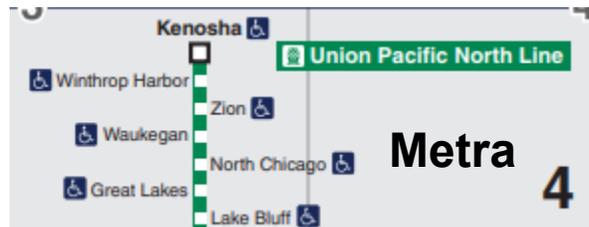
Metro-North



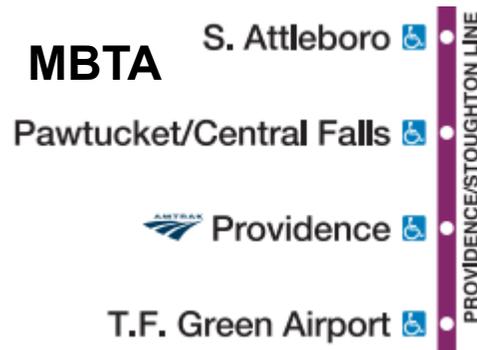
NICTD (South Shore Line)



SEPTA



Metra



MBTA



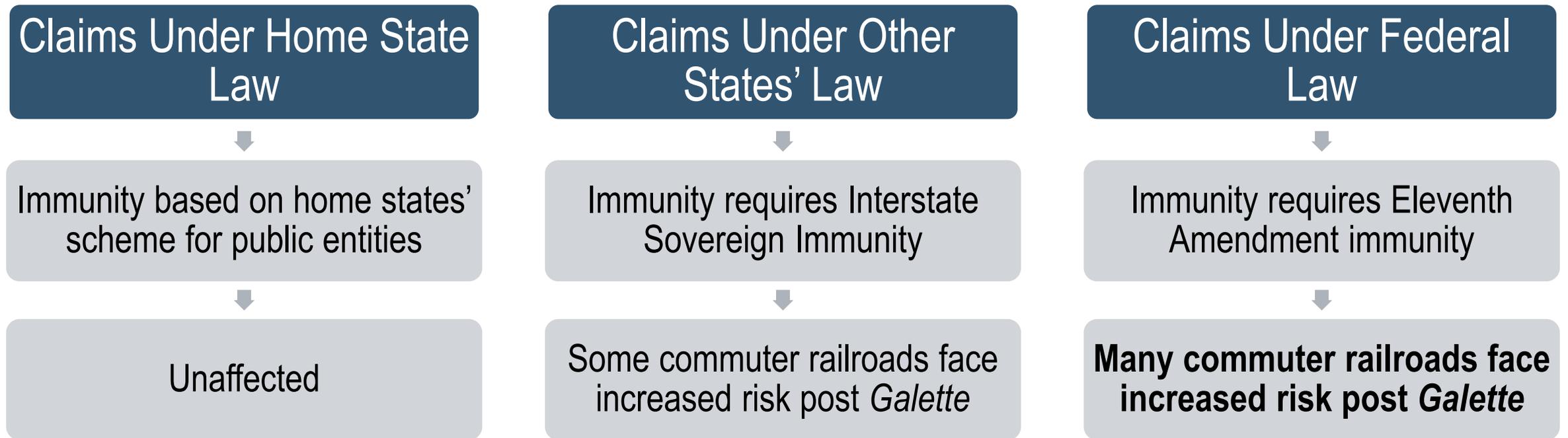
VRE

But...



Galette v. NJ Transit Corp.: Impacts

- The Court did not distinguish between Eleventh Amendment and Interstate Sovereign Immunity



- Increased risk will result in potential increased liability and likely a worse insurance market



Risk Management

- *Galette* arrives in a larger context
- Statutory passenger rail liability cap under 49 USC 28103
 - Currently \$322M
 - Expected to adjust up to just under \$400M
 - Last adjustment was Feb 25, 2021 – required to adjust every 5 years
- Determine scope of ability to claim sovereign immunity
- Determine state law mechanisms for indemnification and insurance



DOT Updates

- Grant condition litigation—to be discussed in other sessions
- DBE Interim Final Rule 49 CFR part 26 (90 Fed Reg 47,969)—to be discussed in other sessions



FTA Updates

- Withdrawal of environmental justice guidance (Circular 4703.1)
- Shift in CIG Environmental Criteria
 - Deprioritize GHG reductions
 - Look solely to NAAQS designation of metropolitan area in which project was located.
- Withdrawal of ANPRM regarding minimum standards to prevent fatigue-related safety incidents



FRA Updates

- FRA deregulatory sprint – 90 Fed Reg 28123 (effective July 31, 2025)
 - Largely ministerial changes
 - Potentially problematic: Revised definition of “person” in updated provisions



Funding Fights: California

- FRA initiated a compliance review of California High-Speed Rail.
- Following the review, FRA terminated its two grants to the project.
- The State sued to challenge the termination, and survived a motion to dismiss.
- Nonetheless, the State voluntarily dismissed the complaint in December 2025.



Funding Fights: New York and New Jersey

- FTA stopped reimbursements to the Hudson Tunnel Project and Second Avenue Subway pending an administrative review.
- Hudson Tunnel received a temporary \$500 million credit line, but construction stopped on February 6.
- Two Hudson Tunnel suits:
 - SDNY (New York and New Jersey; injunction granted; funding restored)
 - Court of Federal Claims (GDC; unresolved)
- Second Avenue Subway funding remains unresolved



Funding Fights: Philadelphia

- SEPTA faced ~\$213M operating gap after federal COVID relief expired and costs rose.
- “Death spiral” plan: 45% service cut; fares raised ~21.5%.
- The State did not act, and the plan took effect.
- Riders brought suit in state court challenging the cuts under Title VI and were awarded a preliminary injunction.
- SEPTA has now used capital funds to stabilize operations and partially reverse service cuts.



Questions

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