

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

-----x

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 |

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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. Strohmeier

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

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Panel V: Other Interests

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

Slaughter Company
Benjamin B. Slaughter

Highroad Consulting, Ltd.
Sandra Dearden

Evrax Claymont Steel
Daniel R. Kloss

Raymond Tylicki

ALSO PRESENT:

ANNE K. QUINLAN, Acting Secretary

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P-R-O-C-E-E-D-I-N-G-S

(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.

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1 CSX is in the business to serve
2 customers. That is our business, and serving
3 them is how we generate revenue. I mean, if we
4 do it poorly, you know, there are other options
5 that crop up.

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

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

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

21 Capacity for rail operations has to
22 be understood in the context of networks. The

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1 network is often defined by the line of road and
2 the infrastructure, but it also is defined by
3 train priorities, speed differentials, the amount
4 of switching work that's done on the main, those
5 kinds of issues.

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

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

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

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1 requirement to be careful about those
2 investments.

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

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

22 Vessel capacity and, frankly, the

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

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

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

19 We can also lease, and we do, but
20 there are inherent problems with lease as a long-
21 term solution, and then, of course, when you
22 purchase to get a locomotive ordered, built and

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1 in service, it can easily take up to a couple
2 years. Building capacity expansion, again,
3 planning, design, permitting, six to 12 months is
4 pretty normal, another six to 24 months to build,
5 depending on the signal design issues, for
6 instance.

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

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

18 There has been a long history of
19 customers making capital investments. Coal
20 loading equipment and mine-side tracks are all,
21 you know, always on producer's property pretty
22 much. Industrial side tracks and loading

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1 facilities are on customer property and built by
2 the customers. Freight cars are owned by either
3 of us.

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

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

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

22 Just like the export coal three years

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1 ago, you would not have been able to predict that
2 that coal would explode to the volume and to the
3 degree of quickness that it has, and so you can't
4 know how you're going to invest in your resources
5 to perfectly match and perfectly time capacity
6 issues.

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

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

22 I wanted to take you through a

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

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

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

14 So he's going to, in the next slide,
15 set up some cars and then pull past the switch,
16 realign the switch, and he'll back in, and he
17 will hook up to the first car and the second car,
18 and he'll pull through the switch. He will then
19 back up and set his car with his train, and he
20 will, as he's doing that, face an opposing train,
21 which goes into the siding, and I see the light's
22 on. Then I have maybe a couple of minutes.

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1 CHAIRMAN NOTTINGHAM: If you could
2 just wrap up in the next minute, please.

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

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

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

21 If you look to the next set of
22 slides, this is a different configuration where

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1 the switching is all done off of the main, and --

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

5 MR. GIBSON: Okay.

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

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

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

20 CHAIRMAN NOTTINGHAM: Thanks. Mr.
21 Hixon for the Norfolk Southern Corporation.
22 Welcome.

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1 MR. HIXON: Thank you. Good morning.
2 First, NS joins in the submission of the
3 Association for American Railroads. This morning
4 I hope to focus the Board's attention on an issue
5 that is critical to the railroad industry.

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

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

22 To advance public safety, shipper

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1 should be constantly promoting substitute
2 products, seeking to ship shorter distances,
3 unequivocally and unanimously advocating safer
4 tank cars. They are not.

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

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

19 First, TIH commodities, unlike coal
20 or grain, are extremely dangerous because of the
21 innate characteristics, but in many cases these
22 commodities may no longer be necessary or may

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1 soon be unnecessary. I'm not a chlorine expert,
2 but considering the following facts that are
3 published by the Center for Disease control.

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

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

19 Second, the transportation risks fall
20 only on the railroads, not the manufacturers of
21 the TIH commodities. Accidents happen despite
22 best efforts, sometimes accidents from human

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1 error. Other times they can happen in bizarre
2 ways, like when a tractor-trailer driver drove
3 through a crossing gate and flashing signal
4 lights and rammed into the side of one of NS's
5 passing trains and resulted in the derailment of
6 24 rail cars.

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

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

21 Had it been a train of automobiles or
22 automobile parts, no deaths. Had it been a train

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1 of paper or lumber, no deaths. In short, the
2 risks associated with these types of incidents
3 increase astronomically because of the
4 characteristics of TIH commodities.

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

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

18 What alternative products are being
19 developed, and when will they be on the market?
20 Where have facilities ended the use of chlorine?
21 What manufacturing, water purifying, and drug
22 manufacturing process no longer require chlorine?

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1 A few witnesses yesterday nibbled at
2 the edges of these issues, but we are not
3 anywhere near any real understanding. These are
4 the interesting issues that the Board should
5 understand, which is why a hearing on TIH
6 commodities would be helpful.

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

17 Recently, the Pipeline and Hazardous
18 Materials Safety Administration, PHMSA, proposed
19 new rules applicable to tank cars used to
20 transport TIH materials. These proposed rules
21 would apply regardless of whether the rail car
22 would travel in, near, or through high-threat

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1 urban areas.

2 Among the proposals are the
3 following: to establish a maximum speed limit of
4 50 miles per hour for all rail tank cars carrying
5 TIH; establish a maximum speed limit of 30 miles
6 per hour in non-signal territory for all TIH tank
7 cars, unless the tank car can meet other enhanced
8 requirements.

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

20 All of these rules, when and if
21 finalized, will dramatically and adversely affect
22 rail operations. These effects will not just be

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1 the direct costs to comply. They will also be
2 costs to the railroad network generally.

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

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

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

20 Although this element of the common
21 carrier obligation often receives little
22 attention, Agency and court rulings have made

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1 clear that not all requests for service are
2 reasonable.

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

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

16 A longstanding standard is that
17 common carriers are only required to act
18 reasonably. Indeed, a railroad's actions do not
19 have to be perfect, nor must a railroad's actions
20 treat customers equally. A railroad's obligation
21 is to act reasonably, which is itself a fact-
22 finding -- a fact-specific question.

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1 Just as the present facts and
2 circumstances are integral to determining whether
3 or not the railroad has acted reasonably, whether
4 a shipper's request is reasonable should be
5 determined by the facts and circumstances
6 surrounding that request. As I've mentioned, the
7 facts have changed with the development and
8 continued development of new substitute products
9 and process and the security changes after
10 September 11.

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

18 The Board should also examine what
19 the maximum requirements will be in the future
20 for a shipper's request for common carrier
21 service for TIH transportation to be reasonable.
22 The shipper's goal is to manufacture these toxic

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1 products and hand them off to somebody else,
2 usually a railroad, and be absolved of any
3 responsibility for the dangers stemming from the
4 release of their products.

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

19 Thank you.

20 CHAIRMAN NOTTINGHAM: Thank you, Mr.
21 Hixon. We'll now turn to Mr. Edward Hamberger of
22 the Association of American Railroads.

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1 MR. HAMBERGER: Thank you, Mr.
2 Chairman. Good morning, Mr. Vice Chairman and
3 Commissioner Buttrey. Thank you for the
4 opportunity to appear before you today to discuss
5 the railroad's common carrier obligation.

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

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

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1 does not have the capacity to provide the
2 service.

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

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

21 Railroads have to decide how the
22 customers share that train, when each train is

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1 going to run, and who is going to share the track
2 and when. When capacity is constrained, it
3 becomes much more complicated, because network
4 efficiency has to be maintained. That has to be
5 the overarching goal, to provide the best service
6 to the most number of customers.

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

15 Railroads are working extremely hard
16 to maintain and expand their capacity to provide
17 service, including making record levels of
18 investment. From 1980 through 2007, U.S. freight
19 railroads invested approximately \$420 billion on
20 capital spending and maintenance expenses related
21 to infrastructure and investment --
22 infrastructure and equipment, more than 40 cents

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1 out of every revenue dollar.

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

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

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

21 In addition to equipment and
22 infrastructure, employees are an important

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1 determinant of rail capacity, and railroads have
2 been aggressively hiring and training crews to
3 expand our capacity. The Board's data show that
4 Class One railroads had 11,000 more employees in
5 December of 2007 than they did in December of
6 2003.

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

12 Finally, I will also like to briefly
13 address the transportation of highly hazardous
14 materials known as TIH, toxic by inhalation.
15 Today, because of the railroads' common carrier
16 obligation, railroads but no other transportation
17 provider must transport these materials, whether
18 they want to or not, but every time railroads do
19 so, they and their shareholders face potentially
20 ruinous liability, even though these commodities
21 account for a tiny fraction of all rail
22 shipments, about .3 percent.

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1 It is fundamentally unfair to force
2 railroads and their shareholders to bear this
3 burden. Railroads are the only participants in
4 the production, distribution, and consumption
5 chain for TIH that are required to handle the
6 commodities.

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

12 The correct public policy, as Mr.
13 Hixon pointed out, should encourage the entities
14 who are making the decisions to produce, ship,
15 and use TIH to find product alternatives to TIH
16 whenever and wherever possible. For this reason,
17 we urge the Board to institute a proceeding that
18 will focus solely on TIH transportation, and I'd
19 like to emphasize at this point, notwithstanding
20 what some may have thought they heard yesterday,
21 we are not asking to be let out of our common
22 carrier obligation.

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1 I was pleased to hear, and, in fact,
2 when I closed my eyes I thought it was railroad
3 personnel talking when some of the witnesses
4 yesterday were talking about the fact that
5 railroads are 16 times safer in moving hazardous
6 materials, the fact that railroads do ease
7 congestion, the fact that railroads do get 435
8 miles per gallon on one ton of freight.

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

15 So there are a number of issues. Mr.
16 Mulvey, you mentioned one yesterday, URCS. Does
17 it properly capture all of the costs? Does it
18 properly allocate those costs? That's something
19 we need -- it should be looked at. What is the
20 proper public policy with respect to moving these
21 materials through our cities? What is the proper
22 public policy with respect to our employees?

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1 And I think there are a number of
2 issues that the Board would be well advised to
3 take a look at and would be well within your
4 rights to open a proceeding and, of course, one
5 of the issues that was raised yesterday, what is
6 your power in this area? And I think it merits a
7 much more detailed discussion than we are able to
8 do today just in the context of the common
9 carrier obligation. Thank you.

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

14 Mr. Hamberger, if I could just jump
15 right in, yesterday I'm sure you -- I know you
16 were here for most of the day. I'm sure you were
17 following it in its entirety. There were some
18 pretty strong statements coming out of the
19 American Chemistry Council that -- and some of
20 the witnesses from the chemistry industry that it
21 is the position of the freight railroad industry,
22 if I recall their statements correctly, that the

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1 proper public policy should be complete
2 indemnification, one hundred percent of railroads
3 for railroad gross negligence in the handling of
4 TIH and chemicals. Is that your position?

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

19 We believe that a Price-Anderson type
20 of approach is warranted here, and that would
21 require, as in Price-Anderson, that the railroads
22 carry the primary insurance liability, that there

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1 would then be a fund to pay above that, and that
2 eventually there would be a cap on liability.
3 So, no, we're not asking to be exempted from
4 being responsible, but we think it is a shared
5 responsibility.

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

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

21 MR. HAMBERGER: We have not quite
22 gotten to singing "Kumbayah" together, but we're

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1 trying. In fact, we have had stop-and-start
2 discussions at the CEO level, CEOs of our members
3 and CEOs of their members, including my
4 counterpart at ACC and myself, and we're sort of
5 in a standstill at this point waiting for a
6 response, a proposal from the ACC.

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

12 MR. HAMBERGER: Well, you know, the
13 whole issue of a holistic approach, our view,
14 frankly, is that the issue of the safety and
15 security and the movement of TIH is one that can
16 be dealt with separately from the issue of
17 economic regulatory issues, and I think to tie up
18 the ability of our -- or confound the ability of
19 our industries to work together trying to address
20 this issue of TIH movement, to tie it up and
21 confound it in economic regulatory issues is not
22 the way to go.

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1 We would prefer to deal with that
2 separately. We're probably not going to reach
3 agreement on the economic regulatory issues, but
4 there's no reason that we shouldn't be able to
5 sit down.

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

17 CHAIRMAN NOTTINGHAM: So just at the
18 risk of being repetitive, the railroad industry
19 position is not that you won't talk about a
20 policy solution to your extreme risk exposure in
21 this area unless all the parties to those
22 discussions agree first that the railroads will

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1 be completely protected from any liability
2 exposure in cases of railroad gross negligence.

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

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

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

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

22 MR. HAMBERGER: Correct.

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

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

13 CHAIRMAN NOTTINGHAM: Okay.

14 MR. HIXON: If I could add that, as I
15 said in my testimony, we are a hundred percent
16 liable right now. We'd be happy to talk to
17 anybody about reducing that liability.

18 We're not looking to be -- it'd be
19 nice if we were a hundred percent not liable, but
20 I think there's a large area in between we'd be
21 willing to talk about.

22 It is interesting. You talked

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1 yesterday about the railroads being liable for
2 accidents, and we have had cases in which we've
3 done nothing wrong, and the jury has still found
4 us negligent.

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

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

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

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1 liability.

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

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

20 As I've said, we've had cases where
21 we've done nothing wrong, grade crossing cases
22 where we've done nothing wrong. They've run into

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1 the side of our train, and because we are
2 perceived as having deep pockets, and the poor
3 driver does not have deep pockets, they can find
4 us liable even though we did nothing wrong.

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

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

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1 to our tort liability system.

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

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

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

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

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1 exposure?

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

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

10 MR. HIXON: I would not.

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

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

20 MR. HIXON: I'm not sure if I could
21 say very often, but they are at times reduced on
22 appeal.

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1 VICE CHAIRMAN MULVEY: Well, I was
2 thinking when the awards are not really based
3 upon facts, when the jury departs from the facts
4 in the case and it makes an award because of deep
5 pockets. It's my understanding that those awards
6 are, in fact, often reduced on appeal.

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

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

12 MR. HIXON: Currently, about \$1
13 billion.

14 VICE CHAIRMAN MULVEY: About \$1
15 billion per occurrence?

16 MR. HIXON: Right.

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

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

22 VICE CHAIRMAN MULVEY: Okay. We heard

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1 yesterday about the failure to quote a tariff
2 rate for shipment of some commodities. They've
3 asked for a tariff rate, and the railroads have
4 refused to quote a tariff rate. Can any of you
5 comment on that, because our understanding is
6 that the railroads are always supposed to quote
7 a tariff rate upon request.

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

14 VICE CHAIRMAN MULVEY: Thank you.

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

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1 take care of that.

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

10 MR. HAMBERGER: No, to their general
11 counsel.

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

20 It's the railroads are most often
21 accused of trying to demarket and not fulfill
22 their common carrier obligation. Would you agree

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1 with this executive that, in fact, it is
2 merchandise traffic where the opportunities for
3 railroad growth really lie today?

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

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

22 VICE CHAIRMAN MULVEY: Mr. Gibson?

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1 MR. GIBSON: I agree entirely. The
2 merchandise network is more complex in some ways
3 than coal and intermodal, but it does not show in
4 our system signs of dwindling or going away at
5 all. It is growing at a slightly slower rate
6 than some of the other commodities.

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

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

21 I have several other questions. Oh,
22 I'll ask one more at this point, and that is it's

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1 been suggested -- you mentioned Price-Anderson.
2 Others have talked about some sort of per-car
3 charge like \$50 per car or something like that,
4 and use that to build a fund that can be used for
5 compensation in case of a serious accident such
6 as a chlorine spill in a large city and let that
7 build up to several billion dollars and have that
8 in reserve. Have you thought about something
9 like that, and have you considered making a
10 presentation on something like that?

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

19 It wouldn't be regulatory because of
20 the pricing and because of the structure
21 involved, but that is one option, but, again,
22 that's one of a number of different approaches

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1 that we're looking at as possible ways of
2 addressing the exposure problem.

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

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

22 VICE CHAIRMAN MULVEY: But with the

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1 railroads carrying the primary insurance?

2 MR. WARCHOT: As the contractors do.

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

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

19 VICE CHAIRMAN MULVEY: You would
20 agree, though, it's bet the company, not bet the
21 industry? It's like the airlines, for example.
22 When the airlines have a very serious accident

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1 and it's their fault, very often the airline goes
2 out of business, yet all the places that the
3 airline serves still get served.

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

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

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

21 VICE CHAIRMAN MULVEY: I did a lot of
22 work on the aviation insurance issue, and the

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1 dwindling number there, as well, historically.

2 MR. HAMBERGER: Yes.

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

5 CHAIRMAN NOTTINGHAM: Sure.
6 Commissioner Buttrey?

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

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

20 We heard a lot yesterday about the
21 attitude, and the word that's commonly used is
22 arrogance of the people that deal with the

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1 customers and the railroad industry, and I was
2 wondering if you could tell me if your
3 association has ever considered sending these
4 customer relations people to charm school,
5 because apparently, you know, people have this --
6 people have this attitude, and it's really --
7 it's really reached a boiling point, really, with
8 a lot of people about how they're treated by
9 their serving railroad, which is sort of
10 inconceivable to me, having come from a company
11 who is well noted around the world for customer
12 service.

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

20 Now I know that doesn't, you know,
21 resonate with a lot of people. "So what?" some
22 people would say, but it sort of permeates the

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1 entire dialogue, really, and rhetoric around a
2 lot of these issues is the way people are
3 treated.

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

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

20 I think that there is some
21 disconnect, what I have discovered in ten years
22 in this job, that there is a disconnect between

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1 the real customers out in the real world beyond
2 the Beltway and those who represent those people
3 inside the Beltway at forums here in Washington,
4 D.C. We instituted ten years ago a customer
5 forum. We held five of them in 1998. We're now
6 down to doing one a year. It's going to be in
7 May.

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

16 This industry understands that it is
17 a service industry. It understands that we are
18 in competition with other providers of
19 transportation, that our customers have choices,
20 whether it be other providers of transportation
21 or product and geographic competition. There are
22 other alternatives that our customers have, and

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1 we are committed to providing them the best
2 service and the friendliest service possible.

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

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

19 We do use those results to try and
20 make improvements and to try and address the
21 issues that come up, but in terms of customer
22 focus, we certainly have as one of our core

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1 principles for the entire organization is that
2 the customers is at the forefront of everything
3 we do, and we know our business is a service
4 industry, and we're dependent on customers, and
5 so we are not out hoping to antagonize anyone
6 that might want to ship on CSX.

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

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

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

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

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1 service.

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

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

17 COMMISSIONER BUTTREY: That's my
18 suggestion.

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

21 CHAIRMAN NOTTINGHAM: Thank you, Mr.
22 Buttrey. I certainly want to associate myself

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1 with Mr. Buttrey's question there. I've
2 certainly heard too often the same concerns. I
3 know it's not a news flash to you. I've shared
4 this in different settings in the past.

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

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

19 It wasn't because all the people at
20 VDOT were bad people. They were great. In fact,
21 when we drilled down and talked to the front
22 lines people out in the field offices and the

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1 area headquarters, they had great relationships.

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

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

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

21 COMMISSIONER BUTTREY: I'll leave that
22 to Tom Peters.

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1 CHAIRMAN NOTTINGHAM: Let me ask --
2 oh, and Mr. Hixon, you had mentioned -- Mr.
3 Mulvey asked you about insurance premiums. If we
4 could, if it's not drilling into something that's
5 overly sensitive or protected, if we could have
6 for the record some more information about your
7 company's insurance premiums. In fact, I would
8 say that to your association generally, Mr.
9 Hamberger.

10 MR. HAMBERGER: We do retention, as
11 well.

12 CHAIRMAN NOTTINGHAM: Trying to get a
13 sense of what it's costing you, because there was
14 some skepticism, I think, voiced yesterday by
15 some of the witnesses that is this really a big
16 problem for the railroads, or is this -- and so -
17 -

18 MR. HAMBERGER: I think, if I might
19 just interject, it's insurance. It's the
20 retention level, but it's also, as Mr. Hixon was
21 trying to point out in his testimony, there are a
22 lot of other impacts operationlly, particularly

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1 with the TSA and DHS folks involved, and so it's
2 not just the dollars and cents of the insurance.
3 It's also the risk and how you monetize what that
4 risk is, and so -- but anyway --

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

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

18 MR. HAMBERGER: I had in my prepared
19 remarks and just realized I did not mention it,
20 but you're going to hear from Henry Lampe on the
21 next panel. Norfolk Southern can go get a
22 billion dollars. Henry Lampe can't, and as a

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1 short line, if it's a bet-the-company for NS,
2 it's really a bet-the-company for a short line.

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

8 VICE CHAIRMAN MULVEY: Mr. Friedman
9 made that line.

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

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

20 How do you, without getting into
21 specific companies' pricing strategies or
22 anything that's not appropriate for the public

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1 domain or for antitrust reasons to be shared, but
2 generally speaking, how do you -- do you just
3 absorb those costs? Do you embed them into your
4 rate structure?

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

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

20 We do not develop rates on a cost-
21 plus basis where we try to figure out, you know,
22 is there -- do we have all the right components?

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1 So when we have these costs, they are always --
2 they're embedded in all of our costs as part of
3 our ongoing cost of running the business, but
4 when we are pricing for customers, what we're
5 trying to do is we're trying to price to the
6 market.

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

20 CHAIRMAN NOTTINGHAM: Is it fair to
21 say that those costs get borne by your customers
22 one way or another?

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1 MR. HIXON: Yes. It's our goal to
2 always make sure that our costs are recovered
3 from our customers one way or the other, or else
4 our shareholders will decide somebody else can
5 run the company.

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

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

20 CHAIRMAN NOTTINGHAM: So, broadly
21 speaking, all shippers are paying for part of
22 this problem.

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1 MR. HIXON: I think it could be viewed
2 that way, yes.

3 CHAIRMAN NOTTINGHAM: One way or
4 another.

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

15 CHAIRMAN NOTTINGHAM: Now if --

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

21 CHAIRMAN NOTTINGHAM: If this Board or
22 Congress or both entities working together

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1 somehow could figure out a solution, a cap, some
2 type of reasonable cap, some type of policies,
3 regulatory or statutory solution that would
4 largely address your somewhat unlimited liability
5 exposure, would shippers -- should shippers
6 expect to see rates come down if your -- if that
7 problem were addressed?

8 MR. HAMBERGER: I don't do rates.

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

15 I think another way to look at it is
16 I'm not sure if today we are recovering -- I know
17 we're not recovering what could be the exposure
18 that we're facing when we move TIH. Basically,
19 when I say we're betting the company, we're
20 betting the company that we don't have a large
21 accident somewhere where we have billions of
22 dollars in damages.

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1 That's not based into our rates
2 today, and so if you take away the exposure from
3 those, the bet-the-company proposition, since
4 we're not charging for it today, I'm not sure if
5 necessarily you would see a big reduction, but,
6 of course, if our exposure goes down, and if our
7 costs are going down, then I think we would have
8 to examine whether or not our rates should be
9 adjusted accordingly.

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

18 Much of those costs, if I understood
19 your earlier answer, get passed on to shippers
20 one way or another, perhaps not all of them.
21 Perhaps the unknown, the worst case scenario,
22 \$100 billion treble damages disaster scenario,

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1 you're not passing those costs on, but you're
2 passing on significant costs related to your
3 liability insurance premium costs and possibly a
4 little more than that to cover whatever any
5 business would need to do in the way of a
6 contingency fund or reserve or self-insurance.
7 Is that fair to say?

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

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

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1 costs along.

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

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

21 Shippers, perhaps, might not ever see
22 a benefit, so you've got to really think, put

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1 yourselves in their shoes, think long and hard
2 about how you can make this meaningful to them.

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

11 CHAIRMAN NOTTINGHAM: Before I forget,
12 too, I thought the Olin Corporation yesterday
13 later in the day described an interesting offer
14 that's at least worth your consideration, if you
15 wouldn't mind, to somebody, Mr. Hamberger,
16 following up with Olin about just trying to
17 collaborate with their railroad partners on what
18 your insurance -- what the railroads' insurance
19 requirements are, what those costs are, and he
20 described a scenario where Olin might be willing
21 to work out a deal with the railroads where they
22 pay somewhat similar to what I heard described

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1 here by some of the witnesses on this panel.

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

12 We heard a lot of -- I heard
13 Chemistry Association counsel saying one thing,
14 at least one chemical industry witness who said
15 he couldn't afford to be a member of the
16 Chemistry Council saying something slightly
17 different, but then the Fertilizer Institute,
18 having a very different position much more in the
19 spirit of coming up with real ideas to solve the
20 problem, and then I believe a member of the
21 Council, Olin, having a very different outlook
22 than the Council had and much more towards having

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1 a real proposal. So if you could --

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

11 CHAIRMAN NOTTINGHAM: No, it was just
12 a friendly suggestion, and let me reiterate the
13 concern that Mr. Mulvey expressed and I believe
14 Mr. Buttrey expressed either yesterday or today.
15 This whole notion that we heard yesterday that
16 railroads on occasion refused to quote tariff
17 rates, whether it be in the tussle and tense
18 environment of negotiating comprehensive
19 contracts, whatever the context is, I'm glad to
20 hear the statement today, Mr. Hamberger, that you
21 had a -- that you huddled with some of your
22 colleagues last night, and you want people,

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1 shippers, to contact the General Counsels of the
2 railroads if this were to happen.

3 MR. HAMBERGER: That is correct.

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

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

17 I mean, it's not -- I haven't
18 personally observed this, but it's come from
19 enough witnesses that I have trouble thinking
20 it's completely a fabrication, so I just -- it's
21 good that your General Counsels from your firms
22 are available to take those kind of calls, but

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1 that's a last resort. I mean, that's a given
2 that they're there for that.

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

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

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

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1 Commissioner Buttrey.

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

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

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

20 MR. HIXON: Frankly, I think right now
21 what we're running through the Port of Norfolk in
22 our Lamberts Point facility is, I guess, a little

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1 bit more than half of what we were doing at the
2 peak, so we have plenty of capacity there, and we
3 can handle the business.

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

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

20 CHAIRMAN NOTTINGHAM: And I applaud
21 the international growth and the international
22 complexity of the rail industry. It truly is

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1 international whether you start more locally and
2 recognize that we have Canadian railroads
3 operating throughout the United States. We have
4 U.S. railroads operating in Mexico, Panama, and
5 then we have railroads shipping product that goes
6 all over the world, coal in particular, grain,
7 and then, of course, receiving international.

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

17 So I hope you'll -- I hope all of the
18 railroads will keep -- we set up, of course, a
19 new Rail Energy Transportation Advisory Committee
20 for the very purpose of trying to get out ahead
21 of these kind of trends, but if you can and will
22 work obviously with the mines, as well, and the

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1 source, I appreciate the answer, Mr. Hixon, but
2 if you could just keep in close communication
3 with us so we can telescope out and get out
4 ahead.

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

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

18 The temporary strains that we've seen
19 were fairly easily overcome by reallocating
20 locomotives into the service and by sending crews
21 to areas until we get the training cycle up, and
22 we've been fairly good over the last, you know,

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1 recent years in having crews availability and
2 supply, you know, and equilibrium, and so we
3 don't see a resource issue at this time.

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

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

18 CHAIRMAN NOTTINGHAM: Thank you. Vice
19 Chairman Mulvey?

20 VICE CHAIRMAN MULVEY: Thank you.
21 Clarify something for a moment. It's not really
22 a matter of the current costs of insurance to you

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1 and passing that cost onto shipments that's at
2 issue here.

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

8 MR. HIXON: That's correct.

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

12 MR. HIXON: That's correct.

13 VICE CHAIRMAN MULVEY: Okay. Thank
14 you. Some have alleged that the proposals to go
15 to a Price-Anderson or some other kind of capping
16 approach really takes the burden off the
17 railroads, and especially in written testimonial
18 but not so much in the oral testimony yesterday,
19 people pointed to the fact that Graniteville and
20 the other major accidents were railroad caused,
21 or the railroads had the responsibility, whether
22 it was a railroad employee or some other failure

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1 of the rail system, and had nothing to do with
2 the manufacturer or the end user, and therefore
3 railroads ought to bear the cost.

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

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

20 The Graniteville accident was the
21 first time since Norfolk Southern was formed that
22 we actually had an accident where the cost of the

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1 accident exceeded our self insurance level, where
2 we actually went to our insurance company and
3 said, "All right, this time, after 25 years of
4 paying premiums, you have to send it the other
5 way."

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

15 So with a Price-Anderson, we're not -
16 - just because the catastrophic is covered, it
17 doesn't mean we're going to be safe. The TIH
18 shipments are less than one percent of our
19 shipments. We try to operate every train as
20 safely as we can, even if it's a coal train, even
21 if it's a grain train. We just don't want the
22 accident.

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1 We don't want anybody to get hurt,
2 and so just because we have the super liability
3 exposure with TIH doesn't mean that because we
4 don't have it on other shipments we don't care
5 about that, and I think our record demonstrates
6 that we are very concerned about the safety of
7 our operations, and I think a Price-Anderson,
8 we're still going to -- even with a Price-
9 Anderson in effect, we would work just as hard as
10 we do today not to have any accidents with any
11 commodity.

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

17 MR. HIXON: No, not whatsoever.

18 VICE CHAIRMAN MULVEY: On the AAR
19 presentation, which I found very interesting and
20 some interesting new numbers in there, I saw you
21 comparing the expenditures of Union Pacific and
22 other large railroads compared to some of the

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1 states. Is the spending on the state roads, is
2 that just state monies, or does that also include
3 the monies that come from the federal government
4 Highway Trust Fund on those roads, or is it only
5 the state spending? I went back to Table 12 --

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

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

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

22 MR. HAMBERGER: I've done some

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1 research. Our figure includes the federal
2 dollars.

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

5 MR. HAMBERGER: Yes.

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

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

16 To what extent is some of the
17 increased spending that's going on in terms of
18 investing in the capacity, investing in
19 infrastructure replacing some of the downsizing
20 that took place in the eighties and nineties, and
21 now we're sort of putting back the rights-of-way
22 and the systems that were there beforehand.

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1 MR. HAMBERGER: I don't have any
2 specific numbers on that, and jump in if you do,
3 gentlemen, but I assume that there is some of
4 that, but I also believe that a lot of it is
5 because of the growth in traffic and also
6 different traffic patterns, and the one that
7 always leaps out at me is the ethanol, where
8 Kendell Keith, who testified yesterday, advise me
9 a little while ago that Iowa will become a net
10 importer of corn, which is a major change in a
11 traffic pattern when that has not been the case
12 up to date. So it is -- I'm sure there is some
13 impact of that, Mr. Vice Chairman, but I think
14 the majority of it would be from the growth in
15 traffic and changes in traffic patterns.

16 VICE CHAIRMAN MULVEY: One of the
17 things that's concerned me, and I think this goes
18 back to your example of switching the car and the
19 complexity of all of that, is this change in the
20 traffic flows associated with things like
21 ethanol. Once you begin moving, instead of
22 trains all going to ports, and all of a sudden

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1 you begin moving things across states in counter-
2 fashion to what it was set up for, that then
3 really can chew up a lot of capacity, and I was
4 wondering if the railroads have been looking at
5 what those impacts might be.

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

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

22 The impact that we are trying to

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

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

22 MR. GIBSON: Well, I've worked in this

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1 industry for 25 years, and the ability to spend
2 for growth is, in my experience, more than a
3 breath of fresh air. I mean, it is an exciting
4 opportunity, and it has to be done carefully.

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

11 The approach has to be gradual, and
12 it has to be sustained, and we are always short
13 of the number of investments that people would
14 like to fund when we go through our budget
15 process, just like any other company, and so we
16 make the best decisions based on the best
17 information that we have, and, you know, our
18 ability to fund is based on our ability to grow,
19 and if the infrastructure is going to stay
20 strong, and if it's going to be reliable for all
21 of our customers including passengers and
22 everybody else that uses the right-of-way that we

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1 build and maintain, the level of investment has
2 to stay at a reasonable level for that
3 infrastructure to be strong and to prepare for
4 the growth of the future.

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

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

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

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1 abandonment?

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

10 VICE CHAIRMAN MULVEY: Thank you.

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

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

21

22 We appreciate that every day we work

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

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

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

22 We have quite a distinguished and

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1 fairly large panel, so we will need to stick to
2 the time limits you've been allocated. Our first
3 speaker on this panel will be Mr. Richard F.
4 Timmons, joined by Mr. Keith T. Borman from the
5 American Short Line and Regional Railroad
6 Association. Welcome.

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

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

22 From a modest beginning in 1980, when

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1 the Staggers Act was partially deregulated, the
2 rail industry to the present has grown
3 significantly. Today's short line and regional
4 railroads total 556 roads. They operate over
5 51,000 miles of right-of-way. They employ 22,000
6 railroaders.

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

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

20 Most importantly, they are not
21 capacity constrained and, as such, seek as much
22 business as they can attract. They are the

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1 connection for thousands of businesses and
2 communities to the national rail network that
3 would otherwise rely on trucks or just not be in
4 business.

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

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

16 The often less robust operating
17 networks inherited from the former Class I owners
18 present special risks and challenges to small
19 railroads, challenges that have been steadily
20 mitigated over the years, however. That
21 notwithstanding, the inability of small railroads
22 to pass along anything near the actual cost of

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1 insuring these TIH shipments makes each one a
2 potential threat to the continued existence of
3 the railroad itself.

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

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

17 Now, from my perspective, from a
18 public policy viewpoint, this should be an
19 unacceptable end state. It is an example where
20 the public interest conflicts with the common
21 carrier obligation. The Short Line Association
22 has joined the AAR in proposing a Price-Anderson

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1 type legislation modeled after the law created to
2 deal with similar liability concerns in the
3 nuclear waste disposal concerns of the 1950s.

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

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

21 Mr. Chairman and Commissioners, I
22 think you for your attention this morning, and

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1 I'll be available for any questions you may have
2 at the appropriate time. Thank you very much.

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

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

10 I would like to point out that in
11 addition to operating in the State of Oregon we
12 operate in 26 other states, as well. We have 43
13 small railroads, some very small, some at the
14 same size of our railroad in Oregon, and we have
15 2,000 employees. In the last five years,
16 RailAmerica has invested over \$300 million in
17 capital on our U.S. railroads.

18 I would like to make just a few
19 comments before I get into my comments about the
20 common carrier obligation in general concerning
21 some of the comments made yesterday by the
22 testimony of the first two panels involving some

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1 factual testimony. As was discussed, we have a
2 pending matter before the Board on the
3 reasonableness of an embargo, and I do not want
4 to make any comments about that, because it is
5 pending litigation, but there are a couple of
6 factual items that I would like to correct.

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

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

20 CHAIRMAN NOTTINGHAM: Mr. Lundberg,
21 I'm sorry to interrupt, but I think this would be
22 helpful for you to know this. My counsel advises

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1 that because we are here in a scheduled public
2 hearing, on the record with all of the parties
3 having an opportunity to be here or to follow on
4 the worldwide web on the webcast, you shouldn't
5 feel for any -- for ex parte reasons that would
6 normally restrict our ability to talk about a
7 pending matter, those concerns don't exist while
8 we're here together at a public hearing.

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

15 MR. LUNDBERG: I understand.

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

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

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1 Thank you.

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

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

21 The other model is the handling line
22 carrier, and that is a business arrangement where

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1 a short line leased or bought from a Class I a
2 railroad, but the Class I retained all of the
3 commercial control of that railroad, and this is
4 the case on the CORP as well as many of our
5 western railroads.

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

15 As you can imagine, 50 percent of
16 RCAF capped at three percent a year may have been
17 a good escalator 15 years ago when these short
18 lines were set up, but given the inflation
19 factors that have beset all of the Class Is, as
20 well as all the short lines and particularly
21 regarding the spectacular rise in the price of
22 fuel, those inflation factors do not adjust the

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1 rates of a handling line carrier sufficiently to
2 recover their operating costs, their cost of
3 capital investment, and a reasonable return.

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

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

16 On the Coos Bay Line itself, up until
17 2004 it was actually doing okay. The revenues
18 covered the expenses of that line and oftentimes
19 covered the capital expenditures, although not
20 always, but in 2004, one of our major customers,
21 a major sawmill, closed its doors, and the line,
22 which handled up to at that point about 7,500

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1 carloads a year, dropped to 5,000 carloads, and
2 for a short line that is a huge body blow, but we
3 continued to operate the line at the 5,000
4 carload level until, of course, we had the
5 situation with the tunnels and embargoed service
6 on the line.

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

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

22 ODOT, as you heard yesterday

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

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

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

19 I will say that despite the
20 discussions about Maersk coming and so forth, we
21 have never been invited by the port or by Union
22 Pacific to be a part of those discussions, so we

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1 really don't know much about what the potential
2 is down there, but that leads to the second
3 proposal that we made to Oregon, which was the
4 form of a joint venture.

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

18 So one other point about the public-
19 private partnership or the joint venture, again,
20 the funds what were mentioned in both of those
21 proposals were funds that were to cover the
22 operating costs, cover the capital expenditures

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1 necessary to preserve and stabilize that line for
2 a period of five years. None of those funds were
3 destined for the profits of RailAmerica, and when
4 we gave out the term sheet to the customers, and
5 we were --

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

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

17 Our capital expenditures for 2008 are
18 in the neighborhood of \$60 million, the same
19 amount, same pace of capital expenditures as
20 prior to the Fortress acquisition, so their
21 dedication and our dedication to investing in the
22 line has not changed because of the change of

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1 ownership, and I thank you very much and look
2 forward to your questions.

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

5 MR. LAMPE: Good morning, Gentlemen.
6 I am President of Chicago South Shore & South
7 Bend Railway, and I'd like to say that our
8 company sincerely welcomes this discussion. I
9 believe we are the -- thank you.

10 CHAIRMAN NOTTINGHAM: You're welcome.

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

19 Our mainline operations from Chicago
20 to South Bend are conducted over rail line owned
21 and operated by Northern Indiana Commuter Transit
22 District, otherwise known as NICTD, which runs 41

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1 commuter trains a day alongside our freight
2 trains. We also share the right-of-way at
3 highway grade crossings with hundreds of high-
4 speed, shallow-pocketed, largely unregulated,
5 incented to speed raw steel hauling trucks.

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

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

17 In 2007, we handled approximately
18 51,000 revenue carloads. Managing the risks
19 associated with TIH is the single greatest
20 challenge facing our company. We handle
21 approximately 200 rail carloads per year of
22 chlorine and anhydrous ammonia. This traffic is

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1 insignificant in terms of the revenue it
2 generates to us.

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

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

18 The TIH traffic moves over the line
19 we share with NICTD, where commuter trains run at
20 speeds as high as 79 miles per hour. Most of the
21 TIH cars are then moved to a chlorine customer on
22 the Stillwell Branch, which is mostly unsignaled

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1 and has track that is maintained through FRA
2 Class II condition.

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

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

19 Some of our operations are on high-
20 speed Class IV track, but there we have to
21 contend with the presence of commuter trains.
22 The rest of our TIH operations, which are more

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1 typical for a Class III railroad, take place in a
2 low-density line where, except at railroad
3 crossings at grade, there is no signal system.
4 In either situation, much of the traffic is
5 received by our railroad in one of the largest
6 population centers in the country.

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

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

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1 legitimate self-interests.

2 This particular traffic comes from
3 eastern Canada. Like I say, it represents about
4 30 percent of it, but our customer, and
5 rightfully so, does not want to restrict himself
6 to one source of chlorine, so he could buy it
7 from western Canada, as far away as Vancouver,
8 British Columbia, dependent on the price of the
9 commodity and the transportation cost.

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

17 At least for the time being, we will
18 continue to handle at 70 percent of our chlorine
19 and anhydrous ammonia traffic in Chicago over the
20 main line we share with NICTD. Moreover, if and
21 when we get a TIH customer located in our Chicago
22 -- in or near Chicago, this type of rerouting

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1 won't be possible.

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

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

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

21 South Shore has also looked hard at
22 insurance options as a way to managing the risk.

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1 As the Graniteville incident made clear, a
2 release of chlorine in a rural area has the
3 potential to generate hundreds of millions of
4 dollars of liability.

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

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

18 When we shopped for excess coverage
19 that would insure losses over and above our
20 primary policy, our insurance brokers have
21 advised that excess coverage might be available
22 with limits up to a maximum of \$1 billion.

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1 However, the annual cost of that coverage would
2 be approximately in the \$3 to \$4 million range,
3 which is well beyond the amount that South Shore
4 or any Class III railroad could spend on
5 insurance.

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

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

18 Long story short, as a Class III that
19 operates in Chicago and several other population
20 centers, we can't afford to manage our TIH risk
21 to a reasonable level without reroutings, capital
22 expenditures, and/or purchasing more insurance.

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1 Our insurance, special handling, legal, and cap
2 ex costs in the last 12 months have been double
3 the revenue generated by this traffic.

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

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

17 If we did all we could possibly do in
18 terms of rerouting traffic, investing in
19 infrastructure, and obtaining additional
20 insurance and had TIH release similar to the one
21 in Graniteville, South Shore still would be
22 forced into bankruptcy.

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1 The bankruptcy of South Shore would
2 not only financially -- not only be financially
3 ruinous for its owners, employees and customers,
4 but it would also leave hundreds, if not
5 thousands, of injured people with unpaid claims.
6 In deference to time, I will conclude, and I
7 would be glad to answer your questions. Thank
8 you.

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

14 Mr. Eric Strohmeier, welcome. The
15 panel is yours for the next ten minutes.

16 MR. STROHMEYER: On behalf of CNJ Rail
17 Corporation, we'd like to thank the Board for
18 holding this hearing on the common carrier
19 obligation of the railroads. We're sort of the
20 newest of the new and the smallest of the small
21 here. I think I'm also the youngest of the
22 young, so bear with me.

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1 In our acquisition of our pending
2 acquisition of our rail line in Mississippi,
3 we've been faced with a situation that was
4 brought to our attention in that acquisition
5 where a shipper, a single individual shipper, had
6 requested service of a rail carrier. We spoke
7 about it in our testimony, our written testimony,
8 and it was what prompted us to want to come down
9 here today to the Board to actually speak about
10 it.

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

18 Nearly a million dollars was
19 committed. Over a million dollars was committed
20 to actually building a rail spur. They secured
21 right-of-ways. They secured Mississippi state
22 grant money.

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

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

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

21 And when I stopped to think about how
22 much resource and time and energy and effort was

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1 put into this particular project, and then all of
2 the sudden to see it fall by the wayside, we felt
3 compelled when the Board asked the question of
4 what, you know, is the purpose of the common
5 carrier obligation. It's to serve upon
6 reasonable request.

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

18 In the same token, one of the issues
19 that we think is a subset to that is what was the
20 reason that this actually happened to get removed
21 or this particular project fell apart seven years
22 ago, which is a problem we're seeing on a regular

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1 basis, and in New Jersey our semestral terminal
2 organization fell victim to one of these
3 transactions where a minor railroad was abandoned
4 without Board authority, sold off, parceled off,
5 ripped up, rebuilt, put back into the national
6 system.

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

13 It may seem to be insignificant to
14 some, but what happens when a shipper like one
15 we're currently talking with says, "Well, I'd
16 like rail service"? Well, we can get you the
17 rail service you'd like. The problem is we have
18 to deal with Conrail's or KCS's abandonment that
19 wasn't really an abandonment. So one of the
20 things that I'd like to see this Board do is to
21 address this issue of simply point it up. In a
22 word, that's what we'd like.

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1 One of the problems that we've seen -
2 - what's 10904 actually mean? You know, just
3 basically you say the common carrier obligations,
4 and what constitutes an abandonment?

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

15 As Mr. Timmons said in his opening
16 remarks, many times that last mile is a short
17 line. It could be on the fringe of a Class I
18 system, but these are important elements that one
19 needs to preserve, especially when we're talking
20 about access points to the national network.
21 That last mile of track, even though it may go
22 out to that industrial field out in the middle of

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1 nowhere, could very well be the next future
2 industrial park, and rail service is critical to
3 it.

4 We have seen in Vicksburg,
5 Mississippi, a local businessman invest over
6 \$300,000 of his own money to buy a line of
7 railroad, and people would say, "He only moves a
8 hundred carloads a year. Why do that?" Nobody
9 bothered to stop to think that one of the reasons
10 why Raymond English made that commitment to do
11 that was his plant is actually worth more with
12 rail service.

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

18 It's not just providing the service
19 itself, but it's the access to the network, and
20 sometimes when I hear people say, "Well, it needs
21 to be profitable. It needs to be capacity
22 constrained," one of the things that we're

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1 concerned over is that we want to see these
2 little areas of gray not necessarily disappear
3 but carefully watched, because we see areas where
4 we can see abuse at the fringe, and that's
5 something we'd like to bring to the Board's
6 attention today.

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

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

19 It's one of the issues that sort of
20 concerned us a little bit with CORP. We've seen
21 cases at the fringe where Class I may not have
22 done something that they were supposed to do, and

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1 they're given, in essence, a free pass.

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

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

16 Now wearing the railroad hat, I tend
17 to want the Board to sit back and simply say --
18 be even-handed, because not everybody is in the
19 position of a Class Two or Class III or Class I,
20 for that matter, with regards to how we can
21 handle the problem, and as I see we're getting
22 close on time, I've made my personal appeal. I

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1 hope that the Board takes what we brought to the
2 table in consideration, and I'm here to answer
3 any questions.

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

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

17 We simply can't be at every spur or
18 every line that is either abandoned or on track
19 to be abandoned, so we really do rely -- and
20 short lines in my experience have been some of
21 the best front line ambassadors for the industry
22 and the source of some of the best information we

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1 get, so I do -- and shippers, of course, very
2 often help us keep informed, so we do depend on
3 that. When we do come across problems, we, of
4 course, do send staff onsite if appropriate, and
5 we try very hard to be even-handed.

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

13 This was sort of dragging on with no
14 apparent solution in sight until the Board
15 ordered that Class I in that case -- it happened
16 to be CSX in that case, but it could have been
17 any other Class I if they found themselves in
18 that circumstance -- to promptly restore at
19 significant expense that cut track, and we heard
20 arguments. "Oh, it's not that important track.
21 It's just maybe a few carloads." No. This Board
22 takes those situations very seriously.

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1 Is it fair to say that because there
2 are a lot more short lines than there are Class
3 Is, and sometimes some short lines don't have
4 enormous budgets, and on occasion some short
5 lines -- this is the minority, because I think
6 very highly of the short line industry, but on
7 occasion some short lines don't have the depth of
8 staff and legal advice and other advice. They
9 sometimes do wander into some tricky waters that
10 the Board has to take action.

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

20 Rest assured we are very even handed,
21 and, in fact, I can think of -- I don't think
22 we're actively in court being sued by the Short

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1 Line Association, if at all, anywhere nearly as
2 much as we are being sued by the Railroad
3 Association and the Class Is, so we're -- they
4 don't think we're being even -- favoring them in
5 a number of matters. So appreciate that.

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

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

22 Refresh my recollection. You've gone

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

8 MR. TIMMONS: Well, Mr. Chairman, the
9 short line industry, as you know, has been a
10 short line industry since the beginning of
11 railroading. It started out as very, very short
12 segments of railroad, and ultimately from the
13 1820s and 1830s it expanded, really starting to
14 take on a national flavor post-Civil War.

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

21 By the 1980s, the short line industry
22 was in the 250 range of small railroads. They

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1 were feeling the same effects that the Class I
2 industry was feeling as the Class I industry
3 slowly spiraled down with any number of problems
4 associated with speed, with accidents, with
5 successive, year after year Class I railroads
6 going into receivership to the point where by
7 1980 most efforts to revive the industry had been
8 exhausted.

9 There was sort of a last-gasp
10 initiative to go ahead and deregulate or
11 partially deregulate the industry to see what
12 would happen. The unintended consequence of that
13 was to balloon this small railroad industry,
14 which started out at that time in slightly under
15 10,000 miles of railroad, about 8,400 miles, and
16 in that period of time it is now at 51,000 miles
17 of railroad and incrementally growing.

18 The number of short line railroads
19 went from roughly 250 to 556 today, so that
20 growth, it really took off in the late eighties
21 and in the early nineties, and while the small
22 railroad industry was expanding exponentially,

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1 there was a compression of the Class I railroad
2 industry so that it got from somewhere around 50
3 or 60 Class I railroads in 1980 down to about
4 nine or ten a decade later.

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

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

21 The number -- our numbers have grown.
22 Since I have been in this job in the last -- over

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1 about the last five years, just the association
2 has increased its membership in small railroads
3 by 35 to 40 railroads, pretty impressive when you
4 consider that someone would think that the
5 industry is not doing particularly well, roughly
6 14 million carloads last year.

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

17 Still, in all, the insurance piece of
18 this is daunting, very, very difficult. There is
19 -- for those that are not roughly familiar with
20 the history of the railroad industry, this
21 business of actually what happened to the Class I
22 industry and what's happened to the Class Two

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1 industry is a little murky and obscure over the
2 last 25 years, but thank you for the opportunity
3 to talk about that.

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

15 CHAIRMAN NOTTINGHAM: Thank you,
16 General Timmons. That's very helpful. Do you
17 believe, General Timmons, that some of your
18 members would be interested in or willing to at
19 least explore possibilities of partnering with --
20 we had some very enormous businesses before us
21 yesterday, almost the entire chemical industry it
22 seemed like, businesses that -- representatives

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1 of Exxon-Mobil, Dupont, different -- Occidental,
2 I believe, companies that dwarf any railroad in
3 size.

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

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

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

22 There were some questions earlier,

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

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

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

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1 appropriate for all concerned.

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

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

22 Henry Lampe's problem is

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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

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1 course, the system, not too unlike a railroad.
2 It was a right-of-way, 57,000 miles or so of lane
3 miles. We had all kinds of hazardous materials
4 crossing on our roads all the time.

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

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

21 Mr. Lampe, it occurs to me you have
22 extensive experience primarily in Illinois and

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1 Indiana, if I heard your testimony, as far as
2 your system and working primarily based in those
3 two states. Is that right?

4 MR. LAMPE: Yes, sir.

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

8 MR. LAMPE: Yes.

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

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

21 MR. LAMPE: In our particular service
22 territory, there are active initiatives going on.

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1 Usually, at least in one case, it was to close a
2 crossing, a dangerous crossing.

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

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

16 MR. LUNDBERG: Yes. We were present
17 yesterday.

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

21 MR. LUNDBERG: No.

22 CHAIRMAN NOTTINGHAM: That's helpful.

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1 Just to refresh my recollection, when did
2 RailAmerica acquire the CORP railroad in Oregon?
3 Roughly what year would it have been?

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

9 CHAIRMAN NOTTINGHAM: Around 2001 or
10 2002? And what was the condition? What kind of
11 due diligence did RailAmerica conduct in getting
12 acquainted with the property you were in the
13 process of buying back in 2001 or 2002? Did you
14 have --

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

22 CHAIRMAN NOTTINGHAM: What's -- it

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1 helps to understand. What would that have been
2 like? What's the normal process?

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

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

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

19 CHAIRMAN NOTTINGHAM: Describe to me
20 what's the relationship between RailAmerica and
21 Fortress? Fortress is the complete owner of
22 RailAmerica? Is that a best way to describe it?

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1 MR. LUNDBERG: Fortress is an
2 investment group. They have a number of funds,
3 private equity funds, and they are -- they bought
4 all of the stock of RailAmerica, so they are our
5 stockholder.

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

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

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

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

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1 a Board of Directors, exactly.

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

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

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

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1 on what I saw confirmed in that FRA report.

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

10 MR. LUNDBERG: I was not.

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

22 MR. LUNDBERG: That's certainly one of

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1 the facts that's present here, yes, and when the
2 embargo was placed on that part of the line, you
3 know, our stated goal all along has been to
4 preserve the line and to find a way to restore
5 service.

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

16 MR. LUNDBERG: Well, at that time, we
17 were seeking to coalesce a public-private
18 partnership with, besides us, four other
19 stakeholders. That's a fairly complicated matter
20 to get that done, but we felt that because the
21 other stakeholders, the Union Pacific, the Port
22 of Coos Bay, the shippers and ODOT, all had a

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1 very important vested interest that that would be
2 a way to go, but putting together that public-
3 private partnership was not something we could do
4 by fiat or could do in a week, and so we had to
5 spend a lot of time communicating with those
6 groups to see if they would be interested in
7 entering into that, and that is a condition
8 precedent to being able to preserve and restore
9 the line.

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

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

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1 reopened it."

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

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

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

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

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1 else.

2 CHAIRMAN NOTTINGHAM: Or abandon.

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

8 There are extraordinary circumstances
9 out there in terms of the level of capital
10 necessary to restore the line and to maintain
11 service, and there is a business arrangement
12 which is insufficient to fund that as that
13 business arrangement exists today and with these
14 other stakeholders, and, quite frankly, we've
15 been quite disappointed and surprised that
16 they've had the reaction that they have, because
17 it seems that it is in the public interest of the
18 State of Oregon and the governor and the two
19 senators and Congressman DeFazio. They've stated
20 that this is very important to them, but they
21 don't seem to be willing to give us the
22 consideration to ways to do it.

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1 We were a little surprised yesterday
2 about the Union Pacific's position. The Union
3 Pacific has an ownership interest in the line,
4 the part of the line from Cordes to the end of
5 the line, Coquille, where the two big customers
6 are located. The Union Pacific continues to own
7 that line.

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

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

22 CHAIRMAN NOTTINGHAM: Well, you're

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

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

16 Here's a line that anyone who is
17 apparently familiar with it over the years knows
18 it's got aging timbered tunnels in a very wet,
19 severe weather type environment, and, I mean, you
20 bought the line of your own volition voluntarily,
21 caveat emptor, and then you have a problem, and
22 you want others to pay, and then when they say

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1 no, we see no progress.

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

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

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

20 I'm not telling you anything you
21 haven't heard. It leads some to believe that
22 this is part of a calculated strategy just to run

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1 out the clock, so to speak, and hope that the
2 shippers just, you know, dwindle and fade away
3 and stop speaking up for themselves.

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

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

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

16 We also, back in November, made it
17 quite clear to all the public-private partner
18 potential stakeholders what the time table was,
19 when we had to have an answer from them in order
20 to be able to take full advantage of the
21 construction season. So they've been all --
22 everyone has been aware of that.

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1 CHAIRMAN NOTTINGHAM: Did I hear you
2 say -- have you begun to make any preparations
3 for procurement, identifying qualified firms to
4 do this work, getting more detailed cost
5 estimates, that kind of information?

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

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

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

20 CHAIRMAN NOTTINGHAM: \$7 million?

21 MR. LUNDBERG: Yes.

22 CHAIRMAN NOTTINGHAM: Is that a number

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1 that's developed over time, or is that a number -
2 - I had heard a lower number last fall.

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

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

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

18 CHAIRMAN NOTTINGHAM: Let me be clear
19 that this Board -- I certainly personally have a
20 completely open mind on this. We want to see
21 what you respond to us formally. I'm not here
22 just to, you know, give you a hard time, but this

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1 is important. We've got people
2 who have lost jobs. We've got an important part
3 of our country that's hurting out there in part
4 because of this embargo. We have no progress,
5 but I will certainly keep an open mind and look
6 forward to seeing your formal responses soon, and
7 rest assured that this Board will be completely
8 fair-minded and do the right thing, but I did
9 want you to get a sense of some of the concerns
10 that I have.

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

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

20 COMMISSIONER BUTTREY: MR. Lundberg,
21 did you precede or did you come after the
22 decision to -- your presence with the company,

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1 did you come after the decision was made to
2 embargo this line, or did you --

3 MR. LUNDBERG: No, I came to the
4 company a year ago with the five senior managers
5 that were hired by Fortress to manage
6 RailAmerica, so I've been here a year, and that
7 preceded the decision to embargo the tunnel, yes.

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

10 MR. LUNDBERG: Yes, sir.

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

13 MR. LUNDBERG: No.

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

17 MR. LUNDBERG: That was made among our
18 senior management group in our normal course of
19 decision-making, and when we realized the serious
20 condition of the tunnel, we needed to embargo for
21 safety reasons, particularly the safety of our
22 employees, and with an embargo, as Mr. Hamberger

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1 said, you know, it's a case-by-case basis, and
2 it's a temporary thing, so we embargoed it
3 immediately when we realized we had a safety
4 issue, and then we tried to work through how to
5 take care of that embargo, and we made that
6 decision.

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

9 MR. LUNDBERG: In September, last
10 September.

11 COMMISSIONER BUTTREY: Last September?

12 MR. LUNDBERG: Yes, sir.

13 COMMISSIONER BUTTREY: And when was
14 the FRA inspection done?

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

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

21 MR. LUNDBERG: Well, the question was
22 when --

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1 COMMISSIONER BUTTREY: You personally.

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

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

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

14 COMMISSIONER BUTTREY: And the tunnels
15 are in bad shape.

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

22 COMMISSIONER BUTTREY: And it didn't

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1 get that way overnight.

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

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

5 MR. LUNDBERG: Right.

6 COMMISSIONER BUTTREY: Would you
7 consider that neglect?

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

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

22 MR. LUNDBERG: I'm not a lawyer, no.

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1 COMMISSIONER BUTTREY: That's a good
2 answer. I dare say the legal community would
3 probably consider that criminal negligence to
4 allow something to get into such disrepair, and
5 then an accident like that occurs and people lose
6 their life, you know, when you knew it was in
7 such bad condition. That bothers me.

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

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

18 COMMISSIONER BUTTREY: That's one
19 avenue. That's the avenue. If you think the
20 line is uneconomic, then the avenue of approach
21 to cease operations on that line is an
22 application to abandon the line.

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1 MR. LUNDBERG: Or to seek partners.

2 COMMISSIONER BUTTREY: Or seek
3 partners.

4 MR. LUNDBERG: Yes.

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

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

18 MR. LUNDBERG: Well --

19 COMMISSIONER BUTTREY: If the accident
20 at Graniteville had happened during a different
21 time of day, rather than the middle of the night,
22 you know what? I dare say that this situation

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1 would be solved right now.

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

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

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

18 MR. LUNDBERG: Yes.

19 COMMISSIONER BUTTREY: -- when you've
20 known for months? I mean, you didn't make this
21 decision overnight. Presumably, as good
22 businessmen would do, you consider this decision

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1 over some potentially long period of time, and
2 then you made a decision to embargo the line, and
3 you gave your customers 24-hour notice.

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

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

19 I would presume that because of that
20 fact they incurred huge, substantial,
21 extraordinary costs because of that activity, and
22 I'm curious if you made any offer to them to

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1 compensate them for these extraordinary costs
2 that they may have had as a result of this
3 precipitous action on your part.

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

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

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

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

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1 Now --

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

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

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

13 MR. LUNDBERG: We did not have the --

14 COMMISSIONER BUTTREY: -- to embargo
15 the line?

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

22 COMMISSIONER BUTTREY: Well, I would

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1 change my statement then. I want to change my
2 statement for the record. You're not just lucky.
3 You're extraordinarily lucky.

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

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

15 MR. LUNDBERG: Well, when we took over
16 RailAmerica, we engaged Shannon & Wilson a year
17 ago to do the tunnel inspection, so we didn't
18 wait. I mean, as soon as we had control and we
19 knew we had a problem, we engaged independent
20 professional engineers, the best tunnel engineers
21 in the country, to do that. It took them all
22 that time to do their inspections and their

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1 measurements and all that sort of thing and issue
2 their report.

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

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

15 COMMISSIONER BUTTREY: Two hundred
16 dollars a what?

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

20 COMMISSIONER BUTTREY: Did they take
21 you up on that?

22 MR. LUNDBERG: Some did, yes. Yes,

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1 sir.

2 COMMISSIONER BUTTREY: That's all I
3 have, Mr. Chairman.

4 CHAIRMAN NOTTINGHAM: Vice Chairman
5 Mulvey?

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

13 I must say I start out by feeling
14 compelled to comment on the irony that while the
15 short lines generally support their spinoff
16 agreements with the Class I carriers, or at least
17 they do so publicly, I have seen a lot of
18 complaints in the written testimonies and some of
19 the oral testimony that these same agreements
20 constrain their pricing freedom and their ability
21 to charge their customers for the cost of
22 transporting TIH, and they're taking much of the

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1 risks and not getting adequately compensated for
2 it because of these -- in part because of these
3 agreements.

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

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

18 MR. LUNDBERG: Some of them were
19 inspected.

20 VICE CHAIRMAN MULVEY: Some of them.

21 MR. LUNDBERG: Yes.

22 VICE CHAIRMAN MULVEY: Well, if you're

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1 making an investment in 40-some-odd railroads, it
2 would strike me that it would be just due
3 diligence, if you like, to inspect them.

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

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

14 VICE CHAIRMAN MULVEY: Okay, so it's
15 kind of one of these, "Hey, we know there's
16 inside information about what this is. We'll
17 grab these right away, and we'll do this without
18 doing due diligence." Is that overstating it or
19 --

20 MR. LUNDBERG: Yes, that's probably
21 overstating it, because while the buyer or
22 potential buyer in this case might not actually

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1 make a physical inspection of all the property,
2 part of the due diligence is examining all the
3 engineering records, and those records are fairly
4 extensive, and that was done, and some of the
5 lines were physically inspected, but when
6 Fortress made the decision to purchase
7 RailAmerica, Fortress understood the obligations
8 that go along with that.

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

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

22 Can you explain why train frequencies

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1 have been so reduced -- reduced so dramatically
2 within the last two years and isn't it true that
3 although RailAmerica is raising the surcharge on
4 that line, none of those revenues are going
5 towards maintenance of the line?

6 MR. LUNDBERG: Is that the Blythe
7 subdivision?

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

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

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

16 MR. LUNDBERG: Right.

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

20 MR. LUNDBERG: Yes, sir. Yes.

21 VICE CHAIRMAN MULVEY: Okay.

22 MR. LUNDBERG: Condition of the track.

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1 VICE CHAIRMAN MULVEY: So your plans
2 are then to abandon the line and maybe hope that
3 somebody offers an OFA on it?

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

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

18 MR. LUNDBERG: Right, exactly.

19 VICE CHAIRMAN MULVEY: Mr. Lampe, it's
20 always distressing when you find a student who
21 had actually retired that comes back and
22 testifies before you, but we're welcome to have

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1 you here today. Mr. Lampe was a student when I
2 was a teaching assistant at Washington State
3 University back in the 1920s.

4 MR. LAMPE: Not quite that long.

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

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

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

20 VICE CHAIRMAN MULVEY: Okay.
21 Yesterday I asked Kansas City Southern to
22 elaborate its arguments about the costs

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1 associated with TIH in relation to its R1 reports
2 and the URCS analysis that we do.

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

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

15 VICE CHAIRMAN MULVEY: It strikes me
16 that every industry faces the possibility -- or
17 not every industry but most industries face the
18 industry of catastrophic loss. I think of, for
19 example, a company that runs a catering operation
20 and somehow winds up using their cow meat and
21 killing lots of people, or somebody owns a dance
22 hall, and a fire occurs and a thousand young

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1 people are killed in a fire like that. These are
2 all kinds of catastrophic losses that you can't
3 really insure for.

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

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

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

21 VICE CHAIRMAN MULVEY: It's never
22 happened. I mean, we've never had a spill of a

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1 chlorine or anhydrous ammonia kind of chemical in
2 an urban area that wound up killing a large
3 number of people or, for that matter, even
4 seriously injuring a large number of people,
5 notwithstanding, what happened in Graniteville.
6 We did have nine fatalities, and those were
7 tragic, but we haven't had the kind of thousands
8 of people that have been killed that some of
9 these projections come up with. It just has
10 never happened.

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

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

19 I don't know how many short line
20 operators of the 142 or 147, whatever it is,
21 given the option would say, "I choose not to move
22 it." Clearly, you heard some commentary this

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1 morning from Norfolk Southern that they would opt
2 not to carry it if given that opportunity.

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

14 VICE CHAIRMAN MULVEY: Well, of
15 course, the short line shareholders can sell
16 their stock and go into another business, also,
17 so, I mean, you always have the option of getting
18 out of the business, but if you're a caterer or
19 if you're a dance hall operator, whatever
20 business you're operating, there's always some
21 possibility that you get hit with a catastrophic
22 risk.

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1 You just hope that that is fairly
2 small. You do whatever you can to minimize it,
3 and you said that, for example, in the case of
4 CSSB that you handle 200 cars a year of anhydrous
5 ammonia and chlorine, correct?

6 MR. LAMPE: Yes.

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

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

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

22 MR. LAMPE: Yes, we do.

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1 VICE CHAIRMAN MULVEY: Okay. Have you
2 investigated the possibility -- you mentioned
3 that one of the lines that you operate over the
4 track is FRA Class Standard II, which is better
5 than I and better than excepted, but it's still
6 not the best track.

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

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

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

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

19 VICE CHAIRMAN MULVEY: I'm just making
20 a case where there is a specific need that we've
21 identified here for short lines that they are at
22 risk, their whole business is at risk every time

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1 they move them, and that this may be something
2 that either can be included as part of the
3 investment tax credit or a separate program can
4 be developed, as we did one for the 286,000-pound
5 cars to address this so that short lines when
6 they're moving TIH materials are moving them over
7 the best track that can reasonably be supplied.

8 Mr. Timmons?

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

14 In the ten years it's been in
15 existence, only 19 railroads have been able to
16 capitalize on that money to the tune of less than
17 three-quarters of a billion dollars. Now I can
18 think of two or three major uses of that money,
19 not the least of which are bridges, which are
20 another significant challenge for the railroad
21 industry at large and for short lines, as well as
22 TIH materials.

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1 The mechanism for getting that money
2 in a reasonable way without undue delays and an
3 awful lot of outside consultant help to get that
4 is burdensome. That's why there are only 19.

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

16 VICE CHAIRMAN MULVEY: It's still
17 being worked on. I mean, you recall when I was
18 on the Hill with Congressman Oberstar and
19 Congressman Young. Both of those gentlemen,
20 although they didn't agree on everything, agreed
21 on making the RRIF loan program more available
22 and streamlining the process, and they both had -

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1 - they shared views of the Office of Management
2 and Budget, and I think you heard those expressed
3 by them.

4 MR. TIMMONS: Yes, sir, I have.

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

7 MR. TIMMONS: Okay, sir.

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

16 Isn't there some subsets of the
17 industry that are only just barely revenue-
18 adequate in total, that some parts of your
19 industry or some parts of your firm will not be
20 revenue-adequate, other parts will be more than
21 revenue-adequate, and there's some sort of
22 balance here, because you are expected to serve a

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1 broad variety of customers with different
2 abilities to cover all the costs?

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

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

11 MR. LUNDBERG: Right.

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

18 MR. LUNDBERG: Well, if we had one of
19 the properties that we didn't think fit our
20 revenue portfolio, our criteria, rather, we would
21 have the option to sell that to another short
22 line operator, yes.

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1 VICE CHAIRMAN MULVEY: That's all for
2 me.

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

14 MR. LUNDBERG: Yes, sir.

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

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

21 CHAIRMAN NOTTINGHAM: And where did
22 you work before that?

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1 MR. LUNDBERG: I was 25 years with the
2 Chicago Northwestern Railroad in Chicago, and I
3 worked at Sealand and Maersk Sealand, the
4 container shipping companies, and I worked for
5 Great Lakes Transportation, which was a holding
6 company that held U.S. Steel railroads, and I was
7 General Manager of commuter rail in Boston, as
8 well.

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

12 MR. LUNDBERG: Yes.

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

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

21 CHAIRMAN NOTTINGHAM: And when you
22 were hired, did you interview with Fortress

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1 officials to talk about your credentials and that
2 kind of thing?

3 MR. LUNDBERG: Yes.

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

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

18 CHAIRMAN NOTTINGHAM: And as any owner
19 would, I assume, they have the prerogative to
20 say, "Hey, you spent a little more there," or,
21 "Wait a second. We think you're spending a
22 little too much in this area. We need to see a

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1 different, you know, set of priorities that
2 reflects the owner's priorities."

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

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

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

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

19 MR. LUNDBERG: They get briefed on
20 that.

21 CHAIRMAN NOTTINGHAM: -- or generally
22 sign off on it?

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1 MR. LUNDBERG: Oh, yes, they sure did,
2 yes.

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

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

20 MR. LUNDBERG: Well, each line is
21 different, and the CORP and particularly Coos Bay
22 Line requires an extraordinary capital

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1 expenditure. As I said, the last three years, 40
2 percent of the revenues went to capital
3 expenditures, but we have lines that don't have
4 the same geographic challenges or the harsh
5 conditions where, you know, ten percent of the
6 revenues is just fine or five percent, because
7 the track structure does not deteriorate as fast
8 as one in the mountains and the rivers and the
9 swamps does.

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

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

22 CHAIRMAN NOTTINGHAM: Well, here's my

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1 concern. Clearly, when you purchase tunnels, you
2 know, I might not expect Fortress to have combed
3 the nation and walked and kicked every tie
4 throughout your system when they acquire, but
5 tunnels are a big deal.

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

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

21 I mean, you have a -- there is a
22 moral and professional obligation to avoid

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1 problems and to maintain infrastructure not based
2 on how wealthy the people are that use it or how
3 much they're paying you but because that's the
4 business you're in, and you make sure that
5 problems don't happen, or you get out of the
6 business, and occasionally highway departments
7 have to tell people, and it's very painful, that,
8 "Hey, we can't -- we just can't justify replacing
9 that bridge. We're going to have to close it,
10 and there'll be a detour."

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

16 MR. LUNDBERG: Well, they're certainly
17 eligible for service, but, like every business,
18 we have to look at the component parts,
19 especially in the short line business where you
20 have these lines that dead-end, I mean, and so
21 that line serves those customers, and that's all
22 it does, and in those instances you have to look

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1 very carefully at the revenues and expenses on
2 the line and make the ultimate decision of
3 whether to stay in business or not, and I guess
4 I'd say we're kind of like in the middle of that
5 process.

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

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

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

22 MR. LUNDBERG: I did.

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1 CHAIRMAN NOTTINGHAM: Have you reached
2 out to them and talked to them about the
3 prospects of a port investment?

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

17 Of course, business conditions can
18 change in the container shipping business. They
19 do all the time, and Coos Bay could become a
20 really good option for them, but at this time, as
21 far as we know, and, again, Maersk is a customer
22 of Union Pacific but not of ours, so we don't

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1 have that kind of a relationship with them.

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

4 COMMISSIONER BUTTREY: No.

5 CHAIRMAN NOTTINGHAM: Mr. Mulvey, Vice
6 Chairman Mulvey?

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

17 The hinterland does not have -- the
18 immediate hinterland, anyway, does not have much
19 of a demand, so virtually everything going into
20 it would have to be either trucked or rail hauled
21 quite a distance to markets. Is that really one
22 of its limits?

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1 MR. LUNDBERG: Yes. My understanding
2 of, you know, the flow of cargo from the West
3 Coast ports, cargo that was unloaded at Coos Bay
4 coming from the Far East would be destined for
5 the Midwest.

6 VICE CHAIRMAN MULVEY: Right.

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

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

11 MR. LUNDBERG: That's right. Exactly.

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

19 Would that preclude you -- would that
20 cause you to hold onto the CORP and cease
21 operations over some number of years in
22 anticipation that this might come back? So the

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1 railroad is shut down for the time being, you
2 are no longer going to serve the shippers who are
3 there, but you're going to hold onto the right-
4 of-way and hold onto the franchise, because in
5 the future that port may develop. Is that a
6 possible outcome, or would you sell the property
7 before you did that?

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

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

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1 we're going to pick one of those.

2 VICE CHAIRMAN MULVEY: Thank you. Mr.
3 Strohmeier, I don't want you to feel left out of
4 this, and maybe you do want to feel left out of
5 this, but you were talking about the fact that
6 Class Is, that the Board treats Class Is and
7 Class IIs and Threes differently with respect to
8 abandonments and whether or not we enforce our
9 abandonment rules.

10 I do want to remind you, though, that
11 very, very recently in the Harsimus case the
12 Board did rule that the abandonment process was
13 not -- it's before us now, so I can't talk about
14 it too much, but nonetheless we did say that no,
15 they did not -- Conrail did not do it properly,
16 et cetera, and we'll send it back to them again,
17 and there's been a few other cases, too, where I
18 know that our staff looks very, very carefully at
19 these abandonment proceedings to make sure that
20 the letter of the law has been followed and that
21 if it's not, we say, "No, we're not accepting
22 this as an abandonment," and so I was somewhat

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1 dismayed by your comments. Do you want to
2 elaborate on them a little bit?

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

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

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

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

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

20 Everybody would think it's gone,
21 done, over with, no problem. I asked the Board
22 to ask your staff members where is Norfolk

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1 Southern and CSX's discontinuance filings in
2 those proceedings, same with AB167-1188, along
3 with AB167-1186. They're not there, and if you
4 read your rules --

5 VICE CHAIRMAN MULVEY: They should be
6 there.

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

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

20 A mechanism of all of those
21 exemptions have expired, because the underlying
22 authorities have not yet been removed from

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1 Norfolk Southern and CSX. It's three of them.

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

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

13 The first sales call I happened to
14 take Mr. Riffin in on, it was his very first time
15 in front of a real customer, and we had the
16 problem of, you know, talking to them about, you
17 know, providing rail service, and they looked at
18 it and said, "Oh, yeah. Well, we have rail
19 service. The real estate person who just moved
20 us in here told us we had the tracks out back."
21 Well, we sort of knew the tracks out back were
22 not necessarily going to be there, but we looked

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1 into it, and all of the sudden we saw NS and CSX
2 hadn't discontinued your authorities.

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

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

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

22 Conrail is not being held accountable

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1 or NS or CSX, and what bothers us is these are
2 Class Is. What really bothers us is in AB167-
3 766, they got it right, so they got the first one
4 right, and they got the second one wrong, and
5 they got the third one wrong, and they got the
6 fourth one wrong. They got the fifth one wrong,
7 but you corrected it for them.

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

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

17 Same thing down in Maryland. We had
18 the Maryland abandonment, the American Short Line
19 Light Rail Line, a line you're all familiar with.
20 Portions of the line have been removed. One
21 other element that we've got with regards to that
22 was MTA came in and made statements to you.

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1 They made an honest-to-goodness
2 statement to you, and it really concerned us, and
3 they said, "Well, we only blocked the line in one
4 location." The record contains a clear document
5 that said, "No, we blocked it a little more than
6 that."

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

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

19 VICE CHAIRMAN MULVEY: Well, I would
20 like to say on my behalf, and I'm sure my
21 colleagues will agree, that we try not to treat -
22 - we will try not to be treating Class Is and

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1 Class IIs and Threes differently with regard to
2 their responsibilities under the law.

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

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

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

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1 working relationship.

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

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

15 It's also got a population of folks
16 who are going to have to contribute sizeable
17 amounts of money up to an incident fund
18 threshold, and this -- in this piece of draft
19 legislation, it was \$10 billion, and so you are
20 going to get to that threshold through a \$5,000-
21 a-car contribution by shippers in the main, and
22 then the Secretary of Transportation was going to

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1 judge whether you really needed to reach the \$10
2 billion threshold or whether she could terminate
3 it, and then you didn't have to contribute until
4 it was exhausted through some incident.

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

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

17 VICE CHAIRMAN MULVEY: Thank you very
18 much.

19 MR. TIMMONS: Yes, sir.

20 VICE CHAIRMAN MULVEY: That's all I
21 have.

22 CHAIRMAN NOTTINGHAM: Thank you. Just

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1 a quick follow-up to that, General Timmons. You
2 mentioned a number of interest groups being
3 concerned about any legislative proposal that
4 would provide a Price-Anderson type solution.
5 You mentioned lawyers. Is it fair to say that --
6 and you mentioned difficulty even getting a
7 meeting to really sit down and have an honest
8 discussion.

9 MR. TIMMONS: Yes.

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

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

21 I mean, very honestly, the chemical
22 industry is very concerned about this. They are

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1 going to end up contributing a lot to it.
2 Everybody that's in it, whether you're a shipper
3 or a car owner and manufacturer, or whether
4 you're a railroad Class I, Two, or Three, must
5 foot the bill for thresholds of insurance that
6 you must carry.

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

14 CHAIRMAN NOTTINGHAM: Thank you.

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

21 Generally, in the shortline
22 Association, and I think it's fair to say this

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1 for the AAR, as well, we've been fully aware that
2 it would take another major incident, and someone
3 would then scramble and say, "Where is that draft
4 legislation those railroad guys were talking
5 about last year or a year and a half ago? Where
6 is that?"

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

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

21 CHAIRMAN NOTTINGHAM: Right. I
22 understand, and thank you for adding some context

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1 to that very challenging but very important
2 situation, and you have my personal commitment.
3 I'll do anything I can to help bring parties
4 together and to help get us to a better place.
5 Just as a taxpayer and a consumer, it just
6 worries me that we're just setting this up to
7 wait until a disaster, and then we'll scramble,
8 and it'll be too late, sadly.

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

15 MR. LUNDBERG: I certainly will.
16 Certainly will.

17 CHAIRMAN NOTTINGHAM: I don't know,
18 and I hazard to even go down this path, but the
19 statement that Senator Wyden, a very
20 distinguished senior member of the Finance
21 Committee, someone who I would think Fortress
22 would have every reason to want to pay attention

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1 to, not to mention Senator Smith, a very
2 distinguished senior member of the Commerce
3 Committee and other committees, but Senator Wyden
4 said something about a 24 or so million dollar
5 investment or loan coming from Fortress to
6 Michael Jackson for his Neverland Ranch, playing
7 out in the press right at the same time that the
8 people of Oregon are being told there's no money
9 available from Fortress for its subsidiaries'
10 rail maintenance.

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

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

21 CHAIRMAN NOTTINGHAM: And yesterday, I
22 hope.

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1 MR. LUNDBERG: And yesterday, too.

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

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

21 MR. LUNDBERG: Thank you, and can I
22 make a little commercial here at the end?

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1 CHAIRMAN NOTTINGHAM: A short one,
2 yes.

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

15 CHAIRMAN NOTTINGHAM: Well, thank you,
16 and rest assured this Board is not at war with
17 anybody, either. We just are trying to do our
18 job and get to a better place on a controversy
19 that just has been lingering and languishing with
20 no progress, and we just want to get to a better
21 place as fairly as we can to all the parties'
22 interest.

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1 Any other questions, Board members?

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

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

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

11 MR. TIMMONS: Okay.

12 COMMISSIONER BUTTREY: -- there is
13 another way.

14 CHAIRMAN NOTTINGHAM: Any other
15 questions?

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

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1 there is a crisis. Thank you.

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

7 A little housekeeping, scheduling, we
8 will break now for 45 minutes, return in exactly
9 45 minutes and get through the remaining panels
10 and look forward to everyone being back, and
11 thanks for your patience.

12 (Whereupon, the foregoing matter went
13 off the record at 12:37 p.m.)

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

2 (1:33 p.m.)

3 CHAIRMAN NOTTINGHAM: Good afternoon.
4 Thank you, Panel, for your patience. We will
5 reconvene this Surface Transportation Board
6 hearing on the common carrier obligation. We are
7 delighted to have a distinguished panel before us
8 this afternoon, and without further ado, we will
9 turn it over to them.

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

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

18 As the Board's notice states,
19 railroads have a statutory duty to provide
20 transportation or service on a reasonable
21 request, even where providing such service would
22 be inconvenient or unprofitable. AECC's

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1 experiences in recent years suggest that the
2 railroads have repeatedly failed to satisfy even
3 a loose definition of the common carrier
4 obligation.

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

12 In the Class I panel earlier, it was
13 mentioned that sometimes there are differences
14 between customers and the folks that come to
15 Washington sometimes to represent them, and in my
16 case that's one of the reasons that I come is
17 because we are a customer. My responsibility is
18 to provide the fuel for our power plants, whether
19 it be coal, natural gas, or fuel oil, so it's
20 part of my day-to-day obligations, and so my
21 viewpoint on some of this is a little different
22 sometimes than, as the Class Is pointed out, than

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1 someone who is not involved in these day-to-day
2 actions.

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

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

20 Number two, the Board should
21 recognize that as railroads achieve revenue
22 adequacy, any theoretical justification for

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1 letting them exercise high levels of market power
2 is reduced or eliminated.

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

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

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

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1 tolerated.

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

12 Number six, the Board should
13 establish meaningful accountability when
14 railroads fail to perform due to management
15 decisions. As Commissioner Buttrey said a little
16 earlier today, bad things do happen. It's
17 certainly not -- we certainly don't think it's
18 the intent of railroad management or anyone else
19 to have such things happen, but they do happen
20 from time to time, and when this happens, you
21 know, we think there should be accountability
22 with the railroads.

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1 From the Board's standpoint, this
2 could include making it easier for a shipper to
3 obtain substitute service, especially when a
4 carrier hasn't followed applicable maintenance
5 guidelines or hasn't taken reasonable steps to
6 ensure adequate capacity.

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

18 Number eight, the Board should
19 consider -- should reconsider paper barriers and
20 the bottleneck rule in the context of the market
21 power they convey to railroads and the
22 inhibitions they place on a shipper's ability to

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1 receive reasonable service under the common
2 carrier obligation. And lastly, in the event of
3 chronic or repeated problems, the Board should
4 not hesitate to facilitate and encourage means to
5 bring market forces to bear such as through the
6 Feeder Line Development Program.

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

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

20 Part of the railroads' obligation to
21 provide common carrier service on a reasonable
22 request is an obligation to maintain

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1 infrastructure in a condition that permits such
2 service to be provided, and we feel like failure
3 to do that is certainly a failure to fulfill
4 their common carrier obligation.

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

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

20 The next example that I would like to
21 briefly address is that the railroads have
22 advanced and cultivated the proposition that

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1 volume increases have used up or are using up
2 excess capacity. According to the railroads,
3 shippers and the Board should assume that
4 capacity will be tight, and degradation of rail
5 price, service options are basically inevitable.

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

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

20 Railroad argument is further
21 nullified by the railroad's long history of
22 investment to expand the capacity of the PRB

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1 joint line in advance of volume increases. At a
2 more fundamental level, the railroad argument is
3 completely inconsistent with the well recognized
4 fact that railroads possess economies of scale,
5 and there are a couple of other examples in the
6 written testimony, and I'd be happy to answer
7 questions at the end. Thank you.

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

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

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1 The members of the group include the
2 City of Grand Island, Nebraska, Duke Energy
3 Corporation, Dynegy and LS Power Associates,
4 Energy Services, Intermountain Power Project,
5 Lafayette Utility System, Progress Energy,
6 Seminole Electric Cooperative, South Mississippi
7 Electric Power Association, and Wisconsin
8 Electric Power Company.

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

17 We have submitted written comments,
18 as you are no doubt aware. In those comments, we
19 explain what we regard as the particular
20 significance of the fact that the Interstate
21 Commerce Act and the common carrier obligation
22 itself have been reenacted without fundamental

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1 change many times over the course of its 100-year
2 history in the law.

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

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

22 The case holds that there can be

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

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

19 There is an analogy that has been
20 used in many instances by railroads, and it was
21 used again this morning by CSX. It tends to draw
22 a little chuckle whenever it's raised. It's that

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1 you don't build a church for Easter Sunday.

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

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

20 Another point that we make in our
21 comments at pages 36 to 39 is that there are a
22 number of cases that specifically reject the

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1 notion that a carrier can rely upon questions of
2 profitability to decide whether it wants to
3 provide service, and the cases hold "a railroad
4 cannot lawfully make fulfilling their statutory
5 obligations contingent upon whether they think it
6 is worth it to do so," and that, of course, is
7 from the Board's own Pejepscot Decision from May
8 15, 2003, that we cite in our comments.

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

14 We think there are several key
15 principles that follow from the historic
16 understanding of the common carrier obligation.
17 First, as I mentioned, the obligation has a
18 longstanding history in the law, and the repeated
19 endorsement from the courts and from Congress in
20 the reenactment of the statute we think is
21 persuasive evidence that the historic
22 understanding should prevail.

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1 Second, questions regarding the exact
2 parameters of that obligation are committed to
3 the sound discretion of this agency. Third,
4 precedent supports the view that a failure to
5 provide adequate service will be excused or
6 demands for service arise in a manner that the
7 carrier could not reasonably have expected or
8 anticipated.

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

14 We took a look at the railroads'
15 written comments, and we thought there were two
16 points that really jumped out that are consistent
17 with what it is that we've had to say, or at
18 least relevant to what we've had to say. First,
19 I think the railroad, the AAR comments make
20 perfectly clear that the railroads do anticipate
21 increases in demand on their systems in the
22 future. Again, that we find to be indicative

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1 that we are not in a situation such as the
2 Pennsylvania Railroad case.

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

13 Not without -- when you take away
14 from the knowledge that the railroads have of
15 their own industry, that argument we believe
16 crosses the line into saying that they should
17 self-regulate and that there really should be no
18 regulatory enforcement of the common carrier
19 obligation, and we don't think that that is
20 consistent with the historic notion of what the
21 common carrier obligation means and the role of
22 this agency in that process.

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1 One other point that was made this
2 morning that we find to be particularly
3 important, we address the subject in our written
4 comments of the timing of a carrier's response to
5 a request for a common carrier rate. That is an
6 issue of some significance for coal shippers.

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

21 You know, another thought comes to
22 mind with respect to Commissioner Buttrey's

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1 question this morning about the perceived
2 arrogance on the railroads' parts and how they
3 might go about improving relationships with their
4 customers.

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

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

21 If both parties to that shipper-
22 carrier discussion know that the Agency is there

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1 to back up the needs of the shipper, then that
2 will alleviate the risk, we believe, that there
3 will be abuses in the treatment of the shipper.

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

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

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

17 In fact, I guess I was nominated
18 because I lived through the history of the
19 development of the common carrier obligation in
20 its most recent battle, and that was the
21 radioactive materials litigation, so I feel a
22 little like you, Vice Chairman Mulvey. You know

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1 you're old when you're the guy that lived the
2 history that people now want to be educated
3 about, but, anyway, here I am, and it's a
4 terribly important subject to us for some reasons
5 that may not be immediately obvious to everyone
6 in the room.

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

18 You may have heard this morning, for
19 example, the gentleman from the Chicago South
20 Shore and South Bend Railroad talking about TIH
21 shipments on his railroad. Well, it was only
22 afterwards I had a chance to have a conversation

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1 with one of the panelists, and it dawned on them
2 that maybe those shipments are moving because
3 they move shipments to the utilities that are
4 served by that railroad.

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

13 So it's terribly important for you to
14 realize that I speak for the people who are 95
15 percent of the ultimate customers of the
16 shareholder-owned organizations that provide
17 electricity in the country, 70 percent of the
18 U.S. electric power industry, and EEI considers
19 this proceeding to be of extraordinary importance
20 because of that disconnect and also because we
21 use chlorine at nuclear and other plants to keep
22 intake pipes clean and for related purposes, and

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1 the facilities can't operate without that.

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

16 The Court said, "The Commission's
17 deference" -- and this is the Interstate Commerce
18 Commission it's talking about -- "to the safety
19 regulations of its sister agencies must extend
20 only this far. A carrier may not ask the
21 Commission to take cognizance of a claim that a
22 commodity is absolutely too dangerous to

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1 transport if there are DOT and NRC regulations
2 governing such transport and these regulations
3 have been met."

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

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

21 So the Agency with the safety
22 authority is on the job, and when Congress

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1 created DOT in the mid-sixties, it separated the
2 safety functions of the ICC from the Commission
3 and gave them to DOT and left this Board's
4 predecessor, now this Board, with the economic
5 regulation, put the safety regulation over there,
6 and, Mr. Chairman, you came from DOT, and I'm
7 sure you know they have expertise over there.

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

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

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1 agencies.

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

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

19 We're all in favor of safety in this
20 room, but it starts with the common carrier
21 obligation, because we also showed, and your
22 predecessor found in the radioactive materials

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1 cases, that the railroads were 14 times safer
2 than the truck mode, and one of the additional
3 reasons for the Court's holdings were that the
4 public interest demanded that the railroads haul
5 those materials precisely because they were the
6 safest mode available to us.

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

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

21 When you buy a railroad, that's the
22 business you're into, and that's just the way it

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1 is, and then you have to work through the
2 government to determine the extent of your
3 obligations. You can't decide for yourself what
4 your obligations are.

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

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

19 Now the railroads themselves in their
20 10K statements, and I gave you the references to
21 these, too, admit what I've just said to you in
22 those that spoke directly to it, and, in fact,

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1 you know, Sherlock Holmes wrote about the dog
2 that didn't bark.

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

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

19 So, please keep in mind that this is
20 a rail industry network, that it depends on more
21 than just coal or more than just grain. We don't
22 move these things and use these things for the

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1 fun of it. We move hazardous materials because
2 we have to, and they do, too.

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

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

18 The common carrier obligation being
19 statutory remains. When this Board issues an
20 exemption, it's simply saying, "We don't need to
21 regulate, because there's no market power and no
22 other need to regulate," but the common carrier

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1 obligation is still in the backdrop and may
2 resume if the Board determines that the exemption
3 should be revoked.

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

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

21 Number three, you said that Staggers
22 did not promote competition in the rail industry.

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1 Well, I lived through it. I helped write some of
2 the testimony and the legislation that led to it,
3 and I brought out my dog-eared copy of the
4 committee report to say to you, respectfully,
5 that I disagree with that.

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

16 We thought we were entitled to
17 bottleneck rates and in one respect that this
18 Board has been commendable in enforcing, and
19 that's the right to get a certificate to build a
20 new line, whether at a plant or into the Powder
21 River Basin for the DM&E, but unhappily for us,
22 we view various provisions of the statute that

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1 were designed to promote competition as not
2 having been applied in that fashion, and that's
3 our concern. If the statute had been applied in
4 the fashion we thought it was intended to be
5 applied in 1980, I'm not sure we'd even be
6 seeking legislative changes.

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

20 We know you have a case pending. The
21 whole shipping community is awaiting the outcome
22 of that. I don't want to suggest that you've

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1 pre-decided the case. I'm sure you haven't, but
2 people are anxious to see whether there is any
3 more to the victory, small as it was, than that.

4 And finally, on the small rate case
5 guidelines, I just wanted you to know that the
6 entire shipping community, it seems, is awaiting
7 the decision in *DuPont vs. CSX*, because the
8 \$400,000 cost estimate that most people bandy
9 about is a real estimate and maybe a minimum for
10 trying one of those cases until issues get
11 resolved, and the million dollar cap over five
12 years on relief is a real impediment.

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

20 Let me just try to wrap up by saying
21 that if there is to be any change in the
22 railroads' common carrier obligation, including

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1 any cap on liability as the railroads have
2 proposed or a refusal to carry certain
3 commodities, neither the Board nor the railroads
4 are empowered to take such actions.

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

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

21 That applies to us, and it applies to
22 the railroads when they move our nuclear

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1 materials, and we are more than happy, and we
2 have said so, to the railroad representatives in
3 this room to sit down and talk to them about that
4 very subject and see if we can't work through it
5 with them. Thank you very much.

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

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

14 We're an association of approximately
15 18 electric utilities that moves collectively 140
16 million tons of coal annually from western coal
17 mines. We're happy to be here today.

18 The Coal League recognizes that the
19 movement of coal by rail is notably different
20 than the movement of TIH commodities that we've
21 heard much about over the last few days. In this
22 respect, the railroads aren't attempting to

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1 demarket coal or otherwise drive coal off their
2 systems. To the contrary, they're doing their
3 best to move as much as they can.

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

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

20 The Board's notice in the proceeding
21 discusses increasing queries about the extent of
22 the railroads' common carrier obligation. I

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1 think a reason for this is that the railroads
2 have been engaged in various initiatives or
3 practices that either directly or indirectly
4 impact common carrier obligation issues, which
5 we've heard a lot about over the last few days.

6 WCTL addresses some of these
7 practices in our written comments. We don't
8 stand here today and ask that any particular
9 common carrier practice be banned as unreasonable
10 impingement on the common carrier obligation.
11 However, that does not mean that the Board has no
12 regulatory responsibility to enforce the
13 obligation on its own accord absent a complaint
14 or to conduct appropriate regulatory oversight,
15 which it fully is doing here, and we're glad to
16 see it.

17 Of course, the Board has the ability,
18 the responsibility, and the right to step in and
19 address any unreasonable practice, as it
20 correctly did in the Ex Parte 661 rail fuel
21 surcharges proceeding, and that was without a
22 complaint being filed.

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1 The carriers argue that the common
2 carrier obligation is not absolute, and Mike
3 addressed this somewhat. I don't think this
4 point is greatly disputed, at least in terms of
5 place and times of service issues.

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

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

22 With respect to these assertions, I

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1 think Vice Chairman Mulvey got it right yesterday
2 when he answered that if it's left to the
3 carriers as to how much capacity to offer, and
4 the common carrier obligation is bounded by that
5 available capacity, this leaves it to the
6 railroads' sole discretion as to the scope and
7 limit of their common carrier obligation. That
8 can't be right and is not right.

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

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

22 Certainly, one of the nice things

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

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

22 I do remember taking strong

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

10 Does that mean that your clients
11 always feel victorious? No. I didn't mean -- in
12 fact, many times when we do things that
13 disappoint or outrage or find ourselves in court
14 up against the railroad industry, which is
15 happening with more frequency in the last year
16 and a half, two years, I would assert, it's not
17 because your clients are happy. Very often,
18 you're in court on the same thing, saying we got
19 it wrong, too, for different reasons. So very
20 often we leave -- in the course of leaving the
21 railroads unhappy, we also somehow make everybody
22 unhappy, which maybe goes with the territory,

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1 but, so anyway, I just, you know, I just wanted
2 to make sure you understood where I was coming
3 from.

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

17 I've been the president of the bar
18 association twice, proudly, and I wouldn't do
19 that if I wasn't proud to come down here and
20 think that you listen to the evidence and try to
21 rule on it. I probably disagree more than I
22 agree with what happens in cases, but I get

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1 listened to, as I am now, and I think I get a
2 fair shake on the evidence, and I appreciate
3 that.

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

14 They said in their comments their
15 return on equity is now for 2006 14 percent and
16 the same for 2007, but we do think that that
17 means that there is more of an obligation to
18 regulate now under the statute than there was
19 before, but I didn't mean to mischaracterize what
20 you said. You were -- it was not your word, and
21 I didn't want to put words in your mouth any more
22 than anybody else here.

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1 I simply wanted you to understand
2 that people are not as fired up, if you will,
3 about some of these rulings as it might seem from
4 your perspective, and it's simply because in the
5 application there's so many problems in trying to
6 carry out some of these decisions, well meaning
7 as they may be, that it takes a couple of tries
8 sometimes to really get it right, but, anyway, I
9 hope you --

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

20 That doesn't necessarily mean that
21 shippers reaped direct benefits or immediate
22 benefits or should be happy or should be high-

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1 fiving each other in the hall. No, I understand
2 that. Sometimes benefits accrue many years later.
3 Sometimes they never accrue, but let's be honest.

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

13 MR. MCBRIDE: Correct.

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

17 MR. MCBRIDE: Right.

18 CHAIRMAN NOTTINGHAM: I think it's a
19 fairly safe statement to say that it was not a
20 happy day in the railroad industry world when
21 they were tagged with the first unreasonable
22 practice, and it is directly consistent with my

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1 statement that this statement we heard from U.S.
2 Magnesium that we are -- this Board, not
3 historically or some boards -- this Board is
4 constantly seeking to ensure railroads'
5 inordinate profitability. I just -- those are
6 statements I can't let slide on into the record
7 without some calling it out a little bit.

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

19 These people are very dependent. The
20 people you've seen over the last two days are
21 very dependent on the railroad system to make
22 this economy go, and my clients, more than

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1 anyone, probably, because of the need not only to
2 move coal but also to move these other products,
3 and we find no unwillingness on anybody's part in
4 the industry to ever come down here when you ask
5 to try to participate and participate as
6 helpfully as we can to make sure that we're on
7 the same wavelength.

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

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

21 Very often, though, it happens,
22 unfortunately, when we're not invited or present

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1 at different public forums where advocates, and
2 I'm not particularly saying any of you in
3 particular but just advocates for various reforms
4 and various changes in the rail regulatory world
5 will say things like, "Shippers can never get a
6 break from this Board," and, you know, I could go
7 on for 18 hours of examples.

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

17 I'm not talking at you individuals,
18 per se, but you're in the fray. You're sometimes
19 there when these statements are uttered by
20 others, and help us, at least. It's fine to have
21 disagreements and to fight hard for hard-fought
22 positions and for clients, but, you know, be fair

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1 and judge us based on what we've actually done or
2 not done, not somebody ten years ago or 20 years
3 ago.

4 MR. MCBRIDE: Two quick comments.
5 One, that's why we come in, and two, that's why I
6 try to be as specific as I can be about where we
7 agree and where we disagree, so you can take
8 shots right back if you disagree with me or
9 Commissioner Buttrey.

10 You know, I like you guys. I respect
11 you guys. I speak well of you guys, but I come
12 in here, and I tell you as straight as I can
13 what's on our mind and let you come right back at
14 me if you disagree, rather than just generalize
15 about your motives or, you know, what you're in
16 business to do down here, because I frankly don't
17 think that gets the ball moved down the field
18 very far. I think trying to be specific is a
19 much better way to go.

20 CHAIRMAN NOTTINGHAM: We appreciate
21 that, and we're not thick-skinned or sensitive.
22 It does not keep me awake one bit at night to

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1 know that somebody had a critical comment at the
2 STB. Bring it on. That's what we're here for.
3 We certainly deserve criticism on occasion and
4 welcome it. Sometimes we learn from it, but just
5 as long as it's in the spirit of accuracy and
6 fairness is all we can try to ask.

7 More back to the point of today's
8 gathering, I've been delighted to hear most of
9 the witnesses have expressed some support and
10 appreciation for just the fact that we're having
11 this discussion yesterday and today. We're
12 having this hearing.

13 It is a very important topic.
14 Obviously, I feel that way or we wouldn't have --
15 I wouldn't have put this kind of time and the
16 Board's resources into it the way I did with the
17 full support of my colleagues, but others,
18 though, in the next breath, almost, seem to
19 indicate that while it's good the Board is having
20 this hearing, the Board shouldn't feel like we
21 have any real authority to implement -- I don't
22 want to put words in it now -- adjust, breathe

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1 life into the very general wording of the very
2 serious --

3 And I have utmost respect for
4 Congressional intent, and all three of us have
5 worked hard in the legislative branch in the U.S.
6 Congress and have -- I feel pretty comfortable in
7 saying have enormous respect for Congress and
8 deference to statutes and legislative intent.

9 At the same time, I look at the
10 common carrier obligation. It's pretty brief in
11 its wording. It's open to a fair amount of
12 interpretation. Thankfully, we're guided, as you
13 helpfully pointed out, Mr. McBride and others and
14 Mr. Kolesar and others, by extensive case law and
15 background, so I don't propose that we come to
16 work and rewrite the rules every day by any
17 means, but we do have, for example, over a
18 hundred exemptions, exempt commodities.

19 That may not be a perfect example
20 related to either any of the examples that you
21 mentioned, TIH or something else, but there have
22 been over a hundred instances where the Board,

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1 either on its own motion or on the motion of
2 shippers, have -- or railroads have exempted
3 commodities from regulation.

4 So I think it's not quite fair to let
5 stakeholders go away from this hearing thinking,
6 "Yes, I heard it loud and clear. Everybody
7 seemed to agree that the Board shouldn't do
8 anything ever to change the playing field or the
9 status quo on the common carrier obligation."

10 But I'd love to get some reaction. I
11 may have this wrong, but I just -- that's what I
12 see, and that's part -- I think that's why we're
13 here is to breathe some life into it.

14 Congress, of course, can always get
15 the last word. They can eliminate the Agency,
16 which they've done once. They can change the
17 statute or tell us -- but, I mean, I think we
18 have a job to just do that implementation of the
19 statute, and occasionally that means defining it,
20 for lack of a better word.

21 MR. MCBRIDE: Well, I don't want to
22 monopolize the field here, so I'll just make a

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1 few quick points in response to that, because I
2 think that goes right to the heart of what we're
3 here to talk about, and my other client,
4 Occidental Chemical, said yesterday, and we were
5 very careful in how she put it, that we don't
6 think the Board respectfully has any authority to
7 abrogate or alter the statutory common carrier
8 obligation, particularly now that the Courts have
9 interpreted it as clearly as they have with
10 respect to the absolute duty of a carrier to
11 carry all commodities regardless of risk, as the
12 radioactive materials cases teach, but our
13 comments go on to acknowledge that although you
14 don't have the authority to change the statute in
15 that respect, your own decisions, we acknowledge
16 them.

17 The *Groom* case, for example, provide
18 that the shipper's request for service must be
19 reasonable in terms of time and place and volume
20 and that sort of thing so that I think what's
21 happened here is the railroads have come in and
22 said, "Well, gee, if some shipper did something

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1 really crazy, you know, and tried to put a switch
2 in," and maybe this wasn't exactly their example,
3 but I'll make it even more extreme, "right at a
4 diamond crossing, you know, we wouldn't have to
5 do that."

6 Well, probably wouldn't have to do
7 that, but the carrier would have the obligation,
8 I think, to go back to that shipper and say,
9 "Well, we have a duty to serve you. We can't do
10 it right there. Here's how we're going to
11 propose to serve you."

12 I've had this situation, and so have
13 these gentlemen at coal fired plants where we
14 wanted to expand the capacity of the plant.
15 Existing line wouldn't accommodate it, and we've
16 been out to places like Omaha to talk to the
17 railroad and say, "Here's what we propose to do.
18 What do you think?"

19 And their engineering department
20 says, "Actually, we've got a better idea. If you
21 build a bigger loop track, you can start a whole
22 empty unit train, and we can then bring in a full

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1 one, too. You could really make that place hum,"
2 and the client said, "Great," and they worked it
3 out, and we came in here, and we got approval to
4 build that line, and it did get built in
5 Joliette, Illinois, for Edison Mission Energy,
6 and Union Pacific was most cooperative in that
7 project.

8 And so it's in that sense that I
9 think this Board does have authority, and I think
10 that's all we're trying to say. We're not saying
11 you don't have authority, but what we're saying
12 is the courts and the Congress have said the
13 railroads may not refuse to carry anything
14 because of a perceived risk and particularly the
15 materials we're talking about today, chlorine,
16 anhydrous ammonia, radioactive materials.

17 CHAIRMAN NOTTINGHAM: And I welcome
18 anyone else jumping in, too, if you could, if
19 your answers try to touch on what does that mean
20 to the over a hundred exemptions we've granted.
21 In other words, if the iron clad rule is the
22 Board can never adjust or implement the common

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1 carrier obligation in a way that actually results
2 in a shipper not being able to get rail service,
3 which is the case potentially for exempt
4 commodities like automobiles, how do we square
5 that with -- is that -- have we overreached our
6 bounds in the past in doing that, because I say
7 this from, I would say, from a pro-shipper
8 perspective.

9 There are shippers out there right
10 now who meet with me on occasion to say, "We have
11 an exempt commodity. We think times have
12 changed, and circumstances have changed. We
13 might not want to be exempt anymore," because of
14 the problems they're having with railroads. So
15 this is not a -- this is not some pro-railroad
16 position, per se.

17 I don't think the railroads
18 necessarily want the Board redefining the common
19 carrier obligation every day of the week, either,
20 nor do we propose to, but do you all recognize we
21 have all these exemptions? Those, as well as
22 some of our, obviously, our cases that we've

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1 decided meaningfully add context to the common
2 carrier obligation, and that's part of what the
3 Board is supposed to do.

4 MR. KOLESAR: Certainly, Chairman
5 Nottingham. You know, the statute exists, but
6 you are the regulatory agency that administers
7 that statute, and your decisions on matters that
8 are related to exemptions or are in a more
9 general common carrier service dispute are part
10 of what informs the interpretation of that
11 statute and allows parties, railroads, and
12 shippers going forward to have a better sense as
13 to how that common carrier obligation ought to be
14 understood in the industry.

15 In fact, you face a very important
16 and a very serious task, because it is
17 undoubtedly the case that when you are asked to
18 look at a situation where there is a question
19 about whether a railroad has or has not complied
20 with its common carrier obligation, there
21 inevitably will be a very large number of
22 important factual considerations that you will

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1 need to look at, and that is really the great
2 value of an administrative agency.

3 So, yes, we would wholeheartedly
4 endorse the authority of the Board to be involved
5 in situations where a shipper would be concerned
6 that its carrier had not provided common carrier
7 service and would hope and expect that the Board
8 would exercise its expertise to try to resolve
9 that issue and clarify the obligation.

10 MR. PFOHL: Let me just add on that,
11 too, that I've heard a lot of discussion in the
12 last two days about the exemption authority.
13 Well, that is an express statutory provision that
14 allows you to do that.

15 It's Section 10502, and, you know,
16 that section reads that in a manner related to
17 rail carrier providing transportation subject to
18 the jurisdiction of the Board, the Board may
19 exempt a commodity where it is not necessary to
20 carry out the transportation policy of Section
21 10101 of this Title, and either the
22 transportation or service is of limited scope, or

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1 the application in whole or in part of the
2 provision is not needed to protect shippers from
3 the abuse of market power. That's 10502(a), and
4 there is 10502(d), which gives you the authority
5 to reverse, revoke the exemption.

6 So I think that Congress has two
7 statutory provisions here which you've worked
8 over the years. One is upholding the common
9 carrier obligation. This is a separate authority
10 which you've used. I haven't seen many or any
11 applications to revoke an exemption in recent
12 years.

13 I think you're right. Times have
14 changed. If a certain commodity desires to come
15 to the Board and ask for an exemption, I think
16 that it would be appropriate under this provision
17 for you to revoke that exemption, but to say that
18 the exemption authority is somehow unrelated to a
19 statutory delegation I think is a little bit off-
20 base.

21 MR. MCBRIDE: And I needed to add --

22 CHAIRMAN NOTTINGHAM: I agree with

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1 that, by the way. I don't think it is. I think
2 it's very related.

3 MR. MCBRIDE: Let me add, because I
4 meant to allude to this generally before, you are
5 right that there have been many exemptions, and I
6 think the statute imposes a duty to revoke the
7 exemption in whole or in part if regulation is
8 needed or if market power has developed, which
9 didn't exist at the time the exemption was
10 granted, and I cite for that proposition, Mr.
11 Chairman, a case that you may want to go read on
12 your off hours, and that's the *Coal Exporters*
13 *Association* decision in the D.C. Circuit in 1984,
14 I believe it was, in which -- and I believe it's
15 the one and only time that the ICC or the Board's
16 exemption decision was overturned, and that was
17 because the Court found that there was a need to
18 regulate that traffic.

19 And so I respectfully submit to you
20 that coal, grain, and the kind of chemicals
21 you've been hearing about today and yesterday
22 that are so dependent on the rails and where

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1 there is market power are the type of things that
2 could not be the subject of an exemption, and I
3 would particularly suggest that TIH, PIH types of
4 commodities are in that category for all the
5 reasons that you've been hearing. I don't think
6 this record could possibly support an exemption
7 for those commodities.

8 CHAIRMAN NOTTINGHAM: And nor is this
9 an exemption proceeding. Mr. Buttrey -- Vice
10 Chairman Buttrey -- Mulvey. Excuse me. I'll get
11 to you next, Mr. Buttrey.

12 VICE CHAIRMAN MULVEY: Thank you. Mr.
13 Sharp, you've been ignored, so we'll turn to you
14 for the moment. In your testimony you mention
15 about the, "well recognized fact that railroads
16 possess economies of scale." I am not familiar
17 with any research that suggests railroads have
18 economies of scale today. Do you have a source
19 with that?

20 MR. SHARP: Well, I would get you the
21 information.

22 VICE CHAIRMAN MULVEY: They do not

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1 possess economies of scale. Going back 50 years
2 of research, analysis shows that railroads have
3 pretty much -- Class I railroads, anyway, have
4 exhausted all scale economies. I think what
5 you're referring to is what's called economies of
6 density, whereas given an existing railroad
7 infrastructure, the more traffic you have,
8 average costs go down.

9 Economies of scale refers to when you
10 expand "fixed" capacity as well as variable costs
11 and variable capacity, as well. The average cost
12 goes down. They are different terms concepts and
13 they have very, very different implications with
14 regard to regulation, so it's economies of
15 density I think you're talking about, rather than
16 economies of scale.

17 MR. SHARP: Well, it may be.

18 VICE CHAIRMAN MULVEY: Okay.

19 MR. KOLESAR: Vice Chairman Mulvey?

20 VICE CHAIRMAN MULVEY: Yes?

21 MR. KOLESAR: If I may jump in, I
22 don't have my copy of the coal rate guidelines

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1 handy, but at least within the last 20 to 25
2 years, rather than the 50-year period you refer
3 to, the coal rate guidelines, if I'm not
4 mistaken, refer to economies of scale, scope, and
5 density in the railroad industry.

6 VICE CHAIRMAN MULVEY: Yes, and those
7 are different.

8 MR. KOLESAR: Certainly.

9 VICE CHAIRMAN MULVEY: Yes.

10 MR. KOLESAR: Okay.

11 VICE CHAIRMAN MULVEY: Scale refers to
12 varying all inputs, including fixed inputs, what
13 would normally be fixed inputs as well as
14 variable. It holds some inputs fixed and others
15 variable, so it's the difference between short-
16 and long-run average costs, but there's different
17 implications for regulation if you're talking
18 about scale economies versus density economies
19 or, for that matter, scope economies, which are a
20 whole different kettle of fish.

21 Also, Mr. Sharp, could you elaborate
22 on your recommendation in your written comments

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1 that the Board should consider expanding the
2 abilities of shippers to make use of the private
3 cars they supply?

4 MR. SHARP: Well, that kind of goes
5 back to the example that's also in the written
6 comments of what has happened to us in some
7 particular instances where on our initial
8 contracting with the railroads we're told that we
9 need X number of unit train rail car sets in
10 order to haul this coal.

11 So we go out and buy those cars,
12 provide those to the railroad, and then, you
13 know, situations arise where for congestion
14 reasons or whatever the railroad takes certain
15 numbers of those rail car train sets out of
16 service, and we have no option, you know. We
17 have no say-so.

18 We have no option in that situation.
19 We can't use them. In many cases, we can't use
20 them in the service of another railroad to try to
21 keep our coal supply flowing to our plant.

22 We're just -- there again, it's kind

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1 of one of those captive situations where they get
2 parked. Sometimes we get notified timely.
3 Sometimes we don't. Sometimes we find out that
4 they're parked and contact the railroad, you
5 know, so.

6 VICE CHAIRMAN MULVEY: So you're
7 required to buy assets, but then you can't use
8 the assets, and you still bear all the costs of
9 paying for those assets.

10 MR. SHARP: Right, and we bear the
11 consequences of them not being used. We don't
12 get the coal. So it's not like they substitute,
13 you know, some other mode of transportation and
14 get us the coal, anyway.

15 VICE CHAIRMAN MULVEY: They substitute
16 their own cars sometimes for your cars, correct?

17 MR. SHARP: Just about the only time
18 that happens is when they get so far behind in
19 their shipments to us that even they recognize
20 that they've got tonnage that they need to make
21 up, or they're going to incur penalties under the
22 contracts, but they do from time to time use

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1 their own train sets to supplement the train sets
2 that we've already provided.

3 VICE CHAIRMAN MULVEY: But not replace
4 them.

5 MR. SHARP: Right.

6 VICE CHAIRMAN MULVEY: When you
7 recommend that the Board "require railroads to
8 accept shipments tendered in accordance with
9 industry protocols," are you suggesting that the
10 -- you're referring to the AAR protocols, I
11 assume, and so are you suggesting that the Board
12 should enforce AAR rules and protocols?

13 MR. SHARP: No, not specifically.
14 There again, this gets back to the situation that
15 we find ourselves in right now out in the Powder
16 River Basin, where it's not been enforced yet,
17 but we have been told by Burlington Northern
18 Santa Fe that they are going to require us to
19 either put covers on our rail cars or to spray
20 dust control surfactants on the top of the coal
21 pile at our expense, and, there again, this gets
22 back to the industry standard.

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1 I mean, how many years has coal been
2 hailed in open-top cars? There again, the
3 specifications for the cars were given to us
4 basically by the railroads, and they are, you
5 know, standards.

6 I mean, we have these cars built to
7 their standards, and now we're being told that
8 they're going to require us to do something
9 differently pretty much unilaterally. I mean,
10 this is what we have been told, that this
11 requirement was going to come out and that it was
12 going to be enforced.

13 Now it has been delayed, I'll say to
14 their credit, but this is one of those situations
15 where do you want to wait for the catastrophe?
16 Do you want to wait for the, you know, for huge
17 problems to arise, or could you potentially
18 address this and prevent this from ever
19 happening, because it seems very clear to us that
20 under this type of common carrier type obligation
21 that they can't just unilaterally wake up one day
22 and decide that we've got to provide some other

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1 kind of equipment that is not the industry
2 standard or add some sort of treatment to the
3 product that we're shipping that is not the
4 industry standard.

5 VICE CHAIRMAN MULVEY: Of course, the
6 fugitive coal dust, which got into the ballast,
7 caused the ballast to weaken, and eventually led
8 to derailments and caused the embargoes, I mean,
9 this is a problem for the railroads, but, of
10 course, it's a problem also related to the
11 product that the railroads are carrying for you,
12 and that is the coal. So isn't there a joint
13 responsibility for making the investments to try
14 and suppress fugitive coal dust, or is that
15 solely the railroads' responsibility?

16 MR. SHARP: Well, I think you're kind
17 of asking the wrong party. They're saying it's
18 solely our responsibility. That's what they've
19 said, and so, you know, we are under the National
20 Coal Transportation Association, which AECC and
21 many of these other companies represented here
22 are members of.

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1 It's doing some studies to try to
2 address this problem, to try and come up with
3 what is the most cost-effective solution, and to
4 help and control this problem, and, of course,
5 there again, this kind of gets back to the point.
6 You know, how many years have they been hauling
7 coal in open-top cars? You know, this isn't a
8 problem that just began in 2005.

9 VICE CHAIRMAN MULVEY: No, that's
10 true. They've been hauling open-top cars for a
11 long time, but, of course, I would suppose
12 ballasts have been getting fouled for a long
13 time, and I suppose it's only with this high
14 volume, running 80 coal trains a day of 110 ten
15 cars each where the expectation that the track
16 would last longer than it would, than it has, and
17 that the cost of maintenance is far greater than
18 they originally expected.

19 I think it's now coming to the fore
20 of how serious this coal dust problem was. I
21 think, to a large extent, everyone knew it was
22 there, but it was not considered as big of a deal

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1 as it has been in the Powder River Basin.

2 MR. SHARP: Well, I take some
3 exception from my understanding of some of the
4 historical facts and what the railroads have said
5 publicly about how often this ballast should be
6 cleaned under these circumstances, because even
7 the railroads have said -- when asked, you know,
8 "How often should you be cleaning this ballast?"
9 they gave a much shorter period of time than what
10 they've actually been cleaning it.

11 So, I mean, I would say no, it's not
12 that they were surprised by how often they should
13 have been cleaning the ballast. They simply
14 didn't do it.

15 VICE CHAIRMAN MULVEY: They didn't do
16 what they should have been doing.

17 MR. SHARP: Well, they didn't do what
18 even they say they should have been doing.

19 VICE CHAIRMAN MULVEY: I have been
20 proposing for quite some time that the Board
21 revisit every once in a while, every five or ten
22 years or whatever, its exemptions, the

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1 commodities that are exempted, and mostly because
2 times and circumstances change.

3 I don't want to be misunderstood here
4 in the sense that I'm not saying that the
5 exemptions are not appropriate and should not
6 continue, but at least, especially for those
7 where you could point to significant changes in
8 the economy or the operating environment or
9 whatever else affects it, that where those should
10 be revisited, and we should reconsider our
11 exemptions.

12 Do any of you have any views as to
13 that, and do you think that requires legislation?

14 MR. MCBRIDE: No, I don't think it
15 requires legislation, to answer the last part of
16 your question first, because the power to exempt
17 is also the power to revoke in whole or in part.
18 Perhaps, rather than sort of have them all come
19 up at once, what you could do is indicate
20 generally as a matter of policy that the Board
21 would be open to particular industries or
22 shippers or types of traffic seeking to have a

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1 review of the exemption and whether it should be
2 revoked in whole or in part or modified in some
3 respects.

4 If you look through the tables in the
5 Code of Federal Regulations, you'll see that
6 there are some pretty fine details to some of
7 these exemptions about certain stick codes and
8 certain types of commodities and types of traffic
9 and that sort of thing, and it may be that slight
10 adjustments are needed and some of those sorts of
11 things just because of changes in the industries,
12 rather than wholesale review of everything.

13 So you might put a little bit of the
14 burden, frankly, on those who might seek to have
15 the change, but make it clear to them that the
16 door is open to do that. Otherwise, I think you
17 might get the wheat and the chaff kind of all
18 mixed up together here if you were looking at a
19 hundred of them at once.

20 VICE CHAIRMAN MULVEY: Well, we seem
21 to have a situation where the parties all agree
22 but characterize the situation very, very

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1 differently with regard to the common carrier
2 obligation. The railroads say that, "Well,
3 because of all the exemptions, because of all the
4 contract rates, we really don't have a common
5 carrier obligation today with exception for maybe
6 coal, chemicals, and grain, and if you want to
7 revoke the exemption."

8 You're saying it seems to be the
9 common carrier obligation is fundamental and that
10 it's sort of suspended for these other groups,
11 but the common carrier obligation underlies all
12 movements and that, therefore, anybody should be
13 able to come in and say, "Well, wait. We have a
14 problem." We should revoke it and then look at
15 it, because it is fundamental to the railroads'
16 responsibility.

17 MR. MCBRIDE: Two responses. First,
18 you may have noticed if you were listening
19 carefully, and I think you were, that some of the
20 railroad witnesses told you that the common
21 carrier obligation was revoked for those
22 commodities or maybe just because of the passage

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1 of time for all intents and purposes or some
2 slight qualifying words like that.

3 They were arguing practicalities,
4 really, rather than law, and part of what's going
5 on in this proceeding, I think, is there's a
6 collision here between economics and law, and I
7 think it's reflected in part in their testimony
8 versus our view of things. I read their
9 testimonies in the main as driven by Wall Street,
10 driven by economics. They're saying finances
11 rule everything. Capital determines everything,
12 and we don't view it quite that way.

13 Yes, we think they need to make a
14 profit. Yes, we want them to make a profit, but
15 we think there's some legal obligations that they
16 can't evade, and so I would contrast this common
17 carrier obligation and the law about it to
18 another body of law that you're familiar with and
19 that is for abandonments.

20 The Supreme Court held that once this
21 Board issues a final decision on an abandonment -
22 - and this is a Chicago Northwestern case --

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1 that's it. You've lost your ability to compel
2 that carrier to perform its obligations with
3 respect to the line that has been abandoned.

4 It's over, but there is no case that
5 has ever held that just because something is
6 exempt or because the Board has declined out of
7 practicality, for example, in the *DeBruce Grain*
8 case, to enforce the contractual agreement to
9 ship or in some case involving an embargo for a
10 limited period of time.

11 There is no case that's ever held
12 that just because of the passage of time or
13 because of an exemption or because of Wall Street
14 demands or because of practicalities that the
15 railroads can escape their statutory common
16 carrier obligation, and that's what we're saying.

17 Congress knew what had been said in
18 the radioactive materials cases, and it reenacted
19 the statute, just as it was, without any material
20 change, and under the Supreme Court's decision in
21 *Square D*, which reaffirmed *Keough*, the Supreme
22 Court recognized that when the Congress

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1 repeatedly sits after it's issued a decision and
2 doesn't change the statute when it's invited to
3 do so by Supreme Court decision, then that must
4 mean that Congress intends the law to stay as it
5 is, and the same principle applies when Congress
6 knows how its statutes have been interpreted and
7 does nothing to change them.

8 MR. PFOHL: And I think the same thing
9 yesterday we heard from UP counsel citing the FMC
10 rate case involving an exempt commodity, and I'm
11 not exactly sure what commodity that was, but in
12 the course of that rate reasonableness
13 proceeding, the shipper involved asked that the
14 exemption be revoked for purposes of rate
15 reasonableness case, and as counsel indicated
16 yesterday, the Board allowed that, and,
17 therefore, the obligation there for
18 reasonableness of rates still was there. It just
19 had to be revoked within the context of the
20 proceeding.

21 MR. KOLESAR: Vice Chairman Mulvey, if
22 I may, not in the context of exempt commodities,

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1 but to answer your question about the
2 significance of the common carrier obligation,
3 certainly when coal shippers are moving their
4 product subject to a contract, they nevertheless
5 remain of the view that the common carrier
6 obligation is very serious and very important.

7 It is the backstop on negotiations
8 for new contracts. It becomes the threshold for
9 the minimum of what a carrier must do, and that
10 can be built upon by parties in their contractual
11 negotiations.

12 Also, if I can follow up very briefly
13 on the exchange you had with Mr. Sharp -- yes, go
14 right ahead.

15 VICE CHAIRMAN MULVEY: Isn't it
16 sometimes argued, though, that that's a violation
17 of the contract, and therefore that should go to
18 the courts rather than the Board, because the
19 courts have enforced the contracts rather than
20 the common carrier obligation and so on?

21 MR. KOLESAR: Most definitely, and
22 that wasn't what I had intended to suggest. I

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1 didn't mean that the Board somehow would enforce
2 the contractual obligation but that a party -- a
3 coal shipper deciding whether to enter into a
4 contract or to, on the other hand, receive common
5 carrier service is -- still regards the
6 enforcement of the common carrier obligation as
7 important, because it knows that it has --

8 If it cannot successfully negotiate a
9 contract, it knows that it has another service
10 vehicle available to it that will provide
11 meaningful service, and if the assurance that
12 that service commitment under a tariff will be
13 meaningful ceases to exist, then it makes it much
14 more difficult to negotiate the contract.

15 VICE CHAIRMAN MULVEY: Thank you.

16 MR. KOLESAR: The follow-up point on
17 your discussion with Mr. Sharp and the notion of
18 coal dust, simply that maintenance has
19 historically been understood as a railroad
20 obligation.

21 VICE CHAIRMAN MULVEY: Mr. McBride,
22 you mentioned you were involved in *Staggers*, in

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1 putting it together and what the implications or
2 what the intent of the Congress was in such
3 things as the Board's decision on bottlenecks and
4 other rulings over the past as runs counter to
5 what you believe the Congress intended, and there
6 is legislation out there now, which I think some
7 people think of as re-regulation. Others look at
8 it as promoting competition or what have you, but
9 you infer that these are things that are
10 consistent with what you think the Congress
11 actually intended at the time back in 1980.

12 Had the Board followed that or had
13 those laws been in place, would the railroads
14 have become as "revenue-adequate" as they are
15 now? I mean, the railroads seem to believe that
16 these benefits that they have, these abilities
17 that they have, have been very critical to their
18 ability to differentially price and to capture
19 revenues in markets where they can capture them
20 with regard to captive shippers and that absent
21 those, the railroads' returns would have been
22 much more marginal.

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1 Somebody here before was referring to
2 the revenue adequacy of the railroads and their
3 return, but the railroads still as a group are
4 not revenue adequate as defined by the Board for
5 the most part. The majority of them have not
6 been over most years, and there are some who will
7 argue that our way of approaching revenue
8 adequacy fails to take into account the real
9 value of the railroad plant that needs to be
10 replaced, and if we use replacement costs,
11 revenue adequacy would be even less likely.

12 So what is the risk of making these
13 changes and making the railroads "more
14 competitive" with respect to the railroads being
15 able to make those investments to meet your needs
16 as shippers?

17 MR. MCBRIDE: A lot of parts to that
18 question, but I'm happy to try to take it on.

19 VICE CHAIRMAN MULVEY: Yes or no would
20 be fine.

21 MR. MCBRIDE: Well, then no.
22 Replacement cost, first, by the way, you may have

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1 noticed that I included a piece in my comments on
2 that just to indicate to you what the law is
3 there. You don't have to go down that path.

4 The Supreme Court's been through
5 this, a tortured history from Smith vs. Ames to
6 FPC vs. Hope Natural Gas Company, concluded that
7 it's just fine to regulate on the net investment
8 standard, and that's how all the other industries
9 are regulated.

10 With respect to the other changes,
11 and, by the way, I don't claim that the Congress
12 specifically said we were entitled to bottleneck
13 rates, but what I do say is that the statute said
14 we were entitled to a rate if we asked for it,
15 and we interpreted that at the time as entitling
16 us to a rate to a point of interchange with
17 another railroad, and we believe it was simply
18 the Board's interpretation in the bottleneck
19 cases, and it was an erroneous one as we read the
20 statute.

21 Now, I have no doubt, for example,
22 that the Board's application of the stand-alone

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1 cost standard, and I say this respectfully, but,
2 for example, in the *Otter Tail Power* case, where
3 the Board allowed a rate, \$29.97 in 2002 dollars,
4 when the stand-alone cost rate was \$11.97, again
5 in 2002 dollars, and we said that to the Eighth
6 Circuit in our brief in support of *Otter Tail*,
7 and the Board and BNSF agreed, the stand-alone
8 cost rate was \$11.97, but the Board's decision
9 said it could charge up to \$29.97 and that since
10 it was "only charging \$16.00 or \$17.00 a ton,
11 exclusive of fuel charges," I have no doubt that
12 those sorts of rulings have enhanced the revenues
13 of the railroads.

14 I'm not here to try to revisit the
15 last 28 years and argue that you shouldn't have
16 done this or you should have done that. I don't
17 see much value in going back over the past and
18 trying to rewrite the history.

19 Our view today is that when the
20 industry says, as it said to you in its comments,
21 that it earned a 14.0 percent return on equity
22 for both 2006 and 2007, that from any standard of

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1 revenue adequacy we're familiar with, at least as
2 an industry -- now maybe there are specific
3 exceptions for particular railroads, but that
4 just means other railroads are doing better --
5 that we believe there are a number of revenue
6 adequate railroads when you work through the
7 process of applying your new cost-of-capital
8 standards to the railroads and the more recent
9 data that's in, and I think you have a proceeding
10 before you to do that right now --

11 VICE CHAIRMAN MULVEY: We do.

12 MR. MCBRIDE: -- that you will come to
13 the conclusion that this has all worked
14 spectacularly well for the railroads, and whether
15 we're right in every respect about whether
16 decisions should have been this way or that way,
17 we're simply saying the time has come to change
18 the balance that we think was intended in
19 *Staggers*, because there was one other very, very
20 fundamental predicate for that whole conversation
21 at the time of *Staggers*.

22 There were over 40 railroads. There

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1 was a lot of competition intra-industry at that
2 time and through mergers, which none of us
3 foresaw to the extent that they've occurred, and
4 really none of you had any responsibility for
5 approving their -- I think all approved before
6 any of you ever got here, so this is not you.

7 I'm just simply saying that when the
8 mergers took 40-plus Class I carriers down to
9 seven, with no more than two competing in any
10 market in virtually any place in this country,
11 and in most respects because of the bottleneck
12 ruling, you can't even use competition when you
13 have it for 90 percent of your route, that maybe
14 those decisions would be different today under
15 the current set of facts.

16 If you look at the Eighth Circuit's
17 ruling in the bottleneck cases, for example, it
18 seized on an argument that I don't even think was
19 in the Board's decision but apparently was in the
20 briefs and the oral argument, and it was picked
21 up in the Court of Appeals where they said
22 because of revenue inadequacy -- it was one of

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1 the reasons they deferred to the Board's ruling,
2 but they also said, "If it had been our decision
3 to make, we might have made a different
4 decision."

5 So I think it's very clear that
6 bottleneck, terminal trackage rights where the
7 ICC added the standard of competitive abuse,
8 paper barriers where there's been sort of no
9 review until recently when you decided to invite
10 review, and you have one of those before you now,
11 that I think times change, and we're simply
12 saying that the decisions that were made in the
13 past, whether they were right or wrong, we think
14 ought to be different going forward, and we've
15 put a list of them, obviously, as you know,
16 before the Congress, because in the past your
17 predecessors have said to us, "We don't need any
18 more authority, and we don't need to change our
19 authority. We think the statute is just fine the
20 way it is." We were told that
21 more than once, so we said, "Okay, we'll go to
22 Congress, because we respectfully disagree in

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1 certain specific respects," and I'm trying to be
2 as specific as I can be about those. So, for
3 example, we think the time has come not to use
4 stand-alone costs anymore, at least not to be
5 compelled to do so.

6 We think an actual cost standard like
7 all the other regulatory agencies apply would be
8 the right way to do it, because then people could
9 afford to try these cases, including the
10 railroads, and who knows how they'd come out? It
11 doesn't mean the shippers would win, but it just
12 means we'd do it on a more cost efficient basis.

13 So we have a specific series of
14 things that we disagree with respectfully over
15 the last 28 years, and we've chosen to go to
16 Congress, and I'm here happy to defend every
17 single one of them.

18 VICE CHAIRMAN MULVEY: I'm glad you
19 made that distinction between the courts, when
20 the courts ruled that, not that you were right
21 but that you weren't wrong, which I think is a
22 very, very different --

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1 MR. MCBRIDE: Sure is.

2 VICE CHAIRMAN MULVEY: -- way of
3 looking at it. One other thing I want to
4 address, and that is Price-Anderson. Price-
5 Anderson is one of the suggestions that the
6 railroads have put forth with regard to covering
7 their -- trying to limit their exposure in case
8 of a serious accident.

9 We just heard recently from General
10 Timmons from the Short Line Railroad Association
11 that while they've been on the Hill trying to
12 drum up support for such a change, Price-Anderson
13 or something else, they have not been joined by
14 the shippers, and I was wondering if the coal
15 shippers, for example -- I know you don't --

16 You do handle hazmats with regard to
17 anhydrous ammonia and chloride for cleaning the
18 stacks and that sort of thing, but for the most
19 part coal is not a hazmat, at least when it's
20 moving on the rail, anyway.

21 MR. MCBRIDE: Right.

22 VICE CHAIRMAN MULVEY: But do you feel

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1 that the shipping community is amiss here in not
2 joining with the railroads to try and resolve
3 this problem of liability for movements of
4 hazmats?

5 MR. MCBRIDE: No, because the word
6 "amiss" would imply that we had an opportunity
7 to, you know, get on board the train, and we
8 somehow missed the train. We never were given
9 that opportunity so far as I'm aware.

10 I should, by the way, slightly
11 correct something I said in my comments to you.
12 I was not aware of any formal legislation the
13 railroads had proposed, and that's why I said
14 that I didn't believe these issues were pending
15 before the Congress, but we've heard over the
16 last two days that they have informally discussed
17 them with Congress. So I take that on face
18 value, but we've had off-the-record conversations
19 with them in which we've pointed out to them
20 we're the experts in Price-Anderson.

21 In those radioactive materials cases
22 that I tried, you'll find in the ICC decisions

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1 and even a little discussion in the court
2 decisions that Price-Anderson came up, because
3 the railroads argued there were gaps in Price-
4 Anderson. It wouldn't provide them adequate
5 coverage when they moved our radioactive
6 materials, and we showed there were no gaps, and
7 the ICC affirmed that, and so we'd be more than
8 happy to talk to them about it.

9 I said that to railroad
10 representatives at lunch time today, but we were
11 not included so far as I know in any of the
12 discussions in the framing of whatever they've
13 come up with, and I suggested to them that maybe
14 the reason things haven't moved is because we
15 weren't involved, and maybe we could talk to them
16 about it, try to help make some sense of all of
17 this, because, as I said in my comments, and I
18 volunteered this to you, if it makes sense to
19 have Price-Anderson coverage for radioactive
20 materials transportation by railroad, then maybe
21 it does for other things, too, although you
22 couldn't do it exactly the same way.

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1 And I'm happy to explain that to you,
2 because the way it works is the nuclear utility,
3 owners of the reactors, each are required to have
4 all the commercial insurance there is available.
5 That's the first layer, so there's no
6 disincentive on their part to be safe, because
7 they have to pay the premiums, have the
8 insurance, and they could get, you know, driven
9 into ruin if they have an accident, so they have
10 all the incentive in the world to be safe.

11 They buy all the insurance they can,
12 and then to promote the nuclear industry,
13 Congress passed the statute in 1957, and what it
14 said was the next layer will be indemnification.
15 Each of the reactor owners has to provide a
16 certain amount of money -- it's determined
17 annually -- into a fund so that if there is any
18 incident at any reactor or related to any reactor
19 anywhere, including by contractors, service
20 providers, everyone involved, then that fund
21 would be used to indemnify, regardless of whose
22 reactor or what the cause was, and only after

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1 that second layer of indemnification is exhausted
2 -- and now we're up to several billion dollars --
3 is there a cap on liability but a statutory
4 commitment on the part of Congress to make good
5 on any additional liabilities as there may be.

6 You couldn't quite carry that over to
7 the railroad industry, because we pay it in the
8 nuclear industry. The utilities do, but there
9 are only seven Class I railroads in the U.S., and
10 there may not be the same capability on their
11 part to indemnify.

12 But I'd respectfully suggest,
13 contrary to what I heard this morning, that they
14 might be the ones looked to for that primary
15 indemnification, if you will, as well as the
16 insurance, but we could certainly talk to them
17 about whether because of the differences in the
18 industries there might be some indemnification
19 that others would provide, as well.

20 But these are matters that I can't
21 negotiate here. I don't have the authority to
22 negotiate, but I'm sure, and I said so with

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1 authorization of Edison Electric Institute, that
2 it would be willing to talk to the industry about
3 these things, because we're that serious about
4 needing the continued rail transportation of
5 these materials, that if they have a reasonable
6 case to make, we're perfectly willing to listen,
7 and I can't go any farther than that, I don't
8 think, except to respond to any other questions
9 that you have, but we're always willing to talk
10 to them.

11 MR. PFOHL: I just wanted to add there
12 was a lot of discussion amongst the railroads
13 yesterday and I think today, too, about either
14 automobiles running in the side of trains, trucks
15 running in the side of trains, and there was very
16 little or, actually, no discussion about the FRSA
17 preemption statute at 49 U.S.C. 20106.

18 It's been on the books for 37 years,
19 1970. If a railroad is acting in accordance with
20 federal railroad safety standards, if it's within
21 the speed limit, its tracks are kept up to speed,
22 those types of actions are preempted. You cannot

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1 bring a common law negligence claim.

2 I haven't -- you know, we did not
3 hear from the railroads any instances where
4 they've lost those types of cases. Now that
5 doesn't cover the big terrorist attack incident
6 that might occur, but for the usual incidents,
7 the railroads are involved in every single case,
8 insuring that this never makes it to the jury,
9 because it's preempted under federal law.

10 VICE CHAIRMAN MULVEY: But, of course,
11 they will point out that they have 220,000
12 employees. They have 140,000 miles of track.
13 The road to Hades is paved with good intentions.
14 There's always going to be the rogue employee who
15 comes to work intoxicated or doesn't pull the
16 switch they're supposed to throw, throws it
17 wrong.

18 There is always going to be trackage
19 that, for some reason or another, causes a
20 derailment, so you can't insure -- you can't,
21 rather, account for everything, and there's going
22 to be times when, in fact, the railroad would be

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1 negligent in the sense that it's responsible for
2 the actions of its agents, or it's responsible
3 for the track, and all the cases that have been
4 cited, Graniteville and the others, have all been
5 cases where the railroad was, in fact, "at
6 fault," and I think that's what the concern is.

7 MR. PFOHL: Correct, but there were
8 many statements made yesterday on the minor
9 incidents or other incidents that didn't involve
10 necessarily error or negligence amongst railroad
11 employees, so I just want to set the record
12 straight on that.

13 VICE CHAIRMAN MULVEY: Sure. Sure. I
14 mean, when somebody tries to outrun the train and
15 has the accident, it's not the railroad's fault.
16 When the gate, however, because of maintenance
17 issues, the gate doesn't go down, then the
18 railroad could be at fault, and sometimes gates
19 don't go down. Sometimes gates do malfunction.
20 Anyway, well, thank you.

21 MR. PFOHL: You're welcome.

22 CHAIRMAN NOTTINGHAM: Commissioner

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1 Buttrey, you've been very patient.

2 COMMISSIONER BUTTREY: I have.

3 CHAIRMAN NOTTINGHAM: I'd like to talk
4 to you. Sorry, we've been a little long-winded
5 over here, but the dais is yours.

6 COMMISSIONER BUTTREY: I'm still with
7 you. Mr. McBride.

8 MR. MCBRIDE: Yes, sir.

9 COMMISSIONER BUTTREY: Maybe we can
10 have some fun here. You had -- I think I heard
11 you say that you disagreed with my statement in
12 my opening statement yesterday that the railroads
13 have always been and are now subject to the
14 antitrust laws --

15 MR. MCBRIDE: No. No, I did not say
16 that.

17 COMMISSIONER BUTTREY: -- except with
18 respect to those few areas that have been carved
19 out by the Congress where -- that affect Board
20 decisions which are immediately and directly
21 reviewable by the federal courts. That's what I
22 said. I don't know whether you were here or not

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1 when I said it, but --

2 MR. MCBRIDE: I was, and I tried to
3 write down exactly what you said, and if I
4 mischaracterized it, I apologize, but what I
5 thought you were saying --

6 COMMISSIONER BUTTREY: The reason I --

7 MR. MCBRIDE: -- was that they are
8 subject to the antitrust. We agree on that, but
9 that you were saying there were only specific
10 exceptions to their antitrust obligations, and I
11 was saying that the exceptions are actually much
12 broader in my view because of the *Keough*
13 decision.

14 COMMISSIONER BUTTREY: Okay. We can
15 have a nice legal discussion about that at some
16 point, maybe. I don't know, but in any case, I
17 am weary of listening to people say in various
18 venues, without any illumination or
19 clarification, that the railroads are not subject
20 to the antitrust laws. That's the reason I said
21 what I said yesterday.

22 MR. MCBRIDE: Fair enough, because --

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1 COMMISSIONER BUTTREY: I'm weary of
2 hearing that.

3 MR. MCBRIDE: Well, I am, too, and
4 that's why I agree --

5 COMMISSIONER BUTTREY: And I hope I
6 never hear it again in this Board room.

7 MR. MCBRIDE: Well, and I agreed with
8 you, and that's why I said I agreed with you that
9 the railroads are subject to the antitrust laws
10 with respect to price fixing, carving up markets,
11 conspiracies, that sort of thing.

12 COMMISSIONER BUTTREY: And I made
13 specific reference to bid rigging and all that
14 sort of thing.

15 MR. MCBRIDE: You did, and we're
16 together on that.

17 COMMISSIONER BUTTREY: Right. Okay.
18 Is it your position that the Board is without
19 authority or jurisdiction to make a determination
20 on a fact-by-fact, case-by-case basis upon what
21 is a reasonable request?

22 MR. MCBRIDE: With respect to the

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1 obligation to handle a commodity because of any
2 claim that it's too risky to carry, the answer is
3 yes, because the courts have interpreted that
4 term in the statute to require and hold, as I
5 read you the language, that the railroads may not
6 ask this Board to allow them to refuse to carry
7 such materials.

8 So with respect to the duty to carry
9 all commodities except for the very few
10 historical exceptions that I provided to you in
11 my testimony, for money, gold, and silver, and
12 arguably for circuses, the obligation is
13 otherwise absolute to carry upon any reasonable
14 request, and the reasonable request was defined
15 by the Court to mean compliance with all
16 applicable governmental regulations.

17 But the answer to your question is
18 you do have authority with respect to other terms
19 of carriage -- place, time, manner, volume -- so
20 that, for example, if a shipper asks for a spur -
21 - I use this example -- into a diamond switch,
22 you'd say, "Well, that's not safe. You can't do

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1 that. You're going to have to get your service
2 somewhere else."

3 And so I'm not disagreeing with that,
4 and shippers have to reasonably inform the
5 carriers how much service they need and what
6 types of cars, what's going to be in the cars,
7 and if they have any special needs for when they
8 have to be picked up or dropped off. Those kinds
9 of things, yes, of course, you have authority,
10 and you can take all those kinds of factors into
11 account so that, for example, we don't quarrel
12 with the outcome in the *DeBruce Grain* case,
13 because the Board was faced with physical
14 impossibility.

15 At least, that was the finding that
16 it made, that Union Pacific couldn't handle all
17 the grain shipments that were demanded of it.
18 What were they going to do? DeBruce wanted its
19 contract carried out. We happen to sympathize
20 greatly with the notion that if they have a
21 contract, they should have to abide by the
22 contract. Otherwise, why have contracts?

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1 But there may be times when a court
2 or this Board would say, "There's just no
3 specific performance available here, because
4 we'll be running the railroad, or we'll harm
5 Peter to pay Paul, and then damages might be the
6 appropriate alternative remedy."

7 So we recognize that in physical
8 impossibility situations, just like in a real
9 embargo for legitimate reasons, they may be
10 excused, or their obligation may be modified, but
11 short of that, I think that you're here to carry
12 it out and enforce it, rather than give them
13 reasons not to comply with it.

14 COMMISSIONER BUTTREY: And you cite
15 *Akron*. Is that it?

16 MR. MCBRIDE: *Akron, Canton*. I cite
17 the --

18 COMMISSIONER BUTTREY: *Akron, Canton &*
19 *Youngstown Railroad Company, et al. v. the ICC*.

20 MR. MCBRIDE: Right.

21 COMMISSIONER BUTTREY: GPU Service
22 Corporation.

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1 MR. MCBRIDE: I'm sorry?

2 COMMISSIONER BUTTREY: GPU Service
3 Corporation.

4 MR. MCBRIDE: Was involved, as well.
5 Yes, there were many utilities. Those were the
6 people I represented. My name didn't make the
7 volume, though, but we're talking about 611 F.2d
8 1162, and the follow-on decision of the D.C.
9 Circuit in *Conrail*.

10 COMMISSIONER BUTTREY: Right. Let me
11 read you something from that same decision, if I
12 may.

13 MR. MCBRIDE: Sure. Sure.

14 COMMISSIONER BUTTREY: A little bit
15 further over in the decision, the Court speaking
16 here, "We cannot refrain from noting at this
17 point that none of the petitioner railroads has
18 availed itself of opportunities to comment upon
19 the safety regulations of DOT and NRC concerning
20 the rail transport of nuclear materials."

21 I was following you along. When you
22 were quoting from the *Akron* case, I was following

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1 along in my copy of the Akron case, which I also
2 have.

3 Still quoting, "Questions of safety
4 are also questions of risk of liability." I'm
5 over on page 7 if you --

6 MR. MCBRIDE: I've got it.

7 COMMISSIONER BUTTREY: "resulting" --
8 "A question of possible liability for damage
9 resulting from carriage of a commodity is
10 therefore within the Commission's jurisdiction as
11 the regulator of the economics of interstate rail
12 transport. We agree with the Petitioner's
13 statement that while DOT and NRC have exclusive
14 authority to promulgate industry-wide standards
15 for the carriage of radioactive materials, the
16 ICC may allow individual carriers to make more,
17 but not less, stringent rules for their own
18 carriage of hazardous materials."

19 Do you care to comment on that?

20 MR. MCBRIDE: Yes, I sure do, because
21 that falls in the category of give them an inch,
22 and they'll take a mile. So what then happened

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1 was the railroads, the same railroads, came
2 before the Commission with tariffs that purported
3 to be in compliance with what the Sixth Circuit
4 mandated, and that was in the case, and maybe you
5 have it --

6 I'm looking for it here. I think I
7 do, *Conrail v. ICC*. That's why I keep referring
8 to that --

9 COMMISSIONER BUTTREY: I've heard of
10 that case.

11 MR. MCBRIDE: -- the follow-on case,
12 646 F.2d 642, because what the railroads did,
13 seizing on that language, was to insist that we
14 use special trains and some other things. There
15 had to be a separate locomotive and caboose for
16 every shipment, and the industry at the time
17 thought that was wasteful and inefficient.

18 Now today, by the way, the nuclear
19 industry might make a very different judgment
20 after 9/11, but that was then, and the argument
21 was that was wasteful, inefficient, and unsafe,
22 and we showed that it would be unsafe, because we

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1 wouldn't have the cushioning effect of the other
2 cars and the train, and the Commission agreed
3 with us in the decision that you will find at 362
4 ICC 756, radioactive materials, special train
5 service nationwide, and in the D.C. Circuit
6 decision, if you read it carefully, and I'll bet
7 you have, but you need to go back to it for this
8 point, the D.C. Circuit said, picking up on the
9 very language that you just referred to in the
10 Sixth Circuit decision, "We agree with the Sixth
11 Circuit as far as it goes."

12 But then they went on to say that
13 because the Commission had decided the service
14 was wasteful and necessary, and because the
15 traffic otherwise complied with the DOT and NRC
16 regulations, the railroads could use special
17 train service if they wanted to, but they
18 couldn't make us pay for it.

19 COMMISSIONER BUTTREY: But we're not -
20 - but I'm not talking about that.

21 MR. MCBRIDE: Okay.

22 COMMISSIONER BUTTREY: I'm not talking

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1 about special train service. I'm talking about
2 what the Court's talking about here, and the
3 Court is talking about here liability, which is
4 what we have before us now with hazmat. It's
5 specifically talking about liability.

6 MR. MCBRIDE: Well, it may be, and it
7 didn't have a specific question.

8 COMMISSIONER BUTTREY: Not they may
9 be. They are.

10 MR. MCBRIDE: Well --

11 COMMISSIONER BUTTREY: It says that.

12 MR. MCBRIDE: Well, what I meant was I
13 don't think they had a specific question before
14 them of how the carrier might seek to shift the
15 liability.

16 COMMISSIONER BUTTREY: It didn't in
17 this case, but it certainly might in the future.

18 MR. MCBRIDE: Absolutely.

19 COMMISSIONER BUTTREY: Yes.

20 MR. MCBRIDE: And I'm not arguing with
21 you that this decision might be read to mean
22 we'll have another argument some day about

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1 whether some liability shifting argument is
2 reasonable or not. There was a --

3 COMMISSIONER BUTTREY: There's no
4 argument about who has the jurisdiction here in a
5 case like this.

6 MR. MCBRIDE: Over the economics, I
7 think that's correct.

8 COMMISSIONER BUTTREY: Over the
9 liability issue.

10 MR. MCBRIDE: That may be right. Now,
11 I can tell you there was an immediate situation
12 that almost came before you recently and may come
13 before you again. Canadian Pacific had a tariff
14 which purported to require the shippers to
15 provide total indemnification regardless of fault
16 and no matter what the circumstances, which I
17 read to include gross negligence, for any
18 shipment of hazardous materials.

19 Now as I understand it, that tariff
20 was withdrawn before it became effective, and
21 people are monitoring this daily to see if such a
22 tariff is published again, and maybe they're

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1 waiting until after this hearing is over. I
2 don't know, but they may come out with such a
3 tariff, and then I think there will be people who
4 argue that you have the jurisdiction because it's
5 in the tariff to decide whether that's lawful or
6 not.

7 Now I can't tell you sitting here
8 that I'm going to agree with that, because I
9 don't know what all the facts and circumstances
10 are until I see it, and I'm going to look at
11 these cases closely.

12 So if they purport to adopt
13 regulatory requirements that DOT didn't agree
14 with or were inconsistent with or something, then
15 we may very well be arguing that they violated
16 these decisions, and they're in the wrong place,
17 but if this is all about economics, then this may
18 well be the right place to be to hash that out.
19 That's how I read the decision.

20 COMMISSIONER BUTTREY: Well, it seems
21 to me -- I mean, of course, I'm just one person,
22 but I frankly would enjoy going before the Court

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1 of Appeals and arguing that case, because I think
2 it's just as clear as the nose on your face that
3 the Board has jurisdiction to deal with this and
4 that the carriers have the ability to make rules
5 that are more stringent than, not less than,
6 rules for carriage of hazardous materials on
7 their line.

8 MR. MCBRIDE: Even if we were to agree
9 that you had the authority, and I just said that
10 you might, let me tell you about another case
11 that was decided by this Agency after these,
12 because that's why I say I think this is going to
13 end up being a fact-specific inquiry, and I think
14 you heard Mr. Hamberger say those words this
15 morning about things sometimes being fact --

16 COMMISSIONER BUTTREY: That's what
17 they said in the morning.

18 MR. MCBRIDE: Exactly, but let me just
19 tell you that there was a case called
20 *Contaminated Covered Hopper Cars* on the Illinois
21 Central, and I've cited it in my comments, as
22 well, and we were involved. I was involved for

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1 the fertilizer industry, and the argument there
2 was that the Illinois Central adopted a tariff
3 that purported to shift the liability to the
4 shipper if there was contamination in a car that
5 was used to load animal feed.

6 Animals later ate the feed and died
7 from the contamination, and we argued that was a
8 violation of the common carrier obligation,
9 because the railroad was in the superior position
10 to know what had been in the car previously and
11 to inspect it and had a duty to furnish safe and
12 clean equipment, and the ICC agreed with us that
13 the proper placement of the burden in that case
14 was on the railroad, because it was in the best
15 position to prevent the harm from occurring, and
16 so -- and nobody argued it didn't properly belong
17 before the ICC to decide, and we prevailed, and
18 that was stricken from that tariff of the
19 Illinois Central.

20 So, you know, that case and things
21 like it may come before you one of these days
22 soon on some of these issues, and if it's about

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1 the economics, then we may be in the right place
2 here, but --

3 COMMISSIONER BUTTREY: I mean, that
4 case you just cited, though, is a strict tort
5 liability -- is a tort liability case --

6 MR. MCBRIDE: Well, that may be right,
7 and that's why I have some problems, frankly,
8 with tariff provisions that purport to alter tort
9 law with respect to who's liable for something,
10 and you may well hear me arguing that, that you
11 don't have the authority to preempt state law
12 with respect to matters that were traditionally
13 for the states in terms of tort, but I don't know
14 that yet. I don't know what the facts are going
15 to be.

16 I may well end up arguing a different
17 position, but I'm just alerting you to the fact
18 that this kind of issue has come up before, and
19 the Board has dealt with it, or the ICC before
20 it, and you may have to do it again, and I'm not
21 arguing with you that that's the kind of thing
22 that may fall squarely within your jurisdiction.

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1 COMMISSIONER BUTTREY: Thank you.

2 MR. MCBRIDE: You're welcome.

3 CHAIRMAN NOTTINGHAM: Mr. McBride, I
4 very much appreciate your offer to consult with
5 the railroad industry about the predicament they
6 are currently in with liability exposure from a
7 broad policy perspective. Putting aside more
8 narrow STB and ICC precedent and law, to me it's
9 a big problem.

10 It's a major societal problem, and
11 just because some parties are unhappy with others
12 for other reasons, and some people want certain
13 bills to pass that others don't, I hope those
14 kind of disagreements don't continue to prevent
15 any discussions about moving forward and solving
16 a problem that needs attention, and I think any
17 role that you or anyone else can play in
18 brokering those kind of discussions will, I can
19 assure you, earn the appreciation of this Board
20 member, and we'll be happy to help any way we
21 can.

22 I also sense from the discussions

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1 I've had before this hearing and then at this
2 hearing, what I've heard, you've said you haven't
3 really been invited to get too involved in this
4 issue. Don't worry. I don't think there's been
5 -- I don't think there have been many meetings up
6 in Congress.

7 If I heard General Timmons correctly
8 this morning, they have trouble even getting a
9 meeting, the staff, because of the interest
10 groups on the other side, and so anything you can
11 do to help get us to a better place would be
12 appreciated.

13 MR. MCBRIDE: We've made those
14 comments to railroads already. My principals
15 have, as I understand it, as well as myself, so
16 you won't need any stick to encourage us to talk
17 to them about these matters. We'd be happy to do
18 it, and I thank you very much for your comments
19 and thank all three of you for your attention,
20 and I want you to know that everything I've said
21 is always with the greatest respect for this
22 body.

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1 CHAIRMAN NOTTINGHAM: Thank you. I
2 appreciate that. That concludes our questions
3 for this panel. Thank you for your patience. We
4 will now bring up our final panel and ask them to
5 come forward, and as they do, I'll step out just
6 for a second and be right back.

7 Good afternoon. We appreciate your
8 patience. It's not always easy being the final
9 panel in a two-day hearing, but somebody had to
10 be the final panel, and we appreciate your being
11 with us.

12 Mr. Mulvey had to step upstairs to
13 tend to a very short matter. He said he would be
14 back momentarily, and Mr. Buttrey is within ear
15 shot just in our anteroom there, so we'll go
16 ahead, if we could. He's returning now.

17 Our first witness in this panel we'll
18 hear from is Mr. Robert P. Fixter of Clean Earth
19 of North Jersey. Welcome.

20 MR. FIXTER: Thank you. I'd like to
21 thank the Board, the Chairman, Vice Chair, the
22 Commissioner for giving us this opportunity.

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1 Again, my name is Bob Fixter. I'm Vice President
2 of Clean Earth of North Jersey. We are a
3 licensed hazardous waste facility located in an
4 industrial park in South Carney, which is about
5 15 miles south of Manhattan.

6 I'd like to go on record of praising
7 the Board for providing this opportunity, this
8 forum, where we could talk to you face-to-face
9 about our service issues and also to thank you
10 for the work that you've done so far in response
11 to our two informal complaints that we filed with
12 the Board.

13 Obviously, I'm here. We need some
14 additional help, and that's what I'm going to
15 speak about for the next five or ten minutes.
16 I'll try and keep it short. It's been a long two
17 days.

18 As part of our business, we are
19 required to move large volumes of contaminated
20 soil in short periods of time. Two years ago, we
21 constructed an industrial spur off an active rail
22 line that services another company further on

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1 down the line.

2 Once the spur was complete, we
3 approached the railroad for service, and they
4 told us that they were not going to provide us
5 service. The issue is that the active rail line
6 goes through a intermodal yard where it's a very
7 busy yard, and they use the active line as a
8 parking lot and a loading/unloading area, and
9 that prompted us to file the first complaint.

10 And after that, we at least got the
11 railroad to the table, and they negotiated with
12 us a side track agreement, which was executed by
13 the line owner, Clean Earth, and then presented
14 to the railroad and no activity. Months went by.
15 We filed the second complaint, and they brought -
16 - it brought them back to the table, and we did
17 start to see some service on a limited basis.

18 Basically, they told us that we will
19 get service when the other customer down the line
20 gets service, and that doesn't suit our needs and
21 the business that we're in. Again, we need to
22 move large volumes of soil from projects which

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1 are basically redevelopment projects, Brown
2 field-type redevelopment projects in the greater
3 metropolitan area.

4 So that brings us to where we're at
5 now. We received their final response, what we
6 believe to be their final response, which in
7 essence is that, "We will service you one day a
8 week, and that's it. Take it or leave it."

9 Obviously, that does not suit our
10 needs, so, again, that's why we're here
11 approaching the Board. We do need some help.
12 Right now what we're asking is to bring the
13 railroad back to the negotiation table. We
14 believe that there is a business-to-business
15 solution if they have the willingness to come and
16 discuss that with us.

17 They did offer at one time what we
18 felt was a legitimate engineering solution. They
19 pursued it quite slowly. We pursued their
20 engineering solution. We were able to get quotes
21 from a railroad contractor in two days, where it
22 took the railroad we really don't know how long,

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1 because they have yet to come back to us with a
2 cost estimate for that solution.

3 They came back and said, "We
4 evaluated it. We're not going to proceed with
5 it. That's it. One day a week. Take it or
6 leave it."

7 So, again, that does not suit our
8 business purpose, our business model. We need to
9 move large volumes of soil in a relatively short
10 period of time. The issue is allowing the train
11 through the intermodal yard on a daily basis, and
12 that is the summary of my testimony. Thank you.

13 CHAIRMAN NOTTINGHAM: Thank you, Mr.
14 Fixter. We'll now turn to Mr. Benjamin B.
15 Slaughter of the Slaughter Company. Welcome.

16 MR. SLAUGHTER: Yes, sir. I'd like to
17 take this opportunity to thank you, Chairman
18 Nottingham, Vice Chairman Mulvey --

19 CHAIRMAN NOTTINGHAM: Be sure to push
20 your -- to press the button in front of you until
21 you see the red light, and then the mic will go
22 live.

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1 MR. SLAUGHTER: I thought it was on.

2 Excuse me.

3 CHAIRMAN NOTTINGHAM: Thank you. No,
4 it happens to me all the time, too.

5 MR. SLAUGHTER: Again, thank you,
6 Chairman Nottingham, Vice Chairman Mulvey, and
7 Commissioner Buttrey. My firm is engaged -- we
8 operate a transload facility and have for 19
9 years.

10 In the past six years, due to an
11 eminent domain action brought on by a state
12 entity, we were forced off of the previous site.
13 Once we identified a new potential site, we met
14 with the, at that time, general manager of the
15 East Carolina Business Unit, a division of
16 Norfolk Southern, and a member of the Industrial
17 Development Department with Norfolk & Southern.

18 Out of that meeting -- and this was
19 on or before the closing on this piece of
20 property. Out of that meeting came a tentative
21 rendering from the Engineering Department at NS
22 for a proposed, based on GIS information, spur or

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1 track layout. At that -- upon that time, we
2 began proceeding with engineering and
3 implementation of the facility.

4 In `06, we met with a new general
5 manager, and by this time the facility had taken
6 a firm layout. In other words, we had negotiated
7 environmental issues with land quality, DENA and
8 the Army Corps and had had the elevations had
9 been pretty much firmed up, and we met with the
10 new general manager, the engineers for Norfolk &
11 Southern out of Roanoke, the Industrial
12 Development people, my engineers, and other
13 operational personnel with the firm.

14 We concluded from that meeting that
15 the railroad would be best -- it would work out
16 better for the railroad if we put in a Y-
17 implementation due to the volume that we had had
18 and that we were expecting to increase into this
19 facility.

20 We proceeded. The engineers left
21 that day, both Norfolk & Southern and mine, and
22 over the next few months, through `06 and into

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1 early '07, they came to a satisfactory layout
2 both on geometry and elevation for the
3 requirements, and it was forwarded to the general
4 manager's office, as best as I can tell, late
5 February or early March of '07.

6 In June, we heard nothing until some
7 time in June, and through a phone conversation
8 from the general manager he informed me of the
9 railroad's intention to close the only crossing
10 and the only access to this facility. Obviously,
11 the wind was taken out of my sails, and I sat for
12 a moment, and I said -- I called him by name, and
13 I said, "What is precipitating this?"

14 I said, "This is a late date, after
15 four years of development, millions of dollars in
16 expenditure, to come up and say that you're going
17 to close the only crossing, the only access to
18 this facility." And he said, "Well, it's a
19 safety issue, and he says, "You'll have other
20 access."

21 I said, "By all means, please come
22 down and show my lawyer, my engineer, my

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1 surveyor, and myself, because that access has
2 escaped us," and he said, "Well, you shouldn't
3 have bought landlocked land." I said, "We need
4 to meet further on this."

5 So I went away, and I pondered the
6 situation at length, and I discussed it with my
7 investors and my other colleagues, and before we
8 proceeded with a further meeting, an article
9 appeared in the paper, which we think -- in the
10 state paper -- which we think is relevant to what
11 is -- what was happening now, and the article
12 reads, "Major transport hub in the works."

13 Well, further examination -- this is
14 a cooperative effort between Norfolk & Southern
15 and another entity, and we have no problem with
16 their desire to implement another facility. The
17 facility that was proposed was going to take \$25
18 million of public funds. It was going to be
19 exactly the same size, a hundred-acre site, that
20 we had.

21 If they're willing to work 16, 18
22 hours a day, six days a week, as we do, we have

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1 no problem, and we have a fairly lengthy
2 clientele, and we expect it further, so we don't
3 have a problem competing there, but as it went on
4 after this, we met again with this general
5 manager, my engineer, and out of that meeting he
6 came up with -- he said, "Well, you close three
7 crossings," and he said, "and I'll probably leave
8 this in place." I said, "Where is it that you
9 think that I'm going to close three crossings?"

10 And my engineer was with me, and I
11 was upset. There's no question of that, but I
12 was trying to contain myself, and so we left with
13 pursuit of more goals and with more research, and
14 I contacted both extensive state agencies,
15 senators, congressmen, federal agencies, and one
16 of them said, "I don't know where they get off
17 thinking they can require of you to close three
18 crossings, and, moreover, I don't know where they
19 think you have the authority to close those three
20 crossings," which we did agree.

21 Well, we continued on, and by this
22 time, you know, I was getting pretty much close.

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1 I had spent millions, and so had my investors,
2 and they were looking to me to bring this thing
3 to fruition. After all, we'd had 19 years of --
4 at that time, it was about 18, between 17 and 18
5 years of harmonious relationships in which we --
6 with the railroad and their customers.

7 We had participated in cooperative,
8 both financial and physical, endeavors to create
9 marketing data, to approach other industry that
10 they would have enjoyed the rewards from, as well
11 as I would, and so would the public, and so
12 finally I said, "Well, years --." My dad had
13 died many years ago, but he had started shipping
14 on the original Norfolk Southern in '48 and had
15 enjoyed throughout that time and until this date,
16 and my -- and I had continued it on once I
17 completed college.

18 So I wrote a letter to Mr. Mormon,
19 and I tried to appeal with a great deal of
20 humility my need for assistance in this, that I
21 felt that there was something underlying here,
22 and if anything I had done that would -- or my

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1 firm had done or any of my colleagues, we would
2 certainly like to render this.

3 We had never known a conflict ever
4 with the railroad at that point in time out of
5 that, and I followed it up with a phone call to
6 his office, and I was relegated down to some vice
7 presidents, and from there came a meeting that
8 was with a representative viewed as a talented
9 and proficient crossing expert.

10 Now this crossing, by my own
11 observation at the time, had been in place for at
12 least 75 years. My father had been on this very
13 site starting in 1948, and it had been
14 uninterrupted as an industrial site since all I
15 could remember, and I'm 57. My father had sold
16 to his partner, gone not too far away, put in
17 another facility, and was shipping five and six
18 cars a day and did for many years.

19 When the eminent domain took my
20 previous site, I started looking. I knew most of
21 the track. I had worked as a contractual matter
22 cleaning up and doing load adjustments for both

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1 CSX and Norfolk & Southern through many years, so
2 I knew a vast amount of the trackage. I was not
3 a novice to any of this.

4 And when I found this new site, I met
5 onsite with the, at that time, general manager,
6 which I have a great deal of respect for, and the
7 Industrial Development people, and, as I said
8 earlier, and so when in `07, after our meeting --
9 I'll wrap this up.

10 In `07, when he brought this on, and
11 then the meetings pursued and the crossing expert
12 came up and said, "Well, he's going to require --
13 the railroad is going to require of you to put in
14 lights and gates," and I listened, and then he
15 went on, and he said, "And they're going to
16 require of you to pay \$3,000 a year maintenance
17 agreement, paid in advance, for 25 years," and I
18 listened even further.

19 And then he got down, and he said,
20 "And they're going to require" -- and this was
21 the onerous part -- a crossing agreement be
22 signed that stipulates that their determination

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1 any time that I have other access, that they
2 would remove my crossing. That wasn't acceptable
3 to neither mine nor my financial institutions and
4 my investors.

5 So I plead with you. We need your
6 assistance. We have pursued in every manner. We
7 have been willing to work and negotiate in any
8 manner that we could to seek remedy, to negotiate
9 this settlement. We need your help. Thank you.

10 CHAIRMAN NOTTINGHAM: Thank you, Mr.
11 Slaughter. Ms. Sandra Dearden of the Highroad
12 Consulting, Ltd. Welcome.

13 MS. DEARDEN: Thank you. My name is
14 Sandra Dearden. I'm President of Highroad
15 Consulting, which is a transportation and
16 logistics consulting firm with offices in
17 Chicago.

18 Highroad represents four clients in
19 this proceeding that are rail shippers. In
20 addition to addressing some of the topics in
21 their statements, which were filed, I will cover
22 some other topics based on events and issues that

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1 I have observed since my -- I launched my career
2 as a professional consultant.

3 In 2005, the Class I railroads
4 announced routing protocol agreements to
5 streamline their exchange of rail traffic at
6 major gateways. The objective was to address
7 congestion by directing rail traffic flows
8 through the most efficient interchange locations
9 and to improve transit times and asset
10 utilization for rail customers.

11 There is no doubt that when they
12 first developed the routing protocols they were
13 acting in the public interest, and there was no
14 question that the routing protocols were
15 successful in addressing congestion in some
16 major lanes.

17 However, as time passed, more
18 problems surfaced with respect to transit times
19 on particular routes, and customers brought these
20 problems to the attention of railroad marketing
21 personnel. Unfortunately, because the routing
22 protocols are being strictly enforced by the

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1 railroads, it appears the customers do not have
2 the option to use alternative routes.

3 As a result, some customers have
4 experienced increase transit times, and since
5 alternative routes evidently are no longer
6 available, the routing protocols are having a
7 negative impact on potential rail-to-rail
8 competition, as well as the competitiveness of
9 our customers in the broader marketplace.

10 A question to be addressed in this
11 proceeding is if the railroads refuse to handle
12 cars via alternative routes, are they failing to
13 comply with their common carrier obligation? If
14 so, then what recourse do the customers have to
15 address those violations?

16 The railroad has experienced a number
17 of fatal accidents in recent years involving
18 transportation of TIH commodities. As a result,
19 new design standards for tank cars used to
20 transport those commodities are being developed.

21 Certainly, we have no quarrel with
22 the implementation of rail car standards designed

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1 to improve safety. However, some of the major
2 railroads have taken this issue one step further.
3 They assert the right to impose all liability for
4 the transportation of these commodities on the
5 shippers, even when the shipments are transported
6 pursuant to regulated rates.

7 For example, Canadian Pacific
8 recently issued an announcement concerning the
9 movement of ammonia and TIH commodities
10 concerning -- with an indemnification and
11 liability provision that stated, "It is being
12 intended that customers assume all liability that
13 is in any way connected with the transportation
14 of hazardous commodities under this tariff."

15 This shift of liability to TIH
16 shippers is patently unfair, particularly since
17 our research indicates that all of the rail
18 accidents in recent years involving TIH
19 commodities have been the result of a track
20 defect or caused by human failure on the part of
21 the crews.

22 If railroads are allowed to limit

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1 their liability and correspondingly their common
2 carrier obligation for the transportation of TIH
3 commodities, we are concerned there may be a
4 cascade effect in which the liability could shift
5 on other hazardous commodities.

6 The chemical industry is very safety
7 conscious. Major rail accidents involving TIH
8 commodities have generally not been caused by the
9 shippers or the rail equipment, and the new
10 safety rules and standards for car design have
11 been established in recent years, further
12 enhancing the safety of shipments of hazardous
13 commodities.

14 Forcing rail shippers to assume 100
15 percent of the liability for shipments of
16 hazardous commodities, thereby enabling the
17 railroads to limit their common carrier
18 obligation on shipments of certain hazardous
19 commodities, does not address the root cause of
20 the problem, that being the need of the railroads
21 to improve their own safety standards and
22 procedures.

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1 Many railroad shippers and receivers
2 are being forced to spend millions of dollars in
3 additional rail infrastructure or, alternatively,
4 to exit the market or incur substantially higher
5 rail costs for rates and charges. Rail customers
6 have made decisions to locate plants and
7 distribution facilities on railroads based on
8 agreements that were subsequently canceled.

9 Some have the space and ability to
10 commit capital to make the infrastructure changes
11 that become necessary when the serving carriers
12 change their policies, but others do not always
13 have the room to expand. Railroads acknowledge
14 that there is not enough business to go around,
15 for example, if all of the grain shippers in a
16 region expand their operations to 100-car trains,
17 forcing some to go out of business.

18 This is indicative of a trend in
19 which carriers, and particularly Class I
20 carriers, have become market makers instead of
21 market service providers. They handle the
22 traffic they want to handle and demarket the

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1 traffic they are not interested in handling.
2 This ineffectively is an erosion of their common
3 carrier obligation.

4 The concept of demarketing is not
5 really new to the railroad industry. Initially,
6 when the railroads developed plans to rationalize
7 their systems and implemented abandonment
8 programs in the early eighties, the abandonments
9 focused on lines that clearly did not have
10 adequate volumes and revenues to support
11 continued maintenance of the lines.

12 However, once those lines were
13 eliminated, some railroads adopted policies to
14 demarket business on marginal lines. This was
15 accomplished by reducing service, thereby forcing
16 shippers to ship by truck. Eventually, rail
17 volumes and revenues on those lines declined to
18 the point that they met the regulatory guidelines
19 for abandonment.

20 Since I started Highroad Consulting
21 in 1996, I have become aware of numerous examples
22 of railroads demarketing business. Some

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1 customers have complained that carriers are
2 demarketing their lines by simple expediency of
3 cutting switch connections to industry tracks.
4 Evidently, if a carrier believes that service to
5 a shipper is not consistent with the availability
6 of capacity on the adjoining main line, the
7 carrier simply opts to cut the industry switch
8 connection.

9 Whatever happened to the shipper's
10 right to obtain a connection to carriers' main
11 lines? The statutory requirements still appear
12 to be in existence, but in practice industry
13 switches are being unilaterally cut off at an
14 alarming pace.

15 There are numerous ways a railroad
16 can demarket business. Demarketing flies in the
17 face of the railroads' common carrier
18 obligations. Stricter guidelines need to be
19 established regarding abandonments, and the
20 procedures need to be established so rail
21 customers have recourse when demarketing occurs
22 and the railroads are not meeting their common

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1 carrier obligation.

2 Finally, we believe the common
3 carrier obligation should apply to all
4 commodities, whether covered by tariff, exempt
5 quote, or unilateral, non-arm's length contract.
6 We request the Board's consideration of that
7 point of view.

8 In conclusion, a procedure should be
9 established so rail customers have recourse if
10 routing protocols result in lessening or
11 elimination of competition and if they result in
12 a negative impact on service. We urge the Board
13 to reaffirm the fundamental common carrier
14 obligation on all regulated commodities including
15 hazardous commodities.

16 What is the Board's view of railroads
17 forcing rail infrastructure investments onto
18 shippers through policy changes, and what is the
19 Board's view of reasonable dispatch, and what
20 remedies do the shippers have to enforce the
21 railroads' common carrier obligation?

22 We request that the Board establish

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1 procedural guidelines and define the role of the
2 Office of Compliance and Consumer Assistance will
3 have in ensuring that the carriers fulfill their
4 common carrier obligation.

5 Finally, stricter guidelines need to
6 be established regarding abandonments, and
7 procedures need to be established so rail
8 customers have recourse when demarketing occurs
9 and the railroads are not meeting their common
10 carrier obligation. Thank you.

11 CHAIRMAN NOTTINGHAM: Thank you, Ms.
12 Dearden. We'll now turn to Mr. Daniel R. Kloss
13 of the Evraz Claymont Steel Company.

14 MR. KLOSS: Thank you, Mr. Chairman,
15 Vice Chairman, Commissioner. The Evraz Claymont
16 Steel plant is located on a 425-acre site off
17 Route 495 in Claymont, Delaware.

18 The company, then Worth Steel, began
19 operation in March 1918. Today, Evraz Claymont
20 employs over 480 people who produce plate steel
21 products to heavy industry, primarily in the
22 rail, bridge, shipbuilding, and tool and dye

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1 sectors.

2 The plant's rail infrastructure
3 initially started by Worth Steel, was completed
4 in 1965 by the Phoenix Steel Corporation. Once
5 completed, the internal rail complex was one of
6 the finest on the East Coast.

7 Annual plate capacity was at 500,000
8 net ton, and rail service was provided by at
9 least two railroads. Rail access to the plant
10 was available on both the north and south ends,
11 and aside from constraints imposed by the Amtrak
12 line, scheduled freight flowed in and out of the
13 plant virtually unimpeded.

14 As plant productivity began to
15 decline in 1980, nonessential rail assets were
16 left to deteriorate. This trend continued for 23
17 years, through three changes in management.
18 During this same time period, rail service was
19 reduced to one rail line, the Norfolk Southern.

20 In January of 2004, it became evident
21 that the steel industry was about to experience a
22 breakthrough in order entry. Plate products in

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1 particular could reach sold-out conditions by
2 mid-year.

3 As this situation develops, meetings
4 were scheduled with the Norfolk Southern
5 operating and marketing groups. These meetings
6 continued each quarter through 2007. The
7 strategies, teamwork, and rapport developed at
8 these meetings played a key role in our
9 businesses successes through this critical
10 period.

11 In December of 2007, prompted by an
12 unprecedented demand for raw metal material
13 worldwide, we contacted the Rail Consumer
14 Assistance Unit to seek guidance on how to
15 proceed. The insights they provided complemented
16 the work being done between our company and the
17 Norfolk Southern.

18 Evraz Claymont Steel is appreciative
19 of the support we have received from the Norfolk
20 Southern Railroad and the Rail Consumer
21 Assistance group. Together, we have made giant
22 strides in revitalizing our rail assets,

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1 expanding our crew schedules, and improving
2 operating efficiencies.

3 Much, however, still remains to be
4 done, and the challenges that lie ahead may be
5 greater than those we faced, but I feel confident
6 that by continuing to work together we will
7 succeed. This concludes my remarks for today.

8 CHAIRMAN NOTTINGHAM: Thank you, Mr.
9 Kloss. Now we will turn to Mr. Raymond Tylicki.

10 MR. TYLICKI: Hi, how are you doing?

11 CHAIRMAN NOTTINGHAM: Good. Welcome.

12 MR. TYLICKI: I would like to touch
13 on the --

14 CHAIRMAN NOTTINGHAM: Press the button
15 for the red light and make sure the mic is
16 pointed --

17 MR. TYLICKI: I am a member of the
18 general public, and I would like to touch on some
19 of the historical basis of common carrier
20 obligations. It seems that the railroads, in my
21 opinion, have not met their common carrier
22 obligations to not just to industry but to the

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1 general public at large.

2 The -- I did some research over the
3 past previous days looking at the historical
4 context of where that common carrier obligation
5 arrives. From the Maryland archives I was able
6 to pull up a number of charters that chartered
7 the B&O Railroad and the Pennsylvania Railroad or
8 the early predecessors.

9 My position here is that the
10 railroads themselves, unlike my grandfather's
11 barber shop, which he went into the Army and
12 saved up money to buy, and if there were drunken
13 people from the bar down the street who came into
14 his barber shop and attempted to get a haircut,
15 he could chuck them to the curb, and, being a big
16 man, he could do that.

17 However, the railroads' initial
18 funding comes from the actual charters that were
19 granted to them by the State of Maryland. The
20 very basis of these charters were started,
21 actually, in the early part of this country when
22 George Washington was among the first to propose

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1 a national railroad that would stretch from the
2 East Coast to a connecting point in the West.

3 The high expenditure in terms of time
4 and money of moving goods overland was a
5 constraint to expansion and settlement. The
6 existing transportation was slow and expensive.

7 What happened here is is that the
8 national -- the early national government at the
9 time created toll roads. The toll roads were
10 financed by a combination of stockholders, which
11 eventually the railroads themselves became
12 railroads and canals.

13 The creation of these where my family
14 had -- my family's homestead in Cumberland,
15 Maryland. We had the wonderful opportunity of
16 participating in this country's creation when
17 first the C&O Canal came through our property at
18 Mexico Farms. Then, after that, the B&O Railroad
19 also came in and did eminent domain on our
20 property and took, again, more of our property in
21 the early 1800s.

22 We allowed this, and the farmers in

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1 that area welcomed that, as well as the coal
2 industry and the people there, because the public
3 had derived a direct benefit from the existence
4 of the railroads. My grandmother --

5 Hoboes would come up on the
6 railroads. The railroad would sort of wave them
7 on, and they would harvest the crops. We would
8 take the crops down to the train station and load
9 them onto railroad cars and ship them back out to
10 port.

11 Then, around 1910, again our land was
12 then divided by the Western Maryland Railroad.
13 These charters of these companies originally
14 created were the -- were created by this, you
15 know, canal company, which then became the C&O
16 part of the railroad.

17 Here I have a charter here. The
18 actual payment for creation of these companies
19 did not come from people saving up their money
20 like my grandfather did but actually came from
21 the public trust and treasury themselves that the
22 State of Maryland, in addition to 5,200 shares of

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1 capital stock, provided for the creation of these
2 railroads to begin with, but this is here, the
3 volume 474, page 203 of the archives of Maryland
4 Accession Law of 1827 -- that the additional
5 5,000 shares of stock, the power to open up
6 books, the railroads -- that the revision
7 citizens that the railroads' connections here in
8 the historical documents show that as far as that
9 person -- that provided that any railroads from
10 different parts of the state provided that
11 performing those injuries worked for companies
12 incorporated, that nothing shall close the
13 turnpike road, railroad to private wagons,
14 meaning that the public should have basically a
15 right to access the railroad.

16 Where I'm going with this here is is
17 that the Union Pacific's position as far as
18 Amtrak is concerned is that they are a private
19 company with private shareholders. Turns out
20 that the United States government in creating the
21 Pacific Railroad Act actually started the
22 railroad in its original charter.

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1 The President of the United States
2 had the ability to appoint people to the Board of
3 the Trustees. We also had the land grants that
4 were given by the U.S. government to construct
5 these railroads to begin with.

6 So the problem here is is that the --
7 I made a couple of inquiries to the Surface
8 Transportation Board over the past couple of
9 years as to why does the public, if I were to
10 call up the railroad today and, matter of fact,
11 Mr. Chairman, actually, they really as refusing -
12 - railroads to refuse shipments.

13 I ask you that perhaps you ought to
14 try calling the railroad yourself and saying,
15 "I'd like to move stuff from my storage unit.
16 I'd like it box car parked at a siding and see if
17 I can load my stuff onto a box car to be shipped
18 across the country," provided that you can
19 actually get through to an actual operator who
20 will actually even speak to you.

21 Railroads actually, despite the
22 public actually occasionally do call them from

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1 time to time to move their automobiles or other
2 what are called exempt household goods or just
3 personal -- you know, the railroads refuse to
4 move these items.

5 Now back to what I'm mostly concerned
6 about here is is that there is this idea that the
7 railroads have no obligation to serve passengers,
8 that they just merely allow Amtrak to be on their
9 lines, that the creation of Amtrak somehow
10 absolved them of that common carrier duty to
11 serve the historical interest of the public and
12 the public's investment in the creation of these
13 railroads to begin with.

14 And I thought I'd have to do a lot of
15 digging, but it turns out that the Supreme Court
16 itself, in *National Passenger Railroad*
17 *Corporation, Appellant vs. Acheson, Topeka &*
18 *Santa Fe Railroad*, in the Supreme Court of the
19 United States --

20 If I might read this here, "As the
21 railroads correctly observe, the threshold
22 inquiry in this case is whether the United States

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1 released the railroads from their passenger
2 service obligations as a matter of regulatory
3 relief or contractual right. The railroads
4 contend that the realities underlying the
5 enactment of the Rail Passenger Service Act
6 established the release as a contractual
7 obligation from the United States."

8 Nothing could be more wrong. The
9 realities are these. Interstate railroads have
10 been extensively regulated by the federal
11 government for more than a century in exchange
12 for a monopoly status and, might I add, the
13 eminent domain that took my family's property, my
14 ancestors' property -- that enormously
15 profitable, the railroads incurred special public
16 service obligations.

17 As common carriers, they were
18 required to provide passenger as well as freight
19 service. They also lack the authority
20 unilaterally to discontinue all or a portion of
21 the service for it's -- instead obligated to
22 petition and secure permission for discontinuance

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1 from the Interstate Commerce Commission.

2 Of course, we know the story by the
3 late 1960s, that rail passenger service had
4 become extremely unprofitable, but I also like to
5 add as far as demarketing is that in some cases
6 the Pennsylvania Railroad and other railroads
7 have made passenger service so bad that, as the
8 book *To Hell in a Stagecoach* reminded, that they
9 did not actually -- passengers did not want to
10 ride them.

11 It is against this background that
12 RSBAC was enacted, the RSBAC, which the railroads
13 now -- the railroad passenger service with the
14 railroads now wield as a weapon against the
15 government and us, the passengers, and to other
16 agencies that want to start rail service.

17 What's interesting now is is back in
18 the 1960s the railroads had the full cost of
19 running the railroads. Now things are a little
20 bit different. With the cost of gas where I live
21 now in Cleveland, Ohio, NOACA and various other
22 municipal planning authorities are saying, "We'll

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1 give you the railroad cars. We'll build the
2 stations for you. We'll put out entire -- a plan
3 here," and the railroads have been basically
4 sitting on their behind and saying, "No, we won't
5 deal with you."

6 The issue here is is that according
7 to this ruling that I had is is that Amtrak was
8 created not to relieve the passenger -- not to
9 relieve the railroads of their passenger duties
10 but a way of enforcing and enacting that is is
11 that the railroads were sold their rights to run
12 those passenger trains, but the common carrier
13 obligation, I believe, according to this ruling
14 back in 1984 where the courts have said that
15 Amtrak was created as a quasi-governmental entity
16 that took assumption of those -- of those
17 obligations, and if Amtrak --

18 What I'm asking this Board to
19 consider is is that the contract between the --
20 if the railroads refuse to provide passenger
21 service, in this case Amtrak, as opposed to
22 expand its lines, the railroads have basically,

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1 particularly Norfolk Southern, has been
2 protesting up and down, saying, "We want the full
3 cost of running a passenger train."

4 A passenger train with 200 people is
5 around \$20,000 worth of revenue. A freight train
6 with 100 trailer cars is about \$1,000 per car, so
7 that's \$100,000, but still, regardless of the
8 profit, as the coal producers had mentioned
9 earlier, that they still should have that
10 obligation to carry me and people who would like
11 to get back and forth to work.

12 Behind here we have the Virginia
13 Railway Express, which Norfolk Southern has sort
14 of petitioning, and there really is a public need
15 to expand those services. The --

16 CHAIRMAN NOTTINGHAM: If you could
17 wrap up --

18 MR. TYLICKI: Yes. Basically, what
19 I'm asking here is is that my solution to this is
20 is that the Surface Transportation Board should
21 have provisions that when you have metropolitan
22 planning organizations and regional transit

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1 authorities who need -- and there's a definite
2 need to be -- have competitive cities such as
3 Cleveland would like to have regional rail
4 systems in order to be competitive with other
5 municipalities such as Chicago, such as other --
6 Nashville, which now has commuter rail -- that
7 there should be provisions to say that the
8 railroad, instead of sitting on their behind and
9 saying, "We don't have to serve you," should
10 there be provisions where the regional planning
11 authority should be able to petition the Surface
12 Transportation Board based on the historical
13 obligation of common carrier duty --

14 CHAIRMAN NOTTINGHAM: Thank you, Mr.
15 Tylicki.

16 MR. TYLICKI: -- to provide service.
17 Thank you.

18 CHAIRMAN NOTTINGHAM: We've got you.
19 You've made your point quite well. Thank you. I
20 appreciate everyone's patience with working with
21 our time limits, but it's only fair. Everyone's
22 done a great job of respecting that. Thank you.

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1 Mr. Tylicki, I'll just say
2 Commissioner Buttrey and I both are regular
3 customers of the Virginia Railroad Express, and
4 so we often ponder what we can do to get
5 ourselves to work and home a little quicker, but
6 we haven't quite figured that out yet, but we're
7 working on it informally, but you touch on some
8 very fascinating history, and Maryland in
9 particular has, you know, just a wonderful rail
10 history, and it's also just interesting to note
11 the history of canals and how many smart people,
12 including George Washington, who was very -- was
13 convinced that canals were going to be the thing
14 for the long term. A lot of money was bet on the
15 canals.

16 MR. TYLICKI: Basically, my point here
17 is is the public has made a significant
18 historical investment in the railroads. Also, on
19 the railroad side, I don't think that it's fair
20 to tax the railroads, you know, when you have the
21 -- tax the railroads while the infrastructure is
22 deteriorating. I think railroads should be

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1 exempt from the taxation if they agree to carry
2 passengers.

3 CHAIRMAN NOTTINGHAM: I understand.
4 Let me just ask a question. Mr. Kloss, thank
5 you. I appreciate your testimony, and, frankly,
6 I appreciate your coming all this way to share a
7 positive experience but also to give us a little
8 bit of a warning that we may have some more
9 challenges and to be ready.

10 We appreciate that. It's far better
11 from the Board's perspective to know about
12 situations before they are already upon us so we
13 can get ready, but too often people only take the
14 trouble to come to the Board when they're really
15 mad or really angry at the Board, and I
16 appreciate the fact that you would come and
17 actually share a good experience you've had.

18 We're very proud of our Office of
19 Rail Consumer Assistance. We're in the process
20 of actually strengthening it and adding staff to
21 it, and so we -- I'm hopeful that that office and
22 the whole Board will continue to be a resource

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1 for you to help make sure you can operate your
2 business the way you need to operate it.

3 MR. KLOSS: I'm sure they will.

4 CHAIRMAN NOTTINGHAM: Thank you. Mr.
5 Fixter, glad to see someone from Carney here.
6 Whenever I hear of Carney, it conjures up
7 childhood memories of going to Carney from where
8 I grew up in South Orange and getting thoroughly
9 humiliated on the soccer field. Fantastic soccer
10 players. I won't list them all, but Tony Meola
11 and John Harkes, World Cup and Olympic players.

12 Carney's got a great history well
13 beyond soccer, too, in transportation. We look
14 forward to working with you further, and please
15 do keep in touch with our staff and our agency as
16 your problems continue. I recognize that getting
17 daily service in a busy environment is not always
18 a simple matter, but hopefully we can continue to
19 be a resource for you.

20 MR. FIXTER: Thank you.

21 CHAIRMAN NOTTINGHAM: Mr. Slaughter,
22 sorry to hear about your situation. It sounds

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1 pretty complicated and sounds like you've been
2 through a lot of cost, time, and expense trying
3 to figure out how to develop your project.

4 I just had a quick question. When
5 you bought your parcel there that you're trying
6 to develop, how many access points, in other
7 words, to a public street did you have?

8 MR. SLAUGHTER: There was one, sir.

9 CHAIRMAN NOTTINGHAM: One, and if I
10 heard you correctly, that access point crossed a
11 Norfolk Southern line at some point?

12 MR. SLAUGHTER: Yes, sir, it had, and
13 I have my legal -- the people that were helping,
14 the lawyers that have helped me have done
15 extensive research in the associated county and
16 found a recorded map that goes back to 1902 that
17 depicts that street and that crossing that
18 access.

19 CHAIRMAN NOTTINGHAM: The suggestion
20 from the railroad that you recounted about their
21 wanting you to close other crossings, that
22 confused me, because how many -- I was with you

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1 when you described one access road or route and
2 then crossing a track, but then when you said
3 other crossings, I --

4 MR. SLAUGHTER: Well, it was the
5 gentleman in the railroad who said with the
6 meeting with my engineer and myself that he would
7 probably leave the crossing open if I were to
8 obtain three crossings to close. That seems to
9 be a fashionable thing if you're opening new
10 crossings, but that's not the case here.

11 This crossing had been there, and it
12 had been an industrial site for at least 75 years
13 that I've been able to obtain, and now that I
14 have the map, it doesn't show it as an industrial
15 crossing on the other side, but it shows it as a
16 crossing since 1902, and that railroad was
17 chartered in 1895. Best I can determine, it
18 wasn't completed until 1905, but that was the
19 very crossing to which the general manager,
20 Industrial Development, the engineers had
21 crossed, accessing the site from the beginning.

22 It is the same crossing to which my

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1 father had enjoyed starting in 1948 when he was
2 conducting business there and had been
3 uninterrupted through all those years from '48 on
4 that my family knew of.

5 CHAIRMAN NOTTINGHAM: Can I ask you,
6 have you previously been in touch with our agency
7 about this problem?

8 MR. SLAUGHTER: I have been talking to
9 your agency. I had recently associated myself
10 with a D.C. firm that had strongly, and I agreed
11 -- the Consumer Affairs Department. We would
12 seek any amicable solution that would return us
13 back to the cooperative spirit that we had
14 enjoyed with the railroad.

15 We've unloaded thousands of cars for
16 their customers and ours and loaded cars and even
17 loaded material for their own firm and shipped it
18 out from this facility. We predominantly handle
19 currently steel products and forest products,
20 but, you know, we would seek -- I mean, for many,
21 many years we had done nothing but enjoy a good
22 and harmonious relationship with the railroad,

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1 and I certainly would like to see a return of
2 that.

3 The issues, I mean, the way it seems
4 -- it seems to -- I can't be -- I can't be
5 absolute on this, but it certainly seems
6 coincidental that the announcement of this
7 proposed megayard not too far from where my
8 original yard was, I mean, it certainly provokes
9 controversy in one's mind, anyway, and I don't
10 have an exception to that yard if they want to
11 implement it, but I do have exception considering
12 the fact that I had the FRA twice reviewed the
13 crossing history of this crossing, as I have
14 done, and since its recorded history there had
15 never been an incident nor an accident of any
16 kind recorded on it, none that I had recalled in
17 my 57 years, and it had been a crossing for so
18 many years.

19 The site path distance was 1,500 feet
20 in all quadrants. It has the -- there are only
21 two trains a day on that track, 25 miles an hour.
22 The street has a five mile-an-hour posted speed

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1 limit.

2 It's only 400 foot long, and it has a
3 stop sign on both sides of it, and to come out at
4 the late date after this many millions of dollars
5 and then the fact that we have -- the railroad
6 and I have had a history together, and to say,
7 "Oh, we're going to close it."

8 CHAIRMAN NOTTINGHAM: I understand.
9 Let me ask. Is the street a publicly owned
10 street? Is it part of a city or county, or is it
11 --

12 MR. SLAUGHTER: It is a 60-foot deeded
13 easement street. It was recorded many, many
14 years ago, so yes.

15 CHAIRMAN NOTTINGHAM: Is it part of a
16 city or county system? In other words, do they
17 come and -- I know you probably don't get a lot
18 of snow down there, but, you know, but if -- you
19 know, the test we used to always use in Virginia
20 is who plows the snow off of it once in a blue
21 moon when you get a lot of snow?

22 MR. SLAUGHTER: Well, I don't recall

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1 any agency maintaining it. I've been the one
2 that's been maintaining it. There are others
3 that access it.

4 CHAIRMAN NOTTINGHAM: So a private,
5 and there's nothing wrong with that, maybe a
6 private road or privately owned road.

7 MR. SLAUGHTER: Well, I think the way
8 my lawyer represents it to me and the title
9 opinion that was written long ago was that it is
10 a public street, but it has not been accepted by
11 the State DOT.

12 CHAIRMAN NOTTINGHAM: Okay.

13 MR. SLAUGHTER: And I'm doing the best
14 I can to represent that accurately, but it is a
15 recorded easement. Just as they do not own a fee
16 simple deed to the right-of-way that they enjoy,
17 they own a easement through the charter.

18 CHAIRMAN NOTTINGHAM: Have you been in
19 touch with your state economic development
20 authority or industrial development authority?

21 MR. SLAUGHTER: Sir, I have knocked on
22 every door that I knew, and I continue to explore

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1 that. I would do just about anything to return
2 to where I was and to continue this operation and
3 to satisfy anyone's reasonable request.

4 CHAIRMAN NOTTINGHAM: North Carolina
5 has got a pretty good, historically good
6 Department of Transportation. It's quite large.

7 MR. SLAUGHTER: I've worked with them,
8 sir. I agree with you.

9 CHAIRMAN NOTTINGHAM: I know in
10 Virginia if someone in your situation came and
11 talked about real job creation and tax
12 generation, we would typically go to great
13 lengths to bring a street into the state system,
14 and that would change the -- in many respects,
15 change the relationship with the railroad.

16 MR. SLAUGHTER: Well, we're pursuing
17 that avenue and have been for a number of months
18 now, but, you know, you'd almost say time is of
19 the essence. We have been required -- because of
20 the eminent domain and the court order to vacate
21 the other facility, we upgraded the facility,
22 another rail facility, to which where we offload

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1 and load rail cars now. We load it on our trucks
2 and truck it to this facility.

3 Some of the customers that we've had
4 for many years are helping us out by shipping in
5 by truck, which they normally used to ship by
6 rail, where we offload it, but it's extremely
7 difficult, and the railroad has resisted.

8 There has not been -- since that June
9 telephone conversation, there has not been one
10 written piece of correspondence. In fact,
11 several months ago I was able to make contact by
12 phone to the Industrial Development Department,
13 and they indicated at that time that they were
14 going -- they were drafting a letter and that
15 their letter would reflect that they were -- that
16 their legal department was requiring that both
17 the crossing agreement and that the lights and
18 gates would be put in place concurrently with the
19 installation of the new switches.

20 I asked the gentleman at that time,
21 and I had known him for well over 20 years, to
22 please include the facts that we had been working

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1 together with this, and they had participated
2 with this for over four years, and his answer to
3 me was, "Ben, I work for Norfolk Southern."

4 I really don't understand why I have
5 gotten to such an immediate and vigorous brick
6 wall on this, but I urgently need your help, and
7 if I am forced to litigate it, then they win on
8 two things. I do not have a massive legal
9 department, as they do, and they win by virtue of
10 time, because to litigate it would require months
11 and months and millions of dollars to do so.

12 CHAIRMAN NOTTINGHAM: I understand.
13 We'll certainly track this situation, and I'll
14 follow up with staff, as well. Thank you for
15 bringing it to us.

16 MR. SLAUGHTER: I do appreciate it,
17 Chairman. Thank you.

18 CHAIRMAN NOTTINGHAM: Ms. Dearden,
19 thank you for being here today, too. I took
20 particular note of your statements about the
21 unilateral severing of track connections. That's
22 something, as a person who came to this job out

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1 of a deep passion for infrastructure and keeping
2 things moving in our country, those types of
3 statements and situations are always of concern
4 to me.

5 Occasionally, they can be -- I
6 suppose in the best of circumstances they can be
7 perhaps warranted or appropriate if everybody's
8 working together, but very often they're a huge
9 concern to me, so thank you for all of your
10 testimony.

11 Commissioner Buttrey, you have any
12 questions? Vice Chairman Mulvey?

13 VICE CHAIRMAN MULVEY: Just briefly.
14 Mr. Kloss, you're with Evraz Steel. I notice
15 that you're part of Oregon Mills.

16 MR. KLOSS: That's correct.

17 VICE CHAIRMAN MULVEY: You manufacture
18 rail?

19 MR. KLOSS: Not at this time.

20 VICE CHAIRMAN MULVEY: No, no. Oregon
21 Steel does. They no longer manufacture rail?

22 MR. KLOSS: Yes.

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1 VICE CHAIRMAN MULVEY: Okay. They're
2 out of the business then? Okay. I thought that
3 might have been one of your leverages for getting
4 a quick response. You make the rails, so if you
5 want to see some rail moving back to Norfolk
6 Southern, they better negotiate with you.

7 But Mr. Slaughter, you said it's been
8 very, very difficult to bring a case, but you are
9 indicating that there's almost a conspiracy
10 involved here between the railroad and this mega-
11 transload facility, that this got proposed, and
12 they're going to work with them, and then they
13 shut you down by closing your crossing. Is that
14 accurate?

15 MR. SLAUGHTER: Well, I would argue
16 that point, sir, exactly, but, you know, really
17 what I'd really like is a resolution to this
18 without having to go to that extent. I mean,
19 essentially, you know, I have been forced to
20 vacate the other facility, which we enjoyed for
21 many years, and, I mean, I'd like a dialogue with
22 them that would be meaningful and that we could

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1 go, but, I mean, as I said, when you can't even
2 get a letter within four months -- it was
3 indicated where a letter was being drafted.

4 VICE CHAIRMAN MULVEY: Well, maybe our
5 Office of Consumer Assistance will be able to
6 help you in at least getting a response to the
7 railroad so they can try to justify what they're
8 trying to do, and we are very, very sensitive to
9 these kinds of --

10 MR. SLAUGHTER: Commissioner, I would
11 be immensely grateful, and so would my employees
12 and my customers.

13 VICE CHAIRMAN MULVEY: Ms. Dearden,
14 thank you very, very much. I want to ask you.
15 You said that the railroads are basically
16 demarketing some of this TIH material. Where has
17 it gone? Is it moving by truck, or has it just
18 stopped being shipped, and what are the consumers
19 doing who are receiving that material?

20 MS. DEARDEN: Well, some of the
21 business is being rerouted to different
22 destinations. Some of the destinations -- one of

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1 the negative impacts is, actually, by changing
2 the routes, they're actually adding miles to the
3 routes, and so the safety of the shipments is
4 negatively impact.

5 VICE CHAIRMAN MULVEY: Or at least the
6 exposure is, anyway, yes.

7 MS. DEARDEN: Right.

8 VICE CHAIRMAN MULVEY: Mr. Tylicki, I
9 found your comments very interesting on passenger
10 rail. I will tell you that I wrote my doctoral
11 thesis on Amtrak when it was first getting
12 started, so I'm very familiar with what the
13 railroads got in terms of their relief from their
14 common carrier obligation. It was in response,
15 of course, to providing service to Amtrak on
16 reasonable terms.

17 There is some legislation out there
18 that proposes to increase to some extent this
19 Board's responsibility for making sure that
20 they're helping, working with railroads to
21 improve commuter rail service and Amtrak service,
22 and this is something this Board also feels is

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1 very, very important, and I want to thank you for
2 your testimony.

3 That's all I have, Chairman.

4 CHAIRMAN NOTTINGHAM: Thank you.
5 Thank you, witnesses. That adjourns our hearing
6 today, and the record typically remains open for
7 30 days. We'll typically keep the record open
8 for 30 days if there is anyone else who has
9 anything to add, and we thank you. This hearing
10 is adjourned.

11 (Whereupon, the foregoing matter went
12 off the record at 4:23 p.m.)

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