UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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ORAL HEARING
MORNING SESSION

IN THE MATTER OF: STB Ex Parte
COMMON CARRIER OBLIGATION No. 677
OF RAILROADS

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

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

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

If it will not be problematic since I know the Board also is involved in a potential enforcement, I am going to mention a specific case which I realize you may not be able to comment on but I think often we are instructed by
specific instances in terms of how the law and
the regulations really are working to serve the
public or not properly serve the public.

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

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

We had the CORP, which is a
subsidiary of RailAmerica and RailAmerica has now
been purchased by a hedge fund which is another
topic of concern to me, the ownership of these
vital assets. We all know that we are constantly engaged and, yes, you are engaged in a discussion before the Rail Subcommittee, or the day before yesterday, about the need for capital investment.

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

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

Now, the unsafe conditions did not arise overnight. RailAmerica had owned the line for 10 years at the time of the embargo and
Fortress Investment purchased RailAmerica last year and one would assume that such a sophisticated group of investors would have done their due diligence and they would have known of the condition of the line.

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

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

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

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

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

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

This has had a dramatic impact. We had very quickly a saw mill that temporarily shut down laying off 120 people. The small businesses served by this line are seeing cost that are
between 10 and 15 percent. Today I would expect more with fuel prices and the premium surcharge for trucking.

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

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

That wasn't acceptable and obviously neither the shippers nor the state had been involved in any discussions prior to the press conference despite the protestations, again, of Mr. Griles at the hearing where he said they had worked with all parties. You will hear from Allyn Ford with the Coos-Siskiyou Shippers Coalition later to make clear there were no discussions.
I asked given the fact that was not well received if the Governor would host a meeting of all the principals and bring in everybody and see if we could work something out because this is a vital line. The shippers have indicated they would be willing to pay more.

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

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

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

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

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

I think that is probably a policy question
that you may cross in this one particular case
but you may have to look at in the future because I assume we are not unique in this instance. There has been tremendous disinvestment in the rail network and America and I expect there are other places where unsafe conditions are going to crop up that may lead to the need for closer. Then the question becomes if an embargo for safety purposes is put in place, how does one demonstrate that the owner of the asset working in good faith with the shippers and other affected parties to get the lines reopened. I guess the reasonable amount of time for an embargo is something that probably has not been particularly defined.

I am certain there are precedents that you are aware of before the Board. In this case I think what started as a proper embargo, which we would all agree that tunnels were unsafe, has now sort of devolved into a questionable use of an embargo. It's seemingly an embargo that will stretch into the future because CORP has further
said they have no plans for abandonment, but they
have also said that the line is not profitable
and they are not anxious to reopen it and operate
it. Then that really brings us back to the
common carrier obligation.

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

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

I thank you for the opportunity and
would be happy if you have any questions you
would like me to address that you address those
questions. Thank you, Mr. Chairman.

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

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

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

CONGRESSMAN DeFAZIO: Sure. Well, I think, again, Allyn Ford can address in much
greater detail. We are looking at a sector that is already been hit fairly hard because of what is going on in the mortgage market and with housing but there is still ongoing demand for the product.

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

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

UP is having problems out of Eugene because their main line over the mountain
suffered a catastrophic landslide the likes of which no one has ever seen. It has reopened now for limited service but they were having to reroute all the way up around through Portland and down the other side for a while.

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

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

I guess maybe this is a harder thing to actually document but they are foregoing
bidding on a number of projects just because they can't -- I mean, they have no way of getting the product there. You have the lumber and wood products and you have a bridge manufacturer.

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

Now we have a company in my district that potentially has a lot of work that can't even bid on that work because of the loss of rail access. This is not an area that has a tremendous amount of alternatives. The only other major alternative is fishing and we are about to see a total closure of the salmon fishery. I know that's not your jurisdiction but it's very, very difficult times for the people on the coast.
At least if we could get the rail access we would be able to be assured of the jobs at American Bridge. Probably see that company grow and our lumber and wood product folks would be, again, more competitive in what is a difficult market.

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

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

This might sound like an odd question from the STB but I want to ask about weather. We
heard a lot of things last fall, as you did in the press, coming from CORP and RailAmerica. We heard about, of course, the safety concerns. Those seem to have been endorsed or ratified or confirmed by the Federal Railroad Administration.

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

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

CONGRESSMAN DeFAZIO: No.

CHAIRMAN NOTTINGHAM: I know here in the east coast it's spring and a lot of projects
are starting to move forward.

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

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

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

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

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

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

You mentioned the embargo and the problems with embargoes and I can assure you one of the concerns and one of the things that has triggered this hearing has been the alleged misuse of the embargo process by railroads which have caused them to quasi abandon or use it for abandoning lines when they put on these embargoes
that become permanent. It's one of the things that concern us, especially today.

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

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

The Port of Coos Bay is actually ideally situated in terms of being in the middle of the Oregon coast. If it could feed into the main lines or UP or Burlington Northern just north of Eugene, it's an excellent transshipment point and an alternative without sitting in a line of ships that goes far out to sea.
Coos Bay has a new and very active port commission the last few years. In particular they have been in serious discussions with Maersk about the potential for a major container facility there because unique characteristics exist in Coos Bay.

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

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

That has raised concern among a number of us, particularly myself, whether or not CORP would like to string this embargo out until such a time -- I mean, there is no commitment yet
from Maersk but this has tremendous potential.

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

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

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

    VICE CHAIRMAN MULVEY: Thank you.
CHAIRMAN NOTTINGHAM: Commissioner Buttrey, any questions?

COMMISSIONER BUTTREY: Thank you, Mr. Chairman.

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

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

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

CONGRESSMAN DeFAZIO: I understand.

COMMISSIONER BUTTREY: Although I can tell you that there is compassion and sympathy
that is alive and well here. I happened to grow up in a very rural part of my home State of Tennessee where logging and lumber is a very big deal.

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

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

These are people who are working basically paycheck to paycheck essentially. At least the ones that I knew worked that way. I means basically jerking up their family, taking the kids out of school, and moving some place
where there is a sawmill still operating.

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

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

In particular I have a couple of firms. Again, I believe Mr. Ford may be more specific about this. It's my understanding that a couple of companies that are family owned are
at the moment perhaps losing money but continuing to operate. The closer they can come to breaking even, the more likely it is they will be able to keep that up for a while until the markets pick up again.

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

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

CHAIRMAN NOTTINGHAM: Chairman DeFazio, just please know that this Board is here as a resource to you and your constituents. We will stay with this controversy as long as it takes to make sure it gets to an outcome that comports with the law and also ensures that the
Board is stepping up in meeting our obligations.

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

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

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

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

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

CHAIRMAN NOTTINGHAM: Thank you, Congressman.

We will now return to member's opening statements and advise that we have two members of the United States Senate who will join us soon so we will be keeping our eyes open for them. When they do arrive we'll bring them forward along with the rest of the first panel including Mr. Ford from the Coos-Siskiyou
Again, welcome to all of you here this morning. Today we will hear testimony on a topic that has generated much interest both within and outside this agency, the common carrier obligation. I am sure that it will be often mentioned today that the common carrier obligation is a long standing legal principle. In fact, as one historian has noted, the principle that common carriage is open to all, upon reasonable request, has been imposed upon transportation companies as a feature of English common law since the Middle Ages, and its roots go back even farther, to commercial codes enacted by the Roman Empire. Today, that common law principle, as it applies to railroads, is codified in the Interstate Commerce Act, in the provision stating that "a rail carrier providing transportation or service subject to the jurisdiction of the Board . . . shall provide the transportation or service on reasonable
At the heart of the Board's mission is our responsibility to serve as a forum for resolving disputes, both formal and informal, between shippers and railroads (and even between a railroad and another railroad) regarding whether, and how well, the railroads are carrying out that obligation to "provide service on reasonable request."

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

This particular "forced sale" was complex and lengthy, but demonstrates this Board's commitment to enforcing the common
carrier obligation and protecting shippers from unreasonable denial of service. The Board acted to preserve shippers' service options in another recent case in Ohio involving a railroad that would not let another railroad cross its line.

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

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

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

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

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

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

The railroads need to make market
based decisions versus the national interest in
ensuring that all markets are served; The status of exempt commodities, which the Board has found are not subject to a common carrier obligation unless the exemption is revoked;

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

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

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

The strain on the common carrier obligation is even more acute given the transportation trends that demonstrate there will be increased pressure on the railroads to carry more and more freight, in light of factors such as highway congestion, truck driver shortages, and increased fuel costs that make rail more
attractive than less fuel efficient modes.

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

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

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

At this point I would like to turn over for his opening comments the dias to Vice
Chairman Mulvey.

VICE CHAIRMAN MULVEY: Thank you Chairman Nottingham. I want to thank my fellow Board members for agreeing to hold this hearing, and our staff for their preparation assistance.

Good morning and welcome to our panelists and other attendees.

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

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

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

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

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

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

Thank you very much Chairman Nottingham.

CHAIRMAN NOTTINGHAM: Thank you, Vice Chair Mulvey.

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

In that section, the statute says that a rail carrier shall provide transportation or service upon reasonable request.
It is the meaning of that somewhat cryptic phrase – provide transportation or service upon reasonable request – that we are here to probe and consider at this hearing. I say "cryptic" because those words used in the statute are so very general and non-specific in nature and require quite a lot of interpretation and fleshing out in order to ascertain exactly what they mean. That is the job of this Board and the courts.

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

But it is clear to me that the interpretation of this cryptic phrase must change over time as circumstances change, and that it may be found to impose different requirements on rail carriers today, in the present capacity-constrained environment, than it did ten, or fifty, or one hundred years ago.
I know at least one person who claims that the concept of the "common carrier obligation" is so well-established that it actually originated with Hammurabi's Code of ancient Babylon! There are probably some who would argue that the concept has some connection to the Dead Sea Scrolls. I am advised that the concept actually has roots in English common law dealing with public utilities. And, we have all heard it said that the concept is as old as dust.

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

At that meeting, God bent down and took a handful of dust and said, "From this dust, I will make a man." Then, the young man bent down and took a handful of dust. At that moment, God said, "You have to provide your own dust!"
Now, I am not suggesting that we repudiate or dishonor the progress that has been made under the original concept, but I am suggesting that it may be time to get our own dust. We may need to get our own concept of the "common carrier obligation" that recognizes the new realities in the current constrained global transportation marketplace.

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

Until the Congress deals with the liability cap issue, I, for one, believe that rail carriers may well be within their rights to refuse to carry the extremely toxic hazmats without indemnification.
I can tell you that as a businessman, that's the decision I would make. I simply do not feel that it is a "reasonable request" for a shipper to ask a railroad to transport these types of commodities without some kind of meaningful protection from the unreasonably high, "bet-the-company" type liability exposure.

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

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

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

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

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

Another fallacy that I've heard asserted as gospel truth by some is the claim
that the Staggers Act was intended to spur, or
increase, competition, and that the Board has
somehow failed to live up to that goal.

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

The Staggers Act does not contain a
mandate to increase competition, and anyone who
says it does is trying to rewrite history.

Another misconception I hear is that "captive
shippers" cannot get meaningful rate relief. But
that term "captive shipper" is often used
inaccurately. A shipper that has a truck
alternative simply is not a captive shipper. The
Staggers Act makes that very clear.

Turning now to some good news, I am
very pleased that the Board is going to start
making agricultural contract summaries readily
available and accessible on the Board's website. Section 10709(d)(1) of the Act directs the Board to ensure that the essential terms of each contract for the transportation of agricultural products including grain are made available to the general public.

This new web posting procedure is a good first step to help to do that. It will help to shed more light on what is going on with grain contracts and make this very dynamic market a bit more transparent. And now, I'm here to listen. I look forward to hearing the testimony of the witnesses.

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

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

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

As usual, we will hear from all the speakers on a panel prior to questions from the commissioners. Speakers, please note that the timing lights are in front of me on the dias. You will see a yellow light when you have one
minute remaining and a red light when you time has expired.

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

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

Additionally, just a reminder to please turn off your cell phones. I look forward to hearing the testimony of the parties and would now like to call forward Mr. Allyn Ford of the Coos-Siskiyou Shippers Coalition from our first panel. As soon as we are joined by -- I don't think we have been joined yet but as soon as we are joined by Senators Ron Wyden and Gordon Smith we will bring them forward as well.
All three members of the Oregon delegation made a special request, Mr. Ford, that you be allowed to sit with or near them as best as their schedules permit early in the proceeding so we were happy to accommodate that. You may well have come the farthest as well so we welcome you back to the Board.

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

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

MR. FORD: Okay. Is that proper?

Thank you. On behalf of the Coos-Siskiyou Shippers Coalition, and my own company Roseburg Forest Products, I wish to thank the Surface Transportation Board for holding this hearing.

I am the President of Roseburg Forest Products, an Oregon family-owned corporation,
with forest products manufacturing facilities throughout the United States but heavily concentrated in Southern Oregon and Northern California. We employ over 3,500 employees manufacturing engineered wood products, composite panels,

softwood and hardwood plywood, lumber with raw materials sourced from our own timberlands.

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

Roseburg Forest Products has had a close relationship over the years with the various railroads, including in 2004 assisting with the reopening of the line between Winston, Oregon and Dillard, Oregon when the line was closed due to a major landslide, and providing financial assistance for repairing tunnels and the reopening of the Siskiyou line in 2006.
In addition to my company, I am here on behalf of the Coos-Siskiyou Shippers Coalition whose membership includes the American Bridge, Co.; Georgia Pacific LLC; Southport Lumber Company; and, Timber Products, Co. These entities are dependent upon shipping materials on the Coos line and the Siskiyou line which are operated by Central Oregon and Pacific Railroad ("CORP"), a short line railroad wholly owned by Rail America.

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

In the face of recent embargoes and deteriorating conditions of the railroad lines,
these organizations have come together with a common goal of restoring and maintaining safe and efficient rail service in Southwestern Oregon, particularly on the Coos and Siskiyou rail lines.

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

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

Our story was experienced by the other members of the coalition as well. Not only were coalition members' shipments disrupted, but in the case of American Bridge, who builds trusses for bridges throughout the United States,
its ability to compete for contracts and orders were severely disrupted.

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

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

Prior to the embargo no attempt was made by CORP to address the issue with the shippers or explore ways for the shippers and railroad to solve the tunnel problem and in turn keep the line operational. In fact, CORP did not provide an assessment of the capital needs to
restore the line to service until several months after closure and only then after pressure from our state legislators and the Governor's office.

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

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

However, rather than make the repairs on the three tunnels and reinstitute service, CORP stated it would not open the line unless the shippers, State of Oregon, Port of Coos Bay, and
the Union Pacific agreed to pay three-quarters of
not only the immediate tunnel repair costs but
also what Rail America described as the neglect
and deferred maintenance that has taken place on
the line over the past twenty years.

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

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

Also disturbing to the shippers is
the fact that in the past the shippers and
governmental entities have provided assistance
and agreed to surcharges, however, CORP and Rail
America have not always used these
funds for either the stated repair or maintenance
on the line.

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

Of the items identified in the
hearing notice, the Coos-Siskiyou Shippers'
experience has demonstrated that with respect to
the issue of "carrier-imposed requirements for
infrastructure investments by shippers", it is
clear that the STB needs to assert more oversight
and control. Further, with respect to the issue
of what constitutes a "proper use of rail
embargoes," it is also clear from our situation
that CORP is willing to abuse the
embargo power to extract monetary concessions.
While it is clear that embargoes play an essential role with respect to rail transportation, the current system is subject to abuse. It is our position that the STB needs to assert a stronger role in ensuring that the railroads meet their common carrier obligations.

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

In our case, the short line operator has admitted that the lines have not been maintained for a period of twenty years and clearly was not reinvesting the maintenance component of the rate into the line. The net result has been a history of derailments
and curtailments that affect the safety and
economic stability of the local
communities and industries.

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

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

The ongoing failure to repair or
maintain the lines is not a reflection of rates,
rather it is a reflection of short-term inflation
of the bottom line without making investments any prudent business would undertake.

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

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

Aggravating the situation is the recent major slide on the UP line, that Congressman DeFazio mentioned, just east of
Eugene which has now forced all this freight to be delivered from Eugene north 150 miles to Portland and then east up the Columbia Gorge connecting to the mainlines that travel south and east.

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

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

CORP further stated that by April 15,
if operating revenues resulting from the reduction to two days per week did not increase, the line would be shut down and all deliveries would only be made by taking freight on the UP line north through Klamath Falls, Oregon and across the Cascades to Eugene, and then back south to the affected Southern Oregon mills.

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

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

Based on normal operating conditions this could result in an additional 36,000 truckloads per year on Interstate 5 for a less efficient mode than rail and further contributing...
to traffic congestion on an important segment of the interstate highway system.

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

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

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

CHAIRMAN NOTTINGHAM: Thank you, Mr.
Ford, for those very thoughtful remarks and for your personal report from the field and first-hand report on the situation.

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

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

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

This is a critical issue, as you can tell,
for the people that we represent. At my town meetings in Southwestern Oregon this issue comes up again and again and again. In our view, this Board has the legal authority to secure a fair shake for the people that we represent.

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

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

Unfortunately, we do see some railroads reducing and restricting service,
raising prices, and putting the squeeze on shippers in an attempt to maximize profit. In my view the Surface Transportation Board is the last line of defense against unfair and unconscionable conduct and we ask you today to step in and protect the public.

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

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

As the Senate was debating on the
Staggers Act of 1980 Senator Cassabaum who helped write the bill, a member of the Subcommittee on Surface Transportation, said, "I would like to make it clear that the attitude of the Senate is that the common carrier obligation is critical and must be strictly enforce."

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

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

Last September, as you heard, with
essentially no warning the CORP just announced that it's going to embargo the Coos Bay branch line between Coquille, Oregon, and Vaughn, Oregon, in our home state. CORP said the embargo was due to unsafe tunnel conditions, conditions which were the result of a lack of maintenance.

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

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

We could take you through scores and scores of these kinds of examples. The point is
our region does not need an economic body blow at a time when we are already seeing as a result of national economic trends a serious concern about where our economy is headed.

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

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

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

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

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

In financing of Michael Jackson's property it's made it clear to us that Fortress
and CORP are somehow in their own Neverland, a
world where others pay for their business' long-
term infrastructure investments and the
government directly subsidizes their business
operation.

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

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

If the line is closed, the impact to
agricultural shippers in particular will be quick
and obvious. Freshness and quality of produce
will be affected, customer expectations won't be
met, and we will certainly see their profits go
down.
Now, the CORP claims that these incredibly high rates are to pay for $5 million in repairs to the rail system but it's unfair and I would argue illegal for a railroad to require that customers pay outright for long-term capital improvements. These are investments that should be recovered by the business owner over the life of an asset which in most instances for railroad infrastructure can be nearly 50 years.

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

We intend to watch it closely and hope that the Board will also investigate the CORP's actions along the Siskiyou line. But I discuss these examples not just to highlight the kind of business practices that extract profits and leave behind shells of what are potentially
vibrant communities, but also to point out that some railroads are using embargoes and the threat of embargoes to subvert those common carrier obligations that are so explicit under federal law.

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

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

Railroads do face pressure to maximize profits. We want railroads to be profitable. I want it clear that we think having profitable railroads in our country is important. We also want shippers on their lines to have
decent and affordable service.

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

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

    When short lines work cooperatively
with shippers and communities rather than scaring
them into abandoning rail, they find that
opportunities for growth exist. Port of Coos
Bay, for example, may provide more freight if
cargo vessel operators were assured they can move
the freight via rail once it gets off-loaded.

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

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

It's a public trust. Railroads have
long been considered to have public obligations
on something more to the public than just the
company's own business concerns. As such,
railroad companies have to take into account not
only the bottom line of the company today but also the repercussions of the local and national academy on operational decisions.

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

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

I've got a hearing of the Finance Committee I've got to be at but you are in very good hands, Mr. Chairman, Vice Chairman, Commission Buttrey. You are in very good hands with my colleague. We are just grateful to you
for your consideration and, again, would ask that you step in and take those steps that will protect our economy during this extremely vulnerable time and I thank you.

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

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

We have sent some of our senior staff already in the recent past out to Oregon to report from the front lines as to what is going on. We have had the CEO of RailAmerica here at
my invitation on a few days notice to meet also
with Mr. Ford and some of his colleagues in an
effort to informally avoid having to be here
today talking about this today.

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

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

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

Senator Smith, the floor is yours.

SENATOR SMITH: Thank you, Chairman
Nottingham and members of the Board. I certainly
echo the sentiments of my colleague Senator Wyden and I do want to note that it is probably rare that you get two U.S. Senators and a Congressman from the representative district before you but I think it is an indication of how urgent we feel this matter is.

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

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

Unfortunately, after all these months the topic of our discourse on that occasion before the Senate Commerce Committee is the same, that being the Central Oregon and Pacific Railroad, or CORP, ongoing embargo of the Coos
Bay rail line.

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

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

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

I respect the motive. I think it's essential if they are going to stay in business and make the capital investments. But I also want to note that those who buy railroads cannot just look to a short-term hit because there is a long-term responsibility.

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

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

I know the Board is familiar with the circumstances surrounding the embargo which the
Board lays out in its April 11th decision. I won't belabor that point. I think others have done that very well today. However, I do want to focus for just a moment on the issue of deferred maintenance and, more specifically, the railroad's obligation consistent with its common carrier obligation to maintain the track and tunnels.

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

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

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

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

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

This line provides a critical transportation link for communities in Southwest
Oregon and CORP in action is literally putting hundreds of family wage jobs in our state at risk.

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

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

I believe that we are far past what should or could be considered a reasonable period for CORP to show progress towards making the
repa... to reopen the line. The Board has the
authority to rectify this situation and I hope
you will do so quickly. I await the Board's next
response to the Coos Bay rail line enclosure. I
thank you for your time this morning.

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

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

Have you in your close monitoring
situation heard about any progress, any
procurement activity, any bidding, any engineers
doing the advance work that you can do, frankly,
in rain or shine. You can do it in the office to
get ready to actually do the nuts and bolts engineering that need to be done to actually get those tunnels restored.

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

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

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

SENATOR SMITH: Well, in the
cloakrooms of the Senate, frankly, the concern is arising over the role of hedge funds and buying these private assets which are attached to public responsibilities.

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

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

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

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

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

SENATOR SMITH: I would be honored to answer any questions you have.
VICE CHAIRMAN MULVEY: Thank you, Senator. When I first came to the Board I was under the assumption that the common carrier obligation for railroads was pretty absolute.

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

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

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

My own view is that we should be
careful as we do this but I also know I have many colleagues who want to re-regulate the railroads. I do not but I also want those who own them to understand that we have a responsibility to the broader public.

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

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

That's why I'm not here to re-regulate the but some of the modest tinkering that you're talking about in terms of common carrier obligations, yes, I'm interested in that
because I don't want to go the next step of total re-regulation because that is the wrong incentive if we're serious about projecting and meeting the future transportation needs, the freight needs of this country.

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

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOTTINGHAM: Commissioner Buttrey.

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

SENATOR SMITH: Thank you.

COMMISSIONER BUTTREY: We are certainly glad to have you here and to hear your
comments. Obviously your presence here today says a lot about how you feel about the importance of this issue. We know it's on your mind and the minds of a lot of other members of Congress.

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

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

SENATOR SMITH: Thank you, Commissioner. I commend you for that. Thank you
all so very much for your public service and for your attention to this vital issue. Coos Bay is in Southwestern Oregon. It's rural. It's beautiful and great people live there.

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

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

I haven't checked this out yet, haven't had time to, but your colleague, Senator Wyden, invoked Michael Jackson and Neverland in
Fortress of investment. I think we have plowed into some new territory there.

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

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

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

SENATOR SMITH: Thank you, gentlemen.

VICE CHAIRMAN MULVEY: I was going to mention, too, if Senator Wyden had stayed that he was not "Thrillered" with Fortress America's investment strategy.
SENATOR SMITH: We are thrilled to be here.

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

MR. FORD: Okay.

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

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

CHAIRMAN NOTTINGHAM: You seem to have a very good relationship with your elected
officials across the state from the Governor on
down as understandably you would as a major
employer.

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

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

MR. FORD: Certainly I don't sit in
the Governor's office but I think the Governor
forwarded a letter to CORP here very recently, I
think last week, stating that he was staying with
his position.
I may be reading into what the Governor is saying but I think the Governor is looking for a commitment from CORP for them to make the move and then the state is willing to sit down and discuss it. Obviously the Governor cannot sit down and say, "We can obligate through bonding or other financial arrangements at this time."

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

I think I can express that people are willing to step forward to help but we need an indication that CORP and RailAmerica are willing to do their fair share. I think the Governor has staked out very clearly his expectations that the first thing they need to do is show movement in getting that line back into operation.
I may add to this that I think politically and otherwise in our state you have to understand Coos Bay is a beautiful port facility. I think Congressman DeFazio talked about the potential. He was talking about containerization or whatever.

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

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

It's on the move and then in this particular situation what we perceive to be a very abrupt process, boom, that we feel like the
rug has been pulled out from underneath of us. A lot of people are really quite shocked in the way this was handled.

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

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

You operate major equipment and facilities. That is a pretty good deal. Would you like to not invest for 10 years, shut down
your facility, lay off hundreds of people, and
then announce that you are deserving of millions
of dollars of contributions from the taxpayers?

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

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

CHAIRMAN NOTTINGHAM: Mr. Ford, I
want to make sure while you are here you do
understand, and I think you do but just while we
have you here on the record and we have a room
full of interested parties and spectators, of
course one outcome possibly, I can't predict or
I'm not promising by any means an outcome at this
point in this pending controversy, but one
outcome, as you know, I believe, could be that
the line could be abandoned.

In fact, the railroad could very well
announce that the big bad STB forced us to do it
and what a tragedy that might be.
That raises the possibility of some additional
time of lack of service there. Do you think you
and your colleagues are sort of ready to face
that possibility if it comes to that? I mean, is
it something that you are mindful of? Is that
one possible scenario as we explore this issue?

MR. FORD: Certainly. You know, I
guess you would look like that is the voice of
doom to say that we wouldn't have rail service to
Coos Bay. Some of us have some alternatives.
Economics are such that we would obviously pull
investment out of the port and Coos Bay is just
not going to work economically. Previous to this
point we thought we had a future.
In saying that, our willingness to go to the extreme of shutting the railroad clear down and whether or not there is something in between, I think the shippers, and certainly the coalition in those communities, again, we are very much community oriented because we are in a rural area and to work with the railroad.

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

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

We are not looking for a Band-Aid. That is the worse thing we can do because we are
in -- all of us are investing in long-term investments and looking at 10, 20 years. We are looking for a permanent solution, not just a Band-Aid. If that means we have to shut it down, I sure hope we don't have to go that route.

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

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

Vice Chairman Mulvey.

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

In some ways this is kind of the reverse of that where we are looking for the public sector to help out the private sector and
make investments that are normally made by the private sector.

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

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

What we are seeing is this point about turnover and we have to look for returns in
the next six weeks for the next three months.
That is counter to what typically has been the
style of management we've seen in the rail
service area.

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

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

Does that require the state and/or a
public body of some sort to get into the
operation with the intent they have a longer term
perspective. They can bring the social values to
bear where needed. If you give us a choice, I
mean, we would have to go there but our preference is certainly not to go that way.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOTTINGHAM: Mr. Buttrey.

COMMISSIONER BUTTREY: No questions.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Ford. That concludes our time with you today.

Thank you again for coming all this way. We hope you can stay as long as you can but we also wish you safe travels as you head home as well.

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

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

MR. WEICHER: Good morning. Thank
you, Chairman, Vice Chairman, and Commissioner Buttrey. It's a pleasure to be here. We appreciate you giving us this opportunity. I will go through some overview concept slides and discuss some of the issues we have seen in the order.

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

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

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

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

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

Having said that, we think we are seeing a somewhat different thrust of arguments in many of the commentators, less discussion than
in past years of do they have all the alternatives they would like with truck or barge and almost the implicit assumption that they are asking for or requesting unilateral assurance of virtually unlimited rail capacity in any quantity whenever and however it might be needed.

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

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

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

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

We don't believe those are the ways railroads should invest. I have to add with Washington State that we have excellent relations with them as I spoke to Mr. Witt this morning. I have spent a lot of time out there working with Sound Transit and King County and Port of Seattle. That is the closest to the Pacific PNW
issues you've got on the calendar today that I
would get.

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

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

This is something that has a history
before the Board. It is common carrier service.
It does not limit the options for a shipper. We
will move traffic in all different ways for all
different kinds of varieties but these are the
kind of tools that have helped us to better plan
logistics and improve efficiency and manage our corridors.

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

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

They do properly involve infrastructure requirements by us and the
shipper. They are not offered to the exclusion of smaller car volumes or shipper options at all. If I could turn to out slide five, this shows since '05 the growth in unit trains on our system and shows singles as well as units.

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

This also indicates that these programs do not, as sometimes are accused, disadvantage the nonparticipants. They help the whole system be fluid. If you choose to be in them you have great advantages. If you choose not to be, you still have common carrier service. It is all common carrier service in our ag
Similarly, on the next slide, our grain fleet capacity. I speak for BNSF. I know railroads are accused of investing in this and not investing in that. We have been aggressive investors in infrastructure in our plant, in locomotives, and in cars including covered hopper cars.

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

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

With respect to the service issues
that the Board raised in its order, embargoes and abandonment, the Board has well-established principles for this. There is industry practice. We believe we have used embargoes judiciously and carefully in accordance with the procedures and we follow the rules on abandonments. We believe that we fully intend to continue to work within the spirit and the law of those processes.

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

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

It has that right. In that sort of way, like the dialogue heard earlier this
morning, all of our traffic is common carrier traffic in that residual sense and the exemptions are properly justified by competition. We intend to continue to invest as long as demand justifies. We ask the Board not to limit the pricing flexibility for us to do that.

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

MR. WEICHER: I will stop.

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

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

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

Mr. Hemmer.

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

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

What a delight we are here. What a delight that we are having this conversation. America recognizes that it needs railroads. We are here really because of the fact that the need for railroad service has expanded and is projected to continue to expand in a secular increase.
It's true that in the short run there is a softness in the economy right now and that has given us a little bit of breathing room but we hope the economy will recover and when it does, we expect the demand to continue to grow and to put pressure on our investment.

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

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

Since then we have been a good deal more careful and thoughtful and disciplined about the way we manage our capacity. We have tried to forecast with our customers as well as possible what future demand will be and how we can meet
it. We have developed a substantial number of new operating techniques to maximize the efficiency of our service and the quality of the service.

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

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

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

Down in Texas we are investing for
removal of bottlenecks that could affect our chemical transportation. Of course we are investing in our Sunset Corridor where we are adding double track between El Paso and Los Angeles.

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

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

Whether or not anybody will be prepared to admit it today, in many of our meetings with customers in that area they are reflecting that level of service. Our commitment
is to try to continue to maintain it by matching
capacity with the volume that is coming at us.

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

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

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

There have been some comments about
the long embargo that Union Pacific adopted in the Powder River Basin. I think a lot of those comments are speculation and misleading. It is true that we had an embargo that began when the Powder River Basin literally melted down during some weather conditions.

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

We put on an embargo to avoid taking on business that we could not handle. We treated the customers who paid low rates the same as the customers who paid high rates. We treated the customers who had contracts the same as the customers who were using tariffs. That was what
believed was our reasonable obligation to discharge our duties to our customers.

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

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

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

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

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

It is important to understand the difference between putting a new shipper adjacent to one of branch lines in Iowa and putting that
same shipper next to our quadruple track mainline
west of North Platte where we are running a train
every six minutes and also trying to maintain the
track. One of those isn't going to have serious
adverse effects. The other one could be
catastrophic.

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

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

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

Thank you very much for listening to
my comments.

CHAIRMAN NOTTINGHAM: Thank you, Mr.
Hemmer.

We will now hear from Mr. David C. Reeves from the Kansas City Southern Railway Company.

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

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

MR. REEVES: All right. Is that better?

COMMISSIONER BUTTREY: Much better.

Thank you.

MR. REEVES: All right. Thank you.

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

MR. REEVES: I'm pleased to be able to offer these comments on behalf of the Kansas City Southern Railway Company. KCSR welcomes this hearing and the Board's examination of the meaning of the common carrier obligation in today's environment.
KCSR strongly believes, however, that
the Board should avoid any pronouncement of a
one-size-fits-all standard for what is and isn't
a railroad's common carrier obligation and should
continue its policy of considering these matters
on a case-by-case basis.

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

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

Another way to look at this issue is
to ask whether a carrier can tailor its network
and operations to maximize the efficiency of its
rail network for the vast majority of the
shippers that it serves or instead must be subject to deploying its assets and changing its network solely to accommodate random request for service regardless of the impacts of those requests on the overall shipper community that the railroad serves.

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

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

The KCS 2008 capital expenditure program represents approximately 28 percent of KCS’ expected revenues. Over the next five years KCS' capital spending is projected to average approximately 20 percent of its revenues. This
compares to capital spending of about 3 percent by an average U.S. manufacturer.

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

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

Thus, railroads must plan their capital spending and design their service plan to
meet the needs of those shippers who are most using the system even if this means an individual shipper may not always be able to obtain the level or type of service that it desires.

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

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

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

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

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

In fact, some parties in this proceeding will try to use the informal nature of this hearing to air their specific service or
rate complaints rather than to file specific complaints or to follow the Board's statutory, regulatory, and evidentiary processes or to use the informal program that Mr. Hemmer referred to. It is neither possible nor appropriate to try to refute the specific allegations in all comments of this proceeding.

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

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

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

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

KCSR, therefore, supports the industry's efforts to establish new standards for tank cars carrying TIH, to cooperate with communities that are developing and evaluating emergency response plans, providing training to emergency responders, and to improve necessary
information flow.

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

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

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

What constitutes a reasonable request for service is, in the first instance, a matter
for business resolution by the involved companies
and, if that fails, a matter of case-by-case
analysis by the Board. Again, the Board should
avoid the temptation in this proceeding to
announce a one-size-fits-all formula about what
is a reasonable request.

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

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

Just to get this out of the way and
seque away from the earlier panels, which were
very helpful, into this panel next, it occurs to
me, Mr. Hemmer, that your railroad, Union
Pacific's name was mentioned a couple times in
earlier panels in discussion of the CORP embargo
controversy in Oregon. Help me understand, and
in case you weren't here for all of it, the
suggestion was made that CORP somehow believes
that the Union Pacific is responsible, or should
be responsible, for a financial commitment to
reopening and maintaining the line to Coos Bay, Oregon. Is that a line that the Union Pacific Company is a part owner of or has any legal responsibility for?

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

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

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

CHAIRMAN NOTTINGHAM: Wouldn't you have some explaining to do to your shareholders if you were to develop that kind of a policy?
MR. HEMMER: I think it would be difficult for us to explain that, particularly if we believe, as is the case here, that there is little prospect that we could earn any return on that investment.

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

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

CHAIRMAN NOTTINGHAM: Thanks. I promise not to turn this into a hearing. I've only got one controversy but since your railroad's name was invoked, I wanted to make sure we cleared that up on the record. Thank you.
I would like to talk about the hazmat issue, the toxic inhalant risk management issues that all railroads face, the attended insurance cost, the tort liability exposure. This issue comes up in much of the testimony that we will be hearing today and tomorrow and I wanted to make sure that we've got a couple of the biggest railroads right before us now along with Kansas City Southern. Not the biggest but also Class I.

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

If you were hypothetically to have an accident on any one of your rail lines where either because a motor vehicle crossed the path of a train and under this hypothetical all safety and DOT and FRA and other regulations were abided by and followed and you were using the right cars that met standards but there was tragically an
accident, it could have been because of a landslide, could have been because of a vehicle crossing onto your track, whatever the cause, and depending on the location tort liability seems to me is administered and applied somewhat differently depending on what state or local the accident might happen.

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

MR. HEMMER: If my colleagues will allow me since we carry more of this stuff than anybody else, I'll offer a few comments. First, you are absolutely right that there are some accidents that we cannot avoid. In 2008 so far
this year, and this is a little bit unusual, but we are running at a rate of 30 percent of our vehicle/train accidents being instances where somebody runs into the side of our train.

It's a little hard for me to know how much we can do to prevent that sort of thing. That is an example of the kind of incident that you are talking about. What we are all worried about here, of course, is that out beyond the range which we realistically can get liability insurance that there is that nightmare scenario. It hasn't happened yet.

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

Second, we have the terrorist threat that didn't previously exist until September 11.
Third, we are looking at a very wide range of new FEMSA, DOT and DHS requirements, some of which we don't know how we are going to meet, that will could disrupt networks, could increase cost. Those are all major factors for us.

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

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

All of that said, we agree with the AAR that this is a topic that deserves much more
extensive and separate investigation than can be
accomplished here with it being one of a half
dozens or a dozen topics. That is why we think it
would be appropriate for the Board to look at
those changes in the environment, to look at the
extent to which product substitution is real or
ephemeral, to look at whether we can realign
incentives associated with risk in some way that
is a little more equitable than "it's just your
problem" approach.

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

CHAIRMAN NOTTINGHAM: That was a very
helpful answer, Mr. Hemmer but, Mr. Weicher, if
you could also add just a little bit of context
to the part of my question about could you still
face -- I think Mr. Hemmer touched on this but
you could possibly still face enormous liability
even without any violation of established safety
standard. Is that fair to say?

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

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

We believe there are serious public policy issues here. We run a very safe railroad. We are the safest way in many instances to handle these commodities. There is a wealth of regulations coming. It is a very serious topic
that the railroad -- excuse me, the consumers and producers, as well as the railroad industry of these commodities need to address, to manage these risks and not leave them on the railroad.

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

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

Insurance companies often point to their concerns about this very topic. They are being asked to basically become your partner in covering sort of unpredictable and unlimited perhaps liability exposure. How do you handle those costs? You are all sharp businesses and I
can only assume you need to recapture those costs as you need to all your costs.

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

MR. REEVES: In general I would say that some component of those costs is probably allocated throughout the network. Some portion of it may be allocated more towards the particular traffic involved in determining the cost for the particular movement which is part of the calculation of the prices. Some portion of the cost bleeds over into all of the traffic.
MR. HEMMER: We believe that about half of our excess insurance cost is attributable to these types of shipments. I don't look in stripes so I'm not going to talk more about how we price. I would point out with all due respect, though, that a simplified stand-alone method that you have developed does not appear to allow us to allocate those costs to the shipments that cause them.

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

The scenario, though, in which there is a major derailment, a major chlorine or anhydrous incident in a major populated area there is no insurance to cover that. Stockholder equity would be wiped out. The company would probably be in a prolonged period of bankruptcy
if something like that happened where all of this investment I have described would probably be put on hold. That is the kind of situation we are worried about.

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

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

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

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

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

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

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

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

CHAIRMAN NOTTINGHAM: Vice Chairman Mulvey.

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

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

I would hope that you take that back and look into that matter because we have been having more of a problem lately with your railroad than with the other railroads and that
hasn't been true in the past. I hope you will
take that to heart.

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

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

MR. WEICHER: We have the
responsibility to work with the capacity we have
at a given time. I should say at various times
in some areas right now we might not be as
constrained in capacity as we wish we would be
but that in light of current economic terms.
We have the responsibility to grow capacity from the standpoint of our shareholders and our company and our customers when the return is justified. We do have a responsibility I would say from the standpoint of the common carrier law to act reasonably in allocating or cuing or whatever the issue might be in a given situation in the commodity we were talking about by definition as the managers of the property.

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

VICE CHAIRMAN MULVEY: It's been argued that a railroad sometimes cannot service new customers because it serves existing
customers. Serving a new customer might affect
the overall service systemwide and networkwide.

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

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

There can be situations where someone
is asking for a kind of service and the kind of
hypothetical you can talk about if someone wanted
to connect with our transcontinental main line, high volume, and set something up where they wanted to come out on the line and switch cars or have us do a function that could not be supported without serious impact on other shippers.

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

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

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

There has been a lot of debate in the filings that have been made here. It's an
interesting and important debate about the extent to which a railroad can ask a shipper to provide infrastructure that on a very busy mainline supports the service to that shipper. You may not like the Easter Sunday example but there are many others.

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

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

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

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

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

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

MR. HEMMER: We think that the AAR circular contemplates an ability to serve a customer for reasons beyond our control. We have had a number of instances, this is the principal use of some of these smaller embargoes, where there are simply too many cars coming at the customer at one time.
I used an example in our testimony of an ethanol receiver in Texas that simply said, "We can't control this." So we had an extended embargo for that receiver and we weren't refusing to accept shipments. We were permitting them in. We finally now reached a sufficient capacity situation on the shipper's facility there where that embargo is no longer necessary.

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

There were just too many cars coming in so we couldn't meet our obligation to the recipients of those shipments or to recipients of other shipments such as our auto customers unless we did something to stem the flow. We aren't stripping -- under our approach we aren't stripping down our yards where we say we will not allow a single car to be stored there.
We understand there is some bunching that takes place. We are responsible for that. What we have tried to do is compromise at about three days worth of business in our yards and that's really our objective right now.

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

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

VICE CHAIRMAN MULVEY: Thank you.

Mr. Reeves, you mentioned in your testimony that the URCS does not incorporate the fully allocated cost of transporting TIH materials. I would like to explore now a little bit with you more.
As I understand it, all railroad costs, including the cost of handling TIH chemicals are captured in the uniform system of accounts.

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

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

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

MR. REEVES: I can't profess to be an expert with URCS. I apologize.
VICE CHAIRMAN MULVEY: The other question I did have about URCS is URCS is thought to be problematic for many, many reasons and it's been around for quite some time and it's based upon econometric analyses and modeling that was done many, many years ago with old data.

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

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

We performed a bit of a fix for TOFC traffic. That helped some. There are some other allocation issues and one ancient one in particular which is the treatment of essentially land cost and right-of-way cost that I think need
to be revisited. Speaking only for Union Pacific we would be willing to join with you in pursuing that initiative if the Board wanted to do it.

VICE CHAIRMAN MULVEY: Thank you.

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

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

VICE CHAIRMAN MULVEY: I recognize it's daunting and it would be very, very costly as well and it would put a lot of demands on the Board's resources. It might even need more resources. I do think having good data and good
information and good models are critical to doing our job correctly. It has been a long time since this has been reviewed in total and I think it's time to do it. My other Board members may not agree with me.

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

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

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

CHAIRMAN NOTTINGHAM: Okay. Jumping back to the risk management discussion we had a few minutes ago triggered primarily by your
required handling of toxic inhalants and hazardous materials and the liability of exposure attended to that. Is this liability exposure something that has grown to the extent that the railroads need to actually and do you report them in various filings like Securities and Exchange Commission filings?

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

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

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

CHAIRMAN NOTTINGHAM: Mr. Reeves.
MR. REEVES: I'm not certain whether that's in there or not. I would believe it would be but I don't know.

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

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

Apparently the Kansas City Southern in an effort to promote the use of the internet by customers to check on the status of train movements and car availability and car location has an interesting incentives policy now whereby if shippers choose to call the old fashioned way, pick up a telephone and call someone at the KCS
to ask, "Hey, what is the status of my shipment? It was supposed to be here yesterday. I need to know where it is," that there is a $25 fee levied on the shipper in those cases. Is that something you are familiar with?

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

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

Just to me you deserve credit for trying to promote e-commerce and getting folks to use the internet but I would like to suggest from a public relations perspective and a customer relations perspective it is a really questionable approach because it sends the message that, "Don't bother us, customers. If you do, we are
going to charge you a $25 fee."

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

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

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

When I asked about that, the railroad -- the way it was recounted to me by shippers is the railroad employees never ever mention the common carrier obligation. Never say, "Of course
we have an obligation to serve you upon reasonable request but here is why it's complicated and here is why it might be awfully expensive for us to meet your needs." Sometimes it's just "no."

If you could take that home to headquarters, talk to your HR people and your training people and your marketing people that it sends a terrible message. People call the Board and they say, "I just got told heck no."

It leaves the impression that not enough railroad employees actually know there is such a thing as a common carrier obligation. It's almost to me, maybe I'm old fashioned, but I sort of think it should be somehow in or close to the mission statement that every new employee gets briefed on and understands to be sensitive to.

MR. HEMMER: I've had two comments today that suggest that we may need to take a close look at what we do. What we have attempted to do is set up a process by which requests for
new service are reviewed including by counsel who are familiar with the common carrier obligation. I'll take a good look at that process and see if we've got some shortcomings in it.

CHAIRMAN NOTTINGHAM: Thanks. My last question really is -- I appreciate everyone's patience. There is much in the record from different statements that were filed for today about the question as to whether the STB has really anything to do with looking at, possibly adjusting, possibly changing the way the very broadly worded common carrier obligation is spelled out in the statute.

Can we actually through rulemakings, regulations, through the work we do actually change the way the Common Carrier obligation impacts certain shippers, certain types of shippers? I'm thinking, for example, exempt commodity process. You all are very keen observers on the Board, pretty experienced with our procedures.

Do you have an opinion as to whether
the Board under certain circumstance can actually make meaningful adjustments to the way the common carrier obligation is actually implemented and to whom it applies?

MR. WEICHER: Short answer, yes. Clearly it's within the Board's jurisdiction to define the term reasonable request, reasonable demand and so forth. This Board or its predecessors granted the exemptions or enacted the exemptions and various commodities more broadly.

These are carefully structured and there is a lot of industry that relies on what is out there but it's within your jurisdiction. If the exemption on widgets and 49 CFR something didn't make sense, I believe you have the jurisdiction to revise that. By the same token on the regulated commodities, just as you have done including with things and programs my companies had, you are the definer of what is a reasonable response to a common carrier request.

MR. HEMMER: I agree that although
you don't change the underlying law, the law
calls on your to take into account what is
reasonable and that, in turn, depends on a
totality of circumstances. What was reasonable
in 1983 with a shrinking railroad industry ought
to be wisely viewed as quite different from what
is reasonable under very different circumstances
in 2010.

With respect to exemptions, I would
also point that that individual shippers are free
to come to you with a request to revoke an
exemption. FMC did that successfully in a case
that we litigated. That opportunity is always
out there.

CHAIRMAN NOTTINGHAM: Mr. Reeves,
anymore thoughts on that?

MR. REEVES: As suggested in my
prepared remarks, we understand that you will
interpret how that obligation applies in various
circumstances but encourage you to do it in
particular facts and cases rather than by a
general pronouncement.
CHAIRMAN NOTTINGHAM: It's a matter of record that the Board and the ICC before us have made over 100 exemption decisions, some at the behest of the industry and some on the Board's own motion.

That precedent is alive and well out there and I just raise it because there are some that in their statements have indicated only Congress has the authority to make meaningful adjustments to how the common carrier obligation is implemented. I think it's important to get the facts down. Thank you.

Any other questions from my colleagues?

VICE CHAIRMAN MULVEY: I just have one. The Price Anderson law with regard to nuclear materials has been raised. Do you support some sort of Price Anderson legislation for hazmats for the railroads and would the railroads be willing to contribute to that fund?

I don't believe that under Price
Anderson the railroads contribute to the liability fund. Or would you prefer something like the Warsaw Convention amended by the Montreal Protocol which would give you a cap on liability?

MR. HEMMER: If I had my choice I would prefer a cap on liability. I have a sense that there are trial lawyers in America who might not react very well to that.

VICE CHAIRMAN MULVEY: I'm not a lawyer but my colleagues might.

MR. HEMMER: The Price Anderson model is an appealing one to us and it seems to me to have some value in this context.

MR. WEICHER: I don't disagree. I'm not sure I would be prepared to parse the different proposals so much as that something along the model of that kind of structure that deals with public risk as a public issue would certainly be something appropriate.

VICE CHAIRMAN MULVEY: Mr. Reeves.

MR. REEVES: The unlimited liability
is the big issue that could potentially ruin us. It's difficult to calculate liability. Either of those would to some extent address the liability cap more directly.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOTTINGHAM: I think it's a very good question, Vice Chairman Mulvey. Thanks for raising it. I just would say that something has got to change. The status quo seems to be unacceptable. We are just waiting for -- we hope it's a long time from now but accidents happen when you have a system across the country that operates 365 days a year night and day in all kinds of weather.

It's just crying out for attention and action so we encourage all of the stakeholders, not just railroads, to get together and develop solutions or else you are going to have others trying to develop them for you that might not work as well. We talk a lot in this town about the challenges in the healthcare sector for example.
It's a huge challenge and the liability problems that disincentivize physicians from practicing in certain states or in certain lines of the medical practice that are particularly subject to massive tort liability and then trigger these enormous insurance premiums to doctors.

Doctors compared to railroads seem to have it pretty good and I'm very sympathetic with doctors. Doctors have a terrible situation. Their terrible situation seems to be terrific compared to the railroads. They can actually choose to move from across to, say, D.C. to Virginia where the result might be a lower insurance premium in many cases.

It's not always convenient and I feel for them. They can adjust their practice and not offer certain types of procedures or a certain type of specialty. Railroads have none of that luxury. You have to be there to handle whatever folks want to stick you with. It is just an enormous public policy problem.
You don't hear about it as much as perhaps the healthcare predicament which is very serious but, in many respects, it's much more serious and much more threatening to our economy and to everyone who relies on rail transportation.

I would welcome any parting comments on that. If not, we'll move on.

MR. WEICHER: I appreciate your interest in these very serious topics and bringing them to the fore. Thank you.

MR. HEMMER: That is the one that keeps me awake at night so thank you.

CHAIRMAN NOTTINGHAM: Thank you, panel. We will now call up Panel III from the State of Washington. We'll take a couple moments as they get up here for Board members and anyone else to stretch their legs. We will keep this moving along because we do have a full day today.

I'll bring forward Mr. Scott Witt, the Director of State Rail and Marine Programs at
Washington State DOT and Roger Johnson, President of the National Association of State Departments of Agriculture. We'll let them get settled and then we'll start off with the panel momentarily.

If I could ask the audience to take your seat or else step out into the back corridor if you need to but we are going to start with our next panel.

Welcome, Mr. Witt and Mr. Johnson. We are glad you could be with us today. You have each been given 15 minutes. Feel free to use as much or as little time of that. We have read your complete statements and look forward to hearing your summary today.

I will start with Mr. Witt.

MR. WITT: Okay. Officially it's afternoon. Good afternoon, Chairman Nottingham and Vice Chairman Mulvey and Commissioner Buttrey. My name is Scott Witt for the record. I'm the State and Rail Marine Director for Washington State Department of Transportation. I want to thank you for this opportunity to submit
testimony on behalf of the shippers of Washington
and the DOT.

The Department and the State, I will
say in follow-up to the Burlington and Northern
UP, have very good working relationships with
both our Class I carriers and enjoy opportunities
for leveraging infrastructure investments between
the two of us.

We work very heavily on both rail and
highway related construction projects as the
state requires and the system requires leverage
investments for both public and private good.

One thing I would like to mention is
that the testimony that was put together in the
written format was rather unique in, at least,
our position. That was created as a result of
polling many of our shippers after the
announcement came out and meeting with a broad
range of shippers and/or receivers including
ports, agriculture, chemicals, lumber, and
industrial.

This information was coming in until
the last minute as we formulated our comments to you. It also spans the spectrum as to position as you can well imagine. The written testimony I submitted was largely a compilation of edited comments and ideas that perhaps should be considered by the Board.

Under the Abandonment heading does the Department necessarily believe a 25-year hold on abandonment is practical as in some other countries? In a word "no." We felt it important to T up these comments for you so that we can -- I will address those additionally under the abandonment portion of my presentation to show a degree of concern of what we believe to be a previously uninvolved constituency.

I will attempt to summarize or, in some cases, simplify the points in the written testimony giving context to my comments. By doing so I will be basically giving you a picture of how Washington State used the infrastructure, some of the constraints, some of the capacity so if you'll give me a little latitude here, it's
going to be more of a story with everything kind
of twisted into it.

The goal of Washington State's
freight system's strategic plan is to support
broad industry sectors. We classify it as three.
(1) The Global Gateways, which includes our
container ports and international and national
trade, flows through Washington through the
gateways in Chicago and east.

(2) Our Made in Washington which is
our regional economies that rely on freight
systems and, as was mentioned earlier, another
earlier by another Class I, some of our shuttle-
loading grain facilities, etc.

(3) Our delivering goods to you which
is the third segment which is primarily our
retail and wholesale distribution systems.

I know you may have to squint a
little on this one but this is our state rail map
illustrating our three east/west mainlines across
the state routes and the main or south route
along the Interstate 5 corridor.
Washington's Class I carriers include the BN and the UP and we have 22 short line railroads in the state. This is one component of our multimodal transportation along with the roads, ocean, pipeline, and air systems.

I would also like to note that as early as last year the State of Washington is now the owner of a short line rail system in the acquisition of the Palouse City lines in the eastern part of the state of 308 miles. Last year I had the opportunity to attend your hearings on infrastructure with Dan O'Neill as I was running his state rail study for him and the Transportation Commission.

This is one of the slides from that as a result of that study illustrating that, in our opinion, because Washington State is a smaller player in the national scheme of railroad business, investments in our state can be slower in coming than elsewhere. It is probably difficult to read but the red line indicates congestion, the yellow lines indicate
constrained, and the green lines are reliable.

Needless to say you see more red and yellow than green.

Probably one of the most important investments as far as capacity is concerned would be the crowning of Stampede Pass which would allow double-stacked container traffic to move east/west as opposed to using the Vancouver to Pasco line in the south.

BNSF and the state have worked towards that end with a memorandum of understanding that could move the project forward if and when the state is able to secure a funding source. The I-5 corridor line owned by the BNSF is the backbone of the Washington State Rail System controlling access to east/west lines.

Most of the line is owned by the BN but they share operating rights over the line with Union Pacific in addition to Amtrak's intercity rail surfaces and the Sounder Commuter Rail operations. There are at least a half dozen sections that are chronic choke points causing
delays to ripple across the entire Washington network.

Some of the program WSDOT has taken on are two-fold. One is addressing capacity. We have a produce rail car program which started in 2003 of 23 refrigerated rail cars to supplement shipments for small shipper availability. It is an ongoing program and we have the option to augment that program by another 40 to 50 cars if need be.

The second one is the Washington Grain Train as you can see illustrated below. There are 89 total cars in that pool and that is primarily focused on the shuttle programs with the Burlington Northern and Union Pacific Railroads basically shuttling either two barge facilities off of short lines or interchanging two large facilities for grain.

Can Washington State successfully adapt to changes in a national freight system, ideally roads? Many of our low-volume shippers are going to have to truck their products to
central intermodal centers. Timber, grain, and
industrial products are heavy and Washington
State roads will need upgrades to handle the new
traffic patterns.

Some shippers, most high-volume
shippers, are adapting on their own but low-
volume shippers will need help making the
transition to BNSF and UP Railroads new shipment
requirements.

And then there's our short lines. An
opportunity exist for short line railroads to
build trains for the BN and UP but if they don't
have the high volume customers and do have
defered maintenance track, they won't survive
without ongoing capital and operational
subsidies.

I would like to speak a little bit
about the railroad infrastructure projects in
Washington. WSDOT will invest over $350 million
between 2007 and 2017 to relieve bottlenecks and
chokepoints, increase system capacity and
preserve and maintain rail lines.
At this point I also would like to note that the lack of an overall federal railroad infrastructure strategy in place concerns our department. With major infrastructure needs coming to the forefront of all transportation modes, carriers, shippers, and the state can only fund a fine item out of the needs.

While the requirements for infrastructure investment may have traditionally been with the carriers, the cost has been partially shifted to both shippers and the public. In some instances only a relative small amount and others a larger amount.

How does the State of Washington fund our rail projects? Gas tax receipts cannot be spent on rail projects. It’s part of our regulations. Rental car taxes, taxes on the sale of new and used vehicles, vehicle weight taxes, and some federal earmarks.

This map illustrates the passenger and freight rail projects and where specifically they sit within the state between 2007 and 2017.
There are a number of projects. The lighter colored ones are primarily passenger related.

I will have a slide here coming up on our Amtrak Cascade service. Also the black ones are primarily freight driven although you will see like in the Vancouver area that benefit both. They are actually combined multimodal improvements.

Some of the challenges faced on the Pacific Northwest rail corridor, it is a shared corridor. One of the issues we have, as well as our partners, is integrating operations with other rail users, operating plans, operating practices. We have an international border. We have freight trains inspections and we have passenger preclearance.

U.S. federal funding, a whopping $12 million in 12 years. The problems for British Columbia funding, eight years to fund one project. It allows the second train movement to Vancouver, B.C. for the Olympic Games. The Washington State and the initiative process; the
people giveth and the people taketh away.

Our Amtrak Cascades passenger service, the State of Washington owns three trains that are under the guise of Amtrak and being operated by Amtrak. Ridership in 2007 reached 677,000, a 7.4 percent increase over 2006.

I would also like to report in the first quarter of 2008 ridership was up 14 percent from 2007. Obviously high fuel prices, congestion, and a strong environmental concern are some of the drivers. We are looking to continue. We are working on the mid-range plan at this time to put our proposal forward to the legislature to possibly increase funding and add additional train sets.

Our investment constraints exist, political, financial, and economic. Washington State freight system's strategic plan must balance the cost of investments with resulting economic output. We have to direct limited resources to their most productive use and by
setting clear priorities linked to the growth of jobs in the state's economy.

Our issues and challenges. Non-gas tax transportation funds are in high demand right now as in most areas. Inflationary pressures are eroding the value of our existing project dollars as projects continue over multiple years or, as we call them, mega projects or five to seven years. With construction material cost going up as quickly as they are we quickly lose the ability to complete those projects on time and on budget. We have limited federal funding participation and then we have the issue of private revenue and private investment.

One of the comments we have is the demand for equipment and multiple use is going to the highest revenue for the carrier. Would any private sector entity not do the same? I most certainly shifted assets to where my company received the best return while I was in the private sector.

This tends to come out primarily in
car supply issues along with the transition to uni-train service to major Oregon destination points. We have worked closely with our Class I and short line carriers to, in effect, supplement those supplies with the state equipment.

This mode also changes the business model for the state and generally smaller industries with less productive lines being sold to short lines as in the case that we have purchased one. In many cases the issues that motivated the Class I's to sell the line to another carrier may, in fact, haunt the new short line carrier also.

Primarily deferred maintenance of the infrastructure in low-volume shipments on the line if new marketing or service accommodations can't revitalize it. We have obviously seen that illustrated earlier.

Ultimately local economies may change dramatically as the business may be required to relocate for rail service or perhaps start trucking the product, if applicable, therefore
changing the wear and tear on the road system, both county and state.

The issue of abandonment. Obviously there is an STB process in place. Thank you for that. The Washington State Legislature in our last session actually introduced legislation to request the Washington State DOT to further enhance that process by stakeholder outreach, communication education, etc., and review on a local government entity of any pending abandonments.

We did testify, quite honestly, against that as it was within the STB's purview. There was an established process. But what it did tell us is that the local government entities are taking a much stronger role in worrying about abandonments for future infrastructure, for future corridors, and for passenger.

We would suggest perhaps we relook at education outreach, some communication processes on more local levels if, in fact, there is going to be a pending abandonment, and I think a
realization of the importance of abandonment to
the local economies, perceived or otherwise
because there are times, as we are finding out,
that some of the local government entities, port
districts, counties, etc., are willing to come
and invest in that.

The common carrier obligation, I'll
just leave it in my testimony that has been
answered by many, many folks here and will
continue to be so.

My last point is on the Toxic
Inhalation Hazards. Obviously the State of
Washington has a very strong agricultural economy
that is very dependant on anhydrous ammonia and
manufacturing involved with the chlorine.
Obviously there are folks here that are very well
versed in this subject and you will be hearing
testimony later but we did want to make it as a
comment to get it on the record.

In closing, we would like to say it
will take all the parties working together in a
systematic approach to deal with all the issues
that are being brought together on common carrier obligation and how to move the national need for a comprehensive rail, both freight and passenger, strategic policy and direction in place for national guidance.

I wish to conclude my testimony by again thanking the Board for the opportunity to testify in this significant proceeding and expressing our hope that the comments submitted by all parties will assist the Board. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Witt.

Mr. Johnson.

MR. JOHNSON: Thank you, Mr. Chairman and members of the Board for this opportunity to testify. A special thanks to you, Chairman Nottingham, for your visit to North Dakota recently and your outreach to a number of the folks that are impacted by many of these issues.

For the record, my name is Roger Johnson. I serve as the Commissioner of Agriculture in the State of North Dakota. I am
also currently serving as the President of the National Association of State Departments of Agriculture which are the elected and appointed commissioners, secretaries, and directors of agriculture from around the country.

As you can imagine, rail service is a huge issue for me and for all of my counterparts. Much of the testimony here is devoted to sort of historic kinds of issues so, with your permission, I am going to skip through some of this fairly quickly and get to the last part where I've got some more specific and more recent issues that may be of interest to you.

As a national organization we have a lot of interest in this. Obviously real transportation is essential to the industry of agriculture. There are lots of issues that you have already talked about. On page 2 of my testimony I summarize some of the positions that NASDA has taken over the years.

I would highlight that our most recent position is that Congress and the federal
government should substantially increase oversight of the railroads including rates and services where competition is not present.

I know that is not the first time you've heard that suggestion. It is the first time, though, that we have spent as much time talking about it as an organization largely, I think, as a result of the enormity of the concentration in the industry that has happened in recent years and some of the issues that have resulted from that.

Obviously with the deregulation of the rail industry over the last couple of decades it has lead to significant financial stability for the railroads certainly compared to the past. It has also led to fairly substantial consolidation and to a decrease in the physical infrastructure of the railroads in terms of the need that is out there that is currently expressed.

I give a lot of data from the recent GAO study that was done which I am sure you have
seen so I am going to kind of quickly skip through that but it certainly does make the point that I just asserted about income for the railroads with the chart on page 3. Both general rates, rates for grain, rates for captive shippers, field surcharges, and line abandonment are all seriously impacting the agricultural industry. Each of those are discussed in turn.

Let me turn to page 5 where we talk a bit about captive rates because that seems to be one that gets a lot more attention. Captive shippers have been and continue to be victimized in our judgment by extremely high rates. In fact, the GAO study puts several statistics to that assertion. Agricultural commodities are at the mercy of potential, if not apparent, monopolistic practices by the railroads.

Since 1985 tonnage from traffic traveling at rates substantially over the threshold, the 180 percent threshold for rate relief, has in fact increased. In addition, tonnage traveling at rates greater than the 300
percent of variable cost threshold has more than doubled.

On page 7 I give more detail to that but I do want to draw your attention to the bottom of that page where I talk about the recent acts that Congress has passed which have encouraged competition as the preferred method to protect shippers from unreasonable rates and granted the STB broad legislative authority to monitor the performance of the railroad industry.

However, the GAO reports that these processes have proven to be largely inaccessible because the standard process remains expensive, time consuming, and complex and the simplified process has simply not yet been used. That is obviously just a little bit dated but it is certainly the feeling that is out there.

I talk about field surcharges and cost shifts in the subsequent pages of my testimony. On page 11 I get to the intermodal shipping. One of the reasons I skipped over some of those other issues as quickly as I did is
because I know that panelists, in fact on the very next panel, are going to go into more detail on each of those issues.

So far I have not heard a lot of discussion about the intermodal shipping kinds of issues. In agriculture one of the things that is happening over time is customers are becoming more attuned to very specific kinds of goods and services. Instead of the commodity movement, in fact, in North Dakota we lead the nation in the production of about 15 different commodities.

Many of these don't fit very well into the bulk movement category. In addition, some of the bulk movement categories, the large commodities, soy beans is a good example, also have very specific identity preserved markets around the world that require them to be segregated and moved to containers. That is becoming a larger and larger issue not only in my state but around the country for those reasons.

Attached to my testimony is a letter dated January of this year that was sent to
Senator Dorgan from North Dakota from one of the intermodal shippers in North Dakota. I present that as part of my testimony because I think it explains in his voice what is happening to many of the intermodal shippers in that part of the state. It certainly is not limited to just him.

If you read that letter, there are several issues that will really sort of leap out at you. First of all, with intermodal shipments that move overseas, there is very much a lack of transparency in the rates. These shippers don't negotiate with the railroads and negotiate with the steamship lines so the rates are combined and are harder to see.

You will see that the result of that is the second major point he makes is that we see some irrational kinds of pricing arrangements and he points out how he is located very near to a particular terminal, Dilworth, which is where much of this industry is located close to.

But, yet, they are routinely draying cars from terminals that are about 300 miles away
in both directions because the prices offered in the closest terminal are so much out of whack that it makes sense to go and dray from Minneapolis.

In fact, they are even considering going as far as Chicago and pulling these empty containers in order to load them and put them back on the railroad and either send them back through Chicago or send them out to the West Coast.

It's not unlike the issue that was very prominent a couple of years ago with the inverse pricing relationship on bulk car shipments of grain through our state. I know you all know a lot about that but it's the same sort of thing.

What really puts salt in the wound is he also describes the fact that until very recently as many as 200 empty containers were moving daily through the closest Dilworth facility and they still had to go 300 miles away to get empty containers and, in fact, to pull the
loaded ones back there as well.

In an attempt to remedy this issue a lot of people got involved as you might imagine. Senator Dorgan got involved, the State of North Dakota got involved, and in cooperation with cities in Minot and Fargo actually entered into a contractual agreement with a national firm.

Wilbur Smith was hired to mitigate these costs in favor of the feasibility of a new concept that would improve statewide access and service to container equipment and improve freight rates from the region. This idea, in fact, was suggested by BNSF, he goes on to say, and everyone was in agreement that this made a whole lot of sense. But this effort was unsuccessful.

In fact, BNSF even clearly informed this national firm, Wilbur Smith, that BNSF would not permit new intermodal service to divert business from current operating hopper car services and would use price as a mechanism to prevent this from happening.
I would seem to suggest from the facts in this case that is precisely what has been happening and what is likely to continue to happen. As a result of this letter and Senator Dorgan's intervention, BNSF and this shipper met and pursuant to that BNSF, in fact, publicly announced the rate equalization to provide relief. However, when the rate equalization announcement was made, it pertained only to bulk grains, not to identity preserved commodities in containers.

I would argue that these practices are contrary to the statutory requirements dealing with -- that require carriers to provide service upon reasonable request and that railroads shall furnish safe and adequate car service and establish, observe, and enforce reasonable rates in practices on car service.

These issues I provide to you not so much because I'm here to say what the solution is but to point out to you that here is a problem, that you have to figure out how you deal with it.
I would suggest, as my fellow Ag commissioners, secretaries, and directors have suggested, that in the absence of competition, and more and more competition, at least in my state, is absent in the railroad industry, that in the absence of that competition there needs to be some sort of regulatory oversight to provide some sort of fairness in how these issues are dealt with.

Obviously we would prefer that the industry would take their common carrier obligations seriously by doing the right things. I think the evidence that I have just described here would suggest that has not happened. Your notice states that a railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable.

The issues of rates and service really cannot be separated. Service offered at prohibitive rates and uneconomic rates is simply no service. It simply is no service.
Concentration in the freight rail industry has led to monopolistic practices by carriers. The question is what is going to be done to bring this industry under control for the public good. Of course, that is the purpose of this hearing.

In the interest of time, Mr. Chairman, members of the Commission, I would be pleased to stand for questions. Thank you again for this opportunity.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Johnson and Mr. Witt. Appreciate your remarks. Mr. Johnson, I really did enjoy the time we spent together in your great State of North Dakota. It was a very informative trip. I learned a lot and met some very good people.

How are things going economically for North Dakota farmers this year?

MR. JOHNSON: Well, if you can make it rain, things would be really good. Obviously the prices in the last half a dozen months or so have been very strong for agriculture. I think the industry is making significant new
investments. What has happened underneath all of that, of course, is you've got enormous increases in cost of production.

Others, I'm sure, will testify to that. On top of that you have some problems with the future markets in terms of being able to actually lock in some of those prices. That is not under your jurisdiction but it is to suggest that there is an awful lot of heightened nervousness, I think, about how this year is going to play out.

On the good side we've got some pretty decent crop insurance coverage out there so if it doesn't rain, it looks to be a pretty good year for agriculture.

CHAIRMAN NOTTINGHAM: You mentioned the GAO study of 2006 and you did concede that it was a little bit dated. Thank you for doing that because I think I feel very strongly that it's dated. It was useful.

MR. JOHNSON: Sure.

CHAIRMAN NOTTINGHAM: GAO reports are
almost always useful. They are usually not initiated with the goal of confirming how well things are working. They are usually initiated because someone believes there is a real problem somewhere.

MR. JOHNSON: Of course.

CHAIRMAN NOTTINGHAM: The report, I can tell you, was one of the first -- I came to the Board in August of '06 and the GAO was finishing it up so you can be certain I spent a lot of attention reading the entire report and repeatedly meeting with GAO and commenting on the report actually.

I worked on the House of Government Reform Committee. I read a lot of GAO reports. That one if you read it in its entirety is pretty favorable commentary on overall the STB's stewardship of the Staggers Act and the overall national picture of how rates have been handled by railroads over a period of years.

A lot of things are dated now. The market and the rail industry is changing fast as
you and your constituents know better than anyone. I just caution folks from picking out a piece of a study that might have been done a couple of years ago that used data that was even a couple more years old and then describing that or even intimating that's an accurate reflection today.

This Board we have completely changed our dispute resolution procedures across the board. We now have three pending small rate case complaints pending that are scheduled for decision in early July. We are open for business and expecting a lot more. You compare that to a period of years where there were none.

We now have three already and the new system is in its first year of operation. Really the landscape has greatly changed. I encourage all witnesses that history is important but I'm an amateur historian myself.

It's almost like a picture of the State of the Union address that President Lincoln would have given in 1864 and compare that to what
his successor might have delivered in 1966. Something big happened in between there. A war ended so we have to be very careful picking our time frames and let's focus on what is going on with the Board now if we can.

MR. JOHNSON: Mr. Chairman, I certainly agree with what you said. I am hopeful that the processes that you described are going to be more useful. I think what we all know is history. We don't know what tomorrow is going to bring or next year or the year after so we do have to look at history.

It is for that very reason that I focused more of my comments on the very real container issue that I spent more of my time talking about today because it is -- it has been said that history often repeats itself.

As I read that letter, I couldn't help but think that it sounds a lot like a few years ago when we had farmers in Western North Dakota loading up their semi's and driving 150 to 200 miles east paralleling the railroad to
deliver to an elevator to put that grain in a box
car or a hopper car and run it right back across
the same road it traveled, if you will, about two
miles separated it, heading west because of the
inverse rate structure.

What I think is happening right now
with the particular case that I cited is
precisely that same thing only with containers
instead of bulk grain. Your point is well made
and that is why I didn't spend as much time
talking about the GAO report as I did about more
recent issues.

CHAIRMAN NOTTINGHAM: Thanks. We
want to hear about all those concerns. We do
have, as we mentioned, a very active rail
consumer assistance program which is a good
starting point. By the way, there is information
on that program, I'm told, in the back of the
room or perhaps in the corridor as you leave.

I do encourage everyone to pick up
that information. In addition to it being open
for business on small rate cases, which we've got
three of now, we have a pending case involving a paper barrier. Haven't had one of those in a long time. We have a pending case involving a fuel surcharge complaint. Haven't had one of those ever I don't think.

We totally reworked our cost of capital measure in a way that seems to have redowned to the benefit of shippers. That wasn't the goal we set out to do. We just wanted to make sure we had the right measurement and it looks like it has turned out that way. I mean, enormous changes.

Things that people when I came to the Board told me wouldn't happen, never had happened, probably couldn't happen unless laws were changed by Congress. We are going to continue moving forward in that vein and I appreciate your comments.

Mr. Mulvey.

VICE CHAIRMAN MULVEY: Yes. As somebody who directed and wrote about a hundred GAO reports, GAO very often does present history
and all GAO reports are the same title. Basically it's whatever it is progress made and more is needed. I think as the Chairman points out we have made significant progress in the last few years from what GAO is reporting.

Mr. Witt, in your testimony you mentioned paper barriers. Could you comment on the problems or the importance of paper barriers in your state and how it affects you?

MR. WITT: Sure, Commissioner. Some of our short lines the state did purchase understanding that there were conditions when those short lines were originally spun off. We had an extreme measure, if you will. We had one of our trestles burn which, in essence, severed the lines.

We are looking at the possibility as the state in this case of reconnecting two lines, two that were formerly going by different class funds obviously. The current operators are asking questions of us which we are asking for clarification. Can they, in fact, interchange
with each other? Can they reconnect?

Currently some of them say no, we have to go through moving it two miles this way so the other guys can come. We are trying to look at it is there something that can be done.

It's more of a question can we do something to facilitate something without obviously negating contracts that were originally done for a purpose. That was the concern of the shippers there, these minor short lines trying to deal with multi-million dollar losses because of infrastructure.

VICE CHAIRMAN MULVEY: You mentioned this new state-run rail line, Palouse --

MR. WITT: Palouse City.

VICE CHAIRMAN MULVEY: Yes. I'm familiar with that area. How is that line doing? Is this requiring heavy subsidies and is the state happy with the performance so far?

MR. WITT: Well, No. 1, there is no subsidy. Part of the purchase, other than the purchase itself, there is a rehabilitation fund
that was set up originally as part of the purchase by the legislature. We have $8.6 million to put over those three lines. We have three separate operators.

One is operating each one differently. Each had a different goal for each line. I think it's fair to say they are all struggling to some degree. It is certainly helpful that the grain markets, as most of those are grain-centric, has picked up and done well as mentioned. Obviously there is a concern. There is always the dynamic.

We have the barge system, the river system there close, so you go rail or do you truck to the barge? The legislature in their wisdom has required the formation of an intergovernmental entity to in essence manage the railroads. The Department of Transportation does not manage the railroad.

I'll be very clear about that. The legislator was so we'll follow up on that. What we do is we administer the contract with the
operator. In this case we may be doing the rehabilitation at the request for the intergovernmental entity but it is really going to be in their hands as to how they operate it, does it continue to operate, can they make money. It's really up to the shippers and the operators in the local areas.

VICE CHAIRMAN MULVEY: Thank you. In your testimony you say that primarily you believe that, "The railroads have a duty to serve all who apply for their services and that the overriding definition of a common carrier today." Do you believe that the common carrier obligation, therefore, currently extends to exempt traffic?

MR. WITT: That has been the argument made to us by many of our shippers, obviously the grain side primarily. I'm not sure from our standpoint. We kind of put it forth as a compilation. The Department of Transportation doesn't necessarily take that view.

That really isn't our purview but we wanted to tee it up for you folks. I'm sure
you're going to get a lot more testimony along these lines both ways but it's a question. We really wanted to T up. I apologize if I was a little misleading with my testimony but we wanted to actually T up a bunch of the questions to say, "Look, this isn't in our purview but it's certainly people we serve in our states' concerns."

VICE CHAIRMAN MULVEY: I appreciate that.

Mr. Johnson, could you elaborate on your reference to a monthly rail shipper survey? Is that something that is already going on or is that something you're proposing and who would do it and how would it be distributed, etc.?

MR. JOHNSON: Direct me to the page would you?

VICE CHAIRMAN MULVEY: Page 2, I guess it is. You have several recommendations.

MR. JOHNSON: Oh, yes.

VICE CHAIRMAN MULVEY: Number 4 is the monthly rail shipper survey should be
published. You also mentioned about nonperformance arbitration of the National Grain Car Council. Again, I was wondering if that was patterned on something else?

MR. JOHNSON: These actually, Commissioner, are a number of policy recommendations that NASDA has made and the monthly rail shipper survey information, I think, was recommended in terms of pricing availability so that folks knew what the prices were.

In more detail, there were recommendations that there be availability from different interconnect from the start, the origin to the destination and any of the interconnect points along that rates be quoted. It was in that vein that was recommended.

VICE CHAIRMAN MULVEY: Probably related to the bottleneck rate problem, right?

MR. JOHNSON: Yes.

VICE CHAIRMAN MULVEY: Okay. One last question and that is you also mentioned about co-loading plans, the intermodal customers
to and from Dilworth. Could you explain what the co-loading is?

MR. JOHNSON: Co-loading was -- the idea was for there to be a cooperative approach between several different locations where they would load these facilities or load the cars and then they would enter the system as a unit then.

VICE CHAIRMAN MULVEY: I see. Thank you very much.

MR. JOHNSON: That was actually one of the things that was suggested by the railroad that the communities work together on.

VICE CHAIRMAN MULVEY: BNSF.

MR. JOHNSON: Yes.

CHAIRMAN NOTTINGHAM: Commissioner Buttrey.

COMMISSIONER BUTTREY: No questions.

CHAIRMAN NOTTINGHAM: Thank you, panel. We are happy to have you here today and safe travels as you head home. We just need to do a little housekeeping. I'll invite the next panel forward, please.
This would be John Cutler of the State of Montana, Terry Whiteside, Idaho Wheat Commission, Kendell Keith, National Grain and Feed, Steve Strege from the North Dakota Grain Dealers Association, Terry Voss, Ag Process, and John M. Frank of Frank Brothers.

This panel will need to bear with us. I would like to start this panel and get the first couple of statements in the record and then we will do a 30-minute lunch break shortly after 1:00.

Then we'll let the rest of the panel finish their statements partly because we are looking at the schedule for the rest of the afternoon and we need to try to get at least some of this panel going before we break for lunch.

This may well have the distinction of being our largest panel. Sometimes there is power in numbers. We are greatly anticipating your statements.

VICE CHAIRMAN MULVEY: Sometimes there is a correlation between quality and
quantity.

CHAIRMAN NOTTINGHAM: Again, please do try to keep within and special good things will happen especially if you can find a way to shorten your remarks. I can't say what that might be but maybe you'll get lunch quicker. That would be at least one thing. We look forward to your comments. We'll start with John Cutler representing the State of Montana.

MR. CUTLER: Thank you, Chairman Nottingham. I would also like to pass on the regrets of Attorney General McGrath and Montana Department of Transportation Director Lynch that they were not able to be here today. At the risk of getting a little bit into history here --

PARTICIPANT: The water levels must be good out there right now.

MR. CUTLER: Water level is good.

MR. WHITESIDE: On the plains, no, but in the mountains, yes.

MR. CUTLER: For the first 25 years after the Staggers Act the railroad industry's
rationale for minimal regulation and minimal competition was revenue inadequacy.

In rulemaking proceeding after rulemaking proceeding the tie breaker offered by the railroads was that the financial weakness of the railroad industry should not be jeopardized. This was also the rationale for requiring shippers to assume costs and burdens formerly borne by the railroads.

COMMISSIONER BUTTREY: Mr. Cutler, excuse me. I'm having a terrible time hearing you. I daresay the people in the back of the room can't hear you at all. Can you hear back there at all? I can't hear you. You have to speak directly into the mic.

MR. CUTLER: I'm sorry. The speaker must be right here. I hate to repeat but I will.

For the first 25 years after the Staggers Act the railroad industry's rationale for minimal regulation and minimal competition was revenue inadequacy. Is that better?
COMMISSIONER BUTTREY: Bring it up just a little.

MR. CUTLER: In rulemaking proceeding after rulemaking proceeding the tie breaker offered by the railroads was that the financial weakness -- the financial strength of the railroad industry should not be jeopardized and their financial weakness should be improved. This was also the rationale for requiring shippers to assume costs and burdens formerly borne by the railroads.

I started out as a transportation lawyer in 1976. I remember those days well. We won a few and we lost a few but I have to acknowledge that the bankruptcies of that era were real and that Congress did include in the Staggers Act along with protections for captive shippers the mandate that the ICC promote railroad revenue adequacy.

Today we don't hear so much about railroad revenue inadequacy. Most railroads are near or above revenue adequacy. Some are well
above. Financial reports for NS and CSX recently indicate improved earnings despite lower freight volumes.

It is, therefore, understandable that the railroad industry needs a trump card other than revenue inadequacy. The capacity and congestion concerns are shaping up as the likely candidate. There have been numerous STB rulemaking proceedings recently and the railroads have consistently cited the need for infrastructure investment as a rationale for opposing help for captive shippers.

I expected similar arguments in this proceeding and feared that the railroads would call for a relaxation of their common carrier obligation. There is less of that than we anticipated but I'm not entirely comforted. As we point out in our testimony, the railroads have many ways to turn down or deter service requests even if there is no explicit change in the common carrier obligation.

For a heavily rail-dependent state
like Montana, arguably the most captive in the
nation, rail service on reasonable request is
important. However, so are the Staggers Act's
protections for captive shippers including
reasonable rates, reasonable charges, reasonable
practices, and the common carrier obligation.

A sound infrastructure doesn't do
much good for shippers who can't get cars,
locomotives, or timely service. Infrastructure
concerns are getting governmental attention and
for the freight community that is a good thing.
A record of funding highway construction and
maintenance has been poor even ignoring diversion
of funds to earmark performing arts centers.

On behalf of Montana Governor
Schweitzer and other agricultural interest I
speak for today, however, there is a different
set of concerns. Specifically we are concerned
that the capacity issues will delay action on
captive shipper issues into the indefinite future
well beyond the attainment of railroad revenue
adequacy. At a minimum policy decisions by the
Board should be based on reality, not appearances.

Today you frequently hear that railroad excess capacity is gone. The railroads say this and others have gone along more or less without knowing the facts. I am one of those people.

Recently when the National Surface Transportation Policy and Revenue Study Commission Report came out, I read it not as a rail shipper lawyer but as a truck shipper lawyer. I was concerned about the way we were going to fund highway construction and maintenance to meet future demands.

However, I was surprised in reading through that report to find that AAR data was cited in support of the proposition that railroad excess capacity is not gone. According to the report, 88 percent of rail corridors are under capacity, 10 or 12 percent or at or near capacity, 1 percent is above capacity.

I'm not here to argue against paying
attention to infrastructure issues. As I say, I think the government has paid too little attention to infrastructure issues over the years.

However, I don't want the infrastructure needs of the railroad industry to be exaggerated to the point that shippers have to wait another 25 years before their concerns are addressed. As I said before, the policy decisions by the Board need to be made on the basis of reality, not appearances.

Well, you might say if infrastructure capacity constraints are not fierce today, isn't it true that they are going to be soon? Well, here again, we have a study by the National Surface Transportation Policy and Revenue Study Commission, a group set up by Congress, to study this, which included Matt Rose as one of its members who voted in the majority, saying that, "Yes, we could have a problem.

By 2035 it could be serious. We could have 40 or 50 percent of rail corridors
under severe strain. The assumption underlying that projection is that there is no additional investment in the infrastructure for the next 28 years. We think that assumption is completely unrealistic. In fact, we think the railroads deserve a lot of credit for the investments they have made in their infrastructure.

I think some of that is overblown. I think a lot of routine maintenance is being characterized as infrastructure investment. The fact remains that they are a capital intensive industry and they could have taken more money out of the industry than they have. Our hats are off to them for that. But they also say they are doing everything they can on infrastructure.

Yet, if you look at some of the statements that have been filed in this proceeding, you see UP candidly admitting that there were times when they didn't have enough labor to handle the demand. UP also acknowledged that if they could add one mile per hour to the speed of their trains, it would have a huge
impact on capacity.

Things like positive train control can also help. When the choice presented to the Board is -- when the Board is presented with a situation in which a shipper is denied service, isn't it incumbent on the Board to ask how the railroads are doing on some of these self-help measures that are available to them, particularly at a time when they are not only not revenue adequate but they are enjoying very high rates of return on their operations.

It's also argued that the STB can't micro-manage the railroad industry. We understand that and we are not looking for an STB to stand at the shoulder of the railroads and tell them how to operate in order to maximize capacity. We don't think you can do that. But we also need an umpire when there are situations in which a shipper is concerned that the rationale for denial of service is either poor or nonexistent or contrary to public policy.

The railroads have also argued that
rate issues should be separated from capacity
issues. Well, this is sort of the railroads win
and the shippers lose position for them to take.
On the one hand, they themselves say, "Don't
touch our ability to earn revenues. We need it
for infrastructure."

But when shippers complain
-- it's also obvious that the ability to price is
the ability to control demand for services. But
when shippers complain about that fact, it's not
acknowledged in the railroad's testimony.

The bottom line is we think the Board
is doing some good things. We are glad that you
have engaged the Christiansen Associates people
to look into some of these issues. We are glad
that your consumer assistance people are working
on these issues. And we are glad to hear that
there was never any interest on the part of the
Board in relaxing the common carrier obligation.
That is exactly where we think the Board should
be on this issue.

We do think the examples of denials
of service, waits for service, pricing of service
require someone to go to for regulatory resource.
One of the main reasons I'm here is to ask the
Board not to be stampeded by concerns about
potential future capacity crunches into making
sure that everything goes the railroad's way
today. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr.
Cutler.

Mr. Whiteside.

MR. WHITESIDE: Good afternoon.
Welcome to Washington. I left Montana on Monday
morning and it was zero at the house so it's
always nice to be here.

John and I have worked very hard on
this statement and trying to make sure that it's
responsive and responsible. Governor Schweitzer
does send his regrets. He really did want to be
here and his schedule just wouldn't allow it so
we apologize for that.

For the record, my name is Terry
Whiteside. My background, I have worked with
shippers every day. I have for about the last 30 years. We negotiate freight rates. We find solutions to problems. We work with the railroads. I have very good railroad friends.

It's interesting. In the provider for shipper services to solve problems, what we've noticed in the last five to seven years is the difference of attitudes at the railroad. What we want to do today is just really kind of talk about some of those. Some of them have bordered on the common carrier obligation.

We don't find that every day. We don't find a problem every day with this but we do find the problems becoming more pervasive in our conversations. I'm going to cover just a couple of them. I covered a number of them in the statement that I wrote with John.

The Staggers Rail Act, as it was outlined this morning, had really two basic thrusts and one was to increase railroad finances, but there was a provision to protect the shippers from abuse. The railroads have
always had a special obligation. When they come
into this industry that obligation for common
carrier service is there.

It isn't something that suddenly they
can become totally private like every other
company. That obligation continues. At the time
when Staggers was past the railroads were
hurting. The ICC and the STB chose to adjudicate
carrier disputes with an eye on railroad
finances. We understand that.

For 25 years the railroad's cry was
that they were poor. For every proceeding they
made the plea that they were poor and revenue
adequacy was important. It was really a
juggernaut that kept rate relief and service
relief from shippers. But during this period
there was a push by the railroads also to attract
more traffic. They were in the business of
finding new traffic and new things to do.

Today we have alleged shortage
capacity but the railroads are rich. The
railroads are doing well so whether the capacity
problems are real or exaggerated or partly mythical. On of the things that John and I struggled long and hard with was how much of this is myth and how much of it is real.

Is there a capacity problem? Yes, there is a capacity problem. Is it catastrophic? No, but yet it's being targeted for why we can't do certain things. It brings a whole set of issues and a whole set of things that we didn't see 10 years ago.

This proceeding was suggested or initiated I suggest because the Board is hearing of circumstances, of seeing circumstances of such things as service denials and other complaints that we've heard about this morning.

This panel is a various-themed panel. We have testified together before. What you have is a whole host of knowledge here. The railroads are private companies to be sure but they are greatly affected with the public interest.

I've given several examples of the railroad operating practices that I have personal
experience with and I won't recall them all but I want to cover a couple of them because I think they are kind of significant.

One on page 25 was dealing with a company called the Montana Seed Company. Here is a company who wanted to put in an ethanol plant about 30 miles north of Billings in a little place called Broadview, Montana. The service has been there for about 50 years.

Broadview was a facility where they had two elevators there, both of them being used for storage. The service train is on a sub-mainline that goes between Billings and Great Falls. They go through there regularly. Here is the interesting thing.

They wanted to ship corn in-bound to establish a new ethanol plant and at the time there were occasional but regular movements of corn going in there to some of the farmers. Some of the Hutter Act colonies were using them for feed. In response to Montana Seed's request, BN said no local train worked the area.
Thus, a passing merchandise train would have to spot and pull cars. It was something the railroads did not like to do. The request by Montana Seed was would they allow Montana Rail Link to bring them up. Montana Rail Link was willing to do it, 30 miles. It was a dark line.

In January of '07 BN said no. BN indicated that were unable to provide the service to drop off the service finally to Montana Seed. If Montana Seed was willing to pay for a new train service, then they would be able to do it. Again, we are back to this rationalization of capacity.

The second example that I really wanted to talk about was a situation that occurred in the western United States with an ag processor. The processor was told that they were putting in a brand new plant on a captive line.

Of course, what they classically do out in that part of the world is they site the plant and then they come to us and say, "Can you
negotiate a freight rate?" always on a captive line. "Well, if you had been here six months ago we probably could have done something on siting."

The key is in this one the railroad came in and started quoting transportation contract rates higher than was in their published tariff rates. We sat there for a day and I said finally at the end of the day, "These are higher than was in your published tariffs." They said, "What tariffs?"

They didn't know they had any. So we sent them home to look at them. They promptly canceled the tariff and then said to us, "Now you've got to deal with us. Now you have to negotiate a contract with us." It's these kinds of things and, you know, this is not prevalent.

This is not everyday but it is a problem that I want the Board to understand that does occur. The key to this challenge, I think, is to find what is reasonable. If the railroads act responsibly and reasonably and all the
shippers make responsible and reasonable requests, we probably wouldn't be here but the real reality is you've heard some of the railroad employees don't know what the common carrier obligation is.

There is some sense that the railroads want to condition all the requests on downstream affects on other shippers. That would be like Federal Express saying, "I don't want to go down to that ranch 30 miles down that road because it will affect my schedule for all the rest of the day and the whole system."

The real reality is somewhere there has to be a balance there. Taken to an extreme all the new service or chain service could be saddled with handling enormous burdens if it always comes back to capacity. Yet, the railroads want and need new business. What is required here is a balance of a reasonable approach.

Most importantly a strong common carrier obligation is mandatory to mesh public
interest with the movement of the goods or the services. What we think is important here is that if the Board finds after consideration evaluation that it does not have the full authority to enforce the common carrier obligations the way it thinks it needs to, it should go back to Congress as the Senator advised this morning.

The Board has been invited to seek additional authority in front of several hearings that we have heard and request additional authority it needs to ensure the development and continuation of what is called the Sound Transportation System with effective competition that meets the needs of the public.

I want to thank this Board for having this hearing. I think this is one of the most important hearings we have probably ever had because it gets to -- one of the things that came up this morning with Roger with North Dakota was this issue of the intermodal service.

All the intermodal service in Montana
has been canceled. It's been taken out. We have
to go 600 miles now to get intermodal service.
Yet, what we are developing across the -- we
bring trade teams in. In Montana we can bring
trade teams in -- Idaho brings them in -- and
the people will say, "We want that wheat right
there."

We can do that with identity reserve.
Most of our post crops, most of our secondary
crops are now out of the triangle being trucked
to Canada and put into intermodal service. The
Burlington Northern refuses to allow intermodal
service in Montana and they are doing the same
thing in North Dakota.

This is a service that right now we
could utilize. I'm not sure that conversations
with the Burlington Northern aren't continuing to
go on. I will say this, I think the Burlington
Northern has done an outreach in the last year.

I think this Board has done some good
work and outreach and I complement them on that
but we are still having problems with service
denials and they are being denied on the basis of efficiency or capacity. Thank you to the Board.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Whiteside. We will now break for 30 minutes for lunch. I apologize for making this panel stand in limbo but we just need to do that. We will regroup here promptly in 30 minutes and we have a full afternoon so we look forward to seeing you back. Thanks.

(Whereupon, at 1:06 p.m. off the record for lunch to reconvene at 1:40 p.m.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

1:40 p.m.

CHAIRMAN NOTTINGHAM: Good afternoon, panel. Thanks for being back with us. We will now turn to Mr. Kendell Keith with the National Grain and Feed Association.

It's a pleasure to see you here today, Mr. Keith. Enjoyed spending some time with you recently at your conference. Thank you.

MR. KEITH: Yes. We appreciate the
opportunity to testify today. Dan Mack sends his apologies. He had a conflict and could not make it. I will summarize our remarks.

The common carrier obligation to us seems to be a rather simple matter of law but it defies enforcement. We are unaware of any significant action on the part of the ICC or the STB to ensure compliance by carriers with its basic legal provision.

Therefore, we are puzzled by some of the comments by the rail industry that expressed fear that the STB will suddenly take an extremely activist approach to enforce common carrier obligations. At the same time we think it's rational to conclude that without some reasonable effort toward enforcement any rule can be judged ineffective.

Toward achieving more enforcement of the law in this regard, we would encourage the STB to think about ways to expedite agency action in situations where the common carrier obligation might be subject to violation either in the
distribution of rail service or in a railroad's acceptance of additional business.

We sincerely believe that a major part of the problem with agency enforcement and market discipline is that the process of filing a complaint and obtaining a decision by the agency is unnecessarily elongated. It adds to the cost and the risk of a formal proceeding.

In 1998 NGFA and the major rail carriers initiated an agreement to privately arbitrate some forms of dispute. Specifically excluded from those arbitration provisions were any matters related to rates or service such as the enforcement of common carrier obligations.

The reason for excluding service matters was that we thought it would be very difficult for a privately managed system to order service of any kind of nature. Our rationale was that to order service in one area could, but not necessarily, require that service be restricted in other locations.

Thus, we concluded that only a
government agency like the STB could reasonably
address such a regulatory need. But the STB also
seems to be hamstrung in legal enforcement as
well. In our view, the STB should not insert
itself in daily operations of carriers.

However, the carrier's comments in
this proceeding are laden with dire warnings
about the implication of any STB involvement in
the enforcement of common carrier matters and
what action by a federal regulator might make a
bad situation worse.

While we would not advise toward a
major shift in regulatory intervention, the law
does say that the STB is the agency with legal
oversight over carriers and that oversight should
at times be exercised. In our view, railroads
should not be able to operate without some degree
of regulatory risk. We think that is the clear
intent of Congress.

To ignore problems in the provision
of basic common carrier services is to invite
abuse. Rail access and rail service are matters
that in periods of constrained capacity should receive more regulatory attention, not less.

It should also be acknowledged that railroads over the long term do self-determine their own capacity for delivering rail service. To the extent that railroads are sellers to captive or inelastic markets, there are incentives to overlay restrict the supply of service from what would otherwise be achieved in a competitive market place.

If the STB does not take action to enforce common carrier matters, the clear message to the regulated carriers is that they should not be concerned about such legal obligations and they should behave like any other profit seeking economic sectors. We think this outcome would be a clear violation of the intent of Congress.

A few specific concerns. First, many of the challenges of common carrier service and the relationship of shippers and carriers are an extension of the same problems that plague other aspects of the business.
It is that the railroads tend to dictate most, if not all, of the terms of business whether the issue is liability shifting to the shipper, the level of fuel surcharges, the kinds of service or other.

Unless the customer wants to accept the service and the terms offered by the carrier, the customer is left to find its own alternatives for transportation which many times don't exist.

As for car supply matters, the grain industry has been compelled by the rail industry practice to purchase or lease the vast majority of rail cars used in the business. As part of this business arrangement the grain processing industry also has been forced to absorb virtually all the risk of variability in the use of this equipment.

When a shipper needs changes in a switch agreement to permit, for example, an ethanol plant to be in operation at a location that traditionally has only shipped grain, a railroad should not unilaterally withhold
approval of such switching arrangements for
extended periods.

Regarding the distribution of service
we have some legal precedent to rely upon. In
the 8th Circuit Court of Appeals decision
regarding NGFA being a COT case, the court ruled
that during periods of constraint capacity, a
railroad cannot shift limitless rail capacity
from one class of service to another.

The court further stated that the
railroad cannot offer premium-priced "guaranteed"
service and simply tell the customer that if they
want service, they must purchase the premium
service.

We have yet to see the STB take any
specific action regarding this ruling. The fact
that the ruling was issued at the appellate level
should provide some discipline in the market
place.

Finally, the grain processing
industry remains concerned about the rail service
grain shippers receive versus the service
provided to other sectors. In that GAO report for 2006 it indicated that of all major classes of shippers rates for grain and grain products rose at the most rapid pace from the mid-80s through 2004.

If you look at rates since that time on the basis of revenue per car, grain rates have continued to rise at roughly the same rates if not exceeding the rates in many of the sectors. Yet, when rail capacity becomes constrained, railroads sometimes still view grain as a commodity that will wait on freight capacity.

We acknowledge that grain does not disappear from its origin point simply because the freight is a few days late, but it's also true that in tight supply situations grain that is not shipped in a timely way can lose a large portion of its economic value and the cost of that falls squarely on the Oregon shipper and the farmers being served at that location.

In setting priorities for service we
would urge that the carriers and the STB understand the full consequences of poor service in the ag sector. The carriers may not feel the economic pain but their customers do.

I look forward to questions.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Keith.

Now we will turn to Mr. Steven D. Strege of the North Dakota Grain Dealers Association. Welcome, Mr. Strege.

MR. STREGE: Thank you, Mr. Chairman and thanks to the entire Board for calling this hearing. I am the Executive Vice President of the North Dakota Grain Dealers Association. Our state is served by the BNSF, CP rail, and spinoffs of each of those railroads.

Seventy-five to 80 percent of our crop production moves the market by rail. Much of our estate is captive to rail economically and for practical purposes. Huge volumes cannot be moved great distances by truck.

All three of you gentlemen have been
to our state, two of you very recently. Vice Chairman Mulvey spoke at our convention this past January and visited with some elevator managers. Chairman Nottingham was there just last month. Mr. Buttrey was there during harvest of '06 and the two of you visited some grain elevators and were again reminded of the vastness of the great plains.

Grain elevators are scattered around where the crop production is which is almost everywhere and those wide expanses of crop production and long distances to market are reasons why the common carrier obligation is so important and why this Board has a great responsibility in ensuring that it is honored.

Getting crops of the points of processing, consumption, or export is more than economics. It's keeping food on the table for Americans and foreign customers. Lately this Board has been dealing with cost of capital, paper barriers, and rate case rules, all important matters but none matter if there is no
service.

The common carrier obligation to serve transcends all of those particular issues and is the glue that holds our transportation system together keeping the far-flung points connected. Railroads must be obligated to serve. They should not be able to pick and choose for only their own bottom-line interest.

They owe their customers and the public more than that. They have been granted huge franchises to serve, not to exploit. Yes, railroads are private businesses. So are investor-owned utilities. Both provide essential services and both have public obligations.

If hauling containers of electronics and toys is more profitable than hauling grain or goal, it is not okay for a railroad to let the essential goods like grain and coal fall behind while hauling containers. When railroads are granted larger service territories through mergers approved by a public body such as the ICC or STB, some obligations to the public come with
it and providing essential service is one of those.

Our written comments include nine points regarding the obligation. In summary, those involved railroads making available to all of their customers an adequate supply of serviceable equipment under reasonable terms in response to market needs and then delivery that service on a timely basis.

Being 20 or 30 or 40 days behind is unacceptable. Imagine if delivery services to your local grocery store or shopping mall ran that far behind. Delays cost shippers money and the grain backs up at farms. Selling capacity at a premium over already very profitable rates and then being late is even more unreasonable.

Paying only a one-time penalty for being late is not reasonable when rail customer's cost for the delay continue to accumulate. Inaccurate ETAs on trains that need to be loaded quickly is not reasonable. Delays related to severe weather are understandable. The railroad
should remember that when dealing with their customers on loading times.

Regarding how much capacity is expected, I'll echo what Mr. Mulvey said this morning. If the common carrier obligation is only to distribute fairly the capacity a railroad has, then that puts defining the common carrier obligation in the hands of the railroad and I don't think that is what we want to do.

Our written comments address concerns with the marketing of capacity. Shipment sizes or duration commitment which do not fit customers do not honor the common carrier obligation to them. When middle men are involved, there is some passing of the buck and railroads are somewhat insulated from true market signals.

Railroads should respond to market needs instead of wishing their concepts on the market. Leaving behind rail customers who cannot comply with expensive new concepts is not honoring the common carrier obligation.

North Dakota has a diversity of
crops. Some of these crops are typically marketed in small lots, not 100-car trains so reliable access to single cars and small train sizes is very important. These should not be pushed to the back of the line in preference for only large shipments. The common carrier obligation applies to all of them and most train shippers also load the smaller shipments.

A grocery store might find it more efficient to sell potatoes in 100 pound bags only. If there was competition, that store would lose much business to stores offering 20 or 10 or 5-pound bags. Common carrier obligation means effective service to the smaller shipments.

We have heard quite a bit said here and at other hearings about market based rates. I would challenge that definition. A market is composed of a willing number -- a number of willing buyers and willing sellers. In the rail transportation industry or grain elevators that's not the case. Most of them have one railroad to go to. I don't think that is really a market.
Our written comments mention the certificate of transportation complaint to the ICC. That has been mentioned before here this morning and this afternoon. At least a couple of us at this table are veterans of that. The 8th Circuit Court of Appeals made it very clear that a common carrier obligation exist and that a preferential program which impairs the railroad's ability to meet it is unlawful and that decision still stands.

A consistent supply of cars offered in programs usable by all customers is essential. The trend, however, has been to more complex programs requiring larger and longer commitments.

Frequent changes in train sizes, incentives, penalties, and more make it difficult to keep up with what's new and the consequences of not knowing the latest railroad change can be significant. This should be a common carrier obligation, not a complicated carrier obligation.

This morning, Mr. Chairman, you
mentioned the $25 fee on bills of lading as being a problem with KCS shippers, I believe. It reminded me of a situation that a BN shipper told me about some years ago. He used to call his local yard at Dilworth, Minnesota to find out when his train was going to come.

The BN centralized things and at that point they were going to handle all such inquiries in Topeka, Kansas. This guy calls Topeka, Kansas and three days later his voicemail was answered and the guy on the other end said, "Just wait a minute. I'll have to call Dilworth." It was a rerouting, a bureaucratic process, and it really intimidates and frustrates shippers when those kinds of things are done.

Requiring rail customers to pay for switches that suffer much wear from the carriers of other traffic is not reasonable. Neither are onerous lease terms including requirements to carry insurance, pay for railroad negligence. Another one is increasing lease payments.

Earlier this week I was told of a
situation in Minnesota where one grain elevator's annual lease payment is to be raised from $1,454 to over $13,000. These things do not honor the common carrier obligation.

Since Staggers and so much rail industry consolidation the balance of power has shifted even more in favor of the railroads. We believe the STB must take a stronger hand in calling fouls and correcting situations.

Even though shippers are organized into associations like those here today, we have no authority over the ever larger and more powerful railroads. Another problem is shipper reluctance to say things for fear of retribution so rail customers look to the STB for assistance.

Regarding the rail consumer assistance services, and this happened before the present folks were in charge, a few years ago a shipper I know had a problem. He sent the information to that office. The office sent that information to the railroad. The railroad came
back and said the shipper didn't have his facts correct and that was the end of it. We need more than that.

In this proceeding we think the Board should define the common carrier obligation with as much clarity as possible and then be more willing to step in and correct abuses of the common carrier obligation that have become all too common. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Strege.

We will now hear from Mr. Terry J. Voss of the Ag Process Company.

MR. VOSS: Thank you, Mr. Chairman. I'm Terry Voss. I work for Ag Processing. We are a regional cooperative based in Omaha, Nebraska. We are owned by 195 local cooperative elevators spread throughout the midwest who in turn are owned by 200,000 farmers and ranchers in the midwest.

I'm here representing AGP, our parent company today, as well as the members and owners
of us. The grain industry is heavily reliant on rail transportation. Our member elevators for the most part are served by a single carrier. Rail service is essential.

There has been a steady transformation of rail service from one that was responsive to one that tells the grain industry today how it will operate. The rules are ever changing. I think we are no different than any other shipper, even a railroad.

I don't think either of us know really what the common carrier obligation is but we both have an opinion on what it should be. We at times will tell a railroad that they have the obligation to perform a service and they disagree. We each have a different opinion.

I am not here to complain or make accusations against railroads but to contribute to the Board's understanding of a shipper's view of issues that affect our businesses. Our view is not to address Section 11101 but railroad service in general nature.
This goes beyond having a line of track, locomotives, and crews to haul cars from point A to point B. Is car supply, specifically covered hopper cars, is an obligation of railroads to furnish to the grain industry? If so, do what extent?

Years ago the ICC issued a service order requiring that railroads could not have more than 20 percent of their cars in grain service. Shippers leased and purchased cars. The order later expired. However, the precedent had been set. Today in the grain processing industry it is the norm for shippers to furnish a large percentage of the covered hoppers needed.

All tank cars, to my knowledge, are furnished by the shipper. It is simply a cost of doing business today for the shipper. Some railroads provide covered hopper cars through an auction system. Many of our members have called me and are confused as to where the common carrier obligation to furnish cars, if there is one, stops and where the auction starts.
The common carrier obligation should have reference to reasonable and consistent service. Inconsistent and unreliable service is extremely harmful to an industry. Let me give you an example. This month we shipped some cars from one origin to one destination. We shipped cars on Monday, Tuesday, Wednesday, Thursday, and Friday.

All cars arrived at the destination the same day. This causes inventory and/or production concern. Another concern is that if all the cars could not be placed in the plant upon arrival they would be placed on storage or demurrage charges or chargeable events.

Inconsistent service has pushed shippers to lease additional cars and build additional track. Some facilities cannot expand because the town has grown around the plant and streets and houses restrict the expansion of track.

The same issues apply to employ cars
returning to origin that are bunched. As service
changes, so does the need for cars. Consistency
is critical. Recently an elevator received and
loaded a train on a Friday and billed it on a
Saturday. The following Friday a train in route
to that elevator on a different railroad had to
be diverted because the other train had not yet
been pulled after six days.

The elevator incurred the cost of the
diversion to the other elevator, the interest
rate of carrying the grain in inventory until
another train could be placed, and a possible
penalty from the buyer for being out of contract.
The first railroad should have a common carrier
obligation to have pulled that train in a timely
fashion or at least sooner than six days.

Recently we have faced situations
from two different carriers. Both are requiring
or requesting that we block or sort cars based on
the destination with the railroad be delivered to
an interchange. I feel the railroads are being
paid to do this either through their reciprocal
switch agreement or in their line haul rates.

We feel the obligation for switching plants, blocking cars, and delivering them is out of the railroads. Every shipper receiver is required to execute an individual track agreement to receive service. This can be very one sided and normally not on the side of the shipper.

We are aware of an agreement where the shipper is required to waive any protection it may be entitled to under that state's warehouse compensation law -- I'm sorry, worker's compensation law -- followed by a clause that requires the shipper to acknowledge that this waiver was mutually negotiated.

It was not. This agreement was required to be signed as a condition of service. Railroads should have the common carrier or an obligation to be reasonable in this area.

The Board requested input on embargoes. I don't think they are used enough. When railroads see a problem, they should use an embargo before a destination is totally plugged
up. We currently have cars sitting to be spotted to a customer. They have been there three-and-a-half weeks. The railroad says the receiver's track is out of service.

They tell us not to ship cars there anymore to that customer until the problem is resolved. The railroad should really embargo the facility until the customer's problem is resolved before additional cars continue to accumulate there and then we do have a mess as UP talked about in Arizona.

I thank you for the opportunity to present our views and those on behalf of AGP's member owners. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Voss.

We will now turn to Mr. John M. Frank of Frank Bros. Feed & Grain Company. Welcome, Mr. Frank.

MR. FRANK: My name is John Frank and I'm the owner of Frank Bros. Feed & Grain Company located in Wells, Minnesota. I would like to
thank you very much for giving me the opportunity
to participate in this hearing and to share with
you what is happening to my company at this time.

I did testify here, I think, 33 or 34
years ago about railroad shipper issues. I never
thought I would be back. My father purchased and
started operating our grain elevator in Wells,
Minnesota in 1933, 75 years ago. In 1973 I was
very influential in getting the Milwaukee road,
we had our line at that time, to start using unit
train shipments of grain.

I convinced them that was the future
of grain shipments. In 1978 we had a death in
our family. My brother-in-law passed away
suddenly so I went to our farming operation and I
leased my elevator out. By then a 50-car loading
facility was leased to Pillsbury and eventually
PB or ConAgra Grain with their acquisition of the
PB grain division.

In 1999 ConAgra terminated the lease
with me. We then leased a facility to Watonwan
Farm Services, hereinafter WFS, who also had a
facility in Wells. It was leased to them for six years from September of 1999 until July 31 of 2005. They loaded rail cars out of our facility the entire time of the lease.

We decided not to lease the facility to WFS beginning August 1 of 2005. They continually lowered the lease payments that we were getting and would do no maintenance to our facility. They had offered to purchase our facility several times but at a fraction of its value. They told me if I would not sell at their price, they would put up a bin at their facility and would offer me less the next year.

I had two sons in the business with me at that time and we decided to search for financing and operate the facility ourselves. We continued to receive and still receive the newsletters from the IC&E. In August of 2007 we were in talks with an ethanol company to purchase grain for them. We had been in talks with them since March of 2007.

We had also been in talks with a bank
for operating funds since August of 2007. I had a question about an item in one of the newsletters e-mailed to me by Joanne Mortenson, Director of Marketing for the IC&E railroad so I e-mailed my question to her.

I received an e-mail back from her which I have given you a copy of on August 3, 2007 telling me I could no longer load rail cars because they had sold the track beside my elevator to WFS, my competitor.

In a phone conversation with her I asked her how she could sell the track and not contact me beforehand. She said that I hadn't shipped in the facility for years. I said that my leasees had been shipping there all the time. She then told me they could whatever they wanted to do. She told me to contact the real estate department.

I contacted Tim Carlson with the IC&E real estate department and he said he had nothing to do with it but if Joanne said he did, he would take the blame. He already had my file sitting
in front of him. They had sold just enough track
to go just a few feet past my facility so that I
could not load.

From the small amount of information
that I have been able to gather, there is plenty
of track to the west of my facility but I can't
load because the track beside my place belongs to
WFS.

Commissioner Buttrey, you said in
your opening remarks this morning that a shipper
that has a truck alternative is not a captive
shipper, although if the competitor on the other
side of town has rail loading facilities and has
a 6 to 10 to 15 cents a bushel advantage, I
believe you are captive and I believe that you
are out of business which is what happened to us.

I am close to putting an agreement
together with an ethanol company to furnish corn
to possibly three of their plants but I cannot go
any further because they don't want to talk
without me having rail. I tried to talk with
Steve Milligan, Assistant Vice President of the
IC&E and all I got was a letter that Tim Carlson had sent to me on August 8th of 2007.

It was addressed to me in Granada, Minnesota. I have no address there. I never received the letter. I have two other land leases with the IC&E. It amazes me that with the facility in Wells, my home address in Winnebago, and our company offices in Paramount that he sends a letter to Grenada, Minnesota.

The letter was full of erroneous statements and lies. Mr. Carlson's letter is in the packet that I gave you. Mr. Carlson was trying to cover the actions of the IC&E. That letter also stated that the transfer had taken place in December of 2006 which was nine months prior to me finding out.

On April 15th of 2008 I received a copy of the Tim Carlson letter dated August 8, 2007. This was the first time I knew what the sale date actually was. Once WFS and the IC&E Railroad knew that I knew about the track, they started to tell people.
On August 6, 2007 I received a call from my banker. He stated that Mike Lepp, one of the top people with WFS, came into the bank and told him that my elevator had little value because they, WFS, owned the track beside my elevator and I could no longer load rail cars.

We own a steakhouse in Fairmont, Minnesota. On August 8, 2007, Ed Busenko, who is the general manager of WFS, came into the lounge of our steakhouse late in the evening when it was all employees and he told them that I was losing everything I had. He also said my elevator was no good because he owned the rail beside it and I could not load rail cars. It was my night off and I was not there.

On August 16th Mr. Busenko entered the steakhouse again and I was there. I met him and told him he was no longer welcome and asked him to leave. He was no longer welcome on a totally unrelated matter. He called me about everything he could think of. He told me he had been trying to get me for four years for not
selling to him at his price and now he did it. He said he owned the track and I couldn't load rail cars.

It is my contention that WFS and IC&E intentionally conspired to drastically reduce the value of our facility and keep us from competing with WFS. We were not given any chance of purchasing the track. There's plenty of track in Wells. They didn't have to sell them the track beside our elevator.

We did not find out about the sale until nine months after the fact. They did everything they could to cover it up as long as they could. The IC&E knew that we had a facility in Wells. We still have two land leases with them and we personally met with Joanne Mortenson and Steve Milligan about operating the facility.

If they are allowed to do this to me, that opens the door for any large company to use its influence to put any small operator out of business. This cost our company hundreds of
thousands of dollars in potential income and in lost value to our real estate. They also hurt the area farmers by eliminating competition.

I personally started doing business with the railroads in 1972. I have seen them let their tracks deteriorate and force shippers and state government to rebuild the track while they invested their income in outside interest and say, "We can do what we want."

In 1992 I was forced to purchase the land that part of my facility was sitting on from the land company created by the Milwaukee Road when they went out of business. The price was quoted to me at $32,000. When I told them there was no land in Wells worth that kind of money for such a small parcel, they raised the price to $47,000 and said if I didn't pay, that I should move my elevator. I guess they thought they could do whatever they wanted.

I tried to reason with Steve Milligan. However, in his April 15th letter, which I've given you a copy, he says they did
nothing wrong and they could do what they wanted.

I feel this is the ultimate indiscrimination
against one shipper versus another. I don't know
how the federal statutes read but they have
clearly violated the Minnesota statutes. They
simply broke the law.

If I go out and damage someone's
property by $500,000, I'm probably going to go to
jail and have to pay restitution. Why should
this be any different? Why is the railroad above
the law? Why do they think they can do anything
they want?

If the IC&E is allowed to sell the
track to my competitor and put me out of
business, there will be no shipper safe from
having the same thing happen to them. I intend
to do whatever it takes to get the sale of the
track by IC&E nullified so that we can enter a
contract with the ethanol company and start
shipping grain again and put some competition
back into our area.

I ask the Board's efforts to nullify
the sale and to let something like this never happen again to another shipper. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Frank. Thank you also for recopying for me last week the letter you sent to the State of Minnesota raising some of your state law potential violations concerns. Rest assured I've had staff looking into your situation and we'll continue to be working with you on what, if anything, the Board can do. We will need to get to the bottom of questions like exactly what kind of track is it, what is the legal status of that track.

Mr. Keith, it's coincidental that you are here, too. If these are actually two members of yours, we may prevail on you to see if you can help us untangle this a little bit but you don't need to commit to that right now. Do you know offhand if Mr. Frank's company and his competitor are actually members?

MR. FRANK: I am not. I'm not at this time. I have been for many years but right
CHAIRMAN NOTTINGHAM: Okay. That may help answer it.

MR. KEITH: WFS is a member and IC&E is a member.

CHAIRMAN NOTTINGHAM: Okay. Good. We may call on your informally to help us untangle that.

Mr. Whiteside, you mentioned a difficult case, the Montana Seed experience. Thank you for sharing that with us. Do you know if they brought that to the intention of the STB? I just don't know the answer. I haven't had time to check that out.

MR. WHITESIDE: Excuse me. I do not know. I do know they brought it to the Governor's attention and that is how it came to me.

CHAIRMAN NOTTINGHAM: Okay. Good. We have heard a number of troubling reports from this panel, some in great specificity, somewhat anecdotal, all troubling. The main message, I
guess, I want to impart is please let the Board
know. Let particularly our rail consumer
assistance office know as soon as possible with
enough specificity so we can begin to try to do
something about it.

It is helpful to hear about
experiences at hearings like this even when they
are several years old but it's even more helpful
if we hear about them contemporaneously and in a
situation where we can actually do something to
make a difference.

I personally enjoy -- this may sound
strange -- enjoy working on solutions to problems
like these. I personally make calls to railroad
CEOs and other officials and have had some
success.

Then we've got a very able staff and
I should say we are actively recruiting for
additional staff in the rail consumer area so if
anyone here knows anyone who would like to work
at the Board, now is a good time to be getting in
touch with us or checking out our job opening
information we post on the web.

   Let's see. Mr. Strege, you mentioned, and I heard about this a little bit when I was with you recently in North Dakota, railroad practice of occasionally requiring shippers to pay for insurance intended to cover negligent actions on the part of railroads. How does that work?

   MR. STREGE: It is part of the lease where the grain elevator agrees to indemnify the railroad for losses on that lease site. I believe it actually requires them to purchase insurance. We have looked into the market and some of these insurances that are required are not even available.

   We had a bill in our legislature a couple sessions ago to nullify this. The railroads, it was primarily the BN, they agreed to not oppose the bill but the provisions apply to only leases from now on. For those who have an existing lease are subject to those requirements.
If they don't have the insurance, which I'm told they can't get, I've had insurance brokers that are experienced in the industry tell me this, then if there would be any kind of a loss, then the grain elevator would be responsible.

It's like if the train jumped the track and hit the elevator and burned the elevator down, then the elevator would be responsible for its loss and if it burned part of the town down, it might be responsible for part of that loss also. The thinking is that if the grain elevator wasn't there, there wouldn't have been an accident. I don't know if I'm quite describing it right. It's been a while since I looked into it but it is a serious problem for grain elevators and other leasees.

MR. CUTLER: Chairman Nottingham, I had mentioned that I reviewed quite a few sidetrack agreements. It's very comment for the sidetrack agreements supplied by the railroads to require the shipper to indemnify the railroad
against claims arising out of the railroad's own negligence or misconduct.

COMMISSIONER BUTTREY: (Off mic.)

MR. CUTLER: Well, whole-time clauses. There are legal defenses to these things. There are a number of courts that say it's against public policy for party A to be indemnified by party B against party A's own negligence.

Some of these things may not hold up in court but they sure are common in these agreements and not only for small companies either. Some very large corporations have the same type of agreement presented on a take-it-or-leave-it basis.

CHAIRMAN NOTTINGHAM: And there well may be STB staff who know much more about this and I would welcome anything in the record in the way of examples of some of these clauses or contracts. It sounds troubling to me.

I don't understand how a shipper can be expected to promise to reimburse a railroad as
a condition of service for costs that are caused
by negligent action of the railroad. It doesn't
quite add up to me but thank you for sharing
that.

Mr. Buttrey, any questions?

COMMISSIONER BUTTREY: I was just
curious, Mr. Whiteside, if you could tell me
whether you are aware of whether MRL brought that
what would be a paper barrier issue to the
Board's attention. We don't seem to recall it
here and I inquired just briefly about it. Maybe
they did but I don't remember hearing anything
about it.

MR. WHITESIDE: I'm sorry. I'm not
following you. I'm not following the question.
Is it on the broad-view situation?

COMMISSIONER BUTTREY: You mentioned
the problem where MRL could have carried some
grain for a customer and they were not able to
carry that grain. They were ready, willing, and
able to carry the grain to customers but they
couldn't carry the grain to the customer because
BNSF -- the only way the grain is going to get there basically is either if the BNSF carries it or if MRL carries it or if they truck it some place.

You said the most economical, the most efficient way of handling this matter would be for MRL to carry it and interchange it with BNSF or somebody, presumably BNSF, and then they would move it on to its destination. You said that transaction was cut off. The opportunity for the grain to move that way was cut off by the refusal of BNSF to allow MRL to participate in the move.

MR. WHITESIDE: Okay. Let's make sure because I think we are close to understanding. Montana Seed --

COMMISSIONER BUTTREY: I might have heard you wrong but I thought that was what you said.

MR. WHITESIDE: Montana Seed had asked MRL if they would be willing to carry it and they said yes. Then the BN told them no,
that they wouldn't allow that. I don't know whether it got to the point where MRL was saying it was a challenge to the paper barrier.

That is obviously the reason why.

Well, no. I'm not sure that is the reason why. I wouldn't even go that far. It's just that in the situation Montana Seed asked and was told no by the Burlington Northern. Yet, Montana Seed was willing to do it.

COMMISSIONER BUTTREY: Do you know how the grain actually moved? Presumably it did move in some way, somehow. Do you happen to know how it moved?

MR. WHITESIDE: No. Montana Seed basically decided they couldn't make the deal work so they abandoned the property. Hopefully we are talking about the same thing.

COMMISSIONER BUTTREY: I think we are talking about the same situation.

MR. WHITESIDE: Okay. I'm sorry.

Okay.

CHAIRMAN NOTTINGHAM: Commissioner
VICE CHAIRMAN MULVEY: Thank you.

Mr. Frank, have you contacted the STB's Office of Consumer Enforcement and Consumer Affairs on the problem that you're facing or have you contacted the Board at all before today?

MR. FRANK: Yes.

VICE CHAIRMAN MULVEY: You have?

Okay. And did you get any kind of satisfaction or any kind of assistance at all? Was it helpful or has it been helpful so far?

MR. FRANK: Yes. So far it's been helpful.

VICE CHAIRMAN MULVEY: Okay. Thank you.

CHAIRMAN NOTTINGHAM: And, Mr. Mulvey, just so you know because we haven't had a chance to chat about this, just in the last few days my office was copied on a letter that Mr. Frank sent to the State of Minnesota, Commissioner of Transportation, so I've had some discussions with Mr. Broadman about his work on
this. It's all been within the last couple days.

VICE CHAIRMAN MULVEY: Okay. Thank you.

Mr. Strege, South Dakota has invested state monies in the rail infrastructure, etc. It has been suggested on occasion that if North Dakota did the same that some of North Dakota's problems might be ameliorated. You want to comment on that?

MR. STREGE: Well, I suppose the railroad would accept investment from anybody whether they be shippers or the state. There has been some of that in North Dakota with the Rail Assistance Program. We've got a state fund that is set up. I don't know how much money is in it but it has been helpful in some situations.

I suppose it could be expanded or you could put more money in it but, you know, it actually is the railroad's responsibility, I think, to provide that infrastructure there. I was thinking of a couple of lines in the central portion of North Dakota that were sold from the
BN to a short line, to the River Valley and Western. They became -- well, they were old lines and there was a lot of CRP land in that part of the state so there wasn't as much business anymore.

Some of the shippers were willing to put some money. It would have been a partnership between the railroad and the shippers and the state but they just couldn't ever get it together. I think they needed about $7 million. Most of the line was subsequently abandoned.

VICE CHAIRMAN MULVEY: Okay. This is a question I was going to ask the railroads but maybe it's just as well to ask you. What recourse is provided to a buyer who wins service through an auction if that service is not delivered in accordance with its on-time performance guarantee? Do you have any recourse if you don't get what you bid for?

MR. STREGE: Right now on the COT program, for instance, in BN if they are more than 15 days late, then the shipper can get a
$200 per car penalty one-time payment. Now, sometimes that might cover his extra cost. Sometimes it might not. That was what I mentioned about a one-time penalty.

His cost may continue to accumulate if he is continually late and he has -- the shipper has on that particular program bid in this auction and most of the time would have paid over-the-tariff rate. That is what really frustrates them when they bid a premium over the rate and are still late.

VICE CHAIRMAN MULVEY: $200 per car rebate after 15 days is not exactly fully compensatory.

MR. STREGE: That used to be -- I think it was $400 up until about five years ago and then they cut it back. Then earlier this year they were going to change it to $150 for a 10-day window. They had that in effect for awhile and then they switched back to $200 for a 15-day window.

VICE CHAIRMAN MULVEY: When they make
these changes, are they negotiated changes or you pretty much take it or leave it?

MR. STREGE: It's take it or leave it. In fact, I brought along some sheets here that I printed off of the BN website of some changes that were made earlier this year. It gets confusing sometimes for managers to be able to keep up with the changing rates and train sizes and so forth. It gets kind of baffling.

VICE CHAIRMAN MULVEY: Mr. Keith, railroads sometimes claim that agricultural shippers often will hold their product waiting for the best price and then begin moving it all out at once and all demanding service simultaneously making it impossible for the railroads to deliver. Do you want to comment on that?

MR. KEITH: There are some years that the nature of the market encourages shippers to hold grain for longer periods than other years. It's true. Sometimes too much grain needs to be moved at once and some of that is driven by the
market place. The market place places a certain value on storing grain and selling grain at particular times.

Right now the market place is encouraging people to actually store but industry can't afford to store it so they are having to sell it to pay the banker and plan to pay the Chicago Board of Trade on their hedges. Yes, in fact, that does happen some years so you get this pre-harvest rush. It's a seasonable business and sometimes the season allocate is more extreme than other years.

VICE CHAIRMAN MULVEY: At least this year the prices have been better than in previous years.

MR. KEITH: Yes.

VICE CHAIRMAN MULVEY: It's been noted about the capacity in the rail system and that this recent report that came out which said that only three percent of the rail infrastructure was beyond capacity or at capacity. If you look at the nation's highways
you can make the same observation.

The vast majority of our highways are empty most of the day. There are parts of the highway system or the railway system that are choke points. It's the fact that three percent of the whole system being at capacity could, in fact, have an impact on the entire network. Isn't it true that the three percent number really doesn't capture the potential for congestion and problems on the network, Terry or John?

MR. CUTLER: Vice Chairman Mulvey, that can be the case. One of the focuses of the last highway bill was precisely choke points. It was never to identify areas where the bang for the buck in terms of investment would be the greatest. That tends to get tangled up in donor issues and so forth. You are familiar with the problem.

Don't misunderstand me. I'm not comfortable with the prospects for us to be hauling freight for the foreseeable future in the
way we need to. All I am saying is that I think there has been some exaggeration of capacity issues in support of other aspects of the railroad's desires in terms of how they are regulated.

CHAIRMAN NOTTINGHAM: Although that is a very good point, Mr. Mulvey, I can say as a former State Highway Commissioner, I could try to get away with telling the Virginia General Assembly that 85 percent of the 57,000 miles of Virginia roadway were not congested most of the day.

When you look at what is going on in Northern Virginia and around the Hampton Roads area they would throw me out of the Capitol if I told them we didn't have a problem.

Yet, it was a fact that when people took the whole geography of the Commonwealth of Virginia while I was there, including Southwest Virginia and the Shenendoah Valley and Southside the percentage of overwhelmed with congestion highways was probably pretty small but the impact
was huge and it threatened the state's economy and continues to this day in that state to be one of the top issues that the Commonwealth is going to have to have a special session with the legislature on and everything else.

MR. CUTLER: Once again, Chairman Nottingham, we are not denying that there are problems here and there but it is important to be a little bit skeptical sometimes about claims that things shippers want have to be turned down because capacity is constrained.

For example, the argument that excess capacity is gone you hear that a lot. I used to say that myself. I'm not sure that is always accurate. That's the only point we are trying to make.

VICE CHAIRMAN MULVEY: Fair point.

Thank you.

Mr. Voss, you made the point, I believe, about car supply. Is it your position that railroads have a common carrier obligation to provide cars upon request of all types, some
types, all the time, sometimes?

MR. VOSS: Yes. Certain types of
cars, yes. Tank cars, I don't think so because
like, for example, in soybean oil that is food
rate edible product. You certainly don't want
cross-contamination or the risk of that anywhere
like that. Covered hopper cars it is a generic
manila folder.

I think they certainly have a large
fleet. You saw the BN slide this morning and
they are continuing to grow their fleet. I think
they have an obligation to furnish them now.

I mean, they furnished lumber cars,
furnished auto racks, trailer trains and stuff, R
boxes. I think they have an obligation. We just
don't know what it is. We don't know where the
obligation stops and the auction starts.

CHAIRMAN NOTTINGHAM: Commissioner
Buttrey.

COMMISSIONER BUTTREY: Mr. Strege,
you were talking earlier about the difficulty in
getting single-car deliveries. You were also
talking about being charged for cars sitting too
long your facility or at a facility in North
Dakota. What is the situation if you keep a car
too long according to the railroad requirements?

What kind of penalty to you pay and
what kind of penalty does the railroad pay if the
-- is there any reciprocity at all between what
you pay and what the railroad pays when the
service is not what it is purported to be or what
it is agreed to be?

MR. STREGE: The penalty for being
late loading a car is demurrage. I believe it's
$50 a day and probably in some commodities and
some markets there is a one day free day or two
days that you get.

After that It's $50 a day. On the
COT program once you get the car you have that
much time or if it would be a car ordered on the
regular tariff program. Under the COT program
you would get that $200 penalty that we just
discussed.
Under the other program just the tariff lottery -- I know I'm throwing out a lot of terminology here that maybe you are not familiar with but there is a lottery for cars at the tariff rate which is limited supply of cars. On those if the railroad would be late in pulling the car, for instance, there would be no penalty.

That is one of the things that frustrates shippers, too, and that Terry was talking about here, loading a car and then it sits there for a week or something like that. Maybe you had to hurry up and load in order to avoid a penalty but then the car sits there for quite a length of time. It's not always a problem. I'm not saying that but it happens.

Can I elaborate a little bit on that lease question that you asked me, Mr. Chairman?

CHAIRMAN NOTTINGHAM: Sure. Yes.

MR. STREGE: It came to mind a little more after we talked. In 2003 the grainulers got a bill introduced into the North Dakota
legislature that would make it illegal for a railroad to impose liability on the leasee for damage that was not the fault of the leasee. The response of the railroad was pretty caustic.

In fact, the Canadian Pacific sent out a letter that said that if that was to pass, they may have to cut the leases and that people would have to move their facilities off the property. Anyway, we had some support from other leasees but then that started to fade away. It was a process of intimidation and we had to back off.

The only thing we got in the end was a limit on the liability that we would have to third parties. We would still have to absorb any damage to our own property but there was a limit placed on liability to third parties. Then we had another bill in 2005 and I don't remember the details of that.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Strege.

Vice Chair Mulvey, anymore questions?
VICE CHAIRMAN MULVEY: That will be it for today. Thank you very much.

CHAIRMAN NOTTINGHAM: Commissioner Buttrey.

COMMISSIONER BUTTREY: I would just like to ask anybody on the panel really what would be wrong with having a system that provides total reciprocity that I do this and I get penalized this much if I do something that is not according to the agreement and you pay the same amount in case you don't live up to your side of the agreement. What would be wrong with a system --

MR. VOSS: Absolutely nothing.

COMMISSIONER BUTTREY: -- that would require reciprocity between the two?

MR. VOSS: Nothing. There is absolutely nothing wrong with that concept. We proposed that before. Basically for simplification we have called it reverse demurrage. Whereas if we've got 24 or 48 hours to load a car and it sits 96 hours, what is good
for the goose is good for the gander.

COMMISSIONER BUTTREY: You said you proposed that.

MR. VOSS: We proposed that to some carriers.

COMMISSIONER BUTTREY: Okay. But you haven't proposed it to us.

MR. VOSS: No, we have not.

COMMISSIONER BUTTREY: I didn't think so.

MR. VOSS: No, we have not.

MR. WHITESIDE: Mr. Chairman, could I do one follow-through back with Commissioner Buttrey?

CHAIRMAN NOTTINGHAM: Yes.

MR. WHITESIDE: Talking a little bit more about that Montana Rail Link, I am not aware that Montana Rail Link ever came to you and I'm not aware that they ever went any further than saying that they were willing and able. It's a paper barrier issue. It will have to acquire acquiescence of the Burlington Northern. That is
not a critique of the Burlington Northern.

What I'm saying here is there would be no reason why the Montana Rail Link would want to push that because they have other business interest with that carrier and there would really be no reason for them to want to go just for that particular movement to go to bat for it.

COMMISSIONER BUTTREY: What you are really saying is, I think, what I'm hearing is that it's not that it would be to their benefit. It would be unadvisable for them to do that is what you seem to be saying.

MR. WHITESIDE: That is perfect diction.

COMMISSIONER BUTTREY: Were you aware of the fact that 10709(d)(1) of the Act directs the Board to ensure that the essential terms of each contract for the transportation of agricultural products including grain be made available to the general public? Were you aware of that?

MR. WHITESIDE: Summaries, yes. I do
know that. For years they were very hard to come
by because you had to actually send somebody over
and have them monitor those to be able to get
them. We have done that because we have needed
to know what the contracts are and we have people
that would come over and just monitor them. If
they were published on the web, it would be very
helpful.

COMMISSIONER BUTTREY: Thank you.
I'm curious what you thought about that.

MR. VOSS: There's some computer
service companies that have been providing those
for quite a while at a cost. I understand -- I
made a call today and they are on the website
today.

CHAIRMAN NOTTINGHAM: Good. Thanks.

VICE CHAIRMAN MULVEY: One more
question.

Mr. Whiteside, you say on page 24 of
your statement that carriers are forcing shippers
to negotiate transportation contracts by refusing
to publish tariffs or provide service under
These tactics amount to self-deregulation by the railroads as to rates of service. My understanding is they have to have tariffs available. Do you have specific evidence of this?

MR. WHITE: I do have evidence. You notice I did not mention the situation with the ag processor. Those are the kind of things that occur. That isn’t the first time that has occurred where they would just cancel a tariff and say, "Now we want you to deal with this on a contract." Is it widespread? No. Does it occur? Yes sir.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOTTINGHAM: Thank you, panel. You are dismissed. We wish you safe travels home and thank you again for being with us today.

We will call up the next panel, Panel IV-B, a group of Chemical Shipper Associations, Mr. Jack N. Gerard from the American Chemistry Council. He’s the President and CEO of that
organization. Mr. Arthur Dungan and Mr. Paul Donovan. Mr. Dungan is the President and Mr. Donovan is the counsel for the Chlorine Institute. And from the Fertilizer Institute Mr. Bob Felgenhauer, Vice President for Transportation and Distribution for the Potash Corporation.

Welcome, panelists. I'll give you a moment to get situated. When you are ready, Mr. Gerard, we will start with you.

MR. GERARD: Am I doing that right? There we go. Thank you, Mr. Chairman, Vice Chairman Mulvey and Commissioner Buttrey. It is a pleasure to be here today. I appreciate the opportunity to testify in behalf of the American Chemistry Council.

As the Chairman mentioned, I currently serve as President and CEO of that group, a group that we believe is very important to our domestic economy as well as our livelihoods and the value of the products that we produce and enjoy on an everyday basis.
Hearing others testify and hearing your earlier remarks, Mr. Chairman, I'm going to try to abbreviate mine today and not use my full time and, thus, gain whatever that reward was that you were referencing earlier in the day so it's going to be quick here.

Our $635 billion industry employed more than 850,000 people in all 50 states. These are direct employees. Products supplied by the chemistry sector are essential in manufacturing, agriculture, energy, transportation, technology, communications, health, education, defense, and virtually all aspects of our lives.

In fact, more than 96 percent of all manufactured goods are directly touched by the business of chemistry. The business of chemistry depends on the nation's railroads to deliver approximately 170 million tons of products each and every year.

Not unlike other bulk commodities, rail transportation is vital to our industry because the unique composition and
characteristics to many chemical products and large volumes required by our customers.

At the outset I would like to make clear that the railroads have an obligation to serve the transportation needs of this country. Railroads are required to operate in the public interest because the public depends on safe and reliable service in the delivery of a wide range of products on which we all rely.

Congress wisely recognized the importance of the common carrier obligation as being fundamental to the effective operation of a rail system to serve the needs of our nation. As long as a railroad holds the operating authority over line of track, it must respond to a reasonable request for transportation service on that line.

While Congress has given the Board the authority to enforce the common carrier obligation, the power to amend that statutory obligation rest solely with the Congress.

I would also like to be clear that
railroads have been and will continue to be valuable partners. All major North American railroads are partners of our Responsible Care Initiative, a program originated and managed by the council which since its inception has been dedicated to the continuous improvement in health, safety, security, and environmental performance including the safety and security of chemical transportation.

While we in the railroads have some differences regarding the best way to promote improved access to competitive and reliable rail service, we will always strive to have a cooperative and constructive relationship to enhance safety and security.

Testimony from the railroad suggest there are serious capacity challenges throughout the rail system. Assuming this to be the case, the STB certainly should be considering how it can help address such challenges within the framework of the common carrier obligation and in pursuit of the public interest.
We are concerned, however, that with today's hearing the Board is pursuing the wrong line of questioning. If the railroads projections of increased demand are correct, we should be focused primarily on issues to improve rail capacity, specifically competition and efficiency, and preparing for that increased demand.

For the past 25 years we have watched the railroads consolidate to the point that a handful of railroads control 90 percent of all rail freight traffic in the U.S. As the Washington Post pointed out this week on the front page, this newfound market power has doubled their industry-wide profits since 2003 and sent their stock prices soaring.

To even consider reducing the common carrier obligation instead of addressing the current barriers to competition in the freight rail system would only serve to extend the monopoly power the railroads currently enjoy over their customers.
For example, we believe that requiring railroads to quote "bottleneck rates" and allow for reciprocal switching and additional reforms would greatly expand access to competition and improve the efficiency of the system. As our members will note in their testimony, removing these barriers can in many instances reduce the distance that hazardous materials would have to travel.

Rail is a safe mode for transporting chemicals including hazardous materials. Thanks to efforts on all sides, the railroads, the shippers, car designers and government regulators, rail transportation is getting even safer.

In addition, the federal government has announced several rules such as a new tank car design standard, analyzing routes, and addressing human factors that take a comprehensive approach toward enhancing the safety and security of hazardous rail shipments.

We have witnessed a century of safe
transportation of these critical materials but
the NTSB has determined that the cause of the
most recent fatal accidents were railroad
maintenance and operational failures. Now with
increased traffic and perceived capacity
constraints, the railroads wish to avoid their
common carrier obligation for hazardous materials
to focus on other traffic. This clearly has
nothing to do with the public interest.

The railroads argue that it is not in
their interest to move these vital materials.
This raises serious questions including which of
the thousands of products made from chemicals and
the jobs of Americans who make these products do
the railroads wish to eliminate from U.S.
commerce.

These materials are critical for the
production of lifesaving medications and medical
devices, body armor used by our military and law
enforcement, the ice and fluids for airplanes,
energy saving solar panels, and the list goes on
and on.
To make matters worse, the railroads are trying to sell a fantasy but there are benign alternatives to all of these crucial materials in order to avoid their responsibility and appropriate liability for the safe transportation of these products.

The current system appropriately places legal liability on the parties that are responsible for an incident. Railroads as well as hazardous material shippers should continue to bear liability for their own actions. Removing that liability could erode safety performance by creating a disincentive to address a multitude of factors to enhance rail safety.

Our members would be happy to entertain a discussion to address the railroad's liability concerns that would strike a reasonable balance between all parties. However, when the railroads tell our members that, "We don't want to move your materials unless we are relieved of liability," even in the cases involving gross negligence on the part of railroads, it doesn't
set the stage for very constructive dialogue.

As you will hear from our member companies on later panels, our other great concern is that any curtailing of the railroad's common carrier obligation will serve to extent the already unprecedented dominance they enjoy over their customers further harming the public interest.

Mr. Chairman, we have shared with you our significant concerns regarding policies that protect the railroads from competition and have allowed the railroads to wheel monopoly power over their customers. Clearly any erosion of the common carrier obligation which could allow railroads to pick and choose the traffic they serve will greatly exacerbate the market dominance they already enjoy.

I will leave it to the individual companies who will testify after me to highlight specific examples of undue leverage and there are many. In sum, the common carrier obligation is vital to my members and the products they produce.
which in turn are part of the lifeblood of our economy and the thousands of essential goods we take for granted each and every day.

Thank you again for allowing us to testify. I look forward to responding to your questions. Thank you, Mr. Chairman.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Gerard. We will now turn it over to Mr. Dungan and Mr. Donovan. You have the next 10 minutes.

MR. DUNGAN: Thank you, Mr. Chairman and members of the Board, my name is Art Dungan and I am President of the Chlorine Institute. The Chlorine Institute supports the Surface Transportation Board's effort to establish a more thorough understanding of the common earner obligation and to inform those who are affected by this obligation.

The Chlorine Institute is a 220 member trade association of chlor-alkali producers, repackagers, distributors, users, and suppliers to the industry. The institute's mission is the promotion of safety and protection
of human health and the environment in the manufacture, distribution and use of chlor-alkali chemicals.

Chlorine is a naturally-occurring chemical element that is essential to life. Chlorine chemistry is used to manufacture thousands of products critical to society's needs and, in particular, provides affordable and reliable disinfectants for the benefit of public health.

Any suggestion that chlorine can be replaced in this nation's economy is pure fantasy. In more than 95 percent of the uses there is no ready substitute. In order to realize these benefits, it is essential to deliver chlorine from production locations to end users which are often significant distances apart.

Approximately 85 percent of the long-distance delivery takes place via railroad tank car. Real transportation of chlorine has overtime proven to be a safe and efficient way to deliver this product. The continued ability to
economically transport chlorine via rail is vital to both our economy and to public health and safety.

Common law provided a basis for railroads being considered as common carriers with certain obligations to provide service on demand. The Interstate Commerce Act codified many of these common carrier obligations and also created new ones.

The Service Transportation Board announced that this hearing will focus on various topics related to the common carrier obligation. The Chlorine Institute has offered as written testimony to the eight specific items raised by the STB. However, time permits me only to address some of them at this time.

First, service limitations resulting from a constrained environment. Increased international trade and movements within the United States have resulted in higher demand on the U.S. rail system. However, it is the obligation of a common carrier to increase
capacity to meet this demand. It is incumbent on the carrier to make the needed investments and technological and infrastructure improvements. Railroads have increased their operated income by 85 percent and their stock prices have nearly doubled in the three-year period ending in 2006.

The rate of return on investment by railroads in 2006 was over 10 percent for the first time since 1929. The railroads have the ability to provide additional capacity if they choose to do so. Regrettably in many cases the railroads have failed to make the needed investments. A strong U.S. economy requires a rail system which supports it by providing transportation upon reasonable request.

The Chlorine Institute urges the Board to use its regulatory and moral authority to require the U.S. railroads to increase capacity to overcome restraints to shipments.

Cost and safety issues related to the transportation of hazardous materials. The rail
transportation of TIH materials, and chlorine in particular, has been very safe. The Chlorine Institute and its members are working with affected parties including government regulators to make such transportation even safer.

Since 1909 there have been over 2 million loaded shipments of chlorine with six fatal releases. Of these six releases two occurred in the 2004/2005 period. The National Transportation Safety Board investigations attributed the 2004/2005 releases to railroad operational failures.

A common carrier has a responsibility not only to transport goods upon reasonable request but to do so in a safe and secure manner. Clearly the railroads have the ability to make their respective systems inherently safer by such systems such as greater use of signaling track and by adopting more comprehensive operating procedures. Regrettably for the most part these vitally needed improvements have not been made.

Because the common carrier obligation
is a statutory one, the Board is not an appropriate forum on which to argue for a change in this obligation. The Board should not allow unilateral action by a railroad to change statutory requirements. The Chlorine Institute urges the Board not to make any change to the common carrier obligation unless such change is debated and authorized by Congress.

Carrier imposed requirements for infrastructure investments by shippers. We are concerned about the reasonableness of some carrier imposed requirements for infrastructure investment by shippers. Recently the Association of American Railroads adopted new standards for railroad tank cars transporting TIH materials.

These requirements were done without sound engineering and without government and industry concurrence. Further, these requirements would have provided only marginal improvement in accident survivability at a great cost to industry.

In the meantime, a separate
An initiative was launched which included members of the Chlorine Institute as well as one of the Class I railroads with the objective to develop a rail car with five to 10 times better performance than the current rail car and significantly better than the proposed AAR standard. Instead of working with this team, the AAR simply ignored this initiative. The AAR also ignored the root cause of the incident that brought about the activity.

The Chlorine Institute supports the continuous improvement and the design of chlorine rail cars. However, such an enhanced design must be based on sound engineering and must be authorized by the Department of Transportation, not the AAR.

Economically motivated service reductions are a mirror of the demand for service. Railroad transportation is an industry which has a unique role which has been given unique privileges.

In contrast to the trucking industry
the rail industry has a much higher barrier to entry from a regulatory perspective and from a capital perspective. Rail rights-of-way were deeded to railroads long ago and, in most cases, on very favorable terms.

It is virtually impossible for a new competitor to obtain the necessary new rights-of-way effectively barring them from entry. Accordingly, the common carrier obligation cannot reasonably be limited while preserving the public good. The idea of economic metering of service has no place in rationing the common carrier obligation.

The underlying motive of the U.S. rail industry in attacking the obligation to provide common carrier service to TIH shippers relates to liability for these movements and the cost related to the two recent incidents that the NTSB attributed to railroad operational failures. The chlor-alkali industry was saddened by the deaths and injuries that resulted from these accidents and understands that the cost of
responses and cleanups were significant.

The chlor-alkali industry has undertaken numerous steps to develop rail cars which would be more likely to survive the types of railroad operational failures that have occurred. It must not be forgotten that there has been a very strong long-term safety record with the current robust standard rail car design.

The Chlorine Institute fully supports the intent of the FRA TIH tank car standard which we expect will result in chlorine and other TIH tank cars with greater accident survivability through the use of new design and fabrication technology and through safer railroad operating procedures and practices.

In summary, the common carrier responsibility, particularly as it is applied to railroad, has a long history in U.S. law. Limiting the applicability to exclude essential chemicals would have a devastating affect on the U.S. economy. There is no justification to limit this obligation.
The Chlorine Institute urges the Board not to make any change in the common carrier obligation unless such change is debated and authorized by congressional actions. Thank you for allowing the Chlorine Institute to present its views to the Board. I'll be glad to answer your questions later.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Dungan.

We'll now turn to Mr. Bob Felgenhauer from the Fertilizer Institute.

MR. FELGENHAUER: My name is Bob Felgenhauer and I work for Potash, Corp. Potash, Corp. is the world's largest fertilizer producer by capacity with headquarters in Saskatoon, Saskatchewan and U.S. headquarters in Northbrook, Illinois.

We ship over 8 million tons of fertilizer per year on the U.S. rail system generating freight revenue in excess of $300 million a year. Included in this is over 600,000 tons of anhydrous ammonia shipments per year.
generating freight revenue in excess of $22 million.

I am here today as a member of the fertilizer institute. TFI is a national trade organization that represents the interest of fertilizer producers, wholesalers, retailers, and others involved in the use of fertilizer in agriculture.

TFI members are particularly concerned today with the common carrier obligation as it applies to the transportation of anhydrous ammonia. As you gentlemen know, anhydrous ammonia is a TIH commodity and there has been much discussion as it relates to the movement on the rails.

We believe that rail transportation of anhydrous ammonia is critical to food supply, energy policy, clean air, industrial production, and the national economy in general. The most prevalent use of anhydrous ammonia is as a nitrogen fertilizer essential to growing food for millions of Americans. It is the least costly
and most effective source of nitrogen fertilizer to American farmers.

In addition to its direct application as a fertilizer, it is also the base raw material for a lot of downstream nitrogen materials like urea and UAN solution and also phosphate materials like DAP and MAP. Fertilizers high in nitrogen are essential for crops like corn which is the largest consumer for direct applied anhydrous ammonia.

A single rail car of ammonia produces approximately 128,000 bushels of corn which can be used to feed 1,600 head of cattle or produce 345,000 gallons of ethanol. Corn is also used in thousands of basic food products that are found on our grocer's shelves. Food security is quickly becoming the number one issue around the world.

Export tariffs in China, as well as civil unrest in Haiti and Egypt are all the result for increasing demand for better quality food. Better quality food that can only be
produced with an effective and reliable source of nitrogen fertilizer. There is simply no substitute for anhydrous ammonia in maintaining our country's and our world's food supply.

Anhydrous ammonia is also used in a variety of industrial applications and is the only raw material available for some consumer goods. For example, anhydrous ammonia is necessary to produce certain pharmaceuticals, adhesives, feed supplements, personal care products, and nylon fibers.

If you just look around this room, the carpet on the floor, the cushions on the seats, the ink in our pens, and if anyone is wearing cologne or perfume, the perfume on your bodies was all manufactured with anhydrous ammonia as the raw material feed stock.

None of these products have a substitute material to produce them. We believe that rail is much safer than any other alternative to trucks for hauling anhydrous ammonia. It keeps this essential TIH commodity
off our nation's highways where we believe the potential for accidents is many times greater to the general public.

According to the AAR zone data in 2005, which is the most recent year that they had for information, 99.997 percent of all rail hazardous material shipments reached their final destination without a release caused by an accident.

AAR statistics also show that on average a little over 50,000 rail shipments totaling 4 million tons a year of anhydrous ammonia is shipped between 2000 and 2005. It takes four trucks to equal one rail car of ammonia.

If all this was converted over to trucks, this would equate to over 200,000 truck shipments. If stacked end to end would extend all the way from this hearing room to Los Angeles, California. We don't believe that is in the best interest of the nation.

The AAR has called upon producers of
TIH commodities including ammonia to cease their production and has even urged Congress to enact legislation to require such action. We believe this to be an unreasonable request unsupported by the facts and based upon an irresponsible short-sighted and self-interested attempt to avoid the common carrier obligation to haul these commodities.

In a misinformed attempt to show that rail transportation of ammonia can be significantly reduced, the rail industry has suggested that farmers replace anhydrous ammonia with nonhazardous nitrogen fertilizers like urea or UAN. We don't believe this is possible. I would like to take a few minutes to explain why.

First, because ammonia is a critical raw material to all other downstream materials, urea, UAN, and a lot of nitrogen containing phosphate materials you cannot produce those downstream materials unless you have ammonia available at production sites to produce the substitutes.
Second, ammonia is a much higher nitrogen content. The substitutes are a much lower content. If you were to try to replace this with ammonia, you would end up having to ship, store, produce, and apply two to three times more the amount of nitrogen fertilizer that is currently going down in the ground.

Third, even if you could do that, if you had the storage available, if you had the infrastructure available to handle it, there is not enough production capacity in the world today that could handle the substitutes. All the production capacity in the world is operating at full and you cannot replace the ammonia that is out there.

Fourth, ammonia producers and distributors have a tremendous amount of money invested in infrastructure. All of that would be stranded and a tremendous amount of capital would have to be put back into new infrastructure in order to handle the substitute products.

Fifth, and very important, is ammonia
gives you the ability to apply nitrogen in the fall. The other products you cannot put nitrogen down in the fall for production of a grain crop due to potential environmental losses.

If you didn't have the ammonia you would have to take all of this that is being direct applied and put it in the spring with everything else that's being done which already is in a very tight window in between rain showers in order to get everything done.

Agriculture is really only part of the picture. The U.S. industrial market, which is defined as ammonia which isn't used to make downstream fertilizer products or used as direct application, consumes about 6 to 6.5 million tons of ammonia a year. Of this about 2.3 to 2.4 million tons is shipped on the rails.

In some manufacturing processes, which use ammonia, product substitution just isn't possible. The rail industry has suggested that ammonia could be shipped in a diluted solution known as aqua ammonia which is a 29
percent anhydrous.

This would require three times current number of rail shipments with a substantial increase in infrastructure investment such as rail cars, storage facilities that are currently not in place for most shippers.

In addition to tripling rail shipments, making costly production modifications, and significantly increasing infrastructure investment, aqua ammonia would require the treatment and disposal of over two billion gallons of water annually.

The most obvious way that the railroads have tried to keep ammonia off the rails is by rates. TFI members report that their rail rates have nearly tripled over the time since 2004 excluding fuel surcharges. My company, Potash, estimates that we are paying about 110 percent premium to ship ammonia versus other commodities which is costing us about $6.5 million annually in additional transportation cost.
By increasing rail rates to such high levels railroads are able to discourage the shipments of ammonia without actually having to refuse to transport those shipments.

Rail rate increases have actually made trucks a little bit more competitive. Typically you can only take a truck out about 200 miles before it wasn't competitive with rail anymore. With the increase in rail rates you can now take trucks out about 500 miles and still be competitive with rail.

Again, we don't believe this is in the best interest and feel that it is the rail industry's failure to de-market ammonia through higher rates. Because of that more ammonia is moving by truck.

If you took my company, Potash, Corp., and took all of our ammonia and switched it over to truck, all of our rail ammonia and switch it over to truck, we would add over 20 million truck miles to an already congested U.S. highway system and consume over 3 million gallons
of diesel fuel annually.

This is two million gallons more than
the railroads are consuming. We understand that
liability is an issue and as TFI we have
presented a proposal to the railroads to help
solve this. We believe you have to come up with
a business solution first before you can go for a
legislative solution.

We have offered to work with the
railroads to look for an insurance policy. We
have been told that there is $1 to $1.5 billion
of available insurance out there in the event of
a release caused by an accident. TFI is willing
to work with the railroads if they will carry
primary insurance and then the TFI would pick up
insurance over this amount to cover in the event
of a release.

This does not indemnify the
railroads. It does not take the liability away
from them but what it does do is they are
constantly telling us that the reason our rates
are so high is because of the cost of the
insurance. We are offering to pick up a portion of the cost of this insurance. In return we would like a reduction in our rates and stability in rates going forward.

My red light is on. Thanks for your time, gentlemen. I will be happy to answer questions.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Felgenhauer, and thanks to all the witnesses.

Mr. Gerard, if I could start with you. You quoted some impressive statistics at the beginning of your testimony about the size of your association, your membership companies, the number of employees. Just ballparking it have you had occasion to compare the size and scope of your member companies with that of the U.S. freight industry?

MR. GERARD: I haven't. We compete with the global world, as I'm sure you appreciate, so we operate all around the world, Europe, China, the emerging world, India, and elsewhere. We are probably significantly larger
but I haven't taken the time to make that comparison. I'm not sure what value that would provide but we are happy to do it if you would like to see it.

CHAIRMAN NOTTINGHAM: No, I just think it's interesting that the scope and size of your industry is just enormous. That leads to my next question. I had the chance to visit some of your member facilities and I appreciate that opportunity. I have learned in those visits that, of course, many chemical company facilities also make big time rail operations on them.

MR. GERARD: Absolutely.

CHAIRMAN NOTTINGHAM: In some respects your members are very much in the rail business so to speak in that you've got infrastructure in your property, track that your members own and need to maintain and build. Do you keep track of the investments that your industry makes directly into rail infrastructure?

MR. GERARD: We do not keep track of it. I can probably find that out. We have
generally moved, if you will, into the rail sector to that extent largely because we have to. If we are told that if we want additional places to park rail cars, tank cars, or whatever, that we have to build it out on our own facility, we do that.

I had one member company tell me about six months ago that their investment in their rail structure over the next two years will be $300 million. Not by choice but by the reality of the competitive relationship between them as a customer to the railroads.

Yes, we are in that business to the extent we have to be to remain competitive in the global environment. If that would be helpful to the Board, I would be happy to go back and try to put together those numbers for you.

CHAIRMAN NOTTINGHAM: I think it would be helpful for a number of reasons but there is a lot more going on it occurs to me in the area of rail infrastructure than just maybe what the big four Class I railroads account for.
There is the short line sector which is not your responsibility, and also industry.

I think it relates to something that is not really front and center at this hearing, and I won't make it front and center, which is the proposal pending in Congress for investment tax credit for rail infrastructure. It occurs to me if you've got a member company, or more than one investing something like $300 million over a period of years in rail infrastructure, they should be incentivized.

I think that is a tremendous benefit they are providing not only to their bottom line shareholders but to the country's transportation system in avoiding backlogs and choke points.

Frankly, I think your members are more than maybe some shippers frankly able because of their size and scope to actually make a meaningful difference on the infrastructural landscape.

MR. GERARD: Yes, we have looked at that. Let me make one comment if I can, Mr.
Chairman. First, this might be a great question for some of those who follow me who are specifically making these investments.

I think if you look at the question historically, what you see is that over time there have been more and more of the rail infrastructure that has been shifted to the shipper. I think the GAO pointed this out in a recent study. For example, in our case all the tank cars are held or leased by us as companies. Railroads don't own those cars.

Likewise the infrastructure at our individual plants or connecting routes or others more and more of that is falling in our lap. Not by choice. We haven't preferred to be in the railroad business or we would have gone into that business but the reality in what we need to try and compete across this country.

I hear your message on the investment tax credit. If we felt we had a good mutual relationship currently in the economic realm of the railroads, we would be happy to support that
initiative and others. That is why I mentioned in my testimony we think the line of questioning here is headed, if you will, either too narrowly or in the wrong direction.

If we look down the road over the next 10, 15, 20, 30 years and we say what is the capacity that is going to be required in this country not only to serve the needs of our growing population, but for those of us who compete in the global environment I believe that is the question we should have on the table.

How do we expand that capacity and how do we do it in a meaningful way so that we have adequate capacity in the future as opposed to looking at this more narrowly saying how can we get out from under this obligation or this obligation and use justification like constrained capacity or liability cost or whatever. I think we ought to change the debate and be forward looking to be more visionary in what we are talking about.

CHAIRMAN NOTTINGHAM: Are you
suggesting then that you might forego supporting a pending bill to provide enormous benefits to your members just because it might also benefit a group of companies you don't particularly care for right now, the railroads?

MR. GERARD: No, I didn't say that at all. In fact, we are not convinced that we are bringing benefits to our members. Our belief is that we should bring together and once again look to the future and say what is the appropriate relationship between the railroads and the customers they serve and then how do we make sure we expand that capacity.

Is it through an investment tax credit? Is it further relationships on questions of liability? Is it further routing issues? What is it? We believe the economic relationship between us and the railroads is currently at such imbalance that must be corrected first in the current environment before we move to that future look to see the vision of the future if you will.
I'm not suggesting how you should do your job, Mr. Gerard. Lord knows you've been doing your work much longer than I would ever care to pretend to know about, but you suggest that you've got at least one member that's planning to spend $300 million on rail infrastructure and there is a pending bill that would give that member and all your members the ability to get a tax credit for those kind of investments.

It's hard to believe that it's not in your member's interest to support that. I'm not pushing that bill today. I'm just probing because I think it's a point of curiosity.

MR. GERARD: We think it's a pretty short-sided view. In order to get a small tax credit for the $300 million investment and turn around in the current relationship and be forced to spend a billion dollars two years from now we don't think is a very good investment. Our view is let's look at the long term.

Let's balance the various
relationships across the rail customer situation and when we do that let's do it holistically. Let's talk about this capacity question. Let's talk about the current relationship we have now in the competitive environment. If we do it that way, you'll see us become the biggest cheerleaders for other activities to expand this capacity.

CHAIRMAN NOTTINGHAM: Okay. Thanks.

How are your members doing financially? I saw yesterday in the Wall Street Journal that DuPont reported 26 percent increase in first quarter profits from a year ago. It's a pretty impressive number. Congratulations. We'll have DuPont with us.

MR. GERARD: Absolutely.

CHAIRMAN NOTTINGHAM: That's impressive given some of the challenges facing our economy today. I realize that numbers like that have a major international component and dimension to them I'm sure given the nature of the business.
How are your members doing in general if you could just give us a quick overview financially. Is yours an industry that is on the brink of disaster, massive layoffs, or doing pretty well, posting significant profits? Give me a sense of how it's going.

MR. GERARD: Yes to all of the above. Let me explain if I can. It's relatively complicated. Let's look at it in two different ways. You look at DuPont's earnings, for example. They may have done well in this particular corridor but if you look at it globally that is the way to assess, if you will, the strength of a company like DuPont.

What we are talking about here today is by in large limited to the borders of the United States, the domestic service. In this case, rail capacity. The impact that it has on us to do well globally is significant from this base of the United States.

What do I mean by that? In our sector here in the United States over the last
five or six years we have lost 120,000 jobs. These are high paying jobs, the best jobs around with great benefits, well educated people, etc., etc. The challenge is because of domestic policies.

Our first great problem right now is the price of natural gas which we use as a feed stock. We take natural gas and we convert it to products, chlorine chain and all the rest of it, and then convert it into all the materials that each of us enjoy every day. Ninety-six percent of all manufactured goods are touched by us. That's number one concern.

Number two concern to a lot of our members is their transportation cost. That is why as you probably sensed in my opening statement we feel so strongly about this issue right now. It impedes our ability to compete globally. We have companies in this country who limit the infrastructure they build in this country and potentially move it off shore because of the cost of rail rates.
You'll hear from one of our CEOs today who will tell you that his rail rate costs are now higher than his manufacturing costs. When we've got that type of imbalance, we can look at a company on a global basis and say they are doing pretty well. Start looking behind the curtain and you'll find the revenues that come from China, India, the Middle East.

I spent last week in Dubai. Why? A lot of our companies are building great relationships with the Middle East now by in large due to the cost of petroleum and natural gas. That is the future of this domestic industry if we don't get these domestic policies right. We don't want to go to China and India at the expense of the United States.

If the economics are such if we can't get competition in the rail system so that it's unclear what our cost will be to build a major facility by the way we are currently building 120 major chemical plants around the world, a major plant being at least a billion dollars of
investment, not one of those is in the United States. Why? Because of the cost structure here in this country and our transportation cost is a big factor.

Again, our point would be let's look at this from the domestic perspective which is what it is but it impacts those of us who compete globally and dictates are we going to build that facility here in the United States or are we going to put another plant in the Middle East or China or India where the merchant market is. Is that helpful?

CHAIRMAN NOTTINGHAM: It is. Offhand do you know how many of your member companies last year reported a loss?

MR. GERARD: I don't know off hand. I certainly hope none of them do and I certainly none of them do in the future for the sake of the country, for all the stocks that each of us enjoy and our 401(k)s and everything else. I hope they do well. I would hope the Board feels the same way.
CHAIRMAN NOTTINGHAM: Me, too. You went to some length to point out that in recent years railroads have been doing pretty well financially.

MR. GERARD: Absolutely

CHAIRMAN NOTTINGHAM: I just think it's only fair to try to give a good snapshot of how your industry is doing, too, just to have it all laid out there.

MR. GERARD: Let me put that in context if I can, Mr. Chairman. I think the comment was made earlier, and I don't know if it was a panel before us earlier today, about a lot of the concern of the rail industry early on when we used to talk about these competitive interests was based on revenue adequacy.

That was always the excuse why we couldn't have a hard competition discussion. That is not an excuse anymore so what is the discussion today? Capacity constraint. Now, from our sector it's a liability issue. When did liability come on the scene. It's been the last
few years.

Liability was the big concern 10 years ago, 20 years ago, yet they were hauling volumes of our materials, TIHs, hazardous materials, etc. We believe some of this debate is ebbing and flowing. You don't want to be so cynical as to suggest there is strategy and other things involved with this.

At the end of the day we think it's critically important that we reassess the competitive relationship between our industries and others which are customers of the rail sector and figure out a way to balance that relationship for the benefit of all of us, particularly our domestic economy.

CHAIRMAN NOTTINGHAM: Thanks. I have some more questions but I want to share the time and let Vice Chairman Mulvey have some questions.

VICE CHAIRMAN MULVEY: Let me start out with a question to the Fertilizer Institute. Have you done any estimates of the output effects on American Agriculture if anhydrous ammonia were
not available or if you had to substitute it with
the available amounts of urea or other
substitutes? What would that mean to the total
agriculture production of the country?

MR. FELGENHAUER: In terms of total
fertilizer we estimate that without fertilizer we
wouldn't have 40 percent of today's food.
Breaking that down into just ammonia there is
about 4 million tons of ammonia consumed direct
applied as fertilizer and there's probably -- I
would have to get you the exact numbers but I
would guess it's somewhere in the -- Pam, you can
help me here -- 40, 50 percent, I guess of the
total goes out as ammonia.

VICE CHAIRMAN MULVEY: You mentioned
about the willingness to fund primary insurance
with the railroads picking up secondary or the
railroads covering the primary and then you would
go beyond that. What percentage of that
insurance cost would the railroads be responsible
for? What would be the primary?

MR. FELGENHAUER: What we looked at
is the railroads have been telling us for some
time that the reason our rates are so high is
because of the liability and a lot of that has to
do with what they have to spend for insurance in
order to cover that liability. We started doing
our own research into the insurance markets and
we spoke to a few brokers and we visited with
some off-shore insurance markets.

What we have come up with is we
believe there is somewhere between $1 billion and
$1.5 billion worth of insurance coverage out
there to cover the railroads in the event of a
release from an accident. What we have requested
from them is that they cover the first $500
million under their primary insurance. That
would be the first to pay under an accident.

Anything above that then up to the
maximum that we could secure, which we believe to
be another billion dollars, would be covered by
insurance policies purchased by TFI members that
would be purchased through an assessment per ton
for ammonia shippers that ship by rail.
VICE CHAIRMAN MULVEY: The railroads sometimes claim that they are betting the firm, or betting the farm, whatever, every time they carry hazardous materials and that the cost of a spill, for example, in Chicago or New York or Washington, D.C. could be tens of thousands of lives and even half a billion dollars wouldn't cover that. Do you see a need for something like a Price Anderson kind of approach, especially if the railroads were also required to contribute to it?

MR. FELGENHAUER: We have talked about that and our belief on that was that no one would listen to us until we exhausted all business solutions. Our intent here was to work with the railroads to try to exhaust that business solution. Once we have maxed out that insurance market, we then have offered to go with the railroads to either the Surface Transportation Board or to Congress or wherever we need to go to in order to enact overall caps for the movement of TIH materials.
VICE CHAIRMAN MULVEY: In your testimony you mentioned about the relative cost of moving it by truck versus rail. You said the higher rail rates up to 500 miles -- Is that one way?

MR. FELGENHAUER: Yes.

VICE CHAIRMAN MULVEY: -- by truck. Is that still true given the current price of diesel at almost $4 a gallon and the higher driver wages and the lack of drivers? Are these estimates fairly current or are they a little bit dated now?

MR. FELGENHAUER: I looked at it last week and for us the break even is right around 400 miles. That is where rail becomes more competitive than truck.

VICE CHAIRMAN MULVEY: Most anhydrous ammonia though, as I recall, especially that used in agriculture, moves by pipeline. Correct?

MR. FELGENHAUER: In total there is about 2 million tons that moves by pipeline. About 4 million tons moves by rail.
VICE CHAIRMAN MULVEY: Four million by rail and 2 million by pipeline?

MR. FELGENHAUER: Yes.

VICE CHAIRMAN MULVEY: Is it possible to shift more to pipeline? I know there are two major pipelines, I guess, coming out of Louisiana and the Texas Gulf area?

MR. FELGENHAUER: That is correct. Pipelines are about at capacity. You couldn't push all four of those million tons through the pipeline. Then also with the pipelines you are fairly restricted to where they end.

The pipelines pretty well run up the river system, the Mississippi River system, and then branch off to the west into Iowa, branch off to the east into Indiana. They stop in Indiana and then they head out a little bit further west.

For those that are a significant distance from the pipeline it's really not an option. Those that are close to the pipeline certainly haul that material by truck. The ones
where we have to ship the rail to is really where truck is not an option.

VICE CHAIRMAN MULVEY: The Chlorine Institute. The problem is often with the delivery of chlorine to water treatment plants. At least that is what has been brought up as a threat. These water treatment plants are in urban areas and chlorine moving through cities to the water treatment plants are problematic.

Can you isolate the chlorine that is moving towards the treatment plants as compared to movers of chlorine to other places? Perhaps the movement to water treatment plants in urban areas can be addressed by rerouting the trains, for example, as was suggested here in Washington.

MR. DUNGAN: Well, certainly most of the chlorine -- I won't say most of it. A vast amount of the chlorine that goes to the urban areas is erected to eventually water treatment areas. Certainly in the northeast that's correct. Frequently that chlorine goes by rail car to a repackager who then puts it in a one-
tone container or 150 pound cylinder and then sells that to a water treatment facility.

Now, there have been several water treatment facilities, both drinking and waste water, that have converted. Certainly in the Washington area a waste water facility has converted. The Washington Sanitary District has converted their waste water treatment system to bleach and others are considering it but many of these facilities cannot.

I visited a facility in Chicago and one in New York City and in Chicago is the world's largest water treatment facility. They just physically cannot have the capability to install bleach or any other kind of chemical treatment. They would have to put in a whole new infrastructure system in.

Most facilities, even if they have a different system for primary disinfection, they have chlorine, usually elemental chlorine, as a residual which is required by the USEPA. Water treatment is only 5 percent. 95 percent of
chlorine has alternate uses.

There is a vast amount of chlorine that is shipped. We need to remind you there is a lot of chlorine that is consumed on site. Probably about 75 percent of the chlorine produced in the United States is produced on site or transferred by short distance pipelines. We are talking 3.5 million tons of chlorine that are shipped primarily by rail.

VICE CHAIRMAN MULVEY: I was referring to the chlorine shipments that had elicited the greatest attention and that seems to be that which is moving in urban areas to waste water treatment plants.

MR. DUNGAN: It's my understanding the railroads, and certainly this CSX system, has implemented some voluntary agreements to reroute chlorine around Washington, D.C. and now there is a proposal that the government will be looking at for the options and what are the best routing routes and we support that. That is really a carrier decision which is the best way to
transport chlorine.

VICE CHAIRMAN MULVEY: There is always a tradeoff between the most direct routes which often go through urban areas but go over Class I track, well maintained, good track, versus moving on more roundabout routes but, unfortunately, over class 1 and class 2 track or excepted track where the likelihood of an accident is greater because of the quality of the infrastructure. There is always that tradeoff.

MR. DUNGAN: That's correct.

VICE CHAIRMAN MULVEY: Versus risk.

MR. DUNGAN: Right. Yes.

VICE CHAIRMAN MULVEY: You mentioned about a 10 percent rate of return for the railroads and I guess it's similar to Chairman Nottingham's question. Is 10 percent a high rate of return in terms of your industry?

MR. DUNGAN: We don't calculate that because our members are part of the American Chemistry Council and we don't ever see and don't track chlor-alkali results separately. We can
certainly say the last few years the chlor-alkali industry has done reasonably well but the last year there has been a downturn with the housing industry.

We have seen cutbacks. While I would like to say all our members are profitable, one of our members unfortunately did go into bankruptcy early this year. Another one who was very big has sustained massive losses. Those are just what I read from press accounts.

Certain the stock prices of the chemical portion of our members if you just look at the chemical portion of the members, they haven't doubled in the three-year period from 2003 to 2006.

In fact, another member company because their profits are dropping this year they instituted travel curtailments for nonessential travel so we are seeing more of this in the industry now. Certainly this year in the chlor-alkali I would expect there would be a downturn in profitability.
VICE CHAIRMAN MULVEY: Mr. Gerard, you were talking about the competitiveness of the U.S. chemical industry and the investments being made abroad, etc. I believe someone testified for the railroads one time referring to the problems facing the American Chemistry Industry and the top 10 problems and transportation wasn't one of them.

What percentage of your total cost -- I'm sure this is kind of a broad question, I guess, because you have different kinds of products but are transportation costs and high transportation costs really critical compared to, say, government regulations, compared to environmental rules and regulations, compared to the cost of natural gas? Aren't these much more determinant than the cost of rail transportation in your investment decision making and location decision making?

MR. GERARD: Transportation is a critical factor or an important factor, if you will, in our decision making process. Let me give
you some anecdotal evidence as to why that is. For some time I think our industry has had some concerns with the process and their relationship with the railroads.

Since I took over the American Chemistry Council a little over two years ago what we do each year is we identify through the CEOs. We did a survey of priority issues and priority questions for the industry, what are the issues that matter most to us.

Transportation, specifically rail transportation, has been in the top five in the last two years. Is it the number one cost? Probably not. Most of their number one costs right now, like I say, are feed stock cost, in this case natural gas.

For example, Dow Chemical, I'm trying to remember the numbers, their annual energy cost was typically around $25 billion. Today it's about double or almost triple that. It is outrageous what is going on in the energy markets right now. Close behind that many will tell me
that transportation is their number two cost.

    Now, again, that varies from company to company so I don't want to make a blanket statement here and leave the impression it is number two everywhere. Clearly for some, particularly those who have less competition opportunities it's a bigger factor. Again, just like all these factors, it plays into the decision making process.

    Where do you site a plant? Many of our people will tell you quietly -- they are always a little reluctant to say this publicly but they will tell you privately that unless there are at least two rail lines to a particular location, they will not build a plant. That is how important it is to them.

    It is a factor that influences heavily Board decisions as to investment money in the United States or we have to take that money elsewhere to be competitive in this global economy. I hope no one underestimates this is a critical factor to us, a very important
consideration as we look at our cost structure and try to remain competitive.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOTTINGHAM: Mr. Buttrey.

COMMISSIONER BUTTREY: Mr. Felgenhauer. Is that the way you pronounce that?

MR. FELGENHAUER: Yes. Very good.

COMMISSIONER BUTTREY: I think you said that you had a proposal on the table that would provide that the railroad pay the first $500 million and then you would get insurance -- there would be insurance to cover the rest of the liability up to $1.5 billion.

MR. FELGENHAUER: As high as we could get, yes. We believe it's $1.5 million.

COMMISSIONER BUTTREY: Are you saying your company has that proposal on the table or does the American Chemistry Council has that proposal on the table? Who actually has that proposal on the table?

MR. FELGENHAUER: That proposal was made by the Fertilizer Institute. First to the
AAR and then the AAR told us they would prefer that we deal directly with each of the Class I railroads so that proposal has now been made to each one of the Class I railroads. In return for that, of course --

COMMISSIONER BUTTREY: Do they all serve your company?

MR. FELGENHAUER: No, they do not all serve our company but the way that we --

COMMISSIONER BUTTREY: AAR is not brokering this deal?

MR. FELGENHAUER: The AAR asked us to work -- we met with the AAR but they did ask us to work directly with the Class Is.

COMMISSIONER BUTTREY: Okay. So is there a similar proposal on the table from your organization, Mr. Gerard?

MR. GERARD: No. We don't --

COMMISSIONER BUTTREY: Do you have any proposal on the table?

MR. GERARD: We have had conversations with --
COMMISSIONER BUTTREY: Just opposing everything?

MR. GERARD: No, we don't oppose everything. We would like to have a good dialogue. The last proposal we saw was a proposal by the railroads to give them complete release of liability even in cases of gross negligence so we would hope they had moved from that position a little bit so we could have a candid reasonable dialogue and we have committed to do that.

COMMISSIONER BUTTREY: Do you like Mr. Felgenhauer's Fertilizer Institute proposal?

MR. GERARD: Haven't seen the proposal. We would clearly be happy to entertain it. The fact is the other proposal has been talked about, Price Anderson structure, etc. We are open to all opportunities, all proposals to some how balance this relationship.

COMMISSIONER BUTTREY: Are you open to capping the liability to $1.5 billion?

MR. GERARD: We would be happy to
consider any proposal.

COMMISSIONER BUTTREY: If the railroads agree to the $500 and the $1.5, then you are saying you would help the railroads get a cap of $1.5?

MR. GERARD: We would be happy to sit with our members and look at that in light of the various economic factors and our broader relationship in decide is that the best way to address this issue. If we agree, absolutely.

COMMISSIONER BUTTREY: How do your members ensure against catastrophic release at your production facilities?

MR. GERARD: They obviously have insurance to cover all those which is the other factor. We are quite sophisticated and understand what that takes. We deal with these materials, these hazardous materials, the TIHs all day every day of the week. We are expert, if you will, in this. We can be very helpful in this dialogue with the railroads. This might be a secondary consideration to them, if you will,
as we are trying to run the railroads.

COMMISSIONER BUTTREY: And you, Mr. Felgenhauer?

MR. FELGENHAUER: Part of our insurance is certainly self-insured but we also have insurance policies at our production facilities and our risk managers are working with us and the railroads to develop this policy.

If I could just add one thing to clarify a position. What is very important to us, too, is to do this we would expect to see a reduction in our rates for hauling anhydrous ammonia and we would expect to see rate stability going forward because we feel like we are taking away the biggest risk that they have.

COMMISSIONER BUTTREY: So the railroads are telling you that part of their rate, or at least a certain percentage of their rate that they are quoting you, is based on the fact this is a serious issue for them in terms of liability. You know what that percentage is above the base rate. Do you know what that
percentage is?

MR. FELGENHAUER: I'm not sure I follow your question.

COMMISSIONER BUTTREY: If it's $1,000 a car and you are having to pay $1,500, is $500 worth of that -- do you know how much the surcharge is for liability coverage?

MR. FELGENHAUER: The railroads haven't told us directly what that is certainly. They are not going to but we have run the math ourselves and just base what they charge us for other commodities versus what they're charging us for anhydrous ammonia on similar lanes.

As I mentioned, we have seen our ammonia rates triple since 2004. During that same period if you look at the railroad's SEC filings their rates up during that period are up around 35 percent. We can do the math and estimate that variance is due to the liability of the money.

COMMISSIONER BUTTREY: Okay. I think that does it for me.
CHAIRMAN NOTTINGHAM: Thank you, Mr. Buttrey.

Mr. Gerard, I just want to make sure I understand where your association is on the possibility of some type of consensus, legislative proposal that would address what I hope you at least recognize as a problem. Earlier today the previous panel certainly helped us recognize the problem which is railroads, of course, have this common carrier obligation.

Certain types of materials are more risky than others and sadly the sorry state of our American tort liability system, especially in certain states more than others, actually means that it is possible for a railroad to not be negligent, yet to experience a release because of an act of nature or act of a truck wrongfully crossing onto a railroad track and knocking over a car but still find themselves liable for billions of dollars in damages to the tune to the extent that it could bankrupt an entire company.
Given the choice, obviously, any business would prefer not to have to be exposed to that kind of risk. Your members are no strangers, as you just touched on, to risk management. You're probably some of the most expert practitioners of it. Similarly you I would hazard to guess that one of the few businesses that the tort liability bar would take pleasure in suing above railroads would be chemical companies and its deep pockets.

Not everybody agrees out there with some of the environmental history of the chemical industry. This is not my position. I'm just saying your members know full well the problems of our American tort liability system and what it has evolved into. I don't think the system has always been as troubled as it is now.

In fact, I'm pretty comfortable in saying we talked earlier in my opening comments that the common carrier obligation goes back to Roman Empire times and certainly British Commonwealth times in the Middle Ages. I can
certainly say that those societies did not have
tort liability, the situation that we have here.

If they did, I'm not quite sure they
would have structured, nor would Congress have
structured the playing field quite a way it is
now. Anyway, we have the situation as it is. Do
you recognize that this presents a problem? You
heard earlier that, of course, these insurance
costs and the risk management costs have to get
paid for by somebody and they are getting passed
along to shippers.

The first shippers that we can
presume railroads try to pass the cost onto are
chemical shippers if they associate the increased
insurance premiums primarily with the requirement
to carry products of the chemistry industry.

Then beyond that we heard earlier
today that railroads pass on those costs to all
shippers. Every shipper is paying because of
this problem and I would argue it's rippling well
beyond that into the economy. What is your
position on what the solution should be?

MR. GERARD: Let me react if I can in a couple different ways. The first one is, I guess, let's assess what the problem is. Is the problem the tort system of the United States or is it liability assumed as a result of the common carrier obligation. Obviously we as an industry assume all those other risks just like every other industry does, tort lawyers, all the rest of it. It's part of doing business in this country. Unfortunately, in that case it gives us all additional exposure, exposure we prefer not to have.

We are willing, as I mentioned in my opening statement, and very happy to sit down with the rail sector and talk about this question. Again, I think we should put it in the context of what we are looking at generally. Has this become a function of the recent accident and, therefore, it's become front and center?

I think the Fertilizer Institute mentioned they have seen their rates go up three
times in the last three or four years. Was it a recent incident that sparked this issue and, if so, let's assess that situation and look at this generically, or more broadly, if you will, as to what the answer should be to it.

We are happy to have those dialogues, those considerations. We will tell you that we are fully liable for any risk in any activity that goes on in our facility as we work with these chemicals and these important materials that are critical to our lives and to our well-being.

The reason we live 20 years longer in this century than we did last century is a direct result of the chemistry and the things that we do in the area of pharmaceuticals, the lifesaving instruments. The list goes on and on. I think it needs to be clearly understood.

We understand those issues well. We are happy to work with our colleagues in the rail industry to better help them understand and to work with them on what the right solution is.
The right solution is not to give us complete liability for their activities and to date that has been part of their position.

If we can get rid of that, let's move to the center and figure this out. We are open to dialogue. We also feel very strongly that as part of that dialogue we need to talk about the relationship between the rail sector and those of us who use them, those of us as customers.

We don't often feel like customers in this relationship which was something frankly that kind of shocked me and appalled me when I came to work for this industry. I've never had anybody treat me so poorly as a customer so we want to look at that question.

As you well know, Mr. Chairman, we are active on Capitol Hill right now because we believe there are some fundamental changes that have to be made to that relationship. We want to look at it in a holistic approach just like we look at the question of safety. We have worked with the rails over time.
Within our industry we've had for 30 years a ChemTrack operation. We are the first responders -- I should say responders. We are the first notification when there is an incident around this country be it the rails, be it on trucks or any place else. We mobilize our people. We have paid for that asset because we take full responsibility for the materials we work with and we use to advance our common interest in our society. Yes, we do not oppose everything.

We are very anxious to have a dialogue but we want it to be a balanced dialogue and we think it should be a holistic dialogue so that when the agreement is reached we can look to the future and say there is a fair economic commercial relationship between these entities and it will govern us for the next 10, 20, 30 years as we try to complete globally and as they try to get a fair return on their investment both of which we hope can be accomplished.

CHAIRMAN NOTTINGHAM: Thank you. You
said something earlier that was news to me, that
the railroad's position is that they need to be
relieved or absolved of total liability exposure
for acts of gross negligence.

We'll have some railroad people with
us again tomorrow and I will certainly explore
that with them because that, to me, just flat out
doesn't make sense. I don't know how you ever
would get --

MR. GERARD: I agree with you on
that, Mr. Chairman. I would encourage you to ask
me about it.

CHAIRMAN NOTTINGHAM: The sooner we
can get through that in about five minutes, which
I'm confident I can, and get them to abandon that
position if it ever was.

Let's just assume their position is
probably going to be what I've heard it is
before, more along the lines of when it's not
gross negligence can we talk about a cap as a
society for the one industry out there that is
required to carry highly dangerous poisonous
material through the largest cities in America.

If we decide to change that, it doesn't give me much more relief to say they are bringing it through the smallest towns of America because, frankly, a life in Mayberry is just as valuable as a life in Washington, D.C. We'll quickly get to that point.

When we do, do I understand your position to be, well, we have to somehow put together an omnibus bill that addresses all the chemical industry's concerns with railroad regulation that go back to things that maybe the chemical industry didn't get when Staggers was passed. We've got to have everything all in one package and then we'll try to get that through Congress. That, to me, sounds like an awfully unrealistic scenario.

MR. GERARD: If you are representing the railroads, I expect they would say that to me.

CHAIRMAN NOTTINGHAM: And I don't.

MR. GERARD: Okay.
CHAIRMAN NOTTINGHAM: I'm just giving you --

MR. GERARD: I just want to make sure.

CHAIRMAN NOTTINGHAM: As I have with you, I have certainly had discussions with them.

MR. GERARD: I understand.

CHAIRMAN NOTTINGHAM: It's my job because it is an incredibly important problem.

MR. GERARD: I understand.

CHAIRMAN NOTTINGHAM: I'm going out of my way not to restate what you have told me in more of what I would off-the-record context because that is not appropriate but I sort of know what your bottom line is but I'm trying to let you state it here on the record.

MR. GERARD: If I haven't been clear, let me try to restate it if I can. I'm obviously not being very articulate. We think it's important as we look at the issues before us today to take a holistic approach.

Look to the future not to figure out
how to narrow the common carrier obligation in this country, but to figure out what is in the best interest of the public, what is in the best interest of our society to continue to move goods and services so we can compete not only domestically but globally.

We believe there are factors that should come into that discussion, liability being a very important one and we are prepared and willing to consider all proposals and come up with some of our own as we address that component of the holistic approach. Does that help?

CHAIRMAN NOTTINGHAM: A little bit. I would wish for a little more of a specific answer. What I believe you're saying is that until you get the railroad's complete capitulation on your other legislative agenda, you are not going to help work out a consensus bill that affects everybody, grain shippers, all shippers, American society to try to get a handle on possibly capping for limiting this liability exposure.
MR. GERARD: I appreciate you putting words in my mouth but that is not what I said. I said we think there should be a holistic approach to this question.

CHAIRMAN NOTTINGHAM: What does that mean?

MR. GERARD: Holistic. That's --

CHAIRMAN NOTTINGHAM: You say holistic and I say --

MR. GERARD: It's a liability question.

CHAIRMAN NOTTINGHAM: -- complete capitulation by the railroads on all of your legislative --

MR. GERARD: No, I wouldn't say that at all any more than us capitulating to them completely in terms of gross negligence. Let's look at the liability question. Let's also look at issues like bottle neck that we think is critically important to us.

We think it would provide more competition, would give us a more competitive
rate to compete. Reciprocal switching. Those have been a few and I think we could do that in a holistic way. We ought to include this Board. We ought to include the Congress. We ought to include others. We ought to have that dialogue.

We need to recognize the importance of it to the future of our domestic economy for those of us who have to compete globally because if we don't get it right, it's going to have outcomes, perhaps negative if we don't do it well so our hope is rather than do this piecemeal one at a time.

It's a little bit like an energy policy. Let's not to out and do a little bit of nuke over here and a little bit of natural gas here. Let's have a broad comprehensive energy policy.

We think we ought to have a rail transportation policy and address the various components of that that would look to the future, expand capacity, deal with liability and deal
with these other concerns so we know what the future is and how it will play out. Does that help?

CHAIRMAN NOTTINGHAM: I appreciate your effort. It's very general but I appreciate it. I think you are making an effort to respond. I would like to explore to make sure I understand. The American Chemistry Council, if I understand what you've said, does not support any proposals currently to address the situation of unlimited liability exposure borne by railroads and passed on in the way of cost through rates, etc. to all shippers.

MR. GERARD: We think we have made an ongoing dialogue with the railroads and this has been one of the pieces of that discussion. It is our intent to continue that dialogue and continue to consider all proposals. We don't believe we nor the railroads have settled on the perfect answer yet so we think the process is evolving and should continue to evolve until we can work it out and then we can both support what it is we
agree to.

CHAIRMAN NOTTINGHAM: Can I ask when the last time you spoke to them about this is?

MR. GERARD: To the railroads?

CHAIRMAN NOTTINGHAM: Ongoing dialogue. What does that mean?

MR. GERARD: We've had personal meetings at the highest level late last year and we are working on some things internally that we hope to have further dialogue with them in the near future. Very near future we hope.

CHAIRMAN NOTTINGHAM: It just occurs to me it's just ironic to me that your position currently of really nonsupport for anything specific that is on the table, or close to being on the table, is basically identical to the position of the trial lawyer and tort law bar which typically I wouldn't associate your association having a lot in common as far as policy agenda.

You are just playing right into their hands and just making this whole problem even
worse because instead of having people who should
be highly incentivized towards working towards a
consensus solution, you are playing in the hands
of folks who for their own selfish reasons don't
want common sense in addressing our tort
liability problems.

MR. GERARD: I appreciate your
characterization. Again, let me for the record
state I strongly disagree with your views, Mr.
Chairman. We are not playing into anybody's
hands. We believe there needs to be a commercial
relationship and right now we take full
responsibility and full liability for our product
on our premises.

When we turn it over to a carrier, we
expect that carrier to take the liability for it
because they are in total control of it. If you
look at the National Transportation Safety
Board's conclusions of the last incidences that
we've had that have raised this issue it hasn't
been the fault of the chemical industry.

What is the answer to that? We think
there is probably a balance there between those two positions. We are happy to consider a solution to that. We believe there is ongoing dialogue. We think there needs to be ongoing dialogue.

I don't know what the trial lawyers have to do with it and I don't know why your position is such that you characterize us as playing into their hands one way or another. There could be nothing farther from the truth.

Let me again state if it's not clear that we are happy to consider any and all proposals. We think the first position on the part of the railroads was irresponsible making us take complete and full liability even in the cases of gross negligence.

If we can get some movement from that position a little closer to the center, we think we can probably have a good constructive dialogue and hopefully come out with a good positive commercial answer.

CHAIRMAN NOTTINGHAM: You've been
very patient. I'll let you have some questions.

VICE CHAIRMAN MULVEY: Thank you. I
was afraid I was looking impatient. I wanted to
follow up on this.

Your group, the Chemistry Council, is
very supportive of H.R. 2125 and S-953. There is
an awful lot in those bills which would affect
the railroads, the bottleneck rates, reciprocal
switching, and so on. You said you wanted a
holistic approach and I think the Chairman was
characterizing it as more or less capitulation on
all of these things.

If you really got all of those things
passed in either or both of those bills, do you
not think that it would have an affect on the
railroad's bottom line so that there would not be
anywhere near the astounding 10 percent return on
investment they got last year and wouldn't that
also then cause a problem for the quality of
service that your companies might receive?

MR. GERARD: We think the bottom line
is, having been at the process for a number of
years, obviously the list included in the pieces of legislation before the Congress are probably a good starting point for a healthy conversation or discussion about what the real issues are. Do we expect that will be the final product of the Congress?

Probably not as all of you well know and I think each of you here having much experience in that forum understand but you've got to start some place. We have not yet received from our colleagues in the rail industry exactly which parts of that they would like taken out other than proposals to get rid of all of it.

I think we do have a bit of a polarized situation and my hope would be that perhaps with the help of this good Board that you could help bring us closer to the center.

VICE CHAIRMAN MULVEY: So you all are willing to compromise then?

MR. GERARD: Absolutely. Absolutely.

I don't think we are expecting anything. We
don't expect anybody to capitulate their position. We want the railroads to be healthy. Let me just state that for the record if it's not understood. Our hope is that moving forward that they do very well.

We just don't want them to do it at our expense. Right now let's find a balance between the two interests and the commercial interest. We think if we sort those out, then we can both move forward and both do well into the future.

VICE CHAIRMAN MULVEY: We previously heard from the agriculture community and they were saying they didn't want it done at their expense and we expect to hear later from the goal shippers who don't want it done at their expense. I don't know how much we can charge the intermodal movements but someone has to pay the freight so to speak.

Obviously given the nature of the economics of the railroad sector there does need to be what economists call faushca binasha which
is sometimes called price differentiation, differential pricing but that's what it means.

It does have to be these differential prices and the railroads obviously will need to cover their cost some way if they are going to make the investments that most people feel are going to be needed to meet the demands of the future.

I have one other question for the Chlorine Institute. In the written statement on page 4 the example you provide is an incidence in which Class I's actions seem to actually reduce system capacity. I have a question. Was there a paper barrier involved in that example that you talk about on page 2? I believe it's paragraph --

MR. DUNGAN: I don't know if there is a paper barrier. It was just that the railroad did not want to transfer to the short line. They wanted to keep -- we can presume. I don't know what their real motives were but our member believes that their motives were to retain all
the revenue for themselves so they went a longer
distance.

VICE CHAIRMAN MULVEY: Okay. So they
wanted to keep it for themselves. It may not
have been a case of a paper barrier which, of
course, is one of the things that is addressed in
the legislation. Thank you.

CHAIRMAN NOTTINGHAM: Commissioner
Buttrey.

COMMISSIONER BUTTREY: That's all for
me.

CHAIRMAN NOTTINGHAM: Mr. Felgenhauer, I commend the Fertilizer Institute
for actually coming up with a proposal. I
haven't studied it and I look forward to learning
a little more about it. It's too important an
issue. It appears that you agree to not be
working on specific proposals and I commend you
and your staff for making that effort.

If the Board can be of help, I say
this to all of the witnesses including Mr.
Gerard, we are more than happy to be a forum for
bringing parties together either informally or formally. We are very much a problem solving type group here.

Our general preference is not to have a lot of preconditions that say if we don't promise to solve these 107 problems, then we won't talk about this other one. Everything should be on the table. I commend you and look forward to learning more about that.

MR. FELGENHAUER: Thank you, Mr. Chairman. We would be happy to keep you informed of our progress.

CHAIRMAN NOTTINGHAM: Good. Any other questions, colleagues?

PARTICIPANT: No.

CHAIRMAN NOTTINGHAM: Thank you. You've been very patient, panel. We appreciate it.

We will bring the next panel up, please. We've got a panel of chemical shippers, the Dow Chemical Company represented by Cindy Elliott, Director for Global Supply Chain
Sourcing, Charles Cogliandro from the Calabrian Corporation, and Gary Spitzer from DuPont.

Welcome, witnesses. Thanks for being with us today. I know you have come from out of town and we appreciate it.

Our first witness on this panel we'll hear from is Ms. Cindy Elliott from the Dow Chemical Company. I've had the pleasure of getting to know Ms. Elliott in both visiting her facilities in Texas and meetings here in Washington. It's very good to see you again and we welcome you here.

MS. ELLIOTT: Thank you. Thanks for the opportunity to present comments regarding Dow's view of the railroads' common carrier obligation. I'm the Global Supply Chain Sourcing Director for Dow, responsible for ensuring that we have the most effective logistics infrastructure in place to serve our businesses and customers globally.

We are a diversified chemical company with $54 billion dollars in sales annually and
46,000 employees. We deliver a broad range of products across virtually every industry, providing functionality for 90 percent of the goods people use every day.

We believe the common carrier obligation of the railroads to serve the public need is clear. Since the earliest days of the industry, railroads have been regarded as public highways organized for the public Interest and to serve the public good and convenience. It is inconsistent with the common carrier obligation to consider only the needs of the railroads, while ignoring the needs of shippers and the nation's economy and public welfare.

Dow supports a constructive approach that arrives at mutually beneficial solutions and shared responsibility to support U.S. industry competitiveness, safety and security. We are very concerned about the railroad's aggressive efforts to stop or avoid transportation of selective chemical products.

This issue is important to us because
Dow's investment in North American Rail Transportation is very significant. We manage a 26,000 rail car fleet and process more than 130,000 shipments per year, half of which are liquid chemicals.

Our first priority in managing our supply chain is to do what is within Dow's control to create a safe and secure environment in which to work and transport goods for our employees and the communities we serve.

We have a long track record of innovation and consistent investment to improve our safety performance with respect to the transportation of chemicals. To that point, Dow has worked closely with our logistics service providers across all modes of transportation to achieve an incident-free rate of 99.97 percent.

Our safety efforts have been extensively recognized by the railroads. In 2007 alone, Dow received awards from Norfolk Southern, CSX, Canadian Pacific, Canadian National and BNSF highlighting our leadership and performance in
safety practices.

Since 9/11, we have bolstered our community outreach as well as partnered with government agencies like the Departments of Transportation and Homeland Security to develop and implement joint safety and security programs. Those efforts are essential to the long-term sustainability of U.S. industry, allowing manufacturers to produce and ship vital products and at the same time improve the safety of our neighboring communities.

Rail and chemical Industry Initiatives are further Improving safety and security. In 2006, Dow published a comprehensive ten-year strategy for Supply Chain Sustainability that is based on the premise of eliminating incidents. This program is aligned around our "Vision of Zero" a company-wide, total safety commitment aimed at zero accidents, zero injuries and zero excuses.

Four components of the strategy include:
First, redesigning our supply chain to reduce the number of shipments and container miles for specific products to enable shorter routes and product swaps. We have set an aggressive goal, regardless of mode, to reduce the number of hazardous shipments and container miles in half.

Second, improving the visibility of shipments through implementation of GPS and sensor technologies, so that product movement can be tracked anywhere, anytime.

Third, redesigning our shipping containers to prevent tampering and to reduce the potential for chemical releases due to accidents or security incidents. For example, Dow has been an important participant in the R&D effort for the "next generation" rail tank car which provides a step change in safety performance, specifically a 5-10 fold improvement.

Fourth, enhancing our collaboration with earners and local communities to improve emergency preparedness and response should a
chemical release occur.

We are a founding member of TRANSCAER, a proactive and collaborative effort between the chemical industry, railroads and communities to appropriately respond to emergency situations.

While we've been conducting outreach via TRANSCAER for more than 20 years, since 2007, we have stepped up our efforts specifically along rail transportation routes. In fact, as we speak, Dow is involved in a 10-city tour on a route that starts in Louisiana and ends in Chicago.

Dow takes very seriously our obligation to responsibly manufacture and move our products and we believe public-private and cross-industry partnerships are vital to our nation's security. Just as Dow manages its risks as a producer and/or user of hazardous materials, the railroad industry should focus its efforts on doing the same, rather than trying to avoid its common carrier obligation to transport these
materials altogether.

Does it cost more money to focus on the safety and security of transporting our products? Yes, and at times it appears to have unreasonable cost disadvantages. In fact, it is literally 3 to 5 times more expensive for us to ship TIH materials on a per car basis than other chemical products.

Some Class I railroads have claimed that they are now pricing their transportation of TIH materials to discourage longer distance movements in favor of shorter distances. However, that has not been Dew's experience. In one recent example we worked collaboratively with our industry partners to reduce the number of miles we were shipping chlorine by 2/3 (from 1400 to 450 miles).

In return for this successful supply chain redesign, we were penalized with an 88% rail rate increase, the equivalent of a $1 million impact annually. The price tag for reducing risk was hardly motivating. It is
becoming clear to us that the railroads are more interested in using price to eliminate these movements all together than creatively exploring options where everyone wins.

This is just one example to illustrate the point but there are many. In feet, despite our efforts since 2006, Dow has faced significant rate increases of 100 percent or more for TIH products and, based on the way the railroads have structured future track agreements, we continue to assume the full burden of infrastructure costs required to move these materials.

Rail Is the most effective, lowest risk way to move chemical products. A scenario that involves the loss of rail service due to the common carrier obligation disappearing would result in four times more chemical shipments if we had to move them by truck. The increased number of shipments would have a cascading risk effect in both transportation hazards and in onsite loading/unloading operations.
Furthermore, the new truck volume would compound practical concerns around highway congestion, accident prevention and lack of available specialized tank truck and driver capacity. Imagine for a moment, if just Dow's chemical rail shipments were to move by truck.

If you consider our rail car volumes and convert them to tank trucks, that translates to an additional quarter of a million tank trucks per year. This represents a 15 percent increase in the bulk tank truck market sector and there are simply not enough trucks on the market to absorb this demand at any price.

Bottom line, converting our chemical rail shipments to truck is not physically possible and efforts to do so would bring U.S. manufacturing to a screeching halt. The safety and security of chemical shipments by rail Is a shared responsibility of the industry the railroad and the government. Dow urges the STB to protect the common carrier obligation from being eroded by the railroads.
because that obligation is vital to the public interest.

As common carriers, the railroads enjoy numerous privileges in addition to their responsibilities. We acknowledge many of the special commercial protections the railroads have enjoyed over the years, but we also believe that in return for these privileges they are obligated to support our business and our customers' business.

The railroads operate in a highly concentrated industry with very high barriers to entry. This leaves companies like Dow with no reasonable competitive alternatives if the railroads are unwilling to serve us.

As a shipper, Dow has been challenged with extraordinary rate increases on TIH products, taken steps to redesign our supply chains, asked for significant concessions from customers, participated in community outreach and worked with the government to enhance safety, security and
emergency response.

The common carrier obligation is an obligation that requires the railroads to transport material as long as the request is reasonable. We believe the chemical industry in general, and Dow specifically, has been very reasonable. We have lived up to our obligation and in feet stepped up our investments and we believe that the railroads must do the same.

Thank you for the opportunity to comment and provide our input on this important issue.

CHAIRMAN NOTTINGHAM: Thank you, Ms. Elliott. Your timing was perfect. I wish I could have you give some of my testimony when I go up to the Hill. I always struggle to hit the right second of the minute. Thank you.

Mr. Cogliandro from Calabrian, we'll turn to you now.

MR. COGLIANDRO: Good afternoon. My name is Charles Cogliandro and I'm President of Calabrian Corporation. My oral comments today
will summarize the main points of my written testimony. The Calabrian story highlights the importance of enforcing the common carrier obligation and providing better avenues of relief for small shippers like Calabrian.

Calabrian is a small family-owned chemical company located in Texas producing sulfur chemicals that are used primarily for waste water treatment. Calabrian is the largest U.S. producer of sulphur dioxide, a hazardous chemical which is transported primarily by rail.

In recent years the U.S. rail carriers have raised rates in sulphur dioxide movements to the point where Calabrian's business has been seriously jeopardized. Moreover, Calabrian has had little or no recourse, nor does it have alternatives with regard to the imposition of rate increases and fuel surcharges.

We are for the most part captive to the KCS Railroad at our Texas plant. Any attempts at negotiating lower rates have not only failed but, for the most part, have been totally
Clearly, the railroads prefer not to move sulfur dioxide for Calabrian and have so indicated to us on numerous occasions so they employ and take-it-or-leave-it approach to the rates while maintaining that Calabrian has tacitly accepted "contract rates" that are being imposed. Any objection on our part results in a nonshipment of the product.

The underlying basis for the huge rate increase is offered by the railroads are in direct contrast to the statements that are prepared for their investors and, more importantly, are not borne out by the numbers of the facts.

While the railroads report record profits, tout their safety record in the handling of hazmats, and show no material ongoing adverse effects from incidents involving hazardous chemicals in the last 10 years.

They insist to us and to the Board that the handling of hazmats presents an enormous
risk and potential ruinous liability forcing us to pay exorbitant rates as a result. In fact, their arguments fall way short under close scrutiny.

I would like to address some of these points in more detail. Until 2005 Calabrian was expanding its business and shipping over 50,000 tons of sulfur dioxide per year. Starting in 2005 the railroads began imposing severe rate increases on SO2 every six months.

Increases from 2005 to 2008 range from 71 percent to 156 percent resulting in a major negative impact on Calabrian's business. Two examples highlight the inequitable rates currently being paid. First, the current cost of shipments from Texas to a customer in Florida accounts for 72 percent of the delivered price of sulfur dioxide.

Secondly, Calabrian ships both sulfur dioxide and sodium bisulfite to another of its customers and both commodities are hazardous liquids. Both shipments travel to the same
destination in near identical tank cars and weigh
roughly the same. The sulfur dioxide rate before
fuel surcharges is roughly double the rate for
sodium bisulfite.

Until February of this year Calabrian
was still paying fuel surcharges which were
assessed as a percentage of the rate resulting in
a surcharge that was roughly double that for
sodium bisulfite even though the same amount of
fuel was consumed.

As rate terms expired mileage charges
as required by the STB were assessed in the new
rates but the old surcharges were baked into the
new rates in every case and in every case base
rates are now dramatically higher resulting in
total cost per car equal to or higher than the
previous rate structure.

Our complaints about this practice
were totally ignored leaving us essentially no
relief. Numerous conversations with the
railroads regarding the devastating effect of
these increases have been fruitless. Out of
frustration Calabrian contacted the STB's Office of Congressional and Public Services in October of 2006. We determined that there was no effective avenue of relief for us.

Over the last three years Calabrian has been told repeatedly by several major U.S. railroads that they prefer not to haul sulfur dioxide at all. Essentially with the astronomical rates they are making that happen.

There is no other method of land transportation that is as efficient, safe, and appropriate for the long-haul transport of sulfur dioxide. According to CSX motor carriers are 10 times more dangerous than railroads for transportation of hazmats.

Norfolk Southern's most recent annual report states that no mode of transportation is safer for rail for transporting chemicals which in the same report they also state are essential to U.S. commerce.

Despite these advantages the railroads are raising the rates so high that rail
transport is unfeasible. This practice allows the railroads an undue concentration of market power in violation of the national rail policy.

Let me turn to the rationalization use railroads used to justify these outrageous rates and how the data clearly does not support their position. The railroads have claimed that their reluctance to transport hazmats is due to enormous risk of such transportation which allegedly creates the possibility of ruinous liability that cannot be covered by insurance.

These claims are simply not supported by the facts. The CEO of the AAR has noted the rail hazmat safety record is extremely favorable. Moreover, 99.997 percent of rail shipments of hazardous materials reached their destination without incident and rail accidents involving hazmats have decreased 26 percent since 1990 and 86 percent since 1980.

Statements directed at investors in Wall Street tout these statistics. While their railroads contend that ruinous liability is
risked every time hazardous materials are transported, recent examples of TIH derailments do not bear this out. While the Graniteville derailment and the subsequent release of chlorine were tragic, NS reports that the financial impact was hardly ruinous.

In its current annual report NS states commercial insurance policies are expected to cover substantially all of the expenses related to this derailment above and as a self-assured retention including NS' response costs and legal fees.

While the NS suffered the direct monetary affect of the accident, the other major railroads have raised their rates on sulfur dioxide to similar levels using the Graniteville accident as a basis to support their increases even though they experience no direct financial impact as a result.

Moreover, the probable cause of the tragic Graniteville accident was employee error. The cause was not any inherent characteristic of
the chlorine being transported. It appears the fact that a hazardous material was involved may be used to deflect attention away from the root cause of the accident in an effort to relinquish the railroad's common carrier obligation to transport hazmats.

To give this a different perspective, consider the case of a drunk driver who crashes his car into a parked car during a busy workday. The car hits with such tremendous impact that the gas tank ruptures and the vehicle explodes killing the driver, two others, and injuring six others who happen to be walking in the vicinity of the accident. In legal proceedings following the crash the defense lawyers point out that the gasoline being carried in the car is extremely dangerous and poses an enormous risk to the public arguing that the government should impose a $10 per gallon tax on the oil companies because their gasoline was responsible for killing and injuring all those people even though the oil companies had absolutely no involvement with
driving the car. They argue that the oil
companies should assume the future cost of all
liability for the movement of any car.

In this way the attention is diverted
away from the real cause of the accident, the
gross negligence of the driver. The oil
companies, even though the gasoline in the car
presents a minimal statistical risk, are forced
to pay for the grave potential risk in the
future.

This example is not used to diminish
the tragic consequences of serious accidents.
However, it is spurious for the railroads to rely
on events like Graniteville as evidence that they
should not have a common carrier obligation to
transport hazmats.

Of the three recent events that took
place in the last 10 years involving hazmats all
were caused by railroad error, all were largely
covered by insurance, and none resulted in
ruinous liability.

Some railroads claim insurance
coverage is not available or is too expensive. Before giving credence to these claims, the Board should require the railroads to substantiate that assertion that insurance coverage is unavailable or so expensive as to justify these massive rate increases.

For example, based upon the average rate increases experienced by Calabrian, freight costs have increased approximately $2.2 million per year. Calabrian doubts that any alleged increase in insurance premiums would come close to the overall rate increases imposed upon Calabrian.

Furthermore, if you apply this average to an approximately 100,000 shipments per year of only sulfur dioxide, chlorine, and ammonia total revenue gain for the railroads would amount to approximately $530 million per year which certainly would dwarf any potential exposure and/or premium increase.

While any loss of life was tragic the railroads have wildly exaggerated the level of
risk incurred by them in transporting hazmats.

In the last 10 years three incidents involving hazmats have resulted in 13 fatalities. While any loss of life is tragic, these figures are dwarfed by other railroad accident deaths.

By comparison railroad street crossing accidents result in roughly 300 to 400 deaths each year in the United States. Moreover, employee related injuries and claims actually make up a large portion of all railroad's casualty expense.

Just as the costs associated with these claims could not justify a railroad abrogating its common carrier obligation, the railroad should not be allowed to apply a different standard to sulfur dioxide and other hazmats.

Calabrian appreciates its opportunity to express its views on the common carrier obligations of the nation's railroads and I will gladly answer any questions.

CHAIRMAN NOTTINGHAM: Thank you, Mr.
Cogliandro.

MR. COGLIANDRO: Thank you.

CHAIRMAN NOTTINGHAM: We will now turn to Mr. Gary Spitzer from the DuPont Company.

Welcome.

MR. SPITZER: Thank you. I am Gary Spitzer, Vice President and General Manager for a global segment of the DuPont Company, Global Science Corporation, with revenues of more than $30 billion per year.

We operate in more than 70 countries, employ 36,000 people here in the United States, and offer over 70,000 products and services for many markets including agriculture, energy, national defense, housing, transportation, and electronics. We appreciate the opportunity to express the views of my company here today.

I am here to testify in strong support of the statutory common carrier obligation of the railroads and to urge the Board to consider revisiting an existing exemption to that obligation. Without common carriage the
railroads would almost certainly refuse to carry regulated materials which are essential to our modern way of life and our nation's economy.

America's freight railroads are vital to our business in Dupont. For example, we produce two lifesaving fibers, Kevlar and Nomex. Kevlar is used in bulletproof body and vehicle armor to protect our troops and law enforcement at home. Nomex is a fire resistant material used in firefighters' turnout gear and aerospace applications.

To produce these and many other DuPont products, we require regulated materials which due to their composition, characteristics, or volume must be transported by rail. Some have advocated moving these materials via our nation's waterways and highways. Geographic realities limit barge as an alternative since there is not always navigable water between origin and destination.

Shifting transportation of materials from rail to truck would increase air pollution,
increase fuel consumption, exacerbate highway congestion, and decrease our collective security. Moving those products by rail is 16 times safer than moving the same materials by truck. A rail car can carry the equivalent of four truckloads and a typical train takes the freight equivalent of several hundred trucks off our nation's highways.

The AAR's argue that companies like DuPont should adopt inherently safer technologies to transport more benign products will eliminate the need for regulated chemicals all together. Dupont and other companies already pursue and employ inherently safer technologies where possible and viable to do so.

However, just as water is required to sustain life, many products require specific chemicals for which there are currently no substitutes. Common carriage is the historical bedrock of this nation's rail transportation system. It remains the statutory law of the United States today and its statutory duty runs
not to shippers alone but to the public as well.

Recent actions by the railroads involving intermodal transport of hazardous materials demonstrate their intent to gut the common carriage principle. Here is an example. In October 2005 DuPont was notified that within two weeks a rail carrier would no longer transport TIH materials in intermodal service.

The carrier refused to carry ISO tanks that were already in route to one of our customers and even declined to transport empty ISO containers then at the customer back to DuPont. Because the customer could not accept rail cars and due to the higher cost associated with trucking, DuPont ultimately lost this customer to an Indian competitor.

Other carriers have also adopted the same exclusion in their tariffs forcing DuPont to move regulated materials for other customers over the U.S. highway system. In effect, the railroads were contravening the national interest by denying shippers access to the safest means of
land transport and we urge the Board to revisit
the current intermodal exemption as it applies to
regulated materials.

Furthermore, railroads are
implementing a de-marketing strategy to avoid
transporting TIH commodities by imposing
exsorbinate price increases and capital demands
on shippers. The railroads are critical to a
viable manufacturing sector and are by far the
safest most energy efficient and environmentally
sound mode of land transport.

Allowing the railroads to reduce or
eliminate their common carriage obligation would
cause companies like DuPont to be unable to move
basic raw materials and deprive us of the safest
means of land transport.

We would be at grave risk of no
longer being able to produce products important
to the health, safety, and security of the
American people. This would also put at risk
jobs to support local economies and exports to
help balance our nation's trade deficit.
In closing, Chairman Nottingham, Vice Chairman Mulvey, and Mr. Buttrey, I want to thank you for allowing me to share my company's views today. DuPont stands prepared to work with the railroads, with government, and with others in industry to enhance the safety and efficiency of the rail transportation system on which our safety of our nation and economic well being so depends. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Spitzer and all the witnesses. I just have a couple questions. Do any of the witnesses agree that we should be -- maybe you are already working on this individually as companies or collectively -- as a country should we be trying to figure out a way to minimize the distance involved with the movement of TIH materials, for example, and try to sort of look at a comprehensive risk management strategy where we perhaps through a database to make sure that there is not a buyer, for example, of TIH that happens to be two miles from a supplier but who
for some reason is getting it from a thousand miles away.

I have heard this actually happens out in the economy. From a risk management perspective it doesn't look ideal. I realize it's probably pretty complicated to implement such a fix. Do you give thought to this? I would welcome any ideas or comments in that regard.

MR. SPITZER: I would be happy to take that first. I believe certainly that there are incentives that already exist for shippers to reduce distances where possible given the extreme increases in freight, difficulties in service.

We are a captive shipper, as I have testified before, at 80 percent of our locations and it has seen significant rate increases. Certainly where we can shorten our supply chains we are going to do it. Recently we just did at one of our plants in the Gulf Coast. We stopped producing a product in Louisville.

We have a concentrated manufacturer
of that product in Louisiana and have thereby
taken 600 rail cars off the roads. However, I
don't quite know how the government would get
involved in making something like this happen. I
believe incentives already exist in our free
market economy to do these types of things.

CHAIRMAN NOTTINGHAM: Does anybody
else care to speak to that? I think it has sort
of Homeland Security type implications, too. I'm
not the expert on that area but I think the idea
of having some type of database or some type of
way of trying to minimize the distances that some
of these materials travel.

MR. COGLIANDRO: We've experienced --
we are the largest U.S. manufacturer of sulfur
dioxide and our major competitor is actually
coming out of Canada. They are actually
transporting S02 past our facility in the U.S.
and we question why that's happening. I mean, we
would be in support of looking at those kinds of
things, looking at those kinds of actions.

In our case not only is U.S. commerce
or U.S. manufacturing discouraged in that case
but we question how they can possibly do that and
why they do that and why are they paying
differential rates. A lot of it has to do with
freight cost.

Their rates coming from Canada are
actually lower than what we pay here in the U.S.
They have a customer in Mobile, as an example,
that they transport product from the west coast
and our rate to that same customer is greater
than what theirs is transporting from the west
coast.

CHAIRMAN NOTTINGHAM: Mr. Spitzer,
you mentioned a case where you lost a customer to
an Indian competitor, a competitor from India.
Do you know much more about that? Was that
competitor of yours able to truck or barge or did
they contract with another rail carrier? How did
that happen?

MR. SPITZER: That actually was a
customer that was ultimately in Latin America.
They brought the product in over the seas and
then did land transport for the final step. The alternative that we had in this particular situation was truck from northeast United States and we were just unable to be competitive.

CHAIRMAN NOTTINGHAM: Okay. I understand. Thanks. Mr. Spitzer, I am advised that DuPont is an example of how we can possibly try to minimize distances on the carriage of this TIHs. DuPont recently decided to expand the facility in Tennessee that produces titanium tetrachloride which is apparently a pretty poisonous gas but it can be used in the manufacturing of paint.

The major purpose of expanding this facility in Tennessee is to serve a paint processing facility in Utah. Do you take into account the transportation costs and the risks of having a long-distance delivery supply chain like that and why do it that way? Why not try to produce the stuff in Utah or some place closer to where it needs to get to?

MR. SPITZER: Well, I would just say
I'm not sure where you received the data in that particular example but it's actually not correct and it's not used for a paint manufacturer. It is ultimately going to be used in an application that relates to national defense needs.

In this particular case it was not possible to shorten the supply chain. There was a very specific and special use for the titanium tetrachloride not related to paint and it was simply not feasible either to locate their production at our location or to locate our production at their location.

To answer your question, we certainly do look at the risks of transport. We believe that having been in this business for 206 years and working with the railroads since the middle of the 1800s we have an exemplary safety record. We continue to look at how can we make that even better towards the goal of zero and it is definitely a consideration of what we do.

If I can come back to a question Mr. Mulvey asked earlier, I would also say that as we
One of my major considerations is will I be able to ship these materials in the future, will there be a common carriage obligation, and if the railroads will carry it, what is it going to cost and will I still be competitive in these businesses? It is definitely a key consideration.

CHAIRMAN NOTTINGHAM: Thanks.

Commissioner Buttrey, any questions of this panel?

COMMISSIONER BUTTREY: One of the witnesses mentioned the fact that you had some discussions here at the Board about some rate issues. I was wondering whether -- I sort of got the impression that you may have gotten the impression from somebody here that you should not bring a rate case. Did somebody say that?

MR. COGLIANDRO: We had discussions in 2006 with one of the officers of the STB.
After a very thorough discussion on the problems that we were having, we were told in an off-the-record kind of capacity that we would have an exceedingly difficult time getting anywhere with basically our situation.

COMMISSIONER BUTTREY: Had you been shipping under a contract before?

MR. COGLIANDRO: Well, we ship under contract. I'm not sure that the word contract is -- I'm not sure how that is any different from tariff today to be honest with you.

COMMISSIONER BUTTREY: I'm talking about historically --

MR. COGLIANDRO: Yes, we ship under contract.

COMMISSIONER BUTTREY: -- you had shipped under contract.

MR. COGLIANDRO: Under contract rate.

COMMISSIONER BUTTREY: Contract rate.

Your contract expired and you went to the tariff rate. Is that it?

MR. COGLIANDRO: No. Actually, in a
lot of cases the railroads refused to quote us a tariff rate. They insisted that we agree to contract rates and would not openly offer us a tariff rate.

COMMISSIONER BUTTREY: They refused to quote you a tariff rate?

MR. COGLIANDRO: In a number of cases they refused to quote us tariff. We specifically asked because the rules are so specific in terms of -- we have considered bringing a case. The problem that we have is we are a small company. We are the classic David fighting Goliath. We don't have the resources. It is very complicated.

COMMISSIONER BUTTREY: Are you familiar with the small rate case?

MR. COGLIANDRO: Yes, I am very familiar with it.

COMMISSIONER BUTTREY: Okay.

MR. COGLIANDRO: It is still an exceedingly complicated venue. It is obvious watching the DuPont case there are a lot of
avenues that the railroads and the attorneys can
go down that would basically exhaust our
revenues. Again, the David and Goliath scenario.

Today we have to fight with very
sophisticated weaponry against a force who has
unlimited resources and dodges so deathly because
of its attorneys that we can't ever hit the
target. It's a very, very complicated thing for
us to do and exceedingly costly in our case.

We moved this particular commodity to
numerous customers. If we were to bring an
action here, we would have to bring four separate
actions in order to look at any real relief.
Four separate actions strictly from a legal cost
standpoint would be way in excess of a million
dollars for us and the potential relief is $1
million per action.

It wouldn't nearly cover the amount
of damage that we have incurred in the last three
years, never mind five years. We have suffered a
tremendous amount of damage. We've lost a number
of customers because of these very, very high rates and we can't recover.

Yes, we have looked at it. We have been watching very closely. We have been observing very closely what DuPont is doing but, in our case, we are not real optimistic. We were told this back in 2006 that our options were really limited. Like I said, we were fighting such a huge force.

COMMISSIONER BUTTREY: Are you all members of the American Chemistry Council?

MR. COGLIANDRO: Can't afford it but I support everything Mr. Gerard does.

COMMISSIONER BUTTREY: You support everything he does?

MR. COGLIANDRO: Yes.

COMMISSIONER BUTTREY: Okay.

MR. COGLIANDRO: I mean, we are very supportive.

COMMISSIONER BUTTREY: I presume Dow and DuPont are members.

MR. SPITZER: Yes.
MS. ELLIOTT: Yes.

MR. COGLIANDRO: For the record, I know the question was asked in earlier testimony if any members lost money in the business. We have. We are losing money. The rates have increased so dramatically so quickly we've lost money.

If I could, one other point, substitutes. There is a big discussion about substitutions. A couple of years ago one of our customers actually did substitute. There was a substitute available on our business because of all the pending safety concerns and all the discussions with the railroads. They are a huge company, a huge conglomerate.

They were very concerned about handling sulfur dioxide in the future. It was cost related but it was also the concern would they be able to get it because the railroads were threatening not to ship it so they converted at every one of their plants.

We received a phone call from them
recently saying they didn't understand when they
did it the cost of the substitute is now three to
times what they paid for the sulfur dioxide
and the volume is seven times and they are
bringing it all in by rail.

It complicates the problem any
further so they are spending an additional $8
million a year for treatment which we have
discussed with them could have gone to insurance
premium coverage to use as a substitute.

They are considering going back but
under these rate circumstances, you know, again,
our major concern is the discussion and the
response by the railroads that they don't want to
haul it at all. They don't care what the price.

The message is very clear to us, "If
we could, we wouldn't haul it." That's not by
inference. That's direct. "We don't want to
haul it and if we had a choice, we wouldn't." By
doing what they are doing effectively that is
what they are going to do.
COMMISSIONER BUTTREY: It's my understanding that the chemical companies and other shippers of hazardous or inherently dangerous commodities are engaging in customer swaps and things like that to cut down on the distances involved. Is that something that you all have been involved in or can you speak to that?

MS. ELLIOTT: I haven't been specifically involved with customer swaps but we do consider all the tools available whether it's routing, whether it's product swaps, whether it's inherently safe for technology. It's one of the tool kits. I don't have any specific examples.

MR. COGLIANDRO: It's exceedingly difficult I believe in our industry because there was a lot of scrutiny in earlier years about anti-trust matters and price fixing and territory fixing. I know every time we've had a discussion about that, again the lawyers get involved and say, "We would prefer not to."

MR. SPITZER: I would say there are
many challenges as he just raised. If they are done, they are an extremely minor amount.

COMMISSIONER BUTTREY: Thank you.

CHAIRMAN NOTTINGHAM: Vice Chairman Mulvey.

VICE CHAIRMAN MULVEY: This issue of swaps is one that requires some sort of oversight by the Department of Justice, but perhaps under this whole idea of Homeland Security that aims to minimize exposure to the public there may be some opportunities to minimize movements by doing swaps. I know there have been talks about it and I am familiar with some of the problems with it.

Ms. Elliott, are you familiar with the AAR's proposed new tank car rules and could you comment on those?

MS. ELLIOTT: I have been exposed to them through other colleagues at Dow so I am familiar somewhat with them. What kind of comments are you interested in?

VICE CHAIRMAN MULVEY: Do you compare those to, say, the FRA's proposed rules? It has
been said here that the new AAR rules are unreasonable and that they are far in excess of what is needed in order to bring about an improvement in safety.

MS. ELLIOTT: I really can't comment on if they are in excess of safety. We were not involved in the development of the rules. As you are aware, we are in development of a new next generation rail tank car. In that specific example that car is five to 10 times safer, if you will, than the current technology. We are involved in what we are developing.

VICE CHAIRMAN MULVEY: Mr. Cogliandro, you talked about eliminating, you didn't mentioned this in your oral testimony but in your written testimony, you mentioned eliminating the hazmat identification on railroad tank cars to reduce the risk of terrorism and putting bar codes in there but wouldn't that cause a real problem for first responders whereas currently the ID's are readily available and they could see what the material is and act
accordingly rather than trying to get closer to the bar code and do a reading on a bar code?

MR. COGLIANDRO: Well, in hazmat response we use that as an example but with modern technology today from a distance you can read computer chips, bar codes probably as close as you can the name on a chemical car, on a tank car.

To me, also, keeping that information available with the engineer himself, I mean, they would have all that information readily available on a chip. There is an amazing amount of information that you can gather that way. To me I think that would be a better alternative. I think we advertise the fact that we transport hazmats. We advertise it. We put it on the side of the car. If there is concern about terrorist hitting a rail car, why give them the opportunity? I think there are a lot better methods of doing it.

VICE CHAIRMAN MULVEY: I'm a little concerned about this presumption we seem to have
that the country is full of terrorists walking
the streets with RPGs on their backs. I think
there is some exaggeration in that.

I mean, there are terrorists out
there, we all know that, but I think if they are
looking to target a railroad tank car, they are
not going to be basing it on just walking down
the street. They will research it out and be
ready for it so I don't think that is going to be
-- I'm not sure that is an appropriate solution.

MR. COGLIANDRO: Excuse me. No
disrespect but half the time we try to find out
where a rail car is. If the railroad doesn't
know, I'm not sure if a terrorist would know.

VICE CHAIRMAN MULVEY: Point well
taken. You also mention, by the way, that you
contacted our office of Congressional and Public
Affairs.

MR. COGLIANDRO: Yes.

VICE CHAIRMAN MULVEY: We also have
an Office of Consumer Compliance and Enforcement
which I would have thought would be the one you
would go to in order to find out what kind of relief you might have. That was back in October of 2006. I'm not asking who you spoke with, etc., but for you to indicate that you have no relief strikes me as probably not true -- there are opportunities for relief that you could have pursued.

Now, it's also true that small rate case guidelines were not out then. They are out now and you have already said that you are following with interest DuPont's progress. Are you considering filing a rate case in the future if it works out for DuPont?

MR. COGLIANDRO: Yes. Let me tell you, at the time that we contacted the STB I must tell you that your people were extremely nice and extremely professional and highly sympathetic. We explained our case in great detail but, unfortunately, they weren't very optimistic.

The fact of the matter is -- I will tell you also that after that discussion with the STB we were told by one of the railroads that
they had heard about those discussions and we believe they acted in somewhat of a retaliatory manner which, you know, I'm not the type to shy away from a fight but if it becomes too expensive, I don't have a choice. Basically we kind of pulled back and the vice president of our company actually issued me a warning and said we need to back off.

A small rate case we've looked at it. We have seriously considered it. We have done estimates. We have done forecasts on what it would cost. The cost benefit to us is traumatic and, again, we have seen -- again, no disrespect with the history, and I know things have changed.

History is a relative thing. I think, Mr. Chairman, you said that earlier. New history is probably better than old history. You know, the attorneys for the railroads are very proficient. They are very creative. They are very brilliant. That is the best thing I can say about attorneys in general but they are very good
at keeping the case open for as long as possible. We just don't have those kinds of resources.

If my friends at DuPont would happen to be successful, I suspect that possibly us and possibly a number of others might entertain it right away having some sort of precedent. At least we know that we might have some sort of chance, some sort of possibility.

We are not -- we have never tried to take the position until recently that we don't want to be cooperative. We are a small company. We have pleaded with the railroads. We haven't fought them. We haven't cursed them. We haven't done anything.

We have pleaded with them to, "Please understand you are putting us out of business," and we do not believe it is their purview to make that decision. That is the Congress' purview. If they don't like the fact that hazardous chemicals are being manufactured, that is the Congress' decision.

They have considered that many times in the
past. If they want to discontinue the manufacture of hazardous chemicals in this country, that is their responsibility. By not allowing us an outlet to ship the product, they are effectively telling us, "We are not going to allow you to produce it." I don't think that is their right. I do not believe that.

VICE CHAIRMAN MULVEY: Thank you.

Mr. Spitzer, you talked about railroads refusing to carry hazardous materials in ISO containers, in intermodal containers under the idea that the intermodal traffic is exempt. This material is not exempt. This material is a regulated commodity. Correct?

There is sort of a tension here between the commodity being regulated and the container not being regulated. Have you thought about filing a case saying this is an unfair practice or unreasonable use of the exemption and ask for a revocation of the exemption?

MR. SPITZER: I appreciate the comment, Vice Chairman Mulvey. That is why today
in my testimony I said we would urge the Board to reconsider this exemption and some of the very points that you're making. ISO containers are a preferred container by many of our customers, particularly in international commerce. It is certainly something that we would hope there would be an opportunity with the Board to follow up on.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOTTINGHAM: Just briefly on that point, is there a difference in the level of safety between the two containers? When I think of a -- I'm not an expert on this but when I think of intermodal containers, I don't have the same image that I do of the typical tank cars that are designed specially for hazmat chemical carriage.

MR. SPITZER: No, these are obviously DOT regulated well-designed mini rail cars, if you will, you know, that ultimately can go by land and then be put on top of a rail car.

One of the reasons they are so
preferred by customers is they can serve as on-site storage at that customer facility and also eliminate the need for disposable packaging as with drums or other types of materials. They are a very robust container.

They are part of the fastest growing types of containers that we see and I believe removing this exemption would be very important both for us as well as other chemical shippers.

CHAIRMAN NOTTINGHAM: Thank you. I will certainly intend to look into that further.

Mr. Cogliandro, I believe you had mentioned, and maybe Mr. Spitzer as well, about apparently railroads occasionally not quoting a tariff rate. Please let us know, let our staff know, let us know if that happens. My understanding of the law is that railroads must quote a tariff rate.

Shippers may not like what that rate is and there are various things you can do when you see it but just saying, "No, we won't give you one," is not an option. It's not the first
time I've heard this but I do urge you to let us
know because unless I'm missing some nuance, I
just don't think that is acceptable. I
appreciate your sharing it.

Mr. Cogliandro, I'm sorry that our
rate dispute resolution process and our rate
regulation authority does not extend to the dues
of the American Chemistry Council but I see Mr.
Gerard is still here. You have been a very able
spokesman for the industry.

I certainly hope he considered giving
you a break but that's not my business. It
sounds like they are pretty tough on rates
themselves if they are not allowing you to be
part of the association when you are clearly a
very articulate leader.

MR. COGLIANDRO: Not allowed. I
think it's like Vegas. I would hope he would
comp me so maybe I'll have a chance now that Jack
can properly comp me into the organization.

CHAIRMAN NOTTINGHAM: Yes, that's
only fair but, again, going beyond my
jurisdiction there. Just a public interest suggestion.

Lastly I will say, Mr. Spitzer, that we won't let anyone apply the David and Goliath analogy to your pending cases here. I've heard others use the same analogy implying that perhaps your company is Goliath. It just depends on who is involved in a particular case and who is doing the labeling but we welcome all the Davids and the Goliaths and everyone in between to come here.

We have done a lot to make it, I believe, easier to come here. I am assured we are on track to have decisions in early July meeting our eight-month target in our regs on those cases so I won't get to say anything more about those cases except to say that we are very serious about keeping those small rate cases moving along quickly.

The filing fee is only 150 bucks. A single complaint may not pay for all of a shipper's past harms or concerns, over history I
think certainly if they've got a case they ought to bring it because it can make a pretty powerful statement.

Anyway, thank you. Any other questions for this panel? Thank you very much. You are excused.

We'll call the next panel forward, Panel 4-D, Chemical Shippers. Welcome and good afternoon. We appreciate your patience and we'll proceed with Panel IV-D. Our first witness we'll hear from is Mr. Howard I. Kaplan, Vice President for Chemicals and By-Products with the U.S. Magnesium Company.

Mr. Kaplan, welcome.

MR. KAPLAN: Thank you, Chairman Nottingham and good afternoon, gentlemen. I'm Howard Kaplan and I'm with U.S. Magnesium located in Salt Lake City. We would like today to address the issues surrounding the legal obligation of the railroads to provide rail service with respect to the transportation of chlorine.
Without the rail transportation of chlorine, U.S. Magnesium would quite possibly go out of business, and the vital chlorine it supplies to Thatcher Company and Kemira Water Solutions, Inc., Western United States Bleach producers and municipalities for water treatment would not be available.

We have attached letters from Thatcher and Kemira Water Solutions to our testimony for the Board's convenience. As can be seen from those water treatment companies, chlorine is essential to the effective treatment of drinking water and waste water in municipal treatment systems.

U.S. Magnesium has about 500 employees in Salt Lake City, Utah and it is the only surviving magnesium metal producer in North America. It is the only chlorine producer from magnesium that sells chlorine commercially in the United States as 99 percent of all chlorine produced in the United States for sale is produced by chlor-alkali companies.
Our plant is located in Raleigh, Utah on the southwest shores of the great Salt Lake. The lake is inexhaustibly rich in minerals like the magnesium chloride that is used in the U.S. our production. It is also the source of other raw materials for plants for productions of potash and salt.

U.S. Magnesium is one of the world's largest commercial users of solar energy to remove water via an extensive system of evaporative ponds in order to concentrate raw brine so that the lake's magnesium chloride can be efficiently electrolyzed to produce magnesium and chlorine.

Magnesium is critical to aluminum alloying for beverage cans and all aluminum sheet such as truck bodies, aircraft skins and many aluminum castings as well. Magnesium usage in the automobile industry is growing and helps reduce weight and therefore fuel consumption.

Magnesium is irreplaceable in producing Titanium, Zirconium, Beryllium and
Uranium for aircraft, nuclear and chemical uses, and is also important in military applications such as fuels, explosives and flares. Magnesium is thus critical for a growing economy, provides several environmental benefits, and is important in national defense as well.

The benefits of chlorine to the economy and to the national health and well being are well known and well documented in this proceeding by the testimony of the Chlorine Institute and others.

However, it must also be noted that without the production, sale and transport by rail of chlorine from our Rowley plant, it is highly doubtful that U.S. Magnesium could stay in business producing only magnesium. U.S. Magnesium and its predecessors developed an entirely new technology that allowed chlorine to be extracted from magnesium chloride and captured for sale as a co-product of magnesium.

Previously, chlorine had been vented to the atmosphere pursuant to Clean Air Act
permits. That venting was wasteful, uneconomic and not environmentally beneficial. In 1989, the U.S. Magnesium predecessor company emitted approximately 55,000 tons of chlorine to the atmosphere. By 2006, that number was reduced to nearly zero.

The inability to ship chlorine from our Rowley plant would possibly result in a closure of the magnesium plant and the accompanying elimination of the only North American supply of that vital metal.

Since the end user markets for products such as bleach and water treatment chemicals are so distant from our plant, and because bleach can only be shipped relatively short distances in the high temperatures of the west, economics preclude the production of these products at our plant in favor of safe shipment of chlorine to remote locations.

If we were not able to ship chlorine and U.S. Magnesium were able to stay in business, it would be forced to dispose of the chlorine...
co-product as it had in the past. In either case, these are highly unattractive consequences.

We have no doubt that the railroads would like to avoid the potential liabilities that follow from their negligent handling of chlorine and other TIH materials, but we also have no doubt that they are in a position to prevent those incidents that they so justifiably fear.

In reality, however, we also recognize that the railroads don't really want to stop handling TIH materials that they move at rates that must be called astronomical, and perhaps any predatory. They simply want the shippers, who have no real power to prevent the railroads' negligence, to indemnify them for that negligence.

If this Board were to hold that the railroads had no obligation to carry chlorine, the railroads would immediately demand that the shippers supply indemnification, or other
liability protection for the carriers. That is what their claims are really all about.

Let me provide a specific example:

Our Rowley plant is served by the Union Pacific. The Union Pacific and the other major carriers have, through their trade association, the Association of American Railroads, been demanding that shippers who own or lease chlorine rail tank cars convert to a new tank car of unproven design and performance characteristics, over the objection of the shippers and the Federal Railroad Administration.

This new car would, when fully loaded, weigh 286,000 pounds as compared to the current 263,000 pound car. An additional metallurgical facility building a plant next to the magnesium plant to take advantage of numerous synergies in the production processes also wants to use the new car to handle its feedstock.

When we were in the process of
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
1 concerned with safety, the UP was prepared to
2 spend the shippers money to
3 improve safety but not their own.
4
5 In conclusion, the railroads have
6 been given a wholly unique position in the U.S.
7 economy. They can charge extraordinarily high
8 rates with impunity, they can operate
9 without any meaningful competition in many
10 industry sectors, and the government
11 through this Board seems to be constantly seeking
12 to insure their inordinate profitability.
13
14 All this is based on the need for the
15 railroads to exist and that need is based on
16 their willingness and ability to provide service
17 on reasonable demand and presumably at reasonable
18 rates. To the extent that they are not so
19 required one is forced to wonder why they are so
20 pampered and protected.
21
22 Without the common carrier
obligation, perhaps the laws should be amended to
allow free and open competition to exist in the
rail industry as it does in our industry and the
other industries represented here today.

I want to thank you for your time and would be glad to answer questions at the conclusion of our panel.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Kaplan.

We will now hear from Mr. Bernard Claude from Total Petrochemicals USA. Welcome.

MR. CLAUDE: Mr. Chairman and members of the Board, my name is Bernard Claude. I am the President and Chief Executive Officer of Total Petrochemicals USA, Inc. Thank you for the opportunity to testify here today.

First of all, I would like to introduce you to Total Petrochemicals USA, Inc., which I will call TPI. We are a U.S.-based producer of petrochemicals (including polypropylene, polyethylene, styrene and polystyrene), base chemicals and transportation fuels with production facilities in Texas and Louisiana.
TPI is part of TOTAL S.A., the world's fourth-largest publicly-traded integrated oil and gas company, with operations in more than 130 countries spanning all aspects of the petroleum industry, including oil and gas exploration, development and production.

Downstream operations include refining, marketing and the trading and shipping of crude oil and petroleum products. In addition, TPI is a market leader in the liquefied natural gas industry, and is helping to secure the future of energy through its commitment to developing renewable energies such as wind, solar and photovoltaic power, and alternative fuels.

TPI has built its North American petrochemicals business with a strong manufacturing bias, based on world-scale plants and technologically advanced operations. We manufacture petrochemicals for the plastics industry. We produce plastics for use in everyday household items like food containers, furniture,
carpets, and bottles to name just a few.

   Many of our products enter the commercial and industrial sectors as well, performing in critical applications from natural gas distribution and water pipelines to building insulation, from medical packaging and devices to erosion control. In the next few minutes, I would like to share with you TPI's concerns as to the common carrier obligation of the nation's railroads.

   Over the years, TPI has built some of the world's most competitive manufacturing sites in the Gulf Coast Region of the United States, including the largest polypropylene and styrenics facilities in the world. We want and need to be competitive and to remain competitive in the USA.

   We have spent about $2 billion in the last ten years on capital projects in the U.S., and continue to show out support for U.S.-based manufacturing with an additional $3.5 billion approved for the next five years. I repeat this
is not expiration prediction projects. Those are all manufacturing side investments.

Beyond these scale economies, the success of our manufacturing sites depends on an efficient, safe, and cost effective transportation and distribution network. Due to congestion and rail infrastructure limitations, transporting our products via rail all too often involves poor service, unpredictable delivery schedules and costs that continue to rise at an alarming rate.

In fact, transportation costs have risen so much in the last several years that TPI's logistics costs are now higher than our manufacturing costs, jeopardizing our global competitiveness. Benchmarking assures that our sites are across the world first class in manufacturing but this is more than offset by the logistical cost.

TPI produces over 9 billion pounds of product each year, much of which is delivered to our customers via rail transportation. Of the
volume moving by rail, 4.5 billion pounds is comprised of plastic pellets, a non-hazardous commodity. TPI also makes overland shipments of materials such as styrene monomer, aromatic solvents and various oils. These materials are classified as hazardous materials by the United States Department of Transportation.

Although these shipments are not toxic inhalation hazard shipments, TPI has concerns that should the railroads' common carrier obligation for these types of products be discontinued, it will negatively impact transportation safety as well as the ability of U.S. industry to compete in the global marketplace. The main part of my talk addresses our 4.5 billion pounds of plastic pellets which is a non-hazardous material.

The common carrier obligation plays an important role in the ability of U.S. industry to compete globally. The widening of the trade deficit in the U.S. relative to chemical industry business is continuing.
Meanwhile, more and more new and existing railroad infrastructure is being consumed to support imports as railroads allocate increasing percentages of their infrastructures to support intermodal traffic. As a result, U.S. chemical manufacturers are increasingly unable to export due, in part, to gridlock in the existing rail infrastructure.

We have experienced such gridlock first hand with respect to exports out of the Houston, Texas area. In this area, serious rail congestion has resulted in intermittent rail service stoppages and seriously impacted TPI's ability to move its product to facilities for necessary pre-export packaging.

If railroads are given the opportunity to forego shipments currently protected by the common carrier obligation, TPI fears that the situation will be exacerbated.

The market of Petrochemicals is a worldwide business. The same plastics are manufactured and consumed across the world.
There are times like now when the economy in the USA is slow and export is the way to stay in the business and to keep our plants running. There were several months last year when the market favored exportation but rail congestion seriously impacted our ability to move our product.

It is also important to note that the chemical industry is struggling to compete with products manufactured in foreign countries, in part, because foreign producers enjoy the freedom of choosing their port of entry into the United States based on areas with competitive rail service.

There are times when it is cheaper to import plastics from the middle east to the northeast side of the U.S. than to send it from the eastern rail to the northeast of the U.S.

This allows foreign manufacturers to strategically avoid areas where railroads engage in noncompetitive pricing practices and to capitalize upon this advantage to the detriment of U.S. rail shippers buffering from
noncompetitive pricing.

We believe that removal of the common carrier obligation would enable such noncompetitive pricing practices to flourish to an even greater extent than they do today and put U.S. industry at a greater disadvantage.

As I conclude my testimony, I would like to recognize the railroads for lowering incident rates on the rail lines in recent years. The safety improvements of the railroads, coupled with the initiatives of the Department of Homeland Security concerning rail movements of various chemicals will continue to magnify the safety advantages of shipping products by rail.

We believe that continued implementation of the common carrier obligation will preserve the progress that has been achieved rather than undermine it by pushing freight off of rail lines and on to the nation's highway system.

I would also like to take this opportunity before the Board to commend Federal
Railroad Administration and Pipeline and Hazardous Materials Safety Administration initiatives, as well as the efforts of shippers, railroads, and key rail car manufacturers in their continued mission to increase the inherent safety of a rail car.

I further commend the FARA for implementing realistic, yet deliberate time lines for shippers and carriers to upgrade the nation's rail car fleets for hazardous and toxic products. These initiatives are costly for the shipping community, but consistent with our drive to continuously increase the safe transportation of our products, not only in the United States, but also throughout North America.

Thank you, Mr. Chairman, and members of the Board and I'll be ready to answer your questions.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Claude.

We will now turn to Ms. Robin A. Burns from the Occidental Chemical Corporation.
Welcome.

MS. BURNS: My name is Robin Burns and I am the Vice President Supply Chain for Occidental Chemical Corporation, more commonly known as OxyChem.

CHAIRMAN NOTTINGHAM: Make sure the red light is on and make sure you are speaking right into the mic. Thank you.

MS. BURNS: Okay. I am here today to express OxyChem's position of support for maintaining the common carrier obligation.

Of particular importance to OxyChem is an adequate rail transportation network throughout the United States.

Railroads must continue to be required, as common carriers, to carry hazardous materials (such as chlorine) that are necessary for many of the industrial applications essential to our economy. The common carrier doctrine is a bedrock of the remaining rail regulation, and provides the sole basis for policy comfort with the rail industry consolidation.
OxyChem is a leading North American manufacturer of basic chemicals and vinyl resins, including chlorine, caustic soda and polyvinyl chloride, the building blocks for a range of products including Pharmaceuticals, water purification, detergents, electronics, building materials and many more. OxyChem employs 3,100 people at 23 domestic locations spread throughout the central to eastern United States.

Our products, which are used in water purification, medical supplies, pharmaceuticals, construction materials, and agricultural chemicals are vital to the economy of the United States. Our products are crucial to the health and welfare of its citizens. Safe and reliable transportation of our products is critical to our success as a company and essential to meet the needs of our customers and the public.

Our various business units make over 70,000 rail shipments per year. Of these, approximately 48,000 are shipments of hazardous materials which include chlorine, vinyl chloride.
monomer, caustic soda and muriatic acid among several others. Of the 48,000 hazardous material shipments, approximately 20 percent are chlorine, which is considered a Poisonous Inhalation Hazard or PIH.

In total, we manufacture approximately 3.6 million tons per year of chlorine of which 2.7 million tons are delivered by pipeline, and thus approximately 900,000 tons are moved by the railroads. We operate a private rail car fleet of 10,000 owned or leased cars with 1,400 dedicated for chlorine.

Due to the locations and needs of our many customers and users across the United States, transportation by rail is essential to the safe provision of this critical building block. Pipeline transportation is not feasible for small or geographically distant customers.

Generally trucks are not cost effective and are inherently riskier considering the number and distance required to handle the
volume. 45,000 truck shipments would be required in place of 10,000 rail shipments.

OxyChem has a long-standing commitment to the safe transportation of our products. We have continuously moved to improve our rail car safety and security including on-site rail yard infrastructure and security improvements, additional pre-shipment inspections, testing of rail car monitoring technology and improved sealing of rail car connections.

This was most recently demonstrated by OxyChem becoming an active participant in the Next Generation Rail Tank Car project. The team is chartered with the objective of developing a rail car which will be five to 10 times stronger than current car designs in terms of withstanding a railroad accident. Our participation in this project includes a public commitment to replace our entire chlorine rail fleet with the NGRTC design by 2017.
It is essential that we partner with the railroads and work together to ensure the safe transportation of hazardous materials, as we have done for years as a leader in the Responsible Care initiative, and we will continue to do so.

OxyChem was recently given an award for contributions made to the training efforts of TRANSCAER, which is an initiative co-sponsored by shippers and railroads and other transportation companies that focuses on training of local emergency responders. Railroads have considerable discretion regarding shipments of goods and use that discretion to maximize revenue and mileage, sometimes at the expense of safety.

OxyChem has obligations to mitigate customer freight expense and strives to reduce the number of miles that chlorine moves over the rails. Unfortunately, this objective is not always supported by the railroads. Recently we had an opportunity to move a chlorine car 112 miles instead of 421
The rate for the shorter move was significantly higher than for the longer move. Our request to get the railroad to lower their rate, allowing us to move the material a shorter distance was denied. When we challenged them on their decision, they stated they did not want the PIH move on their railroad.

As the STB is well aware, railroads are regulated by the STB when acting as common carriers, not when acting as contract or private carriers. Moreover, STB rate regulation is available only when the railroad is acting as a common carrier, there is no effective transportation competition, and the railroad is charging very high rates. STB regulation is vital, because the shipper has no option but to transport commodities at the rate set by the railroad or the STB.

Railroads insist on tying excessive rates on some routes to their willingness to
offer contract rates on more competitive routes.

In recent months, railroads have not always been willing to quote a common carrier rate at OxyChem's request or, in some instances, have made their willingness to do so contingent on OxyChem agreeing to all of the rates that the shipper and the railroad are then negotiating.

The STB should require railroads to quote common carrier tariff rates separately from contract rate quotations for each such movement if the shipper so requests.

It is vital that the STB remain an effective regulatory backstop to encourage commercial resolutions of rate and service disputes.

The only way that the STB can remain an effective backstop is to preserve the railroads' common carrier obligation without diluting the effectiveness of that obligation. The STB requires that railroads must consistent with their common carrier obligation quote a common carrier rate to any shipper which has made a reasonable request for such transportation.
In the 1970s the ICC held that railroads are and must remain common carriers of spent nuclear fuel and high-level radioactive waste despite any risks associated with carrying those commodities and they found that rail was several times safer than trucks to move radioactive materials.

The ICC's finding extended to other commodities and those circumstances are unchanged today. Therefore, the STB must continue to require railroads to carry these vital materials for OxyChem and the rest of American industry.

Frankly, the railroad's stated position present a fundamental challenge to this STB. Without maintaining the common carrier obligation, the Interstate Commerce Act would have no meaning for shippers because they would have no ability to compel railroads to carry what American industry absolutely needs them to carry.

If the railroad industry believes that changes to the statutory common carrier obligation are appropriate, it must seek those
changes from Congress, not the STB. Also, if there is to be any limitation, monetary or otherwise, on liability, as the railroads have proposed, or a refusal to carry certain commodities, neither the Board nor the railroads an empowered to take such actions.

Rather, Congress is empowered to do so, because the existing statutes require railroads to carry all hazardous commodities tendered in conformance with all applicable governmental regulations. OxyChem has always been willing to discuss legislative issues with the railroad industry, but this proceeding is not the appropriate venue for doing so.

You will hear the railroad say railroads do not produce TIH, do not use TIH, and do not own the tank cars used to transport TIH. However, I guarantee that every single railroad employee along with every single person in this room uses products made from chlorine every single day.
OxyChem is grateful for the opportunity to speak today on the need to maintain the current common carrier obligation. Chlorine and its derivative products are vital to the way we live. It is imperative that we preserve our right to transport OxyChem products (including chlorine) safely, securely and economically via rail and to do so the STB must continue to enforce the railroads' current common carrier obligation. Thank you for your consideration.

CHAIRMAN NOTTINGHAM: Thank you, Ms. Burns.

Now I will turn to John McIntosh of the Olin Chlor-Alkali Products Company.

MR. McINTOSH: Chairman Nottingham, members of the Board, I'm pleased to be here today on behalf of my company to testify about this important issue that is before the Board. Today I am testifying as President of Olin's chlor-alkali business which is one of the leading producers of chlorine and caustic in
North America and is an approximate $1.2 billion business.

We have been involved in the U.S. chlor alkali industry for over one hundred years, and we were the first commercial supplier of chlorine in the United States. We continue to grow and service the industry that we participate in.

Our business includes manufacturing sites in New York, Georgia, Tennessee, Alabama, Nevada, Louisiana, California and Washington State, and two provinces in Canada.

Each of these plants offers a favorable manufacturing cost structure, availability of highly skilled workers, access to our customer base, and historically competitive freight rates. In every case they have one common factor and that is they are captive to only one railroad.

As one of the nation's leading producers of chlorine and chlorine derivatives our company produces an essential chemical the
criticality of which has been discussed in previous testimony and doesn't need to be repeated by me.

First is how our products would be delivered to our customers without the common carrier obligation because it has been explained to me in no uncertain terms by the railroads that without that obligation they would not deliver our products.

The fact is that more than 80 percent of the chlorine that we produce is transported by rail to customers who have no other option than to receive it by rail. Let me say that again. More than 80 percent of the chlorine we produce is transported to our customer who have no other option than to receive it by rail. The implication of those two facts is obvious to me.

My testimony today will focus on the importance of the common carrier obligation as it exists today and its importance to Olin and our customers, as I previously mentioned. The
obligation is cited by the railroads as an undue burden when it comes to the duty to transport chlorine or other T1H chemicals.

However, in recent years, the railroads have systematically imposed massive and unprecedented increases in chlorine freight rates, allegedly to recover their "risk premium." In our business alone we have experienced average annual increases of 20 percent or more in the last three years and find that by the end of the current year our freight rates will have tripled from the average rates between 2002 through 2004.

In one high-volume move recently, rates were increased 177 percent in one year. The railroads price increases threaten the ability of chemical shippers like Olin to keep their plants profitable and economically viable.

Continued price increases would ultimately make the transport of chlorine by rail economically untenable and essentially have the
same effect as the railroads refusing to ship chlorine if the common carrier obligation is eliminated.

We are dependent on the U.S. rail industry for the safe, secure and efficient transportation of our chemical products. We emphasize that rail continues to be historically and currently by far the safest mode of transportation in North America. For a substantial amount of the shipments from our facilities, there is no alternative to shipping by rail, and for safety and security reasons we wouldn’t want to switch to a different mode. Moreover, for most of our facilities, we, the shipper, have access to only one rail carrier.

For a captive shipper, such as we are, regardless of the size or location, the efficient movement of our traffic, in some cases even the very survival of its business, depends on the rates and service provided by that single railroad.
Over the last hundred years, shippers like Olin have invested their money in plants and equipment based upon continuing to have the ability to ship our products economically from our manufacturing sites. As time goes on the number of railroads is decreasing, while the number of captive situations for shippers is increasing.

We continue to rely on the common carrier obligation of the railroads to maintain our ability to ship product to our customers at a reasonable rate and with reasonable service. If the common carrier obligations were weakened or eliminated and the railroads declined to carry product from our manufacturing facilities to our customers, the implications for both our business and our customers are obvious.

When considering railroad service, it is important to recognize the common carrier obligation which has been testified earlier as the statutory duty of railroads to provide. The
grants power to Congress to write the laws that
govern our nation's commerce.

Using this authority, Congress
recognized the common carrier obligation as the
framework on which the entire national railroad
transportation system was founded and it remains
crucial today.

Railroads are chartered to operate in
the public interest, as commerce depends on safe
and reliable service in the delivery of a wide
range of products. The common carrier obligation
underlies the role of railroads as a service
industry that supports so many critical sectors
of the U.S. economy.

The federal courts have pointed out
that even if it is inconvenient or unprofitable
for a railroad to carry a particular product, the
common carrier doctrine obligates a railroad to
provide this service.

Also, Congress never intended for the
common carrier obligation to be dependent on
whether the railroads can operate without
negligence or derailments. This has been illustrated in the NTSB findings on several recent accidents but the railroads insist on passing along significant risk premiums in questionable pricing actions or attempt to renege entirely on their legal obligations based solely on the negligence of their part in these recent incidents.

In summary, the common carrier obligation was established by Congress to protect all rail shipments, including chemicals such as chlorine. As our testimony demonstrates, the STB must enforce the common carrier obligation imposed by Congress for all of the aforementioned reasons.

The ability of American manufacturers and producers to compete in today's global market is highly dependent on the railroads' compliance with the common carrier obligation.

I would like to comment on some testimony earlier today from other parties, railroads and others interested in the
proceeding. It is Olin's belief, based on our experience in this regard, that there is not a strict liability standard as has been testified by others.

It is our experience that liability is based on degree of negligence and not strictly held. If there is no negligence, there is no liability and that is different than testimony I heard earlier today.

Olin also has not been shown evidence by the railroads that they are not properly insured or that they cannot obtain insurance. In fact, in discussions with the railroads, we have actually suggested that we would be willing to consider reimbursing them or paying a part of the incremental cost of the transportation of our chemicals if they would show us the data and demonstrate to us what that incremental cost was and how it affected their system.

We have yet to find any of the parties we have had discussions with that have agreed to even show us the information or provide
us a meaningful proposal on how to do that. We are unsure in our mind as to just how much validity there is to that claim that has been made earlier.

Speaking to the creation of cost competitive situations by reducing ton miles, I would comment that there was an attempt to do that on an industry-wide basis through a DOT Section 333 effort a year or two ago. That never came to fruition because of concerns by the Department of Justice on anti-trust and industry related matters.

Speaking just as an individual company, when we have tried to do things to reduce ton miles, what we have found is that if the delivering carrier is captive to that delivering location, our attempts to reduce ton miles have actually resulted, as Robin relayed in her testimony, to increased cost for a route as opposed to decreased cost.

I thank you for the opportunity to testify today and I am willing to answer any
questions provided.

CHAIRMAN NOTTINGHAM: Thank you, Mr. McIntosh and all the witnesses on the panel. I am impressed, Mr. McIntosh, with your offer that you recounted to the railroads that you would be willing to entertain a discussion about cost sharing, if I heard you correctly, on insurance cost if you had the right data to back that up.

I would certainly commend to the railroads' attention that they look at your proposal openly and give it close consideration because I think it's a kind of spirit that I'm looking for of collaboration and actually looking for how we can get to a better place in the status quo which is not ideal currently. I really appreciate your offer in that.

I don't know enough of the details to endorse it but I just think it's the right spirit and I hope the railroads take a serious look at that. I'll probably be asking them about that tomorrow when we have some more railroads back with us. You mentioned, Mr. McIntosh, that a
number of your customers have no alternative 
other than rail if I heard you correctly, on the 
vast majority.

MR. McINTOSH: Yes, sir.

CHAIRMAN NOTTINGHAM: To 80 percent.

MR. McINTOSH: Eighty percent. Yes, 
sir.

CHAIRMAN NOTTINGHAM: Believe me, you 
won't find anybody at the STB who doesn't agree 
that rail transportation of chemicals is the 
safest way to go. I'm struck how theoretically 
even a truck movement is not even possible. What 
kind of facilities are these?

MR. McINTOSH: For the most part 
truck movements of chlorine, in our mind, are not 
an effective alternative to rail transportation 
because they are not safer. As a matter of fact, 
they are a much higher risk.

CHAIRMAN NOTTINGHAM: Absolutely.

MR. McINTOSH: Truck movements of 
chlorine are really very limited to the 
California/Los Angeles area where it is used
predominately for chlorine supplies to municipal water treatment facilities. Outside of that in our system there are no other truck shipments used for chlorine just because of the difference in risk associated with that mode of treatment.

When you factor in the volume multiplier necessary to deliver by truck versus delivering by rail and the number of shipments that you have to make to get an equal volume of product delivered to a customer, it further skews what is already a losing proposition from a risk and a safety and a security standpoint.

Our customers, even if we offered them transportation of chlorine by truck to their facilities, I'm confident they would want no part of it even if it was an economic break-even consideration for them.

CHAIRMAN NOTTINGHAM: So I'm hearing it's obviously riskier certainly and obviously probably impractical in many circumstances but it is technically feasible. If you had a strike or something and the rail industry was shut down as
the aviation industry was after 9/11, for some weird reason, I mean, there are roads that go to these places. Right? People drive to work to these facilities?

MR. McINTOSH: Yes, sir. It is feasible and it is done on a very limited and very specific basis in certain parts of the country.

CHAIRMAN NOTTINGHAM: Okay. These are important. When we hear words like no option or no alternative, I mean, I want to make sure we dig into it. I appreciate that explanation.

MR. CLAUDE: Mr. Chairman, on the same question, in the plastic industry our customers, even the largest customers, don't have enough storage and, therefore, they want us to deliver by rail car so they can use those rail cars as storage facilities. The majority of our customers will only accept rail car.

CHAIRMAN NOTTINGHAM: I understand. Several witnesses today, including a couple on this panel, have indicated that the Board
shouldn't play a role -- I don't want to put words in anyone's mouth but in adjusting or changing the dynamics of the common carrier obligation.

I do want to make sure everyone understands that on more than a hundred occasions the Board has actually exempted commodities from regulation which has the effect the way the law is played out in precedence of basically removing the common carrier obligation for all intents and purposes. Congress has not on a single occasion that I am aware of, certainly not in most instances, reversed that or overridden that. Congress, of course, can.

They can have the last word but my view is looking at the case law, looking at the statutory history, the common carrier obligation us very generally worded as many statutes are, critically important, a touchstone concept for our transportation system and for the agency.

There is an implicit with the Congress also creating the ICC and then the STB
implication that it's the Board's job to give
meaning and life to it through enforcing it and
through occasionally looking at exemptions, for
example.

I'm not suggesting that it's a
brilliant idea to exempt TIH or something but
just want to make sure you're not saying, "Board,
you can't even sort of look at this or consider
this." I think we wouldn't be doing our job if
we didn't have hearings like this and consider
all the different options on the table.

Mr. Kaplan, I noticed and I heard
towards the end of your testimony you slipped in
a zinger on me. I want to make sure I have a
chance to respond to you. Your testimony said
that the government through the Board seems to be
constantly seeking to ensure their, meaning the
railroads, inordinate profitability.

Something I heard when I was a
nominee before coming here, it is stated so often
that it is easy to sort of just accept it as fact
but I can't because I can tell you we're in court
fighting the railroads on a number of fronts. They opposed us when we issued our first ever unreasonable practice finding on the topic of fuel surcharges.

They opposed us when we completely turned around and reformed our small rate case rules and we are in court with them now on that. They opposed us when we took up the issue of the cost of capital of rule making and significantly changed the way we measure that important measure and with the outcome, as we now know, of lowering the cost of capital determination.

The railroad that we forced to sell its line in Lubbock, Texas, I can tell you, I mentioned this in my opening remarks, we forced a railroad to sell its line to a competitor who was willing to actually step in and meet their common carrier obligations. I can tell you there are a lot of railroads on a lot of issues who don't feel that we are constantly focused on helping them obtain inordinate profits.

Not to mention, if you actually
compare the last 20 to pick your time horizon,
the profits of the rail industry to that of all
their customers, or almost all their customers,
you would see that rail industry profitability
generally lag behind that of the chemical
industry, coal industry, grain which there is
nothing wrong with that per se.

It's just a matter of fact and I just
want to make sure -- you may have used this line
from a few years ago and not gotten challenged on
it but I just need to call you out on that a
little bit.

MR. KAPLAN: I understand that.

CHAIRMAN NOTTINGHAM: Vice Chairman
Mulvey.

VICE CHAIRMAN MULVEY: Couple of
questions and I'll try to be brief. U.S.
Magnesium, Mr. Kaplan, you talked about how you
used to vent the chlorine into the atmosphere,
55,000 tons a year. What are the environmental
consequences of doing that if you had to do that
again? Is it a known carcinogen? What are the
problems with doing that?

MR. KAPLAN: Chlorine is an irritant obviously and in high concentrations can be problematic with respect to breathing. When it was emitted with the other materials we emitted, we emit over $100,000 SCFM of steam, for example, so it was combined in that. It dispersed fairly readily. This was all done under clean air permits and there was no detrimental impact of it to any people based on the location of the plant.

VICE CHAIRMAN MULVEY: You mentioned about the line that had to be upgraded to handle 286,000 pound cars and the UP was unwilling to do it. How long was that line? Do you know?

MR. KAPLAN: Eleven miles and change.

VICE CHAIRMAN MULVEY: Eleven miles.

Okay. Did you talk to them about sharing the cost of doing that or was it —

MR. KAPLAN: We felt the cost should have been paid for by the railroad and then put into the ongoing rates.

VICE CHAIRMAN MULVEY: Okay. It's
been mentioned that trucks are less safe for carrying the chlorine and other hazmats than rail cars. Less likely to have accidents and that rail cars can carry four times as much product as a truck.

On the other hand if a rail car derails and if there is a spill, there is a much greater volume of material that can be emitted. Is it also true that rail accidents are demonstratively more dangerous and more harmful and more costly than truck accidents because they are carrying more material, more product?

In other words, there may be more trucks out there, they may be more likely to have accidents, but because of the volumes they are carrying are much less, in a way there is less of a threat to human health and safety when there is a truck accident as opposed to a rail accident.

MR. KAPLAN: I'm not sure that I'm really in a position to comment on that. Trucks when they have an accident are going to be right next to a car whereas trains are often separated
by some distance. There is obviously four times
more product in a rail car. Yes, that's correct.

VICE CHAIRMAN MULVEY: Anybody else
want to comment on that? We are hearing that it
is very, very expensive to insure rail
transportation of chlorine and other TIH
materials but the trucks are carrying them. I'm
certain they're getting insurance when they carry
these materials.

MR. KAPLAN: I don't believe that
there are more than perhaps 20 trucks in the
entire United States that handle chlorine.

MR. McINTOSH: It's a number close to
that. Yes, sir.

MR. KAPLAN: It's only done for very
specific applications.

MR. McINTOSH: There have been risks
-- I was going to say there have been risk
assessment studies done in the past taking into
account the number of shipments, the typical
routing of shipments, the accident frequencies
for both rail and truck, the amount of product in
carriage on average and very complicated risk assessment studies have indicated that the overall risk the safest mode for delivering chlorine is by rail.

Significantly safer than by truck. As a responsible company, I have an obligation to not move chlorine out of an inherently safer mode of transportation to something less safe because it makes it more convenient for the railroads to haul that product or more financially acceptable for them to haul that product.

VICE CHAIRMAN MULVEY: I appreciate that.

MR. KAPLAN: Excuse me, Mr. Vice Chair, but Mr. Claude also made a very valid point and that is that most consumers use the rail car as their storage so they keep the rail car. Unlike HCL where they generally unload it immediately into a tank, they keep the rail car on side and use it for storage which avoids one extra transfer and one extra source of potential leaking.
VICE CHAIRMAN MULVEY: Ms. Burns, you mentioned that the railroads raised the rates 88 percent after you reduced the mileage by so much. Was that in direct response to the reduction of mileage or was that just coincidental that the rates happened to go up right after you did that and you were somewhat surprised?

MS. BURNS: No. The situation was that we had a chlorine move out of our TAC plant moving on the shoulder route. They significantly raised their rates. We then found the longer rail at a lower rate available to us. We went back to the carrier and said. "It's all in our best interest to move fewer miles. We have a rate that is far more competitive than what you."

Asked them to reduce their rate so that we can continue to move on that and we are told that the rate was what it was and there was not going to be any reduction in the rate.

VICE CHAIRMAN MULVEY: Mr. Claude, you mentioned about the importance of the U.S.
advantage in logistics and has historically been a major U.S. competitive advantage to have lower logistics cost because we don't always have a lower labor cost or materials cost but our logistics system has been one of our real competitive advantages.

You testified that you see that evaporating and the U.S. is losing its competitive advantage. Do you see Total in the next decade or so beginning to move more of its operations off shore in response to a higher logistics cost?

MR. CLAUDE: There are two aspects which obviously when we proposed an investment in the company this is versus investment in other places of the world. They look at the total cost and that is manufacturing cost and logistic cost.

Another important aspect, this is obviously this is eroding the profitability in our business but also those costs are passed to our customers. I would like you to know that at the end of last year, early this year, there was
not one plastic transformer huge company getting
bankrupted and either having to close down some
of their plants or send that manufacturing
transformer site to Asia and other places. This
has a chain effect on our activity but also our
customers.

VICE CHAIRMAN MULVEY: Thank you very
much. That's all my questions.

CHAIRMAN NOTTINGHAM: Mr. Buttrey.

COMMISSIONER BUTTREY: Mr. Claude, I
was just curious. You are the fourth largest
publicly traded integrated oil and gas company in
the world. Is your headquarters in Brazil or
where is it?


COMMISSIONER BUTTREY: Paris.

MR. CLAUDE: Yes, sir.

COMMISSIONER BUTTREY: I was just
curious. I know I could get this from your
annual report but I don't happen to have one
handy so maybe you can enlighten me. What are
the global gross revenues of the consolidated
companies? Do you have a feel for that?

MR. CLAUDE: Yes. As the other oil
companies in the world today --

COMMISSIONER BUTTREY: What does the
consolidated income statement show in terms of
global gross revenues.

MR. CLAUDE: As I was saying, as the
other oil companies in the world Total is doing
very well for the moment. You need to know that
petrochemicals is going through a very difficult
cycle and that is why most of the large oil
companies like Shell, BP, and others have sold
their petrochemical activities to financial
communities, hedge funds, or to Middle East
companies.

That is the majority of what the oil
companies have done. They are looking at all
aspects of the business and they will have to
justify the financial half of my activity which
is petrochemical. It has been way below the 10
percent you would be talking about, the end of
last year and this year.
COMMISSIONER BUTTREY: What percentage of the U.S. operation -- you're just responsible for U.S. operations?

MR. CLAUDE: Yes, sir.

COMMISSIONER BUTTREY: What percentage of your U.S. operations -- what percentage of contributions to the total? Do you happen to know what that is?

MR. CLAUDE: In the total Total group?

COMMISSIONER BUTTREY: Total Total group, yes.

MR. CLAUDE: A small percentage.

COMMISSIONER BUTTREY: A small percentage.

MR. CLAUDE: The petrochemical activity worldwide is something like 10 to 15 percent and the U.S., I am pleased to tell you, is about a quarter of that.

COMMISSIONER BUTTREY: I just want to clarify the record, Ms. Burns, about something I thought I heard you say. I think you said you
had experiences where carriers refused to quote you a rate on a movement that you wanted them to do. What was your alternative methodology after that?

MS. BURNS: We have several examples. The first was we were nearing completion of negotiation on a very large move out of Niagara Falls. At the end we felt like we still had six lanes that were unreasonable and we asked for tariff rates for those six lanes. We were told that if we were given tariff rates for those six lanes, all contract rates were off the table and all moves would move to tariff. Since then we've been --

COMMISSIONER BUTTREY: Everything would move to tariff?

MS. BURNS: Correct.

COMMISSIONER BUTTREY: Okay.

MS. BURNS: Since then we've been negotiating with another railroad and this time we asked for tariff rates in parallel with contract rates. We were first told that there
was no tariff rates and when we reminded them of their obligation that they had to give us a tariff rate, they told us that it was not their practice to give us a tariff rate until they exhausted all contract negotiations and they were not going to give us a tariff rate until we completed negotiations. That contract is up next Wednesday and we are still waiting on some of the contract rates.

COMMISSIONER BUTTREY: So you are operating under a contract right now?

MS. BURNS: We are still under contract. Going off contract on the 1st of next month.

COMMISSIONER BUTTREY: So what is the take-away from that, that the carrier was forcing you to a contract, therefore, those rates would be outside the rate relief position?

MS. BURNS: Yes. We wanted both in parallel so we could evaluate our options and we could pursue a small rate case. We have been told, not directly, but that the same thing would
happen. If we were to go ahead and get tariff rates, contract rates would be pulled.

COMMISSIONER BUTTREY: Mr. McIntosh, you said that your current rates and recent rates were far greater than the rates you paid in 2002, 2004.

MR. McINTOSH: Yes, sir.

COMMISSIONER BUTTREY: Now, the rates that you were paying in -- I know we are not here to talk about rates but this really intrigues me if you will indulge me here for a moment.

CHAIRMAN NOTTINGHAM: It has a funny way of coming up whenever we get together.

COMMISSIONER BUTTREY: Has a funny way of coming up. It has a funny way of coming up all day, as a matter of fact. It's kind of like a trial lawyer. You opened this thing and now we are going to talk about it. 2002 through 2004 were those contract rates or were those tariff rates?

MR. McINTOSH: They were contract rates.
COMMISSIONER BUTTREY: They were contract rates?

MR. McINTOSH: Yes, sir.

COMMISSIONER BUTTREY: And they have gone up. Will you refresh my memory on what you said they had increased in 2004?

MR. McINTOSH: Between 200 and 300 percent over the average of the rates between 2002 and 2004.

COMMISSIONER BUTTREY: Okay. And you are not under contract. You are under tariff rates now?

MR. McINTOSH: No, under contract rates for the most part.

COMMISSIONER BUTTREY: You're under contract.

MR. McINTOSH: Yes, sir.

COMMISSIONER BUTTREY: So you are able to move from tariff rates to contract rates during some type of negotiating process?

MR. McINTOSH: We have been under contract rates for that whole period of time,
rapidly escalating contract rates. We are still
under contract rates.

COMMISSIONER BUTTREY: Did the
carrier quote you tariff rates?

MR. McINTOSH: No, sir. No, they
were not willing to quote rates as we were trying
to negotiate contract rates for that period of
time or in recent negotiations.

COMMISSIONER BUTTREY: In your
negotiations you got the distinct impression that
there wasn't going to be a contract, there wasn't
going to be a tariff rate, there was only going
to be a contract rate?

MR. McINTOSH: In any occasion when
we were given tariff rates were even a further
penalty over the contract rates that we were
given with basically 30-day terms.

COMMISSIONER BUTTREY: I just want to
clarify that. Thank you very much.

MR. CLAUDE: I would like to mention
that those cost increases happened also on
plastics which are non-hazardous materials. We
have linked the cost to the hazmat problem today.
I came today to testify that the same is
happening for non-hazmat products.

   COMMISSIONER BUTTREY: You're not
producing inhalants? You're not producing
anything that could be toxically inhaled.
Correct? You're producing pellets.

   MR. CLAUDE: No. We are producing
pellets and we are producing some liquids which
are going by barges and pipeline at 95 percent.

   COMMISSIONER BUTTREY: But not by
rail?

   MR. CLAUDE: Not by rail.

   COMMISSIONER BUTTREY: Okay. Thank
you.

   CHAIRMAN NOTTINGHAM: I think it just
bears reiterating that the Board takes very
seriously any refusal by a railroad to quote a
tariff under any circumstances other than if it's
involving an exempt commodity. Please let us
know.

   Let our Office of Rail Consumer is
the most appropriate stop to know about that. We will make sure to dig in deep to find out what is going on and to straighten that out. This is not the first time I've heard that. We've heard it repeatedly today. I'm very concerned about that.

Anymore questions of this panel? Thank you, panel. Safe travels as you head home and thank you for being with us today.

We'll now call forward our final panel, Mr. Doug Kratzberg and Mr. Nicholas DiMichael from the National Industrial Transportation League.

While the next panel comes forward I will reiterate that in the hallway as you leave this hearing room there is a table that has information sheets on the STB Office of Rail Consumer Assistance and urge folks to grab some of those on your way out.

VICE CHAIRMAN MULVEY: Good evening.

MR. KRATZBERG: Hello.

CHAIRMAN NOTTINGHAM: Welcome, Mr.
Kratzberg and Mr. DiMichael. We wanted to give you the last word, today at least, so when we go to bed tonight we'll have nothing but your wisdom wafting through our ears.

Appreciate your patience. Someone had to have the last word today. We hope you're okay with the fact that it's you. Without further ado we'll turn it over to you for the next 10 minutes.

MR. KRATZBERG: Okay. Thank you. Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey, I'm Doug Kratzberg, Rail Planning and Operations Manager for Exxon-Mobil Chemical Company. I am here today in my role as the Chairman of the National Industrial Transportation League Rail Committee. Appearing with me today is Nick DiMichael, counsel for the League.

I appreciate the opportunity to testify before the Board at this hearing which is designed to examine the issues related to the railroad common carrier obligation. As I believe
you are aware, the League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce.

The League currently has over 600 company members ranging from some of the largest users of the nation's and the world's transportation system to smaller companies engaged in the shipment and receipt of goods.

More than 100 years ago the Congress codified the railroad common carrier obligation. Today this obligation remains a statutory duty that requires railroads subject to the jurisdiction of the Board must provide transportation or service upon reasonable request.

The Board maintains the authority to ensure that the railroads comply with this statutory duty and to determine whether the service requested by a shipper is reasonable. However, the Board does not possess the authority to change or repeal the common carrier obligation.
as its right rest solely with the Congress.

It is the League's strong view that the common carrier obligation is an essential requirement of the U.S. regulatory system governing railroads. The railroads' duty to fulfill the common good and further the nation's commerce is as critical today as when the obligation was first recognized over 100 years ago.

The railroads continue to serve a unique and special role, especially for large bulk commodity shippers or shippers of very hazardous chemicals where rail cannot be replaced by any other mode.

The issues facing today's rail industry including a limited number of service providers and infrastructure and capacity constraints creates a need for government oversight of the manner in which railroads allocate their supply of services.

The League is aware that railroads are taking actions to increase revenue through
price increases and reduce liability risk by refusing to provide service such as in the case of intermodal service of TIH commodities.

While the rail industry has the right to make rational pricing and service decisions based on market conditions in the economics of their business, as a regulated industry such factors are not and should not solely determine who received rail service and who does not. The national interest must take into account the shipping public's need for rail service to allow for safe and cost efficient product deliveries.

If left to their own devices, the League is very concerned that railroads would refuse to transport hazardous commodities that qualify as TIHs and perhaps other traffic as well. Some shippers already suffer from service problems that adversely affect their business including insufficient car supply as well as unreliable and inconsistent service.

Notwithstanding the current challenges faced by the rail industry and its
customers, the common carrier obligation has long served to guarantee that shippers can at least obtain some level of service as compared to no service at all. This fundamental duty helps to ensure that the commercial needs of the U.S. shipping public are met subject to a reasonableness standard.

The League strongly believes that the Board's regulatory oversight of the common carrier obligation is absolutely essentially to ensuring that the railroads provide service upon reasonable request and do not seek to transport only their most profitable and least risky traffic. Accordingly, the Board should not narrow or dilute its interpretation for enforcement of the common carrier obligation based on alleged capacity constraints.

In its notice announcing this hearing, the Board asked for feedback on the cost and safety issues related to the carriage of TIH commodities. Class I railroads have made no secret of their preference not to transport
hazardous materials that qualify as TIHs.

The courts have previously determined that railroads cannot refuse to carry goods based solely on their dangerous nature or characteristics as long as such goods are tendered for shipment in accordance with applicable safety laws and regulation.

In this context request for transportation service are deemed reasonable when such requests conform with minimum safety standards such as Department of Transportation and Nuclear Regulatory Commission requirements.

In enforcing the common carrier obligation with regard to the carriage of certain hazardous materials, the court has sought to further the public interest in finding that rail carriage is the safest and most economical means of transporting such products.

In sum, a railroad's common carrier obligation is comprehensive and the circumstances under which a carrier could refuse transportation of hazardous goods are few. TIH products are
used in many contexts, to purify the water we drink, to operate pollution control systems, and as a component in many manufactured products across a variety of industries such as automotive, defense, healthcare among others.

Based on the dangerous nature of these commodities rail transportation rather than highway transportation is the safest manner in which to move these products to necessary delivery points. Thus, strong public safety considerations continue to require strict enforcement of a common carrier obligation with respect to the carriage of TIH products.

If the railroads begin refusing to carry TIH commodities or impose unreasonable conditions for such carriage, producers of these commodities will be forced to either ship these products by truck or to not ship these products at all. The latter choice is simply not a viable option and will lead to such producers to ship their production overseas at the cost of American jobs.
Turning to the issue of rail infrastructure investment, the League is aware that rail carriers are increasingly requiring shippers to make investments in rail infrastructure as a condition to obtaining rail service. In many cases shippers are being asked to pay for new track construction or improvements that relate to the requested service.

While the League believes it is reasonable for a carrier to make such proposals to its customers regarding infrastructure investments that directly concern the service requested by the shipper, the League does not believe it is appropriate or lawful for a carrier to condition the provision of rail service required by a shipper in exchange for the funding of infrastructure improvements.

With regard to whether volume requirements or incentives including rail service arrangement affects the common carrier obligation, the League would simply note that a rail carrier should not be permitted to avoid the
common carrier obligation merely by inserting such requirements or incentives into its common carrier tariffs.

This issue appears to be related to another STB proceeding Ex Parte 676 Rail Transportation Contracts under 49 USC 10709 in which the Board desires to establish a rule that will help to distinguish common carrier rates and service from contract rates and service.

In short, the League does not believe that the inclusion of volume requirements and rate incentives in a tariff automatically transforms the document into a contract which would not be subject to the common carrier obligation.

In its notice of hearing the Board identified economically motivated service reductions and metering of demand for service as a topic of interest. In surveying the members of the League's transportation committee confidentially with respect to this hearing, the responses broadly demonstrate that shippers are
experiencing double and triple digit price increases at paces never seen before.

However, in some cases there appears to be a growing perception that the aggressive price increases are offered not only to secure market-based compensation which include high energy cost but to directly discourage the shipper from tendering the shipment. This is a very troubling phenomenon if these perceptions are, in fact, true.

Although a shipper could attempt to challenge the level of rate offered by a rail carrier as being unreasonably high, as the Board knows rate challenges have not been widely employed by shipper community in the past for various reasons.

The League believes that a legitimate question exist as to whether railroads that price traffic at extremely levels for the purpose of discouraging the movement of commodities is a violation of the common carrier obligation.

Assuming that the shipper seeking
rail service has made a reasonable request, a
response from a rail carrier that is directly
intended to discourage the movement appears to be
inconsistent with the statutory duty to provide
service upon reasonable request.

This concludes my oral remarks. The
League certainly appreciates the opportunity to
participate in this hearing today and I would be
happy to answer any questions. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr.
Kratzberg. I'll yield to Vice Chairman Mulvey.

VICE CHAIRMAN MULVEY: Just briefly.
It's getting late so I'm sure we all want to get
out of here. A while back, it seems like hours
ago, the witness for DuPont mentioned that they
tried to ship some ISO containers and the
railroads refused to handle them saying this is
an exempt commodity, even though it was a
hazardous material.

Because it was in a container, it was
an exempt commodity. Are you aware of any other
situations like that where the railroads have
refused to ship hazmats because they were not in
tank cars, rather they were in ISO containers?

Have you heard about this before?

MR. KRATZBERG: Personally I am not.

MR. DiMICHAEL: I can add a little
bit to that. I don't believe that the railroads
are refusing to ship hazardous commodities
because they are in ISO containers. They are
refusing to ship hazardous commodities because
they are an intermodal service.

VICE CHAIRMAN MULVEY: That's what
I'm saying.

MR. DiMICHAEL: Therefore, because of
an intermodal exemption, they are basically
saying that they will not ship. I am aware of a
number of situations like that.

VICE CHAIRMAN MULVEY: Okay. You
suggest it would be helpful for the Board to
clarify whether shippers faced with high pricing
proposals may only challenge those rates through
our rate procedures or may alternatively
challenge the pricing as a violation of the
common carrier obligation. If the Board were so
inclined how would you suggest we do so and what
factors would we have to use to determine that it
was a common carrier violation?

MR. KRATZBERG: I'm going to ask my
counsel to assist with that one.

MR. DiMICHAEL: I think, Vice
Chairman Mulvey, that you would have to get into
the level of the rate increase. There might well
be questions of intent here. I think this would
get into a discovery matter just the same way
that an unreasonable practice complaint would be
done, just an ordinary garden variety.

VICE CHAIRMAN MULVEY: Intent is
always difficult to show.

MR. DiMICHAEL: It's true but I guess
we are not saying the Board's rule should
preclude a claim under the common carrier
obligation based on the level and intent of rate
increase.

VICE CHAIRMAN MULVEY: So it would be
a practice rather than a rate case?
MR. DiMICHAEL: That's right.

VICE CHAIRMAN MULVEY: You argue that the shippers should not be required to invest in rail infrastructure as a condition for receiving rail service. Does it make any difference whether the investment is on the shipper's property or it's plant or rather, say, an electric switch that might be on railroad property? Do you differentiate between those two investments made by shippers on railroad property versus investments made on the shipper's own property?

MR. KRATZBERG: My understanding would be that generally if a shipper is going to be asked for making investments, it would be on their own property. If it were on the railroad's property, it would be something they would own and would maintain. In general those type of improvements would be on privately owned property on the shipper's side.

VICE CHAIRMAN MULVEY: But there can be cases where the investment would be made on
the railroad's property in order to give the
shipper better service and the railroad says,
"Look, this is going to benefit largely your
movements so, therefore, we need you to pay for
it."

MR. KRATZBERG: I presume that could
happen. The only cases I'm familiar with are
those shippers that have indicated to me that
they have been asked to make infrastructure
improvements on their own property.

VICE CHAIRMAN MULVEY: Thank you very
much.

CHAIRMAN NOTTINGHAM: Commissioner
Buttrey?

I have no questions either for this
panel. Thank you. The testimony was strong and
clear and we appreciate that. That will adjourn
this hearing for the day. We will resume
tomorrow morning at 9:00 a.m., same place, same
general topic. We have some more good panels
tomorrow.

I want to thank the staff here in the
room and also the staff out in the hallways who provided security and throughout the agency for helping with this hearing and thank all of you for participating.

(Whereupon, at 6:07 p.m. the hearing was adjourned.)