UNITED STATES OF AMERICA

SURFACE TRANSPORTATION BOARD

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ORAL HEARING

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IN THE MATTER OF :

COMMON CARRIER OBLIGATION : STB Ex Parte
OF RAILROADS

: No. 677

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Friday,
April 25, 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
APPEARANCES:

Party

Panel I: Freight Railroads

CSX Transportation, Inc.
John M. Gibson

Norfolk Southern Corporation
James A. Hixon

Association of American Railroads
Edward R. Hamberger and Lou Warchot

Panel II: Short Line and Regional Railroads

American Short Line and Regional Railroad Association
Richard F. Timmons and Keith T. Borman

RailAmerica, Inc.
Paul Lundberg

Chicago South Shore & South Bend Railroad Co.
Henry B. Lampe

CNJ Rail Corporation
Eric S. Strohmeyer

Panel III: Coal Shippers and Utilities

Arkansas Electric Cooperative Corporation
Steve Sharp

Concerned Captive Coal Shippers
Andrew B. Kolesar III

Edison Electric Institute
Michael F. McBride

Western Coal Traffic League
Peter A. Pfohl
Panel V: Other Interests

Clean Earth of North Jersey, Inc.
  Robert P. Fixter

Slaughter Company
  Benjamin B. Slaughter

Highroad Consulting, Ltd.
  Sandra Dearden

Evraz Claymont Steel
  Daniel R. Kloss

Raymond Tylicki

ALSO PRESENT:

ANNE K. QUINLAN, Acting Secretary
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Adjourn
(9:01 a.m.)

CHAIRMAN NOTTINGHAM: Good morning.

If I could ask the audience to take seats, I see we have our first panel. Welcome to Day 2 of the Surface Transportation Board's hearing on the common carrier obligation. I think this panel knows the routine about keeping to time limits, and we'll be asking questions after all the panelists have spoken.

Without further ado, let's turn it over to the panel, and our first -- make sure I have my order correct here. I think this morning we will first hear from Mr. John Gibson of the CSX Transportation Company. Welcome.

MR. GIBSON: Thank you. Good morning.

My name is John Gibson. I'm with CSX, Vice President of Operations, Research, and Planning, and I just wanted to speak to this topic a bit about how this works in the real world, you know, from a more practical point of view than perhaps some of the other presentations.
CSX is in the business to serve customers. That is our business, and serving them is how we generate revenue. I mean, if we do it poorly, you know, there are other options that crop up.

Some of our customers will ship in predictable volumes. Some will predict -- ship in predictable volumes and in predictable lanes, but some customers are seasonal or cyclical, and some customers can show up suddenly or, unfortunately, some can disappear quickly, as well.

Many want to open new facilities, and everyone wants to grow. Everyone wants to sell more, and they all expect the railroad to be able to provide service for their needs.

Capacity constraints and their effect on railroads and customers come into play when demand exceeds supply. Supply and demand are equal considerations. We have to address both.

Capacity for rail operations has to be understood in the context of networks. The
network is often defined by the line of road and
the infrastructure, but it also is defined by
train priorities, speed differentials, the amount
of switching work that's done on the main, those
kinds of issues.

Capacity is also a dynamic measure,
which can be affected by resources, so freight
cars, crews, locomotives, and customer interface
are all part of capacity, as well. Constraints
to capacity can be geographic. They can be
grades. They can be port areas.

They can be market, seasonal grain
harvest, those kinds of things. They can be
driven by the corridors that you operate in and
certainly passenger types of operations, and that
plays into your overall effective capacity, as
well.

Constraints can be either temporary
or long-term, but the investments that are
required to address capacity concerns,
particularly on the capital side, have a useful
life of 20 to 50 years, and it's a very serious
requirement to be careful about those investments.

Response by the railroad requires multi-lead times, their -- the ability to bring crews in and locomotives. Those time frames are different. The ability to build, the amount of time it takes to permitting changes over time and by location, and all of those are required to be put into their proper timelines to be effective at addressing capacity concerns.

The current coal market, I think, is a timely example. We've had, you know, over the years, over the decades, a fairly population-based growth of coal use, but in the last couple of years, in particular the last 12, 16 months, we've seen a very large increase in export coal that's being driven by worldwide changes, the Australian production problems with some of the flooding they've had there. China's rapidly increasing demand is affecting a lot more commodities than just coal, but coal, as well.

Vessel capacity and, frankly, the
weak dollar has made U.S. coal a bargain, and we're seeing coal move to export in record numbers. All of these factors in that market challenge our capacity in terms of infrastructure, equipment, and workforce.

So to address that, we're currently bringing on 5,700 coal cars to our fleet. Some of those we're bringing on very quickly, because we're using leases, and it's a fairly short lead time, but building new coal cars can take up to three years, depending on the way those cars are being built, the supply chain, and supply and demand of the coal car builders.

We're also dedicating a record number of locomotives to the coal service. We can divert from other users, but that has an impact on other customers, so that's a short-term tactical.

We can also lease, and we do, but there are inherent problems with lease as a long-term solution, and then, of course, when you purchase to get a locomotive ordered, built and
in service, it can easily take up to a couple years. Building capacity expansion, again, planning, design, permitting, six to 12 months is pretty normal, another six to 24 months to build, depending on the signal design issues, for instance.

Adding crews to coal districts and in port areas where, you know, that traffic hasn't been moving recently, you can pay bonus to help employees relocate and shift some of your workforce around, but to hire and train, again, you're looking at nine months.

You can encourage customers to change processes, and both of us can build capacity through capital investment, but, again, there are fixed assets and mobile assets, and their lives are very long.

There has been a long history of customers making capital investments. Coal loading equipment and mine-side tracks are all, you know, always on producer's property pretty much. Industrial side tracks and loading
facilities are on customer property and built by the customers. Freight cars are owned by either of us.

Large plants often have their own switching activity completely segregated from ours with their own locomotives and crews. Ports have been investing heavily as we see the demand for imports grow, and the investments that are made by customers on these bases are also very long-term.

We must respond to these fluctuations in all our customer markets, so when we look at our traffic base, for instance, coal is on the rise in the export side of coal and more gradually in the utility side of coal. Automotives for this year, you know, are down.

Fertilizers are up. Grain is up, and ethanol didn't exist a few years ago, so grain to new sources and uses of the grain to new locations for ethanol plants, for instance, is another area where you couldn't have predicted.

Just like the export coal three years
ago, you would not have been able to predict that
that coal would explode to the volume and to the
degree of quickness that it has, and so you can't
know how you're going to invest in your resources
to perfectly match and perfectly time capacity
issues.

There are things that we do with
customers all the time to help get better at
that. Some customers have volume commitments
that help in planning power and crews and fixed
facilities. Some customers provide detailed
lane-by-lane forecasts, and some are very good at
that, and we absolutely use that.

I mean, we do our own demand
forecast, but ultimately we have to respond to
all of those customer markets, and additional
customer demands, you know, want to claim
capacity on an equal basis, and they use capacity
more or less on an equal basis, and a use of
capacity is, you know, in a constrained corridor
is at the expense of other users.

I wanted to take you through a
simplistic view of switching off of the main, and
this first slide, I'll take a moment on it. It's
a single-track railroad, and it has two sidings.
There's no scale.

This would be miles and miles of
railroad. There are no signals. The operating
rules are all sort of glossed over, but it's
illustrative.

So the train in this case is a local
train, and its charge is to pick up the -- the
blue train is going to pick up the blue car in
the middle of the cut at the customer location.
There is a single switch onto the main.

So he's going to, in the next slide,
set up some cars and then pull past the switch,
realign the switch, and he'll back in, and he
will hook up to the first car and the second car,
and he'll pull through the switch. He will then
back up and set his car with his train, and he
will, as he's doing that, face an opposing train,
which goes into the siding, and I see the light's
on. Then I have maybe a couple of minutes.
CHAIRMAN NOTTINGHAM: If you could just wrap up in the next minute, please.

MR. GIBSON: Okay. That would be great. As he does, there's a -- the north arrow is facing to the top of the page. There's a westbound train that pulls into a siding while he's doing this work, and typically this work would take several hours.

He then leaves the cars that have been cut, and he replaces the customer's car on the siding, and he goes back and reattaches to his train. As he's doing that, there is another train that is coming up looking to go in the eastbound direction.

After he reattaches to his cars, he pulls forward and leaves the scene, and the other -- after he's cleared the blocks, the other westbound train -- I'm sorry -- eastbound train is allowed to go through, and then the train that's been in the siding is allowed to go.

If you look to the next set of slides, this is a different configuration where
the switching is all done off of the main, and --

CHAIRMAN NOTTINGHAM: Mr. Gibson, I'm sorry, if you could just wrap up in the next 15 seconds --

MR. GIBSON: Okay.

CHAIRMAN NOTTINGHAM: -- because we had to keep everybody yesterday on a tight time limit. We'll have plenty of time in the questions. I think we get your drift.

MR. GIBSON: Sure. Yes. If you go to that type of configuration, Mr. Chairman, you'll see that you have more capacity for all customers, the one interference there.

If I could go to the next to the last slide, the problem that we have with trying to meet these demands is that if you literally allow an individual homeowner to build his driveway to the interstate highway, you will create traffic congestion and problems throughout your network.

CHAIRMAN NOTTINGHAM: Thanks. Mr. Hixon for the Norfolk Southern Corporation.

Welcome.
MR. HIXON: Thank you. Good morning.

First, NS joins in the submission of the Association for American Railroads. This morning I hope to focus the Board's attention on an issue that is critical to the railroad industry.

Accordingly, I will address one of the questions proposed in the Board's order announcing this hearing, how the common carrier obligation relates to cost and safety issues with respect to the transportation of haz material, especially commodities posing toxic inhalation hazards, the TIHs.

The shippers of these commodities seek four things in rail transportation, to move in bulk the most concentrated levels of these commodities possible, to ship these commodities as cheaply as possible, to ship these commodities without being responsible for the hazards they pose and for the harm they could cause, and to use rail cars as storage facilities to further reduce their liability exposure.

To advance public safety, shipper
should be constantly promoting substitute products, seeking to ship shorter distances, unequivocally and unanimously advocating safer tank cars. They are not.

The regulatory regime should help them along. NS also asks the Board to hold a hearing specifically to address the common carrier obligation and other regulatory issues related to the rail transportation of TIH commodities.

In addition, although the common carrier obligation continues to exist, the Board should consider what constitutes a reasonable request from a shipper of such commodities, whether shippers should share or assume the risk of TIH commodities they produce, and how railroads can recover for the risk and cost association with transporting TIH commodities.

First, TIH commodities, unlike coal or grain, are extremely dangerous because of the innate characteristics, but in many cases these commodities may no longer be necessary or may
soon be unnecessary. I'm not a chlorine expert, but considering
the following facts that are published by the Center for Disease Control.

Chlorine is sometimes in the form of a poisonous gas. Chlorine gas can be pressurized and cooled to change into a liquid so it can be shipped and stored. If chlorine gas is released into the air, people may be exposed through skin contact or eye contact. They may also be exposed by breathing air that contains chlorine.

When chlorine gas comes into contact with moist tissues such as the eyes, throat, and lungs, an acid is produced that can damage these tissues, and there is no antidote exists for chlorine exposure. Similar facts can be readily found for ammonia and ethylene oxide, which together with chlorine comprise about 95 percent of the TIH traffic transported by NS.

Second, the transportation risks fall only on the railroads, not the manufacturers of the TIH commodities. Accidents happen despite best efforts, sometimes accidents from human
error. Other times they can happen in bizarre ways, like when a tractor-trailer driver drove through a crossing gate and flashing signal lights and rammed into the side of one of NS's passing trains and resulted in the derailment of 24 rail cars.

Like Mr. Hemmer, I do not know what railroads can do to stop these kinds of incidences, and we've not even discussed terrorist risk. Whatever the cause, incidents involving TIH commodities create exponentially more risk to the survival of railroads solely because of the characteristics of these commodities.

Consider the NS accident in Graniteville, South Carolina. The accident resulted in nine deaths, which were all attributable to the release of chlorine and not to trauma. Had it been a coal car, a coal train, no deaths, a grain train, no deaths.

Had it been a train of automobiles or automobile parts, no deaths. Had it been a train
of paper or lumber, no deaths. In short, the
risks associated with these types of incidents
increase astronomically because of the
characteristics of TIH commodities.

Third, it appears that the
transportation risks can now be substantially
reduced or eliminated, and the Board should adopt
policies and encourage shippers and receivers to
use alternative, less hazardous commodities, to
use the nearest source of the TIH or both. We
know from news accounts and from reports that
there are alternative commodities.

Yesterday, the chemical associations
did not provide a complete picture of the market.
For example, in what form can chlorine be
shipped? At what concentrations can it be
shipped? What alternative products exist?

What alternative products are being
developed, and when will they be on the market?
Where have facilities ended the use of chlorine?
What manufacturing, water purifying, and drug
manufacturing process no longer require chlorine?
A few witnesses yesterday nibbled at the edges of these issues, but we are not anywhere near any real understanding. These are the interesting issues that the Board should understand, which is why a hearing on TIH commodities would be helpful.

Fourth, the world of rail security is rapidly changing, specifically because of TIH commodities, but all government agencies have asked railroads to take certain voluntary actions to increase security. In addition, agencies have proposed new rules or reexamining existing rules related to the transportation of TIH commodities. These regulations generally are proposed in the form of greater security after the terrorist attacks on September 11, 2001.

Recently, the Pipeline and Hazardous Materials Safety Administration, PHMSA, proposed new rules applicable to tank cars used to transport TIH materials. These proposed rules would apply regardless of whether the rail car would travel in, near, or through high-threat
Among the proposals are the following: to establish a maximum speed limit of 50 miles per hour for all rail tank cars carrying TIH; establish a maximum speed limit of 30 miles per hour in non-signal territory for all TIH tank cars, unless the tank car can meet other enhanced requirements.

Just last week, PHMSA issued interim final rules that also relate to rail transportation of hazardous materials and rail routing of these shipments. These rules require railroads to compile annual data on shipments of certain commodities, analyze safety and security risk along railroads where these commodities are transported, make routing decisions based on these assumptions, and conduct visual inspections of rail cars for tampering or improvised explosive devices.

All of these rules, when and if finalized, will dramatically and adversely affect rail operations. These effects will not just be
the direct costs to comply. They will also be costs to the railroad network generally.

Slower train speeds, reduction of network velocity, deterioration of asset utilization all mean less capacity on the same amount of infrastructure. Resources devoted to reestablish current levels of capacity are then unavailable to expand rail capacity.

As a direct result of NS transporting TIH commodities, shippers of all commodities, including coal, intermodal, automotive, steel, paper, lumber, military equipment and grain, will be hurt.

Fifth, there are two sides to the common carrier coin. The Interstate Commerce Act requires railroads to provide transportation or service upon reasonable request. Thus, the common carrier obligation is predicated on a reasonable request from the shipper.

Although this element of the common carrier obligation often receives little attention, Agency and court rulings have made
clear that not all requests for service are reasonable.

As the ICC noted, a common carrier is not in violation of its obligation if it declines to provide service within the scope of its operating authority, because such service is economically or operationally impracticable and the service -- and the circumstances at the time of the service request is made.

Like the ICC before it, this Board has the power to determine the criteria that makes a request for service reasonable. Although a railroad must provide transportation and service upon reasonable request, the railroad's obligations are not limitless.

A longstanding standard is that common carriers are only required to act reasonably. Indeed, a railroad's actions do not have to be perfect, nor must a railroad's actions treat customers equally. A railroad's obligation is to act reasonably, which is itself a fact-finding -- a fact-specific question.
Just as the present facts and circumstances are integral to determining whether or not the railroad has acted reasonably, whether a shipper's request is reasonable should be determined by the facts and circumstances surrounding that request. As I've mentioned, the facts have changed with the development and continued development of new substitute products and process and the security changes after September 11.

Obviously, the issues arising from the railroad's transportation of TIH commodities are far-ranging. They warrant specific actions by the Board. A good start would be for the Board to hold a hearing to address specifically the common carrier obligations and other regulatory issues specific to TIH commodities.

The Board should also examine what the maximum requirements will be in the future for a shipper's request for common carrier service for TIH transportation to be reasonable. The shipper's goal is to manufacture these toxic
products and hand them off to somebody else, usually a railroad, and be absolved of any responsibility for the dangers stemming from the release of their products.

The regulatory system currently does not make the shippers of TIH commodities even partially responsible for the innate dangers in the commodities they make. Forcing chemical companies to be responsible for the potential harm from the release of their products from the time they produce the products until the time the products are delivered to the end user will create an incentive for chemical companies to work with receivers of TIH commodities to use alternative, less hazardous commodities, to use the nearest source of the commodity, or both. Presently, there is no incentive for the shippers to do so.

Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Hixon. We'll now turn to Mr. Edward Hamberger of the Association of American Railroads.
MR. HAMBERGER: Thank you, Mr. Chairman. Good morning, Mr. Vice Chairman and Commissioner Buttrey. Thank you for the opportunity to appear before you today to discuss the railroad's common carrier obligation.

Many of the questions raised by the Board in this proceeding arise from actions taken or not taken by railroads as a result of the unprecedented demand for rail service on a capacity constrained rail network. I respectfully suggest that the Board needs to take into account the nature of this overarching constraint, as detailed by Mr. Gibson, and what the railroads are doing and can do to address it.

Indeed, an assessment of whether a railroad is complying with a reasonable request for service to meet its common carrier obligation must be made in the totality of circumstances in which that request is made. A railroad cannot and should not be required to provide a service that it cannot reasonably or practicably perform. This is especially relevant where the carrier
does not have the capacity to provide the service.

Thus, if the Board is asked to consider requiring a railroad to provide a specific service, serve a specific shipper, or provide a certain facility, the Board should evaluate the impact on the railroad's ability to serve other shippers, the impact on the railroad's ability to maintain its level of investment elsewhere on the system, and the impact on the ability of the railroad to sustain the efficiency and fluidity of its network operations to all shippers generally.

Even under the best of circumstances, running an efficient rail network is exceedingly complicated. Trains carry different commodities going to different destinations. Different customers often have to share the same train, and different trains have to share the same right-of-way or facility.

Railroads have to decide how the customers share that train, when each train is
going to run, and who is going to share the track and when. When capacity is constrained, it becomes much more complicated, because network efficiency has to be maintained. That has to be the overarching goal, to provide the best service to the most number of customers.

Railroads are heavily investing in their systems and taking numerous other steps to ensure the system fluidity and adequate capacity, but like other firms in every industry, we have limited resources and capabilities, so railroads must prioritize investments and asset utilization. That means they cannot be all things to all shippers at all times.

Railroads are working extremely hard to maintain and expand their capacity to provide service, including making record levels of investment. From 1980 through 2007, U.S. freight railroads invested approximately $420 billion on capital spending and maintenance expenses related to infrastructure and investment -- infrastructure and equipment, more than 40 cents
out of every revenue dollar.

In recent years, railroads have been spending more than ever before. Most recently, Class One railroads alone have been spending up to $20 billion for these purposes. It might surprise you to know that the four largest Class One railroads spend far more on capital outlay on maintenance of track and roadway than the vast majority of state highway agencies spend on their respective highway networks.

For example, only the highway agencies of Texas, Florida, and California spend more on roadway capital and maintenance than either Union Pacific or BNSF spend on their privately financed networks. CSX and NS are in the top ten compared with all states, as well.

I should add that railroads have the additional privilege of paying real estate taxes on their rights-of-way and often see that tax bill increase as they upgrade the right-of-way.

In addition to equipment and infrastructure, employees are an important
determinant of rail capacity, and railroads have been aggressively hiring and training crews to expand our capacity. The Board's data show that Class One railroads had 11,000 more employees in December of 2007 than they did in December of 2003.

We're also aggressively adopting innovative new technologies and engaging in cooperative alliances in collaboration with other railroads and our customers. My written testimony has much more detail on those efforts.

Finally, I will also like to briefly address the transportation of highly hazardous materials known as TIH, toxic by inhalation. Today, because of the railroads' common carrier obligation, railroads but no other transportation provider must transport these materials, whether they want to or not, but every time railroads do so, they and their shareholders face potentially ruinous liability, even though these commodities account for a tiny fraction of all rail shipments, about .3 percent.
It is fundamentally unfair to force railroads and their shareholders to bear this burden. Railroads are the only participants in the production, distribution, and consumption chain for TIH that are required to handle the commodities.

If a chemical company, for example, chooses not to produce anhydrous ammonia, a farmer cannot -- that needs that fertilizer cannot force the chemical company to product it. The system is not in the public interest.

The correct public policy, as Mr. Hixon pointed out, should encourage the entities who are making the decisions to produce, ship, and use TIH to find product alternatives to TIH whenever and wherever possible. For this reason, we urge the Board to institute a proceeding that will focus solely on TIH transportation, and I'd like to emphasize at this point, notwithstanding what some may have thought they heard yesterday, we are not asking to be let out of our common carrier obligation.
I was pleased to hear, and, in fact, when I closed my eyes I thought it was railroad personnel talking when some of the witnesses yesterday were talking about the fact that railroads are 16 times safer in moving hazardous materials, the fact that railroads do ease congestion, the fact that railroads do get 435 miles per gallon on one ton of freight.

So there is a public policy issue here. At the same time that we are the safest way to move it, do you put that mode of transportation in jeopardy of not being around because of a ruinous liability, a catastrophe, to actually move it?

So there are a number of issues. Mr. Mulvey, you mentioned one yesterday, URCS. Does it properly capture all of the costs? Does it properly allocate those costs? That's something we need -- it should be looked at. What is the proper public policy with respect to moving these materials through our cities? What is the proper public policy with respect to our employees?
And I think there are a number of issues that the Board would be well advised to take a look at and would be well within your rights to open a proceeding and, of course, one of the issues that was raised yesterday, what is your power in this area? And I think it merits a much more detailed discussion than we are able to do today just in the context of the common carrier obligation. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Hamberger and other panelists. I do have some questions. I'm sure my colleagues do, as well. I'll start, and then we'll rotate, alternate.

Mr. Hamberger, if I could just jump right in, yesterday I'm sure you -- I know you were here for most of the day. I'm sure you were following it in its entirety. There were some pretty strong statements coming out of the American Chemistry Council that -- and some of the witnesses from the chemistry industry that it is the position of the freight railroad industry, if I recall their statements correctly, that the
proper public policy should be complete indemnification, one hundred percent of railroads for railroad gross negligence in the handling of TIH and chemicals. Is that your position?

MR. HAMBERGER: Well, there are all sorts of exciting words in there, gross negligence and complete. We have proposed informally, and we've talked with the American Chemistry Council, and I'd like to add a word of praise, if I might, for the Fertilizer Institute, which has taken this issue very, very seriously and with whom I have met, and now the issue is being handled on a bilateral basis between the individual railroads and the Fertilizer Institute to address this issue, and I believe they testified yesterday that they recognize that there is a limit in the private market in the amount of insurance that is available.

We believe that a Price-Anderson type of approach is warranted here, and that would require, as in Price-Anderson, that the railroads carry the primary insurance liability, that there
would then be a fund to pay above that, and that eventually there would be a cap on liability. So, no, we're not asking to be exempted from being responsible, but we think it is a shared responsibility.

CHAIRMAN NOTTINGHAM: And that, of course, is critically important, because I don't think anyone wants to remove healthy incentives from the railroad industry or any other industry to continue to operate as safely as you can, and I'm not implying that if you somehow were relieved of your liability exposure you wouldn't worry about safety anymore, but it does -- you know, incentives are important, and what I heard yesterday was that the Chemistry Council is in search of a holistic dialogue.

I'm still not quite sure what that means. I have this image of you and they standing in a circle holding hands and singing some song, folk song, perhaps.

MR. HAMBERGER: We have not quite gotten to singing "Kumbayah" together, but we're
trying. In fact, we have had stop-and-start
discussions at the CEO level, CEOs of our members
and CEOs of their members, including my
counterpart at ACC and myself, and we're sort of
in a standstill at this point waiting for a
response, a proposal from the ACC.

CHAIRMAN NOTTINGHAM: Well, I hope
you're patient, because what I took away from
yesterday is sort of an attitude of it's not
their problem, and so why should they worry about
it?

MR. HAMBERGER: Well, you know, the
whole issue of a holistic approach, our view,
frankly, is that the issue of the safety and
security and the movement of TIH is one that can
be dealt with separately from the issue of
economic regulatory issues, and I think to tie up
the ability of our -- or confound the ability of
our industries to work together trying to address
this issue of TIH movement, to tie it up and
confound it in economic regulatory issues is not
the way to go.
We would prefer to deal with that separately. We're probably not going to reach agreement on the economic regulatory issues, but there's no reason that we shouldn't be able to sit down.

As I say, I again commend the Fertilizer Institute for coming forward with a proposal, and because of antitrust -- you may not know this, but we're covered by the antitrust law. Because of antitrust considerations, we've had to step out of it, but it's being handled on a bilateral basis, but, you know, there is, I hope, progress being made, at least the potential for progress, and on TFI's part, a recognition that we need to go forward and address this issue.

CHAIRMAN NOTTINGHAM: So just at the risk of being repetitive, the railroad industry position is not that you won't talk about a policy solution to your extreme risk exposure in this area unless all the parties to those discussions agree first that the railroads will
be completely protected from any liability exposure in cases of railroad gross negligence.

MR. HAMBERGER: I believe I'm correct, Mr. Hixon, in saying that we want to sit down and talk. We are not asking -- as I say, we believe the Price-Anderson approach is the way to go, which has the railroads responsible for the primary insurance.

CHAIRMAN NOTTINGHAM: So by, you know, if you follow that logic, you would be responsible for your primary insurance, which means, of course, you recognize the very real possibility you would have --

MR. HAMBERGER: And the retention would requirement, which is growing exponentially year by year, exactly.

CHAIRMAN NOTTINGHAM: Right, and why would you be paying for insurance coverage if your position was that you would never be responsible in the unfortunate event of a example of a case of gross negligence.

MR. HAMBERGER: Correct.
CHAIRMAN NOTTINGHAM: That's important, because yesterday we spent a lot of time on this, and the Chemistry Council basically said unfortunately they weren't able to make progress in this area because of the railroad industry position that you are seeking as a precondition to any discussions complete agreement that railroads would be completely protected from any liability in cases of gross negligence, and so I just --

MR. HAMBERGER: I think that's a misunderstanding on their part.

CHAIRMAN NOTTINGHAM: Okay.

MR. HIXON: If I could add that, as I said in my testimony, we are a hundred percent liable right now. We'd be happy to talk to anybody about reducing that liability. We're not looking to be -- it'd be nice if we were a hundred percent not liable, but I think there's a large area in between we'd be willing to talk about.

It is interesting. You talked
yesterday about the railroads being liable for accidents, and we have had cases in which we've done nothing wrong, and the jury has still found us negligent.

You talk about gross negligence. Just this week, the federal government through the EPA has filed suit against Norfolk Southern because of the chlorine release in Graniteville, South Carolina, and the government has asserted that the accident occurred because of gross negligence of Norfolk Southern.

So when you talk about gross negligence, there are lots of different ways to define it. It could ultimately end up being a jury decision, and as we found in our industry, juries can make all kinds of decisions whether or not there are facts to support it.

So I think when you get into the whole issue of gross negligence, it's a very complicated area, but as I said at the start, we're a hundred percent liable right now. We're willing to talk to anybody about reducing that
liability.

CHAIRMAN NOTTINGHAM: Mr. Hixon, if you could elaborate on how -- not everyone here is perhaps as intimately familiar with the idiosyncrasies of our American tort liability system as it plays out in some jurisdictions especially. How can a company be held responsible for perhaps hundreds of millions or billions of dollars liability if, in fact, you did nothing wrong? You can give a hypothetical if you don't want to give a real world example.

MR. HIXON: Under our system today, that if the question of liability, if it goes to the jury, the jury is the sole decider of fact as to whether or not you are liable, so if there is an accident, and it goes to the jury as to whether or not we were negligent, the jury can make that decision, and they don't have to base it on any facts.

As I've said, we've had cases where we've done nothing wrong, grade crossing cases where we've done nothing wrong. They've run into
the side of our train, and because we are perceived as having deep pockets, and the poor driver does not have deep pockets, they can find us liable even though we did nothing wrong.

CHAIRMAN NOTTINGHAM: And is it fair to say that the fact that that kind of situation can happen in our system of tort liability as it stands today and the reason that hasn't been changed or the rules in the tort liability haven't been changed is that there are some pretty powerful interest groups that benefit from that such as the trial lawyers and tort liability bar?

Yesterday the Chemical -- Chemistry Council spokesman said he didn't know what the trial lawyer bar -- how they had anything to do with this whole puzzle. I was amazed that an industry that faces enormous exposure and is a very popular target of that interest group of trial lawyers would profess to not see a link between why we haven't had -- made more progress in this country trying to bring some common sense
to our tort liability system.

MR. HIXON: Well, the tort lawyers on the plaintiff side, there's a great deal of money to be made from winning these cases, and I think they see their livelihood threatened if we try to reform our judicial system where we may get more reasonable awards from juries.

CHAIRMAN NOTTINGHAM: Mr. Hamberger, would -- in the absence of the common carrier obligation, if somehow it were to no longer apply to the railroads' handling of TIH, would you advise your members to continue to carry TIH under the current liability conditions, if you were --

MR. HAMBERGER: I'm sure my counsel will not allow me to answer that, because that would be an individual decision that each company would make on its own.

CHAIRMAN NOTTINGHAM: Mr. Gibson, would you recommend to your management that you continue to carry TIH if you were not required to, you know, under today's current liability
exposure?

MR. GIBSON: We do not solicit those commodities. At the moment, we perform our common carrier obligation.

CHAIRMAN NOTTINGHAM: Mr. Hixon, would you advise your management to continue to carry TIH at today's prices and at today's risk exposure if you weren't obligated to do so by the common carrier obligation?

MR. HIXON: I would not.

CHAIRMAN NOTTINGHAM: I've got some more questions, but let me hand it over to Vice Chairman Mulvey.

VICE CHAIRMAN MULVEY: Thank you, Chairman Nottingham. Mr. Nottingham pointed out the excessive awards that are often awarded by juries when there's deep pockets involved, but isn't it also true that those awards are very often reduced on appeal?

MR. HIXON: I'm not sure if I could say very often, but they are at times reduced on appeal.
VICE CHAIRMAN MULVEY: Well, I was thinking when the awards are not really based upon facts, when the jury departs from the facts in the case and it makes an award because of deep pockets. It's my understanding that those awards are, in fact, often reduced on appeal.

MR. HIXON: They may be reduced, but we still are paying for something we didn't do.

VICE CHAIRMAN MULVEY: How much liability insurance per occurrence does Norfolk Southern carry right now?

MR. HIXON: Currently, about $1 billion.

VICE CHAIRMAN MULVEY: About $1 billion per occurrence?

MR. HIXON: Right.

VICE CHAIRMAN MULVEY: Okay. And what's the annual -- do you know the annual cost of that insurance, approximately?

MR. HIXON: I don't have it on the top of my head. I can't tell you what --

VICE CHAIRMAN MULVEY: Okay. We heard
yesterday about the failure to quote a tariff rate for shipment of some commodities. They've asked for a tariff rate, and the railroads have refused to quote a tariff rate. Can any of you comment on that, because our understanding is that the railroads are always supposed to quote a tariff rate upon request.

MR. HIXON: Our marketing folks are instructed to quote a tariff rate when asked, and if you get any inquiry from a customer saying they have not received a tariff rate when they asked for it, call our law department, and they will get one immediately.

VICE CHAIRMAN MULVEY: Thank you.

MR. HAMBERGER: Mr. Mulvey, if I could say, we had a bit of a caucus last evening, and I was advised to be able to say on behalf of all of the members of the AAR that that is, in fact, the case. If there is a situation where a tariff rate is not being quoted, please, you know, follow Mr. Hixon's advice. Call the General Counsel's office, and the individual company will
take care of that.

VICE CHAIRMAN MULVEY: Well, thank you for clarifying that, because that was something that raised a lot of eyebrows and raised some concerns amongst the Board, and we're happy to hear that, in fact, that is the practice of all the railroads, so if we hear that again, we will simply refer them to your general -- to your counsel.

MR. HAMBERGER: No, to their general counsel.

VICE CHAIRMAN MULVEY: I'm sorry. One railroad executive has opined on several occasions -- I'm not going to mention who it is, but that, in fact, intermodal has pretty much peaked and that coal has limits in growth, and grain has limited growth opportunities, and the railroads' real future lies in merchandise traffic.

It's the railroads are most often accused of trying to demarket and not fulfill their common carrier obligation. Would you agree
with this executive that, in fact, it is merchandise traffic where the opportunities for railroad growth really lie today?

MR. HAMBERGER: I would defer to the real railroads here, maybe John and --

MR. HIXON: Well, I hope it wasn't one of my executives, because I would disagree with that. I think merchandise traffic will continue to grow, but I think what we've seen over the last three years -- this year and last year it slowed down a little, but I think intermodal is still going to be the growth engine for the industry, and I also think that right now export coal is growing very well, and I think with the problems of coal production around the world that export coal is going to continue to grow, but it's not to say that merchandise traffic isn't growing, but I don't think it -- I don't expect it to grow at the same rates that we will probably see intermodal grow once the economy comes back.

VICE CHAIRMAN MULVEY: Mr. Gibson?
MR. GIBSON: I agree entirely. The merchandise network is more complex in some ways than coal and intermodal, but it does not show in our system signs of dwindling or going away at all. It is growing at a slightly slower rate than some of the other commodities.

MR. HAMBERGER: If I could just put in a plug for export grain, as well, the only other constantly growing, at least this year, sector, export grain.

VICE CHAIRMAN MULVEY: Assuming, of course, we don't convert it all to ethanol, but agreed. By the way, I thought that was an excellent presentation of how complicated it is for railroad operations with a single line and what it meant when you had a double line, and it also, I think, made it evident how difficult it is to handle single-car merchandise traffic, as well, and how expensive and time-consuming it can be.

I have several other questions. Oh, I'll ask one more at this point, and that is it's
been suggested -- you mentioned Price-Anderson.

Others have talked about some sort of per-car
charge like $50 per car or something like that,
and use that to build a fund that can be used for
compensation in case of a serious accident such
as a chlorine spill in a large city and let that
build up to several billion dollars and have that
in reserve. Have you thought about something
like that, and have you considered making a
presentation on something like that?

MR. WARCHOT: Yes, we have looked and
considered different proposals that are based
upon Price-Anderson approaches that would provide
for some sort of premiums to be paid in by the
stakeholders involved, both pre- and post-
incident, similar to a Price-Anderson approach.
Obviously, any of this would be a legislative
approach.

It wouldn't be regulatory because of
the pricing and because of the structure
involved, but that is one option, but, again,
that's one of a number of different approaches
that we're looking at as possible ways of addressing the exposure problem.

VICE CHAIRMAN MULVEY: Would the stakeholders include the railroads, or would the stakeholders simply be the producers and the end users?

MR. WARCHOT: This is really still, if you will, a work in progress. I think, though, if you wanted to look at a Price-Anderson approach, one of the thoughts is that we would look at the difference between the nuclear reactor, the nuclear licensees, and the contractors in a Price-Anderson approach where the licensees, those that use, those that are involved in making and their business is working on the nuclear materials, to have more of a responsibility and liability for paying into these funds than the contractors would have, and we would think that the railroads would fall more in the category of the contractors, which would have a different type of liability.

VICE CHAIRMAN MULVEY: But with the
railroads carrying the primary insurance?

MR. WARCHOT: As the contractors do.

VICE CHAIRMAN MULVEY: How much is the primary insurance? Is that a billion dollars, a half a billion dollars? How much of the insurance is primary and then how much of it goes beyond the primary?

MR. HIXON: I think that would be determined as we negotiate the legislation, but speaking on behalf of Norfolk Southern, we're certainly prepared to pony up a lot of insurance, because as we've always said all along, it's the bet-the-company proposition with the movement of these goods that -- and we're insuring today, and we'd be willing to continue to buy a lot of insurance at the lower level as long as somebody can protect us from the bet-the-company proposition.

VICE CHAIRMAN MULVEY: You would agree, though, it's bet the company, not bet the industry? It's like the airlines, for example. When the airlines have a very serious accident
and it's their fault, very often the airline goes out of business, yet all the places that the airline serves still get served.

If Norfolk Southern was to have a serious accident and the company went bankrupt, the tracks would still be there, and one would presume that then somebody else would inherit the property and continue to operate it.

MR. HIXON: I would agree with that, although I am not sure of many shareholders who want to remain in the industry where you can get wiped out with one accident.

MR. HAMBERGER: And I would point out at a conference I did hear a representative from Aon Insurance indicate that there are now four insurers and reinsurers in the world willing to write an insurance policy on TIH. A catastrophe like we're talking about here could very well reduce that number to zero, and then the question is, you know, what happens at that point.

VICE CHAIRMAN MULVEY: I did a lot of work on the aviation insurance issue, and the
MR. HAMBERGER: Yes.

VICE CHAIRMAN MULVEY: I had more questions, but I'll sum up later.

CHAIRMAN NOTTINGHAM: Sure.

Commissioner Buttrey?

COMMISSIONER BUTTREY: Thank you, Mr. Chairman. One of the bad things about just being a commissioner instead of Vice Chairman or Chairman is that all the good questions get asked before it gets around to you, so I had some questions I'd like to ask, but they've already been asked and answered.

So I was trying to think of a question that I could ask you, Mr. Hamberger, while I was sitting here listening to all the questions that I would ask being asked, and we hear a lot of testimony in these hearings whether it's pertinent or not, and sometimes it's not.

We heard a lot yesterday about the attitude, and the word that's commonly used is arrogance of the people that deal with the
customers and the railroad industry, and I was
wondering if you could tell me if your
association has ever considered sending these
customer relations people to charm school,
because apparently, you know, people have this --
people have this attitude, and it's really --
it's really reached a boiling point, really, with
a lot of people about how they're treated by
their serving railroad, which is sort of
inconceivable to me, having come from a company
who is well noted around the world for customer
service.

It seems to me that there may be some
fertile ground here for trying to help these
people relate to their customers a little better
than they have been doing, because we hear this
everywhere we go, all the time, in hearings,
across the board about the way people are
treated, the way customers are treated.

Now I know that doesn't, you know,
resonate with a lot of people. "So what?" some
people would say, but it sort of permeates the
entire dialogue, really, and rhetoric around a lot of these issues is the way people are treated.

Now, obviously, railroads are going to do what's in their best economic interest to do it, but sometimes how you do it makes a lot of difference in the way people perceive how they're being treated, and I was just wondering if that argument or that knowledge resonates with your association and with the members of your association.

MR. HAMBERGER: Let me take a first crack at it. You are correct that it seems to be something that gets raised at every public conference and public hearing. The fact is a very recent Wall Street survey of, I believe, about four or five hundred railroad shippers has now came back and indicated the highest level of customer satisfaction in years.

I think that there is some disconnect, what I have discovered in ten years in this job, that there is a disconnect between
the real customers out in the real world beyond
the Beltway and those who represent those people
inside the Beltway at forums here in Washington,
D.C. We instituted ten years ago a customer
forum. We held five of them in 1998. We're now
down to doing one a year. It's going to be in
May.

I believe, Mr. Chairman, you're going
to be there as a keynote speaker in San Francisco
on May 19 through the National Association of
Railroad Shippers. We have all of our chief
marketing officers there to answer questions, to
give presentations on what each railroad is doing
to improve service, and then with breakout
sessions for one-on-one bilateral conversations.

This industry understands that it is
a service industry. It understands that we are
in competition with other providers of
transportation, that our customers have choices,
whether it be other providers of transportation
or product and geographic competition. There are
other alternatives that our customers have, and
we are committed to providing them the best service and the friendliest service possible.

So I do not dispute that there are occasions where frayed nerves perhaps occur or where things are not as smooth as one would always like, but I do dispute that this is an arrogant industry. I do dispute that we do not take customer service seriously. We do, and it is something that I know every one of our members is focused on, and I'll just turn it over to my members to amplify.

MR. GIBSON: Well, at CSX we do extensive surveys of our customers. We do it independently with JD Power, and we rank ourselves against ourselves. We rank ourselves against our other railroads and against trucking companies and other industries, and we don't get a perfect scorecard.

We do use those results to try and make improvements and to try and address the issues that come up, but in terms of customer focus, we certainly have as one of our core
principles for the entire organization is that
the customers is at the forefront of everything
we do, and we know our business is a service
industry, and we're dependent on customers, and
so we are not out hoping to antagonize anyone
that might want to ship on CSX.

COMMISSIONER BUTTREY: Mr. Hixon,
would you like to take a crack at that?

MR. HIXON: Well, coming from the
legal side, I'm sure we're doing everything --
no. No, similar to CSX, we do have our own
customer surveys that we do once a year. We
follow them closely.

The results are given to our Board,
so they know how we're doing. They see the
scorecard. Customer service is very important to
us, and I think the recent survey that Ed was
talking about I think provided Norfolk Southern
with some pretty good numbers.

Our goal is always to improve those
numbers. We would like to grow our business, and
the best way to do that is through customer
service.

COMMISSIONER BUTTREY: Well, I don't know whether it's an agenda item that appears on the agenda at the association meetings when you have those meetings or not, but I would just suggest that because of what we hear all the time about the -- I'll use the word again, the arrogance, if you will. That's the word we always hear, that it might be worthwhile to put that on the agenda for something to be discussed, because it's currently doing the industry and everybody involved in the industry concern, causing concern, and it's something I think that could be addressed, and it could be made better.

MR. HAMBERGER: I will certainly report back to the AAR Board. Thank you.

COMMISSIONER BUTTREY: That's my suggestion.

MR. HAMBERGER: Thank you. We will do that.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Buttrey. I certainly want to associate myself
with Mr. Buttrey's question there. I've certainly heard too often the same concerns. I know it's not a news flash to you. I've shared this in different settings in the past.

It's mindful -- it reminds me of an interesting moment in my life when I was asked to take over the reins as CEO of the Virginia Department of Transportation, and Governor Gilmore sat me down. I thought he was going to give me a big game plan about which projects needed to move forward first and what bills we were going to try to get through.

Instead, he said, "I just have one thing to ask of you." He said, "Show people every day when you manage VDOT -- try to show people that you care about them." He said, "That's the single biggest problem that VDOT has," and that was some years back.

It wasn't because all the people at VDOT were bad people. They were great. In fact, when we drilled down and talked to the front lines people out in the field offices and the
area headquarters, they had great relationships.

They were beloved by and large by their constituents, but somehow the organization, because it was big and had to make difficult decisions, and it typically got press attention when things went bad, never when they went smoothly, they had developed a real image problem, and so it takes work.

I would like to see this survey that's been referenced. We may be able to learn something. We have our own challenges at the STB. We're not perfect. We're trying to get better in the area of customer service ourselves. It's something we work on every day.

I think we've made good progress, but I do urge you -- in fact, I nominate Commissioner Buttrey if he's willing to be a guest lecturer at your charm school, if you do set up a charm school. I can't think of a better person to be involved with that.

COMMISSIONER BUTTREY: I'll leave that to Tom Peters.
CHAIRMAN NOTTINGHAM: Let me ask --
oh, and Mr. Hixon, you had mentioned -- Mr.
Mulvey asked you about insurance premiums. If we
could, if it's not drilling into something that's
overly sensitive or protected, if we could have
for the record some more information about your
company's insurance premiums. In fact, I would
say that to your association generally, Mr.
Hamberger.

MR. HAMBERGER: We do retention, as
well.

CHAIRMAN NOTTINGHAM: Trying to get a
sense of what it's costing you, because there was
some skepticism, I think, voiced yesterday by
some of the witnesses that is this really a big
problem for the railroads, or is this -- and so -
-

MR. HAMBERGER: I think, if I might
just interject, it's insurance. It's the
retention level, but it's also, as Mr. Hixon was
trying to point out in his testimony, there are a
lot of other impacts operationally, particularly
with the TSA and DHS folks involved, and so it's not just the dollars and cents of the insurance. It's also the risk and how you monetize what that risk is, and so -- but anyway --

MR. HIXON: We'll try to provide the information. I think one thing that I do want to point out, it comes back to the exposure we have moving TIH, and we can only get so much insurance. When I say we have about a billion in coverage, that's what the market will sell us these days. We can't go out and buy more.

We might be able to get another $100 million, but that's it, but if you're talking about something that is a $2 billion, a $5 billion accident, we're totally exposed. We can't buy insurance at any price. No one will sell it to us.

MR. HAMBERGER: I had in my prepared remarks and just realized I did not mention it, but you're going to hear from Henry Lampe on the next panel. Norfolk Southern can go get a billion dollars. Henry Lampe can't, and as a
short line, if it's a bet-the-company for NS, it's really a bet-the-company for a short line.

CHAIRMAN NOTTINGHAM: I'm mindful of the fundamental economic concept of there's no such thing as a free lunch. I don't know if that was -- if that's really part of economic study these days, Dr. Mulvey, but --

VICE CHAIRMAN MULVEY: Mr. Friedman made that line.

CHAIRMAN NOTTINGHAM: Well, I found it to be at least practical if not truly part of a Ph.D. program. It's certainly something that I've learned over the years.

In that vein, we've just been talking about insurance premiums, costs of those premiums, risk exposure, the cost attendant to that risk exposure. The railroad industry is pretty good, and has to be, at passing along costs.

How do you, without getting into specific companies' pricing strategies or anything that's not appropriate for the public
domain or for antitrust reasons to be shared, but
generally speaking, how do you -- do you just
absorb those costs? Do you embed them into your
rate structure?

Do you add a separate billing item
that says insurance cost? Do you try to allocate
those costs more towards people who are causing
the costs such as producers of TIH, or do you
find yourself spreading it around pro rata to
everybody, and are grain farmers and widget
makers and others paying for the costs of TIH
risk management?

MR. HIXON: When we price, we price to
the market, and so what we're trying to do is
figure out if you want our service, you know, we
try to get as close to what our competitor might
be doing so we can still get the business, and
that might be truck. It might be barge. It
might be something else.

We do not develop rates on a cost-
plus basis where we try to figure out, you know,
is there -- do we have all the right components?
So when we have these costs, they are always -- they're embedded in all of our costs as part of our ongoing cost of running the business, but when we are pricing for customers, what we're trying to do is we're trying to price to the market.

Now there have been years when we were pricing to the market, and we were losing money, and there were quite a few years when we were doing that on some of our products. Today, with the heavy demand on rail transportation, we've been able to do a better job of pricing, and we've covered all of -- we're able to cover our costs and make a little money on it, but we're always trying to price to the market, so it kind of depends on where the market goes. If the market develops a heavy demand for transportation, then we're able to price it a little bit higher than when there's weak demand.

CHAIRMAN NOTTINGHAM: Is it fair to say that those costs get borne by your customers one way or another?
MR. HIXON: Yes. It's our goal to always make sure that our costs are recovered from our customers one way or the other, or else our shareholders will decide somebody else can run the company.

CHAIRMAN NOTTINGHAM: Is it fair to say as those costs are borne by your customers they're not surgically targeted and only borne by the shippers who cause most of the costs such as TIH shippers? In other words, they're not necessarily paying for all of your risk exposure related to TIH.

MR. HIXON: Well, again, we're pricing to the market, so we're not -- when we're trying to figure out how to price a certain movement, we're not looking at -- we do look at what the costs of the movement are, but we're also looking at what the competition will allow us to do, what the market forces will allow us to do.

CHAIRMAN NOTTINGHAM: So, broadly speaking, all shippers are paying for part of this problem.
MR. HIXON: I think it could be viewed that way, yes.

CHAIRMAN NOTTINGHAM: One way or another.

MR. HAMBERGER: And, Mr. Chairman, as I was trying to point out in my comments, under the URCS system that is the way this agency would require it to be were a rate case to be brought, that all of the insurance costs, all of the operational costs of moving a train at 30 miles an hour instead of 45 would be borne and spread across all of the traffic rather than concentrated and allocated to the specific cause of that cost --

CHAIRMAN NOTTINGHAM: Now if --

MR. HAMBERGER: -- which would be something, if you were to take our proposed idea and open up a new proceeding would be something that, you know, would be, I think, fertile ground for discussion.

CHAIRMAN NOTTINGHAM: If this Board or Congress or both entities working together
somehow could figure out a solution, a cap, some
type of reasonable cap, some type of policies,
regulatory or statutory solution that would
largely address your somewhat unlimited liability
exposure, would shippers -- should shippers
expect to see rates come down if your -- if that
problem were addressed?

MR. HAMBERGER: I don't do rates.

MR. HIXON: Thanks, Ed. I think that
if -- that's a difficult question.
Theoretically, if our costs are going down, then,
yes, some people should see some reductions.
It's very fact-specific, and as I said, if we're
pricing to the market, it may be different.

I think another way to look at it is
I'm not sure if today we are recovering -- I know
we're not recovering what could be the exposure
that we're facing when we move TIH. Basically,
when I say we're betting the company, we're
betting the company that we don't have a large
accident somewhere where we have billions of
dollars in damages.
That's not based into our rates today, and so if you take away the exposure from those, the bet-the-company proposition, since we're not charging for it today, I'm not sure if necessarily you would see a big reduction, but, of course, if our exposure goes down, and if our costs are going down, then I think we would have to examine whether or not our rates should be adjusted accordingly.

CHAIRMAN NOTTINGHAM: Well, that's why there's no -- there wasn't a coincidence, a sequent to my questions. The earlier question I tried to get at is that this isn't a cost. This risk exposure presents costs, both direct insurance cost but also slightly less tangible costs about reserve fund or emergency reserves or contingency funds and then the unknown.

Much of those costs, if I understood your earlier answer, get passed on to shippers one way or another, perhaps not all of them. Perhaps the unknown, the worst case scenario, $100 billion treble damages disaster scenario,
you're not passing those costs on, but you're passing on significant costs related to your liability insurance premium costs and possibly a little more than that to cover whatever any business would need to do in the way of a contingency fund or reserve or self-insurance. Is that fair to say?

MR. HIXON: I think it's fair to say that we try to pass along the known costs. Now I think what we've talked about with some of the proposals that have come up from PHMSA, you're going to have a reduction in capacity because of the speed restrictions.

You're going to have other impacts on our networks, and whether or not we'll -- I tell you right now, I'm not sure how we would quantify what those costs are and how we would pass those along, but we are going to be subject to government regulations that are going to constrain our capacity, and I don't think it -- maybe somebody else has a better idea how to do that, but I'm not sure how you would pass those
costs along.

CHAIRMAN NOTTINGHAM: Well, let me just try to give you some free advice, for what it's worth. Sometimes free advice, you get what you pay for, right, free advice? But if you're serious about developing a coalition to address this problem in Congress, for example, you really need to be thinking hard about what you can offer shippers in the way of some type of period of years of an X percentage markdown from what the prices would normally be or something.

I'm not -- you know, it's not my job to set your pricing policies specifically, but for extreme circumstances, and I just -- but, I mean, you can understand why shippers would ask, "Why should we exert ourselves? We're not currently liable for, you know, train accidents. Why should we lift a finger if we're just going to see our rates going up just as they otherwise would, and railroads get all the benefit?"

Shippers, perhaps, might not ever see a benefit, so you've got to really think, put
yourselves in their shoes, think long and hard about how you can make this meaningful to them.

MR. HIXON: I think our history -- our industry has a long history when it comes to negotiating legislation. We try to make it a win-win if it's with rail labor, if it's with somebody else so that we're perfectly willing to step up to the plate and do what it takes to make a coalition work if we can get the legislation we need.

CHAIRMAN NOTTINGHAM: Before I forget, too, I thought the Olin Corporation yesterday later in the day described an interesting offer that's at least worth your consideration, if you wouldn't mind, to somebody, Mr. Hamberger, following up with Olin about just trying to collaborate with their railroad partners on what your insurance -- what the railroads' insurance requirements are, what those costs are, and he described a scenario where Olin might be willing to work out a deal with the railroads where they pay somewhat similar to what I heard described
here by some of the witnesses on this panel.

Railroads pay for the initial basic premium, and then they work out some arrangement with shippers on a contingency or fund that goes beyond the first tier coverage, and I thought that combined with the Fertilizer Institute's suggestion shows that there is a lot more, I think, opportunity and creativity and willingness to work towards compromise on this than we may have heard from the association, the Chemistry Council, yesterday.

We heard a lot of -- I heard Chemistry Association counsel saying one thing, at least one chemical industry witness who said he couldn't afford to be a member of the Chemistry Council saying something slightly different, but then the Fertilizer Institute, having a very different position much more in the spirit of coming up with real ideas to solve the problem, and then I believe a member of the Council, Olin, having a very different outlook than the Council had and much more towards having
a real proposal. So if you could --

MR. HAMBERGER: I made a note when I heard that, as well, and I'll follow up to the extent. If it then again drifts into an area where it's more appropriate for individual bilateral discussions, we'll have it go there, but I did want to also comment. I hope you're not going to make it a practice of telling trade association folks to let people in for free.

That was --

CHAIRMAN NOTTINGHAM: No, it was just a friendly suggestion, and let me reiterate the concern that Mr. Mulvey expressed and I believe Mr. Buttrey expressed either yesterday or today. This whole notion that we heard yesterday that railroads on occasion refused to quote tariff rates, whether it be in the tussle and tense environment of negotiating comprehensive contracts, whatever the context is, I'm glad to hear the statement today, Mr. Hamberger, that you had a -- that you huddled with some of your colleagues last night, and you want people,
shippers, to contact the General Counsels of the
railroads if this were to happen.

MR. HAMBERGER: That is correct.

CHAIRMAN NOTTINGHAM: But I want to
hear a little more than that, if I could. This
is not -- it's not the -- it shouldn't be the
shipper's obligation to track down the General
Counsel when this happens. It should be the
railroad's obligation to not let it happen.

In other words, train your people.
Make it your priority to make sure that whatever
the environment is, whether it's tense contract
negotiations, people are under stress, whatever
the excuse or the context, you don't have
employees say, "We're not quoting you a tariff
rate. Forget it."

I mean, it's not -- I haven't
personally observed this, but it's come from
enough witnesses that I have trouble thinking
it's completely a fabrication, so I just -- it's
good that your General Counsels from your firms
are available to take those kind of calls, but
that's a last resort. I mean, that's a given that they're there for that.

We're also available to reiterate our Rail Consumer Assistance Program. My office, any of the Commissioners' offices, I'm sure, would be happy to take that kind of a call. We hope we don't have to. We hope it doesn't happen, but we take that very seriously, because that cuts to the core of what we're here for.

Contract business is great. People choose to contract at arm's length. Wonderful. Contracts offer a lot of benefits on predictability and creativity and innovation in pricing and in incentives and disincentives, but the tariff and the ability to get a tariff quoted goes right to the core of railroading in our country, and I just want to make sure that you hear loud and clear from me how concerned I am about that.

MR. HAMBERGER: We have a Board meeting coming up very shortly, and I will carry that message, as well as the one from
Commissioner Buttrey.

CHAIRMAN NOTTINGHAM: That's fine. Coal service, we've heard about record or near record export of coal. Eastern coal in particular seems to be strong.

Ports, those ports that can handle the kind of volume of coal -- the Port of Virginia and others are exploding with traffic. We're going to hear later today from some very articulate spokespeople from the energy sector.

Are we -- should we be gearing up as a board? Should I be setting aside staff resources more than usual to be ready for a service meltdown later this year or next year because of the demand for coal overseas at higher prices that may force railroads to make some tough decisions about whether they can meet their domestic customers' needs or meet their international customers' needs?

MR. HIXON: Frankly, I think right now what we're running through the Port of Norfolk in our Lamberts Point facility is, I guess, a little
bit more than half of what we were doing at the peak, so we have plenty of capacity there, and we can handle the business.

I think we have the capacity in our rail lines to handle the business. I think we have the capacity to handle the business to our utilities. I think if there is a concern, that will come in the fall or later.

It's not going to be from the transportation of coal. It's going to be the sourcing of coal, because I think that right now we have customers that would like to have coal, export customers that would like to have coal, and it's not available, and so we can move it, and we have proven that we can move it, and at least at Norfolk Southern we don't anticipate any problem moving it either to a utility or for export. The problem is going to be finding the coal to move.

CHAIRMAN NOTTINGHAM: And I applaud the international growth and the international complexity of the rail industry. It truly is
international whether you start more locally and recognize that we have Canadian railroads operating throughout the United States. We have U.S. railroads operating in Mexico, Panama, and then we have railroads shipping product that goes all over the world, coal in particular, grain, and then, of course, receiving international.

That's all great, and I'm a big advocate for the internationalization of our supply lines and trade, but it's not a big, necessarily a big STB problem if our friends in China can't get enough coal from Norfolk Southern or CSX to ports. It is a big STB problem if our friends in Arkansas or Louisiana or any place in the United States can't get enough coal to keep the lights on and their economies running.

So I hope you'll -- I hope all of the railroads will keep -- we set up, of course, a new Rail Energy Transportation Advisory Committee for the very purpose of trying to get out ahead of these kind of trends, but if you can and will work obviously with the mines, as well, and the
source, I appreciate the answer, Mr. Hixon, but
if you could just keep in close communication
with us so we can telescope out and get out
ahead.

We haven't really had a big, big
service meltdown -- knock on wood -- in my short
tenure of less than two years here, but I'd love
to keep it that way for a few more years and
beyond.

MR. GIBSON: We see the same thing,
Chairman. The efficiency of export coal and
utility coal is pretty helpful in all of this.
You know, they are dedicated trains. Their
dedicated equipment crews do the same thing, so
the port capability right now is still quite
high, so, you know, we don't see that strain on
the network.

The temporary strains that we've seen
were fairly easily overcome by reallocating
locomotives into the service and by sending crews
to areas until we get the training cycle up, and
we've been fairly good over the last, you know,
recent years in having crews availability and
supply, you know, and equilibrium, and so we
don't see a resource issue at this time.

We don't see a line capacity issue at
this time, but I do share the concern that, you
know, we're seeing worldwide a number or
commodities being crowded out by foreign demand,
and so -- cement, you know, things that we would
never have thought you might have shortages in
the U.S. for.

You know, with the current prices and
the current markets, coal could slip into that
kind of area where the ability to produce as much
as needs to be consumed and the prices that the
spot market drives could be, you know, could be
an issue in terms of dislocations a little bit,
but we don't see that at this time.

CHAIRMAN NOTTINGHAM: Thank you. Vice
Chairman Mulvey?

VICE CHAIRMAN MULVEY: Thank you.
Clarify something for a moment. It's not really
a matter of the current costs of insurance to you
and passing that cost onto shipments that's at issue here.

Isn't it really more the risk of the catastrophic losses that could occur in the case of a hazmat spill as opposed to the cost of your premiums? Your rates, for example, are not cost-based anymore. They're market-based, correct?

MR. HIXON: That's correct.

VICE CHAIRMAN MULVEY: And so it's really this catastrophic risk more than anything else, more than the current cost of insurance.

MR. HIXON: That's correct.

VICE CHAIRMAN MULVEY: Okay. Thank you. Some have alleged that the proposals to go to a Price-Anderson or some other kind of capping approach really takes the burden off the railroads, and especially in written testimonial but not so much in the oral testimony yesterday, people pointed to the fact that Graniteville and the other major accidents were railroad caused, or the railroads had the responsibility, whether it was a railroad employee or some other failure
of the rail system, and had nothing to do with the manufacturer or the end user, and therefore railroads ought to bear the cost.

And related to that, to return to the FELA argument, the FELA bar argument, that FELA, which does make it more expensive than, say, a workers compensation system, they argue that that is an incentive to the railroads to be safe, to operate safely, and without the threat of a lawsuit, without the threat of these high costs, railroads would not operate safely. Would you want to comment on that?

MR. HIXON: I think that we have a very good safety record within our industry. It is our goal not to have any accidents. We don't want any employees hurt. We don't want any of our shippers' shipments damaged in any way. We'd like to have a perfect railroad where nobody gets hurt.

The Graniteville accident was the first time since Norfolk Southern was formed that we actually had an accident where the cost of the
accident exceeded our self insurance level, where
we actually went to our insurance company and
said, "All right, this time, after 25 years of
paying premiums, you have to send it the other
way."

Our goal is never to have an accident
and never have an accident, certainly, of that
magnitude. If you do a Price-Anderson
arrangement, and let's say that the railroad
industry covers the first $500 million in
liability, that is -- we've never had -- up until
Graniteville, we've never had anything that would
come anywhere close to that, and it's our goal
never to have anything close to that.

So with a Price-Anderson, we're not --
just because the catastrophic is covered, it
doesn't mean we're going to be safe. The TIH
shipments are less than one percent of our
shipments. We try to operate every train as
safely as we can, even if it's a coal train, even
if it's a grain train. We just don't want the
accident.
We don't want anybody to get hurt, and so just because we have the super liability exposure with TIH doesn't mean that because we don't have it on other shipments we don't care about that, and I think our record demonstrates that we are very concerned about the safety of our operations, and I think a Price-Anderson, we're still going to -- even with a Price-Anderson in effect, we would work just as hard as we do today not to have any accidents with any commodity.

VICE CHAIRMAN MULVEY: So you don't feel that the -- this as an incentive to operate safely and that removing the catastrophic risk, say, would in any way, shape, or form reduce your incentive to be a safe railroad?

MR. HIXON: No, not whatsoever.

VICE CHAIRMAN MULVEY: On the AAR presentation, which I found very interesting and some interesting new numbers in there, I saw you comparing the expenditures of Union Pacific and other large railroads compared to some of the
states. Is the spending on the state roads, is that just state monies, or does that also include the monies that come from the federal government Highway Trust Fund on those roads, or is it only the state spending? I went back to Table 12 --

MR. HAMBERGER: I believe it is only the state spending, but let me verify that.

VICE CHAIRMAN MULVEY: I went back to Table 12 of the FHWA numbers, and I couldn't make it out from that, either. It's a little bit difficult.

CHAIRMAN NOTTINGHAM: I'd be happy to answer that, but I don't think we have time today, but basically it's different in every state. Some states like Virginia do a state at almost no local involvement of road maintenance except for Arlington and Henrico County. Other states have enormous local, so if you look at a state budget in some states, you don't see much, because the counties and cities -- so it's a lot of diversity.

MR. HAMBERGER: I've done some
research. Our figure includes the federal dollars.

VICE CHAIRMAN MULVEY: It does include the federal dollars. That's what I was asking.

MR. HAMBERGER: Yes.

VICE CHAIRMAN MULVEY: That makes it even more impressive then. Thank you.

One of the numbers in the AAR presentation, though, it does talk about the fact that the traffic per track mile, traffic per route mile has gone up substantially, and part of that is a traffic increase, but also part of it is the downsizing of the railroads since Staggers, and, for that matter, even before Staggers.

To what extent is some of the increased spending that's going on in terms of investing in the capacity, investing in infrastructure replacing some of the downsizing that took place in the eighties and nineties, and now we're sort of putting back the rights-of-way and the systems that were there beforehand.
MR. HAMBERGER: I don't have any specific numbers on that, and jump in if you do, gentlemen, but I assume that there is some of that, but I also believe that a lot of it is because of the growth in traffic and also different traffic patterns, and the one that always leaps out at me is the ethanol, where Kendell Keith, who testified yesterday, advise me a little while ago that Iowa will become a net importer of corn, which is a major change in a traffic pattern when that has not been the case up to date. So it is -- I'm sure there is some impact of that, Mr. Vice Chairman, but I think the majority of it would be from the growth in traffic and changes in traffic patterns.

VICE CHAIRMAN MULVEY: One of the things that's concerned me, and I think this goes back to your example of switching the car and the complexity of all of that, is this change in the traffic flows associated with things like ethanol. Once you begin moving, instead of trains all going to ports, and all of a sudden
you begin moving things across states in counter-
fashion to what it was set up for, that then
really can chew up a lot of capacity, and I was
wondering if the railroads have been looking at
what those impacts might be.

MR. GIBSON: Yes, we look at it
annually, and we try and project out three years
or five years, and then we also have a very long-
term plan, as well. The kinds of -- I'd caution
a little bit about the comparisons of pre-
Staggers, for instance, and now.

There has been a lot of change in
technology since that time, and the through-put
of a given line segment is not a requirement to
have double track all the way through in order to
add traffic. For instance, signal systems and
the placing of sidings and crossovers, the speed
of those crossovers, all of those things allow
you to get substantial increases in capacity
without full double-tracking or replacement in
kind of facilities that used to be there.

The impact that we are trying to
address is what our current state is and what we anticipate our future state to be, and the future state will shift among things as export coal, you know, looks like it's something that's going to stay here for a number of years, as the ethanol looks like it may or may not, and so, you know, the old adage of you don't build the church for Easter Sunday, you know, but, you know, on Easter Sunday you build a tent, you know, and the difficulty and the fun in some ways of this work is that you have to be able to distinguish between what's good tactical decision-making and investments to address short-term and temporary trends and what's an investment that is going to last for the life of that investment, which is going to be 20 to 50 years in a lot of cases.

VICE CHAIRMAN MULVEY: There are some who will go unnamed here that have suggested that CSX is overinvesting in capital, new capital, expansion capital. Would you want to -- care to comment on that?

MR. GIBSON: Well, I've worked in this
industry for 25 years, and the ability to spend
for growth is, in my experience, more than a
breath of fresh air. I mean, it is an exciting
opportunity, and it has to be done carefully.

I can tell you that culturally, you
know, the industry, I believe, you know, wasn't
built a few years ago to think about expansion,
and we've made that conversion. It is not the
kind of thing that you can turn on and off like a
spigot.

The approach has to be gradual, and
it has to be sustained, and we are always short
of the number of investments that people would
like to fund when we go through our budget
process, just like any other company, and so we
make the best decisions based on the best
information that we have, and, you know, our
ability to fund is based on our ability to grow,
and if the infrastructure is going to stay
strong, and if it's going to be reliable for all
of our customers including passengers and
everybody else that uses the right-of-way that we
build and maintain, the level of investment has
to stay at a reasonable level for that
infrastructure to be strong and to prepare for
the growth of the future.

VICE CHAIRMAN MULVEY: Thank you. The
AAR circular, TB1, with regard to embargoes, we
heard a lot about embargoes yesterday and
embargoes being misused and becoming basically
proxies for abandonment. Are you concerned
about, Mr. Hamberger, how some of the carriers
are using the embargo process and whether or not
that's consistent with the AAR circular on
embargoes?

MR. HAMBERGER: I would associate
myself with Mr. Hemmer's response to that. I
believe that he articulated very well that the
embargo is used on a temporary basis and that it
is taken off as soon as the cause is addressed.

VICE CHAIRMAN MULVEY: Is there any
timeframe on how long an embargo should be able
to go on? I mean, is there some point when the
embargo becomes, in effect, a de facto
abandonment?

MR. HAMBERGER: Well, I believe you addressed that issue recently in a case before you that is still before you, and I think it is a very fact-specific case, you know, specific situation, and so I don't think you can say 30 days, 90 days, whatever a specific time frame, but it just has to be taken into account the totality of the circumstances.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN NOTTINGHAM: Mr. Buttrey, any other questions? Thank you. This panel is dismissed. We appreciate your being here.

MR. HAMBERGER: Mr. Chairman, may I just say one thing? It strikes me as I sit here that all too often it sounds like we're at war with our customers, and we are not at war with the people who make TIH. They're our valued customers. Chemicals are our third largest customer segment. We appreciate their business.

We appreciate that every day we work
with them to try to improve service. We work
with them on a number of safety -- TransCare and
other, ChemTrack, other safety and training
issues, and I just would like to say that
notwithstanding the fact that there are policy
disagreements, we very much appreciate their
business and continue -- look forward to
continuing to work with them. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr.
Hamberger. I was wondering. I'm glad you said
that, because I noticed you brought your own
drinking cup to the stand, and I thought maybe
Mr. Warchot was your taster, but be safe out
there. Watch your back. We'll bring forward the
next panel from the Short Line and Regional
Railroads now.

If I could ask the next panel to take
seats and audience members take seats, we'll
begin just in a moment, as soon as we have a
quorum and everyone's here. Welcome, Panel II.
We look forward to your testimony today.

We have quite a distinguished and
fairly large panel, so we will need to stick to
the time limits you've been allocated. Our first
speaker on this panel will be Mr. Richard F.
Timmons, joined by Mr. Keith T. Borman from the
American Short Line and Regional Railroad
Association. Welcome.

MR. TIMMONS: Well, good morning, Mr.
Chairman and Commissioners, and thank you for the
opportunity to testify today on the important
subject of common carrier obligations as they
effect short line railroads. This hearing is a
timely forum to discuss and consider the more
difficult aspects of this longstanding principle
in our industry, especially in today's fast
changing transportation environment.

I am proud of the consistent and safe
performance of short line and regional railroads
and of their contributions to freight movement
across the country. They are the first mile and
last mile of our system and tie the network
together for both shipper and user.

From a modest beginning in 1980, when
the Staggers Act was partially deregulated, the rail industry to the present has grown significantly. Today's short line and regional railroads total 556 roads. They operate over 51,000 miles of right-of-way. They employ 22,000 railroaders.

They continue to expand a dynamic feeder-distributor network across all of the continental U.S. In fact, one out of every four carloads moved in the U.S. originate or terminate on short lines.

Last year, they moved just under 14 million carloads of merchandise. Those carloads were delivered to about 13,000 facilities nationwide that employ 1.5 million employees, and they continue to provide customers with rates that are 20 to 50 percent less than comparable truck transportation, and given gas prices, that may get better still.

Most importantly, they are not capacity constrained and, as such, seek as much business as they can attract. They are the
connection for thousands of businesses and communities to the national rail network that would otherwise rely on trucks or just not be in business.

Every day, they meet common carrier obligations that cover 20,000 product codes and move 3,500 different products. They are ready, able, and willing to do so and do it very efficiently and economically.

Having said that, let me point out a very troublesome dimension of the common carrier obligation related to TIH products. As with the Class Is, the common carrier obligation requires railroads to accept even the most toxic materials for transportation over their systems.

The often less robust operating networks inherited from the former Class I owners present special risks and challenges to small railroads, challenges that have been steadily mitigated over the years, however. That notwithstanding, the inability of small railroads to pass along anything near the actual cost of
insuring these TIH shipments makes each one a potential threat to the continued existence of the railroad itself.

The result is that most if not all TIH movements over small railroads have not been adequately insured, leaving the small railroad and, more importantly, the public vulnerable should a catastrophic incident occur.

Actually, should an accident produce a TIH spill, the small railroad most probably will go out of business very quickly, as it lacks insurance to cope with the cleanup and litigation costs that will follow immediately. So if the small carrier is bankrupt by claims arising from a TIH incident on its line, the victims will have no source from which to recover damages.

Now, from my perspective, from a public policy viewpoint, this should be an unacceptable end state. It is an example where the public interest conflicts with the common carrier obligation. The Short Line Association has joined the AAR in proposing a Price-Anderson
type legislation modeled after the law created to
deal with similar liability concerns in the
nuclear waste disposal concerns of the 1950s.

Today, approximately 150 short lines
transport TIH products annually and have an
unequaled record of safe movement. However, they
are still unable to acquire adequate insurance to
protect themselves. In my view, this is a shared
burden of responsibility among shippers,
carriers, equipment manufacturers, and the
federal government. Our proposed legislation
does just that.

Now I would say our collective
indifference toward a solution will make this
public policy conflict increasingly more
difficult over time and truly demands attention
today. The Short Line Association, as well as
its members, are ready to consider and work
towards some solution that considers and benefits
all stakeholders connected to TIH movement.

Mr. Chairman and Commissioners, I
think you for your attention this morning, and
I'll be available for any questions you may have at the appropriate time. Thank you very much.

CHAIRMAN NOTTINGHAM: Thank you, General Timmons. Mr. Lundberg.

MR. LUNDBERG: Thank you, Mr. Chairman, Mr. Vice Chairman, Commissioner. Thank you for the opportunity for RailAmerica to appear before you and address the subject matter of common carrier obligation.

I would like to point out that in addition to operating in the State of Oregon we operate in 26 other states, as well. We have 43 small railroads, some very small, some at the same size of our railroad in Oregon, and we have 2,000 employees. In the last five years, RailAmerica has invested over $300 million in capital on our U.S. railroads.

I would like to make just a few comments before I get into my comments about the common carrier obligation in general concerning some of the comments made yesterday by the testimony of the first two panels involving some
factual testimony. As was discussed, we have a pending matter before the Board on the reasonableness of an embargo, and I do not want to make any comments about that, because it is pending litigation, but there are a couple of factual items that I would like to correct.

First of all, on our railroad in Oregon, the Central Oregon & Pacific Railroad, our employees on that railroad are dedicated railroaders, and they are dedicated to serving the shippers on that railroad. They are dedicated to operating a safe railroad, and, in fact, we were very proud that in 2006 they won the Silver Harriman Award for safety for railroads of their size.

As was mentioned yesterday about the embargo on the CORP, the embargo was done solely because of safety reasons. On the CORP, in fact, of the --

CHAIRMAN NOTTINGHAM: Mr. Lundberg, I'm sorry to interrupt, but I think this would be helpful for you to know this. My counsel advises
that because we are here in a scheduled public
hearing, on the record with all of the parties
having an opportunity to be here or to follow on
the worldwide web on the webcast, you shouldn't
feel for any -- for ex parte reasons that would
normally restrict our ability to talk about a
pending matter, those concerns don't exist while
we're here together at a public hearing.

It doesn't mean -- you can choose
what you want to say, of course, what you don't
want to say, but I don't want you to feel
constrained, because I can tell you the Board
members -- I'm trying to be fair to you. The
Board members will not be --

MR. LUNDBERG: I understand.

CHAIRMAN NOTTINGHAM: -- constrained
in our questioning of you, and I just want you to
have the same information that we have about the
ex parte rules and how it relates when we're at a
hearing.

MR. LUNDBERG: Okay. Yes, and we'll
be absolutely forthcoming on your questions.
Thank you.

Of the $300 million RailAmerica spent on its U.S. railroads, $44 million of that was spent on capital infrastructure improvements on the CORP. On the Coos Bay Line, for the last three or four years we have spent almost 40 percent of the gross revenues from that line on the capital expenditures of that line, and so I just wanted to correct what might have been a misconception about not investing -- RailAmerica not investing in the Coos Bay Line, the CORP, or any of its railroads. We are committed to that, and we are committed to that because that is part of our common carrier obligation.

In the short line industry, there are basically two business models. One is the interline settlement carrier, which is very much like a Class I carrier where the short line has the ability to set its own rates and impose its own fuel surcharge and so forth.

The other model is the handling line carrier, and that is a business arrangement where
a short line leased or bought from a Class I a railroad, but the Class I retained all of the commercial control of that railroad, and this is the case on the CORP as well as many of our western railroads.

In those cases, the railroad does not have the right to set its own rates, does not a right to impose its own fuel charge, and the main customer interface with the -- is with the Class I. We agreed in the leases or the purchase to a schedule of handling line fees, and those handling line fees are -- have an inflation factor, usually 50 percent of RCAF capped at three percent per year.

As you can imagine, 50 percent of RCAF capped at three percent a year may have been a good escalator 15 years ago when these short lines were set up, but given the inflation factors that have beset all of the Class Is, as well as all the short lines and particularly regarding the spectacular rise in the price of fuel, those inflation factors do not adjust the
rates of a handling line carrier sufficiently to
recover their operating costs, their cost of
capital investment, and a reasonable return.

Now the solution to that, of course, is -- and one that we are pursuing is to approach
our Class I partners for renegotiation of those
terms and conditions, and that is what we're
doing now, but that is what we have on the CORP
and many other western railroads.

And so when we are confronted with a
situation where we have extraordinary capital
expenditures, and we look at the revenues that we
are receiving from our Class I partner, that is
sometimes not enough to cover the capital
necessities of that particular railroad.

On the Coos Bay Line itself, up until
2004 it was actually doing okay. The revenues
covered the expenses of that line and oftentimes
covered the capital expenditures, although not always, but in 2004, one of our major customers,
a major sawmill, closed its doors, and the line,
which handled up to at that point about 7,500
carloads a year, dropped to 5,000 carloads, and for a short line that is a huge body blow, but we continued to operate the line at the 5,000 carload level until, of course, we had the situation with the tunnels and embargoed service on the line.

There was a lot of discussion yesterday about the efforts that CORP has made to reopen the line, and you heard about the public-private partnership that we proposed to the four other stakeholders in the line. That public-private partnership sought a way to preserve the Coos Bay Line, because without something as extraordinary as a public-private partnership or some other method, the preservation of that line is in serious doubt.

The four stakeholders besides CORP we identified were Union Pacific, the ODOT, the shippers, and the Port of Coos Bay. Each of those stakeholders has a significant interest in the Coos Bay Line and the shippers on that line.

ODOT, as you heard yesterday
eloquently stated by the congressional delegation that was here, ODOT has an interest because the economic development of the southwest coast of Oregon is very much important to them, and they see great future in that, and so the preservation of rail service is certainly in their interest.

For the shippers on the line, it's certainly their interest, because we are significantly — we offer rates significantly lower than truck rates, and even if we were to have the ability to raise our rates to cover the particular costs on that line, we would still be significantly lower than truck rates.

The Port of Coos Bay has an interest, because they believe or have believed that there is a potential for that port to develop into something, an extraordinary international container port.

I will say that despite the discussions about Maersk coming and so forth, we have never been invited by the port or by Union Pacific to be a part of those discussions, so we
really don't know much about what the potential
is down there, but that leads to the second
proposal that we made to Oregon, which was the
form of a joint venture.

We proposed to the governor two weeks
ago that we would jointly own the Coos Bay Line
with the State. We would contribute the line
itself and all of the revenues from the line, and
the state would contribute money for the capital
repairs, and that gives them an ownership
interest in the line so if, in the event that the
Port of Coos Bay became something more than it is
today, the State of Oregon would have a equity
share in that, and that was a -- that offer was
made in direct response to Governor Kulongoski's
suggestion to us that if we expected the state to
invest in the line, he wanted an equity interest.

So one other point about the public-
private partnership or the joint venture, again,
the funds what were mentioned in both of those
proposals were funds that were to cover the
operating costs, cover the capital expenditures
necessary to preserve and stabilize that line for a period of five years. None of those funds were destined for the profits of RailAmerica, and when we gave out the term sheet to the customers, and we were --

And we thank you, Mr. Chairman, for hosting -- for having us meet with them here in January when we first made that presentation to them in conjunction with your staff members. Those proposals had the pro formas, as well as all of the expenditure detail in them.

One final thing to say in response to the common carrier obligation that we feel and that our owners feel, as I mentioned, we have spent -- RailAmerica spent over $300 million in capital over the last five years.

Our capital expenditures for 2008 are in the neighborhood of $60 million, the same amount, same pace of capital expenditures as prior to the Fortress acquisition, so their dedication and our dedication to investing in the line has not changed because of the change of
ownership, and I thank you very much and look forward to your questions.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Lundberg. We'll now hear from Mr. Henry Lampe.

MR. LAMPE: Good morning, Gentlemen.

I am President of Chicago South Shore & South Bend Railway, and I'd like to say that our company sincerely welcomes this discussion. I believe we are the -- thank you.

CHAIRMAN NOTTINGHAM: You're welcome.

MR. LAMPE: I believe we are a poster child of sorts for TIH issues for both the large and small railroads. The South Shore is a Class III railroad that operates over a hundred miles of rail lines in Northern Illinois and Indiana. We have a very diverse traffic mix. We serve -- among others, we serve a number of steel mills, public utilities, and chemical processors.

Our mainline operations from Chicago to South Bend are conducted over rail line owned and operated by Northern Indiana Commuter Transit District, otherwise known as NICTD, which runs 41
commuter trains a day alongside our freight trains. We also share the right-of-way at highway grade crossings with hundreds of high-speed, shallow-pocketed, largely unregulated, incented to speed raw steel hauling trucks.

You may recall two recent area incidents involving steel haulers, one in our line where trucks collided with passenger trains. These accidents both caused great carnage and deaths. We frequently experience close calls at these many crossings.

We also operate over a north-south branch line that extends from Michigan City, Indiana, south to Stillwell, to the Stillwell, Indiana areas. There is no commuter service on the Stillwell Branch.

In 2007, we handled approximately 51,000 revenue carloads. Managing the risks associated with TIH is the single greatest challenge facing our company. We handle approximately 200 rail carloads per year of chlorine and anhydrous ammonia. This traffic is
insignificant in terms of the revenue it generates to us.

Our insurance, special handling, legal, and cap ex costs in the last 12 months have been more than doubled the revenue generated from this traffic. As you can see, we take this, our common carrier obligation, very seriously, yet we put the continued existence of the railroad on the line every time we handle a car of TIH.

South Shore's risk profile insofar as TIH is concerned is a daunting one. Most of the TIH we handle is inbound traffic that we receive in interchange from Class I carriers in Chicago, one of the most densely populated areas in the city. It is considered by TSA a high-threat urban area.

The TIH traffic moves over the line we share with NICTD, where commuter trains run at speeds as high as 79 miles per hour. Most of the TIH cars are then moved to a chlorine customer on the Stillwell Branch, which is mostly unsigned...
and has track that is maintained through FRA Class II condition.

All of our chlorine and anhydrous traffic moves over a line that goes down the middle of a main street in downtown Michigan City, Indiana, for 1.5 miles. That's part of our inter-urban heritage, and that's the kind of railroad that we operate in. We have numerous vehicles running into our trains, as you might expect in that kind of environment where you have two-way traffic on each side of our railroad.

Our remaining TIH traffic, which consists of anhydrous ammonia, is handled to a customer located on the eastern end of the line, which we share with NICTD, approximately 90 miles from Chicago towards South Bend. As a result, we face two basic scenarios with respect to TIH, and neither is good.

Some of our operations are on high-speed Class IV track, but there we have to contend with the presence of commuter trains.

The rest of our TIH operations, which are more
typical for a Class III railroad, take place in a
low-density line where, except at railroad
crossings at grade, there is no signal system.
In either situation, much of the traffic is
received by our railroad in one of the largest
population centers in the country.

After 9/11 and the chlorine accident
in Graniteville in 2005, South Shore began
investigating ways to manage our TIH risk. In
light of the fact that all of our TIH customers
are currently located between the middle and
eastern end of our line, we looked into the
possibility of moving the interchange of that
traffic from Chicago to less densely populated
places on our system.

So far we have successfully
negotiated with one of our Class I connections to
interchange about 30 percent of TIH traffic in
the Stillwell, Indiana area, which is a rural
area close to the largest customer. Remember
that that 30 percent assumes the customer does
not change sources our routings for his
legitimate self-interests.

This particular traffic comes from eastern Canada. Like I say, it represents about 30 percent of it, but our customer, and rightfully so, does not want to restrict himself to one source of chlorine, so he could buy it from western Canada, as far away as Vancouver, British Columbia, dependent on the price of the commodity and the transportation cost.

Given the change in the interchange for that piece of the business, it will be more difficult to change our interchange locations for the remainder of the TIH traffic with the other Class Is and with this carrier. None of these carriers connects with other railroads at any place other than Chicago.

At least for the time being, we will continue to handle at 70 percent of our chlorine and anhydrous ammonia traffic in Chicago over the main line we share with NICTD. Moreover, if and when we get a TIH customer located in our Chicago -- in or near Chicago, this type of rerouting
won't be possible.

In conjunction with the change of the interchange location for some of the TIH at Stillwell, we have invested approximately a quarter of a million dollars to build the track there. We also are continuing our expenditures, which are significant, on track and ties on that branch line.

However, that line is low density. It generates modest amounts of revenue for the company. We could not recover investments and improvements such as centralized traffic control or higher FRA class track conditions, which would reduce the risk of the TIH handling.

The current condition of the track is adequate and safe for South Shore's movements of all commodities other than TIH. Given this fact and the low volume of TIH traffic we handle, there are no practical limitations on the capital expenditures we can make to manage the risk.

South Shore has also looked hard at insurance options as a way to managing the risk.
As the Graniteville incident made clear, a release of chlorine in a rural area has the potential to generate hundreds of millions of dollars of liability.

If that type of accident were to occur in Chicago, Gary, South Bend, downtown Michigan City, there is a real potential for losses in many billions of dollars. A recent Insurance Institute analysis indicated an incident in our territory would create claims exceeding $5 billion.

We have worked with our insurance brokers to raise the limit of our primary policy to a level that vastly exceeds the coverage held by most small railroads. Although our coverage is still less than $100 million per incident, it is more than sufficient for non-TIH risks.

When we shopped for excess coverage that would insure losses over and above our primary policy, our insurance brokers have advised that excess coverage might be available with limits up to a maximum of $1 billion.
However, the annual cost of that coverage would be approximately in the $3 to $4 million range, which is well beyond the amount that South Shore or any Class III railroad could spend on insurance.

Also, $1 billion of coverage obviously does not cover a projected $5 or $6 billion loss in an urban area. This is especially true in light of the fact that a typical Class III carrier has annual freight revenue under $5 million.

As I indicated in my written testimony, there is some chance that we could obtain an excess policy that would bring our coverage up to $200 million, but even that is inadequate in the face of TIH risk and would not be available to many small railroads.

Long story short, as a Class III that operates in Chicago and several other population centers, we can't afford to manage our TIH risk to a reasonable level without reroutings, capital expenditures, and/or purchasing more insurance.
Our insurance, special handling, legal, and cap ex costs in the last 12 months have been double the revenue generated by this traffic.

As you can see, we take our current common carrier obligation seriously. We -- where am I here? Moreover, we can't charge enough of a risk premium on 200 cars of TIH per year to generate the resources necessary to effectively manage the risks associated with a TIH release.

We would be charging somewhere in the neighborhood of $20,000 per car to handle a hundred miles to cover our insurance costs. This is particularly the case given the Board's ruling in the simplified rate case that movement-specific adjustments for handling hazardous materials will not be considered.

If we did all we could possibly do in terms of rerouting traffic, investing in infrastructure, and obtaining additional insurance and had TIH release similar to the one in Graniteville, South Shore still would be forced into bankruptcy.
The bankruptcy of South Shore would not only financially -- not only be financially ruinous for its owners, employees and customers, but it would also leave hundreds, if not thousands, of injured people with unpaid claims. In deference to time, I will conclude, and I would be glad to answer your questions. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Lampe, and, as always, the witnesses' entire statements will be made part of the record, and they have been looked at carefully before the hearing by the Board members and staff, too.

Mr. Eric Strohmeyer, welcome. The panel is yours for the next ten minutes.

MR. STROHMeyer: On behalf of CNJ Rail Corporation, we'd like to thank the Board for holding this hearing on the common carrier obligation of the railroads. We're sort of the newest of the new and the smallest of the small here. I think I'm also the youngest of the young, so bear with me.
In our acquisition of our pending acquisition of our rail line in Mississippi, we've been faced with a situation that was brought to our attention in that acquisition where a shipper, a single individual shipper, had requested service of a rail carrier. We spoke about it in our testimony, our written testimony, and it was what prompted us to want to come down here today to the Board to actually speak about it.

One of the concerns that concerned CNJ when we heard about Hancore -- and I sat with the mayor of Vicksburg, Mississippi, and the aldermen and the other folks, City Council, and we actually talked about this. They had gone through extraordinary lengths to secure rail service for the southern portion of their city.

Nearly a million dollars was committed. Over a million dollars was committed to actually building a rail spur. They secured right-of-ways. They secured Mississippi state grant money.
It wasn't where it was pending money.

It was actually secured and awarded, and they sought the service, and after going through this, hiring the engineers, bringing forth the entire process, presenting it to the rail carrier, they're told, "Sorry, we can't do that unless you happen to restore the track," which had been previously removed, "and then bring the rest of the line up to reasonable standards," and I was kind of shocked when I heard that.

I said, "Well, did you protest over it?" and they said, "No." They said, "The railroads told us there wasn't anything we could do." I said, "Did you know the line was lawfully abandoned?"

They said, "Well." They said, "The rails had been ripped up," and the question that came to our mind was, "It was never abandoned. You were never discharged of your responsibility. Why did this occur?"

And when I stopped to think about how much resource and time and energy and effort was
put into this particular project, and then all of
the sudden to see it fall by the wayside, we felt
compelled when the Board asked the question of
what, you know, is the purpose of the common
carrier obligation. It's to serve upon
reasonable request.

This line was not a major mainline
where you'd have major freight trains stopping.
It was on the end of a branch line. The total
amount of track that would have needed to have
been restored by the carrier was about a thousand
feet at most, but still they refused the service,
and so that is the reason why we are here today,
to talk about this and ask the Board as it sits
down and evaluates the common carrier obligation
of the railroad, what is a reasonable request for
service?

In the same token, one of the issues
that we think is a subset to that is what was the
reason that this actually happened to get removed
or this particular project fell apart seven years
ago, which is a problem we're seeing on a regular
basis, and in New Jersey our semestral terminal organization fell victim to one of these transactions where a minor railroad was abandoned without Board authority, sold off, parceled off, ripped up, rebuilt, put back into the national system.

And one of the problems that we've seen is we're seeing more and more of this, especially up in the Northeast with Conrail. They're not dotting their I's and crossing their T's with regards to these abandonments, and we're deeply concerned over this.

It may seem to be insignificant to some, but what happens when a shipper like one we're currently talking with says, "Well, I'd like rail service"? Well, we can get you the rail service you'd like. The problem is we have to deal with Conrail's or KCS's abandonment that wasn't really an abandonment. So one of the things that I'd like to see this Board do is to address this issue of simply point it up. In a word, that's what we'd like.
One of the problems that we've seen -
- what's 10904 actually mean? You know, just
basically you say the common carrier obligations,
and what constitutes an abandonment?

We've heard word that there is a
process of railroads can pick up rails if
nobody's asking for service. We concur with
that, but who has to bear the cost of putting the
rails back down if you weren't supposed to pick
them up in the first place without the Board
having given you the blessing to do so, in
essence relieving you of that obligation? It
sounds to me like we are allowing this process to
continue to occur.

As Mr. Timmons said in his opening
remarks, many times that last mile is a short
line. It could be on the fringe of a Class I
system, but these are important elements that one
needs to preserve, especially when we're talking
about access points to the national network.
That last mile of track, even though it may go
out to that industrial field out in the middle of
nowhere, could very well be the next future
industrial park, and rail service is critical to
it.

We have seen in Vicksburg, Mississippi, a local businessman invest over
$300,000 of his own money to buy a line of
railroad, and people would say, "He only moves a
hundred carloads a year. Why do that?" Nobody
bothered to stop to think that one of the reasons
why Raymond English made that commitment to do
that was his plant is actually worth more with
rail service.

Without rail service, he's just
another industrial site. With rail, his plant
actually has a lot more money. It's worth a lot
more money, and so these are other important
considerations.

It's not just providing the service
itself, but it's the access to the network, and
sometimes when I hear people say, "Well, it needs
to be profitable. It needs to be capacity
constrained," one of the things that we're
concerned over is that we want to see these little areas of gray not necessarily disappear but carefully watched, because we see areas where we can see abuse at the fringe, and that's something we'd like to bring to the Board's attention today.

We've outlined some of the particulars of the case. Many of these are sort of straight-up, rudimentary type procedures. We're also concerned on a lesser note, but I did make a point of bringing it up.

When these little minor transgressions come to the surface, I don't know if it's in the staff that writes your decisions, but we notice a soft hand when it comes to a Class I. When it comes to a Class III, we're a little concerned sometimes that we don't see an even hand.

It's one of the issues that sort of concerned us a little bit with CORP. We've seen cases at the fringe where Class I may not have done something that they were supposed to do, and
they're given, in essence, a free pass.

CORP has legitimate safety concerns, deterioration of infrastructure, and one thing that I noted in their case that sort of surprised us was total rail service wasn't being withheld. There are certain portions that there was an embargo because of the Coos Bay Line, but over the Summit I keep hearing in all that I read there's no service. You know, there's no shippers between those two points.

The Board did order a show cause order, and as a shipper's agent, which is where I spent my first seven years, I would have normally applauded the decision. Wow, look at that, a proactive decision.

Now wearing the railroad hat, I tend to want the Board to sit back and simply say -- be even-handed, because not everybody is in the position of a Class Two or Class III or Class I, for that matter, with regards to how we can handle the problem, and as I see we're getting close on time, I've made my personal appeal. I
hope that the Board takes what we brought to the
table in consideration, and I'm here to answer
any questions.

CHAIRMAN NOTTINGHAM: Thank you, Mr.
Strohmeyer. We appreciate your bringing this and
any other information you might have about
possible abuse or misuse of the abandonment
procedures or any other procedures to the Board's
attention.

Unlike days long past where the
Interstate Commerce Commission had field offices
and agents with badges and weapons, we --
Congress has told us loud and clear that's not
the agency they want the STB to be. It's borne
out every year in our budget, in our maximum
employment level of 150 employees.

We simply can't be at every spur or
every line that is either abandoned or on track
to be abandoned, so we really do rely -- and
short lines in my experience have been some of
the best front line ambassadors for the industry
and the source of some of the best information we
Get, so I do -- and shippers, of course, very often help us keep informed, so we do depend on that. When we do come across problems, we, of course, do send staff onsite if appropriate, and we try very hard to be even-handed.

I can tell you not too long after I came to the Board I learned of a case that had been pending for a little while that is now no longer pending where a Class I in Defiance, Ohio, had unilaterally severed the track of a short line, denying that short line's ability to market for potential business, and this had been --

This was sort of dragging on with no apparent solution in sight until the Board ordered that Class I in that case -- it happened to be CSX in that case, but it could have been any other Class I if they found themselves in that circumstance -- to promptly restore at significant expense that cut track, and we heard arguments. "Oh, it's not that important track. It's just maybe a few carloads." No. This Board takes those situations very seriously.
Is it fair to say that because there are a lot more short lines than there are Class Is, and sometimes some short lines don't have enormous budgets, and on occasion some short lines -- this is the minority, because I think very highly of the short line industry, but on occasion some short lines don't have the depth of staff and legal advice and other advice. They sometimes do wander into some tricky waters that the Board has to take action.

I think it's just a fact of the landscape that our docket tends to be a little more filled with some occasional short line transgressions, so to speak, but there are 500, approximately, short lines, and so it's not because the short line industry has an endemic problem, and Class Is have their problems, too. So I appreciate you bringing this to our attention.

Rest assured we are very even handed, and, in fact, I can think of -- I don't think we're actively in court being sued by the Short
Line Association, if at all, anywhere nearly as much as we are being sued by the Railroad Association and the Class Is, so we're -- they don't think we're being even -- favoring them in a number of matters. So appreciate that.

We have a number of witnesses here. I know we have a number of questions. I'll try to move through and give my colleagues some time, and -- let's see.

General Timmons, you touched on, as you very ably do whenever we're together on the growth of the short line industry and the important role it plays in our transportation system in our country -- so often, though, I just -- I hear even yesterday smart people who should know better saying things like the railroad industry has been all about consolidation and shrinkage of carriers and providers, less choices to shippers, et cetera. That's not the picture I see, though, when I look at the reality of the short line landscape.

Refresh my recollection. You've gone
-- in the last 20 or so years, you've gone from a relatively limited number of short lines to upwards of 500, if I recall, and help clarify some of those misconceptions we hear on occasion, that the industry is comprised of only four carriers and that kind of information we occasionally hear.

MR. TIMMONS: Well, Mr. Chairman, the short line industry, as you know, has been a short line industry since the beginning of railroading. It started out as very, very short segments of railroad, and ultimately from the 1820s and 1830s it expanded, really starting to take on a national flavor post-Civil War.

The industry, its long history of ascendancy peaked about the period of World War I and then slowly went into a very, very incremental and slow spiral downward, running up and down based on World War II and based on various efforts to salvage it.

By the 1980s, the short line industry was in the 250 range of small railroads. They
were feeling the same effects that the Class I industry was feeling as the Class I industry slowly spiraled down with any number of problems associated with speed, with accidents, with successive, year after year Class I railroads going into receivership to the point where by 1980 most efforts to revive the industry had been exhausted.

There was sort of a last-gasp initiative to go ahead and deregulate or partially deregulate the industry to see what would happen. The unintended consequence of that was to balloon this small railroad industry, which started out at that time in slightly under 10,000 miles of railroad, about 8,400 miles, and in that period of time it is now at 51,000 miles of railroad and incrementally growing.

The number of short line railroads went from roughly 250 to 556 today, so that growth, it really took off in the late eighties and in the early nineties, and while the small railroad industry was expanding exponentially,
there was a compression of the Class I railroad industry so that it got from somewhere around 50 or 60 Class I railroads in 1980 down to about nine or ten a decade later.

Now much of that -- much of that trackage was spun off. Those beaten up pieces of the railroad system that were not economically viable for the Class Is were spun off to an entrepreneurial population of small railroad players. They have converted and through might and main have brought this system to life today.

So you see a tremendous amount of growth and expansion, and, by the way, safety and service. Without that small railroad segment of the rail network, thousands and thousands of communities and businesses and industries and farms would be decoupled directly from the rail network, and so that niche that has evolved over time and become almost an essential piece to our transportation network is thriving and growing.

The number -- our numbers have grown. Since I have been in this job in the last -- over
about the last five years, just the association
has increased its membership in small railroads
by 35 to 40 railroads, pretty impressive when you
consider that someone would think that the
industry is not doing particularly well, roughly
14 million carloads last year.

The hazmat piece alone -- 140-some
railroads move that hazmat, a very, very
challenging piece, and, by the way, a laudatory
aspect of the railroad industry. The insurance
industry has looked at the small railroad hazmat
experience and can find only one example of a
reimbursement for up to $9 million for a hazmat
spill to the small railroad industry, and that
was seven or eight years ago, so they've got a
great track record at doing all that.

Still, in all, the insurance piece of
this is daunting, very, very difficult. There is
-- for those that are not roughly familiar with
the history of the railroad industry, this
business of actually what happened to the Class I
industry and what's happened to the Class Two
industry is a little murky and obscure over the last 25 years, but thank you for the opportunity to talk about that.

The investments that the small railroads are making in their own systems, the expansion into very, very sophisticated equipment, signaling devices, locomotives, car types, safety devices, and particularly the effort to embark on professionalism through training and education, pretty much a dogma in the industry, has been very, very commendable. So that's a little bit of a windy answer, but it gives you the framework within which the small railroad industry operates today.

CHAIRMAN NOTTINGHAM: Thank you, General Timmons. That's very helpful. Do you believe, General Timmons, that some of your members would be interested in or willing to at least explore possibilities of partnering with -- we had some very enormous businesses before us yesterday, almost the entire chemical industry it seemed like, businesses that -- representatives
of Exxon-Mobil, Dupont, different -- Occidental, I believe, companies that dwarf any railroad in size.

Are there -- do you see there opportunities for large shippers in particular who have extensive resources to partner with short lines in order to try to improve their transportation choices out there? Is that something that some short lines are interested in exploring?

MR. TIMMONS: I think, in the first instance, what you must understand about short lines is they are agile, they are very, very flexible, and they're enormously adaptable. Their hallmark is customers service.

That's where they focus, and so their willingness to talk to anybody, to work through some kind of a challenge, I think, is unquestioned. The difficulty comes in, I think, when you take a look at the industry positions at large.

There were some questions earlier,
and I made a brief comment about this Price-
Anderson style of draft legislation that the AAR
and ourselves crafted. That was an all-
encompassing collaborative approach where it
brought in all stakeholders to craft an approach
to an incident fund, contributory amounts, and
insurance thresholds based on what type of
railroad you were and what types of traffic you
had.

That approach has been met with a
lukewarm response on Capital Hill and either
lukewarm or somewhat hostile approach to some of
the stakeholders, and so it has gained no
traction. It's not to say that it is the
inflexible answer to this.

It is to say that this is a start
point for discussions and negotiations, and that
would be -- that would be all-inclusive,
shippers, car manufacturers, railroads, the
government. There is a process there, and the
dollar thresholds, at least two years ago when we
worked on this, were deemed to be reasonable and
appropriate for all concerned.

    Now I'm sure that there are going to be some that say, "Well, our contributions are too great." That was a by-carload contribution solution. There was a certain dollar amount per car if you shipped or received it, and it was to be assessed by the Secretary of Transportation on an annual basis, and so there was a formula for all of this and well defined categories of where Class I, Class Two, Class III fit in, where shippers fit in, where car owners and car manufacturers fit in, so it was developed.

    Very often when we talk about this, it is not thoughtfully understood, and so we kind of toss it out, but the mechanics of it are well developed and tested over time using the Price-Anderson mechanism. So we would certainly welcome the opportunity to sit and talk to shippers, manufacturers, and others to try to get some kind of a collaborative approach to build a solution to this very, very difficult problem.

    Henry Lampe's problem is
1 fundamentally intractable. They are literally
2 backed into a corner. Within the next 20
3 minutes, he could be out of a job. His company
4 could be out of business with one unfortunate
5 mishap with anhydrous ammonia or chlorine. It
6 would be a devastating thing. He doesn't carry
7 enough insurance.
8 The Short Line Association has
9 successfully crafted a small insurance program
10 that will get you up to a couple of hundred
11 million dollars. That's not nearly enough, but
12 that's about as good as we can do to lay on top
13 of your already current insurance, but, as Henry
14 said, to get him to the billion dollar range his
15 little company is somewhere between the $2
16 million and $4 million insurance premium costs on
17 an annual basis, unbearable for the small
18 railroad industry.
19 CHAIRMAN NOTTINGHAM: Thank you. I
20 was just thinking, in my past having been the
21 Chief Executive Officer of the third largest
22 state Department of Transportation, we owned, of
course, the system, not too unlike a railroad. It was a right-of-way, 57,000 miles or so of lane miles. We had all kinds of hazardous materials crossing on our roads all the time.

If you had told me before I took that job that somehow I would be or the Agency would be liable for an accident that took place, you know, two trucks colliding -- I mean, states and government seem to have done a pretty good job of protecting themselves from a lot of this liability, but unfortunately we don't have quite enough attention right now on how we can make sure that the railroad industry is not singled out to bear way more than what seems to be their, you know, any kind of fair share of this.

So I commend you for keeping your focus on a solution to this. Please let the Board know how we can be helpful in bringing the parties together, not just talking about maybe getting together but actually getting together.

Mr. Lampe, it occurs to me you have extensive experience primarily in Illinois and
Indiana, if I heard your testimony, as far as your system and working primarily based in those two states. Is that right?

MR. LAMPE: Yes, sir.

CHAIRMAN NOTTINGHAM: And you described some pretty serious grade crossing risk management concerns, risk concerns.

MR. LAMPE: Yes.

CHAIRMAN NOTTINGHAM: How would you characterize each of those states' programs for addressing systematically high-risk grade crossings and having programs in place, dedicated funding to each year be out there with a six-year plan or what I'm familiar with from my state sort of DOT background?

Do you see progress? Does each state have a serious program where they're trying to minimize the risks presented by roadways, crossing railroads, very often railroads that predated the roadways?

MR. LAMPE: In our particular service territory, there are active initiatives going on.
Usually, at least in one case, it was to close a crossing, a dangerous crossing.

Where we operate the overpasses and underpasses would be massive, massive, expensive projects, so it's somewhat encumbering those initiatives, but the states have pretty much closed the crossings that can be closed, but there are still some large active ones that the money just isn't available from what we can see.

CHAIRMAN NOTTINGHAM: Thank you. Mr. Lundberg, were you able to either be here yesterday or to follow over the internet or at least get briefed on some of yesterday's testimony? Your company's name was invoked a number of times.

MR. LUNDBERG: Yes. We were present yesterday.

CHAIRMAN NOTTINGHAM: Okay, good. I just didn't -- I wanted to make sure I didn't need to review everything with you.

MR. LUNDBERG: No.

CHAIRMAN NOTTINGHAM: That's helpful.
Just to refresh my recollection, when did RailAmerica acquire the CORP railroad in Oregon?

Roughly what year would it have been?

MR. LUNDBERG: Well, it was -- the CORP was acquired from Southern Pacific in 1994, but it was acquired by, I believe, States Rail, which was another short line holding company. We acquired States Rail in 2001 or 2002.

CHAIRMAN NOTTINGHAM: Around 2001 or 2002? And what was the condition? What kind of due diligence did RailAmerica conduct in getting acquainted with the property you were in the process of buying back in 2001 or 2002? Did you have --

MR. LUNDBERG: I'm not personally aware of the due diligence that was done, and I only joined RailAmerica a year ago, so I don't know what inspections or so forth. I assume that it was the same kind of inspections that the short line operators did for all of their properties.

CHAIRMAN NOTTINGHAM: What's -- it
helps to understand. What would that have been like? What's the normal process?

    MR. LUNDBERG: Well, you would do a physical examination of the property by your engineering folks, who would say, "Here's the condition of the railroad, and here's what we think is probably going to attach to the cost side of the equation."

    CHAIRMAN NOTTINGHAM: Could you get to the Board any information that would be relevant to answering that question about what kind of condition the CORP infrastructure, in particular the line to Coos Bay that's now embargoed, what kind of condition that was in when RailAmerica bought it in 2001 or so.

    MR. LUNDBERG: We'll see what we've got. I'm not exactly sure, but we probably have some records, sure.

    CHAIRMAN NOTTINGHAM: Describe to me what's the relationship between RailAmerica and Fortress? Fortress is the complete owner of RailAmerica? Is that a best way to describe it?
MR. LUNDBERG: Fortress is an investment group. They have a number of funds, private equity funds, and they are -- they bought all of the stock of RailAmerica, so they are our stockholder.

CHAIRMAN NOTTINGHAM: Okay. And Fortress itself, though, is not a publicly traded entity, correct? It's more akin to a private hedge fund where they don't make --

MR. LUNDBERG: I think they have a publicly traded part like some of these -- some of the other -- their cohorts have, but I'm not -- I do not understand, you know, that structure.

CHAIRMAN NOTTINGHAM: Do you or any other executives from RailAmerica routinely meet with or speak on the telephone or communicate via email with Fortress officials, you know, "How's it going there?" Do they, you know, do they ask how their investment is going?

MR. LUNDBERG: Yes. We have a Board of Directors of people who work for Fortress who oversee us. It's like any other company that has
a Board of Directors, exactly.

    CHAIRMAN NOTTINGHAM: Is it fair to say they've been following the press accounts and the controversy coming out of Oregon involving the -- related to the embargo that RailAmerica imposed last September?

    MR. LUNDBERG: Yes, it would be fair to say that they've been following this. It's a concern to them like all of our business, you know, situations are.

    CHAIRMAN NOTTINGHAM: One thing that concerns me is when it seems clear to me that -- and I don't think you'll get anybody from the Board questioning this -- that the Federal Railroad Administration did a solid job of inspecting the situation in the wake and aftermath of your embargo last fall, and the FRA put together a report that certainly indicates serious safety problems with those tunnels, and I'm not here to second-guess, which could very well have been a life and death decision that RailAmerica had to make to put safety first based
on what I saw confirmed in that FRA report.

My concern is really with what's happened or not happened since, and I've seen lots of fairly well written letters, been to a lot of meetings. We've personally here at the Board convened some of those meetings. Thank you. You came voluntarily. Thank you for coming today, too, by the way. You weren't subpoenaed by the STB to be here today, correct?

MR. LUNDBERG: I was not.

CHAIRMAN NOTTINGHAM: Thank you for being here, but right in the wake of the embargo, instead of having a message that seemed to be -- that I would have expected to be really focused on the safety situation and when the -- and how soon the line could be reopened, we saw quotes coming from CORP Railroad officials such as, "The Coos Bay Line just doesn't have enough business on it today to justify us making the repairs."

Is that still the position of CORP and RailAmerica?

MR. LUNDBERG: That's certainly one of
the facts that's present here, yes, and when the embargo was placed on that part of the line, you know, our stated goal all along has been to preserve the line and to find a way to restore service.

CHAIRMAN NOTTINGHAM: Another press announcement coming out of CORP towards the end of last year -- I believe this might have even been done in a -- I think it was. It was in a newspaper ad. The railroad went to the -- the railroad spent a lot of time, it seems, on letters and meetings and even has paid for newspaper ads, one of which said that, "We plan to reopen it," the line, the Coos Bay Rail Line, "one day." What does "one day" mean? What is --

MR. LUNDBERG: Well, at that time, we were seeking to coalesce a public-private partnership with, besides us, four other stakeholders. That's a fairly complicated matter to get that done, but we felt that because the other stakeholders, the Union Pacific, the Port of Coos Bay, the shippers and ODOT, all had a
very important vested interest that would be a way to go, but putting together that public-private partnership was not something we could do by fiat or could do in a week, and so we had to spend a lot of time communicating with those groups to see if they would be interested in entering into that, and that is a condition precedent to being able to preserve and restore the line.

CHAIRMAN NOTTINGHAM: I'd like to make, if it's not already part of the record, part of the record the April 21, 2008 letter from Governor Kulongoski. I'm sure you're familiar with it.

It is a recent letter to you and Mr. Lundberg, basically reiterating very clearly. He says, "To put it succinctly, my bottom line has not changed. As I stated when we met in person on January 24 and repeated in my letter on February 12, the State of Oregon would be open to discussion with all of the stakeholders on a long-term solution for the line after you have
reopened it."

This is consistent with what we've heard from the State of Oregon in our efforts to find out how this line can be reopened, what the prospects are of some type of public-private partnership, as you say. We had the UP here before us yesterday. They could not have been clearer. They're not going to be ponying up money, especially under these circumstances where the line is not reopened.

The state is not going to be putting up money. They've been very clear repeatedly. The shippers yesterday seemed to be very clear that they want to see the line reopened.

At what point -- I mean, it seems to me that, following your approach and your logic, as long as you're sending letters and announcing that you have dreams of a public-private partnership, you never have that obligation to reopen that line.

MR. LUNDBERG: Well, we have an obligation to reopen the line or do something
else.

CHAIRMAN NOTTINGHAM: Or abandon.

MR. LUNDBERG: Or abandon. We have that obligation. We understand that, but as I said before, our goal has been to reopen the line and preserve service on that line, and we've been trying to find a way to do it.

There are extraordinary circumstances out there in terms of the level of capital necessary to restore the line and to maintain service, and there is a business arrangement which is insufficient to fund that as that business arrangement exists today and with these other stakeholders, and, quite frankly, we've been quite disappointed and surprised that they've had the reaction that they have, because it seems that it is in the public interest of the State of Oregon and the governor and the two senators and Congressman DeFazio. They've stated that this is very important to them, but they don't seem to be willing to give us the consideration to ways to do it.
We were a little surprised yesterday about the Union Pacific's position. The Union Pacific has an ownership interest in the line, the part of the line from Cordes to the end of the line, Coquille, where the two big customers are located. The Union Pacific continues to own that line.

These customers are their customers. As I said before, we had a handling line fee from them, and they are a natural to help participate in this. You know, we may get $400 a car to haul the lumber from Coquille up to Eugene, and they may get $3,000 a car to handle it to San Antonio, and so these customers are their customers.

So our public-private partnership was created in a sincerity of, "Hey, everybody, this is a -- if we want to maintain service for these shippers, we all have an interest in this. It's not just the CORP that has an interest in it," and at what point do we say we've run out of ideas? I don't know what that point is.

CHAIRMAN NOTTINGHAM: Well, you're
certainly entitled to have asked for others to help pay to reopen your line. That's fine. It's a free country as far as that goes. I think it's fair to say you've asked repeatedly. You've been told repeatedly and very clearly in writing and other ways, no, that those contributions aren't going to be coming.

What we've been told is it's a trust problem. Folks out there just don't trust that if they pony up money now, they're going to really have a partnership. They want to see the line reopened as a sign of good faith, and I would suggest the time to forge that public-private partnership may well should have been before you bought the line.

Here's a line that anyone who is apparently familiar with it over the years knows it's got aging timbered tunnels in a very wet, severe weather type environment, and, I mean, you bought the line of your own volition voluntarily, caveat emptor, and then you have a problem, and you want others to pay, and then when they say
no, we see no progress.

This Board has been very patient, but I just would suggest the lack of progress on reopening these lines is going to -- is testing the Board's patience. Have you started any procurement activities?

I understand that, for example, with the weather out there it may well not have been possible to send engineers in and workers in in the dead of winter with all the moisture and snow out there for safety reasons. You need to synch this up.

That part of the country, I know from the highway background I have, you have a pretty short window of decent weather to get work like that done. My worry is, if we sit here and talk about this too much longer, we'll be back into next fall and the next closeout period, and it leads some to believe -- and you've heard this.

I'm not telling you anything you haven't heard. It leads some to believe that this is part of a calculated strategy just to run
out the clock, so to speak, and hope that the shippers just, you know, dwindle and fade away and stop speaking up for themselves.

We're not going to -- I don't believe we're going to be allowed to let that happen. We need to see some progress on your part, or make up your mind and let the process play out if you truly don't want to be part of the future of that landscape.

Is there anything you'd like to say to any of this?

MR. LUNDBERG: Well, as far as the timing part goes, we've done the engineering work. We have done no procurement. We have hired no contractors. That is true.

We also, back in November, made it quite clear to all the public-private partner potential stakeholders what the time table was, when we had to have an answer from them in order to be able to take full advantage of the construction season. So they've been all -- everyone has been aware of that.
CHAIRMAN NOTTINGHAM: Did I hear you say -- have you begun to make any preparations for procurement, identifying qualified firms to do this work, getting more detailed cost estimates, that kind of information?

MR. LUNDBERG: No, we have the cost estimates. We know what kind of material we need to -- and where it's going to go. We know all that. We just haven't taken any further action.

CHAIRMAN NOTTINGHAM: The cost estimate for reopening the actual tunnels that are the specific focus point of the embargo, not to be confused with some grand plan to possibly refurbish the entire line but the actual work needed to get us back to, you know, status quo anti -- you know, safety before this embargo? How much would that require?

MR. LUNDBERG: That's going to require about $7 million.

CHAIRMAN NOTTINGHAM: $7 million?

MR. LUNDBERG: Yes.

CHAIRMAN NOTTINGHAM: Is that a number
that's developed over time, or is that a number -
- I had heard a lower number last fall.

MR. LUNDBERG: That's the number that
came from the engineering report from Shannon &
Wilson. They had actually a three-phase tunnel
recommendation, 2.3 immediately and another, you
know, 4-point whatever within the next 12 months.
So that's where we are. We're in that time
period where it adds up to $7 million.

CHAIRMAN NOTTINGHAM: And do you
expect in your experience that that cost, that $7
million number, will increase or decrease the
longer you wait to begin this work?

MR. LUNDBERG: It will increase the
longer we wait. Absolutely. These tunnels are
continually being soaked in water and all that
kind of stuff.

CHAIRMAN NOTTINGHAM: Let me be clear
that this Board -- I certainly personally have a
completely open mind on this. We want to see
what you respond to us formally. I'm not here
just to, you know, give you a hard time, but this
is important. We've got people who have lost jobs. We've got an important part of our country that's hurting out there in part because of this embargo. We have no progress, but I will certainly keep an open mind and look forward to seeing your formal responses soon, and rest assured that this Board will be completely fair-minded and do the right thing, but I did want you to get a sense of some of the concerns that I have.

MR. LUNDBERG: We understand that and appreciate that, and, as you know, we do business with the Board on all 43 of our railroads across the country, and we appreciate and respect the fairness that you've shown to us on all of those sites, so thank you.

CHAIRMAN NOTTINGHAM: I think I'll give Commissioner Buttrey a chance to ask the next questions.

COMMISSIONER BUTTREY: MR. Lundberg, did you precede or did you come after the decision to -- your presence with the company,
MR. LUNDBERG: No, I came to the company a year ago with the five senior managers that were hired by Fortress to manage RailAmerica, so I've been here a year, and that preceded the decision to embargo the tunnel, yes.

COMMISSIONER BUTTREY: So that was a decision that you and your management team made?

MR. LUNDBERG: Yes, sir.

COMMISSIONER BUTTREY: Was that a decision that went before your Board --

MR. LUNDBERG: No.

COMMISSIONER BUTTREY: -- or was that made strictly with -- was that made without Board approval?

MR. LUNDBERG: That was made among our senior management group in our normal course of decision-making, and when we realized the serious condition of the tunnel, we needed to embargo for safety reasons, particularly the safety of our employees, and with an embargo, as Mr. Hamberger
said, you know, it's a case-by-case basis, and it's a temporary thing, so we embargoed it immediately when we realized we had a safety issue, and then we tried to work through how to take care of that embargo, and we made that decision.

COMMISSIONER BUTTREY: When did you realize you had a safety issue?

MR. LUNDBERG: In September, last September.

COMMISSIONER BUTTREY: Last September?

MR. LUNDBERG: Yes, sir.

COMMISSIONER BUTTREY: And when was the FRA inspection done?

MR. LUNDBERG: In November, after we embargoed the line, the FRA did their inspection and their report to us and to Congress.

COMMISSIONER BUTTREY: You say you don't know anything about any due diligence that was done on this railroad track?

MR. LUNDBERG: Well, the question was when --
COMMISSIONER BUTTREY: You personally.

MR. LUNDBERG: No, I don't, no. The question that Chairman Nottingham asked me was when RailAmerica purchased States Rail and the CORP five years ago what due diligence, and we weren't around then, so I don't know what due diligence they did.

COMMISSIONER BUTTREY: Well, this track, according to the reports that we've all seen, is in pretty bad shape. Would you agree with that?

MR. LUNDBERG: Yes, it has some pretty serious problems, and, in fact --

COMMISSIONER BUTTREY: And the tunnels are in bad shape.

MR. LUNDBERG: Yes, and, in fact, tunnel 15, which is one of three tunnels that were targeted particularly, had collapsed and was out of service and repaired in 2006, just at the time that Fortress was looking at this railroad, so we understood there were issues, yes.

COMMISSIONER BUTTREY: And it didn't
get that way overnight.

MR. LUNDBERG: No, no it didn't.

COMMISSIONER BUTTREY: It got that way over a period of years.

MR. LUNDBERG: Right.

COMMISSIONER BUTTREY: Would you consider that neglect?

MR. LUNDBERG: Well, as I cited earlier, the investment that RailAmerica even preceding us has made on the Coos Bay Line over the last five years has been 40 percent of the revenues from that line, so as much as could be invested was being invested, and so I would not consider that neglect, no.

COMMISSIONER BUTTREY: Well, if you've been operating this line for this period of time, and the line -- the tunnel caves in on a train engine as it goes through, and your train crew is fatally injured in the accident, would you consider that criminal negligence? You're not a lawyer.

MR. LUNDBERG: I'm not a lawyer, no.
COMMISSIONER BUTTREY: That's a good answer. I dare say the legal community would probably consider that criminal negligence to allow something to get into such disrepair, and then an accident like that occurs and people lose their life, you know, when you knew it was in such bad condition. That bothers me.

I'm just -- this thing has been going on for a long time. This neglect of the line has been going on for a long time, and apparently nothing was done about it. I'm just -- and if you're concerned about whether the line is economically viable or not, the avenue of approach is not embargo. The avenue of approach is abandonment. That's the avenue of approach.

MR. LUNDBERG: That's right. That's one avenue, yes.

COMMISSIONER BUTTREY: That's one avenue. That's the avenue. If you think the line is uneconomic, then the avenue of approach to cease operations on that line is an application to abandon the line.
MR. LUNDBERG: Or to seek partners.

COMMISSIONER BUTTREY: Or seek partners.

MR. LUNDBERG: Yes.

COMMISSIONER BUTTREY: Yes, but it seems to me that there is a pattern of activity here that -- and the good news is -- the really good news is, from where I sit, anyway, is that nothing really ever really bad happened. The good news for your company and the good news for society in general is that nothing really ever bad happened. You got lucky.

It's like some of these other movements on the rail lines today with hazmat. I know that railroads are making an all-out effort to be as safe as they can possibly be, but you know what? We've been lucky. We've been lucky.

MR. LUNDBERG: Well --

COMMISSIONER BUTTREY: If the accident at Graniteville had happened during a different time of day, rather than the middle of the night, you know what? I dare say that this situation
would be solved right now.

We wouldn't even be here talking about this, because there would have been a catastrophic event, and when a catastrophic event occurs, people do something about it, but oftentimes, until a catastrophic event occurs, they don't do anything about it, and then we end up with a bridge falling down over the Mississippi River, which is just one example of a bad thing that can happen.

Bad things happen. We've been lucky. We've just been lucky. You were lucky. The people who operate those trains have been lucky.

The other thing that bothers me about the situation is that you gave these customers, what, 24 hours notice that you were going to embargo this line --

MR. LUNDBERG: Yes.

COMMISSIONER BUTTREY: -- when you've known for months? I mean, you didn't make this decision overnight. Presumably, as good businessmen would do, you consider this decision
over some potentially long period of time, and
then you made a decision to embargo the line, and
you gave your customers 24-hour notice.

Now we heard testimony yesterday that
that is the facts. That are the facts. That is
the facts. Those are the facts, and if you are
here to dispute those facts or to give us
different facts, that's fine, but the facts we
heard was that the customers got 24 hours notice
that they were -- that the line was going to be
abandoned, I mean, is going to be embargoed.

That bothers me, because you knew
about these safety concerns for months in advance
of this decision being made, and then you give
the customers 24-hour notice, and they've got to
move heaven and earth to service their customers,
because you're not there to serve them. They've
got to make all these other arrangements.

I would presume that because of that
fact they incurred huge, substantial,
extraordinary costs because of that activity, and
I'm curious if you made any offer to them to
compensate them for these extraordinary costs that they may have had as a result of this precipitous action on your part.

MR. LUNDBERG: Well, we did, actually, and --

COMMISSIONER BUTTREY: I'd like to know about this.

MR. LUNDBERG: And I will tell you, too, that the fact is we gave them 24 hours notice. There's no question about that, but the other fact is not correct.

We did not know about the severity of the tunnels that would require us to embargo them until the day before we made that decision, and when the senior management realized what we had on our hands in terms of a risk, we made that decision literally overnight, and we issued the embargo, because we are not ones to, you know, keep our fingers crossed and hope for good luck, and when we knew what we had, we had to embargo it. It was as pure and simple as that. We did not have months of notice.
Now --

COMMISSIONER BUTTREY: How long in service -- how long have you been presiding service over that line?

MR. LUNDBERG: Well, for hundreds of years that line has --

COMMISSIONER BUTTREY: And you're telling me, and you're telling this hearing, the Board members and the people in this room that you didn't know about the condition of those tunnels until the day before you made the decision --

MR. LUNDBERG: We did not have the --

COMMISSIONER BUTTREY: -- to embargo the line?

MR. LUNDBERG: We did not have the engineering report from the Shannon & Wilson, the independent inspectors, and our management's evaluation of that report and their recommendations for us until September. That's what I'm telling you, yes, sir.

COMMISSIONER BUTTREY: Well, I would
change my statement then. I want to change my
statement for the record. You're not just lucky.
You're extraordinarily lucky.

You're extraordinarily lucky, and I really
hope -- I really hope that there aren't other
situations out there around the country that are
in that kind of situation where the railroad,
whoever they are and wherever they are, does not
know the condition of their tunnels any better
than that.

That is a serious -- that is a very
serious matter, and I'm shocked, really, to hear
that that fact -- that that is a fact, and you
stated it as a fact just a minute ago.

MR. LUNDBERG: Well, when we took over
RailAmerica, we engaged Shannon & Wilson a year
ago to do the tunnel inspection, so we didn't
wait. I mean, as soon as we had control and we
knew we had a problem, we engaged independent
professional engineers, the best tunnel engineers
in the country, to do that. It took them all
that time to do their inspections and their
measurements and all that sort of thing and issue their report.

So we weren't -- we were aware there was a problem, and we weren't just hoping to be lucky. We were trying to take proactive measure to do that.

You asked a question about did we do something for the shippers, and yes, we did. We offered all of those shippers, Roseburg and Georgia Pacific and South Port Lumber, that we would pay for their transload costs to get their product from their docks to the transload points in Eugene or in Dillard. Two hundred dollars a car we offered.

COMMISSIONER BUTTREY: Two hundred dollars a what?

MR. LUNDBERG: Two hundred dollars a carload we offered to pay to reimburse them for those costs.

COMMISSIONER BUTTREY: Did they take you up on that?

MR. LUNDBERG: Some did, yes. Yes,
COMMISSIONER BUTTREY: That's all I have, Mr. Chairman.

CHAIRMAN NOTTINGHAM: Vice Chairman Mulvey?

VICE CHAIRMAN MULVEY: Thank you. Thank you. I want to preface my remarks by saying that, as General Timmons knows, I've been a long-time supporter of the shortline industry, so my comments today may not always seem that way, but I have been a very strong supporter of the industry.

I must say I start out by feeling compelled to comment on the irony that while the short lines generally support their spinoff agreements with the Class I carriers, or at least they do so publicly, I have seen a lot of complaints in the written testimonies and some of the oral testimony that these same agreements constrain their pricing freedom and their ability to charge their customers for the cost of transporting TIH, and they're taking much of the
risks and not getting adequately compensated for it because of these -- in part because of these agreements.

I want to turn back now, though. I'm sure this is going to be happy to hear this, but back to Mr. Lundberg a moment here. It is Fortress America that had recently acquired RailAmerica, and the day they acquired RailAmerica they acquired over 40 railroads in your RailAmerica family.

In how many cases did they go out and do what we would call due diligence, that is, go out and inspect the railroad to see what the condition was, et cetera? Did they inspect all of the 40 railroads? Did they inspect some of them and not others, or did they inspect none at all?

MR. LUNDBERG: Some of them were inspected.

VICE CHAIRMAN MULVEY: Some of them.

MR. LUNDBERG: Yes.

VICE CHAIRMAN MULVEY: Well, if you're
making an investment in 40-some-odd railroads, it would strike me that it would be just due diligence, if you like, to inspect them.

Let me ask you. How much time was there between the close of the offer for RailAmerica and the time that Fortress America made its offer? I'm told that this was done very, very hastily and that there was a -- Fortress America was the high bidder on this and outbid another company by a small amount. Is that accurate?

MR. LUNDBERG: I believe so. I was not involved in the acquisition.

VICE CHAIRMAN MULVEY: Okay, so it's kind of one of these, "Hey, we know there's inside information about what this is. We'll grab these right away, and we'll do this without doing due diligence." Is that overstating it or --

MR. LUNDBERG: Yes, that's probably overstating it, because while the buyer or potential buyer in this case might not actually
make a physical inspection of all the property,
part of the due diligence is examining all the
engineering records, and those records are fairly
extensive, and that was done, and some of the
lines were physically inspected, but when
Fortress made the decision to purchase
RailAmerica, Fortress understood the obligations
that go along with that.

One of the comments made yesterday by
Senator Smith was that buying a railroad is not
like buying a fast food chain. It comes with an
obligation, and Fortress understands that very
important obligation, and they're not shirking
away from the obligation.

VICE CHAIRMAN MULVEY: Well, the
close concern with what's happening out there goes
beyond what's going on with CORP in Coos Bay.
Recently we've got another filing, a late filing
comment for this docket, which again relates to a
RailAmerica line, the Arizona-California Railway
between Rice and Ripley, California.

Can you explain why train frequencies
have been so reduced -- reduced so dramatically within the last two years and isn't it true that although RailAmerica is raising the surcharge on that line, none of those revenues are going towards maintenance of the line?

MR. LUNDBERG: Is that the Blythe subdivision?

VICE CHAIRMAN MULVEY: Yes, I believe that's the Rice-Ripley, California --

MR. LUNDBERG: Yes, right, and that's one we are going to file -- we are filing for abandonment on that line, yes.

VICE CHAIRMAN MULVEY: You're going to file for abandonment. Okay. There's been an embargo on the line since last December.

MR. LUNDBERG: Right.

VICE CHAIRMAN MULVEY: What was the reason for that embargo? Was that also a safety concern?

MR. LUNDBERG: Yes, sir. Yes.

VICE CHAIRMAN MULVEY: Okay.

MR. LUNDBERG: Condition of the track.
VICE CHAIRMAN MULVEY: So your plans are then to abandon the line and maybe hope that somebody offers an OFA on it?

MR. LUNDBERG: Well, what happened was, interestingly enough, the shippers on that line came to us about three, four months ago and said, "You know, we'd like to buy the line," and we said, "Very good," and they signed confidentiality agreements, and they had access to all of the financial records for that, and they were to get back to us by the end of March, and they did not, so they must have decided that it wasn't going to be in their interest to buy the line. Now, somebody else could, obviously, if we filed for --

VICE CHAIRMAN MULVEY: There could be an OFA. There could be with the abandonment.

MR. LUNDBERG: Right, exactly.

VICE CHAIRMAN MULVEY: Mr. Lampe, it's always distressing when you find a student who had actually retired that comes back and testifies before you, but we're welcome to have
you here today. Mr. Lampe was a student when I was a teaching assistant at Washington State University back in the 1920s.

MR. LAMPE: Not quite that long.

VICE CHAIRMAN MULVEY: Mr. Lampe, you advocate that the Board "clarify the common carrier obligation of small railroads that does not include the obligation to handle TIH."

Is it your position that the Board has the power to exempt all TIH from its regulation or exempt small railroads from transporting these commodities, and if so, on what basis, since most class exemptions are so because they're intermodally competitive, and that's clearly not the case with TIH? So I don't think we have the authority to do that, but I was wondering what your opinion was.

MR. LAMPE: I was under the assumption that you did.

VICE CHAIRMAN MULVEY: Okay.

Yesterday I asked Kansas City Southern to elaborate its arguments about the costs
associated with TIH in relation to its R1 reports and the URCS analysis that we do.

Could you explain why you think it's appropriate to ask the Board to account for TIH costs in small rate cases through this avenue in this proceeding particularly, or should we hold a separate hearing on URCS?

MR. LAMPE: From what I understand of URCS, our unique costs would not be adequately covered, and a small rate case would not be something that we would want to get involved in with the legal expenses and the fact that we would be dealing with the likes of Dupont or someone like that.

VICE CHAIRMAN MULVEY: It strikes me that every industry faces the possibility -- or not every industry but most industries face the industry of catastrophic loss. I think of, for example, a company that runs a catering operation and somehow winds up using their cow meat and killing lots of people, or somebody owns a dance hall, and a fire occurs and a thousand young
people are killed in a fire like that. These are all kinds of catastrophic losses that you can't really insure for.

    How is your handling TIH -- again, something that seems to be an extremely rare phenomenon that there's an accident. We've only had three in five years and four in the last ten years where a fatality occurred.

    How is your handling of TIH really different and more risky than operating a dance hall or, for that matter, a catering operation or almost any other industry that would serve the public and would have the potential of impacting a large number of people negatively?

    MR. LAMPE: I'm not sure how they would manage -- how those entities managed their risk, and so it would be difficult for me to answer that in a way, but I do know that in our case that an incident in an urban area that we just are not capable of managing that size risk.

    VICE CHAIRMAN MULVEY: It's never happened. I mean, we've never had a spill of a
chlorine or anhydrous ammonia kind of chemical in
an urban area that wound up killing a large
number of people or, for that matter, even
seriously injuring a large number of people,
notwithstanding, what happened in Graniteville.
We did have nine fatalities, and those were
tragic, but we haven't had the kind of thousands
of people that have been killed that some of
these projections come up with. It just has
never happened.

MR. LAMPE: We've been lucky,
extremely lucky.

MR. TIMMONS: Mr. Vice Chairman, if I
can just make one observation, I think maybe the
concern here is a matter of principle in that the
caterer that has this significant problem has an
option, whereas the common carrier does not have
an option on this TIH.

I don't know how many short line
operators of the 142 or 147, whatever it is,
given the option would say, "I choose not to move
it." Clearly, you heard some commentary this
morning from Norfolk Southern that they would opt
not to carry it if given that opportunity.

    Short line, to be sure, short line
operators make money moving hazardous materials.
How many are willing to make that tradeoff, and
obviously a whole bunch are, but how many, if
given the option to say, "I choose not to carry
it simply because the risk is too high for me"
would not carry it, whereas many other industries
have that option? If you don't want to be the
caterer with the raw sushi from somewhere, okay,
you don't have that line of business. You can go
somewhere else.

    VICE CHAIRMAN MULVEY: Well, of
course, the short line shareholders can sell
their stock and go into another business, also,
so, I mean, you always have the option of getting
out of the business, but if you're a caterer or
if you're a dance hall operator, whatever
business you're operating, there's always some
possibility that you get hit with a catastrophic
risk.
You just hope that that is fairly small. You do whatever you can to minimize it, and you said that, for example, in the case of CSSB that you handle 200 cars a year of anhydrous ammonia and chlorine, correct?

MR. LAMPE: Yes.

VICE CHAIRMAN MULVEY: That's less than one car a day. Are those all separate movements? Each one is an individual car, or in cases you have more than one car on a train?

MR. LAMPE: It can vary. We can have as many as four cars in a train.

VICE CHAIRMAN MULVEY: So then it may only be one or two cars, one or two movements a week that you have to watch out for. It does seem to me that if it's that restricted and it's that small, such a small part of your business that you can pay, and I'm sure you do, pay special attention to those movements, as we do with nuclear movements in this country. Is that correct?

MR. LAMPE: Yes, we do.
VICE CHAIRMAN MULVEY: Okay. Have you investigated the possibility -- you mentioned that one of the lines that you operate over the track is FRA Class Standard II, which is better than I and better than excepted, but it's still not the best track.

Have you investigated the possibility of acquiring loans from any of the programs like the RRIF program, to focus on upgrading that track FRA to III or IV so that you again reduce further the possibility of a derailment?

MR. LAMPE: Yes, we have done some preliminary investigations on that, yes.

VICE CHAIRMAN MULVEY: And what were the results -- any possibilities there?

MR. LAMPE: There are some. I'm not sure with the restrictions on the RRIF loans if we would qualify.

VICE CHAIRMAN MULVEY: I'm just making a case where there is a specific need that we've identified here for short lines that they are at risk, their whole business is at risk every time
they move them, and that this may be something that either can be included as part of the investment tax credit or a separate program can be developed, as we did one for the 286,000-pound cars to address this so that short lines when they're moving TIH materials are moving them over the best track that can reasonably be supplied.

Mr. Timmons?

MR. TIMMONS: I would fully endorse what you say, Mr. Vice Chairman. The reality, however, of this RRIF loan thing, which offers a tremendous avenue -- there's $32 billion in that fund, as you well know.

In the ten years it's been in existence, only 19 railroads have been able to capitalize on that money to the tune of less than three-quarters of a billion dollars. Now I can think of two or three major uses of that money, not the least of which are bridges, which are another significant challenge for the railroad industry at large and for short lines, as well as TIH materials.
The mechanism for getting that money in a reasonable way without undue delays and an awful lot of outside consultant help to get that is burdensome. That's why there are only 19.

We do have an Office of Management and Budget, a philosophical disconnect on this subject, and, as you know, there has been expedited efforts by the Federal Railroad Administration, by the Department of Transportation. There's even legislation that requires a 90-day decision on this stuff once the completed application has been submitted. Still in all, we have just not been very successful in moving that through the process for a variety of reasons.

VICE CHAIRMAN MULVEY: It's still being worked on. I mean, you recall when I was on the Hill with Congressman Oberstar and Congressman Young. Both of those gentlemen, although they didn't agree on everything, agreed on making the RRIF loan program more available and streamlining the process, and they both had -
they shared views of the Office of Management and Budget, and I think you heard those expressed by them.

MR. TIMMONS: Yes, sir, I have.

VICE CHAIRMAN MULVEY: So we're looking into that.

MR. TIMMONS: Okay, sir.

VICE CHAIRMAN MULVEY: Mr. Lundberg, in your written statement you say that to meet your own common carrier obligation you argue that each RailAmerica carrier must be revenue-adequate. Where in the statute do you find support for this breathtaking premise that every railroad in your group or every line or railroad needs to be revenue-adequate?

Isn't there some subsets of the industry that are only just barely revenue-adequate in total, that some parts of your industry or some parts of your firm will not be revenue-adequate, other parts will be more than revenue-adequate, and there's some sort of balance here, because you are expected to serve a
broad variety of customers with different abilities to cover all the costs?

MR. LUNDBERG: We have to look at each RailAmerica railroad as a separate railroad. They are separate entities, and their common carrier status is separate, and that's the authority under which we operate them, so each one has to be revenue-adequate on its own.

VICE CHAIRMAN MULVEY: So each one is a separate profit center then and therefore --

MR. LUNDBERG: Right.

VICE CHAIRMAN MULVEY: -- if it doesn't -- each one doesn't cover its share, then -- if every line, is not profitable, then we're going to spin off that line. That would be a reasonable thing to do, but would that be in conflict with the common carrier obligation?

MR. LUNDBERG: Well, if we had one of the properties that we didn't think fit our revenue portfolio, our criteria, rather, we would have the option to sell that to another short line operator, yes.
VICE CHAIRMAN MULVEY: That's all for me.

CHAIRMAN NOTTINGHAM: Thanks, Vice Chairman Mulvey. Mr. Lundberg, if I heard you correctly, you said a few minutes ago that Fortress -- and you referenced back to the analogy I think we heard yesterday from one of the witnesses that purchasing a railroad is not like purchasing a fast food chain and that Fortress did some due diligence and that Fortress is not shirking away from its obligation related to its ownership of RailAmerica and the different rail lines. Did I hear you correctly?

MR. LUNDBERG: Yes, sir.

CHAIRMAN NOTTINGHAM: Okay, good. What's your -- remind me again. What's your background? You joined -- when did you join RailAmerica?

MR. LUNDBERG: A year ago, when Fortress took control of RailAmerica.

CHAIRMAN NOTTINGHAM: And where did you work before that?
MR. LUNDBERG: I was 25 years with the Chicago Northwestern Railroad in Chicago, and I worked at Sealand and Maersk Sealand, the container shipping companies, and I worked for Great Lakes Transportation, which was a holding company that held U.S. Steel railroads, and I was General Manager of commuter rail in Boston, as well.

CHAIRMAN NOTTINGHAM: Is it fair to say that Fortress went out and looked for experienced railroad officials --

MR. LUNDBERG: Yes.

CHAIRMAN NOTTINGHAM: -- to help them with this new enterprise?

MR. LUNDBERG: Essentially we are the same group of executives that managed Great Lakes Transportation. Mr. Giles and I and the three others, we were together at Great Lakes Transportation, and all of my colleagues have significant Class I experience, yes.

CHAIRMAN NOTTINGHAM: And when you were hired, did you interview with Fortress
officials to talk about your credentials and that kind of thing?

MR. LUNDBERG: Yes.

CHAIRMAN NOTTINGHAM: Does Fortress look at and approve -- you mentioned your $300 million invested in infrastructure over the past five years, about $60 million planned for 2008 to be spent, $7 million, again, needed for repair of these tunnels at issue. Do you brief and get approval from Fortress of your RailAmerica's annual capital budget investment plans?

MR. LUNDBERG: Yes. On an annual basis, we will create the budget for all 42 railroads and the capital budget and make a presentation to our Board of Directors, just like all railroads do, and they will approve the budget.

CHAIRMAN NOTTINGHAM: And as any owner would, I assume, they have the prerogative to say, "Hey, you spent a little more there," or, "Wait a second. We think you're spending a little too much in this area. We need to see a
different, you know, set of priorities that
reflects the owner's priorities."

MR. LUNDBERG: Actually, it's a little
bit different. They have certain earnings goals
and standards, but as far as the expense side of
it, they really are not too interested in that.
They leave that up to us, because we're the
operating professionals.

CHAIRMAN NOTTINGHAM: So they're not
concerned about expenses?

MR. LUNDBERG: They're concerned about
the return from RailAmerica, and, you know, the
expenses are part of the equation, but they don't
get into examining each expense with us. They
leave that up to us.

CHAIRMAN NOTTINGHAM: But something
like a $60 million a year plan for capital, I
mean, they wouldn't get briefed on that --

MR. LUNDBERG: They get briefed on
that.

CHAIRMAN NOTTINGHAM: -- or generally
sign off on it?
MR. LUNDBERG: Oh, yes, they sure did, yes.

CHAIRMAN NOTTINGHAM: You mentioned that, in your view, maintenance on the -- over the years -- Mr. Buttrey, I know, asked about what appears to be a period of years of neglect of the line. In fairness, that period of years of neglect may well go way beyond RailAmerica's entry to the scene, but it also seems to have extended from 2001 on, not to say there was no maintenance.

I think you've made the point very clear that there was some maintenance that went on, some, but if I heard you correctly, you said that maintenance expenditures were adequate or respectable -- you pick the word -- when you look at the actual revenues that are being generated on that line as a way of measuring the adequacy of maintenance expenditures.

MR. LUNDBERG: Well, each line is different, and the CORP and particularly Coos Bay Line requires an extraordinary capital
expenditure. As I said, the last three years, 40 percent of the revenues went to capital expenditures, but we have lines that don't have the same geographic challenges or the harsh conditions where, you know, ten percent of the revenues is just fine or five percent, because the track structure does not deteriorate as fast as one in the mountains and the rivers and the swamps does.

CHAIRMAN NOTTINGHAM: So does the amount of traffic and the amount of revenue you're earning on a particular line dictate how well you're going to maintain that line?

MR. LUNDBERG: Well, the line -- our general philosophy is the line is maintained to serve the business that that line serves, and, again, a variety of -- you know, the FRA has a whole bunch of classes. Some lines, exempt status serves the business on a particular line just fine, and some we need to have Class III, and it's all over the place.

CHAIRMAN NOTTINGHAM: Well, here's my
concern. Clearly, when you purchase tunnels, you know, I might not expect Fortress to have combed the nation and walked and kicked every tie throughout your system when they acquire, but tunnels are a big deal.

Everyone knows you check out the tunnels, you know, that and large bridges, obviously. You're talking structures, and you're listening to somebody now patiently who has had some experience in this regard.

When I ran VDOT, if I had told the good people of southwest Virginia that we could only maintain Route 58 and the tunnels to Tennessee based on how much tax money was coming in and gas tax money was coming in from southwest Virginia, which I can tell you often was not a lot because there's just not a lot of folks out there, and they don't have large incomes, generally speaking, I would have been tarred and feathered.

I mean, you have a -- there is a moral and professional obligation to avoid
problems and to maintain infrastructure not based on how wealthy the people are that use it or how much they're paying you but because that's the business you're in, and you make sure that problems don't happen, or you get out of the business, and occasionally highway departments have to tell people, and it's very painful, that, "Hey, we can't -- we just can't justify replacing that bridge. We're going to have to close it, and there'll be a detour."

But I'm just concerned. I have this sense that, you know, you let it go into neglect because there wasn't -- you know, the shippers didn't really meet your definition of deserving or being eligible for those kind of investments.

MR. LUNDBERG: Well, they're certainly eligible for service, but, like every business, we have to look at the component parts, especially in the short line business where you have these lines that dead-end, I mean, and so that line serves those customers, and that's all it does, and in those instances you have to look
very carefully at the revenues and expenses on the line and make the ultimate decision of whether to stay in business or not, and I guess I'd say we're kind of like in the middle of that process.

We know it can't stand by itself. We're looking for other alternatives, and if we can find them, then abandonment is certainly a possibility.

CHAIRMAN NOTTINGHAM: You mention in your testimony that you had not -- you have not been invited to take part in discussions between the Union Pacific or the state and the Maersk Corporation, which is the large operator, shipping company and operator of port facilities around the world.

I have extensive experience working with Maersk in Virginia and with the railroads, and I'm interested to hear you say recently in response to my recent question that you actually worked for part of the Maersk family in the past.

MR. LUNDBERG: I did.
CHAIRMAN NOTTINGHAM: Have you reached out to them and talked to them about the prospects of a port investment?

MR. LUNDBERG: We have reached out to them finally, because the port, you know, Port of Coos Bay told us they couldn't share anything with us. They had signed a confidentiality agreement with an unnamed shipping company, so we finally did reach out to Maersk here in their U.S. commercial operations, and they told us that the prospects for the Coos Bay container terminal, while a theoretical possibility, are probably not a reality any time soon, but having said that, you know, that was their courtesy to us, I guess, and they can change their mind in a moment's notice.

Of course, business conditions can change in the container shipping business. They do all the time, and Coos Bay could become a really good option for them, but at this time, as far as we know, and again, Maersk is a customer of Union Pacific but not of ours, so we don't
I have that kind of a relationship with them.

CHAIRMAN NOTTINGHAM: Okay. Any other questions, Mr. Buttrey?

COMMISSIONER BUTTREY: No.

CHAIRMAN NOTTINGHAM: Mr. Mulvey, Vice Chairman Mulvey?

VICE CHAIRMAN MULVEY: I have a couple. I want to follow up on the Coos Bay Port. I understand one of the problems with the Coos Bay Port is its location in the sense that the port itself is very good. It's a deep draft port and all of that, but unlike Los Angeles, Long Beach, or Seattle-Tacoma or San Francisco-Oakland or Savannah or any of the other major ports. Such as New Orleans, there isn't much of a local market.

The hinterland does not have -- the immediate hinterland, anyway, does not have much of a demand, so virtually everything going into it would have to be either trucked or rail hauled quite a distance to markets. Is that really one of its limits?
MR. LUNDBERG: Yes. My understanding of, you know, the flow of cargo from the West Coast ports, cargo that was unloaded at Coos Bay coming from the Far East would be destined for the Midwest.

VICE CHAIRMAN MULVEY: Right.

MR. LUNDBERG: And so it would have to be hauled by train.

VICE CHAIRMAN MULVEY: So competing with Prince Rupert or something like that.

MR. LUNDBERG: That's right. Exactly.

VICE CHAIRMAN MULVEY: Well, that would suggest that the development of that port is a long ways off, but nonetheless, if indeed Los Angeles and Seattle-Tacoma and some of the others do eventually reach capacity, and the Mexican ports reach capacity, then this port has got something in the future.

Would that preclude you -- would that cause you to hold onto the CORP and cease operations over some number of years in anticipation that this might come back? So the
railroad is shut down for the time being, you are no longer going to serve the shippers who are there, but you're going to hold onto the right-of-way and hold onto the franchise, because in the future that port may develop. Is that a possible outcome, or would you sell the property before you did that?

MR. LUNDBERG: I'm not sure that's a possible outcome for us. I think that, you know, we have an option in addition to an abandonment -- excuse me -- file for a discontinuance of service, but I don't think we would go that route.

Our idea was the joint venture, because what if Maersk comes, and the state had said to us, you know, "We want an equity share in any money we put into it." Well, here's an equity share, and if Maersk comes, you get half, but having said that, you know, we know what our options are in terms of the Board's requirements of either putting the line back into service or filing discontinuance or an abandonment, and
we're going to pick one of those.

VICE CHAIRMAN MULVEY: Thank you. Mr. Strohmeyer, I don't want you to feel left out of this, and maybe you do want to feel left out of this, but you were talking about the fact that Class Is, that the Board treats Class Is and Class IIIs and Threes differently with respect to abandonments and whether or not we enforce our abandonment rules.

I do want to remind you, though, that very, very recently in the Harsimus case the Board did rule that the abandonment process was not -- it's before us now, so I can't talk about it too much, but nonetheless we did say that no, they did not -- Conrail did not do it properly, et cetera, and we'll send it back to them again, and there's been a few other cases, too, where I know that our staff looks very, very carefully at these abandonment proceedings to make sure that the letter of the law has been followed and that if it's not, we say, "No, we're not accepting this as an abandonment," and so I was somewhat
dismayed by your comments. Do you want to elaborate on them a little bit?

MR. STROHMEYER: I don't have a problem elaborating on it. If I had a little more time, I probably would have given you some of the case cites with regards --

VICE CHAIRMAN MULVEY: Could you submit those for the record?

MR. STROHMEYER: Oh, yes, I can submit them.

VICE CHAIRMAN MULVEY: We would appreciate seeing those so we see where you think that we were not acting even handedly.

MR. STROHMEYER: Well, it's a question of dotting I's and crossing T's. You know, just as an example, one of the cases that were cited recently in our Mississippi case was a case in Middlesex County, New Jersey, with a Conrail abandonment filing, circa 2006, AB167-1184.

Everybody would think it's gone, done, over with, no problem. I asked the Board to ask your staff members where is Norfolk
Southern and CSX's discontinuance filings in those proceedings, same with AB167-1188, along with AB167-1186. They're not there, and if you read your rules --

VICE CHAIRMAN MULVEY: They should be there.

MR. STROHMEYER: They should be there, and when you have a proceeding before you, and you have two other carriers that have common carrier obligations, and those common carrier obligations need to be extinguished, it's a precondition to actually extinguish the common carrier obligation of the last abandoning carrier, and you'd be there.

Well, they're not there, and the problem is the time frames for those exemptions for extensions have already passed. The deadlines are gone for asking to extend those proceedings. They're not there.

A mechanism of all of those exemptions have expired, because the underlying authorities have not yet been removed from
Norfolk Southern and CSX. It's three of them.

You corrected the fourth one on your own motion. I guess maybe the Board thought, "Well, we'll fix this problem," but it was the fourth one that you finally fixed. You didn't fix the other three.

Well, the problem is there is a shipper in Middlesex County in 1184 that moved its facility. It's an act of -- you know, they were a shipper. They received service in the consolidated rail operations, South Plainfield. They moved their facility to North Brunswick.

The first sales call I happened to take Mr. Riffin in on, it was his very first time in front of a real customer, and we had the problem of, you know, talking to them about, you know, providing rail service, and they looked at it and said, "Oh, yeah. Well, we have rail service. The real estate person who just moved us in here told us we had the tracks out back."

Well, we sort of knew the tracks out back were not necessarily going to be there, but we looked
into it, and all of the sudden we saw NS and CSX hadn't discontinued your authorities.

Okay, Conrail filed a notice of consummation of their abandonment. Well, how can you consummate an abandonment if NS and CSX hadn't sought the discontinuance of their authorities? You can't consummate the abandonment. It's just legally not possible.

In the same token, a little minor little glitch, you have to ask for an extension in a timely fashion. This Board just recently put forth two days ago in your abandonment filing you have to timely ask for an extension. Well, the time for timely asking for an extension has long since expired. The authority has expired. There is no abandonment authority.

So now we have the tracks have been pulled up. The right-of-way has been sold. The rails are gone. NJDOT has been given permission to modify a bridge which may prevent future rail service.

Conrail is not being held accountable
or NS or CSX, and what bothers us is these are Class Is. What really bothers us is in AB167-766, they got it right, so they got the first one right, and they got the second one wrong, and they got the third one wrong, and they got the fourth one wrong. They got the fifth one wrong, but you corrected it for them.

I got the tenor and tone in that was, you know, you're breaking their chops. Our part was, "Wait a second. How many times do you have to get this wrong before you get it right?"

In the same token, we've seen it in a case you recently did in AB33-888, Bridgewater Resources, same underlying problem. Right-of-way was gone. Now you're being asked to deal with the problem.

Same thing down in Maryland. We had the Maryland abandonment, the American Short Line Light Rail Line, a line you're all familiar with. Portions of the line have been removed. One other element that we've got with regards to that was MTA came in and made statements to you.
They made an honest-to-goodness statement to you, and it really concerned us, and they said, "Well, we only blocked the line in one location." The record contains a clear document that said, "No, we blocked it a little more than that."

Norfolk Southern had told you there were two filings. There were actually two sales with regards to a Conrail sale of that line. You only addressed one.

These are some of the things that we're concerned over, and because it's a big carrier and because some of the other issues are there, we're concerned that, you know, a Class I is being given a free pass, and I'm concerned over that. I'm really concerned over some of this stuff, because it is a Class I, and there really isn't an excuse for it.

VICE CHAIRMAN MULVEY: Well, I would like to say on my behalf, and I'm sure my colleagues will agree, that we try not to treat — we will try not to be treating Class Is and
Class IIIs and Threes differently with regard to their responsibilities under the law.

Let me turn to Mr. Timmons for one final -- question here, and that is you said that you'd been on the Hill with the AAR, trying to see whether or not you can get support for Price-Anderson, a Price-Anderson type legislation or something else that might cap liability requirements, and you say you haven't been very successful with it.

Is that because you've been unable to forge an alliance with the shipping community, and is that related back at all to some of the re-reg bills? Is that all part of one big package, or is this a separate problem that you're running into with regard to Price-Anderson?

MR. TIMMONS: Let me just say that I think there is an awful lot of skirmishing associated with the insurance industry, with lawyers, with manufacturers, and so we have not successfully been able to kluge any kind of a
working relationship.

Now, to be fair about this, the railroad industry has basically developed this thing and then tried to shop it around. In some instances, it got lukewarm responses. In others, it's got you guys, "No, we're not interested in that at all."

I think on Capitol Hill you've got a problem with staffers who are really not ready to take on some huge special interest conflagration. In other words, you've got a whole variety of lobbying crews ready to descend on this, because it's got some fairly significant financial implications once you build this thing in.

It's also got a population of folks who are going to have to contribute sizeable amounts of money up to an incident fund threshold, and this -- in this piece of draft legislation, it was $10 billion, and so you are going to get to that threshold through a $5,000-a-car contribution by shippers in the main, and then the Secretary of Transportation was going to
judge whether you really needed to reach the $10 billion threshold or whether she could terminate it, and then you didn't have to contribute until it was exhausted through some incident.

So there are a lot of -- there are a lot of players that are less than comfortable with how this thing is going to work out, but the reality is we couldn't get -- we couldn't even get any traction for a forum or a sit-down discussion. I mean, there's nothing -- it's crafted for the railroad industry, but as you know, there's nothing revolutionary about this idea. I mean, it's been around for 50 years.

So, I mean, that's kind of a windy response to your question, Mr. Vice Chairman, but that's the way it is.

VICE CHAIRMAN MULVEY: Thank you very much.

MR. TIMMONS: Yes, sir.

VICE CHAIRMAN MULVEY: That's all I have.

CHAIRMAN NOTTINGHAM: Thank you. Just
a quick follow-up to that, General Timmons. You mentioned a number of interest groups being concerned about any legislative proposal that would provide a Price-Anderson type solution. You mentioned lawyers. Is it fair to say that -- and you mentioned difficulty even getting a meeting to really sit down and have an honest discussion.

MR. TIMMONS: Yes.

CHAIRMAN NOTTINGHAM: In your experience, is one of those players, one of those interest groups that is not being particularly helpful, to say the least, in advancing progress on this the trial lawyers?

MR. TIMMONS: Yes. Yes. I mean, there are a number of people that see either potential revenue stream or some other implications associated with working in this little cluster. They're going to surrender something.

I mean, very honestly, the chemical industry is very concerned about this. They are
going to end up contributing a lot to it. Everybody that's in it, whether you're a shipper or a car owner and manufacturer, or whether you're a railroad Class I, Two, or Three, must foot the bill for thresholds of insurance that you must carry.

So before you can get into it, you've got to join up and demonstrate to the Secretary that this is how much insurance that we're covering, and then you become part of this incident fund that takes care of things if your insurance is exhausted based on an incident, litigation, and cleanup and things of that sort.

CHAIRMAN NOTTINGHAM: Thank you.

MR. TIMMONS: It is -- just one last thought on that. Chairman -- or Commissioner Buttrey commented before, and I think he's very right when he says this, that things happen expeditiously when there is a catastrophe of some sort, some dire circumstance.

Generally, in the shortline Association, and I think it's fair to say this
for the AAR, as well, we've been fully aware that it would take another major incident, and someone would then scramble and say, "Where is that draft legislation those railroad guys were talking about last year or a year and a half ago? Where is that?"

I mean, that's the kind of thing that will drive everybody into one room and sit down and get serious about it under all kinds of duress, but lacking that, there is no compelling requirement for anybody to come together and sit down. I mean, we think there's a compelling requirement. These men at this table think there's a compelling requirement.

The AAR and all of its members think there is a compelling requirement, but we are over here as one cluster of guys clamoring, and then there's a whole bunch of other players that must participate that are not too excited about it.

CHAIRMAN NOTTINGHAM: Right. I understand, and thank you for adding some context
to that very challenging but very important situation, and you have my personal commitment. I'll do anything I can to help bring parties together and to help get us to a better place. Just as a taxpayer and a consumer, it just worries me that we're just setting this up to wait until a disaster, and then we'll scramble, and it'll be too late, sadly.

Mr. Lundberg, can I get a commitment from you that you will be briefing -- you or someone high up in RailAmerica will be briefing Fortress management on how this hearing went and some of the high points of where we stand now with the predicament out there in Oregon?

MR. LUNDBERG: I certainly will.

Certainly will.

CHAIRMAN NOTTINGHAM: I don't know, and I hazard to even go down this path, but the statement that Senator Wyden, a very distinguished senior member of the Finance Committee, someone who I would think Fortress would have every reason to want to pay attention
to, not to mention Senator Smith, a very
distinguished senior member of the Commerce
Committee and other committees, but Senator Wyden
said something about a 24 or so million dollar
investment or loan coming from Fortress to
Michael Jackson for his Neverland Ranch, playing
out in the press right at the same time that the
people of Oregon are being told there's no money
available from Fortress for its subsidiaries'
rail maintenance.

I mean, if that's remotely accurate,
could you -- have you advised Fortress that
that's not particularly helpful as you're trying
to tend to, you know, a veritable brush fire out
there of ill will and everything?

MR. LUNDBERG: That's something that I
don't really know or understand what that's all
about and haven't paid much attention to it, but
I'm sure they are, and they will -- we'll tell
them what happened here today.

CHAIRMAN NOTTINGHAM: And yesterday, I
hope.
MR. LUNDBERG: And yesterday, too.

CHAIRMAN NOTTINGHAM: Okay, because I think it might be helpful to have Fortress come before us at some point directly and hear -- they seem to be involved with setting and approving budgets, hiring key staff, making the key decisions, not day-to-day but big picture, and we haven't really seen much or heard much from them except when they wanted our concurrence to buying you guys, and in that case we got very little comment.

It was done under an exemption procedure, basically, as a non-rail carrier, but anyway, I do -- I appreciate your commitment to keep them apprised. They need to be apprised. They need to know that it may not just be poor Paul who sits here and suffers through all these questions, but it may be someone from Fortress the next time, and they just need to be aware of that.

MR. LUNDBERG: Thank you, and can I make a little commercial here at the end?
CHAIRMAN NOTTINGHAM: A short one,

yes.

MR. LUNDBERG: Mr. Hamberger said that, you know, that the rail industry is not at war with its customers, and I just wanted for the record to say that we're not at war with our customers on the CORP, and Mr. Ford, who was here yesterday and eloquently explained his feelings, he's our biggest customer on the CORP, and we still, notwithstanding the closure of the Coos Bay Line, still ship 8,000 cars a year for him, and he's very important to us, and we appreciate his business and all of the customers out there. That's what we're in business to do. Thank you.

CHAIRMAN NOTTINGHAM: Well, thank you, and rest assured this Board is not at war with anybody, either. We just are trying to do our job and get to a better place on a controversy that just has been lingering and languishing with no progress, and we just want to get to a better place as fairly as we can to all the parties' interest.
Any other questions, Board members?

COMMISSIONER BUTTREY: Just a comment, General Timmons, in response to your very last comment. I just suggest that there is at least one other way to get this done that I can think of, but I can't talk about it now. Thank you.

MR. TIMMONS: I'll get in touch with you at a later date, sir.

COMMISSIONER BUTTREY: I probably can't even talk to you about it, but --

MR. TIMMONS: Okay.

COMMISSIONER BUTTREY: -- there is another way.

CHAIRMAN NOTTINGHAM: Any other questions?

VICE CHAIRMAN MULVEY: My only comment, my final comment, was that some people said that people only act when there is a crisis, and Commissioner Buttrey mentioned the collapse of the bridge in Minnesota, and we haven't acted even on that, so even a crisis is no guarantee that we'll act, but hopefully we'll act before
there is a crisis. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, panel. You've been very patient. You are dismissed. For those of you who are traveling, I wish you safe travels home today or whenever you are traveling.

A little housekeeping, scheduling, we will break now for 45 minutes, return in exactly 45 minutes and get through the remaining panels and look forward to everyone being back, and thanks for your patience.

(Whereupon, the foregoing matter went off the record at 12:37 p.m.)
CHAIRMAN NOTTINGHAM: Good afternoon. Thank you, Panel, for your patience. We will reconvene this Surface Transportation Board hearing on the common carrier obligation. We are delighted to have a distinguished panel before us this afternoon, and without further ado, we will turn it over to them.

Our first speaker will be Mr. Steve Sharp from the Arkansas Electric Cooperative Corporation. Welcome, Mr. Sharp.

MR. SHARP: Thank you, Chairman Nottingham and Vice Chairman Mulvey and Commissioner Buttrey. We appreciate the opportunity to address you today on this important topic.

As the Board's notice states, railroads have a statutory duty to provide transportation or service on a reasonable request, even where providing such service would be inconvenient or unprofitable. AECC's
experiences in recent years suggest that the railroads have repeatedly failed to satisfy even a loose definition of the common carrier obligation.

The railroad industry today is neither highly regulated nor truly competitive. As a result, to the extent that the railroads are not currently meeting their common carrier obligation, we believe the remedies will require either increased regulatory requirements, increased competitive pressure, or both.

In the Class I panel earlier, it was mentioned that sometimes there are differences between customers and the folks that come to Washington sometimes to represent them, and in my case that's one of the reasons that I come is because we are a customer. My responsibility is to provide the fuel for our power plants, whether it be coal, natural gas, or fuel oil, so it's part of my day-to-day obligations, and so my viewpoint on some of this is a little different sometimes than, as the Class Is pointed out, than
someone who is not involved in these day-to-day actions.

I'd like to kind of change my order up here. I'm certainly summarizing my written comments, but because there's such a short time to do so, rather than go through all my examples that we gave of situations that we feel are problems with the common carrier obligation, I'm going to start with our specific recommendations to the Board, which -- a summary of those, which is included in the written comments.

But our specific recommendation to the Board would include, number one, the Board should reject railroads' attempt to blame higher rates and poor service in increasing traffic volume. Rather, it should demand that the railroads provide sufficient investment in maintenance to handle their increasing business while meeting their common carrier obligation.

Number two, the Board should recognize that as railroads achieve revenue adequacy, any theoretical justification for
letting them exercise high levels of market power is reduced or eliminated.

Number three, the Board should consider expanding the abilities of shippers to make use of the private cars they supply and to protect such shippers from unreasonable deterioration in the service levels provided by railroads.

To the extent that such deterioration necessitates expansion of private fleets after the time of the shipper's initial commitment to supply rail cars, it reflects the type of bait and switch in which the shipper bears all the fleet cost consequences associated with the railroad's decision to provide diminished service.

Number four, the Board should require railroads to accept shipments tendered in accordance with industry protocols. Imposing new and costly burdens on rail customers, particularly those who have made the investment to provide their own cars, should not be
tolerated.

Number five, the Board should establish an expedited procedure for shippers to obtain service over multi-line routings that are more efficient than existing single-line service. At least for unit train shippers, there should be a rebuttable presumption that shorter routes are more efficient than longer routes. For captive shippers, such a demonstration should be deemed a sufficient basis for -- excuse me -- for competitive access relief.

Number six, the Board should establish meaningful accountability when railroads fail to perform due to management decisions. As Commissioner Buttrey said a little earlier today, bad things do happen. It's certainly not -- we certainly don't think it's the intent of railroad management or anyone else to have such things happen, but they do happen from time to time, and when this happens, you know, we think there should be accountability with the railroads.
From the Board's standpoint, this could include making it easier for a shipper to obtain substitute service, especially when a carrier hasn't followed applicable maintenance guidelines or hasn't taken reasonable steps to ensure adequate capacity.

Number seven, the Board should devote careful attention to the legitimacy and duration of embargoes. Embargoes have been talked a lot about today. This is a little bit different aspect of embargoes, but in our case the particular embargo of concern was imposed on account of congestion on the rail system, and, there again, there doesn't seem to be any clear guidelines as to when an embargo can be called or the duration that it can be imposed, and we think that would be very helpful.

Number eight, the Board should consider -- should reconsider paper barriers and the bottleneck rule in the context of the market power they convey to railroads and the inhibitions they place on a shipper's ability to
receive reasonable service under the common
carrier obligation. And lastly, in the event of
chronic or repeated problems, the Board should
not hesitate to facilitate and encourage means to
bring market forces to bear such as through the
Feeder Line Development Program.

In the remaining time I've got, I
would like to go back and highlight some of these
specific examples that were also included in the
written comments. I'll try to go through these
very briefly, as well.

The first, the well publicized
infrastructure failure that began in May of 2005
out in the joint line, the Powder River Basin,
this produced major operational and economic
disruptions for us, for AECC, and numerous other
coil shippers. The problem resulted from the
failure of the railroads to maintain the ballasts
underneath the joint line in stable condition.

Part of the railroads' obligation to
provide common carrier service on a reasonable
request is an obligation to maintain
infrastructure in a condition that permits such service to be provided, and we feel like failure to do that is certainly a failure to fulfill their common carrier obligation.

Following the service disruptions that began in May of 2005, UP imposed an embargo on any new business out of the Powder River Basin on July 18, 2005. This embargo left Burlington Northern Santa Fe as a de facto monopolist for new PR business, new PRB business, even to points for which UP could have otherwise competed. As a result, price levels on new PRB movements increased dramatically.

UP did not lift its embargo until March 27, 2007. It's unclear why the UP embargo lasted so long. UP's declaration of force was lifted in November of 2005, indicating that its ability to move committed tonnage had been restored.

The next example that I would like to briefly address is that the railroads have advanced and cultivated the proposition that
volume increases have used up or are using up excess capacity. According to the railroads, shippers and the Board should assume that capacity will be tight, and degradation of rail price, service options are basically inevitable.

In support of this proposition, railroads have frequently cited a study conducted by Cambridge Systematics. A detailed response to their study has already been provided to the Board by AECC.

As we review it, the CS study not only does not support the railroads' argument. It actually refutes it. The study highlights the way in which an expanded traffic base would support increased infrastructure investment at current rates and the way ongoing and future productivity improvements will increase the through-put capacity of the existing network without major investment.

Railroad argument is further nullified by the railroad's long history of investment to expand the capacity of the PRB
joint line in advance of volume increases. At a more fundamental level, the railroad argument is completely inconsistent with the well recognized fact that railroads possess economies of scale, and there are a couple of other examples in the written testimony, and I'd be happy to answer questions at the end. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Sharp. We appreciate you keeping the time limit. Thank you very much. We'll now turn to Mr. Andrew B. Kolesar from the Concerned Captive Coal Shippers.

MR. KOLESAR: Good afternoon, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. My name is Andrew Kolesar. I'm an attorney with the law firm of Slover & Loftus, and I'm here today on behalf of the Concerned Captive Coal Shippers. The Concerned Coal Shippers are a group of electric generators that consume substantial quantities of coal that is mined and transported from both eastern and western origins.

I'd like to begin, as I think I must, by thanking the Board for invoking this proceeding. We think that the common carrier obligation is certainly foundational to much if not all of what the Board does, and your interest in highlighting that obligation is certainly something that all of the members of the group appreciate.

We have submitted written comments, as you are no doubt aware. In those comments, we explain what we regard as the particular significance of the fact that the Interstate Commerce Act and the common carrier obligation itself have been reenacted without fundamental
change many times over the course of its 100-year history in the law.

Under governing precedent, there should be a great deal of deference given to the fact that Congress has seen the interpretation of the common carrier obligation and has left it in place, and I believe the Board should regard that reenactment and that Congressional seal of approval as an indication that the historic interpretation of the common carrier obligation really is something that should guide future deliberation as to how the obligation ought to be enforced.

Our comments address a decision of the Supreme Court that was actually issued within a decade of that first inclusion of the common carrier obligation and the statute. That's the Pennsylvania Railroad vs. Puritan Coal Mining Company case, and it sets forth the Court's understanding of what the common carrier obligation exactly means.

The case holds that there can be
circumstances in which a carrier will be excused from its failure to fulfill the common carrier obligation, but there are specific limits to those circumstances. In particular, the Court stated that a carrier would be excused from providing rail cars on reasonable request if its failure to furnish those cars was the result of "sudden and great demands, which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full."

Where a carrier has abundant reason to anticipate increased demand and has been telling Wall Street interests and others that it sees huge demand in the future and that that will be a great aid to its pricing power, we don't believe that we're in a situation that's encompassed within the Supreme Court's Pennsylvania Railroad analysis.

There is an analogy that has been used in many instances by railroads, and it was used again this morning by CSX. It tends to draw a little chuckle whenever it's raised. It's that
you don't build a church for Easter Sunday.

We think that that analogy doesn't quite hold for some very serious reasons. Without getting into the philosophy of church architecture, I think that we can all agree that there are differences between churches and railroads, and a church does not hold a common carrier obligation. The railroads do, and in the Pennsylvania Railroad case that I just mentioned, their obligation is excused where there are unexpected demands.

It may very well be the case that a huge crowd is expected on Easter Sunday, and if a railroad faced that situation, a peak season where traffic levels were higher, they would hold an obligation under Pennsylvania Railroad to have the capacity sufficient to meet those reasonable requests for service, so I wanted to raise that issue.

Another point that we make in our comments at pages 36 to 39 is that there are a number of cases that specifically reject the
notion that a carrier can rely upon questions of
profitability to decide whether it wants to
provide service, and the cases hold "a railroad
cannot lawfully make fulfilling their statutory
obligations contingent upon whether they think it
is worth it to do so," and that, of course, is
from the Board's own Pejepscot Decision from May
15, 2003, that we cite in our comments.

A similar quote, "Railroad may not
refuse to maintain service when it becomes
inconvenient to do so or because profits are
decaying," that from the General Foods decision
from the Maryland District Court, 1978.

We think there are several key
principles that follow from the historic
understanding of the common carrier obligation.
First, as I mentioned, the obligation has a
longstanding history in the law, and the repeated
endorsement from the courts and from Congress in
the reenactment of the statute we think is
persuasive evidence that the historic
understanding should prevail.
Second, questions regarding the exact parameters of that obligation are committed to the sound discretion of this agency. Third, precedent supports the view that a failure to provide adequate service will be excused or demands for service arise in a manner that the carrier could not reasonably have expected or anticipated.

And fourth, failures to provide adequate service will not be excused where carriers have acted in a manner that is either designed to create or perpetuate scarcity of transportation service on their lines.

We took a look at the railroads' written comments, and we thought there were two points that really jumped out that are consistent with what it is that we've had to say, or at least relevant to what we've had to say. First, I think the railroad, the AAR comments make perfectly clear that the railroads do anticipate increases in demand on their systems in the future. Again, that we find to be indicative
that we are not in a situation such as the Pennsylvania Railroad case.

The second point that the railroads seem to make in their comments that we think also bears mention, and that is the notion that the railroads will act in a manner with respect to their customers that is designed to ensure that they do the best that they possibly can for the largest number of shippers and that the goal of societal efficiency will best be served by this agency stepping back and allowing the railroads to do what they do best.

Not without -- when you take away from the knowledge that the railroads have of their own industry, that argument we believe crosses the line into saying that they should self-regulate and that there really should be no regulatory enforcement of the common carrier obligation, and we don't think that that is consistent with the historic notion of what the common carrier obligation means and the role of this agency in that process.
One other point that was made this morning that we find to be particularly important, we address the subject in our written comments of the timing of a carrier's response to a request for a common carrier rate. That is an issue of some significance for coal shippers.

We were very heartened to hear this morning that the railroads now, at least, view it as their policy of responding immediately to requests for common carrier service, and we followed the dialogue and appreciated the dialogue that went on about the possibility of conferring with the General Counsels of the railroads if need be, and then the Chairman's remark that that really should not even be necessary, that the railroads should be of the view that providing common carrier rates to shippers on request, even in the context of their negotiations of a new contract, is something that is terribly important.

You know, another thought comes to mind with respect to Commissioner Buttrey's
question this morning about the perceived arrogance on the railroads' parts and how they might go about improving relationships with their customers.

I obviously can't speak to interpersonal relationships between marketing officers and their coal shippers in all cases, but from our perspective, the way that that relationship can sour is where you have a railroad that is the only source of rail service for a given destination, and where that situation exists for many years, there is a risk that they will not be as responsive to their customers as they would be if there were competition there.

In order to salvage that relationship or beneficiate that relationship in some way, charm school may not be the answer, but I think the Agency has an important role to play in that process in terms of effective regulation of service, effective regulation of rates.

If both parties to that shipper-carrier discussion know that the Agency is there
to back up the needs of the shipper, then that
will alleviate the risk, we believe, that there
will be abuses in the treatment of the shipper.

Thank you very much, and I will
welcome your questions and comments.

CHAIRMAN NOTTINGHAM: Thank you, Mr.
Kolesar. Now we will not turn to Mr. Michael F.
McBride from the Edison Electric Institute.
Welcome, Mr. McBride.

MR. McBRIDE: Thank you, Mr. Chairman,
Mr. Vice Chairman, Commissioner Buttrey. I am
Michael McBride. I'm with the law firm of Van
Ness Feldman. I'm not actually with Edison
Electric Institute, but it's been my privilege to
represent it for my entire legal career on this
particular subject.

In fact, I guess I was nominated
because I lived through the history of the
development of the common carrier obligation in
its most recent battle, and that was the
radioactive materials litigation, so I feel a
little like you, Vice Chairman Mulvey. You know
you're old when you're the guy that lived the
history that people now want to be educated
about, but, anyway, here I am, and it's a
terribly important subject to us for some reasons
that may not be immediately obvious to everyone
in the room.

We've frankly been a little stunned
listening to some of the testimony, because we
think there is a disconnect, a fundamental
disconnect between the need of the utility
industry for not only the shipment of coal --
you've just heard that from the prior two
speakers -- but also the shipment of materials
that are hazardous, because we cannot operate the
coal-fired power plants in this country in the
main and satisfy our clean air obligations
without anhydrous ammonia.

You may have heard this morning, for
example, the gentleman from the Chicago South
Shore and South Bend Railroad talking about TIH
shipments on his railroad. Well, it was only
afterwards I had a chance to have a conversation
with one of the panelists, and it dawned on them that maybe those shipments are moving because they move shipments to the utilities that are served by that railroad.

So the railroads say, and they've said to us repeatedly and over the years and in this room over the last two days, "We love to haul coal." They do love to haul coal, but if they love to haul coal, then they have to haul coal. Then they have to haul anhydrous ammonia, or we can't operate the plants that they've come to love.

So it's terribly important for you to realize that I speak for the people who are 95 percent of the ultimate customers of the shareholder-owned organizations that provide electricity in the country, 70 percent of the U.S. electric power industry, and EEI considers this proceeding to be of extraordinary importance because of that disconnect and also because we use chlorine at nuclear and other plants to keep intake pipes clean and for related purposes, and
the facilities can't operate without that.

In going back to what I mentioned about the history that I lived through, my very first cases before this Agency's predecessor were the radioactive materials cases about which you've heard so much. It led to the Akron, Canton case and the Conrail v. ICC case, and we need to clear up something that has become sort of a creeping ambiguity in the discussion in this proceeding and in the comments, and the issue is whether the common carrier obligation is absolute, and the answer is yes in a very important respect, and the Sixth Circuit's decision in the Akron, Canton case speaks directly to this.

The Court said, "The Commission's deference" -- and this is the Interstate Commerce Commission it's talking about -- "to the safety regulations of its sister agencies must extend only this far. A carrier may not ask the Commission to take cognizance of a claim that a commodity is absolutely too dangerous to
transport if there are DOT and NRC regulations
governing such transport and these regulations
have been met."

The issue in the case was the
railroads said, "We're not common carriers,
because we never held ourselves out to be." We
said, "That's not the law. If we tender the
shipments in accordance with DOT and NRC
regulations, you absolutely have a duty to
carry," in that case, radioactive materials, and
the Court agreed with us.

This went to the Supreme Court twice,
cert denied. The D.C. Circuit said the same
thing later in the Conrail v. ICC case and that
there is a comprehensive set of regulations at
DOT and NRC that govern these shipments, and I
think, as the Board knows only too well, just
recently DOT has engaged through FRA and two
additional rule makings with respect to tank
cars.

So the Agency with the safety
authority is on the job, and when Congress
created DOT in the mid-sixties, it separated the
safety functions of the ICC from the Commission
and gave them to DOT and left this Board's
predecessor, now this Board, with the economic
regulation, put the safety regulation over there,
and, Mr. Chairman, you came from DOT, and I'm
sure you know they have expertise over there.

They have a staff that deals with these things. You have not been blessed with an
everous staff, and I dare say, although I know
what a lot of people do around here, I don't
claim to know what everybody does, but I'm not
aware of very much safety expertise at this Board
as opposed to over at DOT or at the NRC.

And so I think it's terribly important for the agencies of the government to
stick to what it is that they were assigned by Congress to do, and if the railroads have a
problem with the safety of anything that is transported on them, the teaching of the
radioactive materials cases is they know where to go. They are to take their concerns to the right
agencies.

As the Court of Appeals again said in the Akron, Canton case, and what I read before is on page 1169, 611 Fed.2, here is what the Court said in footnote five on the same page: "We cannot refrain from noting at this point that none of the petitioner railroads has availed itself of opportunities to comment upon the safety regulations of DOT and NRC concerning the rail transport of nuclear materials." In other words, the Court was saying, "You know where you're supposed to go if you've got a problem."

We want these materials to be transported as safely as possible. There has never been a release of radioactive materials in the rail or truck transport of which I'm aware in these large casks, which are themselves licensed for safe transport.

We're all in favor of safety in this room, but it starts with the common carrier obligation, because we also showed, and your predecessor found in the radioactive materials
cases, that the railroads were 14 times safer than the truck mode, and one of the additional reasons for the Court's holdings were that the public interest demanded that the railroads haul those materials precisely because they were the safest mode available to us.

So the public interest obligation simply requires them to do this. We can then talk about all the other terms and all the things that have been debated over the last two days, but we have to start with what the law requires.

I should also point out to you that we may be unique in another sense, and that is we're the only other common carriers besides the railroads who are testifying. Utilities have a duty to serve. They're happy to do so. They have an obligation that they do not shirk and that they're held to, and we think the same standard has to apply to other public service companies.

When you buy a railroad, that's the business you're into, and that's just the way it
is, and then you have to work through the
government to determine the extent of your
obligations. You can't decide for yourself what
your obligations are.

Now, I'm not going to read all of
what I wrote to you. I hope you've had a chance
to read it. I sent you on the back 20-some pages
of my comments, the history on this subject. I
was asked to write it so that it would be in the
record.

We certainly don't argue that in all
respects the railroads are wrong or that they
don't have legitimate complaints. We
acknowledge, for example, that if there is a
physical impossibility to serve everyone, then
obviously there has to be some kind of
reasonableness attached to this, but that doesn't
mean they can refuse to serve anyone.

Now the railroads themselves in their
10K statements, and I gave you the references to
these, too, admit what I've just said to you in
those that spoke directly to it, and, in fact,
you know, Sherlock Holmes wrote about the dog
that didn't bark.

Well, there's a dog that didn't bark
in this proceeding, and that's the Canadian
National. If you notice what it said in its 2007
annual report, it said that CN "as a common
carrier has a duty to transport . . . hazardous
materials such as chlorine and anhydrous ammonia,
commodities that are essential to the public
health and welfare."

Well, I submit to you that a company
could not say that to the SEC and then come in
here and argue that they shouldn't have to carry
these materials, so I think that there is
something profound about the fact that CN isn't
arguing with the need for it to haul these
materials or that they are essential to the
public interest.

So, please keep in mind that this is
a rail industry network, that it depends on more
than just coal or more than just grain. We don't
move these things and use these things for the
fun of it. We move hazardous materials because
we have to, and they do, too.

So, let me, if I may, in the
remaining time, Mr. Chairman and Commissioner
Buttrey, I wanted to respond to some of the
points that each of you made in your opening
statements or during the course of the last day
and a half. I'll try to be helpful to you.

Commissioner Buttrey, you said that
the common carrier obligation may change over
time. I respectfully submit that in the respects
that I've said today it does not, because not
only is Mr. Kolesar correct that Congress has not
sought to change it after the court decisions
that I've referred you to and that it is
statutory, but also with respect to an issue
that's come up about exemptions.

The common carrier obligation being
statutory remains. When this Board issues an
exemption, it's simply saying, "We don't need to
regulate, because there's no market power and no
other need to regulate," but the common carrier
obligation is still in the backdrop and may resume if the Board determines that the exemption should be revoked.

You said, Commissioner Buttrey, that the railroads were not exempt from the antitrust laws, and we agree with that. In certain respects, price fixing, collusion, carving up markets, it's true, but the restrictions, their exemptions from the antitrust laws, are not narrow.

They're broad because of the Keough decision, because the Supreme Court of the United States reaffirmed in Square D, said that anything that's subject to the regulation of the ICC or this Board, they are now also exempt from under the antitrust laws, and that's our problem, so that if we have problems about a number of the things you've heard over the last two days, there may not be an antitrust remedy. There may only be a remedy at this Board.

Number three, you said that Staggers did not promote competition in the rail industry.
Well, I lived through it. I helped write some of the testimony and the legislation that led to it, and I brought out my dog-eared copy of the committee report to say to you, respectfully, that I disagree with that.

There are a number of respects in the rail transportation policy in which Congress indicated that the 40-something Class Is at that time were supposed to keep competing and that the ICC, now the Board, were supposed to encourage that competition, and there were various provisions of the statute that we thought were designed to promote that, terminal trackage rights, reciprocal switching, the public interest standard in mergers.

We thought we were entitled to bottleneck rates and in one respect that this Board has been commendable in enforcing, and that's the right to get a certificate to build a new line, whether at a plant or into the Powder River Basin for the DM&E, but unhappily for us, we view various provisions of the statute that
were designed to promote competition as not having been applied in that fashion, and that's our concern. If the statute had been applied in the fashion we thought it was intended to be applied in 1980, I'm not sure we'd even be seeking legislative changes.

Mr. Chairman, you made some comments about things that you said the Board had not ruled for the railroads on, and I just wanted to comment on a couple of those. We have no quarrel with what you said about costs of capital or about the PICO lines case, but I do want to say that on the fuel surcharges, that was a limited victory at best, because it was prospective only, and a lot of the shippers have explained to you that the fuel surcharges have been baked into the base rates and then surcharges piled on top of them, which seems to us to be just another version of double-dipping.

We know you have a case pending. The whole shipping community is awaiting the outcome of that. I don't want to suggest that you've
pre-decided the case. I'm sure you haven't, but people are anxious to see whether there is any more to the victory, small as it was, than that.

And finally, on the small rate case guidelines, I just wanted you to know that the entire shipping community, it seems, is awaiting the decision in DuPont vs. CSX, because the $400,000 cost estimate that most people bandy about is a real estimate and maybe a minimum for trying one of those cases until issues get resolved, and the million dollar cap over five years on relief is a real impediment.

Businesspeople make real serious decisions about whether to bring cases here on a cost-benefit basis, and risk is a factor in those cases, too, and so they just want to see what the guidelines really mean in application. So I just wanted to say to you the jury's out, I think, on some of the things that you talked about.

Let me just try to wrap up by saying that if there is to be any change in the railroads' common carrier obligation, including
any cap on liability as the railroads have proposed or a refusal to carry certain commodities, neither the Board nor the railroads are empowered to take such actions.

Rather, Congress must do so because of the existing statutes, and EEI is and it has always been willing to discussion legislative issues with the railroad industry, but it does not, respectfully, believe that this is the proceeding in which it is appropriate to do so, but I'd be happy to answer any of your questions on that.

I should simply say to you that I'm not the guy with the authority to negotiate, but I know my principals are always willing and do talk to the railroads about these matters from time to time. There just simply, in my view, haven't been sufficient such communications, but particularly, for example, on Price-Anderson, we're the experts on that.

That applies to us, and it applies to the railroads when they move our nuclear
materials, and we are more than happy, and we
have said so, to the railroad representatives in
this room to sit down and talk to them about that
very subject and see if we can't work through it
with them. Thank you very much.

CHAIRMAN NOTTINGHAM: Thank you, Mr.
McBride. We'll now turn to Mr. Peter Pfohl from
the Western Coal Traffic League.

MR. PFOHL: Good afternoon. I'm Peter
Pfohl with the law firm of Slover & Loftus. I'm
here today on behalf of the Western Coal Traffic
League, who regularly participates before the
Board.

We're an association of approximately
18 electric utilities that moves collectively 140
million tons of coal annually from western coal
mines. We're happy to be here today.

The Coal League recognizes that the
movement of coal by rail is notably different
than the movement of TIH commodities that we've
heard much about over the last few days. In this
respect, the railroads aren't attempting to
demarket coal or otherwise drive coal off their systems. To the contrary, they're doing their best to move as much as they can.

However, the Coal League members do have concerns about, in the existing market environment, the railroads do have economic incentives to create supply and demand and balances or engage in certain practices that could put them at odds with their fundamental common carrier obligations.

Therefore, the common carrier obligation is really of vital concern to the Western Coal Traffic League and coal shippers generally. Quite simply, our members cannot meet their obligation to satisfy their customers' electric power generation demands unless the railroads adequately meet the utilities' service needs and fulfill their common carrier obligation.

The Board's notice in the proceeding discusses increasing queries about the extent of the railroads' common carrier obligation. I
think a reason for this is that the railroads have been engaged in various initiatives or practices that either directly or indirectly impact common carrier obligation issues, which we've heard a lot about over the last few days. WCTL addresses some of these practices in our written comments. We don't stand here today and ask that any particular common carrier practice be banned as unreasonable impingement on the common carrier obligation. However, that does not mean that the Board has no regulatory responsibility to enforce the obligation on its own accord absent a complaint or to conduct appropriate regulatory oversight, which it fully is doing here, and we're glad to see it.

Of course, the Board has the ability, the responsibility, and the right to step in and address any unreasonable practice, as it correctly did in the Ex Parte 661 rail fuel surcharges proceeding, and that was without a complaint being filed.
The carriers argue that the common carrier obligation is not absolute, and Mike addressed this somewhat. I don't think this point is greatly disputed, at least in terms of place and times of service issues.

What is disputed, though, is the railroads' apparent contention that the Board should review any practices by railroads from the sole perspective of the railroads. Under governing precedent, the question is not whether the practice can be described as rational from the railroads' private perspective but instead whether the practice is reasonable as applied from the public perspective of this Board.

In BN's presentation yesterday, it appeared to contend that the railroads have no obligation to add capacity in response to increasing demand. UP simply asserted that its responsibility is to grow capacity when its investors' demanded returns justify such expenditures.

With respect to these assertions, I
think Vice Chairman Mulvey got it right yesterday when he answered that if it's left to the carriers as to how much capacity to offer, and the common carrier obligation is bounded by that available capacity, this leaves it to the railroads' sole discretion as to the scope and limit of their common carrier obligation. That can't be right and is not right.

If the Board's role is to fulfill the Congressional mandate to enforce the common carrier obligation, the Board has no right or ability to undercut that obligation absent statutory amendment and certainly not because the carriers believe it is more convenient or expedient for them to do so. I appreciate the time here, and we'd be happy to answer any questions.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Pfohl. Thank you to each of the panelists. Mr. McBride, I appreciate your testimony, as always, very thoughtful.

Certainly, one of the nice things
about having a hearing is that it forces Board
members, especially me, to read those cases if I
hadn't read them before, so I have, and it was --
for me, it's well worth having the hearing just
to force myself to make sure I really read and
thought about some of the important cases that I
might not have had the chance to read before.

You mentioned in characterizing some
of my remarks over the last day or two the word
"victories," and I hope I didn't emphasize that
word, because I really don't -- I'm not motivated
by what interest group or what client or what
side has a victory on any third Tuesday of the
month. I mean, as you know, we deal with
hundreds of -- over 600 decisions, mostly small,
but some not small, a year, and if we were to try
to really keep score and make sure that every
group got a percentage of victories, first of
all, we'd probably go insane, but secondly, it
wouldn't be a very reasonable way to interpret
the law and respond to cases.

I do remember taking strong
exceptions to Mr. Kaplan of U.S. Magnesium's statement yesterday that this Board seems to be constantly seeking to ensure their -- meaning the railroad industry's -- inordinate profitability, and when I called the witness out, I didn't hear a defense of that line. His head was nodding more than anything else, because I -- that's a pretty strong statement that this Board -- and I just think it's not a factual statement.

Does that mean that your clients always feel victorious? No. I didn't mean -- in fact, many times when we do things that disappoint or outrage or find ourselves in court up against the railroad industry, which is happening with more frequency in the last year and a half, two years, I would assert, it's not because your clients are happy. Very often, you're in court on the same thing, saying we got it wrong, too, for different reasons. So very often we leave -- in the course of leaving the railroads unhappy, we also somehow make everybody unhappy, which maybe goes with the territory,
but, so anyway, I just, you know, I just wanted
to make sure you understood where I was coming
from.

MR. MCBRIDE: Absolutely, and the word
"victory" was not your word, as I recall. I took
down the notes as carefully as I could yesterday,
but all you said was that you had ruled against
the railroads, and you listed those four
proceedings, and I was afraid the implication of
some people was, "And, therefore, the shippers
were victorious," and I was simply explaining to
you from that shipper's point of view, these were
not particularly perceived as large victories,
but that was not your word, and I don't
classify this Agency as out to just fatten
the wallets of the railroads. I don't.

I've been the president of the bar
association twice, proudly, and I wouldn't do
that if I wasn't proud to come down here and
think that you listen to the evidence and try to
rule on it. I probably disagree more than I
agree with what happens in cases, but I get
listened to, as I am now, and I think I get a fair shake on the evidence, and I appreciate that.

I have some differences of view on the law, and I think that the Agency has a statutory duty with respect to revenue adequacy that we've never quarreled with, because realize that I represent investor-owned electric utilities, and one thing the railroads comment on when they talk to us is that we understand the need to make a profit, and we do, and so we're delighted that the railroads, in our view, are now revenue adequate, frankly.

They said in their comments their return on equity is now for 2006 14 percent and the same for 2007, but we do think that that means that there is more of an obligation to regulate now under the statute than there was before, but I didn't mean to mischaracterize what you said. You were -- it was not your word, and I didn't want to put words in your mouth any more than anybody else here.
I simply wanted you to understand that people are not as fired up, if you will, about some of these rulings as it might seem from your perspective, and it's simply because in the application there's so many problems in trying to carry out some of these decisions, well meaning as they may be, that it takes a couple of tries sometimes to really get it right, but, anyway, I hope you --

CHAIRMAN NOTTINGHAM: And, Mr. McBride, please be assured, I have no quarrel with you. I just want to make sure while we're together I communicate my position as clearly as I can, as you are yours, and my position is not that every time this Board has -- which we have had on multiple occasions the opportunity to, based on the facts that came to us in situations, to rule in a way that was adversarial to the railroad industry.

That doesn't necessarily mean that shippers reaped direct benefits or immediate benefits or should be happy or should be high-
fiving each other in the hall. No, I understand that. Sometimes benefits accrue many years later. Sometimes they never accrue, but let's be honest.

If you're the railroad industry, and you experience for the first time in your history this Agency making an unreasonable practice finding the way we did, probably not a good day for them, correct? And now they find themselves in federal court, in several federal courts, defending antitrust cases that all, coincidentally, reference our finding. What a coincidence.

MR. MCBRIDE: Correct.

CHAIRMAN NOTTINGHAM: Will those cases win, lose? I have no idea, and that's -- but, anyway, just --

MR. MCBRIDE: Right.

CHAIRMAN NOTTINGHAM: I think it's a fairly safe statement to say that it was not a happy day in the railroad industry world when they were tagged with the first unreasonable practice, and it is directly consistent with my
statement that this statement we heard from U.S. Magnesium that we are -- this Board, not historically or some boards -- this Board is constantly seeking to ensure railroads' inordinate profitability. I just -- those are statements I can't let slide on into the record without some calling it out a little bit.

MR. MCBRIDE: I understand, and I hope I've tried to make myself clear, because I'm certainly not trying to mischaracterize your position, and I have appreciated your willingness to listen and keep an open door the whole time you've been the Chairman, and I just hope it stays that way, because we frankly welcomed this proceeding, because we viewed it as an opportunity to educate, and, as you've indicated, not only about the cases but about the facts and the industries.

These people are very dependent. The people you've seen over the last two days are very dependent on the railroad system to make this economy go, and my clients, more than
anyone, probably, because of the need not only to move coal but also to move these other products, and we find no unwillingness on anybody's part in the industry to ever come down here when you ask to try to participate and participate as helpfully as we can to make sure that we're on the same wavelength.

But, in any event, if I mischaracterized anything you said, I didn't mean to. I was just trying to use my time as quickly as I could to communicate the points to you.

CHAIRMAN NOTTINGHAM: No, understood. No problem there. I just wanted to make sure I had a chance to clarify in case anyone did mishear me, but I do think it speaks to the broader concern that I know I personally have as a Board member, and sometimes it happens when we're present, and then we have a chance, hopefully, to explain our perspective and side of the story.

Very often, though, it happens, unfortunately, when we're not invited or present.
at different public forums where advocates, and
I'm not particularly saying any of you in
particular but just advocates for various reforms
and various changes in the rail regulatory world
will say things like, "Shippers can never get a
break from this Board," and, you know, I could go
on for 18 hours of examples.

I think you all know, and I just, you
know, ask as a point of professional privilege if
folks would just think a little. Take a moment
to think through that and the message that sends
back to this Board when we feel that those kind
of statements are just flat-out inaccurate,
because it goes to the credibility of people who
-- and I say this because we have a lot of people
listening.

I'm not talking at you individuals,
per se, but you're in the fray. You're sometimes
there when these statements are uttered by
others, and help us, at least. It's fine to have
disagreements and to fight hard for hard-fought
positions and for clients, but, you know, be fair
and judge us based on what we've actually done or not done, not somebody ten years ago or 20 years ago.

MR. MCBRIDE: Two quick comments.

One, that's why we come in, and two, that's why I try to be as specific as I can be about where we agree and where we disagree, so you can take shots right back if you disagree with me or Commissioner Buttrey.

You know, I like you guys. I respect you guys. I speak well of you guys, but I come in here, and I tell you as straight as I can what's on our mind and let you come right back at me if you disagree, rather than just generalize about your motives or, you know, what you're in business to do down here, because I frankly don't think that gets the ball moved down the field very far. I think trying to be specific is a much better way to go.

CHAIRMAN NOTTINGHAM: We appreciate that, and we're not thick-skinned or sensitive.

It does not keep me awake one bit at night to
know that somebody had a critical comment at the
STB. Bring it on. That's what we're here for.
We certainly deserve criticism on occasion and
welcome it. Sometimes we learn from it, but just
as long as it's in the spirit of accuracy and
fairness is all we can try to ask.

More back to the point of today's
gathering, I've been delighted to hear most of
the witnesses have expressed some support and
appreciation for just the fact that we're having
this discussion yesterday and today. We're
having this hearing.

It is a very important topic.
Obviously, I feel that way or we wouldn't have --
I wouldn't have put this kind of time and the
Board's resources into it the way I did with the
full support of my colleagues, but others,
though, in the next breath, almost, seem to
indicate that while it's good the Board is having
this hearing, the Board shouldn't feel like we
have any real authority to implement -- I don't
want to put words in it now -- adjust, breathe
life into the very general wording of the very serious --

And I have utmost respect for Congressional intent, and all three of us have worked hard in the legislative branch in the U.S. Congress and have -- I feel pretty comfortable in saying have enormous respect for Congress and deference to statutes and legislative intent.

At the same time, I look at the common carrier obligation. It's pretty brief in its wording. It's open to a fair amount of interpretation. Thankfully, we're guided, as you helpfully pointed out, Mr. McBride and others and Mr. Kolesar and others, by extensive case law and background, so I don't propose that we come to work and rewrite the rules every day by any means, but we do have, for example, over a hundred exemptions, exempt commodities.

That may not be a perfect example related to either any of the examples that you mentioned, TIH or something else, but there have been over a hundred instances where the Board,
either on its own motion or on the motion of
shippers, have -- or railroads have exempted
commodities from regulation.

So I think it's not quite fair to let
stakeholders go away from this hearing thinking,
"Yes, I heard it loud and clear. Everybody
seemed to agree that the Board shouldn't do
anything ever to change the playing field or the
status quo on the common carrier obligation."

But I'd love to get some reaction. I
may have this wrong, but I just -- that's what I
see, and that's part -- I think that's why we're
here is to breathe some life into it.

Congress, of course, can always get
the last word. They can eliminate the Agency,
which they've done once. They can change the
statute or tell us -- but, I mean, I think we
have a job to just do that implementation of the
statute, and occasionally that means defining it,
for lack of a better word.

MR. MCBRIDE: Well, I don't want to
monopolize the field here, so I'll just make a
few quick points in response to that, because I think that goes right to the heart of what we're here to talk about, and my other client, Occidental Chemical, said yesterday, and we were very careful in how she put it, that we don't think the Board respectfully has any authority to abrogate or alter the statutory common carrier obligation, particularly now that the Courts have interpreted it as clearly as they have with respect to the absolute duty of a carrier to carry all commodities regardless of risk, as the radioactive materials cases teach, but our comments go on to acknowledge that although you don't have the authority to change the statute in that respect, your own decisions, we acknowledge them.

The Groom case, for example, provide that the shipper's request for service must be reasonable in terms of time and place and volume and that sort of thing so that I think what's happened here is the railroads have come in and said, "Well, gee, if some shipper did something
really crazy, you know, and tried to put a switch in," and maybe this wasn't exactly their example, but I'll make it even more extreme, "right at a diamond crossing, you know, we wouldn't have to do that."

Well, probably wouldn't have to do that, but the carrier would have the obligation, I think, to go back to that shipper and say, "Well, we have a duty to serve you. We can't do it right there. Here's how we're going to propose to serve you."

I've had this situation, and so have these gentlemen at coal fired plants where we wanted to expand the capacity of the plant. Existing line wouldn't accommodate it, and we've been out to places like Omaha to talk to the railroad and say, "Here's what we propose to do. What do you think?"

And their engineering department says, "Actually, we've got a better idea. If you build a bigger loop track, you can start a whole empty unit train, and we can then bring in a full
one, too. You could really make that place hum,
and the client said, "Great," and they worked it
out, and we came in here, and we got approval to
build that line, and it did get built in
Joliette, Illinois, for Edison Mission Energy,
and Union Pacific was most cooperative in that
project.

And so it's in that sense that I
think this Board does have authority, and I think
that's all we're trying to say. We're not saying
you don't have authority, but what we're saying
is the courts and the Congress have said the
railroads may not refuse to carry anything
because of a perceived risk and particularly the
materials we're talking about today, chlorine,
anhydrous ammonia, radioactive materials.

CHAIRMAN NOTTINGHAM: And I welcome
anyone else jumping in, too, if you could, if
your answers try to touch on what does that mean
to the over a hundred exemptions we've granted.
In other words, if the iron clad rule is the
Board can never adjust or implement the common
carrier obligation in a way that actually results in a shipper not being able to get rail service, which is the case potentially for exempt commodities like automobiles, how do we square that with -- is that -- have we overreached our bounds in the past in doing that, because I say this from, I would say, from a pro-shipper perspective.

There are shippers out there right now who meet with me on occasion to say, "We have an exempt commodity. We think times have changed, and circumstances have changed. We might not want to be exempt anymore," because of the problems they're having with railroads. So this is not a -- this is not some pro-railroad position, per se.

I don't think the railroads necessarily want the Board redefining the common carrier obligation every day of the week, either, nor do we propose to, but do you all recognize we have all these exemptions? Those, as well as some of our, obviously, our cases that we've
decided meaningfully add context to the common
carrier obligation, and that's part of what the
Board is supposed to do.

MR. KOLESAR: Certainly, Chairman
Nottingham. You know, the statute exists, but
you are the regulatory agency that administers
that statute, and your decisions on matters that
are related to exemptions or are in a more
general common carrier service dispute are part
of what informs the interpretation of that
statute and allows parties, railroads, and
shippers going forward to have a better sense as
to how that common carrier obligation ought to be
understood in the industry.

In fact, you face a very important
and a very serious task, because it is
undoubtedly the case that when you are asked to
look at a situation where there is a question
about whether a railroad has or has not complied
with its common carrier obligation, there
inevitably will be a very large number of
important factual considerations that you will
need to look at, and that is really the great value of an administrative agency.

So, yes, we would wholeheartedly endorse the authority of the Board to be involved in situations where a shipper would be concerned that its carrier had not provided common carrier service and would hope and expect that the Board would exercise its expertise to try to resolve that issue and clarify the obligation.

MR. PFOHL: Let me just add on that, too, that I've heard a lot of discussion in the last two days about the exemption authority. Well, that is an express statutory provision that allows you to do that.

It's Section 10502, and, you know, that section reads that in a manner related to rail carrier providing transportation subject to the jurisdiction of the Board, the Board may exempt a commodity where it is not necessary to carry out the transportation policy of Section 10101 of this Title, and either the transportation or service is of limited scope, or
the application in whole or in part of the
provision is not needed to protect shippers from
the abuse of market power. That's 10502(a), and
there is 10502(d), which gives you the authority
to reverse, revoke the exemption.

So I think that Congress has two
statutory provisions here which you've worked
over the years. One is upholding the common
carrier obligation. This is a separate authority
which you've used. I haven't seen many or any
applications to revoke an exemption in recent
years.

I think you're right. Times have
changed. If a certain commodity desires to come
to the Board and ask for an exemption, I think
that it would be appropriate under this provision
for you to revoke that exemption, but to say that
the exemption authority is somehow unrelated to a
statutory delegation I think is a little bit off-
base.

MR. MCBRIDE: And I needed to add --

CHAIRMAN NOTTINGHAM: I agree with
that, by the way. I don't think it is. I think it's very related.

MR. MCBRIDE: Let me add, because I meant to allude to this generally before, you are right that there have been many exemptions, and I think the statute imposes a duty to revoke the exemption in whole or in part if regulation is needed or if market power has developed, which didn't exist at the time the exemption was granted, and I cite for that proposition, Mr. Chairman, a case that you may want to go read on your off hours, and that's the Coal Exporters Association decision in the D.C. Circuit in 1984, I believe it was, in which -- and I believe it's the one and only time that the ICC or the Board's exemption decision was overturned, and that was because the Court found that there was a need to regulate that traffic.

And so I respectfully submit to you that coal, grain, and the kind of chemicals you've been hearing about today and yesterday that are so dependent on the rails and where
there is market power are the type of things that
could not be the subject of an exemption, and I
would particularly suggest that TIH, PIH types of
commodities are in that category for all the
reasons that you've been hearing. I don't think
this record could possibly support an exemption
for those commodities.

CHAIRMAN NOTTINGHAM: And nor is this
an exemption proceeding. Mr. Buttrey -- Vice
Chairman Buttrey -- Mulvey. Excuse me. I'll get
to you next, Mr. Buttrey.

VICE CHAIRMAN MULVEY: Thank you. Mr.
Sharp, you've been ignored, so we'll turn to you
for the moment. In your testimony you mention
about the, "well recognized fact that railroads
possess economies of scale." I am not familiar
with any research that suggests railroads have
economies of scale today. Do you have a source
with that?

MR. SHARP: Well, I would get you the
information.

VICE CHAIRMAN MULVEY: They do not
possess economies of scale. Going back 50 years of research, analysis shows that railroads have pretty much -- Class I railroads, anyway, have exhausted all scale economies. I think what you're referring to is what's called economies of density, whereas given an existing railroad infrastructure, the more traffic you have, average costs go down.

Economies of scale refers to when you expand "fixed" capacity as well as variable costs and variable capacity, as well. The average cost goes down. They are different terms concepts and they have very, very different implications with regard to regulation, so it's economies of density I think you're talking about, rather than economies of scale.

MR. SHARP: Well, it may be.

VICE CHAIRMAN MULVEY: Okay.

MR. KOLESAR: Vice Chairman Mulvey?

VICE CHAIRMAN MULVEY: Yes?

MR. KOLESAR: If I may jump in, I don't have my copy of the coal rate guidelines
handy, but at least within the last 20 to 25 years, rather than the 50-year period you refer to, the coal rate guidelines, if I'm not mistaken, refer to economies of scale, scope, and density in the railroad industry.

VICE CHAIRMAN MULVEY: Yes, and those are different.

MR. KOLESAR: Certainly.

VICE CHAIRMAN MULVEY: Yes.

MR. KOLESAR: Okay.

VICE CHAIRMAN MULVEY: Scale refers to varying all inputs, including fixed inputs, what would normally be fixed inputs as well as variable. It holds some inputs fixed and others variable, so it's the difference between short- and long-run average costs, but there's different implications for regulation if you're talking about scale economies versus density economies or, for that matter, scope economies, which are a whole different kettle of fish.

Also, Mr. Sharp, could you elaborate on your recommendation in your written comments
that the Board should consider expanding the abilities of shippers to make use of the private cars they supply?

MR. SHARP: Well, that kind of goes back to the example that's also in the written comments of what has happened to us in some particular instances where on our initial contracting with the railroads we're told that we need X number of unit train rail car sets in order to haul this coal.

So we go out and buy those cars, provide those to the railroad, and then, you know, situations arise where for congestion reasons or whatever the railroad takes certain numbers of those rail car train sets out of service, and we have no option, you know. We have no say-so.

We have no option in that situation. We can't use them. In many cases, we can't use them in the service of another railroad to try to keep our coal supply flowing to our plant.

We're just -- there again, it's kind
of one of those captive situations where they get parked. Sometimes we get notified timely. Sometimes we don't. Sometimes we find out that they're parked and contact the railroad, you know, so.

VICE CHAIRMAN MULVEY: So you're required to buy assets, but then you can't use the assets, and you still bear all the costs of paying for those assets.

MR. SHARP: Right, and we bear the consequences of them not being used. We don't get the coal. So it's not like they substitute, you know, some other mode of transportation and get us the coal, anyway.

VICE CHAIRMAN MULVEY: They substitute their own cars sometimes for your cars, correct?

MR. SHARP: Just about the only time that happens is when they get so far behind in their shipments to us that even they recognize that they've got tonnage that they need to make up, or they're going to incur penalties under the contracts, but they do from time to time use
their own train sets to supplement the train sets
that we've already provided.

VICE CHAIRMAN MULVEY: But not replace
them.

MR. SHARP: Right.

VICE CHAIRMAN MULVEY: When you
recommend that the Board "require railroads to
accept shipments tendered in accordance with
industry protocols," are you suggesting that the
-- you're referring to the AAR protocols, I
assume, and so are you suggesting that the Board
should enforce AAR rules and protocols?

MR. SHARP: No, not specifically.
There again, this gets back to the situation that
we find ourselves in right now out in the Powder
River Basin, where it's not been enforced yet,
but we have been told by Burlington Northern
Santa Fe that they are going to require us to
either put covers on our rail cars or to spray
dust control surfactants on the top of the coal
pile at our expense, and, there again, this gets
back to the industry standard.
I mean, how many years has coal been hauled in open-top cars? There again, the specifications for the cars were given to us basically by the railroads, and they are, you know, standards.

I mean, we have these cars built to their standards, and now we're being told that they're going to require us to do something differently pretty much unilaterally. I mean, this is what we have been told, that this requirement was going to come out and that it was going to be enforced.

Now it has been delayed, I'll say to their credit, but this is one of those situations where do you want to wait for the catastrophe? Do you want to wait for the, you know, for huge problems to arise, or could you potentially address this and prevent this from ever happening, because it seems very clear to us that under this type of common carrier type obligation that they can't just unilaterally wake up one day and decide that we've got to provide some other
kind of equipment that is not the industry
standard or add some sort of treatment to the
product that we're shipping that is not the
industry standard.

VICE CHAIRMAN MULVEY: Of course, the
fugitive coal dust, which got into the ballast,
caused the ballast to weaken, and eventually led
to derailments and caused the embargoes, I mean,
this is a problem for the railroads, but, of
course, it's a problem also related to the
product that the railroads are carrying for you,
and that is the coal. So isn't there a joint
responsibility for making the investments to try
and suppress fugitive coal dust, or is that
solely the railroads' responsibility?

MR. SHARP: Well, I think you're kind
of asking the wrong party. They're saying it's
solely our responsibility. That's what they've
said, and so, you know, we are under the National
Coal Transportation Association, which AECC and
many of these other companies represented here
are members of.
It's doing some studies to try to address this problem, to try and come up with what is the most cost-effective solution, and to help and control this problem, and, of course, there again, this kind of gets back to the point. You know, how many years have they been hauling coal in open-top cars? You know, this isn't a problem that just began in 2005.

VICE CHAIRMAN MULVEY: No, that's true. They've been hauling open-top cars for a long time, but, of course, I would suppose ballasts have been getting fouled for a long time, and I suppose it's only with this high volume, running 80 coal trains a day of 110 ten cars each where the expectation that the track would last longer than it would, than it has, and that the cost of maintenance is far greater than they originally expected.

I think it's now coming to the fore of how serious this coal dust problem was. I think, to a large extent, everyone knew it was there, but it was not considered as big of a deal
as it has been in the Powder River Basin.

MR. SHARP: Well, I take some exception from my understanding of some of the historical facts and what the railroads have said publicly about how often this ballast should be cleaned under these circumstances, because even the railroads have said -- when asked, you know, "How often should you be cleaning this ballast?" they gave a much shorter period of time than what they've actually been cleaning it.

So, I mean, I would say no, it's not that they were surprised by how often they should have been cleaning the ballast. They simply didn't do it.

VICE CHAIRMAN MULVEY: They didn't do what they should have been doing.

MR. SHARP: Well, they didn't do what even they say they should have been doing.

VICE CHAIRMAN MULVEY: I have been proposing for quite some time that the Board revisit every once in a while, every five or ten years or whatever, its exemptions, the
commodities that are exempted, and mostly because
times and circumstances change.

I don't want to be misunderstood here
in the sense that I'm not saying that the
exemptions are not appropriate and should not
continue, but at least, especially for those
where you could point to significant changes in
the economy or the operating environment or
whatever else affects it, that where those should
be revisited, and we should reconsider our
exemptions.

Do any of you have any views as to
that, and do you think that requires legislation?

MR. MCBRIDE: No, I don't think it
requires legislation, to answer the last part of
your question first, because the power to exempt
is also the power to revoke in whole or in part.
Perhaps, rather than sort of have them all come
up at once, what you could do is indicate
generally as a matter of policy that the Board
would be open to particular industries or
shippers or types of traffic seeking to have a
review of the exemption and whether it should be revoked in whole or in part or modified in some respects.

If you look through the tables in the Code of Federal Regulations, you'll see that there are some pretty fine details to some of these exemptions about certain stick codes and certain types of commodities and types of traffic and that sort of thing, and it may be that slight adjustments are needed and some of those sorts of things just because of changes in the industries, rather than wholesale review of everything.

So you might put a little bit of the burden, frankly, on those who might seek to have the change, but make it clear to them that the door is open to do that. Otherwise, I think you might get the wheat and the chaff kind of all mixed up together here if you were looking at a hundred of them at once.

VICE CHAIRMAN MULVEY: Well, we seem to have a situation where the parties all agree but characterize the situation very, very
differently with regard to the common carrier obligation. The railroads say that, "Well, because of all the exemptions, because of all the contract rates, we really don't have a common carrier obligation today with exception for maybe coal, chemicals, and grain, and if you want to revoke the exemption."

You're saying it seems to be the common carrier obligation is fundamental and that it's sort of suspended for these other groups, but the common carrier obligation underlies all movements and that, therefore, anybody should be able to come in and say, "Well, wait. We have a problem." We should revoke it and then look at it, because it is fundamental to the railroads' responsibility.

MR. MCBRIDE: Two responses. First, you may have noticed if you were listening carefully, and I think you were, that some of the railroad witnesses told you that the common carrier obligation was revoked for those commodities or maybe just because of the passage
of time for all intents and purposes or some slight qualifying words like that.

They were arguing practicalities, really, rather than law, and part of what's going on in this proceeding, I think, is there's a collision here between economics and law, and I think it's reflected in part in their testimony versus our view of things. I read their testimonies in the main as driven by Wall Street, driven by economics. They're saying finances rule everything. Capital determines everything, and we don't view it quite that way.

Yes, we think they need to make a profit. Yes, we want them to make a profit, but we think there's some legal obligations that they can't evade, and so I would contrast this common carrier obligation and the law about it to another body of law that you're familiar with and that is for abandonments.

The Supreme Court held that once this Board issues a final decision on an abandonment --
that's it. You've lost your ability to compel
that carrier to perform its obligations with
respect to the line that has been abandoned.

It's over, but there is no case that
has ever held that just because something is
exempt or because the Board has declined out of
practicality, for example, in the DeBruce Grain
case, to enforce the contractual agreement to
ship or in some case involving an embargo for a
limited period of time.

There is no case that's ever held
that just because of the passage of time or
because of an exemption or because of Wall Street
demands or because of practicalities that the
railroads can escape their statutory common
carrier obligation, and that's what we're saying.

Congress knew what had been said in
the radioactive materials cases, and it reenacted
the statute, just as it was, without any material
change, and under the Supreme Court's decision in
Square D, which reaffirmed Keough, the Supreme
Court recognized that when the Congress
repeatedly sits after it's issued a decision and doesn't change the statute when it's invited to do so by Supreme Court decision, then that must mean that Congress intends the law to stay as it is, and the same principle applies when Congress knows how its statutes have been interpreted and does nothing to change them.

MR. PFOHL: And I think the same thing yesterday we heard from UP counsel citing the FMC rate case involving an exempt commodity, and I'm not exactly sure what commodity that was, but in the course of that rate reasonableness proceeding, the shipper involved asked that the exemption be revoked for purposes of rate reasonableness case, and as counsel indicated yesterday, the Board allowed that, and, therefore, the obligation there for reasonableness of rates still was there. It just had to be revoked within the context of the proceeding.

MR. KOLESAR: Vice Chairman Mulvey, if I may, not in the context of exempt commodities,
but to answer your question about the significance of the common carrier obligation, certainly when coal shippers are moving their product subject to a contract, they nevertheless remain of the view that the common carrier obligation is very serious and very important.

It is the backstop on negotiations for new contracts. It becomes the threshold for the minimum of what a carrier must do, and that can be built upon by parties in their contractual negotiations.

Also, if I can follow up very briefly on the exchange you had with Mr. Sharp -- yes, go right ahead.

VICE CHAIRMAN MULVEY: Isn't it sometimes argued, though, that that's a violation of the contract, and therefore that should go to the courts rather than the Board, because the courts have enforced the contracts rather than the common carrier obligation and so on?

MR. KOLESAR: Most definitely, and that wasn't what I had intended to suggest. I
didn't mean that the Board somehow would enforce
the contractual obligation but that a party -- a
coal shipper deciding whether to enter into a
contract or to, on the other hand, receive common
carrier service is -- still regards the
enforcement of the common carrier obligation as
important, because it knows that it has --

If it cannot successfully negotiate a
contract, it knows that it has another service
vehicle available to it that will provide
meaningful service, and if the assurance that
that service commitment under a tariff will be
meaningful ceases to exist, then it makes it much
more difficult to negotiate the contract.

VICE CHAIRMAN MULVEY: Thank you.

MR. KOLESAR: The follow-up point on
your discussion with Mr. Sharp and the notion of
coal dust, simply that maintenance has
historically been understood as a railroad
obligation.

VICE CHAIRMAN MULVEY: Mr. McBride,
you mentioned you were involved in Staggers, in
putting it together and what the implications or
what the intent of the Congress was in such
things as the Board's decision on bottlenecks and
other rulings over the past as runs counter to
what you believe the Congress intended, and there
is legislation out there now, which I think some
people think of as re-regulation. Others look at
it as promoting competition or what have you, but
you infer that these are things that are
consistent with what you think the Congress
actually intended at the time back in 1980.

Had the Board followed that or had
those laws been in place, would the railroads
have become as "revenue-adequate" as they are
now? I mean, the railroads seem to believe that
these benefits that they have, these abilities
that they have, have been very critical to their
ability to differentially price and to capture
revenues in markets where they can capture them
with regard to captive shippers and that absent
those, the railroads' returns would have been
much more marginal.
Somebody here before was referring to the revenue adequacy of the railroads and their return, but the railroads still as a group are not revenue adequate as defined by the Board for the most part. The majority of them have not been over most years, and there are some who will argue that our way of approaching revenue adequacy fails to take into account the real value of the railroad plant that needs to be replaced, and if we use replacement costs, revenue adequacy would be even less likely.

So what is the risk of making these changes and making the railroads "more competitive" with respect to the railroads being able to make those investments to meet your needs as shippers?

MR. MCBRIDE: A lot of parts to that question, but I'm happy to try to take it on.

VICE CHAIRMAN MULVEY: Yes or no would be fine.

MR. MCBRIDE: Well, then no. Replacement cost, first, by the way, you may have
noticed that I included a piece in my comments on that just to indicate to you what the law is there. You don't have to go down that path.

The Supreme Court's been through this, a tortured history from Smith vs. Ames to FPC vs. Hope Natural Gas Company, concluded that it's just fine to regulate on the net investment standard, and that's how all the other industries are regulated.

With respect to the other changes, and, by the way, I don't claim that the Congress specifically said we were entitled to bottleneck rates, but what I do say is that the statute said we were entitled to a rate if we asked for it, and we interpreted that at the time as entitling us to a rate to a point of interchange with another railroad, and we believe it was simply the Board's interpretation in the bottleneck cases, and it was an erroneous one as we read the statute.

Now, I have no doubt, for example, that the Board's application of the stand-alone
cost standard, and I say this respectfully, but, for example, in the Otter Tail Power case, where the Board allowed a rate, $29.97 in 2002 dollars, when the stand-alone cost rate was $11.97, again in 2002 dollars, and we said that to the Eighth Circuit in our brief in support of Otter Tail, and the Board and BNSF agreed, the stand-alone cost rate was $11.97, but the Board's decision said it could charge up to $29.97 and that since it was "only charging $16.00 or $17.00 a ton, exclusive of fuel charges," I have no doubt that those sorts of rulings have enhanced the revenues of the railroads.

I'm not here to try to revisit the last 28 years and argue that you shouldn't have done this or you should have done that. I don't see much value in going back over the past and trying to rewrite the history.

Our view today is that when the industry says, as it said to you in its comments, that it earned a 14.0 percent return on equity for both 2006 and 2007, that from any standard of
revenue adequacy we're familiar with, at least as an industry -- now maybe there are specific exceptions for particular railroads, but that just means other railroads are doing better -- that we believe there are a number of revenue adequate railroads when you work through the process of applying your new cost-of-capital standards to the railroads and the more recent data that's in, and I think you have a proceeding before you to do that right now --

VICE CHAIRMAN MULVEY: We do.

MR. MCBRIDE: -- that you will come to the conclusion that this has all worked spectacularly well for the railroads, and whether we're right in every respect about whether decisions should have been this way or that way, we're simply saying the time has come to change the balance that we think was intended in \textit{Staggers}, because there was one other very, very fundamental predicate for that whole conversation at the time of \textit{Staggers}.

There were over 40 railroads. There
was a lot of competition intra-industry at that
time and through mergers, which none of us
foresaw to the extent that they've occurred, and
really none of you had any responsibility for
approving their -- I think all approved before
any of you ever got here, so this is not you.

I'm just simply saying that when the
mergers took 40-plus Class I carriers down to
seven, with no more than two competing in any
market in virtually any place in this country,
and in most respects because of the bottleneck
ruling, you can't even use competition when you
have it for 90 percent of your route, that maybe
those decisions would be different today under
the current set of facts.

If you look at the Eighth Circuit's
ruling in the bottleneck cases, for example, it
seized on an argument that I don't even think was
in the Board's decision but apparently was in the
briefs and the oral argument, and it was picked
up in the Court of Appeals where they said
because of revenue inadequacy -- it was one of
the reasons they deferred to the Board's ruling, but they also said, "If it had been our decision to make, we might have made a different decision."

So I think it's very clear that bottleneck, terminal trackage rights where the ICC added the standard of competitive abuse, paper barriers where there's been sort of no review until recently when you decided to invite review, and you have one of those before you now, that I think times change, and we're simply saying that the decisions that were made in the past, whether they were right or wrong, we think ought to be different going forward, and we've put a list of them, obviously, as you know, before the Congress, because in the past your predecessors have said to us, "We don't need any more authority, and we don't need to change our authority. We think the statute is just fine the way it is." We were told that more than once, so we said, "Okay, we'll go to Congress, because we respectfully disagree in
certain specific respects," and I'm trying to be as specific as I can be about those. So, for example, we think the time has come not to use stand-alone costs anymore, at least not to be compelled to do so.

We think an actual cost standard like all the other regulatory agencies apply would be the right way to do it, because then people could afford to try these cases, including the railroads, and who knows how they'd come out? It doesn't mean the shippers would win, but it just means we'd do it on a more cost efficient basis.

So we have a specific series of things that we disagree with respectfully over the last 28 years, and we've chosen to go to Congress, and I'm here happy to defend every single one of them.

VICE CHAIRMAN MULVEY: I'm glad you made that distinction between the courts, when the courts ruled that, not that you were right but that you weren't wrong, which I think is a very, very different --
MR. MCBRIDE: Sure is.

VICE CHAIRMAN MULVEY: -- way of looking at it. One other thing I want to address, and that is Price-Anderson. Price-Anderson is one of the suggestions that the railroads have put forth with regard to covering their -- trying to limit their exposure in case of a serious accident.

We just heard recently from General Timmons from the Short Line Railroad Association that while they've been on the Hill trying to drum up support for such a change, Price-Anderson or something else, they have not been joined by the shippers, and I was wondering if the coal shippers, for example -- I know you don't --

You do handle hazmats with regard to anhydrous ammonia and chloride for cleaning the stacks and that sort of thing, but for the most part coal is not a hazmat, at least when it's moving on the rail, anyway.

MR. MCBRIDE: Right.

VICE CHAIRMAN MULVEY: But do you feel
that the shipping community is amiss here in not
joining with the railroads to try and resolve
this problem of liability for movements of
hazmats?

MR. MCBRIDE: No, because the word
"amiss" would imply that we had an opportunity
to, you know, get on board the train, and we
somehow missed the train. We never were given
that opportunity so far as I'm aware.

I should, by the way, slightly
correct something I said in my comments to you.
I was not aware of any formal legislation the
railroads had proposed, and that's why I said
that I didn't believe these issues were pending
before the Congress, but we've heard over the
last two days that they have informally discussed
them with Congress. So I take that on face
value, but we've had off-the-record conversations
with them in which we've pointed out to them
we're the experts in Price-Anderson.

In those radioactive materials cases
that I tried, you'll find in the ICC decisions
and even a little discussion in the court
decisions that Price-Anderson came up, because
the railroads argued there were gaps in Price-
Anderson. It wouldn't provide them adequate
coverage when they moved our radioactive
materials, and we showed there were no gaps, and
the ICC affirmed that, and so we'd be more than
happy to talk to them about it.

I said that to railroad representatives at lunch time today, but we were
not included so far as I know in any of the
discussions in the framing of whatever they've
come up with, and I suggested to them that maybe
the reason things haven't moved is because we
weren't involved, and maybe we could talk to them
about it, try to help make some sense of all of
this, because, as I said in my comments, and I
volunteered this to you, if it makes sense to
have Price-Anderson coverage for radioactive
materials transportation by railroad, then maybe
it does for other things, too, although you
couldn't do it exactly the same way.
And I'm happy to explain that to you, because the way it works is the nuclear utility, owners of the reactors, each are required to have all the commercial insurance there is available. That's the first layer, so there's no disincentive on their part to be safe, because they have to pay the premiums, have the insurance, and they could get, you know, driven into ruin if they have an accident, so they have all the incentive in the world to be safe.

They buy all the insurance they can, and then to promote the nuclear industry, Congress passed the statute in 1957, and what it said was the next layer will be indemnification. Each of the reactor owners has to provide a certain amount of money -- it's determined annually -- into a fund so that if there is any incident at any reactor or related to any reactor anywhere, including by contractors, service providers, everyone involved, then that fund would be used to indemnify, regardless of whose reactor or what the cause was, and only after
that second layer of indemnification is exhausted
-- and now we're up to several billion dollars --
is there a cap on liability but a statutory
commitment on the part of Congress to make good
on any additional liabilities as there may be.

You couldn't quite carry that over to
the railroad industry, because we pay it in the
nuclear industry. The utilities do, but there
are only seven Class I railroads in the U.S., and
there may not be the same capability on their
part to indemnify.

But I'd respectfully suggest,
contrary to what I heard this morning, that they
might be the ones looked to for that primary
indemnification, if you will, as well as the
insurance, but we could certainly talk to them
about whether because of the differences in the
industries there might be some indemnification
that others would provide, as well.

But these are matters that I can't
negotiate here. I don't have the authority to
negotiate, but I'm sure, and I said so with
authorization of Edison Electric Institute, that it would be willing to talk to the industry about these things, because we're that serious about needing the continued rail transportation of these materials, that if they have a reasonable case to make, we're perfectly willing to listen, and I can't go any farther than that, I don't think, except to respond to any other questions that you have, but we're always willing to talk to them.

MR. PFOHL: I just wanted to add there was a lot of discussion amongst the railroads yesterday and I think today, too, about either automobiles running in the side of trains, trucks running in the side of trains, and there was very little or, actually, no discussion about the FRSA preemption statute at 49 U.S.C. 20106.

It's been on the books for 37 years, 1970. If a railroad is acting in accordance with federal railroad safety standards, if it's within the speed limit, its tracks are kept up to speed, those types of actions are preempted. You cannot
bring a common law negligence claim.

I haven't -- you know, we did not hear from the railroads any instances where they've lost those types of cases. Now that doesn't cover the big terrorist attack incident that might occur, but for the usual incidents, the railroads are involved in every single case, insuring that this never makes it to the jury, because it's preempted under federal law.

VICE CHAIRMAN MULVEY: But, of course, they will point out that they have 220,000 employees. They have 140,000 miles of track. The road to Hades is paved with good intentions. There's always going to be the rogue employee who comes to work intoxicated or doesn't pull the switch they're supposed to throw, throws it wrong.

There is always going to be trackage that, for some reason or another, causes a derailment, so you can't insure -- you can't, rather, account for everything, and there's going to be times when, in fact, the railroad would be
negligent in the sense that it's responsible for
the actions of its agents, or it's responsible
for the track, and all the cases that have been
cited, Graniteville and the others, have all been
cases where the railroad was, in fact, "at
fault," and I think that's what the concern is.

MR. PFOHL: Correct, but there were
many statements made yesterday on the minor
incidents or other incidents that didn't involve
necessarily error or negligence amongst railroad
employees, so I just want to set the record
straight on that.

VICE CHAIRMAN MULVEY: Sure. Sure. I
mean, when somebody tries to outrun the train and
has the accident, it's not the railroad's fault.
When the gate, however, because of maintenance
issues, the gate doesn't go down, then the
railroad could be at fault, and sometimes gates
don't go down. Sometimes gates do malfunction.
Anyway, well, thank you.

MR. PFOHL: You're welcome.

CHAIRMAN NOTTINGHAM: Commissioner
Buttrey, you've been very patient.

COMMISSIONER BUTTREY: I have.

CHAIRMAN NOTTINGHAM: I'd like to talk to you. Sorry, we've been a little long-winded over here, but the dais is yours.

COMMISSIONER BUTTREY: I'm still with you. Mr. McBride.

MR. MCBRIDE: Yes, sir.

COMMISSIONER BUTTREY: Maybe we can have some fun here. You had -- I think I heard you say that you disagreed with my statement in my opening statement yesterday that the railroads have always been and are now subject to the antitrust laws --

MR. MCBRIDE: No. No, I did not say that.

COMMISSIONER BUTTREY: -- except with respect to those few areas that have been carved out by the Congress where -- that affect Board decisions which are immediately and directly reviewable by the federal courts. That's what I said. I don't know whether you were here or not.
when I said it, but --

MR. MCBRIDE: I was, and I tried to write down exactly what you said, and if I mischaracterized it, I apologize, but what I thought you were saying --

COMMISSIONER BUTTREY: The reason I --

MR. MCBRIDE: -- was that they are subject to the antitrust. We agree on that, but that you were saying there were only specific exceptions to their antitrust obligations, and I was saying that the exceptions are actually much broader in my view because of the Keough decision.

COMMISSIONER BUTTREY: Okay. We can have a nice legal discussion about that at some point, maybe. I don't know, but in any case, I am weary of listening to people say in various venues, without any illumination or clarification, that the railroads are not subject to the antitrust laws. That's the reason I said what I said yesterday.

MR. MCBRIDE: Fair enough, because --
COMMISSIONER BUTTREY: I'm weary of hearing that.

MR. MCBRIDE: Well, I am, too, and that's why I agree --

COMMISSIONER BUTTREY: And I hope I never hear it again in this Board room.

MR. MCBRIDE: Well, and I agreed with you, and that's why I said I agreed with you that the railroads are subject to the antitrust laws with respect to price fixing, carving up markets, conspiracies, that sort of thing.

COMMISSIONER BUTTREY: And I made specific reference to bid rigging and all that sort of thing.

MR. MCBRIDE: You did, and we're together on that.

COMMISSIONER BUTTREY: Right. Okay. Is it your position that the Board is without authority or jurisdiction to make a determination on a fact-by-fact, case-by-case basis upon what is a reasonable request?

MR. MCBRIDE: With respect to the
obligation to handle a commodity because of any claim that it's too risky to carry, the answer is yes, because the courts have interpreted that term in the statute to require and hold, as I read you the language, that the railroads may not ask this Board to allow them to refuse to carry such materials.

So with respect to the duty to carry all commodities except for the very few historical exceptions that I provided to you in my testimony, for money, gold, and silver, and arguably for circuses, the obligation is otherwise absolute to carry upon any reasonable request, and the reasonable request was defined by the Court to mean compliance with all applicable governmental regulations.

But the answer to your question is you do have authority with respect to other terms of carriage -- place, time, manner, volume -- so that, for example, if a shipper asks for a spur -- I use this example -- into a diamond switch, you'd say, "Well, that's not safe. You can't do
that. You're going to have to get your service somewhere else."

And so I'm not disagreeing with that, and shippers have to reasonably inform the carriers how much service they need and what types of cars, what's going to be in the cars, and if they have any special needs for when they have to be picked up or dropped off. Those kinds of things, yes, of course, you have authority, and you can take all those kinds of factors into account so that, for example, we don't quarrel with the outcome in the DeBruce Grain case, because the Board was faced with physical impossibility.

At least, that was the finding that it made, that Union Pacific couldn't handle all the grain shipments that were demanded of it. What were they going to do? DeBruce wanted its contract carried out. We happen to sympathize greatly with the notion that if they have a contract, they should have to abide by the contract. Otherwise, why have contracts?
But there may be times when a court or this Board would say, "There's just no specific performance available here, because we'll be running the railroad, or we'll harm Peter to pay Paul, and then damages might be the appropriate alternative remedy."

So we recognize that in physical impossibility situations, just like in a real embargo for legitimate reasons, they may be excused, or their obligation may be modified, but short of that, I think that you're here to carry it out and enforce it, rather than give them reasons not to comply with it.

COMMISSIONER BUTTREY: And you site Akron. Is that it?

MR. MCBRIDE: Akron, Canton. I cite the --

COMMISSIONER BUTTREY: Akron, Canton & Youngstown Railroad Company, et al. v. the ICC.

MR. MCBRIDE: Right.

COMMISSIONER BUTTREY: GPU Service Corporation.
MR. MCBRIDE: I'm sorry?

COMMISSIONER BUTTREY: GPU Service Corporation.

MR. MCBRIDE: Was involved, as well.

Yes, there were many utilities. Those were the people I represented. My name didn't make the volume, though, but we're talking about 611 F.2d 1162, and the follow-on decision of the D.C. Circuit in Conrail.

COMMISSIONER BUTTREY: Right. Let me read you something from that same decision, if I may.

MR. MCBRIDE: Sure. Sure.

COMMISSIONER BUTTREY: A little bit further over in the decision, the Court speaking here, "We cannot refrain from noting at this point that none of the petitioner railroads has availed itself of opportunities to comment upon the safety regulations of DOT and NRC concerning the rail transport of nuclear materials."

I was following you along. When you were quoting from the Akron case, I was following
along in my copy of the Akron case, which I also have.

Still quoting, "Questions of safety are also questions of risk of liability." I'm over on page 7 if you --

MR. MCBRIDE: I've got it.

COMMISSIONER BUTTREY: "resulting" --

"A question of possible liability for damage resulting from carriage of a commodity is therefore within the Commission's jurisdiction as the regulator of the economics of interstate rail transport. We agree with the Petitioner's statement that while DOT and NRC have exclusive authority to promulgate industry-wide standards for the carriage of radioactive materials, the ICC may allow individual carriers to make more, but not less, stringent rules for their own carriage of hazardous materials."

Do you care to comment on that?

MR. MCBRIDE: Yes, I sure do, because that falls in the category of give them an inch, and they'll take a mile. So what then happened
was the railroads, the same railroads, came
before the Commission with tariffs that purported
to be in compliance with what the Sixth Circuit
mandated, and that was in the case, and maybe you
have it --

I'm looking for it here. I think I
do, Conrail v. ICC. That's why I keep referring
to that --

COMMISSIONER BUTTREY: I've heard of
that case.

MR. MCBRIDE: -- the follow-on case,
646 F.2d 642, because what the railroads did,
seizing on that language, was to insist that we
use special trains and some other things. There
had to be a separate locomotive and caboose for
every shipment, and the industry at the time
thought that was wasteful and inefficient.

Now today, by the way, the nuclear
industry might make a very different judgment
after 9/11, but that was then, and the argument
was that was wasteful, inefficient, and unsafe,
and we showed that it would be unsafe, because we
wouldn't have the cushioning effect of the other cars and the train, and the Commission agreed with us in the decision that you will find at 362 ICC 756, radioactive materials, special train service nationwide, and in the D.C. Circuit decision, if you read it carefully, and I'll bet you have, but you need to go back to it for this point, the D.C. Circuit said, picking up on the very language that you just referred to in the Sixth Circuit decision, "We agree with the Sixth Circuit as far as it goes."

But then they went on to say that because the Commission had decided the service was wasteful and necessary, and because the traffic otherwise complied with the DOT and NRC regulations, the railroads could use special train service if they wanted to, but they couldn't make us pay for it.

COMMISSIONER BUTTREY: But we're not - - but I'm not talking about that.

MR. MCBRIDE: Okay.

COMMISSIONER BUTTREY: I'm not talking
about special train service. I'm talking about
what the Court's talking about here, and the
Court is talking about here liability, which is
what we have before us now with hazmat. It's
specifically talking about liability.

MR. MCBRIDE: Well, it may be, and it
didn't have a specific question.

COMMISSIONER BUTTREY: Not they may
be. They are.

MR. MCBRIDE: Well --

COMMISSIONER BUTTREY: It says that.

MR. MCBRIDE: Well, what I meant was I
don't think they had a specific question before
them of how the carrier might seek to shift the
liability.

COMMISSIONER BUTTREY: It didn't in
this case, but it certainly might in the future.

MR. MCBRIDE: Absolutely.

COMMISSIONER BUTTREY: Yes.

MR. MCBRIDE: And I'm not arguing with
you that this decision might be read to mean
we'll have another argument some day about
whether some liability shifting argument is reasonable or not. There was a --

COMMISSIONER BUTTREY: There's no argument about who has the jurisdiction here in a case like this.

MR. MCBRIDE: Over the economics, I think that's correct.

COMMISSIONER BUTTREY: Over the liability issue.

MR. MCBRIDE: That may be right. Now, I can tell you there was an immediate situation that almost came before you recently and may come before you again. Canadian Pacific had a tariff which purported to require the shippers to provide total indemnification regardless of fault and no matter what the circumstances, which I read to include gross negligence, for any shipment of hazardous materials.

Now as I understand it, that tariff was withdrawn before it became effective, and people are monitoring this daily to see if such a tariff is published again, and maybe they're
waiting until after this hearing is over. I don't know, but they may come out with such a tariff, and then I think there will be people who argue that you have the jurisdiction because it's in the tariff to decide whether that's lawful or not.

Now I can't tell you sitting here that I'm going to agree with that, because I don't know what all the facts and circumstances are until I see it, and I'm going to look at these cases closely.

So if they purport to adopt regulatory requirements that DOT didn't agree with or were inconsistent with or something, then we may very well be arguing that they violated these decisions, and they're in the wrong place, but if this is all about economics, then this may well be the right place to be to hash that out. That's how I read the decision.

COMMISSIONER BUTTREY: Well, it seems to me -- I mean, of course, I'm just one person, but I frankly would enjoy going before the Court
of Appeals and arguing that case, because I think it's just as clear as the nose on your face that the Board has jurisdiction to deal with this and that the carriers have the ability to make rules that are more stringent than, not less than, rules for carriage of hazardous materials on their line.

MR. MCBRIDE: Even if we were to agree that you had the authority, and I just said that you might, let me tell you about another case that was decided by this Agency after these, because that's why I say I think this is going to end up being a fact-specific inquiry, and I think you heard Mr. Hamberger say those words this morning about things sometimes being fact --

COMMISSIONER BUTTREY: That's what they said in the morning.

MR. MCBRIDE: Exactly, but let me just tell you that there was a case called Contaminated Covered Hopper Cars on the Illinois Central, and I've cited it in my comments, as well, and we were involved. I was involved for
the fertilizer industry, and the argument there
was that the Illinois Central adopted a tariff
that purported to shift the liability to the
shipper if there was contamination in a car that
was used to load animal feed.

Animals later ate the feed and died
from the contamination, and we argued that was a
violation of the common carrier obligation,
because the railroad was in the superior position
to know what had been in the car previously and
to inspect it and had a duty to furnish safe and
clean equipment, and the ICC agreed with us that
the proper placement of the burden in that case
was on the railroad, because it was in the best
position to prevent the harm from occurring, and
so -- and nobody argued it didn't properly belong
before the ICC to decide, and we prevailed, and
that was stricken from that tariff of the
Illinois Central.

So, you know, that case and things
like it may come before you one of these days
soon on some of these issues, and if it's about
the economics, then we may be in the right place here, but --

COMMISSIONER BUTTREY: I mean, that case you just cited, though, is a strict tort liability -- is a tort liability case --

MR. MCBRIDE: Well, that may be right, and that's why I have some problems, frankly, with tariff provisions that purport to alter tort law with respect to who's liable for something, and you may well hear me arguing that, that you don't have the authority to preempt state law with respect to matters that were traditionally for the states in terms of tort, but I don't know that yet. I don't know what the facts are going to be.

I may well end up arguing a different position, but I'm just alerting you to the fact that this kind of issue has come up before, and the Board has dealt with it, or the ICC before it, and you may have to do it again, and I'm not arguing with you that that's the kind of thing that may fall squarely within your jurisdiction.
COMMISSIONER BUTTREY: Thank you.

MR. MCBRIDE: You're welcome.

CHAIRMAN NOTTINGHAM: Mr. McBride, I very much appreciate your offer to consult with the railroad industry about the predicament they are currently in with liability exposure from a broad policy perspective. Putting aside more narrow STB and ICC precedent and law, to me it's a big problem.

It's a major societal problem, and just because some parties are unhappy with others for other reasons, and some people want certain bills to pass that others don't, I hope those kind of disagreements don't continue to prevent any discussions about moving forward and solving a problem that needs attention, and I think any role that you or anyone else can play in brokering those kind of discussions will, I can assure you, earn the appreciation of this Board member, and we'll be happy to help any way we can.

I also sense from the discussions
I've had before this hearing and then at this hearing, what I've heard, you've said you haven't really been invited to get too involved in this issue. Don't worry. I don't think there's been -- I don't think there have been many meetings up in Congress.

If I heard General Timmons correctly this morning, they have trouble even getting a meeting, the staff, because of the interest groups on the other side, and so anything you can do to help get us to a better place would be appreciated.

MR. MCBRIDE: We've made those comments to railroads already. My principals have, as I understand it, as well as myself, so you won't need any stick to encourage us to talk to them about these matters. We'd be happy to do it, and I thank you very much for your comments and thank all three of you for your attention, and I want you to know that everything I've said is always with the greatest respect for this body.
CHAIRMAN NOTTINGHAM: Thank you. I appreciate that. That concludes our questions for this panel. Thank you for your patience. We will now bring up our final panel and ask them to come forward, and as they do, I'll step out just for a second and be right back.

Good afternoon. We appreciate your patience. It's not always easy being the final panel in a two-day hearing, but somebody had to be the final panel, and we appreciate your being with us.

Mr. Mulvey had to step upstairs to tend to a very short matter. He said he would be back momentarily, and Mr. Buttrey is within ear shot just in our anteroom there, so we'll go ahead, if we could. He's returning now.

Our first witness in this panel we'll hear from is Mr. Robert P. Fixter of Clean Earth of North Jersey. Welcome.

MR. FIXTER: Thank you. I'd like to thank the Board, the Chairman, Vice Chair, the Commissioner for giving us this opportunity.
Again, my name is Bob Fixter. I'm Vice President of Clean Earth of North Jersey. We are a licensed hazardous waste facility located in an industrial park in South Carney, which is about 15 miles south of Manhattan.

I'd like to go on record of praising the Board for providing this opportunity, this forum, where we could talk to you face-to-face about our service issues and also to thank you for the work that you've done so far in response to our two informal complaints that we filed with the Board.

Obviously, I'm here. We need some additional help, and that's what I'm going to speak about for the next five or ten minutes. I'll try and keep it short. It's been a long two days.

As part of our business, we are required to move large volumes of contaminated soil in short periods of time. Two years ago, we constructed an industrial spur off an active rail line that services another company further on
down the line.

Once the spur was complete, we approached the railroad for service, and they told us that they were not going to provide us service. The issue is that the active rail line goes through a intermodal yard where it's a very busy yard, and they use the active line as a parking lot and a loading/unloading area, and that prompted us to file the first complaint.

And after that, we at least got the railroad to the table, and they negotiated with us a side track agreement, which was executed by the line owner, Clean Earth, and then presented to the railroad and no activity. Months went by. We filed the second complaint, and they brought -- it brought them back to the table, and we did start to see some service on a limited basis.

Basically, they told us that we will get service when the other customer down the line gets service, and that doesn't suit our needs and the business that we're in. Again, we need to move large volumes of soil from projects which
are basically redevelopment projects, Brown
field-type redevelopment projects in the greater
metropolitan area.

So that brings us to where we're at
now. We received their final response, what we
believe to be their final response, which in
essence is that, "We will service you one day a
week, and that's it. Take it or leave it."

Obviously, that does not suit our
needs, so, again, that's why we're here
approaching the Board. We do need some help.
Right now what we're asking is to bring the
railroad back to the negotiation table. We
believe that there is a business-to-business
solution if they have the willingness to come and
discuss that with us.

They did offer at one time what we
felt was a legitimate engineering solution. They
pursued it quite slowly. We pursued their
engineering solution. We were able to get quotes
from a railroad contractor in two days, where it
took the railroad we really don't know how long,
because they have yet to come back to us with a cost estimate for that solution.

They came back and said, "We evaluated it. We're not going to proceed with it. That's it. One day a week. Take it or leave it."

So, again, that does not suit our business purpose, our business model. We need to move large volumes of soil in a relatively short period of time. The issue is allowing the train through the intermodal yard on a daily basis, and that is the summary of my testimony. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Fixter. We'll now turn to Mr. Benjamin B. Slaughter of the Slaughter Company. Welcome.

MR. SLAUGHTER: Yes, sir. I'd like to take this opportunity to thank you, Chairman Nottingham, Vice Chairman Mulvey --

CHAIRMAN NOTTINGHAM: Be sure to push your -- to press the button in front of you until you see the red light, and then the mic will go live.
MR. SLAUGHTER: I thought it was on.

Excuse me.

CHAIRMAN NOTTINGHAM: Thank you. No, it happens to me all the time, too.

MR. SLAUGHTER: Again, thank you, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. My firm is engaged -- we operate a transload facility and have for 19 years.

In the past six years, due to an eminent domain action brought on by a state entity, we were forced off of the previous site. Once we identified a new potential site, we met with the, at that time, general manager of the East Carolina Business Unit, a division of Norfolk Southern, and a member of the Industrial Development Department with Norfolk & Southern.

Out of that meeting -- and this was on or before the closing on this piece of property. Out of that meeting came a tentative rendering from the Engineering Department at NS for a proposed, based on GIS information, spur or
track layout. At that -- upon that time, we began proceeding with engineering and implementation of the facility.

In `06, we met with a new general manager, and by this time the facility had taken a firm layout. In other words, we had negotiated environmental issues with land quality, DENA and the Army Corps and had had the elevations had been pretty much firmed up, and we met with the new general manager, the engineers for Norfolk & Southern out of Roanoke, the Industrial Development people, my engineers, and other operational personnel with the firm.

We concluded from that meeting that the railroad would be best -- it would work out better for the railroad if we put in a Y-implementation due to the volume that we had had and that we were expecting to increase into this facility.

We proceeded. The engineers left that day, both Norfolk & Southern and mine, and over the next few months, through `06 and into
early `07, they came to a satisfactory layout both on geometry and elevation for the requirements, and it was forwarded to the general manager's office, as best as I can tell, late February or early March of `07.

In June, we heard nothing until some time in June, and through a phone conversation from the general manager he informed me of the railroad's intention to close the only crossing and the only access to this facility. Obviously, the wind was taken out of my sails, and I sat for a moment, and I said -- I called him by name, and I said, "What is precipitating this?"

I said, "This is a late date, after four years of development, millions of dollars in expenditure, to come up and say that you're going to close the only crossing, the only access to this facility." And he said, "Well, it's a safety issue, and he says, "You'll have other access."

I said, "By all means, please come down and show my lawyer, my engineer, my
surveyor, and myself, because that access has escaped us," and he said, "Well, you shouldn't have bought landlocked land." I said, "We need to meet further on this."

So I went away, and I pondered the situation at length, and I discussed it with my investors and my other colleagues, and before we proceeded with a further meeting, an article appeared in the paper, which we think -- in the state paper -- which we think is relevant to what is -- what was happening now, and the article reads, "Major transport hub in the works."

Well, further examination -- this is a cooperative effort between Norfolk & Southern and another entity, and we have no problem with their desire to implement another facility. The facility that was proposed was going to take $25 million of public funds. It was going to be exactly the same size, a hundred-acre site, that we had.

If they're willing to work 16, 18 hours a day, six days a week, as we do, we have
no problem, and we have a fairly lengthy clientele, and we expect it further, so we don't have a problem competing there, but as it went on after this, we met again with this general manager, my engineer, and out of that meeting he came up with -- he said, "Well, you close three crossings," and he said, "and I'll probably leave this in place." I said, "Where is it that you think that I'm going to close three crossings?"

And my engineer was with me, and I was upset. There's no question of that, but I was trying to contain myself, and so we left with pursuit of more goals and with more research, and I contacted both extensive state agencies, senators, congressmen, federal agencies, and one of them said, "I don't know where they get off thinking they can require of you to close three crossings, and, moreover, I don't know where they think you have the authority to close those three crossings," which we did agree.

Well, we continued on, and by this time, you know, I was getting pretty much close.
I had spent millions, and so had my investors, and they were looking to me to bring this thing to fruition. After all, we'd had 19 years of --
at that time, it was about 18, between 17 and 18 years of harmonious relationships in which we --
with the railroad and their customers.

We had participated in cooperative, both financial and physical, endeavors to create marketing data, to approach other industry that they would have enjoyed the rewards from, as well as I would, and so would the public, and so finally I said, "Well, years --." My dad had died many years ago, but he had started shipping on the original Norfolk Southern in `48 and had enjoyed throughout that time and until this date, and my -- and I had continued it on once I completed college.

So I wrote a letter to Mr. Mormon, and I tried to appeal with a great deal of humility my need for assistance in this, that I felt that there was something underlying here, and if anything I had done that would -- or my
firm had done or any of my colleagues, we would certainly like to render this.

We had never known a conflict ever with the railroad at that point in time out of that, and I followed it up with a phone call to his office, and I was relegated down to some vice presidents, and from there came a meeting that was with a representative viewed as a talented and proficient crossing expert.

Now this crossing, by my own observation at the time, had been in place for at least 75 years. My father had been on this very site starting in 1948, and it had been uninterrupted as an industrial site since all I could remember, and I'm 57. My father had sold to his partner, gone not too far away, put in another facility, and was shipping five and six cars a day and did for many years.

When the eminent domain took my previous site, I started looking. I knew most of the track. I had worked as a contractual matter cleaning up and doing load adjustments for both
CSX and Norfolk & Southern through many years, so I knew a vast amount of the trackage. I was not a novice to any of this.

And when I found this new site, I met onsite with the, at that time, general manager, which I have a great deal of respect for, and the Industrial Development people, and, as I said earlier, and so when in '07, after our meeting -- I'll wrap this up.

In '07, when he brought this on, and then the meetings pursued and the crossing expert came up and said, "Well, he's going to require -- the railroad is going to require of you to put in lights and gates," and I listened, and then he went on, and he said, "And they're going to require of you to pay $3,000 a year maintenance agreement, paid in advance, for 25 years," and I listened even further.

And then he got down, and he said, "And they're going to require" -- and this was the onerous part -- a crossing agreement be signed that stipulates that their determination
any time that I have other access, that they
would remove my crossing. That wasn't acceptable
to neither mine nor my financial institutions and
my investors.

So I plead with you. We need your
assistance. We have pursued in every manner. We
have been willing to work and negotiate in any
manner that we could to seek remedy, to negotiate
this settlement. We need your help. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr.
Slaughter. Ms. Sandra Dearden of the Highroad
Consulting, Ltd. Welcome.

MS. DEARDEN: Thank you. My name is
Sandra Dearden. I'm President of Highroad
Consulting, which is a transportation and
logistics consulting firm with offices in
Chicago.

Highroad represents four clients in
this proceeding that are rail shippers. In
addition to addressing some of the topics in
their statements, which were filed, I will cover
some other topics based on events and issues that
I have observed since my -- I launched my career as a professional consultant.

In 2005, the Class I railroads announced routing protocol agreements to streamline their exchange of rail traffic at major gateways. The objective was to address congestion by directing rail traffic flows through the most efficient interchange locations and to improve transit times and asset utilization for rail customers.

There is no doubt that when they first developed the routing protocols they were acting in the public interest, and there was no question that the routing protocols were successful in addressing congestion in some major lanes.

However, as time passed, more problems surfaced with respect to transit times on particular routes, and customers brought these problems to the attention of railroad marketing personnel. Unfortunately, because the routing protocols are being strictly enforced by the
railroads, it appears the customers do not have
the option to use alternative routes.

As a result, some customers have
experienced increase transit times, and since
alternative routes evidently are no longer
available, the routing protocols are having a
negative impact on potential rail-to-rail
competition, as well as the competitiveness of
our customers in the broader marketplace.

A question to be addressed in this
proceeding is if the railroads refuse to handle
cars via alternative routes, are they failing to
comply with their common carrier obligation? If
so, then what recourse do the customers have to
address those violations?

The railroad has experienced a number
of fatal accidents in recent years involving
transportation of TIH commodities. As a result,
new design standards for tank cars used to
transport those commodities are being developed.

Certainly, we have no quarrel with
the implementation of rail car standards designed
to improve safety. However, some of the major railroads have taken this issue one step further. They assert the right to impose all liability for the transportation of these commodities on the shippers, even when the shipments are transported pursuant to regulated rates.

For example, Canadian Pacific recently issued an announcement concerning the movement of ammonia and TIH commodities concerning -- with an indemnification and liability provision that stated, "It is being intended that customers assume all liability that is in any way connected with the transportation of hazardous commodities under this tariff."

This shift of liability to TIH shippers is patently unfair, particularly since our research indicates that all of the rail accidents in recent years involving TIH commodities have been the result of a track defect or caused by human failure on the part of the crews.

If railroads are allowed to limit
their liability and correspondingly their common 
carrier obligation for the transportation of TIH 
commodities, we are concerned there may be a 
cascade effect in which the liability could shift 
on other hazardous commodities.

The chemical industry is very safety 
conscious. Major rail accidents involving TIH 
commodities have generally not been caused by the 
shippers or the rail equipment, and the new 
safety rules and standards for car design have 
been established in recent years, further 
enhancing the safety of shipments of hazardous 
commodities.

Forcing rail shippers to assume 100 
percent of the liability for shipments of 
hazardous commodities, thereby enabling the 
railroads to limit their common carrier 
obligation on shipments of certain hazardous 
commodities, does not address the root cause of 
the problem, that being the need of the railroads 
to improve their own safety standards and 
procedures.
Many railroad shippers and receivers are being forced to spend millions of dollars in additional rail infrastructure or, alternatively, to exit the market or incur substantially higher rail costs for rates and charges. Rail customers have made decisions to locate plants and distribution facilities on railroads based on agreements that were subsequently canceled.

Some have the space and ability to commit capital to make the infrastructure changes that become necessary when the serving carriers change their policies, but others do not always have the room to expand. Railroads acknowledge that there is not enough business to go around, for example, if all of the grain shippers in a region expand their operations to 100-car trains, forcing some to go out of business.

This is indicative of a trend in which carriers, and particularly Class I carriers, have become market makers instead of market service providers. They handle the traffic they want to handle and demarket the
traffic they are not interested in handling. This in effect ively is an erosion of their common carrier obligation.

The concept of demarketing is not really new to the railroad industry. Initially, when the railroads developed plans to rationalize their systems and implemented abandonment programs in the early eighties, the abandonments focused on lines that clearly did not have adequate volumes and revenues to support continued maintenance of the lines.

However, once those lines were eliminated, some railroads adopted policies to demarket business on marginal lines. This was accomplished by reducing service, thereby forcing shippers to ship by truck. Eventually, rail volumes and revenues on those lines declined to the point that they met the regulatory guidelines for abandonment.

Since I started Highroad Consulting in 1996, I have become aware of numerous examples of railroads demarking business. Some
customers have complained that carriers are demarketing their lines by simple expediency of cutting switch connections to industry tracks. Evidently, if a carrier believes that service to a shipper is not consistent with the availability of capacity on the adjoining main line, the carrier simply opts to cut the industry switch connection.

Whatever happened to the shipper's right to obtain a connection to carriers' main lines? The statutory requirements still appear to be in existence, but in practice industry switches are being unilaterally cut off at an alarming pace.

There are numerous ways a railroad can demarket business. Demarketing flies in the face of the railroads' common carrier obligations. Stricter guidelines need to be established regarding abandonments, and the procedures need to be established so rail customers have recourse when demarketing occurs and the railroads are not meeting their common
carrier obligation.

Finally, we believe the common carrier obligation should apply to all commodities, whether covered by tariff, exempt quote, or unilateral, non-arm's length contract. We request the Board's consideration of that point of view.

In conclusion, a procedure should be established so rail customers have recourse if routing protocols result in lessening or elimination of competition and if they result in a negative impact on service. We urge the Board to reaffirm the fundamental common carrier obligation on all regulated commodities including hazardous commodities.

What is the Board's view of railroads forcing rail infrastructure investments onto shippers through policy changes, and what is the Board's view of reasonable dispatch, and what remedies do the shippers have to enforce the railroads' common carrier obligation?

We request that the Board establish
procedural guidelines and define the role of the Office of Compliance and Consumer Assistance will have in ensuring that the carriers fulfill their common carrier obligation.

Finally, stricter guidelines need to be established regarding abandonments, and procedures need to be established so rail customers have recourse when demarketing occurs and the railroads are not meeting their common carrier obligation. Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Ms. Dearden. We'll now turn to Mr. Daniel R. Kloss of the Evraz Claymont Steel Company.

MR. KLOSS: Thank you, Mr. Chairman, Vice Chairman, Commissioner. The Evraz Claymont Steel plant is located on a 425-acre site off Route 495 in Claymont, Delaware.

The company, then Worth Steel, began operation in March 1918. Today, Evraz Claymont employs over 480 people who produce plate steel products to heavy industry, primarily in the rail, bridge, shipbuilding, and tool and dye
The plant's rail infrastructure initially started by Worth Steel, was completed in 1965 by the Phoenix Steel Corporation. Once completed, the internal rail complex was one of the finest on the East Coast.

Annual plate capacity was at 500,000 net ton, and rail service was provided by at least two railroads. Rail access to the plant was available on both the north and south ends, and aside from constraints imposed by the Amtrak line, scheduled freight flowed in and out of the plant virtually unimpeded.

As plant productivity began to decline in 1980, nonessential rail assets were left to deteriorate. This trend continued for 23 years, through three changes in management. During this same time period, rail service was reduced to one rail line, the Norfolk Southern.

In January of 2004, it became evident that the steel industry was about to experience a breakthrough in order entry. Plate products in
particular could reach sold-out conditions by mid-year.

As this situation develops, meetings were scheduled with the Norfolk Southern operating and marketing groups. These meetings continued each quarter through 2007. The strategies, teamwork, and rapport developed at these meetings played a key role in our businesses successes through this critical period.

In December of 2007, prompted by an unprecedented demand for raw metal material worldwide, we contacted the Rail Consumer Assistance Unit to seek guidance on how to proceed. The insights they provided complemented the work being done between our company and the Norfolk Southern.

Evraz Claymont Steel is appreciative of the support we have received from the Norfolk Southern Railroad and the Rail Consumer Assistance group. Together, we have made giant strides in revitalizing our rail assets,
expanding our crew schedules, and improving operating efficiencies.

Much, however, still remains to be done, and the challenges that lie ahead may be greater than those we faced, but I feel confident that by continuing to work together we will succeed. This concludes my remarks for today.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Kloss. Now we will turn to Mr. Raymond Tylicki.

MR. TYLICKI: Hi, how are you doing?

CHAIRMAN NOTTINGHAM: Good. Welcome.

MR. TYLICKI: I would like to touch on the --

CHAIRMAN NOTTINGHAM: Press the button for the red light and make sure the mic is pointed --

MR. TYLICKI: I am a member of the general public, and I would like to touch on some of the historical basis of common carrier obligations. It seems that the railroads, in my opinion, have not met their common carrier obligations to not just to industry but to the
general public at large.

The -- I did some research over the past previous days looking at the historical context of where that common carrier obligation arrives. From the Maryland archives I was able to pull up a number of charters that chartered the B&O Railroad and the Pennsylvania Railroad or the early predecessors.

My position here is that the railroads themselves, unlike my grandfather's barber shop, which he went into the Army and saved up money to buy, and if there were drunken people from the bar down the street who came into his barber shop and attempted to get a haircut, he could chuck them to the curb, and, being a big man, he could do that.

However, the railroads' initial funding comes from the actual charters that were granted to them by the State of Maryland. The very basis of these charters were started, actually, in the early part of this country when George Washington was among the first to propose
a national railroad that would stretch from the
East Coast to a connecting point in the West.

The high expenditure in terms of time
and money of moving goods overland was a
constraint to expansion and settlement. The
existing transportation was slow and expensive.

What happened here is that the
national -- the early national government at the
time created toll roads. The toll roads were
financed by a combination of stockholders, which
eventually the railroads themselves became
railroads and canals.

The creation of these where my family
had -- my family's homestead in Cumberland,
Maryland. We had the wonderful opportunity of
participating in this country's creation when
first the C&O Canal came through our property at
Mexico Farms. Then, after that, the B&O Railroad
also came in and did eminent domain on our
property and took, again, more of our property in
the early 1800s.

We allowed this, and the farmers in
that area welcomed that, as well as the coal industry and the people there, because the public had derived a direct benefit from the existence of the railroads. My grandmother --

Hoboes would come up on the railroads. The railroad would sort of wave them on, and they would harvest the crops. We would take the crops down to the train station and load them onto railroad cars and ship them back out to port.

Then, around 1910, again our land was then divided by the Western Maryland Railroad. These charters of these companies originally created were the -- were created by this, you know, canal company, which then became the C&O part of the railroad.

Here I have a charter here. The actual payment for creation of these companies did not come from people saving up their money like my grandfather did but actually came from the public trust and treasury themselves that the State of Maryland, in addition to 5,200 shares of
capital stock, provided for the creation of these railroads to begin with, but this is here, the volume 474, page 203 of the archives of Maryland Accession Law of 1827 -- that the additional 5,000 shares of stock, the power to open up books, the railroads -- that the revision citizens that the railroads' connections here in the historical documents show that as far as that person -- that provided that any railroads from different parts of the state provided that performing those injuries worked for companies incorporated, that nothing shall close the turnpike road, railroad to private wagons, meaning that the public should have basically a right to access the railroad.

Where I'm going with this here is is that the Union Pacific's position as far as Amtrak is concerned is that they are a private company with private shareholders. Turns out that the United States government in creating the Pacific Railroad Act actually started the railroad in its original charter.
The President of the United States had the ability to appoint people to the Board of the Trustees. We also had the land grants that were given by the U.S. government to construct these railroads to begin with.

So the problem here is is that the -- I made a couple of inquiries to the Surface Transportation Board over the past couple of years as to why does the public, if I were to call up the railroad today and, matter of fact, Mr. Chairman, actually, they really as refusing -- railroads to refuse shipments.

I ask you that perhaps you ought to try calling the railroad yourself and saying, "I'd like to move stuff from my storage unit. I'd like it box car parked at a siding and see if I can load my stuff onto a box car to be shipped across the country," provided that you can actually get through to an actual operator who will actually even speak to you.

Railroads actually, despite the public actually occasionally do call them from
time to time to move their automobiles or other
what are called exempt household goods or just
personal -- you know, the railroads refuse to
move these items.

Now back to what I'm mostly concerned
about here is is that there is this idea that the
railroads have no obligation to serve passengers,
that they just merely allow Amtrak to be on their
lines, that the creation of Amtrak somehow
absolved them of that common carrier duty to
serve the historical interest of the public and
the public's investment in the creation of these
railroads to begin with.

And I thought I'd have to do a lot of
digging, but it turns out that the Supreme Court
itself, in National Passenger Railroad
Corporation, Appellant vs. Acheson, Topeka &
Santa Fe Railroad, in the Supreme Court of the
United States --

If I might read this here, "As the
railroads correctly observe, the threshold
inquiry in this case is whether the United States
released the railroads from their passenger service obligations as a matter of regulatory relief or contractual right. The railroads contend that the realities underlying the enactment of the Rail Passenger Service Act established the release as a contractual obligation from the United States."

Nothing could be more wrong. The realities are these. Interstate railroads have been extensively regulated by the federal government for more than a century in exchange for a monopoly status and, might I add, the eminent domain that took my family's property, my ancestors' property -- that enormously profitable, the railroads incurred special public service obligations.

As common carriers, they were required to provide passenger as well as freight service. They also lack the authority unilaterally to discontinue all or a portion of the service for it's -- instead obligated to petition and secure permission for discontinuance
from the Interstate Commerce Commission.

Of course, we know the story by the late 1960s, that rail passenger service had become extremely unprofitable, but I also like to add as far as demarketing is that in some cases the Pennsylvania Railroad and other railroads have made passenger service so bad that, as the book *To Hell in a Stagecoach* reminded, that they did not actually -- passengers did not want to ride them.

It is against this background that RSBAC was enacted, the RSBAC, which the railroads now -- the railroad passenger service with the railroads now wield as a weapon against the government and us, the passengers, and to other agencies that want to start rail service.

What's interesting now is is back in the 1960s the railroads had the full cost of running the railroads. Now things are a little bit different. With the cost of gas where I live now in Cleveland, Ohio, NOACA and various other municipal planning authorities are saying, "We'll
give you the railroad cars. We'll build the
stations for you. We'll put out entire -- a plan
here," and the railroads have been basically
sitting on their behind and saying, "No, we won't
deal with you."

The issue here is is that according
to this ruling that I had is that Amtrak was
created not to relieve the passenger -- not to
relieve the railroads of their passenger duties
but a way of enforcing and enacting that is is
that the railroads were sold their rights to run
those passenger trains, but the common carrier
obligation, I believe, according to this ruling
back in 1984 where the courts have said that
Amtrak was created as a quasi-governmental entity
that took assumption of those -- of those
obligations, and if Amtrak --

What I'm asking this Board to
consider is is that the contract between the --
if the railroads refuse to provide passenger
service, in this case Amtrak, as opposed to
expand its lines, the railroads have basically,
particularly Norfolk Southern, has been protesting up and down, saying, "We want the full cost of running a passenger train."

A passenger train with 200 people is around $20,000 worth of revenue. A freight train with 100 trailer cars is about $1,000 per car, so that's $100,000, but still, regardless of the profit, as the coal producers had mentioned earlier, that they still should have that obligation to carry me and people who would like to get back and forth to work.

Behind here we have the Virginia Railway Express, which Norfolk Southern has sort of petitioning, and there really is a public need to expand those services. The --

CHAIRMAN NOTTINGHAM: If you could wrap up --

MR. TYLICKI: Yes. Basically, what I'm asking here is is that my solution to this is that the Surface Transportation Board should have provisions that when you have metropolitan planning organizations and regional transit...
authorities who need -- and there's a definite need to be -- have competitive cities such as Cleveland would like to have regional rail systems in order to be competitive with other municipalities such as Chicago, such as other -- Nashville, which now has commuter rail -- that there should be provisions to say that the railroad, instead of sitting on their behind and saying, "We don't have to serve you," should there be provisions where the regional planning authority should be able to petition the Surface Transportation Board based on the historical obligation of common carrier duty --

CHAIRMAN NOTTINGHAM: Thank you, Mr. Tylicki.

MR. TYLICKI: -- to provide service.

Thank you.

CHAIRMAN NOTTINGHAM: We've got you.

You've made your point quite well. Thank you. I appreciate everyone's patience with working with our time limits, but it's only fair. Everyone's done a great job of respecting that. Thank you.
Mr. Tylicki, I'll just say Commissioner Buttrey and I both are regular customers of the Virginia Railroad Express, and so we often ponder what we can do to get ourselves to work and home a little quicker, but we haven't quite figured that out yet, but we're working on it informally, but you touch on some very fascinating history, and Maryland in particular has, you know, just a wonderful rail history, and it's also just interesting to note the history of canals and how many smart people, including George Washington, who was very -- was convinced that canals were going to be the thing for the long term. A lot of money was bet on the canals.

MR. TYLICKI: Basically, my point here is is the public has made a significant historical investment in the railroads. Also, on the railroad side, I don't think that it's fair to tax the railroads, you know, when you have the -- tax the railroads while the infrastructure is deteriorating. I think railroads should be
exempt from the taxation if they agree to carry passengers.

CHAIRMEN NOTTINGHAM: I understand.

Let me just ask a question. Mr. Kloss, thank you. I appreciate your testimony, and, frankly, I appreciate your coming all this way to share a positive experience but also to give us a little bit of a warning that we may have some more challenges and to be ready.

We appreciate that. It's far better from the Board's perspective to know about situations before they are already upon us so we can get ready, but too often people only take the trouble to come to the Board when they're really mad or really angry at the Board, and I appreciate the fact that you would come and actually share a good experience you've had.

We're very proud of our Office of Rail Consumer Assistance. We're in the process of actually strengthening it and adding staff to it, and so we -- I'm hopeful that that office and the whole Board will continue to be a resource.
for you to help make sure you can operate your
business the way you need to operate it.

MR. KLOSS: I'm sure they will.

CHAIRMAN NOTTINGHAM: Thank you. Mr.
 Fixter, glad to see someone from Carney here.
Whenever I hear of Carney, it conjures up
childhood memories of going to Carney from where
I grew up in South Orange and getting thoroughly
humiliated on the soccer field. Fantastic soccer
players. I won't list them all, but Tony Meola
and John Harkes, World Cup and Olympic players.

Carney's got a great history well
beyond soccer, too, in transportation. We look
forward to working with you further, and please
do keep in touch with our staff and our agency as
your problems continue. I recognize that getting
daily service in a busy environment is not always
a simple matter, but hopefully we can continue to
be a resource for you.

MR. FIXTER: Thank you.

CHAIRMAN NOTTINGHAM: Mr. Slaughter,
sorry to hear about your situation. It sounds
pretty complicated and sounds like you've been through a lot of cost, time, and expense trying to figure out how to develop your project.

I just had a quick question. When you bought your parcel there that you're trying to develop, how many access points, in other words, to a public street did you have?

MR. SLAUGHTER: There was one, sir.

CHAIRMAN NOTTINGHAM: One, and if I heard you correctly, that access point crossed a Norfolk Southern line at some point?

MR. SLAUGHTER: Yes, sir, it had, and I have my legal -- the people that were helping, the lawyers that have helped me have done extensive research in the associated county and found a recorded map that goes back to 1902 that depicts that street and that crossing that access.

CHAIRMAN NOTTINGHAM: The suggestion from the railroad that you recounted about their wanting you to close other crossings, that confused me, because how many -- I was with you
when you described one access road or route and then crossing a track, but then when you said other crossings, I --

MR. SLAUGHTER: Well, it was the gentleman in the railroad who said with the meeting with my engineer and myself that he would probably leave the crossing open if I were to obtain three crossings to close. That seems to be a fashionable thing if you're opening new crossings, but that's not the case here.

This crossing had been there, and it had been an industrial site for at least 75 years that I've been able to obtain, and now that I have the map, it doesn't show it as an industrial crossing on the other side, but it shows it as a crossing since 1902, and that railroad was chartered in 1895. Best I can determine, it wasn't completed until 1905, but that was the very crossing to which the general manager, Industrial Development, the engineers had crossed, accessing the site from the beginning.

It is the same crossing to which my
father had enjoyed starting in 1948 when he was conducting business there and had been uninterrupted through all those years from ‘48 on that my family knew of.

CHAIRMAN NOTTINGHAM: Can I ask you, have you previously been in touch with our agency about this problem?

MR. SLAUGHTER: I have been talking to your agency. I had recently associated myself with a D.C. firm that had strongly, and I agreed -- the Consumer Affairs Department. We would seek any amicable solution that would return us back to the cooperative spirit that we had enjoyed with the railroad.

We've unloaded thousands of cars for their customers and ours and loaded cars and even loaded material for their own firm and shipped it out from this facility. We predominantly handle currently steel products and forest products, but, you know, we would seek -- I mean, for many, many years we had done nothing but enjoy a good and harmonious relationship with the railroad,
and I certainly would like to see a return of that.

The issues, I mean, the way it seems -- it seems to -- I can't be -- I can't be absolute on this, but it certainly seems coincidental that the announcement of this proposed megayard not too far from where my original yard was, I mean, it certainly provokes controversy in one's mind, anyway, and I don't have an exception to that yard if they want to implement it, but I do have exception considering the fact that I had the FRA twice reviewed the crossing history of this crossing, as I have done, and since its recorded history there had never been an incident nor an accident of any kind recorded on it, none that I had recalled in my 57 years, and it had been a crossing for so many years.

The site path distance was 1,500 feet in all quadrants. It has the -- there are only two trains a day on that track, 25 miles an hour. The street has a five mile-an-hour posted speed
limit.

It's only 400 foot long, and it has a stop sign on both sides of it, and to come out at the late date after this many millions of dollars and then the fact that we have -- the railroad and I have had a history together, and to say, "Oh, we're going to close it."

CHAIRMAN NOTTINGHAM: I understand. Let me ask. Is the street a publicly owned street? Is it part of a city or county, or is it --

MR. SLAUGHTER: It is a 60-foot deeded easement street. It was recorded many, many years ago, so yes.

CHAIRMAN NOTTINGHAM: Is it part of a city or county system? In other words, do they come and -- I know you probably don't get a lot of snow down there, but, you know, but if -- you know, the test we used to always use in Virginia is who plows the snow off of it once in a blue moon when you get a lot of snow?

MR. SLAUGHTER: Well, I don't recall
any agency maintaining it. I've been the one that's been maintaining it. There are others that access it.

CHAIRMAN NOTTINGHAM: So a private, and there's nothing wrong with that, maybe a private road or privately owned road.

MR. SLAUGHTER: Well, I think the way my lawyer represents it to me and the title opinion that was written long ago was that it is a public street, but it has not been accepted by the State DOT.

CHAIRMAN NOTTINGHAM: Okay.

MR. SLAUGHTER: And I'm doing the best I can to represent that accurately, but it is a recorded easement. Just as they do not own a fee simple deed to the right-of-way that they enjoy, they own a easement through the charter.

CHAIRMAN NOTTINGHAM: Have you been in touch with your state economic development authority or industrial development authority?

MR. SLAUGHTER: Sir, I have knocked on every door that I knew, and I continue to explore
that. I would do just about anything to return to where I was and to continue this operation and to satisfy anyone's reasonable request.

CHAIRMAN NOTTINGHAM: North Carolina has got a pretty good, historically good Department of Transportation. It's quite large.

MR. SLAUGHTER: I've worked with them, sir. I agree with you.

CHAIRMAN NOTTINGHAM: I know in Virginia if someone in your situation came and talked about real job creation and tax generation, we would typically go to great lengths to bring a street into the state system, and that would change the -- in many respects, change the relationship with the railroad.

MR. SLAUGHTER: Well, we're pursuing that avenue and have been for a number of months now, but, you know, you'd almost say time is of the essence. We have been required -- because of the eminent domain and the court order to vacate the other facility, we upgraded the facility, another rail facility, to which where we offload
and load rail cars now. We load it on our trucks and truck it to this facility.

Some of the customers that we've had for many years are helping us out by shipping in by truck, which they normally used to ship by rail, where we offload it, but it's extremely difficult, and the railroad has resisted.

There has not been -- since that June telephone conversation, there has not been one written piece of correspondence. In fact, several months ago I was able to make contact by phone to the Industrial Development Department, and they indicated at that time that they were going -- they were drafting a letter and that their letter would reflect that they were -- that their legal department was requiring that both the crossing agreement and that the lights and gates would be put in place concurrently with the installation of the new switches.

I asked the gentleman at that time, and I had known him for well over 20 years, to please include the facts that we had been working
together with this, and they had participated with this for over four years, and his answer to me was, "Ben, I work for Norfolk Southern."

I really don't understand why I have gotten to such an immediate and vigorous brick wall on this, but I urgently need your help, and if I am forced to litigate it, then they win on two things. I do not have a massive legal department, as they do, and they win by virtue of time, because to litigate it would require months and months and millions of dollars to do so.

CHAIRMAN NOTTINGHAM: I understand. We'll certainly track this situation, and I'll follow up with staff, as well. Thank you for bringing it to us.

MR. SLAUGHTER: I do appreciate it, Chairman. Thank you.

CHAIRMAN NOTTINGHAM: Ms. Dearden, thank you for being here today, too. I took particular note of your statements about the unilateral severing of track connections. That's something, as a person who came to this job out
of a deep passion for infrastructure and keeping things moving in our country, those types of statements and situations are always of concern to me.

Occasionally, they can be -- I suppose in the best of circumstances they can be perhaps warranted or appropriate if everybody's working together, but very often they're a huge concern to me, so thank you for all of your testimony.

Commissioner Buttrey, you have any questions? Vice Chairman Mulvey?

VICE CHAIRMAN MULVEY: Just briefly.

Mr. Kloss, you're with Evraz Steel. I notice that you're part of Oregon Mills.

MR. KLOSS: That's correct.

VICE CHAIRMAN MULVEY: You manufacture rail?

MR. KLOSS: Not at this time.

VICE CHAIRMAN MULVEY: No, no. Oregon Steel does. They no longer manufacture rail?

MR. KLOSS: Yes.
VICE CHAIRMAN MULVEY: Okay. They're out of the business then? Okay. I thought that might have been one of your leverages for getting a quick response. You make the rails, so if you want to see some rail moving back to Norfolk Southern, they better negotiate with you.

But Mr. Slaughter, you said it's been very, very difficult to bring a case, but you are indicating that there's almost a conspiracy involved here between the railroad and this mega-transload facility, that this got proposed, and they're going to work with them, and then they shut you down by closing your crossing. Is that accurate?

MR. SLAUGHTER: Well, I would argue that point, sir, exactly, but, you know, really what I'd really like is a resolution to this without having to go to that extent. I mean, essentially, you know, I have been forced to vacate the other facility, which we enjoyed for many years, and, I mean, I'd like a dialogue with them that would be meaningful and that we could
go, but, I mean, as I said, when you can't even
get a letter within four months -- it was
indicated where a letter was being drafted.

VICE CHAIRMAN MULVEY: Well, maybe our
Office of Consumer Assistance will be able to
help you in at least getting a response to the
railroad so they can try to justify what they're
trying to do, and we are very, very sensitive to
these kinds of --

MR. SLAUGHTER: Commissioner, I would
be immensely grateful, and so would my employees
and my customers.

VICE CHAIRMAN MULVEY: Ms. Dearden,
thank you very, very much. I want to ask you.
You said that the railroads are basically
demarketing some of this TIH material. Where has
it gone? Is it moving by truck, or has it just
stopped being shipped, and what are the consumers
doing who are receiving that material?

MS. DEARDEN: Well, some of the
business is being rerouted to different
destinations. Some of the destinations -- one of
the negative impacts is, actually, by changing the routes, they're actually adding miles to the routes, and so the safety of the shipments is negatively impact.

VICE CHAIRMAN MULVEY: Or at least the exposure is, anyway, yes.

MS. DEARDEN: Right.

VICE CHAIRMAN MULVEY: Mr. Tylicki, I found your comments very interesting on passenger rail. I will tell you that I wrote my doctoral thesis on Amtrak when it was first getting started, so I'm very familiar with what the railroads got in terms of their relief from their common carrier obligation. It was in response, of course, to providing service to Amtrak on reasonable terms.

There is some legislation out there that proposes to increase to some extent this Board's responsibility for making sure that they're helping, working with railroads to improve commuter rail service and Amtrak service, and this is something this Board also feels is
very, very important, and I want to thank you for
your testimony.

That's all I have, Chairman.

CHAIRMAN NOTTINGHAM: Thank you.

Thank you, witnesses. That adjourns our hearing
today, and the record typically remains open for
30 days. We'll typically keep the record open
for 30 days if there is anyone else who has
anything to add, and we thank you. This hearing
is adjourned.

(Whereupon, the foregoing matter went
off the record at 4:23 p.m.)