

Statement of Roger Nober
Chairman, United States Surface Transportation Board
Subcommittee on Transportation, Treasury, Housing and Urban Development
Hearing on Federal Railroad Administration and Amtrak
April 27, 2004, 10:00 a.m., Room 2358

Good morning Chairman Knollenberg, Ranking Member Olver and Members of the Subcommittee. My name is Roger Nober, and I am Chairman of the U.S. Surface Transportation Board.

I appreciate the Subcommittee's invitation to accompany DOT General Counsel Rosen and Acting FRA Administrator Jamison in order to answer any questions you may have about the responsibility of the Board to direct service of commuter and freight rail operations that fail as a result of a cessation of service by Amtrak.

At the outset, let me briefly explain what "directed service" is. As you know, the Board is the successor agency to the former Interstate Commerce Commission. Among its other missions, the Board is the economic and service regulator of freight railroads. For many years, the Board (and before it, the ICC) has had statutory authority under section 11123 of title 49 to "direct service," or in other words, order another railroad to step into the shoes of a rail carrier that has stopped operating (usually because of the bankruptcy of a freight railroad) and serve its customers. Fortunately, this power is rarely needed.

In section 150 of the Departments of Transportation and Treasury, and Independent Agencies Appropriations Act, 2004 (which was included as Division F in the FY 2004 Consolidated Appropriations Act), this Committee amended section 11123 to clarify that the Board could, in the event Amtrak ceases to operate, direct another carrier or carriers to carry out the functions currently performed by Amtrak that are necessary to continue commuter and freight rail operations. The FY05 Transportation Appropriations Act directed the Secretary of Transportation to reserve \$60 million of Amtrak's FY05 appropriation to fund directed service in the event Amtrak ceased to operate during the fiscal year.

I want to emphasize that the Board takes its statutory responsibilities seriously, and the Board has taken a number of steps since Congress' action last year. Among other things, the Board set up a joint working group with the FRA to coordinate issues. That group has met with all major stakeholders -- including Amtrak, the affected commuter and freight railroads and representatives of labor -- to identify issues. We have compiled all of the services Amtrak provides to commuter and freight railroads, and we have examined legal issues that might arise. However, these planning efforts would need to be significantly supplemented were the need to implement directed service imminent.

With that background in mind, I would like briefly to identify some of the findings the Board would need to make and issues it might need to resolve before the Board could issue any directed service order.

As a threshold matter, the law sets two statutory prerequisites. First, section 11123(a)(5) requires that there must be “a failure of existing freight or commuter passenger rail transportation operations *caused by* a cessation of service [by Amtrak].” (emphasis added) The Board could not enter an order until such a failure occurred. Second, section 11123(c)(4)(B) is clear that “the funding for such directed service … [must be] provided *in advance in appropriations Acts*” (emphasis added). This second finding may be an issue if the cessation arises during a continuing resolution or if this Committee does not provide for directed service funds in the appropriations act for fiscal year 2006, because the Board does not have the power to act unless there is an advance appropriation.

Provided that these two threshold requirements are met, the Board would then have to consider many issues prior to entering any directed service order, including:

- What specific operations would be encompassed under the statute’s direction to maintain “freight and commuter passenger services”;
- To what extent will the amount appropriated for directed service pay for those services;
- Which carrier or carriers would be the directed service providers, including whether Amtrak itself could be the directed service provider;
- Whether such carrier or carriers are operationally capable of performing the service in “a safe and efficient manner” (as required by section 11123(c)(4)(B));
- Identifying which current Amtrak equipment, services and employees filling essential positions are necessary for the continuation of the commuter and freight services;
- Establishing a mechanism to pay these employees; and
- FRA’s plans to ensure the safety of these operations.

Another significant matter that would affect any directed service operations is whether Amtrak has declared bankruptcy. If Amtrak has declared bankruptcy, then the Trustee would be operationally in charge of Amtrak. In addition, a bankruptcy would likely affect the ability of directed service providers, including Amtrak, to use encumbered Amtrak equipment.

Importantly, while matters brought before the Board are often lengthy, in directed service proceedings section 11123 does alter some administrative procedures to allow the Board to act cooperatively and quickly.

Of course, since the Board may be called on to consider these issues, I cannot say how I or the Board would rule on them; rather, I can only identify those issues which we currently know would have to be resolved. And surely as a directed service proceeding evolved, more issues would arise. I can say that I, the other Board Members and the staff would work to the best of our abilities to carry them out in a fair and impartial manner

In conclusion, I thank the Committee for the opportunity to be here today, and am prepared to answer any questions that any Members of the Subcommittee may have.