

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

+ + + + +

ORAL HEARING

MORNING SESSION

=====||
IN THE MATTER OF:

COMMON CARRIER OBLIGATION
OF RAILROADS
=====||

||
|| STB Ex Parte
|| No. 677
||
||
||

Thursday,
April 24, 2008

Surface Transportation Board
1st Floor Hearing Room
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

CHARLES D. NOTTINGHAM	Chairman
FRANCIS P. MULVEY	Vice Chairman
W. DOUGLAS BUTTREY	Commissioner

T-A-B-L-E O-F C-O-N-T-E-N-T-S

Panel I: Members of Congress and Guests

The Honorable Peter A. DeFazio, U.S. House of Representatives	5
Coos-Siskiyou Shippers Coalition, Allyn C. Ford	3
The Honorable Ron Wyden, U.S. Senate	68
The Honorable Gordon Smith, U.S. Senate	83

Panel II: Freight Railroads

BNSF Railway Company, Richard E. Weicher	112
Union Pacific Railroad Company, J. Michael Hemmer	123
Kansas City Southern Railway Company, David C. Reeves	133

Panel III: State Government Interests

Washington State Department of Transportation, Scott L. Witt	188
National Association of State Departments of Agriculture, Roger Johnson	203

PANEL IV-A: State Governments, Grain Shippers and Agricultural Interests

State of Montana, John Cutler	231
Idaho Wheat Commission, et al., Terry C. Whiteside	242

T-A-B-L-E O-F C-O-N-T-E-N-T-S

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

**PANEL IV-A: State Governments, Grain Shippers
and Agricultural Interests (continued)**

National Grain and Feed Association, Kendell W. Keith	253
North Dakota Grain Dealers Association, Steven D. Strege	261
Ag Process, Inc., Terry J. Voss	271
Frank Bros. Feed & Grain Co., John M. Frank	278

Panel IV-B: Chemical Shipper Associations

American Chemistry Council, Jack Gerard . .	316
The Chlorine Institute, Inc., Arthur Dungan and Paul Donovan	326
The Fertilizer Institute, Bob Felgenhauser	335

Panel IV-C: Chemical Shippers

Dow Chemical Company, Cindy Elliott	407
Calabrian Corporation, Charles E. Cogliandro	418
DuPont Company, Gary W. Spitzer	430

Panel IV-D: Chemical Shippers

U.S. Magnesium LLC, Howard I. Kaplan . . .	464
Total Petrochemicals USA, Inc., Bernard Claude	473
Occidental Chemical Corporation, Robin A. Burns	482
Olin Chlor-Alkali Products, John McIntosh .	492

Panel IV-E: Associations

The National Industrial Transportation League, Doug Kratzberg and Nicholas DiMichael . . .	528
---	-----

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

9:02 a.m.

CHAIRMAN NOTTINGHAM: Good morning and welcome. We are honored today to be joined by several members of Congress in due course, one of whom is with us right now. It is our custom not to keep these distinguished guests waiting.

Therefore, with the concurrence of my fellow board members, we will defer our opening statements and welcome Congressman Peter DeFazio to our hearing today. I will note that as I made my way to work I listened to Congressman DeFazio on C-Span. He has already done at least one event this morning.

Congressman, I recommend you consider your scheduler for a raise. That's not our business but we are honored to have you here. On behalf of my colleagues, welcome. Take as much time as you need. When your colleagues from Oregon, the two senators arrive in due course, we'll do our best to work them right in immediately and will not keep them waiting as well. Thank you.

1 CONGRESSMAN DeFAZIO: Thank you, Mr.
2 Chairman. I think your custom perhaps could be
3 well adopted in Congress. I always find it
4 puzzling that we invite people in to testify and
5 then the people we work with every day feel that
6 they have to hold forth for sometimes hours on
7 end before we hear from the people invited to
8 testify.

9 I appreciate the curtesy and we will
10 try and return the favor the next time you come
11 before the Hill. Probably can't get down to no
12 opening statements but we can sure cut them down
13 in my opinion.

14 I come not before you as an expert.
15 You all are the expert on these issues but
16 clearly given the crowd here today this
17 particular topic has excited a lot of interest.

18 If it will not be problematic since I
19 know the Board also is involved in a potential
20 enforcement, I am going to mention a specific
21 case which I realize you may not be able to
22 comment on but I think often we are instructed by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 specific instances in terms of how the law and
2 the regulations really are working to serve the
3 public or not properly serve the public.

4 The common carrier obligation
5 obviously is vitally important and with
6 increasing fuel prices I think even more burdens
7 are going to be turned toward rail and we have to
8 see how we are going to be able to accommodate
9 them. We are trying to deal with that issue on a
10 policy basis and obviously you are trying to deal
11 with it on an ongoing oversight enforcement
12 basis.

13 I'm going to talk about the carrier-
14 imposed requirements for infrastructure
15 investments by shippers and the proper use of
16 fuel embargoes in particular. As I mentioned,
17 I'm going to talk about a situation in Oregon.

18
19 We had the CORP, which is a
20 subsidiary of RailAmerica and RailAmerica has now
21 been purchased by a hedge fund which is another
22 topic of concern to me, the ownership of these

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 vital assets. We all know that we are constantly
2 engaged and, yes, you are engaged in a discussion
3 before the Rail Subcommittee, or the day before
4 yesterday, about the need for capital investment.

5
6 The nature of the capital can
7 determine whether we get the needed investments.
8 I think there would be substantial agreement that
9 virtually all of our rail infrastructure needs
10 investment if it's going to play a key role in
11 the expansion of the burden we are putting on it.

12 In this case the CORP of running a
13 short line down between Coquille and Vaughn,
14 Oregon was closed rather precipitously, less than
15 24 hours notice, to the shippers. There were
16 questions about the need for the closure so I
17 asked the FRA to review it and the FRA said, in
18 fact, that they felt that those unsafe conditions
19 exist.

20 Now, the unsafe conditions did not
21 arise overnight. RailAmerica had owned the line
22 for 10 years at the time of the embargo and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Fortress Investment purchased RailAmerica last
2 year and one would assume that such a
3 sophisticated group of investors would have done
4 their due diligence and they would have known of
5 the condition of the line.

6 In fact, Mr. Griles from RailAmerica
7 testified before the committee said, yes, they
8 knew about it and he said, "You knew about it,
9 too." I don't know what that meant but, in any
10 case, I didn't purchase it. I just happened to
11 represent the District. It was served by the
12 line.

13 Then the confusion ensued from the
14 precipitous closure. This, I think, perhaps is
15 instructive for the Board and for future
16 instances. They had known of the condition, the
17 general deterioration at least over 10 years.

18 They had more specifically brought in
19 a consultant, Shannon & Wilson, who conducted a
20 study of the line between March 30th and July
21 9th. Again, they must have had at that point
22 much more specific knowledge of the problems on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the line, CORP and RailAmerica.

2 It was 73 days later with no notice
3 that the line was embargoed. Now, at the time of
4 the embargo they did say that they were going to
5 embargo any future shipments but they were going
6 to operate to bring their equipment out and not
7 strand it at the far end of the line.

8 Although that certainly wouldn't have
9 been a major help but it would have been some
10 help to shippers if as they had brought out the
11 equipment they had brought out that one last
12 load.

13 That would have given the shippers at
14 least a few days to begin to make alternate
15 arrangements since generally they were running a
16 couple a trains a week but the shippers were not
17 given that curtesy. The train and the cars left
18 and the cargo stayed behind.

19 This has had a dramatic impact. We
20 had very quickly a saw mill that temporarily shut
21 down laying off 120 people. The small businesses
22 served by this line are seeing cost that are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 between 10 and 15 percent. Today I would expect
2 more with fuel prices and the premium surcharge
3 for trucking.

4 Now, much confusion has arisen since then as to
5 how we can get the embargo lifted. Clearly there
6 is tunnel work that needs to be done.

7 The RailAmerica and CORP announced
8 via press conference to the shippers and the
9 state that they had a plan and the plan was that
10 four-fifths of the cost would be paid by other
11 than RailAmerica or CORP and that all of the
12 operating cost would be subsidized by the State
13 of Oregon.

14 That wasn't acceptable and obviously
15 neither the shippers nor the state had been
16 involved in any discussions prior to the press
17 conference despite the protestations, again, of
18 Mr. Griles at the hearing where he said they had
19 worked with all parties. You will hear from
20 Allyn Ford with the Coos-Siskiyou Shippers
21 Coalition later to make clear there were no
22 discussions.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I asked given the fact that was not
2 well received if the Governor would host a
3 meeting of all the principals and bring in
4 everybody and see if we could work something out
5 because this is a vital line. The shippers have
6 indicated they would be willing to pay more.

7 The state says that they are willing
8 once the line is reopened to consider working
9 with the rail company. In fact, Oregon, I think,
10 is a leader among many states. We have something
11 called Connect Oregon where our state is
12 partnering with Union Pacific, no easy thing to
13 do.

14 They are really adverse to being
15 involved with the government anyway but they felt
16 Oregon was making a benign offer and they worked
17 together to enhance capacity on the main line
18 through the valley by partnering on building
19 sidings. I think the state has shown that it is
20 willing to work in partnership with rail
21 companies.

22 In this case the Governor said if

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 they would reopen the line, the state would sit
2 down with them and work on the longer-term issue
3 of their cost and other problems along the line
4 but the Governor said, "We've just got to get it
5 reopened and then we'll sit down."

6 CORP said they would consider that
7 but they came back with a different proposal
8 which, again, seems pretty heavily weighted on
9 their side. The state would pay all the costs
10 under their new proposal but they would get 50
11 percent ownership in the line and there are other
12 conditions and perhaps folks can go into that.

13 I really feel that we haven't seen a
14 real good faith effort here on the part of CORP
15 and the question becomes what are their
16 obligations under embargo? When does an embargo
17 become an abandonment? I know the Board again is
18 looking at potential enforcement action there so
19 we probably can't get into too much discussion
20 about that today.

21 I think that is probably a policy question
22 that you may cross in this one particular case

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 but you may have to look at in the future because
2 I assume we are not unique in this instance.
3 There has been tremendous disinvestment in the
4 rail network and America and I expect there are
5 other places where unsafe conditions are going to
6 crop up that may lead to the need for closer.

7 Then the question becomes if an
8 embargo for safety purposes is put in place, how
9 does one demonstrate that the owner of the asset
10 working in good faith with the shippers and other
11 affected parties to get the lines reopened. I
12 guess the reasonable amount of time for an
13 embargo is something that probably has not been
14 particularly defined.

15 I am certain there are precedents
16 that you are aware of before the Board. In this
17 case I think what started as a proper embargo,
18 which we would all agree that tunnels were
19 unsafe, has now sort of devolved into a
20 questionable use of an embargo.

21 It's seemingly an embargo that will
22 stretch into the future because CORP has further

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 said they have no plans for abandonment, but they
2 have also said that the line is not profitable
3 and they are not anxious to reopen it and operate
4 it. Then that really brings us back to the
5 common carrier obligation.

6 Can we leave these communities and
7 these shippers in an indefinite limbo or is there
8 a point at which there is going to have to be an
9 abandonment or some other process that might
10 allow another operator or the shippers an
11 alternative for the future.

12 I am pleased to be here today and,
13 again, I understand that you are looking at
14 enforcement action and perhaps we can't discuss
15 the specifics too much but I think in these
16 specifics are questions of policy that will
17 probably confront the Board and other short lines
18 and other shippers around America again in the
19 future.

20 I thank you for the opportunity and
21 would be happy if you have any questions you
22 would like me to address that you address those

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 questions. Thank you, Mr. Chairman.

2 CHAIRMAN NOTTINGHAM: Thank you,
3 Congressman DeFazio. Just a couple brief
4 questions. We won't keep you here too long I can
5 assure you. You mentioned 120 layoffs and some
6 of the economic hardship that has been caused by
7 this embargo in your state by the CORP railroad.

8
9 Can you elaborate on that? We have
10 also received letters and met with a number of
11 shippers who talked about just enormous financial
12 hardship. Sometimes here in Washington we get a
13 little insulated as to how the real economy
14 works.

15 You have very much a timber and
16 lumber oriented economy in that part of the state
17 is my understanding. It is very dependent on
18 rail transportation. You basically have no such
19 rail transportation now. If you could just help
20 us understand that.

21 CONGRESSMAN DeFAZIO: Sure. Well, I
22 think, again, Allyn Ford can address in much

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 greater detail. We are looking at a sector that
2 is already been hit fairly hard because of what
3 is going on in the mortgage market and with
4 housing but there is still ongoing demand for the
5 product.

6 Obviously the prices are down. We
7 are confronted with the time where basically we
8 have seen some decrease in demand and some
9 decrease in potential profitability or price. At
10 the same time we now find that the cost effective
11 shipping alternative for the lumber and wood
12 products does not exist.

13 And to access rail, in particular now
14 problems are coming up also with the Siskiyou
15 line in the CORP, again something Allyn Ford can
16 address. Most dependably they would have to
17 truck the product all the way up to Union Pacific
18 in Eugene in order to access dependable rail
19 service at this point in time. When it rains it
20 pours.

21 UP is having problems out of Eugene
22 because their main line over the mountain

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 suffered a catastrophic landslide the likes of
2 which no one has ever seen. It has reopened now
3 for limited service but they were having to
4 reroute all the way up around through Portland
5 and down the other side for a while.

6 We have both the challenge of both
7 the limits being proposed on the Siskiyou and the
8 cost increases being proposed there, the closure
9 of the Coos line, so that has had a dramatic
10 impact on the lumber wood products. There is
11 another company, American Bridge, who was
12 affected.

13 Their main facility is here on the
14 east coast but they decided in order to be more
15 competitive in the west and midwest they would
16 open a facility in Oregon and they have in my
17 district on the coast. What is critical to them
18 they have components that cannot even be shipped
19 by truck. They have to go on rail because of
20 weight and size.

21 I guess maybe this is a harder thing
22 to actually document but they are foregoing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 bidding on a number of projects just because they
2 can't -- I mean, they have no way of getting the
3 product there. You have the lumber and wood
4 products and you have a bridge manufacturer.

5 Obviously we clearly have a
6 tremendous demand for bridge manufacturing and
7 repair in this country given my other role as
8 Chairman of the Surface Transportation
9 Subcommittee we have 175,000 bridges in America
10 that are either structurally deficient or
11 functionally obsolete and we are trying to
12 address that issue.

13 Now we have a company in my district
14 that potentially has a lot of work that can't
15 even bid on that work because of the loss of rail
16 access. This is not an area that has a
17 tremendous amount of alternatives. The only
18 other major alternative is fishing and we are
19 about to see a total closure of the salmon
20 fishery. I know that's not your jurisdiction but
21 it's very, very difficult times for the people on
22 the coast.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 At least if we could get the rail
2 access we would be able to be assured of the jobs
3 at American Bridge. Probably see that company
4 grow and our lumber and wood product folks would
5 be, again, more competitive in what is a
6 difficult market.

7 CHAIRMAN NOTTINGHAM: Thank you. I
8 am familiar with the American Bridge Company and
9 their situation. I come from a highway
10 background, Federal Highways, and before that
11 Virginia Department of Transportation. I can
12 tell you, as you know, there is not enormous
13 competition when you get into some of the
14 sophisticated providers of steel and bridge
15 components.

16 My understanding is American Bridge
17 was positioning itself to serve the western
18 coast. California, for example, has some
19 significant plans to do some major projects so it
20 is a very tough situation.

21 This might sound like an odd question
22 from the STB but I want to ask about weather. We

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 heard a lot of things last fall, as you did in
2 the press, coming from CORP and RailAmerica. We
3 heard about, of course, the safety concerns.
4 Those seem to have been endorsed or ratified or
5 confirmed by the Federal Railroad Administration.

6 Then we heard almost
7 contemporaneously with the closure about the lack
8 of profitability of the line as perhaps the
9 reason for the railroad to not be in a rush to
10 reopen. Then we heard about weather. It rains a
11 lot in Oregon in the winter months and that
12 wouldn't be, perhaps, a smart time to initiate
13 challenging tunnel reconstruction repair.

14 That resonated a little bit with me
15 being from a highway background. Weather can
16 often dictate the schedule of a complex
17 infrastructure job. I know you are in Washington
18 probably more than you would like to be and not
19 at home but is it drying out there?

20 CONGRESSMAN DeFAZIO: No.

21 CHAIRMAN NOTTINGHAM: I know here in
22 the east coast it's spring and a lot of projects

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 are starting to move forward.

2 CONGRESSMAN DeFAZIO: Normally we
3 have spring before Washington has spring. This
4 is one of the most severe winters we've suffered
5 in a very long time. I was just home last
6 weekend and it actually snowed which has never
7 happened in April before on the west side that
8 anyone is aware of.

9 We are waiting for our weather to
10 change. Inevitably it will. One day we will
11 wake up and it will be as nice or nicer than this
12 and we'll get into what is typically a very long
13 dry spell.

14 I guess the issue there is I think
15 it's plausible that it would have been very
16 difficult, if not impossible, to do the major
17 tunnel work. There is other work that they have
18 talked about that I think perhaps the track work
19 and other could have been conducted during the
20 winter season, at least in certain areas.

21 I guess the key thing is do they have
22 someone lined up and are they ready to go as soon

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 as things dry out. As far as I know, there are
2 no immediate plans even when weather and
3 conditions do permit to begin construction. We
4 might miss that window for this year if they
5 aren't geared up, committed, and ready to go by
6 the time the construction season begins.
7 Granted, it is a bit later than usual this year.

8 CHAIRMAN NOTTINGHAM: Thank you. I
9 would like to defer to Vice Chairman Mulvey.

10 VICE CHAIRMAN MULVEY: Thank you very
11 much, Chairman Nottingham. I want to welcome
12 Chairman DeFazio to our committee. I had the
13 honor and pleasure of working with him and for
14 him when I was at the T&I Committee. I'm very
15 happy to see him here today.

16 You mentioned the embargo and the
17 problems with embargoes and I can assure you one
18 of the concerns and one of the things that has
19 triggered this hearing has been the alleged
20 misuse of the embargo process by railroads which
21 have caused them to quasi abandon or use it for
22 abandoning lines when they put on these embargoes

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that become permanent. It's one of the things
2 that concern us, especially today.

3 The situation you referred to is in
4 the Port of Coos Bay. Coos Bay, as I recall, has
5 a lot of potential to develop and that
6 development could be impeded if there is not
7 adequate rail access. Do you want to discuss
8 that a little bit?

9 CONGRESSMAN DeFAZIO: Sure. Coos Bay
10 actually, you know, as many people are aware our
11 ports on the west coast are at this point at or
12 above capacity, tremendous congestion for Long
13 Beach, Seattle, Takoma. Port of Portland is not
14 at capacity but it's a very long run up the
15 Columbia River.

16 The Port of Coos Bay is actually
17 ideally situated in terms of being in the middle
18 of the Oregon coast. If it could feed into the
19 main lines or UP or Burlington Northern just
20 north of Eugene, it's an excellent transshipment
21 point and an alternative without sitting in a
22 line of ships that goes far out to sea.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Coos Bay has a new and very active
2 port commission the last few years. In
3 particular they have been in serious discussions
4 with Maersk about the potential for a major
5 container facility there because unique
6 characteristics exist in Coos Bay.

7 Not only the very convenient and
8 short run into the harbor, but also the fact that
9 the port actually has developable properly zoned
10 already vetted ready-to-go land that would allow
11 uniquely unit trains to be put together without
12 an incessant number of pulls.

13 Basically you could put together with
14 one pull a unit train out of Coos Bay. That's
15 unique. Property values are certainly lower than
16 the other major port areas and the land is
17 available which it isn't in many of our other
18 major port areas.

19 That has raised concern among a
20 number of us, particularly myself, whether or not
21 CORP would like to string this embargo out until
22 such a time -- I mean, there is no commitment yet

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 from Maersk but this has tremendous potential.

2 What you have here is a potentially
3 very valuable asset but in the interim it's, as
4 they said, the Coos Bay line just doesn't have
5 enough business on it today to justify us making
6 the repairs. I think they potentially profit
7 from an indefinite embargo.

8 Obviously it's detrimental to the
9 existing businesses but they could be betting on
10 the upside which is if Maersk comes in, then we
11 are in the cat bird seat here with a tremendous
12 asset for the future which, of course, is
13 something that hedge funds are very good at
14 doing.

15 They bet on futures and I think
16 that's what we see here is a bet on the future.
17 The problem is I don't think they should be
18 allowed to essentially embargo their common
19 carrier obligation for an indefinite period of
20 time while they wait to see whether or not their
21 asset becomes more valuable.

22 VICE CHAIRMAN MULVEY: Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRMAN NOTTINGHAM: Commissioner
2 Buttrey, any questions?

3 COMMISSIONER BUTTREY: Thank you, Mr.
4 Chairman.

5 We certainly welcome you here today,
6 Congressman. We appreciate very much your taking
7 time out to come down.

8 CONGRESSMAN DeFAZIO: This is my
9 second visit. I think I might be one of the few
10 members of Congress to come twice but I thank you
11 for the opportunity.

12 COMMISSIONER BUTTREY: You probably
13 do hold the record for that at the moment. We
14 appreciate very much your coming down and sharing
15 your views with us. We can tell by listening to
16 the tone of your voice that this is a great
17 concern to you and I'm sure you certainly know
18 that our determinations here are not based on
19 compassion and sympathy.

20 CONGRESSMAN DeFAZIO: I understand.

21 COMMISSIONER BUTTREY: Although I can
22 tell you that there is compassion and sympathy

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that is alive and well here. I happened to grow
2 up in a very rural part of my home State of
3 Tennessee where logging and lumber is a very big
4 deal.

5 I think we bought our little farm
6 many years ago for \$2,000 and sold the timber off
7 about a month later for about \$15,000. That was
8 a pretty good deal for us. I, for one, sort of
9 understand what you're talking about and have
10 sympathy and compassion for the people that are
11 affected by this.

12 I'm thinking primarily when I talk
13 about people that are affected by this I'm
14 talking about the people who go to work everyday
15 and work in the sawmill down there. This in many
16 cases means these people don't have brokers and
17 401(k)s.

18 These are people who are working
19 basically paycheck to paycheck essentially. At
20 least the ones that I knew worked that way. I
21 means basically jerking up their family, taking
22 the kids out of school, and moving some place

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 where there is a sawmill still operating.

2 Frankly, there aren't very many
3 sawmills operating anymore in this country. Not
4 only in the lower 48 but in Alaska and other
5 places. It's a real sensitive issue for me
6 because I have been close to it before. I just
7 want to let you know we will be seriously
8 considering these issues as we go forward and we
9 appreciate very much your coming down and sharing
10 your views with us.

11 CONGRESSMAN DeFAZIO: I appreciate
12 that, especially since at times we've been in
13 rather fierce competition with some of the
14 southern providers in terms of the U.S. market
15 and also obviously with the Canadians. It is a
16 very competitive market place and with the
17 decrease in demand. Right now, as I said, there
18 is ongoing demand.

19 In particular I have a couple of
20 firms. Again, I believe Mr. Ford may be more
21 specific about this. It's my understanding that
22 a couple of companies that are family owned are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 at the moment perhaps losing money but continuing
2 to operate. The closer they can come to breaking
3 even, the more likely it is they will be able to
4 keep that up for a while until the markets pick
5 up again.

6 This 10 or 15 or 20 percent margin on
7 transportation is that difference for them. I
8 mean, if they weren't paying that much more, they
9 would be perhaps slightly in the blue on the
10 profit side.

11 I have a lot of operators in Oregon
12 who are older family firms and they try and keep
13 their workers on because they realize markets
14 will come back. When you compound the market
15 problems with the shipping problems it becomes
16 very difficult for them.

17 CHAIRMAN NOTTINGHAM: Chairman
18 DeFazio, just please know that this Board is here
19 as a resource to you and your constituents. We
20 will stay with this controversy as long as it
21 takes to make sure it gets to an outcome that
22 comports with the law and also ensures that the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Board is stepping up in meeting our obligations.

2

3 We have sent already in the last few
4 months a couple senior staff out to Oregon to
5 better understand the situation on the ground to
6 meet with stakeholders. We have invited and have
7 had the CEO of RailAmerica come to our offices
8 along with a number of the stakeholders, shippers
9 from Oregon, to conduct some informal
10 negotiation.

11 Now we have, as you know, in the
12 record we have called on the railroad through a
13 Show Cause Order to make some very specific
14 responses to us which we will be receiving soon.
15 We will have RailAmerica before us later in this
16 hearing.

17 You will be hearing more from the
18 Board on this and we appreciate the information
19 you provided today. Thank you for your service
20 to our country and look forward to working with
21 you in the future.

22 CONGRESSMAN DeFAZIO: Thank you, Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Chairman. I thank the other members of the
2 Board. We still miss you, Frank, especially as
3 we are confronting some of these very big policy
4 issues about rail these days. Thank you again.
5 I appreciate the consideration and just on behalf
6 of those I represent, we appreciate the fact they
7 do have recourse.

8 There are laws. Even when dealing
9 with a local firm that has been bought by a
10 national firm that's been bought by an
11 international hedge fund there still is recourse
12 for our citizens. That is the great thing about
13 America. Thank you very much. Appreciate it.

14 CHAIRMAN NOTTINGHAM: Thank you,
15 Congressman.

16 We will now return to member's
17 opening statements and advise that we have two
18 members of the United States Senate who will join
19 us soon so we will be keeping our eyes open for
20 them. When they do arrive we'll bring them
21 forward along with the rest of the first panel
22 including Mr. Ford from the Coos-Siskiyou

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Shippers Coalition.

2 Again, welcome to all of you here
3 this morning. Today we will hear testimony on a
4 topic that has generated much interest both
5 within and outside this agency, the common
6 carrier obligation. I am sure that it will be
7 often mentioned today that the common carrier
8 obligation is a long standing legal principle.

9 In fact, as one historian has noted,
10 the principle that common carriage is open to
11 all, upon reasonable request, has been imposed
12 upon transportation companies as a feature of
13 English common law since the Middle Ages, and its
14 roots go back even farther, to commercial codes
15 enacted by the Roman Empire.

16 Today, that common law principle, as
17 it applies to railroads, is codified in the
18 Interstate Commerce Act, in the provision stating
19 that "a rail carrier providing transportation or
20 service subject to the jurisdiction of the Board
21 . . . shall provide
22 the transportation or service on reasonable

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 request."

2 At the heart of the Board's mission
3 is our responsibility to serve as a forum for
4 resolving disputes, both formal and informal,
5 between shippers and railroads (and even between
6 a railroad and another railroad) regarding
7 whether, and how well, the railroads are carrying
8 out that obligation to "provide service on
9 reasonable request."

10 Recently, for example, a shipper in
11 Lubbock, Texas, complained that it was receiving
12 inadequate service from the railroad serving it.
13 In that case, the Board first issued an order
14 permitting another railroad to operate over the
15 incumbent railroad's lines to serve the shipper,
16 and ultimately, we forced the incumbent railroad
17 to sell its line to another carrier that
18 demonstrated a commitment to improved rail
19 service to shippers.

20 This particular "forced sale" was
21 complex and lengthy, but demonstrates this
22 Board's commitment to enforcing the common

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 carrier obligation and protecting shippers from
2 unreasonable denial of service. The Board acted
3 to preserve shippers' service options in another
4 recent case in Ohio involving a railroad that
5 would not let another railroad cross its line.

6 In that case, a Class I railroad had
7 unilaterally removed the crossing diamonds that
8 were needed for a short line to serve several
9 potential shippers.

10 The Board made clear that a carrier
11 may not undercut another carrier's ability to
12 fulfill its common carrier obligation by
13 unilaterally severing track of the other carrier
14 that is part of the national transportation
15 system. The Board directed the Class I carrier to
16 promptly reinstall the crossing.

17 And pending before the Board right
18 now, as Congressman DeFazio has discussed, is a
19 proceeding involving a line of railroad at Coos
20 Bay, Oregon, which was embargoed by the short
21 line that owns it last fall.

22 In that case, we are looking into

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 whether that railroad has violated its common
2 carrier obligation by failing to restore the line
3 to service (and failing to even begin the process
4 of restoring the line to service). In fact, we
5 will hear testimony at this hearing from some of
6 the principals involved in that case.

7 As we examine today and tomorrow many
8 of the questions and controversies related to the
9 common carrier obligation, one thing is clear:
10 the common carrier obligation must not be allowed
11 to be re-defined, either by railroads or by
12 shippers, in a manner that is inconsistent with
13 the broad public interest in the free flow of
14 interstate commerce.

15 However, exactly what is a
16 "reasonable request" for service is a matter of
17 great debate as is revealed in the statements you
18 have filed with us. There are tensions and trends
19 surrounding the common carrier obligation that I
20 am sure we will hear discussed today, including:

21 The railroads need to make market
22 based decisions versus the national interest in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 ensuring that all markets are served; The status
2 of exempt commodities, which the Board has found
3 are not subject to a common carrier obligation
4 unless the exemption is revoked;

5 The trend in agricultural
6 transportation towards large unit trains and the
7 effects of that trend on single-car shippers;

8 The effect of the modern day tort
9 liability system and security concerns, and
10 resulting insurance costs on the common carrier
11 obligation;

12 Whether service to a shipper can be
13 conditioned on a shipper contributing to the
14 capacity investment the railroad would need to
15 serve that shipper.

16 The strain on the common carrier
17 obligation is even more acute given the
18 transportation trends that demonstrate there will
19 be increased pressure on the railroads to carry
20 more and more freight, in light of factors such
21 as highway congestion, truck driver shortages,
22 and increased fuel costs that make rail more

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 attractive than less fuel efficient modes.

2 We heard about many of those trends
3 just over a year ago, when we gathered in this
4 hearing room to discuss infrastructure demands
5 and capacity constraints in the railroad
6 industry.

7 At that hearing, a representative of
8 one of the Nation's ports testified that
9 container traffic typically carried by truck or
10 rail entering North American ports from overseas
11 will grow by more than 100 percent by the year
12 2020, from over 48 million Twenty Foot Equivalent
13 Units in 2005 to an anticipated 130 million TEUs.

14 Furthermore, representatives of the
15 Class I railroad industry testified that despite
16 their plans to increase investment levels in the
17 system every year they would not maintain a pace
18 to actually keep up with demands. We look
19 forward to getting into these and all the other
20 issues today.

21 At this point I would like to turn
22 over for his opening comments the dias to Vice

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Chairman Mulvey.

2 VICE CHAIRMAN MULVEY: Thank you
3 Chairman Nottingham. I want to thank my fellow
4 Board members for agreeing to hold this hearing,
5 and our staff for their preparation assistance.
6 Good morning and welcome to our panelists and
7 other attendees.

8 I have thoroughly read the testimony
9 submitted for this hearing, and there was a
10 considerable amount of it, and I am eager to
11 engage in discussion with our panelists. I also
12 want to thank those stakeholders, including rail
13 labor, who submitted written testimony only,
14 which I found very helpful in framing our inquiry
15 today.

16 I want to add that I am dismayed that
17 some witnesses believe the Board is holding this
18 hearing today to build a foundation for reducing
19 the scope of the common carrier obligation, and I
20 am quite frankly puzzled as to how this
21 misperception has arisen. That is certainly not
22 my intention and I don't believe it was that of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the other Board members.

2 I recognize there is a tension
3 between the concepts of the railroads as
4 organizations with significant public utility
5 characteristics and as private enterprises that
6 must maximize profits for their shareholders. The
7 purpose of this hearing is to explore that
8 tension.

9 Historically, the common carrier
10 obligation has cast the railroads in the role of
11 public utilities. But, I have heard some railroad
12 executives claim that the railroads today no
13 longer have any common carrier obligation because
14 the vast majority of rail traffic either moves
15 under contract or is exempt from Board regulation
16 because it is considered intermodally
17 competitive. This disturbs me.

18 What does the concept "common carrier
19 obligation" mean today? Has it changed in recent
20 years and if so, how and why? Are any of the
21 railroads' current marketing and operating
22 practices inconsistent with the common carrier

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 obligation?

2 And finally, what is the
3 responsibility of the Board and the legislature
4 to ensure that railroads live up to their common
5 carrier obligations? These are some questions I
6 hope we will explore today.

7 Thank you very much Chairman
8 Nottingham.

9 CHAIRMAN NOTTINGHAM: Thank you, Vice
10 Chair Mulvey.

11 Commissioner Buttrey.

12 COMMISSIONER BUTTREY: Thank you, Mr.
13 Chairman. The term "common carrier obligation"
14 has been around for a long time. It is said to
15 arise in statute, yet the Interstate Commerce Act
16 does not define that precise term. That Act does
17 have a section, section 11101, with the heading:
18 "Common carrier transportation, service and
19 rates."

20 In that section, the statute says that a rail
21 carrier shall provide transportation or service
22 upon reasonable request.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 It is the meaning of that somewhat
2 cryptic phrase - provide transportation or service
3 upon reasonable request - that we are here to
4 probe and consider at this hearing. I say
5 "cryptic" because those words used in the statute
6 are so very general and non-specific in nature
7 and require quite a lot of interpretation and
8 fleshing out in order to ascertain exactly what
9 they mean. That is the job of this Board and the
10 courts.

11 There is quite a lot of history that
12 we can look at to determine what this Board and
13 the ICC before it, and the courts, have thought
14 the "common carrier obligation" meant in the
15 past.

16 But it is clear to me that the
17 interpretation of this cryptic phrase must change
18 over time as circumstances change, and that it
19 may be found to impose different requirements on
20 rail carriers today, in the present
21 capacity-constrained environment, than it did
22 ten, or fifty, or one hundred years ago.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I know at least one person who claims
2 that the concept of the "common carrier
3 obligation" is so well-established that it
4 actually originated with Hammurabi's Code of
5 ancient Babylon! There are probably some who
6 would argue that the concept has some connection
7 to the Dead Sea Scrolls. I am advised that the
8 concept actually has roots in English common law
9 dealing with public utilities. And, we have all
10 heard it said that the concept is as old as dust.

11 Now there is an old story about an
12 arrogant young man who was feeling pretty
13 confident one day and he challenged God by saying
14 that he could make a man, just like God did. God
15 responded by saying that He accepted the
16 challenge and would meet the young man in the
17 Gobi desert.

18 At that meeting, God bent down and
19 took a handful of dust and said, "From this dust,
20 I will make a man." Then, the young man bent
21 down and took a handful of dust. At that moment,
22 God said, "You have to provide your own dust!"

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Now, I am not suggesting that we
2 repudiate or dishonor the progress that has been
3 made under the original concept, but I am
4 suggesting that it may be time to get our own
5 dust. We may need to get our own concept of the
6 "common carrier obligation" that recognizes the
7 new realities in the current constrained global
8 transportation marketplace.

9 Take the question of whether
10 railroads are obligated to transport the most
11 extremely toxic hazardous materials without being
12 properly protected against the horrendous
13 liability exposure that could ensue. In my view,
14 there must be enacted a liability cap for hazmat
15 transport, perhaps something akin to
16 Price-Anderson. I believe that would be good
17 public policy.

18 Until the Congress deals with the
19 liability cap issue, I, for one, believe that
20 rail carriers may well be within their rights to
21 refuse to carry the extremely toxic hazmats
22 without indemnification.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I can tell you that as a businessman,
2 that's the decision I would make. I simply do not
3 feel that it is a "reasonable request" for a
4 shipper to ask a railroad to transport these
5 types of commodities without some kind of
6 meaningful protection from the unreasonably high,
7 "bet-the-company" type liability exposure.

8 While I know we need to stay focused
9 today on the concept of "common carrier
10 obligation," I cannot resist the temptation to
11 comment on some things I have observed over the
12 past few months and which persists today.

13 There are people and groups who seem
14 to be espousing legislative or regulatory
15 proposals that are based on totally incorrect
16 information. I have tried to find explanations
17 for such activity: faulty advice,
18 misunderstanding, intentional deception or a
19 combination of these. Whoever is paying for
20 these activities might consider asking for a
21 refund.

22 It is clear to me that deception and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 diversion are the true "evil twins" when it comes
2 to today's debate in the public arena. We could
3 spend a couple of days, at least, looking into
4 these specious claims but we do not have the
5 time. However, I must expose a couple of them
6 that bother me the most.

7 First, it is simply a
8 misunderstanding of the current state of the law
9 to state that the railroads are not subject to
10 the antitrust laws. They are and always have been
11 subject to the antitrust laws.

12 Congress has carved out very limited
13 exceptions that generally apply to those specific
14 activities that are covered by official Board
15 actions which are directly and immediately
16 reviewable by the Federal courts. But that leaves
17 a very broad range of egregious conduct that is
18 subject to the full weight of our antitrust laws,
19 including price fixing, bid rigging, and market
20 allocation.

21 Another fallacy that I've heard
22 asserted as gospel truth by some is the claim

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that the Staggers Act was intended to spur, or
2 increase, competition, and that the Board has
3 somehow failed to live up to that goal.

4 But I've looked at the legislative
5 history, and it is clear that the balance that
6 Congress struck in the Staggers Act is that where
7 competition exists, it should be the regulator of
8 rail rates to the extent possible; and only where
9 competition does not exist is regulatory rate
10 relief available.

11 The Staggers Act does not contain a
12 mandate to increase competition, and anyone who
13 says it does is trying to rewrite history.
14 Another misconception I hear is that "captive
15 shippers" cannot get meaningful rate relief. But
16 that term "captive shipper" is often used
17 inaccurately. A shipper that has a truck
18 alternative simply is not a captive shipper. The
19 Staggers Act makes that very clear.

20 Turning now to some good news, I am
21 very pleased that the Board is going to start
22 making agricultural contract summaries readily

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 available and accessible on the Board's website.
2 Section 10709(d)(1) of the Act directs the Board
3 to ensure that the essential terms of each
4 contract for the transportation of agricultural
5 products including grain are made available to
6 the general public.

7 This new web posting procedure is a
8 good first step to help to do that. It will help
9 to shed more light on what is going on with grain
10 contracts and make this very dynamic market a bit
11 more transparent.

12 And now, I'm here to listen. I look forward to
13 hearing the testimony of the witnesses.

14 CHAIRMAN NOTTINGHAM: Thank you,
15 Commissioner Buttrey. Your point towards the end
16 of your remarks about the posting on our website
17 of the agricultural shipping contract
18 information, I'm told that is effective today and
19 so folks who are interested in that. These are
20 filings for a long time have come to the Board
21 but we have learned recently haven't made it onto
22 the internet. Now we've addressed that and we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 hope that will make that information more
2 accessible.

3 On a couple of procedural notes, we
4 have a number of witnesses and we appreciate all
5 of you who have come from long distances and
6 medium-long and short distances to be with us
7 today and tomorrow. It is an extraordinary
8 occurrences for the Board to have a two-day long
9 hearing but we thought that was better than to
10 pull an all-nighter. We hope you'll agree.

11 For that reason, though, we will be
12 particularly firm today and tomorrow about
13 limiting witnesses to the prescribed time limits
14 that you have all been given in advance. That is
15 the only fair thing to do so everyone can be
16 heard and that we are not here at 8:00 tomorrow
17 night still hearing from the individuals.

18 As usual, we will hear from all the
19 speakers on a panel prior to questions from the
20 commissioners. Speakers, please note that the
21 timing lights are in front of me on the dias.
22 You will see a yellow light when you have one

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 minute remaining and a red light when you time
2 has expired.

3 As you can see from the published
4 schedule we have quite a few witnesses appearing
5 at this hearing. Therefore, I will be keeping an
6 eye on the clock and ask that you please keep to
7 the time you have been allotted.

8 I assure you that we have read all of
9 your submissions and there is no need to read all
10 of them here in their entirety. After hearing
11 from the entire panel, each entire panel, we will
12 rotate with questions from each Board member
13 until we have exhausted the questions.

14 Additionally, just a reminder to
15 please turn off your cell phones. I look forward
16 to hearing the testimony of the parties and would
17 now like to call forward Mr. Allyn Ford of the
18 Coos-Siskiyou Shippers Coalition from our first
19 panel. As soon as we are joined by -- I don't
20 think we have been joined yet but as soon as we
21 are joined by Senators Ron Wyden and Gordon Smith
22 we will bring them forward as well.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 All three members of the Oregon
2 delegation made a special request, Mr. Ford, that
3 you be allowed to sit with or near them as best
4 as their schedules permit early in the proceeding
5 so we were happy to accommodate that. You may
6 well have come the farthest as well so we welcome
7 you back to the Board.

8 As we mentioned earlier, you have
9 been here already at least once in an effort to
10 informally resolve the situation you are faced
11 with out there and we welcome you back and look
12 forward to working with you. Please proceed.

13 Oh, Mr. Ford. I'm so sorry. There
14 is a button on your microphone. If you just
15 press that and see a red light.

16 MR. FORD: Okay. Is that proper?
17 Thank you. On behalf of the Coos-Siskiyou
18 Shippers Coalition, and my own company Roseburg
19 Forest Products, I wish to thank the Surface
20 Transportation Board for holding this hearing.

21 I am the President of Roseburg Forest
22 Products, an Oregon family-owned corporation,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 with forest products manufacturing facilities
2 throughout the United States but heavily
3 concentrated in Southern Oregon and Northern
4 California. We employ over 3,500 employees
5 manufacturing engineered wood products, composite
6 panels,
7 softwood and hardwood plywood, lumber with raw
8 materials sourced from our own timberlands.

9 Most of our facilities are located in
10 rural areas and represent the principal employer
11 in these communities. As with most wood products
12 companies, we are heavily dependent upon the
13 ability to ship both our raw material and
14 finished product by rail.

15 Roseburg Forest Products has had a
16 close relationship over the years with the
17 various railroads, including in 2004 assisting
18 with the reopening of the line between Winston,
19 Oregon and Dillard, Oregon when the line was
20 closed due to a major landslide, and providing
21 financial assistance for repairing tunnels and
22 the reopening of the Siskiyou line in 2006.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 In addition to my company, I am here
2 on behalf of the Coos-Siskiyou Shippers Coalition
3 whose membership includes the American Bridge,
4 Co.; Georgia Pacific LLC; Southport Lumber
5 Company; and, Timber Products, Co. These entities
6 are dependent upon shipping materials on the Coos
7 line and the Siskiyou line which are operated by
8 Central Oregon and Pacific Railroad ("CORP"), a
9 short line railroad wholly owned by Rail America.

10
11 Membership in the Coalition, in
12 addition to shippers, includes representation
13 from county and city governments, area
14 businesses, chamber of commerces, and other
15 economically dependent groups. These entities,
16 which number over 45 members, have joined the
17 coalition of the fear that CORP's actions to
18 curtail service on both the Siskiyou and Coos
19 lines will hurt rural Oregon and California
20 communities.

21 In the face of recent embargoes and
22 deteriorating conditions of the railroad lines,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 these organizations have come together with a
2 common goal of restoring and maintaining safe and
3 efficient rail service in Southwestern Oregon,
4 particularly on the Coos and Siskiyou rail lines.

5
6 This coalition formed shortly after
7 CORP's September 21, 2007, embargo of the Coos
8 line. The embargo left the shippers scrambling
9 not only to find alternative shipping but also to
10 keep their businesses operating. Compounding the
11 difficulties was the fact that the embargo was
12 imposed with only one day's notice.

13 My company had orders awaiting
14 shipment and targeted for delivery on
15 specific dates, and as a result of the short
16 embargo notice, we really had to improvise to
17 find timely alternate transportation.

18 Our story was experienced by the
19 other members of the coalition as well. Not only
20 were coalition members' shipments disrupted, but
21 in the case of American Bridge, who builds
22 trusses for bridges throughout the United States,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 its ability to compete for contracts and orders
2 were severely disrupted.

3 While the Coos line embargo was based
4 on tunnel safety issues, the railroad was aware
5 of the tunnel problems for a period of time yet
6 only provided one day's notice of embargo.
7 Clearly the tunnels did not become unsafe
8 overnight. In fact a year earlier CORP was cited
9 for maintenance and safety issues on the line.

10 Historically, the shippers have been
11 willing to provide both financial assistance as
12 well as equipment to repair tunnels, landslides,
13 and resolve deferred maintenance issues. CORP,
14 however, clearly did not see this as a
15 railroad-shipper partnership and cavalierly shut
16 the line down.

17 Prior to the embargo no attempt was
18 made by CORP to address the issue with the
19 shippers or explore ways for the shippers and
20 railroad to solve the tunnel problem and in turn
21 keep the line operational. In fact, CORP did not
22 provide an assessment of the capital needs to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 restore the line to service until several months
2 after closure and only then after pressure from
3 our state legislators and the Governor's office.

4 On both the Siskiyou line and the
5 Coos line, CORP has benefitted in the past from
6 the shippers and local governments stepping up to
7 the plate and providing assistance in resolving
8 maintenance and other disruptions of service.

9 Notwithstanding this history, in this
10 case, CORP did not embark upon a similar path to
11 reopen the line rather it simply viewed the
12 embargo as a way to extract further concessions
13 from the shippers and subsidies from the
14 government. At the time of the embargo, CORP's
15 analysis, which was not made available to the
16 shippers until several weeks later, identified
17 that the tunnels could be repaired within twelve
18 months at an expenditure of \$2,865,000.00.

19 However, rather than make the repairs
20 on the three tunnels and reinstitute service,
21 CORP stated it would not open the line unless the
22 shippers, State of Oregon, Port of Coos Bay, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the Union Pacific agreed to pay three-quarters of
2 not only the immediate tunnel repair costs but
3 also what Rail America described as the neglect
4 and deferred maintenance that has taken place on
5 the line over the past twenty years.

6 The proposed solution was for an
7 investment of approximately \$23 million to bring
8 CORP's rail line up to safe operating
9 standards. This funding was to be derived from
10 the State of Oregon, Port of Coos Bay, Union
11 Pacific, shippers, and the CORP each in the
12 amount of \$4.6 million.

13 In addition, CORP also stated that
14 even if these monies were forthcoming, CORP would
15 not reopen the line unless the State of Oregon
16 provided an additional "operating subsidy" of \$2
17 million/year in maintenance subsidies; as well as
18 \$1.5 million/year in revenue subsidies. This
19 latter condition is one that the State of Oregon
20 cannot accept, which CORP obviously knew when
21 they laid the proposal on the table.

22 Also disturbing to the shippers is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the fact that in the past the shippers and
2 governmental entities have provided assistance
3 and agreed to surcharges, however, CORP and Rail
4 America have not always used these
5 funds for either the stated repair or maintenance
6 on the line.

7 In the face of our situation, the
8 Surface Transportation Board's decision to
9 examine the railroad's common carrier obligations
10 is particularly timely and we appreciate this
11 opportunity to provide testimony.

12 Of the items identified in the
13 hearing notice, the Coos-Siskiyou Shippers'
14 experience has demonstrated that with respect to
15 the issue of "carrier-imposed requirements for
16 infrastructure investments by shippers", it is
17 clear that the STB needs to assert more oversight
18 and control. Further, with respect to the issue
19 of what constitutes a "proper use of rail
20 embargoes," it is also clear from our situation
21 that CORP is willing to abuse the
22 embargo power to extract monetary concessions.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 While it is clear that embargoes play
2 an essential role with respect to rail
3 transportation, the current system is subject to
4 abuse. It is our position that the STB needs to
5 assert a stronger role in ensuring that the
6 railroads meet their common carrier obligations.

7 We have always assumed that inherent
8 in a common carrier's obligations would be a duty
9 of good faith both in maintaining the railroad
10 lines and in dealing with shippers. However, it
11 is becoming abundantly clear that it is a common
12 practice to defer maintenance in effect milking
13 the resource. We have also assumed that
14 the rates are set at a level that not only cover
15 operation and maintenance, but also provide a
16 reasonable profit.

17 In our case, the short line operator
18 has admitted that the lines have not been
19 maintained for a period of twenty
20 years and clearly was not reinvesting the
21 maintenance component of the rate into the line.
22 The net result has been a history of derailments

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and curtailments that affect the safety and
2 economic stability of the local
3 communities and industries.

4 The question of whether it is
5 appropriate for the shippers to pay the cost of
6 maintenance, particularly deferred maintenance,
7 is not an easily answered question. However, it
8 should be readily understood, that when Fortress
9 recently acquired Rail America, they knew the
10 condition of both the Coos and Siskiyou lines and
11 assumed responsibility.

12 The purchase price surely reflected
13 the condition of the infrastructure. The short
14 line should not now be allowed to blame the poor
15 condition of the line on prior operators, when in
16 fact the
17 maintenance of the line to a safe standard was an
18 obligation they willingly undertook and the
19 negotiated sale price so reflected.

20 The ongoing failure to repair or
21 maintain the lines is not a reflection of rates,
22 rather it is a reflection of short-term inflation

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of the bottom line without making investments any
2 prudent business would undertake.

3 The situation on the south end of the
4 Siskiyou line where the track climbs over the
5 Siskiyou Summit connecting Southern Oregon to
6 Northern California is a more recent development
7 and another example of the
8 arrogance of CORP in dealing with the shippers
9 who have for decades relied on rail service for
10 the delivery of finished products to market as
11 well as raw material to mills.

12 In a letter to the shippers dated
13 December 13, 2007, CORP announced that they would
14 no longer take finished products south to
15 California from mills in Southern Oregon. With
16 that change all freight now generated in Southern
17 Oregon is taken north to Eugene and then
18 transferred to the Union Pacific for delivery
19 throughout the country.

20 Aggravating the situation is the
21 recent major slide on the UP line, that
22 Congressman DeFazio mentioned, just east of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Eugene which has now forced all this freight to
2 be delivered from Eugene north 150 miles to
3 Portland and then east up the Columbia Gorge
4 connecting to the mainlines that travel south and
5 east.

6 In the December 13, 2007 letter to
7 the shippers, CORP also announced that they
8 intended to curtail shipments of raw materials,
9 green veneer and logs, north over the Siskiyou
10 Summit from Roseburg Forest
11 Products in Weed, California, and from Timber
12 Products in Yreka, California to their finishing
13 plants in Southern Oregon.

14 Prior to this letter, CORP had been
15 pulling cars five days per week, pursuant to the
16 letter they now intended to reduce this service
17 to only two days per week. While CORP explained
18 that their goal was to improve profitability, it
19 is clear that the strategy was to make it
20 sufficiently uneconomic so that the shippers
21 would allow them to discontinue service.

22 CORP further stated that by April 15,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 if operating revenues resulting from the
2 reduction to two days per week did not increase,
3 the line would be shut down and
4 all deliveries would only be made by taking
5 freight on the UP line north through Klamath
6 Falls, Oregon and across the Cascades to Eugene,
7 and then back south to the affected Southern
8 Oregon mills.

9 The shippers in good faith have tried
10 to negotiate new rates to improve CORP's revenues
11 but the demand by CORP of a 300 to 400 percent
12 increase in shipping rates over the Siskiyou
13 makes the haul cost prohibitive.

14 Both companies are now evaluating the
15 difficult decision that the only alternative left
16 for them to keep their operations viable is to
17 truck their raw material up Interstate 5 to their
18 Southern Oregon mills.

19 Based on normal operating conditions
20 this could result in an additional 36,000
21 truckloads per year on Interstate 5 for a less
22 efficient mode than rail and further contributing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to traffic congestion on an important segment of
2 the interstate highway system.

3 The actions by CORP on the Coos and
4 Siskiyou lines are unfortunately a perfect
5 example of why the Surface Transportation Board
6 needs to establish more oversight over the short
7 line railroads to provide the
8 shippers, our employees, and our communities with
9 the reliable rail service.

10 Certainly the April 11, 2008 order
11 that the Board issued to RailAmerica and CORP to
12 show cause why the ongoing failure to provide
13 service on the Coos Bay line is not an unlawful
14 abandonment sends a very clear signal that the
15 common carrier obligation is a serious one that
16 can't be ignored.

17 On behalf of Roseburg Forest Products
18 and the Coos Siskiyou Shippers Coalition we
19 sincerely thank you for weighing in on the Coos
20 Bay line situation and also for this opportunity
21 to testify today. Thank you very much.

22 CHAIRMAN NOTTINGHAM: Thank you, Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Ford, for those very thoughtful remarks and for
2 your personal report from the field and first-
3 hand report on the situation.

4 We are delighted to be joined this
5 morning by both distinguished United States
6 Senators from the great State of Oregon. Welcome
7 Senators Wyden and Senator Smith. It is quite a
8 remarkable occasion for us to be joined by both
9 of you.

10 We also had a few minutes, and he had
11 to leave, but Congressman DeFazio was with us.
12 We would like now to turn it over to Senator
13 Wyden. Then following Senator Wyden, Senator
14 Smith for anything you would like to say for as
15 long as you would like to say it.

16 SENATOR WYDEN: Mr. Chairman, thank
17 you very much and to you, Chairman Nottingham and
18 Vice Chairman Mulvey and Commissioner Buttrey.
19 Thank you particularly for having a significant
20 percentage of the Oregon congressional delegation
21 coming today.

22 This is a critical issue, as you can tell,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for the people that we represent. At my town
2 meetings in Southwestern Oregon this issue comes
3 up again and again and again. In our view, this
4 Board has the legal authority to secure a fair
5 shake for the people that we represent.

6 Obviously the economic impact of an
7 efficient rail system cannot be overstated.
8 Across the country diverse businesses rely on
9 rail for a timely and economical transport of
10 goods and an efficient transportation
11 infrastructure is simply the life blood of our
12 economy.

13 In today's environment of crumbling
14 infrastructure and record-high fuel prices,
15 what's needed is more efficiency, not less. In
16 general, that's what the railroads provide. Many
17 of the railroads are reporting record profits,
18 reinvesting in their infrastructure, and doing a
19 very good job of serving the economy and the
20 public.

21 Unfortunately, we do see some
22 railroads reducing and restricting service,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 raising prices, and putting the squeeze on
2 shippers in an attempt to maximize profit. In my
3 view the Surface Transportation Board is the last
4 line of defense against unfair and unconscionable
5 conduct and we ask you today to step in and
6 protect the public.

7 The actions of the companies involved
8 run directly counter to their common carrier
9 obligation. We feel that federal law is plain on
10 this point. Railroads have a duty to provide
11 service upon reasonable request. By federal law
12 a railroad may not refuse to provide service
13 merely because to do so would be inconvenient or
14 unprofitable.

15 The common carrier obligation is
16 critical to the fair provision of rail service in
17 this country. The fact is that even though the
18 Congress has changed just about every aspect of
19 how railroads are regulated, the one constant --
20 the one constant over all these years has been
21 the common carrier obligation.

22 As the Senate was debating on the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Staggars Act of 1980 Senator Cassabaum who helped
2 write the bill, a member of the Subcommittee on
3 Surface Transportation, said, "I would like to
4 make it clear that the attitude of the Senate is
5 that the common carrier obligation is critical
6 and must be strictly enforce."

7 Now we are facing a time when
8 regrettably some railroads have refused to honor
9 this explicit legal obligation. I think you have
10 heard a bit from both Mr. Ford and Congressman
11 DeFazio what this means for thousands of the
12 people we represent. Let me just kind of
13 summarize some of the concerns that I have heard
14 at home.

15 RailAmerica, of course, is a short
16 line, a regional rail service provider that with
17 its parent company Fortress currently owns and
18 operates 7,800 miles of rail lines in the United
19 States and Canada. One of these railroads, CORP,
20 operates 439 miles of track including 136 miles
21 of the Coos Bay branch.

22 Last September, as you heard, with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 essentially no warning the CORP just announced
2 that it's going to embargo the Coos Bay branch
3 line between Coquille, Oregon, and Vaughn,
4 Oregon, in our home state. CORP said the embargo
5 was due to unsafe tunnel conditions, conditions
6 which were the result of a lack of maintenance.

7 Now, this is a vital shipping line
8 for the entire south coast of our state so what
9 we had is companies all over the region in effect
10 scrambling to find a way to meet their
11 obligations to move their products and adjust
12 their operation so we have seen havoc all through
13 our south coast economy as a result of this.

14 All of this is taking place during a
15 time of great economic uncertainty caused largely
16 by national conditions. You've already got a
17 sense of what it means for one of our leading
18 employers, Roseburg Forest. American Bridge is
19 losing money and has been forced to abandon a
20 planned expansion because of the embargo.

21 We could take you through scores and
22 scores of these kinds of examples. The point is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 our region does not need an economic body blow at
2 a time when we are already seeing as a result of
3 national economic trends a serious concern about
4 where our economy is headed.

5 Now, there has been great pressure
6 from elected officials in our home state and, as
7 a result, CORP announced that it had a plan to
8 fix and reopen the railroad. Unfortunately, the
9 plan was to demand \$4.6 million each from Union
10 Pacific Railroad, the Oregon Department of
11 Transportation, Port of Coos Bay, and the
12 shippers. This money looks to us like it's
13 vastly more than is required to repair the
14 tunnels and, in effect, would be used to upgrade
15 the entire branch line.

16 In addition, shippers such as South
17 Port, which ships 70 percent of its product on
18 this line, was asked to pay \$204 more per carload
19 and along with three other shippers guaranteed
20 that they would move at least 4,600 carloads
21 annually for five years.

22 CORP also demanded that the State of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Oregon pay an annual fee to keep the railroad
2 running. Let us know juxtapose these
3 extraordinary demands that are put on key Oregon
4 industries in our state with some of the other
5 activities that we see CORP involved in.

6 CORP and its parent company,
7 Fortress, obviously isn't broke and what we saw
8 is that the same time it was demanding an
9 operating subsidy from the State of Oregon
10 Fortress loaned \$24 million to Michael Jackson
11 for his Neverland Ranch.

12 With the money that was loaned to
13 Jackson for Neverland they could have upgraded
14 the entire 136 miles of track to pristine
15 condition and protected jobs for thousands of
16 workers and their families by making
17 transportation available and attractive for
18 businesses along the line. That would have been
19 in keeping with the public trust and their common
20 carrier obligation.

21 In financing of Michael Jackson's
22 property it's made it clear to us that Fortress

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and CORP are somehow in their own Neverland, a
2 world where others pay for their business' long-
3 term infrastructure investments and the
4 government directly subsidizes their business
5 operation.

6 The question before us is who
7 wouldn't want a deal like that if you thought you
8 could pull it off. CORP has also begun using
9 similar business practices apparently designed to
10 maximize profits even if they leave behind ghost
11 towns on the Siskiyou line.

12 CORP has reduced service to a trickle
13 and has asked shippers to pay rates 250 percent
14 to 350 percent higher than is currently paid. If
15 the shippers don't agree to the rate hikes, CORP
16 has said it may simply stop operating the line.

17 If the line is closed, the impact to
18 agricultural shippers in particular will be quick
19 and obvious. Freshness and quality of produce
20 will be affected, customer expectations won't be
21 met, and we will certainly see their profits go
22 down.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Now, the CORP claims that these
2 incredibly high rates are to pay for \$5 million
3 in repairs to the rail system but it's unfair and
4 I would argue illegal for a railroad to require
5 that customers pay outright for long-term capital
6 improvements. These are investments that should
7 be recovered by the business owner over the life
8 of an asset which in most instances for railroad
9 infrastructure can be nearly 50 years.

10 I have written to the Board about the
11 CORP's actions and that we're pleased that the
12 Board is taking this action to investigate and to
13 follow up. We appreciate your recent finding
14 that the CORP must now show why their actions on
15 the Coos Bay line don't add up to unlawful
16 abandonment.

17 We intend to watch it closely and
18 hope that the Board will also investigate the
19 CORP's actions along the Siskiyou line. But I
20 discuss these examples not just to highlight the
21 kind of business practices that extract profits
22 and leave behind shells of what are potentially

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 vibrant communities, but also to point out that
2 some railroads are using embargoes and the threat
3 of embargoes to subvert those common carrier
4 obligations that are so explicit under federal
5 law.

6 It's my view the Board ought to do
7 everything in its power to enforce the common
8 carrier obligation and to keep railroad lines,
9 especially the short lines, open. Short line
10 railroads save shippers 20 percent to 50 percent
11 compared to truck transportation.

12 They also take an awful lot of
13 truckloads off the highway which saves us a
14 significant amount, an estimated \$1.3 billion a
15 year in highway damage cost. Compared to
16 trucking short line railroads save 356 million
17 gallons of fuel each year.

18 Railroads do face pressure to
19 maximize profits. We want railroads to be
20 profitable. I want it clear that we think having
21 profitable railroads in our country is important.
22 We also want shippers on their lines to have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 decent and affordable service.

2 In some cases a desire for faster and
3 bigger short-term profits has led some railroads
4 to push aside long-term investing like
5 maintenance of railbeds. When a railroad makes
6 this choice, it cannot use it as an excuse to
7 extort their customers by threatening to without
8 service.

9 Companies like RailAmerica act as if
10 their only options is to force shippers to pay
11 for infrastructure improvements or to close the
12 line. Another alternative is to improve service
13 and grow business. America's railroads and
14 everybody else won't win if this becomes like
15 Monopoly with loads of players going bankrupt.
16 Instead, rail companies have to look at shippers'
17 partners in creating economic opportunities.

18 When short lines work cooperatively
19 with shippers and communities rather than scaring
20 them into abandoning rail, they find that
21 opportunities for growth exist. Port of Coos
22 Bay, for example, may provide more freight if

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 cargo vessel operators were assured they can move
2 the freight via rail once it gets off-loaded.

3 In effect, we are laying out the case
4 for the symbiotic relationship that works for the
5 American economy and particularly for
6 Southwestern Oregon, affordable pricing and
7 reliable scheduling that attract shippers. The
8 current shipping picture isn't static and it
9 isn't permanent.

10 Providers and shippers must cooperate
11 in order to improve market opportunities and grow
12 the demand for rail service. Common carrier
13 obligation is a vital protection for shippers who
14 rely on regularly scheduled reasonably priced
15 transport. I think it's important to note that
16 providing rail service is not a get rich quick
17 proposition.

18 It's a public trust. Railroads have
19 long been considered to have public obligations
20 on something more to the public than just the
21 company's own business concerns. As such,
22 railroad companies have to take into account not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 only the bottom line of the company today but
2 also the repercussions of the local and national
3 academy on operational decisions.

4 We very much appreciate the Board's
5 holding this hearing. I would ask that you
6 consider the Coos Bay line embargo as a signal
7 that a serious decline in long-term investment is
8 around the bend. We cannot let that happen and I
9 would ask that the Board use its power to ensure
10 railroads are performing their obligation to
11 invest in their long-term needs.

12 Again, we very much appreciate your
13 giving us this opportunity. I assure you you
14 don't get so often this kind of turnout from the
15 Oregon congressional delegation at a Board
16 hearing. It reflects the concern that we see
17 throughout our region.

18 I've got a hearing of the Finance
19 Committee I've got to be at but you are in very
20 good hands, Mr. Chairman, Vice Chairman,
21 Commission Buttrey. You are in very good hands
22 with my colleague. We are just grateful to you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for your consideration and, again, would ask that
2 you step in and take those steps that will
3 protect our economy during this extremely
4 vulnerable time and I thank you.

5 CHAIRMAN NOTTINGHAM: Thank you,
6 Senator Wyden, for that very compelling
7 testimony. I know you need to leave. I'll just
8 repeat something that I said to Congressman
9 DeFazio on the record this morning.

10 This Board will stick with this
11 controversy and see it through to its rightful
12 end and we will be availing ourselves of every
13 legal and regulatory tool we have to make sure
14 the right thing is done. Obviously we have a
15 pending matter now. We can't promise any
16 particular outcome. We'll see where the record
17 and the facts take us but this will be a priority
18 and will continue to be.

19 We have sent some of our senior staff
20 already in the recent past out to Oregon to
21 report from the front lines as to what is going
22 on. We have had the CEO of RailAmerica here at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 my invitation on a few days notice to meet also
2 with Mr. Ford and some of his colleagues in an
3 effort to informally avoid having to be here
4 today talking about this today.

5 That was a few months ago so we will
6 have RailAmerica before us at this hearing. Stay
7 tuned. There will be much more coming out on
8 this and we look forward to working with you and
9 your very able staff. Thank you again for being
10 here.

11 SENATOR WYDEN: Mr. Chairman, your
12 message today makes us hopeful and the fact that
13 you are willing to involve yourself in this kind
14 of direct fashion is something I very much
15 appreciate and the people I represent do as well.
16 Thank you.

17 CHAIRMAN NOTTINGHAM: Thank you.
18 It's now my honor to introduce Senator Gordon
19 Smith.

20 Senator Smith, the floor is yours.

21 SENATOR SMITH: Thank you, Chairman
22 Nottingham and members of the Board. I certainly

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 echo the sentiments of my colleague Senator Wyden
2 and I do want to note that it is probably rare
3 that you get two U.S. Senators and a Congressman
4 from the representative district before you but I
5 think it is an indication of how urgent we feel
6 this matter is.

7 We do take your words of tension on
8 this issue with appreciation because this is a
9 very vital issue. We are here without regard to
10 a party or without regard to a parochial interest
11 between urban and rural kinds of differences. We
12 are here in a united way because we feel so
13 keenly about this issue.

14 The last time we were together,
15 Chairman Nottingham and Commissioner Mulvey, I
16 was behind the dias and you were in the witness
17 chair. Today those roles are reversed.

18 Unfortunately, after all these months
19 the topic of our discourse on that occasion
20 before the Senate Commerce Committee is the same,
21 that being the Central Oregon and Pacific
22 Railroad, or CORP, ongoing embargo of the Coos

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Bay rail line.

2 As a member of the Senate Commerce
3 Committee and ranking member of its Subcommittee
4 for Surface Transportation, it is my privilege
5 and my responsibility to work on issues affecting
6 the rail industry and its partners. My
7 congressional record, if anyone cares to check,
8 is one of staunch advocacy for a vibrant railroad
9 industry. I believe a healthy railroad industry
10 is absolutely vital to our economy.

11 I understand that railroads need to
12 earn adequate returns if they are going to
13 continue to serve the public and provide the
14 capital investments necessary to meet our future
15 transportation needs.

16 However, I want to emphasize this
17 point. I also know that buying a railroad is not
18 like buying a fast food chain. There is a
19 responsibility to serve the public that comes
20 with owning a railroad. We talked in that
21 Commerce hearing, Mr. Chairman, and members of
22 the Board, about the tendency now for hedge funds

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to buy railroads.

2 I respect the motive. I think it's
3 essential if they are going to stay in business
4 and make the capital investments. But I also
5 want to note that those who buy railroads cannot
6 just look to a short-term hit because there is a
7 l o n g - t e r m r e s p o n s i b i l i t y .

8 Unfortunately, after months of
9 watching events unfold, it seems clear to me that
10 CORP and its parent company, RailAmerica, are not
11 interested in meeting their obligation to the
12 shippers on the Coos Bay line.

13 Mr. Chairman and members of the
14 Board, I live in a rural place in Oregon and I
15 know what it feels like when you see a rail line
16 abandoned and I know how frustrating it is when
17 that occurs not for what are obvious economic
18 advantages but to some predetermined conclusions
19 that they will simply continue to not invest in a
20 line and its maintenance.

21 I know the Board is familiar with the
22 circumstances surrounding the embargo which the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Board lays out in its April 11th decision. I
2 won't belabor that point. I think others have
3 done that very well today. However, I do want to
4 focus for just a moment on the issue of deferred
5 maintenance and, more specifically, the
6 railroad's obligation consistent with its common
7 carrier obligation to maintain the track and
8 tunnels.

9 Commission Mulvey, during your
10 renomination hearing last December I read to you
11 an excerpt of the Federal Railroad
12 Administration's inspection report on the safety
13 of the Coos Bay line. I would like to again read
14 it because I think it makes it very clear what we
15 are talking about.

16 According to FRA's Inspection Report
17 from last fall, and this is a quote, "Predominant
18 problems observed were decay of untreated cinder
19 timbers, lagging and footing blocks. The FRA's
20 inspectors noted that some of the timbers sounded
21 hollow and decayed when struck with a hammer."

22 Clearly this situation did not happen

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 overnight. As the Board rightly points out in
2 its April 11th decision, this was not a situation
3 of CORP being caught off guard. They had ample
4 time to study the problem and take corrective
5 action before embargoing the line. They chose
6 not to do so and instead have engaged in a slow-
7 down state of the shippers trying to extort
8 financial commitments from the public.

9 Mr. Chairman, it has been more than
10 seven months since the embargo on the Coos Bay
11 line. Unfortunately it seems that we are no
12 closer to seeing the line reopened than we were
13 last September.

14 I believe this is a clear misuse of
15 the embargo process and would set a horrible
16 precedent if the railroad is allowed to shirk its
17 common carrier obligations by allowing the line
18 to slip into a state of disrepair and halting
19 service until others come up with the financing
20 to repair the line.

21 This line provides a critical
22 transportation link for communities in Southwest

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Oregon and CORP in action is literally putting
2 hundreds of family wage jobs in our state at
3 risk.

4 I'll let Allyn Ford, I think he
5 already has, describe the impact of that to his
6 work. It is very, very serious to him, his
7 businesses, and other Coos shippers in the
8 coalition. I cannot stress enough the importance
9 of the STB to take the appropriate action to
10 restore service to the Coos Bay rail line as
11 expeditiously as possible.

12 The economic toll and job loss over
13 the past seven months have been unacceptable and
14 cannot continue any longer. I realize that this
15 hearing is about issues broader than just the
16 embargo of the Coos Bay line. However, I could
17 not let the opportunity past without again making
18 the case for the Board to take quick action to
19 force an end to the embargo.

20 I believe that we are far past what
21 should or could be considered a reasonable period
22 for CORP to show progress towards making the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 repairs to reopen the line. The Board has the
2 authority to rectify this situation and I hope
3 you will do so quickly. I await the Board's next
4 response to the Coos Bay rail line enclosure. I
5 thank you for your time this morning.

6 CHAIRMAN NOTTINGHAM: Thank you,
7 Senator Smith, for your excellent remarks. If I
8 could just follow up. We won't keep you here
9 long but just a question or two if your time
10 permits. You've been tracking this controversy
11 as closely as anyone. Clearly you're right.

12 You raised it very directly and
13 emphatically with me when I was last before the
14 Senate Commerce Committee as you rightfully
15 should have. I know you reiterated your concerns
16 when Mr. Mulvey was before you more recently for
17 his renomination confirmation hearing.

18 Have you in your close monitoring
19 situation heard about any progress, any
20 procurement activity, any bidding, any engineers
21 doing the advance work that you can do, frankly,
22 in rain or shine. You can do it in the office to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 get ready to actually do the nuts and bolts
2 engineering that need to be done to actually get
3 those tunnels restored.

4 SENATOR SMITH: I hope it's
5 occurring. If it is, however, I have not been
6 informed of it.

7 CHAIRMAN NOTTINGHAM: Okay. We'll be
8 asking that question to others, too. You may
9 have more first-hand knowledge. You are also, as
10 you mentioned, very much on the front lines, on
11 the Commerce Committee as a leader there in the
12 debates about the future of the railroad
13 industry, how it perhaps should be regulated or
14 not regulated.

15 A situation like this, a controversy
16 like this, how does it impact the Senate in
17 deliberations? In many respects this reflects --
18 sadly it's one railroad but it could reflect, it
19 occurs to me, on the broader industry and you're
20 there on the front lines. How does it play in
21 the Senate?

22 SENATOR SMITH: Well, in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 cloakrooms of the Senate, frankly, the concern is
2 arising over the role of hedge funds and buying
3 these private assets which are attached to public
4 responsibilities.

5 The concern is that perhaps there is
6 a view by some in financial industries and hedge
7 funds that they can make some quick killings by
8 buying these properties, carving them up without
9 regard to common carrier obligations, pulling
10 money out and putting it in other places where
11 they may think there is a higher rate of return.
12 Again, I respect the profit motive. I know how
13 important out financial instruments are and
14 institutions are to the functioning of our
15 economy.

16 I also want to say that those who buy
17 these kinds of assets do so subject to public
18 obligation. The same calculations may be made
19 with respect to a fast food chain cannot be made
20 with respect to a railroad because there is such
21 an overriding public responsibility.

22 Those who are looking for turn a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 dollar fast I think better think again about how
2 they look at railroads because there is an entire
3 governmental apparatus that is very concerned
4 with folks at home who depend upon their job
5 continuing by the continuance of railroad. We
6 need people to invest in railroads but we need
7 them to understand that the long-term, not just
8 the short-term turn of a dollar.

9 CHAIRMAN NOTTINGHAM: Thank you,
10 Senator Smith. Out of respect for your time,
11 Senator, I would like to turn it over to Vice
12 Chairman Mulvey for any questions you may have of
13 the Senator, and then also to Commissioner
14 Buttrey after that.

15 Then, Senator, we'll let you leave if
16 you need to after those questions, or you are
17 welcome to stay as long as you would like. We'll
18 be here for two days. I would imagine you've got
19 some other things on your schedule but you are
20 formally invited.

21 SENATOR SMITH: I would be honored to
22 answer any questions you have.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 VICE CHAIRMAN MULVEY: Thank you,
2 Senator. When I first came to the Board I was
3 under the assumption that the common carrier
4 obligation for railroads was pretty absolute.

5 I have been informed that's not true,
6 that the common carrier obligation only applies
7 to traffic that is regulated by the Board and for
8 other traffic that exemption has to be revoked. A
9 revocation rather of the exemption in order for
10 that to come under the common carrier obligation.

11 Given that, so you think that there
12 is a role here for the Congress to play in
13 perhaps changing the law to broaden the common
14 carrier exemption without going to the extreme of
15 re-regulating the railroads.

16 SENATOR SMITH: I do think that there
17 is considerable interest on the Commerce
18 Committee to look at that. Look, I didn't come
19 to Washington to re-regulate things. I believe
20 in modest regulation, but I also understand
21 public responsibility.

22 My own view is that we should be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 careful as we do this but I also know I have many
2 colleagues who want to re-regulate the railroads.
3 I do not but I also want those who own them to
4 understand that we have a responsibility to the
5 broader public.

6 If they are serious about staying
7 unregulated, I think it's very important that
8 they get more serious about serving the public.
9 That is my word of warning so I would simply say
10 to all those who want to invest in railroads,
11 understand that it is a long-term investment.

12 It's a good investment. It's a
13 capital intensive investment but that our nations
14 need for more, not less, railroads. As a
15 parenthetical I would say if you re-regulate
16 railroads you'll get less investment. You'll
17 have less capital to improve and expand our
18 railroad system.

19 That's why I'm not here to re-
20 regulate the but some of the modest tinkering
21 that you're talking about in terms of common
22 carrier obligations, yes, I'm interested in that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 because I don't want to go the next step of total
2 re-regulation because that is the wrong incentive
3 if we're serious about projecting and meeting the
4 future transportation needs, the freight needs of
5 this country.

6 They are growing, they are not
7 diminishing so we need those who come to the
8 table to understand there is profit to be made in
9 railroads but it's long-term and it takes a
10 commitment of a career to make this happen. The
11 quick buck artists on Wall Street who want to
12 look at railroads as a turkey to be plucked, I'm
13 sorry but that's not going to happen.

14 VICE CHAIRMAN MULVEY: Thank you.

15 CHAIRMAN NOTTINGHAM: Commissioner
16 Buttrey.

17 COMMISSIONER BUTTREY: Senator, I
18 would just like to add my word of welcome to have
19 you here today.

20 SENATOR SMITH: Thank you.

21 COMMISSIONER BUTTREY: We are
22 certainly glad to have you here and to hear your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 comments. Obviously your presence here today
2 says a lot about how you feel about the
3 importance of this issue. We know it's on your
4 mind and the minds of a lot of other members of
5 Congress.

6 I just wanted to tell you that I
7 wasn't aware of this because I haven't been here
8 a terribly long time and won't be here for a
9 terribly long time but, in any case, my
10 understanding is that for the Board to issue a
11 Show Cause Order in a proceeding is a somewhat
12 rare occasion.

13 I think it says something about our
14 commitment to getting into this matter very
15 seriously in depth to see if through as an
16 indication of how we feel about that Show Cause
17 Order that was issued. I can certainly add my
18 word of assurance to what the Chairman said about
19 the fact that we are going to stick with this and
20 see it through.

21 SENATOR SMITH: Thank you,
22 Commissioner. I commend you for that. Thank you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 all so very much for your public service and for
2 your attention to this vital issue. Coos Bay is
3 in Southwestern Oregon. It's rural. It's
4 beautiful and great people live there.

5 I'm from Northeastern Oregon. It's
6 beautiful. It's rural. We depend on railroads
7 and we need owners of railroads who are real
8 serious about us because we are real serious
9 about them.

10 CHAIRMAN NOTTINGHAM: Thank you,
11 Senator Smith. I know it was not in your
12 testimony but I do need to take note this may be
13 a first. The Interstate Commerce Commission was
14 the first regulatory agency in the government
15 where the success rate -- in the STB we've had
16 probably, it would be safe to say, in the
17 thousands of hearings since the 1880s when the
18 ICC was stood up but I'm hazarding a guess here.

19
20 I haven't checked this out yet,
21 haven't had time to, but your colleague, Senator
22 Wyden, invoked Michael Jackson and Neverland in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Fortress of investment. I think we have plowed
2 into some new territory there.

3 SENATOR SMITH: Well, we are trail
4 blazers in Oregon. The Oregon Trial leads to
5 some interesting places.

6 CHAIRMAN NOTTINGHAM: Usually our
7 friends on the Federal Communications Commission
8 get all the sexy movie star type issues and we
9 are relegated to things like cost of capital and
10 stand-alone railroads and unexciting things but
11 if you see Senator Wyden, I couldn't say this
12 before he had to rush off, please thank him for
13 putting a little spice into the proceedings.

14 He did raise a very good point with
15 that, too, as did you in your testimony and we
16 really appreciate your service. We look forward
17 to working with you and your very capable staff.

18 SENATOR SMITH: Thank you, gentlemen.

19 VICE CHAIRMAN MULVEY: I was going to
20 mention, too, if Senator Wyden had stayed that he
21 was not "Thrillered" with Fortress America's
22 investment strategy.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 SENATOR SMITH: We are thrilled to be
2 here.

3 CHAIRMAN NOTTINGHAM: Thank you,
4 Senator. I think we'll probably have a couple
5 questions for Mr. Ford while we've got you.
6 Thank you, Mr. Ford, for your patience.

7 MR. FORD: Okay.

8 CHAIRMAN NOTTINGHAM: Welcome again.
9 Let me ask you the same question I asked the
10 Senator. Have you heard about any progress in
11 preparing the way for reopening the tunnels?

12 MR. FORD: Not specifically. Just
13 via the grapevine. We understand there's plans
14 to do so but it's out understanding, and perhaps
15 your questions are better directed to people from
16 RailAmerica, that everything is kind of on hold
17 pending the resolution of the outcome of whether
18 or not they get what they are asking for. We are
19 not aware there is any active activity to take
20 place at this time.

21 CHAIRMAN NOTTINGHAM: You seem to
22 have a very good relationship with your elected

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 officials across the state from the Governor on
2 down as understandably you would as a major
3 employer.

4 You probably have a better read on
5 the sort of political and policy landscape there
6 than we might but we follow it closely now, of
7 course. CORP seems to have come back over and
8 over again with offers or these sort of cost-
9 sharing offers we've heard about, sort of one-
10 fourth, one-fourth or things like that.

11 Do you sense -- I mean, my read of
12 the Governor, for example, is he's pretty clear.
13 Reopen the tunnels, get the line moving, and then
14 we'll talk about a partnership. Do you see that
15 changing? The position seems pretty clear here
16 but you are closer to it and I want to get your
17 sense.

18 MR. FORD: Certainly I don't sit in
19 the Governor's office but I think the Governor
20 forwarded a letter to CORP here very recently, I
21 think last week, stating that he was staying with
22 his position.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I may be reading into what the
2 Governor is saying but I think the Governor is
3 looking for a commitment from CORP for them to
4 make the move and then the state is willing to
5 sit down and discuss it. Obviously the Governor
6 cannot sit down and say, "We can obligate through
7 bonding or other financial arrangements at this
8 time."

9 The Governor has to go through a
10 legislative and regulatory process. Also, the
11 proposal has been made by RailAmerica that
12 involves support of Coos Bay. They have a
13 process to go through and certainly the shippers
14 group we have to, so to speak, sit down and see
15 what we can do.

16 I think I can express that people are
17 willing to step forward to help but we need an
18 indication that CORP and RailAmerica are willing
19 to do their fair share. I think the Governor has
20 staked out very clearly his expectations that the
21 first thing they need to do is show movement in
22 getting that line back into operation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 I may add to this that I think
2 politically and otherwise in our state you have
3 to understand Coos Bay is a beautiful port
4 facility. I think Congressman DeFazio talked
5 about the potential. He was talking about
6 containerization or whatever.

7 Also, you asked Congressman DeFazio
8 the question about the nature of the market.
9 It's a difficult time for the wood industry.
10 It's also a transition time for Coos Bay. What's
11 happening is we are seeing a lot of reinvestment,
12 people stepping forward.

13 I'll use the example we just invested
14 \$20 million in modernizing our operations and a
15 brand new mill that South Port is building. They
16 are \$35 million or something like that. You
17 heard the story about American Bridge. Here you
18 have a facility that is really first class and
19 has a tremendous potential.

20 It's on the move and then in this
21 particular situation what we perceive to be a
22 very abrupt process, boom, that we feel like the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 rug has been pulled out from underneath of us. A
2 lot of people are really quite shocked in the way
3 this was handled.

4 Hopefully that can be resolved but I
5 can assure you certainly from a shipper and
6 community standpoint, we are willing to step
7 forward and do our fair share. I think we are
8 watching our Governor and our elected
9 representatives, Senator Smith and Senator Wyden,
10 and they are very engaged. This is a very key
11 issue in our state.

12 CHAIRMAN NOTTINGHAM: Thank you. I
13 have worked for a Governor in my past and it
14 seems to me from a policy perspective it's an
15 interesting proposition that CORP makes, under
16 invest in your infrastructure for 10 years or
17 longer, then shut it down, and then ask to be
18 rewarded with a huge public subsidy. What kind
19 of message does that send to you?

20 You operate major equipment and
21 facilities. That is a pretty good deal. Would
22 you like to not invest for 10 years, shut down

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 your facility, lay off hundreds of people, and
2 then announce that you are deserving of millions
3 of dollars of contributions from the taxpayers?

4 MR. FORD: Chairman Nottingham, I
5 certainly share that opinion. We certainly are
6 shocked. We appreciate and understand there is
7 some work that is required but, frankly, maybe
8 it's just our perception but the attitude and the
9 willingness to work with us in partnership as a
10 result of this crisis, we just haven't seen that.
11 It's been very confrontational.

12 Our expectation is we need to sit
13 down and work this thing out. It's too important
14 to let go. Your point is very, very valid. So
15 far it seems to be very much a one-way street and
16 no interest in participating in trying to work
17 out a partnership.

18 CHAIRMAN NOTTINGHAM: Mr. Ford, I
19 want to make sure while you are here you do
20 understand, and I think you do but just while we
21 have you here on the record and we have a room
22 full of interested parties and spectators, of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 course one outcome possibly, I can't predict or
2 I'm not promising by any means an outcome at this
3 point in this pending controversy, but one
4 outcome, as you know, I believe, could be that
5 the line could be abandoned.

6 In fact, the railroad could very well
7 announce that the big bad STB forced us to do it
8 and what a tragedy that might be.

9 That raises the possibility of some additional
10 time of lack of service there. Do you think you
11 and your colleagues are sort of ready to face
12 that possibility if it comes to that? I mean, is
13 it something that you are mindful of? Is that
14 one possible scenario as we explore this issue?

15 MR. FORD: Certainly. You know, I
16 guess you would look like that is the voice of
17 doom to say that we wouldn't have rail service to
18 Coos Bay. Some of us have some alternatives.
19 Economics are such that we would obviously pull
20 investment out of the port and Coos Bay is just
21 not going to work economically. Previous to this
22 point we thought we had a future.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 In saying that, our willingness to go
2 to the extreme of shutting the railroad clear
3 down and whether or not there is something in
4 between, I think the shippers, and certainly the
5 coalition in those communities, again, we are
6 very much community oriented because we are in a
7 rural area and to work with the railroad.

8 I think we would step forward. What
9 that looks like and how that plays with the
10 Surface Transportation Board, I'm getting into an
11 area I don't belong in. All I can tell you is
12 that we are very, very concerned. It's putting a
13 terrible cloud over our economic future in this
14 given area.

15 I think one point I would like to
16 make, for example, American Bridge, they just had
17 to totally almost stop. We've had a lot of
18 shutdowns because the economics are so break even
19 for some of the plants operating there. People
20 are looking for a long-term solution.

21 We are not looking for a Band-Aid.
22 That is the worse thing we can do because we are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in -- all of us are investing in long-term
2 investments and looking at 10, 20 years. We are
3 looking for a permanent solution, not just a
4 Band-Aid. If that means we have to shut it down,
5 I sure hope we don't have to go that route.

6 I think there is a tremendous future
7 in this area and I would hate to see that happen
8 but we understand that is the game plan. Again,
9 we are looking for that long-term solution.

10 CHAIRMAN NOTTINGHAM: Thank you, Mr.
11 Ford. That concludes my questions.

12 Vice Chairman Mulvey.

13 VICE CHAIRMAN MULVEY: Thank you.
14 There has been a lot of discussion lately in
15 Washington about public/private partnerships and
16 what that has mostly meant is increasing roles
17 for the private sector and providing services
18 that have typically been provided by the public
19 sector.

20 In some ways this is kind of the
21 reverse of that where we are looking for the
22 public sector to help out the private sector and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 make investments that are normally made by the
2 private sector.

3 There are a lot of short line
4 railroads around the country that are low-density
5 lines that have some of the same problems that
6 CORP has in Coos Bay. Based upon the experience
7 you've had in the last few months, do you have
8 any opinion as to whether or not there needs to
9 be a greater role for communities, state and
10 local governments, groups of shippers to acquire
11 these lines and operate themselves rather than
12 rely upon these traditional short line railroads?

13 MR. FORD: Well, if you put a gun to
14 our heads and say that is the only option left,
15 sure, we're in favor of it but I would strongly
16 agree with what Senator Smith said, that we would
17 much rather stay with the private entity. The
18 concern we are seeing it has been a tradition
19 though of the long-term perspective of railroad
20 management.

21 What we are seeing is this point
22 about turnover and we have to look for returns in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the next six weeks for the next three months.
2 That is counter to what typically has been the
3 style of management we've seen in the rail
4 service area.

5 My preference certainly is that we
6 would stay with a private operator but with a
7 private operator who frankly his decision process
8 was fairly -- you know, we can work as partners
9 and if there is a problem, we work it out
10 together which frankly we have in the past.

11 It seems to be the trend in the most
12 recent five, six, seven, eight, years that
13 especially with the turnover of ownership taking
14 place on the short lines that the investment and
15 maintenance as just gone to nothing. They are
16 just what appears to be from our perspective
17 running it in the ground.

18 Does that require the state and/or a
19 public body of some sort to get into the
20 operation with the intent they have a longer term
21 perspective. They can bring the social values to
22 bear where needed. If you give us a choice, I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 mean, we would have to go there but our
2 preference is certainly not to go that way.

3 VICE CHAIRMAN MULVEY: Thank you.

4 CHAIRMAN NOTTINGHAM: Mr. Buttrey.

5 COMMISSIONER BUTTREY: No questions.

6 CHAIRMAN NOTTINGHAM: Thank you, Mr.
7 Ford. That concludes our time with you today.
8 Thank you again for coming all this way. We hope
9 you can stay as long as you can but we also wish
10 you safe travels as you head home as well.

11 MR. FORD: Thank you very much,
12 gentlemen. Appreciate the opportunity to meet
13 with you today. Thank you.

14 CHAIRMAN NOTTINGHAM: We will now
15 call forward Panel II, Mr. Richard Weicher, Mr.
16 Michael Hemmer, and Mr. David Reeves. Welcome
17 Panel II. We are pleased to have you with us
18 today. Our first witness I would like to call on
19 is Mr. Richard E. Weicher, Vice President and
20 Senior Regulatory Counsel of the BNSF Railway
21 Company. Welcome.

22 MR. WEICHER: Good morning. Thank

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you, Chairman, Vice Chairman, and Commissioner
2 Buttrey. It's a pleasure to be here. We
3 appreciate you giving us this opportunity. I
4 will go through some overview concept slides and
5 discuss some of the issues we have seen in the
6 order.

7 I have read and skimmed through many
8 of the statements filed in advance and summaries.
9 I don't know that I've read every one of them
10 despite a good effort but I'm working my way
11 through them. We do see certain themes that we
12 think it's important to place into proper
13 context.

14 I would like to add, as the first
15 railroad panelist after the first two hours of
16 the morning, my name is Richard Weicher with the
17 BNSF Railway. We operate in the Pacific
18 Northwest but have nothing to do with the past,
19 present, or future of the serious issues that
20 were discussed earlier this morning and I will be
21 talking about issues of railroad investment but I
22 am making inferential or otherwise comments on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 any of those other issues.

2 The themes that we hear echoing that
3 appear to be directed at BNSF and that echo in
4 the Board's order are issues of service to our
5 grain and agricultural customers, our service,
6 and capital investment more broadly across our
7 system and the offerings we make.

8 First, I would like to say as a
9 general matter you have seen and already quoted
10 the reasonable request standard for service. We
11 would certainly admit that rail transportation in
12 this country is not 100 percent perfect but we
13 think that we are serving our customers
14 remarkably well.

15 There may be limited numbers of
16 shippers who do not see the system working as
17 well as they think it should or have all the
18 service they might wish all the time for all
19 kinds and degrees of service.

20 Having said that, we think we are
21 seeing a somewhat different thrust of arguments
22 in many of the commentators, less discussion than

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 in past years of do they have all the
2 alternatives they would like with truck or barge
3 and almost the implicit assumption that they are
4 asking for or requesting unilateral assurance of
5 virtually unlimited rail capacity in any quantity
6 whenever and however it might be needed.

7 We at BN are driven by market demand.
8 We do not believe the law requires that one
9 invest in non-economic capacity or to make
10 service available for anyone at anytime but we
11 have very aggressively invested and we look for
12 those opportunities. In the past 10 years we
13 invested \$24 million in our infrastructure. Last
14 year \$2.6 billion.

15 We are investing across the board.
16 Sometimes in these dialogues it's each groups
17 saying, "Where are we compared to the other one?"
18 We have invested aggressively in a call service
19 capacity including to deal with prior service
20 issues and meet growing demand as we move record
21 volumes.

22 We have invested aggressively in an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 intermodal capacity including in the late '90s
2 when our company was criticized for investing for
3 traffic to come that we were overdoing it. We
4 have continued to invest and continue to look at
5 new facilities and track capacity on our line.

6 And in agricultural areas where we
7 have invested to make possible the movement of
8 the tremendous volumes we move and the
9 infrastructure to serve shippers in ever-
10 increasing volumes. There are some themes in
11 these comments including from people we work very
12 well with like Washington DOT that perhaps there
13 should be equalization of investment or
14 investment in shore-haul moves that don't make
15 economic sense.

16 We don't believe those are the ways
17 railroads should invest. I have to add with
18 Washington State that we have excellent relations
19 with them as I spoke to Mr. Witt this morning. I
20 have spent a lot of time out there working with
21 Sound Transit and King County and Port of
22 Seattle. That is the closest to the Pacific PNW

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 issues you've got on the calendar today that I
2 would get.

3 If I may, turning to our next, we
4 have also, we believe, pioneered and expanded a
5 number of tools for maximizing utilization of
6 capacity through market-based offerings. I will
7 spend some time this morning to talk directly
8 about a couple of the areas that are mentioned in
9 many of the comments. These are our so-called
10 COTs and LOGs.

11 We have a program that I know the
12 Board is familiar with and has historically been
13 before them. The Certificate of Transportation
14 which is a mechanism that allows customers to bid
15 on future equipment commitments with, if they
16 choose it, rate protections.

17 This is something that has a history
18 before the Board. It is common carrier service.
19 It does not limit the options for a shipper. We
20 will move traffic in all different ways for all
21 different kinds of varieties but these are the
22 kind of tools that have helped us to better plan

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 logistics and improve efficiency and manage our
2 corridors.

3 It has expanded over the years to
4 programs in other commodities, our so-called LOGs
5 program, Loading Origin Guarantees, percent of
6 being flat cars, box cars, gondolas, other kinds
7 of equipment. We think relating to some of the
8 questions you raise in your order, our areas
9 encourage shipper involvement in planning with us
10 and give other options and expand common carrier
11 options for everyone.

12 Another area that is mentioned by
13 many of the commentators in our ag area are
14 shuttle trains and how they impact the movement
15 of grain. We think these programs which do
16 provide price incentives for volume shipments,
17 referred to in the Board's order, they give us
18 the opportunity to provide price incentives for
19 economies of scale in our business and the grain
20 transportation business.

21 They do properly involve
22 infrastructure requirements by us and the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 shipper. They are not offered to the exclusion
2 of smaller car volumes or shipper options at all.
3 If I could turn to out slide five, this shows
4 since '05 the growth in unit trains on our system
5 and shows singles as well as units.

6 We are proud to say that it is all
7 increasing. We are moving more shuttles
8 including some years in relative terms. We are
9 moving more single car shipments. Most of all,
10 through the efficiencies and the planning and the
11 investments in our infrastructure, our velocity
12 has been excellent. Not always but moving record
13 volumes with powerful concepts that help us move
14 more and more ag and ag products for our
15 customers.

16 This also indicates that these
17 programs do not, as sometimes are accused,
18 disadvantage the nonparticipants. They help the
19 whole system be fluid. If you choose to be in
20 them you have great advantages. If you choose
21 not to be, you still have common carrier service.
22 It is all common carrier service in our ag

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 segment.

2 Similarly, on the next slide, our
3 grain fleet capacity. I speak for BNSF. I know
4 railroads are accused of investing in this and
5 not investing in that. We have been aggressive
6 investors in infrastructure in our plant, in
7 locomotives, and in cars including covered hopper
8 cars.

9 As we have shown on our annual
10 report, our fleet increased approximately 3,000
11 cars in '06 to '07. We have a general fleet and
12 a shuttle fleet. We have grown it all.

13 You hear the comments that you can't
14 have everything for everyone at all times, or the
15 Easter Sunday analogy, but we have grown
16 aggressively in this area both in terms of
17 investment and the capacity through velocity of
18 productivity of what we can move for shuttles as
19 well as the general fleet as well as the folks
20 who are not using shuttles or do not have the
21 volumes for those kinds of movements.

22 With respect to the service issues

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that the Board raised in its order, embargoes and
2 abandonments, the Board has well-established
3 principles for this. There is industry practice.
4 We believe we have used embargoes judiciously and
5 carefully in accordance with the procedures and
6 we follow the rules on abandonments. We believe
7 that we fully intend to continue to work within
8 the spirit and the law of those processes.

9 With respect to the scope of the
10 common carrier obligation, it is an unreasonable
11 demand. It is not universal for everyone. I
12 will say a word to two about exempt traffic.

13 It is true that the common carrier
14 obligation doesn't generally apply to exempt
15 traffic, traffic that has been properly revoked -
16 - excuse me, exempted by the STB and is subject
17 to revocation if there were a reason that the
18 Board wanted to look at the revocation -- excuse
19 me, look at the exemption on the particular
20 widgets in one of the columns in CFR.

21 It has that right. In that sort of
22 way, like the dialogue heard earlier this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 morning, all of our traffic is common carrier
2 traffic in that residual sense and the exemptions
3 are properly justified by competition. We intend
4 to continue to invest as long as demand
5 justifies. We ask the Board not to limit the
6 pricing flexibility for us to do that.

7 CHAIRMAN NOTTINGHAM: Mr. Weicher,
8 your time has expired.

9 MR. WEICHER: I will stop.

10 CHAIRMAN NOTTINGHAM: If you want to
11 take 30 seconds to wrap up, that's fine but we do
12 need to move on.

13 MR. WEICHER: We appreciate the
14 opportunity and we will continue to respond to
15 increases in demand as best we can if the market
16 permits us and the system permits us. Thank you.

17 CHAIRMAN NOTTINGHAM: Thank you. It
18 is now my privilege to introduce Mr. Michael
19 Hemmer, Senior Vice President for Law and General
20 Counsel for Union Pacific Railroad Company.

21 Mr. Hemmer.

22 MR. HEMMER: Thank you, Mr. Chairman,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Mr. Vice Chairman, Commissioner Buttrey. I have
2 relatively few slides. It's about 30 years ago
3 that I had the privilege of sitting in on a
4 conversation among the court-appointed bankruptcy
5 chairman at the Penn Central Transportation
6 Corporation and some other experts in the rail
7 industry. The topic at that discussion was what
8 is the future of this industry.

9 With that kind of rail operation
10 being pretty prominent, especially in the east,
11 it was pessimistic forecast. We imagined that
12 the railroad industry by the year 2000 would be a
13 skeleton of its former self handling some coal
14 and some grain and that would probably be about
15 it.

16 What a delight we are here. What a
17 delight that we are having this conversation.
18 America recognizes that it needs railroads. We
19 are here really because of the fact that the need
20 for railroad service has expanded and is
21 projected to continue to expand in a secular
22 increase.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 It's true that in the short run there
2 is a softness in the economy right now and that
3 has given us a little bit of breathing room but
4 we hope the economy will recover and when it
5 does, we expect the demand to continue to grow
6 and to put pressure on our investment.

7 Union Pacific unfortunately has
8 demonstrated rather publicly what happens when a
9 railroad has more traffic than it can handle. In
10 late 2003 and early 2004, as is well known, we
11 were caught by surprise by a surge in traffic.
12 We didn't have all the resources we needed.

13 The impact was clear for our
14 customers and for us. It was expensive for us.
15 We had congestion in a number of places, our
16 service declined, and we didn't perform all that
17 well either financially or for our customers.

18 Since then we have been a good deal
19 more careful and thoughtful and disciplined about
20 the way we manage our capacity. We have tried to
21 forecast with our customers as well as possible
22 what future demand will be and how we can meet

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 it. We have developed a substantial number of
2 new operating techniques to maximize the
3 efficiency of our service and the quality of the
4 service.

5 We have invested in new technology
6 and operating practices. Most importantly, we
7 have invested more than anybody else. We have
8 been investing at a rate, as shown on this map,
9 of about \$3.1 billion a year. We target that
10 again this year.

11 For those who are concerned about
12 whether we are committed to maintenance, about
13 \$1.6 billion of that investment is capital
14 investment in maintenance to keep our tracks and
15 bridges in good condition.

16 In addition, we are investing in new
17 capacity throughout the system. Some of that
18 investment is in the Powder River Basin and in
19 other parts of our coal network. We are
20 investing in areas that generate ethanol traffic.

21
22 Down in Texas we are investing for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 removal of bottlenecks that could affect our
2 chemical transportation. Of course we are
3 investing in our Sunset Corridor where we are
4 adding double track between El Paso and Los
5 Angeles.

6 This is a very strong commitment to
7 the future by this company and we believe that we
8 can get the returns on this investment. As long
9 as we believe that, we will continue to make
10 them.

11 These efforts, all of which I have
12 summarized here, have made a difference. I have
13 decided to show you our southern region surface
14 metrics. This eye chart is a little bit hard to
15 read but basically what it shows you is on a
16 number of basic measurements of service quality
17 we are at best ever levels in our southern area.

18
19 Whether or not anybody will be
20 prepared to admit it today, in many of our
21 meetings with customers in that area they are
22 reflecting that level of service. Our commitment

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 is to try to continue to maintain it by matching
2 capacity with the volume that is coming at us.

3 I would like to talk for a moment
4 about embargoes. Union Pacific has used them
5 extensively. We have acknowledged that in our
6 filing. We have explained that we have had very
7 significant successes with those embargoes in
8 eliminating congestion in places where a
9 combination of our efforts and our shippers'
10 efforts otherwise wouldn't have succeeded.

11 We have not used embargoes in a way
12 that has been most problematic for the Board and
13 for the ICC and that is to avoid making
14 investments in lines to keep them up to
15 serviceable standards.

16 On the contrary, as you know, we are
17 spending right now something on the order of \$75
18 million with 200 people working 18 hours a day
19 and hundreds of pieces of large machinery to
20 literally move a mountain in Oregon and keep our
21 main line through Oregon in operating condition.

22 There have been some comments about

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the long embargo that Union Pacific adopted in
2 the Powder River Basin. I think a lot of those
3 comments are speculation and misleading. It is
4 true that we had an embargo that began when the
5 Powder River Basin literally melted down during
6 some weather conditions.

7 We did not do that, as some had
8 speculated, in order to restrict capacity and
9 increase prices. Quite the opposite. We would
10 loved to have carried more. It was a very
11 attractive business. It was more attractive than
12 the business that we had already committed to
13 handle. But we believed that our obligation was
14 to handle the commitments that we had already
15 made including those customers growth
16 projections.

17 We put on an embargo to avoid taking
18 on business that we could not handle. We treated
19 the customers who paid low rates the same as the
20 customers who paid high rates. We treated the
21 customers who had contracts the same as the
22 customers who were using tariffs. That was what

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 believed was our reasonable obligation to
2 discharge our duties to our customers.

3
4 I would like to leave, if I may, a
5 few final thoughts with the Board and some
6 recommendations. This proceeding is very
7 important. Assuming that the predictions by the
8 Department of Transportation, ASHTO, and other
9 outside observers are correct, over the long run
10 the industry will need to invest very heavily in
11 new capacity and even that may not be enough. As
12 a result, it will fall to you to make a decision
13 about how to deal with capacity shortfalls when
14 they arise.

15 Our recommendations to you, if we may
16 be so bold, are for, first, please try to keep in
17 mind it is crucially important to protect the
18 rail network's capacity to maximize service. It
19 is possible, for example, that the public will
20 benefit most from actions that do not benefit a
21 particular customer at a particular place on a
22 given day. You will be asked to weigh those

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 considerations.

2 Secondly, we urge you to recognize
3 the complexity and the integrated character of a
4 railroad network. Quite literally if we were
5 obligated tomorrow to start serving from our main
6 line head northeast out of El Paso a shipper that
7 required a lot of daily service would cause auto
8 traffic going to Phoenix to be delayed.

9 It would cause transcontinental
10 intermodal shipments to be delayed. It would
11 delay shipments of chemicals between Texas and
12 the west coast. I believe CSX tomorrow is going
13 to give you a physical demonstration of why that
14 problem arises. We ask you to keep in mind the
15 need to protect the network.

16 Third, we would love to have some
17 simple rules to give you but, on the contrary,
18 our recommendation to you is that each of these
19 instances will be very fact specific.

20 It is important to understand the
21 difference between putting a new shipper adjacent
22 to one of branch lines in Iowa and putting that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 same shipper next to our quadruple track mainline
2 west of North Platte where we are running a train
3 every six minutes and also trying to maintain the
4 track. One of those isn't going to have serious
5 adverse effects. The other one could be
6 catastrophic.

7 So we urge you to focus on these fact-specific
8 considerations.

9 Finally, we want to point out that
10 your customer assistance program works. You are
11 reorganizing it to strengthen it. It brings
12 together customers and railroads. It gives us a
13 chance to learn from each other.

14 We have changed our minds about some
15 of our actions because of what we have learned
16 through that process. We urge you to consider
17 whether that should be a step that is always
18 taken before the Board gets involved in a formal
19 process involving common carriers.

20 Thank you very much for listening to
21 my comments.

22 CHAIRMAN NOTTINGHAM: Thank you, Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Hemmer.

2 We will now here from Mr. David C.
3 Reeves from the Kansas City Southern Railway
4 Company.

5 MR. REEVES: Chairman Nottingham,
6 Vice Chairman Mulvey, and Commissioner Buttrey,
7 good morning.

8 COMMISSIONER BUTTREY: You need to
9 pull that mic right in front of you.

10 MR. REEVES: All right. Is that
11 better?

12 COMMISSIONER BUTTREY: Much better.
13 Thank you.

14 MR. REEVES: All right. Thank you.

15 COMMISSIONER BUTTREY: I'm pretty old
16 and hard of hearing.

17 MR. REEVES: I'm pleased to be able
18 to offer these comments on behalf of the Kansas
19 City Southern Railway Company. KCSR welcomes
20 this hearing and the Board's examination of the
21 meaning of the common carrier obligation in
22 today's environment.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 KCSR strongly believes, however, that
2 the Board should avoid any pronouncement of a
3 one-size-fits-all standard for what is and isn't
4 a railroad's common carrier obligation and should
5 continue its policy of considering these matters
6 on a case-by-case basis.

7 For the record, KCSR is joined in the
8 comments filed by the Association of American
9 Railroads. Accordingly, I will limit my remarks
10 to issues of capital investment, the distinction
11 between disputes about rates and about the common
12 carrier obligation and the burdens of handling
13 TIH shipments.

14 One of the issues raised by the
15 Board's notice of this hearing is what service
16 limitations, if any, the railroad can adopt in
17 the context of the capacity constrained
18 environment.

19 Another way to look at this issue is
20 to ask whether a carrier can tailor its network
21 and operations to maximize the efficiency of its
22 rail network for the vast majority of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 shippers that it serves or instead must be
2 subject to deploying its assets and changing its
3 network solely to accommodate random request for
4 service regardless of the impacts of those
5 requests on the overall shipper community that
6 the railroad serves.

7 Recent studies show that the demand
8 for freight rail service will continue to grow
9 requiring more and more capacity. KCSR is
10 already doing its part to use its revenues to
11 build capacity for the future.

12 In 2008 Kansas City Southern, the
13 parent company of KCSR, plans capital
14 expenditures of approximately \$529 million for
15 new infrastructure and equipment, plus another
16 \$111 million in new locomotive and
17 equipment lease programs.

18 The KCS 2008 capital expenditure
19 program represents approximately 28 percent of
20 KCS' expected revenues. Over the next five years
21 KCS' capital spending is projected to average
22 approximately 20 percent of its revenues. This

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 compares to capital spending of about 3 percent
2 by an average U.S. manufacturer.

3 Infrastructure and capacity drive the
4 ability to provide service. Through its capital
5 spending program KCSR is committed to doing its
6 best to meet the demands for service placed upon
7 it by its shippers. Sometimes the shipper
8 request a certain level or type of service that
9 it believes to be reasonable but that the
10 railroad cannot meet due to capacity constraints
11 or the needs of other shippers.

12 That shipper may complain that the
13 railroad has failed to meet its common carrier
14 obligation because it did not provide what the
15 shipper asked for. Meeting that shipper's
16 particular need, however, could mean that several
17 other shipper's needs would not be met
18 potentially leading to complaints from those
19 shippers that the railroad is not meeting its
20 common carrier obligation to them.

21 Thus, railroads must plan their
22 capital spending and design their service plan to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 meet the needs of those shippers who are most
2 using the system even if this means an individual
3 shipper may not always be able to obtain the
4 level or type of service that it desires.

5 Designing a service plan that
6 accommodates the needs of most yet being
7 sensitive to the needs of the individual shipper
8 is not an easy task. KCSR works with its
9 shippers to achieve the type of balance that is
10 necessary to ensure that adequate capacity and
11 corresponding service levels are available now
12 and will be in the future.

13 Nonetheless, even KCS' plan to expend
14 capital at almost six times the average rate for
15 U.S. manufacturers does not guarantee that its
16 system will have the ability to meet every
17 request for service. As such, there are going to
18 be instances in which shippers that do not
19 receive the level and type of service that they
20 want complain to the Board that the
21 common carrier obligation has been violated.

22 In such cases, the Board needs to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 carefully evaluate the specific merits of that
2 particular case and to do so in the context of
3 the overall needs of the entire rail network. Any
4 attempt to resolve such issues without such a
5 case-by-case approach would be flawed and could
6 lead to long-lasting harm to future capacity and
7 service to other shippers.

8 I would briefly like to address the
9 distinction between disputes about rates and
10 disputes about the common carrier obligation. As
11 has been stated already this morning, the common
12 carrier obligation stems from 49 USC 11101.

13 That Section imposes no substantive
14 standards or requirements regarding the level of
15 rate quoted or the frequency with which the
16 railroad must provide the service. Those issues
17 are covered by other provisions of ICCTA. The
18 distinction between the different statutory
19 provisions is important.

20 In fact, some parties in this
21 proceeding will try to use the informal nature of
22 this hearing to air their specific service or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 rate complaints rather than to file specific
2 complaints or to follow the Board's statutory,
3 regulatory, and evidentiary processes or to use
4 the informal program that Mr. Hemmer referred to.
5 It is neither possible nor appropriate to try to
6 refute the specific allegations in all comments
7 of this proceeding.

8 In the context of this proceeding,
9 therefore, the Board needs to carefully ensure
10 that it will not adopt any policy or
11 pronouncement that would allow complaints which
12 are really about the level of rates to be treated
13 under the procedures developed to resolve
14 complaints about a failure to abide by a common
15 carrier obligation.

16 Finally, I would like to address
17 KCSR's views regarding the transportation of
18 highly hazardous materials, especially so-called
19 TIH. Despite the rail industry's outstanding
20 safety record in moving TIH materials, the risk
21 of even one accident related to TIH materials is
22 potentially devastating, especially for smaller

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 carriers.

2 If a carrier attempts to account for
3 this risk through its rates, it may be subjected
4 to a rate complaint. However, the Board's rules
5 for simplified stand-alone cost cases and three
6 benchmark cases do not provide a carrier with an
7 opportunity to recover the particular costs
8 associated with the risk of transporting TIH
9 materials.

10 A rail carrier can, thus, be stuck
11 carrying TIH materials at terms that do not fully
12 account for the extreme risk of the release of
13 such chemicals. This situation should be
14 corrected. Certainly improving the safety of
15 transporting TIH materials is an important step.

16
17 KCSR, therefore, supports the
18 industry's efforts to establish new standards for
19 tank cars carrying TIH, to cooperate with
20 communities that are developing and evaluating
21 emergency response plans, providing training to
22 emergency responders, and to improve necessary

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 information flow.

2 KCSR also supports efforts to replace
3 TIH materials with safer product substitutes
4 whenever possible. Nonetheless, despite these
5 efforts as long as a carrier must transport these
6 materials as part of its common carrier
7 obligation, the risk of a catastrophic accident
8 remains.

9 As such, KCSR believes the Board
10 needs to carefully examine the numerous issues
11 surrounding the transportation of TIH material
12 and develop regulatory or legislative solutions.
13 In particular, others have suggested a separate
14 proceeding, I believe, on that subject and we
15 would concur with that.

16 KCSR has always understood that the
17 common carrier obligation required KCSR to
18 provide a rate and service upon reasonable
19 request and has always abided by that requirement
20 to the best of its understanding and ability.

21 What constitutes a reasonable request
22 for service is, in the first instance, a matter

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for business resolution by the involved companies
2 and, if that fails, a matter of case-by-case
3 analysis by the Board. Again, the Board should
4 avoid the temptation in this proceeding to
5 announce a one-size-fits-all formula about what
6 is a reasonable request.

7 Thank you. I'll do my best to
8 respond to your questions.

9 CHAIRMAN NOTTINGHAM: Thank you, Mr.
10 Reeves. I appreciate you limiting your remarks
11 to the prescribed time. It is very helpful.

12 Just to get this out of the way and
13 seque away from the earlier panels, which were
14 very helpful, into this panel next, it occurs to
15 me, Mr. Hemmer, that your railroad, Union
16 Pacific's name was mentioned a couple times in
17 earlier panels in discussion of the CORP embargo
18 controversy in Oregon. Help me understand, and
19 in case you weren't here for all of it, the
20 suggestion was made that CORP somehow believes
21 that the Union Pacific is responsible, or should
22 be responsible, for a financial commitment to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 reopening and maintaining the line to Coos Bay,
2 Oregon. Is that a line that the Union Pacific
3 Company is a part owner of or has any legal
4 responsibility for?

5 MR. HEMMER: The Union Pacific
6 doesn't have any ownership of the line that was
7 discussed this morning. We were listed and
8 asked, along with a number of other parties, most
9 of them public, to contribute \$4.66 million to
10 the rebuilding of that line. I can't say we
11 acted with anymore enthusiasm than any of the
12 public entities or heard about or from today.

13 CHAIRMAN NOTTINGHAM: Is that a
14 common occurrence? I mean, does the UP have a
15 program or a budget allocation for donations to
16 other railroads to help them out with their
17 maintenance problems?

18 MR. HEMMER: We tend not to be
19 volunteers to help our connecting carriers.

20 CHAIRMAN NOTTINGHAM: Wouldn't you
21 have some explaining to do to your shareholders
22 if you were to develop that kind of a policy?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. HEMMER: I think it would be
2 difficult for us to explain that, particularly if
3 we believe, as is the case here, that there is
4 little prospect that we could earn any return on
5 that investment.

6 CHAIRMAN NOTTINGHAM: RailAmerica has
7 made several overtures and shows a pattern of
8 possibly continuing for a good period of time to
9 continue to ask Union Pacific and others to
10 contribute to the maintenance and repair of their
11 line. Do you get the sense that the Union
12 Pacific will change its position if the request
13 just comes three, four, five, or 10 or 20 more
14 times?

15 MR. HEMMER: I don't think repetition
16 is going to affect our views on this subject.

17 CHAIRMAN NOTTINGHAM: Thanks. I
18 promise not to turn this into a hearing. I've
19 only got one controversy but since your
20 railroad's name was invoked, I wanted to make
21 sure we cleared that up on the record. Thank
22 you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I would like to talk about the hazmat
2 issue, the toxic inhalant risk management issues
3 that all railroads face, the attended insurance
4 cost, the tort liability exposure. This issue
5 comes up in much of the testimony that we will be
6 hearing today and tomorrow and I wanted to make
7 sure that we've got a couple of the biggest
8 railroads right before us now along with Kansas
9 City Southern. Not the biggest but also Class I.

10
11 You all, of course, are required to
12 handle and move, and you do, significant amounts
13 of hazardous materials and toxic inhalants, often
14 called TIH. I believe you all are also lawyers.

15
16 If you were hypothetically to have an
17 accident on any one of your rail lines where
18 either because a motor vehicle crossed the path
19 of a train and under this hypothetical all safety
20 and DOT and FRA and other regulations were abided
21 by and followed and you were using the right cars
22 that met standards but there was tragically an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 accident, it could have been because of a
2 landslide, could have been because of a vehicle
3 crossing onto your track, whatever the cause, and
4 depending on the location tort liability seems to
5 me is administered and applied somewhat
6 differently depending on what state or local the
7 accident might happen.

8 Someone said that if you just act
9 safe and follow the regs, you shouldn't have much
10 to worry about. Is that accurate? Help add some
11 context and some color to the type of risk
12 management you are confronted with in that kind
13 of hypothetical where all regulations and safety
14 standards are complied with but, nevertheless,
15 there still could be an accident resulting in
16 release of a TIH, perhaps in a populated
17 community.

18 MR. HEMMER: If my colleagues will
19 allow me since we carry more of this stuff than
20 anybody else, I'll offer a few comments. First,
21 you are absolutely right that there are some
22 accidents that we cannot avoid. In 2008 so far

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 this year, and this is a little bit unusual, but
2 we are running at a rate of 30 percent of our
3 vehicle/train accidents being instances where
4 somebody runs into the side of our train.

5 It's a little hard for me to know how
6 much we can do to prevent that sort of thing.
7 That is an example of the kind of incident that
8 you are talking about. What we are all worried
9 about here, of course, is that out beyond the
10 range which we realistically can get liability
11 insurance that there is that nightmare scenario.
12 I t h a s n ' t h a p p e n e d y e t .

13 Graniteville was terrible. Our
14 incident near San Antonio was as well for those
15 who were involved and for us. It is the death of
16 5,000 people or some have suggested even 100,000.
17 What has changed it seems to us over time is,
18 first, that the American tort liability system
19 has become more extreme and more dangerous for
20 corporations, and perhaps for all of us.

21 Second, we have the terrorist threat
22 that didn't previously exist until September 11.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Third, we are looking at a very wide range of new
2 FEMSA, DOT and DHS requirements, some of which we
3 don't know how we are going to meet, that will
4 could disrupt networks, could increase cost.
5 Those are all major factors for us.

6 We agree with those who say that if
7 these shipments are going to move, rail is the
8 safest way to move them. We are substantially
9 safer than truck. We also have made substantial
10 improvements over the last couple of years to
11 reduce the risk of an accident. I'm speaking
12 only for UP right now. We have done a lot.

13 For example, we spent tens of
14 millions of dollars to add signals on a so-called
15 dark line between Shreveport and Houston. We had
16 to do that for the bizarre reason that we carry
17 coals to Newcastle on that line. We bring
18 southbound shipments of chlorine into Houston
19 where they make this stuff. We have made the
20 investment for safety reasons.

21 All of that said, we agree with the
22 AAR that this is a topic that deserves much more

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 extensive and separate investigation than can be
2 accomplished here with it being one of a half
3 dozen or a dozen topics. That is why we think it
4 would be appropriate for the Board to look at
5 those changes in the environment, to look at the
6 extent to which product substitution is real or
7 ephemeral, to look at whether we can realign
8 incentives associated with risk in some way that
9 is a little more equitable than "it's just your
10 problem" approach.

11 Finally, I would point out that there
12 are partners of ours, Dow in particular stands
13 out, that have worked with us very cooperatively
14 to reduce risk throughout the entire supply chain
15 and we are very grateful for that.

16 CHAIRMAN NOTTINGHAM: That was a very
17 helpful answer, Mr. Hemmer but, Mr. Weicher, if
18 you could also add just a little bit of context
19 to the part of my question about could you still
20 face -- I think Mr. Hemmer touched on this but
21 you could possibly still face enormous liability
22 even without any violation of established safety

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 standard. Is that fair to say?

2 MR. WEICHER: Certainly, if I may,
3 and I'll make a few brief remarks. We are not as
4 big of a mover of these kinds of commodities as
5 some of the other major railroads but they are
6 important commodities. We move a lot of
7 anhydrous ammonia.

8 In the area of actual TIHs the most
9 discussed ones I think it's less three-tenths of
10 one percent of our movements. Having said that,
11 we are very concerned about the risks of these
12 movements. They present a significant potential
13 liability, as you have suggested, in situations
14 where we may have no fault or something could
15 occur either through a third-party or a random
16 event or a terrorist event that we have no
17 control over.

18 We believe there are serious public
19 policy issues here. We run a very safe railroad.
20 We are the safest way in many instances to handle
21 these commodities. There is a wealth of
22 regulations coming. It is a very serious topic

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that the railroad -- excuse me, the consumers and
2 producers, as well as the railroad industry of
3 these commodities need to address, to manage
4 these risks and not leave them on the railroad.

5 In keeping with some of the comments
6 this morning, we are open to a more focused
7 proceeding from the standpoint of the STB what
8 are reasonable terms of common carriage in this
9 day and age is a question worth examining.

10 CHAIRMAN NOTTINGHAM: Thank you. As
11 any business, I know that railroads need to work
12 with insurance providers to make sure you
13 properly manage risk. I have heard in my visits
14 with some of the railroads about the enormous
15 cost, increasing cost, of that insurance coverage
16 in recent years.

17 Insurance companies often point to
18 their concerns about this very topic. They are
19 being asked to basically become your partner in
20 covering sort of unpredictable and unlimited
21 perhaps liability exposure. How do you handle
22 those costs? You are all sharp businesses and I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 can only assume you need to recapture those costs
2 as you need to all your costs.

3 How do you pass this along? Are you
4 able to basically sit down only with your
5 chemical shippers who are the driving force in
6 those cost increases and pass those costs onto
7 those handful of -- maybe it's more than a
8 handful of shippers or do you basically have to
9 pass them off onto everybody including grain
10 farmers and other shippers you've got nothing to
11 do with TIH. Of course, some do receive
12 fertilizer and all that but people who may well
13 not have any role in TIH. Are they asked to
14 basically pony-up?

15 MR. REEVES: In general I would say
16 that some component of those costs is probably
17 allocated throughout the network. Some portion
18 of it may be allocated more towards the
19 particular traffic involved in determining the
20 cost for the particular movement which is part of
21 the calculation of the prices. Some portion of
22 the cost bleeds over into all of the traffic.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. HEMMER: We believe that about
2 half of our excess insurance cost is attributable
3 to these types of shipments. I don't look in
4 stripes so I'm not going to talk more about how
5 we price. I would point out with all due
6 respect, though, that a simplified stand-alone
7 method that you have developed does not appear to
8 allow us to allocate those costs to the shipments
9 that cause them.

10 Beyond that, though, that is really
11 not the ultimate concern for us at Union Pacific.
12 Our concern is what I cause the nightmare
13 scenario, the derailment, perhaps because we've
14 hit in the side, or we've run into something, or
15 it could be because of our own operating failure.

16
17 The scenario, though, in which there
18 is a major derailment, a major chlorine or
19 anhydrous incident in a major populated area
20 there is no insurance to cover that. Stockholder
21 equity would be wiped out. The company would
22 probably be in a prolonged period of bankruptcy

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 if something like that happened where all of this
2 investment I have described would probably be put
3 on hold. That is the kind of situation we are
4 worried about.

5 MR. WEICHER: If I might add, and I'm
6 not prepared to discuss pricing practices or what
7 options we may look at or deal with with a
8 specific shipper. Having said that, I think it's
9 fair to say in a similar vein that this is an
10 area where our shippers in general and our system
11 and network in general are being forced to bear
12 or try to spread a risk you may not be able to
13 spread across other commodities of the shippers
14 to keep our system going.

15 There is no mechanism out there now
16 that deals with it. There is nothing like the
17 Price Anderson nuclear material type structure
18 that has recognized these are public needs and
19 public risks. I realize that is a matter for
20 Congress, not the Board, but there are serious
21 issues that today leave us as the only vehicle to
22 try to deal with these across our system, these

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 risks.

2 CHAIRMAN NOTTINGHAM: Please be sure
3 I'm not asking for any specific pricing
4 information other than just the general concept
5 that all businesses need to recover cost
6 including insurance cost but it is worth noting
7 that at least one of the witnesses was willing
8 share just generally, and I appreciate it Mr.
9 Reeves, that all of your customers are paying for
10 this problem one way or another.

11 Some perhaps more than others if I
12 heard you correctly. That is important because
13 when I meet with some rail stakeholders,
14 customers of yours, I sometimes come away with
15 the impression that they feel this is not their
16 problem, this is just your problem.

17 I'm looking forward to getting into
18 it more with the other panels but it occurs to me
19 that perhaps it is all of our problem whether you
20 are a user of the chemicals, as we all are, or
21 whether you are a grain shipper or a coal shipper
22 or any kind of shipper interested in keeping your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 rates down.

2 The fact that these costs are
3 creeping in that you may have no direct
4 relationship to makes it all of our problem. Let
5 me pause here. I do have some more questions but
6 I would like to let Mr. Buttrey take a turn with
7 questions.

8 COMMISSIONER BUTTREY: Thank you, Mr.
9 Chairman. I don't really have a question for the
10 panel but I think I made my views on this
11 perfectly clear this morning in my opening
12 statement. I stand by those.

13 I know that saying what I said this
14 morning may waltz up to the line of something
15 that maybe was a little too strident and it goes
16 to the issue of what is a reasonable request. I
17 think, as I said this morning, we may need to
18 take a real fresh look at what that means in the
19 context of hazmat. Thank you, Mr. Chairman.

20 CHAIRMAN NOTTINGHAM: Vice Chairman
21 Mulvey.

22 VICE CHAIRMAN MULVEY: Thank you. I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 want to begin by once again trying to drive a
2 stake through the heart of an analogy I've always
3 hated and that is the Easter Sunday analogy.
4 Churches are built for Easter Sunday. Go to
5 church when it's not Easter Sunday and you find
6 lots of room. While the point may be well taken,
7 I've always hated the analogy.

8 Let me start off with Mr. Hemmer of
9 Union Pacific to raise a point that is concerning
10 the Board right now. You may or may not be
11 familiar with this. You said some very, very
12 nice things about our consumer assistant program
13 and we appreciate that but it has come to our
14 attention that Union Pacific lately has been the
15 least cooperative of all of the railroads in
16 terms of dealing with customer problems or
17 working with our consumer assistance group and
18 dealing with those problems.

19 I would hope that you take that back
20 and look into that matter because we have been
21 having more of a problem lately with your
22 railroad than with the other railroads and that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 hasn't been true in the past. I hope you will
2 take that to heart.

3 To the BNSF, to Mr. Weicher, you
4 argue the railroad's capacity is constrained and
5 when it's constrained it's common carrier
6 obligation is "to act fairly and reasonably to
7 provide service with its available capacity."

8 If the railroad is the organization
9 that decides how much capacity is going to be
10 offered, then the reasonableness of the service
11 is bounded by that capacity. In a sense the
12 railroad is determining what is reasonable, what
13 a reasonable offering is rather than this Board
14 or any other group. Is that true? I mean,
15 basically you determine how much capacity so,
16 therefore, you can determine what is reasonable.

17 MR. WEICHER: We have the
18 responsibility to work with the capacity we have
19 at a given time. I should say at various times
20 in some areas right now we might not be as
21 constrained in capacity as we wish we would be
22 but that in light of current economic terms.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 We have the responsibility to grow
2 capacity from the standpoint of our shareholders
3 and our company and our customers when the return
4 is justified. We do have a responsibility I
5 would say from the standpoint of the common
6 carrier law to act reasonably in allocating or
7 cuing or whatever the issue might be in a given
8 situation in the commodity we were talking about
9 by definition as the managers of the property.

10 That is also not to say, and this
11 hasn't happened in many, many years, but there
12 are remedies before the Board if that wasn't done
13 right. I'm thinking way back to grain car
14 allocation many, many years ago. There are
15 remedies for such things. In the first instance,
16 we have to deal with our customers and the
17 demands they come together with the commitments
18 we have made to them and the rates and the
19 offerings we've done.

20 VICE CHAIRMAN MULVEY: It's been
21 argued that a railroad sometimes cannot service
22 new customers because it serves existing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 customers. Serving a new customer might affect
2 the overall service systemwide and networkwide.

3 That may be true but how does the
4 Board then handle the needs of the new shipper
5 that comes before it saying, "The railroad is
6 refusing to serve us," when, in fact, the
7 railroad is refusing to serve them because it's
8 making the argument that it is going to affect
9 other customers. Should we be making judgments
10 and say, "Well, look, there may be these downside
11 effects but, in fact, you must serve these new
12 customers when they come to you."

13 MR. WEICHER: I'll comment briefly
14 and then since the other railroads also have
15 views on this but it is hard to hypothesize
16 exactly what we're talking about. We are not in
17 the habit of turning away new business. We look
18 for business opportunities. We want the business
19 opportunities.

20 There can be situations where someone
21 is asking for a kind of service and the kind of
22 hypothetical you can talk about if someone wanted

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to connect with our transcontinental main line,
2 high volume, and set something up where they
3 wanted to come out on the line and switch cars or
4 have us do a function that could not be supported
5 without serious impact on other shippers.

6 Or coming out of the Powder River
7 Basin somebody wanted to interfere with the flow,
8 that could lead to compromises, or there could be
9 someone asking for a form of benefits. Sometimes
10 these are rate issues.

11 They want the benefit of a high
12 volume rate and they are not going to do that.
13 But there are remedies if we acted unreasonably
14 either on the rate side or otherwise and those
15 are very, very fact-specific situations.

16 MR. HEMMER: You framed the issue as
17 denying service or refusing to provide service.
18 We prefer to look at it at Union Pacific as the
19 terms on which we can get the yes, the terms on
20 which we can provide the service.

21 There has been a lot of debate in the
22 filings that have been made here. It's an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 interesting and important debate about the extent
2 to which a railroad can ask a shipper to provide
3 infrastructure that on a very busy mainline
4 supports the service to that shipper. You may
5 not like the Easter Sunday example but there are
6 many others.

7 There are stop lights on the New
8 Jersey Turnpike. There's requiring Southwest to
9 fly from every airport in Wisconsin to Midway no
10 matter what affect it has on Midway or the
11 economics of the business. What we are trying to
12 do is find a way to attract new business and to
13 be able to do it while continuing to serve out
14 existing customers efficiently.

15 I'm very surprised to see, for
16 example, the concerned coal shippers weighing in
17 heavily on the subject. They are major
18 beneficiaries of our policy because our objective
19 is they use a lot of our highest density lines
20 and they, therefore, would be hurt most if we
21 started doing a lot of switching off of those
22 lines and blocking those lines for an hour or two

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 or three hours a day.

2 VICE CHAIRMAN MULVEY: You mentioned
3 requiring shippers to make investments in the
4 infrastructure. A lot of the testimony that we
5 receive from shippers have complained about these
6 requests. What considerations or what obligation
7 do you have to the shippers if you required them
8 to make this investment? What guarantee do they
9 have that after they make the investment they are
10 going to be served.

11 MR. HEMMER: It's in our interest to
12 serve them once they have made that investment.
13 This is the way much of the ethanol business is
14 moving right now. We've had a lot of shippers
15 who have made significant investments and we want
16 to carry their traffic. We are carrying their
17 traffic. We are increasing our
18 ethanol shipments 40 and 50 percent on a
19 compounded annual basis. We expect to see that
20 continue. If they want commitments, and vice
21 versa, we get commitments from them, we are happy
22 to sit down and work out a contract. That's an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 alternative way to proceed.

2 VICE CHAIRMAN MULVEY: Union Pacific
3 has, as you mentioned before, used the embargo
4 more than the other railroads. In fact, since
5 the beginning of 2006 until, I think, last week
6 the Union Pacific has put in more embargoes than
7 all the other railroads put together. I believe
8 you put 154 embargoes in place.

9 Is this consistent with the AAR
10 circular with regard to embargoes that says
11 embargoes should not be used except for safety or
12 weather-related emergencies and should not be
13 used for commercial reasons or to monitor
14 traffic? Do you find that UPS approach to be in
15 conflict with the AAR circular?

16 MR. HEMMER: We think that the AAR
17 circular contemplates an ability to serve a
18 customer for reasons beyond our control. We have
19 had a number of instances, this is the principal
20 use of some of these smaller embargoes, where
21 there are simply too many cars coming at the
22 customer at one time.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 I used an example in our testimony of
2 an ethanol receiver in Texas that simply said,
3 "We can't control this." So we had an extended
4 embargo for that receiver and we weren't refusing
5 to accept shipments. We were permitting them in.
6 We finally now reached a sufficient capacity
7 situation on the shipper's facility there where
8 that embargo is no longer necessary.

9 The alternative is very ugly. We
10 showed what happened in Phoenix when you have
11 literally 700 cars in a 1,100 capacity yard that
12 are waiting to get into shippers some place.
13 That happened when Phoenix was booming and lumber
14 was coming in from all over creation.

15 There were just too many cars coming
16 in so we couldn't meet our obligation to the
17 recipients of those shipments or to recipients of
18 other shipments such as our auto customers unless
19 we did something to stem the flow. We aren't
20 stripping -- under our approach we aren't
21 stripping down our yards where we say we will not
22 allow a single car to be stored there.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 We understand there is some bunching
2 that takes place. We are responsible for that.
3 What we have tried to do is compromise at about
4 three days worth of business in our yards and
5 that's really our objective right now.

6 VICE CHAIRMAN MULVEY: You would
7 agree that embargoes are always temporary.
8 Correct? A permanent embargo constitutes
9 abandonment. No?

10 MR. HEMMER: If you have a situation
11 where you're not doing anything to get rid of the
12 embargo and you are not repairing a line or you
13 are not doing anything to resolve the cause then,
14 yes, I would agree you have to use one or the
15 other mechanisms that is available. Your Show
16 Cause Order in the court case seems to me to
17 stable off precisely.

18 VICE CHAIRMAN MULVEY: Thank you.
19 Mr. Reeves, you mentioned in your testimony that
20 the URCS does not incorporate the fully allocated
21 cost of transporting TIH materials. I would like
22 to explore now a little bit with you more.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 As I understand it, all railroad
2 costs, including the cost of handling TIH
3 chemicals are captured in the uniform system of
4 accounts.

5 The question I want to ask you is
6 this. Are you asserting that URCS understates
7 TIH costs because it's not capturing those costs
8 in the first place or is it a matter of
9 assignment that some of the TIH cost is being
10 assigned to other traffic?

11 MR. REEVES: What I was particularly
12 referring to was the small rate case decision
13 that adjustments to URCS would not be allowed for
14 shipments that had particular issues.

15 VICE CHAIRMAN MULVEY: But in URCS
16 isn't the TIH cost actually captured because
17 aren't your insurance costs captured in URCS?
18 The other shippers paying that cost when we look
19 at the revenue to variable cost ratio of other
20 movements?

21 MR. REEVES: I can't profess to be an
22 expert with URCS. I apologize.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRMAN MULVEY: The other
2 question I did have about URCS is URCS is thought
3 to be problematic for many, many reasons and it's
4 been around for quite some time and it's based
5 upon econometric analyses and modeling that was
6 done many, many years ago with old data.

7 I for one am wondering about the
8 feasibility of redoing URCS and bringing it up to
9 date. We might be able to address some of the
10 TIH issues at that time. Do any of you have any
11 comments or thoughts on doing that?

12 MR. HEMMER: Before saying yes, one
13 has to swallow very hard and wonder about whether
14 you have the staff that can do it or we have the
15 staff that can do it. Nevertheless, as you say,
16 it is quite outdated. We know some of the
17 allocations are very questionable.

18 We performed a bit of a fix for TOFC
19 traffic. That helped some. There are some other
20 allocation issues and one ancient one in
21 particular which is the treatment of essentially
22 land cost and right-of-way cost that I think need

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to be revisited. Speaking only for Union Pacific
2 we would be willing to join with you in pursuing
3 that initiative if the Board wanted to do it.

4 VICE CHAIRMAN MULVEY: Thank you.

5 MR. WEICHER: Vice Chair Mulvey, if I
6 may, I would have to agree that it is a fine
7 system because it is the Board system. It has
8 been there a long time but I remember when it
9 evolved. There are things in there like
10 regressions and things that go way, way back in
11 reference to the question you were posing
12 earlier.

13 There are various costs, no doubt
14 insurance as well, that are simply spread across
15 vast quantities of traffic. It would be a very
16 daunting effort to take on but we would
17 participate, of course.

18 VICE CHAIRMAN MULVEY: I recognize
19 it's daunting and it would be very, very costly
20 as well and it would put a lot of demands on the
21 Board's resources. It might even need more
22 resources. I do think having good data and good

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 information and good models are critical to doing
2 our job correctly. It has been a long time since
3 this has been reviewed in total and I think it's
4 time to do it. My other Board members may not
5 agree with me.

6 CHAIRMAN NOTTINGHAM: Thanks. I have
7 a couple more questions. I appreciate your
8 patience.

9 Mr. Weicher, this relates to the
10 grain sector. What would you estimate is the
11 total percentage of your grain fleet devoted to
12 contract movements of grain?

13 MR. WEICHER: Quite small. I don't
14 know a precise number because COTs are not
15 contracts. They are commitments forward and the
16 vast bulk. Now, in the ag products area we have
17 a number of things that move under contracts and
18 the whole grains I believe is quite small but I
19 can't give you a number.

20 CHAIRMAN NOTTINGHAM: Okay. Jumping
21 back to the risk management discussion we had a
22 few minutes ago triggered primarily by your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 required handling of toxic inhalants and
2 hazardous materials and the liability of exposure
3 attended to that. Is this liability exposure
4 something that has grown to the extent that the
5 railroads need to actually and do you report them
6 in various filings like Securities and Exchange
7 Commission filings?

8 Sometimes businesses when they have a
9 certain type of risk they need to sort of put
10 that out there and some people see that as an
11 indicator. If it's real, you have it in your SEC
12 filings. If it's not there, then maybe it's not
13 quite as imminent or problematic as people
14 suggest.

15 MR. HEMMER: It's real and it's in
16 our SEC filings.

17 MR. WEICHER: There are extensive
18 discussions of the various kinds of risks
19 overlooking and otherwise that we are facing
20 very, very carefully crafted in our annual report
21 and our 10(k)

22 CHAIRMAN NOTTINGHAM: Mr. Reeves.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. REEVES: I'm not certain whether
2 that's in there or not. I would believe it would
3 be but I don't know.

4 CHAIRMAN NOTTINGHAM: Okay. These
5 are all items at the end of the public domain but
6 if you wouldn't mind just making those SEC
7 reports available to us and we can make them part
8 of the record. Thank you.

9 Mr. Reeves, I have to confess that in
10 my travels and dealings with shippers the issue
11 that I hear most about the Kansas City Southern
12 in recent weeks and months is not one of the
13 gigantic issues that we have maybe touched on
14 already today. It's really kind of a smaller one
15 but I need to while I have you here raise it.

16 Apparently the Kansas City Southern
17 in an effort to promote the use of the internet
18 by customers to check on the status of train
19 movements and car availability and car location
20 has an interesting incentives policy now whereby
21 if shippers choose to call the old fashioned way,
22 pick up a telephone and call someone at the KCS

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to ask, "Hey, what is the status of my shipment?
2 It was supposed to be here yesterday. I need to
3 know where it is," that there is a \$25 fee levied
4 on the shipper in those cases. Is that something
5 you are familiar with?

6 MR. REEVES: I am not. I don't know.
7 I could find out I'm sure.

8 CHAIRMAN NOTTINGHAM: Okay. I can
9 maybe help you because I know that the dozens and
10 dozens of shippers who have pulled me aside and
11 of all the issues out there that we have to deal
12 with from rate dispute resolution processes and
13 this issue, common carrier obligation, all these
14 big issues, that's the one I hear about from KCS
15 customers more than anything else.

16 Just to me you deserve credit for
17 trying to promote e-commerce and getting folks to
18 use the internet but I would like to suggest from
19 a public relations perspective and a customer
20 relations perspective it is a really questionable
21 approach because it sends the message that,
22 "Don't bother us, customers. If you do, we are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 going to charge you a \$25 fee."

2 If you can imagine that the STB
3 started doing that. Yes, we have our filing fees
4 and those are not always popular but if we didn't
5 answer status inquiries but for a \$25 fee, we
6 would be hounded out of existence in a matter of
7 weeks. Please take that back if you could.

8 If I've got it wrong, please correct
9 me but I've heard it from so many shippers.
10 While I had you here I wanted to raise that. I
11 will say it kind of relates to perhaps just a
12 customer service orientation and perhaps a
13 training opportunity for all of the railroads.

14 In my travels and extensive meetings
15 with shippers I hear over and over again that
16 railroad employees will say, "We can't provide
17 that service. We won't provide that service.
18 Not going to happen. No."

19 When I asked about that, the railroad
20 -- the way it was recounted to me by shippers is
21 the railroad employees never ever mention the
22 common carrier obligation. Never say, "Of course

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we have an obligation to serve you upon
2 reasonable request but here is why it's
3 complicated and here is why it might be awfully
4 expensive for us to meet your needs." Sometimes
5 it's just "no."

6 If you could take that home to
7 headquarters, talk to your HR people and your
8 training people and your marketing people that it
9 sends a terrible message. People call the Board
10 and they say, "I just got told heck no."

11 It leaves the impression that not
12 enough railroad employees actually know there is
13 such a thing as a common carrier obligation.
14 It's almost to me, maybe I'm old fashioned, but I
15 sort of think it should be somehow in or close to
16 the mission statement that every new employee
17 gets briefed on and understands to be sensitive
18 to.

19 MR. HEMMER: I've had two comments
20 today that suggest that we may need to take a
21 close look at what we do. What we have attempted
22 to do is set up a process by which requests for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 new service are reviewed including by counsel who
2 are familiar with the common carrier obligation.
3 I'll take a good look at that process and see if
4 we've got some shortcomings in it.

5 CHAIRMAN NOTTINGHAM: Thanks. My
6 last question really is -- I appreciate
7 everyone's patience. There is much in the record
8 from different statements that were filed for
9 today about the question as to whether the STB
10 has really anything to do with looking at,
11 possibly adjusting, possibly changing the way the
12 very broadly worded common carrier obligation is
13 spelled out in the statute.

14 Can we actually through rulemakings,
15 regulations, through the work we do actually
16 change the way the Common Carrier obligation
17 impacts certain shippers, certain types of
18 shippers? I'm thinking, for example, exempt
19 commodity process. You all are very keen
20 observers on the Board, pretty experienced with
21 our procedures.

22 Do you have an opinion as to whether

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the Board under certain circumstance can actually
2 make meaningful adjustments to the way the common
3 carrier obligation is actually implemented and to
4 whom it applies?

5 MR. WEICHER: Short answer, yes.
6 Clearly it's within the Board's jurisdiction to
7 define the term reasonable request, reasonable
8 demand and so forth. This Board or its
9 predecessors granted the exemptions or enacted
10 the exemptions and various commodities more
11 broadly.

12 These are carefully structured and
13 there is a lot of industry that relies on what is
14 out there but it's within your jurisdiction. If
15 the exemption on widgets and 49 CFR something
16 didn't make sense, I believe you have the
17 jurisdiction to revise that. By the same token
18 on the regulated commodities, just as you have
19 done including with things and programs my
20 companies had, you are the definer of what is a
21 reasonable response to a common carrier request.

22 MR. HEMMER: I agree that although

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you don't change the underlying law, the law
2 calls on your to take into account what is
3 reasonable and that, in turn, depends on a
4 totality of circumstances. What was reasonable
5 in 1983 with a shrinking railroad industry ought
6 to be wisely viewed as quite different from what
7 is reasonable under very different circumstances
8 in 2010.

9 With respect to exemptions, I would
10 also point that that individual shippers are free
11 to come to you with a request to revoke an
12 exemption. FMC did that successfully in a case
13 that we litigated. That opportunity is always
14 out there.

15 CHAIRMAN NOTTINGHAM: Mr. Reeves,
16 anymore thoughts on that?

17 MR. REEVES: As suggested in my
18 prepared remarks, we understand that you will
19 interpret how that obligation applies in various
20 circumstances but encourage you to do it in
21 particular facts and cases rather than by a
22 general pronouncement.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRMAN NOTTINGHAM: It's a matter
2 of record that the Board and the ICC before us
3 have made over 100 exemption decisions, some at
4 the behest of the industry and some on the
5 Board's own motion.

6 That precedent is alive and well out
7 there and I just raise it because there are some
8 that in their statements have indicated only
9 Congress has the authority to make meaningful
10 adjustments to how the common carrier obligation
11 is implemented. I think it's important to get
12 the facts down. Thank you.

13 Any other questions from my
14 colleagues?

15 VICE CHAIRMAN MULVEY: I just have
16 one. The Price Anderson law with regard to
17 nuclear materials has been raised. Do you
18 support some sort of Price Anderson legislation
19 for hazmats for the railroads and would the
20 railroads be willing to contribute to that fund?

21
22 I don't believe that under Price

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Anderson the railroads contribute to the
2 liability fund. Or would you prefer something
3 like the Warsaw Convention amended by the
4 Montreal Protocol which would give you a cap on
5 liability?

6 MR. HEMMER: If I had my choice I
7 would prefer a cap on liability. I have a sense
8 that there are trial lawyers in America who might
9 not react very well to that.

10 VICE CHAIRMAN MULVEY: I'm not a
11 lawyer but my colleagues might.

12 MR. HEMMER: The Price Anderson model
13 is an appealing one to us and it seems to me to
14 have some value in this context.

15 MR. WEICHER: I don't disagree. I'm
16 not sure I would be prepared to parse the
17 different proposals so much as that something
18 along the model of that kind of structure that
19 deals with public risk as a public issue would
20 certainly be something appropriate.

21 VICE CHAIRMAN MULVEY: Mr. Reeves.

22 MR. REEVES: The unlimited liability

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 is the big issue that could potentially ruin us.
2 It's difficult to calculate liability. Either of
3 those would to some extent address the liability
4 cap more directly.

5 VICE CHAIRMAN MULVEY: Thank you.

6 CHAIRMAN NOTTINGHAM: I think it's a
7 very good question, Vice Chairman Mulvey. Thanks
8 for raising it. I just would say that something
9 has got to change. The status quo seems to be
10 unacceptable. We are just waiting for -- we hope
11 it's a long time from now but accidents happen
12 when you have a system across the country that
13 operates 365 days a year night and day in all
14 kinds of weather.

15 It's just crying out for attention
16 and action so we encourage all of the
17 stakeholders, not just railroads, to get together
18 and develop solutions or else you are going to
19 have others trying to develop them for you that
20 might not work as well. We talk a lot in this
21 town about the challenges in the healthcare
22 sector for example.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 It's a huge challenge and the
2 liability problems that disincentivize physicians
3 from practicing in certain states or in certain
4 lines of the medical practice that are
5 particularly subject to massive tort liability
6 and then trigger these enormous insurance
7 premiums to doctors.

8 Doctors compared to railroads seem to
9 have it pretty good and I'm very sympathetic with
10 doctors. Doctors have a terrible situation.
11 Their terrible situation seems to be terrific
12 compared to the railroads. They can actually
13 choose to move from across to, say, D.C. to
14 Virginia where the result might be a lower
15 insurance premium in many cases.

16 It's not always convenient and I feel
17 for them. They can adjust their practice and not
18 offer certain types of procedures or a certain
19 type of specialty. Railroads have none of that
20 luxury. You have to be there to handle whatever
21 folks want to stick you with. It is just an
22 enormous public policy problem.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 You don't hear about it as much as
2 perhaps the healthcare predicament which is very
3 serious but, in many respects, it's much more
4 serious and much more threatening to our economy
5 and to everyone who relies on rail
6 transportation.

7 I would welcome any parting comments
8 on that. If not, we'll move on.

9 MR. WEICHER: I appreciate your
10 interest in these very serious topics and
11 bringing them to the fore. Thank you.

12 MR. HEMMER: That is the one that
13 keeps me awake at night so thank you.

14 CHAIRMAN NOTTINGHAM: Thank you,
15 panel. We will now call up Panel III from the
16 State of Washington. We'll take a couple moments
17 as they get up here for Board members and anyone
18 else to stretch their legs. We will keep this
19 moving along because we do have a full day today.

20

21 I'll bring forward Mr. Scott Witt,
22 the Director of State Rail and Marine Programs at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Washington State DOT and Roger Johnson, President
2 of the National Association of State Departments
3 of Agriculture. We'll let them get settled and
4 then we'll start off with the panel momentarily.

5 If I could ask the audience to take
6 your seat or else step out into the back corridor
7 if you need to but we are going to start with our
8 next panel.

9 Welcome, Mr. Witt and Mr. Johnson.
10 We are glad you could be with us today. You have
11 each been given 15 minutes. Feel free to use as
12 much or as little time of that. We have read
13 your complete statements and look forward to
14 hearing your summary today.

15 I will start with Mr. Witt.

16 MR. WITT: Okay. Officially it's
17 afternoon. Good afternoon, Chairman Nottingham
18 and Vice Chairman Mulvey and Commissioner
19 Buttrey. My name is Scott Witt for the record.
20 I'm the State and Rail Marine Director for
21 Washington State Department of Transportation. I
22 want to thank you for this opportunity to submit

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 testimony on behalf of the shippers of Washington
2 and the DOT.

3 The Department and the State, I will
4 say in follow-up to the Burlington and Northern
5 UP, have very good working relationships with
6 both our Class I carriers and enjoy opportunities
7 for leveraging infrastructure investments between
8 the two of us.

9 We work very heavily on both rail and
10 highway related construction projects as the
11 state requires and the system requires leverage
12 investments for both public and private good.

13 One thing I would like to mention is
14 that the testimony that was put together in the
15 written format was rather unique in, at least,
16 our position. That was created as a result of
17 polling many of our shippers after the
18 announcement came out and meeting with a broad
19 range of shippers and/or receivers including
20 ports, agriculture, chemicals, lumber, and
21 industrial.

22 This information was coming in until

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the last minute as we formulated our comments to
2 you. It also spans the spectrum as to position
3 as you can well imagine. The written testimony I
4 submitted was largely a compilation of edited
5 comments and ideas that perhaps should be
6 considered by the Board.

7 Under the Abandonment heading does
8 the Department necessarily believe a 25-year hold
9 on abandonment is practical as in some other
10 countries? In a word "no." We felt it important
11 to T up these comments for you so that we can --
12 I will address those additionally under the
13 abandonment portion of my presentation to show a
14 degree of concern of what we believe to be a
15 previously uninvolved constituency.

16 I will attempt to summarize or, in
17 some cases, simplify the points in the written
18 testimony giving context to my comments. By
19 doing so I will be basically giving you a picture
20 of how Washington State used the infrastructure,
21 some of the constraints, some of the capacity so
22 if you'll give me a little latitude here, it's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 going to be more of a story with everything kind
2 of twisted into it.

3 The goal of Washington State's
4 freight system's strategic plan is to support
5 broad industry sectors. We classify it as three.

6 (1) The Global Gateways, which includes our
7 container ports and international and national
8 trade, flows through Washington through the
9 gateways in Chicago and east.

10 (2) Our Made in Washington which is
11 our regional economies that rely on freight
12 systems and, as was mentioned earlier, another
13 earlier by another Class I, some of our shuttle-
14 loading grain facilities, etc.

15 (3) Our delivering goods to you which
16 is the third segment which is primarily our
17 retail and wholesale distribution systems.

18 I know you may have to squint a
19 little on this one but this is our state rail map
20 illustrating our three east/west mainlines across
21 the state routes and the main or south route
22 along the Interstate 5 corridor.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Washington's Class I carriers include
2 the BN and the UP and we have 22 short line
3 railroads in the state. This is one component of
4 our multimodal transportation along with the
5 roads, ocean, pipeline, and air systems.

6 I would also like to note that as
7 early as last year the State of Washington is now
8 the owner of a short line rail system in the
9 acquisition of the Palouse City lines in the
10 eastern part of the state of 308 miles. Last
11 year I had the opportunity to attend your
12 hearings on infrastructure with Dan O'Neill as I
13 was running his state rail study for him and the
14 Transportation Commission.

15 This is one of the slides from that
16 as a result of that study illustrating that, in
17 our opinion, because Washington State is a
18 smaller player in the national scheme of railroad
19 business, investments in our state can be slower
20 in coming than elsewhere. It is probably
21 difficult to read but the red line indicates
22 congestion, the yellow lines indicate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 constrained, and the green lines are reliable.
2 Needless to say you see more red and yellow than
3 green.

4 Probably one of the most important
5 investments as far as capacity is concerned would
6 be the crowning of Stampede Pass which would
7 allow double-stacked container traffic to move
8 east/west as opposed to using the Vancouver to
9 Pasco line in the south.

10 BNSF and the state have worked
11 towards that end with a memorandum of
12 understanding that could move the project forward
13 if and when the state is able to secure a funding
14 source. The I-5 corridor line owned by the BNSF
15 is the backbone of the Washington State Rail
16 System controlling access to east/west lines.

17 Most of the line is owned by the BN
18 but they share operating rights over the line
19 with Union Pacific in addition to Amtrak's
20 intercity rail surfaces and the Sounder Commuter
21 Rail operations. There are at least a half dozen
22 sections that are chronic choke points causing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 delays to ripple across the entire Washington
2 network.

3 Some of the program WSDOT has taken
4 on are two-fold. One is addressing capacity. We
5 have a produce rail car program which started in
6 2003 of 23 refrigerated rail cars to supplement
7 shipments for small shipper availability. It is
8 an ongoing program and we have the option to
9 augment that program by another 40 to 50 cars if
10 need be.

11 The second one is the Washington
12 Grain Train as you can see illustrated below.
13 There are 89 total cars in that pool and that is
14 primarily focused on the shuttle programs with
15 the Burlington Northern and Union Pacific
16 Railroads basically shuttling either two barge
17 facilities off of short lines or interchanging
18 two large facilities for grain.

19 Can Washington State successfully
20 adapt to changes in a national freight system,
21 ideally roads? Many of our low-volume shippers
22 are going to have to truck their products to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 central intermodal centers. Timber, grain, and
2 industrial products are heavy and Washington
3 State roads will need upgrades to handle the new
4 traffic patterns.

5 Some shippers, most high-volume
6 shippers, are adapting on their own but low-
7 volume shippers will need help making the
8 transition to BNSF and UP Railroads new shipment
9 requirements.

10 And then there's our short lines. An
11 opportunity exist for short line railroads to
12 build trains for the BN and UP but if they don't
13 have the high volume customers and do have
14 deferred maintenance track, they won't survive
15 without ongoing capital and operational
16 subsidies.

17 I would like to speak a little bit
18 about the railroad infrastructure projects in
19 Washington. WSDOT will invest over \$350 million
20 between 2007 and 2017 to relieve bottlenecks and
21 chokepoints, increase system capacity and
22 preserve and maintain rail lines.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 At this point I also would like to
2 note that the lack of an overall federal railroad
3 infrastructure strategy in place concerns our
4 department. With major infrastructure needs
5 coming to the forefront of all transportation
6 modes, carriers, shippers, and the state can only
7 fund a fine item out of the needs.

8 While the requirements for
9 infrastructure investment may have traditionally
10 been with the carriers, the cost has been
11 partially shifted to both shippers and the
12 public. In some instances only a relative small
13 amount and others a larger amount.

14 How does the State of Washington fund
15 our rail projects? Gas tax receipts cannot be
16 spent on rail projects. It's part of our
17 regulations. Rental car taxes, taxes on the sale
18 of new and used vehicles, vehicle weight taxes,
19 and some federal earmarks.

20 This map illustrates the passenger
21 and freight rail projects and where specifically
22 they sit within the state between 2007 and 2017.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 There are a number of projects. The lighter
2 colored ones are primarily passenger related.

3 I will have a slide here coming up on
4 our Amtrak Cascade service. Also the black ones
5 are primarily freight driven although you will
6 see like in the Vancouver area that benefit both.
7 They are actually combined multimodal
8 improvements.

9 Some of the challenges faced on the
10 Pacific Northwest rail corridor, it is a shared
11 corridor. One of the issues we have, as well as
12 our partners, is integrating operations with
13 other rail users, operating plans, operating
14 practices. We have an international border. We
15 have freight trains inspections and we have
16 passenger preclearance.

17 U.S. federal funding, a whopping \$12
18 million in 12 years. The problems for British
19 Columbia funding, eight years to fund one
20 project. It allows the second train movement to
21 Vancouver, B.C. for the Olympic Games. The
22 Washington State and the initiative process; the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 people giveth and the people taketh away.

2 Our Amtrak Cascades passenger
3 service, the State of Washington owns three
4 trains that are under the guise of Amtrak and
5 being operated by Amtrak. Ridership in 2007
6 reached 677,000, a 7.4 percent increase over
7 2006.

8 I would also like to report in the
9 first quarter of 2008 ridership was up 14 percent
10 from 2007. Obviously high fuel prices,
11 congestion, and a strong environmental concern
12 are some of the drivers. We are looking to
13 continue. We are working on the mid-range plan
14 at this time to put our proposal forward to the
15 legislature to possibly increase funding and add
16 additional train sets.

17 Our investment constraints exist,
18 political, financial, and economic. Washington
19 State freight system's strategic plan must
20 balance the cost of investments with resulting
21 economic output. We have to direct limited
22 resources to their most productive use and by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 setting clear priorities linked to the growth of
2 jobs in the state's economy.

3 Our issues and challenges. Non-gas
4 tax transportation funds are in high demand right
5 now as in most areas. Inflationary pressures are
6 eroding the value of our existing project dollars
7 as projects continue over multiple years or, as
8 we call them, mega projects or five to seven
9 years.

10 With construction material
11 cost going up as quickly as they are we quickly
12 lose the ability to complete those projects on
13 time and on budget. We have limited federal
14 funding participation and then we have the issue
15 of private revenue and private investment.

16 One of the comments we have is the
17 demand for equipment and multiple use is going to
18 the highest revenue for the carrier. Would any
19 private sector entity not do the same? I most
20 certainly shifted assets to where my company
21 received the best return while I was in the
22 private sector.

This tends to come out primarily in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 car supply issues along with the transition to
2 uni-train service to major Oregon destination
3 points. We have worked closely with our Class I
4 and short line carriers to, in effect, supplement
5 those supplies with the state equipment.

6 This mode also changes the business
7 model for the state and generally smaller
8 industries with less productive lines being sold
9 to short lines as in the case that we have
10 purchased one. In many cases the issues that
11 motivated the Class I's to sell the line to
12 another carrier may, in fact, haunt the new short
13 line carrier also.

14 Primarily deferred maintenance of the
15 infrastructure in low-volume shipments on the
16 line if new marketing or service accommodations
17 can't revitalize it. We have obviously seen that
18 illustrated earlier.

19 Ultimately local economies may change
20 dramatically as the business may be required to
21 relocate for rail service or perhaps start
22 trucking the product, if applicable, therefore

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 changing the wear and tear on the road system,
2 both county and state.

3 The issue of abandonment. Obviously
4 there is an STB process in place. Thank you for
5 that. The Washington State Legislature in our
6 last session actually introduced legislation to
7 request the Washington State DOT to further
8 enhance that process by stakeholder outreach,
9 communication education, etc., and review on a
10 local government entity of any pending
11 abandonments.

12 We did testify, quite honestly,
13 against that as it was within the STB's purview.
14 There was an established process. But what it
15 did tell us is that the local government entities
16 are taking a much stronger role in worrying about
17 abandonments for future infrastructure, for
18 future corridors, and for passenger.

19 We would suggest perhaps we relook at
20 education outreach, some communication processes
21 on more local levels if, in fact, there is going
22 to be a pending abandonment, and I think a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 realization of the importance of abandonment to
2 the local economies, perceived or otherwise
3 because there are times, as we are finding out,
4 that some of the local government entities, port
5 districts, counties, etc., are willing to come
6 and invest in that.

7 The common carrier obligation, I'll
8 just leave it in my testimony that has been
9 answered by many, many folks here and will
10 continue to be so.

11 My last point is on the Toxic
12 Inhalation Hazards. Obviously the State of
13 Washington has a very strong agricultural economy
14 that is very dependant on anhydrous ammonia and
15 manufacturing involved with the chlorine.
16 Obviously there are folks here that are very well
17 versed in this subject and you will be hearing
18 testimony later but we did want to make it as a
19 comment to get it on the record.

20 In closing, we would like to say it
21 will take all the parties working together in a
22 systematic approach to deal with all the issues

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that are being brought together on common carrier
2 obligation and how to move the national need for
3 a comprehensive rail, both freight and passenger,
4 strategic policy and direction in place for
5 national guidance.

6 I wish to conclude my testimony by
7 again thanking the Board for the opportunity to
8 testify in this significant proceeding and
9 expressing our hope that the comments submitted
10 by all parties will assist the Board. Thank you.

11 CHAIRMAN NOTTINGHAM: Thank you, Mr.
12 Witt.

13 Mr. Johnson.

14 MR. JOHNSON: Thank you, Mr. Chairman
15 and members of the Board for this opportunity to
16 testify. A special thanks to you, Chairman
17 Nottingham, for your visit to North Dakota
18 recently and your outreach to a number of the
19 folks that are impacted by many of these issues.

20 For the record, my name is Roger
21 Johnson. I serve as the Commissioner of
22 Agriculture in the State of North Dakota. I am

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 also currently serving as the President of the
2 National Association of State Departments of
3 Agriculture which are the elected and appointed
4 commissioners, secretaries, and directors of
5 agriculture from around the country.

6 As you can imagine, rail service is a
7 huge issue for me and for all of my counterparts.
8 Much of the testimony here is devoted to sort of
9 historic kinds of issues so, with you permission,
10 I am going to skip through some of this fairly
11 quickly and get to the last part where I've got
12 some more specific and more recent issues that
13 may be of interest to you.

14 As a national organization we have a
15 lot of interest in this. Obviously real
16 transportation is essential to the industry of
17 agriculture. There are lots of issues that you
18 have already talked about. On page 2 of my
19 testimony I summarize some of the positions that
20 NASDA has taken over the years.

21 I would highlight that our most
22 recent position is that Congress and the federal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 government should substantially increase
2 oversight of the railroads including rates and
3 services where competition is not present.

4 I know that is not the first time
5 you've heard that suggestion. It is the first
6 time, though, that we have spent as much time
7 talking about it as an organization largely, I
8 think, as a result of the enormity of the
9 concentration in the industry that has happened
10 in recent years and some of the issues that have
11 resulted from that.

12 Obviously with the deregulation of
13 the rail industry over the last couple of decades
14 it has lead to significant financial stability
15 for the railroads certainly compared to the past.
16 It has also led to fairly substantial
17 consolidation and to a decrease in the physical
18 infrastructure of the railroads in terms of the
19 need that is out there that is currently
20 expressed.

21 I give a lot of data from the recent
22 GAO study that was done which I am sure you have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 seen so I am going to kind of quickly skip
2 through that but it certainly does make the point
3 that I just asserted about income for the
4 railroads with the chart on page 3. Both general
5 rates, rates for grain, rates for captive
6 shippers, field surcharges, and line abandonment
7 are all seriously impacting the agricultural
8 industry. Each of those are discussed in turn.

9 Let me turn to page 5 where we talk a
10 bit about captive rates because that seems to be
11 one that gets a lot more attention. Captive
12 shippers have been and continue to be victimized
13 in our judgment by extremely high rates. In
14 fact, the GAO study puts several statistics to
15 that assertion. Agricultural commodities are at
16 the mercy of potential, if not apparent,
17 monopolistic practices by the railroads.

18 Since 1985 tonnage from traffic
19 traveling at rates substantially over the
20 threshold, the 180 percent threshold for rate
21 relief, has in fact increased. In addition,
22 tonnage traveling at rates greater than the 300

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 percent of variable cost threshold has more than
2 doubled.

3 On page 7 I give more detail to that
4 but I do want to draw your attention to the
5 bottom of that page where I talk about the recent
6 acts that Congress has passed which have
7 encouraged competition as the preferred method to
8 protect shippers from unreasonable rates and
9 granted the STB broad legislative authority to
10 monitor the performance of the railroad industry.

11 However, the GAO reports that these
12 processes have proven to be largely inaccessible
13 because the standard process remains expensive,
14 time consuming, and complex and the simplified
15 process has simply not yet been used. That is
16 obviously just a little bit dated but it is
17 certainly the feeling that is out there.

18 I talk about field surcharges and
19 cost shifts in the subsequent pages of my
20 testimony. On page 11 I get to the intermodal
21 shipping. One of the reasons I skipped over some
22 of those other issues as quickly as I did is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 because I know that panelists, in fact on the
2 very next panel, are going to go into more detail
3 on each of those issues.

4 So far I have not heard a lot of
5 discussion about the intermodal shipping kinds of
6 issues. In agriculture one of the things that is
7 happening over time is customers are becoming
8 more attuned to very specific kinds of goods and
9 services. Instead of the commodity movement, in
10 fact, in North Dakota we lead the nation in the
11 production of about 15 different commodities.

12 Many of these don't fit very well
13 into the bulk movement category. In addition,
14 some of the bulk movement categories, the large
15 commodities, soy beans is a good example, also
16 have very specific identity preserved markets
17 around the world that require them to be
18 segregated and moved to containers. That is
19 becoming a larger and larger issue not only in my
20 state but around the country for those reasons.

21 Attached to my testimony is a letter
22 dated January of this year that was sent to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Senator Dorgan from North Dakota from one of the
2 intermodal shippers in North Dakota. I present
3 that as part of my testimony because I think it
4 explains in his voice what is happening to many
5 of the intermodal shippers in that part of the
6 state. It certainly is not limited to just him.

7 If you read that letter, there are
8 several issues that will really sort of leap out
9 at you. First of all, with intermodal shipments
10 that move overseas, there is very much a lack of
11 transparency in the rates. These shippers don't
12 negotiate with the railroads and negotiate with
13 the steamship lines so the rates are combined and
14 are harder to see.

15 You will see that the result of that
16 is the second major point he makes is that we see
17 some irrational kinds of pricing arrangements and
18 he points out how he is located very near to a
19 particular terminal, Dilworth, which is where
20 much of this industry is located close to.

21 But, yet, they are routinely draying
22 cars from terminals that are about 300 miles away

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in both directions because the prices offered in
2 the closest terminal are so much out of whack
3 that it makes sense to go and dray from
4 Minneapolis.

5 In fact, they are even considering
6 going as far as Chicago and pulling these empty
7 containers in order to load them and put them
8 back on the railroad and either send them back
9 through Chicago or send them out to the West
10 Coast.

11 It's not unlike the issue that was
12 very prominent a couple of years ago with the
13 inverse pricing relationship on bulk car
14 shipments of grain through our state. I know you
15 all know a lot about that but it's the same sort
16 of thing.

17 What really puts salt in the wound is
18 he also describes the fact that until very
19 recently as many as 200 empty containers were
20 moving daily through the closest Dilworth
21 facility and they still had to go 300 miles away
22 to get empty containers and, in fact, to pull the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 loaded ones back there as well.

2 In an attempt to remedy this issue a
3 lot of people got involved as you might imagine.
4 Senator Dorgan got involved, the State of North
5 Dakota got involved, and in cooperation with
6 cities in Minot and Fargo actually entered into a
7 contractual agreement with a national firm.

8 Wilbur Smith was hired to mitigate
9 these costs in favor of the feasibility of a new
10 concept that would improve statewide access and
11 service to container equipment and improve
12 freight rates from the region. This idea, in
13 fact, was suggested by BNSF, he goes on to say,
14 and everyone was in agreement that this made a
15 whole lot of sense. But this effort was
16 unsuccessful.

17 In fact, BNSF even clearly informed
18 this national firm, Wilbur Smith, that BNSF would
19 not permit new intermodal service to divert
20 business from current operating hopper car
21 services and would use price as a mechanism to
22 prevent this from happening.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I would seem to suggest from the
2 facts in this case that is precisely what has
3 been happening and what is likely to continue to
4 happen. As a result of this letter and Senator
5 Dorgan's intervention, BNSF and this shipper met
6 and pursuant to that BNSF, in fact, publicly
7 announced the rate equalization to provide
8 relief. However, when the rate equalization
9 announcement was made, it pertained only to bulk
10 grains, not to identity preserved commodities in
11 containers.

12 I would argue that these practices
13 are contrary to the statutory requirements
14 dealing with -- that require carriers to provide
15 service upon reasonable request and that
16 railroads shall furnish safe and adequate car
17 service and establish, observe, and enforce
18 reasonable rates in practices on car service.

19 These issues I provide to you not so
20 much because I'm here to say what the solution is
21 but to point out to you that here is a problem,
22 that you have to figure out how you deal with it.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1
2 I would suggest, as my fellow Ag
3 commissioners, secretaries, and directors have
4 suggested, that in the absence of competition,
5 and more and more competition, at least in my
6 state, is absent in the railroad industry, that
7 in the absence of that competition there needs to
8 be some sort of regulatory oversight to provide
9 some sort of fairness in how these issues are
10 dealt with.

11 Obviously we would prefer that the
12 industry would take their common carrier
13 obligations seriously by doing the right things.
14 I think the evidence that I have just described
15 here would suggest that has not happened. Your
16 notice states that a railroad may not refuse to
17 provide service merely because to do so would be
18 inconvenient or unprofitable.

19 The issues of rates and service
20 really cannot be separated. Service offered at
21 prohibitive rates and uneconomic rates is simply
22 no service. It simply is no service.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Concentration in the freight rail industry has
2 led to monopolistic practices by carriers. The
3 question is what is going to be done to bring
4 this industry under control for the public good.
5 Of course, that is the purpose of this hearing.

6 In the interest of time, Mr.
7 Chairman, members of the Commission, I would be
8 pleased to stand for questions. Thank you again
9 for this opportunity.

10 CHAIRMAN NOTTINGHAM: Thank you, Mr.
11 Johnson and Mr. Witt. Appreciate your remarks.
12 Mr. Johnson, I really did enjoy the time we spent
13 together in your great State of North Dakota. It
14 was a very informative trip. I learned a lot and
15 met some very good people.
16 How are things going economically for North
17 Dakota farmers this year?

18 MR. JOHNSON: Well, if you can make
19 it rain, things would be really good. Obviously
20 the prices in the last half a dozen months or so
21 have been very strong for agriculture. I think
22 the industry is making significant new

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 investments. What has happened underneath all of
2 that, of course, is you've got enormous increases
3 in cost of production.

4 Others, I'm sure, will testify to
5 that. On top of that you have some problems with
6 the future markets in terms of being able to
7 actually lock in some of those prices. That is
8 not under your jurisdiction but it is to suggest
9 that there is an awful lot of heightened
10 nervousness, I think, about how this year is
11 going to play out.

12 On the good side we've got some
13 pretty decent crop insurance coverage out there
14 so if it doesn't rain, it looks to be a pretty
15 good year for agriculture.

16 CHAIRMAN NOTTINGHAM: You mentioned
17 the GAO study of 2006 and you did concede that it
18 was a little bit dated. Thank you for doing that
19 because I think I feel very strongly that it's
20 dated. It was useful.

21 MR. JOHNSON: Sure.

22 CHAIRMAN NOTTINGHAM: GAO reports are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 almost always useful. They are usually not
2 initiated with the goal of confirming how well
3 things are working. They are usually initiated
4 because someone believes there is a real problem
5 somewhere.

6 MR. JOHNSON: Of course.

7 CHAIRMAN NOTTINGHAM: The report, I
8 can tell you, was one of the first -- I came to
9 the Board in August of '06 and the GAO was
10 finishing it up so you can be certain I spent a
11 lot of attention reading the entire report and
12 repeatedly meeting with GAO and commenting on the
13 report actually.

14 I worked on the House of Government
15 Reform Committee. I read a lot of GAO reports.
16 That one if you read it in its entirety is pretty
17 favorable commentary on overall the STB's
18 stewardship of the Staggers Act and the overall
19 national picture of how rates have been handled
20 by railroads over a period of years.

21 A lot of things are dated now. The
22 market and the rail industry is changing fast as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you and your constituents know better than
2 anyone. I just caution folks from picking out a
3 piece of a study that might have been done a
4 couple of years ago that used data that was even
5 a couple more years old and then describing that
6 or even intimating that's an accurate reflection
7 today.

8 This Board we have completely changed
9 our dispute resolution procedures across the
10 board. We now have three pending small rate case
11 complaints pending that are scheduled for
12 decision in early July. We are open for business
13 and expecting a lot more. You compare that to a
14 period of years where there were none.

15 We now have three already and the new
16 system is in its first year of operation. Really
17 the landscape has greatly changed. I encourage
18 all witnesses that history is important but I'm
19 an amateur historian myself.

20 It's almost like a picture of the
21 State of the Union address that President Lincoln
22 would have given in 1864 and compare that to what

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 his successor might have delivered in 1966.
2 Something big happened in between there. A war
3 ended so we have to be very careful picking our
4 time frames and let's focus on what is going on
5 with the Board now if we can.

6 MR. JOHNSON: Mr. Chairman, I
7 certainly agree with what you said. I am hopeful
8 that the processes that you described are going
9 to be more useful. I think what we all know is
10 history. We don't know what tomorrow is going to
11 bring or next year or the year after so we do
12 have to look at history.

13 It is for that very reason that I
14 focused more of my comments on the very real
15 container issue that I spent more of my time
16 talking about today because it is -- it has been
17 said that history often repeats itself.

18 As I read that letter, I couldn't
19 help but think that it sounds a lot like a few
20 years ago when we had farmers in Western North
21 Dakota loading up their semi's and driving 150 to
22 200 miles east paralleling the railroad to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 deliver to an elevator to put that grain in a box
2 car or a hopper car and run it right back across
3 the same road it traveled, if you will, about two
4 miles separated it, heading west because of the
5 inverse rate structure.

6 What I think is happening right now
7 with the particular case that I cited is
8 precisely that same thing only with containers
9 instead of bulk grain. Your point is well made
10 and that is why I didn't spend as much time
11 talking about the GAO report as I did about more
12 recent issues.

13 CHAIRMAN NOTTINGHAM: Thanks. We
14 want to hear about all those concerns. We do
15 have, as we mentioned, a very active rail
16 consumer assistance program which is a good
17 starting point. By the way, there is information
18 on that program, I'm told, in the back of the
19 room or perhaps in the corridor as you leave.

20 I do encourage everyone to pick up
21 that information. In addition to it being open
22 for business on small rate cases, which we've got

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 three of now, we have a pending case involving a
2 paper barrier. Haven't had one of those in a
3 long time. We have a pending case involving a
4 fuel surcharge complaint. Haven't had one of
5 those ever I don't think.

6 We totally reworked our cost of
7 capital measure in a way that seems to have
8 redounded to the benefit of shippers. That wasn't
9 the goal we set out to do. We just wanted to
10 make sure we had the right measurement and it
11 looks like it has turned out that way. I mean,
12 enormous changes.

13 Things that people when I came to the
14 Board told me wouldn't happen, never had
15 happened, probably couldn't happen unless laws
16 were changed by Congress. We are going to
17 continue moving forward in that vein and I
18 appreciate your comments.

19 Mr. Mulvey.

20 VICE CHAIRMAN MULVEY: Yes. As
21 somebody who directed and wrote about a hundred
22 GAO reports, GAO very often does present history

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and all GAO reports are the same title.
2 Basically it's whatever it is progress made and
3 more is needed. I think as the Chairman points
4 out we have made significant progress in the last
5 few years from what GAO is reporting.

6 Mr. Witt, in your testimony you
7 mentioned paper barriers. Could you comment on
8 the problems or the importance of paper barriers
9 in your state and how it affects you?

10 MR. WITT: Sure, Commissioner. Some
11 of our short lines the state did purchase
12 understanding that there were conditions when
13 those short lines were originally spun off. We
14 had an extreme measure, if you will. We had one
15 of our trestles burn which, in essence, severed
16 the lines.

17 We are looking at the possibility as
18 the state in this case of reconnecting two lines,
19 two that were formerly going by different class
20 funds obviously. The current operators are
21 asking questions of us which we are asking for
22 clarification. Can they, in fact, interchange

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 with each other? Can they reconnect?

2 Currently some of them say no, we
3 have to go through moving it two miles this way
4 so the other guys can come. We are trying to
5 look at it is there something that can be done.

6 It's more of a question can we do
7 something to facilitate something without
8 obviously negating contracts that were originally
9 done for a purpose. That was the concern of the
10 shippers there, these minor short lines trying to
11 deal with multi-million dollar losses because of
12 infrastructure.

13 VICE CHAIRMAN MULVEY: You mentioned
14 this new state-run rail line, Palouse --

15 MR. WITT: Palouse City.

16 VICE CHAIRMAN MULVEY: Yes. I'm
17 familiar with that area. How is that line doing?
18 Is this requiring heavy subsidies and is the
19 state happy with the performance so far?

20 MR. WITT: Well, No. 1, there is no
21 subsidy. Part of the purchase, other than the
22 purchase itself, there is a rehabilitation fund

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that was set up originally as part of the
2 purchase by the legislature. We have \$8.6
3 million to put over those three lines. We have
4 three separate operators.

5 One is operating each one
6 differently. Each had a different goal for each
7 line. I think it's fair to say they are all
8 struggling to some degree. It is certainly
9 helpful that the grain markets, as most of those
10 are grain-centric, has picked up and done well as
11 mentioned. Obviously there is a concern. There
12 is always the dynamic.

13 We have the barge system, the river
14 system there close, so you go rail or do you
15 truck to the barge? The legislature in their
16 wisdom has required the formation of an
17 intergovernmental entity to in essence manage the
18 railroads. The Department of Transportation does
19 not manage the railroad.

20 I'll be very clear about that. The
21 legislator was so we'll follow up on that. What
22 we do is we administer the contract with the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 operator. In this case we may be doing the
2 rehabilitation at the request for the
3 intergovernmental entity but it is really going
4 to be in their hands as to how they operate it,
5 does it continue to operate, can they make money.
6 It's really up to the shippers and the operators
7 in the local areas.

8 VICE CHAIRMAN MULVEY: Thank you. In
9 your testimony you say that primarily you believe
10 that, "The railroads have a duty to serve all who
11 apply for their services and that the overriding
12 definition of a common carrier today." Do you
13 believe that the common carrier obligation,
14 therefore, currently extends to exempt traffic?

15 MR. WITT: That has been the argument
16 made to us by many of our shippers, obviously the
17 grain side primarily. I'm not sure from our
18 standpoint. We kind of put it forth as a
19 compilation. The Department of Transportation
20 doesn't necessarily take that view.

21 That really isn't our purview but we
22 wanted to tee it up for you folks. I'm sure

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you're going to get a lot more testimony along
2 these lines both ways but it's a question. We
3 really wanted to T up. I apologize if I was a
4 little misleading with my testimony but we wanted
5 to actually T up a bunch of the questions to say,
6 "Look, this isn't in our purview but it's
7 certainly people we serve in our states'
8 concerns."

9 VICE CHAIRMAN MULVEY: I appreciate
10 that.

11 Mr. Johnson, could you elaborate on
12 your reference to a monthly rail shipper survey?
13 Is that something that is already going on or is
14 that something you're proposing and who would do
15 it and how would it be distributed, etc.?

16 MR. JOHNSON: Direct me to the page
17 would you?

18 VICE CHAIRMAN MULVEY: Page 2, I
19 guess it is. You have several recommendations.

20 MR. JOHNSON: Oh, yes.

21 VICE CHAIRMAN MULVEY: Number 4 is
22 the monthly rail shipper survey should be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 published. You also mentioned about
2 nonperformance arbitration of the National Grain
3 Car Council. Again, I was wondering if that was
4 patterned on something else?

5 MR. JOHNSON: These actually,
6 Commissioner, are a number of policy
7 recommendations that NASDA has made and the
8 monthly rail shipper survey information, I think,
9 was recommended in terms of pricing availability
10 so that folks knew what the prices were.

11 In more detail, there were
12 recommendations that there be availability from
13 different interconnect from the start, the origin
14 to the destination and any of the interconnect
15 points along that rates be quoted. It was in
16 that vein that was recommended.

17 VICE CHAIRMAN MULVEY: Probably
18 related to the bottleneck rate problem, right?

19 MR. JOHNSON: Yes.

20 VICE CHAIRMAN MULVEY: Okay. One
21 last question and that is you also mentioned
22 about co-loading plans, the intermodal customers

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to and from Dilworth. Could you explain what the
2 co-loading is?

3 MR. JOHNSON: Co-loading was -- the
4 idea was for there to be a cooperative approach
5 between several different locations where they
6 would load these facilities or load the cars and
7 then they would enter the system as a unit then.

8 VICE CHAIRMAN MULVEY: I see. Thank
9 you very much.

10 MR. JOHNSON: That was actually one
11 of the things that was suggested by the railroad
12 that the communities work together on.

13 VICE CHAIRMAN MULVEY: BNSF.

14 MR. JOHNSON: Yes.

15 CHAIRMAN NOTTINGHAM: Commissioner
16 Buttrey.

17 COMMISSIONER BUTTREY: No questions.

18 CHAIRMAN NOTTINGHAM: Thank you,
19 panel. We are happy to have you here today and
20 safe travels as you head home. We just need to
21 do a little housekeeping. I'll invite the next
22 panel forward, please.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 This would be John Cutler of the
2 State of Montana, Terry Whiteside, Idaho Wheat
3 Commission, Kendell Keith, National Grain and
4 Feed, Steve Strege from the North Dakota Grain
5 Dealers Association, Terry Voss, Ag Process, and
6 John M. Frank of Frank Brothers.

7 This panel will need to bear with us.
8 I would like to start this panel and get the
9 first couple of statements in the record and then
10 we will do a 30-minute lunch break shortly after
11 1:00.

12 Then we'll let the rest of the panel
13 finish their statements partly because we are
14 looking at the schedule for the rest of the
15 afternoon and we need to try to get at least some
16 of this panel going before we break for lunch.

17 This may well have the distinction of
18 being our largest panel. Sometimes there is
19 power in numbers. We are greatly anticipating
20 your statements.

21 VICE CHAIRMAN MULVEY: Sometimes
22 there is a correlation between quality and

1 quantity.

2 CHAIRMAN NOTTINGHAM: Again, please
3 do try to keep within and special good things
4 will happen especially if you can find a way to
5 shorten your remarks. I can't say what that
6 might be but maybe you'll get lunch quicker.
7 That would be at least one thing. We look
8 forward to your comments. We'll start with John
9 Cutler representing the State of Montana.

10 MR. CUTLER: Thank you, Chairman
11 Nottingham. I would also like to pass on the
12 regrets of Attorney General McGrath and Montana
13 Department of Transportation Director Lynch that
14 they were not able to be here today. At the risk
15 of getting a little bit into history here --

16 PARTICIPANT: The water levels must
17 be good out there right now.

18 MR. CUTLER: Water level is good.

19 MR. WHITESIDE: On the plains, no,
20 but in the mountains, yes.

21 MR. CUTLER: For the first 25 years
22 after the Staggers Act the railroad industry's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 rationale for minimal regulation and minimal
2 competition was revenue inadequacy.

3 In rulemaking proceeding after
4 rulemaking proceeding the tie breaker offered by
5 the railroads was that the financial weakness of
6 the railroad industry should not be jeopardized.
7 This was also the rationale for requiring
8 shippers to assume costs and burdens formerly
9 borne by the railroads.

10 COMMISSIONER BUTTREY: Mr. Cutler,
11 excuse me. I'm having a terrible time hearing
12 you. I daresay the people in the back of the
13 room can't hear you at all. Can you hear back
14 there at all? I can't hear you. You have to
15 speak directly into the mic.

16 MR. CUTLER: I'm sorry. The speaker
17 must be right here. I hate to repeat but I will.

18
19 For the first 25 years after the
20 Staggers Act the railroad industry's rationale
21 for minimal regulation and minimal competition
22 was revenue inadequacy. Is that better?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 COMMISSIONER BUTTREY: Bring it up
2 just a little.

3 MR. CUTLER: In rulemaking proceeding
4 after rulemaking proceeding the tie breaker
5 offered by the railroads was that the financial
6 weakness -- the financial strength of the
7 railroad industry should not be jeopardized and
8 their financial weakness should be improved.
9 This was also the rationale for requiring
10 shippers to assume costs and burdens formerly
11 borne by the railroads.

12 I started out as a transportation
13 lawyer in 1976. I remember those days well. We
14 won a few and we lost a few but I have to
15 acknowledge that the bankruptcies of that era
16 were real and that Congress did include in the
17 Staggers Act along with protections for captive
18 shippers the mandate that the ICC promote
19 railroad revenue adequacy.

20 Today we don't hear so much about
21 railroad revenue inadequacy. Most railroads are
22 near or above revenue adequacy. Some are well

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 above. Financial reports for NS and CSX recently
2 indicate improved earnings despite lower freight
3 volumes.

4 It is, therefore, understandable that
5 the railroad industry needs a trump card other
6 than revenue inadequacy. The capacity and
7 congestion concerns are shaping up as the likely
8 candidate. There have been numerous STB
9 rulemaking proceedings recently and the railroads
10 have consistently cited the need for
11 infrastructure investment as a rationale for
12 opposing help for captive shippers.

13 I expected similar arguments in this
14 proceeding and feared that the railroads would
15 call for a relaxation of their common carrier
16 obligation. There is less of that than we
17 anticipated but I'm not entirely comforted. As
18 we point out in our testimony, the railroads have
19 many ways to turn down or deter service requests
20 even if there is no explicit change in the common
21 carrier obligation.

22 For a heavily rail-dependent state

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 like Montana, arguably the most captive in the
2 nation, rail service on reasonable request is
3 important. However, so are the Staggers Act's
4 protections for captive shippers including
5 reasonable rates, reasonable charges, reasonable
6 practices, and the common carrier obligation.

7 A sound infrastructure doesn't do
8 much good for shippers who can't get cars,
9 locomotives, or timely service. Infrastructure
10 concerns are getting governmental attention and
11 for the freight community that is a good thing.
12 A record of funding highway construction and
13 maintenance has been poor even ignoring diversion
14 of funds to earmark performing arts centers.

15 On behalf of Montana Governor
16 Schweitzer and other agricultural interest I
17 speak for today, however, there is a different
18 set of concerns. Specifically we are concerned
19 that the capacity issues will delay action on
20 captive shipper issues into the indefinite future
21 well beyond the attainment of railroad revenue
22 adequacy. At a minimum policy decisions by the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Board should be based on reality, not
2 appearances.

3 Today you frequently hear that
4 railroad excess capacity is gone. The railroads
5 say this and others have gone along more or less
6 without knowing the facts. I am one of those
7 people.

8 Recently when the National Surface
9 Transportation Policy and Revenue Study
10 Commission Report came out, I read it not as a
11 rail shipper lawyer but as a truck shipper
12 lawyer. I was concerned about the way we were
13 going to fund highway construction and
14 maintenance to meet future demands.

15 However, I was surprised in reading
16 through that report to find that AAR data was
17 cited in support of the proposition that railroad
18 excess capacity is not gone. According to the
19 report, 88 percent of rail corridors are under
20 capacity, 10 or 12 percent or at or near
21 capacity, 1 percent is above capacity.

22 I'm not here to argue against paying

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 attention to infrastructure issues. As I say, I
2 think the government has paid too little
3 attention to infrastructure issues over the
4 years.

5 However, I don't want the
6 infrastructure needs of the railroad industry to
7 be exaggerated to the point that shippers have to
8 wait another 25 years before their concerns are
9 addressed. As I said before, the policy
10 decisions by the Board need to be made on the
11 basis of reality, not appearances.

12 Well, you might say if infrastructure
13 capacity constraints are not fierce today, isn't
14 it true that they are going to be soon? Well,
15 here again, we have a study by the National
16 Surface Transportation Policy and Revenue Study
17 Commission, a group set up by Congress, to study
18 this, which included Matt Rose as one of its
19 members who voted in the majority, saying that,
20 "Yes, we could have a problem.

21 By 2035 it could be serious. We
22 could have 40 or 50 percent of rail corridors

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 under severe strain. The assumption underlying
2 that projection is that there is no additional
3 investment in the infrastructure for the next 28
4 years. We think that assumption is completely
5 unrealistic. In fact, we think the railroads
6 deserve a lot of credit for the investments they
7 have made in their infrastructure.

8 I think some of that is overblown. I
9 think a lot of routine maintenance is being
10 characterized as infrastructure investment. The
11 fact remains that they are a capital intensive
12 industry and they could have taken more money out
13 of the industry than they have. Our hats are off
14 to them for that. But they also say they are
15 doing everything they can on infrastructure.

16 Yet, if you look at some of the
17 statements that have been filed in this
18 proceeding, you see UP candidly admitting that
19 there were times when they didn't have enough
20 labor to handle the demand. UP also acknowledged
21 that if they could add one mile per hour to the
22 speed of their trains, it would have a huge

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 impact on capacity.

2 Things like positive train control
3 can also help. When the choice presented to the
4 Board is -- when the Board is presented with a
5 situation in which a shipper is denied service,
6 isn't it incumbent on the Board to ask how the
7 railroads are doing on some of these self-help
8 measures that are available to them, particularly
9 at a time when they are not only not revenue
10 adequate but they are enjoying very high rates of
11 return on their operations.

12 It's also argued that the STB can't
13 micro-manage the railroad industry. We
14 understand that and we are not looking for an STB
15 to stand at the shoulder of the railroads and
16 tell them how to operate in order to maximize
17 capacity. We don't think you can do that. But
18 we also need an umpire when there are situations
19 in which a shipper is concerned that the
20 rationale for denial of service is either poor or
21 nonexistent or contrary to public policy.

22 The railroads have also argued that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 rate issues should be separated from capacity
2 issues. Well, this is sort of the railroads win
3 and the shippers lose position for them to take.
4 On the one hand, they themselves say, "Don't
5 touch our ability to earn revenues. We need it
6 for infrastructure."

7 But when shippers complain
8 -- it's also obvious that the ability to price is
9 the ability to control demand for services. But
10 when shippers complain about that fact, it's not
11 acknowledged in the railroad's testimony.

12 The bottom line is we think the Board
13 is doing some good things. We are glad that you
14 have engaged the Christiansen Associates people
15 to look into some of these issues. We are glad
16 that your consumer assistance people are working
17 on these issues. And we are glad to hear that
18 there was never any interest on the part of the
19 Board in relaxing the common carrier obligation.
20 That is exactly where we think the Board should
21 be on this issue.

22 We do think the examples of denials

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of service, waits for service, pricing of service
2 require someone to go to for regulatory resource.
3 One of the main reasons I'm here is to ask the
4 Board not to be stampeded by concerns about
5 potential future capacity crunches into making
6 sure that everything goes the railroad's way
7 today. Thank you.

8 CHAIRMAN NOTTINGHAM: Thank you, Mr.
9 Cutler.

10 Mr. Whiteside.

11 MR. WHITESIDE: Good afternoon.
12 Welcome to Washington. I left Montana on Monday
13 morning and it was zero at the house so it's
14 always nice to be here.

15 John and I have worked very hard on
16 this statement and trying to make sure that it's
17 responsive and responsible. Governor Schweitzer
18 does send his regrets. He really did want to be
19 here and his schedule just wouldn't allow it so
20 we apologize for that.

21 For the record, my name is Terry
22 Whiteside. My background, I have worked with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 shippers every day. I have for about the last 30
2 years. We negotiate freight rates. We find
3 solutions to problems. We work with the
4 railroads. I have very good railroad friends.

5 It's interesting. In the provider
6 for shipper services to solve problems, what
7 we've noticed in the last five to seven years is
8 the difference of attitudes at the railroad.
9 What we want to do today is just really kind of
10 talk about some of those. Some of them have
11 bordered on the common carrier obligation.

12 We don't find that every day. We
13 don't find a problem every day with this but we
14 do find the problems becoming more pervasive in
15 our conversations. I'm going to cover just a
16 couple of them. I covered a number of them in
17 the statement that I wrote with John.

18 The Staggers Rail Act, as it was
19 outlined this morning, had really two basic
20 thrusts and one was to increase railroad
21 finances, but there was a provision to protect
22 the shippers from abuse. The railroads have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 always had a special obligation. When they come
2 into this industry that obligation for common
3 carrier service is there.

4 It isn't something that suddenly they
5 can become totally private like every other
6 company. That obligation continues. At the time
7 when Staggers was past the railroads were
8 hurting. The ICC and the STB chose to adjudicate
9 carrier disputes with an eye on railroad
10 finances. We understand that.

11 For 25 years the railroad's cry was
12 that they were poor. For every proceeding they
13 made the plea that they were poor and revenue
14 adequacy was important. It was really a
15 juggernaut that kept rate relief and service
16 relief from shippers. But during this period
17 there was a push by the railroads also to attract
18 more traffic. They were in the business of
19 finding new traffic and new things to do.

20 Today we have alleged shortage
21 capacity but the railroads are rich. The
22 railroads are doing well so whether the capacity

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 problems are real or exaggerated or partly
2 mythical. On of the things that John and I
3 struggled long and hard with was how much of this
4 is myth and how much of it is real.

5 Is there a capacity problem? Yes,
6 there is a capacity problem. Is it catastrophic?
7 No, but yet it's being targeted for why we can't
8 do certain things. It brings a whole set of
9 issues and a whole set of things that we didn't
10 see 10 years ago.

11 This proceeding was suggested or
12 initiated I suggest because the Board is hearing
13 of circumstances, of seeing circumstances of such
14 things as service denials and other complaints
15 that we've heard about this morning.

16 This panel is a various-themed panel.
17 We have testified together before. What you have
18 is a whole host of knowledge here. The railroads
19 are private companies to be sure but they are
20 greatly affected with the public interest.

21 I've given several examples of the
22 railroad operating practices that I have personal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 experience with and I won't recall them all but I
2 want to cover a couple of them because I think
3 they are kind of significant.

4 One on page 25 was dealing with a
5 company called the Montana Seed Company. Here is
6 a company who wanted to put in an ethanol plant
7 about 30 miles north of Billings in a little
8 place called Broadview, Montana. The service has
9 been there for about 50 years.

10 Broadview was a facility where they
11 had two elevators there, both of them being used
12 for storage. The service train is on a sub-
13 mainline that goes between Billings and Great
14 Falls. They go through there regularly. Here is
15 the interesting thing.

16 They wanted to ship corn in-bound to
17 establish a new ethanol plant and at the time
18 there were occasional but regular movements of
19 corn going in there to some of the farmers. Some
20 of the Hutter Act colonies were using them for
21 feed. In response to Montana Seed's request, BN
22 said no local train worked the area.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Thus, a passing merchandise train
2 would have to spot and pull cars. It was
3 something the railroads did not like to do. The
4 request by Montana Seed was would they allow
5 Montana Rail Link to bring them up. Montana Rail
6 Link was willing to do it, 30 miles. It was a
7 dark line.

8 In January of '07 BN said no. BN
9 indicated that were unable to provide the service
10 to drop off the service finally to Montana Seed.
11 If Montana Seed was willing to pay for a new
12 train service, then they would be able to do it.
13 Again, we are back to this rationalization of
14 capacity.

15 The second example that I really
16 wanted to talk about was a situation that
17 occurred in the western United States with an ag
18 processor. The processor was told that they were
19 putting in a brand new plant on a captive line.

20 Of course, what they classically do
21 out in that part of the world is they site the
22 plant and then they come to us and say, "Can you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 negotiate a freight rate?" always on a captive
2 line. "Well, if you had been here six months ago
3 we probably could have done something on siting."
4

5 The key is in this one the railroad
6 came in and started quoting transportation
7 contract rates higher than was in their published
8 tariff rates. We sat there for a day and I said
9 finally at the end of the day, "These are higher
10 than was in your published tariffs." They said,
11 "What tariffs?"

12 They didn't know they had any. So we
13 sent them home to look at them. They promptly
14 canceled the tariff and then said to us, "Now
15 you've got to deal with us. Now you have to
16 negotiate a contract with us." It's these kinds
17 of things and, you know, this is not prevalent.

18 This is not everyday but it is a
19 problem that I want the Board to understand that
20 does occur. The key to this challenge, I think,
21 is to find what is reasonable. If the railroads
22 act responsibly and reasonably and all the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 shippers make responsible and reasonable
2 requests, we probably wouldn't be here but the
3 real reality is you've heard some of the railroad
4 employees don't know what the common carrier
5 obligation is.

6 There is some sense that the
7 railroads want to condition all the requests on
8 downstream affects on other shippers. That would
9 be like Federal Express saying, "I don't want to
10 go down to that ranch 30 miles down that road
11 because it will affect my schedule for all the
12 rest of the day and the whole system."

13 The real reality is somewhere there
14 has to be a balance there. Taken to an extreme
15 all the new service or chain service could be
16 saddled with handling enormous burdens if it
17 always comes back to capacity. Yet, the
18 railroads want and need new business. What is
19 required here is a balance of a reasonable
20 approach.

21 Most importantly a strong common
22 carrier obligation is mandatory to mesh public

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 interest with the movement of the goods or the
2 services. What we think is important here is
3 that if the Board finds after consideration
4 evaluation that it does not have the full
5 authority to enforce the common carrier
6 obligations the way it thinks it needs to, it
7 should go back to Congress as the Senator advised
8 this morning.

9 The Board has been invited to seek
10 additional authority in front of several hearings
11 that we have heard and request additional
12 authority it needs to ensure the development and
13 continuation of what is called the Sound
14 Transportation System with effective competition
15 that meets the needs of the public.

16 I want to thank this Board for having
17 this hearing. I think this is one of the most
18 important hearings we have probably ever had
19 because it gets to -- one of the things that came
20 up this morning with Roger with North Dakota was
21 this issue of the intermodal service.

22 All the intermodal service in Montana

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 has been canceled. It's been taken out. We have
2 to go 600 miles now to get intermodal service.
3 Yet, what we are developing across the -- we
4 bring trade teams in. In Montana we can bring
5 trade teams in -- Idaho brings them in -- and
6 the people will say, "We want that wheat right
7 there."

8 We can do that with identity reserve.
9 Most of our post crops, most of our secondary
10 crops are now out of the triangle being trucked
11 to Canada and put into intermodal service. The
12 Burlington Northern refuses to allow intermodal
13 service in Montana and they are doing the same
14 thing in North Dakota.

15 This is a service that right now we
16 could utilize. I'm not sure that conversations
17 with the Burlington Northern aren't continuing to
18 go on. I will say this, I think the Burlington
19 Northern has done an outreach in the last year.

20 I think this Board has done some good
21 work and outreach and I complement them on that
22 but we are still having problems with service

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 denials and they are being denied on the basis of
2 efficiency or capacity. Thank you to the Board.

3 CHAIRMAN NOTTINGHAM: Thank you, Mr.
4 Whiteside. We will now break for 30 minutes for
5 lunch. I apologize for making this panel stand
6 in limbo but we just need to do that. We will
7 regroup here promptly in 30 minutes and we have a
8 full afternoon so we look forward to seeing you
9 back. Thanks.

10 (Whereupon, at 1:06 p.m. off the
11 record for lunch to reconvene at 1:40 p.m.)
12

13 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

14 1:40 p.m.

15 CHAIRMAN NOTTINGHAM: Good afternoon,
16 panel. Thanks for being back with us. We will
17 now turn to Mr. Kendell Keith with the National
18 Grain and Feed Association.

19 It's a pleasure to see you here
20 today, Mr. Keith. Enjoyed spending some time
21 with you recently at your conference. Thank you.

22 MR. KEITH: Yes. We appreciate the

1 opportunity to testify today. Dan Mack sends his
2 apologies. He had a conflict and could not make
3 it. I will summarize out remarks.

4 The common carrier obligation to us
5 seems to be a rather simple matter of law but it
6 defies enforcement. We are unaware of any
7 significant action on the part of the ICC or the
8 STB to ensure compliance by carriers with its
9 basic legal provision.

10 Therefore, we are puzzled by some of
11 the comments by the rail industry that expressed
12 fear that the STB will suddenly take an extremely
13 activist approach to enforce common carrier
14 obligations. At the same time we think it's
15 rational to conclude that without some reasonable
16 effort toward enforcement any rule can be judged
17 ineffective.

18 Toward achieving more enforcement of
19 the law in this regard, we would encourage the
20 STB to think about ways to expedite agency action
21 in situations where the common carrier obligation
22 might be subject to violation either in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 distribution of rail service or in a railroad's
2 acceptance of additional business.

3 We sincerely believe that a major
4 part of the problem with agency enforcement and
5 market discipline is that the process of filing a
6 complaint and obtaining a decision by the agency
7 is unnecessarily elongated. It adds to the cost
8 and the risk of a formal proceeding.

9 In 1998 NGFA and the major rail
10 carriers initiated an agreement to privately
11 arbitrate some forms of dispute. Specifically
12 excluded from those arbitration provisions were
13 any matters related to rates or service such as
14 the enforcement of common carrier obligations.

15 The reason for excluding service
16 matters was that we thought it would be very
17 difficult for a privately managed system to order
18 service of any kind of nature. Our rationale was
19 that to order service in one area could, but not
20 necessarily, require that service be restricted
21 in other locations.

22 Thus, we concluded that only a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 government agency like the STB could reasonably
2 address such a regulatory need. But the STB also
3 seems to be hamstrung in legal enforcement as
4 well. In our view, the STB should not insert
5 itself in daily operations of carriers.

6 However, the carrier's comments in
7 this proceeding are laden with dire warnings
8 about the implication of any STB involvement in
9 the enforcement of common carrier matters and
10 what action by a federal regulator might make a
11 bad situation worse.

12 While we would not advise toward a
13 major shift in regulatory intervention, the law
14 does say that the STB is the agency with legal
15 oversight over carriers and that oversight should
16 at times be exercised. In our view, railroads
17 should not be able to operate without some degree
18 of regulatory risk. We think that is the clear
19 intent of Congress.

20 To ignore problems in the provision
21 of basic common carrier services is to invite
22 abuse. Rail access and rail service are matters

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that in periods of constrained capacity should
2 receive more regulatory attention, not less.

3 It should also be acknowledged that
4 railroads over the long term do self-determine
5 their own capacity for delivering rail service.
6 To the extent that railroads are sellers to
7 captive or inelastic markets, there are
8 incentives to overlay restrict the supply of
9 service from what would otherwise be achieved in
10 a competitive market place.

11 If the STB does not take action to
12 enforce common carrier matters, the clear message
13 to the regulated carriers is that they should not
14 be concerned about such legal obligations and
15 they should behave like any other profit seeking
16 economic sectors. We think this outcome would be
17 a clear violation of the intent of Congress.

18 A few specific concerns. First, many
19 of the challenges of common carrier service and
20 the relationship of shippers and carriers are an
21 extension of the same problems that plague other
22 aspects of the business.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 It is that the railroads tend to
2 dictate most, if not all, of the terms of
3 business whether the issue is liability shifting
4 to the shipper, the level of fuel surcharges, the
5 kinds of service or other.

6 Unless the customer wants to accept
7 the service and the terms offered by the carrier,
8 the customer is left to find its own alternatives
9 for transportation which many times don't exist.

10 As for car supply matters, the grain
11 industry has been compelled by the rail industry
12 practice to purchase or lease the vast majority
13 of rail cars used in the business. As part of
14 this business arrangement the grain processing
15 industry also has been forced to absorb virtually
16 all the risk of variability in the use of this
17 equipment.

18 When a shipper needs changes in a
19 switch agreement to permit, for example, an
20 ethanol plant to be in operation at a location
21 that traditionally has only shipped grain, a
22 railroad should not unilaterally withhold

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 approval of such switching arrangements for
2 extended periods.

3 Regarding the distribution of service
4 we have some legal precedent to rely upon. In
5 the 8th Circuit Court of Appeals decision
6 regarding NGFA being a COT case, the court ruled
7 that during periods of constraint capacity, a
8 railroad cannot shift limitless rail capacity
9 from one class of service to another.

10 The court further stated that the
11 railroad cannot offer premium-priced "guaranteed"
12 service and simply tell the customer that if they
13 want service, they must purchase the premium
14 service.

15 We have yet to see the STB take any
16 specific action regarding this ruling. The fact
17 that the ruling was issued at the appellate level
18 should provide some discipline in the market
19 place.

20 Finally, the grain processing
21 industry remains concerned about the rail service
22 grain shippers receive versus the service

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 provided to other sectors. In that GAO report
2 for 2006 it indicated that of all major classes
3 of shippers rates for grain and grain products
4 rose at the most rapid pace from the mid-80s
5 through 2004.

6 If you look at rates since that time
7 on the basis of revenue per car, grain rates have
8 continued to rise at roughly the same rates if
9 not exceeding the rates in many of the sectors.
10 Yet, when rail capacity becomes constrained,
11 railroads sometimes still view grain as a
12 commodity that will wait on freight capacity.

13 We acknowledge that grain does not
14 disappear from its origin point simply because
15 the freight is a few days late, but it's also
16 true that in tight supply situations grain that
17 is not shipped in a timely way can lose a large
18 portion of its economic value and the cost of
19 that falls squarely on the Oregon shipper and the
20 farmers being served at that location.

21
22 In setting priorities for service we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 would urge that the carriers and the STB
2 understand the full consequences of poor service
3 in the ag sector. The carriers may not feel the
4 economic pain but their customers do.

5 I look forward to questions.

6 CHAIRMAN NOTTINGHAM: Thank you, Mr.
7 Keith.

8 Now we will turn to Mr. Steven D.
9 Strege of the North Dakota Grain Dealers
10 Association. Welcome, Mr. Strege.

11 MR. STREGE: Thank you, Mr. Chairman
12 and thanks to the entire Board for calling this
13 hearing. I am the Executive Vice President of
14 the North Dakota Grain Dealers Association. Our
15 state is served by the BNSF, CP rail, and
16 spinoffs of each of those railroads.

17 Seventy-five to 80 percent of our
18 crop production moves the market by rail. Much
19 of our estate is captive to rail economically and
20 for practical purposes. Huge volumes cannot be
21 moved great distances by truck.

22 All three of you gentlemen have been

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to our state, two of you very recently. Vice
2 Chairman Mulvey spoke at our convention this past
3 January and visited with some elevator managers.
4 Chairman Nottingham was there just last month.
5 Mr. Buttrey was there during harvest of '06 and
6 the two of you visited some grain elevators and
7 were again reminded of the vastness of the great
8 plains.

9 Grain elevators are scattered around
10 where the crop production is which is almost
11 everywhere and those wide expanses of crop
12 production and long distances to market are
13 reasons why the common carrier obligation is so
14 important and why this Board has a great
15 responsibility in ensuring that it is honored.

16 Getting crops of the points of
17 processing, consumption, or export is more than
18 economics. It's keeping food on the table for
19 Americans and foreign customers. Lately this
20 Board has been dealing with cost of capital,
21 paper barriers, and rate case rules, all
22 important matters but none matter if there is no

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 service.

2 The common carrier obligation to
3 serve transcends all of those particular issues
4 and is the glue that holds our transportation
5 system together keeping the far-flung points
6 connected. Railroads must be obligated to serve.
7 They should not be able to pick and choose for
8 only their own bottom-line interest.

9 They owe their customers and the
10 public more than that. They have been granted
11 huge franchises to serve, not to exploit. Yes,
12 railroads are private businesses. So are
13 investor-owned utilities. Both provide essential
14 services and both have public obligations.

15 If hauling containers of electronics
16 and toys is more profitable than hauling grain or
17 coal, it is not okay for a railroad to let the
18 essential goods like grain and coal fall behind
19 while hauling containers. When railroads are
20 granted larger service territories through
21 mergers approved by a public body such as the ICC
22 or STB, some obligations to the public come with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 it and providing essential service is one of
2 those.

3 Our written comments include nine
4 points regarding the obligation. In summary,
5 those involved railroads making available to all
6 of their customers an adequate supply of
7 serviceable equipment under reasonable terms in
8 response to market needs and then delivery that
9 service on a timely basis.

10 Being 20 or 30 or 40 days behind is
11 unacceptable. Imagine if delivery services to
12 your local grocery store or shopping mall ran
13 that far behind. Delays cost shippers money and
14 the grain backs up at farms. Selling capacity at
15 a premium over already very profitable rates and
16 then being late is even more unreasonable.

17 Paying only a one-time penalty for
18 being late is not reasonable when rail customer's
19 cost for the delay continue to accumulate.
20 Inaccurate ETAs on trains that need to be loaded
21 quickly is not reasonable. Delays related to
22 severe weather are understandable. The railroad

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 should remember that when dealing with their
2 customers on loading times.

3 Regarding how much capacity is
4 expected, I'll echo what Mr. Mulvey said this
5 morning. If the common carrier obligation is
6 only to distribute fairly the capacity a railroad
7 has, then that puts defining the common carrier
8 obligation in the hands of the railroad and I
9 don't think that is what we want to do.

10 Our written comments address concerns
11 with the marketing of capacity. Shipment sizes
12 or duration commitment which do not fit customers
13 do not honor the common carrier obligation to
14 them. When middle men are involved, there is
15 some passing of the buck and railroads are
16 somewhat insulated from true market signals.

17 Railroads should respond to market
18 needs instead of wishing their concepts on the
19 market. Leaving behind rail customers who cannot
20 comply with expensive new concepts is not
21 honoring the common carrier obligation.

22 North Dakota has a diversity of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 crops. Some of these crops are typically
2 marketed in small lots, not 100-car trains so
3 reliable access to single cars and small train
4 sizes is very important. These should not be
5 pushed to the back of the line in preference for
6 only large shipments. The common carrier
7 obligation applies to all of them and most train
8 shippers also load the smaller shipments.

9 A grocery store might find it more
10 efficient to sell potatoes in 100 pound bags
11 only. If there was competition, that store would
12 lose much business to stores offering 20 or 10 or
13 5-pound bags. Common carrier obligation means
14 effective service to the smaller shipments.

15 We have heard quite a bit said here
16 and at other hearings about market based rates.
17 I would challenge that definition. A market is
18 composed of a willing number -- a number of
19 willing buyers and willing sellers. In the rail
20 transportation industry or grain elevators that's
21 not the case. Most of them have one railroad to
22 go to. I don't think that is really a market.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Our written comments mention the
2 certificate of transportation complaint to the
3 ICC. That has been mentioned before here this
4 morning and this afternoon. At least a couple of
5 us at this table are veterans of that. The 8th
6 Circuit Court of Appeals made it very clear that
7 a common carrier obligation exist and that a
8 preferential program which impairs the railroad's
9 ability to meet it is unlawful and that decision
10 still stands.

11 A consistent supply of cars offered
12 in programs usable by all customers is essential.
13 The trend, however, has been to more complex
14 programs requiring larger and longer commitments.

15
16 Frequent changes in train sizes,
17 incentives, penalties, and more make it difficult
18 to keep up with what's new and the consequences
19 of not knowing the latest railroad change can be
20 significant. This should be a common carrier
21 obligation, not a complicated carrier obligation.

22 This morning, Mr. Chairman, you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 mentioned the \$25 fee on bills of lading as being
2 a problem with KCS shippers, I believe. It
3 reminded me of a situation that a BN shipper told
4 me about some years ago. He used to call his
5 local yard at Dilworth, Minnesota to find out
6 when his train was going to come.

7 The BN centralized things and at that
8 point they were going to handle all such
9 inquiries in Topeka, Kansas. This guy calls
10 Topeka, Kansas and three days later his voicemail
11 was answered and the guy on the other end said,
12 "Just wait a minute. I'll have to call
13 Dilworth." It was a rerouting, a bureaucratic
14 process, and it really intimidates and frustrates
15 shippers when those kinds of things are done.

16 Requiring rail customers to pay for
17 switches that suffer much wear from the carriers
18 of other traffic is not reasonable. Neither are
19 onerous lease terms including requirements to
20 carry insurance, pay for railroad negligence.
21 Another one is increasing lease payments.

22 Earlier this week I was told of a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 situation in Minnesota where one grain elevator's
2 annual lease payment is to be raised from \$1,454
3 to over \$13,000. \$1,450 to over \$13,000. These
4 things do not honor the common carrier
5 obligation.

6 Since Staggers and so much rail
7 industry consolidation the balance of power has
8 shifted even more in favor of the railroads. We
9 believe the STB must take a stronger hand in
10 calling fouls and correcting situations.

11 Even though shippers are organized
12 into associations like those here today, we have
13 no authority over the ever larger and more
14 powerful railroads. Another problem is shipper
15 reluctance to say things for fear of retribution
16 so rail customers look to the STB for assistance.

17 Regarding the rail consumer
18 assistance services, and this happened before the
19 present folks were in charge, a few years ago a
20 shipper I know had a problem. He sent the
21 information to that office. The office sent that
22 information to the railroad. The railroad came

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 back and said the shipper didn't have his facts
2 correct and that was the end of it. We need more
3 than that.

4 In this proceeding we think the Board
5 should define the common carrier obligation with
6 as much clarity as possible and then be more
7 willing to step in and correct abuses of the
8 common carrier obligation that have become all
9 too common. Thank you.

10 CHAIRMAN NOTTINGHAM: Thank you, Mr.
11 Strege.

12 We will now hear from Mr. Terry J.
13 Voss of the Ag Process Company.

14 MR. VOSS: Thank you, Mr. Chairman.
15 I'm Terry Voss. I work for Ag Processing. We
16 are a regional cooperative based in Omaha,
17 Nebraska. We are owned by 195 local cooperative
18 elevators spread throughout the midwest who in
19 turn are owned by 200,000 farmers and ranchers in
20 the midwest.

21 I'm here representing AGP, our parent
22 company today, as well as the members and owners

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of us. The grain industry is heavily reliant on
2 rail transportation. Our member elevators for
3 the most part are served by a single carrier.
4 Rail service is essential.

5 There has been a steady
6 transformation of rail service from one that was
7 responsive to one that tells the grain industry
8 today how it will operate. The rules are ever
9 changing. I think we are no different than any
10 other shipper, even a railroad.

11 I don't think either of us know
12 really what the common carrier obligation is but
13 we both have an opinion on what it should be. We
14 at times will tell a railroad that they have the
15 obligation to perform a service and they
16 disagree. We each have a different opinion.

17 I am not here to complain or make
18 accusations against railroads but to contribute
19 to the Board's understanding of a shipper's view
20 of issues that affect our businesses. Our view
21 is not to address Section 11101 but railroad
22 service in general nature.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 This goes beyond having a line of
2 track, locomotives, and crews to haul cars from
3 point A to point B. Is car supply, specifically
4 covered hopper cars, is an obligation of
5 railroads to furnish to the grain industry? If
6 so, do what extent?

7 Years ago the ICC issued a service
8 order requiring that railroads could not have
9 more than 20 percent of their cars in grain
10 service. Shippers leased and purchased cars.
11 The order later expired. However, the precedent
12 had been set. Today in the grain processing
13 industry it is the norm for shippers to furnish a
14 large percentage of the covered hoppers needed.

15 All tank cars, to my knowledge, are
16 furnished by the shipper. It is simply a cost of
17 doing business today for the shipper. Some
18 railroads provide covered hopper cars through an
19 auction system. Many of our members have called
20 me and are confused as to where the common
21 carrier obligation to furnish cars, if there is
22 one, stops and where the auction starts.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1
2 The common carrier obligation should have
3 reference to reasonable and consistent service.
4 Inconsistent and unreliable service is extremely
5 harmful to an industry. Let me give you an
6 example. This month we shipped some cars from
7 one origin to one destination. We shipped cars
8 on Monday, Tuesday, Wednesday, Thursday, and
9 Friday.

10 All cars arrived at the destination
11 the same day. This causes inventory and/or
12 production concern. Another concern is that if
13 all the cars could not be placed in the plant
14 upon arrival they would be placed on storage or
15 demurrage charges or chargeable events.

16 Inconsistent service has pushed
17 shippers to lease additional cars and build
18 additional track. Some facilities cannot expand
19 because the town has grown around the plant and
20 streets and houses restrict the expansion of
21 track.

22 The same issues apply to employ cars

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 returning to origin that are bunched. As service
2 changes, so does the need for cars. Consistency
3 is critical. Recently an elevator received and
4 loaded a train on a Friday and billed it on a
5 Saturday. The following Friday a train in route
6 to that elevator on a different railroad had to
7 be diverted because the other train had not yet
8 been pulled after six days.

9 The elevator incurred the cost of the
10 diversion to the other elevator, the interest
11 rate of carrying the grain in inventory until
12 another train could be placed, and a possible
13 penalty from the buyer for being out of contract.
14 The first railroad should have a common carrier
15 obligation to have pulled that train in a timely
16 fashion or at least sooner than six days.

17 Recently we have faced situations
18 from two different carriers. Both are requiring
19 or requesting that we block or sort cars based on
20 the destination with the railroad be delivered to
21 an interchange. I feel the railroads are being
22 paid to do this either through their reciprocal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 switch agreement or in their line haul rates.

2 We feel the obligation for switching
3 plants, blocking cars, and delivering them is out
4 of the railroads. Every shipper receiver is
5 required to execute an individual track agreement
6 to receive service. This can be very one sided
7 and normally not on the side of the shipper.

8 We are aware of an agreement where
9 the shipper is required to waive any protection
10 it may be entitled to under that state's
11 warehouse compensation law -- I'm sorry, worker's
12 compensation law -- followed by a clause that
13 requires the shipper to acknowledge that this
14 waiver was mutually negotiated.

15 It was not. This agreement was
16 required to be signed as a condition of service.
17 Railroads should have the common carrier or an
18 obligation to be reasonable in this area.

19 The Board requested input on
20 embargoes. I don't think they are used enough.
21 When railroads see a problem, they should use an
22 embargo before a destination is totally plugged

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 up. We currently have cars sitting to be spotted
2 to a customer. They have been there three-and-a-
3 half weeks. The railroad says the receiver's
4 track is out of service.

5 They tell us not to ship cars there
6 anymore to that customer until the problem is
7 resolved. The railroad should really embargo the
8 facility until the customer's problem is resolved
9 before additional cars continue to accumulate
10 there and then we do have a mess as UP talked
11 about in Arizona.

12 I thank you for the opportunity to
13 present our views and those on behalf of AGP's
14 member owners. Thank you.

15 CHAIRMAN NOTTINGHAM: Thank you, Mr.
16 Voss.

17 We will now turn to Mr. John M. Frank
18 of Frank Bros. Feed & Grain Company. Welcome,
19 Mr. Frank.

20 MR. FRANK: My name is John Frank and
21 I'm the owner of Frank Bros. Feed & Grain Company
22 located in Wells, Minnesota. I would like to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 thank you very much for giving me the opportunity
2 to participate in this hearing and to share with
3 you what is happening to my company at this time.

4 I did testify here, I think, 33 or 34
5 years ago about railroad shipper issues. I never
6 thought I would be back. My father purchased and
7 started operating our grain elevator in Wells,
8 Minnesota in 1933, 75 years ago. In 1973 I was
9 very influential in getting the Milwaukee road,
10 we had our line at that time, to start using unit
11 train shipments of grain.

12 I convinced them that was the future
13 of grain shipments. In 1978 we had a death in
14 our family. My brother-in-law passed away
15 suddenly so I went to our farming operation and I
16 leased my elevator out. By then a 50-car loading
17 facility was leased to Pillsbury and eventually
18 PB or ConAgra Grain with their acquisition of the
19 PB grain division.

20 In 1999 ConAgra terminated the lease
21 with me. We then leased a facility to Watonwan
22 Farm Services, hereinafter WFS, who also had a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 facility in Wells. It was leased to them for six
2 years from September of 1999 until July 31 of
3 2005. They loaded rail cars out of our facility
4 the entire time of the lease.

5 We decided not to lease the facility
6 to WFS beginning August 1 of 2005. They
7 continually lowered the lease payments that we
8 were getting and would do no maintenance to our
9 facility. They had offered to purchase our
10 facility several times but at a fraction of its
11 value. They told me if I would not sell at their
12 price, they would put up a bin at their facility
13 and would offer me less the next year.

14 I had two sons in the business with
15 me at that time and we decided to search for
16 financing and operate the facility ourselves. We
17 continued to receive and still receive the
18 newsletters from the IC&E. In August of 2007 we
19 were in talks with an ethanol company to purchase
20 grain for them. We had been in talks with them
21 since March of 2007.

22 We had also been in talks with a bank

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for operating funds since August of 2007. I had
2 a question about an item in one of the
3 newsletters e-mailed to me by Joanne Mortenson,
4 Director of Marketing for the IC&E railroad so I
5 e-mailed my question to her.

6 I received an e-mail back from her
7 which I have given you a copy of on August 3,
8 2007 telling me I could no longer load rail cars
9 because they had sold the track beside my
10 elevator to WFS, my competitor.

11 In a phone conversation with her I
12 asked her how she could sell the track and not
13 contact me beforehand. She said that I hadn't
14 shipped in the facility for years. I said that
15 my leasees had been shipping there all the time.
16 She then told me they could whatever they wanted
17 to do. She told me to contact the real estate
18 department.

19 I contacted Tim Carlson with the IC&E
20 real estate department and he said he had nothing
21 to do with it but if Joanne said he did, he would
22 take the blame. He already had my file sitting

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 in front of him. They had sold just enough track
2 to go just a few feet past my facility so that I
3 could not load.

4 From the small amount of information
5 that I have been able to gather, there is plenty
6 of track to the west of my facility but I can't
7 load because the track beside my place belongs to
8 WFS.

9 Commissioner Buttrey, you said in
10 your opening remarks this morning that a shipper
11 that has a truck alternative is not a captive
12 shipper, although if the competitor on the other
13 side of town has rail loading facilities and has
14 a 6 to 10 to 15 cents a bushel advantage, I
15 believe you are captive and I believe that you
16 are out of business which is what happened to us.

17 I am close to putting an agreement
18 together with an ethanol company to furnish corn
19 to possibly three of their plants but I cannot go
20 any further because they don't want to talk
21 without me having rail. I tried to talk with
22 Steve Milligan, Assistant Vice President of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 IC&E and all I got was a letter that Tim Carlson
2 had sent to me on August 8th of 2007.

3 It was addressed to me in Granada,
4 Minnesota. I have no address there. I never
5 received the letter. I have two other land
6 leases with the IC&E. It amazes me that with the
7 facility in Wells, my home address in Winnebago,
8 and our company offices in Paramount that he
9 sends a letter to Grenada, Minnesota.

10 The letter was full of erroneous
11 statements and lies. Mr. Carlson's letter is in
12 the packet that I gave you. Mr. Carlson was
13 trying to cover the actions of the IC&E. That
14 letter also stated that the transfer had taken
15 place in December of 2006 which was nine months
16 prior to me finding out.

17 On April 15th of 2008 I received a
18 copy of the Tim Carlson letter dated August 8,
19 2007. This was the first time I knew what the
20 sale date actually was. Once WFS and the IC&E
21 Railroad knew that I knew about the track, they
22 started to tell people.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 On August 6, 2007 I received a call
2 from my banker. He stated that Mike Lepp, one of
3 the top people with WFS, came into the bank and
4 told him that my elevator had little value
5 because they, WFS, owned the track beside my
6 elevator and I could no longer load rail cars.

7 We own a steakhouse in Fairmont,
8 Minnesota. On August 8, 2007, Ed Busenko, who is
9 the general manager of WFS, came into the lounge
10 of our steakhouse late in the evening when it was
11 all employees and he told them that I was losing
12 everything I had. He also said my elevator was
13 no good because he owned the rail beside it and I
14 could not load rail cars. It was my night off
15 and I was not there.

16 On August 16th Mr. Busenko entered
17 the steakhouse again and I was there. I met him
18 and told him he was no longer welcome and asked
19 him to leave. He was no longer welcome on a
20 totally unrelated matter. He called me about
21 everything he could think of. He told me he had
22 been trying to get me for four years for not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 selling to him at his price and now he did it.
2 He said he owned the track and I couldn't load
3 rail cars.

4 It is my contention that WFS and IC&E
5 intentionally conspired to drastically reduce the
6 value of our facility and keep us from competing
7 with WFS. We were not given any chance of
8 purchasing the track. There's plenty of track in
9 Wells. They didn't have to sell them the track
10 beside our elevator.

11 We did not find out about the sale
12 until nine months after the fact. They did
13 everything they could to cover it up as long as
14 they could. The IC&E knew that we had a facility
15 in Wells. We still have two land leases with
16 them and we personally met with Joanne Mortenson
17 and Steve Milligan about operating the facility.

18
19 If they are allowed to do this to me,
20 that opens the door for any large company to use
21 its influence to put any small operator out of
22 business. This cost our company hundreds of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 thousands of dollars in potential income and in
2 lost value to our real estate. They also hurt
3 the area farmers by eliminating competition.

4 I personally started doing business
5 with the railroads in 1972. I have seen them let
6 their tracks deteriorate and force shippers and
7 state government to rebuild the track while they
8 invested their income in outside interest and
9 say, "We can do what we want."

10 In 1992 I was forced to purchase the
11 land that part of my facility was sitting on from
12 the land company created by the Milwaukee Road
13 when they went out of business. The price was
14 quoted to me at \$32,000. When I told them there
15 was no land in Wells worth that kind of money for
16 such a small parcel, they raised the price to
17 \$47,000 and said if I didn't pay, that I should
18 move my elevator. I guess they thought they
19 could do whatever they wanted.

20 I tried to reason with Steve
21 Milligan. However, in his April 15th letter,
22 which I've given you a copy, he says they did

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 nothing wrong and they could do what they wanted.
2 I feel this is the ultimate indiscrimination
3 against one shipper versus another. I don't know
4 how the federal statutes read but they have
5 clearly violated the Minnesota statutes. They
6 simply broke the law.

7 If I go out and damage someone's
8 property by \$500,000, I'm probably going to go to
9 jail and have to pay restitution. Why should
10 this be any different? Why is the railroad above
11 the law? Why do they think they can do anything
12 they want?

13 If the IC&E is allowed to sell the
14 track to my competitor and put me out of
15 business, there will be no shipper safe from
16 having the same thing happen to them. I intend
17 to do whatever it takes to get the sale of the
18 track by IC&E nullified so that we can enter a
19 contract with the ethanol company and start
20 shipping grain again and put some competition
21 back into our area.

22 I ask the Board's efforts to nullify

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the sale and to let something like this never
2 happen again to another shipper. Thank you.

3 CHAIRMAN NOTTINGHAM: Thank you, Mr.
4 Frank. Thank you also for recopying for me last
5 week the letter you sent to the State of
6 Minnesota raising some of your state law
7 potential violations concerns. Rest assured I've
8 had staff looking into your situation and we'll
9 continue to be working with you on what, if
10 anything, the Board can do. We will need to get
11 to the bottom of questions like exactly what kind
12 of track is it, what is the legal status of that
13 track.

14 Mr. Keith, it's coincidental that you
15 are here, too. If these are actually two members
16 of yours, we may prevail on you to see if you can
17 help us untangle this a little bit but you don't
18 need to commit to that right now. Do you know
19 offhand if Mr. Frank's company and his competitor
20 are actually members?

21 MR. FRANK: I am not. I'm not at
22 this time. I have been for many years but right

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 now I'm not.

2 CHAIRMAN NOTTINGHAM: Okay. That may
3 help answer it.

4 MR. KEITH: WFS is a member and IC&E
5 is a member.

6 CHAIRMAN NOTTINGHAM: Okay. Good.
7 We may call on your informally to help us
8 untangle that.

9 Mr. Whiteside, you mentioned a
10 difficult case, the Montana Seed experience.
11 Thank you for sharing that with us. Do you know
12 if they brought that to the attention of the STB?
13 I just don't know the answer. I haven't had time
14 to check that out.

15 MR. WHITESIDE: Excuse me. I do not
16 know. I do know they brought it to the
17 Governor's attention and that is how it came to
18 me.

19 CHAIRMAN NOTTINGHAM: Okay. Good.
20 We have heard a number of troubling reports from
21 this panel, some in great specificity, somewhat
22 anecdotal, all troubling. The main message, I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 guess, I want to impart is please let the Board
2 know. Let particularly our rail consumer
3 assistance office know as soon as possible with
4 enough specificity so we can begin to try to do
5 something about it.

6 It is helpful to hear about
7 experiences at hearings like this even when they
8 are several years old but it's even more helpful
9 if we hear about them contemporaneously and in a
10 situation where we can actually do something to
11 make a difference.

12 I personally enjoy -- this may sound
13 strange -- enjoy working on solutions to problems
14 like these. I personally make calls to railroad
15 CEOs and other officials and have had some
16 success.

17 Then we've got a very able staff and
18 I should say we are actively recruiting for
19 additional staff in the rail consumer area so if
20 anyone here knows anyone who would like to work
21 at the Board, now is a good time to be getting in
22 touch with us or checking out our job opening

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 information we post on the web.

2 Let's see. Mr. Strege, you
3 mentioned, and I heard about this a little bit
4 when I was with you recently in North Dakota,
5 railroad practice of occasionally requiring
6 shippers to pay for insurance intended to cover
7 negligent actions on the part of railroads. How
8 does that work?

9 MR. STREGE: It is part of the lease
10 where the grain elevator agrees to indemnify the
11 railroad for losses on that lease site. I
12 believe it actually requires them to purchase
13 insurance. We have looked into the market and
14 some of these insurances that are required are
15 not even available.

16 We had a bill in our legislature a
17 couple sessions ago to nullify this. The
18 railroads, it was primarily the BN, they agreed
19 to not oppose the bill but the provisions apply
20 to only leases from now on. For those who have
21 an existing lease are subject to those
22 requirements.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 If they don't have the insurance,
2 which I'm told they can't get, I've had insurance
3 brokers that are experienced in the industry tell
4 me this, then if there would be any kind of a
5 loss, then the grain elevator would be
6 responsible.

7 It's like if the train jumped the
8 track and hit the elevator and burned the
9 elevator down, then the elevator would be
10 responsible for its loss and if it burned part of
11 the town down, it might be responsible for part
12 of that loss also. The thinking is that if the
13 grain elevator wasn't there, there wouldn't have
14 been an accident. I don't know if I'm quite
15 describing it right. It's been a while since I
16 looked into it but it is a serious problem for
17 grain elevators and other leasees.

18 MR. CUTLER: Chairman Nottingham, I
19 had mentioned that I reviewed quite a few
20 sidetrack agreements. It's very comment for the
21 sidetrack agreements supplied by the railroads to
22 require the shipper to indemnify the railroad

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 against claims arising out of the railroad's own
2 negligence or misconduct.

3 COMMISSIONER BUTTREY: (Off mic.)

4 MR. CUTLER: Well, whole-time
5 clauses. There are legal defenses to these
6 things. There are a number of courts that say
7 it's against public policy for party A to be
8 indemnified by party B against party A's own
9 negligence.

10 Some of these things may not hold up
11 in court but they sure are common in these
12 agreements and not only for small companies
13 either. Some very large corporations have the
14 same type of agreement presented on a take-it-or-
15 leave-it basis.

16 CHAIRMAN NOTTINGHAM: And there well
17 may be STB staff who know much more about this
18 and I would welcome anything in the record in the
19 way of examples of some of these clauses or
20 contracts. It sounds troubling to me.

21 I don't understand how a shipper can
22 be expected to promise to reimburse a railroad as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 a condition of service for costs that are caused
2 by negligent action of the railroad. It doesn't
3 quite add up to me but thank you for sharing
4 that.

5 Mr. Buttrey, any questions?

6 COMMISSIONER BUTTREY: I was just
7 curious, Mr. Whiteside, if you could tell me
8 whether you are aware of whether MRL brought that
9 what would be a paper barrier issue to the
10 Board's attention. We don't seem to recall it
11 here and I inquired just briefly about it. Maybe
12 they did but I don't remember hearing anything
13 about it.

14 MR. WHITESIDE: I'm sorry. I'm not
15 following you. I'm not following the question.
16 Is it on the broad-view situation?

17 COMMISSIONER BUTTREY: You mentioned
18 the problem where MRL could have carried some
19 grain for a customer and they were not able to
20 carry that grain. They were ready, willing, and
21 able to carry the grain to customers but they
22 couldn't carry the grain to the customer because

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 BNSF -- the only way the grain is going to get
2 there basically is either if the BNSF carries it
3 or if MRL carries it or if they truck it some
4 place.

5 You said the most economical, the
6 most efficient way of handling this matter would
7 be for MRL to carry it and interchange it with
8 BNSF or somebody, presumably BNSF, and then they
9 would move it on to its destination. You said
10 that transaction was cut off. The opportunity
11 for the grain to move that way was cut off by the
12 refusal of BNSF to allow MRL to participate in
13 the move.

14 MR. WHITESIDE: Okay. Let's make
15 sure because I think we are close to
16 understanding. Montana See --

17 COMMISSIONER BUTTREY: I might have
18 heard you wrong but I thought that was what you
19 said.

20 MR. WHITESIDE: Montana Seed had
21 asked MRL if they would be willing to carry it
22 and they said yes. Then the BN told them no,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that they wouldn't allow that. I don't know
2 whether it got to the point where MRL was saying
3 it was a challenge to the paper barrier.

4 That is obviously the reason why.
5 Well, no. I'm not sure that is the reason why.
6 I wouldn't even go that far. It's just that in
7 the situation Montana Seed asked and was told no
8 by the Burlington Northern. Yet, Montana Seed
9 was willing to do it.

10 COMMISSIONER BUTTREY: Do you know
11 how the grain actually moved? Presumably it did
12 move in some way, somehow. Do you happen to know
13 how it moved?

14 MR. WHITESIDE: No. Montana Seed
15 basically decided they couldn't make the deal
16 work so they abandoned the property. Hopefully
17 we are talking about the same thing.

18 COMMISSIONER BUTTREY: I think we are
19 talking about the same situation.

20 MR. WHITESIDE: Okay. I'm sorry.
21 Okay.

22 CHAIRMAN NOTTINGHAM: Commissioner

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Mulvey.

2 VICE CHAIRMAN MULVEY: Thank you.
3 Mr. Frank, have you contacted the STB's Office of
4 Consumer Enforcement and Consumer Affairs on the
5 problem that you're facing or have you contacted
6 the Board at all before today?

7 MR. FRANK: Yes.

8 VICE CHAIRMAN MULVEY: You have?
9 Okay. And did you get any kind of satisfaction
10 or any kind of assistance at all? Was it helpful
11 or has it been helpful so far?

12 MR. FRANK: Yes. So far it's been
13 helpful.

14 VICE CHAIRMAN MULVEY: Okay. Thank
15 you.

16 CHAIRMAN NOTTINGHAM: And, Mr.
17 Mulvey, just so you know because we haven't had a
18 chance to chat about this, just in the last few
19 days my office was copied on a letter that Mr.
20 Frank sent to the State of Minnesota,
21 Commissioner of Transportation, so I've had some
22 discussions with Mr. Broadman about his work on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 this. It's all been within the last couple days.

2 VICE CHAIRMAN MULVEY: Okay. Thank
3 you.

4 Mr. Strege, South Dakota has invested
5 state monies in the rail infrastructure, etc. It
6 has been suggested on occasion that if North
7 Dakota did the same that some of North Dakota's
8 problems might be ameliorated. You want to
9 comment on that?

10 MR. STREGE: Well, I suppose the
11 railroad would accept investment from anybody
12 whether they be shippers or the state. There has
13 been some of that in North Dakota with the Rail
14 Assistance Program. We've got a state fund that
15 is set up. I don't know how much money is in it
16 but it has been helpful in some situations.

17 I suppose it could be expanded or you
18 could put more money in it but, you know, it
19 actually is the railroad's responsibility, I
20 think, to provide that infrastructure there. I
21 was thinking of a couple of lines in the central
22 portion of North Dakota that were sold from the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 BN to a short line, to the River Valley and
2 Western. They became -- well, they were old
3 lines and there was a lot of CRP land in that
4 part of the state so there wasn't as much
5 business anymore.

6 Some of the shippers were willing to
7 put some money. It would have been a partnership
8 between the railroad and the shippers and the
9 state but they just couldn't ever get it
10 together. I think they needed about \$7 million.
11 Most of the line was subsequently abandoned.

12 VICE CHAIRMAN MULVEY: Okay. This is
13 a question I was going to ask the railroads but
14 maybe it's just as well to ask you. What
15 recourse is provided to a buyer who wins service
16 through an auction if that service is not
17 delivered in accordance with its on-time
18 performance guarantee? Do you have any recourse
19 if you don't get what you bid for?

20 MR. STREGE: Right now on the COT
21 program, for instance, in BN if they are more
22 than 15 days late, then the shipper can get a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 \$200 per car penalty one-time payment. Now,
2 sometimes that might cover his extra cost.
3 Sometimes it might not. That was what I
4 mentioned about a one-time penalty.

5 His cost may continue to accumulate
6 if he is continually late and he has -- the
7 shipper has on that particular program bid in
8 this auction and most of the time would have paid
9 over-the-tariff rate. That is what really
10 frustrates them when they bid a premium over the
11 rate and are still late.

12 VICE CHAIRMAN MULVEY: \$200 per car
13 rebate after 15 days is not exactly fully
14 compensatory.

15 MR. STREGE: That used to be -- I
16 think it was \$400 up until about five years ago
17 and then they cut it back. Then earlier this
18 year they were going to change it to \$150 for a
19 10-day window. They had that in effect for
20 awhile and then they switched back to \$200 for a
21 15-day window.

22 VICE CHAIRMAN MULVEY: When they make

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 these changes, are they negotiated changes or you
2 pretty much take it or leave it?

3 MR. STREGE: It's take it or leave
4 it. In fact, I brought along some sheets here
5 that I printed off of the BN website of some
6 changes that were made earlier this year. It
7 gets confusing sometimes for managers to be able
8 to keep up with the changing rates and train
9 sizes and so forth. It gets kind of baffling.

10 VICE CHAIRMAN MULVEY: Mr. Keith,
11 railroads sometimes claim that agricultural
12 shippers often will hold their product waiting
13 for the best price and then begin moving it all
14 out at once and all demanding service
15 simultaneously making it impossible for the
16 railroads to deliver. Do you want to comment on
17 that?

18 MR. KEITH: There are some years that
19 the nature of the market encourages shippers to
20 hold grain for longer periods than other years.
21 It's true. Sometimes too much grain needs to be
22 moved at once and some of that is driven by the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 market place. The market place places a certain
2 value on storing grain and selling grain at
3 particular times.

4 Right now the market place is encouraging
5 people to actually store but industry can't
6 afford to store it so they are having to sell it
7 to pay the banker and plan to pay the Chicago
8 Board of Trade on their hedges. Yes, in fact,
9 that does happen some years so you get this pre-
10 harvest rush. It's a seasonable business and
11 sometimes the season allocate is more extreme
12 than other years.

13 VICE CHAIRMAN MULVEY: At least this
14 year the prices have been better than in previous
15 years.

16 MR. KEITH: Yes.

17 VICE CHAIRMAN MULVEY: It's been
18 noted about the capacity in the rail system and
19 that this recent report that came out which said
20 that only three percent of the rail
21 infrastructure was beyond capacity or at
22 capacity. If you look at the nation's highways

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you can make the same observation.

2 The vast majority of our highways are
3 empty most of the day. There are parts of the
4 highway system or the railway system that are
5 choke points. It's the fact that three percent
6 of the whole system being at capacity could, in
7 fact, have an impact on the entire network.
8 Isn't it true that the three percent number
9 really doesn't capture the potential for
10 congestion and problems on the network, Terry or
11 John?

12 MR. CUTLER: Vice Chairman Mulvey,
13 that can be the case. One of the focuses of the
14 last highway bill was precisely choke points. It
15 was never to identify areas where the bang for
16 the buck in terms of investment would be the
17 greatest. That tends to get tangled up in donor
18 issues and so forth. You are familiar with the
19 problem.

20 Don't misunderstand me. I'm not
21 comfortable with the prospects for us to be
22 hauling freight for the foreseeable future in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 way we need to. All I am saying is that I think
2 there has been some exaggeration of capacity
3 issues in support of other aspects of the
4 railroad's desires in terms of how they are
5 regulated.

6 CHAIRMAN NOTTINGHAM: Although that
7 is a very good point, Mr. Mulvey, I can say as a
8 former State Highway Commissioner, I could try to
9 get away with telling the Virginia General
10 Assembly that 85 percent of the 57,000 miles of
11 Virginia roadway were not congested most of the
12 day.

13 When you look at what is going on in
14 Northern Virginia and around the Hampton Roads
15 area they would throw me out of the Capitol if I
16 told them we didn't have a problem.

17 Yet, it was a fact that when people
18 took the whole geography of the Commonwealth of
19 Virginia while I was there, including Southwest
20 Virginia and the Shenendoah Valley and Southside
21 the percentage of overwhelmed with congestion
22 highways was probably pretty small but the impact

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 was huge and it threatened the state's economy
2 and continues to this day in that state to be one
3 of the top issues that the Commonwealth is going
4 to have to have a special session with the
5 legislature on and everything else.

6 MR. CUTLER: Once again, Chairman
7 Nottingham, we are not denying that there are
8 problems here and there but it is important to be
9 a little bit skeptical sometimes about claims
10 that things shippers want have to be turned down
11 because capacity is constrained.

12 For example, the argument that excess
13 capacity is gone you hear that a lot. I used to
14 say that myself. I'm not sure that is always
15 accurate. That's the only point we are trying to
16 make.

17 VICE CHAIRMAN MULVEY: Fair point.
18 Thank you.

19 Mr. Voss, you made the point, I
20 believe, about car supply. Is it your position
21 that railroads have a common carrier obligation
22 to provide cars upon request of all types, some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 types, all the time, sometimes?

2 MR. VOSS: Yes. Certain types of
3 cars, yes. Tank cars, I don't think so because
4 like, for example, in soybean oil that is food
5 rate edible product. You certainly don't want
6 cross-contamination or the risk of that anywhere
7 like that. Covered hopper cars it is a generic
8 manila folder.

9 I think they certainly have a large
10 fleet. You saw the BN slide this morning and
11 they are continuing to grow their fleet. I think
12 they have an obligation to furnish them now.

13 I mean, they furnished lumber cars,
14 furnished auto racks, trailer trains and stuff, R
15 boxes. I think they have an obligation. We just
16 don't know what it is. We don't know where the
17 obligation stops and the auction starts.

18 CHAIRMAN NOTTINGHAM: Commissioner
19 Buttrey.

20 COMMISSIONER BUTTREY: Mr. Strege,
21 you were talking earlier about the difficulty in
22 getting single-car deliveries. You were also

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 talking about being charged for cars sitting too
2 long your facility or at a facility in North
3 Dakota. What is the situation if you keep a car
4 too long according to the railroad requirements?

5
6 What kind of penalty to you pay and
7 what kind of penalty does the railroad pay if the
8 -- is there any reciprocity at all between what
9 you pay and what the railroad pays when the
10 service is not what it is purported to be or what
11 it is agreed to be?

12 MR. STREGE: The penalty for being
13 late loading a car is demurrage. I believe it's
14 \$50 a day and probably in some commodities and
15 some markets there is a one day free day or two
16 days that you get.

17 After that It's \$50 a day. On the
18 COT program once you get the car you have that
19 much time or if it would be a car ordered on the
20 regular tariff program. Under the COT program
21 you would get that \$200 penalty that we just
22 discussed.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Under the other program just the
2 tariff lottery -- I know I'm throwing out a lot
3 of terminology here that maybe you are not
4 familiar with but there is a lottery for cars at
5 the tariff rate which is limited supply of cars.
6 On those if the railroad would be late in pulling
7 the car, for instance, there would be no penalty.

8
9 That is one of the things that
10 frustrates shippers, too, and that Terry was
11 talking about here, loading a car and then it
12 sits there for a week or something like that.
13 Maybe you had to hurry up and load in order to
14 avoid a penalty but then the car sits there for
15 quite a length of time. It's not always a
16 problem. I'm not saying that but it happens.
17 Can I elaborate a little bit on that lease
18 question that you asked me, Mr. Chairman?

19 CHAIRMAN NOTTINGHAM: Sure. Yes.

20 MR. STREGE: It came to mind a little
21 more after we talked. In 2003 the grainulers got
22 a bill introduced into the North Dakota

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 legislature that would make it illegal for a
2 railroad to impose liability on the leasee for
3 damage that was not the fault of the leasee. The
4 response of the railroad was pretty caustic.

5 In fact, the Canadian Pacific sent
6 out a letter that said that if that was to pass,
7 they may have to cut the leases and that people
8 would have to move their facilities off the
9 property. Anyway, we had some support from other
10 leasees but then that started to fade away. It
11 was a process of intimidation and we had to back
12 off.

13 The only thing we got in the end was
14 a limit on the liability that we would have to
15 third parties. We would still have to absorb any
16 damage to our own property but there was a limit
17 placed on liability to third parties. Then we
18 had another bill in 2005 and I don't remember the
19 details of that.

20 CHAIRMAN NOTTINGHAM: Thank you, Mr.
21 Strege.

22 Vice Chair Mulvey, anymore questions?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRMAN MULVEY: That will be
2 it for today. Thank you very much.

3 CHAIRMAN NOTTINGHAM: Commissioner
4 Buttrey.

5 COMMISSIONER BUTTREY: I would just
6 like to ask anybody on the panel really what
7 would be wrong with having a system that provides
8 total reciprocity that I do this and I get
9 penalized this much if I do something that is not
10 according to the agreement and you pay the same
11 amount in case you don't live up to your side of
12 the agreement. What would be wrong with a system
13 --

14 MR. VOSS: Absolutely nothing.

15 COMMISSIONER BUTTREY: -- that would
16 require reciprocity between the two?

17 MR. VOSS: Nothing. There is
18 absolutely nothing wrong with that concept. We
19 proposed that before. Basically for
20 simplification we have called it reverse
21 demurrage. Whereas if we've got 24 or 48 hours
22 to load a car and it sits 96 hours, what is good

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for the goose is good for the gander.

2 COMMISSIONER BUTTREY: You said you
3 proposed that.

4 MR. VOSS: We proposed that to some
5 carriers.

6 COMMISSIONER BUTTREY: Okay. But you
7 haven't proposed it to us.

8 MR. VOSS: No, we have not.

9 COMMISSIONER BUTTREY: I didn't think
10 so.

11 MR. VOSS: No, we have not.

12 MR. WHITESIDE: Mr. Chairman, could I
13 do one follow-through back with Commissioner
14 Buttrey?

15 CHAIRMAN NOTTINGHAM: Yes.

16 MR. WHITESIDE: Talking a little bit
17 more about that Montana Rail Link, I am not aware
18 that Montana Rail Link ever came to you and I'm
19 not aware that they ever went any further than
20 saying that they were willing and able. It's a
21 paper barrier issue. It will have to acquire
22 acquiescence of the Burlington Northern. That is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 not a critique of the Burlington Northern.

2 What I'm saying here is there would
3 be no reason why the Montana Rail Link would want
4 to push that because they have other business
5 interest with that carrier and there would really
6 be no reason for them to want to go just for that
7 particular movement to go to bat for it.

8 COMMISSIONER BUTTREY: What you are
9 really saying is, I think, what I'm hearing is
10 that it's not that it would be to their benefit.
11 It would be unadvisable for them to do that is
12 what you seem to be saying.

13 MR. WHITESIDE: That is perfect
14 diction.

15 COMMISSIONER BUTTREY: Were you aware
16 of the fact that 10709(d)(1) of the Act directs
17 the Board to ensure that the essential terms of
18 each contract for the transportation of
19 agricultural products including grain be made
20 available to the general public? Were you aware
21 of that?

22 MR. WHITESIDE: Summaries, yes. I do

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 know that. For years they were very hard to come
2 by because you had to actually send somebody over
3 and have them monitor those to be able to get
4 them. We have done that because we have needed
5 to know what the contracts are and we have people
6 that would come over and just monitor them. If
7 they were published on the web, it would be very
8 helpful.

9 COMMISSIONER BUTTREY: Thank you.
10 I'm curious what you thought about that.

11 MR. VOSS: There's some computer
12 service companies that have been providing those
13 for quite a while at a cost. I understand -- I
14 made a call today and they are on the website
15 today.

16 CHAIRMAN NOTTINGHAM: Good. Thanks.

17 VICE CHAIRMAN MULVEY: One more
18 question.

19 Mr. Whiteside, you say on page 24 of
20 your statement that carriers are forcing shippers
21 to negotiate transportation contracts by refusing
22 to publish tariffs or provide service under

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 tariff. These tactics amount to self-
2 deregulation by the railroads as to rates of
3 service. My understanding is they have to have
4 tariffs available. Do you have specific evidence
5 of this?

6 MR. WHITESIDE: I do have evidence.
7 You notice I did not mention the situation with
8 the ag processor. Those are the kind of things
9 that occur. That isn't the first time that has
10 occurred where they would just cancel a tariff
11 and say, "Now we want you to deal with this on a
12 contract." Is it widespread? No. Does it
13 occur? Yes sir.

14 VICE CHAIRMAN MULVEY: Thank you.

15 CHAIRMAN NOTTINGHAM: Thank you,
16 panel. You are dismissed. We wish you safe
17 travels home and thank you again for being with
18 us today.

19 We will call up the next panel, Panel
20 IV-B, a group of Chemical Shipper Associations,
21 Mr. Jack N. Gerard from the American Chemistry
22 Council. He's the President and CEO of that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 organization. Mr. Arthur Dungan and Mr. Paul
2 Donovan. Mr. Dungan is the President and Mr.
3 Donovan is the counsel for the Chlorine
4 Institute. And from the Fertilizer Institute Mr.
5 Bob Felgenhauer, Vice President for
6 Transportation and Distribution for the Potash
7 Corporation.

8 Welcome, panelists. I'll give you a
9 moment to get situated. When you are ready, Mr.
10 Gerard, we will start with you.

11 MR. GERARD: Am I doing that right?
12 There we go. Thank you, Mr. Chairman, Vice
13 Chairman Mulvey and Commissioner Buttrey. It is
14 a pleasure to be here today. I appreciate the
15 opportunity to testify in behalf of the American
16 Chemistry Council.

17 As the Chairman mentioned, I
18 currently serve as President and CEO of that
19 group, a group that we believe is very important
20 to our domestic economy as well as our
21 livelihoods and the value of the products that we
22 produce and enjoy on an everyday basis.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Hearing others testify and hearing
2 your earlier remarks, Mr. Chairman, I'm going to
3 try to abbreviate mine today and not use my full
4 time and, thus, gain whatever that reward was
5 that you were referencing earlier in the day so
6 it's going to be quick here.

7 Our \$635 billion industry employed
8 more than 850,000 people in all 50 states. These
9 are direct employees. Products supplied by the
10 chemistry sector are essential in manufacturing,
11 agriculture, energy, transportation, technology,
12 communications, health, education, defense, and
13 virtually all aspects of our lives.

14 In fact, more than 96 percent of all
15 manufactured goods are directly touched by the
16 business of chemistry. The business of chemistry
17 depends on the nation's railroads to deliver
18 approximately 170 million tons of products each
19 and every year.

20 Not unlike other bulk commodities,
21 rail transportation is vital to our industry
22 because the unique composition and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 characteristics to many chemical products and
2 large volumes required by our customers.

3 At the outset I would like to make
4 clear that the railroads have an obligation to
5 serve the transportation needs of this country.
6 Railroads are required to operate in the public
7 interest because the public depends on safe and
8 reliable service in the delivery of a wide range
9 of products on which we all rely.

10 Congress wisely recognized the
11 importance of the common carrier obligation as
12 being fundamental to the effective operation of a
13 rail system to serve the needs of our nation. As
14 long as a railroad holds the operating authority
15 over line of track, it must respond to a
16 reasonable request for transportation service on
17 that line.

18 While Congress has given the Board
19 the authority to enforce the common carrier
20 obligation, the power to amend that statutory
21 obligation rest solely with the Congress.

22 I would also like to be clear that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 railroads have been and will continue to be
2 valuable partners. All major North American
3 railroads are partners of our Responsible Care
4 Initiative, a program originated and managed by
5 the council which since its inception has been
6 dedicated to the continuous improvement in
7 health, safety, security, and environmental
8 performance including the safety and security of
9 chemical transportation.

10 While we in the railroads have some
11 differences regarding the best way to promote
12 improved access to competitive and reliable rail
13 service, we will always strive to have a
14 cooperative and constructive relationship to
15 enhance safety and security.

16 Testimony from the railroad suggest
17 there are serious capacity challenges throughout
18 the rail system. Assuming this to be the case,
19 the STB certainly should be considering how it
20 can help address such challenges within the
21 framework of the common carrier obligation and in
22 pursuit of the public interest.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 We are concerned, however, that with
2 today's hearing the Board is pursuing the wrong
3 line of questioning. If the railroads
4 projections of increased demand are correct, we
5 should be focused primarily on issues to improve
6 rail capacity, specifically competition and
7 efficiency, and preparing for that increased
8 demand.

9 For the past 25 years we have watched
10 the railroads consolidate to the point that a
11 handful of railroads control 90 percent of all
12 rail freight traffic in the U.S. As the
13 Washington Post pointed out this week on the
14 front page, this newfound market power has
15 doubled their industry-wide profits since 2003
16 and sent their stock prices soaring.

17 To even consider reducing the common
18 carrier obligation instead of addressing the
19 current barriers to competition in the freight
20 rail system would only serve to extend the
21 monopoly power the railroads currently enjoy over
22 their customers.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 For example, we believe that
2 requiring railroads to quote "bottleneck rates"
3 and allow for reciprocal switching and additional
4 reforms would greatly expand access to
5 competition and improve the efficiency of the
6 system. As our members will note in their
7 testimony, removing these barriers can in many
8 instances reduce the distance that hazardous
9 materials would have to travel.

10 Rail is a safe mode for transporting
11 chemicals including hazardous materials. Thanks
12 to efforts on all sides, the railroads, the
13 shippers, car designers and government
14 regulators, rail transportation is getting even
15 safer.

16 In addition, the federal government
17 has announced several rules such as a new tank
18 car design standard, analyzing routes, and
19 addressing human factors that take a
20 comprehensive approach toward enhancing the
21 safety and security of hazardous rail shipments.

22 We have witnessed a century of safe

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 transportation of these critical materials but
2 the NTSB has determined that the cause of the
3 most recent fatal accidents were railroad
4 maintenance and operational failures. Now with
5 increased traffic and perceived capacity
6 constraints, the railroads wish to avoid their
7 common carrier obligation for hazardous materials
8 to focus on other traffic. This clearly has
9 nothing to do with the public interest.

10 The railroads argue that it is not in
11 their interest to move these vital materials.
12 This raises serious questions including which of
13 the thousands of products made from chemicals and
14 the jobs of Americans who make these products do
15 the railroads wish to eliminate from U.S.
16 commerce.

17 These materials are critical for the
18 production of lifesaving medications and medical
19 devices, body armor used by our military and law
20 enforcement, the ice and fluids for airplanes,
21 energy saving solar panels, and the list goes on
22 and on.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 To make matters worse, the railroads
2 are trying to sell a fantasy but there are benign
3 alternatives to all of these crucial materials in
4 order to avoid their responsibility and
5 appropriate liability for the safe transportation
6 of these products.

7 The current system appropriately
8 places legal liability on the parties that are
9 responsible for an incident. Railroads as well
10 as hazardous material shippers should continue to
11 bear liability for their own actions. Removing
12 that liability could erode safety performance by
13 creating a disincentive to address a multitude of
14 factors to enhance rail safety.

15 Our members would be happy to
16 entertain a discussion to address the railroad's
17 liability concerns that would strike a reasonable
18 balance between all parties. However, when the
19 railroads tell our members that, "We don't want
20 to move your materials unless we are relieved of
21 liability," even in the cases involving gross
22 negligence on the part of railroads, it doesn't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 set the stage for very constructive dialogue.

2 As you will hear from our member
3 companies on later panels, our other great
4 concern is that any curtailing of the railroad's
5 common carrier obligation will serve to extent
6 the already unprecedented dominance they enjoy
7 over their customers further harming the public
8 interest.

9 Mr. Chairman, we have shared with you
10 our significant concerns regarding policies that
11 protect the railroads from competition and have
12 allowed the railroads to wheel monopoly power
13 over their customers. Clearly any erosion of the
14 common carrier obligation which could allow
15 railroads to pick and choose the traffic they
16 serve will greatly exacerbate the market
17 dominance they already enjoy.

18 I will leave it to the individual
19 companies who will testify after me to highlight
20 specific examples of undue leverage and there are
21 many. In sum, the common carrier obligation is
22 vital to my members and the products they produce

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 which in turn are part of the lifeblood of our
2 economy and the thousands of essential goods we
3 take for granted each and every day.

4 Thank you again for allowing us to
5 testify. I look forward to responding to your
6 questions. Thank you, Mr. Chairman.

7 CHAIRMAN NOTTINGHAM: Thank you, Mr.
8 Gerard. We will now turn it over to Mr. Dungan
9 and Mr. Donovan. You have the next 10 minutes.

10 MR. DUNGAN: Thank you. Mr. Chairman
11 and members of the Board, my name is Art Dungan
12 and I am President of the Chlorine Institute. The
13 Chlorine Institute supports the Surface
14 Transportation Board's effort to establish a more
15 thorough understanding of the common earner
16 obligation and to inform those who are affected
17 by this obligation.

18 The Chlorine Institute is a 220
19 member trade association of chlor-alkali
20 producers, repackagers, distributors, users, and
21 suppliers to the industry. The institute's
22 mission is the promotion of safety and protection

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of human health and the environment in the
2 manufacture, distribution and use of chlor-alkali
3 chemicals.

4 Chlorine is a naturally-occurring
5 chemical element that is essential to life.
6 Chlorine chemistry is used to manufacture
7 thousands of products critical to society's needs
8 and, in particular, provides affordable and
9 reliable disinfectants for the benefit of public
10 health.

11 Any suggestion that chlorine can be
12 replaced in this nation's economy is pure
13 fantasy. In more than 95 percent of the uses
14 there is no ready substitute. In order to realize
15 these benefits, it is essential to deliver
16 chlorine from production locations to end users
17 which are often significant distances apart.

18 Approximately 85 percent of the long-
19 distance delivery takes place via railroad tank
20 car. Real transportation of chlorine has
21 overtime proven to be a safe and efficient way to
22 deliver this product. The continued ability to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 economically transport chlorine via rail is vital
2 to both our economy and to public health and
3 safety.

4 Common law provided a basis for
5 railroads being considered as common carriers
6 with certain obligations to provide service on
7 demand. The Interstate Commerce Act codified
8 many of these common carrier obligations and also
9 created new ones.

10 The Service Transportation Board
11 announced that this hearing will focus on various
12 topics related to the common carrier obligation.
13 The Chlorine Institute has offered as written
14 testimony to the eight specific items raised by
15 the STB. However, time permits me only to address
16 some of them at this time.

17 First, service limitations resulting
18 from a constrained environment. Increased
19 international trade and movements within the
20 United States have resulted in higher demand on
21 the U.S. rail system. However, it is the
22 obligation of a common carrier to increase

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 capacity to meet this demand.

2 It is incumbent on the carrier to
3 make the needed investments and technological and
4 infrastructure improvements. Railroads have
5 increased their operated income by 85 percent and
6 their stock prices have nearly doubled in the
7 three-year period ending in 2006.

8 The rate of return on investment by
9 railroads in 2006 was over 10 percent for the
10 first time since 1929. The railroads have the
11 ability to provide additional capacity if they
12 choose to do so. Regrettably in many cases the
13 railroads have failed to make the needed
14 investments. A strong U.S. economy requires a
15 rail system which supports it by providing
16 transportation upon reasonable request.

17 The Chlorine Institute urges the
18 Board to use its regulatory and moral authority
19 to require the U.S. railroads to increase
20 capacity to overcome restraints to shipments.

21 Cost and safety issues related to the
22 transportation of hazardous materials. The rail

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 transportation of TIH materials, and chlorine in
2 particular, has been very safe. The Chlorine
3 Institute and its members are working with
4 affected parties including government regulators
5 to make such transportation even safer.

6 Since 1909 there have been over 2
7 million loaded shipments of chlorine with six
8 fatal releases. Of these six releases two
9 occurred in the 2004/2005 period. The National
10 Transportation Safety Board investigations
11 attributed the 2004/2005 releases to railroad
12 operational failures.

13 A common carrier has a responsibility
14 not only to transport goods upon reasonable
15 request but to do so in a safe and secure manner.
16 Clearly the railroads have the ability to make
17 their respective systems inherently safer by such
18 systems such as greater use of signaling track
19 and by adopting more comprehensive operating
20 procedures. Regrettably for the most part these
21 vitally needed improvements have not been made.

22 Because the common carrier obligation

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 is a statutory one, the Board is not an
2 appropriate forum on which to argue for a change
3 in this obligation. The Board should not allow
4 unilateral action by a railroad to change
5 statutory requirements. The Chlorine Institute
6 urges the Board not to make any change to the
7 common carrier obligation unless such change is
8 debated and authorized by Congress.

9 Carrier imposed requirements for
10 infrastructure investments by shippers. We are
11 concerned about the reasonableness of some
12 carrier imposed requirements for infrastructure
13 investment by shippers. Recently the Association
14 of American Railroads adopted new standards for
15 railroad tank cars transporting TIH materials.

16 These requirements were done without
17 sound engineering and without government and
18 industry concurrence. Further, these
19 requirements would have provided only marginal
20 improvement in accident survivability at a great
21 cost to industry.

22 In the meantime, a separate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 initiative was launched which included members of
2 the Chlorine Institute as well as one of the
3 Class I railroads with the objective to develop a
4 rail car with five to 10 times better performance
5 than the current rail car and significant better
6 than the proposed AAR standard. Instead of
7 working with this team, the AAR simply ignored
8 this initiative. The AAR also ignored the root
9 cause of the incident that brought about the
10 activity.

11 The Chlorine Institute supports the
12 continuous improvement and the design of chlorine
13 rail cards. However, such an enhanced design
14 must be based on sound engineering and must be
15 authorized by the Department of Transportation,
16 not the AAR.

17 Economically motivated service
18 reductions are a mirror of the demand for
19 service. Railroad transportation is an industry
20 which has a unique role which has been given
21 unique privileges.

22 In contrast to the trucking industry

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the rail industry has a much higher barrier to
2 entry from a regulatory perspective and from a
3 capital perspective. Rail rights-of-way were
4 deeded to railroads long ago and, in most cases,
5 on very favorable terms.

6 It is virtually impossible for a new
7 competitor to obtain the necessary new rights-of-
8 way effectively barring them from entry.
9 Accordingly, the common carrier obligation cannot
10 reasonably be limited while preserving the public
11 good. The idea of economic metering of service
12 has no place in rationing the common carrier
13 obligation.

14 The underlying motive of the U.S.
15 rail industry in attacking the obligation to
16 provide common carrier service to TIH shippers
17 relates to liability for these movements and the
18 cost related to the two recent incidents that the
19 NTSB attributed to railroad operational failures.
20 The chlor-alkali industry was saddened by the
21 deaths and injuries that resulted from these
22 accidents and understands that the cost of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 responses and cleanups were significant.

2 The chlor-alkali industry has
3 undertaken numerous steps to develop rail cars
4 which would be more likely to survive the types
5 of railroad operational failures that have
6 occurred. It must not be forgotten that there
7 has been a very strong long-term safety record
8 with the current robust standard rail car design.

9 The Chlorine Institute fully supports
10 the intent of the FRA TIH tank car standard which
11 we expect will result in chlorine and other TIH
12 tank cars with greater accident survivability
13 through the use of new design and fabrication
14 technology and through safer railroad operating
15 procedures and practices.

16 In summary, the common carrier
17 responsibility, particularly as it is applied to
18 railroad, has a long history in U.S. law.
19 Limiting the applicability to exclude essential
20 chemicals would have a devastating affect on the
21 U.S. economy. There is no justification to limit
22 this obligation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 The Chlorine Institute urges the
2 Board not to make any change in the common
3 carrier obligation unless such change is debated
4 and authorized by congressional actions. Thank
5 you for allowing the Chlorine Institute to
6 present its views to the Board. I'll be glad to
7 answer your questions later.

8 CHAIRMAN NOTTINGHAM: Thank you, Mr.
9 Dungan.

10 We'll now turn to Mr. Bob Felgenhauer
11 from the Fertilizer Institute.

12 MR. FELGENHAUER: My name is Bob
13 Felgenhauer and I work for Potash, Corp. Potash,
14 Corp. is the world's largest fertilizer producer
15 by capacity with headquarters in Saskatoon,
16 Saskatchewan and U.S. headquarters in Northbrook,
17 Illinois.

18 We ship over 8 million tons of
19 fertilizer per year on the U.S. rail system
20 generating freight revenue in excess of \$300
21 million a year. Included in this is over 600,000
22 tons of anhydrous ammonia shipments per year

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 generating freight revenue in excess of \$22
2 million.

3 I am here today as a member of the
4 fertilizer institute. TFI is a national trade
5 organization that represents the interest of
6 fertilizer producers, wholesalers, retailers, and
7 others involved in the use of fertilizer in
8 agriculture.

9 TFI members are particularly
10 concerned today with the common carrier
11 obligation as it applies to the transportation of
12 anhydrous ammonia. As you gentlemen know,
13 anhydrous ammonia is a TIH commodity and there
14 has been much discussion as it relates to the
15 movement on the rails.

16 We believe that rail transportation
17 of anhydrous ammonia is critical to food supply,
18 energy policy, clean air, industrial production,
19 and the national economy in general. The most
20 prevalent use of anhydrous ammonia is as a
21 nitrogen fertilizer essential to growing food for
22 millions of Americans. It is the least costly

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and most effective source of nitrogen fertilizer
2 to American farmers.

3 In addition to its direct application
4 as a fertilizer, it is also the base raw material
5 for a lot of downstream nitrogen materials like
6 urea and UAN solution and also phosphate
7 materials like DAP and MAP. Fertilizers high in
8 nitrogen are essential for crops like corn which
9 is the largest consumer for direct applied
10 anhydrous ammonia.

11 A single rail car of ammonia produces
12 approximately 128,000 bushels of corn which can
13 be used to feed 1,600 head of cattle or produce
14 345,000 gallons of ethanol. Corn is also used in
15 thousands of basic food products that are found
16 on our grocer's shelves. Food security is
17 quickly becoming the number one issue around the
18 world.

19 Export tariffs in China, as well as
20 civil unrest in Haiti and Egypt are all the
21 result for increasing demand for better quality
22 food. Better quality food that can only be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 produced with an effective and reliable source of
2 nitrogen fertilizer. There is simply no
3 substitute for anhydrous ammonia in maintaining
4 our country's and our world's food supply.

5 Anhydrous ammonia is also used in a
6 variety of industrial applications and is the
7 only raw material available for some consumer
8 goods. For example, anhydrous ammonia is
9 necessary to produce certain pharmaceuticals,
10 adhesives, feed supplements, personal care
11 products, and nylon fibers.

12 If you just look around this room,
13 the carpet on the floor, the cushions on the
14 seats, the ink in our pens, and if anyone is
15 wearing cologne or perfume, the perfume on your
16 bodies was all manufactured with anhydrous
17 ammonia as the raw material feed stock.

18 None of these products have a
19 substitute material to produce them. We believe
20 that rail is much safer than any other
21 alternative to trucks for hauling anhydrous
22 ammonia. It keeps this essential TIH commodity

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 off our nation's highways where we believe the
2 potential for accidents is many times greater to
3 the general public.

4 According to the AAR zone data in
5 2005, which is the most recent year that they had
6 for information, 99.997 percent of all rail
7 hazardous material shipments reached their final
8 destination without a release caused by an
9 accident.

10 AAR statistics also show that on
11 average a little over 50,000 rail shipments
12 totaling 4 million tons a year of anhydrous
13 ammonia is shipped between 2000 and 2005. It
14 takes four trucks to equal one rail car of
15 ammonia.

16 If all this was converted over to
17 trucks, this would equate to over 200,000 truck
18 shipments. If stacked end to end would extend
19 all the way from this hearing room to Los
20 Angeles, California. We don't believe that is in
21 the best interest of the nation.

22 The AAR has called upon producers of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 TIH commodities including ammonia to cease their
2 production and has even urged Congress to enact
3 legislation to require such action. We believe
4 this to be an unreasonable request unsupported by
5 the facts and based upon an irresponsible short-
6 sighted and self-interested attempt to avoid the
7 common carrier obligation to haul these
8 commodities.

9 In a misinformed attempt to show that
10 rail transportation of ammonia can be
11 significantly reduced, the rail industry has
12 suggested that farmers replace anhydrous ammonia
13 with nonhazardous nitrogen fertilizers like urea
14 or UAN. We don't believe this is possible. I
15 would like to take a few minutes to explain why.

16 First, because ammonia is a critical
17 raw material to all other downstream materials,
18 urea, UAN, and a lot of nitrogen containing
19 phosphate materials you cannot produce those
20 downstream materials unless you have ammonia
21 available at production sites to produce the
22 substitutes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Second, ammonia is a much higher
2 nitrogen content. The substitutes are a much
3 lower content. If you were to try to replace
4 this with ammonia, you would end up having to
5 ship, store, produce, and apply two to three
6 times more the amount of nitrogen fertilizer that
7 is currently going down in the ground.

8 Third, even if you could do that, if
9 you had the storage available, if you had the
10 infrastructure available to handle it, there is
11 not enough production capacity in the world today
12 that could handle the substitutes. All the
13 production capacity in the world is operating at
14 full and you cannot replace the ammonia that is
15 out there.

16 Fourth, ammonia producers and
17 distributors have a tremendous amount of money
18 invested in infrastructure. All of that would be
19 stranded and a tremendous amount of capital would
20 have to be put back into new infrastructure in
21 order to handle the substitute products.

22 Fifth, and very important, is ammonia

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 gives you the ability to apply nitrogen in the
2 fall. The other products you cannot put nitrogen
3 down in the fall for production of a grain crop
4 due to potential environmental losses.

5 If you didn't have the ammonia you
6 would have to take all of this that is being
7 direct applied and put it in the spring with
8 everything else that's being done which already
9 is in a very tight window in between rain showers
10 in order to get everything done.

11 Agriculture is really only part of
12 the picture. The U.S. industrial market, which
13 is defined as ammonia which isn't used to make
14 downstream fertilizer products or used as direct
15 application, consumes about 6 to 6.5 million tons
16 of ammonia a year. Of this about 2.3 to 2.4
17 million tons is shipped on the rails.

18 In some manufacturing processes,
19 which use ammonia, product substitution just
20 isn't possible. The rail industry has suggested
21 that ammonia could be shipped in a diluted
22 solution known as aqua ammonia which is a 29

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 percent anhydrous.

2 This would require three times
3 current number of rail shipments with a
4 substantial increase in infrastructure investment
5 such as rail cars, storage facilities that are
6 currently not in place for most shippers.

7 In addition to tripling rail
8 shipments, making costly production
9 modifications, and significantly increasing
10 infrastructure investment, aqua ammonia would
11 require the treatment and disposal of over two
12 billion gallons of water annually.

13 The most obvious way that the
14 railroads have tried to keep ammonia off the
15 rails is by rates. TFI members report that their
16 rail rates have nearly tripled over the time
17 since 2004 excluding fuel surcharges. My
18 company, Potash, estimates that we are paying
19 about 110 percent premium to ship ammonia versus
20 other commodities which is costing us about \$6.5
21 million annually in additional transportation
22 cost.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 By increasing rail rates to such high
2 levels railroads are able to discourage the
3 shipments of ammonia without actually having to
4 refuse to transport those shipments.

5 Rail rate increases have actually
6 made trucks a little bit more competitive.
7 Typically you can only take a truck out about 200
8 miles before it wasn't competitive with rail
9 anymore. With the increase in rail rates you can
10 now take trucks out about 500 miles and still be
11 competitive with rail.

12 Again, we don't believe this is in
13 the best interest and feel that it is the rail
14 industry's failure to de-market ammonia through
15 higher rates. Because of that more ammonia is
16 moving by truck.

17 If you took my company, Potash,
18 Corp., and took all of our ammonia and switched
19 it over to truck, all of our rail ammonia and
20 switch it over to truck, we would add over 20
21 million truck miles to an already congested U.S.
22 highway system and consume over 3 million gallons

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of diesel fuel annually.

2 This is two million gallons more than
3 the railroads are consuming. We understand that
4 liability is an issue and as TFI we have
5 presented a proposal to the railroads to help
6 solve this. We believe you have to come up with
7 a business solution first before you can go for a
8 legislative solution.

9 We have offered to work with the
10 railroads to look for an insurance policy. We
11 have been told that there is \$1 to \$1.5 billion
12 of available insurance out there in the event of
13 a release caused by an accident. TFI is willing
14 to work with the railroads if they will carry
15 primary insurance and then the TFI would pick up
16 insurance over this amount to cover in the event
17 of a release.

18 This does not indemnify the
19 railroads. It does not take the liability away
20 from them but what it does do is they are
21 constantly telling us that the reason our rates
22 are so high is because of the cost of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 insurance. We are offering to pick up a portion
2 of the cost of this insurance. In return we
3 would like a reduction in our rates and stability
4 in rates going forward.

5 My red light is on. Thanks for your
6 time, gentlemen. I will be happy to answer
7 questions.

8 CHAIRMAN NOTTINGHAM: Thank you, Mr.
9 Felgenhauer, and thanks to all the witnesses.

10 Mr. Gerard, if I could start with
11 you. You quoted some impressive statistics at
12 the beginning of your testimony about the size of
13 your association, your membership companies, the
14 number of employees. Just ballparking it have
15 you had occasion to compare the size and scope of
16 your member companies with that of the U.S.
17 freight industry?

18 MR. GERARD: I haven't. We compete
19 with the global world, as I'm sure you
20 appreciate, so we operate all around the world,
21 Europe, China, the emerging world, India, and
22 elsewhere. We are probably significantly larger

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 but I haven't taken the time to make that
2 comparison. I'm not sure what value that would
3 provide but we are happy to do it if you would
4 like to see it.

5 CHAIRMAN NOTTINGHAM: No, I just
6 think it's interesting that the scope and size of
7 your industry is just enormous. That leads to my
8 next question. I had the chance to visit some of
9 your member facilities and I appreciate that
10 opportunity. I have learned in those visits
11 that, of course, many chemical company facilities
12 also make big time rail operations on them.

13 MR. GERARD: Absolutely.

14 CHAIRMAN NOTTINGHAM: In some
15 respects your members are very much in the rail
16 business so to speak in that you've got
17 infrastructure in your property, track that your
18 members own and need to maintain and build. Do
19 you keep track of the investments that your
20 industry makes directly into rail infrastructure?

21 MR. GERARD: We do not keep track of
22 it. I can probably find that out. We have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 generally moved, if you will, into the rail
2 sector to that extent largely because we have to.
3 If we are told that if we want additional places
4 to park rail cars, tank cars, or whatever, that
5 we have to build it out on our own facility, we
6 do that.

7 I had one member company tell me
8 about six months ago that their investment in
9 their rail structure over the next two years will
10 be \$300 million. Not by choice but by the
11 reality of the competitive relationship between
12 them as a customer to the railroads.

13 Yes, we are in that business to the
14 extent we have to be to remain competitive in the
15 global environment. If that would be helpful to
16 the Board, I would be happy to go back and try to
17 put together those numbers for you.

18 CHAIRMAN NOTTINGHAM: I think it
19 would be helpful for a number of reasons but
20 there is a lot more going on it occurs to me in
21 the area of rail infrastructure than just maybe
22 what the big four Class I railroads account for.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 There is the short line sector which is not your
2 responsibility, and also industry.

3 I think it relates to something that
4 is not really front and center at this hearing,
5 and I won't make it front and center, which is
6 the proposal pending in Congress for investment
7 tax credit for rail infrastructure. It occurs to
8 me if you've got a member company, or more than
9 one investing something like \$300 million over a
10 period of years in rail infrastructure, they
11 should be incentivized.

12 I think that is a tremendous benefit
13 they are providing not only to their bottom line
14 shareholders but to the country's transportation
15 system in avoiding backlogs and choke points.

16 Frankly, I think your members are
17 more than maybe some shippers frankly able
18 because of their size and scope to actually make
19 a meaningful difference on the infrastructural
20 landscape.

21 MR. GERARD: Yes, we have looked at
22 that. Let me make one comment if I can, Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Chairman. First, this might be a great question
2 for some of those who follow me who are
3 specifically making these investments.

4 I think if you look at the question
5 historically, what you see is that over time
6 there have been more and more of the rail
7 infrastructure that has been shifted to the
8 shipper. I think the GAO pointed this out in a
9 recent study. For example, in our case all the
10 tank cars are held or leased by us as companies.
11 Railroads don't own those cars.

12 Likewise the infrastructure at our
13 individual plants or connecting routes or others
14 more and more of that is falling in our lap. Not
15 by choice. We haven't preferred to be in the
16 railroad business or we would have gone into that
17 business but the reality in what we need to try
18 and compete across this country.

19 I hear your message on the investment
20 tax credit. If we felt we had a good mutual
21 relationship currently in the economic realm of
22 the railroads, we would be happy to support that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 initiative and others. That is why I mentioned
2 in my testimony we think the line of questioning
3 here is headed, if you will, either too narrowly
4 or in the wrong direction.

5 If we look down the road over the
6 next 10, 15, 20, 30 years and we say what is the
7 capacity that is going to be required in this
8 country not only to serve the needs of our
9 growing population, but for those of us who
10 compete in the global environment I believe that
11 is the question we should have on the table.

12 How do we expand that capacity and
13 how do we do it in a meaningful way so that we
14 have adequate capacity in the future as opposed
15 to looking at this more narrowly saying how can
16 we get out from under this obligation or this
17 obligation and use justification like constrained
18 capacity or liability cost or whatever. I think
19 we ought to change the debate and be forward
20 looking to be more visionary in what we are
21 talking about.

22 CHAIRMAN NOTTINGHAM: Are you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 suggesting then that you might forego supporting
2 a pending bill to provide enormous benefits to
3 your members just because it might also benefit a
4 group of companies you don't particularly care
5 for right now, the railroads?

6 MR. GERARD: No, I didn't say that at
7 all. In fact, we are not convinced that we are
8 bringing benefits to our members. Our belief is
9 that we should bring together and once again look
10 to the future and say what is the appropriate
11 relationship between the railroads and the
12 customers they serve and then how do we make sure
13 we expand that capacity.

14 Is it through an investment tax
15 credit? Is it further relationships on questions
16 of liability? Is it further routing issues?
17 What is it? We believe the economic relationship
18 between us and the railroads is currently at such
19 imbalance that must be corrected first in the
20 current environment before we move to that future
21 look to see the vision of the future if you will.

22

1 I'm not suggesting how you should do
2 your job, Mr. Gerard. Lord knows you've been
3 doing your work much longer than I would ever
4 care to pretend to know about, but you suggest
5 that you've got at least one member that's
6 planning to spend \$300 million on rail
7 infrastructure and there is a pending bill that
8 would give that member and all your members the
9 ability to get a tax credit for those kind of
10 investments.

11 It's hard to believe that it's not in
12 your member's interest to support that. I'm not
13 pushing that bill today. I'm just probing
14 because I think it's a point of curiosity.

15 MR. GERARD: We think it's a pretty
16 short-sided view. In order to get a small tax
17 credit for the \$300 million investment and turn
18 around in the current relationship and be forced
19 to spend a billion dollars two years from now we
20 don't think is a very good investment. Our view
21 is let's look at the long term.

22 Let's balance the various

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 relationships across the rail customer situation
2 and when we do that let's do it holistically.
3 Let's talk about this capacity question. Let's
4 talk about the current relationship we have now
5 in the competitive environment. If we do it that
6 way, you'll see us become the biggest
7 cheerleaders for other activities to expand this
8 capacity.

9 CHAIRMAN NOTTINGHAM: Okay. Thanks.
10 How are your members doing financially? I saw
11 yesterday in the Wall Street Journal that DuPont
12 reported 26 percent increase in first quarter
13 profits from a year ago. It's a pretty
14 impressive number. Congratulations. We'll have
15 DuPont with us.

16 MR. GERARD: Absolutely.

17 CHAIRMAN NOTTINGHAM: That's
18 impressive given some of the challenges facing
19 our economy today. I realize that numbers like
20 that have a major international component and
21 dimension to them I'm sure given the nature of
22 the business.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 How are your members doing in general
2 if you could just give us a quick overview
3 financially. Is yours an industry that is on the
4 brink of disaster, massive layoffs, or doing
5 pretty well, posting significant profits? Give
6 me a sense of how it's going.

7 MR. GERARD: Yes to all of the above.
8 Let me explain if I can. It's relatively
9 complicated. Let's look at it in two different
10 ways. You look at DuPont's earnings, for
11 example. They may have done well in this
12 particular corridor but if you look at it
13 globally that is the way to assess, if you will,
14 the strength of a company like DuPont.

15 What we are talking about here today
16 is by in large limited to the borders of the
17 United States, the domestic service. In this
18 case, rail capacity. The impact that it has on
19 us to do well globally is significant from this
20 base of the United States.

21 What do I mean by that? In our
22 sector here in the United States over the last

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 five or six years we have lost 120,000 jobs.
2 These are high paying jobs, the best jobs around
3 with great benefits, well educated people, etc.,
4 etc. The challenge is because of domestic
5 policies.

6 Our first great problem right now is
7 the price of natural gas which we use as a feed
8 stock. We take natural gas and we convert it to
9 products, chlorine chain and all the rest of it,
10 and then convert it into all the materials that
11 each of us enjoy every day. Ninety-six percent
12 of all manufactured goods are touched by us.
13 That's number one concern.

14 Number two concern to a lot of our
15 members is their transportation cost. That is
16 why as you probably sensed in my opening
17 statement we feel so strongly about this issue
18 right now. It impedes our ability to compete
19 globally. We have companies in this country who
20 limit the infrastructure they build in this
21 country and potentially move it off shore because
22 of the cost of rail rates.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 You'll hear from one of our CEOs
2 today who will tell you that his rail rate costs
3 are now higher than his manufacturing costs.
4 When we've got that type of imbalance, we can
5 look at a company on a global basis and say they
6 are doing pretty well. Start looking behind the
7 curtain and you'll find the revenues that come
8 from China, India, the Middle East.

9 I spent last week in Dubai. Why? A
10 lot of our companies are building great
11 relationships with the Middle East now by in
12 large due to the cost of petroleum and natural
13 gas. That is the future of this domestic
14 industry if we don't get these domestic policies
15 right. We don't want to go to China and India at
16 the expense of the United States.

17 If the economics are such if we can't
18 get competition in the rail system so that it's
19 unclear what our cost will be to build a major
20 facility by the way we are currently building 120
21 major chemical plants around the world, a major
22 plant being at least a billion dollars of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 investment, not one of those is in the United
2 States. Why? Because of the cost structure here
3 in this country and our transportation cost is a
4 big factor.

5 Again, our point would be let's look
6 at this from the domestic perspective which is
7 what it is but it impacts those of us who compete
8 globally and dictates are we going to build that
9 facility here in the United States or are we
10 going to put another plant in the Middle East or
11 China or India where the merchant market is. Is
12 that helpful?

13 CHAIRMAN NOTTINGHAM: It is. Offhand
14 do you know how many of your member companies
15 last year reported a loss?

16 MR. GERARD: I don't know off hand.
17 I certainly hope none of them do and I certainly
18 none of them do in the future for the sake of the
19 country, for all the stocks that each of us enjoy
20 and our 401(k)s and everything else. I hope they
21 do well. I would hope the Board feels the same
22 way.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRMAN NOTTINGHAM: Me, too. You
2 went to some length to point out that in recent
3 years railroads have been doing pretty well
4 financially.

5 MR. GERARD: Absolutely

6 CHAIRMAN NOTTINGHAM: I just think
7 it's only fair to try to give a good snapshot of
8 how your industry is doing, too, just to have it
9 all laid out there.

10 MR. GERARD: Let me put that in
11 context if I can, Mr. Chairman. I think the
12 comment was made earlier, and I don't know if it
13 was a panel before us earlier today, about a lot
14 of the concern of the rail industry early on when
15 we used to talk about these competitive interests
16 was based on revenue adequacy.

17 That was always the excuse why we
18 couldn't have a hard competition discussion.
19 That is not an excuse anymore so what is the
20 discussion today? Capacity constraint. Now,
21 from our sector it's a liability issue. When did
22 liability come on the scene. It's been the last

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 few years.

2 Liability was the big concern 10
3 years ago, 20 years ago, yet they were hauling
4 volumes of our materials, TIHs, hazardous
5 materials, etc. We believe some of this debate
6 is ebbing and flowing. You don't want to be so
7 cynical as to suggest there is strategy and other
8 things involved with this.

9 At the end of the day we think it's
10 critically important that we reassess the
11 competitive relationship between our industries
12 and others which are customers of the rail sector
13 and figure out a way to balance that relationship
14 for the benefit of all of us, particularly our
15 domestic economy.

16 CHAIRMAN NOTTINGHAM: Thanks. I have
17 some more questions but I want to share the time
18 and let Vice Chairman Mulvey have some questions.

19 VICE CHAIRMAN MULVEY: Let me start
20 out with a question to the Fertilizer Institute.
21 Have you done any estimates of the output effects
22 on American Agriculture if anhydrous ammonia were

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 not available or if you had to substitute it with
2 the available amounts of urea or other
3 substitutes? What would that mean to the total
4 agriculture production of the country?

5 MR. FELGENHAUER: In terms of total
6 fertilizer we estimate that without fertilizer we
7 wouldn't have 40 percent of today's food.
8 Breaking that down into just ammonia there is
9 about 4 million tons of ammonia consumed direct
10 applied as fertilizer and there's probably -- I
11 would have to get you the exact numbers but I
12 would guess it's somewhere in the -- Pam, you can
13 help me here -- 40, 50 percent, I guess of the
14 total goes out as ammonia.

15 VICE CHAIRMAN MULVEY: You mentioned
16 about the willingness to fund primary insurance
17 with the railroads picking up secondary or the
18 railroads covering the primary and then you would
19 go beyond that. What percentage of that
20 insurance cost would the railroads be responsible
21 for? What would be the primary?

22 MR. FELGENHAUER: What we looked at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is the railroads have been telling us for some
2 time that the reason our rates are so high is
3 because of the liability and a lot of that has to
4 do with what they have to spend for insurance in
5 order to cover that liability. We started doing
6 our own research into the insurance markets and
7 we spoke to a few brokers and we visited with
8 some off-shore insurance markets.

9 What we have come up with is we
10 believe there is somewhere between \$1 billion and
11 \$1.5 billion worth of insurance coverage out
12 there to cover the railroads in the event of a
13 release from an accident. What we have requested
14 from them is that they cover the first \$500
15 million under their primary insurance. That
16 would be the first to pay under an accident.

17 Anything above that then up to the
18 maximum that we could secure, which we believe to
19 be another billion dollars, would be covered by
20 insurance policies purchased by TFI members that
21 would be purchased through an assessment per ton
22 for ammonia shippers that ship by rail.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 VICE CHAIRMAN MULVEY: The railroads
2 sometimes claim that they are betting the firm,
3 or betting the farm, whatever, every time they
4 carry hazardous materials and that the cost of a
5 spill, for example, in Chicago or New York or
6 Washington, D.C. could be tens of thousands of
7 lives and even half a billion dollars wouldn't
8 cover that. Do you see a need for something like
9 a Price Anderson kind of approach, especially if
10 the railroads were also required to contribute to
11 it?

12 MR. FELGENHAUER: We have talked
13 about that and our belief on that was that no one
14 would listen to us until we exhausted all
15 business solutions. Our intent here was to work
16 with the railroads to try to exhaust that
17 business solution. Once we have maxed out that
18 insurance market, we then have offered to go with
19 the railroads to either the Surface
20 Transportation Board or to Congress or wherever
21 we need to go to in order to enact overall caps
22 for the movement of TIH materials.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRMAN MULVEY: In your
2 testimony you mentioned about the relative cost
3 of moving it by truck versus rail. You said the
4 higher rail rates up to 500 miles -- Is that one
5 way?

6 MR. FELGENHAUER: Yes.

7 VICE CHAIRMAN MULVEY: -- by truck.
8 Is that still true given the current price of
9 diesel at almost \$4 a gallon and the higher
10 driver wages and the lack of drivers? Are these
11 estimates fairly current or are they a little bit
12 dated now?

13 MR. FELGENHAUER: I looked at it last
14 week and for us the break even is right around
15 400 miles. That is where rail becomes more
16 competitive than truck.

17 VICE CHAIRMAN MULVEY: Most anhydrous
18 ammonia though, as I recall, especially that used
19 in agriculture, moves by pipeline. Correct?

20 MR. FELGENHAUER: In total there is
21 about 2 million tons that moves by pipeline.
22 About 4 million tons moves by rail.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRMAN MULVEY: Four million
2 by rail and 2 million by pipeline?

3 MR. FELGENHAUER: Yes.

4 VICE CHAIRMAN MULVEY: Is it possible
5 to shift more to pipeline? I know there are two
6 major pipelines, I guess, coming out of Louisiana
7 and the Texas Gulf area?

8 MR. FELGENHAUER: That is correct.
9 Pipelines are about at capacity. You couldn't
10 push all four of those million tons through the
11 pipeline. Then also with the pipelines you are
12 fairly restricted to where they end.

13 The pipelines pretty well run up the
14 river system, the Mississippi River system, and
15 then branch off to the west into Iowa, branch off
16 to the east into Indiana. They stop in Indiana
17 and then they head out a little bit further west.

18
19 For those that are a significant
20 distance from the pipeline it's really not an
21 option. Those that are close to the pipeline
22 certainly haul that material by truck. The ones

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 where we have to ship the rail to is really where
2 truck is not an option.

3 VICE CHAIRMAN MULVEY: The Chlorine
4 Institute. The problem is often with the
5 delivery of chlorine to water treatment plants.
6 At least that is what has been brought up as a
7 threat. These water treatment plants are in
8 urban areas and chlorine moving through cities to
9 the water treatment plants are problematic.

10 Can you isolate the chlorine that is
11 moving towards the treatment plants as compared
12 to movers of chlorine to other places? Perhaps
13 the movement to water treatment plants in urban
14 areas can be addressed by rerouting the trains,
15 for example, as was suggested here in Washington.

16 MR. DUNGAN: Well, certainly most of
17 the chlorine -- I won't say most of it. A vast
18 amount of the chlorine that goes to the urban
19 areas is erected to eventually water treatment
20 areas. Certainly in the northeast that's
21 correct. Frequently that chlorine goes by rail
22 car to a repackager who then puts it in a one-

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 tone container or 150 pound cylinder and then
2 sells that to a water treatment facility.

3 Now, there have been several water
4 treatment facilities, both drinking and waste
5 water, that have converted. Certainly in the
6 Washington area a waste water facility has
7 converted. The Washington Sanitary District has
8 converted their waste water treatment system to
9 bleach and others are considering it but many of
10 these facilities cannot.

11 I visited a facility in Chicago and
12 one in New York City and in Chicago is the
13 world's largest water treatment facility. They
14 just physically cannot have the capability to
15 install bleach or any other kind of chemical
16 treatment. They would have to put in a whole new
17 infrastructure system in.

18 Most facilities, even if they have a
19 different system for primary disinfection, they
20 have chlorine, usually elemental chlorine, as a
21 residual which is required by the USEPA. Water
22 treatment is only 5 percent. 95 percent of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 chlorine has alternate uses.

2 There is a vast amount of chlorine
3 that is shipped. We need to remind you there is
4 a lot of chlorine that is consumed on site.
5 Probably about 75 percent of the chlorine
6 produced in the United States is produced on site
7 or transferred by short distance pipelines. We
8 are talking 3.5 million tons of chlorine that are
9 shipped primarily by rail.

10 VICE CHAIRMAN MULVEY: I was
11 referring to the chlorine shipments that had
12 elicited the greatest attention and that seems to
13 be that which is moving in urban areas to waste
14 water treatment plants.

15 MR. DUNGAN: It's my understanding
16 the railroads, and certainly this CSX system, has
17 implemented some voluntary agreements to reroute
18 chlorine around Washington, D.C. and now there is
19 a proposal that the government will be looking at
20 for the options and what are the best routing
21 routes and we support that. That is really a
22 carrier decision which is the best way to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 transport chlorine.

2 VICE CHAIRMAN MULVEY: There is
3 always a tradeoff between the most direct routes
4 which often go through urban areas but go over
5 Class I track, well maintained, good track,
6 versus moving on more roundabout routes but,
7 unfortunately, over class 1 and class 2 track or
8 excepted track where the likelihood of an
9 accident is greater because of the quality of the
10 infrastructure. There is always that tradeoff.

11 MR. DUNGAN: That's correct.

12 VICE CHAIRMAN MULVEY: Versus risk.

13 MR. DUNGAN: Right. Yes.

14 VICE CHAIRMAN MULVEY: You mentioned
15 about a 10 percent rate of return for the
16 railroads and I guess it's similar to Chairman
17 Nottingham's question. Is 10 percent a high rate
18 of return in terms of your industry?

19 MR. DUNGAN: We don't calculate that
20 because our members are part of the American
21 Chemistry Council and we don't ever see and don't
22 track chlor-alkali results separately. We can

1 certainly say the last few years the chlor-alkali
2 industry has done reasonably well but the last
3 year there has been a downturn with the housing
4 industry.

5 We have seen cutbacks. While I would
6 like to say all our members are profitable, one
7 of our members unfortunately did go into
8 bankruptcy early this year. Another one who was
9 very big has sustained massive losses. Those are
10 just what I read from press accounts.

11 Certain the stock prices of the
12 chemical portion of our members if you just look
13 at the chemical portion of the members, they
14 haven't doubled in the three-year period from
15 2003 to 2006.

16 In fact, another member company
17 because their profits are dropping this year they
18 instituted travel curtailments for nonessential
19 travel so we are seeing more of this in the
20 industry now. Certainly this year in the chlor-
21 alkali I would expect there would be a downturn
22 in profitability.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 VICE CHAIRMAN MULVEY: Mr. Gerard,
2 you were talking about the competitiveness of the
3 U.S. chemical industry and the investments being
4 made abroad, etc. I believe someone testified
5 for the railroads one time referring to the
6 problems facing the American Chemistry Industry
7 and the top 10 problems and transportation wasn't
8 one of them.

9 What percentage of your total cost --
10 I'm sure this is kind of a broad question, I
11 guess, because you have different kinds of
12 products but are transportation costs and high
13 transportation costs really critical compared to,
14 say, government regulations, compared to
15 environmental rules and regulations, compared to
16 the cost of natural gas? Aren't these much more
17 determinant than the cost of rail transportation
18 in your investment decision making and location
19 decision making?

20 MR. GERARD: Transportation is a
21 critical factor or an important factor, if you
22 will, in our decision making process. Let me give

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you some anecdotal evidence as to why that is.
2 For some time I think our industry has had some
3 concerns with the process and their relationship
4 with the railroads.

5 Since I took over the American
6 Chemistry Council a little over two years ago
7 what we do each year is we identify through the
8 CEOs. We did a survey of priority issues and
9 priority questions for the industry, what are the
10 issues that matter most to us.

11 Transportation, specifically rail
12 transportation, has been in the top five in the
13 last two years. Is it the number one cost?
14 Probably not. Most of their number one costs
15 right now, like I say, are feed stock cost, in
16 this case natural gas.

17 For example, Dow Chemical, I'm trying
18 to remember the numbers, their annual energy cost
19 was typically around \$25 billion. Today it's
20 about double or almost triple that. It is
21 outrageous what is going on in the energy markets
22 right now. Close behind that many will tell me

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that transportation is their number two cost.

2 Now, again, that varies from company
3 to company so I don't want to make a blanket
4 statement here and leave the impression it is
5 number two everywhere. Clearly for some,
6 particularly those who have less competition
7 opportunities it's a bigger factor. Again, just
8 like all these factors, it plays into the
9 decision making process.

10 Where do you site a plant? Many of
11 our people will tell you quietly -- they are
12 always a little reluctant to say this publicly
13 but they will tell you privately that unless
14 there are at least two rail lines to a particular
15 location, they will not build a plant. That is
16 how important it is to them.

17 It is a factor that influences
18 heavily Board decisions as to investment money in
19 the United States or we have to take that money
20 elsewhere to be competitive in this global
21 economy. I hope no one underestimates this is a
22 critical factor to us, a very important

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 consideration as we look at our cost structure
2 and try to remain competitive.

3 VICE CHAIRMAN MULVEY: Thank you.

4 CHAIRMAN NOTTINGHAM: Mr. Buttrey.

5 COMMISSIONER BUTTREY: Mr.
6 Felgenhauer. Is that the way you pronounce that?

7 MR. FELGENHAUER: Yes. Very good.

8 COMMISSIONER BUTTREY: I think you
9 said that you had a proposal on the table that
10 would provide that the railroad pay the first
11 \$500 million and then you would get insurance --
12 there would be insurance to cover the rest of the
13 liability up to \$1.5 billion.

14 MR. FELGENHAUER: As high as we could
15 get, yes. We believe it's \$1.5 million.

16 COMMISSIONER BUTTREY: Are you saying
17 your company has that proposal on the table or
18 does the American Chemistry Council has that
19 proposal on the table? Who actually has that
20 proposal on the table?

21 MR. FELGENHAUER: That proposal was
22 made by the Fertilizer Institute. First to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 AAR and then the AAR told us they would prefer
2 that we deal directly with each of the Class I
3 railroads so that proposal has now been made to
4 each one of the Class I railroads. In return for
5 that, of coursed --

6 COMMISSIONER BUTTREY: Do they all
7 serve your company?

8 MR. FELGENHAUER: No, they do not all
9 serve our company but the way that we --

10 COMMISSIONER BUTTREY: AAR is not
11 brokering this deal?

12 MR. FELGENHAUER: The AAR asked us to
13 work -- we met with the AAR but they did ask us
14 to work directly with the Class Is.

15 COMMISSIONER BUTTREY: Okay. So is
16 there a similar proposal on the table from your
17 organization, Mr. Gerard?

18 MR. GERARD: No. We don't --

19 COMMISSIONER BUTTREY: Do you have
20 any proposal on the table?

21 MR. GERARD: We have had
22 conversations with --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 COMMISSIONER BUTTREY: Just opposing
2 everything?

3 MR. GERARD: No, we don't oppose
4 everything. We would like to have a good
5 dialogue. The last proposal we saw was a
6 proposal by the railroads to give them complete
7 release of liability even in cases of gross
8 negligence so we would hope they had moved from
9 that position a little bit so we could have a
10 candid reasonable dialogue and we have committed
11 to do that.

12 COMMISSIONER BUTTREY: Do you like
13 Mr. Felgenhauer's Fertilizer Institute proposal?

14 MR. GERARD: Haven't seen the
15 proposal. We would clearly be happy to entertain
16 it. The fact is the other proposal has been
17 talked about, Price Anderson structure, etc. We
18 are open to all opportunities, all proposals to
19 some how balance this relationship.

20 COMMISSIONER BUTTREY: Are you open
21 to capping the liability to \$1.5 billion?

22 MR. GERARD: We would be happy to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 consider any proposal.

2 COMMISSIONER BUTTREY: If the
3 railroads agree to the \$500 and the \$1.5, then
4 you are saying you would help the railroads get a
5 cap of \$1.5?

6 MR. GERARD: We would be happy to sit
7 with our members and look at that in light of the
8 various economic factors and our broader
9 relationship in decide is that the best way to
10 address this issue. If we agree, absolutely.

11 COMMISSIONER BUTTREY: How do your
12 members ensure against catastrophic release at
13 your production facilities?

14 MR. GERARD: They obviously have
15 insurance to cover all those which is the other
16 factor. We are quite sophisticated and
17 understand what that takes. We deal with these
18 materials, these hazardous materials, the TIHs
19 all day every day of the week. We are expert, if
20 you will, in this. We can be very helpful in
21 this dialogue with the railroads. This might be
22 a secondary consideration to them, if you will,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 as we are trying to run the railroads.

2 COMMISSIONER BUTTREY: And you, Mr.
3 Felgenhauer?

4 MR. FELGENHAUER: Part of our
5 insurance is certainly self-insured but we also
6 have insurance policies at our production
7 facilities and our risk managers are working with
8 us and the railroads to develop this policy.

9 If I could just add one thing to
10 clarify a position. What is very important to
11 us, too, is to do this we would expect to see a
12 reduction in our rates for hauling anhydrous
13 ammonia and we would expect to see rate stability
14 going forward because we feel like we are taking
15 away the biggest risk that they have.

16 COMMISSIONER BUTTREY: So the
17 railroads are telling you that part of their
18 rate, or at least a certain percentage of their
19 rate that they are quoting you, is based on the
20 fact this is a serious issue for them in terms of
21 liability. You know what that percentage is
22 above the base rate. Do you know what that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 percentage is?

2 MR. FELGENHAUER: I'm not sure I
3 follow your question.

4 COMMISSIONER BUTTREY: If it's \$1,000
5 a car and you are having to pay \$1,500, is \$500
6 worth of that -- do you know how much the
7 surcharge is for liability coverage?

8 MR. FELGENHAUER: The railroads
9 haven't told us directly what that is certainly.
10 They are not going to but we have run the math
11 ourselves and just base what they charge us for
12 other commodities versus what they're charging us
13 for anhydrous ammonia on similar lanes.

14 As I mentioned, we have seen our
15 ammonia rates triple since 2004. During that
16 same period if you look at the railroad's SEC
17 filings their rates up during that period are up
18 around 35 percent. We can do the math and
19 estimate that variance is due to the liability of
20 the money.

21 COMMISSIONER BUTTREY: Okay. I think
22 that does it for me.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRMAN NOTTINGHAM: Thank you, Mr.
2 Buttrey.

3 Mr. Gerard, I just want to make sure
4 I understand where your association is on the
5 possibility of some type of consensus,
6 legislative proposal that would address what I
7 hope you at least recognize as a problem.
8 Earlier today the previous panel certainly helped
9 us recognize the problem which is railroads, of
10 course, have this common carrier obligation.

11 Certain types of materials are more
12 risky than others and sadly the sorry state of
13 our American tort liability system, especially in
14 certain states more than others, actually means
15 that it is possible for a railroad to not be
16 negligent, yet to experience a release because of
17 a act of nature or act of a truck wrongfully
18 crossing onto a railroad track and knocking over
19 a car but still find themselves liable for
20 billions of dollars in damages to the tune to the
21 extent that it could bankrupt an entire company.

22

1 Given the choice, obviously, any
2 business would prefer not to have to be exposed
3 to that kind of risk. Your members are no
4 strangers, as you just touched on, to risk
5 management. You're probably some of the most
6 expert practitioners of it. Similarly you I
7 would hazard to guess that one of the few
8 businesses that the tort liability bar would take
9 pleasure in suing above railroads would be
10 chemical companies and its deep pockets.

11 Not everybody agrees out there with
12 some of the environmental history of the chemical
13 industry. This is not my position. I'm just
14 saying your members know full well the problems
15 of our American tort liability system and what it
16 has evolved into. I don't think the system has
17 always been as troubled as it is now.

18 In fact, I'm pretty comfortable in
19 saying we talked earlier in my opening
20 comments that the common carrier obligation goes
21 back to Roman Empire times and certainly British
22 Commonwealth times in the Middle Ages. I can

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 certainly say that those societies did not have
2 tort liability, the situation that we have here.

3
4 If they did, I'm not quite sure they
5 would have structured, nor would Congress have
6 structured the playing field quite a way it is
7 now. Anyway, we have the situation as it is. Do
8 you recognize that this presents a problem? You
9 heard earlier that, of course, these insurance
10 costs and the risk management costs have to get
11 paid for by somebody and they are getting passed
12 along to shippers.

13 The first shippers that we can
14 presume railroads try to pass the cost onto are
15 chemical shippers if they associate the increased
16 insurance premiums primarily with the requirement
17 to carry products of the chemistry industry.

18 Then beyond that we heard earlier
19 today that railroads pass on those costs to all
20 shippers. Every shipper is paying because of
21 this problem and I would argue it's rippling well
22 beyond that into the economy. What is your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 position on what the solution should be?

2 MR. GERARD: Let me react if I can a
3 couple different ways. The first one is, I
4 guess, let's assess what the problem is. Is the
5 problem the tort system of the United States or
6 is it liability assumed as a result of the common
7 carrier obligation. Obviously we as a industry
8 assume all those other risks just like every
9 other industry does, tort lawyers, all the rest
10 of it. It's part of doing business in this
11 country. Unfortunately, in that case it gives us
12 all additional exposure, exposure we prefer not
13 to have.

14 We are willing, as I mentioned in my
15 opening statement, and very happy to sit down
16 with the rail sector and talk about this
17 question. Again, I think we should put it in the
18 context of what we are looking at generally. Has
19 this become a function of the recent accident
20 and, therefore, it's become front and center?

21 I think the Fertilizer Institute
22 mentioned they have seen their rates go up three

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 times in the last three or four years. Was it a
2 recent incident that sparked this issue and, if
3 so, let's assess that situation and look at this
4 generically, or more broadly, if you will, as to
5 what the answer should be to it.

6 We are happy to have those dialogues,
7 those considerations. We will tell you that we
8 are fully liable for any risk in any activity
9 that goes on in our facility as we work with
10 these chemicals and these important materials
11 that are critical to our lives and to our well
12 being.

13 The reason we live 20 years longer in
14 this century than we did last century is a direct
15 result of the chemistry and the things that we do
16 in the area of pharmaceuticals, the lifesaving
17 instruments. The list goes on and on. I think
18 it needs to be clearly understood.

19 We understand those issues well. We
20 are happy to work with our colleagues in the rail
21 industry to better help them understand and to
22 work with them on what the right solution is.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 The right solution is not to give us complete
2 liability for their activities and to date that
3 has been part of their position.

4 If we can get rid of that, let's move
5 to the center and figure this out. We are open
6 to dialogue. We also feel very strongly that as
7 part of that dialogue we need to talk about the
8 relationship between the rail sector and those of
9 us who use them, those of us as customers.

10 We don't often feel like customers in
11 this relationship which was something frankly
12 that kind of shocked me and appalled me when I
13 came to work for this industry. I've never had
14 anybody treat me so poorly as a customer so we
15 want to look at that question.

16 As you well know, Mr. Chairman, we
17 are active on Capitol Hill right now because we
18 believe there are some fundamental changes that
19 have to be made to that relationship. We want to
20 look at it in a holistic approach just like we
21 look at the question of safety. We have worked
22 with the rails over time.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Within our industry we've had for 30
2 years a ChemTrack operation. We are the first
3 responders -- I should say responders. We are
4 the first notification when there is an incident
5 around this country be it the rails, be it on
6 trucks or any place else. We mobilize our
7 people. We have paid for that asset because we
8 take full responsibility for the materials we
9 work with and we use to advance our common
10 interest in our society. Yes, we do not oppose
11 everything.

12 We are very anxious to have a
13 dialogue but we want it to be a balanced dialogue
14 and we think it should be a holistic dialogue so
15 that when the agreement is reached we can look to
16 the future and say there is a fair economic
17 commercial relationship between these entities
18 and it will govern us for the next 10, 20, 30
19 years as we try to complete globally and as they
20 try to get a fair return on their investment both
21 of which we hope can be accomplished.

22 CHAIRMAN NOTTINGHAM: Thank you. You

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 said something earlier that was news to me, that
2 the railroad's position is that they need to be
3 relieved or absolved of total liability exposure
4 for acts of gross negligence.

5 We'll have some railroad people with
6 us again tomorrow and I will certainly explore
7 that with them because that, to me, just flat out
8 doesn't make sense. I don't know how you ever
9 would get --

10 MR. GERARD: I agree with you on
11 that, Mr. Chairman. I would encourage you to ask
12 me about it.

13 CHAIRMAN NOTTINGHAM: The sooner we
14 can get through that in about five minutes, which
15 I'm confident I can, and get them to abandon that
16 position if it ever was.

17 Let's just assume their position is
18 probably going to be what I've heard it is
19 before, more along the lines of when it's not
20 gross negligence can we talk about a cap as a
21 society for the one industry out there that is
22 required to carry highly dangerous poisonous

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 material through the largest cities in America.

2 If we decide to change that, it
3 doesn't give me much more relief to say they are
4 bringing it through the smallest towns of America
5 because, frankly, a life in Mayberry is just as
6 valuable as a life in Washington, D.C. We'll
7 quickly get to that point.

8 When we do, do I understand your
9 position to be, well, we have to some how put
10 together an omnibus bill that addresses all the
11 chemical industry's concerns with railroad
12 regulation that go back to things that maybe the
13 chemical industry didn't get when Staggers was
14 passed. We've got to have everything all in one
15 package and then we'll try to get that through
16 Congress. That, to me, sounds like an awfully
17 unrealistic scenario.

18 MR. GERARD: If you are representing
19 the railroads, I expect they would say that to
20 me.

21 CHAIRMAN NOTTINGHAM: And I don't.

22 MR. GERARD: Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIRMAN NOTTINGHAM: I'm just giving
2 you --

3 MR. GERARD: I just want to make
4 sure.

5 CHAIRMAN NOTTINGHAM: As I have with
6 you, I have certainly had discussions with them.

7 MR. GERARD: I understand.

8 CHAIRMAN NOTTINGHAM: It's my job
9 because it is an incredibly important problem.

10 MR. GERARD: I understand.

11 CHAIRMAN NOTTINGHAM: I'm going out
12 of my way not to restate what you have told me in
13 more of what I would off-the-record context
14 because that is not appropriate but I sort of
15 know what your bottom line is but I'm trying to
16 let you state it here on the record.

17 MR. GERARD: If I haven't been clear,
18 let me try to restate it if I can. I'm obviously
19 not being very articulate. We think it's
20 important as we look at the issues before us
21 today to take a holistic approach.

22 Look to the future not to figure out

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 how to narrow the common carrier obligation in
2 this country, but to figure out what is in the
3 best interest of the public, what is in the best
4 interest of our society to continue to move goods
5 and services so we can compete not only
6 domestically but globally.

7 We believe there are factors that
8 should come into that discussion, liability being
9 a very important one and we are prepared and
10 willing to consider all proposals and come up
11 with some of our own as we address that component
12 of the holistic approach. Does that help?

13 CHAIRMAN NOTTINGHAM: A little bit.
14 I would wish for a little more of a specific
15 answer. What I believe you're saying is that
16 until you get the railroad's complete
17 capitulation on your other legislative agenda,
18 you are not going to help work out a consensus
19 bill that affects everybody, grain shippers, all
20 shippers, American society to try to get a handle
21 on possibly capping for limiting this liability
22 exposure.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. GERARD: I appreciate you putting
2 words in my mouth but that is not what I said. I
3 said we think there should be a holistic approach
4 to this question.

5 CHAIRMAN NOTTINGHAM: What does that
6 mean?

7 MR. GERARD: Holistic. That's --

8 CHAIRMAN NOTTINGHAM: You say
9 holistic and I say --

10 MR. GERARD: It's a liability
11 question.

12 CHAIRMAN NOTTINGHAM: -- complete
13 capitulation by the railroads on all of your
14 legislative --

15 MR. GERARD: No, I wouldn't say that
16 at all any more than us capitulating to them
17 completely in terms of gross negligence. Let's
18 look at the liability question. Let's also look
19 at issues like bottle neck that we think is
20 critically important to us.

21 We think it would provide more
22 competition, would give us a more competitive

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 rate to compete. Reciprocal switching. Those
2 have been a few and I think we could do that in a
3 holistic way. We ought to include this Board.
4 We ought to include the Congress. We ought to
5 include others. We ought to have that dialogue.

6
7 We need to recognize the importance
8 of it to the future of our domestic economy for
9 those of us who have to compete globally because
10 if we don't get it right, it's going to have
11 outcomes, perhaps negative if we don't do it well
12 so our hope is rather than do this piecemeal one
13 at a time.

14 It's a little bit like an energy
15 policy. Let's not to out and do a little bit of
16 nuke over here and a little bit of natural gas
17 here. Let's have a broad comprehensive energy
18 policy.

19 We think we ought to have a rail
20 transportation policy and address the various
21 components of that that would look to the future,
22 expand capacity, deal with liability and deal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 with these other concerns so we know what the
2 future is and how it will play out. Does that
3 help?

4 CHAIRMAN NOTTINGHAM: I appreciate
5 your effort. It's very general but I appreciate
6 it. I think you are making an effort to respond.
7 I would like to explore to make sure I
8 understand. The American Chemistry Council, if I
9 understand what you've said, does not support any
10 proposals currently to address the situation of
11 unlimited liability exposure borne by railroads
12 and passed on in the way of cost through rates,
13 etc. to all shippers.

14 MR. GERARD: We think we have made an
15 ongoing dialogue with the railroads and this has
16 been one of the pieces of that discussion. It is
17 our intent to continue that dialogue and continue
18 to consider all proposals. We don't believe we
19 nor the railroads have settled on the perfect
20 answer yet so we think the process is evolving
21 and should continue to evolve until we can work
22 it out and then we can both support what it is we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 agree to.

2 CHAIRMAN NOTTINGHAM: Can I ask when
3 the last time you spoke to them about this is?

4 MR. GERARD: To the railroads?

5 CHAIRMAN NOTTINGHAM: Ongoing
6 dialogue. What does that mean?

7 MR. GERARD: We've had personal
8 meetings at the highest level late last year and
9 we are working on some things internally that we
10 hope to have further dialogue with them in the
11 near future. Very near future we hope.

12 CHAIRMAN NOTTINGHAM: It just occurs
13 to me it's just ironic to me that your position
14 currently of really nonsupport for anything
15 specific that is on the table, or close to being
16 on the table, is basically identical to the
17 position of the trial lawyer and tort law bar
18 which typically I wouldn't associate your
19 association having a lot in common as far as
20 policy agenda.

21 You are just playing right into their
22 hands and just making this whole problem even

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 worse because instead of having people who should
2 be highly incentivized towards working towards a
3 consensus solution, you are playing in the hands
4 of folks who for their own selfish reasons don't
5 want common sense in addressing our tort
6 liability problems.

7 MR. GERARD: I appreciate your
8 characterization. Again, let me for the record
9 state I strongly disagree with your views, Mr.
10 Chairman. We are not playing into anybody's
11 hands. We believe there needs to be a commercial
12 relationship and right now we take full
13 responsibility and full liability for our product
14 on our premises.

15 When we turn it over to a carrier, we
16 expect that carrier to take the liability for it
17 because they are in total control of it. If you
18 look at the National Transportation Safety
19 Board's conclusions of the last incidences that
20 we've had that have raised this issue it hasn't
21 been the fault of the chemical industry.

22 What is the answer to that? We think

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 there is probably a balance there between those
2 two positions. We are happy to consider a
3 solution to that. We believe there is ongoing
4 dialogue. We think there needs to be ongoing
5 dialogue.

6 I don't know what the trial lawyers
7 have to do with it and I don't know why your
8 position is such that you characterize us as
9 playing into their hands one way or another.
10 There could be nothing farther from the truth.

11 Let me again state if it's not clear
12 that we are happy to consider any and all
13 proposals. We think the first position on the
14 part of the railroads was irresponsible making us
15 take complete and full liability even in the
16 cases of gross negligence.

17 If we can get some movement from that
18 position a little closer to the center, we think
19 we can probably have a good constructive dialogue
20 and hopefully come out with a good positive
21 commercial answer.

22 CHAIRMAN NOTTINGHAM: You've been

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 very patient. I'll let you have some questions.

2 VICE CHAIRMAN MULVEY: Thank you. I
3 was afraid I was looking impatient. I wanted to
4 follow up on this.

5 Your group, the Chemistry Council, is
6 very supportive of H.R. 2125 and S-953. There is
7 an awful lot in those bills which would affect
8 the railroads, the bottleneck rates, reciprocal
9 switching, and so on. You said you wanted a
10 holistic approach and I think the Chairman was
11 characterizing it as more or less capitulation on
12 all of these things.

13 If you really got all of those things
14 passed in either or both of those bills, do you
15 not think that it would have an affect on the
16 railroad's bottom line so that there would not be
17 anywhere near the astounding 10 percent return on
18 investment they got last year and wouldn't that
19 also then cause a problem for the quality of
20 service that your companies might receive?

21 MR. GERARD: We think the bottom line
22 is, having been at the process for a number of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 years, obviously the list included in the pieces
2 of legislation before the Congress are probably a
3 good starting point for a healthy conversation or
4 discussion about what the real issues are. Do we
5 expect that will be the final product of the
6 Congress?

7 Probably not as all of you well know
8 and I think each of you here having much
9 experience in that forum understand but you've
10 got to start some place. We have not yet
11 received from our colleagues in the rail industry
12 exactly which parts of that they would like taken
13 out other than proposals to get rid of all of it.

14
15 I think we do have a bit of a
16 polarized situation and my hope would be that
17 perhaps with the help of this good Board that you
18 could help bring us closer to the center.

19 VICE CHAIRMAN MULVEY: So you all are
20 willing to compromise then?

21 MR. GERARD: Absolutely. Absolutely.
22 I don't think we are expecting anything. We

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 don't expect anybody to capitulate their
2 position. We want the railroads to be healthy.
3 Let me just state that for the record if it's not
4 understood. Our hope is that moving forward that
5 they do very well.

6 We just don't want them to do it at
7 our expense. Right now let's find a balance
8 between the two interests and the commercial
9 interest. We think if we sort those out, then we
10 can both move forward and both do well into the
11 future.

12 VICE CHAIRMAN MULVEY: We previously
13 heard from the agriculture community and they
14 were saying they didn't want it done at their
15 expense and we expect to hear later from the goal
16 shippers who don't want it done at their expense.
17 I don't know how much we can charge the
18 intermodal movements but someone has to pay the
19 freight so to speak.

20 Obviously given the nature of the
21 economics of the railroad sector there does need
22 to be what economists call faushca binasha which

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is sometimes called price differentiation,
2 differential pricing but that's what it means.

3 It does have to be these differential
4 prices and the railroads obviously will need to
5 cover their cost some way if they are going to
6 make the investments that most people feel are
7 going to be needed to meet the demands of the
8 future.

9 I have one other question for the
10 Chlorine Institute. In the written statement on
11 page 4 the example you provide is an incidence in
12 which Class I's actions seem to actually reduce
13 system capacity. I have a question. Was there a
14 paper barrier involved in that example that you
15 talk about on page 2? I believe it's paragraph -
16 -

17 MR. DUNGAN: I don't know if there is
18 a paper barrier. It was just that the railroad
19 did not want to transfer to the short line. They
20 wanted to keep -- we can presume. I don't know
21 what their real motives were but our member
22 believes that their motives were to retain all

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the revenue for themselves so they went a longer
2 distance.

3 VICE CHAIRMAN MULVEY: Okay. So they
4 wanted to keep it for themselves. It may not
5 have been a case of a paper barrier which, of
6 course, is one of the things that is addressed in
7 the legislation. Thank you.

8 CHAIRMAN NOTTINGHAM: Commissioner
9 Buttrey.

10 COMMISSIONER BUTTREY: That's all for
11 me.

12 CHAIRMAN NOTTINGHAM: Mr.
13 Felgenhauer, I commend the Fertilizer Institute
14 for actually coming up with a proposal. I
15 haven't studied it and I look forward to learning
16 a little more about it. It's too important an
17 issue. It appears that you agree to not be
18 working on specific proposals and I commend you
19 and your staff for making that effort.

20 If the Board can be of help, I say
21 this to all of the witnesses including Mr.
22 Gerard, we are more than happy to be a forum for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 bringing parties together either informally or
2 formally. We are very much a problem solving
3 type group here.

4 Our general preference is not to have
5 a lot of preconditions that say if we don't
6 promise to solve these 107 problems, then we
7 won't talk about this other one. Everything
8 should be on the table. I commend you and look
9 forward to learning more about that.

10 MR. FELGENHAUER: Thank you, Mr.
11 Chairman. We would be happy to keep you informed
12 of our progress.

13 CHAIRMAN NOTTINGHAM: Good. Any
14 other questions, colleagues?

15 PARTICIPANT: No.

16 CHAIRMAN NOTTINGHAM: Thank you.
17 You've been very patient, panel. We appreciate
18 it.

19 We will bring the next panel up,
20 please. We've got a panel of chemical shippers,
21 the Dow Chemical Company represented by Cindy
22 Elliott, Director for Global Supply Chain

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Sourcing, Charles Cogliandro from the Calabrian
2 Corporation, and Gary Spitzer from DuPont.

3 Welcome, witnesses. Thanks for being
4 with us today. I know you have come from out of
5 town and we appreciate it.

6 Our first witness on this panel we'll
7 hear from is Ms. Cindy Elliott from the Dow
8 Chemical Company. I've had the pleasure of
9 getting to know Ms. Elliott in both visiting her
10 facilities in Texas and meetings here in
11 Washington. It's very good to see you again and
12 we welcome you here.

13 MS. ELLIOTT: Thank you. Thanks for
14 the opportunity to present comments regarding
15 Dow's view of the railroads' common carrier
16 obligation. I'm the Global Supply Chain Sourcing
17 Director for Dow, responsible for ensuring that
18 we have the most effective logistics
19 infrastructure in place to serve our businesses
20 and customers globally.

21 We are a diversified chemical company
22 with \$54 billion dollars in sales annually and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 46,000 employees. We deliver a broad range of
2 products across virtually every industry,
3 providing functionality for 90 percent of the
4 goods people use every day.

5 We believe the common carrier
6 obligation of the railroads to serve the public
7 need is clear. Since the earliest days of the
8 industry, railroads have been regarded as public
9 highways organized for the public Interest and to
10 serve the public good and convenience. It is
11 inconsistent with the common carrier obligation
12 to consider only the needs of the railroads,
13 while ignoring the needs of shippers and the
14 nation's economy and public welfare.

15 Dow supports a constructive approach
16 that arrives at mutually beneficial solutions and
17 shared responsibility to support U.S. industry
18 competitiveness, safety and security. We are
19 very concerned about the railroad's aggressive
20 efforts to stop or avoid transportation of
21 selective chemical products.

22 This issue is important to us because

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Dow's investment in North American Rail
2 Transportation is very significant. We manage a
3 26,000 rail car fleet and process more than
4 130,000 shipments per year, half of which are
5 liquid chemicals.

6 Our first priority in managing our
7 supply chain is to do what is within Dow's
8 control to create a safe and secure environment
9 in which to work and transport goods for our
10 employees and the communities we serve.

11 We have a long track record of
12 innovation and consistent investment to improve
13 our safety performance with respect to the
14 transportation of chemicals. To that point, Dow
15 has worked closely with our logistics service
16 providers across all modes of transportation to
17 achieve an incident-free rate of 99.97 percent.

18 Our safety efforts have been
19 extensively recognized by the railroads. In 2007
20 alone, Dow received awards from Norfolk Southern,
21 CSX, Canadian Pacific, Canadian National and BNSF
22 highlighting our leadership and performance in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 safety practices.

2 Since 9/11, we have bolstered our
3 community outreach as well as partnered with
4 government agencies like the Departments of
5 Transportation and Homeland Security to develop
6 and implement joint safety and security programs.
7 Those efforts are essential to the long-term
8 sustainability of U.S. industry, allowing
9 manufacturers to produce and ship vital products
10 and at the same time improve the safety of our
11 neighboring communities.

12 Rail and chemical Industry
13 Initiatives are further Improving safety and
14 security. In 2006, Dow published a comprehensive
15 ten-year strategy for Supply Chain Sustainability
16 that is based on the premise of eliminating
17 incidents. This program is aligned around our
18 "Vision of Zero" a company-wide, total safety
19 commitment aimed at zero accidents, zero injuries
20 and zero excuses.

21 Four components of the strategy
22 include:

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 First, redesigning our supply chain
2 to reduce the number of shipments and container
3 miles for specific products to enable shorter
4 routes and product swaps. We have set an
5 aggressive goal, regardless of mode, to reduce
6 the number of hazardous shipments and container
7 miles in half.

8 Second, improving the visibility of
9 shipments through implementation of GPS and
10 sensor technologies, so that product movement can
11 be tracked anywhere, anytime.

12 Third, redesigning our shipping
13 containers to prevent tampering and to reduce the
14 potential for chemical releases due to accidents
15 or security incidents. For example, Dow has been
16 an important participant in the R&D effort for
17 the "next generation" rail tank car which
18 provides a step change in safety performance,
19 specifically a 5-10 fold improvement.

20 Fourth, enhancing our collaboration
21 with earners and local communities to improve
22 emergency preparedness and response should a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 c h e m i c a l r e l e a s e o c c u r .

2 We a r e a f o u n d i n g m e m b e r o f
3 TRANSCAER, a p r o a c t i v e a n d c o l l a b o r a t i v e e f f o r t
4 b e t w e e n t h e c h e m i c a l i n d u s t r y , r a i l r o a d s a n d
5 c o m m u n i t i e s t o a p p r o p r i a t e l y r e s p o n d t o e m e r g e n c y
6 s i t u a t i o n s .

7 W h i l e w e ' v e b e e n c o n d u c t i n g o u t r e a c h
8 v i a T R A N S C A E R f o r m o r e t h a n 2 0 y e a r s , s i n c e 2 0 0 7 ,
9 w e h a v e s t e p p e d u p o u r e f f o r t s s p e c i f i c a l l y a l o n g
10 r a i l t r a n s p o r t a t i o n r o u t e s . I n f a c t , a s w e
11 s p e a k , D o w i s i n v o l v e d i n a 1 0 - c i t y t o u r o n a
12 r o u t e t h a t s t a r t s i n L o u i s i a n a a n d e n d s i n
13 C h i c a g o .

14 D o w t a k e s v e r y s e r i o u s l y o u r
15 o b l i g a t i o n t o r e s p o n s i b l y m a n u f a c t u r e a n d m o v e
16 o u r p r o d u c t s a n d w e b e l i e v e p u b l i c - p r i v a t e a n d
17 c r o s s - i n d u s t r y p a r t n e r s h i p s a r e v i t a l t o o u r
18 n a t i o n ' s s e c u r i t y . J u s t a s D o w m a n a g e s i t s r i s k s
19 a s a p r o d u c e r a n d / o r u s e r o f h a z a r d o u s m a t e r i a l s ,
20 t h e r a i l r o a d i n d u s t r y s h o u l d f o c u s i t s e f f o r t s o n
21 d o i n g t h e s a m e , r a t h e r t h a n t r y i n g t o a v o i d i t s
22 c o m m o n c a r r i e r o b l i g a t i o n t o t r a n s p o r t t h e s e

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 materials altogether.

2 Does it cost more money to focus on
3 the safety and security of transporting our
4 products? Yes, and at times it appears to have
5 unreasonable cost disadvantages. In fact, it is
6 literally 3 to 5 times more expensive for us to
7 ship TIH materials on a per car basis than other
8 chemical products.

9 Some Class I railroads have claimed
10 that they are now pricing their transportation of
11 TIH materials to discourage longer distance
12 movements in favor of shorter distances. However,
13 that has not been Dew's experience. In one recent
14 example we worked collaboratively with our
15 industry partners to reduce the number of miles
16 we were shipping chlorine by 2/3 (from 1400 to
17 450 miles).

18 In return for this successful supply
19 chain redesign, we were penalized with an 88%
20 rail rate increase, the equivalent of a \$1
21 million impact annually. The price tag for
22 reducing risk was hardly motivating. It is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 becoming clear to us that the railroads are more
2 interested in using price to eliminate these
3 movements all together than creatively exploring
4 options where everyone wins.

5 This is just one example to
6 illustrate the point but there are many. In feet,
7 despite our efforts since 2006, Dow has faced
8 significant rate increases of 100 percent or more
9 for TIH products and, based on the way the
10 railroads have structured future track
11 agreements, we continue to assume the full burden
12 of infrastructure costs required to move these
13 materials.

14 Rail Is the most effective, lowest
15 risk way to move chemical products. A scenario
16 that involves the loss of rail service due to the
17 common carrier obligation disappearing would
18 result in four times more chemical shipments if
19 we had to move them by truck. The increased
20 number of shipments would have a cascading risk
21 effect in both transportation hazards and in
22 onsite loading/unloading operations.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Furthermore, the new truck volume
2 would compound practical concerns around highway
3 congestion, accident prevention and lack of
4 available specialized tank truck and driver
5 capacity. Imagine for a moment, if just Dow's
6 chemical rail shipments were to move by truck.

7 If you consider our rail car volumes
8 and convert them to tank trucks, that translates
9 to an additional quarter of a
10 million tank trucks per year. This represents a
11 15 percent increase in the bulk tank truck market
12 sector and there are simply not enough trucks on
13 the market to absorb this demand at any price.

14 Bottom line, converting our chemical
15 rail shipments to truck is not physically
16 possible and efforts to do so would bring U.S.
17 manufacturing to a screeching halt. The safety
18 and security of chemical shipments by rail is a
19 shared responsibility of the
20 industry the railroad and the government
21 Dow urges the STB to protect the common carrier
22 obligation from being eroded by the railroads

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 because that obligation is vital to the public
2 interest.

3 As common carriers, the railroads
4 enjoy numerous privileges in addition to their
5 responsibilities. We acknowledge many of the
6 special commercial protections the railroads have
7 enjoyed over the years, but we also believe that
8 in return for these privileges they are obligated
9 to support our business and our customers'
10 business.

11 The railroads operate in a highly
12 concentrated industry with very high barriers to
13 entry. This leaves companies like Dow with no
14 reasonable competitive alternatives if the
15 railroads are unwilling to serve us.

16 As a shipper, Dow has been challenged
17 with extraordinary rate increases on TIH
18 products, taken steps to redesign our supply
19 chains, asked for significant concessions from
20 customers, participated
21 in community outreach and worked with the
22 government to enhance safety, security and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 emergency response.

2 The common carrier obligation is an
3 obligation that requires the railroads to
4 transport material as long as the request is
5 reasonable. We believe the chemical industry in
6 general, and Dow specifically, has been very
7 reasonable. We have lived up to our obligation
8 and in fact stepped up our investments and we
9 believe that the railroads must do the same.

10 Thank you for the opportunity to
11 comment and provide our input on this important
12 issue.

13 CHAIRMAN NOTTINGHAM: Thank you, Ms.
14 Elliott. Your timing was perfect. I wish I
15 could have you give some of my testimony when I
16 go up to the Hill. I always struggle to hit the
17 right second of the minute. Thank you.

18 Mr. Cogliandro from Calabrian, we'll
19 turn to you now.

20 MR. COGLIANDRO: Good afternoon. My
21 name is Charles Cogliandro and I'm President of
22 Calabrian Corporation. My oral comments today

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 will summarize the main points of my written
2 testimony. The Calabrian story highlights the
3 importance of enforcing the common carrier
4 obligation and providing better avenues of relief
5 for small shippers like Calabrian.

6 Calabrian is a small family-owned
7 chemical company located in Texas producing
8 sulfur chemicals that are used primarily for
9 waste water treatment. Calabrian is the largest
10 U.S. producer of sulphur dioxide, a hazardous
11 chemical which is transported primarily by rail.

12 In recent years the U.S. rail
13 carriers have raised rates in sulphur dioxide
14 movements to the point where Calabrian's business
15 has been seriously jeopardized. Moreover,
16 Calabrian has had little or no recourse, nor does
17 it have alternatives with regard to the
18 imposition of rate increases and fuel surcharges.

19 We are for the most part captive to
20 the KCS Railroad at our Texas plant. Any
21 attempts at negotiating lower rates have not only
22 failed but, for the most part, have been totally

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 one sided.

2 Clearly, the railroads prefer not to
3 move sulfur dioxide for Calabrian and have so
4 indicated to us on numerous occasions so they
5 employ and take-it-or-leave-it approach to the
6 rates while maintaining that Calabrian has
7 tacitly accepted "contract rates" that are being
8 imposed. Any objection on our part results in a
9 nonshipment of the product.

10 The underlying basis for the huge
11 rate increase is offered by the railroads are in
12 direct contrast to the statements that are
13 prepared for their investors and, more
14 importantly, are not borne out by the numbers of
15 the facts.

16 While the railroads report record
17 profits, tout their safety record in the handling
18 of hazmats, and show no material ongoing adverse
19 effects from incidents involving hazardous
20 chemicals in the last 10 years.

21 They insist to us and to the Board
22 that the handling of hazmats presents an enormous

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 risk and potential ruinous liability forcing us
2 to pay exorbitant rates as a result. In fact,
3 their arguments fall way short under close
4 scrutiny.

5 I would like to address some of these
6 points in more detail. Until 2005 Calabrian was
7 expanding its business and shipping over 50,000
8 tons of sulfur dioxide per year. Starting in
9 2005 the railroads began imposing severe rate
10 increases on SO2 every six months.

11 Increases from 2005 to 2008 range
12 from 71 percent to 156 percent resulting in a
13 major negative impact on Calabrian's business.
14 Two examples highlight the inequitable rates
15 currently being paid. First, the current cost of
16 shipments from Texas to a customer in Florida
17 accounts for 72 percent of the delivered price of
18 sulfur dioxide.

19 Secondly, Calabrian ships both sulfur
20 dioxide and sodium bisulfite to another of its
21 customers and both commodities are hazardous
22 liquids. Both shipments travel to the same

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 destination in near identical tank cars and weigh
2 roughly the same. The sulfur dioxide rate before
3 fuel surcharges is roughly double the rate for
4 sodium bisulfite.

5 Until February of this year Calabrian
6 was still paying fuel surcharges which were
7 assessed as a percentage of the rate resulting in
8 a surcharge that was roughly double that for
9 sodium bisulfite even though the same amount of
10 fuel was consumed.

11 As rate terms expired mileage charges
12 as required by the STB were assessed in the new
13 rates but the old surcharges were baked into the
14 new rates in every case and in every case base
15 rates are now dramatically higher resulting in
16 total cost per car equal to or higher than the
17 previous rate structure.

18 Our complaints about this practice
19 were totally ignored leaving us essentially no
20 relief. Numerous conversations with the
21 railroads regarding the devastating effect of
22 these increases have been fruitless. Out of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 frustration Calabrian contacted the STB's Office
2 of Congressional and Public Services in October
3 of 2006. We determined that there was no
4 effective avenue of relief for us.

5 Over the last three years Calabrian
6 has been told repeatedly by several major U.S.
7 railroads that they prefer not to haul sulfur
8 dioxide at all. Essentially with the
9 astronomical rates they are making that happen.

10 There is no other method of land
11 transportation that is as efficient, safe, and
12 appropriate for the long-haul transport of sulfur
13 dioxide. According to CSX motor carriers are 10
14 times more dangerous than railroads for
15 transportation of hazmats.

16 Norfolk Southern's most recent annual
17 report states that no mode of transportation is
18 safer for rail for transporting chemicals which
19 in the same report they also state are essential
20 to U.S. commerce.

21 Despite these advantages the
22 railroads are raising the rates so high that rail

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 transport is unfeasible. This practice allows
2 the railroads an undue concentration of market
3 power in violation of the national rail policy.

4 Let me turn to the rationalization
5 use railroads used to justify these outrageous
6 rates and how the data clearly does not support
7 their position. The railroads have claimed that
8 their reluctance to transport hazmats is due to
9 enormous risk of such transportation which
10 allegedly creates the possibility of ruinous
11 liability that cannot be covered by insurance.

12 These claims are simply not supported
13 by the facts. The CEO of the AAR has noted the
14 rail hazmat safety record is extremely favorable.
15 Moreover, 99.997 percent of rail shipments of
16 hazardous materials reached their destination
17 without incident and rail accidents involving
18 hazmats have decreased 26 percent since 1990 and
19 86 percent since 1980.

20 Statements directed at investors in
21 Wall Street tout these statistics. While their
22 railroads contend that ruinous liability is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 risked every time hazardous materials are
2 transported, recent examples of TIH derailments
3 do not bear this out. While the Graniteville
4 derailment and the subsequent release of chlorine
5 were tragic, NS reports that the financial impact
6 was hardly ruinous.

7 In its current annual report NS
8 states commercial insurance policies are expected
9 to cover substantially all of the expenses
10 related to this derailment above and as a self-
11 assured retention including NS' response costs
12 and legal fees.

13 While the NS suffered the direct
14 monetary affect of the accident, the other major
15 railroads have raised their rates on sulfur
16 dioxide to similar levels using the Graniteville
17 accident as a basis to support their increases
18 even though they experience no direct financial
19 impact as a result.

20 Moreover, the probable cause of the
21 tragic Graniteville accident was employee error.
22 The cause was not any inherent characteristic of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the chlorine being transported. It appears the
2 fact that a hazardous material was involved may
3 be used to deflect attention away from the root
4 cause of the accident in an effort to relinquish
5 the railroad's common carrier obligation to
6 transport hazmats.

7 To give this a different perspective,
8 consider the case of a drunk driver who crashes
9 his car into a parked car during a busy workday.
10 The car hits with such tremendous impact that the
11 gas tank ruptures and the vehicle explodes
12 killing the driver, two others, and injuring six
13 others who happen to be walking in the vicinity
14 of the accident. In legal proceedings following
15 the crash the defense lawyers point out that the
16 gasoline being carried in the car is extremely
17 dangerous and poses an enormous risk to the
18 public arguing that the government should impose
19 a \$10 per gallon tax on the oil companies because
20 their gasoline was responsible for killing and
21 injuring all those people even though the oil
22 companies had absolutely no involvement with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 driving the car. They argue that the oil
2 companies should assume the future cost of all
3 liability for the movement of any car.

4 In this way the attention is diverted
5 away from the real cause of the accident, the
6 gross negligence of the driver. The oil
7 companies, even though the gasoline in the car
8 presents a minimal statistical risk, are forced
9 to pay for the grave potential risk in the
10 future.

11 This example is not used to diminish
12 the tragic consequences of serious accidents.
13 However, it is spurious for the railroads to rely
14 on events like Graniteville as evidence that they
15 should not have a common carrier obligation to
16 transport hazmats.

17 Of the three recent events that took
18 place in the last 10 years involving hazmats all
19 were caused by railroad error, all were largely
20 covered by insurance, and none resulted in
21 ruinous liability.

22 Some railroads claim insurance

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 coverage is not available or is too expensive.
2 Before giving credence to these claims, the Board
3 should require the railroads to substantiate that
4 assertion that insurance coverage is unavailable
5 or so expensive as to justify these massive rate
6 increases.

7 For example, based upon the average
8 rate increases experienced by Calabrian, freight
9 costs have increased approximately \$2.2 million
10 per year. Calabrian doubts that any alleged
11 increase in insurance premiums would come close
12 to the overall rate increases imposed upon
13 Calabrian.

14 Furthermore, if you apply this
15 average to an approximately 100,000 shipments per
16 year of only sulfur dioxide, chlorine, and
17 ammonia total revenue gain for the railroads
18 would amount to approximately \$530 million per
19 year which certainly would dwarf any potential
20 exposure and/or premium increase.

21 While any loss of life was tragic the
22 railroads have wildly exaggerated the level of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 risk incurred by them in transporting hazmats.
2 In the last 10 years three incidents involving
3 hazmats have resulted in 13 fatalities. While
4 any loss of life is tragic, these figures are
5 dwarfed by other railroad accident deaths.

6 By comparison railroad street
7 crossing accidents result in roughly 300 to 400
8 deaths each year in the United States. Moreover,
9 employee related injuries and claims actually
10 make up a large portion of all railroad's
11 casualty expense.

12 Just as the costs associated with
13 these claims could not justify a railroad
14 abrogating its common carrier obligation, the
15 railroad should not be allowed to apply a
16 different standard to sulfur dioxide and other
17 hazmats.

18 Calabrian appreciates its opportunity
19 to express its views on the common carrier
20 obligations of the nation's railroads and I will
21 gladly answer any questions.

22 CHAIRMAN NOTTINGHAM: Thank you, Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Cogliandro.

2 MR. COGLIANDRO: Thank you.

3 CHAIRMAN NOTTINGHAM: We will now
4 turn to Mr. Gary Spitzer from the DuPont Company.

5 Welcome.

6 MR. SPITZER: Thank you. I am Gary
7 Spitzer, Vice President and General Manager for a
8 global segment of the DuPont Company, Global
9 Science Corporation, with revenues of more than
10 \$ 3 0 b i l l i o n p e r y e a r .

11 We operate in more than 70 countries,
12 employ 36,000 people here in the United States,
13 and offer over 70,000 products and services for
14 many markets including agriculture, energy,
15 national defense, housing, transportation, and
16 electronics. We appreciate the opportunity to
17 express the views of my company here today.

18 I am here to testify in strong
19 support of the statutory common carrier
20 obligation of the railroads and to urge the Board
21 to consider revisiting an existing exemption to
22 that obligation. Without common carriage the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 railroads would almost certainly refuse to carry
2 regulated materials which are essential to our
3 modern way of life and our nation's economy.

4 America's freight railroads are vital
5 to our business in Dupont. For example, we
6 produce two lifesaving fibers, Kevlar and Nomex.
7 Kevlar is used in bulletproof body and vehicle
8 armor to protect our troops and law enforcement
9 at home. Nomex is a fire resistant material used
10 in firefighters' turnout gear and aerospace
11 applications.

12 To produce these and many other
13 DuPont products, we require regulated materials
14 which due to their composition, characteristics,
15 or volume must be transported by rail. Some have
16 advocated moving these materials via our nation's
17 waterways and highways. Geographic realities
18 limit barge as an alternative since there is not
19 always navigable water between origin and
20 destination.

21 Shifting transportation of materials
22 from rail to truck would increase air pollution,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 increase fuel consumption, exacerbate highway
2 congestion, and decrease our collective security.
3 Moving those products by rail is 16 times safer
4 than moving the same materials by truck. A rail
5 car can carry the equivalent of four truckloads
6 and a typical train takes the freight equivalent
7 of several hundred trucks off our nation's
8 highways.

9 The AAR's argue that companies like
10 DuPont should adopt inherently safer technologies
11 to transport more benign products will eliminate
12 the need for regulated chemicals all together.
13 Dupont and other companies already pursue and
14 employ inherently safer technologies where
15 possible and viable to do so.

16 However, just as water is required to
17 sustain life, many products require specific
18 chemicals for which there are currently no
19 substitutes. Common carriage is the historical
20 bedrock of this nation's rail transportation
21 system. It remains the statutory law of the
22 United States today and its statutory duty runs

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 not to shippers alone but to the public as well.

2 Recent actions by the railroads
3 involving intermodal transport of hazardous
4 materials demonstrate their intent to gut the
5 common carriage principle. Here is an example.
6 In October 2005 DuPont was notified that within
7 two weeks a rail carrier would no longer
8 transport TIH materials in intermodal service.

9 The carrier refused to carry ISO
10 tanks that were already in route to one of our
11 customers and even declined to transport empty
12 ISO containers then at the customer back to
13 DuPont. Because the customer could not accept
14 rail cars and due to the higher cost associated
15 with trucking, DuPont ultimately lost this
16 customer to an Indian competitor.

17 Other carriers have also adopted the
18 same exclusion in their tariffs forcing DuPont to
19 move regulated materials for other customers over
20 the U.S. highway system. In effect, the
21 railroads were contravening the national interest
22 by denying shippers access to the safest means of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 land transport and we urge the Board to revisit
2 the current intermodal exemption as it applies to
3 regulated materials.

4 Furthermore, railroads are
5 implementing a de-marketing strategy to avoid
6 transporting TIH commodities by imposing
7 exorbitant price increases and capital demands
8 on shippers. The railroads are critical to a
9 viable manufacturing sector and are by far the
10 safest most energy efficient and environmentally
11 sound mode of land transport.

12 Allowing the railroads to reduce or
13 eliminate their common carriage obligation would
14 cause companies like DuPont to be unable to move
15 basic raw materials and deprive us of the safest
16 means of land transport.

17 We would be at grave risk of no
18 longer being able to produce products important
19 to the health, safety, and security of the
20 American people. This would also put at risk
21 jobs to support local economies and exports to
22 help balance our nation's trade deficit.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 In closing, Chairman Nottingham, Vice
2 Chairman Mulvey, and Mr. Buttrey, I want to thank
3 you for allowing me to share my company's views
4 today. DuPont stands prepared to work with the
5 railroads, with government, and with others in
6 industry to enhance the safety and efficiency of
7 the rail transportation system on which our
8 safety of our nation and economic well being so
9 depends. Thank you.

10 CHAIRMAN NOTTINGHAM: Thank you, Mr.
11 Spitzer and all the witnesses. I just have a
12 couple questions. Do any of the witnesses agree
13 that we should be -- maybe you are already
14 working on this individually as companies or
15 collectively -- as a country should we be trying
16 to figure out a way to minimize the distance
17 involved with the movement of TIH materials, for
18 example, and try to sort of look at a
19 comprehensive risk management strategy where we
20 perhaps through a database to make sure that
21 there is not a buyer, for example, of TIH that
22 happens to be two miles from a supplier but who

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 for some reason is getting it from a thousand
2 miles away.

3 I have heard this actually happens
4 out in the economy. From a risk management
5 perspective it doesn't look ideal. I realize
6 it's probably pretty complicated to implement
7 such a fix. Do you give thought to this? I
8 would welcome any ideas or comments in that
9 regard.

10 MR. SPITZER: I would be happy to
11 take that first. I believe certainly that there
12 are incentives that already exist for shippers to
13 reduce distances where possible given the extreme
14 increases in freight, difficulties in service.

15 We are a captive shipper, as I have
16 testified before, at 80 percent of our locations
17 and it has seen significant rate increases.
18 Certainly where we can shorten our supply chains
19 we are going to do it. Recently we just did at
20 one of our plants in the Gulf Coast. We stopped
21 producing a product in Louisville.

22 We have a concentrated manufacturer

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of that product in Louisiana and have thereby
2 taken 600 rail cars off the roads. However, I
3 don't quite know how the government would get
4 involved in making something like this happen. I
5 believe incentives already exist in our free
6 market economy to do these types of things.

7 CHAIRMAN NOTTINGHAM: Does anybody
8 else care to speak to that? I think it has sort
9 of Homeland Security type implications, too. I'm
10 not the expert on that area but I think the idea
11 of having some type of database or some type of
12 way of trying to minimize the distances that some
13 of these materials travel.

14 MR. COGLIANDRO: We've experienced --
15 we are the largest U.S. manufacturer of sulfur
16 dioxide and our major competitor is actually
17 coming out of Canada. They are actually
18 transporting SO₂ past our facility in the U.S.
19 and we question why that's happening. I mean, we
20 would be in support of looking at those kinds of
21 things, looking at those kinds of actions.

22 In our case not only is U.S. commerce

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 or U.S. manufacturing discouraged in that case
2 but we question how they can possibly do that and
3 why they do that and why are they paying
4 differential rates. A lot of it has to do with
5 freight cost.

6 Their rates coming from Canada are
7 actually lower than what we pay here in the U.S.
8 They have a customer in Mobile, as an example,
9 that they transport product from the west coast
10 and our rate to that same customer is greater
11 than what theirs is transporting from the west
12 coast.

13 CHAIRMAN NOTTINGHAM: Mr. Spitzer,
14 you mentioned a case where you lost a customer to
15 an Indian competitor, a competitor from India.
16 Do you know much more about that? Was that
17 competitor of yours able to truck or barge or did
18 they contract with another rail carrier? How did
19 that happen?

20 MR. SPITZER: That actually was a
21 customer that was ultimately in Latin America.
22 They brought the product in over the seas and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 then did land transport for the final step. The
2 alternative that we had in this particular
3 situation was truck from northeast United States
4 and we were just unable to be competitive.

5 CHAIRMAN NOTTINGHAM: Okay. I
6 understand. Thanks. Mr. Spitzer, I am advised
7 that DuPont is an example of how we can possibly
8 try to minimize distances on the carriage of this
9 TIHs. DuPont recently decided to expand the
10 facility in Tennessee that produces titanium
11 tetrachloride which is apparently a pretty
12 poisonous gas but it can be used in the
13 manufacturing of paint.

14 The major purpose of expanding this
15 facility in Tennessee is to serve a paint
16 processing facility in Utah. Do you take into
17 account the transportation costs and the risks of
18 having a long-distance delivery supply chain like
19 that and why do it that way? Why not try to
20 produce the stuff in Utah or some place closer to
21 where it needs to get to?

22 MR. SPITZER: Well, I would just say

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 I'm not sure where you received the data in that
2 particular example but it's actually not correct
3 and it's not used for a paint manufacturer. It
4 is ultimately going to be used in an application
5 that relates to national defense needs.

6 In this particular case it was not
7 possible to shorten the supply chain. There was
8 a very specific and special use for the titanium
9 tetrachloride not related to paint and it was
10 simply not feasible either to locate their
11 production at our location or to locate our
12 production at their location.

13 To answer your question, we certainly
14 do look at the risks of transport. We believe
15 that having been in this business for 206 years
16 and working with the railroads since the middle
17 of the 1800s we have an exemplary safety record.
18 We continue to look at how can we make that even
19 better towards the goal of zero and it is
20 definitely a consideration of what we do.

21 If I can come back to a question Mr.
22 Mulvey asked earlier, I would also say that as we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 look at the future of the current plant sites
2 that we have in this country, as a business
3 leader in DuPont responsible for over 20 plants,
4 one of my major considerations is will I be able
5 to ship these materials in the future, will there
6 be a common carriage obligation, and if the
7 railroads will carry it, what is it going to cost
8 and will I still be competitive in these
9 businesses? It is definitely a key
10 consideration.

11 CHAIRMAN NOTTINGHAM: Thanks.

12 Commissioner Buttrey, any questions
13 of this panel?

14 COMMISSIONER BUTTREY: One of the
15 witnesses mentioned the fact that you had some
16 discussions here at the Board about some rate
17 issues. I was wondering whether -- I sort of got
18 the impression that you may have gotten the
19 impression from somebody here that you should not
20 bring a rate case. Did somebody say that?

21 MR. COGLIANDRO: We had discussions
22 in 2006 with one of the officers of the STB.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 After a very thorough discussion on the problems
2 that we were having, we were told in an off-the-
3 record kind of capacity that we would have an
4 exceedingly difficult time getting anywhere with
5 basically our situation.

6 COMMISSIONER BUTTREY: Had you been
7 shipping under a contract before?

8 MR. COGLIANDRO: Well, we ship under
9 contract. I'm not sure that the word contract is
10 -- I'm not sure how that is any different from
11 tariff today to be honest with you.

12 COMMISSIONER BUTTREY: I'm talking
13 about historically --

14 MR. COGLIANDRO: Yes, we ship under
15 contract.

16 COMMISSIONER BUTTREY: -- you had
17 shipped under contract.

18 MR. COGLIANDRO: Under contract rate.

19 COMMISSIONER BUTTREY: Contract rate.
20 Your contract expired and you went to the tariff
21 rate. Is that it?

22 MR. COGLIANDRO: No. Actually, in a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 lot of cases the railroads refused to quote us a
2 tariff rate. They insisted that we agree to
3 contract rates and would not openly offer us a
4 tariff rate.

5 COMMISSIONER BUTTREY: They refused
6 to quote you a tariff rate?

7 MR. COGLIANDRO: In a number of cases
8 they refused to quote us tariff. We specifically
9 asked because the rules are so specific in terms
10 of -- we have considered bringing a case. The
11 problem that we have is we are a small company.
12 We are the classic David fighting Goliath. We
13 don't have the resources. It is very
14 complicated.

15 COMMISSIONER BUTTREY: Are you
16 familiar with the small rate case?

17 MR. COGLIANDRO: Yes, I am very
18 familiar with it.

19 COMMISSIONER BUTTREY: Okay.

20 MR. COGLIANDRO: It is still an
21 exceedingly complicated venue. It is obvious
22 watching the DuPont case there are a lot of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 avenues that the railroads and the attorneys can
2 go down that would basically exhaust our
3 revenues. Again, the David and Goliath scenario.

4
5 Today we have to fight with very
6 sophisticated weaponry against a force who has
7 unlimited resources and dodges so deathly because
8 of its attorneys that we can't ever hit the
9 target. It's a very, very complicated thing for
10 us to do and exceedingly costly in our case.

11 We moved this particular commodity to
12 numerous customers. If we were to bring an
13 action here, we would have to bring four separate
14 actions in order to look at any real relief.
15 Four separate actions strictly from a legal cost
16 standpoint would be way in excess of a million
17 dollars for us and the potential relief is \$1
18 million per action.

19 It wouldn't nearly cover the amount
20 of damage that we have incurred in the last three
21 years, never mind five years. We have suffered a
22 tremendous amount of damage. We've lost a number

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of customers because of these very, very high
2 rates and we can't recover.

3 Yes, we have looked at it. We have
4 been watching very closely. We have been
5 observing very closely what DuPont is doing but,
6 in our case, we are not real optimistic. We were
7 told this back in 2006 that our options were
8 really limited. Like I said, we were fighting
9 such a huge force.

10 COMMISSIONER BUTTREY: Are you all
11 members of the American Chemistry Council?

12 MR. COGLIANDRO: Can't afford it but
13 I support everything Mr. Gerard does.

14 COMMISSIONER BUTTREY: You support
15 everything he does?

16 MR. COGLIANDRO: Yes.

17 COMMISSIONER BUTTREY: Okay.

18 MR. COGLIANDRO: I mean, we are very
19 supportive.

20 COMMISSIONER BUTTREY: I presume Dow
21 and DuPont are members.

22 MR. SPITZER: Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. ELLIOTT: Yes.

2 MR. COGLIANDRO: For the record, I
3 know the question was asked in earlier testimony
4 if any members lost money in the business. We
5 have. We are losing money. The rates have
6 increased so dramatically so quickly we've lost
7 money.

8 If I could, one other point,
9 substitutes. There is a big discussion about
10 substitutions. A couple of years ago one of our
11 customers actually did substitute. There was a
12 substitute available on our business because of
13 all the pending safety concerns and all the
14 discussions with the railroads. They are a huge
15 company, a huge conglomerate.

16 They were very concerned about
17 handling sulfur dioxide in the future. It was
18 cost related but it was also the concern would
19 they be able to get it because the railroads were
20 threatening not to ship it so they converted at
21 every one of their plants.

22 We received a phone call from them

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 recently saying they didn't understand when they
2 did it the cost of the substitute is now three to
3 four times what they paid for the sulfur dioxide
4 and the volume is seven times and they are
5 bringing it all in by rail.

6 It complicates the problem any
7 further so they are spending an additional \$8
8 million a year for treatment which we have
9 discussed with them could have gone to insurance
10 premium coverage to use as a substitute.

11 They are considering going back but
12 under these rate circumstances, you know, again,
13 our major concern is the discussion and the
14 response by the railroads that they don't want to
15 haul it at all. They don't care what the price.

16
17 The message is very clear to us, "If
18 we could, we wouldn't haul it." That's not by
19 inference. That's direct. "We don't want to
20 haul it and if we had a choice, we wouldn't." By
21 doing what they are doing effectively that is
22 what they are going to do.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 COMMISSIONER BUTTREY: It's my
2 understanding that the chemical companies and
3 other shippers of hazardous or inherently
4 dangerous commodities are engaging in customer
5 swaps and things like that to cut down on the
6 distances involved. Is that something that you
7 all have been involved in or can you speak to
8 that?

9 MS. ELLIOTT: I haven't been
10 specifically involved with customer swaps but we
11 do consider all the tools available whether it's
12 routing, whether it's product swaps, whether it's
13 inherently safe for technology. It's one of the
14 tool kits. I don't have any specific examples.

15 MR. COGLIANDRO: It's exceedingly
16 difficult I believe in our industry because there
17 was a lot of scrutiny in earlier years about
18 anti-trust matters and price fixing and territory
19 fixing. I know every time we've had a discussion
20 about that, again the lawyers get involved and
21 say, "We would prefer not to."

22 MR. SPITZER: I would say there are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 many challenges as he just raised. If they are
2 done, they are an extremely minor amount.

3 COMMISSIONER BUTTREY: Thank you.

4 CHAIRMAN NOTTINGHAM: Vice Chairman
5 Mulvey.

6 VICE CHAIRMAN MULVEY: This issue of
7 swaps is one that requires some sort of oversight
8 by the Department of Justice, but perhaps under
9 this whole idea of Homeland Security that aims to
10 minimize exposure to the public there may be some
11 opportunities to minimize movements by doing
12 swaps. I know there have been talks about it and
13 I am familiar with some of the problems with it.

14 Ms. Elliott, are you familiar with
15 the AAR's proposed new tank car rules and could
16 you comment on those?

17 MS. ELLIOTT: I have been exposed to
18 them through other colleagues at Dow so I am
19 familiar somewhat with them. What kind of
20 comments are you interested in?

21 VICE CHAIRMAN MULVEY: Do you compare
22 those to, say, the FRA's proposed rules? It has

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 been said here that the new AAR rules are
2 unreasonable and that they are far in excess of
3 what is needed in order to bring about an
4 improvement in safety.

5 MS. ELLIOTT: I really can't comment
6 on if they are in excess of safety. We were not
7 involved in the development of the rules. As you
8 are aware, we are in development of a new next
9 generation rail tank car. In that specific
10 example that car is five to 10 times safer, if
11 you will, than the current technology. We are
12 involved in what we are developing.

13 VICE CHAIRMAN MULVEY: Mr.
14 Cogliandro, you talked about eliminating, you
15 didn't mentioned this in your oral testimony but
16 in your written testimony, you mentioned
17 eliminating the hazmat identification on railroad
18 tank cars to reduce the risk of terrorism and
19 putting bar codes in there but wouldn't that
20 cause a real problem for first responders whereas
21 currently the ID's are readily available and they
22 could see what the material is and act

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 accordingly rather than trying to get closer to
2 the bar code and do a reading on a bar code?

3 MR. COGLIANDRO: Well, in hazmat
4 response we use that as an example but with
5 modern technology today from a distance you can
6 read computer chips, bar codes probably as close
7 as you can the name on a chemical car, on a tank
8 car.

9 To me, also, keeping that information
10 available with the engineer himself, I mean, they
11 would have all that information readily available
12 on a chip. There is an amazing amount of
13 information that you can gather that way. To me
14 I think that would be a better alternative. I
15 think we advertise the fact that we transport
16 hazmats. We advertise it. We put it
17 on the side of the car. If there is concern
18 about terrorist hitting a rail car, why give them
19 the opportunity? I think there are a lot better
20 methods of doing it.

21 VICE CHAIRMAN MULVEY: I'm a little
22 concerned about this presumption we seem to have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that the country is full of terrorists walking
2 the streets with RPGs on their backs. I think
3 there is some exaggeration in that.

4 I mean, there are terrorists out
5 there, we all know that, but I think if they are
6 looking to target a railroad tank car, they are
7 not going to be basing it on just walking down
8 the street. They will research it out and be
9 ready for it so I don't think that is going to be
10 -- I'm not sure that is an appropriate solution.

11 MR. COGLIANDRO: Excuse me. No
12 disrespect but half the time we try to find out
13 where a rail car is. If the railroad doesn't
14 know, I'm not sure if a terrorist would know.

15 VICE CHAIRMAN MULVEY: Point well
16 taken. You also mention, by the way, that you
17 contacted our office of Congressional and Public
18 Affairs.

19 MR. COGLIANDRO: Yes.

20 VICE CHAIRMAN MULVEY: We also have
21 an Office of Consumer Compliance and Enforcement
22 which I would have thought would be the one you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 would go to in order to find out what kind of
2 relief you might have. That was back in October
3 of 2006. I'm not asking who you spoke with,
4 etc., but for you to indicate that you have no
5 relief strikes me as probably not true -- there
6 are opportunities for relief that you could have
7 pursued.

8 Now, it's also true that small rate
9 case guidelines were not out then. They are out
10 now and you have already said that you are
11 following with interest DuPont's progress. Are
12 you considering filing a rate case in the future
13 if it works out for DuPont?

14 MR. COGLIANDRO: Yes. Let me tell
15 you, at the time that we contacted the STB I must
16 tell you that your people were extremely nice and
17 extremely professional and highly sympathetic.
18 We explained our case in great detail but,
19 unfortunately, they weren't very optimistic.

20 The fact of the matter is -- I will
21 tell you also that after that discussion with the
22 STB we were told by one of the railroads that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 they had heard about those discussions and we
2 believe they acted in somewhat of a retaliatory
3 manner which, you know, I'm not the type to shy
4 away from a fight but if it becomes too
5 expensive, I don't have a choice. Basically we
6 kind of pulled back and the vice president of our
7 company actually issued me a warning and said we
8 need to back off.

9 A small rate case we've looked at it.
10 We have seriously considered it. We have done
11 estimates. We have done forecasts on what it
12 would cost. The cost benefit to us is traumatic
13 and, again, we have seen -- again, no disrespect
14 with the history, and I know things have changed.

15
16 History is a relative thing. I
17 think, Mr. Chairman, you said that earlier. New
18 history is probably better than old history. You
19 know, the attorneys for the railroads are very
20 proficient. They are very creative. They are
21 very brilliant. That is the best thing I can say
22 about attorneys in general but they are very good

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 at keeping the case open for as long as possible.

2 We just don't have those kinds of resources.

3 If my friends at DuPont would happen
4 to be successful, I suspect that possibly us and
5 possibly a number of others might entertain it
6 right away having some sort of precedent. At
7 least we know that we might have some sort of
8 chance, some sort of possibility.

9 We are not -- we have never tried to
10 take the position until recently that we don't
11 want to be cooperative. We are a small company.
12 We have pleaded with the railroads. We haven't
13 fought them. We haven't cursed them. We haven't
14 done anything.

15 We have pleaded with them to, "Please
16 understand you are putting us out of business,"
17 and we do not believe it is their purview to make
18 that decision. That is the Congress' purview.
19 If they don't like the fact that hazardous
20 chemicals are being manufactured, that is the
21 Congress' decision.

22 They have considered that many times in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 past. If they want to discontinue the
2 manufacture of hazardous chemicals in this
3 country, that is their responsibility. By not
4 allowing us an outlet to ship the product, they
5 are effectively telling us, "We are not going to
6 allow you to produce it." I don't think that is
7 their right. I do not believe that.

8 VICE CHAIRMAN MULVEY: Thank you.

9 Mr. Spitzer, you talked about
10 railroads refusing to carry hazardous materials
11 in ISO containers, in intermodal containers under
12 the idea that the intermodal traffic is exempt.
13 This material is not exempt. This material is a
14 regulated commodity. Correct?

15 There is sort of a tension here
16 between the commodity being regulated and the
17 container not being regulated. Have you thought
18 about filing a case saying this is an unfair
19 practice or unreasonable use of the exemption and
20 ask for a revocation of the exemption?

21 MR. SPITZER: I appreciate the
22 comment, Vice Chairman Mulvey. That is why today

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 in my testimony I said we would urge the Board to
2 reconsider this exemption and some of the very
3 points that you're making. ISO containers are a
4 preferred container by many of our customers,
5 particularly in international commerce. It is
6 certainly something that we would hope there
7 would be an opportunity with the Board to follow
8 up on.

9 VICE CHAIRMAN MULVEY: Thank you.

10 CHAIRMAN NOTTINGHAM: Just briefly on
11 that point, is there a difference in the level of
12 safety between the two containers? When I think
13 of a -- I'm not an expert on this but when I
14 think of intermodal containers, I don't have the
15 same image that I do of the typical tank cars
16 that are designed specially for hazmat chemical
17 carriage.

18 MR. SPITZER: No, these are obviously
19 DOT regulated well-designed mini rail cars, if
20 you will, you know, that ultimately can go by
21 land and then be put on top of a rail car.

22 One of the reasons they are so

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 preferred by customers is they can serve as on-
2 site storage at that customer facility and also
3 eliminate the need for disposable packaging as
4 with drums or other types of materials. They are
5 a very robust container.

6 They are part of the fastest growing
7 types of containers that we see and I believe
8 removing this exemption would be very important
9 both for us as well as other chemical shippers.

10 CHAIRMAN NOTTINGHAM: Thank you. I
11 will certainly intend to look into that further.

12 Mr. Cogliandro, I believe you had
13 mentioned, and maybe Mr. Spitzer as well, about
14 apparently railroads occasionally not quoting a
15 tariff rate. Please let us know, let our staff
16 know, let us know if that happens. My
17 understanding of the law is that railroads must
18 quote a tariff rate.

19 Shippers may not like what that rate
20 is and there are various things you can do when
21 you see it but just saying, "No, we won't give
22 you one," is not an option. It's not the first

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 time I've heard this but I do urge you to let us
2 know because unless I'm missing some nuance, I
3 just don't think that is acceptable. I
4 appreciate your sharing it.

5 Mr. Cogliandro, I'm sorry that our
6 rate dispute resolution process and our rate
7 regulation authority does not extend to the dues
8 of the American Chemistry Council but I see Mr.
9 Gerard is still here. You have been a very able
10 spokesman for the industry.

11 I certainly hope he considered giving
12 you a break but that's not my business. It
13 sounds like they are pretty tough on rates
14 themselves if they are not allowing you to be
15 part of the association when you are clearly a
16 very articulate leader.

17 MR. COGLIANDRO: Not allowed. I
18 think it's like Vegas. I would hope he would
19 comp me so maybe I'll have a chance now that Jack
20 can properly comp me into the organization.

21 CHAIRMAN NOTTINGHAM: Yes, that's
22 only fair but, again, going beyond my

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 jurisdiction there. Just a public interest
2 suggestion.

3 Lastly I will say, Mr. Spitzer, that
4 we won't let anyone apply the David and Goliath
5 analogy to your pending cases here. I've heard
6 others use the same analogy implying that perhaps
7 your company is Goliath. It just depends on who
8 is involved in a particular case and who is doing
9 the labeling but we welcome all the Davids and
10 the Goliaths and everyone in between to come
11 here.

12 We have done a lot to make it, I
13 believe, easier to come here. I am assured we
14 are on track to have decisions in early July
15 meeting our eight-month target in our regs on
16 those cases so I won't get to say anything more
17 about those cases except to say that we are very
18 serious about keeping those small rate cases
19 moving along quickly.

20 The filing fee is only 150 bucks. A
21 single complaint may not pay for all of a
22 shipper's past harms or concerns, over history I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 think certainly if they've got a case they ought
2 to bring it because it can make a pretty powerful
3 statement.

4 Anyway, thank you. Any other
5 questions for this panel? Thank you very much.
6 You are excused.

7 We'll call the next panel forward,
8 Panel 4-D, Chemical Shippers. Welcome and good
9 afternoon. We appreciate your patience and we'll
10 proceed with Panel IV-D. Our first witness we'll
11 hear from is Mr. Howard I. Kaplan, Vice President
12 for Chemicals and By-Products with the U.S.
13 Magnesium Company.

14 Mr. Kaplan, welcome.

15 MR. KAPLAN: Thank you, Chairman
16 Nottingham and good afternoon, gentlemen. I'm
17 Howard Kaplan and I'm with U.S. Magnesium located
18 in Salt Lake City. We would like today to
19 address the issues surrounding the
20 legal obligation of the railroads to provide rail
21 service with respect to the transportation of
22 chlorine.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Without the rail transportation of
2 chlorine, U.S. Magnesium would quite possibly go
3 out of business, and the vital chlorine it
4 supplies to Thatcher Company and Kemira Water
5 Solutions, Inc., Western United States Bleach
6 producers and municipalities for water treatment
7 would not be available.

8 We have attached letters from
9 Thatcher and Kemira Water Solutions to our
10 testimony for the Board's convenience. As can be
11 seen from those water treatment companies,
12 chlorine is essential to the effective treatment
13 of drinking water and waste water in municipal
14 treatment systems.

15 U.S. Magnesium has about 500
16 employees in Salt Lake City, Utah and it is the
17 only surviving magnesium metal producer in North
18 America. It is the only chlorine producer from
19 magnesium that sells chlorine commercially in the
20 United States as 99 percent of all chlorine
21 produced in the United States for sale is
22 produced by chlor-alkali companies.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Our plant is located in Raleigh, Utah
2 on the southwest shores of the great Salt Lake.
3 The lake is inexhaustibly rich in minerals like
4 the magnesium chloride that is used in the U.S.
5 our production. It is also the source of other
6 raw materials for plants for productions of
7 potash and salt.

8 U.S. Magnesium is one of the world's
9 largest commercial users of solar
10 energy to remove water via an extensive system of
11 evaporative ponds in order to concentrate raw
12 brine so that the lake's magnesium chloride can
13 be efficiently electrolyzed to produce magnesium
14 and chlorine.

15 Magnesium is critical to aluminum
16 alloying for beverage cans and all aluminum
17 sheet such as truck bodies, aircraft skins and
18 many aluminum castings as well. Magnesium usage
19 in the automobile industry is growing and helps
20 reduce weight and therefore fuel consumption.

21 Magnesium is irreplaceable in
22 producing Titanium, Zirconium, Beryllium and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Uranium for aircraft, nuclear and chemical uses,
2 and is also important in military applications
3 such as fuels, explosives and flares. Magnesium
4 is thus critical for a growing economy, provides
5 several environmental benefits, and is important
6 in national defense as well.

7 The benefits of chlorine to the
8 economy and to the national health and well being
9 are well known and well documented in this
10 proceeding by the testimony of the Chlorine
11 Institute and others.

12 However, it must also be noted that
13 without the production, sale and transport by
14 rail of chlorine from our Rowley plant, it is
15 highly doubtful that U.S. Magnesium could stay
16 in business producing only magnesium. U.S.
17 Magnesium and its predecessors developed an
18 entirely new technology that allowed chlorine to
19 be extracted from magnesium chloride and captured
20 for sale as a co-product of magnesium.

21 Previously, chlorine had been vented
22 to the atmosphere pursuant to Clean Air Act

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 permits. That venting was wasteful, uneconomic
2 and not environmentally beneficial. In 1989, the
3 U.S. Magnesium predecessor company emitted
4 approximately 55,000 tons of
5 chlorine to the atmosphere. By 2006, that number
6 was reduced to nearly zero.

7 The inability to ship chlorine from
8 our Rowley plant would possibly result in a
9 closure of the magnesium plant and the
10 accompanying elimination of the only North
11 American supply of that vital metal.

12 Since the end user markets for
13 products such as bleach and water treatment
14 chemicals are so distant from our plant, and
15 because bleach can only be shipped relatively
16 short distances in the high temperatures of the
17 west, economics preclude the production of these
18 products at our plant in favor of safe
19 shipment of chlorine to remote locations.

20 If we were not able to ship chlorine
21 and U.S. Magnesium were able to stay in business,
22 it would be forced to dispose of the chlorine

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 co-product as it had in the past. In either case,
2 these are highly unattractive
3 consequences.

4 We have no doubt that the railroads
5 would like to avoid the potential liabilities
6 that follow from their negligent handling of
7 chlorine and other TIH materials, but we also
8 have no doubt that they are in a position to
9 prevent those incidents that they so justifiably
10 fear.

11 In reality, however, we also
12 recognize that the railroads don't really want to
13 stop handling TIH materials that they move at
14 rates that must be called astronomical, and
15 perhaps any predatory. They simply want the
16 shippers, who have no real power to prevent the
17 railroads' negligence, to indemnify them for that
18 negligence.

19 If this Board were to hold that the
20 railroads had no obligation to carry chlorine,
21 the railroads would immediately demand that the
22 shippers supply indemnification, or other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 liability protection for the carriers. That is
2 what their
3 claims are really all about.

4 Let me provide a specific example:
5 Our Rowley plant is served by the Union
6 Pacific. The Union Pacific and the other major
7 carriers have, through their trade
8 association, the Association of American
9 Railroads, been demanding that shippers who
10 own or lease chlorine rail tank cars convert to a
11 new tank car of unproven design and
12 performance characteristics, over the objection
13 of the shippers and the Federal Railroad
14 Administration.

15 This new car would, when fully
16 loaded, weigh 286,000 pounds as compared to the
17 current 263,000 pound car. An additional
18 metallurgical facility building a plant next to
19 the magnesium plant to take advantage of numerous
20 synergies in the production processes also wants
21 to use the new car to handle its feedstock.

22 When we were in the process of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 leasing/purchasing many of the new 286,000
2 pound cars, we both approached the Union Pacific
3 and noted that the line leading from
4 the main line to our plant was not able to handle
5 the additional weight and should be
6 upgraded.

7 The Union Pacific declined to do so
8 and said if it was to be upgraded the
9 shippers should do it. When we said that we could
10 not afford this expense because our company has
11 recently emerged from bankruptcy, the Union
12 Pacific said fine, just light load the new cars
13 by leaving out about 18,000 pounds of product per
14 car.

15 This would result in requiring us to
16 purchase additional expensive chlorine cars for
17 our fleet. We would have to ship 10 percent more
18 cars, pay 10 percent more freight, by the way,
19 and it would increase the potential for accidents
20 by that amount as well.

21 When concluded that notwithstanding
22 their constant drumbeat about how they are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 concerned with safety, the UP was prepared to
2 spend the shippers money to
3 improve safety but not their own.

4 In conclusion, the railroads have
5 been given a wholly unique position in the U.S.
6 economy. They can charge extraordinarily high
7 rates with impunity, they can operate
8 without any meaningful competition in many
9 industry sectors, and the government
10 through this Board seems to be constantly seeking
11 to insure their inordinate profitability.

12 All this is based on the need for the
13 railroads to exist and that need is based on
14 their willingness and ability to provide service
15 on reasonable demand and presumably at reasonable
16 rates. To the extent that they are not so
17 required one is forced to wonder why they are so
18 pampered and protected.

19 Without the common carrier
20 obligation, perhaps the laws should be amended to
21 allow free and open competition to exist in the
22 rail industry as it does in our industry and the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 other industries represented here today.

2 I want to thank you for your time and
3 would be glad to answer questions at the
4 conclusion of our panel.

5 CHAIRMAN NOTTINGHAM: Thank you, Mr.
6 Kaplan.

7 We will now hear from Mr. Bernard
8 Claude from Total Petrochemicals USA. Welcome.

9 MR. CLAUDE: Mr. Chairman and members
10 of the Board, my name is Bernard Claude. I am the
11 President and Chief Executive Officer of Total
12 Petrochemicals USA, Inc. Thank you for the
13 opportunity to testify
14 here today.

15 First of all, I would like to
16 introduce you to Total Petrochemicals USA, Inc.,
17 which I will call TPl. We are a U.S.-based
18 producer of petrochemicals (including
19 polypropylene, polyethylene, styrene and
20 polystyrene), base chemicals and
21 transportation fuels with production facilities
22 in Texas and Louisiana.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 TPI is part of TOTAL S.A., the
2 world's fourth-largest publicly-traded integrated
3 oil and gas company, with operations in more than
4 130 countries spanning all aspects of the
5 petroleum industry, including oil and gas
6 exploration, development and production.

7 Downstream operations include
8 refining, marketing and the trading and shipping
9 of crude oil and petroleum products. In addition,
10 TPI is a market leader in the liquefied natural
11 gas industry, and is helping to secure the future
12 of energy through its commitment to developing
13 renewable energies such as wind, solar and
14 photovoltaic power,
15 and alternative fuels.

16 TPI has built its North American
17 petrochemicals business with a strong
18 manufacturing bias, based on world-scale plants
19 and technologically advanced operations. We
20 manufacture petrochemicals for the plastics
21 industry. We produce plastics for use in everyday
22 household items like food containers, furniture,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 carpets, and bottles to name just a few.

2 Many of our products enter the
3 commercial and industrial sectors as well,
4 performing in critical applications from natural
5 gas distribution and water pipelines to building
6 insulation, from medical packaging and devices to
7 erosion control. In the next few minutes, I
8 would like to share with you TPI's concerns as to
9 the common carrier obligation of the nation's
10 railroads.

11 Over the years, TPI has built some of
12 the world's most competitive manufacturing sites
13 in the Gulf Coast Region of the United States,
14 including the largest polypropylene and styrenics
15 facilities in the world. We want and need to be
16 competitive and to remain competitive in the USA.

17
18 We have spent about \$2 billion in the
19 last ten years on capital projects in the U.S.,
20 and continue to show out support for U.S.-based
21 manufacturing with an additional \$3.5 billion
22 approved for the next five years. I repeat this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is not expiration prediction projects. Those are
2 all manufacturing side investments.

3 Beyond these scale economies, the
4 success of our manufacturing sites depends on an
5 efficient, safe, and cost effective
6 transportation and distribution network. Due to
7 congestion and rail infrastructure limitations,
8 transporting our products via rail all too often
9 involves poor service, unpredictable delivery
10 schedules and costs
11 that continue to rise at an alarming rate.

12 In fact, transportation costs have
13 risen so much in the last several years that
14 TPI's logistics costs are now higher than our
15 manufacturing costs, jeopardizing our global
16 competitiveness. Benchmarking assures that our
17 sites are across the world first class in
18 manufacturing but this is more than offset by the
19 logistical cost.

20 TPI produces over 9 billion pounds of
21 product each year, much of which is delivered to
22 our customers via rail transportation. Of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 volume moving by rail, 4.5 billion pounds is
2 comprised of plastic pellets, a non-hazardous
3 commodity. TPI also makes overland shipments of
4 materials such as styrene monomer, aromatic
5 solvents and various oils. These materials are
6 classified as hazardous materials by the United
7 States Department of Transportation.

8 Although these shipments are not
9 toxic inhalation hazard shipments, TPI has
10 concerns that should the railroads' common
11 carrier obligation for these types of products be
12 discontinued, it will negatively impact
13 transportation safety as well as the ability of
14 U.S. industry to compete in the global
15 marketplace. The main part of my talk addresses
16 our 4.5 billion pounds of plastic pellets which
17 is a non-hazardous material.

18 The common carrier obligation plays
19 an important role in the ability of U.S. industry
20 to compete globally. The widening of the trade
21 deficit in the U.S. relative to chemical industry
22 business is continuing.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Meanwhile, more and more new and
2 existing railroad infrastructure is being
3 consumed to support imports as railroads allocate
4 increasing percentages of their infrastructures
5 to support intermodal traffic. As a result, U.S.
6 chemical manufacturers are increasingly unable to
7 export due, in part, to gridlock in the existing
8 rail infrastructure.

9 We have experienced such gridlock first
10 hand with respect to exports out of the Houston,
11 Texas area. In this area, serious
12 rail congestion has resulted in intermittent rail
13 service stoppages and seriously impacted TPI's
14 ability to move its product to facilities for
15 necessary pre-export packaging.

16 If railroads are given the
17 opportunity to forego shipments currently
18 protected by the common carrier obligation, TPI
19 fears that the situation will be exacerbated.

20 The market of Petrochemicals is a
21 worldwide business. The same plastics are
22 manufactured and consumed across the world.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 There are times like now when the economy in the
2 USA is slow and export is the way to stay in the
3 business and to keep our plants running. There
4 were several months last year when the market
5 favored exportation but rail congestion seriously
6 impacted our ability to move our product.

7 It is also important to note that the
8 chemical industry is struggling to compete with
9 products manufactured in foreign countries, in
10 part, because foreign producers enjoy the freedom
11 of choosing their port of entry into the United
12 States based on areas with competitive rail
13 service.

14 There are times when it is cheaper to
15 import plastics from the middle east to the
16 northeast side of the U.S. than to send it from
17 the eastern rail to the northeast of the U.S.

18 This allows foreign manufacturers to
19 strategically avoid areas where railroads engage
20 in noncompetitive pricing practices and to
21 capitalize upon this advantage to the detriment
22 of U.S. rail shippers buffering from

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 noncompetitive pricing.

2 We believes that removal of the
3 common carrier obligation would enable such
4 noncompetitive pricing practices to flourish to
5 an even greater extent than they do today and put
6 U.S. industry at a greater disadvantage.

7 As I conclude my testimony, I would
8 like to recognize the railroads for lowering
9 incident rates on the rail lines in recent years.
10 The safety improvements of the railroads, coupled
11 with the initiatives of the Department of
12 Homeland Security concerning rail movements of
13 various chemicals will continue to magnify the
14 safety advantages of shipping products by rail.

15 We believe that continued
16 implementation of the common carrier obligation
17 will preserve the progress that has been achieved
18 rather than undermine it by pushing freight off
19 of rail lines and on to the nation's highway
20 system.

21 I would also like to take this
22 opportunity before the Board to commend Federal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Railroad Administration and Pipeline and
2 Hazardous Materials Safety Administration
3 initiatives, as well as the efforts of shippers,
4 railroads, and key rail car manufacturers in
5 their continued mission to increase the inherent
6 safety of a rail car.

7 I further commend the FARA for
8 implementing realistic, yet deliberate time lines
9 for shippers and carriers to upgrade the nation's
10 rail car fleets for hazardous and toxic products.
11 These initiatives are costly for the shipping
12 community, but consistent with our drive to
13 continuously increase the safe transportation of
14 our products, not only in the United States, but
15 also throughout North America.

16 Thank you, Mr. Chairman, and members
17 of the Board and I'll be ready to answer your
18 questions.

19 CHAIRMAN NOTTINGHAM: Thank you, Mr.
20 Claude.

21 We will now turn to Ms. Robin A.
22 Burns from the Occidental Chemical Corporation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Welcome.

2 MS. BURNS: My name is Robin Burns
3 and I am the Vice President Supply Chain for
4 Occidental Chemical Corporation, more commonly
5 known as OxyChem.

6 CHAIRMAN NOTTINGHAM: Make sure the
7 red light is on and make sure you are speaking
8 right into the mic. Thank you.

9 MS. BURNS: Okay. I am here today to
10 express OxyChem's position of support for
11 maintaining the common carrier obligation.
12 Of particular importance to OxyChem is an
13 adequate rail transportation network throughout
14 the United States.

15 Railroads must continue to be
16 required, as common carriers, to carry hazardous
17 materials (such as chlorine) that are necessary
18 for many of the industrial applications essential
19 to our economy. The common carrier doctrine is a
20 bedrock of the remaining rail regulation, and
21 provides the sole basis for policy comfort with
22 the rail industry consolidation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 OxyChem is a leading North American
2 manufacturer of basic chemicals and vinyl resins,
3 including chlorine, caustic soda and polyvinyl
4 chloride, the building blocks for a range of
5 products including Pharmaceuticals, water
6 purification, detergents, electronics, building
7 materials and many more. OxyChem employs 3,100
8 people at 23 domestic locations spread throughout
9 the central to eastern United States.

10 Our products, which are used in water
11 purification, medical supplies, pharmaceuticals,
12 construction materials, and agricultural
13 chemicals are vital to the economy of the United
14 States. Our products are crucial to the health
15 and welfare of its citizens. Safe and reliable
16 transportation of our products is critical to our
17 success as a company and essential to meet the
18 needs of our customers and the public.

19 Our various business units make over
20 70,000 rail shipments per year. Of these,
21 approximately 48,000 are shipments of hazardous
22 materials which include chlorine, vinyl chloride

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 monomer, caustic soda and muriatic acid among
2 several others. Of the 48,000 hazardous material
3 shipments, approximately 20 percent are chlorine,
4 which is considered a Poisonous Inhalation Hazard
5 or PIH.

6 In total, we manufacture
7 approximately 3.6 million tons per year of
8 chlorine
9 of which 2.7 million tons are delivered by
10 pipeline, and thus approximately 900,000 tons are
11 moved by the railroads. We operate a private
12 rail car fleet of 10,000 owned or leased cars
13 with 1,400 dedicated for chlorine.

14 Due to the locations and needs of our
15 many customers and users across the United
16 States, transportation by rail is essential to
17 the safe provision of this critical building
18 block. Pipeline transportation is not feasible
19 for small or geographically distant customers.

20 Generally trucks are not cost
21 effective and are inherently riskier considering
22 the number and distance required to handle the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 volume. 45,000 truck shipments would be required
2 in place of 10,000 rail shipments.

3 OxyChem has a long-standing
4 commitment to the safe transportation of our
5 products. We have continuously moved to improve
6 our rail car safety and security including
7 on-site rail yard infrastructure and security
8 improvements, additional pre-shipment
9 inspections, testing of rail car monitoring
10 technology and improved sealing of rail car
11 connections.

12 This was most recently demonstrated
13 by OxyChem becoming an active participant in the
14 Next Generation Rail
15 Tank Car project. The team is chartered with the
16 objective of developing a rail car which will be
17 five to 10 times stronger than current car
18 designs in terms of withstanding a railroad
19 accident. Our participation in this project
20 includes a public commitment to replace our
21 entire chlorine rail fleet with the NGRTC design
22 by 2017.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 It is essential that we partner with
2 the railroads and work together to ensure the
3 safe transportation of hazardous materials, as we
4 have done for years as a leader in the
5 Responsible Care initiative, and we will continue
6 to do so.

7 OxyChem was recently given an award
8 for contributions made to the training efforts of
9 TRANSCAER, which is an initiative co-sponsored by
10 shippers and railroads and other transportation
11 companies that focuses on training of local
12 emergency responders. Railroads have
13 considerable discretion regarding shipments of
14 goods and use that discretion to maximize revenue
15 and mileage, sometimes at the expense of safety.

16 OxyChem has obligations to mitigate
17 customer freight expense and strives to reduce
18 the number of miles that chlorine moves over the
19 rails. Unfortunately, this objective is not
20 always supported by the
21 railroads. Recently we had an opportunity to
22 move a chlorine car 112 miles instead of 421

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 miles.

2 The rate for the shorter move was
3 significantly higher man for the longer move. Our
4 request to get the railroad to lower their rate,
5 allowing us to move the material a shorter
6 distance was denied. When we challenged them on
7 their decision, they stated they did not want the
8 PIH move on their railroad.

9 As the STB is well aware, railroads
10 are regulated by the STB when acting as common
11 carriers, not when acting as contract or private
12 carriers. Moreover, STB rate regulation is
13 available only when the railroad is acting as a
14 common carrier, there is no effective
15 transportation competition, and the railroad is
16 charging very high rates. STB regulation is
17 vital, because the shipper has no option but to
18 transport
19 commodities at the rate set by the railroad or
20 the STB.

21 Railroads insist on tying excessive
22 rates on some routes to their willingness to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 offer contract rates on more competitive routes.
2 In recent months, railroads have not always been
3 willing to quote a common carrier rate at
4 OxyChem's request or, in some instances, have
5 made their willingness to do so contingent on
6 OxyChem agreeing to all of the rates that the
7 shipper and the railroad are then negotiating.

8 The STB should require railroads to
9 quote common carrier tariff rates separately from
10 contract rate quotations for each such movement
11 if the shipper so requests.

12 It is vital that the STB remain an effective
13 regulatory backstop to encourage commercial
14 resolutions of rate and service disputes.

15 The only way that the STB can remain
16 an effective backstock is to preserve the
17 railroads' common carrier obligation without
18 diluting the effectiveness of that obligation.
19 The STB requires that railroads must consistent
20 with their common carrier obligation quote a
21 common carrier rate to any shipper which has made
22 a reasonable request for such transportation.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 In the 1970s the ICC held that
2 railroads are and must remain common carriers of
3 spent nuclear fuel and high-level radioactive
4 waste despite any risks associated with carrying
5 those commodities and they found that rail was
6 several times safer than trucks to move radio
7 active materials.

8 The ICC's finding extended to other
9 commodities and those circumstances are unchanged
10 today. Therefore, the STB must continue to
11 require railroads to carry these vital materials
12 for OxyChem and the rest of American industry.

13 Frankly, the railroad's stated
14 position present a fundamental challenge to this
15 STB. Without maintaining the common carrier
16 obligation, the Interstate Commerce Act would
17 have no meaning for shippers because they would
18 have no ability to compel railroads to carry what
19 American industry absolutely needs them to carry.

20 If the railroad industry believes
21 that changes to the statutory common carrier
22 obligation are appropriate, it must seek those

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 changes from Congress, not the STB. Also, if
2 there is to be any limitation, monetary or
3 otherwise, on liability, as the railroads have
4 proposed, or a refusal to carry certain
5 commodities, neither the Board nor the railroads
6 an empowered to take such
7 actions.

8 Rather, Congress is empowered to do
9 so, because the existing statutes require
10 railroads to carry all hazardous commodities
11 tendered in conformance with all applicable
12 governmental regulations. OxyChem has always
13 been willing to discuss legislative issues with
14 the railroad industry, but this proceeding is not
15 the appropriate venue for doing so.

16 You will hear the railroad say
17 railroads do not produce TIH, do not use TIH, and
18 do not own the tank cars used to transport TIH.
19 However, I guarantee that every single railroad
20 employee along with every single person in this
21 room uses products made from chlorine every
22 single day.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 OxyChem is grateful for the
2 opportunity to speak today on the need to
3 maintain the current common earner obligation.
4 Chlorine and its derivative products are vital to
5 the way we live. It is imperative that we
6 preserve our right to transport OxyChem products
7 (including chlorine) safely, securely and
8 economically via rail and to do so the STB must
9 continue to enforce the railroads' current common
10 carrier obligation. Thank you for your
11 consideration.

12 CHAIRMAN NOTTINGHAM: Thank you, Ms.
13 Burns.

14 Now I will turn to John McIntosh of
15 the Olin Chlor-Alkali Products Company.

16 MR. McINTOSH: Chairman Nottingham,
17 members of the Board, I'm pleased
18 to be here today on behalf of my company to
19 testify about this important issue that is before
20 the Board. Today I am testifying as President of
21 Olin's chlor-alkali business which is one of the
22 leading producers of chlorine and caustic in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 North America and is an approximate \$1.2 billion
2 business.

3 We have been involved in the U.S.
4 chlor alkali industry for over one hundred years,
5 and we were the first commercial supplier of
6 chlorine in the United States. We continue to
7 grow and service the industry that we participate
8 in.

9 Our business includes manufacturing
10 sites in New York, Georgia, Tennessee, Alabama,
11 Nevada, Louisiana, California and Washington
12 State, and two provinces in Canada.

13 Each of these plants offers a
14 favorable manufacturing cost structure,
15 availability of highly skilled workers, access to
16 our customer base, and historically competitive
17 freight rates. In every case they have one
18 common factor and that is they are captive to
19 only one railroad.

20 As one of the nation's leading
21 producers of chlorine and chlorine derivatives
22 our company produces an essential chemical the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 criticality of which has been discussed in
2 previous testimony and doesn't need to be
3 repeated by me.

4 First is how our products would be
5 delivered to our customers without the common
6 carrier obligation because it has been explained
7 to me in no uncertain terms by the railroads that
8 without that obligation they would not deliver
9 our products.

10 The fact is that more than 80 percent
11 of the chlorine that we produce is transported by
12 rail to customers who have no other option than
13 to receive it by rail. Let me say that again.
14 More than 80 percent of the chlorine we produce
15 is transported to our customer who have no other
16 option than to receive it by rail. The
17 implication of those two facts is obvious to me.

18
19 My testimony today will focus on the
20 importance of the common carrier obligation as it
21 exists today and its importance to Olin and our
22 customers, as I previously mentioned. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 obligation is cited by the railroads as an undue
2 burden when it comes to the duty to transport
3 chlorine or other T1H chemicals.

4 However, in recent years, the
5 railroads have systematically imposed massive and
6 unprecedented increases in chlorine freight
7 rates, allegedly to recover their
8 "risk premium." In our business alone we have
9 experienced average annual increases of 20
10 percent or more in the last three years and find
11 that by the end of the current year our freight
12 rates will have tripled from the average rates
13 between 2002 through 2004.

14 In one high-volume move recently,
15 rates were increased 177 percent in one year.
16 The railroads price increases threaten
17 the ability of chemical shippers like Olin to
18 keep their plants profitable and economically
19 viable.

20 Continued price increases would
21 ultimately make the transport of chlorine by rail
22 economically untenable and essentially have the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 same effect as the railroads refusing to ship
2 chlorine if the common carrier obligation is
3 eliminated.

4 We are dependent on the U.S. rail
5 industry for the safe, secure and efficient
6 transportation of our chemical products. We
7 emphasize that rail continues to be historically
8 and currently by far the safest mode of
9 transportation in North America. For a
10 substantial amount of the shipments from our
11 facilities, there is no alternative to shipping
12 by rail, and for safety and security reasons we
13 wouldn't want to switch to a different mode.
14 Moreover, for most of our facilities, we, the
15 shipper, have access to
16 only one rail carrier.

17 For a captive shipper, such as we
18 are, regardless of the size or location, the
19 efficient movement of our traffic, in some cases
20 even the very survival of its business, depends
21 on the rates and service provided by that single
22 railroad.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Over the last hundred years, shippers
2 like Olin have invested their money in plants and
3 equipment based upon continuing to have the
4 ability to ship our products economically from
5 our manufacturing sites. As time goes on the
6 number of railroads is decreasing, while the
7 number of captive situations for shippers is
8 increasing.

9 We continue to rely on the common
10 carrier obligation of the railroads to maintain
11 our ability to ship product to our customers at a
12 reasonable rate and with reasonable service. If
13 the common carrier obligations were weakened or
14 eliminated and the railroads declined to carry
15 product from our manufacturing facilities to our
16 customers, the implications for both our business
17 and our customers are obvious.

18 When considering railroad service, it
19 is important to recognize the common carrier
20 obligation which has been testified earlier as
21 the statutory duty of railroads to provide. The
22 Interstate Commerce Clause of the Constitution

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 grants power to Congress to write the laws that
2 govern our nation's commerce.

3 Using this authority, Congress
4 recognized the common carrier obligation as the
5 framework on which the entire national railroad
6 transportation system was founded and it remains
7 crucial today.

8 Railroads are chartered to operate in
9 the public interest, as commerce depends on safe
10 and reliable service in the delivery of a wide
11 range of products. The common carrier obligation
12 underlies the role of railroads as a service
13 industry that supports so many critical sectors
14 of the U.S. economy.

15 The federal courts have pointed out
16 that even if it is inconvenient or unprofitable
17 for a railroad to carry a particular product, the
18 common carrier doctrine obligates a railroad to
19 provide this service.

20 Also, Congress never intended for the
21 common carrier obligation to be dependent on
22 whether the railroads can operate without

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 negligence or derailments. This has been
2 illustrated in the NTSB findings on several
3 recent accidents but the railroads insist on
4 passing along significant risk premiums in
5 questionable pricing actions or attempt to renege
6 entirely on their legal obligations based solely
7 on the negligence of their part in these recent
8 incidents.

9 In summary, the common carrier
10 obligation was established by Congress to protect
11 all rail shipments, including chemicals such as
12 chlorine. As our testimony demonstrates, the STB
13 must enforce the
14 common carrier obligation imposed by Congress for
15 all of the aforementioned reasons.

16 The ability of American manufacturers
17 and producers to compete in today's global market
18 is highly dependent on the railroads' compliance
19 with the common carrier obligation.

20 I would like to comment on some
21 testimony earlier today from other parties,
22 railroads and others interested in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 proceeding. It is Olin's belief, based on our
2 experience in this regard, that there is not a
3 strict liability standard as has been testified
4 by others.

5 It is our experience that liability
6 is based on degree of negligence and not strictly
7 held. If there is no negligence, there is no
8 liability and that is different than testimony I
9 heard earlier today.

10 Olin also has not been shown evidence
11 by the railroads that they are not properly
12 insured or that they cannot obtain insurance. In
13 fact, in discussions with the railroads, we have
14 actually suggested that we would be willing to
15 consider reimbursing them or paying a part of the
16 incremental cost of the transportation of our
17 chemicals if they would show us the data and
18 demonstrate to us what that incremental cost was
19 and how it affected their system.

20 We have yet to find any of the
21 parties we have had discussions with that have
22 agreed to even show us the information or provide

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 us a meaningful proposal on how to do that. We
2 are unsure in our mind as to just how much
3 validity there is to that claim that has been
4 made earlier.

5 Speaking to the creation of cost
6 competitive situations by reducing ton miles, I
7 would comment that there was an attempt to do
8 that on an industry-wide basis through a DOT
9 Section 333 effort a year or two ago. That never
10 came to fruition because of concerns by the
11 Department of Justice on anti-trust and industry
12 related matters.

13 Speaking just as an individual
14 company, when we have tried to do things to
15 reduce ton miles, what we have found is that if
16 the delivering carrier is captive to that
17 delivering location, our attempts to reduce ton
18 miles have actually resulted, as Robin relayed in
19 her testimony, to increased cost for a route as
20 opposed to decreased cost.

21 I thank you for the opportunity to
22 testify today and I am willing to answer any

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 questions provided.

2 CHAIRMAN NOTTINGHAM: Thank you, Mr.
3 McIntosh and all the witnesses on the panel. I
4 am impressed, Mr. McIntosh, with your offer that
5 you recounted to the railroads that you would be
6 willing to entertain a discussion about cost
7 sharing, if I heard you correctly, on insurance
8 cost if you had the right data to back that up.

9 I would certainly commend to the
10 railroads' attention that they look at your
11 proposal openly and give it close consideration
12 because I think it's a kind of spirit that I'm
13 looking for of collaboration and actually looking
14 for how we can get to a better place in the
15 status quo which is not ideal currently. I
16 really appreciate your offer in that.

17 I don't know enough of the details to
18 endorse it but I just think it's the right spirit
19 and I hope the railroads take a serious look at
20 that. I'll probably be asking them about that
21 tomorrow when we have some more railroads back
22 with us. You mentioned, Mr. McIntosh, that a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 number of your customers have no alternative
2 other than rail if I heard you correctly, on the
3 vast majority.

4 MR. MCINTOSH: Yes, sir.

5 CHAIRMAN NOTTINGHAM: To 80 percent.

6 MR. MCINTOSH: Eighty percent. Yes,
7 sir.

8 CHAIRMAN NOTTINGHAM: Believe me, you
9 won't find anybody at the STB who doesn't agree
10 that rail transportation of chemicals is the
11 safest way to go. I'm struck how theoretically
12 even a truck movement is not even possible. What
13 kind of facilities are these?

14 MR. MCINTOSH: For the most part
15 truck movements of chlorine, in our mind, are not
16 an effective alternative to rail transportation
17 because they are not safer. As a matter of fact,
18 they are a much higher risk.

19 CHAIRMAN NOTTINGHAM: Absolutely.

20 MR. MCINTOSH: Truck movements of
21 chlorine are really very limited to the
22 California/Los Angeles area where it is used

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 predominately for chlorine supplies to municipal
2 water treatment facilities. Outside of that in
3 our system there are no other truck shipments
4 used for chlorine just because of the difference
5 in risk associated with that mode of treatment.

6 When you factor in the volume
7 multiplier necessary to deliver by truck versus
8 delivering by rail and the number of shipments
9 that you have to make to get an equal volume of
10 product delivered to a customer, it further skews
11 what is already a losing proposition from a risk
12 and a safety and a security standpoint.

13 Our customers, even if we offered
14 them transportation of chlorine by truck to their
15 facilities, I'm confident they would want no part
16 of it even if it was an economic break-even
17 consideration for them.

18 CHAIRMAN NOTTINGHAM: So I'm hearing
19 it's obviously riskier certainly and obviously
20 probably impractical in many circumstances but it
21 is technically feasible. If you had a strike or
22 something and the rail industry was shut down as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the aviation industry was after 9/11, for some
2 weird reason, I mean, there are roads that go to
3 these places. Right? People drive to work to
4 these facilities?

5 MR. McINTOSH: Yes, sir. It is
6 feasible and it is done on a very limited and
7 very specific basis in certain parts of the
8 country.

9 CHAIRMAN NOTTINGHAM: Okay. These
10 are important. When we hear words like no option
11 or no alternative, I mean, I want to make sure we
12 dig into it. I appreciate that explanation.

13 MR. CLAUDE: Mr. Chairman, on the
14 same question, in the plastic industry our
15 customers, even the largest customers, don't have
16 enough storage and, therefore, they want us to
17 deliver by rail car so they can use those rail
18 cars as storage facilities. The majority of our
19 customers will only accept rail car.

20 CHAIRMAN NOTTINGHAM: I understand.
21 Several witnesses today, including a couple on
22 this panel, have indicated that the Board

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 shouldn't play a role -- I don't want to put
2 words in anyone's mouth but in adjusting or
3 changing the dynamics of the common carrier
4 obligation.

5 I do want to make sure everyone
6 understands that on more than a hundred occasions
7 the Board has actually exempted commodities from
8 regulation which has the effect the way the law
9 is played out in precedence of basically removing
10 the common carrier obligation for all intents and
11 purposes. Congress has not on a single occasion
12 that I am aware of, certainly not in most
13 instances, reversed that or overridden that.
14 Congress, of course, can.

15 They can have the last word but my
16 view is looking at the case law, looking at the
17 statutory history, the common carrier obligation
18 us very generally worded as many statutes are,
19 critically important, a touchstone concept for
20 our transportation system and for the agency.

21 There is an implicit with the
22 Congress also creating the ICC and then the STB

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 implication that it's the Board's job to give
2 meaning and life to it through enforcing it and
3 through occasionally looking at exemptions, for
4 example.

5 I'm not suggesting that it's a
6 brilliant idea to exempt TIH or something but
7 just want to make sure you're not saying, "Board,
8 you can't even sort of look at this or consider
9 this." I think we wouldn't be doing our job if
10 we didn't have hearings like this and consider
11 all the different options on the table.

12 Mr. Kaplan, I noticed and I heard
13 towards the end of your testimony you slipped in
14 a zinger on me. I want to make sure I have a
15 chance to respond to you. Your testimony said
16 that the government through the Board seems to be
17 constantly seeking to ensure their, meaning the
18 railroads, inordinate profitability.

19 Something I heard when I was a
20 nominee before coming here, it is stated so often
21 that it is easy to sort of just accept it as fact
22 but I can't because I can tell you we're in court

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 fighting the railroads on a number of fronts.
2 They opposed us when we issued our first ever
3 unreasonable practice finding on the topic of
4 fuel surcharges.

5 They opposed us when we completely
6 turned around and reformed our small rate case
7 rules and we are in court with them now on that.
8 They opposed us when we took up the issue of the
9 cost of capital of rule making and significantly
10 changed the way we measure that important measure
11 and with the outcome, as we now know, of lowering
12 the cost of capita; determination.

13 The railroad that we forced to sell
14 its line in Lubbock, Texas, I can tell you, I
15 mentioned this in my opening remarks, we forced a
16 railroad to sell its line to a competitor who was
17 willing to actually step in and meet their common
18 carrier obligations. I can tell you there are a
19 lot of railroads on a lot of issues who don't
20 feel that we are constantly focused on helping
21 them obtain inordinate profits.

22 Not to mention, if you actually

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 compare the last 20 to pick your time horizon,
2 the profits of the rail industry to that of all
3 their customers, or almost all their customers,
4 you would see that rail industry profitability
5 generally lag behind that of the chemical
6 industry, coal industry, grain which there is
7 nothing wrong with that per se.

8 It's just a matter of fact and I just
9 want to make sure -- you may have used this line
10 from a few years ago and not gotten challenged on
11 it but I just need to call you out on that a
12 little bit.

13 MR. KAPLAN: I understand that.

14 CHAIRMAN NOTTINGHAM: Vice Chairman
15 Mulvey.

16 VICE CHAIRMAN MULVEY: Couple of
17 questions and I'll try to be brief. U.S.
18 Magnesium, Mr. Kaplan, you talked about how you
19 used to vent the chlorine into the atmosphere,
20 55,000 tons a year. What are the environmental
21 consequences of doing that if you had to do that
22 again? Is it a known carcinogen? What are the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 problems with doing that?

2 MR. KAPLAN: Chlorine is an irritant
3 obviously and in high concentrations can be
4 problematic with respect to breathing. When it
5 was emitted with the other materials we emitted,
6 we emit over \$100,000 SCFM of steam, for example,
7 so it was combined in that. It dispersed fairly
8 readily. This was all done under clean air
9 permits and there was no detrimental impact of it
10 to any people based on the location of the plant.

11 VICE CHAIRMAN MULVEY: You mentioned
12 about the line that had to be upgraded to handle
13 286,000 pound cars and the UP was unwilling to do
14 it. How long was that line? Do you know?

15 MR. KAPLAN: Eleven miles and change.

16 VICE CHAIRMAN MULVEY: Eleven miles.
17 Okay. Did you talk to them about sharing the
18 cost of doing that or was it --

19 MR. KAPLAN: We felt the cost should
20 have been paid for by the railroad and then put
21 into the ongoing rates.

22 VICE CHAIRMAN MULVEY: Okay. It's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 been mentioned that trucks are less safe for
2 carrying the chlorine and other hazmats than rail
3 cars. Less likely to have accidents and that
4 rail cars can carry four times as much product as
5 a truck.

6 On the other hand if a rail car
7 derails and if there is a spill, there is a much
8 greater volume of material that can be emitted.
9 Is it also true that rail accidents are
10 demonstratively more dangerous and more harmful
11 and more costly than truck accidents because they
12 are carrying more material, more product?

13 In other words, there may be more
14 trucks out there, they may be more likely to have
15 accidents, but because of the volumes they are
16 carrying are much less, in a way there is less of
17 a threat to human health and safety when there is
18 a truck accident as opposed to a rail accident.

19 MR. KAPLAN: I'm not sure that I'm
20 really in a position to comment on that. Trucks
21 when they have an accident are going to be right
22 next to a car whereas trains are often separated

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 by some distance. There is obviously four times
2 more product in a rail car. Yes, that's correct.

3 VICE CHAIRMAN MULVEY: Anybody else
4 want to comment on that? We are hearing that it
5 is very, very expensive to insure rail
6 transportation of chlorine and other TIH
7 materials but the trucks are carrying them. I'm
8 certain they're getting insurance when they carry
9 these materials.

10 MR. KAPLAN: I don't believe that
11 there are more than perhaps 20 trucks in the
12 entire United States that handle chlorine.

13 MR. MCINTOSH: It's a number close to
14 that. Yes, sir.

15 MR. KAPLAN: It's only done for very
16 specific applications.

17 MR. MCINTOSH: There have been risks
18 -- I was going to say there have been risk
19 assessment studies done in the past taking into
20 account the number of shipments, the typical
21 routing of shipments, the accident frequencies
22 for both rail and truck, the amount of product in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 carriage on average and very complicated risk
2 assessment studies have indicated that the
3 overall risk the safest mode for delivering
4 chlorine is by rail.

5 Significantly safer than by truck.
6 As a responsible company, I have an obligation to
7 not move chlorine out of an inherently safer mode
8 of transportation to something less safe because
9 it makes it more convenient for the railroads to
10 haul that product or more financially acceptable
11 for them to haul that product.

12 VICE CHAIRMAN MULVEY: I appreciate
13 that.

14 MR. KAPLAN: Excuse me, Mr. Vice
15 Chair, but Mr. Claude also made a very valid
16 point and that is that most consumers use the
17 rail car as their storage so they keep the rail
18 car. Unlike HCL where they generally unload it
19 immediately into a tank, they keep the rail car
20 on side and use it for storage which avoids one
21 extra transfer and one extra source of potential
22 leaking.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIRMAN MULVEY: Ms. Burns, you
2 mentioned that the railroads raised the rates 88
3 percent after you reduced the mileage by so much.
4 Was that in direct response to the reduction of
5 mileage or was that just coincidental that the
6 rates happened to go up right after you did that
7 and you were somewhat surprised?

8 MS. BURNS: No. The situation was
9 that we had a chlorine move out of our TAC plant
10 moving on the shoulder route. They significantly
11 raised their rates. We then found the longer
12 rail at a lower rate available to us. We went
13 back to the carrier and said. "It's all in our
14 best interest to move fewer miles. We have a
15 rate that is far more competitive than what you."

16
17 Asked them to reduce their rate so
18 that we can continue to move on that and we are
19 told that the rate was what it was and there was
20 not going to be any reduction in the rate.

21 VICE CHAIRMAN MULVEY: Mr. Claude,
22 you mentioned about the importance of the U.S.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 advantage in logistics and has historically been
2 a major U.S. competitive advantage to have lower
3 logistics cost because we don't always have a
4 lower labor cost or materials cost but our
5 logistics system has been one of our real
6 competitive advantages.

7 You testified that you see that
8 evaporating and the U.S. is losing its
9 competitive advantage. Do you see Total in the
10 next decade or so beginning to move more of its
11 operations off shore in response to a higher
12 logistics cost?

13 MR. CLAUDE: There are two aspects
14 which obviously when we proposed an investment in
15 the company this is versus investment in other
16 places of the world. They look at the total cost
17 and that is manufacturing cost and logistic cost.

18 Another important aspect, this is
19 obviously this is eroding the profitability in
20 our business but also those costs are passed to
21 our customers. I would like you to know that at
22 the end of last year, early this year, there was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 not one plastic transformer huge company getting
2 bankrupted and either having to close down some
3 of their plants or send that manufacturing
4 transformer site to Asia and other places. This
5 has a chain effect on our activity but also our
6 customers.

7 VICE CHAIRMAN MULVEY: Thank you very
8 much. That's all my questions.

9 CHAIRMAN NOTTINGHAM: Mr. Buttrey.

10 COMMISSIONER BUTTREY: Mr. Claude, I
11 was just curious. You are the fourth largest
12 publicly traded integrated oil and gas company in
13 the world. Is your headquarters in Brazil or
14 where is it?

15 MR. CLAUDE: Paris.

16 COMMISSIONER BUTTREY: Paris.

17 MR. CLAUDE: Yes, sir.

18 COMMISSIONER BUTTREY: I was just
19 curious. I know I could get this from your
20 annual report but I don't happen to have one
21 handy so maybe you can enlighten me. What are
22 the global gross revenues of the consolidated

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 companies? Do you have a feel for that?

2 MR. CLAUDE: Yes. As the other oil
3 companies in the world today --

4 COMMISSIONER BUTTREY: What does the
5 consolidated income statement show in terms of
6 global gross revenues.

7 MR. CLAUDE: As I was saying, as the
8 other oil companies in the world Total is doing
9 very well for the moment. You need to know that
10 petrochemicals is going through a very difficult
11 cycle and that is why most of the large oil
12 companies like Shell, BP, and others have sold
13 their petrochemical activities to financial
14 communities, hedge funds, or to Middle East
15 companies.

16 That is the majority of what the oil
17 companies have done. They are looking at all
18 aspects of the business and they will have to
19 justify the financial half of my activity which
20 is petrochemical. It has been way below the 10
21 percent you would be talking about, the end of
22 last year and this year.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 COMMISSIONER BUTTREY: What
2 percentage of the U.S. operation -- you're just
3 responsible for U.S. operations?

4 MR. CLAUDE: Yes, sir.

5 COMMISSIONER BUTTREY: What
6 percentage of your U.S. operations -- what
7 percentage of contributions to the total? Do you
8 happen to know what that is?

9 MR. CLAUDE: In the total Total
10 group?

11 COMMISSIONER BUTTREY: Total Total
12 group, yes.

13 MR. CLAUDE: A small percentage.

14 COMMISSIONER BUTTREY: A small
15 percentage.

16 MR. CLAUDE: The petrochemical
17 activity worldwide is something like 10 to 15
18 percent and the U.S., I am pleased to tell you,
19 is about a quarter of that.

20 COMMISSIONER BUTTREY: I just want to
21 clarify the record, Ms. Burns, about something I
22 thought I heard you say. I think you said you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 had experiences where carriers refused to quote
2 you a rate on a movement that you wanted them to
3 do. What was your alternative methodology after
4 that?

5 MS. BURNS: We have several examples.
6 The first was we were nearing completion of
7 negotiation on a very large move out of Niagara
8 Falls. At the end we felt like we still had six
9 lanes that were unreasonable and we asked for
10 tariff rates for those six lanes. We were told
11 that if we were given tariff rates for those six
12 lanes, all contract rates were off the table and
13 all moves would move to tariff. Since then we've
14 been --

15 COMMISSIONER BUTTREY: Everything
16 would move to tariff?

17 MS. BURNS: Correct.

18 COMMISSIONER BUTTREY: Okay.

19 MS. BURNS: Since then we've been
20 negotiating with another railroad and this time
21 we asked for tariff rates in parallel with
22 contract rates. We were first told that there

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 was no tariff rates and when we reminded them of
2 their obligation that they had to give us a
3 tariff rate, they told us that it was not their
4 practice to give us a tariff rate until they
5 exhausted all contract negotiations and they were
6 not going to give us a tariff rate until we
7 completed negotiations. That contract is up next
8 Wednesday and we are still waiting on some of the
9 contract rates.

10 COMMISSIONER BUTTREY: So you are
11 operating under a contract right now?

12 MS. BURNS: We are still under
13 contract. Going off contract on the 1st of next
14 month.

15 COMMISSIONER BUTTREY: So what is the
16 take-away from that, that the carrier was forcing
17 you to a contract, therefore, those rates would
18 be outside the rate relief position?

19 MS. BURNS: Yes. We wanted both in
20 parallel so we could evaluate our options and we
21 could pursue a small rate case. We have been
22 told, not directly, but that the same thing would

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 happen. If we were to go ahead and get tariff
2 rates, contract rates would be pulled.

3 COMMISSIONER BUTTREY: Mr. McIntosh,
4 you said that your current rates and recent rates
5 were far greater than the rates you paid in 2002,
6 2004.

7 MR. MCINTOSH: Yes, sir.

8 COMMISSIONER BUTTREY: Now, the rates
9 that you were paying in -- I know we are not here
10 to talk about rates but this really intrigues me
11 if you will indulge me here for a moment.

12 CHAIRMAN NOTTINGHAM: It has a funny
13 way of coming up whenever we get together.

14 COMMISSIONER BUTTREY: Has a funny
15 way of coming up. It has a funny way of coming
16 up all day, as a matter of fact. It's kind of
17 like a trial lawyer. You opened this thing and
18 now we are going to talk about it. 2002 through
19 2004 were those contract rates or were those
20 tariff rates?

21 MR. MCINTOSH: They were contract
22 rates.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 COMMISSIONER BUTTREY: They were
2 contract rates?

3 MR. McINTOSH: Yes, sir.

4 COMMISSIONER BUTTREY: And they have
5 gone up. Will you refresh my memory on what you
6 said they had increased in 2004?

7 MR. McINTOSH: Between 200 and 300
8 percent over the average of the rates between
9 2002 and 2004.

10 COMMISSIONER BUTTREY: Okay. And you
11 are not under contract. You are under tariff
12 rates now?

13 MR. McINTOSH: No, under contract
14 rates for the most part.

15 COMMISSIONER BUTTREY: You're under
16 contract.

17 MR. McINTOSH: Yes, sir.

18 COMMISSIONER BUTTREY: So you are
19 able to move from tariff rates to contract rates
20 during some type of negotiating process?

21 MR. McINTOSH: We have been under
22 contract rates for that whole period of time,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 rapidly escalating contract rates. We are still
2 under contract rates.

3 COMMISSIONER BUTTREY: Did the
4 carrier quote you tariff rates?

5 MR. McINTOSH: No, sir. No, they
6 were not willing to quote rates as we were trying
7 to negotiate contract rates for that period of
8 time or in recent negotiations.

9 COMMISSIONER BUTTREY: In your
10 negotiations you got the distinct impression that
11 there wasn't going to be a contract, there wasn't
12 going to be a tariff rate, there was only going
13 to be a contract rate?

14 MR. McINTOSH: In any occasion when
15 we were given tariff rates were even a further
16 penalty over the contract rates that we were
17 given with basically 30-day terms.

18 COMMISSIONER BUTTREY: I just want to
19 clarify that. Thank you very much.

20 MR. CLAUDE: I would like to mention
21 that those cost increases happened also on
22 plastics which are non-hazardous materials. We

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 have linked the cost to the hazmat problem today.
2 I came today to testify that the same is
3 happening for non-hazmat products.

4 COMMISSIONER BUTTREY: You're not
5 producing inhalants? You're not producing
6 anything that could be toxically inhaled.
7 Correct? You're producing pellets.

8 MR. CLAUDE: No. We are producing
9 pellets and we are producing some liquids which
10 are going by barges and pipeline at 95 percent.

11 COMMISSIONER BUTTREY: But not by
12 rail?

13 MR. CLAUDE: Not by rail.

14 COMMISSIONER BUTTREY: Okay. Thank
15 you.

16 CHAIRMAN NOTTINGHAM: I think it just
17 bears reiterating that the Board takes very
18 seriously any refusal by a railroad to quote a
19 tariff under any circumstances other than if it's
20 involving an exempt commodity. Please let us
21 know.

22 Let our Office of Rail Consumer is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the most appropriate stop to know about that. We
2 will make sure to dig in deep to find out what is
3 going on and to straighten that out. This is not
4 the first time I've heard that. We've heard it
5 repeatedly today. I'm very concerned about that.

6
7 Any more questions of this panel?
8 Thank you, panel. Safe travels as you head home
9 and thank you for being with us today.

10 We'll now call forward our final
11 panel, Mr. Doug Kratzberg and Mr. Nicholas
12 DiMichael from the National Industrial
13 Transportation League.

14 While the next panel comes forward I
15 will reiterate that in the hallway as you leave
16 this hearing room there is a table that has
17 information sheets on the STB Office of Rail
18 Consumer Assistance and urge folks to grab some
19 of those on your way out.

20 VICE CHAIRMAN MULVEY: Good evening.

21 MR. KRATZBERG: Hello.

22 CHAIRMAN NOTTINGHAM: Welcome, Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Kratzberg and Mr. DiMichael. We wanted to give
2 you the last word, today at least, so when we go
3 to bed tonight we'll have nothing but your wisdom
4 wafting through our ears.

5 Appreciate your patience. Someone
6 had to have the last word today. We hope you're
7 okay with the fact that it's you. Without
8 further ado we'll turn it over to you for the
9 next 10 minutes.

10 MR. KRATZBERG: Okay. Thank you.
11 Chairman Nottingham, Vice Chairman Mulvey, and
12 Commissioner Buttrey, I'm Doug Kratzberg, Rail
13 Planning and Operations Manager for Exxon-Mobil
14 Chemical Company. I am here today in my role as
15 the Chairman of the National Industrial
16 Transportation League Rail Committee. Appearing
17 with me today is Nick DiMichael, counsel for the
18 League.

19 I appreciate the opportunity to
20 testify before the Board at this hearing which is
21 designed to examine the issues related to the
22 railroad common carrier obligation. As I believe

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you are aware, the League is one of the oldest
2 and largest national associations representing
3 companies engaged in the transportation of goods
4 in both domestic and international commerce.

5 The League currently has over 600
6 company members ranging from some of the largest
7 users of the nation's and the world's
8 transportation system to smaller companies
9 engaged in the shipment and receipt of goods.

10 More than 100 years ago the Congress
11 codified the railroad common carrier obligation.
12 Today this obligation remains a statutory duty
13 that requires railroads subject to the
14 jurisdiction of the Board must provide
15 transportation or service upon reasonable
16 request.

17 The Board maintains the authority to
18 ensure that the railroads comply with this
19 statutory duty and to determine whether the
20 service requested by a shipper is reasonable.
21 However, the Board does not possess the authority
22 to change or repeal the common carrier obligation

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 as its right rest solely with the Congress.

2 It is the League's strong view that
3 the common carrier obligation is an essential
4 requirement of the U.S. regulatory system
5 governing railroads. The railroads' duty to
6 fulfill the common good and further the nation's
7 commerce is as critical today as when the
8 obligation was first recognized over 100 years
9 ago.

10 The railroads continue to serve a
11 unique and special role, especially for large
12 bulk commodity shippers or shippers of very
13 hazardous chemicals where rail cannot be replaced
14 by any other mode.

15 The issues facing today's rail
16 industry including a limited number of service
17 providers and infrastructure and capacity
18 constraints creates a need for government
19 oversight of the manner in which railroads
20 allocate their supply of services.

21 The League is aware that railroads
22 are taking actions to increase revenue through

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 price increases and reduce liability risk by
2 refusing to provide service such as in the case
3 of intermodal service of TIH commodities.

4 While the rail industry has the right
5 to make rational pricing and service decisions
6 based on market conditions in the economics of
7 their business, as a regulated industry such
8 factors are not and should not solely determine
9 who received rail service and who does not. The
10 national interest must take into account the
11 shipping public's need for rail service to allow
12 for safe and cost efficient product deliveries.

13 If left to their own devices, the
14 League is very concerned that railroads would
15 refuse to transport hazardous commodities that
16 qualify as TIHs and perhaps other traffic as
17 well. Some shippers already suffer from service
18 problems that adversely affect their business
19 including insufficient car supply as well as
20 unreliable and inconsistent service.

21 Notwithstanding the current
22 challenges faced by the rail industry and its

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 customers, the common carrier obligation has long
2 served to guarantee that shippers can at least
3 obtain some level of service as compared to no
4 service at all. This fundamental duty helps to
5 ensure that the commercial needs of the U.S.
6 shipping public are met subject to a
7 reasonableness standard.

8 The League strongly believes that the
9 Board's regulatory oversight of the common
10 carrier obligation is absolutely essentially to
11 ensuring that the railroads provide service upon
12 reasonable request and do not seek to transport
13 only their most profitable and least risky
14 traffic. Accordingly, the Board should not
15 narrow or dilute its interpretation for
16 enforcement of the common carrier obligation
17 based on alleged capacity constraints.

18 In its notice announcing this
19 hearing, the Board asked for feedback on the cost
20 and safety issues related to the carriage of TIH
21 commodities. Class I railroads have made no
22 secret of their preference not to transport

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 hazardous materials that qualify as TIHs.

2 The courts have previously determined
3 that railroads cannot refuse to carry goods based
4 solely on their dangerous nature or
5 characteristics as long as such goods are
6 tendered for shipment in accordance with
7 applicable safety laws and regulation.

8 In this context request for
9 transportation service are deemed reasonable when
10 such requests conform with minimum safety
11 standards such as Department of Transportation
12 and Nuclear Regulatory Commission requirements.

13 In enforcing the common carrier
14 obligation with regard to the carriage of certain
15 hazardous materials, the court has sought to
16 further the public interest in finding that rail
17 carriage is the safest and most economical means
18 of transporting such products.

19 In sum, a railroad's common carrier
20 obligation is comprehensive and the circumstances
21 under which a carrier could refuse transportation
22 of hazardous goods are few. TIH products are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 used in many contexts, to purify the water we
2 drink, to operate pollution control systems, and
3 as a component in many manufactured products
4 across a variety of industries such as
5 automotive, defense, healthcare among others.

6 Based on the dangerous nature of
7 these commodities rail transportation rather than
8 highway transportation is the safest manner in
9 which to move these products to necessary
10 delivery points. Thus, strong public safety
11 considerations continue to require strict
12 enforcement of a common carrier obligation with
13 respect to the carriage of TIH products.

14 If the railroads begin refusing to
15 carry TIH commodities or impose unreasonable
16 conditions for such carriage, producers of these
17 commodities will be forced to either ship these
18 products by truck or to not ship these products
19 at all. The latter choice is simply not a viable
20 option and will lead to such producers to ship
21 their production overseas at the cost of American
22 jobs.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Turning to the issue of rail
2 infrastructure investment, the League is aware
3 that rail carriers are increasingly requiring
4 shippers to make investments in rail
5 infrastructure as a condition to obtaining rail
6 service. In many cases shippers are being asked
7 to pay for new track construction or improvements
8 that relate to the requested service.

9 While the League believes it is
10 reasonable for a carrier to make such proposals
11 to its customers regarding infrastructure
12 investments that directly concern the service
13 requested by the shipper, the League does not
14 believe it is appropriate or lawful for a carrier
15 to condition the provision of rail service
16 required by a shipper in exchange for the funding
17 of infrastructure improvements.

18 With regard to whether volume
19 requirements or incentives including rail service
20 arrangement affects the common carrier
21 obligation, the League would simply note that a
22 rail carrier should not be permitted to avoid the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 common carrier obligation merely by inserting
2 such requirements or incentives into its common
3 carrier tariffs.

4 This issue appears to be related to
5 another STB proceeding Ex Parte 676 Rail
6 Transportation Contracts under 49 USC 10709 in
7 which the Board desires to establish a rule that
8 will help to distinguish common carrier rates and
9 service from contract rates and service.

10 In short, the League does not believe
11 that the inclusion of volume requirements and
12 rate incentives in a tariff automatically
13 transforms the document into a contract which
14 would not be subject to the common carrier
15 obligation.

16 In its notice of hearing the Board
17 identified economically motivated service
18 reductions and metering of demand for service as
19 a topic of interest. In surveying the members of
20 the League's transportation committee
21 confidentially with respect to this hearing, the
22 responses broadly demonstrate that shippers are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 experiencing double and triple digit price
2 increases at paces never seen before.

3 However, in some cases there appears
4 to be a growing perception that the aggressive
5 price increases are offered not only to secure
6 market-based compensation which include high
7 energy cost but to directly discourage the
8 shipper from tendering the shipment. This is a
9 very troubling phenomenon if these perceptions
10 are, in fact, true.

11 Although a shipper could attempt to
12 challenge the level of rate offered by a rail
13 carrier as being unreasonably high, as the Board
14 knows rate challenges have not been widely
15 employed by shipper community in the past for
16 various reasons.

17 The League believes that a legitimate
18 question exist as to whether railroads that price
19 traffic at extremely levels for the purpose of
20 discouraging the movement of commodities is a
21 violation of the common carrier obligation.

22 Assuming that the shipper seeking

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 rail service has made a reasonable request, a
2 response from a rail carrier that is directly
3 intended to discourage the movement appears to be
4 inconsistent with the statutory duty to provide
5 service upon reasonable request.

6 This concludes my oral remarks. The
7 League certainly appreciates the opportunity to
8 participate in this hearing today and I would be
9 happy to answer any questions. Thank you.

10 CHAIRMAN NOTTINGHAM: Thank you, Mr.
11 Kratzberg. I'll yield to Vice Chairman Mulvey.

12 VICE CHAIRMAN MULVEY: Just briefly.
13 It's getting late so I'm sure we all want to get
14 out of here. A while back, it seems like hours
15 ago, the witness for DuPont mentioned that they
16 tried to ship some ISO containers and the
17 railroads refused to handle them saying this is
18 an exempt commodity, even though it was a
19 hazardous material.

20 Because it was in a container, it was
21 an exempt commodity. Are you aware of any other
22 situations like that where the railroads have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 refused to ship hazmats because they were not in
2 tank cars, rather they were in ISO containers?
3 Have you heard about this before?

4 MR. KRATZBERG: Personally I am not.

5 MR. DiMICHAEL: I can add a little
6 bit to that. I don't believe that the railroads
7 are refusing to ship hazardous commodities
8 because they are in ISO containers. They are
9 refusing to ship hazardous commodities because
10 they are an intermodal service.

11 VICE CHAIRMAN MULVEY: That's what
12 I'm saying.

13 MR. DiMICHAEL: Therefore, because of
14 an intermodal exemption, they are basically
15 saying that they will not ship. I am aware of a
16 number of situations like that.

17 VICE CHAIRMAN MULVEY: Okay. You
18 suggest it would be helpful for the Board to
19 clarify whether shippers faced with high pricing
20 proposals may only challenge those rates through
21 our rate procedures or may alternatively
22 challenge the pricing as a violation of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 common carrier obligation. If the Board were so
2 inclined how would you suggest we do so and what
3 factors would we have to use to determine that it
4 was a common carrier violation?

5 MR. KRATZBERG: I'm going to ask my
6 counsel to assist with that one.

7 MR. DiMICHAEL: I think, Vice
8 Chairman Mulvey, that you would have to get into
9 the level of the rate increase. There might well
10 be questions of intent here. I think this would
11 get into a discovery matter just the same way
12 that an unreasonable practice complaint would be
13 done, just an ordinary garden variety.

14 VICE CHAIRMAN MULVEY: Intent is
15 always difficult to show.

16 MR. DiMICHAEL: It's true but I guess
17 we are not saying the Board's rule should
18 preclude a claim under the common carrier
19 obligation based on the level and intent of rate
20 increase.

21 VICE CHAIRMAN MULVEY: So it would be
22 a practice rather than a rate case?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. DiMICHAEL: That's right.

2 VICE CHAIRMAN MULVEY: You argue that
3 the shippers should not be required to invest in
4 rail infrastructure as a condition for receiving
5 rail service. Does it make any difference
6 whether the investment is on the shipper's
7 property or it's plant or rather, say, an
8 electric switch that might be on railroad
9 property? Do you differentiate between those two
10 investments made by shippers on railroad property
11 versus investments made on the shipper's own
12 property?

13 MR. KRATZBERG: My understanding
14 would be that generally if a shipper is going to
15 be asked for making investments, it would be on
16 their own property. If it were on the railroad's
17 property, it would be something they would own
18 and would maintain. In general those type of
19 improvements would be on privately owned property
20 on the shipper's side.

21 VICE CHAIRMAN MULVEY: But there can
22 be cases where the investment would be made on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the railroad's property in order to give the
2 shipper better service and the railroad says,
3 "Look, this is going to benefit largely your
4 movements so, therefore, we need you to pay for
5 it."

6 MR. KRATZBERG: I presume that could
7 happen. The only cases I'm familiar with are
8 those shippers that have indicated to me that
9 they have been asked to make infrastructure
10 improvements on their own property.

11 VICE CHAIRMAN MULVEY: Thank you very
12 much.

13 CHAIRMAN NOTTINGHAM: Commissioner
14 Buttrey?

15 I have no questions either for this
16 panel. Thank you. The testimony was strong and
17 clear and we appreciate that. That will adjourn
18 this hearing for the day. We will resume
19 tomorrow morning at 9:00 a.m., same place, same
20 general topic. We have some more good panels
21 tomorrow.

22 I want to thank the staff here in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 room and also the staff out in the hallways who
2 provided security and throughout the agency for
3 helping with this hearing and thank all of you
4 for participating.

5 (Whereupon, at 6:07 p.m. the hearing
6 was adjourned.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

1

2