

TESTIMONY OF

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BEFORE THE

**U.S. SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION'S
SUBCOMMITTEE ON SURFACE TRANSPORTATION AND
MERCHANT MARINE INFRASTRUCTURE, SAFETY, AND
SECURITY**

**OVERSIGHT HEARING
ON THE
SURFACE TRANSPORTATION BOARD**

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**Testimony of Charles D. Nottingham
Chairman of the Surface Transportation Board
Before the
U.S. Senate Committee on Commerce, Science, and Transportation's
Subcommittee on Surface Transportation and
Merchant Marine Infrastructure, Safety, and Security**

Good morning Chairman Lautenberg, Ranking Member Smith and Members of the Subcommittee. My name is Charles Nottingham, and I am Chairman of the Surface Transportation Board (STB or Board). I appreciate the opportunity to appear before this Subcommittee today to address issues related to this Subcommittee's oversight of the Board.

This is my first appearance before this Subcommittee since I became Chairman of the STB in August 2006. It has been an extraordinary year for me personally, and an unusually busy year for the Board. In addition to handling its normal workload of formal actions, the Board has taken numerous steps this year to proactively monitor the rail industry and reform the Board's existing regulations to modernize and improve how we regulate the railroads.

Before elaborating on these efforts in this written testimony, I will first provide an overview of the Board and its responsibilities.

Overview Of The STB

Administration

The Board has kept up with its steady workload, and issued 1,139 decisions and court-related matters in FY 2007, with new cases being filed even as pending cases were resolved. A summary of significant decisions and hearings is included as Attachment 1

to this testimony. In recent years, the Board experienced an increase in the number of major rail rate disputes and work related to these disputes. In past years, the Board had two or three of these cases pending at any one time. At the end of FY 2007, it had three rail rate cases pending. The Board had one pipeline rate dispute, which was resolved during the fiscal year, and one water carrier rate dispute that was pending at the end of FY 2007, but has since been dismissed. The Board also defended numerous decisions in court during the fiscal year. A list of court cases decided within the past twelve months and court cases currently pending is attached to this testimony as Attachment 2.

Congress has authorized a 150 FTE staffing level for the STB. Currently, we have 141 employees on board. We are actively seeking to fill the remaining vacancies. In addition, we are cognizant that pending legislation on Amtrak and commuter rail issues could require additional Board staff and we have analyzed what our staffing needs will be should the pending legislation become law.

The Board is also aware that it, like many other Federal agencies, is facing a major drain on its human capital through attrition. In the latest government-wide statistics available from the Office of Personnel Management (OPM), the average age of the Federal worker is 45.3 years. The average STB employee is 50 years old. Forty-five percent of the Board's employees have over 25 years of service. Thirty-three percent of those in management positions are eligible for immediate retirement. While it is not expected that the majority of these employees will retire when eligible, the STB has prepared a draft succession planning framework, which it has submitted to OPM, to ensure that the STB has a viable workforce from which to groom future leaders.

Statutory Responsibilities

The STB is charged by statute with resolving railroad rate and service disputes and reviewing railroad restructuring transactions (mergers, line sales, line constructions, and line abandonments). In addition, the Board has limited jurisdiction over certain trucking, bus, household goods, ocean carrier, and pipeline matters.

It is important to note that the substantial deregulation effected in the Staggers Rail Act of 1980 was carried forward by the ICC Termination Act of 1995 (ICCTA), which retains the directive that the Board issue administrative “exemptions” that suspend active regulation in areas where the market is competitive. The Board’s governing statute, like virtually all other modern statutes of economic regulatory agencies, assumes that aggressive regulation is not necessary where there is competition, because in such circumstances competition will discipline businesses and prevent market abuse. Our statute, at 49 U.S.C. 10101, establishes a Federal policy “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail,” and to “minimize the need for Federal regulatory control over the rail transportation system,” but “to maintain reasonable rates where there is an absence of effective competition.” It also permits the Board to intervene with respect to railroad rates only “[i]f the Board determines . . . that a rail carrier has market dominance over the transportation to which [the] rate applies.” 49 U.S.C. 10701(d)(1).

Under the law, a carrier is considered not to have market dominance where its rates produce revenues that are less than 180% of its “variable costs” of providing the service. (Variable costs are the portion of a carrier’s costs that change with the amount of traffic handled, unlike the fixed portion of its costs.) Also, if there are competitive

alternatives for moving the traffic between the same points – that is, competition either from other railroads (intramodal competition) or from other modes of transportation such as trucks, pipelines, or barges (intermodal competition) – then the Board does not have authority to regulate the rate, even if the revenues exceed 180% of the variable costs of providing the service. Finally, the Board has limited jurisdiction over rail transportation contracts between shippers and carriers.

When Congress passed the Staggers Act in 1980, the Nation's rail system was in desperate financial straits. It was burdened with unproductive assets, forced to provide unprofitable services, and hampered by excessive government regulation. Recognizing that a sound, healthy rail transportation system is essential to the Nation's economy, Congress put in place reforms directing that railroads be treated, in most respects, more like other businesses. Since that time, the railroad industry's financial condition has steadily improved. Today the industry is considered by most independent analysts to be relatively healthy.

Unlike most businesses, however, railroads are common carriers. As common carriers, they have an obligation to provide service to the general public on reasonable request. In order to ensure that shippers receive the needed level of service, the railroads' financial resources must be sufficient to maintain a sound and sufficient infrastructure. At the same time, transportation of commodities vital to the Nation's economic wellbeing must be efficient and reasonably priced.

In 1980, the rail system was faced with excess capacity, which made it difficult for railroads to provide service efficiently and on a financially sustainable basis. The

Staggers Act made it easier to shed excess capacity and become more efficient in other ways, and the system has now been largely rationalized and made more productive.

In recent years, the U.S. economy has expanded, and the rail network, like other transportation sectors, has become capacity-constrained. Railroads, however, cannot respond as readily to capacity constraints (by quickly building new track and other facilities) as some other transportation sectors can. For example, trucking companies can purchase new equipment or hire new drivers. Not only are rail construction projects expensive and time-consuming, but these projects can generate significant opposition on environmental and community-impact grounds.

On April 11, 2007, the Board held a public hearing focused on rail capacity, traffic forecasts, and infrastructure requirements. Because the Nation's freight rail system will be relied upon to handle significant increases in traffic in the years ahead, the Board wanted to get a better understanding of whether current and planned or forecasted investments will be adequate to meet rail capacity demands, and, if not, what new policies and strategies need to be pursued. That hearing, which lasted 12 hours, brought together representatives of large railroads; short-line railroads; Federal, state, regional, and local government interests; many different shipper interests; rail passenger carrier interests; and rail labor. The hearing documented widespread consensus among stakeholders that rail capacity will become increasingly constrained by traffic growth. A representative of one of the Nation's ports testified that container traffic typically carried by truck or rail entering North American ports from overseas will grow by more than 100% by the year 2020, from over 48 million Twenty Foot Equivalent Units (TEUs) in 2005 to an anticipated 130 million TEUs. Furthermore, representatives of the large

railroads that make up the Class I railroad industry testified that – despite their plans to increase investment levels in the system every year – their anticipated capacity investments will not keep up with forecasted increases in rail service demands. In sum, the rail system’s capacity shortfall that we see in many markets today will dramatically worsen unless bold new policies and strategies are adopted.

Another important indicator of the adequacy of an individual railroad’s revenues is the railroad’s cost of capital. The Board is required by statute to make an annual assessment of the railroad industry’s cost of capital. This determination is an input in the Board’s review of rail rate challenges and rail line abandonment proposals. A railroad’s cost of capital reflects the carrier’s cost to raise capital both through debt and through equity arrangements. While the cost of debt is easy to determine, the cost of equity is far more difficult. Indeed, how best to calculate the cost of equity is the subject of a vast literature spanning the fields of finance, economics, and regulation. Since 1981, the Board has been using the same basic approach to estimate the cost of equity, but concerns recently have been raised that the approach is outdated and may be overstating the industry’s cost of capital and thus the revenue needs of the industry.¹

Given the importance of this cost-of-capital figure in many of our regulatory procedures, we launched a rulemaking to improve our methodology and to ensure the accuracy of this important measurement. The comment period is scheduled to close at the end of October, and we will carefully consider all comments before issuing a final rule.

¹ The cost of equity for 2005 using the current methodology was calculated to be 15.2%, compared to 8.4% using the proposed methodology; similar disparities are reflected in prior years’ calculations (e.g., 2003: 12.7% vs. 8.0%; 2004: 13.2% vs. 8.2%).

GAO Report and STB Competition Study

The Government Accountability Office (GAO) prepared a report in 2006,² and a supplement in 2007,³ addressing railroad rates, competition, and capacity. The 2006 Report analyzed general trends in the industry and also highlighted particular markets. The 2007 Supplement updated some of the information in the 2006 Report.

As GAO documented in the 2007 Supplement, between 1985 and 2005, rates did not keep pace with inflation for each of the four major categories of rail traffic separately tracked by GAO (coal, grain, motor vehicles, and miscellaneous mixed shipments). Moreover, GAO found that despite an uptick in recent years, rail rates overall for 2005 remained below 1985 levels even in nominal terms. At the same time, the Board's index for tracking changes in railroad costs (the Railroad Cost Adjustment Factor) shows that the costs that the railroads themselves had to pay for the goods and services that they use in their business increased by 80% from 1985 to 2005. Thus, the fact that rates overall remained at or below 1985 levels even with these recent cost increases demonstrates that, in general, rail rates have been held down for most shippers.

The 2006 GAO Report focused to some extent on concerns over higher rate levels in parts of the agriculture sector. Last November, the Board held a public hearing to obtain information from interested parties about the grain transportation market in general, and in particular about the market conditions in the grain industry that may have caused grain rates to diverge from the long-term general trend of reduced rail rates for

² The report is entitled *Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed*.

³ The supplement is entitled *Freight Railroads: Updated Information on Rates and Other Industry Trends*.

most shippers. Because U.S. and Canadian grain producers compete, both with each other and in a global marketplace, the agency also wanted to hear about the interplay between the American and Canadian wheat markets, how the Canadian regulatory system differs from the American system, and what impact those differences might have on grain production in the United States.

There are of course areas – states like North Dakota and Montana – in which rail rates tend to be higher than average, as the 2006 GAO Report points out.⁴ That is largely because of the economics of the railroad industry: under principles of “differential pricing,” railroads, with high “sunk” costs and with fierce competition for most traffic, are expected to charge more, even substantially more, from their captive traffic than from their competitive traffic if they are to achieve enough revenues to cover their costs and invest in necessary facilities. Although differential pricing is practiced in many other industries – such as airlines, utilities, hotels, and movie theaters – we understand that shippers on the captive end of this differential pricing scale would not be satisfied with the status quo. But if differential pricing is to be substantially tempered in the industry, then revenues will have to come from some source other than captive shippers. And if other sources of revenue cannot be found, then infrastructure investment will suffer, as will rail service.

To further address GAO’s observations about areas with less competition, the Board recently commissioned an extensive study on the extent of competition in the railroad industry. The study will also assess various policy issues, including current and near-future capacity constraints in the industry; how competition and regulation impact

⁴ For some areas, rates can be higher because traffic is seasonal and there is little volume during off-peak times.

capacity investment; how capacity constraints impact competition; and how competition, capacity constraints, and other factors affect the quality of service provided by railroads. The economic consulting firm Christensen Associates, based in Madison, Wisconsin, has begun work on a contract valued at approximately \$1 million to deliver this study to the STB for publication in the Fall of 2008.

Another rulemaking that the Board is currently completing involves interchange commitments that may be part of sale or lease contracts when large carriers sell or lease lighter-density portions of their lines to smaller carriers (referred to by some as the “paper barrier” issue). Some parties take the view that these arrangements have helped facilitate the growth of the short-line industry into a vibrant force in the transportation sector – with well over 500 carriers today operating nearly 46,500 miles of track with nearly 20,000 employees – while others are concerned that they have tended to freeze in place the competitive status quo, rather than allowing the development of new competitive options not available before the transaction. A Board decision addressing a request for a general rule regarding such contractual interchange commitments is imminent.

Rate Regulation

As is the case with other industries, when capacity is tight, carriers will seek to raise their rates. As a result of differential pricing, those shippers without competitive options often see their rates rise the most. Thus, with tight capacity throughout the industry today, the Board’s rate processes are particularly important, and I will now turn to that matter.

Rate Disputes. Under the statute, the Board is directed to ensure that rates are reasonable while at the same time not precluding railroads from obtaining adequate

revenues. Balancing these potentially conflicting objectives is not an easy task. Rates that are too high can harm rail-dependent businesses, while rates that are held down too low will deprive railroads of the revenues needed to pay for the infrastructure investments that are in turn needed to give shippers the level and quality of service that they require. The Board has recently improved its procedures for handling rate cases, with one set of procedures for large rate cases and two other procedures for smaller cases.

Large Rate Cases. With often hundreds of millions of dollars at stake, large rate disputes raise complex questions over the value of the assets needed to serve the shipper, the operating costs to serve the shipper, and the degree of differential pricing a carrier needs to earn a reasonable return. To resolve these large disputes, in 1985 the Board's predecessor agency, the ICC, created a sophisticated, although complex, approach known as "Constrained Market Pricing," or CMP. CMP provides a framework for the Board to regulate rates while affording railroads the opportunity to cover their costs. Although CMP is premised on the need for differential pricing, CMP principles also impose constraints on a railroad's ability to price, even for their captive traffic.

CMP sets up four potential constraints on railroad pricing. The constraint that is typically used is the stand-alone cost (SAC) test. Under SAC, a railroad may not charge a shipper more than what a hypothetical new, optimally efficient carrier would need to charge the complaining shipper if such a carrier were to design, build, and operate – with no legal or financial barriers to entry into or exit from the industry – a system to serve only that shipper and whatever group of traffic that shipper selects to be included in the analysis. The ultimate objective of the SAC test is to ensure that the complaining shipper is not charged for a carrier's inefficiencies or for facilities or services from which the

shipper derives no benefit. This assures that the complaining shipper is not required to unfairly subsidize other customers of the railroad.

Although the U.S. courts of appeals have affirmed every challenged SAC case issued by the Board since the agency was created in 1996⁵ (whether they were challenged by the shipper or the railroad involved), during the past few years it became apparent that a loophole gave railroads the ability to “game” the outcome of future SAC determinations. Moreover, in a recent court decision, the Board was warned that part of its SAC methodology was on “shaky ground.”⁶ Finally, the complexity and costs of litigating a SAC case had increased over time, often costing \$3-5 million and 2-4 years for a shipper to bring, or a railroad to defend, a case. For these reasons, the Board found it necessary in 2006 to make some significant changes in how we will apply the SAC test and how we will calculate the amount of relief in a large rate case. The revisions reflect a significant milestone in the STB’s ongoing effort to reduce litigation costs, create incentives for private settlement of disputes, and shorten the time required to develop and present large rail rate cases to the STB. These rules were completed last Fall — within 8 months of the notice of proposed rulemaking.

⁵ See *Otter Tail Power Co. v. BNSF Ry.*, 484 F.3d 959 (8th Cir. 2007); *Arizona Elec. Power Coop., Inc. v. STB*, 454 F.2d 359 (D.C. Cir. 2006); *BNSF Ry. v. STB*, 453 F.3d 473 (D.C. Cir. 2006); *PPL Mont., LLC v. STB*, 437 F.3d 1240 (D.C. Cir. 2006); *Wisconsin Power & Light Co. v. Union Pac. R.R.*, 62 Fed. Appx. 354 (D.C. Cir. Apr. 30, 2003); *McCarty Farms, Inc. v. STB*, 158 F.3d 1294 (D.C. Cir. 1998); *Burlington N.R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997).

⁶ In particular, the United States Court of Appeals for the District of Columbia, in affirming one of the Board’s more recent SAC decisions that had been challenged by a railroad, explicitly stated that, if the Board were “presented with a model [for allocating revenue for so-called “cross-over traffic”] that took account both of the economies of density and of the diminishing returns thereto, a decision to adhere to its [existing] model would be on shaky ground indeed.” *BNSF Ry. v. STB*, 453 F.3d 473, 484 (D.C. Cir. 2006).

In the first test of our new guidelines for large rate cases, the shippers in two recent cases may have been disadvantaged by the changes. Those cases were initiated under the old rules and decided under the new rules. Because of the unique procedural posture of those cases, the Board has taken the nearly unprecedented step of allowing those shippers to redesign significant portions of their cases if they choose to do so.

Small Rate Cases. In 1996, in response to a Congressional directive, the STB adopted simplified guidelines for assessing the reasonableness of challenged rail rates in cases in which a full SAC presentation is too costly. Under these guidelines, the agency established three “benchmarks” to determine the reasonableness of a challenged rate in a small rate case. The three benchmarks look at the carrier’s overall revenue needs, how the railroad prices its other captive traffic, and how comparable traffic is priced.

Shippers, however, noted several shortcomings to the small rate case procedures that discouraged them from filing cases. For example, many stated that it was unclear what shippers would qualify to use the guidelines. In addition, shippers (and railroads) wanted greater clarity as to how the three benchmarks would be applied in a particular case. Shippers also expressed concerns about how railroads might use the discovery process to unreasonably prolong a case. As a result of these ambiguities, no cases were decided under the 1996 simplified guidelines, although two cases were filed and then settled.

The agency held several public hearings on this matter from 2003 through 2007, and its staff met with staff from other economic regulatory agencies to gather information on how those agencies handle smaller disputes. On September 5, 2007, the Board issued

a decision updating our process for reviewing rate complaints in cases too small to warrant the cost of litigating a full SAC case. The Board's decision, which makes the rate review process available to shippers of all sizes, allows smaller rate cases to proceed on one of two tracks. First, freight rail customers may seek up to \$1 million in relief over a 5-year period, using a revised version of the three-benchmark test with more predictability built into it. A shipper using that approach would have a Board ruling on its case within 8 months of the filing of its complaint.

Under a second approach, freight rail customers can seek up to \$5 million in relief over a 5-year period, by using a process that focuses on whether the carrier is abusing its market power by charging more than it needs to earn a reasonable return on the replacement cost of the infrastructure used to serve that shipper. This is a simpler form of the SAC test that is applied in large cases; it relies on standardization of many of the components in order to reduce the cost and complexity of litigating the case. A Board decision in a rate case brought under this approach would be issued within 17 months after the filing of the complaint.

In finalizing this rule, the Board received a number of suggestions and comments from the shipper community on how to improve that proposal. The Board implemented the following changes to the initial proposal, at the urging of a shipper or to respond to shipper criticisms with the initial approach:

- Modified the eligibility approach to ensure that all captive shippers have a meaningful forum for seeking protection from unreasonable rates by raising the relief available under the simplified guidelines;

- Increased the maximum value of recovery under the "Three-Benchmark" approach five-fold, from \$200,000 to \$1,000,000;
- Removed the formal “aggregation” approach, which may have unnecessarily prevented a captive shipper that ships to numerous destinations from a single origin from seeking relief under the simplified guidelines;
- Required railroads to participate in mandatory 20-day, non-binding mediation at the beginning of the case;
- Expedited the procedural schedules to the maximum extent practical;
- For the Simplified-SAC analysis:
 - Excluded depreciation on equipment when calculating operating expenses;
 - Removed the annual adjustment process for a rate prescription to make the case simpler and less expensive;
- For the Three-Benchmark analysis:
 - Provided equal access for shippers to the confidential Waybill Sample;
 - Permitted the shipper to submit evidence of “other relevant factors” to rebut certain presumptions established in the methodology.

In addition, the Board rejected numerous proposed changes by the railroad community that were opposed by the shippers. For example, the railroads asked the Board to permit movement-specific adjustments to its Uniform Rail Costing System used to estimate the variable cost of a movement and whether it falls above or below the 180% jurisdictional threshold. The Board, at the shippers’ urging, rejected that change, which would have made these cases more expensive.

Before the Board's recent changes, the majority of captive rail traffic had been effectively blocked from Board rate review due to the complexity and resulting high costs of the previous procedures. The Board's new procedures – which have been challenged in court by numerous rail interests – ensure that the rate review process will be accessible to all captive traffic that moves under common carrier rates.

In all rate cases, the Board will require mediation up front, which we have found is a good way of encouraging adversaries to narrow their differences and possibly reach a mutually satisfactory settlement. Indeed, earlier this year a small rate case involving Williams Olefins, LLC and Grand Trunk Corporation was resolved privately within only a few weeks pursuant to mediation by Board staff.

Fuel Surcharges. Another matter that has concerned shippers in the past few years is the way the railroads were assessing fuel surcharges. In recent years fuel costs have been unpredictable and volatile, with some sharp upward spikes. Fuel is a substantial component of railroad costs, and carriers have sought to recover their increased fuel costs through surcharges. Some shippers felt that the surcharges they were being assessed were greater than the increased fuel costs that could be attributed to their movements. Captive shippers voiced concerns that the fuel surcharge programs of the carriers, which were expressed as a percentage of the base rate, virtually guaranteed that captive shippers with high base rates would bear the increased fuel costs of other shippers. They also objected to the carriers' practices of "double dipping" by first raising the base rate using an index that includes changes in fuel costs and then adding a separate fuel surcharge to the same movement.

In May 2006, the Board held a public hearing on the matter. In January of this year we issued a decision declaring it an unlawful practice for carriers to use a fuel surcharge to recover more than the increased fuel costs attributable to the particular movement to which the surcharge is applied. This action, with industry-wide effect, demonstrates that the Board will use aggressively the authority granted to it by statute to stop unreasonable practices, thereby protecting shippers and advancing the public interest.

Service Quality and Railroad-Shipper Relationships

The Board actively monitors railroad industry performance. We receive monthly reports from each Class I railroad, tracking such indicators of congestion and efficiency as the number of freight cars on line, train speeds, and terminal dwell time (the amount of time cars spend in railroad terminals to make connections between trains). Moreover, as it has done for several years now, the Board has asked each of those carriers to provide forward-looking information on how the railroads are preparing to handle end-of-year peak shipping demands in several key markets: agriculture (grain, grain products, and ethanol); coal; chemicals; and intermodal traffic. This year the Board also asked the carriers for their performance goals (with respect to cars-on-line, terminal dwell time, train speed, and employment levels), as well as information on critical capacity-related infrastructure needs this year and their capital needs for increasing capacity in 2008. The carriers' responses are available on our website.

On July 18, 2007, the Board held a field hearing in Kansas City, Missouri, to examine issues related to the efficiency and reliability of railroad transportation of resources critical to the Nation's energy supply, including coal, ethanol and other

biofuels. Speakers at the hearing represented the interests of railroads, utilities, coal

much to hold carriers to their common carrier obligation to their shippers. We also resolved two situations in which the crossing or interchange point between two railroads had been blocked, in each case getting the railroad or railroads involved to work out mutually acceptable compromises. We successfully secured rail service for a new shipper in Texas when a large railroad refused to serve it. We assisted a small grain shipper in Nebraska with a rate dispute, persuading the carrier to compromise with the shipper, and assisted a shipper in Missouri with its freight claims, persuading the carrier to honor the claims. And we assisted a shipper organization by persuading a large carrier to modify its freight car information system to provide information that was needed for the businesses of the involved shippers.

When parties cannot resolve their differences informally, they can engage the Board's formal processes by filing a complaint. For example, the Board may temporarily substitute another carrier for a carrier that is unable or unwilling to provide adequate service on its lines. We have used those rules several times in the past few years. This past year, following up on a 2006 authorization of such alternative rail service at the request of a shipper in Texas, the Board extended the temporary relief until a long-term solution could be developed. In August, the Board ordered the lines involved to be sold, at a price set by the Board to reflect the value of the property, to either of two entities which the Board found should result in improved rail service to shippers. This particular "forced sale" was complex and lengthy. The Board's decisions demonstrate that we will use every available tool, where necessary, to protect shippers receiving inadequate service.

The Board acted to preserve shippers' service options in a case in Ohio this year involving a railroad that would not let another railroad cross its line. In that case, a Class I rail carrier had unilaterally removed the crossing diamonds that were needed for a short line to serve several potential shippers. The Board made clear that a carrier may not undercut another carrier's ability to fulfill its common carrier obligation by unilaterally severing track of the other carrier that is part of the national transportation system. The Board directed the Class I carrier to promptly reinstall the crossing.

Preemption

One of the most difficult issues facing the Board this year is how to improve the Board's ability to ensure effective regulation of rail operations that handle solid waste. We have made significant progress in this area, and I would like to take this opportunity to highlight some of our recent actions.

The express Federal preemption contained in the STB's governing statute at 49 U.S.C. 10501(b) gives the Board exclusive jurisdiction over transportation by rail carriers. It is important to keep in mind that preemption applies both to cases that require STB licensing authority, and also to some that do not.

New Rail Construction

If a project involves building a new rail line into what would be a new service area for the railroad, it requires a license from the Board and an environmental review under NEPA. In such cases, the Board's existing processes are sufficient to allow full consideration of the environmental and other issues that arise. This is shown by *New England Transrail*, which involves a plan to construct, acquire and operate track in Massachusetts to carry a variety of commodities, including municipal solid waste (MSW)

and construction and demolition debris (C&D) for connection to other rail carriers. In that case, the Board, in a preliminary decision issued in July 2007, made clear that the Board will conduct a detailed NEPA review and that New England Transrail will not be allowed to enter the rail business until extensive environmental, safety, public health, and other public interest considerations are fully addressed.

Acquisition of an Existing Rail Line

If a project involves a new carrier seeking to acquire or operate an existing rail line, the new carrier must also obtain authority from the Board. While NEPA review can be triggered, the Board has grown concerned recently that the summary class exemption process used in many of these cases does not always provide enough information about a pending proposal to allow us to handle our regulatory responsibilities effectively and efficiently.

Indeed, we recently have begun a proceeding to consider whether to increase the information required from all of those seeking to use the class exemption procedure to acquire, lease and operate rail lines. In a number of recent cases, including matters involving Freehold, New Jersey and Croton-on-Hudson, New York, the Board has stayed the effectiveness of a notice invoking the class exemption to allow a more searching inquiry and to solicit further evidence. We hope that our rulemaking will improve this process and lessen the need for stay requests.

Construction of Facilities Ancillary to an Already-Authorized Rail Line

Finally, there are those activities that although part of rail transportation, may not be subject to STB licensing. These activities include making improvements to existing railroad operations, such as adding track or facilities – including transload facilities

where materials are transferred between truck and rail – at existing railroad locations, to better serve the needs of a railroad’s service territory. They also include construction of ancillary spur, industrial, team, switching, or side tracks by an already-authorized rail carrier.

Because no Board license is required in these types of cases, there is no occasion for the Board to conduct a formal NEPA review or impose specific environmental conditions. However, as the Board has repeatedly explained, other Federal environmental laws continue to apply, and state and local police powers are not preempted entirely. In addition, any interested party, community, or state or local authority concerned that the Federal preemption is being wrongly claimed to shield activities that are not “transportation by rail carrier” can ask the Board to issue a declaratory order addressing that issue. Alternatively, they can go directly to court to have that issue addressed.

The Board tries to be proactive where environmental concerns are brought to our attention. STB staff conducts site visits to rail facilities where MSW or C&D is handled, if appropriate. This month, the Board issued an order in a matter in Yaphank, New York requiring an entity constructing facilities there to immediately cease that activity and to either obtain Board authorization for the construction or a Board decision finding that such activity does not require our approval.

Moreover, some states have adopted regulations, such as New Jersey’s 2D regulations, that accommodate Federal preemption but allow the states to inspect and impose other requirements on rail-related waste facilities under the police powers they retain. I believe it would be consistent with everything the Board has said about the

scope of preemption that states can apply their regulations to rail-related waste facilities so long as the regulations are not applied in a discriminatory manner and do not unreasonably interfere with the railroad's ability to conduct its operations.

While the statutory and regulatory issues presented in cases involving rail-related waste facilities are quite complex, the public interest and public policy considerations involved in these controversies require policy makers to balance several important, and often conflicting, policies. The Board will continue to work hard to identify and implement administrative and regulatory strategies that improve our ability to ensure effective regulation in this area.

Amtrak

Currently there is pending legislation that would give the STB significant new responsibilities regarding Amtrak. Those responsibilities include resolving performance complaints, assisting in the development of service metrics, and determining compensation between Amtrak and commuter authorities for Northeast Corridor access costs if agreement cannot be reached.

With those increased responsibilities will also come the need for additional Board staff in order to ensure that we have the ability both to meet our current caseload requirements and to provide an evenhanded and efficient resolution of the Amtrak matters entrusted to us. I would be remiss if I did not note that the Senate FY 2008 appropriation for the STB is 5.6% lower than the Board's FY 2008 request. But I am certain that all involved will continue to work to ensure that the Board has sufficient appropriations to carry out all of our responsibilities.

Conclusion

The past 12 months have been noteworthy for the number of proactive steps taken by the Board to reform, streamline, and modernize our oversight and rail regulatory procedures. To summarize, some of the highlights of the past year include the following:

- In September 2006, we instituted a rulemaking proceeding to modernize the way we calculate the railroad industry's cost of capital to more accurately reflect the financial health of the rail industry;
- In October 2006, we reformed the rate review process for large rate cases to streamline and improve the accuracy of the process, to close a loophole that permitted carriers to manipulate the process, and to address a legal vulnerability;
- In September 2007, we overhauled the procedures for handling smaller rail rate cases so that all shippers will have a practical and feasible means of challenging rail rates;
- We investigated the fuel surcharge practices of the railroads, and in January 2007 concluded that their fuel-surcharge programs were unreasonable because they were misleading and because they required captive shippers to bear surcharges that were higher than the increased fuel costs attributable to their traffic;
- In November 2006, we held a hearing on issues related to the transportation of grain to explore whether further changes to the regulatory framework are necessary;
- In July 2007, we held a hearing and announced that we are establishing an advisory committee on transportation of energy commodities to monitor the ability of the railroads to handle the future energy needs of the Nation;
- In August 2007, we ordered a railroad providing inadequate service to sell its line to another entity that would provide better service;
- We recently contracted with an independent economic consulting firm to conduct a sweeping national study of rail competition-related issues; and
- The Board has taken a number of steps to ensure that waste handling facilities do not use preemption to subvert appropriate review and regulation.

Of the more important actions that will take place between now and the end of next year, the STB will:

- Issue final rules on how to calculate the cost of capital for the rail industry;
- See that the competition study is completed, and analyze the results and recommendations contained therein;

- Test the new simplified rate guidelines on three newly filed small rail rate disputes (and perhaps more cases, if filed);
- Finish our investigation into the concerns about the appropriateness of certain interchange commitments that large carriers may enter into when they sell or lease light-density portions of their lines to smaller carriers;
- Consult with our new energy advisory committee for guidance on a range of significant issues that affect the public interest in a reliable delivery network for coal and liquid biofuels;
- Continue to examine the infrastructure and capacity needs of the rail network and the railroads' capital investment levels, and to emphasize the critical importance of developing new strategies to meet those challenges;
- Review the recently announced proposal by the Canadian Pacific Railway to acquire the Dakota, Minnesota & Eastern Railroad, as well as the Canadian National Railway's proposal to acquire the Elgin, Joliet & Eastern Railway;
- Improve the Board's ability to ensure effective regulation of rail operations that handle municipal solid waste and related materials;
- Address the current ambiguity as to whether certain types of arrangements between rail carriers and shippers reflect contracts (for which regulatory remedies are unavailable), or whether they reflect common carrier service subject to Board regulation; and
- Prepare the STB to have the capability to address potential conflicts between passenger rail and freight rail operations and to implement potential legislative proposals in this regard.

I appreciate the opportunity to discuss these issues today, and look forward to any questions you might have.

**SUMMARY OF
SURFACE TRANSPORTATION BOARD
SIGNIFICANT DECISIONS AND HEARINGS
October 1, 2006 – October 16, 2007**

Rulemakings

EP 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases* 9/05/07
Modified the Board's simplified rail rate guidelines by creating a simplified stand-alone cost approach for medium-sized rail rate disputes and revising its three-benchmark approach for smaller rail rate disputes. The Board's decision also places limits on the total relief available over a 5-year period under these two simplified approaches.

EP 656 *Motor Carrier Bureaus—Periodic Review Proceeding*

- 5/7/07 – Completed periodic review, pursuant to 49 U.S.C. 13703(c), of agreements of motor carriers to engage in rate-related collective activities. The Board terminated approval of the agreements of all remaining motor carrier bureaus. To provide sufficient time for parties to adjust to a new environment without antitrust immunity for motor carrier bureau activities, the decision was made effective in 120 days.
- 6/28/07 – Postponed, to January 1, 2008, the effective date of Board's decision terminating its approval of antitrust immunity for motor carrier bureau agreements.

EP 657 (Sub-No. 1) *Major Issues in Rail Rate Cases* 10/30/06
Decision adopted procedural and substantive changes regarding proper application of the stand-alone cost test in rail rate cases.

EP 659 *Public Participation in Class Exemption Proceedings* 10/19/06
Decision adopted changes in the procedures for certain exemptions to ensure that the public is given notice of a proposed transaction before the pertinent exemption becomes effective, and to allow the Board to process these notices of exemption, and any related petitions for stay, in an orderly and timely fashion.

EP 661 *Rail Fuel Surcharges* 1/26/07
Found that computing rail fuel surcharges as a percentage of a base rate is an unreasonable practice and directed carriers to change this practice. Board also concluded that the practice of "double dipping," i.e., applying to the same traffic both a fuel surcharge and a rate increase that is based on a cost index that includes a fuel cost component, such as the Railroad Cost Adjustment Factor (RCAF), is an unreasonable practice and directed carriers to change this practice as well. Board announced it would proceed with a proposal to impose mandatory reporting requirements for all Class I railroads regarding their fuel surcharges, in STB Ex Parte No. 661 (Sub-No. 1).

EP 661 (Sub-No. 1) *Rail Fuel Surcharges* [reporting requirement]

- 1/26/07 – Proposed to require all large (Class I) railroads to submit a monthly report containing the following information: (1) total monthly fuel cost; (2) gallons of fuel consumed during the month; (3) increased or decreased cost of fuel over the previous month; and (4) total monthly revenue from fuel surcharges.
- 8/14/07 – Adopted final rules to require all Class I railroads to submit a quarterly report containing the following information: (1) total quarterly fuel cost; (2) gallons of fuel consumed during the quarter; (3) increased or decreased cost of fuel over the previous quarter; (4) total quarterly revenue from fuel surcharges; and (5) revenue from fuel surcharges on regulated traffic.

EP 664 *Methodology to be Employed in Determining the Rail Industry's Cost Of Capital* 8/14/07

Proposed to revise the Board's method for calculating the railroad industry's cost of capital by computing the cost of equity using a capital asset pricing model rather than a discounted cash flow analysis.

EP 669 *Interpretation of the Term "Contract" in 49 U.S.C. 10709* 3/29/07

Requested public comment on a proposal to interpret the term "contract" in 49 U.S.C. 10709 to embrace "any bilateral agreement between a carrier and a shipper for rail transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper."

EP 670 *Establishment of a Rail Energy Transportation Advisory Committee*

- 3/9/07 – Provided notice seeking public comments on the establishment of a Rail Transportation Advisory Committee to provide independent advice and policy suggestions on issues related to the reliability of rail transportation of resources critical to the nation's energy supply.
- 7/17/07 – Announced the establishment of the Rail Energy Transportation Advisory Committee and requested nominations of candidates to serve on the committee.
- 9/21/07 – Announced the appointment of 23 individuals to serve on the newly established Rail Energy Transportation Advisory Committee.

EP 673 *Information Required in Certain Notices of Exemption* 10/04/07

Granted a petition filed by 6 Class I rail carriers to institute a rulemaking proceeding to consider requiring more information in notices of exemption for acquiring and operating rail lines and to reconsider the Board's *Effingham* decision.

Annual Regulatory Determinations

EP 290 (Sub-No. 4) *Railroad Cost Recovery Procedures—Productivity* 1/31/07

Proposed to adopt 1.017 (1.7% per year) as the measure of average change in railroad productivity for the 2001-2005 (5-year) averaging period, a decline of 0.2% from the measure of 1.9% that was developed for the 2000-2004 period.

EP 542 (Sub-No. 14) *Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services* 4/6/07

Decision adopted 2007 user fee update and revised fee schedule to cover certain costs.

EP 552 (Sub-No. 10) *Railroad Revenue Adequacy—2005* 10/23/06

Found one Class I carrier, Norfolk Southern, to be revenue adequate in 2005.

EP 558 (Sub-No. 9) *Railroad Cost of Capital—2005 determination* 2/12/07

Denied Western Coal Traffic League's petition for reconsideration of the cost-of-capital decision for 2005. The Board rejected various technical challenges and said that it would address the League's argument that the Board should replace its discounted cash flow methodology with a capital asset pricing model in a new proceeding, EP 664.

EP 558 (Sub-No. 10) *Railroad Cost of Capital—2006 determination* 5/16/07

Instituted a proceeding to determine the railroad industry's cost of capital for 2006 and required comments from all Class I railroads.

Rail Cases

Major Rate Cases

NOR 42088 *Western Fuels v. BNSF* 9/10/07

Found that BNSF had market dominance over the transportation at issue, but that the complainant had not demonstrated that the challenged rates were unreasonably high. The complainant was offered an opportunity to submit supplemental evidence.

NOR 41191 (Sub-No. 1) *AEP Texas v. BNSF* 9/10/07

Found that BNSF had market dominance over the transportation at issue, but that the complainant had not demonstrated that the challenged rates were unreasonably high. The complainant was offered an opportunity to submit supplemental evidence.

No. 42095 *Kansas City Power and Light v. Union Pacific RR* 3/29/07

Found that the parties had shown cause why the case should not be dismissed (on grounds that the transportation at issue is covered by contract) and directed the parties to submit a proposed procedural schedule.

Small Rate Cases

No. 42098 *Williams Olefins, L.L.C. v. Grand Trunk Corporation* 2/15/07

Dismissed this small rate complaint after the parties confirmed that they had reached a mediated settlement with the assistance of Board staff.

No. 42099 et al. *E.I. DuPont de Nemours and Co. v. CSX Transportation* 9/7/07

Decided that three small rate cases filed by DuPont in August would be adjudicated under the Board's new simplified guidelines for small- and medium-sized rate cases, and directed DuPont to supplement its complaints as warranted under the new guidelines.

Acquisition of Control

FD 35031 *Fortress Investment Group—Control—Florida East Coast Ry.* 9/28/07
Approved the acquisition of control of Florida East Coast Railway by Newco and Fortress Investment Group LLC.

Construction, Acquisition, or Operation of Rail Lines and Facilities

FD 30186 (Sub-No. 3) *Tongue River RR Co.—Construction and Operation—Western Alignment* 10/9/07

Approved Tongue River's application for construction and operation of a 17.3-mile rail line in Montana as part of a route previously authorized for construction to move coal out of the Powder River Basin and modified previously imposed environmental conditions.

FD 34421 *Holrail LLC—Construction and Operation Exemption—In Orangeburg and Dorchester Counties, SC* 2/12/07

Denied Holrail's petition to cross CSX's right-of-way, because HolRail's proposal to construct in the right-of-way in the form of a crossing petition was an inappropriate use of the crossing statute, and denied Holrail's request for authority to construct and operate its preferred route.

FD 34797 *New England Transrail—Construction Acquisition and Operation Exemption* 7/10/07

Found that New England Transrail would, if authorized, become a rail carrier subject to the Board's jurisdiction, but also found that some of its planned activities related to the handling of construction and demolition debris would extend beyond the scope of rail transportation and therefore would not be subject to Federal preemption from most state and local laws. The Board held an oral argument in this case on 4/19/07.

FD 34909 *CSX, Norfolk Southern and Conrail—Joint Use* 10/5/06

Granted a petition for exemption filed by CSX, Norfolk Southern, and Conrail to provide for the joint use and joint rail freight operations over 7.69 miles of abandoned rail line of the former Staten Island Railway Corporation in New York and New Jersey.

FD 34986 *Ashland RR—Lease and Operation—In Monmouth County, NJ* 8/16/07
Rejected a notice of exemption by Ashland to acquire and operate 1.5 miles of track in Freehold Township because Ashland failed to provide information on whether it proposed to transload solid waste at a facility on the line to be acquired.

FD 35020 *Northern and Bergen RR—Acquisition Exemption—A Line of the New York & Greenwood Lake Ry.*

- 5/25/07 – Stayed the effective date of the exemption to provide additional time for the parties to meet to discuss concerns about the rail facility's compliance with health and safety regulations.
- 6/25/07 – Denied further stay of the exemption.

FD 35024 et al. *Washington State Dept of Transportation* 5/30/07
—*Acquisition—Palouse River and Coulee City RR*

Granted Washington State DOT authority to acquire a total of 296 miles of rail line from the Palouse River and Coulee City Railroad on an expedited basis in four separate and related transactions.

FD 35036 *Suffolk & Southern Rail Road LLC—Lease and Operation Exemption—Sills Road Realty, LLC*

- 6/1/07 – Provided that the exemption in this proceeding would not become effective until further order of the Board and directed Suffolk & Southern to file supplemental information.
- 8/13/07 – Directed Suffolk & Southern to file supplemental information required in a prior Board decision and to explain why it sought to withdraw its petition filed in this case.
- 10/12/07 – Reopened proceeding in light of evidence that construction of intended rail facilities may be occurring despite prior reports appearing designed to give a different impression and directed that any construction activities cease until the Board either grants construction authority or rules that no authority is needed.

FD 35042 *U S Rail Corp—Lease and Operation Exemption—Shannon G.* 6/15/07
Ordered that the proposed exemption would not become effective until further order of the Board and directed U S Rail to file supplemental information.

FD 35063 *Michigan Central Railway—Acquisition* 8/2/07
And Operation Exemption—Norfolk Southern

Commenced a proceeding to consider the petition of Michigan Central Railway to exempt its acquisition and operation of certain railroad lines of the Norfolk Southern Railway Company in Michigan and Indiana.

FD 35068 *Soo Line RR Co. d/b/a Canadian Pac. Ry.* 9/07/07
—*Acquisition and Operation—BNSF Ry.*

Granted a petition for Soo to acquire BNSF's interest in and to operate 36.26 miles of rail line in North Dakota previously jointly owned by CP and BNSF and to acquire and operate a contiguous 9.96-mile line owned by BNSF.

Unreasonable Practice Complaints

No. 42060 (Sub-No. 1) *North America Freight Car Association* 1/26/07
v. BNSF Ry. Co.

Denied complaint challenging storage and demurrage charges on empty private freight cars when held on BNSF property beyond a “free time” period. Complainants had alleged that the imposition of such charges, which had not been imposed in the past, was an unreasonable practice, constituted a failure to furnish adequate car service, violates requirements regarding demurrage charges, and violates the shipper allowance provisions.

Requests for Declaratory Order

FD 34527 *Maumee & Western RR Co.—Pet. for Dec. Order—* 5/9/07
CSXT Crossing Rights at Defiance, OH

Granted request for declaratory order and found that CSXT is obligated to restore the crossing diamonds it had removed at Defiance, unless the parties agree to a different crossing arrangement.

FD 34818 *City of Jersey City, et al.—Pet. for Dec. Order* 8/9/07

Determined that Conrail needs abandonment authorization from the Board before it may transfer ownership of the pertinent property for nonrail use.

FD 34865 *Arkansas Midland Railroad Company* 5/2/07
—Pet. for Dec. Order—Caddo Valley RR Co.

Found that the right of first refusal under 49 U.S.C. 10907(h) [under which a railroad forced to sell its rail line under the feeder line railroad provisions has a right of first refusal if the line is subsequently sold] applies in a situation where the stock of the feeder line buyer is proposed to be sold instead of the asset (line) itself.

FD 34914 *DesertXpress—Pet. for Dec. Order* 6/27/07

Granted DesertXpress' petition, finding that its proposed construction is not subject to state and local environmental review, land use restrictions, or other discretionary permitting requirements because of Federal preemption.

FD 35021 *Union Pac. RR Co.—Petition for Declaratory Order* 5/16/07

Denied a request by UP for a declaratory order as to whether "Option 2 of Circular 111" (a rate made available by the UP to its customers which depended upon certain commitments from both carrier and shipper as to term, volume, rates and service) was a contract or a tariff. The Board denied the railroad's request on the grounds that such a determination depended on the facts surrounding the execution of each particular Option 2 agreement, and those facts were not placed before the Board.

Forced Sale and Alternative Service

AB-556 (Sub-No. 2) *Railroad Ventures-Abandonment Exemption* 2/15/07
—Between Youngstown, OH, and Darlington, PA

Reversed the Board's prior decision to the extent that it had considered newly introduced evidence pertaining to certain expenditures and tentatively concluded that none of the \$375,000 portion of the purchase price set aside for repairs need be turned over to Railroad Ventures.

FD 34890 *PYCO—Feeder Line Application* 8/31/07

Ordered South Plains Switching to sell its rail lines in Lubbock, TX, to either PYCO Industries or Keokuk Junction Railway under the terms set by the Board pursuant to 49 U.S.C. 10907.

FD 34917 *Pioneer Industrial Railway Company—Alternative Service 1/12/07*
Request—Central Illinois Railroad Company

Denied request for Pioneer to provide alternative rail service over line of Central Illinois but reopened a prior decision granting an adverse discontinuance application that sought removal of Pioneer as a carrier authorized to serve the line.

Motor Carrier Cases

MC-F-21020 *FirstGroup plc—Acquisition—Laidlaw International, Inc. 4/5/07*
Approved, subject to opposing comments being submitted, the application of FirstGroup, plc to acquire Laidlaw International, Inc., the parent of Greyhound Lines, Inc. No opposing comments were received, and the decision therefore became effective 5/21/07.

RR 999 (Amendment No. 4 to Released Rates Decision No. MC-999)
Released Rates of Motor Common Carriers of Household Goods 6/13/07
Decision amended the Board’s previous decisions authorizing motor carriers of household goods to offer “released rates,” under which they limit their cargo liability, to comport with a statutory change in the standard liability of motor carriers for damage to, or loss of, the household goods they transport.

RR 999 (Amendment No. 5 to Released Rates Decision No. MC-999)
Released Rates of Motor Common Carriers of Household Goods 6/13/07
Decision proposed, and sought comment on, three changes to the Board’s released rates authorization to enhance the protection of consumers whose household goods are damaged or lost by motor common carriers.

Pipeline Cases

NOR 42084 *CF Industries v. Kanab Pipe Line 11/21/06*
Granted the parties’ joint motion to approve their settlement agreement without condition and place it under seal.

Water Carrier Cases

WCC 101 *Guam v. Sea-Land Service et al.*

- 2/02/07 – Denied carriers’ motion to dismiss and ordered carriers to submit all additional evidence regarding effective competition in the Guam market by March 19, 2007, and ordered the Government of Guam (GovGuam) to submit its reply by April 18, 2007.
- 8/30/07 – Denied petitions for reconsideration filed by GovGuam and the Caribbean Shippers Association and modified the procedural schedule.
- 10/12/07 – Granted GovGuam’s motion to dismiss its complaint.

Hearings

- EP 665 *Rail Transportation of Grain* 11/02/06
The Board held a public hearing as a forum for interested persons to provide views and information about the market conditions pertaining to rail transportation of grain.
- EP 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases* 1/31/07
The Board held a hearing regarding proposed changes to its procedures for determining the reasonableness of challenged railroad rates in those small- and medium-sized cases in which a full stand-alone cost (SAC) presentation is too costly.
- EP 664 *Methodology to be Employed in Determining
the Rail Industry's Cost Of Capital* 2/15/07
The Board held a hearing regarding the appropriate methodology to be employed by the Board in determining the railroad industry's estimated cost of capital, which would then be used by the agency in future, annual cost-of-capital decisions.
- EP 671 *Rail Capacity and Infrastructure Requirements* 4/11/07
The Board held a hearing as a forum for interested persons to provide views and information about: rail-freight traffic forecasts; the extent of capacity constraints and the ability of railroads to meet rising demand; the infrastructure investment needed to ensure that the Nation's freight-rail system continues to operate in an efficient and reliable manner; possible solutions to the challenges presented by growing rail traffic and limited capacity; and the potential role of public-private partnerships and innovative financing tools in meeting these challenges.
- FD 34797 *New England Transrail—Construction
Acquisition and Operation Exemption* 4/19/07
The Board held an oral argument in the *New England Transrail* case to permit the parties of record to discuss the extent to which NET's planned activities would constitute transportation by rail carrier and thus lie within the Board's exclusive regulatory jurisdiction.
- EP 672 *Rail Transportation of Resources
Critical to the Nation's Energy Supply* 7/18/07
The Board held a hearing in Kansas City, Missouri, to provide a public forum for examination of issues related to the efficiency and reliability of railroad transportation of resources critical to the Nation's energy supply, including coal, ethanol and biofuels.

STB'S RECORD IN COURT

Since 10/1/2006

Cases Decided on the Merits:

Mayo Foundation v. STB (8th Cir. No. 06-2031). *Rail Line Constructions*. In response to challenges brought by various environmental groups, community interests located along the line, and others, the court upheld an STB decision on remand re-authorizing Dakota Minnesota & Eastern to construct a rail line to serve coal mines in the Powder River Basin. (4 petitions embraced.) *472 F.3d 545*.

Springfield Term. Ry. v. STB (D. Mass. No. 04-12705-RGS). *Rail charges*. In response to a challenge brought by a rail carrier, the court upheld an STB decision addressing court-referred issues as to when a claim for car mileage allowance accrues. (2 petitions embraced.) *472 F. Supp. 2d 89*.

Black et al. v. STB (6th Cir. No. 06-3045). *Rail Labor Protection*. In response to a challenge brought by individual employees who were not supported by their union, the court upheld an STB decision declining to overturn a labor arbitration ruling. *476 F.3d 409*.

American Orient Express Ry. v. STB (D.C. Cir. Nos. 06-1077 & 06-1080). *Rail Passenger Service*. In response to a challenge brought by a business that operates passenger services over lines owned by Amtrak and other rail carriers, the court upheld an STB decision finding that petitioner is a rail carrier subject to Board jurisdiction. (2 petitions embraced.) *484 F.3d 554*.

Otter Tail Power Co. v. STB (8th Cir. No. 06-1962). *Rail Rates*. In response to a challenge brought by a shipper, the court upheld an STB decision finding that challenged rates had not been shown to be unreasonably high. (3 petitions embraced.) *484 F.3d 959*.

DHX, Inc. v. STB (9th Cir. No. 05-74592). *Water Carrier practices*. The court upheld an STB decision denying a freight forwarder's challenge to rates and practices of two water carriers serving Hawaii.

Pending Cases:

Northern Plains Resource Council v. STB (9th Cir. Nos. 97-1011, 97-70099, 97-70217, & 97-70037). *Rail Line Construction*. Challenges brought by property owners and others to an STB decision approving the construction and operation of the Tongue River rail line in Montana. Case held in abeyance. (4 petitions embraced.)

Railroad Ventures v. STB (6th Cir. No. 05-3157). *Rail Abandonments; OFA Sales*. Challenge brought by a business that bought a rail line, but then provided poor service, to an STB decision regarding one of the terms and conditions for the forced sale of the rail line under offer of financial assistance procedures.

District of Columbia v. STB (D.C. Cir. No. 05-1220). *Preemption*. Challenge brought by the District of Columbia government and the Sierra Club to an STB decision declaring that an act of the District of Columbia seeking to govern the transportation of hazardous materials moving by rail through the District is preempted by the Interstate Commerce Act. (2 petitions embraced)

Kershaw Sunnyside Ranches et al. v. STB (9th Cir. No. 05-76364). *Adverse Abandonment*. Challenge brought by a landowner to an STB decision denying an application for adverse abandonment of rail track running through a portion of its property.

Tri-State Brick & Stone of N.Y. v. STB (D.C. Cir. No. 06-1334). *Preemption*. Challenge by a business that leases property next to a rail yard to an STB decision finding that the petitioner is not a rail carrier and thus not protected from state and local land use laws.

BNSF Ry. v. STB (D.C. Cir. Nos. 06-1372 et al.). *Rail Rates*. Challenges by various large rail carriers, a carrier association, and a shipper group to an STB rulemaking decision modifying the standards and procedures for addressing large rail rate disputes. (4+ petitions embraced.)

Western Coal Traffic League v. STB (D.C. Cir. No. 07-1064). *Railroad Cost of Capital*. Challenge by a shipper group to an STB decision applying established procedure for determining cost of capital for railroad industry in 2005, while exploring in a separate rulemaking whether current method for computing cost of equity should be replaced with some other technique.

North Am. Freight Car Ass'n v. STB (D.C. Cir. No. 07-1070). *Rail Charges*. Challenge by a group of railcar owners to an STB decision denying complaint against a carrier's imposition of storage and demurrage charges on empty private freight cars.

HolRail LLC v. STB (D.C. Cir. No. 07-1088). *Rail Crossing*. Challenge by a shipper-owned new rail carrier to an STB decision denying request to invoke the crossing statute to use another carrier's right-of-way in connection with the proposed construction of a new rail line.

Caddo Valley Railroad Co. v. STB (8th Cir. No. 07-2066). *Feeder Line Sale*. Challenge by a small rail carrier to an STB decision finding that the statutory right of first refusal to repurchase the line applied to the sale of the entire stock of the business.

CSX Transportation, Inc., et al. v. STB (D.C. Cir. No. 07-1369). *Small Rate Guidelines*. Challenges by four large railroads and a railroad association to the newly modified small rate guidelines. (5 petitions embraced.)

212 Marin Boulevard, LLC, et al. v. STB (D.C. Cir. No. 07-1397). *STB jurisdiction*. Challenge by rail carrier and property developers to an STB decision finding that certain property sold to a developer for residential housing is part of a line of railroad that remains subject to STB jurisdiction until abandonment authority is obtained. (2 petitions embraced.)