

HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON RAILROADS

TESTIMONY OF LINDA J. MORGAN
CHAIRMAN, SURFACE TRANSPORTATION BOARD

ON REAUTHORIZATION:
RAILROAD INTER-CARRIER TRANSACTIONS,
CONSTRUCTION AND ABANDONMENTS

May 6, 1998

Introduction

My name is Linda J. Morgan, Chairman of the Surface Transportation Board (Board). I am appearing on behalf of the Board at the request of the Subcommittee to discuss the reauthorization of the Board, and to focus specifically on issues related to railroad inter-carrier transactions, line constructions and abandonments. The Subcommittee held a prior hearing on the Board's reauthorization on March 12, 1998, focusing specifically on funding, resources, and workload issues, and thus my testimony today will not address those issues in any detail. In addition, the Subcommittee, I understand, will be holding another hearing on the Board's reauthorization, focusing specifically on issues relating to rail rate and service oversight and competitive access, and I will be submitting testimony separately for next week's hearing on those issues.

Background on the Board

As you know, on January 1, 1996, the Board was established pursuant to P.L. 104-88, the ICC Termination Act of 1995 (ICCTA). Consistent with the trend at that time toward less economic regulation of the surface transportation industry, the ICCTA eliminated the Interstate Commerce Commission (ICC) and, with it, certain regulatory functions that it had administered. The ICCTA transferred to the Board core rail adjudicative functions and certain non-rail adjudicative functions previously performed by the ICC. Motor carrier licensing and certain other

motor functions were transferred to the Federal Highway Administration (FHWA) within the Department of Transportation (DOT).

The Board is a three-member, bipartisan, decisionally independent adjudicatory body organizationally housed within DOT. As a quasi-judicial body, it makes decisions on matters before it based on the record compiled in the cases after adequate notice and full opportunity for participation and comment by interested parties. Pending its decision in a matter, the Board must maintain complete objectivity; it cannot prejudge or speculate about the ultimate decision.

The rail oversight conducted by the Board encompasses, among other things, maximum rate reasonableness, car service and interchange, mergers and line acquisitions, line constructions and abandonments, and labor protection and arbitration matters. The jurisdiction of the Board also includes certain oversight of the intercity bus industry and pipeline carriers; rate regulation involving non-contiguous domestic water transportation, household goods carriers, and collectively determined motor rates; and the disposition of motor carrier undercharge claims. The substantial deregulation effected in the Staggers Rail Act of 1980 (Staggers Act) and the laws governing motor carriers of property and passengers was continued under the ICCTA; the ICCTA empowers the Board, through its exemption authority, to promote deregulation administratively.

Reauthorization of the Board

The Board was authorized under the ICCTA through September 30, 1998, and thus its reauthorization is before Congress this year. The Board believes that it should be reauthorized for at least 3 years, and at least at its existing staffing and budget levels.

Congress created the Board as an independent adjudicative body. There continues to be an important regulatory role for such a body with respect to surface transportation; the need for such a

body is no less today than it was when the Board was established. The resources allocated to the Board should reflect the fact that the Board's responsibilities continue at least at the level they were when the Board was created. Given the critical nature of the responsibilities being implemented by the Board relative to an ever-changing transportation marketplace, the certainty and stability associated with continuing these functions in the same forum are paramount, and a multi-year reauthorization period is important to that end.

Discussion of Railroad Inter-carrier Transactions, Construction and Abandonments

The Board has significant responsibility to oversee rail restructuring matters. This responsibility includes mergers and acquisitions, line sales, line constructions, and line abandonments. These restructurings involve large and small railroads.

In these areas, my testimony will address the relevant law that the Board is charged with implementing and significant decisions that the Board has issued or has pending. For more specific reference, attached to my testimony is a summary of what the Board has accomplished over the last 2 years since its establishment on January 1, 1996 (See attachment). Also, the Board has submitted to Congress its first annual report covering fiscal year (FY) 1996 (from the Board's inception on January 1, 1996) and FY 1997.

Rail Mergers and Common Control Arrangements

Transactions with Industry-wide Impact: Overview. When two or more Class I rail carriers (i.e., carriers with annual operating revenues of at least \$250 million in 1991 dollars) seek to consolidate through a merger or common control arrangement, they must file an application and obtain the prior approval of the Board under 49 U.S.C. 11323-25. See 49 CFR Part 1180. Each

merger application must contain significant information regarding the purpose of the proposed transaction, a discussion of how it is consistent with the public interest (including the financial aspects of the transaction and the effect of the transaction on competition), an operating plan effectuating the proposed transaction, data on labor impact, and environmental and safety information.

The Board is directed by law to approve a major merger transaction that it finds is in the public interest. In determining whether a merger is in the public interest, the Board must consider at least: (1) the effect of the merger on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of rail carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system. 49 U.S.C. 11324. By law, the Board's approval of a merger exempts such a transaction from all other laws (including antitrust laws) to the extent necessary for the carriers to consummate the approved transaction. 49 U.S.C. 11321.

The Board may, where warranted to alleviate anticompetitive effects, impose conditions upon approval of the transaction. These can include divestiture of parallel tracks or requiring grants of trackage rights or grants of access to other facilities.

In addition, by law the Board is required to impose labor protective conditions to alleviate harm to non-management employees who are adversely affected by the transaction. As you know, Congress has recognized that rail mergers can result in job losses and job relocations, and Congress has addressed this matter in the statutory provisions governing rail mergers by directing the agency

to impose the standard New York Dock employee protective conditions [New York Dock Ry.-- Control--Brooklyn Eastern Dist., 360 I.C.C. 60 (1979)]. The New York Dock conditions embody the basic framework for mitigating the labor impacts of rail mergers. The conditions provide both substantive benefits for adversely affected employees (dismissal allowances, displacement allowances, and the like) and procedures (negotiation if possible; arbitration, if necessary) for resolving disputes regarding implementation of particular merger-related transactions.

In particular, the New York Dock conditions require the merged carrier to pay up to 6 years of wages to employees dismissed or displaced as a result of the consolidation. Procedurally, the merged carrier, under New York Dock, must give at least 90 days written notice of any action implementing the merger that adversely affects employees, including a 30-day negotiation period. If the parties are unable to resolve their differences, the matter then may be submitted to binding arbitration.

Also, as part of the decision-making process, the Board must consider the environmental effects of a proposed merger pursuant to the National Environmental Policy Act and related environmental laws, and as part of the approval of a merger, it imposes conditions as appropriate to mitigate the potential environmental impacts resulting from the merger that are identified during the environmental review process. The Board's environmental staff, the Section of Environmental Analysis (SEA), conducts the process, which includes various public outreach activities to inform the public about the proposed merger and to facilitate public participation in the environmental review process. As part of the environmental review process, SEA prepares a detailed analysis not only of the system-wide effects of the proposed merger, but also of particular merger-related activities that would affect, for example, individual rail line segments, rail yards, intermodal facilities, and commuter and rail passenger services. This analysis includes a thorough independent

assessment of potential safety impacts as well as other environmental impacts.

*Specific Industry-wide Transactions.*¹ In August 1996, the Board approved, with significant conditions, the acquisition of the Southern Pacific rail system by the Union Pacific rail system. This approval permitted the common control and eventual merger of the Union Pacific, Missouri Pacific, Southern Pacific, St. Louis Southwestern, SPCSL, and Denver and Rio Grande railroads into what is known as the “UP/SP” system.

Because there was overlap between the UP and the SP systems, certain parties sought to require UP to give up certain SP lines to other railroads to avoid competitive harm. Instead of requiring such “divestiture,” however, which the Board strongly believed could have undermined the benefits of the merger and left the ailing SP system with no hope of successfully serving shippers over the long term, the Board imposed significant competition-preserving conditions, which expanded upon and added to those suggested by various shippers and shipper representatives.

One of the conditions attached to the Board’s approval gave substantial operating rights to the Burlington Northern and Santa Fe railroad (BNSF) over the UP/SP system, thus ensuring that all shippers that were served by more than one railroad before the merger could continue to be served by more than one railroad after the merger. In addition, the Board provided shippers with competitive opportunities for rail line buildouts and access to transload (intermodal) facilities. Also, the Board imposed various environmental mitigation measures and in particular provided for additional environmental review of traffic increases in Reno, Nevada, and Wichita, Kansas, resulting from the merger. Further review relating to Reno and Wichita has been suspended pending

¹ This discussion necessarily does not include any discussion of the merger of the Burlington Northern and Santa Fe railroads, which was approved by the ICC with conditions in August 1995 prior to its termination.

private negotiations between the parties; there continues in place a moratorium on increased traffic through these areas; and no final Board action has been taken with respect to mitigation in these areas.

Another condition required Board oversight for 5 years, to examine whether additional remedial conditions would be required. In May 1997, the Board initiated the first annual oversight proceeding. In a decision issued in October of last year, the Board concluded that, while it was still too early to tell, no additional conditions were justified at that time. However, the Board indicated that it would continue vigilant monitoring, and in fact has underway the second annual oversight proceeding.

In this regard, the Board on March 31, 1998, initiated a separate oversight proceeding focusing specifically on the Houston area and proposals by the Kansas City Southern (KCS) and Texas Mexican railroads and others to transfer certain UP/SP lines and yards to other entities with a view toward providing for neutral switching and additional competitors in the Houston area. The details of such proposals are due in early June 1998.

In July 1997, the Board accepted for consideration an application by the CSX, Norfolk Southern (NS), and Conrail railroads for CSX and NS to acquire Conrail and divide its assets between them. The Board also received related applications for ancillary construction projects and abandonments. To date, the Board has issued close to 80 decisions in this matter, has directed the filing of safety integration plans, and will be producing an Environmental Impact Statement (EIS) on the transaction in May 1998. The Board will hold an oral argument and voting conference during the first week of June 1998, followed by a voting conference on June 8, and will issue a final decision on the entire matter by July 23, 1998. In addition, the Board has been notified that, in June

1998, the Canadian National and Illinois Central (IC) railroads will be filing a merger application.

The Service Emergency in the West. During the summer of 1997, service began to deteriorate on the UP/SP system, and by late summer/early fall, the congestion became extremely serious. The Board responded to the service emergency swiftly and decisively. It held oral hearings on October 27, and December 3, 1997, at which it received testimony over a 20-hour period from over 85 witnesses representing a broad spectrum of interests. In the Service Order No. 1518 proceeding instituted following the October 27 hearing, the Board has issued three unprecedented emergency service orders that, among other things, made substantial changes to the way in which service is provided in and around the Houston area (the center of the service problems). Essentially, the service orders, which extend until August 2, 1998, have sought to relieve some of the pressure on rail service to Houston in general, and on UP/SP in particular, by routing traffic around Houston and by authorizing other carriers to handle UP/SP traffic moving through the area. They have required extensive railroad data reporting to help the Board and affected parties evaluate the progress of the service recovery, and have directed certain other activities with respect to the movement of grain and additional assistance from other railroads.

Although no party during the UP/SP merger proceeding suggested that the merger would cause an operational emergency of the sort that ultimately developed, the Board recognized that merger operational integration problems (such as integration of computer systems and workforces and problems with equipment and reserve capacity) were a factor in the congestion that created the emergency. However, it concluded that one of the major causes of the service emergency was the inadequate railroad infrastructure in the Houston area, and that, at least on the basis of the record made to date, a key step in improving service in the Houston area is to upgrade the infrastructure. The Board directed UP/SP to meet with other railroads and other interested parties to discuss ways

to improve infrastructure in the Houston area, and to report back to the Board by May 1, 1998, after which interested parties can comment on the report or make other relevant submissions.

In taking action to address the rail service emergency in the West, the Board's objective has been to have a positive impact without creating harm. In this regard, the Board recognizes that government cannot run private businesses as well as private businesses can run themselves, and that government is not, and should not be, in the business of running railroads. Thus, our actions have been focused, balanced and constructive without undermining ongoing private sector efforts to fix the problems, and without inadvertently degrading the service to some shippers to upgrade the service to others. In this regard, along with the major modifications to the service provided by UP and the other railroads serving the Southwest that the Board directed, the Board's involvement has spawned important private-sector initiatives intended to resolve the service problems that have developed, including the recent agreement between UP/SP and BNSF to better coordinate service and facilities in the Houston area, and UP/SP's already announced commitment to expend significantly more to upgrade infrastructure in the Gulf Coast area. Furthermore, the Board's directives regarding the infrastructure problem should produce much needed private-sector planning by affected railroads, shippers, and other interested parties. The situation in the West is not yet resolved, but the Board believes that it has been a positive force, imposing appropriate governmental mandates while promoting needed private-sector resolution. We are committed to remaining actively involved in this entire matter until we believe that service is satisfactorily improved.

Transactions with Regional Impact. Smaller transactions involving a single Class I railroad also must obtain Board approval under 49 U.S.C. 11323-25. In May 1996, the Board approved the acquisition of control by IC of the Chicago, Central & Pacific Railroad and the Cedar River railroad. In the fall of 1996, the Board approved the acquisition of the Washington Central railroad

by BNSF, enabling the reopening of the Stampede Pass route in the State of Washington as a main line for through traffic. The Board granted permission to BNSF, with environmental mitigation conditions stemming from its environmental review in connection with its approval of this transaction, to reactivate the Stampede Pass line. The Board's action was supported by ports, numerous communities and other interests, including a number of agricultural and other shippers. This decision has been appealed by certain affected local communities. In deciding this case, the Board issued a declaratory order addressing the extent of the preemption of state and local laws for railroad activities related to the reactivation and operation of railroad lines. Generally, state and local preclearance of Board-authorized construction projects is preempted, because a prior state or local permitting process implies the power to deny the authorization and thus could frustrate or defeat the activity that is subject to federal control. Similarly, state and local laws that could prevent maintenance and upgrading projects on existing lines, such as enlarging tunnels, installing communication towers, or upgrading track, are preempted.

In November 1996, the Board approved the acquisition of the Indiana Railroad by CSX. In May 1997, the Board approved the control of the Gateway Western and Gateway Eastern railroads by KCS, an arrangement designed to provide financial security for the Gateway companies and to improve the combined system's operating and financial performance.

Smaller Transactions. The Board has also authorized various other, smaller acquisitions and mergers. Those that involved only Class II or III railroads whose lines do not connect with each other need only follow a simplified notification procedure under a class exemption at 49 CFR 1180.2(d)(2). (Class III railroads are those with annual operating revenues below \$20 million, in 1991 dollars; Class II railroads have annual operating revenues of at least \$20 million, but less than \$250 million, in 1991 dollars).

Line Acquisitions by Shortline and Regional Railroads

Overview. To acquire or operate an existing rail line, a noncarrier (which will thereby become a carrier) must obtain the prior approval of the Board under 49 U.S.C. 10901. A Class II or III railroad must obtain Board approval for such a transaction under the streamlined provisions of 49 U.S.C. 10902. See 49 CFR 1150. (The acquisition of an existing line by a Class I railroad is treated as a form of carrier consolidation discussed above under 49 U.S.C. 11323.) For nonconnecting lines, Class II and III railroads may elect to use the class exemption at 49 CFR 1180.2(d)(2), discussed above, provided the transaction does not involve a Class I rail carrier. An example of the use of new 49 U.S.C. 10902 is the acquisition by the Dakota, Minnesota and Eastern (DM&E), a Class II railroad, of the 203-mile “Colony Line” from the UP, approved by the Board in April 1996.

New Exemption for Class III Carriers. In a rulemaking under 49 U.S.C. 10902 served in June 1996, the Board adopted a class exemption allowing Class III railroads to acquire and operate additional rail lines through a simplified notification process. 49 CFR 1150.41. By removing regulatory burdens on Class III rail carrier line acquisitions, this exemption should facilitate the growth of these small carriers and the preservation of rail service and rail employment on lines that might otherwise be abandoned. (See Labor Matters for a discussion of notice and standards and procedures relative to employees affected by Class II and Class III transactions under 49 U.S.C. 10902.)

Exemption for Noncarriers. Noncarriers may acquire rail lines under the class exemption at 49 CFR 1150.31. A notification process, together with the Board's ability to revoke the class exemption as it applies to a particular transaction, prevents misuse of this exemption for the sale of lines for uses other than continued rail operations. The Board has rejected attempts to purchase rail

lines under the class exemption upon finding that the purchaser did not really intend to operate the line as a railroad. When used properly, however, this exemption has been helpful in preserving rail service. For example, in the I&M Rail Link case served in April 1997, the Board affirmed the use of this exemption by a new carrier to purchase approximately 1,100 miles of rail lines for continued rail operations.

Trackage Rights

Trackage rights arrangements allow one carrier to perform local, overhead, or bridge operations over the tracks of another carrier that may or may not continue to provide service over the same line. Bridge trackage rights improve operating efficiency for a carrier by providing alternative, shorter, and/or faster routes. Local trackage rights may introduce a new competitor, giving shippers service options. Board approval of trackage rights arrangements may be sought under 49 U.S.C. 11323 (Class I carrier), or 10902 (Class II or III carrier), or 10901 (a noncarrier). See 49 CFR 1180 (proposals under section 11323); 49 CFR 1150 (proposals under section 10901 or 10902).

The Board maintains a class exemption, at 49 CFR 1180.2(d)(7), providing a simplified notification procedure for the acquisition or renewal of trackage rights by carriers through mutual agreement that are not in response to a rail consolidation proposal. All of the 159 trackage rights arrangements authorized by the Board in FY 1997 were processed under the class exemption.

Leases

Overview. Leases and contracts to operate rail lines by a Class I railroad require Board approval under 49 U.S.C. 11323. See 49 CFR 1180. (Leases by noncarriers or by Class II or III railroads are handled as line acquisitions under 49 U.S.C. 10901 or 10902, respectively.) Lines are sometimes leased by a nonoperating carrier to another carrier willing to assume the common carrier

obligation of providing service on demand.

Dispute Resolution. In May 1997, the Board instituted a proceeding to resolve a dispute over the appropriate level of compensation for the lease of 317 miles of track in North Carolina. The dispute arose when two leases expired under their own terms and a newly negotiated lease agreement was not approved by the owning railroad's shareholders. The Board asserted its jurisdiction to resolve the dispute, established an interim compensation level, and held the proceeding in abeyance pending an attempt to reach a settlement with the objecting shareholders.

Railroad Constructions

Overview. Authorization to construct a new rail line must be obtained from the Board under 49 U.S.C. 10901. See 49 CFR 1150. Construction applications are to be approved unless they are inconsistent with the public interest. In connection with authorizing the construction of a new line, the Board can compel other carriers to permit the new line to cross their tracks, and prescribe the appropriate compensation for the line crossing, if necessary. 49 U.S.C. 10901(d).

New Lines. The Board has worked on several construction projects. In May 1997, the Alameda Corridor Transportation Authority began construction of a 20-mile rail corridor connecting central Los Angeles with the Ports of Los Angeles and Long Beach, California, pursuant to authority granted by the Board in June 1996. The \$1.8 billion project will provide improved access to the ports, which are experiencing significantly increased rail traffic, while reducing air and noise pollution as well as highway traffic congestion. FHWA and the Federal Railroad Administration recommended the final route of the project that the Board approved.

Two new construction projects received final authorization in FY 1997, subject to various environmental mitigation conditions. One of these new lines involved the Tongue River Railroad, which had planned to build the line to serve coal fields in the Powder River Basin. However, very

recently the Tongue River Railroad filed a new application seeking permission to build a different alignment for a portion of the line that the Board approved. The other construction case approved in FY 1997 (the Hastings Industrial Link railroad) will allow rail service to be extended to a new industrial park in Hastings, Nebraska. One other construction project involving the Southern Electric Railroad, approved in November 1997, will allow for additional, competitive rail service to be provided to a coal burning electric generating plant northwest of Birmingham, Alabama.

In FY 1998, the Board received an application from DM&E for approval to construct approximately 280 miles of rail line to serve the Powder River Basin. Recently the Board sought comments on a procedural schedule of 180 days for considering the transportation merits of the application, and a decision on that matter is expected shortly. Also, the Board has announced that it will issue an EIS on the proposed transaction. In addition, the Board has pending several other construction projects, including Tongue River, an application from KCS to build a line in the Geismar area of Louisiana and a project involving the Port of Charleston, South Carolina.

New Exemption Procedures for Connecting Lines. In June 1996, the Board adopted a class exemption for the construction and operation of connecting railroad track on land already owned by railroads, to make it easier for carriers to rationalize their physical plants and thereby provide improved service. 49 CFR 1150.36. Because of the sometimes substantial environmental concerns that arise in rail construction projects, carriers must provide advance notice to state agencies of their proposed use of the class exemption. Carriers also must comply with all applicable environmental regulations.

Rail Line Abandonments

Revised Procedures. Railroads require Board approval under 49 U.S.C. 10903 to abandon a rail line or to discontinue all rail service over a line that will be kept in reserve. In December

1996, the Board modified its abandonment regulations, at 49 CFR 1152, to streamline the regulatory procedures, shorten the time needed to process such requests, and implement changes in the underlying law made by the ICCTA.

Decline in Abandonments. Railroad abandonments are on the decline by every measure. Requests to abandon track or discontinue service fell from 142 in FY 1996 to 105 in FY 1997 (a decline of more than 25%). The miles of track sought to be abandoned or to lose service also dropped, from 2,311 miles in FY 1996 to 1,365 miles in FY 1997 (a reduction of over 40%). Similarly, the number of miles authorized for abandonment or loss of service was reduced by almost 1,000 miles -- from 2,245 miles in FY 1996 to 1,253 miles in FY 1997. Use of the class exemption for lines that have been out of service at least 2 years has declined dramatically as well. In addition, the Board has denied certain abandonment requests.

The decline in abandonments sought reflects an increased rationalization of the nation's railroad system through line sales rather than abandonments, and the growth of the shortline industry. The Board authorized the sale or acquisition of 7,249 miles of railroad lines to shortline and regional carriers in 110 transactions in FY 1997, compared with the sale of 4,055 miles in 86 transactions in FY 1996.

Preservation of Lines

The Board administers the following three programs designed either to preserve rail service or to preserve railroad rights-of-way.

Offers of Financial Assistance. Under 49 U.S.C. 10904, if the Board finds that an abandonment proposal should be authorized, and receives an offer by another party to pay for continued rail service, the Board may require the line to be sold (or operated under subsidy for a

year) pursuant to the Board's offer of financial assistance procedures. See 49 CFR 1152.27. In FY 1997, three lines (totaling 41 miles) were sold under this program.

Feeder Line Development Program. Under 49 U.S.C. 10907, the Board can compel a railroad to sell a line to an interested party when a line has been placed in category 1 of a carrier's system diagram map (showing that the line is a candidate for abandonment), or when there has been a substantial decline in service on that line. See 49 CFR 1151. In FY 1997, the Board had one feeder line application pending before it.

Trail Use/Rail Banking Program. The Board has a purely ministerial role in administering the rail banking program under the National Trails System Act Amendments of 1983, 16 U.S.C. 1247(d). See 49 CFR 1152.29. This law allows railroad rights-of-way that have been approved for abandonment to be preserved for future restoration of rail service and, in the interim, to be converted into recreational trails. During interim trail use, the right-of-way remains under the jurisdiction of the Board and reversionary property interests in the right-of-way cannot vest, thereby preserving the right-of-way for future reactivation of rail service. The Board cannot deny a trail use request unless the carrier refuses to participate in the rail banking program or the prospective trail user does not undertake or is unable to pay taxes on and assume liability for the right-of-way. In FY 1997, the Board granted 36 requests for rail banking with interim trail use, and denied 18 requests, sometimes on the ground that the abandonments have already been consummated and thus the trail use requests came too late.

Rail Labor Matters

Overview. Railroad employees who are adversely affected by certain Board-authorized rail restructurings are entitled to statutorily-prescribed protective conditions, under 49 U.S.C. 11326(a) (consolidations of Class I or II carriers), 11326(b) (consolidations between Class II and III carriers),

10902(d) (line acquisitions by Class II carriers), or 10903(b)(2) (line abandonments). Such conditions were discussed earlier specifically in connection with Class I rail mergers. These standard conditions relate to both wage or salary protection and changes in work conditions. They provide for resolving disputes regarding implementation through arbitration, and arbitration awards are appealable to the Board under certain criteria. The Board has interpreted the statutory labor protection provisions cognizant of employee interests under the law in a variety of ways.

Procedural Protections for Employees of Class II Carriers. In April 1997, the Board resolved issues regarding procedural protections available to employees to be affected by a Class II carrier line acquisition. The railroad involved had argued that the only employees covered by certain new protections established in the ICCTA were employees who had actually lost their jobs. The Board disagreed, interpreted the statute to cover all affected employees, and set forth procedures to be followed in implementing these new protections. This matter has been appealed by the carrier involved.

Advance Notice Requirement. In a rulemaking decision served in September 1997, the Board amended its procedures for processing proposed rail line purchases by Class II carriers, and by noncarriers and Class III carriers where the carrier will have revenues in excess of \$5 million once the transaction is completed, to require 60 days' notice. This additional notice requirement will benefit both affected communities and employees who work on lines proposed to be transferred to a new owner or operator. The buyer must inform employees on the line to be sold of the types and number of jobs expected to be available after the transaction is consummated, the terms of employment, and the principles to be used for employee selection. This notice requirement is expected to ensure the smooth implementation of these transactions for all involved. This matter

has been appealed by the smaller railroads.

Appeals of Arbitrator Decisions. The Board has reassessed the approach taken by the ICC to agency review of decisions by arbitrators implementing or adjudicating claims under labor protective conditions. The Board's current practice is to show strong deference to the decisions of the labor arbitrator, who is the person closest to the facts and who is experienced in labor relations.

Out of the 16 appeals of arbitral decisions addressed by the Board in the 2-year period following its creation, the Board has reviewed only 6 of the arbitration decisions. Of those 6 cases, the Board upheld the arbitrator, in whole or in part, in 3 of them, and, in another case, the Board vacated the decision on review when it became clear that the matter had become moot. The Board vacated the arbitral award in the other 2 cases.

A rare instance of Board action overturning even part of an award occurred in June 1997, when the Board reversed part of one arbitration decision, arising from the UP/SP merger, that required employees to change their health benefit provider. Because health benefits relate to vested and accrued fringe benefits, the Board found that these medical care programs were preconsolidation rights, privileges, and benefits that could not be modified as part of the standard (New York Dock) implementing agreement process.

In 2 proceedings related to each other, the Board stayed a disruptive arbitral award on the basis of irreparable injury to employees who would have been required to change their residences in connection with a railroad financial transaction. After the Board stayed the effect of the award twice, the railroad and employees settled the case with no need for further Board action.

The Immunity Provision. Concerns have been raised regarding the overriding of laws and contracts -- particularly collective bargaining agreements -- as part of the Board's approval of railroad consolidations. The courts have made clear, however, that the so-called immunity provision

now appearing at section 11321(a) of the ICCTA is self-executing and operates automatically to override collective bargaining agreements to the extent “necessary” without any findings or action by the Board as long as the agency has properly approved the consolidation transaction. Thus, the Board itself does not abrogate or override existing collective bargaining agreements; rather, that is accomplished by act of law as interpreted by the courts.

Environmental Review

Overview. Under the National Environmental Policy Act of 1969, 42 U.S.C. 4331-4335, the Board is required to examine the environmental impacts of actions requiring Board authorization. The Board must complete this environmental review before making a final decision on a proposed action. The environmental staff of SEA assists the Board in meeting this responsibility by conducting an independent environmental review of cases filed with the Board, preparing any necessary environmental documentation, generally an EIS or Environmental Assessment (EA), and providing technical advice to the Board on environmental matters.

Review Process. Environmental reviews are conducted most frequently for railroad mergers, rail line constructions, and rail line abandonments. In its environmental analyses, SEA considers the requirements of a number of related statutes, including the Endangered Species Act (16 U.S.C. 1531-1544), the Coastal Zone Management Act (16 U.S.C. 1451 et seq.), the Clean Air and Water Acts (42 U.S.C. 7401-7642 and 33 U.S.C. 1344), the National Historic Preservation Act (16 U.S.C. 470 et seq.), and pertinent hazardous substance laws (42 U.S.C. 6901-6933 and 9601-9675). SEA conducts its review in accordance with the Board's environmental rules (49 CFR 1105), the President's Council on Environmental Quality regulations (40 CFR 1500 et seq.), and other applicable Federal environmental requirements.

The public (including Federal, state, and local agencies) plays an important role in the

environmental review process. SEA first presents to the public the preliminary results of its analysis of potential environmental impacts, typically in either a draft EIS or an EA. This analysis is based on information made available from the applicant and the public; SEA's independent analysis; and in some cases, site visits. After a public comment period, SEA considers all comments received and performs additional analysis, as needed, before preparing an EIS or Post EA setting forth SEA's ultimate recommendations to the Board.

SEA may recommend that the Board impose conditions to mitigate the potential effects that a proposed action may have on the environment. Such conditions must be reasonable and must address environmental impacts that would result directly from the transaction being considered by the Board. The Board has the ultimate authority to determine what mitigation is appropriate. Based on SEA recommendations, the Board has imposed numerous environmental mitigation conditions in cases decided to address public safety, land use, air quality, wetlands and water quality, hazardous waste and materials, noise, and protection of historic resources.

Railroad Mergers. As previously discussed, in analyzing railroad mergers, SEA typically examines the potential environmental impacts related to changes in rail traffic patterns on existing lines. The Board may impose measures designed to mitigate potential system-wide and corridor-specific environmental impacts. Such measures may address safety, hazardous materials/emergency response, air quality, and noise.

SEA has been evaluating the potential environmental impacts that may result from the proposed acquisition of Conrail by CSX and NS. SEA determined that, unlike prior merger proposals, this proposal warranted preparation of an EIS. SEA's work has related to the potential impacts of the proposed transaction on safety, transportation systems, land use, energy, air quality, noise, biological resources, water resources, socioeconomic effects directly related to physical

changes in the environment, environmental justice, and historic/cultural resources.

Also, as previously discussed, SEA has conducted environmental mitigation studies to develop additional, tailored measures to address local conditions unique to Reno, Nevada, and Wichita, Kansas, that have resulted from the UP/SP merger. SEA served preliminary mitigation plans at the end of FY 1997, but all further Board activity has been held in abeyance pending private-sector negotiations among the parties.

Rail Line Constructions. Rail construction proposals vary in purpose, size, and the complexity of potential environmental impacts. These projects are located throughout the country and may involve unusually complicated and sensitive environmental issues.

Rail Line Abandonments. SEA's review of rail line abandonments includes an analysis of the potential environmental impacts of track removal and diversion of traffic from the line proposed for abandonment. Mitigation conditions imposed in rail line abandonments often involve the protection of critical habitats for threatened and endangered species, historic and cultural resources, and wetlands. SEA prepared approximately 125 EAs for rail abandonment proposals in FY 1997.

Summary

I have attempted to briefly describe the Board's activities in a variety of rail restructuring matters. I look forward to working with Congress and all interested parties to ensure that the Board carries out the law in this regard as intended, and the multi-year reauthorization of the Board with the provision of adequate resources is critical to that end. I would be happy to address any questions that you might have.