

Dear Dr. Wakefield and Ms. Yackley:

On behalf of the Transportation Trades Department, our railroad union affiliates, the ILA and the MM&P, we wish to register our strong disagreement with a number of the Working Group's draft recommendations. We believe the document, as currently written, ignores the historic framework for port productivity measures, will endanger the collective bargaining process, and goes beyond the BTS' mission.

Specifically, the port performance measures were used by the Pacific Maritime Association and the National Retail Federation to seek a Taft-Hartley injunction against the ILWU in 2014 & 2015. Taft-Hartley is an extraordinary legal measure that serves as an emergency means for the President of the United States to intervene in management-labor disputes when the nation's health and safety are endangered. There has only been one Taft-Hartley injunction since the 1970s. President Barack Obama wisely ignored the pleas of these organizations and allowed for the dispute to be resolved as designed under the National Labor Relations Act (NLRA). In response, these same groups – many of whom were represented on the Working Group – sought to have Congress try and compel more frequent federal intervention in port labor disputes by the creation of the Port Performance provision. The clear motivation was to have BTS measure port productivity – initially in monthly installments during labor negotiations – as a means to try and crudely create the pretense of statistical connection between union contract negotiations and port productivity. In addition, these productivity measures could be paired with a series of introduced bills, that dramatically revise the NLRA to increase Taft-Hartley injunctions for port unions. Notably, these bills all rely on “evidence of workplace slowdowns,” which would be provided for by the port performance measures under consideration in this Working Group recommendation.

Congress saw all this as clear intrusion on the collective bargaining process and appropriately removed the language. In fact, the Secretary of Transportation weighed-in opposing the language and BTS sent a transmission to Congress raising many concerns over the implementation of the program and its unsuitability for BTS. Therefore, the continued viability of these prescriptive measures seems incongruent with the stated policy of the federal agencies to which they will be recommended.

Our understanding was that the Working Group recommendations would be made by consensus agreement, rather than a contentious voting process. Instead, the decision to hold a vote over an obviously fraught political issue gave members of the Working Group – many of whom had little statutory claim to participation – a means to enact an outcome that represents anything but a consensus opinion and seeks to politicize the utility of statistical data.

We would add that the DOT has a founding mission statement that includes safety, not the velocity of production, and it certainly does not and should not have any role in the collective bargaining process. The DOL and the NLRB have jurisdiction over these matters. While some proponents of this Working Group draft may maintain that productivity measures are simply statistical tools to provide the industry and Congress with a better portrait of US ports, that is belied by the entire history of the provision, how capacity proxies have been used in the past and is not something BTS traditionally measures in other modes. We emphatically reject this

Working Group recommendations, believe it will serve as a means to undermine President Obama's strong record on collective bargaining, is completely at odds with BTS' history of not collecting productivity performance data or worker productivity, and that the Working Group recommendations should be revised accordingly.

Specifically:

- **BTS should not conduct further analysis on the utility of capacity metrics, and it should not request more resources for the longer-term.** Such a request provides an avenue to put BTS in the position of measuring anti-union workplace productivity metrics, which Congress specifically rejected. Further, if Congress would like to provide further resources for these anti-union activities, it has the capability to do so. BTS should not be providing invitation to such an ideologically-driven crusade against port and maritime unions.
- **BTS should not increase the frequency of data reporting or measurement**
A major sticking point during FAST Act negotiations was the frequency of data measurement. Proponents of Taft-Hartley and the original Port performance provision very much wanted to measure data more frequently so that they could create the false statistical pretense that workers were responsible for monthly or quarterly changes in port productivity. In the end, Congress gave BTS a mandate to have an annual report, and nothing more, because more frequent data collection will be used by employers to seek federal intervention in the collective bargaining process. Data should be measured annually.
- **The BTS should not seek "spotlight" port productivity metrics which are not required by statute or are beyond BTS' current capability.**
Corporate members of the Working Group have requested that BTS highlight so called "spotlight" issues on port capacity. Basically, this would mean that BTS would be asking for the ability to measure new capacity metrics.
- **BTS should not conduct further analysis to assess the national utility of additional performance-related metrics and potential approaches for developing nationally consistent datasets.** This request, which is in the Working Group report, literally recommends that BTS should look into measuring the precise productivity metrics (truck turn times, vessel dwell time etc) that were removed by Congress. These measures were used by employers during the 2014/2015 ILWU-PMA negotiations to try and compel federal intervention of the dispute – an action declined by the Obama administration. It would be unparalleled for BTS to be providing such leading, and easily manipulated, statistical information that bears on collective bargaining.

We appreciate the work that you have done, especially given this very difficult mandate provided to you. However, we strongly urge that you revise the Report to reflect a more consensus driven approach that eschews dangerous productivity measures. We find these measures inconsistent with BTS role as a dispassionate statistical agency, at odds with DOT's safety mission, and representative of a very dangerous effort to inject the agency into matters of private sector labor negotiations to which it should have no role. If you have questions or concerns, please feel free to reach out to me.

Sincerely,

Dennis A. Daggett, Executive Vice President, International Longshoremen's Association, AFL-CIO

Donald J. Marcus, President, International Association of Masters, Mates, and Pilots

Jeffrey S. Pavlak, Legislative Representative, Transportation Trades Department, AFL-CIO