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# THE FEDERAL ROLE IN NATIONAL RAIL POLICY

## HEARING

BEFORE THE

## COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

SEPTEMBER 15, 2010

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ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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# THE FEDERAL ROLE IN NATIONAL RAIL POLICY

**WEDNESDAY, SEPTEMBER 15, 2010**

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
*Washington, DC.*

The Committee met, pursuant to notice, at 2:10 p.m. in room SR–253, Russell Senate Office Building, Hon. John D. Rockefeller IV, Chairman of the Committee, presiding.

## OPENING STATEMENT OF HON. JOHN D. ROCKEFELLER IV, U.S. SENATOR FROM WEST VIRGINIA

The CHAIRMAN. The hearing will come to order.

Today's hearing is about progress. It's about what's required to modernize our transportation system so our businesses and workers can stay competitive in the 21st century. It's about leveling the playing field. It's about how and when we do that. Do we have the guts to do it?

America is stronger in the global marketplace, and that means jobs and economic security are more important than ever. One of the keys to this program, obviously, are railroads, our national rail system. We all understand that our highways and our skies are continuing to get more crowded. That means that rail is going to have to become a higher priority. And I am pleased that the Obama Administration is hard at work on this important issue, and I appreciate the fact that they are aggressively implementing important infrastructure programs created by Congress.

I look forward today to hearing from Deputy Secretary Porcari, with whom I've met and who is a superb human being and policymaker, about the status and the development of the Department of Transportation's national rail plan. A comprehensive long-term plan for our rail system is long overdue. I commend the Department and the Federal Railroad Administration for its good work on this issue. But, some things are going to have to change before this happens, and they're going to have to change, big-time. I'm looking forward to hearing from Chairman Elliott, of the Surface Transportation Board. He has been already, in his job, now for more than a year, and I think he has a lot to tell us.

While today's hearing is about progress, in many ways it's more about lack of progress over the last several decades. It's about the natural tendency of large corporations to fight to maintain the status quo with which they've lived so comfortably. And since they've had such input, if not ownership, up until recently, of the ICC and the STB and their respective chairmen, I can understand why they don't want to change. But, what's at stake here is, are we talking, in public policy from the Congress of this country, about what's simply good for them, and sort of forgetting about consumers and shippers and people and nonfreight railroads, or are we just talking about what's good and profitable for them?

So, we're not going to get to the future on the path that we're on now. And, as I say, I've been working on this for 26 years, so there's a good deal of frustration in me. I met with the railroads very early, and they said, yes, they were going to go 50–50 with the shippers, and we had a nice little meeting in a railroad car, and it was all very pleasant and happy. And what's happened is that I had to cause a pause, because the railroads weren't showing up to discuss anything. I asked them to list their priorities. They didn't do that; they declined to do that—the shippers did. The point was that each had to sort of go halfway to go at all; they each had to get and give some adjustments, so that you can get to a halfway point. And this, of course, is the rail freight industry that I'm talking about. Passengers are a different thing. They make their money off of freight, so they put their concentration on freight; passengers and shippers and consumers and the rest of the public comes down the line.

Thirty years ago, the freight railroads were really struggling. Congress did a courageous thing, and they amended the law to give the railroads an opportunity to do business differently. Railroads needed that, badly. That was called the Staggers Act. I'm not sure I agree with how the law was written back in 1980. I'm sure that I'm agreed at how it has been eroded through what I would call—and my language will be strong today—through the kind of ownership of the original ICC and then the STB, up until recently, by the railroads. And so, everything is done differently today, not according to the intent of the Staggers Act.

So, things have worked very well from the railroad's point of view. Today, I'm interested in releasing a staff report—which, if you don't have, it's because you haven't grabbed it—that documents just how well the big Class I freight railroads are doing, these days. To me, it's a shocking report and a revealing report. I had stronger language, but I was advised not to use that, by a loyal and faithful staff and, I'm sure, my Vice Chairman.

What this important report tells us is that the railroads are earning 12 to 13 percent profits, which puts them at the top—in fact, the top five—of the Fortune 500. They're just getting more and more profitable as the years go by. Because they're getting more profitable—and particularly rail freight—they're raising their prices on an average of 5 percent a year. That's a real route to making a lot of money. Now, whether that's good for everybody else, that's a different matter.

But, the railroads say things are different. And what they say depends on who they're saying it to, what is their audience. It's disingenuous. When they're talking to the Surface Transportation Board—now a different one, Mr. Elliott's agency—they act like it's still 1980. They say they're barely making enough money to keep the lights on. When they're on their quarterly calls with Wall Street investors, it's a very different story. Those companies tout their high profit margins—and they can do so very accurately—and their power to dictate prices to their customers, which is very appealing to Wall Street, because that points at more profits. And, at the same time, they're telling Congress that they don't have enough money to invest in needed capital projects. And, at the same time, they're using billions of dollars of their profits to reward their shareholders with dividends and a lovely little item called "stock buybacks."

This is all happening at a time when shippers all over our country—shippers—folks who need the railroads, have to ship things. You had a big brouhaha in Houston; I have them all the time in West Virginia; you have them in Massachusetts, you have them in North Dakota—when shippers all over our country are paying more than their fair share to transport their goods to their customers, paying more because they have no other alternative, there is no competition. That's what the Staggers Act was about. Where there is no competition, people don't have the freedoms that they do on the 80 percent of the traffic rail structure where there is competition.

So, in conclusion, as I've said many times before, we need a rail system that works, not just for the freight railroads, but for all shippers, all passengers, and all consumers. We do not have that now, and we're not being dealt with honorably.

Unfortunately, it is felt like the railroads—some, granted, more than others, but all—have attempted to delay this process. In fact, I think it's reasonably obvious to me, as a reasonably seasoned politician and at least somebody who's been here for quite a long time, and in government, that they want to stretch this whole process out through the elections, hoping that they will gain advantage. In any event, they're doing nothing to cooperate in what has been a 2-year-long process, since I've been chairman, opening with this wonderful meeting on the railroad car, "Yes, we'll do our part, we'll be helpful. We understand change needs to come. We need to get this behind us and move on to a national rail plan." And I'm thinking, you know, all of this should be moving on to a national rail plan or should we be moving on to a national barge and truck plan? I'm open. I'm open. Whoever serves the customers the best.

So, I'm proud that, for the first time in 30 years, this committee reported out a bill, in a bipartisan manner, that would update our rail regulations to reflect the economic realities of 2010. This legislation may not be on the cover of all the newspapers in the country every day, but it benefits communities, large and small, and shippers, large and small, and people, large and small, all over the United States of America. And that should not be underestimated.

Along with my cosponsors, the wonderful—quite wonderful Senator Hutchison, Senator Lautenberg, who's on his way here, Senator Thune, Senator Dorgan—Senator Kerry? Put you on right now. Want to be a cosponsor?

[Laughter.]

Senator KERRY. We have to talk.

The CHAIRMAN. We have to talk, OK.

[Laughter.]

The CHAIRMAN. Kerry demurs. In other words, we're finally engaged in the dialogue to address these concerns before bringing the bill to the floor of the Senate. So, I end by saying this: I want everybody in this room to know that, whether we do this, this year or next, railroad reform is going to happen. I'm going to be here; I'm going to be Chairman for a long time. Either Congress will do it or we will do it through regulation. I'm agnostic. I'd prefer to do it through legislation.

And I also want to make it very clear that today's hearing is the first in a series of hearings on this subject. We will be coming back to this with some frequency, both in hearings of our sort as well as reports from the Department of Transportation, which I have not yet asked them for, but will, during the course of this hearing.

So, we're going to examine these issues, and I look forward to hearing from our witnesses today.

[The prepared statement of Senator Rockefeller follows:]

PREPARED STATEMENT OF HON. JOHN D. ROCKEFELLER IV, U.S. SENATOR FROM WEST VIRGINIA

Today's hearing is about progress. It's about what's required to modernize our transportation system so our businesses and our workers can stay competitive in the 21st century. It's about leveling the playing field. And it's about how when we do that, America is stronger in the global marketplace and that means jobs and economic security.

One of the keys to this progress is our national rail system. We all understand that our highways and skies are continuing to get more crowded. That means rail is going to have to become a higher priority. I am pleased that the Obama Administration is hard at work on this important issue, and I appreciate the Administration's efforts to aggressively implement the important infrastructure programs created by Congress.

I'm looking forward to hearing today from Deputy Secretary Porcari about the status of the development of the Department of Transportation's new "National Rail Plan." A comprehensive, long-term plan for our rail system is long overdue. I commend the Department and the Federal Railroad Administration for its good work on this issue. I'm also looking forward to hearing from Chairman Elliott of the Surface Transportation Board. He has been in his job for a little more than a year now and is ready to tell us about his future plans.

While today's hearing is about progress, it's also about the lack of progress we have seen over the last few decades. It's about the natural tendency of big corporations to fight to maintain a status quo that works well for them, but that will not get us where we need to go for the future. Of course I'm talking about the freight rail industry.

Thirty years ago, the freight railroads were really struggling. Congress responded by amending the law to give the railroads an opportunity to do business differently. I'm not sure I agree with how the law was written back in 1980, but I think it's pretty clear that the reforms worked from the railroads' point of view.

Today, I am releasing a staff report that documents just how well the big Class I freight railroads are doing these days.

What this important report tells us is that the railroads are earning 12 and 13 percent profit margins, which puts them at the top of the Fortune 500. And they're just getting more profitable because they're raising their shipping prices by an average of 5 percent a year. But the railroads say different things depending on their audience.

When they're talking to the Surface Transportation Board, Mr. Elliott's agency, they act like it's still 1980. They say they're barely making enough money to keep the lights on. But when they're on their quarterly calls with Wall Street investors, it's a very different story. These companies tout their high profit margins and their power to dictate prices to their customers. And at the same time they're telling Congress that they don't have enough money to invest in needed capital projects, they're using billions of dollars of their profits to reward their shareholders with dividends and stock buybacks. This is all happening at a time when shippers all over our country are paying more than their fair share to transport their goods to their customers—paying more because they have no other alternative.

As I have said many times before, we need a rail system that works not just for the freight railroads, but for all—shippers, passengers, and consumers. Unfortunately, it has felt at times like the railroads—some much more than others—have attempted to delay this process, hoping that these reforms will die if they can only stretch the process out through the elections. I am proud that for the first time in 30 years, this Committee reported out a bill—in a bipartisan way—that would update our rail regulations to reflect the economic realities of 2010. This legislation may not be on the cover of all the newspapers in the country each and every day but its benefits for communities small and large throughout America cannot—and should not—be underestimated.

Along with my cosponsors, Senators Hutchison, Lautenberg, Thune, and Dorgan, we have engaged the stakeholders in a dialogue to address their concerns before bringing the bill to the Senate floor. I want everybody in this room to know that whether we do it this year or next year, railroad reform is going to happen. Either Congress will do it, or it will need to be done through regulation.

Today's hearing is the first in a series to examine these issues and I look forward to hearing from our witnesses today.

Senator Hutchison?

**STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS**

Senator HUTCHISON. Is that all you have to say on that?

The CHAIRMAN. Yes. No, it isn't, actually——

[Laughter.]

The CHAIRMAN.—but it's all I really had to say.

Senator HUTCHISON. Well, Mr. Chairman, I am glad that you are having this hearing and that we are talking about it. And I have tried, since I came to the Senate and was actually chairman of the Surface Transportation Subcommittee, to strike a balance between the need for a strong rail industry, and a profitable one, with the need to help captive shippers, as well, because I think that the captive shippers have paid a very high price, with the lack of competition on those lines that only allow for one way out of a captive shipper site. And I've looked at it, and I've seen the destruction to shippers. And I tried to fashion a compromise in the STB reform bill, years ago, and it's just been very difficult to make this happen, to get the parties to the table with a real goal of addressing this issue in a responsible way that keeps a healthy rail system, as well as a healthy alternative for captive shippers.

So, having said that, I hope that we can keep working on it. I really do. And I'm glad that you are highlighting it once again to try to solve this issue. I think it's the most important issue that is unresolved that I have seen in this arena since I came to the Senate.

I also just want to mention, that we passed, with my support and yours, the Rail Safety Improvement Act of 2008, and in it we mandated that, by the year 2015, December 31, that Positive Train Control be put in place for the lines that are going to be carrying toxic materials. We pretty unanimously, or fairly unanimously, passed that legislation. However, today the FRA has interpreted this in a way that they are going to require railroads to base their Positive Train Control on lines that were moving TIH as of 2008, 7 years before the mandate takes effect. And I think that is not what Congress intended, and I am going to urge that the FRA look at that again, because products and routes are going to change over a 7-year period. By the FRA's own estimates, the present-value cost to install and operate PTC over a 20-year period will be between 9.5- and 13 billion dollars, a cost that will be borne by the railroads and the shippers. So, if the FRA view is to stand, Class I railroads would have to install Positive Train Control on one-third more miles of track than they would be using in 2015, and that's not what Congress intended. I hope that we can get the FRA to step back from that and make it relevant and current, by 2015 standards, not by 2008 standards.

I will end by saying, I think the Department is making a good start on the national rail plan. I think we need to have a national rail plan that includes passenger rail—a strong system of passenger rail, high-speed rail—that can compete with the other modes of transportation in an effective way. And I hope that the national rail plan, as it is developed, will include passenger movement for a transportation system in our country that can also take much of the burden off highways and even the aviation community, where we have congestion.

So, I'm glad that we're still working on these issues, and I hope that we can find a balance, especially on the captive shipper issue. And I do hope that we can continue to push for a national rail plan that also includes passenger rail, which I know Senator Lautenberg is a strong proponent of, as I have been, as well.

Thank you.

[The prepared statement of Senator Hutchison follows:]

PREPARED STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS

Thank you, Mr. Chairman, and thank you for holding today's hearing. This committee has been extremely active in addressing rail policy issues, most recently securing enactment of legislation to reauthorize Amtrak; laying the groundwork for the development of high-speed rail service; and addressing rail safety. And of course, last December, the Committee unanimously reported S. 2889, legislation to reauthorize the Surface Transportation Board (STB) and reform policies that govern the economic regulation of the freight railroads. Today's hearing will be a good opportunity to take stock of what has been achieved and what still needs to be accomplished, particularly in light of the Department of Transportation's (DOT) progress report on the National Rail Plan.

As you know, Mr. Chairman, I am a strong supporter of a national network for intercity passenger rail service, and believe high-speed rail service can be competitive with highway and air travel along densely populated corridors. I also support a healthy freight rail industry. Nearly 40 percent of all freight, as measured in ton-miles, now moves by rail. Rail transportation reduces the number of trucks on our highways, lowering highway maintenance costs; uses less fuel; and emits fewer greenhouse gases.

However, I am also a strong supporter of a better balance at the STB between the needs of the freight railroads and their customers. For the past 30 years, the railroads have enjoyed virtually unlimited ratemaking freedom, and captive shippers have literally paid the price. Mr. Chairman, we have worked together very closely on the STB bill, and I know you want to see legislation passed this year as much as I do. I hope we can use today's hearing to get Mr. Elliott's views about the bill and where the STB is headed, and then move to quickly resolve the remaining open issues in the Committee bill.

I realize it may be difficult to reach a consensus on compensation for bottleneck rates, but we need to keep trying. That has remained the most difficult issue to address throughout this legislative process, and it is not surprising given the importance of adequate revenues to the industry and, in turn, to infrastructure investment in the network. I believe a lot of progress has been made and that we can still succeed, even though time is getting short. We have come too far to not keep working to achieve a consensus.

Since today's hearing will include a discussion of the investment needs for a national rail system, I want to take this opportunity to mention my concerns about the Federal Railroad Administration's (FRA) interpretation of the Positive Train Control (PTC) mandate approved, with my support, as part of the 2008 Rail Safety Improvement Act. PTC is not due on lines carrying passengers and toxic-by-inhalation materials until December 31, 2015, yet FRA is requiring the railroads to base their PTC plans on lines where TIH moved in 2008, *seven years before the mandate takes effect*. I believe this is an incorrect and unfair interpretation of the statute.

By FRA's own estimate, the present value cost to install and operate PTC over a 20-year period will be between $9.5 and $13.2 billion—a cost that will be borne by the railroads and, I expect, their shippers. The costs of installing PTC exceed the benefits by a factor of about 20 to 1. FRA's view, if allowed to stand, would require Class I railroads to install PTC on approximately one-third more miles of track than would be required using the "2015 map" for the movement of TIH. I look forward to hearing from Deputy Secretary Porcari about how DOT plans to address concerns raised by many regarding the 2008 base year.

Finally, it appears DOT has made a good start on a National Rail Plan. However, as DOT acknowledges, there is much additional work that remains to be done to have a detailed plan and roadmap, as well as a good estimate of the cost of a fully developed freight and passenger rail system, including high-speed rail routes. I look forward to hearing more about the Plan and recommendations for any actions needed by Congress.

Thank you again, Mr. Chairman. I look forward to a spirited discussion this afternoon about the STB bill and the other rail policy issues before us.

The CHAIRMAN. Thank you, Senator Hutchison.

I call on Senator Lautenberg, who is Chairman of the Subcommittee, and then Senator Thune. And, in fact, there are relatively few of us here, and so, I really would feel comfortable if everybody had something to say, unless you're shy.

**STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY**

Senator LAUTENBERG. Thank you very much, Mr. Chairman.

We're talking about a fairly sensitive subject here, because part of what we're looking at is, what's the place of rail, generally, in our society? It's way behind. I mean, that we know. Whether it's passenger or freight. We haven't made the investments that are essential. And I think it has been very harmful to the United States. And I don't want to prolong the agony, but I, for one, believe that we have to make sure that there is more investment in passenger rail, in freight rail, and keep developing the kind of service that we, in the United States, should be able to have.

I look at the Northeast Corridor. The trains that we have would not only have to run 243 more flights within the Nation's most densely congested airspace every single day, but also add 30,000 more cars daily to, principally, Highway 95. It's an example, only, of how our Nation's rail network reduces congestion across the country.

Freight rail helps relieve congestion. A single freight train takes 280 trucks off the road. Single train. Less congestion means less time waiting in traffic and a better overall, in my view, quality, reliability, and functioning of life.

But, rail doesn't just ease congestion, it reduces our dependence on oil, and protects our environment. Trains are 17 percent more energy efficient than airplanes, and over 20 percent more efficient than cars. A freight train can move a ton of goods 480 miles on a gallon of fuel. And that's why it's essential for our country to invest more in rail and make it part of a complete national transportation system.

Two years ago, we took a major step forward, and I used passenger rail as a companion with my law to reauthorize Amtrak. That law provides $13 billion over 5 years to repair Amtrak's infrastructure and grow its service into towns and cities that are all ready for passenger rail.

We note with interest that recently in the State of Wisconsin, $800 million was issued as a grant to pursue high-speed rail interests between Madison and, I believe, Milwaukee, but there's a huge contest within the State, almost looking like they'd like to reject taking that money, that $800 million. So, the lack of interest in rail in that place, I find shocking, but that's what happens.

We have to keep goods moving swiftly throughout the country, and that's why I recently introduced the Freight Act, with Senators Cantwell and Murray, to improve our Nation's freight transportation system and provide investments across the country.

There is something else, Mr. Chairman and fellow members of the Committee. I am now honored to chair the Subcommittee on Homeland Security, in Appropriations. It's massive. We have 225,000 employees just in that Department—and we're helped by other Departments; the CIA and military, and police, you name it—and a budget—or an appropriation of about $43 billion. So, we're talking about security. And security is so dependent on rail that we dare not turn our backs. When the hurricane struck—Katrina—rail cars were down there to take people away. Whether they availed themselves of it or not, they were there. On 9/11, in my neighborhood, the only transportation available was rail. And we're lucky to have it. It brought people up from Washington to examine the damage that took place—was the only way to get here. There were no airplanes flying. The highways were jammed. But, rail was available.

Fortunately, we have strong partners in the interest in rail—the White House, President Obama, Vice President Biden—and they know that, to keep our Nation competitive and keep our economy back on track, we can't rely solely on cars, trucks, and planes to get people and goods from place to place; we need a balanced transportation system, and passenger and freight rail are part of that balanced equation.

Just 2 weeks ago, President Obama called for more investment in rail, and put it, and I quote, "on an equal footing in our surface transportation program." Now, I look forward to hearing more details about this proposal, and working with the President and this committee to carry out these goals.

The Chairman was good enough to mention that I am the Chairman of the Subcommittee here on this subject. But, the report, Mr. Chairman, in all fairness and all respect, arrived in my office 2 hours ago. And we have this committee—which is pretty important—and, frankly, we have not had a chance, with other things that we have to tend to, to be able to give it a thorough review. And I would have appreciated more time.

One thing, the last thing I'll mention, and that is that the rail industry—the freight rail industry ought not to be presented as pariahs. The rail industry, since 1980, has invested its own funds, almost $450 billion in expansion and improvement in rail service. And that's a positive thing. So, we have to look at this in a balanced way. We want to treat the shippers right, but we also want to treat the rail service companies that carry so much—the largest carrier of coal out of West Virginia. And so, we can't ignore the need to make further investments in freight rail service, and make sure that they are in our view as we look at the Nation's transportation needs.

Thank you.

The CHAIRMAN. Thank you, Senator Lautenberg.

Senator Thune.

**STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. Thank you, Mr. Chairman.

I want to also thank you for holding this important hearing. And I want to thank our witnesses for being here today. I look forward to hearing from our witnesses about their views on rail policy, particularly as it applies to rural States. Many of the Administration's policies, including high-speed passenger rail, will benefit metropolitan areas, but do little, if anything, to assist rural communities. And for South Dakota, which does not have Amtrak service and is not a good candidate for high-speed rail, freight rail policy is the dominant concern. And so, I look forward to hearing from the STB Chairman about the Committee's STB reauthorization bill, which I am cosponsoring.

I agree, Mr. Chairman, that the railroad's financial health has improved significantly since Staggers. And as we consider rail policy today, I think it's instructive to remember the state of the rail industry before the Act was passed.

And I would say, just by way of sort of historical comment, that the railroad tradition in my family goes back a long ways. My grandfather and great uncle came here from Norway, back in 1906, and worked on building the railroads across South Dakota. My grandfather on my mother's side worked for the railroad, and was killed in a railroad accident. And so, when I became the State rail director, back in the early 1990s, it was a time when the industry had changed a lot in our State, and it was in the aftermath of a lot of bankruptcies. And if you go back to 1970, Congress was forced to step in to create Amtrak to ensure the continuation of passenger rail service, which, at that point, had become unprofitable; you go back to 1973, Congress was forced to create and fund Conrail out of the ashes of the Penn Central and other bankrupt eastern railroads. Shortly after that, in South Dakota, the bankruptcy of the Milwaukee Road—in 1980—put over half of the operating rail mileage in the State of South Dakota at risk. And to preserve that vital rail service, the State was forced to purchase essential rail lines. Even today, the State continues to own about 17 percent of the State's active rail mileage.

So, I think we all need to take pride in the fact that the United States is home to the world's premier freight railroad system. The industry transports a significant share of merchandise, automotive, intermodal, and bulk products nationwide. And in South Dakota, of course, it's critical to the efficient movement of grain.

Although the industry is very capital-intensive, it has been able, in large measure due to the Staggers Rail Act, which passed back in 1980, to fund capital improvements for freight operations without government subsidies.

I've cosponsored Senate bill 2889, the STB reauthorization bill, and I agree with the Chairman and the Ranking Member and the Chairman of the Surface Transportation Subcommittee, that modifications to STB policies are needed to strike a better balance between the railroads and their shippers. And I hope that we can still pass a consensus bill this year.

But I also think we must be cautious in our approach, as we have been so far, and ensure, Mr. Chairman, that reform does not cause unintended economic harm to our freight railroad system.

Finally, I want to express my concern about the Administration's latest proposal to spend another $50 billion on road, rail, and other infrastructure projects to stimulate the economy, when less than half of the infrastructure funding provided in the last stimulus Act has been spent. In my view, there isn't justification for calling for additional spending that will further worsen the deficit in the name of stimulus.

Mr. Chairman, I thank you again for holding this hearing, and look forward to hearing from our witnesses.

[The prepared statement of Senator Thune follows:]

PREPARED STATEMENT BY HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

Thank you, Mr. Chairman, and thank you for holding this important hearing. I also want to thank our witnesses for being here today.

I look forward to hearing from our witnesses about their views on rail policy, particularly as it applies to rural states. Many of the Administration's policies, including high-speed passenger rail, will benefit metropolitan areas, but do little, if anything, to assist rural communities. For South Dakota, which does not have Amtrak service and is not a good candidate for high-speed rail, freight rail policy is the dominant concern.

I also look forward to hearing the STB Chairman's remarks about the Committee's STB reauthorization bill which I am co-sponsoring.

I agree, Mr. Chairman, that the railroads' financial health has improved significantly under the Staggers Act. And thank goodness. As we consider rail policy today, I think it is instructive to remember the state of the rail industry before the Act was passed. I remember this period vividly because I served as South Dakota's rail director in the early 1990s in the aftermath of earlier bankruptcies.

- In 1970, Congress was forced to step in to create Amtrak to ensure the continuation of passenger rail service, which had become unprofitable.
- In 1973, Congress was forced to create and fund Conrail out of the ashes of the Penn Central and other bankrupt eastern railroads.
- In South Dakota, the bankruptcy of the Milwaukee Road in 1980 put over half of the operating rail mileage in the state at risk. To preserve vital service, the State was forced to purchase essential rail lines. Even today, the state continues to own about 17 percent of the state's active rail mileage.

I think we should all take pride in the fact that the United States is home to the world's premier freight railroad system. The industry transports a significant share of merchandise, automotive, intermodal and bulk products nationwide, and in South Dakota, is critical to the efficient movement of grain. Although the industry is very capital intensive, it has been able—in large measure due to the Staggers Rail Act of 1980—to fund capital improvements for freight operations without government subsidies.

I have co-sponsored S. 2889, the STB Reauthorization bill and agree with the Chairman, the Ranking Member, and the Chairman of the Surface Transportation Subcommittee that modifications to STB policies are needed to strike a better balance between the railroads and their shippers. And I hope we can still pass a consensus bill this year. But I also think we must be cautious in our approach—as we have been so far, Mr. Chairman, to ensure that "reform" does not cause serious—and unintended—economic harm to the freight railroads.

Finally, I want to express my concern about the Administration's latest proposal to spend another $50 billion on road, rail, and other infrastructure projects to stimulate the economy. When less than half of the infrastructure funding provided in the last stimulus Act has been spent, there is no justification for calling for additional spending that will further add to the deficit in the name of "stimulus."

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Johanns, Senator Kerry, and Senator Dorgan. And the reason is, I want to hear what they have to say, but also, Mr. Porcari and others who are here have just finished up marathon sessions in the House, probably need a Coke or some water, if anybody can provide them with that.

Mr. Elliott, are you here, too? Are you thirsty?

[Laughter.]

The CHAIRMAN. OK.

Senator Johanns.

**STATEMENT OF HON. MIKE JOHANNS, U.S. SENATOR FROM NEBRASKA**

Senator JOHANNS. Mr. Chairman, thank you very, very much. I appreciate the opportunity to say a few words, although I can't stay here today; I'm part of that impeachment panel.

The CHAIRMAN. Aren't you lucky.

[Laughter.]

Senator JOHANNS. Yes. And it is taking a lot of hours. And Senator McCaskill is being very insistent upon us being there to make sure we always have a quorum.

But, I did want to stop by and offer a few thoughts. Let me, if I might, start and just say thank you, Mr. Chairman, for holding this hearing. I can tell from your opening, but I also know that you are very, very committed to rail issues.

I appreciate that this hearing looks at the whole rail industry. But, if I might, I'd just like to focus a few comments on freight rail for a moment.

In many respects, I would suggest that freight rail is really an unsung hero when it comes to transportation. Quite simply, it carries a lot of freight. Now, if you were to measure that in ton-miles, if my numbers are accurate, freight rail carries about 39 percent of the domestic freight. But, I'll bring it even a little bit closer to home. Rail is absolutely critical, central to the shipment of bulk commodities in a State like Nebraska. That could be everything from coal coming out of Wyoming across the tracks that lay across Nebraska, to ethanol, to bulk agricultural commodities, like corn and soybeans. Ask anyone who has stopped at a railroad crossing in Nebraska for a long time, and they'll tell you that trains are very long and they carry a very heavy load.

Our shippers in the State absolutely depend on rail. Without it, we don't survive. It could be corn, it could be ethanol, it could be distillers' grain, it could be a whole host of things in our State, but, like I said, without a successful freight rail industry, we don't survive.

I hesitate to draw comparisons, Mr. Chairman, but I've sat through so many hearings on this Commerce Committee, and even with my short time in the Senate, where we've had industries come and sit before us, and I just want to cry out, "What's your business plan? Because it seems to me you flirt with bankruptcy, year in and year out, and I just can't figure out how anybody can survive that way." And I won't mention a specific company, I won't even mention a specific industry, but it is a source of great frustration, when I know how dependent we are on that industry for transportation needs, also.

So, I go back to the days when, literally, freight rail was in very, very serious trouble, and an industry that moves this fast can find itself in that kind of situation very quickly. Therefore, aggressive government intervention is going to be something I take a very, very skeptical look at because of my concern for our shippers, our agricultural sector, so many that depend upon this.

I think our goal here in the Committee, Mr. Chairman—and I applaud you again for this hearing—is a good, strong rail network for our Nation. Our shippers need that. Nebraskans need that. It is just a part of what our economy is about.

I'll end my comments here. It's no secret that we have a major rail presence in our State. I guess that's obvious. In your report, a fairly famous Nebraskan is even quoted. I've worked with this industry a long time, as a mayor and as a Governor, even as the Secretary of Agriculture.

The working relationship that I've had has always been professional. And I will tell you, that doesn't mean that we've always agreed on issues; we haven't. But, it has been a professional relationship. What I have appreciated about this industry is that it provides quality jobs, quality benefits, and quality retirement; again, at a time when our Nation is struggling with 10-percent unemployment and trying to figure out what is the right course of action to deal with that. I think too often we fail to celebrate the successes of what has happened in this great country. And here's an industry that has kept itself financially working while providing really quality jobs.

Mr. Chairman, thank you again for your leadership on this important issue. And thank you for giving me an opportunity to say a few words.

The CHAIRMAN. Thank you, Senator. I hope you enjoy the rest of your afternoon.

[Laughter.]

Senator JOHANNS. And evening.

The CHAIRMAN. OK.

In order of appearance, Senator Kerry and then Senator Dorgan, please.

## STATEMENT OF HON. JOHN F. KERRY, U.S. SENATOR FROM MASSACHUSETTS

Senator KERRY. Thank you, Mr. Chairman.

First of all, let me thank you for giving each of us an opportunity to speak. And I particularly want to thank the witnesses and our colleague, Senator Kohl, for being so patient with us here.

And, Mr. Chairman, I want the record to show that I did support you in committee on your captive shipper initiative. And obviously that's critical to you and to the folks in your State, and we all understand that.

In fact, freight, overall, I might add, you know, is critical to the Nation in every regard. Senator Lautenberg just talked about the fuel savings, and the shipping-per-mile cost, which is really quite extraordinary.

One of the biggest problems we have is, we haven't invested sufficiently in the infrastructure of rail overall, so we force passenger rail into competition with the freight. And I think freight would love nothing more than to have dedicated lines for one and the other, and we'd all be better off. And that's where we ought to be heading, here, ultimately, although there'll always be shared usage in certain areas.

We've just had a long negotiation, over the last few years, with CSX, up in Massachusetts; and I'm proud to say we got to the table and finally have bought out some line and have been able to increase ridership and increase passenger lines. But, it always comes at an expense, in terms of your economy, because of the importance of those goods moving by rail.

And so, we've got to think about this holistically, which we really haven't done, Mr. Chairman. So, I'm very grateful to you for this hearing today. I can't stay, either, because we have a briefing on START, and we have a vote tomorrow on the START agreement, in our committee, and I need to go be there for that.

But, I want to say a few words about this:

This discussion of rail comes at a critical time for our economy. And I happen to believe, and have believed for a long period of time, that high-speed rail, particularly, but passenger rail, as a whole, and the improvement of our rail structure, including freight, is absolutely critical to our ability to transform the American economy and move in the direction that we need to.

Now, the truth is that the history of rail is, in large part, the history of our country. And I believe the development of high-speed rail in the years ahead is going to be just as important as the development of rail was in the 1800s and the early 1900s and the industrialization of the country. It will have so many pluses—I mean, cleaner air, ease traffic congestion—and we waste billions of competitive dollars every day just sitting in traffic, going nowhere. We sit. Now, modern communications has improved that. You can't text message now in a lot of places, which is appropriate, but you can still Bluetooth and talk and conduct business. But, the productivity losses are stunning, in terms of that, not to mention fuel just evaporates and contributes to the dependency on foreign oil, which reduces America's foreign policy choices and national security, in the long run. We could save families money, we could lessen our dependence on that foreign oil, we'd create a lot of jobs in the United States; some of the best returns on investment of the public dollar come from those kinds of projects.

So, that's why I've previously introduced a bill called, the "High Speed Rail for America Act," and it authorizes $8 billion, over a 6-year period, for tax-exempt bonds to finance high-speed rail projects. And it also calls for an Office of High-Speed Passenger Rail to oversee the development of this and provide a consistent source of funding.

I'm also working with Senator Dodd and Congresswoman DeLauro and others—and I hope that the Senator from Texas, Kay Bailey Hutchison, will be a partner in this as we go forward—and that is a national infrastructure bank legislation to leverage private capital in merit-based commercially viable projects of national significance that span both traditional and technological infrastructure; that includes roads, airports, bridges, high-speed rail, Smart Grid, and broadband. It is not a replacement for the highway bill; we don't want it to be, it shouldn't be. It's not a replacement for the airport appropriations process. It is in addition to them, because we have a $2.2-trillion infrastructure deficit in this country.

Now, the 2008 National Surface Transportation Policy Review Study Commission report says that, in the next 50 years, the population of the United States is going to grow by 120 million people. That is going to hugely intensify the demand for transportation services by private individuals and businesses. Most of that growth is going to occur in the metropolitan areas, and most of the population of the United States lives within about 50 miles of a coastline. That includes the Great Lakes.

Estimates indicate that the U.S. needs to invest about $225 billion annually for the next 50 years to upgrade our existing transportation network to a good state of repair and build more advanced facilities, just leave alone remaining competitive. Right now, the United States is spending less than 40 percent of that amount.

You know, we just don't make choices that are in our common interest, unfortunately, anymore. And evidently the politics are getting even more interesting with respect to our possibility of doing so. Congestion cripples major cities. Our infrastructure in small towns is aging at an alarming rate. We can't simply focus on building more roads. So, we've got to find broader solutions, one of which is this high-speed rail concept.

Now, I'd just very quickly say, Mr. Chairman, we are woefully behind even in that. Americans like to think of ourselves—we've always thought of ourselves that way—sort of the ethic of excellent and primacy, and we like to think of ourselves as being number one. And we've been the world's number-one economy, and still are today, though we are sliding rapidly, and China is growing on us, and there is a time, we can all see, where China is going to surpass us, unless we get our act together.

The fact is, Japan, which unveiled the world's first high-speed rail system in 1964, has a 1,350-mile network that shows speeds of more than 300 miles an hour are possible.

France holds the world's speed record for high-speed rail, 357 miles per hour, has a 1,180-mile network, and plans to add another 1,500 miles.

Spain plans to spend more than $100 billion, over the next year in the largest high-speed rail network in all of Europe. It'll create tens of thousands of jobs, and when it's done, nearly everyone in Spain will live within 30 miles of a train station.

And earlier this year, China announced a plan to expand its high-speed rail system to a network of over 16,000 miles within 10 years from now. And in this year alone, China has poured more than $50 billion into this system. And let me just tell you, anybody who believes China isn't moving toward, you know, clean energy, you've just got to go see what they're doing. I rode, a few months ago, on a 200-mile-an-hour train, bullet train from Beijing to

Tianjin. The old train took 8 hours and ran on diesel. The new train takes 29 minutes, and your water barely moves in the glass.

In Shanghai, there's a Maglev train that goes 300 miles an hour.

So, I'd just say to my colleagues and to all of our folks in this country, the Administration is moving, I think, to try to lay this plan down. Thanks to Senator Lautenberg's leadership, Amtrak was reauthorized with $1.5 billion over a 5-year period for 11 high-speed rail corridors. But, you can just see, $1.5 billion compared to $30 billion, just in 1 year, and $800 billion over the next few years in another country. Last year, we were successful, a few of us, to get $8 billion, in the Recovery Act, to begin to move toward high-speed rail.

But, we have a long way to go very quickly, Mr. Chairman. And I think this hearing is exceedingly important in helping us to focus on how we're going to get from here to there, and I thank you for having it.

The CHAIRMAN. Thank you very much, Senator Kerry.

Senator Dorgan, I have a problem. Senator Kohl has been waiting. The 9/11 ceremony begins at 3:00, and——

What is your wish, Senator Kohl?

Senator KOHL. Let him speak, please.

The CHAIRMAN. Senator Dorgan, you've been requested to speak.

## STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Well, Mr. Chairman, I will try to be mercifully brief. I understand there has been a lot said here.

Let me just make a couple of points. And as I was sitting here, I was just musing about something I'd read, years ago, about a man named "Head-On Joe" Connolly. Joe Connolly created a business plan to create train wrecks. He bought used locomotives, a century ago, when they were to be discarded by the railroads—they were done. He'd buy them, and then he'd lay a couple of miles of track, and then he'd advertise he was going to have a train wreck. He'd have these two locomotives get to top speed and hit each other head-on, and he'd sold up to 30, 40, 50, 60,000 tickets for people to come and watch train wrecks. And then, the business plan didn't work quite as well as he thought, because people were being burned by steam and hit by flying metal, and finally, his career ended. But, he was fabulously successful. They called him "Head-On Joe" Connolly.

And so, train wrecks, at least at one point in the lifetime of our country, represented a business plan.

Of course, now that's not a business plan. We're talking about, how do you make sure you have a rail system that works, that strengthens the rail system? And, you know, 30 years ago, when I came to the U.S. House, I was told by one of the old bulls of the U.S. House, "Don't ever pick a fight with the railroads, because it's one you'll never win." And, you know, in retrospect, he was fairly accurate about that. I've had great angst about captive shippers and the prices they pay and not been able to succeed on that the way we should. And I do hope that we're able to finish the work that was started on S. 2889.

I know, from having a television set in the bathroom, that when I brush my teeth and shave in the morning, I know that we use 1 gallon of fuel to move freight 457 miles. I know that because every single morning I'm told that in a commercial.

[Laughter.]

Senator DORGAN. And I think, "Good for them." You know, it's good to know that. And so, I understand the value of having a financially successful industry. I think that's very important.

But, I also believe that—we have a report, that's referenced in your committee report, saying that the railroads have experienced a pricing renaissance. And at least the farmers in the upper northern Great Plains would understand what that means.

And that brings me to the final point, that I also understand, not just the importance of having a strong rail system in America—and I believe that's important for our country; our country would not do as well as we are without a strong rail system. I also understand the genius of competition. Competition's about choice, it's about better prices, it's about higher quality, and it's about more innovation. And the fact is, in recent decades, there has been a relentless march toward less competition in the rail industry. And frankly, I don't think that serves our country very well.

The Surface Transportation Board is, you know, off and on, either awake or asleep, depending on your perspective of it. I think, for a long period of time, all of the regulatory functions that we have established have—in order to oversee the "4R" Act and other issues—have been in a very, very deep sleep. And that's why I think we need S. 2889.

So, I do hope we can find ways to continue to work, negotiate issues that still exist, pass legislation that we know needs passing, and continue to see a strong rail industry in this country, with competition, that gives shippers fair prices at the same time.

Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you, Senator Dorgan.

Senator Kohl, if you would please come forward and give your testimony, and I will be here, even if nobody else is. And we welcome you.

## STATEMENT OF HON. HERB KOHL, U.S. SENATOR FROM WISCONSIN

Senator KOHL. Thank you very much, Chairman Rockefeller, for holding today's hearing on the Federal role in national rail policy and for accommodating my request to testify before your fine committee.

We all share your goal of updating and modernizing our Nation's rail policy so that this vital means of transportation does truly serve the interests of passengers, rail shippers, and consumers all across our Nation.

I'm testifying today in my capacity as Chairman of the Judiciary's Committee's Subcommittee on Antitrust, Competition, Policy, and Consumer Rights.

As we consider the Federal role in national rail policy, I believe it's crucial that antitrust law enforcement be a part of our Nation's rail policy. On the Antitrust Subcommittee, we've seen that, in industry after industry, vigorous application of our Nation's antitrust laws is the best way to eliminate barriers to competition, to end monopolistic behavior, to keep prices low and quality of service high.

I raise the importance of antitrust and competition principles because our current Federal rail policy does not include enforcement of the antitrust laws in most respects. For decades, the freight railroads have been insulated from the normal rules of competition, followed by almost all other parts of our economy, and because of an outmoded and unwarranted antitrust exemption. Consolidation in the railroad industry in recent years has resulted in only four Class I railroads providing nearly 90 percent of the Nation's freight rail transportation, as measured by revenue; and three decades ago, there were 42 such railroads. The railroad industry's obsolete antitrust exemptions mean higher prices for consumer and manufactured goods, for food, and for electricity.

As you know, I've introduced legislation designed to repeal this obsolete antitrust exemption. This bipartisan legislation has 11 cosponsors, including members of both the Judiciary and Commerce Committees, and it was reported out of the Judiciary Committee on a unanimous 14-to-0 vote in March 2009.

The ill effects of railroad consolidation and immunity from the antitrust laws are exemplified in the case of captive shippers, industries served by only one railroad. Over the past several years, these captive shippers have faced spiking rail rates. They're often the victims of the monopolistic practices and price gouging by the single railroad that serves them, prices increases which they are forced to pass along in the price of their products, and ultimately to consumers. And in most cases, the ordinary protections of antitrust law are not available to these captive shippers.

A recent study by the Consumer Federation of America found that rail shipping rates for captive shippers are $3 billion higher than they would be if the market were competitive. These unjustified cost increases cause consumers to suffer higher electricity bills because of—a utility must pay for the high cost of transporting coal, result in higher prices for goods produced by manufacturers who rely on railroads to transport raw materials, reduce earnings for American farmers who ship their products by rail, and also raise food prices paid by consumers. This special exemption is unique to the rail industry. Virtually all other regulated industries, including telecom, energy, and air transportation, are fully subject to antitrust law. Our railroad antitrust legislation is supported by the Attorneys General of 20 states, a wide range of consumer organizations and leading industry trade organizations, including the American Public Power Association, the American Chemistry Council, the National Farmers Union, and the American Corn Growers Association, among others. Even the Bush Justice Department recognized damages done by the railroad antitrust exemption, and I would ask consent to introduce into the record a 2004 letter from the Justice Department to then-House Judiciary Committee Chairman Sensenbrenner detailing the manner in which antitrust exemption shields potentially anticompetitive conduct.

[The information referred to is contained in the appendix.]

So, that's why I'm so pleased, Mr. Chairman, that, in May 2009, you and I reached an agreement that a repeat of the railroad industry's undeserved antitrust exemption would be incorporated into your comprehensive rail reform bill. I look forward to continuing to work together to achieve this goal. However, all should know that if comprehensive rail reform is not possible, then I will seek to advance repeal of the antitrust exemption by any other means possible.

All those who rely on railroads to ship their products deserve the full application of the antitrust laws to end the anticompetitive abuses all too prevalent in this industry today.

I thank you, Mr. Chairman, for your courtesy in allowing my testimony today.

[The prepared statement of Senator Kohl follows:]

PREPARED STATEMENT OF HON. HERB KOHL, SENATOR FROM WISCONSIN

Thank you, Chairman Rockefeller, for holding today's hearing on the Federal role in national rail policy and for accommodating my request to testify before your Committee. We all share your goal of updating and modernizing our Nation's rail policy so that this vital means of transportation truly serves the interests of passengers, rail shippers and consumers all across the Nation.

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I raise the importance of antitrust and competition principles because our current Federal rail policy does not include enforcement of the antitrust laws in most respects. For decades freight railroads have been insulated from the normal rules of competition followed by almost all other parts of our economy by an outmoded and unwarranted antitrust exemption. Consolidation in the railroad industry in recent years has resulted in only four Class I railroads providing nearly 90 percent of the Nation's freight rail transportation, as measured by revenue. Three decades ago there were 42. The railroads' obsolete antitrust exemptions mean higher prices for consumer and manufactured goods, for food and electricity.

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The CHAIRMAN. Thank you very much, Senator Kohl. And thanks for your patience.

What we need to do here is going to make you all very unhappy, but we have a 9/11 ceremony from 3:00 to 3:30 which Senators are asked to attend. And Senator Hutchison and I are going to attend. And so, we will be back here at 3:30. So, get that report that we've put out, read it, have fun, be nice to your neighbors, and see you shortly.

[Recess.]

The CHAIRMAN. All right. We're here again.

The Honorable John Porcari, the Deputy Secretary, U.S. Department of Transportation, you will testify first—and the Honorable Daniel R. Elliott III, Chairman of the Surface Transportation Board, will testify second. And then we'll have a nice conversation.

**STATEMENT OF HON. JOHN D. PORCARI, DEPUTY SECRETARY OF TRANSPORTATION, U.S. DEPARTMENT OF TRANSPORTATION**

Mr. PORCARI. Thank you, Chairman Rockefeller and members——

The CHAIRMAN. I apologize for keeping you waiting.

Mr. PORCARI. I apologize for arriving late, but it worked out.

Mr. Chairman and members of the Committee, I appreciate the opportunity to update you on the Department of Transportation's ongoing efforts to deliver a modern, efficient, world-class passenger and freight rail system in America.

Over the last 18 months, our Department has helped to usher in a new era for rail transportation in this country with unprecedented levels of investment and a renewed sense of direction. In his Labor Day Address to the Nation, President Obama reiterated his commitment to building our current investments in high-speed rail and to invest in the long-overdue overhaul of Amtrak's fleet. He also announced an ambitious plan to lay and maintain 4,000 additional miles of rail across our country. Clearly, freight and passenger rail has a central role to play as part of a robust and balanced transportation network that strengthens all the forms of transportation this country relies on.

We appreciate the support we've received from this committee as we've worked to achieve the Administration's vision. That includes a strong freight rail industry that builds upon its current 40-percent market share, particularly in the area of intermodal container movements at distances of 500 miles or greater. We see access to the private financial markets as a critical way to help fund the rail improvements needed for this expanded role. For that reason, we need to preserve a fiscally healthy freight rail system, but we also need to remember that cost-effective transportation is a critical element of our domestic economy in global competitiveness. Thus, our public policies and strategies need to assure a balanced system under which rail earns financial returns sufficient to keep and expand access to private capital markets, but not at the sole expense of limited-option shippers. At the same time, we're committed to providing the large majority of Americans with access to an integrated system of high-speed and intercity passenger rail service.

Portions of the system may involve use of existing rail rights-of-way and infrastructure. A key to the success of this vision will be a positive working relationship between the freight railroads, the States, and this Department. To this end, the Department has worked with States and railroads to clarify our expectations. We will not build a world-class passenger rail system at the expense of losing our world-class freight rail system. We want all our partners to understand, we're not pursuing an either/or strategy, but we insist on tangible performance outcomes, and consensus on those outcomes, to assure we receive sustained improvements in passenger rail service in return for funds invested for passenger improvements.

Regrettably, the difficulty in achieving timely stakeholder agreements between the States and freight railroads has delayed putting Americans to work building our rail system of the future. Just as we enthusiastically support a vision for the future of rail that includes both stronger passenger and freight systems, expanding our investment in freight rail requires a freight rail industry that's committed to the needs of the 21st century passenger rail.

We are seeing some signs of progress. Notably, Burlington Northern Santa Fe, an industry leader, recently reached an agreement with Washington State to improve passenger rail service between Seattle and Portland, Oregon. We're grateful to BNSF for brokering this agreement. We sincerely hope that the promises of cooperation that we've recently received from other freight railroads will soon result in additional stakeholder agreements. We are looking, quite frankly, for some facts on the ground to verify that.

And, in closing, America's future and its economy depends upon an efficient, safe, and reliable transportation system. We believe that rail can play an increasingly important role in meeting our freight and passenger rail mobility needs. In fact, we're finalizing a progress report on our first-ever national rail plan. That'll serve as an effective blueprint for achieving these goals in the months and years ahead.

Mr. Chairman, that concludes my testimony, and I'll be happy to answer any questions.

[The prepared statement of Mr. Porcari follows:]

PREPARED STATEMENT OF HON. JOHN D. PORCARI, DEPUTY SECRETARY OF TRANSPORTATION, U.S. DEPARTMENT OF TRANSPORTATION

Chairman Rockefeller, Ranking Member Hutchison and members of the Committee: I am honored to appear before you today on behalf of President Obama and Secretary of Transportation Ray LaHood to discuss the rail industry as it continues to evolve to meet this Nation's transportation needs.

**The Administration's Transportation Strategic Goals**

Throughout the history of this nation, transportation has played a key foundational role in economic development, providing for the common defense, and in defining a quality of life that is the envy of the world. Today the U.S. has the best transportation system in the world. But this system must continue to evolve if we are to remain the global leader in coming decades. As we develop policies that impact transportation, we must look at transportation from a system perspective. It is in this context that the Department has identified five strategic goals that will guide the Department in meeting the challenges of transportation in the 21st Century. These are:

- *Safety*: Improve public health and safety by reducing transportation-related fatalities and injuries.
- *State of Good Repair*: Ensure the U.S. proactively maintains its critical transportation infrastructure in a state of good repair to preserve transportation safety, reliability, capacity and efficiency.
- *Economic Competitiveness*: Promote transportation policies and investments that bring lasting and equitable benefits to the Nation and its citizens, including the encouragement of expanded transportation-oriented domestic manufacturing much like that spurred by the growth of the railroads in the 19th Century and the automobile industry in the 20th Century.
- *Livable Communities*: Foster livable communities through place-based policies and investments that increase transportation choices and access to transportation services.
- *Environmental Sustainability*: Advance environmentally sustainable policies and investments that reduce carbon and other harmful emissions from transportation sources and lessen transportation's dependence on fossil fuels.

In developing our policy, legislative and funding initiatives, we at the Department are moving beyond traditional modal programmatic stereotypes. We are looking at transportation policy and investment from a bottom-line perspective. We are asking where does our policy emphasis and transportation investment yield the greatest benefit when viewed against these goals?

A challenge in taking such an approach is that it forces us to look beyond existing policy and programmatic structures. The traditional Federal approach to rail transportation, certainly for the last several generations, has been markedly different than the approach to other forms of transportation. While we have made significant public investments in highway, aviation, transit and waterway infrastructure over the past 30 years, the same cannot be said for rail.

The Administration believes that we need to take a new look at rail transportation—both freight and passenger. Indeed, freight rail has often been off our radar screens except when there was an accident. Yet 40 percent of U.S. freight, when measured on a ton-mile basis, moves by rail. Intercity passenger rail also plays a significant role in meeting mobility needs in several intercity corridors; and commuter rail service has experienced a sustained period of growth.

**Rail Aligns Well with the Department*s Strategic Goals:**

Rail is safe. According to the Bureau of Transportation Statistics' *National Transportation Statistics, 2010* the fatality rate related to movement of intermodal containers by rail is nine times better than moving similar containers by highway. Passenger rail is also safer than travel by auto.

Rail is an efficient user of infrastructure and right-of-way thus having a positive effect on our efforts to maintain assets in a state of good repair and to offset the demand for investments in other forms of transportation. Some estimate that to compensate for shutting down Amtrak's Northeast Corridor would require the addition of seven new lanes to I–95. Given the cost of highway construction, particularly in urban areas, rail construction is a sound investment. On the freight side, a single intermodal train moves the equivalent of 300 truck movements. And, as I will discuss later, for the last 30 years, freight rail service has consistently attracted private capital into building and maintaining needed infrastructure.

Rail contributes to our economic competitiveness. Rail's efficient access to ports facilitates the global trade for key areas of our economy such as agriculture. Rail investment also offers a significant opportunity to develop and expand domestic manufacturing in the atrophied rail supply industries. Rail is integral to the development and growth of our Nation's regional economies.

Rail transportation can be a key element of our strategies for enhancing the livability of our communities. Rail transportation played a key role in the development of the U.S. in the 19th and first half of the 20th Century. Many communities grew up around their rail connection. Now those urban rail corridors offer significant opportunities to increase public transportation and reduce dependence upon single passenger automobile travel. But this must be done without impacting critical freight mobility.

Approximately 57 percent of petroleum used in the U.S. is imported, and approximately 71 percent of U.S. consumption of petroleum is by the transportation sector (of which rail's share is 2.13 percent). Studies by the Federal Railroad Administration have concluded that transporting freight by rail, when measured on a gallons per ton-mile basis, is 3 to 4 times more energy efficient than moving that same freight over a highway. Passenger rail is 21 percent more energy efficient when measured on a BTUs per passenger mile basis. (The FRA fuel use study can be found at *http://www.fra.dot.gov/Downloads/Comparative_Evaluation_Rail_Truck_Fuel_Efficiency.pdf*.) Not only does rail offer the opportunity to reduce our dependence on petroleum products but also the greenhouse emissions that result.

The Department's experience with the Transportation Investment Generating Economic Recovery (TIGER) Grants offers testament to the strength of rail as part of a truly modal neutral transportation system where decisions are based on efficiency and performance. Authorized by the American Recovery and Reinvestment Act (ARRA), the TIGER grants were the first discretionary modal neutral program where investments decisions would be based upon objective results-based criteria and not upon allocation of resources into specified modal stovepipes. In this competitive decision-making environment, rail projects received the greatest allocation of funds. This allocation is even more significant when one realizes that freight rail projects do not traditionally compete for public funds.

**Passenger Rail initiative and Freight Railroads**

The President's High-Speed Intercity Passenger Rail (HISPR) Program is one of the Administration's most high-profile transportation initiatives. Through this program we seek to bring the benefits of high performing intercity passenger rail service to regions across the country. Our vision is of a multi-tiered passenger rail network, with services that are designed to meet the mobility demand of the regions they serve, and that are integrated in the local public and highway systems. Thus, at one end of the spectrum we envision services at sustained peak speeds of 150 to 220 mph, on dedicated infrastructure, serving large urban areas (what we are calling High-speed Rail Express), particularly those experiencing highway and airline congestion. As part of the network, we also envision a Regional network linking the Express service to mid-sized urban areas with convenient, frequent service at sustained peak speeds of 90 to 125 mph. We see Emerging high-speed rail and Feeder routes that will connect regional urban areas to the intercity passenger rail network.

We envision that Regional, Emerging and Feeder elements of the passenger rail network will be built upon a mixture of dedicated rail infrastructure and infrastructure and/or rights-of-way shared with freight operations. It is the shared track and rights of way that have caused some concerns within the freight rail industry, which I wish to address here.

The Interstate Highway program is now over 50 years old—50 years in which to develop procedures, regulations, guidance and precedent that define the relationships of the various participants. By contrast, the President's new program investing in high-speed and improved intercity passenger rail is still in its formative stages. In the absence of such a well defined program such as exists for highways, it is understandable that there would be some degree of concern on the part of the private sector freight railroads, over the specifics of investments in improved passenger rail on rights of way, including infrastructure they own and operate for the financial benefit of their shareholders. We in the Department are attempting to provide clarity to the basic relationships between private freight railroads and the States that will need to exist to make the program successful.

Our top priority is and always will be safety. Beyond that, we have identified the key elements that must be in the agreement between the State and its key stakeholder, the private freight railroad. These elements are:

- America's world-class freight rail system must be preserved and improved.
- HSIPR grants are for the benefit of existing or future intercity passenger rail service and will fund infrastructure improvements necessary to ensure a high level of performance.
- Agreements must achieve the necessary balance to protect both the private and public interests.
- Agreements must achieve and maintain quantifiable performance outcomes based upon objective, mutually agreed-upon analysis/modeling including:
  —operating slots/frequencies
  —trip times
  —reliability (to the extent it is under a party's control).

In its most basic terms, the States and the Federal Government are seeking to purchase, through capital investments, specific performance for passenger rail service improved or expanded under this program. We are not looking for the freight railroads to participate in the new HSIPR program beyond their current obligations under the Railroad Passenger Service Act of 1970 and the Passenger Rail Investment and Improvement Act of 2008 without compensation. On the other hand, it is not the purpose of HSIPR funds to add freight capacity, except where the freight railroad is a financial participant in the specific improvements.

This summer, we experienced a pause in all State negotiations of stakeholder agreements as the freight railroads absorbed the meaning of their obligations where public funds improved their infrastructure or other assets. I am happy to report that in recent weeks we have seen stakeholder agreements that meet our bottom line principles reached between the Northern New England Passenger Rail Authority and Pan Am Railways for improvements between Portland and Brunswick, ME; between Vermont and the New England Central Railroad (NECR) subsidiary of Rail America for improvements to the rail line between Brattleboro and St. Albans, VT; and between Washington State and the Burlington Northern Santa Fe Railway (BNSF) for improvements between Seattle, WA and Portland, OR.

The agreements reflect real progress. The Department understands that other stakeholder agreements based upon the principles articulated above are in advanced stages of discussion. Unfortunately, we understand that in other corridors, progress has not been as promising. Some States have suggested that they be given the right of access to freight railroad infrastructure in a manner analogous to Amtrak, for the purpose of implementing the Administration's new passenger rail program. The Department remains hopeful that the freight railroads will see an alignment between their interests and those of the public in the success of this new program, just as have BNSF, NECR, and Pan Am. Thus at this time we are not proposing inclusion of the legislation requested by the States into any bills pending before this Committee.

**Rail As A Means To Meet Freight Mobility Needs**

As we move from the recession to economic expansion, the freight rail movements needed to support our economy will grow. Based upon past experience as documented by the U.S. Census Bureau's Commodity Flow Survey, it is not unreasonable to expect that the freight tonnage hauled in 25 years will be nearly 25 percent greater than what is hauled today. Our present transportation system cannot handle such growth without changes in how we do things. Success for our economy in the future will take policies and investments that improve our capacity and efficiency beginning today.

Rail today carries 40 percent of the total domestic freight movements. The Department believes that increasing that percentage could be a cost-effective approach to meeting our stated strategic goals. Increasing the percentage of certain intermodal movements could be particularly telling on the investment needs in other forms of transportation. To be clear, this does not imply disinvesting in highways or waterways. Indeed, transportation of freight will grow on all modes of transportation in the future. It means developing policies and investments that place all the modes on a level playing field where objective, merit-based measures define how the Department's limited resources will be used in the future to ensure that each mode operates as efficiency as possible. This will be one of the guiding principles as the Department considers options for reauthorization of surface transportation legislation.

One attribute of the freight railroad segment of the rail industry has been its ability over the last 30 years to attract private capital for infrastructure investment. Not so long ago, certainly within the professional careers of several in this room, this was not the case. Large segments of the rail industry were in bankruptcy protection or Federal ownership. We certainly do not want to go back that era. We learned then and know now that Federal funding cannot alone sustain a healthy freight rail industry.

Affordable Federal investment options for the future will most likely be focused on addressing bottlenecks, much as the Alameda Corridor does in Los Angeles and the CREATE Project is designed to do in Chicago. This will mean that freight railroads will need to be profitable to attract the level of private capital investment necessary to assure that the rest of their systems as a whole are built and maintained to meet our freight mobility needs of the future. This is particularly true given a number of new initiatives underway including implementing positive train control, new air quality standards for locomotives, and new security initiatives.

At the same time, public policy needs to be sensitive to shippers who have limited transport options. Freight railroads must be able to earn enough to assure we avoid another era of the downward spiral of declining service quality, declining investment, and declining revenue. On the other hand, freight railroad profitability should not be tied solely to revenues from shippers with limited transportation options.

Finding the correct balance will be difficult and we need to recognize that history would indicate that we will be very fortunate indeed if we find this balance the first time. (The Staggers Rail Act of 1980 was the fourth piece of legislation enacted within a decade to address the rail financial crisis.) So any policy changes need to include provisions for quick correction if they are found to be detrimental to transportation investment.

In closing, America's economy depends upon an efficient, safe and reliable transportation system. The Obama Administration believes that rail can play an increasingly important role in meeting our freight and passenger mobility needs. But this cannot be just a responsibility of the Administration and the Congress. It requires commitments from our States and local partners. They too need to put into place the appropriate policies, program structures and investments, both public and private to achieve this enhanced opportunity for rail. It also requires that our the private sector partners' policies recognize that the larger public interest in rail transportation, in particular passenger rail transportation, is foundational to achieving that part of the larger vision that they are most interested in.

The next several months will be exciting as we address these issues. Secretary LaHood and I look forward to working with the Committee in realizing this once in a lifetime opportunity for American rail transportation.

I appreciate this opportunity to appear before you today and look forward to answering any questions you might have.

The CHAIRMAN. Thank you.
Mr. Elliott.

**STATEMENT OF HON. DANIEL R. ELLIOTT III, CHAIRMAN, SURFACE TRANSPORTATION BOARD**

Mr. ELLIOTT. Good afternoon, Chairman Rockefeller, Senator. Thank you very much for your comments, Deputy Secretary. Thank you for your invitation to speak today. It is an honor to appear before you today.

We are the economic regulators of the national freight rail system, which is recognized as the world's most efficient and cost effective. It is our job to make sure that we have the right rules in place for the rail industry of today and tomorrow. Finding the proper Federal role in national rail policy is always a continuing balancing act. My mission is to ensure that our oversight properly balances the interests of all segments of the transportation industry: carriers, customers, suppliers, and workers.

Over the next year, I plan to tackle longstanding issues that would better balance the agency's mission and priorities with the economic realities of today's railroad industry. These issues include looking at the competitive access rules, revisiting the need for existing broad exemptions to regulation, and looking at how much we charge to file a case with the Board.

But, first I want to thank the Committee for the hard work it has done toward the first reauthorization of the STB since it was created, in 1996. By reaching across political lines, this committee worked together to create a good bill. The bill would restore our ability to start investigations on our own. It would give us the ability to send small disputes to a quick and inexpensive arbitration process. It would authorize a budget that would allow us to be more proactive. We stand ready to carry out Congress's wishes. But, I also appreciate that Congress has a lot of other very important things it needs to do, and a limited time to do them. And I do not want to sit still while important matters are in my power to pursue, despite my agency's limited resources.

First, we need to revisit Board rules on railroad industry competition, including those that govern competitive access. Those rules were adopted over 25 years ago, when the financial health of the industry was completely different than it is today.

Second, for similar reasons, I also believe it is time to revisit several of the Board's exemption rulings which removed the Federal protections of reasonable service and rates from various shippers in the 1980s. At the time, most of the shippers supported the exemptions; but, many of those same shippers now say that these exemptions have outlived their usefulness.

Third, I would like to review the level of filing fees and complaint cases. Right now, a shipper has to pay a filing fee of over $20,000 to complain about a service or other unreasonable practice. That does not seem right. I understand that agencies are supposed to charge fees that recover their costs, but I am concerned that high fees may discourage meritorious complaints.

Fourth, I will continue my efforts to reinvent the agency into an engaged problem-solver instead of a board that simply responds to a docket of filings and complaints. We've already bolstered the Board's Rail Customer Assistance Program, emphasized mediation, and started a process to breathe life into our arbitration process. We must continue to do more.

Finally, I will continue to look for more ways to make the agency more accessible, open, and transparent. In making any changes to the STB's regulatory framework, I want to be both proactive and responsible, making every effort to avoid unintended consequences.

As I said earlier, finding the proper Federal role means finding the right balance. That is the approach this committee took in fashioning the reauthorization bill, and one I will follow, going forward.

Thank you for your time, and I would be pleased to answer any questions.

[The prepared statement of Mr. Elliott follows:]

PREPARED STATEMENT OF HON. DANIEL R. ELLIOTT III, CHAIRMAN, SURFACE TRANSPORTATION BOARD

Good Morning, Chairman Rockefeller, Ranking Member Hutchison and members of the Committee. My name is Daniel Elliott, and I am Chairman of the Surface Transportation Board (STB or Board). I appreciate the opportunity to appear before this committee today to address the Board's regulation of the freight railroads and how it is part of the Federal Government's role in national rail policy.

I am also honored to be testifying alongside Deputy Secretary Porcari of the Department of Transportation. The Preliminary National Rail Plan that the Deputy Secretary will address today is an important step in developing a comprehensive approach to rail transportation in the United States. As we look out over the next several decades, those of us engaged in transportation policy must be dedicated to ensuring that this Nation has a world class transportation system for freight and passengers. Railroads are an important part of this vision. While the Board's primary role is one of impartial adjudicator of disputes, I commend the Department of Transportation on the work they have undertaken to plan for the future.

This is my first appearance before the Committee since I became Chairman last August. It has been a busy and productive year for the Board. In addition to the day-to-day business of judging cases and issuing decisions, I have spent the year learning about the Board, its staff, and processes. I have also spent a great deal of energy reaching out to stakeholders to learn how the railroad industry affects nearly every sector of the American economy. I believe that this foundation will allow me to lead the Board in a proactive and effective way in the coming years.

During this period, this committee has been working very hard on reauthorization legislation for the Board. I commend the Committee for the approach it has taken: seeking bipartisan consensus among all stakeholders to reach solutions to difficult policy problems in economic regulation. There are many important pieces contained in the legislation that would greatly enhance the agency's ability to fulfill its mission. For example, the Board generally lacks the ability to launch an investigation on its own initiative. Moreover, the agency has not been reauthorized since it was created in 1996.

I should also note that the past year has presented extremely challenging times for all segments of American industry. Significant changes in the economy have often occurred quite rapidly. These macroeconomic trends inevitably affect the dynamics of railroad/customer relationships and the allocation of labor and resources throughout the transportation industry. As conditions continue to improve in the coming months, the Board will need to monitor how and to what degree it should reexamine and tailor its regulatory policies to meet new conditions.

I will begin my testimony by providing a brief overview of the Board and its responsibilities; then lay out my vision for moving the agency forward in the coming year; and conclude with a summary of the Board's recent activities and accomplishments.

**Overview of the STB**

Congress created the Surface Transportation Board in the ICC Termination Act of 1995 (ICCTA). At its inception, the STB assumed many, but not all, functions of its predecessor, the Interstate Commerce Commission (ICC). While the Board is administratively-housed within the Department of Transportation, the STB is a bipartisan, decisionally-independent regulatory agency. The Board is composed of three members nominated by the President and confirmed by the Senate for five-year terms. The Board's Chairman is designated by the President from among the three members.

Assisting the Board in carrying out its responsibilities is a staff of approximately 150 employees, with extensive experience in economics, law, accounting, transportation analysis and logistics, environmental matters, finance and administration. For the second straight year, the Board was named the best place to work in the Federal Government in the small agency category by the Partnership for Public Service. The 2010 rankings were based on a U.S. Office of Personnel Management Federal Employee Viewpoint Survey, undertaken in February–March 2009 and issued in July 2010. An engaged and energized staff is critical to the success of an agency in achieving its mission.

The Board is charged by statute with broad economic regulatory oversight of railroads, including rates; service; the construction, acquisition and abandonment of rail lines; mergers between rail carriers; and interchange of traffic among carriers. While the majority of its work involves railroads, the STB also has certain oversight of pipeline carriers, intercity bus carriers, moving-van companies, trucking companies involved in collective activities, and water carriers engaged in non-contiguous domestic trade. In addition, the Board has limited but important regulatory authority involving Amtrak. That authority has been expanded by the Passenger Rail Investment and Improvement Act (PRIIA) of 2008.

**Moving the Agency Forward**

This hearing coincides with the one year anniversary of my appointment as Chairman of the Surface Transportation Board. The STB remains a fair and evenhanded forum for regulatory oversight, and we are taking steps toward creating a more open and accessible agency. At the same time, as Chairman I have committed myself to expanding the culture at the agency from one of merely judicial decision-maker to one of engaged problem solver, as well. Instead of devoting all of our tremendous human resources to pushing cases through the administrative process, the agency can be equally effective in applying its considerable expertise to solving disputes and other problems before they result in formal case filings. We are well-suited to successfully mediating disputes because we have neutral experts on staff who understand the rights of shippers and the responsibilities of the carriers. This year, the agency has taken a number of positive steps toward becoming a more proactive problem-solving agency.

Continuing in that same direction, I intend to focus my second year at the agency on the following projects:

1. *Reexamine Key Regulatory Policies.* There are three key regulatory policies that I believe merit reexamination, if for no reason other than it has been many years since they were put in place. Needless to say, enormous changes have taken place in the industry since passage of the Staggers Act in 1980, as well as ICCTA in 1995. A map of the national rail system reveals significant consolidation of Class I railroads and the development of an expansive short line railroad industry. In addition, railroads have become more productive and shippers'

needs and their roles in the shipping process have evolved. The result has been a very different state of economic health in the rail industry than was true in 1980.

*First,* I plan to examine the rules the agency has in place regarding rail-to-rail competition. The ICC adopted these rules in the early 1980s before waves of consolidation rippled through the railroad industry. In the Spring of 2009, the agency considered beginning such a reexamination, but deferred in light of the comprehensive review being conducted by the Congress in connection with reauthorization legislation. This process should be launched anew.

*Second,* I believe it is time to explore the commodity exemption system, also created in the 1980s, which removed the Federal protections of reasonable service and rates from shippers of numerous different types of commodities. These exemptions were not cast in stone and can be revoked by a petitioning party. It may be that the assumptions underlying some of those exemptions are no longer current.

*Third,* I plan to take steps to make the agency more accessible to parties that need to file a complaint because of a violation of the law. In a recent decision, the Board stated that it would review the level of filing fees in all complaint cases. It is vitally important to ensure that all valid claims are brought before the agency. Therefore, filing fees should not deter parties from bringing disputes to the Board.

2. *Continue Active Monitoring of Industry.* Let me note that the mission of the STB—to balance the needs of shippers for low-cost, reliable rail service with the needs of railroads for revenues adequate to encourage investment in our Nation's rail network—remains just as critical in challenging economic times as in good. With the recovery of the economy underway, but a great deal of uncertainty ahead, we will continue to monitor the health of the railroad industry and the service it provides to its customers.

In 2009, the number of carloads carried by the freight railroads was at its lowest level since 1989. This was a reflection of the severe and broadly felt economic downturn affecting railroad customers, resulting in significant dampening of shipping demand. Despite hauling the least amount of traffic in two decades, the Class I railroads still managed to weather the storm, due in large part to cost-cutting. Cost-cutting included layoffs, furloughing employees and storing rail cars and locomotives. Carload numbers for 2010 have begun to improve, and I hope that we will see continued economic recovery and a better year for shippers and railroads alike. The industry must remain poised and ready to handle a return of traffic that will be the best sign of renewed economic growth. But most of all, I look forward to the industry bringing all these furloughed workers back to the job and adding workers to grow the railroad workforce as traffic rebounds.

3. *Continue Reexamination of URCS Costing Model.* The Board is extensively reviewing its Uniform Railroad Costing System, or "URCS." URCS is the agency's general purpose costing model, which estimates the variable cost of transporting goods by rail. It is used in many Board proceedings, but most prominently in rate cases. Yet the model has not been updated significantly since it was adopted in 1989. Updating URCS is important because shippers and railroads need to have confidence that the Board will issue rulings that are based on accurate and reliable data.

In May of this year, the Board responded to a Congressional request to submit a report on three different options—basic, moderate, and comprehensive—for updating URCS. The Board advocated implementation of the moderate option. The Board estimated that these changes to URCS would cost the agency approximately $625,000 beyond normal operating expenditures and would take approximately 2 years to complete. Many of these suggested changes to URCS would be subject to rulemaking procedures. While the task is technical and complicated, it is also important and will continue to be a priority for the agency in 2011.

4. *Continue to Improve Transparency.* No goal has been more important to me during my first year than to respond to President Obama's call for government leaders to establish a system of transparency, public participation, and collaboration. To facilitate better interaction with the public, I have reached out directly to stakeholders by conducting site visits, holding field hearings, giving speeches, and conducting meetings with local communities and elected officials. I have met with the agency's key stakeholders, some on multiple occasions,

which has given me an opportunity receive feedback from them on the challenges they face and how the Board can be more responsive to their concerns.

Having been on the outside looking in at the Board during my time as an attorney practitioner before the Board, I can sympathize with the frustration felt by many stakeholders that what goes on inside the Board is too much of a mystery. Accordingly, I have undertaken several efforts to make the Board more transparent. I have begun the policy of holding regular oral arguments in a number of cases before the Board, so that parties have a chance to talk face-to-face with the Board, and field questions from the Commissioners. I believe that these arguments have been well received and have contributed measurably to our understanding of the issues in the cases. The oral arguments also provide stakeholders with better insight into the Board's decision-making process.

The Board has also begun a process to make our written decisions more transparent and understandable to the public. Our decisions are often complex and technical in nature. But no one should need a PhD or law degree to understand what the agency is doing. Therefore, the Board has begun to include a "plain language" statement to describe the dispute and decision of the agency for all of its major decisions. This statement, which will appear at the beginning of a decision, explains in plain, ordinary language (devoid of legalese) what the decision does and why.

In the same vein, Board is undertaking a major redesign of its website. The website is a key source of information for stakeholders, legal practitioners, and members of the public, yet it can be difficult to find information on the website and the site can be difficult to navigate. I plan to transform the current website into a state-of-the-art information portal that will be more user-friendly, allow for better interaction, and provide better information. Everything that can be made public will be made public.

5. *Continue to Foster Better Shipper/Railroad Relationships.* Railroads and their customers rely upon one another in order to prosper. While the STB represents a strong and neutral forum for adjudicating rail-related and other complaints, I believe that business partners usually reach a more constructive result when they can settle their disputes privately, without litigation. Accordingly, I have made it a priority of my first year as chairman to foster private settlement of rail-related disputes. Toward that end, I have bolstered the Board's informal dispute resolution team, emphasized mediation, and initiated an effort to revitalize the Board's moribund arbitration process.

I will also continue my efforts to bolster public awareness of the Rail Customer and Public Assistance Program (RCPA). As I will describe further, the RCPA program provides help and solves problems through informal means, and members of the public have availed itself of this assistance increasingly over the past few years.

As a regulator of one of America's most important national assets, I appreciate that we must be vigilant that regulatory review be conducted carefully, responsibly, and with every effort to consider the possibility of unintended consequences. And the Board is a small agency with limited resources. We must thus prioritize our efforts carefully.

Our mission is to ensure that our oversight properly balances the interests of all segments of the transportation industry—carriers, customers (and their customers), suppliers, and workers. I believe that the measured steps described above can be carried out consistent with these goals.

**Recent Accomplishments**

The past year has been quite active at the STB, with many accomplishments in rail regulation. In that time, the Board has issued over 1,000 decisions. It has been quite busy internally, as well, with many reforms of the agency's administration. Here are some highlights of the Board's accomplishments over the last few years.

*Alternative Dispute Resolution*

As noted earlier, I have made it a priority of my first year as chairman to foster private settlement of rail-related disputes. Toward that end, I have bolstered the Board's informal dispute resolution team, emphasized mediation, and initiated an effort to revitalize the Board's moribund arbitration process.

The Board's RCPA program represents a highly successful model of this approach. No longer "Washington's Best Kept Secret," the RCPA program provides an informal venue for the private-sector resolution of shipper-railroad disputes and assists Board stakeholders seeking guidance regarding Board decisions and regulations.

The RCPA program provides help and solves problems through informal means, and members of the public have availed themselves of this assistance increasingly over the past few years. In 2009, the RCPA staff addressed more than 1,400 inquiries, about a third of which involved disputes between a rail carrier and shipper or member of the public. 2010 has seen a similar level of activity. Such help can range from a simple answer to a telephone inquiry, to engaging in lengthy dispute-resolution efforts between railroads and shippers. The program's staff—which includes attorneys and former employees of shippers and railroads—brings to the table decades of experience in rail shipping, operations, marketing and analysis.

This program is free and can be confidential at the request of a party. In these matters, Board staff receives requests for assistance through a special toll-free number or a fill-in form on the Board's website. All matters are expeditiously handled on an informal basis and involve a wide-range of issues, including rates and other charges; car supply; claims for damages; labor concerns; safety; noise; land disputes; and many other service-related problems. Very often, informal resolution allows both sides to walk away satisfied, and obviates the need for litigation before the Board. We have placed information about our program prominently on our website and made it available easily by phone call or e-mail to encourage its use in resolving disputes at an early stage. The program is also now featured on the websites of various shipper organizations.

In addition to promoting use of the RCPA program, I continue to encourage the use of mediation where parties have initiated a formal proceeding. In all rate cases, in fact, the Board requires mediation at the outset of the proceeding. We are pleased that within the last 2 years, Board staff was able to successfully mediate a settlement in two large rate cases, while a settlement has been reached in principle in a third case. As a result of these mediated settlements, both the parties and the Board avoided the additional expense and time that it would have taken to see these cases through to the end.

The Board has also persuaded parties in other formal, non-rate related proceedings to pursue mediation. There are currently several such cases where we have put litigation on hold while the parties, with the aid of Board staff, discuss private resolutions of their disputes.

In addition, The Board has begun a project to improve its arbitration procedures. These procedures were adopted at the urging of the Railroad-Shipper Transportation Advisory Council (RSTAC), an advisory committee that is focused on issues of concern to small railroads and small shippers. In the decade since this process was put in place, however, not a single party has used it. Accordingly, over the next year, the Board will receive input from industry stakeholders on why they have not used the current process, in the hope of removing deterrents and making the process more attractive. We also have sought comment on how to build on our successful mediation program and expand those efforts.

*Passenger Rail*

In October 2008, Congress expanded the Board's jurisdiction over the regulation of passenger rail service. The Passenger Rail Investment and Improvement Act (PRIIA) authorizes the Board to institute enforcement or investigatory action under certain circumstances to address a failure by Amtrak to meet on-time passenger train performance standards or service quality standards. Based on such investigation, the Board is directed to identify reasonable measures and make recommendations to improve Amtrak performance and/or service quality, and may assess damages against the host rail carrier or provide other relief in appropriate circumstances. PRIIA also allows states access to Amtrak equipment and services when the state selects an entity other than Amtrak to provide intercity passenger rail service. If Amtrak and the state or state-sponsored entity cannot agree on terms of use, the Board can determine reasonable compensation, liability and other terms of use for Amtrak's services.

Section 209 of PRIIA calls for Amtrak and interested state authorities (Governors or representative entities) to jointly develop a standardized methodology to allocate operating and capital costs of state-supported Amtrak routes between the states and Amtrak. In the event that the parties cannot agree on the methodology within 2 years of PRIIA's enactment—Oct. 16, 2010—the Board could be asked to decide the appropriate methodology. The Board must do so within 120 days and require full implementation of its methodology within 1 year of its decision. As the parties are permitted to revise the methodology, it is possible the Board could be called upon to resolve disputes over revisions as well.

Finally, Board staff has reached out to industry groups to ensure they are aware of the new mediation authority the Board received under PRIIA. The Board is now authorized to conduct nonbinding mediation between commuter and freight railroads where the commuter railroad seeks access to the freight railroad's trackage or right-of-way to conduct commuter service, but the parties cannot reach agreement on this access. Stakeholders are interested in the opportunity to use the Board's services, although the Board has not yet received any requests for mediation.

Implementation of PRIIA is still in the early stages, and no party has yet sought action from the Board under any provisions of the law. However, the Board continues to monitor developments and will be ready to act when the time comes.

In June of this year, the Board issued a report on the liability and indemnity provisions contained in agreements between passenger and freight railroads, in response to a request from Congress. Liability and indemnity issues are two of the most contentious issues between passenger and freight carriers that operate over the same lines. As the Board noted in its conclusion to the report, the discord is ultimately over which sector—public or private—should bear the risk of exposure for accidents involving passengers.

*Mergers, Acquisitions, and Construction*

As I noted at the outset of my testimony, rail line mergers, acquisitions, and constructions are subject to Board approval. A new carrier seeking to acquire or operate an existing rail line must obtain authority from the Board. Recent years have seen a number of smaller, but still important, mergers that have required Board approval. In December 2008, the Board issued a decision approving the Canadian National Railway's acquisition of the Elgin, Joliet & Eastern Railway West Company (EJ&E). The line CN acquired creates, in effect, a rail beltway around Chicago and permits CN to divert traffic from its congested lines in Chicago to the less congested lines of the EJ&E. The Board attached 182 environmental and other conditions to the acquisition, an unprecedented number. They include increasing safety at crossings, implementing and protecting quiet zones, and adding fences near schools and parks. The conditions also call for intensive monitoring that includes monthly and quarterly progress reports.

I take the implementation of the required mitigation measures very seriously, and have personally visited the affected communities three times. I am committed to ensuring that CN is living up to all of its responsibilities in the communities.

In response to community concerns about extended crossing blockages, the Board instituted a third-party audit, which revealed a number of significant discrepancies between the data that CN reported to the Board and the data that CN had itself collected. On April 20, 2010, the Board ordered CN to appear for a hearing to address CN's failure to report its internal data. The matter is still under active consideration by the Board.

A significant development in the freight railroad industry occurred this year when Berkshire-Hathaway acquired BNSF Railway. As a result, BNSF became the first Class I railroad in recent memory to be privately held. While this acquisition did not require formal Board approval, nothing about this purchase will change how the Board regulates BNSF. BNSF will still need to seek regulatory approval for line sales, constructions, and abandonments and its common carrier rates and practices are subject to the same regulation as other railroads.

The acquisition raises a number of more technical issues. For example, because BNSF will no longer be publicly traded, it will have no stock price, a component that is needed for the STB's annual railroad industry cost of capital calculation. The Board has sought public comment on this matter. Parties in the cost of capital proceeding have also raised the issue of how this transaction impacts the valuation of BNSF's assets. When BNSF submits financial data to the Board, it may seek to write up the value of its assets to reflect the purchase price, rather than the depreciated book value. These technical issues have been raised in pending cases or will be before the agency shortly. I therefore can say little more on these subjects, other than that I am fully aware of the disputes and the Board will address them as they arise in a fair and impartial manner.

*Abandonment and Discontinuance*

A carrier may not cease serving a line of railroad without prior approval from the Board. In such cases, the Board looks to balance the public interest in continued rail service with the needs of rail carriers to earn adequate revenues. In February 2010, the Montreal Maine & Atlantic Railway (MMA) filed an application to discontinue service and abandon the line. The State of Maine opposed MMA's proposal, and sought funds—partially through a successful bond referendum earlier this year—to acquire the line and preserve service, should the Board grant MMA's application. The Board held a public field hearing on the application in Maine in July of this year. The Board has also made mediation available to the parties. I directed our top mediator and our Chief Economist to lead these efforts. This is a pending matter, so I cannot comment on the merits of the case. But I want to note how this case highlights my approach to regulation: open, transparent, and on a full and fair record.

*Rate and Practice Regulation*

The Board's governing statute establishes a Federal policy "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," and to "minimize the need for Federal regulatory control over the rail transportation system," but "to maintain reasonable rates where there is an absence of effective competition." In accordance with this policy that there be no rate regulation where effective competition exists, there are a number of statutory limits on the Board's jurisdiction concerning rates charged by rail carriers. Only common carrier rates (as opposed to rates contained in a contract) for non-exempt commodities by market dominant carriers are subject to rate review. It is in those instances where it is most important that the agency be able to step in: rates for captive shippers that have no competitive alternatives. The statute mandates that such rail rates be "reasonable."

In recent years, the Board has adopted several new rules designed to reform, streamline, and improve access to the Board's rate procedures. Most significantly, the Board created three options for shippers seeking protection from unreasonable rates: a set of procedures for large cases and two simplified procedures for smaller cases.

For large, multi-million dollar disputes, the Board has adopted an approach called the "stand-alone cost" (SAC) test. Under this test, the complainant seeks to show that it is paying for facilities or services that it does not use, or is paying for inefficient service. Major reforms to streamline the SAC test and produce more accurate results were completed in 2006.

For smaller rate disputes, a rail customer can choose from two simplified approaches, depending on the amount of relief it seeks, the amount of money it wants to spend, and how quickly it wants a result. The "simplified stand-alone cost" methodology allows shippers to recover up to $5 million, spread out over a 5-year period, and the Board will issue its ruling no more than 17 months from the filing of the complaint. The Simplified-SAC methodology removes the "hypothetical" from the SAC analysis. Many of the aspects of the analysis utilize the results of already litigated SAC cases or are limited to the actual costs of the defendant railroad. The Board has estimated that using the Simplified-SAC test over a full SAC test reduces the cost of litigating a rate case by 80 percent.

Under the simplest approach, the "Three Benchmark" methodology, shippers can recover up to $1 million in relief, spread out over a 5-year period, and the Board will issue its ruling no more than 8 months from the filing of the complaint. Under the Three Benchmark methodology, the Board looks at the carrier's overall revenue needs, how the railroad prices its other captive traffic, and how comparable traffic is priced.

Captive shippers immediately began to take advantage of the improved simplified procedures for smaller rate disputes. In the decade under the old rules, few shippers sought relief under the simplified guidelines, but once the simplified procedures were reformed in 2007, six complaints were soon filed. Five of those cases settled in mediation, while the sixth case resulted in a finding that the rate was found to be unreasonable and $1 million in relief awarded to the shipper.

Since all of the revised rules were put in place, there have been 17 rate disputes before the agency, 4 of which are still pending. Of the other 13, the agency fostered settlement in 8 cases, found rates to be unreasonable in 4 cases, and found rates to be reasonable in 1 case. The breakdown of more recent cases, which is tracked and made available to the public on our website, is set forth in Table 2 below. In the "Test" column of that table, the denotation "R/VC" are cases where the parties stipulated to have the rate established at 180 percent of variable cost in lieu of using the SAC test. The "3–B" test refers to the Three-Benchmark approach, and S–SAC indicates the Simplified-SAC approach.

Table 2.—Rail Rate Cases at the STB (2008–Present)

| Docket | Case Name | Commodity | Test | Date | Decision |
|---|---|---|---|---|---|
| 42095 | KCPL v. UP | Coal | R/VC | 2008 | **Rates Unreasonable** |
| 42088 | Western Fuels v. BNSF | Coal | SAC | 2009 | **Rates Unreasonable** |
| 42112 | E.I. Dupont v. CSX | Chemical | SAC | 2009 | *Settlement* |
| 41191–1 | AEP Texas v. BNSF | Coal | SAC | 2009 | Rates Reasonable |
| 42111 | Oklahoma Gas v. UP | Coal | R/VC | 2009 | **Rates Unreasonable** |
| 42099 | DuPont v. CSX | Chemical | 3–B | 2009 | *Settlement* |
| 42100 | DuPont v. CSX | Chemical | 3–B | 2009 | *Settlement* |
| 42101 | DuPont v. CSX | Chemical | 3–B | 2009 | *Settlement* |
| 42114 | U.S. Magnesium v. UP | Chemical | 3–B | 2010 | **Rates Unreasonable** |
| 42110 | Seminole Electric v. CSX | Coal | SAC | 2010 | *Settlement* |
| 42115 | U.S. Magnesium v. UP | Chemical | S–SAC | 2010 | *Settlement* |
| 42116 | U.S. Magnesium v. UP | Chemical | S–SAC | 2010 | *Settlement* |
| 42122 | NRG Power v. CSX | Coal | SAC | 2010 | *Settlement* |
| **Pending at the STB:** | | | | | |
| 42113 | AEPCO v. BNSF & UP | Coal | SAC | TBD | |
| 42113–1 | AEPCO v. UP | Coal | SAC | TBD | |
| 42121 | Total v. CSX | Chemical | SAC | TBD | |
| 42123 | M&G Polymers v. CSX | Chemical | SAC | TBD | |

In addition to rate cases, the agency has statutory grounds to hear complaints that railroad practices are unreasonable. We currently have several such cases pending involving matters such as coal dust, fuel surcharges, unit train requirements, shipper-owned car issues, routing, and demurrage. I believe that the large number of pending complaints indicates an understanding by our stakeholders that the agency is and is "open for business" to hear disputes.

*Service Quality and Railroad-Shipper Relations*

The Board takes its duty to monitor railroad industry performance very seriously, especially during these difficult economic times. I am briefed on the performance of the railroad industry by our staff, which tracks the efficiency of carriers by looking at a variety of performance metrics. We also examine the railroads' performance goals, as well as information on critical capacity-related infrastructure needs.

In addition, I have continued the agency's customary request that the Class I carriers, along with the American Short Line and Regional Railroad Association, provide the agency with information on how they will handle end-of-year peak shipping demands in agriculture, coal, chemicals and intermodal traffic. This request is particularly relevant this year. With Russia recently announcing a ban on exports of its wheat crop, the demand for U.S. wheat is expected to skyrocket, and so the railroads' role in the supply chain will be even more vital than usual. In addition, with the railroads having significantly reduced its number of employees and equipment in use in 2009 due to the poor economy, there is concern in some parts of the shipping community as to whether the railroads will be able to provide adequate service as traffic levels continue to increase. Therefore, I took a further step by requesting that the railroads provide more extensive data than in past years, including information on the status of their Positive Train Control initiatives, the on-time performance by Amtrak trains that operate over their lines, and their customer service surveys. The railroads' responses are due back no later than today.

The Board also works with several Federal advisory committees formed to enhance communication across the railroad/customer industry, which serve the dual functions of bringing together members of different segments of the industry to engage in a collegial and informative discussion of salient issues, as well as providing valuable advice and recommendations to the Board on issues within their mission. Last month, the Board announced the creation of a new advisory committee, the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee, regarding issues associated with the transportation of hazardous materials. The Rail Energy Transportation Advisory Committee, the RSTAC, and the National Grain Car Council all meet regularly and have been extremely valuable in coordinating preparation of white papers and reports to the Board across a wide range of topics, including rail capacity, economic trends, and rail/customer issues. As an example, I will work with railroads and shippers on keeping pace with service demands when I meet with the National Grain Car Council, at the group's annual meeting later this week.

## Conclusion

As I have testified, the past few years have presented many changes, both within the industry and at the STB. It is my intent to continue the agency on a path of innovation, regulatory responsiveness, and fulfilling our statutory mission. In this way, the STB can be a productive part of the Federal role in national rail policy.

I appreciate the opportunity to testify before you today and would be happy to answer any questions you might have.

The CHAIRMAN. Thank you, Mr. Elliott, very much.

I will start. And there are only three of us here, so we can do this well.

I asked my staff, Mr. Elliott, to review the financial results of these four big rail companies. When I came here, there were 50 class-A railroads, now there are 4. And then we've allowed them to establish a virtual monopoly on freight transportation in this country. And just done so relatively quietly. Most of the time, I think people in Washington, and because they're very good at flying below the radar, just accept the numbers of the Association of American Railroads. Not necessarily you, but people in general, "If they say so, it must be true." And that really is the secret to their success, because you never hear about them, you don't know what AAR is, but it may be the most powerful, effective lobby in town. And if Mr. Hamberger is here, I'm sure he'll be happy to hear that. But, it's not helpful.

We looked at these companies and what they file with the SEC. And here's what we found. Freight railroads are some of the most profitable companies in the world. I mean, to be more specific, Fortune 500 companies. There are only four types more profitable—the network and other communication equipment is one; Internet services, two; pharmaceuticals, three; medical products and equipment, four; railroads, number five—among all companies. And it doesn't matter if the quarter is bad, if there's a recession. In fact, they're doing extremely well right now, when other people aren't. They continue to make very large profits. Now, this is from the *Fortune* magazine 2008 list.

Mr. Elliott, can you please tell me why the Surface Transportation Board—they—you have in your—in the 1980 law, that there must be an adequate rate of return, adequate revenue. That's the word—"adequate"—which, to me, means sufficient to the requirement, I guess. I'm not really sure what it means, and I don't know what it does mean, and I think that has been one of the problems. But, why is it that the Surface Transportation Board doesn't think that BNSF, Union Pacific, CSX, and Norfolk Southern are financially sustainable companies? Because you don't.

Mr. ELLIOTT. In response, with respect to the railroads, I do believe that they are, as you described them, a very healthy and profitable industry, and that, looking at our revenue adequacy numbers, while some of the railroads have hit those numbers over the past 10 years, there is this concern that the railroads are able to use their market dominance in a way that causes shippers to pay excessive rates. And that is why, in my testimony today, I've stated that I want to take a look at the way the system is operating right now, especially with respect to competitive access.

I believe that the arena has changed significantly since the Staggers Act was put in place, in 1980. At that time, in 1980, the railroads were suffering, they were broke. And as you described, and as your report describes very well, things have changed significantly. And we had the hope to look at something as serious as competitive access as a way to look toward looking at some of these serious issues with regard to market dominance.

The CHAIRMAN. And what's interesting to me—and my time is virtually out—is that everybody understands that passenger trains are less profitable than freight trains. I mean, you have to be good to passengers, and you have to feed them and take their tickets. And you don't have to do that with containers. But, the profit comes from the freight railroads, because those are the moneymakers, because you don't have those other concerns. And they focus on the freight railroads.

But, still you have this term, and it—maybe you're about to get rid of it—called "revenue adequacy." Now, I don't know what—you know, "sufficient," "adequate," "revenue adequacy" is, but they have interpreted that to their advantage. And because people don't follow these issues, either in Congress or generally in the public, they get away with it. Wall Street understands, and is very pleased by what they see. But, what happens to the shippers gets lost, because when people think of railroads, they think of railroads, they don't think, "Oh, well, there are passenger railroads, and there are freight railroads, and one's doing very well, and the other is a different thing." We're focused on the freight railroads and what they charge people who have no choice; if there's only one railroad into their factory or granary, they have to pay what they're told.

And I've been through this many times. In fact, they make deals with you sometimes. They'll say, "Okay, okay, well, we'll forget that." I remember, specifically; it was CSX and Weirton Steel. They said, "Oh, well, we'll forget that." And Weirton Steel saved $8 million. In other words, an effort—and I was in the Commerce Committee—and it was an effort to buy, I guess, my goodwill or something. But, life can't work like that. And it seems to me the STB can't allow that type of dealmaking to sort of push off—and I was knowledgeable, relatively; others might not be, in the Congress. So, don't you have to sort of take that freedom to exploit away from them and to get this revenue adequacy down to something which is a solid, workable number that you can live with? And are you going to?

Mr. ELLIOTT. I seriously considered looking at the revenue adequacy constraint. And in reviewing the possibilities of what we would like to look at first, I thought that we would get more bang for our buck if we looked at the competitive access, as opposed to the revenue adequacy. I think that the competitive access affects more shippers that are captive shippers, and that—as opposed to revenue adequacy, which I think is a barometer that we use, but it is only somewhat relevant in rate cases, so it would only really affect the shippers that bring the rate cases, which are even a narrower group than the captive shippers, themselves.

So, we thought, going forward, our emphasis should be on somewhere where more people would be interested and affected, and we thought the competitive access was the way to go. Revenue adequacy was also something that I did seriously consider.

The CHAIRMAN. My time is up, and therefore, it goes to the distinguished Vice Chairman.

Senator HUTCHISON. I share many of those concerns. And from what you've said in answer to the questions, it does seem that you are trying to get the right parameters to be fair and even-handed.

The railroads have urged the Board to use replacement costs to determine revenue adequacy. What impact do you think replacement costs would have on the cost of capital a railroad would need to earn revenue adequacy?

Mr. ELLIOTT. Well, if we used replacement costs, it would drive their asset base up, using replacement costs. What we really use now is the depreciated cost, because we find it to be the only feasible way to measure the asset base. But, if they used replacement costs, or if we used replacement costs in the accounting of revenue adequacy, it would definitely drive up the asset base, allowing them to earn more return on that asset—more return on that asset base, and, as a result, they would be less likely to become revenue adequate.

Senator HUTCHISON. Let me turn to a different area, because I think you are trying to do what we're interested in, and that is having relief for the captive shippers, with a fair basis rate when there is a captive shipper and no competition. So, just know that that is my priority, as well as the Chairman's.

But, I'd like to just ask you a Texas question, and that is, When the stimulus money on high-speed rail was awarded—actually, this would be for you, Mr. Porcari, the Secretary criticized the Texas Department of Transportation for not having its act together. And I would like to ask you what you think the Texas Department ought to be doing to put itself in a position to get some of the high-speed rail money. Because I am a strong supporter of having high-speed rail in Texas, and there are some areas that are very congested, that if you could just get pieces of a system bypassed or gone through, then it would allow Amtrak to provide, a better service, because it's very, very late in its delivery times now in Texas, and there are just segments where it could be very helpful to have the high-speed rail.

So, what—does the legislature need to act more affirmatively? Does TexDOT need to do something more clear about its intentions to be ready for a high-speed rail connection? What should they be doing?

Mr. PORCARI. It's an excellent question, ma'am. And Texas is in the same position that many other States are, where, because there has not been much attention until very recently in the President's initiative, there hasn't been much attention on high-speed rail. There isn't much capacity within the State, and the State Department of Transportation, to actually build high-speed rail lines. So, the front of the pipeline, if you will—the planning, the design, the environmental approvals, through the National Environmental Policy Act, which, in many cases, take a number of years—have not been done. And that's not at all a knock on Texas or any other State; it's a reflection that, from a standing start, like with the interstate system, we're trying to build a national network.

So, what the Secretary was trying to express is that, although Texas has an enormous ability to benefit from high-speed rail—and there are some city pairs and some linkages with other States, in particular, that would be, I think, extraordinarily well served by high-speed rail, a lot of the preparation work in planning and design in partnership agreements with the Class I railroads and other railroads, short lines, where appropriate, are just not there yet.

I know that, as a State and as a State DOT, Texas is racing ahead to get that capacity. It's very similar to what you're seeing in other parts of the country.

Finally, I'd——

Senator HUTCHISON. Are you saying that you think they are now focusing better and beginning the processes that would be necessary to lay the groundwork?

Mr. PORCARI. Yes, they are. They're very much on the right track. Karen Rae, who is with us today, our deputy FRA administrator, is very familiar with Texas. She has been working directly with them on that, and they're clearly getting there. The first winners that you see in high-speed rail—California, for example—have been at this for 10 years.

Senator HUTCHISON. OK, thank you very much.

The CHAIRMAN. Senator LeMieux.

**STATEMENT OF HON. GEORGE S. LEMIEUX, U.S. SENATOR FROM FLORIDA**

Senator LEMIEUX. Mr. Chairman, thank you.

Secretary Porcari, Chairman Elliott, thank you for being here today.

Let me start by saying that I think that rail, both on the passenger and freight side, needs to have an ever more prominent role in transportation in this country. Just talking about high-speed rail, Florida is looking forward to high-speed rail between Orlando and Tampa. Like Texas, Florida is a big State; it's hard to get around. And in-State air travel is challenging. So, the idea that we can create mega-corridors between Orlando and Tampa, that's going to create jobs, it's going to create great economic synergies. So, I look forward to that, and I hope that we can expand upon that.

Also, on the freight side, freight rail takes trucks off the road; it is clean; it is efficient; it's safe; and it plays a big part in Florida; it plays a big part, I think, in the future of this country. So, I'm glad that you all are focused on trying to create the prominence of both freight and passenger rail.

I want to direct some questions, on a narrow topic, to you, Mr. Elliott. And you spoke, in your opening remarks, about the fact that you've been emphasizing mediation on these rate cases. And I want to visit with you about that, because I think it's important.

We just had a successful mediation in Florida between the Seminole Electric Cooperative and CSX. My background, before coming to the Senate—one of the things that I did was as a lawyer. And I know that we saved a lot of costs and heartache when we mediate disputes. And I wanted to get you to elaborate on your emphasis on mediation and where you see mediation going forward on these rate cases.

Mr. ELLIOTT. Thank you for the question—our rules require, in these rate cases, that the parties mediate. So, they always are required to come to us. And that's not the case in every type of case that comes before the Board, but in rate cases it's a requirement.

So, it has proven to be incredibly successful in the past. We've settled probably the biggest case that probably would have ever come to the Board, a couple of years ago also, I believe, was CSX. And then we were very pleased to see the settlement in the Seminole case. We were happy to do that. We had the parties come before us and have oral argument.

And mediation, to me—I come from a labor background, and I'm also an attorney—and, to me, I hate to see the litigation costs, especially in these large rate cases, expended if they can be resolved through a simpler way. And mediation has proven to be incredibly successful. So, we're hoping—and, in fact, have asked for money, in this situation, to increase our mediation staff in order—in the hopes that, in the future, that we'll be able to have more qualified mediators. We have an excellent mediator, who was involved in the Seminole case and the prior DuPont case, and he's getting close to retirement age, so we're looking to make sure that we are ready, as we go forward, to have other excellent mediators in place.

Senator LEMIEUX. Well, I thank you for that. I ask that you keep at it, and that you also create even further incentives for mediation. Sometimes people have to be pushed, and I think that it's for the benefit of all concerned. So, any incentives that you can create and make sure that your staff is on the job to push for those mediations, I would appreciate that.

Mr. ELLIOTT. We will do so.

Senator LEMIEUX. Mr. Secretary, on the high-speed rail piece, Florida is receiving this first tranche of money. It's not enough money to complete the rail between Tampa and Orlando. I was told, by the Secretary, that there will be additional funds that will be made available in the future.

Can you tell me, and give me some assurances, that the money will be there in the future to make sure that we can complete these rail lines? You know, the last thing we want is to build half of a high-speed rail corridor. We need to make sure the work is done.

Mr. PORCARI. It—yes, Senator. It's a good question. And, first, Tampa-Orlando is clearly the first leg of, at a minimum, Tampa-Orlando-Miami, which would—studies show, have very significant ridership. What we've tried to do throughout the country is have a competitive process. And that's—Florida was obviously one of the early and big winners. It will continue to be a competitive process.

The best assurance that we get to completion together is to keep the momentum going on the planning, design, and construction side. We're working very closely with the Florida DOT staff, and others, on that. It is a singular project, in the sense that the right-of-way is there in the I–4 corridor, which is an enormous advantage. From day one, it will be segregated from freight traffic; it won't have any issues associated with that. That positions it very well for the future.

There are no guarantees in this process. The ones that are working the hardest and making the tangible improvements are likely to be the successful ones in the future. And I do think you're well positioned for that.

Senator LEMIEUX. Great.

Well, thank you both for your service.

And, Mr. Chairman, thank you for this hearing.

The CHAIRMAN. Thank you, Senator.

Mr. Porcari, it's my impression that the railroads—I think we discussed this in my office—generally stipulate that they pay for everything, they've done it all, they've borne the burden. And it's also my understanding and knowledge that that is not the case and that, in fact, the government, at various levels, have paid for enormous amounts of that.

And I'll just give two examples: CSX has something they care about very much, and it's called the National Gateway Corridor. And it's huge. It's $842 million. It's an infrastructure project called the National Gateway Corridor. And they're building a new terminal in Ohio, and they're trying to improve tracks and tunnels all over the East Coast. My understanding is that about half the funding for this project comes from public sources—Federal, State, or local—it's a terrible thing if you mislead the public in that sense, because the public's going to believe you, and therefore, they just leave out the Federal Government and States, et cetera. Can you sort of elaborate, generally, in your view on this? Because I think I felt just a bit of frustration on your part.

Mr. PORCARI. Yes, there is some frustration on that front. It's—first of all, we view the freight railroad system in America as one of our economic jewels, and it's clearly part of the Nation's future prosperity and a foundation for future economic development. And I think there's a very real reflection of that in the TIGER grant process. As you recall in the Recovery Act, there was a $1.5-billion merit-based selection process, where, for the first time, freight rail projects would be eligible for the funding. Of that $1.5 billion, the largest single winner of a category was freight rail. And I think that's a really—it's important to underscore that, because it shows that, one, we all understand how important freight rail movement is to the Nation; two, our inability to have funded it before; but, three, how much significant public funding—it's about $420 million, as I say, of the TIGER grant funding for the National Gateway Project, the Crescent Corridor, Colton Crossing, in California, the CREATE Project. There are very large projects around the country that reflect that. And it is our expectation, and it is our insistence, that we get—that the public benefits from that—and that means, across the board, that the—our public benefits from—and that, as well, we make sure that, as we rebuild a passenger rail system and build a high-speed passenger rail system, that the Nation has not had in the past, that we partner with the Class I railroads to do that.

So, we have worked very hard to acknowledge the freight rail movement part of the system, taking a system approach, knowing that, 25 years from now, we're going to have 70 million more Americans, and most of those will be clustered in existing population areas. The interstate system, just as one part of the transportation system, simply can't accommodate that kind of growth. And it's a very inefficient use of interstate capacity to have it skewed toward goods movement.

So, freight rail is very important, but passenger rail equally is, for that. And we want to move forward positively, and we're asking our industry partners to embrace the future with us. And we'll be happy to continue to report on what progress we make along those lines.

The CHAIRMAN. Is it not also the case that—I have in here somewhere, that, at one point in our history—and I think that continues—that the government—the Federal Government basically turned over about 7 percent of the entire land mass of the United States to the railroads?

Mr. PORCARI. I believe that's the right number. It's the one that I've heard. And in the late 1870s, that was a way to build the future economic prosperity of the country. It was a grant—a very large grant, by the Government of the United States, to spur that development. We certainly see the national freight rail system as a national asset that benefits the country. We do expect some national benefits from it in return for that long-ago generational investment. And making sure that both freight and passenger needs are accommodated in the future is the bottom line, and that's what we need to do as part of this.

The CHAIRMAN. So, in essence, when you do something like that, you expect fairness and some return on the public investment.

Mr. PORCARI. We do. In return for any public investment, there should be a defined public benefit.

The CHAIRMAN. So, we're talking about it now, and we're talking about it a long time ago.

Mr. PORCARI. I think it's——

The CHAIRMAN. But, the long-time-ago—imagine the increase in the worth of that 7 percent. I mean, I'll guarantee you that's several West Virginias.

[Laughter.]

Mr. PORCARI. I'm sure it is. And it is—again, I think it's—it's imperative that we have defined public benefits in return for that public investment. Whether it was generations ago or today, it's a continued investment. And make no mistake, that transportation is economic development, and this is an important part of it. We had hoped to be here today with more progress on the passenger rail side, in particular.

The CHAIRMAN. And you've had trouble in the relationship—of railroads making agreements with States, have you not?

Mr. PORCARI. We have. The—most of the high-speed rail agreements are between individual States and the Class I railroads. I mentioned BNSF as a positive example, with the State of Washington. They have a long cooperative relationship. That agreement clearly sets the stage for the future, because in return for a public investment in high-speed passenger rail, and even interim passenger service, there will be defined benefits. There are many other examples on the other side of the ledger. And you could look at North Carolina and Norfolk Southern, New York and CSX. You could—Wisconsin—there are any number of other States where we don't yet have that progress. It is something that we are going to insist on. And again, I think there's a positive way to do this, going forward.

The CHAIRMAN. I just want to tarry briefly on one subject and then get back to my main interests, which is captive shipper rates and what's going to happen with respect to that, because, in an odd way, they really get lost in all of this, except if you follow it; then they're a large part of it.

But, one of the things that's troubling to me is the massive use of stock repurchases, as opposed to capital expenditures and this kind of thing. And so, you have dividends, you have stock repurchases. I think that is very, very effective, and eagerly awaited by executives of the company. But, I think one would have to look at kind of a balance. You'd have to say, "Well, people have a right to reward their shareholders"—and indeed, they have to. But, I think we've already made the case today that Wall Street is much enamored—because they tell them one story as they tell you another—much enamored of their asset value, and it encourages people to invest, and Warren Buffett, and many others, has made that point very clearly.

But, along with that is the whole question of captive shippers, and that's really why we're here. That's really why we're here. I would like to hear from you, Mr. Elliott, a sense of your path to fairness in the treatment of captive shippers.

I mean, I deal with captive shippers; I don't deal with railroads. They don't come to see me very often, because it doesn't tend to be a very profitable discussion, or useful—fruitful discussion. But, captive shippers come to see me all the time, and they don't just come from West Virginia, they come from all over the country; they're profoundly frustrated. I'm steeped in the history. I'm not a lawyer, but I feel like one when I think about all the cases that have been brought before the ICC or the STB, in terms of feeling shortchanged, that they had to pay much more than was fair.

And so, they're always up against—I mean, those are people who can talk about revenue adequacy in the most intimate, desperate terms; and they either win or lose. Now, they can win or lose because you've got a system, which has a formula, which kind of works things out; and you've discussed that, at least in some of these papers that I'm reading. But, it's also a matter of timing. I mean, it's a classic technique, is to stall. And the longer you stall, the people just can't afford to have lawyers. And I can go back and think of many cases over the past 26 years where people have just given up. Doesn't mean they're not mad. It doesn't mean that they were offering a product for the freight railroads to carry. But, when they felt they were being overcharged—and, indeed, they were being overcharged; and, indeed, the freight railroads say they have to do that, you know, to make up for other expenditures—I don't think they include stock options and things of that in that.

But, I need to know of what your personal roadmap is, in terms of trying to give captive shippers, one, a chance to—and I don't—I just don't mean the categories—5 million and above and, you know, 1 million and above—I mean, there's a lot that are less than that—but, the—but, how you plan to try and work—and it'll take time, it'll take help from us, if we can provide that, which we can—to make it work for captive shippers, which is why we're here.

Mr. ELLIOTT. In response, the first thing I've done since I've been at the Board, since I was last before you, was to reach out to the captive shippers. And in my first week in office, I called all the shipper groups and invited them to come to my office. And I saw that there was some distress—that I hear in your voice, also of the agency. And I wanted to invite them in and show them that they had a fair place to come and to bring their rate cases, and that they're going to get a fair shake when they're before us.

I've noticed, since I've been at the Board, that more people have brought rate cases. It seems like the rate cases are coming in. As I said, that's not really my desire. I think you're looking at a bigger picture. And I, hopefully, laid out some of that in my testimony, as far as the bigger picture, where we look at the balance between the railroads' ability to earn adequate revenue to make these large investments, versus the captive shippers' rates to have reasonable rates. And in looking at that balance, the way I look at going forward is looking at the competitive access issue.

I think—when I look through your bill, I see that as one of the biggest issues that needs to be looked at. And I will go forward, looking at that as something that needs to be explored. We have a case regarding reciprocal switching interchange agreements from 1985, I believe. Times have changed. Times have changed since 1985. The railroad industry is a different place. We're in a different landscape.

Also, like I mentioned, I've talked to a lot of groups that are exempt from our rules. Back in the 1980s, exemptions were thought to be a good thing to some of these shipping groups. And right now, I don't think they think that, some of the groups I've talked to. And we are going to explore that to see if that is another area to at least explore and decide whether or not that our agency should be available to them to regulate them.

And also, last, with respect to service, reasonable practices, I'm hoping to take a careful look at reducing that filing fee. That seems fairly extreme—$20,000 to file a case before us just to determine whether or not it's reasonable. Those things, in line with the other things that I mentioned about openness and transparency and alternative dispute resolution to make some of these things go away before we litigate them. But, that's the path that I see, going forward.

The CHAIRMAN. They're not excited about resolution arbitration, are they? The railroads.

Mr. ELLIOTT. I have recently put out a request for comments on arbitration. I don't have the railroads' opinion set forth yet, because the comment period hasn't expired. So, I don't know exactly their feeling on arbitration. I would think arbitration would be in everyone's interest, because it does reduce litigation costs. So, I would hope—that's always been my feeling, that arbitration is a good thing; it takes cases that maybe aren't worth spending millions of dollars on litigating, and bringing them to us. We need to do a lot of work on that to make it a place that you can actually bring a case. We haven't done a very good job at that, and I think we need to do that, going forward. But, I am looking forward to hearing the railroads' opinions, as well as the shippers', to see if we can do something. We don't have the power to require people to arbitrate before us, but we're aware of other arbitration processes that have worked and got the railroads involved. So, we're hoping to follow that path.

The CHAIRMAN. I have a great deal of faith in you, Mr. Elliott, and I'm really glad you're there. Isn't it a question, also, that you're going to have to prove the STB's effectiveness? I mean, I'd like to see you with five people rather than three people. I mean, there are all kinds of things that can be done. But, you have to win the confidence of captive shippers, because if you don't, they're just not going to bring cases, because, based upon history, there's no reason why they should bring cases, because they know they're going to lose it by the classic maneuver of delay; to wit your question of the railroads, which they haven't answered yet. Well, that has been the whole history of the last 2 years, where we've really intensively—and, I mean, I—you know, I've had to go back in—to the captive shippers, who get furious at me, because they say, "Well, you're giving away too much to the railroads." And I tell them, "Well, I mean, the railroads have to—they have to sign up to this deal"—and I'm trying to, you know, get the railroads over here and the captive shippers over here, and the railroads have gotten everything, the captive shippers have gotten virtually nothing. And you've got to kind of move to a central point. And that's a very hard thing to do. But, I mean, these folks sitting behind me spend all their days, weeks, years, you know, in these meetings, and the railroad people come, and they say, "Well, they"—first, they talk in terms of individual railroad's needs. Well, that's not of interest. What's interest is what "the railroads" want. What are their top five priorities? What are their top 10 priorities? What are their top 20 priorities?—so we can look at them. And we hold them out, we hold out that prospect, and they just simply don't reply; they stall—which they also do, in terms of expediting cases. And they have the right to do, because they have all kinds of lawyers.

So, I mean, the shippers have to have confidence in you. You're going to have to prove yourself to them, or else a lot of folks—not the big shippers; they'll continue to bring cases—but, the small ones, and often the most, sort of, poignant ones, won't, because they've, long ago, realized it's just not worth it financially; they can't afford it, so they don't. Why would they just lose the money over a losing prospect in any event?

You think you're going to be able to do that?

Mr. ELLIOTT. I've heard that—those thoughts. When I did reach out, and we had the meetings with some of the shipper groups. Like I mentioned, I heard a lot of distress—and our staff asked, "Why don't you just bring a case?" or asked, "Why don't you just bring a case?"—the response was exactly what you said. And so, it is an uphill battle, but I think we've gotten off to a good start in gaining the trust of some of these groups, and we will just keep—continue to make our process as open and transparent as possible, also by reaching out and speaking to these groups. You know, I find that having a relationship, an actual personal relationship with people, is very helpful, and it has been helpful to me, so far. I mean, you—if you have a face to put with the issue, you get to—it—I think you get a lot more trust that way.

The CHAIRMAN. Well, I'm looking at you, and I'm seeing the faces of some of your predecessors in my mind.

[Laughter.]

The CHAIRMAN. And, you know, they can come in—and there are folks from rural West Virginia or rural North Dakota, or whatever, and they don't particularly like going to Washington, and they wish they didn't have to, but—anyway, they come in, and they actually get a lot of their first impressions from your body language, from your face, from your expression. Is it open? Is it not? And I can name to you just a number of which who were very, very closed people, because they were really working for the railroads. And that's a nasty thing to have to say, but, nevertheless.

Mr. Secretary, you indicated, when we talked, also, that some States have been able to reach agreements, but others have not. And the railroads have, I think, four enumerated reasons, which are particularly troublesome to them, and one of them is climate change. They say if this climate change takes place, well, they just can't make a deal. And there are other things, too. But, what I would really be grateful for is if you would be willing to give me fairly regular reports on how those meetings with States go. Because that will tell me a lot about what progress is being made. If this hearing, in fact—does it amount to something? Does the fact that we're going to have a series of hearings—and I think I mentioned—I think you were in here when I mentioned that we're going to—a series of hearings. We're going to do this.

You know, I've finally gotten to be Chairman, after 127 years, and, by golly, I'm going to solve this problem if it's the last thing I do on Earth.

So, having your impressions would be very helpful.

And, frankly, Mr. Elliott, if you can do that—I mean, if it's ethical for you to do it—and I'm not a lawyer, so I don't know these things—I'd like to hear from you, even if we just meet fairly frequently and it's on an informal basis. Do you see a change in the way of their behavior? Do they seem to be so oblivious to the possibility of legislation, because they may do better in upcoming elections than they thought? And I really see that as a specific strategy on their part, just, "Let's wait it out, and then we'll have different people around, and maybe Jay isn't going to be Chairman." But, it's not going to work out that way in the Senate. But, you know, you can read them, you could read, Is there a change of behavior?

I go back to that original meeting that they asked for, and they said—and I went happily to it, and I said, "I believe in railroads." I can remember going, as a little boy, to Tucson on the railroads. I can still remember the music of the clickety-click before a seamless, and all the rest of it. And I love railroads. I mean, I—they're wonderful, and they are efficient, and they are cleaner, but they also have to be fair to everybody. I mean, they just absolutely do. All the rest of it is just window-dressing unless they are fair to captive shippers. And so, that's a large responsibility on you, and we're willing to do everything we can to help you.

Can either of you think of some other points that you'd like to make?

Mr. PORCARI. If I may, Mr. Chair. First, we would be very happy to periodically update you on progress, and keep you and staff and the Committee informed.

I do want to go back, just very briefly, to the future and what America is going to look like in 25 years from now, 70 million more people. Twenty-five years is "the day after tomorrow," in transportation planning terms. We see that the future for railroads, both freight and passenger, is very, very bright. Even if, for some reason, we didn't think it was an important part of the transportation system, we'd have no choice but to really make it part—an important part of a balanced transportation system.

We need to lay the groundwork right now to do that. And the sense of urgency that you see from the Administration is recognizing the future, and recognizing that the progress we've made as a Nation is really because of the sacrifice and the generational investments in infrastructure made by our parents and our grandparents and our great-grandparents. And if we're honest with ourselves, we're not doing the same. So, that's where the sense of urgency's coming from.

The CHAIRMAN. Let's say there's a project in West Virginia, where they want to have double——

Mr. PORCARI. Double-stack clearance?

The CHAIRMAN.—double-decker, yes——

Mr. PORCARI. Yes.

The CHAIRMAN.—and to go through tunnels that take single-deckers so that those tunnels have to be made higher; and it's happening, and they're paying for part of it, but you're paying for half of it, too. I wish there were a way to have more public discussion about this problem, that we didn't have to confine it just to the members of the Commerce Committee, and actually just a few members of the Commerce Committee who, over the years, have kind of followed this. Attendance here is not what I would have hoped.

On the other hand, everybody knows the way I feel, but, more importantly, Kay Bailey Hutchison feels the same way. I mean, this was a bipartisan bill that we passed. John Thune feels exactly the same way, as Byron Dorgan does and I do. And I like that a lot. We tend to be a very bipartisan committee. We pass a lot of things out unanimously, that would seem to others to be controversial, that we get unanimous consent agreement on the Senate floor because people know that we tend to operate in a bipartisan fashion.

And so, in essence, I'm trying to make that comparison to captive shippers and railroads, and each of them giving up, or getting, you know, what they need to in order to arrive at parity. And that's not subject to a formula; that's subject to the will primarily of railroads, because, for the most part, I've had to restrain captive shippers from wanting more than they can properly get, and expect the railroads to go along. But, then when I get that, and then they growl at me a bit but they know that I'm for them, the railroads take advantage of that. And so, actually what we did—I just called off all meetings, in July or something like that, and it was just a pause, and it was meant to be a pregnant pause so that people would notice that we had called off meetings. And it was a signal to the railroads to say, "Look, we really mean this, and you've got to bring your priorities to the table, and we will deal with them." And we're good at doing that. I mean, I've accepted a lot of things from railroads that the captive shippers didn't want to happen, but I will gladly do that, in the interest of getting an agreement, so that they will cooperate, and your job will become easier, and Mr. Porcari can worry about 75 years from now. Well, looking at you, I think, 25, 30 is probably better. But, in any event——

[Laughter.]

The CHAIRMAN.—you understand what I'm saying. It's a desperately important process. Every single shipper who uses a railroad is affected by whether this is a fair system, or not. And that lies on your hands, and ours.

So, I'm just going to keep at it, and you're going to keep at it. I'm glad you're here, and I'm glad you're there. And, you know, fairness is fairness, and that's what makes America work.

Mr. POCARI. You bet.

The CHAIRMAN. So, with that absolutely unique statement, I'm going to adjourn the hearing.

Mr. POCARI. Thank you, Mr. Chairman.

The CHAIRMAN. I thank you both very much.

[Whereupon, at 4:35 p.m., the hearing was adjourned.]

# A P P E N D I X

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
OFFICE OF OVERSIGHT AND INVESTIGATIONS—MAJORITY STAFF

THE CURRENT FINANCIAL STATE OF THE CLASS I FREIGHT RAIL INDUSTRY

*Staff Report for Chairman Rockefeller*—September 15, 2010

**Executive Summary**

Thirty years ago, Congress made sweeping changes to the laws regulating freight railroads to give the industry the opportunity to improve its finances and its ability to compete against other transportation modes. The Staggers Rail Act of 1980 allowed freight railroads to get rid of unprofitable lines and to consolidate their operations. The law also allowed the railroads to charge lower rates to their customers who operated in a competitive environment, and higher rates to customers who were "captive" to one railroad carrier for transportation service.

A review of the Class I railroads' recent financial results shows that the Staggers Act's goal of restoring financial stability to the U.S. rail system has been achieved. The restructuring of the industry that the Staggers Act set into motion thirty years ago has produced a so-called "rail renaissance." The four Class I railroads that today dominate the U.S. rail shipping market are achieving returns on revenue and operating ratios that rank them among the most profitable businesses in the U.S. economy.

After struggling with declining market share and rates in the years after the Staggers Act became law, the railroads have now regained their pricing power and begun increasing railroads' share of the freight transportation market. Unlike other transportation modes such as trucking, the railroads have been able to maintain their high profit margins even during the sustained economic downturn of 2008–10. Freight railroads have been assuring their investors the companies will take advantage of this "robust pricing environment" and continue to push rate increases on their customers.

While the freight railroads have been investing record amounts of their profits into much-needed capital projects, they have also doubled dividend payments to their shareholders and spent billions more dollars repurchasing their publicly-traded shares to boost the short-term value of their stocks. These large expenditures undermine the railroads' argument that they still lack the income to invest in their long-term capital needs. In addition to their own capital investments, the railroads have recently received hundreds of millions of dollars from state governments and the Federal Government to support their network improvement activities.

The companies' strong financial performance has attracted billions of new investment dollars, including the unprecedented $34 billion purchase of the BNSF railroad by Berkshire Hathaway, the operating company of the investor Warren Buffett. Buffett predicts that BNSF and the other large Class I railroads will show "steady and certain growth" over the coming decades.

In spite of the obvious financial strength of the Class I railroads, their industry association, the Association of American Railroads (AA R), continues to tell Congress and the Surface Transportation Board (STB) that the freight rail industry is not yet financially stable and is not yet capable of meeting its capital needs without the differential pricing powers the Staggers Act gave the railroads in 1980. As the rail industry continues to operate profitably and to aggressively exercise its pricing power, these claims need to be more carefully scrutinized.

**I. Past Financial Problems in the Rail Industry**

Faced with a national railroad system in financial decline and physical disrepair, Congress passed the Staggers Rail Act (Staggers Act) in 1980.[1] Citing the railroads'

[1] Staggers Rail Act of 1980, Pub. L. No. 96–448.

declining share of intercity freight transportation and the industry's poor financial performance, the authors of the Staggers Act said the purpose of the law was to provide "the opportunity for railroads to obtain adequate earnings to restore, maintain, and improve their physical facilities while achieving the financial stability of the national rail system."[2]

The law directed the Interstate Commerce Commission (and its successor, the Surface Transportation Board) to shift its regulatory focus from rate-making to the financial health of the railroad industry. Under this new approach, "the Commission is required to make efforts to ensure that rail carriers earn adequate revenues."[3] The Act legalized private transportation contracts, encouraged railroad mergers, and accelerated abandonment of unprofitable rail lines.

In order to increase the railroads' ability to earn "adequate revenues," the Staggers Act allowed railroads to charge higher rates to shippers over which they had "market dominance."[4] Because railroads could not build their fixed business costs into the rates they charged shippers who had access to competing transportation modes—such as trucks, barges, or other railroads—Congress allowed them to charge higher markups on so-called "captive" shippers without viable transportation alternatives. In order to increase the rail industry's revenues, the Act required regulators to accept as "reasonable" even rates with very high captive-shipper markups.[5] According to the authors of the Staggers Act, regulators would have greater authority to review this so-called "differential pricing" when the railroads were once again financially stable businesses.[6]

The pricing and regulatory reforms in the Staggers Act led to wide-ranging changes in the railroad industry. In 1980, there were 39 Class I railroads, employing 458,000 workers, and owning 270,623 miles of track.[7] Thanks to a wave of mergers and consolidation in the 1980s and 1990s, today there are only seven Class I railroads. In 2008, these companies employed 164,000 workers and owned 160,734 miles of track.[8] In spite of the fact that the Class I railroads own significantly less track and employ fewer workers than they did in 1980, their network handled almost twice as much cargo in 2008 (1.7 trillion revenue ton-miles) than it did in 1980 (918 billion revenue ton-miles).[9]

Also unlike 1980, today four Class I railroads dominate the long-haul freight market and function as "regional duopolies" in the eastern and western United States.[10] Burlington Northern Santa Fe (BNSF) and Union Pacific dominate freight rail transportation west of the Mississippi, and CSX and Norfolk Southern dominate the business east of the Mississippi. In 2008, these four railroads accounted for over 90 percent of Class I freight shipments and over 92 percent of Class I railroads' $61 billion in revenues.[11]

**II. Current Financial Picture**

In their official communications with the Surface Transportation Board (STB), freight railroad carriers consistently tell their regulators that while their industry's financial condition has significantly improved since 1980, they have not yet reached the "financial stability" goal established in the Staggers Act. In 2007, for example, the Association of American Railroads (AAR), the rail industry's trade group, told the STB that since the passage of the Staggers Act, Class I railroads have "only

[2] U.S. House of Representatives, *Staggers Rail Act of 1980 Conference Report*, 96th Cong. (H.R. Rep. No. 96–1430) at 80.

[3] *Id.* at 89.

[4] *Id.* zt 90–91; 49 U.S.C. § 10707.

[5] A captive shipper is not entitled to STB review of the reasonableness of a rate unless it can demonstrate that the rate produces revenues above 180 percent of the railroad's "variable costs" in providing the service, and that is has no other transportation alternatives. 49 U.S.C. § 10707. In the railroad industry, "variable costs" are the expenses a railroad carrier incurs in the course of a particular shipment of goods, while "fixed costs" (also known as "joint and common costs") are the expenses railroads incur to maintain their networks, but are not attributable to specific customers or shipments.

[6] *Staggers Rail Act of 1980 Conference Report, supra* note 2, at 91. ("The Conferees have adopted the concept of a jurisdictional level that varies according to the performance of the railroad industry. When the industry is earning revenues which are adequate, it is appropriate for the Commission to have the authority to review rate increases more carefully.").

[7] Association of American Railroads, *Railroad Facts, 2009 Edition* (2009).

[8] *Id.*

[9] *Id.* Railroads measure the total amount of freight they ship using the measure "revenue ton miles," which is the weight of paid tonnage multiplied by the total number of miles the freight has been transported.

[10] Wolfe Research, *A Training Manual. Will Rail Renaissance Survive Recession and Re-Regulation?* (May 2009), at 10. (hereinafter "Wolfe, Training Manual").

[11] Association of American Railroads, *Railroad Ten-Year Trends, 1999–2008* (Feb. 2010).

slowly made progress toward the goal of long-term financial sustainability." [12] While "freight railroads are finally showing tangible signs that financial sustainability might be within reach," the AA R concluded, the companies have not yet reached that point.[13]

A year later, in April 2008, AAR told the STB in written testimony that the railroads' profitability was "still far from stellar in comparison to the many other industries against which railroads compete for capital" and that "rail industry profitability has consistently lagged most other industries—and that is still the case today." [14]

While the rail industry's regulatory filings with the STB portray an industry that is still struggling to attract capital and to compete with the other transportation modes, the railroads' public financial results tell a different story. According to the four largest rail companies' Securities and Exchange Commission (SEC) filings, in recent years, these companies have far exceeded the Staggers Act's goal of bringing the railroads back from the brink of ruin to financial sustainability. In fact, today, the large U.S. rail companies are some of the most profitable publicly-traded companies in the world.

Policymakers, outside analysts, and the railroads themselves agree that today's industry bears little resemblance to the financially failing, inefficient rail industry of 1980. In 2007, the U.S. Department of Transportation told the STB that the Staggers Act has been "profoundly successful," noting that the railroads are financially healthy, the industry's infrastructure has been modernized, productivity is high, and shippers have benefited from lower average rates.[15] According to BNSF's CEO, Matthew Rose, after Staggers passed in 1980, the railroads spent two decades going on a "productivity binge, wringing out excess costs, getting rid of inefficient lines, finding wage rates that we all could live within, both for employees and our companies." He told *USA Today*, "we think we are a very productive institution at this time." [16]

As a result of these changes, as well as increases in highway congestion and fuel costs, the railroad industry is no longer at a competitive disadvantage to other transportation modes, as it was when the Staggers Act was passed in 1980. According to a financial analyst at BB&T Capital Markets, 4 years ago, trucks handled 80 percent of the freight hauls between 700 and 1,000 miles, while today trucks and railroads split this market.[17] A well-respected transportation analyst, Wolfe Research, predicts that railroads will "likely continue to take market share from the less fuel-efficient and increasingly less productive truck industry." [18]

A review of the largest four railroads' Securities and Exchange Commission (SEC) filings shows just how profitable the large rail companies have become over the last decade. Figure I demonstrates that the four largest U.S. rail carriers have nearly doubled their collective profit margin in the last 10 years to 13 percent.[19] In fact, in 2008, the railroad companies' 12.6 percent profit margin placed the industry fifth out of 53 industries on *Fortune's* list of "most profitable industries," trailing only the communications, Internet, pharmaceutical, and medical device industries.[20] Between 2001 and 2008, the railroad industry was ranked in the top ten on Fortune's profitability list seven out of eight times. While the railroads were telling their regu-

[12] Comments of the Association of American Railroads, *STB Ex Parte No. 671, Rail Capacity and Infrastructure Requirements* (April 4, 2007). The STB filings that are cited in this report can be obtained by searching the STB's online database by docket number at *http://www.stb.dot.gov/home.nsf/EnhancedSearch?OpenForm&Type=F*.

[13] *Id.*

[14] Written Testimony of the Association of American Railroads, *STB Ex Parte No. 677, Common Carrier Obligation of Railroads* (April 17, 2008).

[15] Written testimony of Jeffrey N. Shane, Under Secretary for Policy, Department of Transportation, *STB Ex Parte No. 671, Rail Capacity and Infrastructure Requirements* (April 4, 2007).

[16] *Warren Buffett sees strong rail system as key to U.S. growth*, USA Today (Mar. 25, 2010).

[17] *Burned Before, Railroads Take Risks, Wall Street Journal* (June 28, 2010).

[18] Wolfe, Training Manual at 6.

[19] The accounting measure used to measure profitability in this report is "profit margin" or "return on revenue," which is the percentage of a company's revenues that is net income. AAR and other industry representatives sometimes selectively use another financial ratio, the "return on shareholders' equity," to argue that the railroad industry's profits are modest compared to other sectors. Return on equity measures not all net income, but only the income a company retains from year to year for future growth. Return on equity can be negatively affected by paying dividends or buying back stock. The Class I railroads' recent stock buyback activities are discussed in Section V of this report.

[20] Fortune, *2008's Top Industries: Most Profitable, Return on Revenues* (online at *http://money.cnn.com/magazines/fortune/fortune500/2009/performers/industries/profits/*) (accessed Aug. 27, 2010).

lators that their profitability trailed most other U.S. companies, they were actually among the U.S. economy's top performers.

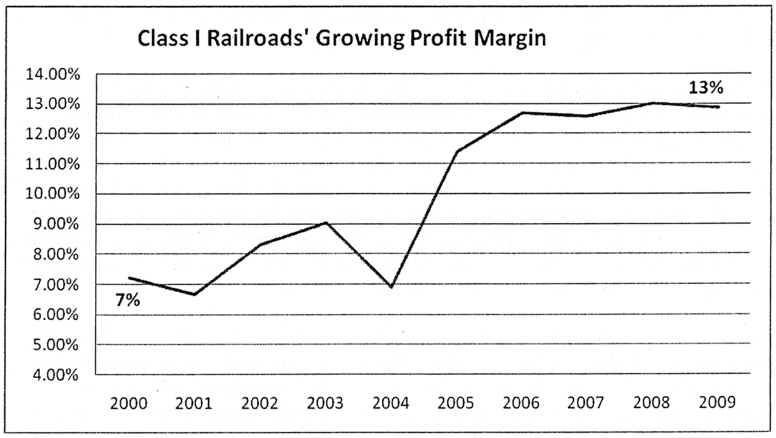


*Figure 1 – Combined Profit Margins (Net Income/Revenue) for BNSF, Union Pacific, CSX, and Norfolk Southern, 2000-09 (Source: SEC filings)*

**III. Investor Interest in the Freight Railroad Industry**

The companies' SEC filings over the past decade do not show that the railroad industry is "lagging behind" other industries, as AAR told its regulators in 2008. In fact, the railroads' growth in earnings and profitability has outpaced almost all of the other large industries it competes with for capital in the equity markets. Over the last decade, the large railroad companies have reported higher revenues and stable or only slowly-growing expenses, even during the recent economic recession. This relationship between operating expenses and revenues is known as the "operating ratio," and is an important indicator of financial performance in many transportation sectors, including the rail and trucking industries.[21]

As Figure II demonstrates, railroads have been steadily lowering their operating ratios over the past decade, reaching a ten-year low in 2009. This 2009 result is especially impressive, since it was achieved in the midst of a severe economic downturn.

[21] *See e.g.,* Testimony of Michael J. Ward, Chairman and CEO, CSX Corporation, U.S. House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials, *Hearing on Investment in the Rail Industry*, 110th Congress (March 5, 2008) (H. Rept. 110–104). ("Operating ratio, which is inverse margin or the ratio of operating expenses to operating revenues expressed as a percentage, is a widely used performance measurement in the railroad industry.")

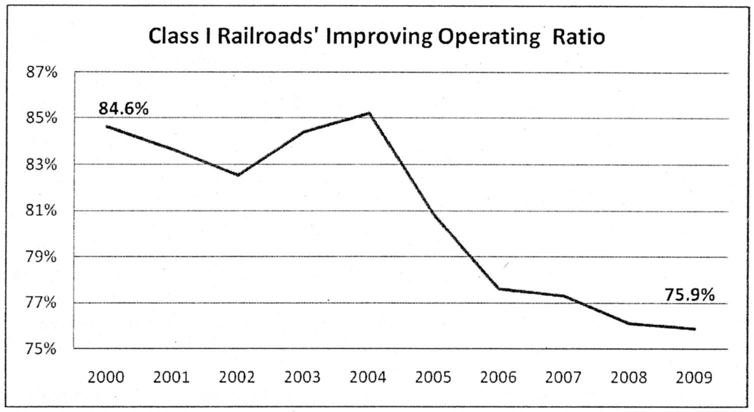


*Figure II – Combined Operating Ratios (Expenses/Revenues) for BNSF, Union Pacific, CSX, and Norfolk Southern, 2000-09 (Source: SEC filings)*

As the railroad industry's profit margins have risen and their operating ratios have dropped, investors have taken notice. As Figure III shows, the stock value of the four largest rail carriers over the past 10 years has far exceeded the average stock value of the large U .S. companies that are part of the S& P 500. An index of large railroad company stocks monitored by Wolfe Research appreciated 119 percent between 2003 and 2009; the S& P index was down 0.3 percent during the same period.[22] Recent quantitative stock reports published by Standard & Poor's give quality rankings of "A," "A−,“ and "B+" to Union Pacific, Norfolk Southern, and CSX, respectively. Union Pacific and Norfolk Southern scored above the 90th percentile on S&P's "Investability Quotient," a measure of an investment's desirability, while CSX received a score of 89 percent.[23]

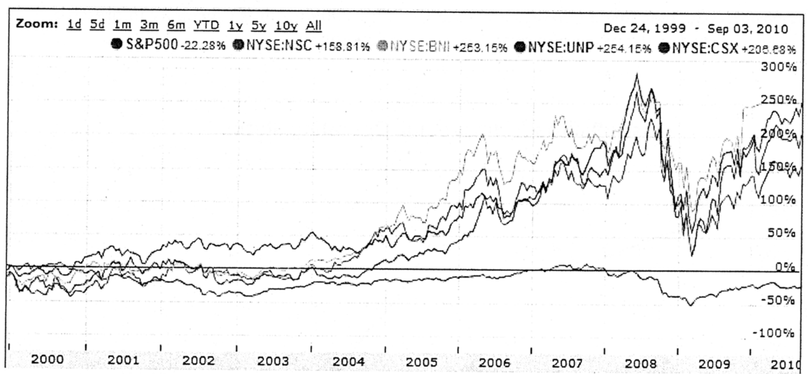


*Figure III – Stock Performance of BNSF, Union Pacific, CSX, and Norfolk Southern Compared to the S&P 500 Index, 2000-09 (Source: Google Finance)*

In November 2009, the investor Warren Buffett expressed his great confidence in the financial sustainability of the railroad industry by announcing that his company, Berkshire Hathaway, would purchase the 77.4 percent of the BNSF railroad

[22] Wolfe, Training Manual at 6.

[23] Standard & Poor's, Union Pacific, Quantitative Stock Report (Sep. 4, 2010); Standard & Poor's, Norfolk Southern, Quantitative Stock Report (Sep. 4, 2010); Standard & Poor's, CSX, Quantitative Stock Report (Sep. 4, 2010). Since its purchase by Berkshire Hathaway (see below), BNSF shares are no longer listed on the New York Stock Exchange.

his company did not already own. The deal was valued at approximately $34 billion, making it the largest ever acquisition in Berkshire Hathaway history.[24]

In discussing his acquisition of BNSF, Buffett said he believed his investment in BNSF would deliver "steady and certain growth" over the coming decades.[25] He also predicted that the U.S. rail industry has a "dynamic and profitable future" and that all four big freight railroads will "do very well" in the coming decades because they are the only mode of freight transportation that will be able to keep up with the American economy's increasing demand for consumer goods and raw materials.[26] Analysts suggest that as much as $18 billion poured into the rail industry in the wake of Mr. Buffett's BNSF announcement.[27]

In his annual letter to Berkshire shareholders, Mr. Buffett noted the similarities between the capital-intensive railroad industry and the regulated electric utilities his company already owned. Like electric utilities, railroads "provide fundamental services that are, and will remain, essential to the economic well-being of our customers, the communities we serve, and indeed the Nation." He predicted that Berkshire's investment in BNSF would "deliver significantly increased earnings over time, albeit at the cost of our investing many tens—yes, tens—of billions of dollars of incremental equity capital."[28]

### IV. Railroad Industry Pricing Power

The railroad industry correctly points out that after the Staggers Act gave the railroads the ability to negotiate prices with shippers, railroad rates dropped significantly. According to the AA R, after adjusting for inflation, rail rates are still lower than they were in 1980.[29] The railroads' presumed inability to raise rates on freight shippers with competitive alternatives has long been the industry's justification for its differential pricing practices. Because they cannot adequately recover their costs from shippers with transportation alternatives, railroads are allowed to charge higher rates to "captive" shippers without alternatives.[30]

One of the recent structural changes that the railroad industry does not highlight is that since 2004, railroads have regained their ability to raise prices on their non-captive customers. One leading industry analyst, Wolfe Research, refers to this change as the industry's "pricing renaissance."[31] As Figure IV demonstrates, for a number of years after the Staggers Act was enacted, rail prices measured against inflation fell by an average of 3.6 percent a year. Since 2004, however, Class I railroads have been raising prices by an average of 5 percent a year above inflation.[32] And even during the recent recession, while other modes of freight transportation have cut their rates, the Class I railroads have been able to push year-over-year price increases onto their customers.[33]

This new "pricing power" has led to significant top-line revenue growth for Class I railroads and has resulted in the swelling profit margins described in the sections above. And according to Wolfe Research, because railroad rates are still below their inflation-adjusted 1980 levels, the freight rail carriers believe they will have a "solid multiyear glide path to continued strong rail pricing hikes regardless of the economic environment."[34] A recent Morgan Stanley analysis of the rail industry notes that in the current environment of strong railroad pricing power, "[r]ate negotiations continue to be difficult for shippers and competition remains minimal."[35]

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[24] Burlington Northern Santa Fe Corporation and Berkshire Hathaway, Inc. Joint Press Release, *Berkshire Hathaway Inc. to Acquire Burlington Northern Santa Fe Corporation (BNSF) for $100 Per Share in Cash and Stock* (Nov. 3, 2009).

[25] *Buffett: Railroad business is 'in tune with the future,'* USA Today (Nov. 4, 2009).

[26] Warren Buffett sees strong rail system as key to U.S. growth, USA Today (Mar. 25, 2010).

[27] *Id.*

[28] Berkshire Hathaway Letter to Shareholders (Feb. 26, 2010) (online at *http://www.berkshirehathaway.com/letters/2009ltr.pdf*).

[29] Association of American Railroads, A Short History of U.S. Freight Railroads (May 2010) (online at *http://www.aar.org/incongress/~/media/aar/backgroundpapers/ashorthistoryofusfreightrailroads.ashx*).

[30] Government Accountability Office, *Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed* (Oct. 2006) (GAO 07–94). See also the discussion in Section I above.

[31] Wolfe, Training Manual at 33.

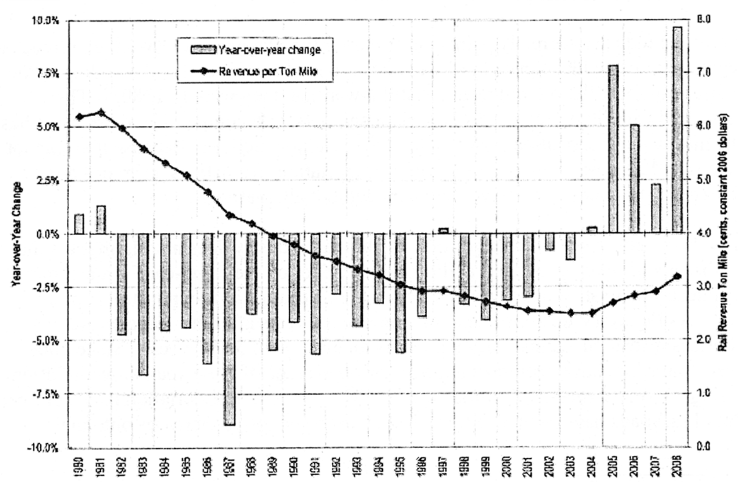
[32] *Id.* at 35.

[33] *Id.* at 43.

[34] *Id.* at 35.

[35] Morgan Stanley Research, North American Transportation, *Freight Transportation: Rails 2Q10 Review* (Aug. 6, 2010).

Exhibit 17. Historical Rail Rates, 1980-2008




Source: Association of American Railroads; Wolfe Research, LLC estimates.

*Figure IV- Annual Class I Rail Rates and Revenues, 1980-2008 (Source: Wolfe Research using Association of American Railroads Data)*

In recent conversations with their investors, the rail companies have discussed this increase in pricing power and their expectation that it will continue in the future. In a recent investor call, Union Pacific's CEO, James Young, commented, "[t]he pricing environment is stronger today than it has been in a long time . . . I feel very good about the potential in the pricing side going forward." [36] A CSX senior executive, Clarence Gooden, made a similar prediction in his company's second-quarter 2010 investment call, when he said, "[l]ooking forward, we continue to expect core price increases to exceed rail inflation." [37]

A number of factors seem to lie behind the railroads' new "robust pricing environment." [38] Post-Staggers Act industry consolidation and capacity reduction slowly eliminated the excess supply of rails and rail service, while the railroads invested in making their remaining operations more productive. One industry analyst estimates that the railroads moved from a position of "material excess capacity" to "tight capacity" in the late 1990s or early 2000s and that the pendulum has continued to swing further in the industry's favor as demand for rail services continues to grow, particularly in the intermodal , coal, and grain markets.[39]

Another factor that has contributed to the industry's renewed pricing power over the past few years is its shift to short-term contracts with its customers. After the passage of the Staggers Act, during the time they had weak pricing power, the freight railroads entered into long-term contracts with many of their customers. As these so-called "legacy contracts" are expiring, railroads are replacing them with shorter-term contracts—sometimes for terms as short as 1 year—at significantly higher rates. Shippers also report that railroads are more frequently offering unilateral "take-it-or-leave-it" contracts to customers, a practice that bears more resemblance to setting a tariff rate than establishing a price through negotiation.[40]

Analysts view these expiring legacy contracts as an important source of pricing gains over the next few years. According to Wolfe Research, "[a]s these rail contracts are repriced over the next several years for the first time since the rails gained pric-

[36] Union Pacific Corporation 2nd Quarter 2010 Earnings Conference Call (July 22, 2010).

[37] CSX Corporation 2nd Quarter 2010 Earnings Conference Call (July 13, 2010).

[38] Wolfe, Training Manual at 9.

[39] *Id.* at 34–35.

[40] These types of arrangements were the subject of a rulemaking by the STB that was discontinued because consensus on a new rule could not be reached. *See* STB Ex Parte No. 669 (Interpretation of the Term "Contract" in 49 U.S.C. 10709); STB Ex Parte 676 *(Rail Transportation Contracts Under 49 U.S.C. 10709)*.

ing power in 2004, we believe the rails will be recording material rate increases that could exceed 100 percent in some cases of very old and underpriced business. (*e.g.,* ten-year old coal contracts)."[41] Morgan Stanley recently rated Union Pacific as its top Class I rail stock based on the fact that the company has the largest percentage of "revenue under legacy contract left to reprice."[42]

**V. Railroad Industry Capital Investments**

Because they have the primary financial responsibility for their rail networks, Class I freight rail companies have both high fixed operating costs and constant needs for capital investments. In addition to the high costs of replacing and upgrading physical assets such as track, ties, and engines, major capital investments are required to expand the capacity of the rail network to address the growing demand for freight rail transportation in the United States.[43] While they tell Congress that they are still not producing sufficient revenue to address their long-term capital needs, a review of the railroads' financial filings and their statements to their investors suggests the opposite.

According to SEC reports filed by the four largest Class I railroads and summarized in Figure V, over the past 10 years, the companies made a combined total of $62.5 billion in capital expenditures to replace and upgrade equipment and expand their rail networks. As the companies' revenues grew over the course of the decade, so did their capital investments. The four railroads spent $4.8 billion in 2000 on capital projects, while they spent $7.8 billion in 2009. While these capital investment figures are large, in their public relations materials, the freight railroad industry misleadingly makes them appear larger by adding maintenance costs to capital investments and calling the total "Spending on Infrastructure & Equipment."[44]

The railroad industry has consistently testified before Congress that while it has heavily invested in its network and will continue to do so, it will not be able to completely pay for all of the improvements necessary for freight railroads to meet the long-term capacity demands of the U.S. economy. These investments include upgrading tracks and signal control systems, expanding terminals, and improving bridges and tunnels. In testimony he delivered before the Senate Commerce Committee in 2009, for example, BNSF CEO, Matthew Rose, said that Class I railroads would fall short of paying for their long-term capital investments by approximately $40 billion.[45] A few months earlier, Union Pacific's CEO, James Young, told the House Transportation Committee that "our industry is only investing about half the level DOT studies say is needed to meet the demands on freight rail in the future."[46]

These statements are inconsistent with statements Class I railroad officials make about their capital investments to financial analysts in quarterly conference calls. In these calls, company officials routinely assure analysts their capital investments are sufficient to address future needs. In an investor call in late 2007, for example, the CEO of CSX, Michael Ward, told investors that his company was making the capital investments necessary "to prepare for future growth" and that the company would continue to "generate the cash-flow to be able to make capital investment for the future."[47] In an investor call in April 2010, Mr. Young, the Union Pacific CEO, assured analysts that his company was "continuing to make the critical, long-term capital investments that support the Company's growth strategy."[48]

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[41] Wolfe, Training Manual at 45.

[42] Morgan Stanley Research, North American Transportation, *Freight Transportation: Rails 2Q10 Review* (Aug. 6, 2010).

[43] The industry is also working to lower its future capital needs by shifting some of its traditional costs to its customers, such as the cost of railcars. In 1987, railcars owned by freight railroad companies moved 60 percent of tons carried; by 2005, that figure had decreased to 40 percent of tons carried. Government Accountability Office, *Freight Railroads, supra*, note 30.

[44] *See e.g.,* Association of American Railroads, *Rail Earnings Today Pay for Rail Capacity and Service Improvements for Tomorrow* (May 2010) (online at *http://www.aar.org/incongress/~/media/aar/backgroundpapers/railearningstodaypayforrailcapacityandserviceimprovementsfortomorrow.ashx*).

[45] Testimony of Matthew K. Rose, Chairman, President and CEO, BNSF Railway Company, U.S. Senate Committee on Commerce Science, and Transportation, Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security, *Addressing Surface Transportation Needs in Rural America*, 111th Congress (Aug. 10, 2009) (S. Hrg. 111–490).

[46] Testimony of James R. Young, Chairman, President, and CEO, Union Pacific Corporation, U.S. House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials, *Freight and Passenger Rail: Present and Future Roles, Performance, Benefits, and Needs*, 111th Congress (Jan. 28, 2009).

[47] CSX Corporation 3rd Quarter 2007 Earnings Conference Call (Oct. 17, 2007).

[48] Union Pacific 1st Quarter 2010 Earnings Conference Call (Apr. 22, 2010).

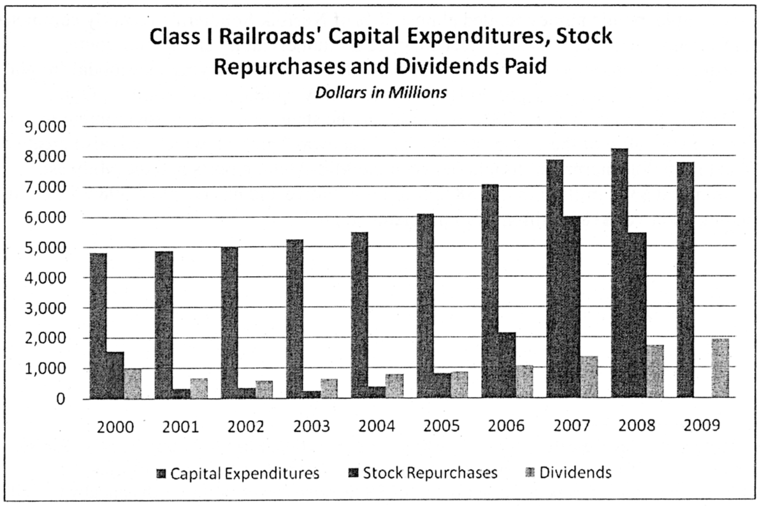


*Figure V – Combined Capital Expenditures and Public Stock Repurchases of BNSF, Union Pacific, CSX, and Norfolk Southern – 2000-09 (Source: SEC filings)*

Another indication that the Class I railroads believe they are spending sufficient amounts of money on their long-term capital needs is that in recent years, they have used growing portions of their net income to increase their dividend payments and to repurchase their publicly-traded shares. By reducing the number of shares on the market, buybacks have the effect of increasing earnings per share and driving up share prices. The capital expended to buy back shares provides short-term gains in stock value at the expense of investments that increase capacity and productivity. As Figure V shows, the four major U.S. railroads cumulatively spent over $2 billion in share repurchases in 2006, over $6 billion in 2007, and over $5 billion in 2008. Although none of these companies repurchased shares in 2009, they have resumed their share buyback programs in 2010.[49] According to their most recent SEC quarterly filings, CSX, Norfolk Southern, and Union Pacific have already bought back more than $1.6 billion worth of shares in 2010.

Another factor that freight railroads do not highlight in their discussions of their long-term capital needs is that several high-profile railroad capacity projects recently have been financed through a combination of public and private funds. Railroads lobby Congress and state governments for taxpayer contributions to their rail infrastructure improvements and have had a few recent successes in establishing such “public-private partnerships.”[50]

For example, public money funded almost 50 percent of Norfolk Southern’s recently completed “Heartland Corridor” project.[51] That project enlarged 28 tunnels along an old coal route, creating a faster and more direct path for double-stack freight trains carrying intermodal freight between the international shipping port

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[49] *See, e.g.*, Morgan Stanley Research, North American Transportation, *Freight Transportation: Rails 2Q10 Review* (Aug. 6, 2010). (“Share repurchase activity is accelerating at a number of Class I’s—a trend which is likely to add a few percentage points of EPS [earnings per share] growth annually to CNI, CSX, NSC, and UNP”).

[50] *See, e.g.,* Testimony of Matthew K. Rose, Senate Committee on Commerce, Science, and Transportation, *Addressing Surface Transportation Needs in Rural America*, 111th Cong. (Aug. 10, 2009) (“As an industry, we’re currently spending about $10 billion in the freight rail network. But, if policy leveraged those investments with public partnerships, these investments would happen more quickly, and with more certainty.”); Testimony of James R. Young, House Committee on Transportation and Infrastructure, *Freight and Passenger Rail: Present and Future Roles, Performance, Benefits, and Needs*, 111th Cong. (Jan. 28, 2009) (“Congress should enact and fund programs that allow States to partner with freight railroads to move forward with projects that benefit both the freight railroad and the public.”).

[51] Norfolk Southern put up $97.8 million for the project, the Federal Government added $83.3 million, and Ohio and Virginia provided $9.8 million. Associated Press, *Norfolk Southern Opens New $191 Million Route to Midwest* (Sept. 9, 2010).

in Hampton Roads, Virginia, and Columbus, Ohio.[52] Similarly, Norfolk Southern's rival, CSX, is looking to the states and Federal Government to contribute more than 50 percent of the cost of its "National Gateway" project, which will also create a more efficient route for intermodal freight between the Mid-Atlantic ports and the Midwest. CSX has committed $395 million to this $842 million initiative and has received $98 million in Federal funding and over $180 million from the states so far.[53]

**Conclusion**

Thirty years ago, in order to restore the financial stability of the U.S. rail network, Congress gave railroads the authority to charge captive shippers higher rates than other shippers. Today, the goal of restoring the financial health of the rail industry has been achieved. Class I freight railroads have regained the pricing power they lacked in the 1980s, and are now some of the most highly profitable businesses in the U.S. economy. The railroads have high levels of capital investment and consistently produce strong results for their shareholders throughout the economic cycle. As Congress and the Federal Government look to the Nation's rail system to meet the United States' future transportation needs, they also need to evaluate whether our country's current rail policy needs to be changed to reflect this new reality.

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PREPARED STATEMENT OF ANNE CANBY, PRESIDENT, SURFACE TRANSPORTATION POLICY PARTNERSHIP (STPP); AND FOUNDING MEMBER, ONERAIL COALITION

The OneRail Coalition appreciates the opportunity to provide the Committee with its views on the importance of rail as a critical part of our Nation's surface transportation system.

Rail offers significant benefits to travelers, shippers, the general public, and provides an important link in an integrated intermodal system.

The OneRail Coalition supports expanding the role of rail by providing for additional public and private investment in the Nation's rail infrastructure to create American jobs, de-congest chokepoints, put more freight and passengers on fuel-efficient trains, and reduce our Nation's greenhouse gas emissions.

The Coalition urges that the Nation's transportation policies be rebalanced to put rail on an equal footing with highways and other transportation modes, and notes that the development of a National Rail Plan presents an historic opportunity to align the future of our transportation system with critical national priorities. We look forward to the Plan laying out a comprehensive long-term view for rail transportation in America.

OneRail believes the Plan should establish a *national framework for transportation investment* in the context of an overall multimodal transportation network and specific national goals and performance outcomes. Further, OneRail emphasizes maintaining a strong focus on *safety and security*. Relying on common sense and performance-based regulations, including a flexible approach to new rail safety technologies, would produce a balanced approach to ensuring a safe and secure rail network.

The Coalition believes that the Federal Government must recognize the complexities of *passenger and freight rail partnerships*, and recognize that delivering successful new high-speed and intercity passenger rail (HSIPR) corridor services will require significant capital investment, as well as a new level of analysis and consistent communication among and between freight railroads, Amtrak, other passenger operators, and the traveling public.

OneRail supports continued dedicated funding for commuter rail, and underscores the need to *establish new dedicated funding sources* for HSIPR including Amtrak. Further, passenger and freight rail infrastructure projects should be treated as eligible expenditures to the degree that new revenues are provided from sources above the existing Highway Trust Fund user payments utilized to fund the current Federal surface transportation program. OneRail believes the Plan should support policies that provide matching funds and incentives for rail expansion.

The National Rail Plan should foster economic growth and U.S. job creation by supporting economic regulatory policies that promote continued *robust private investment* in rail to enable railroads to attract and serve the broadest range of freight customers, as well as intercity and commuter passengers.

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[52] *Id.*

[53] *Railroads Redraw the Intermodal Map*, Journal of Commerce (Aug. 6, 2010).

In order to avoid "boom or bust" procurement cycles, support for development of a renewed U.S. passenger rail equipment *manufacturing industry* would provide for sustained equipment purchases and the creation of a strong domestic supplier base for equipment.

OneRail urges that greater effort be placed on providing *rail workforce development* and planning leadership to support the growth of freight, regional, intercity passenger and high-speed rail corridors, and foster the qualified rail workforce of tomorrow.

Finally, the OneRail Coalition urges the National Rail Plan to include 5-, 10- and 20-year milestones to measure metrics such as the percent of population with access to intercity passenger rail service, growth in market share for rail freight and intercity passenger rail and to capture critical public benefits generated from rail investment including increased mobility and transportation choice, decreased greenhouse gas emissions, improved energy efficiency and less dependence on oil, increased safety, job creation and enhanced U.S. competitiveness in the global economy.

We appreciate the opportunity to share our thoughts on the importance of rail and the role rail can play in the Nation's transportation system.

The OneRail Coalition includes the American Public Transportation Association, American Short Line and Regional Railroad Association, Amtrak, Association of American Railroads, Brotherhood of Railroad Signalmen, National Association of Railroad Passengers, Natural Resources Defense Council, National Railroad Construction and Maintenance Association, Railway Supply Institute, States for Passenger Rail Coalition, Surface Transportation Policy Partnership, Transportation Communications International Union/IAM, and United Transportation Union. Alstom and Parsons Brinckerhoff are Associate Supporters.

For more information please visit *www.onerail.org* or contact Anne Canby at 202–466–2641 or *acanby@transact.org*.

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OFFICE OF LEGISLATIVE AFFAIRS
OFFICE OF THE ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
*Washington, DC, September 27, 2004*

Hon. F. JAMES SENSENBRENNER, JR.,
Chairman,
Committee on the Judiciary,
U.S. House of Representatives,
Washington, DC.

Dear Chairman Sensenbrenner:

This responds to your letter of July 15, 2004, to the Department of Justice regarding the application of the antitrust laws in the railroad industry. You note that the various statutory antitrust exemptions for railroad industry activities were enacted many decades ago, and you question whether continuing this antitrust immunity serves the public interest. The Department appreciates having the benefit of your persExperiencethis important issue of competition policy.

The antitrust laws are the chief legal protector of the fire-market principles on which the American economy is based. Experience has shown that competition among businesses, each attempting to be successful in selling its products and services, leads to better-quality products and services, lower prices, and higher levels of innovation. The antitrust laws ensure that businesses will not stifle this competition to the detriment of consumers. Accordingly, the Department has historically opposed efforts to create sector-specific exemptions to the antitrust laws. The Department believes such exemptions can be justified only in rare instances, when the fundamental free-market values underlying the antitrust laws are compellingly outweighed by a clearly paramount and clearly incompatible public policy objective.

In the first decades of the past century, for example, Congress enacted antitrust exemptions in industries in which it believed normal free-market competition to be unworkable. These industries included the railroad, airline, trucking, and telephone industries. In lieu of competition protected by the antitrust laws, Congress established comprehensive regulatory regimes that regulated prices, service offerings, and market entry as well as other aspects of these industries. These regulatory regimes often included statutory antitrust exemptions for conduct approved by the regulatory agency. And if the regulatory regime was sufficiently pervasive, the courts could hold that it had implicitly displaced private damages recovery under the antitrust laws. *See Keogh* v. *Chicago Northwestern Railway*, 260 U.S. 156 (1922); *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986).

In the last decades of the past century, policymakers began to reconsider whether competition was truly unworkable in these industries, and efforts were undertaken to replace market regulation with competition where possible. As these industries became deregulated, antitrust exemptions no longer made sense. In the case of airlines, for example, the antitrust exemption for mergers approved by the Civil Aeronautics Board was repealed and, after a transition period, merger enforcement in the airline industry reverted to the Department of Justice under the antitrust laws.

In 1995, when Congress abolished the Interstate Commerce Commission and created the Surface Transportation Board to retain some of the ICC's old regulatory authority, the Department urged Congress to turn over review of railroad mergers to the antitrust enforcement agencies, as it had done with airlines. See Statement of Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, Before the House Transportation Subcommittee on Railroads, January 26, 1995 (attached). Congress opted instead to leave that responsibility with the Surface Transportation Board, with an accompanying antitrust exemption, with the Justice Department limited to an advisory role before the Surface Transportation Board. *See* 49 U.S.C. § 11321(a).

Your letter also describes three specific practices in the railroad industry about which concerns have been raised about possible anticompetitive effects.

The first practice is the refusal by a railroad that controls one segment of a freight movement to quote rates separately for that "bottleneck" segment, instead quoting rates only for the entire freight movement. You note that this practice denies shippers the benefits of competition on segments of the move where an alternative carrier might compete for the business. Because of the Surface Transportation Board's involvement in approving these rates, and its acceptance of this practice, relief may not be available under the antitrust laws. If this practice were subject to the antitrust laws, it could be evaluated as a refusal to deal in possible violation of section 2 of the Sherman Act, or as a tying arrangement in possible violation of section 1 of the Sherman Act. Whether it would constitute an antitrust violation would depend on the particular facts.

The second industry practice you describe is "paper barriers." Paper barriers are created when Class I railroads spin off segments of their trackage to short-line or low-density carriers with contractual terms that prohibit the acquiring carriers from competing with the Class I railroads for business. Since these contractual terms are part of an underlying sale transaction that is reviewed and approved by the Surface Transportation Board, they may be exempted from the reach of the antitrust laws, depending on the scope of the approval language in each of the Board's relevant orders. If paper barriers were subject to the antitrust laws, they would be evaluated under section 1 of the Sherman Act. The Department would examine whether the restraint is ancillary to the sale of the trackage—*i.e.*, whether the restraint is reasonably necessary to achieve the pro-competitive benefits of the sale.

The third industry practice you describe is the practice by both of the major western Class I railroads of publicly disclosing tentative prospective shipping rate offerings. Under the antitrust laws, the public disclosure of pricing information among competitors can, under some circumstances, facilitate collusion and result in increased prices, in violation of section 1 of the Sherman Act. *See, e.g., United States* v. *Airline Tariff Publishing Co.*, 1994 Trade Cas. (CCH) 1170,687 (D.D.C. 1994). Publicly announcing prospective rates outside the confines of a rate approval proceeding at the Surface Transportation Board is likely to be subject to review under the antitrust laws. If you know of anyone who has information that you believe might be useful for evaluating this practice under the antitrust laws, please encourage them to contact the Antitrust Division.

Thank you for bringing your interest in these issues to our attention, and for soliciting our views as you consider these issues. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

WILLIAM E. MOSCHELLA,
*Assistant Attorney General.*

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BILL NELSON TO HON. JOHN D. PORCARI

*Question.* Would you please describe the reinvestment requirements of other freight transportation modes?

Answer. Reinvestment requirements for freight transportation are complicated by the fact that, for highways (and to some extent for rail), the same infrastructure serves both passenger and freight vehicles. Overall highway reinvestment requirements for both passenger and freight vehicles are estimated in the highway portion of the biennial Conditions and Performance Report prepared by the Federal Highway Administration. The latest edition of this Report is 2008 and it includes a number of alternative definitions of investment needs. The average annual investment level required to maintain the system (in terms of both physical condition and performance) at its 2006 levels through 2026 are estimated to be $24.8 billion for the Interstate System, $38.7 billion for the National Highway System, and $105.6 billion for all roads. There are three different definitions of what is required to improve the system, based on what benefit-cost ratio threshold is used as a criterion for investment. One such threshold assumes that all potential capital improvements with a benefit-cost ratio of 1.0 or higher should be funded. Reinvesting based on this definition would cost $47 billion for the Interstate System, $76.1 billion for the National Highway System (NHS), and $174.6 billion for all roads. Alternatively, if the threshold benefit-cost ratio is 1.5, then the cost would be $39 billion for the Interstate System, $60.7 billion for the National Highway System, and $137.4 billion for all roads. It is important to note that these reinvestment requirements are for a mixed-use system that handles both freight and passenger use. While trucks carrying freight use all aspects of the system, 75 percent of the freight-hauling trucks serving places at least 50 miles apart use the Interstate System, 20 percent use the balance of the NHS, and 6 percent use other highways. The reinvestment requirements for the freight component of the highway system can thus be most closely approximated by the reinvestment costs for the NHS: $38.7 billion annually to maintain the system, $60.7 billion annually to improve the system based on a benefit-cost ratio of 1.5, and $76.1 billion annually to improve the system with all projects that have benefits at least equal to their costs.

Because we do not provide infrastructure funding for the pipeline industry, we do not have any estimates of reinvestment requirements for the pipeline industry. However, a report prepared for the INGAA Foundation in 2009 projected that pipeline capital expenditures (for both replacement of existing assets and for new construction) could be expected to total $5 to $7.5 billion annually through 2030. Pipelines are very expensive to build, but operate at low cost for long periods. In total, pipelines move about 17 percent of U.S. freight ton-miles.

Waterway reinvestment requirements are predominantly the responsibility of the U.S. Army Corps of Engineers (USACE). We are working with the Corps to better understand how their reinvestment requirements are quantified.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BYRON L. DORGAN TO HON. JOHN D. PORCARI

*Question.* The Department of Transportation worked with the USDA on the recently released study on rural transportation. The study seems to agree that in recent rail industry consolidation, consumers and not Wall Street are being saddled with paying for billions of dollars in railroad merger premiums as “the railroad industry and the STB are the only industry that adds merger premiums into the rate base.” Can you explain why no action has been taken to prevent acquisition premiums from impacting rail shippers’ rates?

Answer. The STB has jurisdiction over the economic regulation of railroads. Under their requirements for formulating regulatory costs, the so called “acquisition premium” is included in its assessment of these costs. There has been only one railroad consolidation where a so-called “acquisition premium” was questioned: the acquisition of Conrail by Norfolk Southern and CSX Transportation, approved in 1998. In this case the two carriers bid against each other before agreeing to divide Conrail’s assets between themselves. Various shipper parties alleged before the STB that the ultimate price paid for Conrail exceeded the market value of its stock by billions of dollars, and that paying off the debt undertaken by the acquiring carriers would: (1) force those railroads to raise rates on captive shippers, and (2) allow them to evade regulatory oversight because acquisition costs are generally included in a railroad’s regulatory rate/cost base. These parties, therefore, asked the STB to extract this premium from the regulatory cost basis. The Board declined to do so on legal and factual grounds.

First, it found that CSX and Norfolk Southern possessed the financial wherewithal to service the debt without any need to raise rates. Second, the agency noted that because the merger would largely increase intramodal competition and significantly reduce the number of captive shippers, CSX and Norfolk Southern would be unsuccessful at pursuing such a strategy in any event. Third, the STB emphasized that the merger synergies reflected in the record and other factors would likely lead to a lower regulatory rate/cost base. Finally, the STB pointed out that the relief requested would be contrary to generally accepted accounting principles that had been judicially affirmed and that the purchase price agreed to by the railroads represents by far the best evidence of the current market value of Conrail.

Over the course of a lengthy and detailed oversight period there was no evidence that the so called "acquisition premium" had resulted in increased rail rates. In no other railroad consolidation has this issue even arisen.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARK WARNER TO HON. JOHN D. PORCARI

*Question.* Virginia applied for and was awarded $75 million of ARRA funding for a shovel-ready passenger rail project that would construct 11 miles of rail line around Quantico, Virginia at a 79 MPH speed specification.

FRA has strongly indicated its goal of a 110 MPH capable track and that projects must conform to PRIIA's 110 MPH definition of a high speed corridor. Following years of joint study with FRA, this section of track and its physical and operational challenges noted by the host railroad renders 90 MPH, the maximum speed in a mixed freight and higher speed rail environment. FRA has been working with Virginia and its partners for over a decade on its corridor plans and is well aware of the challenges of this corridor.

Virginia has been a cooperative partner with FRA in the development of this grant. At the persuasion of FRA, Virginia has added rail infrastructure to the project at additional cost as a condition for FRA agreement to fund the project. CSX and Virginia have come to agreement on how the corridor and its project components will be developed and maintained. FRA has not accepted this agreement since it does not include a performance and penalty for on time performance.

It is difficult to determine when performance should be delivered in a mature, high density rail corridor that will literally be under construction for decades. On time performance improvements will be difficult to achieve until the corridor is built out in significant sections. However, the railroad can ensure the delivery of train slot capacity and increased speeds of intercity passenger rail service upon completion of the projects appears easier to achieve.

These two issues (maximum speed in the DC-Richmond Corridor, and the performance requirements of a component project that is one of 19 projects in Virginia's overall corridor development plan that delivers a 90 MPH rail corridor) must be resolved.

Can you assure me that Virginia will be allowed to move forward with the project that they applied for and were awarded? Can you commit to me that FRA will partner with Virginia to make high speed rail connecting the Northeast Corridor to the Southeast Corridor a reality?

Answer. FRA and Virginia Department of Rail and Public Transportation (DRPT) have partnered in planning for the development of the I–95 corridor for high-speed rail for nearly 20 years. Multiple reports have been prepared through this partnership, resulting in the identification of 19 projects that are needed to increase the frequency and speed of intercity passenger rail service on the corridor. While each project is independent in nature, it is understood that the entire list of projects must be completed before any significant time savings would be achieved through increased speeds between Richmond and Washington. Until the full set of projects is completed, each individual project will provide additional capacity that can absorb operating delays and incrementally improve the reliability of trains across this corridor.

Considering that the scale of projects on this corridor will amount to nearly $1.7 billion, each incremental project is also a rather costly investment. As you are aware, DRPT's 11-mile Arkendale to Powell's Creek Third Track project was selected for $75 million in funding through FRA's High-Speed Intercity Passenger Rail (HSIPR) program. This project was selected upon its merits through a competitive program that was well over-subscribed. The specific merit of this project was to increase capacity on the I–95 Corridor to reduce interference between intercity passenger, VRE commuter, and CSXT freight traffic. Directly, this project was identified to improve the on-time performance of Amtrak service on the corridor from 80.8 percent to 82.8 percent. While this improvement may seem slight, committing the applicant (DRPT), and the host railroad (CSXT) to 82.8 percent will protect the value of this project as an incremental improvement building toward the ultimate goal for high-speed intercity passenger rail service on this corridor.

FRA and DRPT are working closely to bring this project closer to delivery. DRPT and the host railroad have incorporated a modification to the design of this project at FRA's request, which will provide the team with a more accurate project budget and schedule. Upon completion of the design revisions, an environmental review, and a stakeholder agreement between DRPT and CSXT, FRA will issue a cooperative agreement for the final design and construction of this important project. A cooperative agreement is anticipated for December 2010, with construction commencing in the Spring of 2011.

In October, FRA selected Virginia DRPT for an award of $44 Million in FY10 HSIPR funding to prepare a Tier-II EIS for the Richmond-Washington Corridor, including Preliminary Engineering for the 19 major projects in their Corridor Development Plan. This plan envisions building a 90 mph corridor through these 19 projects, for which DRPT and CSX will perform modeling to determine the ultimate performance outcomes of the projects. This commitment is provided in a letter of support, but there is not enough information to support an MOU until modeling is performed. 110 mph will also be considered for portions of the corridor south of Fredericksburg.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. KAY BAILEY HUTCHISON TO HON. JOHN D. PORCARI

*Question 1.* The National Conference of State Legislatures has estimated that the cost to complete the 11 high-speed rail corridors designated by Congress will be approximately $90 billion. What recommendations do you have for funding a high-speed rail program?

Answer. The capital investment needed to develop high-speed intercity passenger rail service discussed in the recently released National Rail Plan Progress Report will be significant. The Department is presently working to develop the cost estimates associated with the vision in the Progress Report. We believe that we need to build upon the cost-sharing principles embodied in PRIIA, but the precise role for the Federal Government in undertaking this investment as well as investment in other forms of surface transportation, and how we fund that capital investment, will evolve as part of the debate on the reauthorization of surface transportation programs next year.

*Question 2.* What should be the responsibility of the States?

Answer. State participation is key to the success of high-speed and intercity passenger rail development, and over the years State and local governments have played a growing role in the development of our Nation's railroad system. PRIIA made States eligible to receive grant funds for intercity and high-speed passenger rail, but also required States to prepare State rail plans. In the future, States will be involved in planning, developing, and managing new core, regional and feeder high-speed rail services. They will also serve as the principal recipients of Federal capital grants in support of such services.

*Question 3.* How does the process for approving high-speed rail projects compare to the New Starts process for transit projects?

Answer. New Starts is a program administered by the Federal Transit Administration and represents the Federal Government's primary financial resource for supporting locally-planned, implemented, and operated transit "fixed guideway" capital investments. This includes rail and highway transit systems, such as commuter, heavy, and light rail and bus rapid transit systems. The program has helped to reduce congestion and improve air quality in the areas these systems serve; they have also fostered the development of more viable, safer, and more livable communities.

While the high-speed and intercity passenger rail (HSIPR) program shares certain statutory requirements with New Starts, and has adopted a similar phased approach toward structuring Project Development, there are nonetheless significant differences between the two programs. Most fundamentally, while New Starts emphasizes the centrality of the role of local government in planning and implementing transit projects, the HSIPR program recognizes the need for a greater role for Federal leadership in developing high-speed and intercity passenger rail corridors that often cross multiple states.

Consistent with this more prominent Federal role is the fact that, under the HSIPR program, projects receive a Federal "green light" for implementation far earlier in the project development process than is generally the case with New Starts. Whereas in New Starts the Federal commitment to a project generally comes only after Final Design has commenced, under the HSIPR program FRA can make a commitment to a project prior to the commencement of Preliminary Engineering, following completion of a rigorous planning and programmatic environmental process. The "early commitment" approach adopted by the HSIPR program allows for a project to be implemented more quickly by bringing to bear the combined resources and talents of the project sponsor and FRA as early as possible, while removing much of the uncertainty that comes when project sponsors must significantly advance a project's development prior to receiving the backing of their Federal partner.

*Question 4.* Is DOT performing benefit-cost analysis to determine which high-speed rail projects should move forward?

Answer. Economic analysis and a benefit-cost analysis are particularly relevant in the evaluation of HSIPR applications. The evaluation criteria in the HSIPR Notice of Funding Availability for FY 2010 noted that it was important for applicants to account for the benefits and costs of their proposals based on standard data and consistent with Executive Order 12893. Furthermore, FRA requested applicants to monetize the transportation and other public benefits that result from the Federal investment. Quality of the benefit-cost analysis in each of the applications played a crucial role in the evaluation process, because public benefits are one of the priority selection factors in the decision-making process and final grant award.

*Question 5.* How will high-speed rail be integrated with conventional services for a cohesive, interconnected National Network?

Answer. The goal of the high-speed and intercity passenger rail program is one of connecting communities where population densities and competitive trip times create markets for success. This can be achieved through the development of a multi-tiered passenger rail network that takes into account the different markets and geographic contexts found throughout the U.S. This approach builds on the legislative framework established in PRIIA and the financial "down payment" committed in the American Recovery and Reinvestment Act of 2009 (ARRA). The following tiers will create an integrated, interconnected network of high-speed rail and conventional rail services:

- Core Express Corridors: These routes would connect large urban areas up to 500 miles apart with 2–3 hour travel time and train speeds of between 125 and 250 mph. Service will be frequent and will operate on electrified, dedicated track that is publicly owned. Based on their operation in and between large, dense metropolitan regions, the Core Express corridors will form the "backbone" of the national passenger rail system.
- Regional Corridors: This network would connect mid-sized urban areas, and smaller communities in between, with convenient, frequent, 90–125 mph service on a mix of dedicated and shared track, depending on the particular corridor. In some areas, these corridors could connect to Core Express corridors, with many potential passenger services operating over both the Core Express and Regional routes.
- Emerging Feeder Routes: Emerging routes would connect regional urban areas at speeds up to 90 mph on shared track. In some areas, the Emerging/Feeder routes could connect to the Core Express or Regional corridors, allowing residents of these smaller or more distant areas to have efficient access to the national system.
- Community Connections: For this vision of 21st century passenger rail to be successful, it must be integrated with existing and future policies and investments in public transportation, airports, and other modes to provide convenient options for accessing the passenger rail network. This access is critical to ensuring that passenger rail is a viable alternative to other methods of intercity travel.

*Question 6.* What are the implications for the National Rail Plan of PRIIA's requirement that the plan be consistent with approved State rail plans?

Answer. PRIIA requires states to develop State rail plans as a prerequisite to receiving Federal funding for rail projects. According to PRIIA, State rail plans should address State policy involving freight and passenger rail transportation, including commuter rail operations; establish the period covered by the plan; present priorities and strategies to enhance rail service in the State that benefits the public; and serve as the basis for Federal and State rail investment within the State. State rail plans must be coordinated with other State transportation goals and programs. Under PRIIA, only projects in approved State rail plans are eligible for a grant award; however, this provision was waived by the American Recovery and Reinvestment Act of 2009 and by DOT FY 2010 appropriations act for projects funded under those acts.

We have given the states a comprehensive outline, which contains the elements that their State rail plans should address. In addition, in developing the National Rail Plan we have canvassed States as well as reviewed their current State rail plans.

*Question 7.* As you know, I have sponsored legislation to address clear and present safety problems in the intercity bus industry. There have been a number of horrific motorcoach accidents in my State and in others in the past few years, and making motorcoach operations safe is a top priority for me. I was pleased to see that NHTSA has finally issued a proposed rule to require seat belts on motor coaches. But why has the agency proposed limiting the requirement to intercity, tour and commuter bus service, and not requiring belts on buses used in charter service, for special operations such as transportation to casinos, and shuttle services?

Answer. In our notice of proposed rulemaking (NPRM), the definition of motorcoach includes buses sold for intercity, tour, and commuter bus service. We do not propose to exclude buses used for charter or shuttle services or for special operations from the definition of a motorcoach. In our proposal, if a charter or shuttle bus has a Gross Vehicle Weight Rating (GVWR) greater than or equal to 26,000 pounds, 16 or more designated seating positions, and at least 2 rows of passenger seats that are forward facing, it would be considered a motorcoach and would be required to meet the provisions in the proposed rule, including having lap/shoulder seat belts at all forward facing seating positions.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. JOHN D. PORCARI

*Question 1.* This past April, the Departments of Agriculture and Transportation submitted a report on a joint study of rural transportation issues. Among the report's findings were that:

- Almost 75 percent of agricultural areas lost rail competition from 1992 to 2007, and the areas in which a railroad had a monopoly in transporting grain and oilseeds increased from 10 percent to 15 percent;
- Rail rates for grain and oilseeds rose 46 percent from 2003 to 2007, while rates for all other products increased 32 percent over the period; and
- From 2001 to 2007, fuel surcharges by the railroads were 55 percent higher than the incremental increase in the cost of fuel.

What do you believe needs to be done to address these findings?

Answer. Since deregulation in 1980, the railroad industry has greatly reduced its fixed plant while more than doubling the total tonnage carried. This has greatly increased efficiency and, on the whole, has lowered rates. At the same time, many railroads have merged into larger companies, resulting in only seven large (Class I) railroads remaining in the United States.

Prior to the downturn in the economy, the entire freight transportation industry struggled to meet growing demand that strained existing capacity. Truckers, in particular, faced with driver shortages and highway congestion, were forced to raise rates, leading shippers to use other modes where feasible. The railroad industry took advantage of tight market conditions to raise rates and increase its returns . While shippers have been unhappy with a perceived loss of competition and with railroad rates and service, the railroad share of wheat moving for export through the Pacific Northwest has actually increased over the last 10 years, suggesting that railroad rates and service levels continue to be attractive to shippers relative to the available alternatives.

The STB has initiated rules that would make it easier for small shippers, including agricultural shippers, to bring a rate case before it and has initiated proceedings following shipper complaints regarding railroad practices. It has also tightened its regulation of fuel surcharges. STB investigated fuel surcharges and issued regulations (on January 6, 2007) that require railroads to base any fuel surcharges on actual increases in the cost of fuel. We believe that this has largely ended abusive fuel surcharge practices. STB has also established a mediation program and, most recently, instituted a review of the rate exemption process. USDOT believes STB's statutory authority is sufficient to address any exercise of market power by railroads.

*Question 2.* What needs to be done to make it possible for other train operators to compete with Amtrak to operate new high-speed trains?

Answer. Amtrak's monopoly to provide intercity passenger rail service was repealed in 1997. Under PRIIA, states are free to select operators for high-speed rail (HSR) and other Intercity Passenger Rail (IPR) services they develop and whose operations they are willing to fund.

Basically, there are two types of HSR systems. "New HSR" systems make use of largely or completely new right-of-way. In that case, Amtrak and the other potential operators start from an essentially level playing field with respect to the rights to operate over the new rail infrastructure, as it is specifically designed for HSR use. "Incremental HSR" systems, however, employ upgraded existing freight railroad rights-of-way over which Amtrak would ordinarily have access rights at incremental cost that other potential operators would not possess. For both types of HSR, further exacerbating the cost differential is Amtrak's ability to spread its fixed overhead costs (for example, the fixed costs of its nationwide reservation/information/Internet system) over a large number of routes and services, while a new operator might have only one or two routes available against which to charge its overheads.

On the other hand, Amtrak's costs are high. Therefore, a new train operator that carefully developed operating methods and cost containment strategies could overcome some of Amtrak's inherent cost advantages as it applies them to a given HSR route. Alternatively, it is conceivable that arrangements could be negotiated that would enable the new operator to avail itself of Amtrak's nationwide capabilities (*e.g.,* the reservation system) at a reasonable cost. Furthermore, out of the complex negotiations among the FRA, the States, Amtrak, the host railroads, and a prospective new operator, it might be possible to develop a method to secure for the new operator trackage rights at a cost that might be bearable.

*Question 3.* In announcing his latest economic proposal, the President stated that the next surface transportation reauthorization bill must be deficit neutral. Does the Administration believe the surface transportation program should be funded through user fees going forward?

Answer. The Administration is committed to restoring fiscal responsibility and to paying for all new infrastructure investments made under the President's plan. Traditionally, surface transportation infrastructure investments have been fully paid for. This system has broken down, and the highway trust fund has been allowed to become insolvent. The Administration intends to work with Congress to change this—to fully pay for our new infrastructure investments and to restore solvency to the highway trust fund.

*Question 4.* How does the President plan to pay for a very costly high-speed rail program?

Answer. The development of high speed rail corridors does require substantial capital funding. The Administration firmly believes, however, that HSR's benefits as part of a larger reformed and transformed national transportation infrastructure program will far exceed its costs. The precise means of funding high speed rail, along with all other surface transportation modes, are under careful consideration within the Administration and in the Congress.

*Question 5.* What is the Administration's position on having one mode—most likely highway users—subsidize other modes of transportation such as transit, and freight and passenger rail?

Answer. The use of Highway Trust Fund revenues to fund transit expenditures has been a consensus element of transportation policy since the 1982 Surface Transportation Assistance Act. Similarly, highway revenues have been used to fund bicycle and walking paths since the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA). Some expenditures for rail projects, such as under the Congestion Mitigation and Air Quality Program (also authorized in ISTEA) have also been authorized from the Highway Trust Fund when the Congress has judged them either to benefit highway users or to mitigate costs created by highway use. So the Administration does not take an absolute position on the use of Highway Trust Fund revenues to cover the costs of investments in other modes.

*Question 6.* The Administration has talked again and again about the need to get small businesses borrowing and investing again and has been quite critical of the Nation's banks for not lending investment capital. Can you tell me what the Administration has been doing to promote the $35 billion that's at your disposal under the Railroad Rehabilitation and Improvement Financing, or RRIF Program?

Answer. FRA hired a new program manager for the RRIF program in September 2009. During the past year, the RRIF program office has visited numerous rail conferences to promote the RRIF program and its benefits. More importantly, the Department recently published in the Federal Register the first ever policy statement on the consideration of RRIF applications that will help prospective applicants better understand what they need to do to have a successful application.

*Question 7.* How many applications has FRA received since January 2009, and how many of those applications have been approved?

Answer. Sixteen applications have been received since January 2009. Of these applications, four have been approved as of October 6, 2010, three were not approved, three were withdrawn or are on hold at the request of the applicant, and the others are still in process.

*Question 8.* How many applications have been decided within the 90-day period mandated by SAFETEA–LU?

Answer. Since the establishment of the 90-day schedule in SAFETEA–LU in 2005, only two applications took more than 90 days, and both were decided within a few days after the 90-day period expired.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK WARNER TO HON. DANIEL R. ELLIOTT III

*Question 1.* As I am sure you know, it is very important for a company not only to meet its cost of capital, but to exceed it. How does this principle factor into the STB's decisions? Does the STB want railroads to exceed their cost of capital in order to attract the level of investment needed to maintain and expand their systems?

Answer. Railroads should be permitted to exceed their cost of capital in a given year. The railroad industry is cyclical, so that while a carrier may earn a return above the cost of capital in 1 year, the tide may turn and returns may drop below the cost of capital in the next. The agency attempts to permit sufficient returns so that, over the course of a business cycle, the carriers can sustain a return on investment needed to attract capital and maintain their infrastructure. The Board factors this principle into its rate setting approaches, which all take a long-term view to determine if the carriers are earning excessive returns over a 4, 5, or 10 year horizon (depending on the complexity of the rate analysis used). This approach is consistent with the agency's statutory mandate (49 U.S.C. 10704(a)(2)) to permit the carriers sufficient revenues to "attract and retain capital in amounts adequate to provide a sound transportation system in the United States."

*Question 2.* The industry says current proposed STB Reauthorization legislation could put up to $6 billion at risk annually (about the amount of the industry's total net income in 2009). Do you believe that this decrease could put at risk the industry's investments in maintaining and expanding rail networks? Would there be a risk of railroads raising rates on customers to the point that those customers would switch back to using trucks to transport their freight?

Answer. I am aware the industry has made such claims, but fail to see how the proposed reauthorization would put $6 billion at risk annually. That figure seems to suggest that all rail transportation rates would be driven to the statutory jurisdictional floor (180 percent of variable cost). Such an outcome is implausible, particularly given the broad discretion afforded the agency to implement many of the key provisions of S. 2889. However, the industry has never shared any such analysis with me or the Board, so I cannot assess the validity of that position.

If the bill did in fact reduce railroad revenues by $6 billion a year, that would plainly put at risk the health and continued viability of the American freight railroad system.

If the bill were implemented in a reasonable and measured fashion, I do not believe it would cause railroads to increase rates and drive customers with competitive options back to using truck. A reduction in the rates to reasonable levels that railroads can charge captive traffic should have no impact on their pricing decision for competitive traffic. The carriers price according to market demand. Unless there is a change in market demand, or a change in the cost of providing the service, I would not expect that the carriers would adjust prices for truck-competitive traffic.

However, if the bill is not implemented in a responsible and measured fashion, the new provisions could inject serious operating inefficiencies into the rail network. If that happens, then the carriers would indeed respond to any increase in operating costs by increasing transportation rates and thus driving traffic to the highways, a result I do not believe is contemplated by the bill or is in the public interest.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BYRON L. DORGAN TO HON. DANIEL R. ELLIOTT III

*Question.* In 2007, the STB issued a long overdue decision to establish standards for shippers to file challenges to paper barriers. I understand that since 2007, only one shipper has challenged a paper barrier under this standard and that case has been pending for over two and a half years. Do you agree that shippers need real avenues for relief from paper barriers and do you believe that the current process offers shippers the opportunity for relief? Has the delay and inaction in the single paper barrier case filed deterred other shippers from challenging unreasonable paper barriers at the STB?

Answer. In the 2007 proceedings to which you refer (*Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League*, STB Ex Parte No. 575 and *Disclosure of Rail Interchange Commitments*, STB Ex Parte No. 575 (Sub No. 1) (served Oct. 29, 2007)), the Board gave thorough consideration to the effect of paper barriers and concluded that they should be scrutinized on a case-by-case basis. It also concluded that not all paper barriers are anticompetitive in nature and that paper barriers can provide a means by which a Class I carrier can economically justify selling a marginally profitable line to a shortline carrier, rather than abandoning the line, which would result in the shipper losing rail service altogether.

In those instances where a shipper does believe that it has been harmed as a result of a paper barrier, I believe that the policies put in place by the Board in 2007 provide them with an avenue to relief. In that proceeding, the. Board required carriers to disclose when a paper barrier is created, so that such arrangements are no longer hidden from shippers. The Board also spelled out with greater clarity how challenges to paper barriers should be brought and the factors that the agency would look at in evaluating whether those paper barriers are proper. However, I am open to ways to improve the transparency and efficiency of this process going forward.

The specific case to which you are referring is *Entergy Arkansas, Inc. and Entergy Services, Inc.* v. *Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.,* STB Docket No. 42104. Although this case has been pending at the agency for some time, it is not due to inaction. To the contrary, this case involves several complex and novel issues that go beyond a mere challenge to a paper barrier. Moreover, there has been a significant volume of evidence (over 50 filings) and some of the delay has been the result of the fact that the Board has had to request additional evidence to address all of the issues that have been raised.

I do not believe that the length of time that the *Entergy* case has been pending has caused other shippers from challenging paper barriers. I believe that the shipper community is aware that the *Entergy* case is complex and unique and that if a challenge to a paper barrier were brought under less complicated circumstances, the Board would process that case quickly.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. KAY BAILEY HUTCHISON TO HON. DANIEL R. ELLIOTT III

*Question 1.* As you know, last December, the Committee reported legislation to reauthorize the STB and reform certain aspects of railroad regulation under the Staggers Act. Is the STB satisfied with the proposed reauthorization measure or are there additional areas you would like to see addressed?

Answer. As an independent regulatory agency, the Board does not express opinions on the merits of pending legislation; rather the agency will be prepared to implement the bill once it is signed into law. However, it is clear that the legislation would make the agency more proactive and would authorize more resources to allow it to carry out its mission more robustly. I would like to note several measures in the legislation that would provide the agency with better regulatory tools to carry out that mission.

First, I am supportive of the provision in the legislation that would allow the Board to initiate investigations on its own accord (except in rate disputes). This would eliminate the need for a party to file a complaint before the Board investigates, a requirement that serves as a barrier to the Board examining matters that it knows are a source of conflict, but which it can do nothing about. Having the ability to investigate matters on its own accord, the Board could be more proactive—rather than reactive—to problems it spots in the rail industry.

Second, I am supportive of the provisions that would give the Board the ability to refer certain disputes to arbitration. As I mentioned during my oral testimony, I have initiated a proceeding to explore ways to improve our current arbitration process, which has admittedly been a failure. Although I am hopeful that this proceeding will ultimately lead to an improved arbitration process, use of arbitration will still be limited by the fact that it is only voluntary. Providing the Board with statutory authority to *require* arbitration would give the process much more leverage. I think use of arbitration would be particularly helpful in resolving those isolated disputes that do not have industry-wide ramifications.

Finally, I am pleased with the provisions in the legislation that require the Board to carry on with its efforts to revamp the Uniform Rail Costing System (URCS). As

I have repeatedly stated, it is imperative that the Board improve URCS so that parties can feel confident that the results of our decisions are in fact accurate.

*Question 2.* As you know, the rail reform bill reported by the Committee last December would require railroads to quote bottleneck rates and direct the STB to establish standards for determining the reasonableness of such rates. To guide the Board, the bill specifies 6 elements of a reasonable rate, including the carrier's ability to recoup its costs and earn a reasonable return on a bottleneck rate. What is the STB's view of the railroads' demand for "lost contribution"? Should the railroads be entitled to all of the profits they stand to lose in quoting bottleneck rates, even though they would no longer be providing service over a portion of the route?

Answer. At this time, the STB has no view on the railroads' request for lost contribution. This is one of the issues I plan to seek public comment on in a proceeding to explore our competitive access rules. Such a hearing will give us the opportunity to hear from the industry and various experts on the pros and cons of such a request. But until the agency has benefited from that input, it would be premature to take any position on that issue.

*Question 3.* How far can the STB go in opening access without additional statutory authority?

Answer. Again, unfortunately, I can offer no view at this time. The Board has statutory authority to order competitive access remedies—including reciprocal switching (49 U.S.C. 11102(c)), terminal access (49 U.S.C. 11102(a)), and alternative through routes (49 U.S.C. 10705))—in specific situations. The precise scope of that discretion, however, is unclear. It is my intent to explore that issue in an upcoming hearing on our competitive access rules. But until the matter has been fully briefed, it would be premature to offer my views on how far the Board can go to open access under the existing statutory structure.

*Question 4.* As you know, revenue adequacy is one of four constraints on a railroad's pricing of captive traffic. The STB has long said that "revenue adequacy is a long-term concept that calls for a company, over time, to average return on investment equal to its cost of capital." How does the Board define "long-term"? Norfolk Southern has been revenue adequate for a number of years, and yet the STB has not applied the revenue adequacy constraint to the rates NS charges. How does the Board intend to apply the revenue adequacy constraint when railroads achieve revenue adequacy for a sustained period?

Answer. In *Coal Rate Guidelines* (1985), the rulemaking in which the Board's predecessor agency, the Interstate Commerce Commission (ICC), created the revenue adequacy constraint, the agency stated "that revenue adequacy is a long-term concept that calls for a company, over time, to average return on investment equal to its cost of capital. In any industry there are business cycles producing years during which earnings exceed projections and years when they fall short of the target." The ICC then specified in a footnote, "We will not attempt to decide here what period of time may be sufficiently representative in every case. This will vary depending upon the carrier's traffic base and the relative stability of the economy at the time."

Accordingly, there is no bright-line cut-off for the number of years that a carrier must achieve revenue adequacy for the revenue adequacy constraint to apply. Rather, it will depend on the facts of each individual case. However, as the ICC noted, the number of years should be representative of a business cycle, so it would be incumbent on a complaint to show that the number of years the carrier has achieved revenue adequacy are reflective of such a business cycle.

It is true that Norfolk Southern Railway Co. (NSR) has earned a return on investment that exceeds the industry average cost of capital over the past several years, though the Board has not yet issued its 2009 revenue adequacy calculation. However, even if it were assumed that this would make the revenue adequacy constraint applicable to NSR, the Board does not apply the revenue adequacy constraint on its own accord. Rather, as set forth in Coal Rate Guidelines, if a shipper believes that it is paying rates in excess of what NSR needs to charge to achieve revenue adequacy, that shipper must file a rate complaint with the Board.

There is no formulaic test or methodology for a complaint based on the revenue adequacy constraint as there is for the stand-alone cost constraint. Accordingly, I cannot specify in detail what evidence the complainant must submit, but such evidence would have to show that the rail carrier is charging the shipper a rate beyond what the carrier needs to charge in order to maintain revenue adequacy. The Board would consider this evidence one case at a time.

If there were a number of revenue adequacy rate complaints over time, eventually a body of case law would develop that would guide future parties bringing such cases, as happened with the stand-alone cost test. The ICC did provide some guidance in *Coal Rate Guidelines*, stating that "A railroad seeking to earn revenues that would provide it, over the long term, a return on investment above the cost of capital would have to demonstrate with particularity: (1) a need for the higher revenues; (2) the harm it would suffer if it could not collect them; and (3) why the captive shippers should provide them." The Board also processed a rate complaint against a pipeline carrier (*CF Industries, Inc.* v. *Koch Pipeline Co.*, L.P., 4 S.T.B. 637 (2000)) in which the complainant successfully used the revenue adequacy constraint.

*Question 5.* Is the value of a railroad's assets adjusted for capital invested by Federal, state, and other government or quasi-government entities in the determination of revenue adequacy, and if so, how? If not, shouldn't it be? Why should railroads be entitled to a return on investment for capital invested by government bodies?

Answer. The value of railroad assets is adjusted to reflect capital from public sources. Funds provided by government subsidies have no cost to the carriers and are subtracted from the net investment base in computing revenue adequacy because railroads should not earn returns on increases in asset bases generated from investments that were paid for by government subsidies.

Because of the Department of Transportation's issuance of Transportation Investment Generating Economic Recovery (TIGER) grants, the Board's accountants earlier this year reminded rail carriers of their obligation to account for capital invested in their systems by governmental bodies separately, and to exclude such capital from the carrier's asset base for the purposes of our revenue adequacy determination. Therefore, in the future, Class I railroads should disclose the amount of government funding (*i.e.,* Tiger Grants, grants, and subsidies) in footnotes to Schedule 250 annual reports. We will continue to monitor and audit the carriers' public filings to ensure they are in compliance with our reporting requirements.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. DANIEL R. ELLIOTT III

*Question 1.* This past April, the Departments of Agriculture and Transportation submitted a report on a joint study of rural transportation issues. Among the report's findings were that:

- Almost 75 percent of agricultural areas lost rail competition from 1992 to 2007, and the areas in which a railroad had a monopoly in transporting grain and oilseeds increased from 10 percent to 15 percent;
- Rail rates for grain and oilseeds rose 46 percent from 2003 to 2007, while rates for all other products increased 32 percent over the period; and
- From 2001 to 2007, fuel surcharges by the railroads were 55 percent higher than the incremental increase in the cost of fuel.

What do you believe needs to be done to address these findings?

Answer. I have reviewed the joint report by the Departments of Agriculture and Transportation and it raises a number of important issues. I believe it is appropriate for the agency to explore the state of competition as part of a broader inquiry into the state of its competitive access rules, particularly as the conclusions of that study appear to diverge with some of the conclusions of the competition study conducted by Christensen Associates for the STB. And, in that inquiry of its competitive access remedies, the Board will explore in more depth the issues of captivity that many agricultural shippers face. To that end, the agency has announced that it will hold a hearing on December 9, 2010, to begin re-examining the class exemption for certain commodities.

*Question 2.* A recent study conducted by Christensen Associates for the STB indicates that the percentage of rail tonnage moving at a revenue-to-variable cost ratio of less than 100 percent has risen from 16 percent in 2001 to 25 percent in 2008. The percentage of rail tonnage moving at rates producing a revenue-to-variable cost ratio above 300 percent has also risen, from 6 percent to 9 percent of total tonnage. Is it correct to interpret this trend as showing that where competition exists, prices are being driven down, and that where competition does not exist, prices are going up? What justification can there be for the railroads moving one-quarter of their traffic at rates that don't cover their variable costs, let alone contribute to fixed costs and a return on investment?

Answer. The Christensen report found that overall railroad rates have been steadily increasing since 2004, with a particularly sharp increase in 2008. The report also found evidence that shippers with less access to competition paid higher rates while otherwise similar shippers with more competition paid lower rates. But the steady increase in the short term rates detected by Christensen was attributed to cost increases rather than an increase in the exercise of market power by the railroad. At this point, I have no basis to disagree with the report, but I look forward to exploring the issue in more depth as we move forward and reexamine our competitive access rules.

Concerns about the large amount of railroad traffic with rates below "variable costs," as calculated by the Board's Uniform Rail Costing System (URCS), are misplaced. For many decades, a significant portion of rail traffic has traveled below the "variable cost" as calculated by the agency. This is true because, as the Board has long observed, URCS is not a marginal cost model. Short-run marginal costs are the operating costs that would not be incurred but for a particular movement. Examples of these directly variable costs include fuel, labor, track maintenance, and switching costs. These costs are the kinds of expenses that a carrier should consider when setting transportation rates for a particular movement in the short run. And any rate above marginal cost will make a contribution to the railroad network, which in turn reduces the contribution the carrier needs to earn from captive traffic to be revenue adequate.

However, the marginal cost associated with handling particular traffic is not readily measurable. So the agency has, for decades (dating back as far as the 1930s), used a costing model that seeks to include in its estimate the *long run* variable costs. Expenses included in this measure include maintenance-of-way and structures, management expenses, depreciation, interest on debt, and return on investment. As a result, "URCS variable costs may include a significant portion of what may actually be unattributable joint and common costs." *Simplified Standards*, 1 S.T.B. 1004, 1028 (1996). For example, the agency's general purpose costing model has long included 50 percent of road ownership costs as a "variable cost" for regulatory costing purposes. Thus, regarding traffic with a revenue-to-variable cost ratio less than 100 percent, it is possible that even though this traffic would appear, on its face, to be money-losing traffic, because of the way URCS accounts for road property investment (a significant cost to rail carriers), that is not always the case. In other words, traffic with an R/VC ratio of 90 percent may be contributing to the fixed costs of the carrier's network, but because of the way URCS accounts for road property investment, it is showing up as moving at below cost.

In addition, it is also true that some traffic moves at rates below even the marginal cost of handling that traffic. Movements under legacy, long-term contracts, where the escalation clause may not have kept pace with rising costs, are a likely candidate. But because our costing model was never designed to capture marginal costs, looking at the amount of traffic that falls below 100 percent of URCS is not an accurate measure of unprofitable traffic.

*Question 3.* What impact do you believe caps on carbon emissions as part of climate change legislation would have on railroad coal traffic, and by extension, on overall railroad revenues?

Answer. The STB Board Members participate in regular meetings of the Rail Energy Transportation Advisory Committee, which was formed to provide reports and advice to the Board on issues concerning transportation of energy-related cargo, including coal. As part of that input, the Board has received two recent presentations by the U.S. Energy Information Agency addressing the future outlook for energy demand and consumption, "Outlook for U.S. Coal, Presentation to Rail Energy Transportation Advisory Committee of the Surface Transportation Board at FERC" (December 1, 2009), and "EIA's Outlook Through 2035 From the Annual Energy Outlook 2010, Surface Transportation Board, Washington, D.C." (March 23, 2010). These presentations have included detailed quantitative analyses of scenarios incorporating a variety of possible legislative and regulatory initiatives. These projections represent a considerable range, corresponding with the types of legislative and regulatory actions that are incorporated into the projections. The reports, and links to additional detailed reports prepared on these topics, may be found in full at the Rail Energy and Transportation Advisory Committee section of the STB's website, *www.stb.dot.gov*. The impact of any proposal would of course depend on the particular details of the proposed legislation.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. OLYMPIA J. SNOWE TO HON. DANIEL R. ELLIOTT III

*Question.* As you know, in February, the Montreal, Maine, & Atlantic Railway (MMA) submitted an application to abandon a rail line from Millinocket north to Van Buren—along which a vast majority of Maine's timber and paper industries work. The abandonment process is a complicated one; it requires a series of events to occur, all overseen and agreed to by the Surface Transportation Board. The State of Maine has taken steps to purchase the underlying track and real estate—and to negotiate an equitable settlement. But if this fails, losing an operating railroad in northern Maine would decimate the economy, forcing nearly 100,000 more trucks onto the roads, and driving up shipping costs for the lumber and paper manufacturers. There has not been a contested abandonment case in more than two decades. *Please provide this committee with an update on the STB's efforts with respect to this case. From your perspective, what can the STB do to find an equitable solution that protects jobs and ensures the long-term viability of freight rail in this part of the state?*

Answer. The application filed by Montreal, Maine & Atlantic Railway (MMA) in STB Docket No. AB–1043 (Sub-No. 1) to abandon several different rail lines has presented the Board with significant issues to resolve. As a matter still pending before the Board, there is little I can say about the merits of that dispute, but I was pleased to see that the parties recently filed with the Board a term sheet that outlines a deal that would allow MMA to sell the line to the state of Maine for continued rail service.

I would like to detail our efforts to mediate an alternative to abandonment that have contributed to this outcome. First, I encouraged the parties to enter into mediation to see if they could work out a solution that did not involve the abandonment of the MMA lines. To help shepherd this process, I appointed the Board's most experienced mediator and the chief economist of the agency to this matter. When it became clear that the parties would not be able to reach an agreement before the deadline for the Board to rule on MMA's abandonment application, I directed the Board staff to take the unprecedented action of postponing a ruling on the application, so that the parties would be able to continue their negotiations.

Second, at the request of the Maine Congressional Delegation and Maine Department of Transportation (Maine DOT), the Board held a field hearing in Presque Isle, Maine, on July 7, 2010. Speakers representing public officials, the railroad, the State, shippers, business and community interests, and rail labor testified at the hearing. The purpose of the hearing was so that the Board members and staff could hear firsthand from the parties that would be affected if the lines were abandoned and from MMA the difficulties it would face if it were required to keep the lines in operation. The hearing was also intended to serve as an airing of the facts, in order to help the parties in their mediated discussions. I believe our decision to take this matter to the residents of Maine, rather than ask them to come to Washington, served the dual purpose of letting the affected public voice their concerns with the transaction and better informing my colleagues and me of the impact the abandonment will have on the region.

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