

**Statement of
The Honorable James L. Oberstar
Committee on Transportation & Infrastructure
Hearing on
“H.R. 6707, The Taking Responsible Action For Community
Safety Act”
September 9, 2008**

The Committee is convening today to review H.R. 6707, the Taking Responsibly Action for Community Safety Act (“TRACS Act”). This legislation will ensure that the Surface Transportation Board has the legal authority and policy direction to deal with mergers that involve at least one Class I railroad and have the potential to cause serious safety, environmental and other quality of life problems for affected communities.

The recently filed merger application by the Canadian National Railway (“CN”) has called attention to the need for enhancing the Board’s authority. CN is seeking the Board’s approval to acquire control of the Elgin, Joliet, and Eastern Railway Company (“EJ&E”). If the Board approves CN’s application, the railroad will divert traffic on three of its lines running through Chicago onto the EJ&E’s main line, a 198-mile line that encircles the City of Chicago. CN contends that this will lead to faster transit times, better service, decreased rail traffic in the City of Chicago, and improved flow of rail traffic in the region.

However, 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 (15 to 24 additional trains per day), the acquisition would result in a projected 28% 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 two 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 four 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%, the likely number of rail accidents on the existing CN rail lines would decline 77%, 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.

Regardless of whether you support the CN acquisition or not, this transaction has highlighted a serious question: whether the STB, under current law, has the authority to disapprove a merger or consolidation of a Class I railroad and a Class II or Class III railroad on public interest grounds.

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 railroads, and much less discretion to disapprove transactions not involving at least two Class I railroads, such as the CN acquisition of the EJ&E.

This wasn't always the case. Prior to the Staggers Act of 1980, the criteria for considering an application for a merger or acquisition between two Class I railroads and between a Class I railroad and a Class II or Class III railroad were identical. For all mergers and consolidations, the Interstate Commerce 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 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 be considered was limited to cases involving at least two Class I's.

A new section was added to govern rail consolidations not involving the merger or control of two or more Class I railroads (such as the CN acquisition of the EJ&E). This section provides that the Board “shall approve” such transactions “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, this section does not provide the Board with the authority to disapprove a merger or consolidation of a Class I railroad with a Class II or a Class III railroad, even if the Board determines that the transaction should be disapproved on general public interest grounds, such as adverse effects on safety or the environment.

Chairman Nottingham’s testimony suggests that the Board assumed that it still has the power to refuse to approve a merger with a Class II or III railroad on environmental grounds. However, he concedes that the Board has never tried to exercise this power, and that it has never been tested in court. CN’s testimony (and a petition it just filed before the Board) suggests that it believes that the Board does not have this power.

It is not clear if the Board did disapprove a transaction involving a Class I and Class II 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* (see 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 railroads, and minor rail consolidations, which do not involve the consolidation of two or more Class I railroads. 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’s findings are echoed in the remarks included by 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.”

I believe that we need legislation to clarify that the Board has the power to deny a merger with Class IIs and IIIs on environmental grounds. Otherwise, we may have a law that prevents the Board from disapproving a transaction between a Class I railroad and a Class II or Class III railroad even if there was a severe environmental and safety impact which couldn’t be mitigated. Although transportation benefits are important, we should not allow them to trump all other concerns, regardless of their strength. That is contrary to good public policy, and something that I believe was not intended by the original drafters of the Staggers Act.

In fact, on November 10, 1981, a little over a year after the Staggers Act was enacted, former Interstate Commerce Commission 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 inability of the ICC to consider the public interest when dealing with transactions involving smaller railroads was “a problem area in the legislation possibly in need of redrafting.”

H.R. 6707, the Taking Responsible for Community Safety Act, or the TRACS Act, addresses those concerns by enabling the STB to thoroughly consider the public interest when evaluating a proposed railroad merger or consolidation which includes at least one Class I railroad.

Specifically, the bill requires the STB to consider, in a merger or consolidation proceeding, all of 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. It also requires the STB to consider the effects of the proposed transaction on intercity passenger rail and commuter rail.

The bill prohibits the STB from approving or authorizing a merger or consolidation if it finds that the transaction is inconsistent with the public interest because the transaction’s impacts on safety and on the affected communities outweigh the transaction’s transportation benefits. Further, the bill authorizes the STB to impose conditions to mitigate the effects of the transaction on local communities when such conditions are in the public interest.

With these new powers and policy directives, the STB will clearly have the authority to protect local communities against the adverse effects of rail mergers.

I want to thank the witnesses for being here today and I look forward to their testimony.