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April 24, 2023

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: *Docket No. FD 36695, Petition for Declaratory Order and Injunctive Relief*
– *Rail Service to Pennsylvania Feed Mills and Other Facilities*

Dear Ms. Brown:

Accompanying this letter for filing in the referenced docket is a Petition for Declaratory Order and Injunctive Relief, which is being filed on behalf of Wenger Group, Inc. and Esbenshade, Inc. A Highly Confidential Version of the Petition is being filed under seal, and a Public Version is being submitted in the public docket. Petitioners are also submitting a Motion for Protective Order contemporaneously with this filing.

This petition seeks the requested relief on an expedited basis because, absent immediate intervention by the Surface Transportation Board, ongoing daily rail freight service to their feed mills by Norfolk Southern Railway (“NSR”) will be shut down for a period of at least six weeks by the actions of National Railroad Passenger Corporation (“Amtrak”) described in the Petition. The Petition further explains that the date the shut down of all freight service to the facilities at issue is scheduled to be on or around **May 20, 2023**. For this reason, Petitioners have respectfully requested the Board take action on or before **May 16, 2023**, and to set **May 5, 2023** as the filing date for Amtrak and NSR to file any replies to the Petition or other pleadings.

Copies of the Public Version of the Petition are being served today on counsel for NSR and Amtrak to facilitate their responses on the requested timeline.

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Please do not hesitate to contact the undersigned counsel for the Petitioners should you have any questions.

Sincerely,



Thomas W. Wilcox

*Attorney for the Wenger Group, Inc. and
Esbenshade, Inc.*

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EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36695

**PETITION FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF –
RAIL SERVICE TO PENNSYLVANIA FEED MILLS AND OTHER FACILITIES**

**PETITION FOR DECLARATORY ORDER
AND INJUNCTIVE RELIEF**

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PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36695

**PETITION FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF –
RAIL SERVICE TO PENNSYLVANIA FEED MILLS AND OTHER FACILITIES**

**PETITION FOR DECLARATORY ORDER
AND INJUNCTIVE RELIEF**

Pursuant to 49 U.S.C §§554, 1321(b)(4) and applicable precedent, The Wenger Group, Inc.¹ (“Wenger”) and Esbensshade, Inc. (“Esbensshade”) (together “Petitioners”) file this petition requesting, on an expedited basis, certain declaratory and injunctive relief due to the impending cessation of all freight railroad service to their respective facilities for an extended period of time. As explained below, absent Board intervention, all freight rail service to Petitioners (and possibly three other shippers)² will cease on or around May 20, 2023 and remain shut down for a period lasting at least six weeks. Consequently, Petitioners request the Board to act on this Petition by no later than **Tuesday May 16, 2023**.

¹ The Wenger Group was formed in 2015 as a holding company for Wenger Feeds, LLC, Dutchland Farms, LLC, Nutrify, LLC, Risser Grain, LLC, and Hooper Feeds. The Wenger Group and its subsidiaries are referred to herein as “Wenger.” Wenger has 1000 employees and offers animal nutrition and feeds; specialty protein production, processing, and marketing; on-farm protein production services; and grain, fertilizer, and ingredient procurement.

² On information and belief, two of the other three shippers on the line of railroad at issue are Kellogg Company and Ingredients Plus. Petitioners do not know the identity of the third shipper.

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I. INTRODUCTION AND SUMMARY OF REQUESTED RELIEF

As explained in more detail below and in the accompanying Verified Statements of David Glock Senior Vice President and Chief Procurement Officer at Wenger (“Glock V.S.”), and Mike Anderson, Vice President of Mill Operations for Esbenshade (“Anderson V.S.”), Petitioners are rail-served shippers on a line of railroad owned by the National Railroad Passenger Corporation (“Amtrak”) that runs between a point just east of Rheems PA and Lancaster, PA, (the “Subject Line”³). A map of the Subject Line showing the locations of the Petitioner’s facilities that will be harmed by the planned track shutdown is attached as Exhibit A.

Petitioners’ businesses are, among other things, the production of animal feed and agricultural food products that are supplied to large numbers of livestock in Pennsylvania and the surrounding region. Railroad deliveries of inbound corn, soybeans, and distillers mash to Petitioners’ facilities are provided by the Norfolk Southern Railway (“NSR”) five days per week pursuant to NSR operating rights under a confidential agreement between NSR and Amtrak (the “Trackage Rights Agreement”).

In January 2023 Amtrak informed NSR that, starting on or around July 18, 2023, Amtrak intended to block all freight rail service on the Subject Line for at least four weeks during a pre-planned track project. NSR informed Wenger of Amtrak’s plans in early February 2023. Glock V.S. at 2. On March 10, 2023, NSR informed Wenger that the start date had been moved up to May 17, 2023, and that the period freight service would be shut down had been extended to six weeks.

³ There are two main lines owned by Amtrak running between Rheems and Lancaster. According to NSR, Amtrak is halting NSR’s freight service over the main line to which Petitioners’ facilities are connected. Further, Amtrak intends to continue its passenger service and NSR’s freight service over the other main line.

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*Id.*⁴ On April 24, 2023, NSR confirmed to Wenger that Amtrak intended to shut down all freight service to its Mount Joy, PA feed mill. *Glock V.S.* at 2. Amtrak has never communicated directly with Petitioners about its plans and the potential impact of the track shutdown on Petitioners' businesses. Through NSR, Petitioners learned that a complete cessation of freight service was deemed necessary by Amtrak because it had chosen to utilize equipment and methods that will completely disable the track from use for any purpose for the duration of the project. Such equipment and methods are not utilized by NSR (or, on information and belief, any other Class I railroad) when doing so would shut down service to rail customers for an extended period and without their consent.⁵

Upon first learning of Amtrak's plans, Petitioners attempted for several weeks to pursue the establishment of an arrangement for continued rail service to their facilities during Amtrak's track work by working with NSR⁶ and the Board's Office of Public Assistance, Governmental Affairs and Compliance ("OPAGAC"). *Id.* NSR and OPAGAC engaged directly with Amtrak to try to resolve the issue. Unfortunately, their attempts to dissuade Amtrak from shutting down freight service to Petitioners and the other shippers on the Subject Line have been unsuccessful. Petitioners' counsel also contacted Amtrak in-house counsel by email on April 13th to arrange a call to discuss Amtrak's plans, but as of the date of this Petition Amtrak counsel has not responded.

⁴ The latest indication from NSR to Petitioners' counsel is that the start date has been moved to May 20, 2023.

⁵ On information and belief, Petitioners understand that Amtrak intends to utilize same equipment and methodologies on the second main line after the project at issue is completed, which will mean that Amtrak will stop NSR from providing freight rail service to shippers connected to the other main line.

⁶ Prior to Petitioners' attempts to preserve rail service during the track project, NSR tried for several months to persuade Amtrak to conduct the track project in a manner that would allow freight rail service to continue during the project, to no avail.

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Amtrak's plans to prohibit NSR from providing any freight rail service to Petitioners' feed mills for at least six weeks will have devastating consequences for Petitioners. Because all informal attempts to resolve this issue have failed, Petitioners now seek – on an expedited basis – a Board order (1) declaring that Amtrak's choice of equipment and methods for its track project that it knows will completely shut down all freight service to Petitioners for an extended period of time constitutes a *per se* violation of 49 U.S.C. § 11101(a), (2) enjoining Amtrak from commencing any aspect of its track project that would curtail freight rail service on the Subject Line until the Board approves a plan filed by Amtrak and NSR that preserves service to Petitioners on the same terms and with the same frequency as such service is provided today; and/or (3) the other relief described hereinbelow and any additional relief that the Board deems appropriate under these circumstances

II. BACKGROUND

A. Identity and Interest of Petitioners

Wenger is a food and agricultural products company headquartered in Rheems, Pennsylvania. Wenger is a critical source of agricultural products and agricultural for the Mid-Atlantic region, an area that comprises nearly one fifth of the U.S. population, and a major supplier of animal feed throughout the Northeast. Wenger operates ten feed mills and a soybean processing plant located in central and eastern Pennsylvania and one feed mill located in northeast Maryland. One of the feed mills is located on the Subject Line in Mount Joy, PA. Glock V.S at 1. {{[REDACTED]}}

[REDACTED]

[REDACTED] }}. *See Id.*

Esbenshade is a family-owned farm established in 1963 that produces eggs and hogs. Esbenshade produces a wide range of specialty eggs at three state-of-the-art layer facilities {{[REDACTED]}}

[REDACTED] }}. Anderson V.S. at 1

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Esbensshade also owns and operates a feed mill located at Mount Joy, PA, which produces animal feed for Esbensshade's chickens and for sale to other farmers and customers. *Id.*

B. History of the Subject Line and Rail Service Requirements of Petitioners

The Subject Line is the western portion of a 104-mile line of railroad that runs between Harrisburg and Philadelphia, PA which historically was owned and operated by Penn Central Railroad Company and its predecessors. It was acquired by Amtrak in 1976, at which time Conrail took over the freight rail service obligations.⁷ NSR took over the freight operations from Conrail in 1999. *CSX Corp. & CSX Transportation, Inc., Norfolk S. Corp. & Norfolk S. Ry. Co. -Control & Operating Leases/agreements-Conrail Inc. & Consol. Rail Corp.*, 3 S.T.B. 196 (1998).

Petitioners understand that NSR's access to the Subject Line and rail operations are pursuant to the Trackage Rights Agreement. However, NSR has informed Petitioners that the terms and conditions of the Trackage Rights Agreement are confidential. Consequently, Petitioners do not know the extent to which its terms affect or bear upon Amtrak's plans to suspend NSR's use of the Subject Line to provide rail service to Petitioners.

Wenger's Mount Joy feed mill receives inbound yellow corn (STCC 0113215) and soybean meal (STCC 2092314) by rail and uses these materials to produce various types of animal feed for

⁷ Amtrak acquired ownership of the Subject Line under the Regional Rail Reorganization Act of 1973 ("3R Act") and the 4R Act. *See* 3R Act, 45 U.S.C. § 791 (d). The 3R Act established the United States Railway Association ("USRA") and authorized USRA to prepare and implement the Final System Plan ("FSP") for restructuring the railroads. The 4R Act had the purpose of improving the operations and restoring the financial stability of the railway system through various actions, including implementation of the FSP and the Northeast Corridor Project outlined in the 3R Act. *See* Pub. L. No. 94-210. To carry out the purpose of the 3R and 4R Acts, Amtrak was given the option to purchase Harrisburg-Philadelphia Line, which it exercised. *See* United States Railway Association, *The Conveyance Process*, 22 (1986) ("Northeast corridor property including the . . . Philadelphia-Harrisburg. . . lines were ultimately conveyed to Amtrak").

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poultry (chickens and turkeys), pigs and other livestock. Glock V.S. at 1-2. Wenger animal feed ships out by truck to farmers, grain merchandisers and other suppliers across the region. *Id.* at 2. Given the high volume of animal feed production and consumption, Wenger requires a high volume of rail cars per year delivered on a regular schedule. *Id.* To keep the mill at Mount Joy running and help Wenger keep its animal feed supply constantly going out to customers, NSR provides service to the feed mill five times per week.

In the absence of rail service to the Mount Joy mill, Wenger will be forced to try to replace direct deliveries by NSR with soybean meal that is delivered by rail to transload facilities in Muncy and Turbotville, PA, then transload the feedstock to trucks for transport over 100 miles of state and local roads to the mill. *Id.* at 3. It takes approximately 3.5 trucks to transport the soybean meal loaded in one railcar, which will significantly disrupt Wenger's operations. *Id.* at 4. Having to use this alternative will substantially increase the cost of delivered soybean meal at the Mount Joy mill. Mr. Glock estimates that {{ [REDACTED] [REDACTED] }}. Glock *Id.* at 3. Wenger would also incur additional direct and indirect costs. *Id.* at 4.

Wenger would be compelled to attempt to pass this increased cost on to its farmer customers and other customers. This is concerning to Wenger because of the adverse impact on the company's relationships with its customers. *Id.* In many instances, Wenger customers have alternative sources of animal feed and it is possible that the customers will decline to purchase Wenger's higher priced animal feed and look elsewhere for supply. In this case, Wenger loses the sale and damages its customer relationships. *Id.*

Esbensshade's Mount Joy, PA feed mill receives {{ [REDACTED] [REDACTED] }} by rail and uses these materials to produce various types of

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animal feed for chickens, turkeys, pigs and other livestock. Anderson V.S. at 1. {{[REDACTED]}}
[REDACTED]
[REDACTED]}}. *Id.* at 2. To keep the mill running to ensure its animal feed supply constantly goes to its livestock and out to its customers Esbensshade receives rail service from NSR five days per week. *Id.* Esbensshade animal feed ships out by truck to its own poultry and pig farms and to other farmers, grain merchandisers and other suppliers across the region. *Id.*

In the absence of rail service to the feed mill, Esbensshade would need to move {{[REDACTED]}}
[REDACTED]}} by rail to the aforementioned transload facilities in Muncy and Turbotville PA, then arrange for transload of the feedstock to trucks and take truck delivery of the feedstock at the mill. This will substantially increase the cost of delivered {{[REDACTED]}}
[REDACTED]}} at the feed mill. Mr. Anderson estimates {{[REDACTED]}}
[REDACTED]}}. *Id.* at 2.

Esbensshade would absorb this cost on its own animal feed consumption but would attempt to pass this increased cost on to its third-party farmer and other customers. *Id.* at 3. This is concerning to Esbensshade because of the adverse impact on the company's relationships with its customers. *Id.* In many instances, Esbensshade's customers have alternative sources of animal feed and it is possible that the customers will decline to purchase the higher priced animal feed and look elsewhere for supply. In such cases, Esbensshade loses the sale and damages its customer relationships. *Id.* at 3.

The increased number of trucks from the transload alternative also would disrupt Esbensshade's operations by substantially increasing the number of trucks operating in and out of its mill. *Id.* Specifically, Mr. Anderson estimates that it will take 100 30-ton trucks per week to

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replace the volumes delivered by NSR. *Id.* All of the trucks delivering inbound feedstock will need to use the same scales and receiving pits that the mill uses for outbound animal feed traffic, but because the mill was not designed for 100% truck transportation, it is not physically capable of receiving and processing 100 inbound trucks per week. *Id.*

III. REQUEST FOR DECLARATORY RELIEF

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board has discretion to issue a declaratory order to remove uncertainty or terminate a controversy. *See, Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989). Although Amtrak counsel did not respond to counsel for Petitioners' attempt to discuss this matter, there is a clear controversy here, because Amtrak has informed NSR and OPAGAC that it intends to proceed with its project as planned, and it erroneously believes that its actions are lawful. In addition, the Board has recognized that questions concerning the scope of the Board's jurisdiction, are suited for resolution under its declaratory order powers.⁸ Declaratory relief is particularly appropriate here, because Amtrak's planned track shutdown using equipment and methods no freight railroads utilize in situations like this one is imminent and it will have devastating impact on Petitioners' operations and their customers.

Petitioners first seek a declaration that the cessation of freight rail service during Amtrak's planned track project would be a *per se* violation of their right to receive rail service upon reasonable request under 49 U.S.C. §11101(a), because Amtrak, with full knowledge that

⁸ *See Padgett v. Surface Transit Bd.*, 804 F.3d 103, 105 (1st Cir. 2015) (upholding the Board's use of a declaratory order proceeding to address a jurisdictional issue); *see also, e.g., Los Angeles Metropolitan Transportation Authority — Petition for Declaratory Order*, Docket No. FD 36112 (STB served Oct. 27, 2017); *Jersey Marine Rail, LLC — Petition for Declaratory Order*, Docket No. FD 36063 (STB served Jan. 31, 2017).

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Petitioners are receiving, and will continue to require, regular service from NSR, is deliberately causing the cessation of that freight service for at least six weeks. Frequency of transportation service “can be a relevant consideration in determining whether a rail carrier has met its common carrier obligations under §11101(a).” *Bell Oil Terminal, Inc. v. BNSF Railway Company*, NOR 42169 (STB served Dec. 12, 2020). Likewise, curtailment of rail service can amount to violation of a railroad’s common carrier obligation. *See, Granite State Concrete Co. v. Bos. & Me. Corp.*, NOR 42083, slip op. at 7 (STB served Sept. 15, 2003)(commencing an investigation into whether a railroad was violating its common carrier obligations when it restricted a carrier’s operation on its rail line), *complaint denied*, Docket No. NOR 42083 (STB served Sept. 24, 2004).

Here, the indisputable facts are that (1) Petitioners are currently receiving, and have real and pressing needs to continue receiving, regular freight rail service from NSR five days per week, and (2) Amtrak, with full knowledge of NSR’s current service levels, intends to prohibit NSR from providing *any* rail freight service at all to Petitioners (and the other three shippers on the line) for at least six weeks and possibly an indefinite additional period. Questions of whether infrequent service or the temporary curtailment of service constitute a violation of §11101(a) typically entail factual disputes the Board must resolve. However, a deliberate act to cut off all freight service for an extended period of time where there is a pressing need for such service requires the Board to conclude here that Amtrak, or NSR, or both, will violate §11101(a) when Amtrak follows through with its plan, and that therefore, the six-week interruption of service on the Subject Line to accommodate Amtrak’s pre-planned track project will be a clear violation of the Petitioners’ rights to rail service under § 11101(a).⁹

⁹ The planned outage is for a scheduled track rehabilitation project but this does not make the planned outage reasonable under §11101.

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A *per se* violation of §11101 is present regardless of the contractual relationship between Amtrak and NSR. By virtue of the Trackage Rights Agreement, NSR has the primary obligation to provide freight service to Petitioners on the Subject Line. Petitioners are not privy to the terms of the Trackage Rights Agreement, but they submit any provision of that agreement which gives Amtrak the right to prohibit NSR from fulfilling its common carrier obligations to Petitioners is in direct conflict with section §11101(a) and is unenforceable.¹⁰

Moreover, as the owner of the Subject Line, Amtrak has the underlying common carrier obligation to provide rail freight service on reasonable request. *See Nat'l R.R. Passenger Corp.-Conveyance of B&H Corp. Interests in Conn. River Line in Vt. & N.H.*, 4 I.C.C.2d 761, 807 (1988) (Amtrak acquired the underlying common carrier obligation when it purchased the line of railroad) (*aff'd sub nom. Bos. & Maine Corp. v. I.C.C.*, 976 F.2d 1444 (D.C. Cir. 1992); *see also, Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad*, 8 I.C.C.2d 835 (1991); *see also, Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad*, 8 I.C.C.2d 835 (1991)). Entering into the Trackage Rights Agreement with NSR did not extinguish this underlying statutory obligation. Consequently, although NSR has assumed the primary responsibility for fulfilling the statutory requirements of §11101, Amtrak is equally liable to Petitioners for violations of §11101 should it prevent NSR from fulfilling those responsibilities, but then refuse to provide freight rail service in NSR's stead. Stated another way, if Amtrak has an enforceable contractual right to prevent NSR from providing service to the Petitioners, then Amtrak assumes the obligation to provide freight service to the

¹⁰ The existence of such a provision in the original Trackage Rights Agreement would be surprising because the agreement was approved by the Board as a condition for its approval of the Conrail transaction in Finance Docket No. 33388. Arguably, if the Trackage Rights Agreement was later amended to give Amtrak this right, it should have first been submitted to the Board for public comment and approval.

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Petitioners on the Subject Line, and the associated liability for not providing, or in this case deliberately shutting off, the service.¹¹

In summary, Petitioners request the Board to issue an order declaring that Amtrak's actions to cut off all freight service to Petitioners will constitute a *per se* violation of 49 U.S.C. §11101, and further providing the injunctive relief described below.

IV. REQUEST FOR INJUNCTIVE RELIEF

The Board should enjoin Amtrak from carrying out its planned shutdown of the Subject Line until the Board approves a freight rail service plan filed by Amtrak and NSR that preserves service to the Petitioners on the same terms and with the same frequency as such service is provided today.

Under 49 U.S.C. § 1321(b)(4), the Board has authority to issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. A party seeking a preliminary injunction must establish that (1) it is likely to prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will be irreparably harmed in the absence of the requested relief, (3) issuance of the injunction will not substantially harm other parties, and (4) granting the injunction is in the public interest. *See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Union Pac. R.R. v. BNSF Ry. Co.*, FD 36197, slip op. at 3 (STB served June 29, 2018); *Am. Chemistry Council v. Ala. Gulf Coast Ry.*,

¹¹ Amtrak's exclusion from most of Subtitle IV of Title 49 in 49 U.S.C. § 24301(c) cannot be construed to extend to Amtrak as the owner of a line of railroad subject to the Board's jurisdiction. Otherwise, Amtrak could merge rail carriers into itself thereby accomplishing abandonments and purchase, sell, or (as in this case) unilaterally close lines of railroad without Board authorization. Amtrak's exclusion must be read to apply to its passenger rail service and not its obligations as the owner of a line of railroad subject to Board jurisdiction. *See e.g., Commuter Rail Division of the Regional Transportation Authority and Northeast Illinois Regional Commuter Railroad Corporation – Petition for Declaratory Order – Status of Chicago Union Station*, Docket No. FD 36171 (STB served Aug. 22, 2018) at 5.

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NOR 42129, slip op. at 4 (STB served May 4, 2012). A preliminary injunction is an extraordinary remedy and the party seeking it “carries the burden of persuasion on all of the elements required for [such] extraordinary relief.” *BP Amoco Chem. Co. v. Norfolk S. Ry.*, NOR 42093, slip op. at 4 (STB served June 6, 2005) (quoting *San Joaquin Valley R.R.—Aban. Exemption—In Tulare & Kern Cty.s., Cal.*, AB 398 (Sub-No. 5X), slip op. at 4 (STB served Apr. 3, 1998)); *Middletown & New Jersey R.R.—Lease and Operation Exemption—Norfolk S. Ry.*, FD 35412 at 2 (STB served Oct. 6, 2010); 5 U.S.C. § 556(d). Each of these factors has been met in this case.

A. Petitioners are likely to succeed on the merits.

For the reasons discussed above, the complete suspension of rail service on the Subject Line for at least six weeks indisputably would be a violation of Petitioners’ right to receive rail service upon reasonable request and NSR’s and Amtrak’s common carrier obligations to provide the service under §11101(a).

B. Suspension of rail service during Amtrak’s track project would cause irreparable harm to Petitioners.

The complete and sustained disruption of freight rail service during Amtrak’s planned track project will result in irreparable harm to Petitioners, as they cannot simply shut down their operations for a minimum of six weeks in to accommodate Amtrak’s plans. Rather, Petitioners will be forced to try to obtain deliveries of inbound corn, soybean meal, {{[REDACTED]}}, and other commodities from trucks, which will substantially increase their transportation costs. Under Board precedent “[e]conomic losses that are substantial and unredressable can qualify as irreparable injury.” *Colorado Wheat Admin. Comm., et al. v. V and S Ry.*, NOR 42140, slip op. at 5 (STB served May 7, 2015). *See, Long Island R.R. Co. v. Int’l Ass’n of Machinists*, 874 F.2d 901, 911 (2d Cir.1989)(“general cessation of service” from a strike found to be irreparable harm) *accord, CSX Transp., Inc. v. Williams*, 406 F.3d 667, 674 (D.C. Cir. 2005). Here, the total

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cessation of service to Petitioners' facilities will result in should be deemed irreparable and unredressable because these facilities must receive, and are receiving, rail freight service from NSR up to five days per week. This rail service must be replaced with significantly more expensive and logistically complicated truck transportation, which also adversely affects local roads and communities.

Relying 100% on trucks to replace the NSR's rail service to the Wenger and Esbenshade feed mills would force both companies to raise animal feed prices to their customers to cover their substantially increased transportation costs. Whether accepted or not, proposing higher prices would adversely impact Wenger's and Esbenshade's relationships with their customers. See *Glock V.S.* at 3; *Anderson V.S.* at 3. In addition, as Msrs. Glock and Anderson have explained, forcing Wenger and Esbenshade to utilize transload facilities located 100 miles away from their mills will significantly disrupt their operations. Wenger and Esbenshade both already use trucks for outbound animal feed transport. The transload operation for soybean meal and the additional local sourcing of truck transportation for yellow corn by Wenger will require the addition of dozens of 30-ton trucks at its Mount Joy mill, which is configured and designed for inbound deliveries via railcars. *Glock V.S.* at 4. Similarly, Esbenshade's mill was not designed for 100% truck deliveries of inbound feedstock and so it is not physically capable of receiving and processing the estimated 100 30-ton trucks per week that will be necessary to replace current rail deliveries from NSR. *Anderson V.S.* at 3.

As noted above, Esbenshade would absorb the increased transportation costs of a track shutdown with respect to its own animal feed consumption. *Id.* With respect to their third-party animal feed sales, if customers refuse to pay more, Wenger and Esbenshade will be forced to

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absorb their substantial additional transportation costs, selling animal feed at a lower margin or below production cost. See *Glock V.S.* at 3; *Anderson V.S.* at 3. .

To the extent the higher costs are absorbed by Petitioners, this will also result in irreparable and unredressable harm through a combination of lower margins and losses on the sale of their products (i.e., product sales below the cost of production). To the extent Petitioners attempt to pass on the higher costs to their customers in the form of higher prices (whether accepted or not by such customers) Petitioners will experience loss of customer goodwill and other damage to business relationships. If their customers reject the higher prices Petitioners will experience lost sales and the customers will be forced to look elsewhere for supply. If alternative supplies are deficient this could cause animal feed supply disruptions, shortages, delivery delays and malnourished poultry, pigs and other livestock. Higher animal feed prices to farmers will lead to some combination of lower margins (or losses) for farmers and higher meat and egg prices on grocery store shelves.

C. Enjoining Amtrak's project until it and NSR provide a plan that allows freight service to continue during the track project will not harm Amtrak

Directing Amtrak to temporarily delay its track project until it and NSR develop a Board-approved plan for continuation of freight service during the project would not harm Amtrak at all. Indeed, as stated previously, Amtrak has planned its track project so that only freight rail shippers will be harmed while Amtrak's passenger service would be unaffected. Petitioners are not seeking to permanently enjoin Amtrak's proposed action, and the duration of the delay to Amtrak's track project would largely be in Amtrak's hands. If Amtrak moves quickly, working with NSR, and produces a workable plan, it can be approved by the Board in a reasonable time.¹² Petitioners

¹² Petitioners maintain that a service plan during the track project is clearly feasible. Railroads routinely conduct track work while continuing to provide safe freight and passenger

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understand that NSR has been urging Amtrak to make just such a plan for many months and NSR has informed Petitioners' counsel as recently as April 17, 2023 that NSR is ready to expeditiously develop such a plan with Amtrak.

D. Enjoining the track project until a service plan is approved is in the public interest

Finally, there is a strong public interest argument in favor of the requested injunction. First, it cannot be in the public interest for common carrier railroads to arbitrarily halt *all* freight service over their rail lines for extended track repair projects when regular rail service is required and is being provided. This is especially true in this case, where the rail service being provided is the delivery of feedstock for the production of feed that is supplied to millions of chickens and other livestock. But in any case, freight railroads nearly always plan their maintenance and track projects so that windows are provided for freight service to continue to be provided, even if necessarily at a reduced level. Amtrak should not be able to exempt itself from such industry practices. Second, as explained above, the cessation of rail service would indisputably and substantially harm Petitioners, who are in the business of producing feed for livestock that in turn are consumed by the public, and, in Esbenshade's case, millions of eggs that are consumed by the public.

Finally, enjoining Amtrak's plan is in the public interest because this scenario is not confined to Petitioners' Mount Joy feed mills and the other three shippers along the Subject Line. Rather, absent Board action and guidance, the equipment and methods Amtrak is utilizing are likely to be used again and result in total shutdowns of freight service on other Amtrak-owned

service. Amtrak can do the same. Track work with continued operations likely would involve additional expense, but that is part and parcel of Amtrak's rail common carrier obligation on the Subject Line.

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lines. Wenger also owns and operates another, larger feed mill further down Amtrak's track in Rheems, PA that is also served by NSR,¹³ and therefore could be subject to a future freight service shutdown should Amtrak seek to execute a similar project on that section of its track. According to NSR freight service shutdowns are also expected to be the case for the freight shippers connected to the second main line running parallel to the Subject Line. Finally, Amtrak could also attempt to execute similar projects that halt all freight rail shippers connected to other Amtrak-owned tracks in the United States. The public interest therefore requires the Board to address this issue now.

V. ALTERNATIVES TO INJUNCTIVE RELIEF

Under these circumstances, declaring that Amtrak and/or NSR will violate 49 U.S.C. §11101 and enjoining Amtrak from implementing its track plan until a Board-approved plan to continue rail freight service to Petitioners (and the other three Petitioners along to the Subject Line) while the track work is completed, is most appropriate under these circumstances. However, Petitioners submit that the Board has authority to provide similar relief via other means, namely the authority to preserve the *status quo* for at least 30 days pursuant to a directed service order issued pursuant to 49 U.S.C. §11123.¹⁴ Among other scenarios under §11123, the Board may order directed service if it determines that “[an] unauthorized cessation of operations . . . exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers . . . or that a rail carrier providing transportation subject to the jurisdiction of the Board under this part cannot transport the traffic offered to it in a manner that properly serves the public.” 49 U.S.C. §11123(a).

¹³ Glock V.S. at 2.

¹⁴ See, 11123(e) “For purposes of this section, the National Railroad Passenger Corporation. . . shall be considered [a] rail carrier[] subject to the Board's jurisdiction.”

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Here, Amtrak's imminent plan to shut down freight rail service on the Subject Line would cause an unauthorized cessation of freight rail operations. As summarized above, this will have substantial adverse effects on the Petitioners. Amtrak's actions will also prevent NSR from transporting the traffic offered to it for origination or termination on the Subject Line in a manner that properly serves the public. *See Foster Poultry Farms – Ex Parte Petition for Emergency Service Order*, Docket No. FD 36609, (STB served June 17, 2022) (finding that UP's failure to deliver corn to Foster Poultry Farms for the processing of animal feed warranted an emergency service order). Thus, there are at least two bases on which the Board has authority to direct service under §11123.¹⁵ The Board has multiple tools at its disposal when exercising its directed service power. In this case, the Board could direct Amtrak to handle the movement of NSR traffic over Amtrak's lines under §11123(a)(1) or it could direct Amtrak to continue "operations and dispatching, maintenance, and other necessary infrastructure functions related to operations" of NSR under § 11123(a)(5).¹⁶ In either case, Amtrak and NSR would have at least 30 days to work out a feasible way to accomplish necessary track work while still providing rail freight service.

Finally, while the remedy preferred by Petitioners is an order directing Amtrak to delay its track project and permit NSR to continue to provide freight service, in the event the Board does not agree, these unique circumstances and the public interest require that the Board should still issue an order declaring that a *per se* violation of §11101 will occur as the legal consequence of Amtrak's deliberate choice to use equipment and methods that will require NSR to cease all freight

¹⁵ The Board has authority to issue a directed emergency order prospectively to prevent an emergency situation. *See Canexus Chemicals Canada L.P. v. BNSF Railway Company*, Docket No. NOR 42131 (STB Served Oct. 14, 2011) (finding that "the carriers' refusal to provide through service cooperatively" after a specified date "constitute[d] a failure of traffic movement" which warranted a directed service order to maintain the status quo).

¹⁶ Section 11123(a)(5) applies (inter alia) to remedy a "failure of existing freight service ... caused by" Amtrak.

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traffic on the Subject Line. Petitioners should not have to bear the burdens of separately demonstrating a violation of §11101 in a formal complaint proceeding when the violation here is obvious and intentional. Petitioners further submit that if the track project goes forward without continued freight service, the Board should also provide the parties with guidance and direction on the categories of damages the Board recognizes Petitioners may pursue from Amtrak and/or NSR as a result of their breach of their common carrier obligations to Petitioners. The Board has not provided such guidance in a formal proceeding in over 15 years, and then on the specific circumstances of that case. *See Groome & Associates, Inc. & Lee K. Groome Greenville County Econ. Dev. Corp.* STB Docket No. 42087, at 14 (STB served July 27, 2005)(damages awarded against carrier for unlawful embargo when railroad did not believe it was subject to §11101). Broader guidance and direction in this proceeding would at a minimum further streamline a subsequent formal damages proceeding before the Board, and it could lead the parties to reach a mutually agreeable commercial settlement without requiring the Board's further involvement.

Petitioners also note that such guidance in a declaratory order is appropriate in this proceeding because, as stated previously, Amtrak intends to repeat the process of cutting off freight rail services to other rail shippers connected to the main line adjacent to the Subject Line, and it could very well intend to attempt to cut off freight service to rail shippers connected to its other tracks.

VI. REQUEST FOR EXPEDITED CONSIDERATION

For many months NSR has been attempting to reach an agreement with Amtrak that would allow freight rail service to continue during the Amtrak track project and for the last several weeks the Petitioners have been involved in NSR's efforts. Petitioners refrained from filing this Petition as long as there was a reasonable chance that the matter could be resolved without Board

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intervention. Now there appears to be no reasonable chance for resolution without Board intervention. Accordingly, Petitioners request expedited consideration of this Petition and the respectfully request the Board to issue a decision granting the requested relief on or before **May 16, 2023**. To facilitate this schedule, Petitioners request that the Board immediately issue a procedural schedule requiring Amtrak and NSR to file responses to this Petition by **May 5, 2023**.

Respectfully submitted,



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Attorney for Petitioners

April 24, 2023

ATTACHMENT A
MAP

||||| SUBJECT LINE

Exhibit A



PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36695

**PETITION FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF –
RAIL SERVICE TO PENNSYLVANIA FEED MILLS AND OTHER FACILITIES**

VERIFIED STATEMENT OF DAVID GLOCK

1. My name is David Glock. I am Senior Vice President and Chief Procurement Officer at The Wenger Group, a position I have held since April 2, 2018. As Senior Vice President and Chief Procurement Officer, I lead and manage the supply chain of The Wenger Group and its operating subsidiaries (together referred to here as “Wenger”) to enable and support Wenger with financial plans, performance, and operating efficiency around procurement of ingredients for animal feed.

2. I am submitting this Verified Statement in support of the Petition for Declaratory Order and Injunctive Relief filed in the above docket.

3. Wenger operates ten feed mills and a soybean processing plant located in central and eastern Pennsylvania and one feed mill located in northeast Maryland. {{ [REDACTED]

[REDACTED]

[REDACTED] } }.

4. One of Wenger’s feed mills is located in Mount Joy, PA, on a railroad between Harrisburg and Lancaster, PA. The feed mill receives inbound yellow corn (STCC 0113215) and soybean meal (STCC 2092314) by rail from the Norfolk Southern Railway (“NSR”) and uses these

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materials to produce various types of animal feed for poultry (chickens and turkeys), pigs and other livestock. Our rail deliveries at these two mills are approximately 300 carloads per year. The mill operates 24 hours a day, five days per week. Wenger animal feed ships out by truck to farmers, grain merchandisers and other suppliers across the region, most of whom draw tonnage from the Mount Joy facilities on a daily basis. Wenger also owns and operates another, larger feed mill in Rheems, PA further down Amtrak's line of railroad, and this feed mill is also served by NSR. To keep our feed mills running and help us keep our animal feed supply constantly going out to customers, we require a high volume of rail cars per year delivered on a regular schedule. To meet this demand at the Mount Joy mill, NSR provides service five times per week.

5. On February 9, 2023, I was notified by NSR that Amtrak had announced to NSR that Amtrak was going to halt all freight rail service to Wenger and the other four shippers connected to its main line for a period of four weeks. According to NSR, Amtrak had decided to shut down all freight service on the line serving our facilities because it desired to perform certain track work utilizing equipment and methods that resulted in the tracks being unusable for the four week period. The initial start date was to be July 18, 2023, but then NSR subsequently informed me on March 10, 2023 that Amtrak had moved up the start date to May 17, 2023, and it had also extended the outage period from four to six weeks. On April 24, 2023 NSR clarified that the outage from this track project would halt all freight service to our Mount Joy feed mill.

6. Upon first learning of Amtrak's intentions in February, Wenger engaged in discussions with NSR and the STB's Office of Public Assistance, Government Affairs and Compliance ("OPAGAC") in an attempt to fashion an alternative plan that would allow the track work to be performed and rail freight service to continue. These discussions were not successful.

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7. In the absence of rail service to the Mount Joy feed mill, Wenger cannot simply stop production or shift the tonnages to other feed mills. The economics, as well as logistical effects of trying to move this tonnage to another of our feed mills is not feasible because we are running close to capacity at all locations. Instead, we will need to replace soybean meal received by railroad by finding soybean meal supplies that can be transported by truck to this mill. As for soybean meal we normally receive by rail, we will have to pursue arrangements with NSR to transport loaded railcars to transload facilities in Muncy and Turbotville, PA, where the meal can be transferred to trucks for delivery of the feedstock at the two mills. Both of these transload facilities are approximately 100 miles from the Mount Joy mill. This will substantially increase the cost of delivered soybean meal at this feed mill.

8. {{ [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } }.

9. I will be compelled to attempt to pass this increased cost on to our farmer customers and our other customers. This is concerning, because we make every effort in our relations with our customers to avoid surprises on service or pricing. We recognize that long-term relationships with customers can be damaged by unanticipated price increases.

10. In many instances, our customers have alternative sources of animal feed and it is possible that they will decline to purchase our higher priced animal feed and look elsewhere for supply. In this case, we lose the sale and damage our customer relationships.

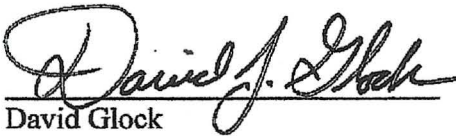
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11. With respect to our third-party animal feed sales, if customers refuse to let us pass on the higher costs caused by Amtrak's shutdown, we will be forced to absorb the additional costs, selling animal feed at a lower margin or below our production cost.

12. My estimate of the impact of a rail service outage is limited to the incremental direct costs of transportation. It does not include all other direct and indirect costs, the costs from disruption to our operations, or the burden on local roads triggered by the presence of dozens of 30-ton trucks, which will each travel approximately 100 miles one way to reach the mill. We estimate that the soybean meal transload alone will require approximately 18 trucks per week, as it takes approximately 3.5 trucks to transport the tons contained in one railcar. I also will need to arrange for additional local truckloads of yellow corn, which will mean even more trucks per week at the Mount Joy mill. And all these trucks will need to use the same mill facilities used for our steady outbound animal feed traffic. In addition, due to the short notice we received of Amtrak's track project, some rail cars we had ordered for direct moves to our mills this spring and summer will no longer be usable for those moves.

VERIFICATION

I, David Glock, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.


David Glock

April 24, 2023

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36695

**PETITION FOR DECLARATORY ORDER AND INJUNCTIVE RELIEF –
RAIL SERVICE TO PENNSYLVANIA FEED MILLS AND OTHER FACILITIES**

VERIFIED STATEMENT OF MIKE ANDERSON

1. My name is Mike Anderson. I am the Vice President of Mill Operations for Esbensshade Inc. (“Esbensshade”), a position I have held since 2019. As VP of Mill Operations, my responsibilities include animal feed manufacturing and ingredient procurement.

2. I am submitting this Verified Statement in support of the Petition for Declaratory Order and Injunctive Relief filed in the above docket.

3. Esbensshade is a family-owned poultry farm established in 1963. Esbensshade produces a wide range of specialty eggs at two state-of-the-art layer facilities. {{[REDACTED]}}.

4. Esbensshade also owns and operates a feed mill at Mount Joy, PA on the line of railroad owned by Amtrak that runs between Harrisburg and Lancaster, PA. {{[REDACTED]}} delivered by the Norfolk Southern Railway (NSR). Esbensshade uses these materials to produce various types of animal feed for our chickens and for sale to other farmers

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and customers who raise chickens, pigs, and other livestock. The feed ships out by truck to our own poultry and pig farms and to other farmers, grain merchandisers and suppliers across the region.

5. {{ [REDACTED] }}. To keep our mill running and to help us maintain our animal feed supply constantly going to our chickens and livestock and out to customers, we require, and NSR provides, rail service to the feed mill five times per week.

6. In the absence of rail service to our feed mill, Esbensshade will need to try to replace the inbound {{ [REDACTED] }} by other transportation modes. We do not have the option of simply stopping operations and feed production for days, let alone weeks. We also do not have the option of reducing our inbound deliveries because the consumption rates of our chickens and the chickens and livestock of our customers remain constant.

7. If direct deliveries by NSR are stopped, we would be forced to pursue arranging for NSR to move {{ [REDACTED] }} by rail to transload facilities in Muncy and Turbotville, PA, transload the feedstock to trucks, and then take truck delivery of the feedstock at the mill. Both transload facilities are approximately 100 miles from the mill.

8. {{ [REDACTED] }}
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}.

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9. I will absorb this cost on our own animal feed consumption, which will reduce Esbenshade's margins, but I will attempt to pass this increased cost on to our third-party farmer and other customers. We make every effort in our relations with our customers to avoid surprises on service or pricing, so even if our customers accept the higher prices this will harm our relationships with them.

10. Some of our customers have alternative sources of animal feed, and so it is possible they will decline to purchase our higher priced animal feed and look elsewhere for supply. In this case, we will not only lose the sale; we will also damage our customer relationships.

11. My estimate of the impact of a rail service outage does not include all direct and indirect costs, the disruption to our operations, or the wear and tear on local roads and communities that will be caused by the addition of around 100 30-ton trucks per week required to haul the equivalent of our inbound material we receive from NSR. For example, all the trucks delivering inbound feedstock will need to use the same scales and receiving pits that the mill uses for our steady outbound animal feed traffic. But because our mill was not designed for 100% truck transportation, it is not physically capable of receiving and processing 100 inbound trucks per week.

VERIFICATION

I, Mike Anderson, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

A handwritten signature in black ink, appearing to read 'Mike Anderson', followed by a long horizontal line extending to the right.

Mike Anderson

April 24, 2023