

Before The
U.S. House of Representatives
Committee on Transportation and Infrastructure

September 9, 2008 Hearing
Taking Responsible Action for Community Safety Act
H.R. 6707
11:00 A.M.
2167 Rayburn House Office Building



Testimony Of
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Good morning Chairman Oberstar, Ranking Member Mica, and other Members. Thank you for this opportunity to testify on H.R. 6707, the “Taking Responsible Action for Community Safety Act.”

At the outset, I would like to make clear that my testimony today pertains only to the TRACS Act. It should not be interpreted as signaling my views on any cases currently pending before the Board, including three control transactions between: the Canadian Pacific and Dakota, Minnesota & Eastern; the Canadian National and Elgin, Joliet & Eastern; and the Norfolk Southern and Pan Am Railways, respectively.

Whether the Board can deny approval of a merger that it has categorized as “minor” on grounds other than potential anticompetitive impacts is a question that is under review at present. To date, the Board has never rejected any merger on such grounds. Our statute with respect to “minor” transactions specifies that we focus on competitive impacts. On the other hand, the National Environmental Policy Act (NEPA) directs that agencies take a so-called “hard look” at potential environmental impacts in carrying out their mandates. “The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall” give appropriate consideration to environmental concerns in their decision-making along with economic and technical considerations; and explain the environmental impacts of the proposed action before the agency, unavoidable adverse impacts, and “alternatives to the proposed action” before the

agency.¹ 42 U.S.C. 4332. The question of the scope of the Board's authority is very likely to wind up in court in the near future.

A related concern of mine is the way the agency has categorized mergers (i.e., "major," "significant," and "minor") over the past 15 years. I have long thought that the agency's categorization was problematic in practice because the "significant" category is almost a null set. The agency has only categorized one transaction as "significant" since 1993. When I was on this Committee's staff, I was critical of the Board's categorizations, because all non-"major" transactions were determined to be "minor," even where there were important regional impacts (in my opinion). I believe that mergers -- other than those involving two Class I railroads -- that have regional or

¹ NEPA provides that:

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.....

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

.....

42 U.S.C. 4332.

national transportation significance should be classified as “significant,” in accordance with our existing statute.²

Over the past year, I have made clear my views regarding the Board’s categorization of particular transactions. I believe it is important that we continue to differentiate among transactions, although what is considered “significant” needs to be recalibrated because of the changes in the rail industry since the Staggers Rail Act of 1980. I also believe that the Board should accord the fullest due process permissible under our existing statute to all transactions before it, including adequate opportunities for stakeholder participation in developing the evidentiary record and in undertaking the environmental review process.

I am not opposed to the TRACS Act. I believe that the Board should consider the “public interest” (including environmental issues) in some manner in deciding whether or not to approve control transactions. If the Board already has the direct authority to do so, then the TRACS Act is not needed. If it does not, then I would welcome the additional authority to do so.

While I do not oppose the TRACS Act, as I have already stated, I do want to comment on a practical problem that I see with regard to it. Section 2 of the TRACS Act would require the Board to hold public hearings “in the affected communities, unless the Board determines that public hearings are not necessary in the public interest.” It appears that this language provides a suitable amount of discretion for the Board to determine

² 49 U.S.C. 11325(c); 49 CFR 1180.2(b).

whether or not to hold hearings, where to hold hearings, how many hearings to hold, and how to conduct hearings. However, I do want to emphasize that we are a small agency, and we currently dedicate a considerable portion of our resources to our hearings. I urge the Committee to be mindful of this in light of the size and scope of potential future transactions. As you know, Class I railroads operate networks in the tens of thousands of miles, running through multitudes of communities. It would be impractical and impossible to hold hearings in every community that might be affected by a “major” merger.

That concludes my statement. Thank you for the opportunity to testify today. I look forward to answering any questions you may have.