

TESTIMONY OF

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AT A HEARING BEFORE THE

**U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND
INFRASTRUCTURE**

REGARDING

***H.R. 6707, the Taking Responsible Action for Community
Safety Act (TRACS Act)***

**SEPTEMBER 9, 2008
11:00 A.M.**

**Testimony of Charles D. Nottingham
Chairman of the Surface Transportation Board
Before the U.S. House of Representatives
Committee on Transportation and Infrastructure
Hearing on H.R. 6707, the Taking Responsible Action
for Community Safety Act (TRACS Act)
11:00 a.m. September 9, 2008
2167 Rayburn House Office Building**

Good morning Chairman Oberstar, Ranking Member Mica, and Members of the Committee. My name is Charles D. Nottingham, and I am Chairman of the Surface Transportation Board (Board or STB). I appreciate the opportunity to appear before this Committee today to discuss H.R. 6707, the "Taking Responsible Action for Community Safety Act." The apparent purpose of the bill is to direct how the Board should take certain environmental and safety considerations into account in its decision making in merger and acquisition proposals involving only one large railroad. My testimony will be fairly general, because an issue addressed by the bill is raised in a pending Board proceeding.

The Board's Authority Over Railroad Mergers And Acquisitions. Since 1920, the Board or its predecessor, the Interstate Commerce Commission (ICC), has had authority over railroad mergers and acquisitions involving two or more rail carriers, 49 U.S.C. 11321(a). Railroads may not merge with or acquire another railroad absent prior Board approval, 49 U.S.C. 11323.

For mergers or acquisitions involving two (or more) large (Class I) carriers, the statute, at 49 U.S.C. 11324(b), lists five factors that the Board must, at a minimum, consider: the effect of the transaction on the adequacy of transportation to the public; the effect of including, or failing to include, other rail carriers in the area involved in the

proposed transaction; the fixed charges that would result from the transaction; the interests of rail carrier employees; and the effect of the transaction on competition among rail carriers in the affected region or in the national rail system. Section 11324(c) makes clear that the Board may impose conditions governing the transaction, a power that applies equally to transactions involving small railroads. The courts have consistently recognized that the STB has “extraordinarily broad discretion” in determining whether or not to attach merger conditions to its approval, and in shaping those conditions. Southern Pacific Transp. Co. v. ICC, 736 F.2d 708, 721 (D.C. Cir. 1984); Grainbelt Corp. v. STB, 109 F.3d 794, 798 (D.C. Cir. 1997).

In 1980, Congress changed the standards and procedures for considering railroad mergers and acquisitions that do not involve more than one large railroad. Congress found that over-regulation had contributed to the railroad industry’s financial woes, and so Congress sought “to provide, through . . . freedom from unnecessary regulation, [for] improve[d] physical facilities [and] financial stability of the national rail system.” H. Conf. Rept. No. 96-1430 (1980), at 80. Toward that end, Congress changed the statute to require the agency to rule on smaller transactions (those that do not involve two large carriers) more quickly and it “[reduced] the number of factors the [agency] must consider” (id. at 120) in those cases. Under the current standard, the agency examines whether there would be a substantial lessening of competition or restraint of trade if the transaction were approved.

NEPA. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321-43, generally requires federal agencies to consider “to the fullest extent possible” the potential environmental consequences in every major federal action that could

significantly affect the quality of the human environment. 42 U.S.C. 4332(2)(C). This means that in granting approval for an action that has the potential for significant environmental impacts, the Board must examine the potential impacts, inform the public of those impacts, and generally take those impacts into account in its decision making. Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 97 (1983).

The nature and extent of the agency's environmental review in railroad merger and acquisition cases varies, depending upon the extent to which operational changes and traffic increases are projected as a result of the proposed merger or acquisition. However, the environmental review that the Board has conducted under NEPA in various types of Board cases routinely embraces (where applicable) all of the sorts of safety and community impacts described in H.R. 6707. And the Board has imposed mitigating conditions addressed to those sorts of impacts in various cases in the past.

Discussion. H.R. 6707 would place transactions involving only one large railroad, together with one or more smaller (Class II & III) railroads, under the standard now applicable only to the merger of two or more large railroads. The bill also would amend that standard to specifically enumerate certain safety and community impacts, along with effects on passenger transportation, as mandatory criteria that must always be considered in the analysis.

The legislative history of H.R. 6707 makes clear that the bill comes “in response to an application filed last year by the Canadian National Railway (CN) seeking the STB's approval to acquire control of the 198-mile Elgin, Joliet, and Eastern (EJ&E) rail line encircling Chicago...”¹ As with any case that is pending before the agency, it is

¹ Press Release, U.S. House of Representatives, 110th Congress, Transportation and Infrastructure Committee (Aug. 1, 2008).

inappropriate for me to discuss any aspect of this proceeding while it is pending at the Board.

I understand that the Committee may wish to discuss a legal issue that extends beyond the bounds of the CN/EJ&E case: whether the Board believes that it already has the authority under the current statute to deny, on environmental grounds, a transaction that does not involve two or more large railroads. However, that issue recently has been raised in the CN/EJ&E case.² It is a legal issue of first impression that has not been addressed by the Board or any court. Accordingly, it would not be appropriate for me to discuss that issue at this time.

I should note, however, that the introduction of the bill – purportedly to provide clarity – has to date served primarily to create confusion. Until this bill’s introduction, it had been assumed that the agency has the authority to deny a transaction on environmental grounds. See Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company, STB Finance Docket No. 35087 (STB served July 25, 2008) (Commissioner Buttrey, concurring); see also the Draft Environmental Impact Statement issued on July 25, 2008, at 1. The Board’s environmental staff, along with the parties, have put forth extensive efforts in studying the environmental issues in the CN/EJ&E case. Unfortunately, the overarching premise of this bill – that the Board currently lacks authority to protect the public interest, public safety and the environment – will likely be referenced in litigation by parties seeking to pressure the Board to either approve or deny a pending merger application.

² CN’s pending petition to modify the procedural schedule appears to assume that the Board lacks such authority. The Board has received at least one reply to that petition in which several parties assert that the Board has such authority.

For the record, I would like to take this opportunity to note that the Board neither requested this legislation nor were we consulted during the drafting process. This Board takes its merger review and environmental review responsibilities seriously, and we have always been able to take appropriate action to address the environmental concerns that have been brought before us. If we determine that existing law does not allow us to protect the public interest and the environment, we will not hesitate to seek legislative reform.

I would be happy to respond to any questions, so long as they are not focused on a pending proceeding. Thank you for providing me this opportunity to appear before the Committee.