

Testimony of Roger Nober
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House Committee Transportation and Infrastructure Subcommittee on Railroads
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Good morning, Chairman Quinn, Ranking Member Brown, and Members of the Subcommittee.

My name is Roger Nober, and I am Chairman of the Surface Transportation Board. I appreciate the opportunity to appear before this Subcommittee today to discuss the status of railroad economic regulation.

I appreciate the longstanding and deep interest that the Members have shown in the economic issues facing the freight railroad industry, which are vital to the financial health of the railroads, to the railroads' customers and employees and to the nation's freight transportation system as a whole. I want to particularly commend the Subcommittee for holding this hearing on matters which are among the most important and difficult matters now facing the Board.

In my written testimony, I first will provide the Subcommittee with an overview of the Board and its responsibilities. Next, I will focus on the most important economic regulatory issues now facing the Board, namely the rate and service issues faced by railroad shippers in general and singly-served (otherwise known as "captive") rail shippers in particular, and the need for railroads to earn adequate revenues. Finally, I will address legislation designed to address the concerns raised by captive shippers, including the bills introduced by members of this Committee - H.R. 2192, the Surface Transportation Board Reform Act of 2003, and H.R. 2924, the Railroad Competition Act of 2003.

Overview of the STB

As all of you know, the Surface Transportation Board was created eight years ago by this Committee in the ICC Termination Act of 1995. The Board is an economic regulatory agency that Congress charged with the fundamental missions of resolving railroad rate and service disputes and reviewing railroad mergers, line sales, abandonments and new construction. Structurally, Congress determined that the Board should be decisionally independent but administratively affiliated with the Department of Transportation.

The Board serves as both an adjudicatory and a regulatory body. The Board has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments); certain trucking company, moving van, and non-contiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and matters related to certain pipelines not regulated by the Federal Energy Regulatory Commission.

One of the main reasons the Board exists is to provide a regulatory backstop to assess the reasonableness of rates charged to captive shippers when those customers and their railroads are unable to successfully negotiate a contract for the transportation and to redress unreasonable rates. Another main reason is to assess the adequacy of service received by shippers, as well as to provide redress if railroad service is inadequate. These issues may be addressed in formal proceedings before the Board. In addition to our formal adjudication processes, the Board also created a number of informal mechanisms to help railroads and their customers resolve disputes before needing to avail themselves of the Board's formal processes.

When it was created at the beginning of 1996, the Board had to accomplish its statutory missions with one-third fewer employees than had been performing those same functions at the ICC. Since 1996, the Board has met its statutory deadlines while functioning with nearly the same level of resources during that time. But as I will outline in my testimony, the Board will face

new challenges in the coming year as it works to address the issues raised today and will need some modest additional resources to continue its important work.

In carrying out its duties, the Congress directed the Board to balance the needs of carriers to earn adequate revenues with the needs of shippers to have reasonable rates and adequate service. It is no secret that many captive shippers believe that the Interstate Commerce Act as interpreted by the Board is an ineffective regulatory backstop, and therefore the transportation market for freight rail services does not properly function. By the same token, many railroads feel that twenty five years after the passage of the Staggers Act, they are still not earning adequate revenues. I will next turn to the fundamental concerns raised by captive shippers and railroads and the steps the Board is taking to address them.

Issues Faced by Captive Shippers

1. Unreasonable Rates

Under the Interstate Commerce Act, the Board has exclusive jurisdiction to resolve rate disputes in those instances when railroads have market dominance – in other words, when the railroad is charging a rate higher than the regulatory floor and the shipper has no effective transportation alternative. Under the Interstate Commerce Act, the Board must balance the often conflicting objectives of assisting railroads in attaining revenue adequacy, on the one hand, and ensuring that the rates that individual shippers pay are reasonable and fair, on the other. The balance, as we all know, is not an easy one. Rates that are too high can harm rail-dependent businesses, while rates that are held down too low will deprive railroads of revenues to pay for the infrastructure investments needed to provide shippers the level and quality of service that they require and permit economic growth. The Board is the forum of last resort if a captive shipper feels its rate is unreasonable, and the agency must do its best to carry out the law in a way that is fair to all when deciding railroad rate cases.

For determining whether rates are unreasonable, the Board has one set of procedures for

handling “large” rate cases and another for “small” cases. In recent years, the Board has experienced a significant increase in the number of large rail rate complaints filed with it. Whereas in past years the Board had two or three of these cases pending at any one time, today it has 10 large rail rate disputes pending (as well as two pipeline rate disputes and two water carrier rate disputes pending). The Board has not had a single small rate case filed since it adopted its small case guidelines in 1996, but as I will discuss further, my top priority going forward is to establish a more meaningful process for deciding small rate cases.

a. Large Rate Cases.

Determining the reasonableness of a rate in a large rate case is a complicated inquiry. The Board’s governing statute requires it first to determine whether the railroad has market dominance over its customer – in other words, whether the railroad has monopoly power over it. Only if the railroad is market dominant does the Board have jurisdiction to review the rate. This is so because under the Interstate Commerce Act, there is no rail rate regulation where there is effective competition. Once it has determined that it has jurisdiction to review the rate, the Board applies a court-approved methodology known as “constrained market pricing” (CMP) to determine whether the rate is reasonable.

i. Market Dominance.

There are two components to the inquiry as to whether the railroad has “market dominance” over the transportation to which the rate applies. The first part is to determine the “variable costs” of providing the service. The statute establishes a conclusive presumption that a railroad does not have market dominance over transportation if the rate that it charges produces revenues below 180% of the variable costs of providing the service, which means that this 180% revenue-to-variable cost (r/vc) percentage is the floor for regulatory scrutiny.

The second part of the inquiry is to perform a qualitative assessment to determine whether there are any feasible transportation alternatives that could be used for the traffic involved. The

Board considers whether there is actual or potential direct competition – that is either competition from other railroads (intramodal competition) or from other modes of transportation such as trucks, pipelines, or barges (intermodal competition) for transporting the same traffic moving between the same points. If there are effective competitive alternatives for the transportation, then the Board does not have jurisdiction to regulate the rate, even if the rate charged yields an r/vc ratio greater than 180%.

ii. Rate Reasonableness Standards.

If the shipper can show that the railroad is market dominant, then the Board applies its CMP principles to assess whether the rate being charged that shipper is in fact unreasonable. CMP provides a framework for the Board to regulate rates while affording railroads the opportunity to cover their costs. It is premised on differential pricing, that is, pricing based on the demand for the service provided. CMP principles recognize that, for railroads to earn adequate revenues, they need the flexibility to charge different customers different prices based on each customer's demand for rail service. But CMP principles also impose constraints on a railroad's ability to differentially price. Despite the complexity of CMP, the courts have held that it is the most desirable available approach to railroad rate review and that the Board must use it whenever it is feasible.

Although complaining shippers can choose from three CMP approaches, the most commonly used is the “stand-alone cost” (SAC) test. Under SAC, a railroad may not charge a shipper more than what a hypothetical new, optimally-efficient carrier would need to charge the complaining shipper if such a carrier were to design, build, and operate – with no legal or financial barriers to entry into or exit from the industry – a system to serve only that shipper and whatever group of traffic that shipper selects to be included in the traffic base. The ultimate objective of the SAC test is to ensure that the complaining shipper is not charged for carrier inefficiencies or for facilities or services from which the shipper derives no benefit. As with CMP in general, this

assures the complaining shipper that it is not required to pay for inefficiencies or to subsidize unfairly other customers of the railroad.

iii. The Board Is Working to Reform the Large Rate Case Process.

Deciding large rate cases is time consuming and costly for both the parties involved and for the Board. Although the Board by statute has nine months after all evidence is filed to decide a large rate case, it can take more than twice that long after the shipper files its complaint for the parties to file all their evidence with the Board. Preparing that evidence and presenting it to the Board are very expensive – parties have testified that a SAC case can cost as much as \$3 million to prosecute, \$5 million to defend, and generate more than 700,000 pages of material.

When I became Chairman, the Board intensified its search for ways to simplify and speed up this process, and as a result of this effort the Board adopted a number of changes to its rules that are having an effect on the conduct of these cases. In early 2003, the Board held a hearing in the rulemaking proceeding entitled *Procedures to Expedite Resolution of Rail Rate Challenges To Be Considered Under the Stand-Alone Cost Methodology*, STB Ex Parte No. 638, which was exceptionally productive.

Based on the extensive testimony received from shippers and railroads, in April 2003 the Board revised its rules in ways that ought to both shorten the decisional process and limit the expense of bringing a case. The new rules' most significant provisions include: (1) mandatory, non-binding mediation at the beginning of the case, under the Board's auspices, between the complaining shipper and the defendant railroad; (2) expedited procedures to resolve disputes, using Board staff, over what information the parties can be required to give to each other during "discovery"; (3) technical conferences to resolve, before the actual evidence is filed, certain factual disputes between the parties using the expertise of Board staff; and (4) requiring parties to submit versions of all filings with the Board that can be read by the opposing party and the public.

A significant component of the new rules is to increase the involvement of Board staff in the process through technical conferences and regular meetings with the parties. The Board established technical conferences because the parties were spending time and attorney and consultant fees fighting about – and the Board was expending resources to resolve – technical matters over which there should be no dispute, such as the number of miles between a coal mine and a power plant. In the first technical conference (held in the “*Otter Tail v. The Burlington Northern and Santa Fe Railway*” case), disputes over 200 pieces of data were settled in just over an hour. In the past, these disputes would have led to protracted litigation that would have cost the parties thousands of dollars in fees and could have substantially slowed resolution of the case. We have since held several additional technical conferences in pending cases, including one earlier this week, and found these to be very helpful in all instances.

Another major component of the new rules was the institution of a 60-day period of mediation at the start of any new case. All parties – railroads and shippers alike – who testified at our hearing on *Ex Parte No. 638* thought mediation would be a useful tool to help them to resolve their rate disputes privately. The first case since the Board adopted these new rules, “*AEP Texas North v. The Burlington Northern and Santa Fe Railway*”, was filed in August 2003, and I selected former Congressman John Thune to serve as the mediator in that case. Although this mediation did not result a settlement, I believe that mediation in rate matters will help some parties resolve their disputes.

An important objective is to instill greater transparency into our rate case procedure. It is important that the process for resolving major rail rate disputes be open and fair, and every party must have an opportunity to make its case so that the Board will have a full grasp of the implications of any actions it takes. In that regard, on September 10, 2003, for the first time, the agency held an oral argument in an individual large rate case (“*Duke Energy v. CSXT Transportation*”). Since that initial argument, the Board has held oral arguments in three other

rate cases. These sessions were productive both for the Board and for the parties, and the Board will continue to hold arguments, as appropriate, in future cases.

One significant outgrowth of holding oral arguments on rate cases is that the Board realized that it needed to ask the parties to supplement the records in three cases in which the records were incomplete in at least one critical respect. The parties submitted that additional evidence to the Board in all three cases. Over an 18 week period, the Board issued a decision in each of those cases.

Many observers have tried to draw conclusions from the results of those three cases, which arose in the Eastern United States. In two of those cases, the Board found the rate charged by the railroad was reasonable and in one case the Board found the rate charged was unreasonable. I think the lesson clearly is that each rate case stands on its own and depends on the particular stand-alone railroad designed by the complainant and the particular evidence submitted by the parties. However, the parties have asked us to reconsider each of these decisions, and those are pending before the agency now.

In sum, while major litigation such as large rate cases is expensive and slow, the Board has made progress in helping to ensure that the rate cases before it proceed faster, cheaper and better. I will make it a priority to continue to make more improvements in this area, and more progress is possible.

b. Small Rate Case Procedures

Since I became Chairman, my top priority has been to provide shippers who have smaller rate disputes an effective forum for resolving such disputes where none now exists. It is a difficult issue, one where the Board must be mindful of maintaining the delicate balance between the legitimate concerns of shippers to have a forum to challenge rates that they believe are unreasonable on the one hand, and the need for railroads to earn adequate revenues on the other. It is a difficult balance, but as I will explain below, one I believe the Board can be successful in

striking.

I have spent much of the past 16 months learning why no shippers have brought any small rate cases. Their procedural and substantive concerns can be summarized as follows.

First, shippers contend that the ambiguity of who would qualify to use the small rate case procedures is an insurmountable hurdle that has chilled them from bringing any cases before the Board. Shippers believe that the railroads would fight any shipper's claim that it is entitled to use the expedited procedures, thus tying up the shipper in extensive, expensive threshold litigation. This uncertainty appears to be a major reason why no cases have been brought using the small-case process.

Second, shippers want the Board to ensure that the consideration of small rate cases is expedited and to constrain the discovery process. These shippers argued that protracted litigation of small rate case disputes under the current rules would do them no good because the transportation marketplace for such shipments is so fluid. Many shippers have suggested arbitration as a way of resolving such disputes because of its speed and simplicity. Railroads oppose arbitration, because those proceedings are outside of the strictures of the Interstate Commerce Act and could produce inconsistent results. While mandating binding arbitration is beyond the Board's statutory authority, I also believe it is unnecessary because the small rate case process being developed should be able to accommodate each side's concerns.

I believe that the Board can address these two procedural concerns through procedural reform. Some level of certainty can be brought to the issue of who qualifies for the small rate case procedures, so that if a shipper met that new test, the shipper automatically would be eligible to use the small case process. The Board can streamline the discovery and resolution phases by creating an administrative process that combines the speed and simplicity of arbitration while ensuring that such cases are decided under the framework of the Interstate Commerce Act.

One way for the Board to accomplish these goals is to hire an Administrative Law Judge

(ALJ) to hear and decide small rate cases in the first instance. The ALJ would have a prescribed time period for overseeing discovery and for issuing a decision. The ALJ's decision could then be appealed to the full Board. This would allow cases to proceed with the speed and low cost of arbitration, but also ensure that these matters are decided under the principles of the Interstate Commerce Act.

Beyond procedural concerns, shippers and railroads alike have urged the Board to adopt a rate standard for small cases that is clear, unambiguous, fair, and of course, able to withstand legal challenge. The Board promulgated a standard in 1996, but that standard has been widely criticized and – despite having never been applied – was challenged in court (although the court declined to hear the challenge before the standard is actually applied in a case).

There is no doubt that identifying an appropriate standard for the resolution of these cases is the Board's greatest challenge. It is also the area where it will be hardest to find any consensus. Last year at our hearing on this subject, while I asked the parties to provide suggestions to the Board on revising the small-case standard, none has yet done so.

In the Board's efforts to revise our small rate case procedures, we are pursuing every alternative. For example, last year I assembled a team from within the agency to meet with other economic regulatory agencies to gather information on how they handle smaller disputes. The team talked with other agencies, including the Federal Energy Regulatory Commission, the Federal Communications Commission, the Postal Rate Commission, and the Maryland Public Utilities Commission, in a "best practices" survey to gather information that might inform the Board's ideas.

And the Board's efforts are not focused solely on procedural changes to formal proceedings. I am also exploring whether the Board can institute enhanced informal processes to allow the Board to be more responsive to shipper concerns. While the Board does currently have a Rail Consumer Assistance Program in place, I do believe more could be done in terms of staff

assistance and outreach to make this program an effective enhancement to the rail economic regulatory environment.

Despite the importance of this effort and the priority I place on it, unfortunately the Board has not been able to move forward on a small rate case rulemaking initiative. I have made a judgment that a rulemaking to finalize a new process for resolving small rate cases is significant enough that I should not take such action as a single Board member, even though I have the power to act alone. Although it is uncertain exactly how the Board's final proposal will look, I have outlined several key elements of the process and believe that these will form the core of meaningful reform.

2. Bringing Competition to Singly-Served Customers

A common desire of singly-served rail customers is to gain service from a second, competing railroad. Singly-served rail customers who want to be served by a second railroad may work with that railroad to finance and to apply for authority to construct a new rail line to the singly-served facility to gain rail competition. The Board's experience over the past decade has shown that, despite some recent court setbacks, new line construction can bring competition while maintaining the private-sector characteristics of our rail system.

As the Subcommittee is aware, the Board must approve certain new rail line construction projects. I testified earlier this month before the Subcommittee on the Board's processes for reviewing new rail line construction projects and will not repeat those standards here. But I can assure you that the Board has worked hard to expedite consideration of requests to construct rail lines and to approve them when appropriate. I would like to highlight two such proposals that I believe will, if constructed, provide significant competitive benefits to rail shippers.

First, the Board approved the construction by the Dakota, Minnesota and Eastern Railroad (DM&E) of a line into the Powder River Basin in Wyoming, which, if constructed, will provide enhanced rail transportation options for coal shippers, particularly in the Midwest.

Second, the Board recently approved the construction of a line to provide the Burlington Northern Santa Fe Railway (BNSF), in partnership with a consortium of singly-served chemical shippers in the region, access into the Bayport industrial area near Houston, Texas, which would provide competition to the members of the consortium located there.

While build-ins can increase competition and provide many benefits, the Board has seen recently that the construction of new rail lines can be controversial in local areas. Indeed, both the DM&E and Bayport Loop projects have generated extensive local opposition and spawned court challenges to the Board's decisions in those cases by various citizen and other groups.

In DM&E, the United States Court of Appeals for the Eighth Circuit reviewed the Board's decision, and while the court found the Board had done "a highly commendable and professional job," it nonetheless remanded the matter to the agency for limited additional consideration of a few environmental issues. Although the Board asked the court to reconsider its finding that the Board should look at the environmental impacts of increased consumption of the commodity that would be carried by the transportation project, the court declined. Thus, the Board recently reopened its proceeding on the DM&E project and will work as expeditiously as possible to address those issues remanded to it by the court.

The Bayport Loop case has produced litigation both in Federal court (where the Board's environmental review process was challenged but subsequently withdrawn) and in state court (where the City of Houston is resisting the railroad's attempts to use state condemnation procedures to acquire property needed for the new line). A state court in Texas delayed construction on the grounds that the project's proponents could not use state eminent domain laws to acquire property needed to construct the line. I believe this court's interpretation of state law is preempted by the federal statute that gives the Board authority to determine which proposed rail construction projects should be built.

Despite these two recent court decisions, the Board is confident that it will prevail in both

of these cases. But notwithstanding the litigation that they can generate, construction projects represent the best way to balance the need for greater competition with the importance of preserving the private rail network.

Capital Needs of Freight Railroads

As the Board considers the concerns of captive shippers, it must also keep in mind the concerns of freight railroads, particularly the need for railroads to earn sufficient revenues to invest in capital. While the Board is an economic regulatory agency, the state of railroad infrastructure is inextricably intertwined with every rate and service matter it addresses. Upkeep of rail infrastructure is a key part of the conundrum that has faced the rail industry for several generations – how to provide a level of service that will allow railroads to grow their businesses and provide the level of service expected by shippers while maintaining our freight railroads as viable private entities.

The problem is as follows. The service railroads provide and the rates they charge customers are directly limited by the capacity and reliability of their network. To increase their business or to charge premium prices, railroads must improve service. But, they can only improve service if they increase their capital investments. Railroads cannot increase infrastructure spending because they are not earning their cost of capital. To earn their cost of capital and be revenue adequate, railroads must increase their revenues, which are limited due to the condition of their networks. And thus the problem comes full circle.

As publicly-traded companies, freight railroads must listen to their investors, who are seriously concerned about the returns on railroad capital investments. Since I have become Chairman, I have met with most major figures in the railroad investment community. They all agree that the railroads are not meeting their cost of capital, but they disagree on the solution. Some urge increased capital spending, some say current levels are about right, and others believe railroads should cut back. Many urge railroads to increase revenue by raising prices to existing

customers, rather than by investing to grow their traffic. Railroads face a difficult decision, rooted in the conundrum I referred to earlier.

When the Board considers the rate and service issues raised by shippers, we must balance their concerns against those of the railroads. Our rate standards allow railroads to price their services in a way that will permit them to earn a reasonable return on the facilities needed to serve captive traffic. That is a fundamental principle of railroad economics. As freight and passenger rail traffic grows, there will be infrastructure improvements that should not be deferred if our nation is to maintain a healthy rail industry that can meet the growing demand of the economy for rail transportation, which ultimately works to the benefit of all shippers.

Legislation to Address Shipper Concerns

Finally, I would like to address the legislation that has been introduced in the House and Senate that would address many of the issues raised here today. In the House, two bills address these issues: H.R. 2924, the Railroad Competition Act of 2003 and H.R. 2192, the Surface Transportation Board Reauthorization Act of 2003. Pending in the Senate is S. 919, which is the companion bill to H.R. 2924.

Taken as a whole, legislation such as H.R. 2924, H.R. 2192, and S. 919 would fundamentally change the economic model of the railroad industry and is unwise. Not a single one of our major railroads is revenue adequate, and if enacted these bills would call into question the continued economic viability of our freight railroad system. While some shippers may realize a short-term gain from lower rates, in the long run this legislation of this type, if passed, could significantly degrade our nation's freight rail network, to the detriment of all of its users. Although the nation's privately funded railroad system may have some problems, it is the best freight railroad system in the world, and the United States is the only country with a national freight rail network that does not need taxpayer subsidy.

Most of the provisions of these bills reflect unhappiness with the Board and certain of its

regulatory doctrines. I have met with most of the supporters of these bills, and they almost all agree that they would not be calling for legislation if the Board had interpreted certain provisions of the Interstate Commerce Act differently. But to me, the individual provisions in any bill are less significant than the underlying concerns that gave rise to seeking legislative changes in the first place. Since I have become Chairman I have worked hard to understand the core concerns of captive shippers and the railroads that serve them.

First, many shippers do not have full confidence in the Board as a fair and impartial regulatory body. My most important initiative as Chairman has been to win that confidence through openness and dialogue. During my nomination and confirmation process, there was a great deal of concern expressed about the lack of transparency at the STB. Since I have become Chairman I have taken several steps to change this perception, including restoring regular voting conferences on cases; holding hearings on significant matters such as large and small rate case procedures, and on individual cases and merger proposals; and holding oral arguments on large rate cases. In fact, on Friday, the Board will hold a field hearing in Trenton, New Jersey, related to its five-year oversight of the CSXT and Norfolk Southern acquisition of Conrail, which is due to expire in July of this year. I am pleased that 20 witnesses have asked to testify at that hearing.

Last summer, the Board also held an open house for practitioners to introduce our staff to them and explain how the agency processes cases. I have an open door policy for meetings and have met with many shippers and railroads. I have traveled extensively in the past year to better understand rail transportation. The Board has also redesigned its web-site to provide practitioners, stakeholders, and interested persons easier and more extensive access to Board information, including streaming audio broadcasts of the Board's public meetings. While these may seem like small steps, I believe they have gone a long way to help the agency's stakeholders understand how and why the Board makes its decisions.

Second, many disputes between shippers and railroads often take on a life of their own

because of the way shippers feel they are treated by the railroads. Rail customers often conclude that while rates are high, the railroads' service and attitude are bigger problems.

Rail customers are primarily wholesale enterprises who are themselves industrial and manufacturing companies or producers of goods. Like railroads, these shippers are capital intensive and work on thin profit margins. They have customers who demand top-notch service and low prices, and they have suppliers from whom they demand the same. All operate in a brutally competitive global marketplace. These companies understand the financial pressures railroads are under, but they feel that they are not treated by the railroads the way they would treat their own customers. This has led some shippers to assume that railroads act this way because they are monopolies and to believe that legislation like H.R. 2924, H.R. 2192, or S. 919 would introduce more competition into the rail network and force railroads to be more responsive to them.

Railroads should work harder to operate in a more customer-friendly fashion, and I am working with all of our major rail carriers to impress upon them the importance of doing so. Railroads must be nimble competitors in the transportation marketplace to increase their business and grow their revenues. While the leadership of each of the major railroads understands this, that attitude does not always translate throughout their entire organizations. The good news is that in many circumstances railroads have worked with their customers to improve efficiency and take costs out of the supply chain to the benefit of both parties. But these examples are not common enough, and they must become the norm, not the exception.

Helping railroads improve their operations to provide better service is one goal that carriers, shippers and policy makers all share. The Board has been instrumental in bringing the railroads, the city and the state together to improve operations and devise a capital plan for improving operations in the Chicago terminal area. Approximately one-third of all rail shipments go through Chicago at some point in their journey. Improving Chicago and other rail gateways

will allow for faster, more reliable shipments, to the benefit of all.

But these efforts to improve service through operational focus can only go so far. As we have seen in recent months, the growing economy has sharply increased the demand for rail shipments, and the railroads are short of the crew and equipment necessary to meet this increased demand. Without sufficient capital funds, the railroads' efforts to improve service will not be fully successful.

Third, a fundamental underpinning of these bills is that very few rail shippers feel the Board provides an effective regulatory forum in those instances when carriers and shippers cannot privately resolve their differences and the shipper has no effective recourse.

The agency tries to help parties informally resolve their differences and improve relations between railroads and their customers. The Board's Rail Consumer Assistance Program is a model for informally addressing a wide variety of concerns between shippers and railroads. The Board's Office of Compliance and Enforcement generally acts on inquiries made through this program within four hours and has had some significant successes assisting railroads and shippers to resolve their disputes.

I believe the Board can do more to be an informal facilitator when shippers and carriers have difficulties. Just a few months ago, the Board successfully facilitated discussions to address delays in moving agricultural freight from the upper Midwest that occurred last fall. A confluence of events that affected that region occurred last fall, including a great harvest, an increased demand for grain to export (which meant grain was being transported further distances than normal), an improving economy that meant more traffic of all kinds on the rails, and shortages in railroad crews. As a result of this "perfect storm," the railroad was very late in getting rail cars to some North Dakota shippers. The Governor of North Dakota and some shippers in that state contacted me for assistance, and I hosted meetings and facilitated discussions among the Governor, grain shippers from North Dakota, and the senior management of the railroad that

serves the area. As a result, they agreed to a number of measures to address the problem and work off the backlog. I consider this behind-the-scenes approach a model for resolving similar problems in the future. Of course, the Board can only try to solve the problems, like this one, that it knows about with specificity.

Even with the success of informal Board activities, the Board has to remain an effective regulatory backstop when a dispute over rates and services is formally brought before the Board. No cases have ever been brought under our small rate guidelines, and we must work to change that. But in doing so, the Board must recognize that the economic relationship between shippers and carriers is complex. In many cases, shippers have many facilities – both captive and competitively served – and ship to numerous destinations on several railroads. While the legislation seeks to simplify the shipper-carrier relationship, in reality the relationships between shippers and carriers are enormously complicated and not easily understood. Many shippers do have economic leverage with railroads when the totality of their relationship is considered, and the legislation takes no account of this reality.

Finally, certain areas of the country are disproportionately dependent on rail service in general, and on a single rail carrier in particular, for their economic health. Many who are from the upper Midwest feel that, because of the importance to their states' economies of producing bulk, commodity-based products, their region's economies are particularly dependent upon the business practices of a single railroad.

The Board must pay close attention to the unique set of concerns of rail shippers in that part of the country. I traveled to North Dakota and met with a number of government officials, shippers and producers. I have spoken numerous times with the railroad that primarily serves that area about the issues raised there and, as I indicated earlier, worked to mediate a service dispute there. The issues faced in that part of the country are complex, and not easily resolved.

However, attention – and not legislation – is the best way to resolve the issues faced there, and

while attention may not solve every problem, significant progress is possible if there is communication and focus.

Conclusion

One of my goals as Chairman of the STB has been to ensure that the agency's processes work as well as they possibly can. The first step was to open up the Board. The Board has taken steps to streamline the process for large rate cases, steps which are already working. The Board will continue to reevaluate and refine how the parties and Board staff work through the large rate cases. The next step is to improve the agency's small rate case process.

I believe that the Board can and will do a better job to address the concerns raised by captive shippers. The reforms outlined today – and not substantive changes to the statutory scheme – are the best way to address the concerns raised by captive shippers while maintaining a healthy private freight rail network. It is a difficult balance, but one that can be achieved.

I appreciate the opportunity to discuss these issues today, and look forward to any questions you might have.