

No. 22-60217

IN THE
**United States Court of Appeals
for the Fifth Circuit**

BNSF RAILWAY COMPANY,
Petitioner,

v.

FEDERAL RAILROAD ADMINISTRATION; AMIT BOSE, in his official
capacity as Administrator, Federal Railroad Administration;
and UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

On Petition for Review of an Order of
the Federal Railroad Administration

**BRIEF FOR *AMICUS CURIAE*
NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF PETITIONER**

ARJUN GARG
KEVIN M. SHEYS
SEAN MAROTTA
NATHANIEL A.G. ZELINSKY
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-4881
sean.marotta@hoganlovells.com

*Counsel for Amicus Curiae
National Association of Manufacturers*

July 12, 2022

CERTIFICATE OF INTERESTED PERSONS

1. Number and style of case: *BNSF Railway Company v. Federal Railroad Administration*, 22-60217.

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Petitioner

BNSF Railway Company

Current and Former Attorneys for Petitioner

Thomas H. Dupree Jr.
Jessica L. Wagner
Gibson, Dunn & Crutcher LLP

Respondents

Federal Railroad Administration
Amit Bose
United States Department of Transportation

Current and Former Attorneys for Respondents

Cynthia Barmore
Allison Ishihara Fultz

Intervenor

Brotherhood of Maintenance of Way Employees Division/IBT

Current and Former Attorneys for Intervenor

Richard Steven Edelman
Mooney Green Saindon Murphy & Welch

Amicus Curiae

National Association of Manufacturers

Attorneys for Amicus Curiae

Arjun Garg
Kevin M. Sheys
Sean Marotta
Nathaniel A.G. Zelinsky
Hogan Lovells US LLP

/s/ Sean Marotta
Sean Marotta

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF AUTHORITIES	iv
INTERESTS OF <i>AMICUS CURIAE</i>	1
ARGUMENT	3
I. AMERICAN RAILROADS CURRENTLY FACE SERIOUS CHALLENGES AND AUTOMATED TRACK INSPECTION IS AN IMPORTANT PART OF THE SOLUTION.....	4
II. THE FRA’S FAILURE TO ACKNOWLEDGE ITS DEPARTURE FROM EXISTING POLICY IS ARBITRARY AND CAPRICIOUS.....	8
CONCLUSION	13
CERTIFICATE OF SERVICE	
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<i>American Wild Horse Pres. Campaign v. Perdue</i> , 873 F.3d 914 (D.C. Cir. 2017).....	10
<i>Belmont Mun. Light Dep’t v. FERC</i> , ___ F.4th ___, No. 19-1224, 2022 WL 2182810 (D.C. Cir. June 17, 2022)	9
<i>Department of Homeland Sec. v. Regents of the Univ. of California</i> , 140 S. Ct. 1891 (2020).....	10, 12
<i>Encino Motorcars, LLC v. Navarro</i> , 579 U.S. 211 (2016).....	9, 10
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	9, 10, 11
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	8, 9
<i>NLRB v. International Union of Operating Eng’rs</i> , 460 F.2d 589 (5th Cir. 1972)	11
<i>Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968).....	9
<i>Shaw’s Supermarkets, Inc. v. NLRB</i> , 884 F.2d 34 (1st Cir. 1989).....	10
<i>Wages & White Lion Invs., L.L.C. v. United States Food & Drug Ad- min.</i> , 16 F.4th 1130 (5th Cir. 2021)	10, 11
ADMINISTRATIVE PROCEEDING:	
<i>Urgent Issues in Freight Rail Service—Railroad Reporting</i> , No. EP 770 (Sub-No. 1) (STB May 6, 2022)	4, 5

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITY:

Freight Rail & Intermodal, Association of American Railroads,
<https://www.aar.org/issue/freight-rail-intermodal/> (last visited: July
12, 2022)2

INTERESTS OF *AMICUS CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States.¹ The NAM represents small and large manufacturers in every industrial sector and in all 50 states, as well as companies that provide critical infrastructure necessary for manufacturing. Manufacturing employs more than 12.7 million men and women, contributes roughly \$2.71 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States. Petitioner BNSF and other freight railroads are NAM members.

The NAM regularly files *amicus* briefs in cases, such as this one, that raise issues important to manufacturers. The NAM writes to explain how the Federal Railroad Administration (FRA) decision under review undermines railroad efficiency and safety, directly harming America's manufacturers.

¹ The parties to this appeal have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part, and that no party or person other than *amicus curiae* or its counsel contributed money toward the preparation or filing of this brief.

The NAM's member companies rely heavily on freight railroads like BNSF to ship in raw materials, parts, and goods, and to ship out finished products to customers. For instance, railroads deliver the raw materials and parts to make cars and light trucks, and transport almost 70% of all new cars and light trucks sold in the United States. Railroads move a wide range of chemicals, including plastics and fertilizers. Railroads play a critical role in the nation's construction industry, by moving essential items like steel, cement, and lumber. Railroads move cardboard and other forest products essential in the e-commerce economy. And perhaps most importantly, railroads transport shipping containers and truck trailers on flatcars which allows railroads to provide NAM members and their customers with cost-effective transport for any product that can be loaded into a truck or ocean container.² Railroads thus provide essential connectivity for commerce among businesses and with consumers. The NAM's member companies rely on the railroad system to run efficiently to support logistics, and to operate safely to protect people and property.

America's railroads are currently experiencing serious operational and service challenges, and the supply chain is under tremendous pressure. The FRA de-

² See *Freight Rail & Intermodal*, Association of American Railroads, <https://www.aar.org/issue/freight-rail-intermodal/> (last visited: July 12, 2022).

cision under review exacerbates these major stresses confronting the NAM's member companies and the American economy as a whole. Especially in the midst of this difficult environment, the NAM has a deep interest in correcting an improper FRA decision that directly undermines railroad efficiency and safety.

ARGUMENT

The FRA's decision is bad policy implemented through an unlawful exercise of administrative authority. *First*, the decision harms the American economy. Freight railroads play a key role in supporting commerce but are currently facing serious challenges. Trains are running slower than normal, and the tracks are clogged. This degraded rail service has contributed to widely-felt disruptions in the U.S. supply chain. Automated Track Inspection (ATI) technology can help railroads solve their current challenges by allowing them to operate more efficiently. ATI reduces the need to shut down tracks for manual inspections and allows railroads to identify track defects more quickly. The result: faster trains and smoother service. The record in this case demonstrates ATI's considerable benefits. Where BNSF has used ATI, the railroad has seen improvements across a variety of metrics. But the FRA refused to allow BNSF to expand its efforts to harness ATI's full potential. That is a serious mistake.

Second, the FRA's decision violates basic principles of administrative law. When the FRA previously approved BNSF's proposal to use ATI on some tracks,

the FRA informed BNSF that it could expand its ATI program if the railroad met certain metrics. More broadly, the FRA has supported ATI. But in the decision under review, the FRA did an about face. Despite BNSF meeting the prior metrics the FRA had set, the FRA denied BNSF's request to expand its use of ATI. Hornbook administrative law requires an agency that changes policy to at least acknowledge the shift and to offer some reasoned justification for adopting its new policy. The FRA failed to meet these requirements. That the FRA violated basic administrative procedure despite the serious challenges railroads currently face only underscores how arbitrary and capricious its decision was.

I. AMERICAN RAILROADS CURRENTLY FACE SERIOUS CHALLENGES AND AUTOMATED TRACK INSPECTION IS AN IMPORTANT PART OF THE SOLUTION.

The four largest U.S.-based railroads, including BNSF, are currently experiencing significant operational and service challenges due to personnel shortages and capacity constraints. If the FRA's decision stands, it will negatively impact the railroad industry at an especially challenging time for the American supply chain and the wider economy.

Right now, America's railroads are tangled. The Surface Transportation Board's ("the Board") data reveals that "key performance indicators, such as system average train speed and average number of trains holding per day" are "below historic norms." *Urgent Issues in Freight Rail Service—Railroad Reporting*, No.

EP 770 (Sub-No. 1), slip op. at 2 (STB May 6, 2022). Railroad customers have reported “increased dwell time at origins, decreased velocity, increased transit time, inadequate car supply, missed switches, increased demurrage charges, and congestion caused by trains that do not fit into existing sidings.” *Id.* at 3. In other words, America’s freight trains are running more slowly and less smoothly than what customers deserve, and have come to expect. This has contributed to the wider disruptions in America’s supply chain.

In response to this degraded service, the Board has ordered BNSF and the other three largest U.S.-based railroads to submit detailed service recovery plans and progress reports and to participate in bi-weekly conference calls with Board staff. *Id.* at 5-6. The NAM’s members are keenly interested in the rapid recovery in freight railroad network performance, and remain confident that BNSF and the other large U.S.-based railroads will use all resources at their disposal to achieve improvements. ATI technology is a key part of any solution.

There are two ways ATI technology can help railroads maximize rail-network capacity, and ameliorate the serious operational and service challenges railroads currently face.

First, ATI technology allows tracks to remain in service during inspection, meaning the rail network experiences less downtime overall. Traditional visual

track inspection requires railroads to suspend train service on lines while employees manually inspect the track in person. *See* A142. To conduct a visual inspection, a railroad employee first contacts railroad dispatch to secure authority to traverse the right of way and track, either walking or riding a special “hi-rail” vehicle. To grant authority for the inspection, railroad dispatch must suspend all train service on the track. For obvious safety reasons, train service only resumes once inspectors have completed their work.

ATI, by contrast, does not require an employee to physically traverse the track on foot or by hi-rail. Instead, ATI systems use specialized, unmanned rail cars attached to existing trains. *See* A142; A272-273. As the train passes over the track, the ATI system scans the track and identifies defects. Because ATI cars are attached to existing trains and inspect the track while the train rolls along its normal route, ATI technology obviates the need for *any* suspension of rail service on the track being inspected. In other words, ATI happens in tandem with, not instead of, the normal operation of freight trains.

When railroads employ ATI systems, railroads avoid significant and unnecessary disruptions to service. BNSF reported that implementing ATI reduced the amount of time that BNSF needed to shut down lines for inspection by 25-30 percent. *See* A372. Given how logistics networks work, a small percentage improvement in efficiency can yield meaningful benefits when multiplied over the entire

network. Thus, BNSF's 25-30 percent reduction in idle track time for safety inspections translates to substantially improved through-put capacity, better utilization of equipment, and saved crew time. These efficiencies ultimately benefit railroad customers and the American consumer.

Second, in addition to reducing service disruptions related to track inspection, ATI technology helps railroads maximize capacity by detecting track defects faster and repairing them sooner. In particular, ATI has allowed railroads to find and fix a back-log of the most severe types of track defects—those that pose the greatest derailment risk and require a track-speed reduction of more than one level until repaired—which are known as “multi-class defects.” *See* A356.

ATI is more accurate and faster than traditional visual inspection. As a result, when it uses ATI, a railroad can quickly identify all multi-class defects on a given track. Once ATI identifies the multi-class defects, the railroad can repair all such defects in one repair program, all at once, and restore track speed. By contrast, the traditional visual-only inspection regime takes longer to identify all multi-class defects, leaving railroads to fix the defects piecemeal.

ATI also helps reduce the back-log of outstanding defects that require railroads to run trains at slower speeds. For example, after BNSF deployed ATI on the Southern Transcon line and conducted proactive repairs, the rate of multi-class defects dropped by 73%. *See* A372. This meant that BNSF could run more trains

at faster speeds, all while doing so more safely. These benefits accrue to railroad customers and American consumers, who receive goods faster and on-time.

In sum, ATI technology can help ameliorate the current operational and service challenges to America's freight network. Even when the current challenges plaguing U.S. railroads abate, ATI will remain a necessary ingredient to maintaining a fluid and flexible railroad network for the NAM's members, their consumer and business customers, and the U.S. economy as a whole.

II. THE FRA'S FAILURE TO ACKNOWLEDGE ITS DEPARTURE FROM EXISTING POLICY IS ARBITRARY AND CAPRICIOUS.

The FRA's decision to prevent BNSF from expanding ATI is not only bad policy at a tumultuous moment for the American economy, but also unlawful because it violates hornbook administrative law. BNSF's brief details how FRA failed to explain its deviation from its prior policy supporting ATI and providing BNSF a clear path to expanding ATI. *See* Pet'r's Br. 32-37. The NAM writes to emphasize that when an agency like the FRA departs from an existing policy, foundational principles of administrative law require the government, at a minimum, to both admit that it has done so and to articulate some reasoned basis for changing course. When an agency fails to comply with these basic requirements—as the FRA failed to do here—the agency acts arbitrarily and capriciously.

The law permits agencies “ample latitude to ‘adapt their rules and policies to the demands of changing circumstances.’ ” *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*

v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)). But this latitude is not unbounded: When agencies “change their existing policies” they must “provide a reasoned explanation” for doing so. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

At the core of a reasoned explanation are two elements: An acknowledgment of the shift, and a logical rationale behind the new policy. As an initial matter, “the agency must at least display awareness that it is changing position.” *Id.* (internal quotation marks omitted). The failure to acknowledge a change in position creates “an unexplained inconsistency in agency policy” which “is a reason for holding an interpretation to be . . . arbitrary and capricious.” *Id.* (cleaned up). Thus, an “agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

When agencies fail to follow this modest rule, courts have not hesitated to act, vacating a diverse array of actions spanning agencies and Administrations, and stretching back decades. *See, e.g., Belmont Mun. Light Dep’t v. FERC*, ___ F.4th ___, No. 19-1224, 2022 WL 2182810, at *9 (D.C. Cir. June 17, 2022) (finding an agency “demonstrate[d] a lack of reasoned decisionmaking” where it failed to

acknowledge its change in position); *American Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 927 (D.C. Cir. 2017) (finding agency’s “failure even to acknowledge its past practice and formal policies,” “let alone to explain its reversal of course” to be “arbitrary and capricious”); *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 35 (1st Cir. 1989) (Breyer, J.) (“Because the Board has not explained its inconsistent decision in this case, we shall not now enforce its order, but instead we shall remand this case to the Board.”).

But an agency’s mere acknowledgment that a new policy has replaced an old one is not enough. The agency “must [also] show that there are good reasons for the new policy.” *Fox Television*, 556 U.S. at 515. This Court’s arbitrary and capricious “review is not toothless,” and “has serious bite.” *Wages & White Lion Invs., L.L.C. v. United States Food & Drug Admin.*, 16 F.4th 1130, 1136 (5th Cir. 2021) (internal quotation marks omitted).

For starters, the Court must ensure the agency’s reasoning takes “into account” any “serious reliance interests” in the existing policy. *Encino Motorcars*, 579 U.S. at 221-222 (internal quotation marks omitted). As the Supreme Court recently reiterated, “[i]t would be arbitrary and capricious to ignore such matters.” *Department of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (internal quotation marks omitted); *see, e.g., White Lion*, 16

F.4th at 1136, 1138-39 (vacating where agency failed to consider reliance interests in prior policy).

Moreover, if a “new policy rests upon factual findings that contradict those which underlay its prior policy,” the agency may need to provide “more detailed justification than what would suffice for a new policy created on a blank slate.” *Fox Television*, 556 U.S. at 515. The “further justification is demanded” not “by the mere fact of policy change,” but because “a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy.” *Id.* at 515-516.

These twin requirements to acknowledge a shift and articulate reasoning are not onerous; they are the bare minimum standards imposed by a legal system that provides the administrative state generous room to reevaluate prior practices. These rules ensure that agency action is truly based on an expert judgment and does not instead amount to “a rule for Monday, another for Tuesday.” *NLRB v. International Union of Operating Eng’rs*, 460 F.2d 589, 604 (5th Cir. 1972) (internal quotation marks omitted).

The FRA failed to follow these foundational tenets of administrative law in multiple respects. *First*, the FRA initially articulated precise standards by which BNSF could expand its ATI program. *See* A351, A362. BNSF met those metrics in spades. *See* A372-373. Yet the FRA here refused to permit BNSF to expand its

ATI program, without acknowledging that the agency had pulled the rug from under BNSF. *See* A406-407. The FRA’s failure to acknowledge its shift in its prior policy is arbitrary and capricious. The FRA’s further failure to consider BNSF’s good-faith reliance on the FRA’s prior policy makes its unspoken about-face even worse. *See* A399-400 (“BNSF has voluntarily invested significant resources in advancing this next-generation safety improvement . . .”).

Second, the FRA had previously endorsed ATI because it found that ATI was better than traditional visual inspections. *See* A271 (noting that FRA “has long advocated for the development and advancement of” ATI). But despite having made these prior findings, FRA denied BNSF’s waiver without even attempting to explain its new policy in light of those findings. *See* A406-407. That, too, is reason enough to vacate the decision.

America’s railroads, the manufacturers who rely on them, and the entire economy deserve more from their government—especially in light of the serious challenges currently facing the United States’ supply chain. The law permits a new Administration to change old policy; it does not permit an Administration to refuse to acknowledge that it has adopted a new policy, as the FRA did here. If “men must turn square corners when they deal with the Government,” “it is also true, particularly when so much is at stake, that the Government should turn square corners in dealing with the people.” *Regents*, 140 S. Ct. at 1909 (cleaned up). In

this case, there is no excuse for the FRA “cutting corners,” and this Court should vacate the FRA’s decision and direct the agency to grant the expanded waiver.

CONCLUSION

For the foregoing reasons, and those in BNSF’s brief, the Court should vacate FRA’s denial of the expanded waiver and direct the agency to grant the expanded waiver.

Respectfully submitted,

/s/ Sean Marotta

ARJUN GARG

KEVIN M. SHEYS

SEAN MAROTTA

NATHANIEL A.G. ZELINSKY

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-4881

sean.marotta@hoganlovells.com

July 12, 2022

*Counsel for Amicus Curiae
National Association of
Manufacturers*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on July 12, 2022. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Sean Marotta
Sean Marotta

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,803 words.

2. This document 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)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Times New Roman.

/s/ Sean Marotta
Sean Marotta