

12 MR. SMITH: Thank you, Mr. Chairman.

13 CHAIRMAN NOBER: Okay. I'd like to
14 remind all of the witnesses that we have all of your
15 written testimony, and we've had a chance to read it
16 all. So please feel free to summarize any of your
17 comments as you go forward. Mr. Smith?

18 MR. SMITH: Mr. Chairman and members of
19 the Board, good morning. My name is Paul Samuel
20 Smith, and once again it is my privilege to
21 represent the United States Department of
22 Transportation.

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1 The Department has two main points that
2 we'd like to make today, and the first is to ask the
3 Board to consider seriously the suggestions offered
4 last year in this docket.

5 Many of those suggestions were drawn
6 from the Board's then-recent refinement of
7 procedures in major rail rate cases, such as non-
8 binding mediation and accelerated discovery, staff
9 conferences and so forth.

10 The initial review is all pretty
11 favorable on those, and we think they might well
12 prove helpful in these kind of cases as well.

13 The second point is to bring to the
14 Board's attention something the Chairman already
15 alluded to and which we're well aware of in other
16 contexts, and that is the possibility that large
17 portions of the country's rail network are
18 approaching the limits of capacity.

19 There is at least some evidence that
20 points in this direction, and we therefore think
21 that the Board should explore whether and to what
22 extent this is true, for if it is, there are clear

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1 implications for railroad pricing.

2 To illustrate, as a matter of economics,
3 a railroad at capacity would tend to treat
4 incremental demand than a carrier with excess
5 capacity.

6 A railroad without capacity would be
7 less willing to accept traffic that simply made some
8 contribution to fixed costs, whereas such a railroad
9 would have to incur such significant fixed costs in
10 order to expand capacity to accommodate more
11 business. Alternatively, such a carrier might be
12 inclined to restrict service.

13 It is important to keep in mind, of
14 course, that these choices would be made in an
15 industry that overall fails to earn an adequate
16 return on capital.

17 As a matter of law, of course,
18 continuing requirements to charge reasonable rates
19 and to maintain common carrier obligations are most
20 relevant.

21 We therefore recommend that the Board
22 not only consider the past suggestions made in this

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1 proceeding already, but to expand its scope to take
2 into account the prospect of constrained capacity,
3 and its implications for railroad pricing. Thank
4 you very much, and I know I'll try to answer any
5 questions you might have.

6 CHAIRMAN NOBER: Yes. Well, thank you.
7 Commissioner Buttrey?

8 COMMISSIONER BUTTREY: I have no
9 questions.

10 CHAIRMAN NOBER: Commissioner Mulvey?

11 VICE CHAIRMAN MULVEY: Your testimony
12 does focus on the capacity crisis facing the
13 American railroads, and their inability to meet the
14 forecasted demand for rail transportation over the
15 next ten to 20 years.

16 This is a very, very complicated
17 situation. You would normally think in most
18 industries that an industry that's facing this
19 tremendous surge in demand for its services would be
20 eager to try to make the investments necessary to
21 meet it.

22 But railroads think they cannot earn the

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1 return on that investment to justify making those
2 expenditures.

3 That's due to a lot of reasons,
4 including the fact that the railroads face higher
5 costs for certain of their inputs than other firms
6 do, and they also face competition from truckers,
7 who don't pay the total cost of their use of the
8 infrastructure. Many argue they don't pay the full
9 costs of their infrastructure, but that's what the
10 real world is like.

11 Therefore, if the railroads are going to
12 meet this demand, is there anything the Board can
13 do, to help the railroads meet their need to expand
14 capacity?

15 Secondly, what do you think is the role
16 for the Federal government? Is there a role of the
17 Federal government to assist the railroads in making
18 that infrastructure investment, to get that capacity
19 to meet that expected demand?

20 MR. SMITH: I think there is a role for
21 the Federal government. The rail industry is vital
22 to this country's economy and security. It's --

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1 probably the most beneficial steps the government
2 could take would be, would require legislation, that
3 of course would be beyond the ability of this Board
4 to implement.

5 In terms of this Board's authorities,
6 much more limited, of course. You have your
7 requirements to continue to monitor the financial
8 healthiness. You've done that, so there's that
9 information that Congress can use and that you can
10 use.

11 There's a proceeding like this to
12 streamline, in a very admittedly complicated and
13 difficult situation, the cases that do arise because
14 since there are no cases that have been brought
15 under the current procedures and standards for the
16 small cases.

17 Clearly, those are not adequate. Those
18 are not appropriate to meet the needs of all
19 shippers. It cannot be that every shipper, other
20 than major shippers that bring the major cases, are
21 satisfied with their rates and service.

22 I think it would be very helpful, as we

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1 said 15 months ago, to try and get a better
2 understanding on the dimensions of that problem. Of
3 course, the eligibility standards, for whatever
4 shippers and cases might be appropriate for these
5 new procedures and standards, whatever they might
6 be, are an immediate matter of controversy.

7 Some would make them open only to
8 shippers of no more than a certain size. Some would
9 make them open to shipments of no more than a
10 certain size.

11 So I wish I could be more creative
12 myself in offering to you the kinds of things that
13 would be helpful in putting some concrete
14 regulations, procedures and standards in place. I'm
15 afraid I really cannot.

16 CHAIRMAN NOBER: Mr. Smith, I mean, you
17 mentioned something that I had mentioned as well,
18 which is the impact of the needs of capacity on how
19 we would look at this. How would you have us do
20 that? What suggestion do you have? How would we
21 take that into account?

22 MR. SMITH: Well, I think the capacity

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1 is a factor that, of course, relates to more than
2 just this proceeding, and it has very broad impact
3 upon the industry and upon the economy beyond that.
4 That might take more time.

5 I don't know that I would recommend
6 doing nothing while you determine the existence of
7 the problem where it might be, whether it's just
8 seasonal, as it has been in the past, and so on and
9 so forth.

10 I would recommend moving forward on more
11 finite, more narrowly-focused procedures and
12 standards that might apply in these cases, but by
13 all means moving forward simultaneously with an
14 exploration of the capacity and how economically and
15 legally that would impact upon, in some cases, even
16 the major rate cases and not just these.

17 CHAIRMAN NOBER: Is it the Department's
18 position that there should be some changes to our
19 current standards?

20 MR. SMITH: I think there has to be,
21 because these have just simply proven not attractive
22 to any kind of shipper.

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1 CHAIRMAN NOBER: So the status quo is
2 unacceptable in the Department's view?

3 MR. SMITH: I think that's right.

4 CHAIRMAN NOBER: Okay. Well, thank you.
5 Anybody else have any questions?

6 VICE CHAIRMAN MULVEY: No.

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