U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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September 5, 2008

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Committee on Transportation and Infrastructure Staff

SUBJECT: Hearing on H.R. 6707, the "Taking Responsible Action for Community Safety Act"

PURPOSE OF HEARING

On Tuesday, September 9, 2008, at 11:00 a.m., in Room 2167 Rayburn House Office Building, the Committee on Transportation and Infrastructure is scheduled to hold a hearing on H.R. 6707, the "Taking Responsible Action for Community Safety Act".

The main purpose of H.R. 6707 is to establish that when the Surface Transportation Board ("STB" or "Board") considers a merger involving a Class I railroad and a Class II or III railroad[1] the Board has the power to disapprove the merger if the Board finds that the adverse environmental effects of the merger outweigh its transportation or other benefits. Under current law, the Board has the authority to disapprove a merger involving at least two Class I carriers if the transaction is not consistent with the public interest, but has never disapproved a Class I merger on environmental grounds. Some STB staff believe that under existing law the Board also has authority to disapprove a merger involving a Class II or Class III rail carrier on environmental grounds. However, there is a provision in existing law indicating that in a merger involving a Class II or Class III rail carrier, the Board can only disapprove the merger if it would have adverse competitive effects. Additionally, it is not clear whether the Board Members share the staff's view that they have authority under existing law to disapprove a merger involving a Class II or Class III rail carrier on environmental

[1] Rail carriers are grouped into three classes to determine their accounting and reporting obligations. A Class I railroad has annual operating revenues of more than $250 million, a Class II railroad has annual operating revenues of between $20 million and $250 million, and a Class III railroad has annual operating revenues of less than $20 million. These operating revenues are fixed on 1991 dollars and are adjusted annually for inflation. (49 C.F.R. Part 1201, Subpart A, General Instructions)

grounds. If the Board did take this position, there is a substantial possibility that a reviewing Court would not accept their interpretation of existing law, for reasons discussed below.

BACKGROUND

On September 26, 2007, the Canadian National Railway ("CN"), which is a Class I railroad, and the U.S. Steel Corporation ("U.S. Steel") announced an agreement where CN would acquire most of the Elgin, Joliet & Eastern Railway Company ("EJ&E"), which is a Class II railroad that is a wholly owned indirect subsidiary of U.S. Steel, for $300 million, subject to the regulatory approval of the STB. The EJ&E's main line, known as "Chicago's Outer Belt", runs 198 miles and encircles the City of Chicago, from Waukegan, Illinois through Joliet, Illinois, to Gary, Indiana. This acquisition will allow CN to bypass Chicago, which CN believes will allow it to significantly improve the efficiency of CN's rail operations in the Chicago region. CN currently has three lines that run into Chicago, and it plans to divert traffic from these lines onto the EJ&E line, which would increase the number of trains operating through the communities along the EJ&E by approximately 15 to 24 trains per day.

Opponents of the transaction maintain that the CN acquisition would impose a number of adverse impacts on the people living in the 50 communities along the EJ&E line. The STB's Section of Environmental Analysis ("SEA"), which is responsible for undertaking environmental reviews of certain STB actions, found that if CN increases train volumes on the EJ&E rail line as proposed in its Operating Plan, the acquisition would result in a projected 28 percent increase in rail accidents on the EJ&E line; an increase in grade crossing accidents on the EJ&E rail line of anywhere from 1.57 to 6.04 accidents annually; an increase in the number of "major key routes" (rail segments where the volume of hazardous materials transported would exceed 20,000 carloads annually) from 2 to 14 on the EJ&E rail line, with subsequent increases in reportable hazardous material releases; an increase in air pollution; and a substantial increase in noise and vibration in communities and on public lands adjacent to the line, affecting 17 forest preserves, natural areas and preserves, resource-rich areas, and land and water reserves, 14 adjacent trails and scenic corridors, 16 adjacent local parks, and 4 adjacent land and water conservation fund properties. In addition, 15 grade crossings on the EJ&E line would be "substantially affected" (meaning that train queue length would block a roadway that is not blocked currently, the roadway would be at or over-capacity, or delay for all delayed vehicles would be more than 40 hours per day), resulting in total traffic delays from about one hour in West Chicago to about 165 hours in Joliet; and 11 fire and emergency medical service providers near the EJ&E rail line could have substantial difficulties in coping with emergencies as a result of the proposed transaction.

Proponents of the transaction maintain that the CN acquisition would be beneficial to the region and help mitigate freight rail congestion in the nation's freight rail bottleneck. They also maintain that the transaction would benefit communities along CN's current lines to and from Chicago through decreased accidents, noise, congestion, and delay as a result of a reduction in train traffic. The SEA found that the transaction would reduce CN traffic in some minority and low-income communities by eight trains per day. The SEA also found that the transaction would not affect existing Metra commuter rail service or Amtrak service on rail lines in the area in which CN now operates, and it would not preclude implementation of the proposed STAR line and Southeast Service, but could introduce potential operating complexities. In addition, the SEA found that while the total number of train accidents on the EJ&E rail line is likely to increase by 28 percent, the likely

number of rail accidents on the existing CN rail lines would decline 77 percent, a change directly related to the decrease in train-miles on CN's existing rail lines. The SEA also found that the consequences of increased train traffic on the EJ&E rail line would increase the risk for pedestrians and bicycles at 21 train/rail crossings and decrease the risk at 36 trail/rail crossings along existing CN lines.

The application for the CN to acquire the EJ&E is now pending before the STB. Under current law, a rail carrier or other entity may not consolidate, merge, or acquire control of another rail carrier without authorization and approval from the Board.

Existing law sets forth two different standards – depending on the class of the rail carrier – that the STB must use in considering applications for consolidation, merger, or acquisition of control: the law gives the STB considerable discretion to disapprove a transaction involving at least two Class I rail carriers, and much less discretion to disapprove transactions not involving at least two Class I rail carriers, such as the CN acquisition of the EJ&E.

Prior to the Staggers Act of 1980, the criteria for considering an application for a merger or control between Class I rail carriers and Class II or Class III rail carriers were identical. For all mergers and consolidations, the Interstate Commerce Commission ("ICC" or "Commission") was required to consider (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; and (4) the interest of carrier employees affected by the proposed transaction. The Commission was required to approve and authorize such a transaction only when it found that the transaction was consistent with the public interest. The Commission was also authorized to impose conditions governing the transaction.

However, Section 228 of the Staggers Act altered considerably the standards for rail carrier consolidation applications involving at least two Class I rail carriers filed after October 1, 1980. A fifth factor was added to the list of criteria that the Commission must consider: whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region. However, the requirement that the five factors (outlined in the above paragraph) be considered was limited to cases involving at least two Class I railroads.

The Staggers Act added a new section to govern rail consolidations not involving the merger or control of two or more Class I railroads (such as CN-EJ&E). This section, now found in section 11324(d) of Title 49, United States Code, provides that the Board "shall approve" this type of consolidation "unless" the Board finds that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

On its face, the new section would appear to take away the Board's authority to disapprove mergers or consolidations of a Class I rail carrier with a Class II or a Class III rail carrier on general public interest grounds, such as adverse effects on safety or the environment.

Some STB staff, however, maintain that the Board does have the authority to disapprove transactions involving Class II or Class III rail carriers because of adverse environmental effects.

The STB staff did not have any cases or legal memos to support this interpretation. As Committee staff understands it, STB staff's rationale is that although there is a specific provision in the law requiring approval of mergers with Class II or Class III rail carriers if they are not anti-competitive, if we interpret the law "as a whole", the Board has authority to disapprove a merger involving Class II or Class III rail carriers on environmental grounds. In the view of STB staff, the Board has authority to disapprove a merger involving two Class I rail carriers on environmental grounds and it would not make sense for the Board not to have the same power to disapprove a merger between a Class I rail carrier and a Class II rail carrier on environmental grounds. This type of merger could be just as harmful to the environment as a merger involving two Class I rail carriers.

STB staff further points to the fact that the draft Environmental Impact Statement ("EIS"), prepared by staff, for the proposed CN acquisition of the EJ&E states that the Board "will decide whether to approve the proposed acquisition, deny it, or approve it with mitigating conditions, including environmental conditions." The draft EIS also states that Council on Environmental Quality regulations implementing the National Environmental Policy Act require consideration of a No-Action Alternative. Under the No-Action Alternative, CN would not acquire control of the EJ&E land, rail line, and related assets. Thus, by implication the draft EIS asserts the Board's power to deny approval on environmental grounds.

It is not clear if the Board did disapprove a transaction involving a Class I rail carrier and Class II rail carrier on environmental grounds that the decision would survive a judicial challenge. A U.S. Court of Appeals case dealing with the Board's power over mergers with Class II and Class III rail carriers points in the direction of not giving the Board power to deny a merger on environmental grounds. However, this case is not completely dispositive since it involved public interest factors other than the environment. Moreover, the decision is not binding on other Federal Courts of Appeal.

The case in point is *People of the State of Illinois, Illinois Commerce Commission and Patrick W. Simmons v. Interstate Commerce Commission and United States of America* (687 F.2d 1047; 1982 U.S. App.), before the United States Court of Appeals for the Seventh Circuit. The court affirmed a decision of the ICC (predecessor of the STB) refusing to consider public interest factors involving effects on employment of a Class I/Class II merger which was not anticompetitive. The court ruled that if there were not anti-competitive effects, the ICC was required to approve the merger. The court found the Staggers Act separated rail consolidation proposals into two distinct groups: major rail consolidations, which involve the merger or control of two or more Class I rail carriers, and minor rail consolidations, which do not involve the consolidation of two or more Class I rail carriers. The court concluded that a careful reading of the law in its entirety "discloses that the broad public interest standard of [section 11324(c)] applies only to consolidations of two or more Class I railroads whereas the more limited criteria of (d) apply to all other rail consolidations."

The court also found "the mandatory language "shall approve" of [section 11324(d)] taken in context, denotes that if the Commission finds no substantial anticompetitive effects flowing from the proposed transaction, its analysis is at an end. At that point, the Commission must approve the transaction, and any finding about consistency with the public interest would be superfluous. In other words..."the words "shall approve" in this context should be construed to require approval of transactions where no substantial anticompetitive effects are found."

The court added, "Although subsection (d) requires the Commission to review public interest factors if it finds substantial anticompetitive effects, that provision does not require the agency to determine whether the transportation is 'consistent with the public interest'. Rather, if anticompetitive effects are substantial, the Commission must balance against those effects 'the public interest in meeting significant transportation needs.' "

The court's findings are echoed in the remarks included by current STB Commissioner Buttrey in a July 25, 2008 decision setting forth a schedule for completion of the environmental review process in the proposed CN acquisition of the EJ&E. He states, "For a transaction like this that does not involve the merger or control of at least two Class I railroads, the statute provides that the Board shall approve the application unless it finds serious anticompetitive effects that outweigh the public interest."

CN, the applicant in the CN/EJ&E case, appears to also believe that the Board cannot disapprove the merger on environmental grounds. Accordingly, CN would be likely to seek judicial review of any STB decision disapproving the merger on environmental grounds.

In a petition filed before the Board on August 14, 2008, for expedited approval of the transaction, CN stated: "ICCTA requires the Board to approve any transaction not involving two Class I railroads unless the Board finds both that (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. Under this standard, if the Board is unable to make either of these findings, approval of the proposed transaction is mandatory."

It is worth noting that, in *People of the State of Illinois v. Interstate Commerce Commission and United States of America*, the court stated that the law "could benefit from more artful draftsmanship" on the question of public interest considerations. Additionally, on November 10, 1981, a little over a year after the Staggers Act was enacted, ICC Chairman Reese H. Taylor, Jr. testified before the Surface Transportation Subcommittee of the Senate Committee on Commerce, Science, and Transportation that the interplay between the two different sets of standards for considering rail mergers and consolidations and the requirement for considering the public interest was "a problem area in the legislation possibly in need of redrafting."

SUMMARY OF H.R. 6707

H.R. 6707 amends section 11324 of Title 49, United States Code, to require the Surface Transportation Board, in a proceeding which involves the merger or control of at least one Class I rail carrier to consider the five factors the Board is now required to consider when the merger involves two Class I carriers: (1) the effect of the proposed transaction on the adequacy of transportation to the public; (2) the effect on the public interest of including, or failing to include other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of rail carrier employees affected by the proposed transaction; (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system. H.R. 6707 also adds two new factors for the Board to consider: (6) the safety and environmental effects of the

proposed transaction, including the effects on local communities, such as public safety, grade crossing safety, hazardous materials transportation safety, emergency response time, noise, and socioeconomic impacts; and (7) the effect of the proposed transaction on intercity rail passenger transportation and commuter rail passenger transportation.

H.R. 6707 also requires the Board to approve and authorize a transaction involving at least one Class I rail carrier when the Board finds the transaction is consistent with the public interest. The bill prohibits the Board from approving a transaction if it finds that the transaction's adverse impacts on safety and on the affected communities outweigh the transportation benefits of the transaction. The bill further authorizes the Board to impose conditions governing the transaction, including conditions to mitigate the effects of the transaction on local communities.

In addition, the bill requires the Board to hold public hearings on a proposed transaction involving at least one Class I rail carrier including public hearings in the affected communities, unless the Board determines that public hearings are not necessary in the public interest.

The amendments made by H.R. 6707 are to be applied to all transactions that have not been approved by the Board as of August 1, 2008. The hearing will examine the anticipated impacts of H.R. 6707 on pending and future railroad acquisitions and mergers.

EXPECTED WITNESSES

The Honorable Peter Visclosky
Congressman
Indiana, District 1

The Honorable Donald Manzullo
Congressman
Illinois, District 16

The Honorable Judy Biggert
Congresswoman
Illinois, District 13

The Honorable Melissa Bean
Congresswoman
Illinois, District 8

The Honorable Peter Roskam
Congressman
Illinois, District 6

The Honorable Bill Foster
Congressman
Illinois, District 14

The Honorable Charles D. "Chip" Nottingham
Chairman
Surface Transportation Board

The Honorable Francis P. Mulvey
Vice Chairman
Surface Transportation Board

The Honorable W. Douglas Buttrey
Board Member
Surface Transportation Board

Mr. Phineas Baxandall, Ph.D.
Senior Analyst for Tax and Budget Policy
U.S. Public Interest Research Group
Federation of State Public Interest Research Groups

Ms. Karen Darch
Village of Barrington, Illinois

Mr. E. Hunter Harrison
President and Chief Executive Officer
Canadian National Railway

Representative Elaine Nekritz
State of Illinois

Mr. John Tolman
Vice President & National Legislative Representative
Brotherhood of Locomotive Engineers and Trainmen

Mr. Joseph P. Schwieterman, Ph.D.
Director
Chaddick Institute for Metropolitan Development
DePaul University

Mr. Peter Silvestri
President
Village of Elmwood Park, Illinois

Accompanied by
Mr. Richard Pellegrino
Executive Director
West Central Municipal Conference

Mr. John Swanson
Executive Director
Northern Indiana Regional Planning Commission

Mr. Tom Weisner
Mayor
City of Aurora, Illinois

Mr. Mark Yagelski
Chairman of the Board of Trustees
Northern Indiana Commuter Transportation District
Member of the LaPorte County Council