

**A REVIEW OF AMTRAK OPERATIONS, PART II:
THE HIGH COST OF AMTRAK'S MONOPOLY
MENTALITY IN COMMUTER RAIL COMPETITIONS**

(112-102)

HEARING
BEFORE THE
**COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE**
HOUSE OF REPRESENTATIVES
ONE HUNDRED TWELFTH CONGRESS
SECOND SESSION

SEPTMBER 11, 2012

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

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Chairman

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James W. Cook, Director Staff

September 7, 2012

James H. Zales, Director Chief of Staff

MEMORANDUM

TO: Members, Committee on Transportation and Infrastructure

FROM: Staff, Committee on Transportation and Infrastructure

SUBJECT: Oversight Hearing on "A Review of Amtrak Operations Part 2: The High Cost of Amtrak's Monopoly Mentality in Commuter Rail Competitions"

PURPOSE

The Committee on Transportation and Infrastructure will meet on Tuesday, September 11th, 2012, at 10 a.m. to receive testimony on Amtrak's involvement in commuter rail operations. Specifically, the hearing will investigate competitive procurements for commuter rail operations. It will also review Amtrak's role in the commuter rail industry as well as its recent failures to successfully compete for commuter rail contracts.

BACKGROUND

Current Status of the Nation's Commuter Rail Industry

Commuter rail service is primarily designed to address a high volume of passengers requiring daily travel to and from work in city centers, operating in metropolitan and suburban areas and usually having morning and evening peak period operations. Commuter rail service has become an important element of local transportation systems.

Commuter rail agencies provide transportation to millions of people nationwide. There are currently 26 commuter rail agencies across the country providing service for nearly 460 million riders in 2010. Commuter rail service is typically operated directly by a public transit agency or is contracted to a private rail operator. Amtrak is one of the operators that provide contract commuter rail service.

The National Railroad Passenger Corporation (Amtrak)

The Rail Passenger Service Act of 1970 (P.L. 91-518) created the National Railroad Passenger Corporation (Amtrak) and charged it with the responsibility for providing intercity passenger rail transportation on a basic national route system designated by the Department of Transportation. Before Amtrak's creation, freight rail companies were required by federal law to operate passenger rail services.

Amtrak was designed to serve long-distance passenger travel needs, however, over time it has expanded its operations to include State-supported routes, where States cover the cost of Amtrak operations, and commuter rail operations, under contract to a public transit agency. In 2010, Amtrak was responsible for the following commuter service operations:

- California Caltrain - Operations;
- California Metrolink - Operations;
- Washington Sounder – Equipment Maintenance;
- Connecticut Shore Line East- Operations;
- Maryland MARC – Penn Line Operations;
- Virginia Railway Express – Operations and Maintenance; and
- South Florida Tri-Rail - Dispatching

Today, Amtrak is no longer responsible for the operations of the California Caltrain and the Virginia Railway Express, having lost to private sector rail companies in recent competitive procurements for operating contracts.

Growth in Commuter Service Operations

Since 2005, seven new commuter rail agencies have initiated service. During the same period, commuter rail ridership has grown from approximately 417 million in 2005 to nearly 460 million in 2010, an increase of 10 percent or approximately 42 million passenger trips. The following chart illustrates the commuter rail systems that have initiated service since 2005.

Listing of U.S. Commuter Railroads Operating Entities Opened Since 2005			
Commuter Rail System	Operating Entity	Year Opened	2010 Ridership*
New Mexico: Rail Runner Express (Albuquerque)	Contract operations by Herzog	2006	1,240.5
Tennessee: Music City Star (Nashville)	Contract operations by Nashville and Eastern Railroad	2006	204.7
Utah: FrontRunner (Salt Lake City)	Direct operations by Utah Transit Authority	2008	1,389.9
Minnesota: Northstar (Minneapolis)	Contract operations by BNSF	2009	710.4

Existing U.S. Commuter Railroads Operating Entities Opened Since 2005 - Continued			
Oregon: Tri-Met (Portland suburbs, Beaverton to Wilsonville)	Contract operations by Portland and Western Railroad	2009	306.2
Texas: Austin Capital Metro Rail (Austin)	Contract operations by Herzog	2010	120.8
Texas: Denton County Transportation Authority A-Train (Dallas to Denton)	Contract operations by Herzog	2011	0.0**

*Ridership in Thousands, Source: National Transit Database

**Due to the recent opening of the service, no ridership numbers are available yet.

Competitive Procurement for Commuter Rail Operations

Currently there are 26 commuter railroads nationwide and 19 of these contract out some elements of their services. The remaining seven have chosen to directly operate their own service. Eleven commuter railroads that have contracted out services have competitively bid for operations contracts. (Some commuter railroads have agreed, as a condition of access, to have the host freight railroad provide their operations.)

The Federal Transit Administration (FTA) requires that transit agencies that receive federal assistance “must conduct all procurements in a manner that provides full and open competition,” including contracts for commuter rail operations (49 U.S.C. 5325(a)). This mandate for competition ensures increased efficiencies and improved service levels, which result in reduced costs and a reduction in the amount of taxpayer subsidy required. Procurement for commuter rail services provides opportunities for qualified private rail operators to compete for contracts offered by state and local agencies.

The past ten years has seen a significant increase in the level of competition between the major private rail operators. However, Amtrak has not fared well as the frequency of competitions and the level of competitiveness with private operators has increased. Amtrak’s inability to adapt its nationwide model for intercity passenger rail to regional commuter rail markets has led to its failure to secure a single commuter rail operations contract over the past ten years.

WITNESSES

Joseph Boardman

President and Chief Executive Officer
Amtrak

Joe Giuliatti

Executive Director
South Florida Regional Transportation Authority (Tri-Rail)

Chuck Harvey

Deputy CEO, Operations Administration
Peninsula Corridor Joint Powers Board

Ray Chambers

Executive Director
Association of Independent Passenger Rail Operators

Ed Wytkind

President, Transportation Trades Department
AFL-CIO



**Amtrak Commuter Rail Service: The High Cost of
Amtrak's Operations**

OVERSIGHT AND INVESTIGATIONS STAFF REPORT

**Prepared for Chairman John L. Mica
Committee on Transportation and Infrastructure
U.S. House of Representatives**

112th Congress

September 11th, 2012

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Commuter Rail Competition One Pagers

Listing of U.S. Commuter Railroads Operating Entities

I. Executive Summary

This report examines the process and benefits of competitive contracting for commuter rail operations. It reviews the current number of active commuter rail operations contracts obtained through competitive processes, as well as the National Railroad Passenger Corporation's (Amtrak) role in this industry, and its effectiveness in competing with private rail operators. To address these issues, Committee staff questioned and obtained information from every commuter rail agency that has competed out commuter rail operations. Furthermore, Committee staff interviewed major commuter rail providers as well as State transportation personnel.

Recent years have seen an increase in commuter rail ridership and the number of routes in operation. From 2005 to 2010, ridership on commuter rail lines has increased more than 10 percent, or approximately 42 million passenger trips.¹ In 2010, the Nation's commuter rail transportation system provided nearly 460 million passenger trips.² With rising demand for service, it is critically important for commuter rail agencies to continue to look for ways to improve service while reducing costs. As a result, commuter rail agencies are looking to competitive contracting for commuter rail operations as a way to provide the highest level of service at the lowest costs.

Major Report Findings:

- Even with high federal subsidies, Amtrak loses when competing with private operators;
- Amtrak spent millions of dollars on failed bids in response to commuter rail agency Requests for Proposals;
- Commuter rail agencies save \$107.8 million or 11.5% by awarding contracts to private operators;
- Amtrak attempts to stifle competition with frivolous litigation and interfering with the transition to private operators; and
- Amtrak used approximately \$2.1 million in government funds to sue a private rail operator.

Major Report Recommendations:

- Amtrak should immediately cease expansion of commuter rail operations
- States should consider competing out State-supported intercity routes
- Amtrak should immediately cease the use of federal funds to sue private entities

¹ Compare Am. Pub. Transp. Ass'n, Public Transportation Fact Book, at 73 (58th ed. 2007) (2007 Fact Book) (setting forth 2005 ridership numbers for each commuter rail agency) with Am. Pub. Transp. Ass'n, 2012 Public Transportation Fact Book, at Appendix B: Transit Agency and Urbanized Area Operating Statistics 107 (63d ed. 2012) (2012 Fact Book) (setting forth 2010 ridership numbers for each commuter rail agency).

² 2012 Fact Book, *supra* note 1, at App. B 107.

This analysis was conducted by Majority staff of the House Committee on Transportation and Infrastructure. Members of the Committee continue to conduct general oversight activities of Amtrak, especially as it pertains to waste, fraud, and mismanagement.

Key Findings

1. Amtrak's inability to adapt its nationwide model for intercity passenger rail to commuter rail regional markets has led to its failure to secure a single commuter rail operations contract over the past ten years.
2. Since 2010, Amtrak's revenue from commuter rail service has decreased \$59 million from \$152 million to approximately \$93 million.

Major Amtrak Commuter Rail Failures

3. The decision to compete out commuter rail operations rather than contract directly with Amtrak will save these six transit agencies \$107.8 million over the life of these contracts. This resulted in a net savings of 11.5 percent.
 - a. Massachusetts Bay Transportation Authority – 2002 Competition: After 17 years of continued operation of MBTA's commuter service, Amtrak withdrew from the competition and forfeited its single largest commuter rail contract.
 - b. North County Transit District Coaster Service – 2005 Competition: After 10 years of operating the Coaster service between San Diego and Oceanside, California, Amtrak lost a competitive operating and maintenance contract, scoring lower in every evaluation category with a higher total cost.
 - c. New Mexico Rail Runner Express Service – 2005 Competition: Amtrak's ineffective proposal had an average annual cost that was \$1.25 million greater than Herzog.
 - d. Florida Tri-Rail – 2007 Competition: Amtrak's proposal scored lower than Veolia for every evaluation criteria, including bid price that was 67% higher or \$65.5 million more than Veolia's.
 - e. Virginia Railway Express (VRE) – 2009 Competition: Amtrak failed to win the competition despite a complete understanding of the facilities, customers, agency's desires, and costs of operations.

- f. Surprisingly, Amtrak's proposal included a \$2.2 million dollar mobilization fee for a service it was already operating. Keolis' winning proposal included a mobilization fee of only \$1.7 million
 - g. California Caltrain – 2010 Competition: After Amtrak's nearly 20 year incumbency and a comprehensive understanding of Caltrain's service needs and operational demands, Amtrak's proposal scored 13 points lower than Herzog's at a cost of more than \$1 million dollars more annually.
4. Amtrak spent millions of dollars on failed bids in response to commuter rail agency Requests for Proposals.

Amtrak's Efforts to Stifle Competition

- 5. Amtrak spent more than \$2.1 million in a failed legal attempt to sue Veolia and disgorge Veolia of its profits from the operation of the Florida Tri-Rail commuter service.
- 6. Amtrak's frivolous lawsuit against Veolia forced the private operator to spend nearly \$3 million dollars to defend itself from Amtrak's federally subsidized pockets.
- 7. After Amtrak's failed bid to operate the Virginia Railway Express (VRE) in 2009, it reportedly interfered with the transition to the winning bidder, Keolis, so much so that VRE officials began exploring legal action that could be taken against Amtrak.
- 8. Amtrak's union allegedly told its workers they would be fired by Amtrak and blacklisted if they took a job with Keolis to operate Keolis's trains on the line.
- 9. Amtrak refused to allow VRE engineers to ride with Amtrak crews to learn the route.

State-Supported Routes and PRIIA Section 209

- 10. Upon implementation of section 209 of PRIIA, States could potentially save, in aggregate, an estimated \$91.3 million annually if they choose to compete out the operational services on the Amtrak State-supported intercity routes.
- 11. The potential savings of an estimated \$91.3 million would cover much of the \$120 million increase in costs that will be borne by these 19 States when section 209 of PRIIA is fully implemented in October 2013.

II. Background

Commuter rail service is primarily designed to address a high volume of passengers requiring daily travel to and from work in city centers, operating in metropolitan and suburban areas and usually having morning and evening peak period operations. Commuter rail systems can be a cost effective transportation alternative for longer commutes to downtown from outlying suburbs, where the costs associated with congestion, fuel and parking are greater.

Commuter rail agencies provide transportation to millions of people nationwide. There are currently 26 commuter rail agencies across the country providing service for nearly 460 million riders in 2010.³ Commuter rail service is typically operated directly by a public transit agency or is contracted to a private rail operator. Amtrak is one of the operators that provide contract commuter rail service.

The National Railroad Passenger Corporation

The Rail Passenger Service Act of 1970 (P.L. 91-518) created the National Railroad Passenger Corporation (Amtrak) and charged it with the responsibility for providing intercity passenger rail transportation on a basic route system designated by the Department of Transportation. Before Amtrak's creation, freight rail companies were required by federal law to operate passenger rail services. Amtrak was created as a federally chartered corporation, with the Federal government holding all of Amtrak's preferred stock and freight railroads or their successors holding 100 percent of the Corporation's common stock.⁴ Amtrak's Board is appointed by the President and confirmed by the Senate, and Amtrak is operated as a for-profit company, rather than a public authority.⁵

Amtrak was designed to serve long-distance passenger travel needs. However, it has expanded its operations to include State-supported routes -- where States cover the cost of Amtrak operations -- and commuter rail operations, under contract to a public transit agency.

In 2010, Amtrak was responsible for the following commuter service operations:

- California Caltrain - Operations;
- California Metrolink - Operations;
- Washington Sounder - Equipment Maintenance;
- Connecticut Shore Line East - Operations;
- Maryland MARC - Penn Line Operations;
- Virginia Railway Express (VRE) - Operations and Maintenance; and
- South Florida Tri-Rail -- Dispatching.⁶

³ 2012 Fact Book, *supra* note 1, at App. B 107.

⁴ Nat'l R.R. Passenger Corp., Annual Report Fiscal Year 2011, at 81-82 (2011).

⁵ See 49 U.S.C. §§24301, 24302.

⁶ Nat'l R.R. Passenger Corp., The U.S. Commuter Rail Market, at 2 (Aug. 29, 2012) (on file with author).

These seven contracts had estimated annual revenue of \$152 million.⁷ However, by 2012, Amtrak's failed attempts to re-secure service contracts with the California Caltrain and VRE had reduced its revenue from commuter service to approximately \$93 million.⁸

Growth in Commuter Service Operations

Since 2005, seven new commuter rail agencies have initiated service. During the same period, commuter rail ridership has grown from approximately 417 million in 2005⁹ to nearly 460 million in 2010,¹⁰ an increase of 10 percent or approximately 42 million passenger trips. The following chart illustrates the commuter rail systems that have initiated service since 2005.

Listing of U.S. Commuter Railroads Operating Entities Opened Since 2005 ¹¹			
Commuter Rail System	Operating Entity	Year Opened	2010 Ridership*
New Mexico: Rail Runner Express (Albuquerque)	Contract operations by Herzog	2006	1,240.5
Tennessee: Music City Star (Nashville)	Contract operations by Nashville and Eastern Railroad	2006	204.7
Utah: FrontRunner (Salt Lake City)	Direct operations by Utah Transit Authority	2008	1,389.9
Minnesota: Northstar (Minneapolis)	Contract operations by BNSF	2009	710.4
Oregon: Tri-Met (Portland suburbs, Beaverton to Wilsonville)	Contract operations by Portland and Western Railroad	2009	306.2
Texas: Austin Capital Metro Rail (Austin)	Contract operations by Herzog	2010	120.8
Texas: Denton County Transportation Authority A-Train (Dallas to Denton)	Contract operations by Herzog	2011	0.0**

*Ridership in Thousands

**Due to the recent opening of the service, no ridership numbers are available yet.

⁷ *Id.*, at 2.

⁸ *Id.*

⁹ 2007 Fact Book, *supra* note 1, at 73.

¹⁰ 2012 Fact Book, *supra* note 1, at App. B 107.

¹¹ *Id.*, at Appendix A: Historical Tables 38, Appendix B 107.

Contract Services for Commuter Rail Operations

Currently there are 26 commuter railroads nationwide and 19 of these contract some elements of their services.¹² The remaining seven have chosen to directly operate their own service. Eleven commuter railroads that have contracted services have competitively bid operations. The following is a list of the commuter routes that have competitively procured services for operations:

Commuter Route	Current Contract Operator
*Maryland Area Regional Commuter (MARC)	Amtrak on the Penn Line; CSX on the Camden & Brunswick Lines ¹³
California: Altamont Commuter Express -ACE	Contract operations by Herzog ¹⁴
**California: Caltrain	Contract operations by Herzog ¹⁵
California: North County Transit District Coaster - NCTD	Contract operations by Herzog ¹⁶
Florida: Tri-Rail	Contract operations by Veolia ¹⁷
**Massachusetts: Massachusetts Bay Transportation Authority - MBTA	Contract operations by Massachusetts Bay Railroad Company, a consortium of Veolia and Bombardier ¹⁸
New Mexico: Rail Runner Express	Contract operations by Herzog ¹⁹
Texas: Austin Capital Metro Rail	Contract operations by Herzog ²⁰
Texas: Denton County Transportation Authority A-Train	Contract operations by Herzog ²¹
Texas: Trinity Railway Express - TRE	Contract operations by Herzog ²²
**Virginia: Virginia Railway Express - VRE	Contract operations by Keolis ²³

*The MARC Operation for the Camden and Brunswick Lines are currently out for contract

**Line previously operated by Amtrak

Public transportation agencies, hit hard by the Nation’s struggling economy, high fuel prices, and lower local funding, are looking for ways to reduce costs while maintaining high service

¹² 2012 Fact Book, *supra* note 1, at App. B 107.

¹³ Interview with Amtrak staff in Washington, D.C. (Aug. 29, 2012).

¹⁴ Telephone interview with San Joaquin Regional Rail Comm’n staff (June 27, 2012).

¹⁵ Telephone interview with Caltrain staff (Sep. 4, 2012).

¹⁶ Telephone interview with North County Transit District staff (June 22, 2012).

¹⁷ Telephone interview with South Florida Regional Transp. Auth. staff (June 15, 2012).

¹⁸ Telephone interview with Massachusetts Bay Transp. Auth. staff (Aug. 13, 2012).

¹⁹ Telephone interview with New Mexico Rail Runner Express staff (June 26, 2012).

²⁰ Telephone interview with Capital Metropolitan Transp. Auth. staff (June 21, 2012).

²¹ Telephone interview with Dallas Area Rapid Transit staff (June 27, 2012) (Denton County Transportation Authority’s A-Train went into service in 2011 and through inter-local agreements, was able to modify the Trinity Railway Express contract with Herzog to include operations for the A-Train).

²² Telephone interview with Dallas Area Rapid Transit staff (June 27, 2012).

²³ Telephone interview with Virginia Railway Express staff (June 19, 2012).

levels. This has resulted in an increase in competitive procurements for commuter rail service operations.

III. Competitive Procurement for Commuter Rail Operations

“...It is competition that is inherently better than monopoly. This driving force of our free-enterprise economy can be a most powerful lens to focus management attention on controlling costs: either match a competitor’s efficiency or lose customers.”

Rodney Fisk
President, Princeton New Jersey Railroad Company 1989²⁴

Competitive Procurement for Commuter Rail Operations

The Federal Transit Administration (FTA) requires that transit agencies that receive federal assistance “must conduct all procurements in a manner that provides full and open competition,” including contracts for commuter rail operations.²⁵ This mandate for competition ensures increased efficiencies and improved service levels, which result in reduced costs and a reduction in the amount of taxpayer subsidy required.

Procurement for commuter rail services provides opportunities for qualified private rail operators to compete for contracts offered by State and local agencies. Public transportation agencies interested in competitively procuring services for commuter rail operation develop their own contract criteria and usually award the bid to the proposal with the highest combined technical score and lowest contract price. Each competition has slightly different criteria weighting; however, technical evaluation categories typically include some or all of the following:

- Key management team experience
- A management plan
- System safety and security requirements
- Demonstrated equipment and facility maintenance experience
- Customer service.

The past ten years has seen a significant increase in the level of competition between the major private rail operators. However, Amtrak has not fared well as the frequency of competitions

“Whether measured in terms of quality of service, safety, or cost, Amtrak’s performance as an operator of commuter rail networks has been poor.”

- Charles D. Chieppo
Pioneer Institute Public Policy Research

*cited from Charles D. Chieppo, The New MBTA Commuter Rail Contract (Dec. 3, 2002)

²⁴ Rodney Fisk, Op-Ed., *Needed: Competition for Commuter Rail Lines*, N.Y. Times, June 18, 1989, at 12NJ 20.

²⁵ 49 U.S.C. §5325(a).

and the level of competitiveness with private operators has increased. Amtrak’s inability to adapt its nationwide model for intercity passenger rail to regional commuter rail markets has led to its failure to secure a single commuter rail operations contract over the past ten years. Over this time period Amtrak prepared offers for seven separate competitions, withdrawing from two prior to the final decision award.²⁶

Interviews with Amtrak and independent passenger rail operators indicate it is very expensive to prepare a responsive bid to a commuter rail agency RFP. Estimates of bid preparation costs range from hundreds of thousands of dollars to well-over a million dollars. The following chart is a list of all commuter rail competitions for operations service that Amtrak has participated in since 2002. In preparing bid proposals to respond to the competitions listed below, Amtrak wasted millions of taxpayer-subsidized dollars.

Commuter Rail Operations Competitions with Amtrak Participation Since 2002 ²⁷		
Commuter Agency	Year	Amtrak Result
Massachusetts Bay Transportation Authority - MBTA	2002	Withdrew during RFP Stage
California Metrolink	2004	Withdrew During BAFO*
California North County Transit District - Coaster Service	2005	Lost Competition
New Mexico Rail Runner	2005	Lost Competition
South Florida Regional Transportation Authority – Tri-Rail	2007	Lost Competition
Virginia Railway Express - VRE	2009	Lost Competition
California Caltrain	2010	Lost Competition

*BAFO – Best and Final Offer

Major Amtrak Commuter Rail Failures

The following are examples of six of the largest competitive defeats Amtrak has suffered over the past ten years:

Massachusetts Bay Transportation Authority (MBTA) -2002 Competition

The Massachusetts Bay Transportation Authority is the oldest and the fifth largest transportation network in the United States.²⁸ MBTA’s commuter rail service provided nearly 37 million passenger trips in 2010.²⁹ From 1986 to 2003 Amtrak was solely responsible for operating MBTA’s commuter rail service. At the time, this was Amtrak’s single largest commuter rail contract.³⁰ However, by 2002, frustrated by low service levels and the high costs of Amtrak

²⁶ Interview with Amtrak staff in Washington, D.C. (Aug. 29, 2012).

²⁷ *Id.*

²⁸ Mass. Bay Transp. Auth., Sustainability, http://www.mbta.com/about_the_mbta/environment/ (last visited Sep. 7, 2012).

²⁹ 2012 Fact Book, *supra* note 1, at App. B 107.

³⁰ Charles D. Chieppo, The Next MBTA Commuter Rail Contract (Dec. 3, 2002), available at http://www.pioneerinstitute.org/pdf/021203_chieppo.pdf (last visited Sep. 7, 2012).

operations, the MBTA began the procurement process to competitively bid the commuter rail service contract.

A Request for Proposals (RFP) was subsequently sent to Amtrak and three other companies that were considered qualified bidders. The RFP contained technical and cost proposals. Of the four companies that received RFPs, Amtrak was the only company to refuse to submit a proposal for the MBTA procurement. *After 17 years of continued operation on MBTA's commuter service, Amtrak withdrew from the competition and forfeited its single largest commuter rail contract due to the lack of time and resources necessary to compete effectively.*³¹

North County Transit District Coaster Service – 2005 Competition

The Coaster commuter train runs north-south through San Diego County, serving eight stations between Oceanside and downtown San Diego. The system is managed by the North County Transit District (NCTD). The Coaster runs more than 20 trains on weekdays, with additional service on the weekends,³² totaling approximately 1.3 million passenger trips in 2010.³³ The Coaster began operations in 1995 and, until the competition in 2005, was operated by Amtrak. In 2005, NCTD undertook a competitive bid process, using the following criteria to evaluate the proposals:

- Technical Approach - 20%
- Maintenance & Operating Plans - 20%
- Qualifications & Experience - 15%
- Innovation & Customer Service - 5%
- Cost - 40%.³⁴

The following chart illustrates the competitive bid proposals put forth by Amtrak and Herzog.³⁵

Private Rail Operator	Total Award Points	Bid Price
Herzog	90.8	\$49 million
Amtrak	82.6	\$53 million
Difference	-8.2	+\$4 million

**Total points awarded out of a possible 100.*

Despite Amtrak's presumed advantages in experience on the service, which it had operated, until the competition, Amtrak still lost in each and every category of the evaluation, including "Qualifications & Experience." In this category, Amtrak received a score of 10.3 and Herzog

³¹ *Id.*

³² North County Transit District COASTER, <http://www.gonctd.com/coaster> (last visited Sep. 6, 2012).

³³ 2012 Fact Book, *supra* note 1, at App. B 107.

³⁴ North County Transit District, Monitoring Committee Report, Award: Five-Year Base Term Plus a Potential Five-Year Option Contract for Operation, Maintenance of Equipment and Maintenance-of-Way for the COSTER Commuter Rail Service, at 35 (2005).

³⁵ *Id.*, at 36-37.

received a score of 13.³⁶ Indeed, Herzog won in every single technical scoring category, in addition to providing the lowest cost. Consequently, the NCTD awarded a five-year contract, with a five-year option, to Herzog. This particular competition demonstrates that private operators can offer lower costs in addition to better service components.³⁷

New Mexico Rail Runner Express Service – 2005 Competition

The Rail Runner Express is New Mexico’s commuter rail service that runs from Albuquerque to Santa Fe. The Rail Runner Express provided more than 1.2 million passenger trips in 2010.³⁸ Rail Runner Express commuter operations have been contracted out since the service was initiated.³⁹ Herzog was awarded the contract to operate service for the Rail Runner Express in 2005 (with options for up to 8 years).⁴⁰ The following illustrates the difference in bid proposals between Herzog and Amtrak.⁴¹

Private Rail Operator	Total Award Points	Bid Price
Herzog	463.25	\$10.7 million
Amtrak	401.25	\$13.2 million
Difference	-62	+\$2.5 million

The following five criteria were used to determine which proposal would be recommended for final selection:

- Project Understanding - 10 pts.
- Scope of Services – 25 pts.
- Previous Experience/References – 25 pts.
- Price – 40 pts.
- Oral Interview – 30 pts.⁴²

Amtrak’s proposal scored only 401.25 out of a possible 520 points, 62 points lower than Herzog, even though the price of Amtrak’s contract had an average annual cost that was \$1.25 million higher.⁴³

³⁶ *Id.*
³⁷ *Id.*, at 38 (“[Herzog] proved the most advantageous to [NCTD], not only in all technical areas, but in cost.”).
³⁸ 2012 Fact Book, *supra* note 1, at App. B 107.
³⁹ Telephone interview with New Mexico Rail Runner Express staff (June 26, 2012).
⁴⁰ *Id.*
⁴¹ Memorandum from Chris Blewett, Director Transport & Planning Services, Procurement Manager for the Mid-Region Council of Governments Procurement 2005-01, to Lawrence Rael, Executive Director, at 1-2 (May 12, 2005) (on file with author).
⁴² *Id.* (points were awarded by four evaluators with a total possible score of 520).
⁴³ *Id.*, at Attachment 3.

Florida Tri-Rail - 2007 Competition

The Tri-Rail is a commuter transportation system that provides commuter rail service from Miami to Ft. Lauderdale and Palm Beach. The South Florida Regional Transportation Authority (SFRTA) manages this critical transportation system. Tri-Rail’s commuter rail service provided nearly 3.6 million passenger trips in 2010.⁴⁴ Tri-Rail operations have been contracted out since it initiated service in 1989.⁴⁵ The SFRTA awarded the most recent seven year competitive procurement to Veolia in 2007.⁴⁶ The following criteria were used to evaluate the proposals:

- Price – 15%
- Technical Approach – 25%
- Operating Plans – 25%
- Qualifications/Experience – 35%.⁴⁷

The chart below illustrates the difference in scoring and pricing for Veolia, who was awarded the contract, and Amtrak.⁴⁸

Private Rail Operator	Total Award Points*	Bid Price
Veolia	85.0	\$97.1 million
Amtrak	62.3	\$162.6 million
Difference	-22.7	+\$65.5 million

* Total points awarded out of a possible 100

The chart above highlights the significant difference in proposed service levels as well as operational costs for the two highest scoring bids. Amtrak failed bid scored lower than Veolia for every evaluation criteria, including an overall score that was 22.7 points lower.⁴⁹ Furthermore, Amtrak’s bid price was 67% greater or \$65.5 million higher than Veolia’s.⁵⁰ Frustrated with its loss of the contract, Amtrak sued Veolia in Federal District Court.⁵¹

⁴⁴ 2012 Fact Book, *supra* note 1, at App. B 107.

⁴⁵ Telephone interview with South Florida Regional Transp. Auth. staff (June 15, 2012).

⁴⁶ *Id.*

⁴⁷ Memorandum from Evaluation and Selection Comm. to Joseph Giuliotti, Executive Director, South Florida Regional Transp. Auth. at 2 (March 9, 2007) (on file with author).

⁴⁸ South Florida Regional Transp. Auth., RFP No. 06-112 Commuter Rail Operations for SFRTA’s Commuter Rail System Price Proposals for Veolia Transportation and Amtrak, at 3 (on file with author).

⁴⁹ Memorandum from Evaluation and Selection Comm. to Joseph Giuliotti, Executive Director, South Florida Regional Transp. Auth., at 2 (March 9, 2007) (on file with author).

⁵⁰ *Id.*

⁵¹ *Nat’l R.R. Passenger Corp. v. Veolia Transp. Servs.*, Civ. Action No. 1:07-1263(RBW) (D.D.C. filed July 16, 2007).

Virginia Railway Express (VRE) - 2009 competition

VRE, which began operations in 1992, provides commuter rail service from the Northern Virginia’s suburbs to downtown Washington, D.C. VRE’s commuter rail service provided nearly 4 million passenger trips in 2010.⁵² Until the completion of the 2009 competition, Amtrak had been VRE’s only rail operator. The following criteria were used to evaluate the proposals:

- Management Plan – 15%
- Experience, Qualifications, Capabilities – 10%
- Safety and Security – 10%
- Equipment Maintenance – 15%
- Facility Maintenance/Environmental Services – 5%
- Train Operations – 15%
- Mobilization Plan -- 5%
- Cost Effectiveness/Value – 20%
- Certified Disadvantaged Business Enterprises –5%.⁵³

The following illustrates the difference in proposals between Keolis, who was awarded the five-year contract, plus two options of five years each, and Amtrak.⁵⁴

Private Rail Operator	Total Award Points*	Bid Price
Keolis	91	\$263.5 million
Amtrak	56.75	\$287.9 million
Difference	-34.25	+\$24.5 million**

*Total points awarded out of a possible 100

**Difference is rounded.

Amtrak failed to effectively compete for a service that it had operated since its initiation. Amtrak knew the facilities and the customers and had a complete understanding of the agency’s desires and costs of operations, yet it still failed to compete effectively. Amtrak was so confident in its ability to retain the VRE operations contract that its proposal included a \$2.2 million dollar mobilization fee for a service it was already operating.⁵⁵ Keolis’ winning proposal included a mobilization fee of only \$1.7 million.⁵⁶

⁵² 2012 Fact Book, *supra* note 1, at App. B 107.

⁵³ Virginia Railway Express, RFP No. 09-013 Operating and Maintenance Services for Commuter Rail Operations, Section 22 Evaluation Criteria, Contract Award and Execution 185-6 (on file with author).

⁵⁴ Virginia Railway Express, RFP No. 09-013 Operating and Maintenance Services for Commuter Rail Operations, Summary Matrix of Evaluation Scores (on file with author); .

⁵⁵ Virginia Railway Express, RFP No. 09-013, Operating and Maintenance Services for Commuter Rail Operations, Comparison of Proposals (on file with author).

⁵⁶ *Id.*

California Caltrain - 2010 Competition

Caltrain provides commuter rail service along the San Francisco Peninsula, through the South Bay to San Jose and Gilroy. The Peninsula Corridor Joint Powers Board (PCJPB) took over operations of the Caltrain system in 1992.⁵⁷ Caltrain transported roughly 10.6 million riders in 2010.⁵⁸ Amtrak served as Caltrain's rail operator from 1992 to 2010.

Struggling with budgetary constraints and looking to find ways to reduce costs and improve efficiencies, the PCJPB chose to compete out its commuter rail service operations in 2010. The following illustrates the difference in proposals between Transit America – Herzog, who was awarded the contract, and Amtrak.⁵⁹

Private Rail Operator	Total Award Points*	Bid Price
Transit America - Herzog	91.2	\$409.8 million
Amtrak	78.2	\$421.1 million
Difference	-13	+\$11.3 million**

*Total points awarded out of a possible 100

After nearly 20 years of Amtrak operations for the commuter rail service, Caltrain awarded the operations contract to Transit America, a division of Herzog for roughly five years with an additional five-year option.⁶⁰ Despite a twenty year incumbency with a complete understanding of Caltrain's service needs and operational demands, Amtrak's proposal scored 13 points lower than Herzog's at a cost of more than \$2 million dollars more annually.⁶¹

⁵⁷ San Mateo County Transit District, About Caltrain, <http://www.caltrain.com/about.html> (last visited Sep. 7, 2012).

⁵⁸ 2012 Fact Book, *supra* note 1, at App. B 107.

⁵⁹ Summary of Request for Proposals, Evaluation and Selection Process for Contract to Provide Rail Operations, Maintenance and Support Services for the Peninsula Corridor Joint Powers Board, Contract 10-PCJPB-S-025, at 5, 8 (Aug. 16, 2011) (on file with author).

⁶⁰ *Id.*, at 1.

⁶¹ *Id.*, at 5.

Summary

The six case studies above highlight the improved service levels and reduced costs of commuter rail operations when there is competition. It also highlights Amtrak's inability to effectively compete with private rail operators. One explanation for Amtrak's overpriced services is that agencies are paying not only for the services under contract, but also for overhead costs associated with Amtrak's nationwide operations. In other words, agencies partnering with Amtrak are literally buying in to its bloated bureaucracy. The use of innovative private rail operators versus Amtrak's monopoly mentality will save \$107.8 million in aggregate over the life of these commuter rail operating contracts,⁶² resulting in a net savings of more than 11.5 percent.⁶³

IV. Amtrak's Efforts to Stifle Competition

As documented above, the number of commuter rail systems has increased and so have the number of competitions to provide those services; Amtrak, however, has not effectively competed for those commuter rail contracts. After failing to win some of these competitive bids, Amtrak engaged in anti-competitive behavior that can only be described as an attempt to stifle competition among the burgeoning private operator market for passenger rail. Several recent examples of such actions are detailed below.

In the first instance, in January 2007 Amtrak lost a competitive bid to operate Tri-Rail to Veolia. Amtrak's bid price was \$162.6M compared to Veolia's bid price of \$97.1M; a difference of \$65.5M.⁶⁴ Furthermore, Amtrak's overall bid score was 62.3, while Veolia's bid score was 85.⁶⁵ Instead of filing an administrative bid protest in the State of Florida, Amtrak filed a complaint in the Federal District Court for the District of Columbia alleging Veolia wrongfully recruited and enticed members of Amtrak's staff to terminate their employment with Amtrak and take positions with Veolia if Veolia won the contract. Amtrak claimed this caused Amtrak to suffer harm and lose the Tri-Rail contract. The basis of Amtrak's allegations was the fact that Veolia included as part of their management team for the Tri-Rail system three individuals who, at the time, worked for Amtrak, though not in Florida. Ironically, Amtrak's

⁶² The estimated total savings was calculated by adding the total cost of Amtrak's bids for each of the five competitions listed above in which Amtrak participated and subtracting from that figure the total cost of each of the winning private operators' bids.

⁶³ The estimated percentage of savings was calculated by dividing the estimated total savings by the total costs of Amtrak's bids.

⁶⁴ South Florida Regional Transp. Auth., RFP No. 06-112 Commuter Rail Operations for SFRTA's Commuter Rail System Price Proposals for Veolia Transportation and Amtrak, at 3 (on file with author).

⁶⁵ *Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs.*, 592 F. Supp. 2d 86, 91 (D.D.C. Jan. 8, 2009)

bid did exactly the same thing, including an individual employed by another private operator as part of Amtrak's management team.⁶⁶

After five years of litigation, the case went to trial. The jury found that Veolia's conduct was not the cause of Amtrak's failure to win the Tri-Rail contract and no damages were awarded to Amtrak.⁶⁷ Even after the jury returned its verdict, Amtrak continued to litigate its cause seeking to disgorge Veolia of its profits.⁶⁸ Indeed, Amtrak spent \$2.1 million on the litigation,⁶⁹ and forced Veolia to spend approximately \$3 million to defend itself,⁷⁰ an amount that represents a substantial portion of its profits from the contract. Given this fact and the history of Amtrak's inability to compete, it seems quite clear the litigation was intended to stifle competition in the industry.

Similarly, when Amtrak lost its bid to operate VRE in 2009, it reportedly interfered with the transition to the winning bidder, Keolis, so much so that VRE officials began exploring legal action that could be taken against Amtrak.⁷¹ Specifically, after losing its bid to Keolis by nearly \$24.5 million, Amtrak allegedly took several steps to interfere with the transition to Keolis as the operator. First, because train crews had to be certified by Amtrak to operate on Amtrak property in Union Station and elsewhere, Amtrak allegedly raised the certification requirements for crews from 85% to 88%.⁷² Second, Amtrak's union allegedly told its workers they would be fired by Amtrak and blacklisted if they took a job with Keolis to operate Keolis's trains on the line.⁷³ Finally, Amtrak refused to allow VRE engineers to ride with Amtrak crews to learn the route.⁷⁴ These efforts lead the VRE operations chairman at the time to claim that, "[T]hey [Amtrak] are trying to frustrate our efforts."⁷⁵ Clearly, Amtrak's efforts to interfere with the smooth transition to another operator could serve no other purpose but to stifle future competition in the commuter rail sector.

⁶⁶ *Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs.*, 791 F. Supp. 2d 33, 40 (D.D.C. May 9, 2011).

⁶⁷ *Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs.*, Civ. Action No. 1:07-1263(RBW) Memorandum Op. Denying Mot. For Judgment of Disgorgement, slip op. at 2 (D.D.C. filed Aug. 21, 2012).

⁶⁸ *Id.*

⁶⁹ Letter from Joseph McHugh, Vice President Government Affairs & Corporate Communication, Nat'l R.R. Passenger Corp., to John L. Mica, Chairman, Transportation and Infrastructure Committee, Spreadsheet Document Request (Aug. 28, 2012).

⁷⁰ Interview with Veolia Transit Services staff in Washington, D.C. (Aug. 14, 2012).

⁷¹ Jennifer Buske, "VRE considers suing Amtrak", WASH. POST, May 21, 2010; Uriah Kiser, "VRE to explore Amtrak lawsuit", insidenova.com, May 23, 2010.

⁷² Don Phillips, "An old-fashioned rail battle erupts in the nation's capital", Discovery News, August 26, 2010.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Uriah Kiser, "VRE to explore Amtrak lawsuit", insidenova.com, May 23, 2010.

VI. State-Supported Routes and PRIIA Section 209

One unit of the “national rail passenger system” is the “state-supported routes” which are defined as those short distance corridors of not more than 750 miles in length.⁷⁶ The State-supported routes are the sector of Amtrak’s passenger rail services that have seen the greatest growth over the past two decades. State-supported routes carried 5 million passengers in FY 1990 but in FY 2011, ridership was up to 14.7 million.⁷⁷ The total operating cost in FY 2011 of providing the State-supported routes was \$793.8 million.⁷⁸

Currently, 19 States contract with Amtrak for the operation of 27 State-supported routes. State and regional agencies pay most of the operating costs of these services not covered by farebox revenues. Indeed, 16 routes are fully supported by the States, 5 routes are partially supported by the States, and 6 routes currently receive no State support.⁷⁹ Continued operation of these State-supported routes is subject to annual contracts and State legislative appropriations.

Section 209 of the Passenger Rail Investment and Improvement Act (PRIIA) requires Amtrak, in consultation with the Federal Railroad Administration (FRA) and each relevant State, to develop and implement a single, nationwide standardized methodology for establishing and allocating the operating and capital costs among Amtrak and the States concerning the State-supported routes.⁸⁰ The cost allocation methodology had a deadline of October 2010, but Amtrak did not present the Final Policy it developed to all the States until August 2011.⁸¹ Because not all 19 States voluntarily adopted the Final Policy methodology, Amtrak, pursuant to section 209(c), submitted the methodology to the Surface Transportation Board for approval. The STB upheld the Final Policy methodology in March 2012, explaining that it ensures equal treatment in the provision of like services for all States and allocates to each route the costs incurred only for the benefit of that route and a proportional share of costs incurred for the common benefit of more than one route.⁸²

With the methodology for allocating costs now approved, it is scheduled to take effect in October 2013, meaning that States will be responsible for covering a majority of the costs for their State-supported routes. According to Amtrak, sixteen States will see an increase in the amount of support they must provide totaling more than \$120 million.⁸³ The methodology was developed in a menu approach, such that States can better control route costs by picking and choosing among Amtrak services. Because States will be taking on more financial responsibility for the State-supported routes, implementation of the methodology will allow

⁷⁶ 49 U.S.C. § 24102(5)(D)

⁷⁷ Nat’l R.R. Passenger Corp., Monthly Performance Report for Sep. 2011, at A-3.5 (June 14, 2012).

⁷⁸ Nat’l R.R. Passenger Corp., Amtrak PRIIA Section 209 Review & Update, at 10 (June 12, 2012).

⁷⁹ *Id.*, at 2

⁸⁰ Passenger Rail Investment and Improvement Act, Pub. L. No. 110-432, 122 Stat. 4917-18.

⁸¹ *Id.*, at 6.

⁸² *Amtrak’s Pet. For Determination of PRIIA Section 209 Cost Methodology*, FD 35571 (STB served Mar. 13, 2012).

⁸³ Nat’l R.R. Passenger Corp., Amtrak PRIIA Section 209 Review & Update, at 13 (June 12, 2012).

each State to make informed decisions about who should provide aspects of their State-supported route services.

The 11.5 percent savings that transit agencies have realized through competitive procurement of commuter rail service when compared to Amtrak operations is confirmation of the cost savings associated with competition that includes private rail operators. This model of competition could be equally as cost effective when implemented by the States after the impact of section 209 of PRIIA is realized. **Upon implementation of section 209 of PRIIA, the States could potentially save an estimated \$91.3 million annually if they choose to compete out the operational services on the Amtrak run State-supported route.**⁸⁴ The potential savings of an estimated \$91.3 million would cover much of the \$120 million increase in costs realized by these 19 States through the implementation of section 209 of PRIIA.

VII. Recommendations

As the level of competition has increased Amtrak's ability to maintain its position as a commuter rail industry leader has faded. The last ten years has seen a significant decrease in Amtrak's revenue from commuter rail operations even though ridership is at record levels. It has become clear that Amtrak is unable to adapt and utilize its massive federal advantages in a fair manner to develop a model that regional transit agencies desire. As this report illustrates, it is time for Amtrak to stop wasting taxpayer resources competing with more dynamic, innovative and cost effective private rail operators. Amtrak must decide to set aside its desires to expand its commuter rail operations and improve the cost effectiveness and efficiency of its national passenger rail service.

1. Amtrak should immediately cease expansion of its commuter rail operations and focus on its congressionally mandated responsibilities and making the Northeast Corridor more cost efficient and effective.
2. All commuter rail agencies should consider the benefits of contracting out its operational services through a competitive bid process.
3. States should consider competing out the operational services on the State-supported routes upon implementation of section 209 of PRIIA.
4. Amtrak should not use its federal funds to file, litigate, or otherwise pursue in any Federal or State court any cause of action against a passenger rail service provider arising from a competitive bid process in which Amtrak and that passenger rail service provider both participated.

⁸⁴ The estimated savings to States for the costs of PRIIA section 209 implementation was calculated by multiplying the total increased costs for PRIIA section 209 (\$120 million) by 11.5%, the amount of savings that transit agencies have realized through competitive procurement of commuter rail service.

5. Amtrak should not interfere in the transition to a new passenger rail provider and should actively cooperate with the incoming passenger rail providers and the public commuter rail agencies throughout the transition.

About the Committee

The Transportation and Infrastructure Committee currently has jurisdiction over all modes of transportation: aviation, maritime and waterborne transportation, roads, bridges, mass transit, and railroads. The Committee also has jurisdiction over other aspects of our national infrastructure, such as clean water and wastewater management, the transport of resources by pipeline, flood damage reduction, economic development programs for rural and urban areas, disaster preparedness and response, the Civil Works program of the Army Corps of Engineers, and the various missions of the U.S. Coast Guard.

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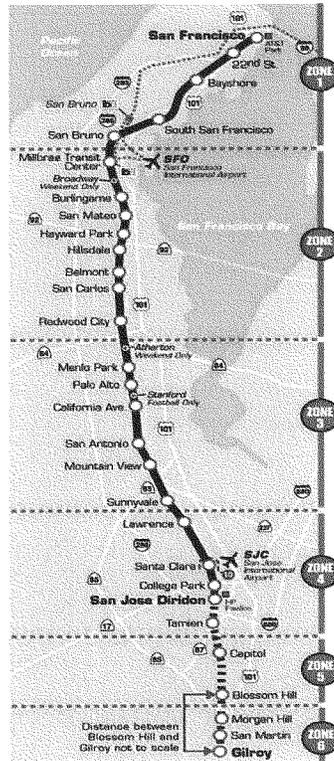
Phone: (202) 225-9446 · Fax: (202) 225-6782
<http://transportation.house.gov/>



Committee on Transportation and Infrastructure

CALIFORNIA CALTRAIN

San Francisco, California



QUICK FACTS:

- Operations began in 1992
- Mileage: 77.4
- Termini: San Francisco to Gilroy, CA

RIDERSHIP

2005	2010	Growth	% Growth
8,120,900	10,611,700	2,490,800	+31%

BID COMPARISON

	Cost	Scores
Herzog	\$398.6M	91.2
Amtrak	\$421.1M	78.2

NEW MEXICO RAIL RUNNER EXPRESS

Albuquerque, New Mexico



QUICK FACTS:

- Operations began in 2006
- Mileage: 97 miles
- Termini: Santa Fe and Belén, NM

RIDERSHIP

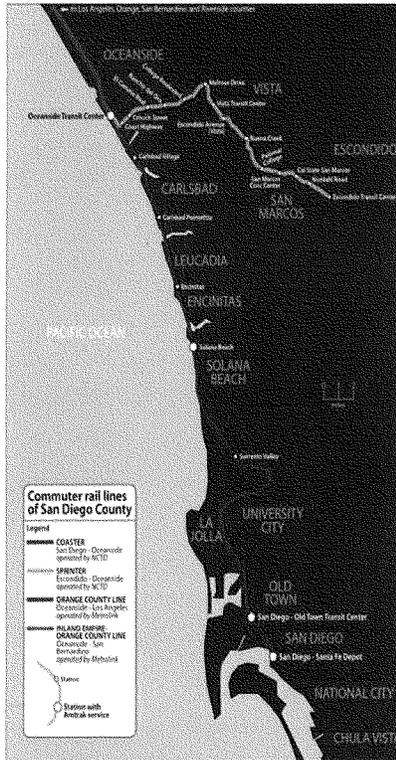
2005	2010	Growth
N/A	1,240,500	N/A

BID COMPARISON

	Cost	Scores
Herzog	\$10.7M	463.25
Amtrak	\$13.2M	401.25

NORTH COUNTY TRANSIT DISTRICT COASTER

San Diego, California



QUICK FACTS:

- Operations began in 1995
- Mileage: 41 miles
- Termini: Oceanside Transit Center and San Diego-Santa Fe Depot

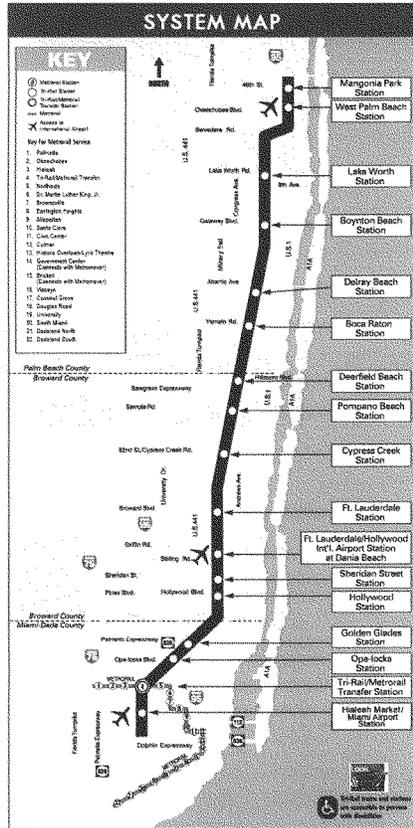
RIDERSHIP

2005	2010	Growth	% Growth
1,432,500	1,271,600	-160,900	-11%

BID COMPARISON

	Cost	Scores
Herzog	\$49M	90.8
Amtrak	\$53M	82.6

SOUTH FLORIDA REGIONAL TRANSPORTATION AUTHORITY (TRI-RAIL) South Florida



QUICK FACTS:

- Operations began in 1989
- Mileage: 71 miles
- Termini: Mangonia Park and Miami Airport Station, FL

RIDERSHIP

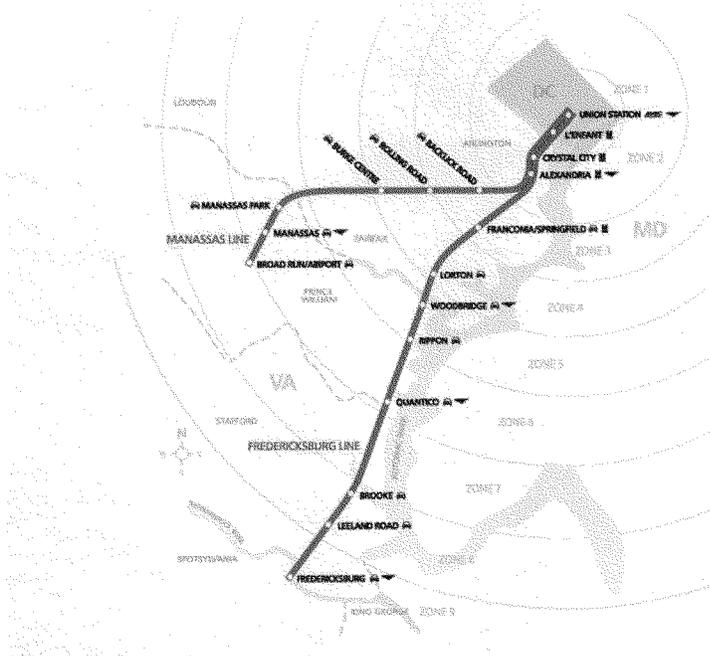
2005	2010	Growth	% Growth
2,800,400	3,606,100	805,700	+29%

BID COMPARISON

	Cost	Scores
Veolia	\$97M	85.0
Amtrak	\$163M	62.3

VIRGINIA RAILWAY EXPRESS

Northern Virginia Metro Area



QUICK FACTS:

- Operations began in 1992
- Mileage: 90 miles
- Termini: Union Station, Washington, D.C., Manassas, VA and Fredericksburg, VA

RIDERSHIP

2005	2010	Growth	% Growth
3,654,300	4,016,600	362,300	10%

BID COMPARISON

	Cost	Scores
Keolis	\$263.5M	364
Amtrak	\$287.9M	227

Listing of U.S. Commuter Railroads Operating Entities (in thousands)					
Commuter Rail System	Operating Entity	Year Opened	2010 Ridership	2005 Ridership	Change
Alaska: Alaska Railroad	Directly operated by Alaska Railroad	1923	107.6	144.6	-37.0
California: Altamont Commuter Express -ACE (Stockton-San Jose)	Contract operations by Herzog	1998	655.5	640.6	14.9
California: Caltrain (San Francisco-San Jose)	Contract operations by Herzog	1992	10,611.7	8,120.9	2,490.8
California: MetroLink (Orange, Los Angeles, Riverside and San Bernardino Counties)	Contract operations by Amtrak	1992	12,005.8	10,693.3	1,312.5
California: North County Transit District Coaster - NCTD (San Diego)	Contract operations by Herzog	1995	1,271.6	1,432.5	-160.9
Connecticut: Shore Line East (New London to New Haven)	Contract operations by Amtrak	1990	557.6	407.4	150.2
Florida: Tri-Rail (South Florida)	Contract operations by Veolia	1989	3,606.1	2,800.4	805.7
Illinois: Metra (Chicago)	Combination -- Metra directly operates most lines, BNSF and UP operate Metra services on lines they own	1984	70,534.9	68,591.0	1,943.9
Indiana: Northern Indiana Commuter Transportation District - NICTD (Fort Wayne)	Directly operated by NICTD	1903	3,714.4	0.0	3,714.4
Maine: Northern New England Passenger Rail Authority -- Downeaster	Contract operations by Amtrak	2001	474.2	250.5	223.7
Maryland: Maryland Area Regional Commuter (MARC)	Combination -- Contract operations by Amtrak on Camden and Penn Lines; operations by CSX on Brunswick Line	1984	8,095.6	6,884.1	1,211.5
Massachusetts: Massachusetts Bay Transportation Authority - MBTA (Boston)	Contract operations by Massachusetts Bay Railroad Company, a consortium of Veolia and Bombardier	1964	36,909.9	37,890.2	-980.3
Minnesota: Northstar (Minneapolis)	Contract operations by BNSF	2009	710.4	0.0	710.4
New Jersey Transit	Directly operated by New Jersey Transit	1983	82,223.5	72,613.8	9,609.7
New Mexico: Rail Runner Express (Albuquerque)	Contract operations by Herzog	2006	1,240.5	0.0	1,240.5
New York: Metro North	Directly operated by Metro North	1983	80,699.5	74,267.2	6,432.3
New York: Long Island Rail Road - LIRR	Directly operated by LIRR	1834	98,373.2	95,519.0	2,854.2
Oregon: Tri-Met (Portland suburbs, Beaverton to Wilsonville)	Contract operations by Portland and Western Railroad	2009	306.2	0.0	306.2
Pennsylvania: SEPTA (Philadelphia)	Directly operated by SEPTA	1983	36,805.7	31,680.0	5,125.7
Tennessee: Music City Star (Nashville)	Contract operations by Nashville and Eastern Railroad	2006	204.7	0.0	204.7
Texas: Austin Capital Metro Rail (Austin)	Contract operations by Herzog	2010	120.8	0.0	120.8
Texas: Denton County Transportation Authority A-Train (Dallas to Denton)	Contract operations by Herzog	2011	0.0	0.0	0.0
Texas: Trinity Railway Express - TRE (Forth Worth-Dallas)	Contract operations by Herzog	1996	2,434.2	826.4	1,607.8
Utah: FrontRunner (Salt Lake City)	Directly operated by Utah Transit Authority	2008	1,389.9	0.0	1,389.9
Virginia: Virginia Railway Express - VRE (Northern Virginia)	Contract operations by Keolis	1992	4,016.6	3,654.3	362.3
Washington: Sound Transit (Seattle)	Contract operations by BNSF	1999	2,480.1	1,268.0	1,212.1
TOTAL:			459,550.2	417,684.2	41,866.0

**A REVIEW OF AMTRAK OPERATIONS, PART II:
THE HIGH COST OF AMTRAK'S MONOPOLY
MENTALITY IN COMMUTER RAIL
COMPETITIONS**

TUESDAY, SEPTEMBER 11, 2012

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The committee met, pursuant to notice, at 10:11 a.m. in Room 2167, Rayburn House Office Building, Hon. John Mica (Chairman of the committee) presiding.

Mr. MICA. I would like to call this meeting of the House Transportation and Infrastructure Committee to order. Welcome, everyone, this morning. Somber day of the 11th anniversary of 9/11, but we appreciate everyone's attendance this morning.

We will recess this hearing at approximately 10:45, and then return. There is a ceremony on the Capitol steps for Members until approximately 11:30. It is my intention to try to reconvene at 11:30, sharp as possible, in getting Members back. So maybe we can get through opening statements and the opening comments from our witnesses.

So, again, welcome, everyone. The order of business will be opening statements by Members, and then we will turn to our witnesses. And how many panels do we have today, folks? One? One panel. OK. So, welcome to witnesses, and we will hear from you. We will defer questions until we return, so everyone will have a chance to make their presentation and then begin questions after that memorial service recess.

This morning the title of the hearing is "Amtrak Commuter Rail Operations: The High Cost of Amtrak's Monopoly." That is the title of the hearing, and this is the second in a series of at least three hearings that we will be conducting. And appreciate Mr. Shuster's cooperation, Ms. Brown's cooperation, Mr. Rahall, holding these committees at the—holding these hearings at the committee full level. I think it is a—these are very important issues. And I think that Amtrak deserves the full attention of the full committee.

First of all, I preface my remarks by saying I am a strong supporter. In fact, I have been called one of the cheerleaders for not only transportation, but also for rail, passenger rail service, in the United States of America. I believe that where the systems can meet the needs and make sense and have good routes and service, they are an excellent investment of taxpayer funds. I have said before if we didn't have an Amtrak we would need an Amtrak to de-

cide routing and to—also to ensure that we have national service, which I also support.

I might say I am also a strong supporter of the fine men and women that work at Amtrak. We have thousands of employees who go to work every day, do a great job. I am also fully committed to making certain that their labor agreements are adhered to, and that they receive full compensation and benefits according to the agreements they have received.

I preface those remarks, because sometimes people say that I don't favor passenger rail service or a national system or have it in, in some way, for Amtrak. And it is quite the opposite. We should make Amtrak a success story. But we have got a ways to go.

And I appreciate the service of Mr. Boardman and some of his predecessors in trying to do the best they can. Some of the constraints they have were imposed by Congress. Congress does set the terms by which the contract operates, and by which we subsidize some of their operations. So that being said, I will address some of the issues that, again, I think are important.

Our last hearing we focused on food service, and some folks said I was getting into the weeds. But when you spend \$833 million, nearly \$1 billion on subsidizing food service over a decade, that is the kind of weeds that have got in the country's finance—financial weeds, and I believe that we can do a better job in getting us out of a high subsidization. What particularly concerned me during that hearing is the last 3 years we have actually lost ground from \$79 million, I think, to \$83 billion or \$84 billion losses. So, at a time, again, when every Federal dollar is—should be carefully managed, we need to do better.

Today we are going to focus on one of Amtrak's 10 general businesses, and that is operating local commuter rail systems under contract to—primarily to public transit agencies. I have asked the investigative staff of the Transportation and Infrastructure Committee and the rail subcommittee staff to investigate and review all of the rail operating contract competitions over the last decade, and how Amtrak has performed in the competitive environment.

I think this morning, as we release this report—the report is entitled, “Amtrak Commuter Rail Service: The High Cost of Amtrak's Operations”—we will see pretty good documentation that, in fact, Amtrak is attempting to be in a business that they are not succeeding in. And also, that it does have significant costs to the taxpayers to compete in. And, again, in a time with limited resources, we have got to look at everything that we can to make Amtrak's bottom line as positive as possible.

The result of this investigation, again, are in this report. And the committee—some of the major committee findings are as follows.

First of all, despite every ticket being subsidized by an average of nearly \$50 by taxpayer, Amtrak has consistently failed to successfully compete against the private sector passenger rail operators, and some of those who provide services for commuter rail contracts. This is particularly disturbing, when Amtrak is underwritten by a subsidy of, I guess, last year, close to \$1.4 billion, and it has been in excess of \$1 billion almost consistently over the past years.

There is cost to putting these proposals together. There is cost to competition. And even when they lose in competition and they are competing against an unsubsidized private sector vendor, the taxpayers lose. So there is a double loss in even competing against the private sector. And we have pretty good documentation that they compete, they win, and actually do the work for less. In fact, commuter rail agencies, we found, will save \$107 million—that is an average of 11.5 percent—by awarding contracts to private operators.

Unfortunately, also we found that Amtrak has tried to stifle competition with frivolous litigation and also instances of interfering with the transition of commuter rail operations to private operations. That is particularly disturbing, because whether they are using Amtrak dollars of revenue, or funds that are provided through subsidization. They are using those monies to file suits against private contractors who, in fact, I think the courts have found legitimately participated in the competition and won the competition with lower prices than subsidized Amtrak.

So, unfortunately, I am left to conclude that Amtrak should not be in the commuter rail business at all, that—and there are plenty of private sector providers who can provide this service and, again, provide it at lower cost. And I believe that Amtrak should not be allowed to use taxpayer funds to sue private entities for competition-related lawsuits.

We have got a couple of slides here I will go through.
[The slides follow.]

Amtrak Fails in Competing for Commuter Rail Operations

Commuter Agency	Year	Amtrak Result
Massachusetts Bay Transportation Authority - MBTA	2002	Withdraw
California Metrolink	2004	Withdraw
California North County Transit District - Coaster Service	2005	Lost Competition
New Mexico Rail Runner	2005	Lost Competition
South Florida Regional Transportation Authority – Tri-Rail	2007	Lost Competition
Virginia Railway Express - VRE	2009	Lost Competition
California Caltrain	2010	Lost Competition

Amtrak's Frivolous Lawsuit Against Florida Commuter Rail Contractor

- Amtrak spent \$2.1 million suing a private contractor for its profits from operating a Florida commuter rail contract that Amtrak lost in competitive bid.
- Amtrak forced the private contractor to spend \$3 million dollars to defend itself from Amtrak's federally subsidized pockets.

Amtrak's Efforts to Stifle Competition After Failed Bid to Operate the VRE

- Amtrak interfered with the transition to a private contractor after losing competitive bid for VRE commuter rail operations.
- Amtrak's union allegedly told its workers they would be blacklisted if they accepted a job with the new operator.
- Amtrak refused to allow VRE engineers to train with Amtrak crews.

Potential Savings for State-Supported Routes

19 States contract with Amtrak to operate intercity passenger rail services on State-supported routes, all costs not covered

Beginning Oct 1, 2013, States will pay 100% of Amtrak's operating & capital costs for these routes: increase of \$120 M

Commuter rail savings using private companies vs. Amtrak:

11.5%

Potential savings on State-supported routes

(at 11.5% savings): \$91.3M annually

Mr. MICA. And it shows, first of all—I don't know if we passed this out, but the slide lists every commuter rail operating contract competition held in the last 10 years in which Amtrak competed. In every case, Amtrak either lost the competition to a private operator, or—who scored better and was able to provide the service at a lower cost, or Amtrak withdrew during the course of the competition.

Second slide we will put up there, again, is of great concern. In January 2007, South Florida Tri-Rail awarded its rail competitions to a private vendor. And that vendor had a national—an international reputation of providing transportation services with some 200 contracts in the U.S. and Canada for rail/bus transit, on-demand transit, airport shuttle, and charter service operations. Unfortunately, Amtrak lost the competition to this private contractor, in a full and open competition bidding in which they bid 67 percent higher cost, and scoring significantly lower in the RFP evaluation.

Unfortunately, Amtrak retaliated by filing a suit in Federal district court alleging that the private contractor wrongfully recruited and enticed members of Amtrak staff to work for the private contractor if they won the contract.

After some 5 years of very costly litigation to both parties, the case went to trial. Amtrak spent a total of \$2.1 million and either it was their revenues that could have put them in a more positive financial light and situation, or Federal subsidization dollars, to try to take the contract from the private vendor. Unfortunately, the private vendor had to spend nearly \$3 million defending itself in the case. I think that is cause to look at legislation that would make the loser pay on this instance. In some of those lawsuits I think it is grossly unfair, particularly the private sector, to have to defend itself against the publicly subsidized entity, and then bear the burden, as they had to, to defend themselves in court.

The slide three shows Amtrak's effort to stifle competition. If you look out the window, you can see the VRE, Virginia Railway Express operations. And in 2009, Amtrak lost its operating contract with VRE to a private contractor. And Amtrak's bid was some \$24 million higher than the private contractor, and its evaluation scores were lower than the private operators. The transition from Amtrak to the private operator was just tortuous and, unfortunately, Amtrak made it difficult, tried to make it impossible.

Some of you may have read about this. In fact, it was reported by the Washington Post that VRE was so dismayed by Amtrak's interference, that the agency explored taking legal action against Amtrak. And some of the examples of interference, Amtrak changed the certification requirement for train crews coming into Union Station, and refused to allow private vendor engineers to train with Amtrak crews in order to learn the routes. And, unfortunately, it is also alleged that Amtrak labor representatives told its workers they would be blacklisted if they accepted jobs with the private contractor.

The fourth slide is potential savings for State-sponsored routes. Nineteen States contract with Amtrak to operate intercity passenger rail service on State-supported routes, less than 750 miles. But not all operating costs are covered by the fair box and State support. We do underwrite that. PRIIA provisions require States to

cover 100 percent of their—all their capital and operating costs, beginning next year, the first of October a year from now. And this will increase the States' costs by \$120 million a year.

As I noted earlier, commuter rail agencies have saved 11.5 percent average by contracting out operations to private versus Amtrak providers—Amtrak serving as a provider.

Let me say I am a strong supporter of these State-supported routes. And this is one of the areas in which we have had significant increases in passenger rail service. In fact, if I am correct, a large portion of Amtrak's increase in ridership is in that area. And it is a good partnership. It needs to be continued.

But again, we need to look in tough financial times, or just to make Amtrak as efficient as possible, of having that service again be competed fairly and squarely. And if the private sector can do it, honoring labor and other commitments, then they should, in fact, have at it.

So, that is some of the findings from this report that we are releasing today from the Majority side. Welcome the Minority adding anything in the record they like to supplement the Majority report.

Our intent, again, is to try to make Amtrak a positive operation, to increase ridership, to do it at the lowest possible subsidization or the lowest cost, and in some instances, God forbid, we should actually turn positive revenue, and that can—there are plenty of examples around the world, and even in the United States, where that does occur. In fact, we have private vendor operators that operate passenger rail service and do make a profit. So that can, in fact, be achieved.

So, those are my comments. Again, I think we have got folks here now. I am pleased to yield to the ranking member of the rail subcommittee, Ms. Brown from Florida.

Ms. BROWN. Thank you, Mr. Chairman. And here we go again.

Mr. Chairman, I want to state for the hearing's record that we never were consulted on this oversight report. We never saw it or heard about it this time. When we were in the Majority, we always gave you advance copies of oversight reports so we could best prepare for the discussion. It is very sad that we are wasting the committee's time micromanaging Amtrak while totally ignoring critical issues in our transportation system that truly need to be addressed by this Congress.

Does any Member of Congress really think that this issue is more important than the critical mission of preparing our waterways for port—ships, addressing the glaring problems of our aviation system, or planning how we will address transportation funding in the all-too-near future? Recent headlines have warned that Al Qaeda is considering targeting U.S. rail lines. So, naturally, on the anniversary of 9/11, the chairman is holding a hearing on Amtrak limited commuter contracts.

I want to talk about what this hearing is about and what it is not about. This hearing is not about Amtrak's monopoly or commuter rail competition, as the title would seem to suggest. It can't be. Amtrak doesn't actually have a monopoly on commuter rail in the United States. A monopoly is defined as a situation in which a single company or group owns all or nearly all of the market for a given type of product or service. According to the American Pub-

lic Transportation Association, there are 29 commuter rail operations in the U.S. Twenty-one of those are outsourced to private companies. Of the 21, Amtrak has 6 contracts, or 28.6 percent of the market. That is not a monopoly.

This hearing is not about Amtrak's loss of commuter rail. It can't be. Amtrak made more than \$15 million in profits on its commuter rail service. We continually hear how Amtrak isn't doing enough. In this situation, Amtrak's profit helped reduce its operational costs, and its reliance on increased Federal funds.

I hope this hearing is not about a Republican attempt to punish Amtrak for pursuing legal actions against Veolia, or to justify a legislative earmark contained in H.R. 7 to prohibit Amtrak from pursuing legal actions or defending itself in court. I suspect, however, this is done for Veolia, since, according to the letter from Amtrak to Chairman Mica on August the 28th of 2012, Amtrak has never pursued legal action against any other private commuter rail operations. I ask unanimous consent to include the letter in the record.

Mr. MICA. Without objection, so ordered.

[The information follows:]

Mr. Board

NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, NE, Washington, DC 20002
Tel 202 966.3867 fax 202 966.3865

Joe McHugh
Vice President, Government Affairs
and Corporate Communications



August 28, 2012

The Honorable John L. Mica
U.S. House of Representatives
2187 Rayburn House Office Building
Washington, DC 20515

Dear Representative Mica:

Pursuant to your August 8, 2012 letter to Mr. Boardman, enclosed please find the requested information regarding commuter rail operations. While there was no time frame identified in your request, we were able to gather information about commuter passenger rail competitions dating back to 2000. We have also included a copy of Amtrak's competitive bid for the South Florida Regional Transportation Authority's request for proposal no. 06-112. All of the above information is in the public domain and you should feel free to treat it as public information.

Your final request was for a list of all legal proceedings filed by Amtrak against private passenger and/or commuter rail operators. Although Amtrak has engaged in dispute resolution proceedings, both judicial and private arbitration, designated by contract, and involving a variety of contractual disputes with partner commuter railroads, Amtrak has only filed one lawsuit against a private commuter rail operator arising from an RFP for commuter services against Veolia Transportation. Enclosed is a summary of Amtrak's lawsuit against Veolia Transportation which was based on Veolia's inducing Amtrak's employees to breach their fiduciary obligation to Amtrak.

Please let me know if you have additional questions.

Sincerely,
A handwritten signature in black ink that reads "Patrick Edmond for Joe McHugh". The signature is written in a cursive, flowing style.

Joe McHugh
Vice President
Government Affairs and Corporate Communications

Enclosures

Ms. BROWN. The chairman wants to include this provision in future legislation. But it is worth noting that Amtrak won the legal action. And by the way, Mr. Chairman, if the loser had to pay, then they would have received the reimbursement from the lawsuit, since they won.

The U.S. District Court for the District of Columbia found wrongful conduct by Veolia in its bid against Amtrak for the contract with Tri-Rail. Wrongful conduct. In fact, I'd like to ask unanimous consent to include the verdict in today's hearing record.

Mr. MICA. Without objection, so ordered.
[The information follows:]

For record

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FILED

MAY 10 2012

Clark, U.S. District & Bankruptcy
Courts for the District of Columbia

VERDICT FORM

We, the jury, return the following verdict:

1. Has Amtrak proved by a preponderance of the evidence (1) that any or all of the three Amtrak employees breached the fiduciary duty of loyalty they owed to Amtrak; (2) that Veolia had knowledge of the breach by the Amtrak employee or employees; and (3) that Veolia substantially assisted or encouraged the breach?

Yes No

If you answered "Yes" to Question 1, please proceed to answer Question 2. If you answered "No" to Question 1, then you have completed the verdict form. Please sign and date it below.

2. Has Amtrak proved by a preponderance of the evidence that Veolia's wrongful conduct was a proximate cause of Amtrak's failure to win the Tri-Rail Operations Contract?

Yes No

If you answered "Yes" to Question 2, please proceed to answer Question 3. If you answered "No" to Question 2, then you have completed the verdict form. Please sign and date it below.

3. What is the amount, if any, of profits that Amtrak has lost or will lose as a result of Veolia's wrongful conduct?

\$ _____

4. Do you find that Amtrak is entitled to punitive damages?

Yes No

If so, you need not determine the amount of punitive damages at this time.

You have completed the verdict form. Please sign and date it below.

SO SAY WE ALL 5 day of 10, 2012.

Presiding Juror *[Signature]*

Ms. BROWN. This is what this hearing is about. Good, old-fashioned politics and a nod to the Republican Party job-killing platform which endorses the dismantling of Amtrak in favor of outsourcing service to low-wage, low-benefit, private operations. The best evidence for this is the chairman's press statement leading up to this hearing, one which said he would put an end to Amtrak and others, while referring to the holy jihad against Amtrak.

And, by the way, Amtrak is an American company. It appears he meant war, when he used the term, although this is not what it means. Regardless, it is insulting on this day of remembrance. It is insulting to me, it is insulting to Amtrak, and its employees, and it is insulting to Amtrak riders. And I am sure it is insulting to Muslims that live in this country, particularly on the anniversary of 9/11.

What this hearing should be about on September the 11th is the security of our Nation's transportation system. This committee should be taking the time to reflect on the lives that were lost on these tragic attacks and what we can do to secure that this Nation's mass transportation system now and in the future is always safe.

But we are not holding a hearing on rail security, or even aviation security, for that matter. Nor are we holding a hearing on pipeline security or hazardous material security. We are having a hearing, once again, criticizing Amtrak, all while Members of Congress are gathering on the east front steps of the Capitol at 10:45 this morning in remembrance of 9/11.

The fact is on this very day 11 years ago, Amtrak and its employees worked around the clock to provide one of the only traveling options for many in this country. Within minutes of the incident, Amtrak jumped into action. It mobilized and established a command center, evacuating a number of stations for inspections of trains and infrastructure and dispatching police officers and staff throughout Amtrak facilities to patrol and conduct on-site inspections. On the Northeast Corridor, Amtrak added about 300 percent more seating capacity to fill the traveling gap. Over 1,600 daily seats were added to long-distance trains and another 300 to the west coast train.

Amtrak also provided transportation to New York City for families and friends of victims, firefighters, police, medical teams, military, and other public office, and even airline crew members. In partnership with the American Red Cross, Amtrak transported thousands of emergency relief kits to New York City. In fact, with the airline grounded, the U.S. Postal Service turned to Amtrak to carry the mail.

These are the things we should be discussing today. In fact, I would like to close with asking the chairman unanimous consent to hold a moment of silence right now to reflect on 9/11.

Mr. Chairman.

Mr. MICA. I am most pleased to grant the lady's request for a moment of silence in the committee. If we would observe that, thank you.

[A moment of silence was observed.]

Ms. BROWN. I yield back the balance of my time.

Mr. MICA. Thank the gentlelady. Thank her for her opening statement. And let me just say, too, that I had received at the end of the last week the draft of the staff report, and the draft did say “monopoly.” I share the gentlelady’s concern, and I have read that title. This is the draft report, and I felt the same way. And the complete report does not cite “monopoly.” The gentlelady is correct, and the correction was made in what has been submitted today.

So that item is corrected, and I want to make certain the record reflects that. I did not have the actual final copy after my edits were made over the weekend.

I will say, too, that I said in my opening statement that I would welcome the Minority to add to this report. And normally we leave the record open for 10 days, or something like that. But I would be glad to leave it open for 30 days for the Minority to submit the—a Minority section to the report.

Ms. BROWN. A question for the chairman. Mr. Chairman, I understand, and we appreciate you extending the 30 days. But is there any reason why we could not have had the information prior to? Because you are releasing this information to the public as if it is 100 percent correct, or there is no Minority report. I mean it seems to me that this Committee on Transportation in the past used to work together. We used to have a bipartisan committee. We used to be the most bipartisan committee in this Congress. This does not exist any more.

Mr. MICA. Well, sorry the gentlelady has that feeling and perception. But again, I got the report, I believe, on Friday, edited—made my edits over the weekend. You have it today. And you are also welcome to fully participate in the hearing and also add any commentary that you like, as the Minority. And I will keep the record open for 30 days to allow that.

Let me now yield to the chairman of the rail subcommittee, the gentleman from Pennsylvania, Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman. I appreciate you holding this hearing today. And I welcome our witnesses. I see some of them are back again for a number of visits here, so I appreciate to hear from you today.

Also like to welcome some of my constituents that are here today, some of the hard-working guys that make Norfolk Southern keep—continue to run on time up in Altoona, Pennsylvania. So welcome to you fellows for making the trip down here today.

I also want to thank the gentlelady from Florida for taking that—or making that motion to have a moment of silence. Today is 9/11, and we certainly should be—every day should be, but especially today in our thoughts and our prayers, the people who perished at the World Trade Center, the Pentagon, and then, in my district, Shanksville, Pennsylvania, where those brave 40 people had the first counterattack on the war on terror. And they live in our memories forever.

I am pleased that the chairman has put forth his focus on these important issues. And I disagree with the gentlelady from Florida. This is one of the issues that we need to focus on: passenger rail service in this country, making it better, stronger, safer. And the only way we can do that is by examining what has gone on and what hasn’t gone on. And it is good, old-fashioned take-a-look, let’s

find out the things that work, let's find out the things that don't work, and let's change them. Let's make some changes for the positive.

The committee staff has completed this extensive investigation that Chairman Mica is releasing. It is looking at the competitive rail contracts over the past decade. And there are, as the chairman mentioned, 26 commuter rail systems around this country, over 450 million people ride on them. And out of those, as the chairman mentioned, 19 are—have contracted out some element of their services. And 11 commuter rail services have contracted out service in a competitive bid for operations contracts.

The past 10 years we have seen a significant increase in the level of competition between major private rail operators. And, as Chairman Mica has noted, Amtrak has been unsuccessful to secure a single commuter rail operation contract over the past 10 years. And with the rising demand for service, it is critically important for commuter rail agencies to continue to work to look for ways to improve service while reducing costs. And commuter rail agencies have saved \$107 million, or 11 percent—over 11 percent—by awarding such contracts.

I think it is important, also, to point out that some of my colleagues and some of the stakeholders in passenger rail and rail service in this country like to look to Europe and use them as an example of how there is no commuter rail service or passenger rail service that doesn't have Government involvement, which is true. But the Europeans today are at breakneck speed, moving fast and furiously, towards implementing competition in their system.

So, on the one hand, we look to Europe and say, "Well, look what the Europeans are doing." While, on the other hand, when they do something we don't agree with, then we disregard it. I think it is important, and I hope to, in the future, bring those folks over. Chairman Mica and I were—I forget where we were, but we were somewhere at a meeting with many of these European rail companies that are doing just that. And by 2014, I think the entire European Union has to have competitive bids going on within the passenger rail, because they see the benefits of competition.

State-supported routes, such as the keystone corridor in Pennsylvania, which is a sector of Amtrak's passenger rail service, has seen the greatest growth over the past two decades, up almost 50 percent in the past 4 or 5 years. These routes have carried 5 million passengers in fiscal year 1990. And in 2011, ridership is up to 14.7 million passengers.

Currently, 19 States contract with Amtrak for the operation of 27 State-supported routes. States and regional agencies pay most of their operating costs of services not covered by fare book revenues. But section 209 of the Passenger Rail Investment and Improvement Act requires Amtrak, in consultation with the FRA and each relevant State, to develop and implement a single, nationwide, standardized methodology for establishing and allocating the operating and capital costs—Amtrak and the States concerning the State-supported routes.

The methodology for allocating costs is scheduled to take effect in October 2013, meaning that States will be responsible for covering a majority of their costs, their State's cost—supported routes.

According to Amtrak, 16 States will see an increase in the amount of support they must provide. Totally, more than \$120 million. And this methodology was developed as a menu approach, such that States can better control costs by picking and choosing among Amtrak's services.

Upon implementation, we believe that the estimates are about—over \$90 million that they will be able to compete for in operational services in these State-supported routes. And potential savings could cover the \$120 million increase that these States will see in the coming months and years.

The competition for Intercity Passenger Rail in America Act outlined by this committee last year offered States greater control and authority over the passenger rail services, including incentives to competitively bid passenger rail services. And although this proposal has not moved forward, we believe that it is a good framework for us to use next year to move forward and try to improve.

And that's the bottom line: improve passenger rail in this country. Because I believe, with the—when you look at the population growth over the next 30 years in this country, we're going to go from about 300 million to 400 million people. And the congested corridors, the Northeast Corridor and others around this country, need to have passenger rail that is efficient, that is safe, and that helps us to reduce that congestion that's on our highways around this Nation.

So, with that, I am looking forward to the testimony today. And thank you, Mr. Chairman.

Mr. MICA. Thank the gentleman. Now recognize the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. Let me be clear that I agree with Ms. Brown and with my other colleagues on this side of the aisle. On this day, when we pause to mark the anniversary of the terrorist attacks on September 11, 2001, that forever changed our Nation, including its transportation industry, our hearing should be focused on assessing whether our transportation system networks are fully secure. In fact, the Coast Guard Subcommittee, upon which I sit, held a hearing this morning entitled, "Tenth Anniversary of the Maritime Transportation Security Act: Are We Safer?"

This hearing is focused specifically on examining the implementation of the maritime security legislation passed in the wake of 9/11 attacks in order to answer the question we should be asking here: Are we safer?

However, the hearings here in the full committee is not focused on any topic related to security in any mode. Instead, the Majority is continuing its senseless attack—and I do consider it an attack—on Amtrak. In this case, by claiming that Amtrak has a monopoly mentality in commuter rail operations. And I am glad you clarified that, Mr. Chairman.

This claim, of course, is unfounded, and seems particularly bizarre, given that Amtrak is engaged by contract with only a few of the more than 25 commuter rail systems in operation in the United States. For example, Amtrak operates only one of the three lines that comprise the MARC system in my district. The other two lines are operated by CSX. Yesterday, Amtrak issued a statement

indicating that its ridership is surging this year with 11 consecutive monthly ridership records.

In each month of the current fiscal year, Amtrak has posted the highest ridership total ever for that particular month, with the final month of September also expected to be a new record. In addition, July was the single best ridership month in the history of Amtrak. Further, from fiscal year 2002 to fiscal year 2011, Amtrak ridership increased 44 percent and set a new annual record—excuse me, set new annual records in 8 of those 9 years. Rather than celebrating this success and seek ways to build on it, to expand transportation options in this Nation, and to create jobs, the Republicans are seeking only to destroy Amtrak.

The platform adopted by the Republicans during their convention explicitly calls for the elimination of Amtrak, stating—and I quote—“It is long past time for the Federal Government to get out of way”—presuming they meant “get out of the way”—“and allow private ventures to provide passenger service to the Northeast Corridor. The same holds true with regard to high-speed and intercity rail across the country.” That is from the platform.

Unmoved by the Republicans’ ideological obsessions, the traveling public is clear. It supports Amtrak. And it has made Amtrak a vital part of our Nation’s transportation networks.

I note that in the days after 9/11, when the airlines could not operate, as Ms. Brown said, Amtrak did. And the system surged capacity to meet expanded demand after the terror attacks. Given that millions of Americans ride Amtrak, on today of all days our committee should be focused on examining whether the system is as safe as it can be.

Rather than seeking to derail Amtrak, we should also be focused on understanding the factors contributing to the success and identifying the steps that we can take to strengthen this critical system to make it more effective and more efficient. And with that, Mr. Chairman, I yield back.

Mr. MICA. Thank the gentleman. Mr. Duncan?

Mr. DUNCAN. Thank you very much, Mr. Chairman. Thank you for calling this hearing and continuing to exercise oversight over the operations of Amtrak. There is nobody on this side that has anything against Amtrak. We just are concerned about the megabillions, the many, many, many billions of losses that have been incurred by Amtrak over the years, and they continue at the rate of hundreds of millions, even to this day.

But this hearing touches in part—or at least coincides nicely—with a bill that Senator Thune and I have introduced called the Freedom from Government Competition Act, and it is an issue that I’ve been interested in for a number of years. In fact, we passed in an earlier Congress a very limited form of that bill. And we have that bill introduced again in this Congress because it is been, usually the number one concern, but always one of the top three concerns of all the White House Conferences on Small Business, competition from Government agencies that don’t pay taxes and receive huge subsidies.

In fact, at a White House Conference on Small Business in 1955, this statement was issued. It says, “The Federal Government will not start or carry on any commercial activity to provide a service

or product for its own use if such product or service can be procured from private enterprise through ordinary business channels.” And that problem has been raised by groups as diverse as hearing aid operators, alarm system operators, school bus operators. It is tough enough to survive in small business or even medium-sized business in this day and age against ordinary competition. But to have to compete with the Government agencies makes it even tougher.

And so, I appreciate your calling attention, Mr. Chairman, to all of the problems that Amtrak is having. Because if this agency is to continue, it certainly needs to do a much better job than it has done thus far. Thank you.

Mr. MICA. Thank the gentleman. Mr. DeFazio. And I don’t see any other requests for speakers. Do we have some—Mr. DeFazio—because we will—OK, we will go—if other Members want to go ahead and go over to the Capitol, the—

Mr. DEFAZIO. Very quickly, Mr. Chairman, so we can—

Mr. MICA. Well, you will get your full time.

Mr. DEFAZIO. Oh.

Mr. MICA. If other Members want to go, you may want to proceed to the Capitol for the memorial service. But we’re going to—I’m going to stay, and then scoot over.

Mr. DeFazio, you are recognized.

Mr. DEFAZIO. Thank you, Mr. Chairman. Obviously, it is a somber day. And you and I worked on aviation security issues, in particular, or transportation security issues at great length after the tragedy of 9/11. And you know, it is a somber day to be here.

I do share the views some have expressed on this side that perhaps today would have been more appropriate to focus on transportation security in general, because I believe it is a task that is yet undone in America. We are still vulnerable in many ways, even in the areas where we have made the greatest investment, which is aviation. But that is not to be.

So, to the issue at hand, it is 1 day before another incredibly somber anniversary, a bit more recent, which was the horrendous rail crash in California at Chatsworth. And 25 people died. One of the entities here, the one particularly in regards to litigation, Veolia, was the responsible operator. And as I believe was determined ultimately, their engineer was very engaged in texting at the time. And that’s why 25 people died. And, as I understand it, subsequently they were removed as the operator.

And now there are questions being raised whether we should have—you know, Amtrak is required to carry what I think probably in this day and age is inadequate liability insurance, which is \$200 million for a crash. It was exceeded in the case of Chatsworth. And so I find it incredible that anybody would be recommending that we not have more robust caps for liability, whether it is Amtrak or a private provider or a State provider on rail service. So that’s one issue.

The other is, as was pointed out by Ms. Brown, it would be ironic to say that we should have loser pays on these contract disputes. I mean I actually am intrigued by the loser pays concept in certain areas of law. But in this case, since most of the decision, with the

exception of damages, was in favor of Amtrak, I guess Veolia would have had to pay. So I don't see how that follows, exactly.

And finally, you know, these contract disputes, I—you know, if we're going to say that a public entity can't dispute egregious conduct or improper conduct in competitive bidding process, then maybe we should just say that nobody can litigate in these issues. And so someone cheated to get a contract? Hey, they cheated and got it fair and square; it is their contract. Let's save the money on litigation and let them go ahead and—with the contract.

So I would find it really odd to tie the hands of one entity who might provide competitive bids, while others are free to litigate and, in fact, do frequently litigate the award of Government contracts between private operators across a multitude of Government contracts.

And I make one further observation. I am not as versed in all of what underlays the economics of the operation of these lines. But my understanding, having spent some time on rail issues, and in Europe, is that there is no entity which is responsible for both the rail, the rail bed, the crossings, and the operating who makes—it was private, and makes money. You know, in the case that's widely touted in Britain, I met with those people too, it is a very impressive operation. But the Government was responsible for the rail and the rail bed and the rail crossings. They operated the trains. And I further understand that, you know, that contract is lapsing at this point, or being rescinded.

So, you know, to say that, you know, we can do these things without any sort of public subsidies, in the case of all these private contracts on all these commuter rails, there is a public subsidy. And, you know, that's the question we have to decide here. Do we want to provide more efficient, safer rail service across America? Do we want to compete with the rest of the world in rail, or do we want to be the only great Nation on earth without adequate rail service? And that is what we should be focusing on, not these minutia that don't make much sense. Thank you, Mr. Chairman.

Mr. MICA. I thank the Members. What we're going to do is recess now until 11:30. And then we—I thought we might get to you all first, but we will start with hearing your opening testimony.

The committee stands in recess until 11:30.

[Recess.]

Mr. MICA. Call the committee back to order, and welcome everyone back. It is fitting on this day that we do take a few minutes and reflect on those that were lost on September 11th, and the service did just that on the steps of the Capitol.

I can't help but remember—and was reminded—standing next to Roger Wicker the now-Senator from Mississippi, that he and I, with several other Members in the Pentagon the morning of September 11th with Secretary Rumsfeld for a breakfast, and actually were there as the planes hit the World Trade Center. And I remember that morning with Secretary Rumsfeld leaving. I got delayed getting the information from staff about the planes hitting the World Trade Center, as the new chairman of the aviation subcommittee, and, actually, I think I informed Secretary Rumsfeld.

As the first plane hit, we were standing at the end of the breakfast conference table where we had met the previous hour, and

then the second plane—Sharon Pinkerton, our staff director, had advised me. I remember arguing with her that a second plane could not hit the World Trade Center, because it was impossible. That's why we had set up the air traffic control system. A plane had hit, I guess, the Empire State Building, and they put that in place.

But on—the irony of that is the committee went up about a month before to New York City and at the request of Neil Levin, who was the New York Port Authority director overseeing the airports. Bill DeCota was the airport director. And in August we went up to look at the congestion at JFK Laguardia and Newark. And Neil took me to all three airports and then on the Monday after spending time at each airport, we met and had an Aviation Subcommittee hearing in the World Trade Center. I think it was on the 60-something floor about a month before 9/11.

And after the hearing, Neil had invited the Members of Congress to the Windows on the World. They had a little conference dining room that was next to the restaurant that they—actually, the New York Port Authority owned the World Trade Center and had developed it. Neil had told me the story of that.

Unfortunately, on September 11th, Neil Levin and everyone who helped us at the hearing were all at a meeting, a breakfast meeting, the morning of September 11th and all of them were killed, except for one individual, Bill DeCota, the airport director, who had gone to a conference in Montreal, survived, only to die several years later on an operating table on September 11th, the great irony in his life.

The plane that flew in the Pentagon—again, I left at about 9:20 to come back here to this building—and as I arrived I saw the smoke coming up. But on the plane was Barbara Olson, who worked for our committee across the hall, the Government Reform Committee. I remember seeing her at a reception not too long before that, and sort of saying goodbye to her there. But she was one of the passengers on the flight that crashed into Shanksville. Telephoned her husband, Ted Olson. Many of you may know him.

And then, Terry Lynch, who worked with me in the U.S. Senate, was an aid to Senator Shelby. He was in the Pentagon and actually killed that day. So can't help but remember those people today and every day and this day. So all of us have our memories. Now I've got Ms. Brown back, and maybe joined by some other Members.

So we will return to our regular order of business, and we'll hear from—we have Mr. Boardman, the Amtrak president; Joe Giulietti, who is Tri-Rail executive director; Chuck Harvey, deputy CEO, Peninsula Corridor Joint Powers Board; Mr. Ray Chambers, Association of Independent Passenger Rail Operators. And welcome back to Ed Wytkind, who is the president of the Transportation Trades Department for AFL-CIO.

So, most of you have been here or know the procedure. If you have anything you'd like submitted for the record, we'd be glad to do that.

Welcome, Mr. Boardman, you are recognized.

TESTIMONY OF JOSEPH H. BOARDMAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMTRAK; JOSEPH J. GIULIETTI, EXECUTIVE DIRECTOR, SOUTH FLORIDA REGIONAL TRANSPORTATION AUTHORITY; C.H. "CHUCK" HARVEY, DEPUTY CEO, OPERATIONS ADMINISTRATION, PENINSULA CORRIDOR JOINT POWERS BOARD—CALTRAIN; RAY B. CHAMBERS, EXECUTIVE DIRECTOR, ASSOCIATION OF INDEPENDENT PASSENGER RAIL OPERATORS (AIPRO); AND EDWARD WYTKIND, PRESIDENT, TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

Mr. BOARDMAN. Thank you, Mr. Chairman. Good morning, Ms. Brown.

Mr. MICA. Can you pull that up as close to you as possible?

Mr. BOARDMAN. Thank you. As you said, everybody has their story about 9/11. And 11 years ago, on a day just about like today, our Nation was attacked. And I was the commissioner of transportation for Governor George Pataki of New York.

One of my department offices was the North Tower of the World Trade Center. And while most of my employees were able to escape, without physical injuries at least, I lost three decent, hard-working public employees: See-Wong Shum, Charles A. Lesperance, and Ignatius Adanga.

During the aftermath I promised their families I would not forget them. So please join me one more time for a moment of silence for those three, and for all the families that lost loved ones that day.

[A moment of silence was observed.]

Mr. BOARDMAN. Thank you. At 1:00 eastern today, Amtrak will blow all its train whistles in memory of all the victims of 9/11. For each of our business lines—and commuters are one of them—our number one goal is safety. And in our strategic plan we state that we offer commuter partners, passengers, and employees safe and secure service wherever risks are minimized—where risks are minimized on every train and at every station every day.

Today we are conducting the 27th RAILS SAFE—Regional Alliance Including Local, State, and Federal Efforts is what RAILS SAFE stands for—in cooperation with hundreds of police throughout the Nation, and in close cooperation with TSA. We have conducted RAILS SAFE 26 times. And the last RAILS SAFE involved 260 law enforcement agencies across the Nation with 1,493 officers, 192 Amtrak stations, 271 commuter stations, 44 States, the District of Columbia, and Vancouver, Canada.

Amtrak is the leader in the use of vapor wake and explosive dog use throughout our system, and is being studied by the Federal agencies, local police, and even other railroads for the techniques we employ to keep our customers safe. Amtrak has a total police force of 492 officers and members with both special operations unit and K-9 teams.

We are proud of our relationship with the TSA, recently winning their highest rating of the gold standard under their base program, where they look at system security programs, identifying vulnerabilities that should be addressed. And the program is voluntary, but fits well in Amtrak's desire for safety and security for our customers.

Amtrak—and it is already been stated—really has a paltry 12 percent of the commuter market, in terms of value. Other private sector competitors have the remaining 88 percent. Mr. Chambers's members alone have greater than 50 percent of the market. And the Union Pacific Railroad, a freight railroad, has 17 percent of the market. Amtrak has no monopoly on commuter contract value, mentally or materially.

Amtrak was formed to rescue private railroads from the losing proposition of providing passenger service in 1971. System ridership growth of 44 percent since 2000. State corridor ridership is up 63 percent, nearly double since 1998. Our expectation is that in 2012 we will set another record, making nine records in the past 10 years.

Today, for every passenger who flies between New York and the District of Columbia, three take the train. We've cut our debt in half in the past 10 years, from nearly \$4 billion down now to \$1.6 billion. Systemwide, on-time performance is over 80 percent, up from 70 percent 4 years ago. Our cost recovery is the best of any passenger railroad or agency in the United States, at 85 percent.

Mr. Chairman, if you compare us to what you call us, a Soviet-style railroad, you would see that while we grew our ridership 37 percent between 2000 and 2010, the Russian railways fell 33 percent.

The Nixon administration's rescue of the passenger rail service in the United States is a success. I think Herzog, Keolis, First America, RATP Development, and Veolia Transportation are much more interested in the State corridor services that we provide than they are with the 12 percent of the commuter business that Amtrak has. And I think that's why we—they—may have wanted this hearing, as well.

To me, having the hearing for the commuter service really makes no sense. In 1997, Congress took away many of what are now considered State-supported trains. But at the time they were considered national network trains. And then, in 2008, Congress took the next step and required the States to become responsible for the nearly \$200 million of Federal subsidy provided to Amtrak for those State corridors.

Amtrak was required to work out the reimbursement levels from those States. And that will start in 2013. That task has been completed by Amtrak. And, in essence, it provides the opportunity for our competitors here today to engage in provision of State corridor service.

Now, the States always had the ability to use other operators, but it wasn't until Congress acted to strip away the State subsidies through the section 209 that the States had the incentive to compete their service. I do not believe that Congress needs to provide any additional advantages to Keolis, Veolia, RATP Development, Herzog, First America, or any other competitor to Amtrak than they already have. They have proven ability to compete with and secure business that Amtrak has operated.

Commuter service is different from the State corridor services, some of which operate for several hours. So the existing model of competition needs to do a few things such as protecting the public through proper and consistent levels of insurance and indemnity

provisions. I spelled those out to the committee in a February 26, 2010, letter. Ensuring that labor protections and retirement issues are secure. Safety certifications are complete for any operator of service. Ensuring that scheduling is coordinated on a national basis to provide the only remaining national intercity, coast-to-coast, border-to-border, public transportation system in the United States.

The interstate highway system would not work if it wasn't connected. Nor will a broken-up, uncoordinated puzzle of passenger rail services. I find it wrong that Amtrak, America's railroad, seems to be constantly berated by some Republican Members, while foreign-owned management companies are extolled for their experience. One of them is a subsidiary of the French national railroad, SNCF, France's railroad. I wonder how Amtrak would be received in France? Thank you.

Mr. MICA. I thank the witness.

And we will turn now to Mr. Joe Giulietti from Tri-Rail in south Florida.

Mr. GIULIETTI. Good morning, Chairman Mica and Ranking Member Brown, and members of the Transportation and Infrastructure Committee. My name is Joe Giulietti. I am appearing before you today on behalf of the South Florida Regional Transportation Authority, where I serve as the executive director, and oversee the Tri-Rail commuter railroad. I thank you for the opportunity to testify today, and to discuss issues relating to competitive contracting in the commuter rail industry. A copy of my full testimony has been submitted to the committee. I will summarize my testimony, and would be pleased to answer any questions you may have.

First, let me take a brief moment to tell you about my background and that of SFRTA. Then I plan to summarize our experience with competitive contracting on our system. I am in my 41st year in this industry, and have had a wide range of experience in both passenger and freight railroad operations. I started as a brakeman and have worked as a locomotive engineer, transportation manager, superintendent. I have worked for Penn Central, Amtrak, Conrail, Metro-North Commuter Railroad in New York, and now Tri-Rail. I have worked in New Haven, Boston, New York, New Jersey, Philadelphia, and Florida, and I have worked closely during my career with the Federal Railroad Administration and the Federal Transit Administration, as well as the National Transportation Safety Board.

As you may already know, Tri-Rail service commenced in 1989, following the purchase of the right-of-way by the State of Florida from CSX Railway. And Tri-Rail has been operated under agreement with private contractors since its inception.

Mr. Chairman, let me summarize several key points about contracted services and the issue for concern for systems such as Tri-Rail that rely on contracted services. One, competitive contracting for train operations and maintenance services has served us well since we commenced passenger service in 1989. Two, there is no need or justification for adding new certification and/or liability coverage requirements, as was proposed in Senate bill earlier this year. And, three, while we welcome Amtrak's participation in the commuter rail industry on a level playing field with other private

contractors, we fear that their recent lawsuit over whether one contractor can approach employees of another for submission in competitive procurement will chill the marketplace and only make the job of evaluating competing proposals more difficult.

Passenger safety is the number one priority on our Nation's commuter railroads. Contractors know they need to share this priority, or they can be replaced through the competitive process. SFRTA has used private contractors and their operations since inception. The first operation was UTDC, now a division of Bombardier. Subsequent contracts were awarded to Veolia, Herzog Transit Services. Current contract is awarded to Veolia for operations and Bombardier for maintenance. Splitting the contract encouraged more competitors to bid.

Amtrak was awarded our contract to dispatch the New River Bridge, and the SFRTA has had the great success with contracted services. And I believe it will work for the States, as well.

Under the proposed increase of liability coverage for commuter railroads, while Congress has not previously intervened in the State and local review of various contracting options offered by Amtrak and other private operators in the railroad industry, CEOs in the commuter rail industry were very concerned earlier this summer with provisions contained in the Senate Commerce Committee's rail title of S. 1813 during the consideration and development of MAP-21.

Major concerns include liability insurance is a significant cost item for commuter rail industries. Merely establishing new minimum coverage requirements for non-Amtrak commuter rail operations without explicitly clarifying the status of limitation of liability for such operations would not only fail to address the uncertainty, but would exacerbate current difficulties in negotiating necessary liability agreements and securing affordable insurance. And proposed 35601 would make liability difficulties worse than under the current law.

Amtrak recently sued Veolia in Federal court in Washington, DC, on the grounds that Veolia had, by including the names of Amtrak employees in its proposal, aided those employees in a breach of their fiduciary responsibility to their employer. And, as such, should pay damages in the amount of lost profits to Amtrak. Although no monetary damages were awarded, there are several major concerns raised.

In my opinion, this lawsuit will create significant challenges for agencies such as Tri-Rail. It will limit the ability to include potential employees in proposals in an already limited talent pool. And it will create a chill in the marketplace and lead to greater hesitancy by contractors and reduce competition.

Mr. Chairman, I have submitted my report, and I thank you for this opportunity.

Mr. MICA. Thank you. And we will make that part of the record.

Let me now introduce and recognize Chuck Harvey with Peninsula Corridor Joint Powers Board.

Mr. HARVEY. Thank you, Mr. Chairman and members of the committee. My remarks this morning will cover the recent procurement process followed by Caltrain to secure an operating contractor for our rail service.

To place this recent procurement into context, the Peninsula Corridor Joint Powers Board, known as Caltrain, assumed operation of the system in 1992, when it was acquired from the Southern Pacific Transportation Corporation. The Joint Power Board consists of three public partners from San Francisco, San Mateo, and Santa Clara Counties, who share the ownership of Caltrain, including the entire 50-mile right-of-way which runs from San Jose to San Francisco, all rolling stock stations, and an equipment maintenance facility. Since 1992, the system has grown significantly, with ridership recently surpassing 50,000 per day.

Amtrak was selected as Caltrain's operator in 1992, and was again selected in 2001, after a competitive solicitation. Caltrain's partnership with Amtrak over the past 20 years has contributed to the growth and success of the system. The decision to solicit competitive proposals for this contract was based on good procurement practice, the expiration of the current contract, and the presence of potential new proposers in the marketplace. The specific objectives of Caltrain included improving operating performance and customer service, realizing efficiencies, and ensuring the continuity and enhancement of a robust safety culture.

In order to achieve these objectives, Caltrain adopted a unique new compensation methodology that would have the effect of providing the contractors profit for performance in areas that were identified as important to Caltrain. This performance fee program provides for no minimum or no guarantee level of profit, and establishes amounts that will be paid for meeting and exceeding certain performance targets. In this manner, alignment with Caltrain's objectives would be ensured. This is in contrast to the guaranteed fixed fee that had been paid as part of previous contracts.

The procurement process took over 2 years to complete. The requirements for the new contract were identified, including scope of services, evaluation criteria, and other methodologies. The proposals were—the request for proposal was issued, which generated a great deal of interest among qualified firms.

Caltrain received proposals from five firms: Keolis; PCRS, a joint venture of Amtrak and Bombardier; PRS, a joint venture of RailAmerica and RATP Dev; TASI, a subsidiary of Herzog; and Veolia. A committee was formed for evaluating the proposals, which included more than 30 individuals from Caltrain and our partners, who offered expertise on all key technical areas, with a scoring team comprised of five senior team members.

In order to ensure that a fair and objective mechanism was used to evaluate the proposals, weighted criteria were established to score the proposals. Qualifications and experience of the firm and key personnel was worth up to 20 points, management operations and maintenance plans worth up to 55 points, and the cost proposal worth up to 25 points, for a total of 100.

After initial scoring of the proposals, Caltrain determined that four firms were in the competitive range and invited them for interviews. These interviews were rigorous, all-day sessions which were followed by committee representatives making site visits to rail properties to solicit feedback from each firm's—of each firm's performance.

The next step in the process was to request best and final offers from the firms. These final offers were evaluated and scored, and a consensus ranking was established. The highest ranked proposer was TASI, with the Amtrak joint venture ranked second. While the TASI cost proposal was not the lowest, it was a realistic proposal that provides cost efficiencies over the term of the contract. It was also 5 to 10 percent lower on an annualized basis than the second-ranked proposal from the Amtrak joint venture.

It is important to note that none of the firms participating in this process filed a formal protest of the award, as allowed in the process. And the contract was awarded to TASI.

The transition from Amtrak to TASI operation was complex, and took many months to complete. At the onset of this transition, it was important for Caltrain and TASI to work closely with organized labor to ensure their questions and concerns were addressed. Federal labor law required all existing employees be protected in various aspects of their jobs, requiring TASI to negotiate 11 different implementing agreements with the unions.

Approximately 90 percent of the existing workforce agreed to become TASI employees and continue to provide Caltrain service. A close collaboration with the regulatory agencies, including the Federal Railroad Administration, was also ensured that those charged with the safety oversight of Caltrain understood and supported our transition plan.

Finally, the close-out of the Amtrak contract and a nearly 20-year relationship has required a lot of due diligence. Amtrak has been fully cooperative during this process. TASI assumed operation of the Caltrain service on May 26, 2012, and the service is operating as expected.

Mr. Chairman, I have included for the committee an appendix to my testimony that provides many more details of the procurement process followed by Caltrain that I could not cover in the time allotted. I thank you for the opportunity to appear today, and I look forward to answering your questions.

Mr. MICA. Thank you for your testimony. And we will include the appendix to your testimony as part of the record, without objection.

Mr. Ray Chambers, and he is the executive director of the Association of Independent Passenger Rail Operators. Welcome. You are recognized. Pull that up real close, Ray.

Mr. CHAMBERS. OK. Thank you, Mr. Chairman, Ms. Brown, and members of the committee. I very much appreciate this invitation to testify on behalf of AIPRO today, which is one of the newer rail organizations in Washington, DC. We are an organization of five independent rail operators. We compete against each other and Amtrak to provide passenger rail operations under contract to commuter authorities.

AIPRO was established to actively encourage the expansion of passenger rail service in the United States. Our mission is to promote the public benefits of our current passenger rail system, while working with partners in the industry to increase passenger rail opportunities through a competitive marketplace wherever possible.

We believe that there should be a bipartisan, national commitment to establish a viable, intercity, and urban high-performance

passenger rail network in America over the coming decades. This network should be built on the existing framework of commuter and intercity passenger service, and it should be implemented through public-private partnerships and the competitive process, wherever possible.

An expanded passenger rail network in the United States made possible by additional quality operators offering competitive pricing and innovation will expand America's mobility options, will reduce urban congestion, and most importantly, will create jobs that would not otherwise be available.

Now, today, Amtrak maintains a de facto monopoly on intercity rail passenger service. However, as Ms. Brown and Mr. Boardman and many others have pointed out, there is vigorous competition in the commuter passenger arena. And that, of course, is the focus of this hearing. We believe the reason there is vigorous competition in the commuter arena is because it works. It works.

Another purpose of this testimony is to shoot down a myth that independent operators are not safe; that they're fly-by-night; that they're relatively small; that they're anti-union. Most don't want a patchwork of these kinds of operators running throughout the country. So this, then, leads to the feeling that, at least for intercity, Amtrak is the only realistic option as a provider of rail passenger service.

Well, the myth is patently not true, in terms of the reach and the breadth of the scope of these operators. Our members have a wide global reach. We've got vast American experience. We operate thousands of trains every year. We carry an excess of a billion passengers every year in the international marketplace.

In fact, some of our members—I think three or four of them are themselves the size or larger than Amtrak. In the United States, three of the AIPRO members are operating some 252,000 passenger trains per year, and are carrying 72 million people each year. In 2011, Amtrak claimed about 110,000 annual trains, I believe, about 30.2 million passengers. And, of course, Amtrak has been growing, as has passenger service, generally.

However, my point here in making these comparisons is not to "dis" Amtrak in any fashion. I've got a lot of respect for Joe Boardman and for Amtrak and for what they've tried to do under incredibly difficult circumstances, particularly with the charge of operating the long-distance trains. The point that I'm trying to make here is that competition works, that our members, our AIPRO members, and others out are a major competitive force today in American rail passenger operations.

Further, every AIPRO member works with the railroad operating unions. Coast to coast, our operations, from the MBTA in Massachusetts, to the Virginia Railway Express, to Caltrain, are fully unionized. We are not anti-union in any respect, and I think I can boast personally of some good relationships with some of the legislative representatives here that I've worked with over the years. We don't always agree. In fact, Ed and I have frequently disagreed. But we are not an anti-union group.

The commuter agencies around the country have increasingly turned to competition. Of the 25 commuter railroads reporting to the national database, 17 purchase transportation service under

contract. Some 11 have gone to competitive bid for operations. Several have gone to bid for maintenance. Amtrak has been involved in nine properties where there has been bidding in the last few years, and, as has been pointed out, has not succeeded in any of those.

It is clear a growing number of agencies in the commuter world recognize that competition provides the very best service at the lowest cost.

So now let's look to the future. What is this all about? Where are we going from here? Well, one, I hope we will preserve and protect the ability to provide competition and to move to competition. Frankly, a bill that came out of the Senate would have been harmful to competition. I thank the committee leadership here for resisting those provisions in the conference. We need to promote and preserve competition wherever possible.

Looking to the future, as far as our members are concerned, Mr. Boardman is correct. Our members are interested in expanding beyond commuter-style competition to intercity operations through whatever mechanisms are appropriate. We submit that this commuter model does point the way to States for introducing competition into our national intercity passenger rail network. As has already been pointed out, section 209 of PRIIA is going to require the States by the end of this next year to pay the full subsidy cost of all corridor passenger service, under 750 miles. I believe there are about 27 corridors in some 19 States that are going to see their cost greatly increased if they are going to preserve existing levels of service.

So, as PRIIA is reauthorized, I think a good reform is something we should work on together: management, organized labor, the freight railroads, the States. A good reform would be to incentivize the States, to apply the commuter model where possible, to intercity corridor service. And I can assure you that our members will be active participants in that process.

We look for a new vision and a bipartisan program. Thank you.

Mr. MICA. Thank you, Mr. Chambers. And now I'm pleased to recognize Mr. Ed Wytkind, who is the president of the Transportation Trades Department of the AFL-CIO.

Welcome back. You are recognized.

Mr. WYTKIND. Thank you, Mr. Chairman—glad to be back—and Ms. Brown and other members of the committee, for allowing transportation labor the chance to present our views on this important issue.

Let me first also join my colleagues in marking the moment of today, of September 11th, as a day when America was attacked and our transportation system faced challenges it never had faced before. And the members that we represent dealt with that day by performing quiet acts of heroism, helping to transport thousands of Americans left stranded.

It is—the irony is not lost on me, and I'm sure most others, that we're here on 9/11 discussing proposals that would, unfortunately, dismantle Amtrak on the very day when, 11 years ago, Amtrak workers, among other transportation workers, helped with emergency transportation operations to deal with the wake of the terrorist attacks.

This is the fourth time I've been before this committee in 18 months. And I am again here talking about privatization measures to dismantle or, at a minimum, weaken Amtrak. And we wish we were here discussing a number of other important challenges. I can't help but note that, as we're in a Presidential election year, that some of the proposals coming out of this committee remind me of the Mitt Romney view of the world, which is we dismantle Amtrak, which he would do by zeroing it out, we cost thousands of Amtrak workers their jobs, we subject Amtrak riders to chaos and uncertainty on the very corridor that he was Governor once, and tragically undermining the Railroad Retirement system.

I know the facts can be stubborn things, but let me offer a few about Amtrak and its performance. As we all know, ridership is soaring, on-time performance is the best ever, infrastructure upgrades are paying off, and long-term debt is clearly improving. But these facts can be a nuisance when there is another agenda here. We are puzzled by the odd rhetoric coming from the committee about Amtrak's role in the commuter business. We know that commuter rail authorities do turn to other entities other than Amtrak to perform those services. And it is a fact that, while we want to see Amtrak grow its commuter portfolio, that this is a competitive marketplace, as evidenced by the hearing today and the folks on this hearing panel.

But let's be clear. Fair, open, and balanced competition isn't what Mr. Chambers and his clients are looking for here. The motives here are really about going after Amtrak and, unfortunately, its employees. They have paraded all sorts of ideas on Capitol Hill designed to create a legal and regulatory framework that disadvantages Amtrak when it dares to compete in the marketplace. Imagine that. Failing that, they would like to see Amtrak exit from the business all together, so they can have it all for themselves.

Their aim is consistent with their broader agenda, which is to eliminate Amtrak and let private corporations—by the way, many of them foreign—to cherry pick those parts of the Amtrak system that can yield them the highest profits. I'm certain these corporate entities would love to seize every potentially lucrative business segment of Amtrak, and would love Congress to rig the laws to ensure their success, sort of like H.R. 7, when they basically said that private contractors—which, by the way, they claim can do it better than everybody else—would be held harmless by the taxpayer if they lost money.

What's obvious is that elements of the private sector wish to seize the growing passenger rail market, while avoiding basic rail and labor laws that cover Amtrak and its workforce. Under their vision for the future, collective bargaining would be undermined, Railroad Retirement coverage would be evaded, and other laws would be avoided entirely. We reject that vision for our members, and we're not going to apologize for their right to have good middle-class jobs with good benefits. And those are the kind of jobs that Members of Congress up here spend all day talking about they want to create.

The Association of Independent Passenger Rail Operators even opposed efforts in MAP-21, as Mr. Chambers said, to hold all pro-

viders of passenger rail service to reasonable and common standards.

So, what does that mean? Let's get it down to basic English. They're against having the financial fitness to prove that they're worthy of these contracts and able to operate safely. They're against demonstrating liability insurance coverage. No one is for that, except Mr. Chambers's clients. And in full compliance with safety and security requirements, which, by the way, every other railroad in America led by Amtrak has to do.

Meanwhile, they want to be leaders in the passenger rail business, but don't want to be covered by railroad laws like Railroad Retirement. It is no wonder that the freight railroads have been less than enthusiastic about dealing with a hodgepodge of operators who are not indemnified, like Amtrak is. And it really, to me, is a sort of a moment of time for this committee to ask a question. Do you really want the Federal Government to seize the private property rights of freight railroads on behalf of the private rail operators in this country that want to provide rail service? I hope the answer is no.

We support expansion of commuter rail. We support more money going to passenger and freight transportation needs in this country. But we oppose measures designed to disadvantage Amtrak and bar it from participating in any segment of the evolving business of rail transportation. I suspect the 30 million riders at Amtrak would love Congress to focus more on giving the company long-term financial stability so it can expand into other rail areas and provide better and faster service. Our future will be one focus on one thing, which is to promote more passenger rail service in America.

But we're not going to support an agenda which is clear. It is to get rid of Amtrak and enrich corporations with special treatment under our laws. And along the way we're going to harm way too many workers, including harming the Railroad Retirement. Thank you, and—for giving us this opportunity.

Mr. MICA. Thank you again for your testimony, and all of our witnesses. Pleased to have your input before the committee on this important issue. And we will have an opportunity for questions now. So I will recognize myself first for some questions.

I might turn to—well, Mr. Boardman, I think you had cited my comments calling Amtrak a Soviet-style train operation, which I commonly do, because it still relies too much on Government and not privatization. So I think that you're correct in that. However, your reference to Russia and their loss of passenger service, actually, in the one line that I recently had some familiarity with, recently they held a high-speed rail conference in—international—in Philadelphia. And around the table were all the nations: Spain and UK and Sweden and Germany.

At the end was—and everyone had their little name tag at the conference. I noticed that name tag. His name was Vladimir. So everyone was giving an update. And then we got to Vladimir, the Russian representative. And he described the private—that Russia has now engaged the private sector, and they are actually—put in service high-speed service between Leningrad and Moscow. So were you aware of that?

Mr. BOARDMAN. Yes.

Mr. MICA. Yes. So I'm hoping that we can get to a different model, and a model that does have the least amount of subsidization. Sometimes you do have to subsidize the service. And I have cited on several occasions at least one of the Virgin Rail routes which originally had 14 million passengers, it grew in a decade to 28 million passengers, increased the employment, also a very substantial private sector investment. And I think you're aware of Virgin Rail's success, at least on one of those routes. Is that correct, Mr. Boardman?

Mr. BOARDMAN. I see in some of the commercials he did a great job delivering newspapers, yes.

Mr. MICA. Well, again—

Mr. BOARDMAN. Yes, I did.

Mr. MICA. I mean that's just factual. It started out with a \$300 million a year subsidy 10 years ago. And it is paid dividends, and now paying approximately \$100 million a year, increasing employment for jobs on the new service, and also doubling the passenger count in a little over a decade. So there are examples. They are not all applicable.

Are you aware, too, that—Mr. Boardman—in 2015 that you will be able to compete in the European Union, any of those countries, for service?

Mr. BOARDMAN. Through what application?

Mr. MICA. Well, the European Union has—

Mr. BOARDMAN. I mean—

Mr. MICA [continuing]. Which is a little bit more socially oriented than the United States, but by 2015, any of the member States must allow open—

Mr. BOARDMAN. Oh, yes. But Amtrak? Do you think Amtrak can compete?

Mr. MICA. Well, I'm hoping not.

Mr. BOARDMAN. The committee would like us to do that?

Mr. MICA. I'm hoping not, but I just wanted to make you aware of the opportunity—

Mr. BOARDMAN. Yes.

Mr. MICA [continuing]. Since you—I think you closed with what about Amtrak competing in France, I think, was your commentary.

And it is quite interesting. In that same symposium for providing high-speed rail, I was quite surprised to learn—and I didn't know this, and I have family from Italy, but—and have been there almost every year since I was 20 years old, but Italy also has private sector competition to the existing rail line. Were you aware of that, Mr. Boardman?

Mr. BOARDMAN. I am aware of the fact that Europe is trying to propose competition—

Mr. MICA. No, but this is Italy. Italy.

Mr. BOARDMAN. No.

Mr. MICA. And actually, it is operational. And their plans to expand are dramatic and—

Mr. BOARDMAN. Are you recommending that Amtrak go to Italy and—

Mr. MICA. No, I'm not.

Mr. BOARDMAN. OK.

Mr. MICA. I Just—you brought up France and some—and competing—

Mr. BOARDMAN. I think that the French wouldn't like us to be there competing with them.

Mr. MICA. Well, again, the European Union has changed the rules. And I guarantee you, whether I'm here or not, Congress will change the rules and there will be—

Mr. BOARDMAN. I guarantee you whether you're—

Mr. MICA [continuing]. And there will be—

Mr. BOARDMAN [continuing]. If you're here or not, you wouldn't want Amtrak competing in Europe.

Mr. MICA. No, I'm not advocating that. In fact, I'm not advocating that they compete for commuter rail service.

Mr. BOARDMAN. I understand that.

Mr. MICA. And I would also like to get them out of providing any of the State-supported intercity passenger rail service. And I would like to get them back to their core mission.

And I think you were here, too, sir, when I opened my comments and I said if there wasn't an Amtrak you would create one to make certain that we had a national rail passenger service, quite contrary to some other comments that I heard that I am in some way opposed to providing that service. But what you do want—it was provided as economically, efficiently as possible. And I know that's your goal—at least I hope it is.

A couple of other questions were raised. And Mr. Wytkind talked about liability and possibly some advantage, either for the private sector. And I don't think that that is our goal. I think that we have got to be responsible, as far as liability for both Amtrak, as a provider, and also for the private sector. And they should have equal responsibility. Would you agree or disagree with—

Mr. WYTKIND. Well, first of all, what I referred to, I wasn't referring to your goal. I am hopeful that this committee wouldn't support reducing the liability protections that these private carriers carry.

Mr. MICA. Well, no one has advocated—

Mr. WYTKIND. It is their—

Mr. MICA [continuing]. That. In fact—

Mr. WYTKIND. It is their position that they should not be held to the same standard that Amtrak is. And that's why the freight railroads like to deal with Amtrak, because they're appropriately indemnified against liability.

Mr. MICA. Is that your position, Mr.—

Mr. WYTKIND. That's clearly the position I heard by Mr. Chambers.

Mr. MICA. Mr. Chambers?

Mr. CHAMBERS. Unless I am missing what you're saying, it is not our position. We believe—

Mr. WYTKIND. Just roll back the tape.

Mr. MICA. Well again, Mr. Chambers, would you respond?

Mr. CHAMBERS. Yes, we—

Mr. MICA. Is that your position?

Mr. CHAMBERS. There are some major issues out there in terms of can we introduce competition. And that's what this hearing is about. Can we introduce competition?

Mr. MICA. On the question of liability, though, which I was addressing to Mr. Wytkind, would you support, you know, what's good for the goose is good for the gander? Labor has advocated that position, I believe. And I advocate it.

Mr. CHAMBERS. Yes. We would support that.

Mr. MICA. OK. But I think we do need liability reform. And Mr. DeFazio has pointed out we do need adequate protection. The last incident we had, it wasn't adequate, and we should make certain that that's in place.

Also, this thing that somehow we advocate something that would diminish labor's role, first, I think is not accurate. I think if you could dramatically increase the number of routes and use of passenger service, whether it is transit, intercity, or long-distance, or actually high-speed rail, there would be countless opportunities for increasing employment. And all of those would be union memberships. Now, they may be different unions, granted, but I think there would be substantial opportunities.

What do you think, Mr. Chambers? I will throw you a softball.

Mr. CHAMBERS. Yes. The——

Mr. MICA. That's all you need to say.

Mr. CHAMBERS. OK.

Mr. WYTKIND. Could I—since I represent the labor movement, could I answer that question?

Mr. MICA. And we'll give you an opportunity.

Mr. WYTKIND. OK, thank you. That's sort of addition by subtraction, Mr. Chairman. When you just said you want to downsize Amtrak's role in very important business segments of that company, and yet we're supposed to see job growth at Amtrak, I don't think the math adds up.

Mr. MICA. Yes. Well, again, my position is, first of all, if you could provide it more efficiently and economically, which it is proven, at least in competition in the commuter rail arena, that Amtrak cannot compete.

Amtrak—also I would say, Mr. Boardman, those proposals aren't put together for free, are they? I mean there is cost involved——

Mr. BOARDMAN. Oh, yes, there is cost. But if I could respond to that——

Mr. MICA. But they are spending millions of dollars to compete and, in fact, not winning. So, first, we could save that money.

Mr. BOARDMAN. Well, I didn't say millions. But it is costly.

Mr. MICA. I say millions.

Mr. BOARDMAN. Yes.

Mr. MICA. From what we have done.

Mr. WYTKIND. But the whole premise is that you're trying to disarm the company. You're asking it to operate more like a business. And when it tries to compete, you don't want them to use a resource to compete.

Mr. MICA. But I think there are certain things——

Mr. WYTKIND. You can't have it both ways in this committee.

Mr. MICA. Well——

Mr. WYTKIND. It is one or the other.

Mr. MICA. Again, this isn't a discussion between two of the panelists; I will ask the questions. But what we have——

Mr. BOARDMAN. But I have to be——

Mr. MICA. Let me finish with him, then I will come back to you. He made a comment, again, saying that somehow we are looking at lessening the employment. I think you could dramatically increase the employment in Amtrak and you could also dramatically increase the private sector employment. Again, if the service can be provided at the most reasonable cost and maximize efficiencies, customer service—and it is been proven in countless cases where there has been privatization around the world, or even in our own competition, where Amtrak competes.

Mr. Boardman, on—well, and just let me say one thing about—one more thing for Mr. Wytkind. Was it 2008 when you all had the labor dispute with Amtrak over wages and benefits? Remember when we had the meeting with Mr. Oberstar?

Mr. WYTKIND. Yes, I do remember.

Mr. MICA. It was 2008. But I would venture to say, too, that labor has had a difficult situation with Amtrak. In fact, I think those suits involved there had to go to the Presidential board and—to secure rights. And actually, I defended the position of labor in that instance for resolution, where the brothers and sisters who were in the freight rails have consistently been able to resolve their issues working with the private sector and also maintaining, what, 22,000 miles of track over which Amtrak—or 20,000 miles, I'm not sure of the exact figure—over which Amtrak runs its passenger service, and all being paid a union wage and getting substantial benefits.

Mr. Boardman, you had one other point that you made relating to cost recovery. Eighty-five percent?

Mr. BOARDMAN. Operating—yes.

Mr. MICA. Operating—

Mr. BOARDMAN. Operating cost.

Mr. MICA. OK. If you calculate in the total subsidy, \$1.4 billion, we come out to about \$49 per ticket cost, not counting how much money was given to Amtrak under stimulus. What was the total given?

Mr. BOARDMAN. I don't see the capital investment as a subsidy. I see the capital investment the same way I see the capital investment in highways, in airports, and in ports. It is about the growth of this economy. It is not a subsidy to Amtrak.

Mr. MICA. Well, the last—

Mr. BOARDMAN. That corridor, the Northeast—

Mr. MICA. Well, the last I checked, if you had given \$49 per ticket, per ride subsidy to any of those modes, you would totally bankrupt the United States of America.

Mr. BOARDMAN. We don't have a need for any operating subsidy above the rail on the Northeast Corridor. And the investment in that corridor, whether it is run by us or another private company—and we are a private company—

Mr. MICA. Well, again, I would differ. I think you're holding the Northeast Corridor hostage. I think we should have four or five times the passengers, two or three times the number of employees in that corridor. And we would also relieve the air traffic congestion not only for the Northeast Corridor, from which 70 percent of our chronically delayed flights emanate, but we would also be a

better steward of our environment, and we would also move a lot more people by rail than we are at this time.

And I hope that we can have at least the private sector competition we have seen in other parts of the world, whether it is Russia or Italy or Romania, in the United States of America.

With that I will yield now for questions to Ms. Brown.

Ms. BROWN. Thank you, Mr. Chairman. Thank you, Mr. Chairman. Can you hear me?

First of all, Mr. Boardman, thank you for coming. You look really good. You lost weight.

Mr. BOARDMAN. Thank you.

Ms. BROWN. And personally, I just want to acknowledge that your father passed away just a few days ago. And thank you for being here. And I—you know, the stakeholders in this room, we all from time to time have different agreements, but we are one family.

And I really have to say I'm—I keep saying it. I'm really disappointed with this committee. You know, we get in the weeds of how competition should operate. And I don't think that is the role of the United States Congress Transportation Committee.

We talk about—you know, one of the things that I've constantly have heard, don't confuse these Republicans with any facts. I mean it is no place for it in this room. I mean they think that they can say things over and over again, and that's the way it should be. Well, that's the way it is supposed to be. You don't want competition? My friends here, you don't want us to file lawsuits when someone does something wrong? Come on. This is America. And there are recourses when you don't behave a certain way.

Republicans are all about states' rights and the States are free to choose the operators, whether it is Amtrak or someone else. But I want to go back to 9/11, because to me that is the most—that is what we need to be talking about. When—first of all, what did Amtrak do after 9/11 to protect the public? And what are the additional securities have we put in place?

When we went and took out the Osama bin Laden compound in Pakistan, one of the things they indicated was that they were going to attack our rail system. What have we done, and has the Federal Government been the kind of partner you need in this process?

Mr. BOARDMAN. I think the short answer is the Federal Government has been a very good partner with TSA. Every once in a while we have to push back on TSA a little bit as they push forward, trying to get their job done, and we've done that. But Amtrak has become the leader, I think.

And what was so surprising to me in the same conference that the chairman talked about up in Philadelphia is that the Japanese railroads have been watching Amtrak's security. And their indication is that they believe they're using some of what we're doing as a model to—for the future, and think that we're really on the right track.

And that track, really, is in two areas that we really are looking at. One is, obviously, explosive and detection and protection. We are using relatively new technology with the dogs that we use, which are vapor wake, which is basically they—you can explain that by if you smell popcorn popping in a microwave, you're going

to be able to see where that popcorn went. And where you see us squeezing up a crowd and you see a dog there, they're looking for that vapor wake as the crowds go through, because you can't do it the same as they do in the airports.

The second thing is the active shooter situation, that we're training how do we get people out of the way quickly, and how do we deal with something that occurs. And is what's occurring really going to be a diversion, and there is something else going somewhere else? When I talked in my testimony about RAILS SAFE and about how we're working with all the local law enforcement agencies, and the numbers of officers that we will have out today, over 1,400 of them across the country, it is that relationship, that building of those community relationships, where people own their Amtrak station as a part of their community, that they are really interested in what is really happening there.

We see a real change. We have our own people within the Joint Terrorism Task Force are in there all the time. Communication has improved. We follow the lead a lot of Commissioner Kelly out of New York City, and what he has tried to do to improve the Northeast Corridor, where we think there is a greater vulnerability. We are a part of RAILPOL, which is a global European effort to identify early any kinds of difficulties across the world that we should be aware of and knowledgeable about. I get a briefing almost every day on what is going on in the world about Amtrak. And it is sometimes a secure briefing.

We have done our best to train our maintenance of way and other workers to look for and become part of see-something-say-something. Hopefully it is nothing, because we know a lot of times people don't want to be embarrassed and come forward and say that they see something and it turns out to be nothing. That is what we hope for, that it is nothing. And we are involved in many, many ways to improve and harden our infrastructure with cameras and fences and working with the freight railroads, as well.

Ms. BROWN. Has the Federal Government been a partner, as far as providing additional monies or grants for security?

Mr. BOARDMAN. Yes. We have a good working relationship with that. We know they are going to be under stress, which will put us under stress. We have grown, we think, fairly responsibly. Our dog team program, we have 57 teams of dog teams out there that, as an extra cost, almost 500 officers at Amtrak, which most other railroads don't have, but it was absolutely necessary to secure our customers, and that is what we have done.

Ms. BROWN. Thank you. And I have additional questions as we move on.

Mrs. SCHMIDT. [presiding.] Thank you. And no, I am not Chairman Mica, I am Congresswoman Schmidt. And I would like to ask you two questions, sir.

How do you explain Amtrak's failure to successfully win a single commuter rail operations competitive contract over the last 10 years, Mr. Boardman?

Mr. BOARDMAN. Actually, we have Metrolink, which we received about 3 years ago, after the Veolia accident. So we do have an additional commuter contract. But primarily because we have—

Mrs. SCHMIDT. Was it competitive?

Mr. BOARDMAN. No, it was because—

Mrs. SCHMIDT. The question was competitive contracts.

Mr. BOARDMAN. OK, I know. But the fact is that when people go through that competitive process, and then later they are really looking for somebody that has the experience and ability to bring back a safe environment, Amtrak is selected.

In terms of not being able to compete necessarily with—and we have an entirely new group of competitors—the Keolis folks were not in the environment until they came to compete on the VRE contract. They—RATP Development, which is part of this group, have not gotten a contract in this country. And I think the first one they proposed on was the Caltrain contract. Veolia, of course, has been around for a while. Under the circumstances of what we are dealing with, we were not chosen. But we were competitive. Even in the Caltrain project, we were the second identified proposer. And so we believe we were competitive. We believe we did a good job with that. We were not selected.

Mrs. SCHMIDT. Well, you know, sometimes second is good and sometimes it is not, sir. And I won't belabor this right now. But could you please provide the committee with a detailed—and I mean detailed—cost breakout for every commuter rail competition Amtrak has participated in over the last 10 years? So over the last 10 years, every contract, competitive contract that you participated in, I would like a detailed cost breakout. Could you provide that for us in a timely fashion?

Mr. BOARDMAN. Sure.

Mrs. SCHMIDT. Thank you. I would like to turn my attention to some other folks.

Mr. Giuliotti, in your opinion, despite the fact that Amtrak was not awarded any damages in its 5-year litigation with Veolia after losing a competition for the Tri-Rail commuter railroad operating contract, this lawsuit will have the effect of stifling competition in the passenger rail market. Why do you believe this court case will stifle future passenger rail competition?

Mr. GIULIOTTI. And my answer to that is that what has happened in the commuter rail industry—Tri-Rail was the first startup in 25 years of a commuter rail operation. It was an industry that has been in tremendous decline. So, as we have looked at the bids that have come forward, those bids have included the same personnel on multiple bidders coming forward.

If you take a look at this trial—and I participated in the trial—the basis was that Amtrak went after Veolia for using some of their personnel in the bid document. Now, I want to point out that the difference between the two costs—Amtrak came in at \$162 million over the 10 years of the contract, Veolia came in at \$97 million. But Amtrak took them to court for the fact that some of Amtrak's personnel were listed on the Veolia bid, two key personnel that were listed on the bid. And I may be corrected on that. It could be a couple more than two, but that's what we were focusing the trial on.

So, from a commuter rail standpoint, the fact that what came down as a decision on this was the fact that they did not want personnel listed from a company, that Amtrak's main argument here—and excuse me for simplifying—was basically that employees

should not be allowed to bid or enter into a bid against their own company. And that was the basis of the lawsuit. So, Amtrak was looking for the total loss of their profits and everything else, and not getting this contract.

If indeed this is held true and goes forward the way that it is right now, the only way the commuter agencies are going to be able to evaluate bids is that you won't be able to list the personnel that are going to be there, because you could be subject to a lawsuit, based on the fact that you have listed personnel from another company. That dampens the ability for an agency to be able to determine who the best qualified are going to be.

The other end of it is that ultimately, when there is cost to these lawsuits, whether it is on this or anything else, the public agencies that are putting these competitive contracts out, these bidders that are going to bid are going to have to build into their cost the cost of the lawsuits and defending the lawsuits. So that is why I say it puts a chill in, and it causes a dampening effect in the industry.

Mrs. SCHMIDT. And a followup for you, sir. Do you believe it is appropriate for Amtrak to bring a lawsuit of this nature, particularly given the corporation status as a federally funded subsidy?

Mr. GIULIETTI. You know, I have—understand I am doing this from a personal nature, OK? And from a personal nature I was very disappointed to see the lawsuit come forward because it, again, entered into where the agency had to get involved, OK, and there was a lot of expense associated with this.

I know that that has been the position of the private sector, is that Amtrak is able to use public funds to go and initiate these lawsuits. And I don't think it is appropriate for me to respond as to whether or not that is right or wrong, OK, but I will say this. The fact that this led to the decision that it did, and the fact that this has been common practice was very disappointing, and put us in a position that I ended up in a courtroom discussing this. And I do feel that that part was wrong.

Mrs. SCHMIDT. Thank you. Mr. DeFazio, do you have any questions, sir?

Mr. DEFAZIO. Yes, thank you, Madam Chair. You directed a question to Mr. Boardman regarding bids that were undertaken for commuter rail. And apparently—answered in the affirmative, provided that information.

Mr. Chambers, would your members be willing—is that information public for the private bidders?

Mr. CHAMBERS. I don't know.

Mr. DEFAZIO. Yes. I don't think it is. I mean, and I think we are talking about proprietary information normally in a contract bidding process.

Mr. CHAMBERS. We would not provide proprietary information.

Mr. DEFAZIO. Right.

Mr. CHAMBERS. Of that I am sure.

Mr. DEFAZIO. Right. And I would assume that Amtrak would not provide proprietary information, either.

Mr. BOARDMAN. We will only provide what we are allowed to provide.

Mr. DEFAZIO. OK. All right. I just wanted to get that—because I was a little puzzled by that, knowing a little about the contracting process.

To Mr. Giulietti, I am just a bit puzzled on two things. One is you were just addressing the issue of contesting contracts. If two private companies wanted to sue one another over a contract, over a bid, would that be OK?

Mr. GIULIETTI. Obviously, the answer is that it is OK, but it is extremely disappointing, and it has been a turn in the industry. No matter what we are putting out, whether it is—

Mr. DEFAZIO. Right. I mean the Federal Government—I mean I am trying to build a new VA clinic in my home town, and I now have—you know, we got litigation over that between private contractors. I mean at some point everybody gets frustrated by this. But I guess the question is why would we just tie one entity's hands and say Amtrak, you know, couldn't pursue court relief when anybody else could. I mean I agree with you that it gets very frustrating, so—

Mr. GIULIETTI. Should I respond?

Mr. DEFAZIO. Sure.

Mr. GIULIETTI. From the standpoint, again, all right, obviously, the court is the relief system for finding things that are egregious. But I would go back to what was the core here. And the core was that we put out a competitive bid. And I am very grateful that Amtrak bid. We only had two bidders on it. We had separated it out to ensure that there was going to be competition. The difference between the two bids was \$162 million and \$97 million over the 10 years, all right?

So there is a difference between what I would consider a true lawsuit because you are egregiously hurt, OK, versus a lawsuit to make a point. And in my opinion, this was a lawsuit to make a point, and that is why I have taken the position I have.

Mr. DEFAZIO. Well, I understand that. But a private company would have probably different recourse if some of their execs signed up for a competitor who was bidding against them; they would be instantly out of a job. And, unfortunately, I believe probably his people had some protection where they couldn't be instantly out of a job. So, one way or—yes, Mr. Boardman?

Mr. BOARDMAN. Well, you are exactly right. And I think that, yes, the point was made, and it is an important point to make. From 1988 to 1995 I was a chief operating officer of Progressive Transportation Services, which was purchased after I left it and joined the Pataki administration as commissioner of transportation. And my job there was to do exactly the kinds of things that we are talking about here. And I had 11 different contracts that I did proposals on. In not one of those cases did I take and approach and hire an employee of another company prior to me presenting the proposal or the bid.

And there was sometimes in the practice of buses—this involved buses—a practice of going and hiring the manager of the system prior to actually getting the bid. That was not something that I thought was ethical.

And so, for me, this is very important. I believe—and I try to put myself forward in regard to this—that employees are our most important and valuable assets.

Mr. DEFAZIO. Sure.

Mr. BOARDMAN. Whether it is VRE—

Mr. DEFAZIO. Right. I get it. No—but I'm going to run out of time.

Mr. BOARDMAN. OK, OK.

Mr. DEFAZIO. But anyway, I appreciate that.

Mr. BOARDMAN. Thank you.

Mr. DEFAZIO. Mr. Giulietti and Mr. Chambers, quickly. As I understand it, you objected to provisions in the Senate-passed bill. And I would just like to know, in particular, which provisions. I mean because one is financial capacity, operating experience. I assume you wouldn't object to that. Three was applicable safety security requirements. Wouldn't object to that. There was a part about the right-of-way, which would get somewhat technical, dealing with the railroads, obviously.

But number four seems to be the key, which is minimum liability coverage. And I guess I am concerned if that is the issue, since we have already had one commuter accident which exceeded what would be, you know, the \$200 million that Amtrak is required to carry. Are we carrying adequate liability, and is that the principal objection?

Mr. CHAMBERS. The principal objection to the Senate-passed rail title was the mechanism that it set up in the Surface Transportation Board, where the Surface Transportation Board would have the ability to essentially engage in as much regulation as they wanted to throughout the whole passenger industry, including commuter. On the specific—

Mr. DEFAZIO. Beyond these principles we are talking about here?

Mr. CHAMBERS. Beyond the principles—

Mr. DEFAZIO. OK. Well, then, the—OK. So that's not—

Mr. CHAMBERS. It was very broad. It was very dangerous, from our perspective—

Mr. DEFAZIO. All right. OK, all right. And Mr. Giulietti?

Mr. GIULIETTI. Yes. On the passenger commuter rail side, we have been wrestling constantly. For example, Tri-Rail, when it was formed, CSX made it a requirement, even though the State bought the corridor, that Tri-Rail had to carry a minimum of \$100 million worth of liability insurance. There is a lot of States in the commuter rail industry that the State feels that they handle that liability. CSX has used that numerous times—and, in fact, part of the whole Central Florida negotiation was that they wanted the Tri-Rail system to have to carry \$200 million worth of liability coverage now. And they have actually used Amtrak as an example, saying Amtrak is buying over \$500 million worth of insurance, so therefore we should be buying \$200 million worth of insurance.

The issue for the commuter rail properties is the cost of this insurance, and the fact that it can only be procured in overseas markets. Everything above \$75 million you have got to go over—and I am there with CSX and everybody else, trying to buy insurance coverages that are extremely expensive, and we can't afford the increase. And in several cases, even down in Florida—

Mr. DEFAZIO. But—OK. But if claims—I mean, you know, I got to tell you, \$75 million for a bad commuter train crash, where is the money over \$75 million going to come from?

Mr. GIULIETTI. Well, and that is—again, comes down to public policy. And that is why I was—I truly—my main objection was I felt that we really needed to talk this thing out. In other words, there were some rules coming out that we hadn't even had an opportunity to go—

Mr. DEFAZIO. Well maybe—I mean you would probably agree—and thank you, Madam Chair, for the indulgence—but maybe we ought to be—have to look at something like what we have done historically with flood insurance or something, where the Feds mandate and set up a pool or something, where people could get into a pool. Because I am just thinking these numbers are pretty low, given the current environment.

Mr. GIULIETTI. And, Congressman, that is exactly where the commuter rail industry was. And, in fact, I even joined in with the AAR so that we could talk with the freight railroads as well, and approach Congress about this. It is a very serious issue, and I agree with you.

Mr. DEFAZIO. I would like to hear about it anyway, sometime—

Mr. GIULIETTI. Sure.

Mr. DEFAZIO [continuing]. If you have the opportunity. Thank you.

Mrs. SCHMIDT. Thank you. I would like to go back to Mr. Boardman first.

Sir, I wasn't asking for everybody's competitive bid over the last 10 years. I was asking only for yours. And so there is no proprietary issue there. And isn't it true—

Mr. BOARDMAN. Well, I wouldn't want to give out—my competitors my information—

Mrs. SCHMIDT. Isn't it—excuse me. Isn't it true that Amtrak used an employee of Herzog in its bid for the Tri-Rail competition?

Mr. BOARDMAN. I don't know. I wasn't here.

Mrs. SCHMIDT. OK. Well, I would like to go to—

Mr. BOARDMAN. But we don't object to using—

Mrs. SCHMIDT. So—that is OK. I would like to now focus—

Mr. BOARDMAN [continuing]. Any of the other employees of any—

Mrs. SCHMIDT [continuing]. My attention to Mr. Harvey. Mr. Harvey, isn't it fair to say that because of existing labor protections in U.S. transit law, contracting out computer rail operations to a private operator does not have a negative impact on existing employees—

Ms. BROWN. Excuse me. Excuse me.

Mrs. SCHMIDT. Excuse me. I am sorry, I am asking Mr. Harvey—

Ms. BROWN. I know, but I—

Mrs. SCHMIDT. Ma'am, ma'am, I didn't interrupt—

Ms. BROWN. But you should give him the opportunity to answer the question.

Mrs. SCHMIDT. Ma'am, ma'am—

Ms. BROWN. No, ma'am. You should have given him the opportunity to answer the question.

Mrs. SCHMIDT. Mr. Harvey—

Ms. BROWN. Just as rude as you can be.

Mrs. SCHMIDT. I am asking you the question, sir. Isn't it fair to say that because of existing labor protections of U.S. transit law, contracting out commuter rail operations to a private operator does not have a negative impact on existing employees?

Mr. HARVEY. That depends on the operation. At Caltrain, we were signatories to a 13C agreement, and that was developed as a course of how Caltrain became a publicly owned railroad before it was operated by a private railroad. So it would depend on the 13C agreements that were signed. In our case, it did not have a negative impact. All the employees were protected, and their job classifications, their pays, and their benefits. But they still had to transition and negotiate implementing agreements with all of the unions to transition to a new operator. That was very complex.

Mrs. SCHMIDT. And I know that there was some carryover staff from Amtrak who are now employed by Transit America Services. What—about how many percent? I mean I have heard up to 90 percent. Is that a fair and accurate statement, sir?

Mr. HARVEY. Yes. The entire existing Caltrain team, for the most part, came over. There were a few operating engineers who decided to stay and drive Amtrak trains elsewhere. There were a couple of managers that went back in the Amtrak system. But over 90 percent of all the employees in all crafts decided to stay and operate the Caltrain service.

Mrs. SCHMIDT. OK, thank you. Mr. Chambers, in your testimony you spoke to the widely held opinion that Amtrak is the only realistic option as a provider of passenger rail service. Do you think there would be interest from the independent passenger rail operators in competing to participate in the operations of State-supported intercity passenger rail services?

Mr. CHAMBERS. Absolutely there would be interest.

Mrs. SCHMIDT. And Amtrak, sir, has asserted to us in a recent briefing that some independent operators do not carry sufficient liability coverage. What advantages and disadvantages do private rail operators have when competing with Amtrak for commuter rail service contracts?

Mr. CHAMBERS. I don't believe that the private operators, or these operators that I represent, have any particular advantage.

Now, admittedly, the whole arena of liability is a very complex area. And I do think that something—such as was being suggested by Mr. DeFazio—that we create some sort of a board or panel of stakeholders to really thrash through that area for both Amtrak and for the independent operators.

Mrs. SCHMIDT. Thank you. And Mr. Wytkind?

Mr. WYTKIND. Wytkind.

Mrs. SCHMIDT. Wytkind, sorry.

Mr. WYTKIND. Quite all right.

Mrs. SCHMIDT. In your testimony you mentioned your concerns with certain railroad labor related to status the Railroad Labor Act, Unemployment Insurance Act, the Federal Employees Liability Act, and the Railroad Retirement Act. Are you advocating that all commuter rail agencies and providers of services should be subject to those rail labor statutes?

Mr. WYTKIND. What I am advocating and that which Mr. Chambers does not admit in this hearing today is that the cost differentials that occur in the railroad industry, are often—they come out of the hides of employees who don't get Railroad Retirement from many of these employers. And so, this idea, it is preposterous that they would say that there isn't a cost structure difference between their members and Amtrak. When Amtrak participates in commuter rail and any other rail segment in our transportation system, they provide a pension system for their employees, who are our members. And we should not have to pay the price in so-called competition, that the competition be taken out of the hide of the employees. And that is exactly what their goal is.

Mrs. SCHMIDT. One followup for you, sir. Do each of those rail labor statutes increase costs for the provision of the service? And, if so, do you know, on average, about how much it elevates the cost of doing business?

Mr. WYTKIND. I couldn't give you—the employers that are involved in the rail industry could tell you what different things cost.

The statutes we are talking about—the Railway Labor Act is basically a bargaining statute that provides for the ability of employees and management to collectively bargain over wages, benefits, and working conditions. The Railroad Unemployment Insurance Act is a statutory provision that gives them unemployment benefits for seasonal employees and other employees.

The Railroad Retirement system is one of the premier pension systems in the country. And there are people in this room who are going to be beneficiaries of it, and perhaps are others in the room that are maybe already beneficiaries of it. And this committee's agenda, through the leadership of the chairman, Mr. Mica, their proposals would have a significant—to use the words of some of my colleagues on the panel—chilling effect on the ability of workers in the rail industry to expect to have retirement when they reach that age. Because if you take away Railroad Retirement, you have taken away their pension system.

Mrs. SCHMIDT. I will let Mr. Chambers follow, and then I will turn my questions over—

Mr. CHAMBERS. I believe that Mr. Wytkind has misrepresented my position, at least as far as I am concerned.

It is not the decision of my members or Amtrak or anybody as to whether a transit or a commuter rail passenger operation is under the Railway Labor Act, Railroad Retirement, or the traditional railroad laws, which, admittedly, are more—much more—expensive. As to that decision the law dictates. Within the law the authorities themselves make determinations as to the level of labor protection or labor arrangements.

We are not opposed to the Railway Labor Act or to the railroad laws, by any stretch of the imagination. And every one of my members has all of the unions on board on three different properties, operating under those laws. They are completely happy to be doing so. That is not our issue. And so I don't like to be mischaracterized, that we have some opposition to the railway labor laws. My dad was a locomotive engineer for his whole career and a BLE official. I grew up under that, and I love the railway labor laws.

Mrs. SCHMIDT. Thank you. Ms.—

Ms. NORTON. Mr. Giuliatti, I just want to make sure I understand for the record your position. Your position is that it is appropriate and ethical for one competitor to list the other's personnel in his bid for a contract. That is an appropriate practice, you believe.

Mr. GIULIETTI. I am going to tell you that that practice has gone on for the—almost the last 20 years—

Ms. NORTON. Do you believe it is—if there are—

Mr. GIULIETTI. Yes, I—

Ms. NORTON [continuing]. Two competitors, you are competing—I think in this case there were only two.

Mr. GIULIETTI. That is correct.

Ms. NORTON. To appropriate the names, through contract with them, of course, of your competitor's employees, unbeknownst to the competitor, in bidding against that competitor for a contract, whatever is happening—it also happens that people steal and rob banks for more than 20 years. My question is, is it ethical and is it appropriate?

Mr. GIULIETTI. And again, I am going to respond that, first off, all the public agencies sign on to the 13C agreements and everything else that protect the employees, as you have heard Caltrain talking about. The second—

Ms. NORTON. Is it ethical or is it appropriate?

Mr. GIULIETTI. I believe it is both ethical and appropriate, since there is such a limited pool of available candidates. The only way an agency can make its determination is to know who the candidates are that are being proposed. I think that for Amtrak and for anybody else to require their employees to tell them what they are doing is another discussion. But in terms of whether or not my name would show up on multiple contracts, that has been done in this industry, and continues—

Ms. NORTON. Because it has been done, it is appropriate.

Now, the fact that you would appropriate your competitor's employees in order to get a contract that he is competing for seems to imply that you do not have qualified personnel on board to, in fact, carry out this contract. Is that not a reasonable assumption?

Mr. GIULIETTI. I am going to say that is a reasonable assumption. But what you also need to hear is that 90 percent of the employees are going to move with the contract. So, as we have seen each one of these change, the employees that are working there continue to go to work for the next person that is coming in.

So, in effect, that is what is going on every single time in every one of these contracts, because there are laws to protect those employees' rights, so they are working with multiple contracts—

Ms. NORTON. I mean I am assuming these were management employees.

Mr. GIULIETTI. No.

Ms. NORTON. What level of employee—

Mr. GIULIETTI. Oh, no, no. You are talking about in the bid.

Ms. NORTON. Yes.

Mr. GIULIETTI. In the bid it is predominantly management employees—

Ms. NORTON. Well, all I can tell you is you must work in—

Mr. GIULIETTI [continuing]. That were listed, yes. No, I apologize, I misunderstood.

Ms. NORTON. You work in an altered universe of ethics, if you believe that these are ethical practices, or that somebody ought to sit by and take it, and just assume that since it is done in the industry, we ought to understand that, even though we don't—apparently under Mr. Boardman it has not been done—even though we don't do it, we ought to allow our competitors to do it at will.

Mr. Chambers, you indicate that—in your testimony I am looking—in your submitted testimony—that there are 27 corridors that will be, you say, nearly fully subsidized by 15 States. That is in intercity commuter operations.

Mr. CHAMBERS. Intercity passenger, yes. Under—

Ms. NORTON. Now, you would like to apply the commuter model—I am looking through your testimony—to intercity corridor surfaces. Are you saying that you believe there are 15 States that would be prepared to—and I am using your language here—“nearly fully subsidize intercity corridor services”?

Mr. CHAMBERS. Yes. I am saying there are 15 and maybe 19 States—I think that number was used—that are going to be required by a provision of PRIIA to fully subsidize intercity rail passenger service on all corridors under 750 miles. And what we are suggesting here is that if the States have the ability to put those corridors into competition, it would be a good idea.

Ms. NORTON. Mr. Boardman, what is your view of that?

Mr. BOARDMAN. Well, I think that certainly the door has been opened by the 2008 PRIIA legislation for the States to be looking at competition. They could do that now. But because there is the 209 requirement, where they have to reimburse at least a large portion of what the cost is back to Amtrak so that the Federal subsidy is reduced, there is a greater incentive at this point in time for something like that to occur.

I think what has been missed here—and he stayed quiet, and I can appreciate; I probably would at the same time—is Mr. Harvey, when he did his presentation, really identified the kinds of things that you have to look at. It is not just price. It was 25 percent price, it was 20 percent the management team, and it was 55 percent the plans and what would be done for the future.

I think what the States—we have good partnerships with the States, and we really provide a connection to the national network that would not exist unless somebody above this whole fray exerts the policy that that has to occur. And that is one critical piece, and I included it in my testimony.

We are not afraid to compete on a level playing field. We are just not. We can compete. But when it is not level—and often times we are accused of the ones that—of not keeping it level, and yet the chairman admitted in part that it often times is the laws that we have to follow that keep it from being not quite so level. That needs to be leveled out, not just for us, but for all, if there is going to be competition.

Ms. NORTON. Well, the point of this hearing seems to be that Amtrak should not compete at all.

And you say, indeed, in your testimony, looking at page two, that there are costs and there are benefits to competing for this com-

muter traffic. You say, unlike the private sector, you cannot cross-subsidize. Therefore, it costs you more to bid. But then you conclude, whatever the cost, private—profit margins have decreased significantly in recent years. Yet you say you want to continue to compete.

Mr. BOARDMAN. Well, we—

Ms. NORTON. For commuter traffic.

Mr. BOARDMAN. Good point. We believe, in our strategic plan, there are certain commuter operations that fit very well with Amtrak, and we should compete for, strategically. For example, the MARC Penn Line service would be exactly one, because it is on our tracks. Just like that is why the Union Pacific freight railroad and the BNSF freight railroad have one of the largest pieces of this, more than what Amtrak has, in the Chicago area. Right now, CSX has the other two lines going into Maryland, as Mr. Cummings pointed out. And you also have the—one other freight railroad—I can't think right this minute—that provides additional commuter services, as well.

So, there are those areas that we really could compete well with. There are other places that we are not. And I think Mr. Giulietti—I always pronounce it wrong; I am sorry Joe—also identified the fact that Amtrak has provided to many communities a competitive environment by actually bidding. As a request, many times, for us to bid, knowing that we might not be able to really compete to it, but understanding the necessity that they have to have that competition. And that is exactly what happened with Tri-Rail. You know, no good deed never ever goes unpunished in that process.

Mrs. SCHMIDT. Thank you. Ms. Brown, do you have any other questions before we wrap up?

Ms. BROWN. Yes, I do. Thank you. First of all, let me just say that I get very emotional when—I don't care who is chairing—that someone would ask the question, and we don't give them a opportunity to complete their statement.

I have a question for you, Mr. Boardman, because Mrs. Schmidt asked a question what would be the advantage to the competition to provide the information that she requested. If I could get that same information from Mr. Chambers for—on those same contracts. I mean I know that we are—what are we doing? Letting the competition know exactly what we are bidding? Is this public record? I mean what is—why would we want to do that?

Mr. BOARDMAN. Well—

Ms. BROWN. Because I can't trust that any information that you give this committee is a confidence of this committee.

Mr. BOARDMAN. I understand. Most of the time—and Mr. Harvey had on the back of his presentation the—basically, the cost structure of all the bidders. So, in that public environment, we certainly can provide that. If it was outside the public environment, we wouldn't provide it.

Ms. BROWN. OK. And the question that was asked about has my bid—Herzog bid on the Tri-Rail, they did not. The answer was no. I don't think you knew the answer.

Mr. BOARDMAN. The—I am sorry, I didn't quite catch that. What—

Ms. BROWN. The question was did Herzog bid on the Tri-Rail contract. And they did not.

Mr. BOARDMAN. They did not.

Ms. BROWN. They did not.

Mr. BOARDMAN. They did not. We don't have any objection to our employees being approached. We don't. It is not that. It is listing them in a contract without us knowing it.

Ms. BROWN. Well now, I am very familiar with Tri-Rail. I drove it, I rode it. I mean I was very instrumental in making sure that you all got the dedicated source of revenue. But I guess here I am just a little confused. Because if—let's just take it to—if one of my staffers decided that if I had opposition and that they would say, well, if, you know, you lose, we would go to work for you, I would fire them on the spot. And so I understand that you took them to court, and I would have. And I am glad you took it to court. I mean let's not be confused. You took it to court and you won.

But let me just ask Tri-Rail. What are some of the additional safety factors that you put in place because of the—your location and, you know, 9/11?

Mr. GIULIETTI. Oh, in terms of that, first off, again, we have a great relationship with TSA. We also have a great relationship with our partners on the corridor, which include CSX and Amtrak. And not only did we work together with this, but we also provide onboard security, armed security, on board our trains, which gets us among the highest ratings in terms of safety. It also enables us to reallocate our forces, as is necessary when we perceive that there might be some issues on the corridor.

The State has been a tremendous supporter on this, and we have also had the benefit of having three airports that connect with us. And TSA has actually brought personnel over to our stations and assisted with security testing. And long before it was even required, we went through emergency simulations, and continue to do that with all of our partners on the corridor.

Ms. BROWN. Did you figure out the fare box? Fare box? How to get that money?

Mr. GIULIETTI. The—are we doing the fare box? We are right in the middle—we have put the fare boxes in right now. We are working with our partners in Miami. We are trying to get the other two counties to come on board with us. But it has been through the tremendous support of Congress that we are able to be able to put those out there. Yes. Thank you again.

Ms. BROWN. One last question for Mr. Wytkind. Mr. Mica said contracts should go to the lowest cost bidder. What does that mean for the workers?

Mr. WYTKIND. Pretty simple stuff. We have a history in this country where privatization in any industry, particularly transportation, is used to undermine basic benefits and wages of workers. And if you are looking for the lowest cost, then you are talking about eliminating a legitimate pension system from railroads.

And Mr. Chambers's comments earlier are just not accurate. He has got members who do not pay into the Railroad Retirement system, including Tri-Rail, which does not. I am not going to get into the details about why they should, shouldn't, or whether they do,

it is a fact. There is a segment of the railroad industry that does not participate under the various railroad laws.

And it is the position of the association that Mr. Chambers represents to advocate for the so-called commuter model across the entire Amtrak system—which is code. This committee is famous for code. For workers, the code is you are not going to get a pension system because we are going to use the same model we are seeing elsewhere, and we are going to apply it more vastly to the entire Amtrak system. That is a loser for employees.

Ms. BROWN. Well, I want to thank you all for your service, and thank you for your coming here. And tell those Amtrak employees to keep it up, that they got a team that appreciates them, at least on the D side.

Mrs. SCHMIDT. I would like to——

[Applause.]

Mrs. SCHMIDT. I would like to go back to Mr. Boardman, because I think there has been some confusion on the question that I asked you originally. And what I really am trying to get at, sir, is how much it costs Amtrak to prepare all of those bids over the last 10 years.

So, what I would like you to provide for this committee is a detailed cost breakout of every commuter rail Amtrak participated in—competition Amtrak participated in over the last 10 years. And I think you should be able to come up with that.

I would like to thank each and every one of you for coming here today. In the era that we are in, where every dollar is precious, we have to learn how to make dollars work. And we also have to have a transportation system that is workable for this country. I am not against Amtrak, but I have seen some of the flaws in Amtrak, especially when it cost so much for a simple Coca Cola for Amtrak to provide. And with food costs going up in this country, the fact that we are losing so much with Amtrak on food cost is only going to get wider. There are other cost problems that are going to continue to occur with Amtrak. There may be other problems with private industries, as well.

And so, I think it is incumbent on all of us to find ways to use those precious dollars in a very wise and judicious manner. Thank you all. And this hearing is adjourned.

[Whereupon, at 1:10 p.m., the committee was adjourned.]

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September 11, 2012

The Honorable John Mica
 Chair
 Committee on Transportation and Infrastructure
 U.S. House of Representatives
 Washington, DC 20515

Dear Mr. Chairman:

I am deeply concerned about the direction, or lack thereof, of this Committee. This morning, the Full Committee held a hearing on Amtrak's commuter rail contracts. Meanwhile, the Subcommittee has not held a single hearing this entire year (since July 14, 2011). In fact, the Subcommittee has only had six hearings this entire Congress. Compare that with 13 hearings held in the 111th Congress, when I was Subcommittee Chair.

The fact is this morning's hearing should have been a hearing focused on September 11th and the security of our nation's transportation systems. We should have taken the time to reflect on the lives that were lost in those tragedies, to console the families of the victims, thank the first responders, and focus on what we can do as a nation to secure our mass transportation systems now and in the future.

Further, the Subcommittee should have held a hearing on rail security, pipeline security and/or hazardous material security. While I recognize that rail, pipeline and hazardous material security are primarily under the purview of the Committee on Homeland Security, it does not obviate this Committee's and this Congress' responsibility to ensure that our transportation systems and the people that utilize them are safe and secure.

Instead of evaluating recent warnings of Al Qaeda threats against U.S. rail and pipeline networks, we wasted valuable time with yet another hearing criticizing Amtrak while on this very day 11 years ago, it was Amtrak and its employees that worked around the clock to provide the only travel option available in many parts of this country. In fact, it was Amtrak that carried the U.S. Congress to New York to see the devastation.

What I am most concerned about leading up to this hearing, is your recent press statement of your "holy jihad" against Amtrak. It appears you meant "war" when you used this term, although that is not what it means. Western cultures and extremists often misuse the term. Regardless, it is insulting on this day of remembrance. It is insulting to me; it is insulting to

Amtrak and its employees; it is insulting Amtrak's riders, and I am sure it is insulting to many Muslims that live in the United States and throughout the world.

As Members of Congress, we have an obligation to conduct ourselves in a distinguishable manner. In fact, Rule XXIII of the House of Representatives requires all Members and employees of the House to behave at all times in a manner that reflects creditably on the House. Our actions not only reflect on the U.S. Congress, but the United States as a whole. Making such disparaging comments only reflects poorly on us and serves to further others' vision that we are not a tolerable nation. I strongly urge you to retract your comments and apologize to Amtrak and its hardworking employees and the Muslim community.

Sincerely,

A handwritten signature in black ink that reads "Corrine Brown". The signature is written in a cursive, flowing style.

Corrine Brown
Member of Congress

Cc: The Honorable John Boehner
The Honorable Nancy Pelosi
The Honorable Steny Hoyer
Democratic Members, House of Representatives

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Eddie Bernice Johnson
 Congress of the United States
 30th District, Texas

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Statement for the Record
 Congresswoman Eddie Bernice Johnson
 House Committee on Transportation & Infrastructure
 Tuesday, September 11, 2012
 Hearing on:

A Review of Amtrak Operations, Part II: The High Cost of Amtrak's Monopoly
 Mentality in Commuter Rail Operations

Mr. Chairman, I must confess that I when received notice of this hearing, I was perplexed by the focus. It is unclear to me what exactly the majority means by Amtrak's "Monopoly Mentality." Amtrak, with only six contracts of the twenty-nine commuter rail services in U.S., is hardly a monopoly. Further, it is my understanding that of the current requests for proposals issued by the states, Amtrak does not intend to bid on any. While this Committee, and the American people, could indeed benefit from review and testimony on federal rail policy, I am not sure this hearing is the best use of our time.

H.R. 7, which passed this committee without one Democratic Member's support, would have prohibited Amtrak from using federal funds to pursue any action in court. I am hard pressed to see the wisdom in this provision, as it would have a devastating impact on Amtrak's ability to pursue litigation or defend itself in a court of law.

Mr. Chairman, there are very few days in September that the Congress will be in session. I take my role of oversight very seriously, and it is my hope that we can use the time we have to pursue meaningful policy discussions and address the many problems with our country's transportation infrastructure.

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TESTIMONY

OF

JOSEPH H. BOARDMAN

PRESIDENT AND CHIEF EXECUTIVE OFFICER

AMTRAK

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BEFORE THE

HOUSE COMMITTEE ON TRANSPORTATION &

INFRASTRUCTURE

OVERSIGHT HEARING ON

“A REVIEW OF AMTRAK OPERATIONS PART 2:

THE HIGH COST OF AMTRAK’S

MONOPOLY MENTALITY IN COMMUTER RAIL

COMPETITIONS”

TUESDAY, SEPTEMBER 11, 2012

10:00 A.M.

2167 RAYBURN HOUSE OFFICE BUILDING

Mr. Chairman, Ranking member, and members of the Committee, good morning.

Amtrak has been involved in the commuter rail business since the early days of our company. When we acquired the Northeast Corridor in 1976, we became responsible for dispatching and maintaining the tracks used by hundreds of commuter trains each day, most of which were then operated by Conrail. In the Northeast Rail Services Act of 1981, Congress relieved Conrail of its obligation to provide commuter service and stated that Amtrak should be available to operate commuter trains for commuter authorities that chose not to provide their own operations. We began operating what is now MARC's Penn Line between Washington and Baltimore on January 1, 1983. During the 29 years we've operated that service, it has grown from 4 to 57 weekday trains. Amtrak has also operated a number of other commuter services. In some cases, we have since helped to inaugurate new services. In others, we became involved in commuter services as a contract carrier for agencies that needed to find a capable replacement for freight carriers who wished to exit the commuter business, or were dissatisfied with their current operator. Currently, we operate 3 commuter services: the MARC Penn Line in Maryland, the Shore Line East in Connecticut, and Metrolink in Los Angeles. We maintain equipment for the Sounder service in Seattle and we dispatch South Florida's Tri-Rail. We also provide access, dispatching, equipment maintenance and/or other services for Long Island Railroad, New Jersey Transit, Metra in Chicago, and Boston's MBTA, among others.

The American Public Transportation Association lists 26 commuter carriers in America. Of those, eight operate their own commuter rail services; the remainder contract with another carrier to provide them. The largest commuter carriers are typically run as integrated railroads,

maintaining and operating their own track and trains. Several of the next largest services are run by the railroads whose tracks they use – so Metra contracts with BNSF and UP to operate services on their routes. On a slightly smaller scale, Amtrak runs the MARC NEC service while CSX currently operates the MARC trains on their Camden and Brunswick Lines. Amtrak operates the CDOT Shore Line East trains that use our Northeast Corridor. The remainder of the agencies contract with independent carriers to run their services. Those carriers and the freights have the vast majority of the U.S. commuter rail business. Amtrak-operated services generate fewer than 6% of the nation's annual commuter passenger-miles.

From Amtrak's point of view, the contract commuter business has both costs and benefits. It can generate net revenue, which allows us to reduce our dependence on Federal operating support. Because we do not use Federal funds to cross-subsidize these agencies, our bids can be more expensive than those of private companies that may underbid to enter the market or to build a market for other services such as capital replacement. Whatever the cause, profit margins have decreased significantly in recent years.

Liability is also a major challenge. As you know, while Amtrak must maintain \$200 million in liability insurance, other commuter operators are not subject to this requirement. When we take on a service, we must ensure that we don't take on a liability obligation that could leave us vulnerable to a judgment or an award that could impact our financial viability. There are a lot of companies competing for the commuter business, and we are finding that agencies are increasingly asking them to take on much greater liability exposure in the event of an accident rather than having the agency purchase its own insurance to cover the risk. Amtrak cannot assume that risk. When responsibility for liability exposure is passed to a private commuter service operator that does not have adequate insurance, and can be constructed so that

it can escape an unaffordable liability judgment through bankruptcy, the risk is in effect transferred to the riding public. If Amtrak assumes that liability, then the costs generated by a single commuter operation are transferred to the federal taxpayer, an option we do not believe is in our best interest.

Over the past two years, we have lost two operations, VRE and Caltrain, and gained a third – Metrolink in Los Angeles, which asked us to take over its rail operations in the wake of the Chatsworth collision. Amtrak will remain in the commuter rail business, and we are taking some of the lessons learned from recent events into account. We will continue to work with agencies that are a “good fit” for both Amtrak and the agency. This is an exciting field right now, and there is plenty of competition and many opportunities for both carriers and agencies to find suitable partners. Amtrak will continue to look at the opportunities on a case-by-case basis, and we will be guided by the need to provide our partners with the support they’re looking for and our need to generate revenues that can be used to reduce Amtrak’s dependence on Federal operating support.

NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, NE, Washington, DC 20002



November 14, 2012

Mr. Sean McMaster
Oversight and Investigations Committee
for Transportation and Infrastructure
586 Ford House Office Building
Washington, DC 20515

Dear Mr. McMaster:

Per your request of October 15, 2012, enclosed are responses to questions for the record as a result of the September 11th Full T&I Committee Oversight hearing on the "High Cost of Amtrak's Monopoly Mentality In Commuter Rail Competitions."

Please let me know if you have additional questions or if I can be of further assistance to you.

Sincerely,

Patrick Edmond
Senior Director, Government Affairs

Enclosure

REPUBLICAN MEMBER QUESTIONS FOR THE RECORD
Full T&J Committee Oversight Hearing – High Cost of Amtrak’s Monopoly Mentality
In Commuter Rail Competitions
Tuesday, September 11, 2012, 10:00 a.m.

Questions for Joe Boardman, Amtrak

Question 1: How much did it cost Amtrak to submit a bid proposal for the Virginia Railway Express (VRE) commuter rail Request for Proposal?

Answer to Question 1:

Less than \$100,000.

Question 2: Can you please provide the Committee with a detailed cost breakout for every commuter rail competition Amtrak participated in for the past ten years?

Answer to Question 2:

I believe that further clarification should be requested. Specifically, is the Committee looking for a “detailed cost breakout” of the Amtrak costs to prepare the commuter bids for the past ten years, similar to question 1, or is it looking for further detailed information regarding the bids that we submitted over the last 10 years? As information, Amtrak supplied a detailed cost matrix to the Committee during the first round of questions on this topic that included a complete list of all competitions Amtrak had entered into for commuter passenger rail contracts, the number of bids in each competition, Amtrak's bid price and score, the result of the competition, and the winning proposals' bid price and score.

Question 3: In your testimony you mention that private companies underbid to win commuter business, can you please provide us with specific examples of where you believe there was underbidding?

Answer to Question 3:

The most notable recent example of what we believe to be underbidding came in the recent award of the VRE contract to Keolis. After contract award, the agency subsequently revised the contract with Keolis upwards by more than \$2 million, a considerable figure for a contract that was originally let for \$18.4 million. Some of the costs that were included were things that we would expect a bidder to cover in its initial proposal, and included:

- \$160,000 for crew layover facilities
- \$275,000 for additional training costs during mobilization. Keolis appears to have assumed that 70% of the Amtrak employees working in VRE service would elect to transition to VRE.
- \$325,000 for higher than anticipated liability premium costs in FY 2011 for the Keolis indemnification of VRE.

- \$325,000 for additional locomotive repair costs until the transition to the new fleet.
- \$500,000 of contingency funds for other equipment maintenance and/or capital needs, such as warranty work that will be reimbursed by the Gallery car manufacturer.

In this instance, we believe the operator offered a bid that did not capture all of the likely costs of mobilization or liability and insurance costs.

Question 4: Amtrak spent more than \$2.1 million in a failed legal attempt to sue Veolia and strip Veolia of its profits from the operation of the Florida Tri-Rail commuter service. Amtrak's lawsuit against Veolia forced the private operator to spend nearly \$3 million to defend itself from Amtrak's federally subsidized pockets. The jury denied Amtrak's plea for damages and the judge denied Amtrak's motion to take Veolia's profits from the contract.

- a) Can you please provide the Committee with detailed legal bills for Amtrak's use of outside counsel in its lawsuit against Veolia?

Answer: Amtrak will follow-up with the Committee at a later date.

- b) Please also provide for the record the names and time associated with each Amtrak employee directly involved with this lawsuit.

Answer: Amtrak will follow up with the Committee at a later date.

Question 5: According to various news reports following Amtrak's failed bid to operate the Virginia Railway Express (VRE), Amtrak interfered with the transition to the winning bidder so much so that VRE officials began exploring legal action that could be taken against Amtrak.

- a. Mr. Boardman, can you please outline the circumstances that led VRE to consider legal action against Amtrak?

Answer: I would recommend that you address this question to the VRE management.

- b. Were you personally aware of Amtrak's interference during the transition?

Answer:

VRE and Keolis may have felt that because Amtrak employees did not transfer over to Keolis, we were interfering. However, you must consider the transfer from the point of view of an Amtrak employee. By moving over to Keolis, an Amtrak employee would have:

1. Lost his zone seniority with Amtrak;
2. Lost his National Seniority which allows an employee to transfer anywhere in the country where Amtrak operates.

Lastly, I was unaware of any interference during the transition and I offer the following snapshot of our efforts to support Keolis as operator of the VRE service:

- On April 19, 2010, VRE contacted Amtrak and requested that Amtrak provide two (2) rules classes for Keolis employees. We responded on April 22 with dates for the two classes and provided 50 NORAC Rules books; Timetable Special Instructions; and the AMT-2 electrical book.
- On April 28, 2010, Amtrak allowed Keolis employees to use Amtrak's CBT system to access practice rules tests and subsequently provided 4 additional operating rules classes at the request of VRE.
- After each rules class was completed, Amtrak provided two (2) UTU Conductors to lead walk-arounds with the Keolis employees in an attempt to help them understand the physical characteristics of Washington Terminal.
- After the Keolis employees passed their physical characteristics, Amtrak provided Washington Terminal training trains as requested by VRE, during which Keolis crews operated the trains under Amtrak direction and were certified to operate in Washington Terminal.
- Although not required, Amtrak provided pilot crews as requested by VRE so VRE could operate training trains on the NS railroad from Manassas to AF tower.

In closing, I want to assure you each time a request for training was received, Amtrak provided immediate assistance in scheduling and providing the training that was required to support the transition of service and operations.

WITNESS QUESTIONS FOR THE RECORD
THE HONORABLE CORRINE BROWN TO MR. JOSEPH H. BOARDMAN, AMTRAK
HEARING ON
“A REVIEW OF AMTRAK OPERATIONS PART 2: THE HIGH COST OF AMTRAK’S MONOPOLY
MENTALITY IN COMMUTER RAIL COMPETITIONS”
SEPTEMBER 11, 2012

1. Section 8102 of H.R. 7 prohibits Amtrak from using any Federal funds for (A) Hiring or contracting with any outside legal professional for the purpose of filing, litigating, or otherwise pursuing any cause of action in a Federal or State court against a passenger rail service provider; and (B) Filing, litigating, or otherwise pursuing in any Federal or State court any cause of action against a passenger rail service provider arising from a competitive bid process in which Amtrak and the passenger rail service provider participated.

For purposes of the section, the term 'outside legal professional' means any individual, corporation, partnership, limited liability corporation, limited liability partnership, or other private entity in the business of providing legal services that is not employed on a full-time basis solely by Amtrak; and the term 'passenger rail service provider' means any company, partnership, or other public or private entity that operates passenger rail service or bids to operate passenger rail service in a competitive process.

I would like to understand how this provision originated since there seems to be no indication of Amtrak filing numerous lawsuits against passenger rail operators. In fact, on August 28, 2012, Amtrak sent a letter to Chairman Mica, in which Amtrak states: “Amtrak has only filed one lawsuit against a private commuter rail operator arising from a Request for Proposals for commuter services.” Who was the private commuter rail operator?

Answer to Question 1:

Veolia Transportation Services, Inc. and Veolia Transportation, Inc.

2. Please describe the legal action taken by Amtrak against Veolia and its purpose. In addition, please summarize the verdict in the lawsuit.

Answer to Question 2:

Background: In 2007, Amtrak filed suit in federal district court in Washington, DC, after learning that Veolia had engaged in tortious conduct involving a competitive bid for the South Florida Regional Transportation Authority Tri-Rail commuter rail contract. When Veolia was awarded the Tri-Rail contract, Amtrak learned that Veolia had induced three Amtrak employees to work secretly against Amtrak’s interests on behalf of Veolia by agreeing to be listed in Veolia’s bid while they continued to work as Amtrak employees. Veolia’s illegal actions caused the employees to breach their fiduciary obligation to Amtrak.

Subsequently, the jury held that:

- Employees of Amtrak did owe a fiduciary duty of loyalty to Amtrak
 - Employees breached that duty in aiding Veolia to defeat Amtrak for the Tri-Rail contract
 - Veolia induced employees to breach their fiduciary duty of loyalty to Amtrak
 - Veolia had knowledge that what it was doing was aiding and abetting employees to breach their Fiduciary duty to Amtrak
 - Veolia's conduct was not the cause of Amtrak's failure to obtain the contract
 - Absent causation, Veolia is not liable for damages.
3. Chairman Mica stated that "Amtrak stifles competition with frivolous litigation and also instances of interfering with the transition of commuter rail operations to private operations. They are using [federal dollars] to file suits against private contractors who, I think, the courts have found legitimately participated in the competition."
- a. Does Amtrak pursue frivolous litigation? **Answer:** No. Has anyone ever alleged in court a claim that Amtrak has pursued frivolous litigation? **Answer:** We have no record of any party ever claiming Amtrak filed a frivolous complaint or any other court filing, including the Veolia matter. Was the claim successful? **Answer:** Not applicable. See above.
 - b. Has Amtrak ever interfered with the transition of commuter rail operations to private operations? If so, please explain. **Answer:** No
4. If section 8102 of H.R. 7 was enacted, would Amtrak need to hire additional counsel internally? If so, how many additional personnel would be needed to handle the increased workload? What sort of budgetary impacts would this have on Amtrak, and would this be an efficient way to manage your legal office?

Answer to Question 4:

Amtrak would need to hire a substantial number of additional personnel and it is difficult to project how many more would be needed. Currently, a majority of Amtrak's legal work is done by its own staff of 30 in-house attorneys. They handle over 1400 matters, with more than 400 matters in active litigation. The primary focus is transactional and administrative matters as well as contracts with various vendors, freight railroads and its others railroad partners. A prohibition on outside counsel would mean that virtually all of Amtrak's litigation, which includes over 1,500 pending litigation matters, would require in-house staffing. The precise numbers of additional litigation attorneys and thus budgetary impact we have not calculated, but it would no doubt drive the budget for such matters up by at least several millions of dollars, which in turn would take funds away from important service and customer priorities. In my opinion, it would not be an efficient way to manage an office because it would force us to grow the number of attorneys and support personnel to manage and litigate cases.

This would be a truly unfortunate development, especially in light of the tight management of the Law Department budget and reductions in spending over the last few years. For Amtrak to be prohibited from engaging outside counsel and from bringing and defending claims of and against Amtrak by another railroad would in combination be devastating to Amtrak's bottom line and would run completely counter to the longtime Congressional mandate for Amtrak to run as any private American business.

5. What other impacts would the section 8102 of H.R. 7 have on Amtrak, including impacts relating to safety?

Answer to Question 5:

This proposal would have an immediate impact on the safety of Amtrak operations. If, for example, a train operated by another entity collided with an Amtrak train, that entity could avoid any liability for its wrongdoing and negligence by simply suing Amtrak.

6. Mr. Giuletti from Tri-Rail stated that Amtrak's lawsuit against Veolia "will create significant challenges for commuter rail agencies, chill the marketplace and lead to a great hesitancy by contractors to approach the very limited pool of railroad talent." What is your response to that?

Answer to Question 6:

That there is no basis for that conclusion. Indeed, the marketplace is made more competitive when all parties are held to the same standard, including compliance with the law.

7. You stated that Amtrak does not "have any objection to our employees being approached. It is listing them in a contract without us knowing it." Please explain this statement.

Answer to Question 7:

Amtrak has experienced and valuable staff, and like any other railroad with such a workforce, it understands and accepts that other railroads or operators may try to hire our staff, just as we may try to hire outstanding staff from other railroads. But this wholly acceptable process does not involve the offering railroad to ask Amtrak employees they are approaching to take an action in violation of Amtrak's interests. That is what happened in the Veolia case, and the federal court jury found that Veolia's conduct in so inducing Amtrak employees violated the law.

8. Chairman Mica stated that there is a \$49 per ticket subsidy to Amtrak. This figure only takes into account Amtrak's intercity rail passengers. It does not take into account commuter rail passengers or passengers that travel on Amtrak owned, operated and maintained infrastructure. Taking Amtrak's total ridership into account, is the \$49 figure accurate? If not, what is the subsidy?

Answer to Question 8:

FY11

Amtrak Riders	30.2
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Commuter Riders	231.1
Total Riders (in millions)	261.3
<hr/>	
Operating Subsidy per Rider	\$2.15
Operating & Capital Subsidy per Rider	\$4.63
Total Subsidy (incl. debt) per Rider	\$5.64

9. Chairman Shuster stated: "Amtrak has been unsuccessful to secure a single commuter rail operation contract over the past 10 years." Is that accurate? If not, why not?

Answer to Question 9:

It is not altogether accurate; while Amtrak has not been successful in its efforts to pursue several bundled service contracts, it is not simply the case that we have lost every bid. In some cases, such as the 2003 MBTA competition and 2009 MARC Camden and Brunswick Line competition, Amtrak elected to leave the process because of concerns over liability or profitability. In other cases, such as VRE and Caltrain, another provider was selected, although Amtrak did make it to the final phase of the competition. Amtrak has been awarded smaller contracts to provide selected services for commuter partners, such as the award of a long-term maintenance contract for Seattle's Sounder service, which opened in 2000.

In the wake of the 2008 Chatsworth collision, Metrolink approached Amtrak and asked our company to take over train operations for the commuter rail services in the Los Angeles Basin. We took over the operation of all Metrolink trains in the summer of 2010. While Amtrak has not been awarded a contract to operate a commuter rail service as a result of a competitive bid process, there have been various factors – in particular the challenge associated with liability – that have either led Amtrak to withdraw from bids or that have made us uncompetitive with other carriers.

10. The Association of Independent Passenger Rail Operators testified that States should be required to competitively bid State-supported routes. Are States currently able to choose their own passenger operator?

Answer to Question 10:

States are free to choose any entity to operate state-supported intercity trains, although Amtrak's statutory right of access to host railroad lines and facilities would not apply to trains operated by entities other than Amtrak. States can also contract with entities other than Amtrak to provide many of the services required in connection with Amtrak-operated state-supported trains. While a small number of states have contracted with third parties to provide services such as on-board food service, telephone information, local marketing and maintenance of state-owned equipment, the vast majority of states have chosen to have Amtrak provide all of the services required for their trains. We believe that this is due to Amtrak's 41 years of experience in providing intercity passenger rail services, the

quality of our work force and the efficiencies and economies of scale associated with utilizing Amtrak-provided services.

11. Amtrak is a member of the Association of American Railroads. Please describe the freight railroads' position on requiring the Department of Transportation, States and/or Amtrak to competitively bid passenger rail services on freight rail-owned infrastructure?

Answer to Question 11:

For the freight industry's position on Amtrak restructuring, we would recommend that you refer to a background paper on Amtrak restructuring published by the Association of American Railroads (AAR) in 2008. This document states the industry's position on Amtrak restructuring in very clear terms:

"Safety requirements and the integrated nature of railroading necessitate that intercity passenger rail be provided by one entity — Amtrak. Further, Amtrak's right of access, preferential access rates, and operating priority should not be transferred or franchised."

Enclosed is the PDF of the AAR paper for attachment.

12. You mentioned insurance in your testimony. Do you think the higher level of insurance coverage that is required of Amtrak puts you at a disadvantage over other providers who do not have this requirement?

Answer to Question 12:

I do not just think this puts Amtrak at a competitive disadvantage — I think it puts the traveling public at a greater risk.

Over the past decade, we have noticed that commuter agencies are increasingly asking their contract carriers to take on a large liability load. At the same time, some of those carriers have adopted a strategy of creating small limited liability corporations that provide a hedge for the parent company. Most commuter operations are low-margin businesses. There are no Federally-mandated insurance requirements for commuter carriers, and it is conceivable that a situation could arise where such a carrier's liability would exceed the ability to pay. In such a case, particularly if the carrier elected to declare bankruptcy, injured passengers might not be able to receive the damages that they were due. Amtrak does carry insurance, but when we take on a commuter contract, we believe that the liability lies with the agency that runs the service, as it is the agency that sets the performance standards, owns the rolling stock, station and maintenance facilities used for the service, and sometimes the agency even owns the infrastructure used for the service. As a matter of policy, Amtrak does not generally take on operating contracts for agencies that ask the carrier to assume liability for the operation, because such an arrangement could potentially result in a situation where Amtrak's costs exceed the revenues, which would make such a service a net drain, rather than a profit source. In such a situation, the costs of operating that commuter service would effectively be passed on to the Federal taxpayer.

Association of American Railroads' Principles Regarding Amtrak Restructuring

ASSOCIATION OF AMERICAN RAILROADS

FEBRUARY 2008

Our nation's intercity rail passenger system depends heavily on subsidies from freight railroads that must provide Amtrak priority access to their infrastructure at non-compensatory rates. Future rail passenger service in the United States should be guided by public policy that recognizes the extreme capital intensity of railroading and ensures that these investment needs can be met. Policies which add to freight railroads' already enormous investment burden, such as saddling them with support of rail passenger infrastructure needs, will severely undercut our nation's freight rail capabilities and be counterproductive in addressing our country's congestion, environmental, safety, and economic concerns.

1. Intercity passenger rail service requires ongoing public support.

Intercity passenger rail service on a broad scale simply is not profitable in this or any other country and cannot exist without significant government subsidization. The route structure of Amtrak is best determined by public policy decision makers. Freight carriers believe that corridors should be chosen as much as possible on potential ridership and other accepted economic factors.

2. Freight railroads should receive full compensation for the use of their assets by intercity passenger operators.

For the past 30 years, freight railroads have heavily subsidized Amtrak by virtue of Amtrak's statutory right of priority access to freight railroads' tracks at incremental cost. An incremental cost basis does not come close to reflecting the full market value of Amtrak's access to the owning railroad's tracks because it does not cover the full operating, capital, and other costs freight railroads incur in hosting Amtrak trains.

3. Freight railroads should not be expected to further subsidize intercity passenger rail service.

If policymakers determine that intercity passenger service provides essential public benefits — and freight railroads believe it does — then the costs of the passenger service should be borne by the public, not by the private sector freight railroads.

4. Safety requirements and the integrated nature of railroading necessitate that intercity passenger rail be provided by one entity — Amtrak. Further, Amtrak's right of access, preferential access rates, and operating priority should not be transferred or franchised.

The terms and conditions by which Amtrak uses freight-owned tracks were originally negotiated more than 30 years ago, under circumstances vastly different from today, when the railroads were forced to operate passenger trains at significant losses. Moreover, freight railroads would consider conveying mandatory access to non-Amtrak passenger operators a taking of private property which requires just and reasonable compensation under the Constitution.

5. **Amtrak's present obligations, notably those under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, must not be shifted to the freight rail industry.**

Railroad Retirement is a government-mandated pension plan funded by payroll taxes on railroad employers and employees. Like Social Security, Railroad Retirement is a pooled, pay-as-you-go system in which all participating entities contribute at the same statutory rates based on the current number of active workers employed. Amtrak should not be relieved of its retirement obligations, nor should the obligation be shifted to the freight railroads.

6. **Future high-speed (90 miles per hour and above) rail passenger corridors should be sealed and, where feasible, passenger trains should operate over tracks separate from those maintained for freight operations.**

When passenger trains operate over freight tracks, the passenger railroad must negotiate an arms-length, written agreement with the owning railroad to cover the terms of use of the freight corridor, including compensation for such use, liability and indemnification, and assurances of the adequacy of infrastructure capacity to accommodate both existing and future freight and passenger operations. Further, Amtrak's statutory right of access should be eliminated for high-speed rail operations.

TESTIMONY OF

JOSEPH J. GIULIETTI, EXECUTIVE DIRECTOR

**SOUTH FLORIDA REGIONAL TRANSPORTATION
AUTHORITY**

BEFORE THE

**HOUSE COMMITTEE ON TRANSPORTATION AND
INFRASTRUCTURE**

**ON “Competitive Contracting in Commuter Rail
Operations”**

September 11, 2012

INTRODUCTION

Chairman Mica, Ranking Member Rahall and members of the House Committee on Transportation and Infrastructure, I thank you for the opportunity to testify today to discuss the important issue of competitive contracting in commuter rail operations and our experience at the South Florida Regional Transportation Authority or SFRTA over the past 26 years.

First let me emphasize that passenger safety is the number one priority on all our nation's commuter railroads and it is my opinion that competitive contracting of commuter rail services has not in any way diminished the safe provision of services by Tri-Rail, SFRTA's commuter rail service. In fact, it enhances safety. Each contract operator knows that if it doesn't keep safety its number one priority, it can be replaced. As the Executive Director of Tri-Rail, I can assure the committee that we intend to continue to employ contracted operators and we are confident that we can fulfill our number one commitment to our passengers - that every day we offer the highest degree of safety in the provision of our services. I know the Committee has many questions about SFRTA's experience with contracted commuter rail services in South Florida and I will try to address the key points that I believe will offer the Committee the most valuable information. I will also be happy to provide additional information beyond my written and oral testimony.

I also want to emphasize that while the Congress has not previously intervened in the state and local review of various contracting options offered by Amtrak and other private operators in the railroad industry, I along with my fellow CEOs in the Commuter Rail industry were very concerned earlier this summer with provisions contained in the Senate Commerce Committee's Rail Title of S. 1813 during the consideration and development of MAP-21. These provisions would have required contract operators to carry liability insurance coverages and obtain federal certification for operating in the US. I along with my fellow CEOs in the commuter rail industry were very concerned when these provisions were proposed. These requirements would have represented major obstacles to the limited number of enterprises offering contracted commuter rail services and would provide no recognizable additional benefits. In fact, I believe that these provisions, if passed, would have added only significant new costs to commuter rail agencies such as Tri-Rail, making the service we offer less attractive to our customers and possibly have negatively impacted competition for these services.

If there is a bottom line message in my testimony today, it is that the process for selecting and overseeing contracted operations and maintenance services for commuter rail services employed by commuter rail agencies such as Tri-Rail has become a very sophisticated and rigorous process that assures only qualified entities are able to compete for these services. And further, I am totally confident that contracted operators can and do meet the rigorous safety standards for operations set by the industry and enforced by the Federal Railroad Administration.

Additionally, it is important that Congress fully examine the impacts of any action that places additional restrictions on who can participate in the process, such as the introduction of any

certification requirements for contract operators, or the requirement for contract operators to obtain liability insurance coverage, or increase the limits for existing liability coverages. Any actions along the lines of what was proposed in the US Senate earlier this year, would have significant cost implications for Tri-Rail and other commuter rail agencies across the nation, while producing no measurable contribution to safety of our operations.

ABOUT TRI-RAIL

Tri-Rail is the commuter rail line linking Miami, Fort Lauderdale, and West Palm Beach. Tri-Rail is operated by the South Florida Regional Transportation Authority ("SFRTA"). The 72-mile-long system has 18 stations along the Southeast Florida coast. The system shares several stations with Amtrak along the same corridor and both Tri-Rail and Amtrak connect to the Miami Metrorail at Hialeah (Miami). Tri-Rail will soon also provide service to the Miami Intermodal Center where the airport, bus, and rail systems will all be connected at one location.

Planning for the system began in 1983, and building the organization began in 1986. The current system was formed by the Florida Department of Transportation and began operation in 1989, originally to provide mitigation while construction was underway to widen Interstate 95 and the parallel Florida Turnpike. It was the first new commuter rail operation in this country in 25 years. The success of Tri-Rail since its inception led to its permanent status and expansions of service. Tri-Rail provides intermodal connections to all three South Florida international airports: Miami International Airport, Fort Lauderdale – Hollywood International Airport, and Palm Beach International Airport.

In 1998, the initial 67-mile-long route was extended north from the West Palm Beach Station to the Mangonia Park Station, and south from Hialeah Market Station (formerly Miami Airport Station) to the new Miami Airport station. Construction of the extensions began in 1996, which added nearly 4 miles to the system. In the early 2000s, Tri-Rail received \$84.8 million in federal New Starts funds for double tracking, building extensions and improving stations, not to mention expanding service to 20 minute headways during the rush hour.

In 2007, a project to upgrade the full length of the line from Mangonia Park to Miami Airport with double track was completed with the opening of a high-level fixed bridge over the New River near Fort Lauderdale.

All stations other than Pompano Beach were remodeled to include new elevators and pedestrian bridges over the tracks, large roofs over the platforms, and better facilities. In 2011, SFRTA received a \$5.7 million federal grant to replace the dilapidated Pompano Beach station with a "green station," generating more than 100% of its energy through solar power. Construction is expected to take 18 months to complete, with the station to remain open during construction.

COMPETITIVE CONTRACTING

Background of Agreements. SFRTA has used private contract operators since the inception of service in 1989. The original Train Operations & Maintenance agreement was with a firm, Urban Transportation Development Corporation ("UTDC"), now a division of Bombardier Transportation (since 1991). The term for that agreement expired in January 1994.

SFRTA undertook a competitive procurement and after receiving bids from Amtrak, a joint venture of Morrison-Knudsen, Inc. and the Burlington Northern Railway, and Herzog Transit Services, the Board selected Herzog Transit Services to provide Train Operations & Maintenance under an agreement from January 1994 to January 1998.

Herzog Transit Services was again selected to provide Train Operations & Maintenance under an agreement that began in January 1998 and concluded October 2002. In November 2002, Herzog Transit Services was again renewed following a competitive procurement to provide Train Operations & Maintenance under an agreement that spanned until June 2007. Of note was a proposal received from a new proposer, Florida Transit Services, a joint venture comprised of Connex and Bombardier.

Prior to the expiration of this agreement, the SFRTA Board elected to split the Train Operations & Maintenance into two separate contracts. Veolia Transportation submitted a proposal and was selected to provide Train Operations under an agreement commencing in July 2007, while Bombardier Mass Transit was selected as the successful contractor for the Fleet Maintenance agreement that also began in July 2007. Both agreements expire on 6/30/14. Other bidders for the Train Operations procurement included Amtrak for train operations and Talgo, Inc. for fleet maintenance.

Most Recent Procurement. The decision to split the Train Operations and Maintenance services into two separate contracts was made to insure multiple contractors would bid on the contract and the agency could use the market to set a competitive price for the Operation. At the time the contracts were let, there were few companies that could offer both disciplines and that limitation could have led to cost increases. SFRTA received very competitive bids on both the Train Operations and the Maintenance contracts. The Train Operations contract term is for 7 years with one 3 year option, which we are currently evaluating. Over the past 6 years, we have seen an increase in the number of contractors providing these services and the ability of these contractors to provide both disciplines. We are now evaluating whether it is a better time in the market to combine these services and realize the economies of scale from including multiple services under one agreement.

Lessons Learned from Competitive Procurements

The SFRTA Board has seen that the market has changed over the past 20 plus years. The Agency has been very successful recognizing new trends and seizing opportunities to tailor the procurements to maximize competition and save taxpayer dollars by getting the best prices from a robust competition. The ability for SFRTA to make its best decision based on the market

has yielded successful results. This has been true for not only its Train Operations and Maintenance services but also for Security, Station Maintenance and Bus Services as well. Over 80% of SFRTA's total operation is under contract for services and all are competitively bid. In addition, over 97 % of our capital projects are competitively bid and performed by private contractors. SFRTA has also won multiple state and federal awards in recognition of its procurement practices. This ability to seek the best services at the most competitive costs must be maintained so that we can continue to provide these services in constrained fiscal times.

It is important to note that SFRTA currently contracts with Amtrak and CSX Transportation for the dispatch of the Tri-Rail service corridor. These agreements are not competitively procured, due to the inability of other parties to dispatch the corridor.

LAWSUIT CHILLS MARKETPLACE

Amtrak recently sued Veolia in federal court in Washington D.C. on the grounds that Veolia had, by including names of then-Amtrak employees in its proposal, aided those employees in a breach of their fiduciary duty to their employer (Amtrak) and as such, should pay damages in the amount of lost profits to Amtrak. This lawsuit will likely create significant challenges for commuter rail agencies such as Tri-Rail. It is my opinion that, although there were no damages awarded to Amtrak, the mere fact that a contract operator was sued by a competitor for approaching the other party's employees for possible inclusion in their proposal submission to be presented as a part of a proposed management team, will chill the marketplace and lead to a great hesitancy by contractors to approach the very limited pool of railroad talent.

The result will be that agencies such as SFRTA may be presented with proposals that do not provide specific details of a proposed management team, because the proposer is too intimidated to approach management level employees of another firm, or the agency is not offered the best team because the proposers are limited to their current employees. Prior to this claim filed by Amtrak against Veolia, a collegial atmosphere appeared to exist that allowed proposers to discuss possible future employment with other individuals in the industry when submitting a proposal.

The ability to include potential employees in proposals has been a critical feature of the process of responding to Operations and other procurements due to the relatively limited talent pool of railroad managers with the experience and expertise required for this type of service. It has been a normal practice, not only in the commuter rail industry, but also in the transit contracted operations industry as a whole, to be able to freely approach employees of other firms to discuss possible employment options when preparing proposal teams.

Of course it is important that employees do not in any way violate their obligations to their current employer or any of the requirements of their positions with that employer. But, the process of talking with current employees of other potential contractors was perceived in the industry as a normal practice. I believe this lawsuit, and the costs associated with it, will force

potential proposers to be much more circumspect in their management team submissions. It will chill competition, and that is not a positive development for our industry.

LIABILITY COVERAGES/LIMITS AND CERTIFICATION OF CONTRACTORS

During consideration of the surface transportation programs, the Senate Committee on Commerce passed a Rail Title under S. 1813 that included provisions that would have amended 49 U.S.C. §10901 to establish new certification requirements for passenger rail operators (presumably other than Amtrak), including a requirement for minimum liability coverage of \$200,000,000 per incident for such operators. This proposed requirement under proposed §35601 once again brought to the fore the issue of liability coverage for commuter rail operations other than those provided by Amtrak.

Liability coverage is a significant cost item for commuter rail agencies, whether proposed, new, or established. Putting aside the question of whether the new coverages envisioned in S. 1813 could even be procured at these levels in what has become a foreign dominated insurance marketplace, there is also a fair amount of uncertainty surrounding the interpretation of the existing statutory cap and related provisions vis-à-vis non-Amtrak commuter rail operations that undermines commuter rail agencies' ability to negotiate reasonable passenger rail liability agreements both with freight railroads that own or share passenger corridors and with third parties that operate the agencies' trains.

Merely establishing a new minimum coverage requirement for non-Amtrak commuter rail operations without explicitly clarifying the status of limitation of liability for such operations would not only fail to address the uncertainty, but would exacerbate current difficulties in negotiating necessary liability agreements and securing affordable insurance.¹ In fact, proposed §35601 arguably would make liability difficulties for commuter rail agencies worse than under current law. This would occur first, because the provision would have added a new requirement for liability coverage for passenger rail but did not confirm the applicability of the existing statutory liability cap for passenger rail. As such, the provision could be construed as demonstrating Congressional intent that the existing liability cap under 49 U.S.C. §28103 does not apply to commuter rail. This is clearly not the way the statute reads, but the proposed section 35601, by omitting any confirmation of Congress's intent, would have clouded the issue. Second, the provision conflicts with some state laws on the limitation of liability, possibly increasing confusion about the appropriate levels of liability coverage for commuter rail and disrupting states' carefully articulated public policy as to sovereign immunity.

As to the latter point, it should be noted that Amtrak, a national carrier, is not similarly situated to local commuter rail providers in this regard because all of its requirements for liability coverage and other insurance coverage are addressed through federal mandates; this places Amtrak in a unique posture with respect to both issues.

¹ See APTA letter to conferees, which opposes §35601.
http://www.apta.com/gap/letters/2012/Documents/120509_conferees_s1813andhr4348.pdf.

Commuter rail carriers do not have the rights that Amtrak has to gain access to freight rail infrastructure. As a result, we have little leverage other than the power of public opinion in negotiations with freight railroads. Agreeing to full indemnification appears to be the price of access. With rare exceptions, freight railroads—at least the Class I carriers—uniformly require “but for” indemnification for liability. We have not been able to discern an overall position for commuter railroads on the issue of liability other than the implicit one that indemnifying freight railroads is a necessary evil. Given the disparity in bargaining power, the most advantageous recent agreements have been those in which the host railroad is required to pay part of the commuter railroad’s insurance premium and to pay the commuter railroad’s deductible in case of gross negligence or willful misconduct.

Uncertainty about liability limits increases liability insurance costs. Increasing the statutory liability cap increases potential liability for all passenger carriers, and therefore costs for all passenger carriers. Alternatively, establishing a fund for paying claims in excess of perhaps \$100 million, but not in excess of the statutory cap, or authorizing federal funding to pay such claims would provide relief in cases of extraordinary damages without skewing the entire passenger rail insurance market. Increasing federal safety fines and devoting those additional fines to an extraordinary relief fund would address public policy concerns about incentives for safe operations and concerns about how to pay for extraordinary claims.

Background

Amtrak has a statutory right of access to freight rail infrastructure.² The terms of access, however, must be negotiated.³ Liability coverage is a difficult issue, although Amtrak can appeal to the Surface Transportation Board (STB) in event of an impasse.⁴ No fault agreements are the norm. However, enforceability of such indemnification provisions was placed in serious doubt in the wake of a 1988 district court opinion holding that, notwithstanding contractual provisions, Amtrak was not required to indemnify Conrail for gross negligence based on public policy grounds.⁵ Ostensibly in response to difficulties Amtrak experienced in negotiating liability provisions in required shared-use agreements with freight railroads, Congress enacted a \$200 million per incident cap on passenger rail liability and express authorization for passenger rail providers to enter into liability agreements, as well as a requirement for Amtrak to carry an equivalent amount of insurance.⁶ The rationale for the provision in the Amtrak Reform and Accountability Act (ARAA) seems to have been that avoiding litigation between Amtrak and the

² 49 U.S.C. § 24308(a)(2)(B), (c).

³ Amtrak Will Continue to Have Difficulty Controlling Its Costs and Meeting Capital Needs, GAO/RCED-00-138, May 2000, p. 34.

⁴ See Guidebook for Implementing Passenger Rail Service on Shared Passenger and Freight Corridors, NCHRP REPORT 657 (2010), Section 2.5, The Liability Issue, http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_657.pdf.

⁵ National Railroad Passenger Corp. v. Consolidated Rail Corp., 698 F. Supp. 951 (D.D.C. 1988), vacated on other grounds, 892 F.2d 1066 (D.C. Cir. 1990).

⁶ Amtrak Reform and Accountability Act of 1997, 49 U.S.C. 28103 (“ARAA”).

host railroads over liability would expedite recovery to accident victims,⁷ although it has been argued that the freight rail industry was able to force the provision through and that the provision acts as a disincentive to freight rail safety.⁸

Many commuter railroads run over infrastructure owned and/or operated by Amtrak or freight railroads. Unlike Amtrak, commuter railroads do not have a guaranteed right of access to freight rail infrastructure. When the commuter railroads negotiate shared use agreements with the host railroads, the only role the Surface Transportation Board (STB) can play in case of deadlock is to facilitate nonbinding mediation. Similar to the Amtrak situation with freight rail, insurance and indemnity requirements are two of the most challenging issues that must be negotiated under those agreements.⁹ As the STB noted in its 2010 report to Congress, “uncertainty about the relationship between state and federal laws, concerns about risk exposure from recent passenger rail accidents, and relatively tight capacity over some rail lines . . . lead freight railroads and passenger providers to more disparate negotiating positions.”¹⁰ The

⁷ The Senate report on ARAA’s liability provisions stated:

. . . this bill clarifies that indemnification agreements related to the provision of rail passenger service entered into by Amtrak and other parties would be enforceable. The Committee has been requested by Amtrak to include this provision in order to aid Amtrak in achieving operating self-sufficiency. Amtrak and the freight railroads believe legislation is necessary to confirm enforceability of the indemnification agreements they have entered into regarding operation over each other’s rail lines, notwithstanding allegations of gross negligence by a freight railroad or Amtrak. As long as there is the possibility that state laws governing indemnification contracts may make these contracts unenforceable, Amtrak and a freight railroad may find themselves litigating with each other. Amtrak believes that such litigation inevitably would not only adversely impact business relationships between Amtrak and the host freight railroads, but it would also lead to significantly higher outlays in settlements and judgments to plaintiffs.

S. Rpt. 105–85, AMTRAK REFORM AND ACCOUNTABILITY ACT OF 1997,
REPORT OF THE COMMITTEE ON COMMERCE, SCIENCE, AND

TRANSPORTATION ON S. 738, p. 5. Arguably defending the \$200 million liability cap, the chairman of the Metrolink board stated “The rationale is this is the maximum that could be recovered in any event and will expeditiously get the maximum compensation to the victims and their families.” Teresa Rochester, Kathleen Wilson, *\$200 MILLION SETTLEMENT CRITICIZED BY METROLINK VICTIMS*, Ventura County Star, Aug. 25, 2010, <http://m.vcstar.com/news/2010/aug/25/victims-say-proposed-200-million-metrolink-isnt/>.

⁸ Walt Bogdanich, *Amtrak Pays Millions for Others’ Fatal Errors*, NY Times, October 15, 2004, www.nytimes.com/2004/10/15/national/15rail.html?scp=1&sq=Amtrak%20Pays%20Millions%20for%20Others%20Fatal%20Errors&st=cse. Amtrak’s payments for accidents dwarf freight rail payments for safety violations that cause the accidents. *Id.*

⁹ See NCHRP REPORT 657, Section 2.5, The Liability Issue, http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_657.pdf.

¹⁰ June 10, 2010 letter from STB to House Appropriations Committee (“STB June 2010 Liability Letter”), p. 1, <http://stb.dot.gov/stb/docs/Liability%20Report%20letter%2006-10.pdf>. Even in those cases where a commuter railroad owns the infrastructure, such infrastructure was usually acquired from a freight railroad, which in most cases required indemnification as a condition of sale. See, e.g., Keith Laing, *Sparks Fly on Liability Early in Senate Rail Debate*, The News Service of Florida, December 3, 2009, <http://cflaw.com/news.php?category=Florida+Legislature+News+Headlines&headline=THE+NEWS+SERVICE+OF+FLORIDA%3A++Sparks+Fly+on+Liability+Early+in+Senate+Rail+Debate>. In addition, where the commuter rail operator is considered to be a governmental entity, waiver of sovereign immunity may be

increasing cost of railroad accidents has led freight railroads to seek very high levels of indemnification.¹¹ Some major freight railroads are now requiring \$500 million in liability coverage. In addition to constituting a barrier to entry for new commuter rail service,¹² these demands may create difficulties in renewing existing commuter rail agreements when current, lower liability agreements expire.¹³

Freight railroads have raised questions about the scope of the ARAA liability cap's applicability to commuter railroads; the issue has not yet been litigated to conclusion. Accordingly, the statutory cap has neither provided sufficient certainty to rein in either demands of freight railroads that commuter rail agencies maintain very high levels of insurance, nor the cost of such insurance.

Following the Metrolink crash in Chatsworth, damages from the accident were expected to exceed the statutory cap of \$200 million per passenger rail accident.¹⁴ There have been numerous other passenger rail accidents involving significant injuries and/or fatalities, some clearly due to freight rail culpability. It appears that the Metrolink Chatsworth accident is the only accident to date in which claims might have exceeded the ARAA liability cap.¹⁵ However, the prospect of future accidents resulting in claims exceeding the cap may be sufficient to increase insurance costs.

In response to the prospect of judicial approval of a settlement of \$200 million for outstanding claims, Representative Elton Gallegly (R-CA, 24th District - Ventura and Santa Barbara Counties) in 2010 introduced H.R. 6150, a bill to increase the statutory limitation per passenger rail accident on damages proximately caused by gross negligence or willful misconduct from \$200,000,000 to \$500,000,000, retroactive to September 12, 2008. The proposed legislation would not have increased the statutory cap on damages arising from simple negligence. H.R.

required. Denver RTD Board of Directors Meeting, March 23, 2010, <http://www3.rtd-denver.com/content/BoardOffice/boardMeetingScheduleUpload/03.23.10%20Board%20Meeting%20Agenda.pdf>.

¹¹ NCHRP REPORT 657, p. 16.

¹² Insurance premiums for a new commuter rail agency are substantial, up to as much as 20 percent of operating costs. Even existing agencies may devote as much as 15 percent of their operating budgets to insurance premiums. *Many Factors Influence Liability and Indemnity Provisions, and Options Exist to Facilitate Negotiations*, GAO-09-282 (February 2009), p. 18, www.gao.gov/new.items/d09282.pdf. APTA has asserted that a tight insurance market has forced some transit operators to purchase insurance from overseas carriers at substantially increased costs. September 23, 2010 letter from APTA to Representative Gallegly, opposing H.R. 6150, www.apta.com/gap/letters/2010/Pages/100923_gallegly.aspx.

¹³ NCHRP REPORT 657, p. 30.

¹⁴ Teresa Rochester, Kathleen Wilson, *\$200 MILLION SETTLEMENT CRITICIZED BY METROLINK VICTIMS*, *supra*; Kitty Felde & Molly Peterson, *NTSB places Metrolink Chatsworth crash blame on texting engineer*, Southern California Public Radio, Jan. 21, 2010, www.scpr.org/news/2010/01/21/ntsb-blames-engineer-in-metrolink-crash/.

¹⁵ Erica Werner, *Damages limit a concern in wake of train crash*, LA Daily News, Sept. 18, 2008, www.dailynews.com/breakingnews/ci_10501563.

6150 ultimately attracted 18 co-sponsors, 16 of them from California, but never made it out of subcommittee. (Senator Feinstein, co-sponsored by Senator Boxer, introduced the legislation in the Senate, where it did not emerge from committee.) This legislation could have further increased the difficulty of negotiating liability agreements and the cost of obtaining necessary insurance.

The Senate Commerce Committee language as proposed for §35601 would not have changed the text of §28103, which appears on its face to cap liability for commuter rail just as it does for intercity rail; the provision's effect on liability would have been limited to establishing a minimum required amount of liability coverage for passenger rail. However, the way the provision was drafted I believe it would have caused more confusion about the status of the statutory limitation of liability of commuter rail providers.

Legal Issues

As noted above, most liability and indemnity agreements between passenger railroads (both intercity and commuter) and the freights with whom they share right-of-way are “but for” arrangements : the commuter rail agency indemnifies the freight railroad for all accidents that involve the commuter rail operations, regardless of fault; the freight railroads have been known to escape any liability whatsoever even in cases where the freight railroad was at fault, as long as the commuter operation was involved. There are some no-fault arrangements, but these are rare.¹⁶ Smaller freight railroads may be more willing than Class I Railroads to compromise on the liability issue.¹⁷

Section 28103: The applicability of the \$200 million per passenger rail accident cap under 49 U.S.C. §28103 has not yet been litigated to conclusion. Accordingly a number of legal issues related to the scope of the provision remain outstanding.

- Whether the ARAA liability cap applies to rail operators other than Amtrak. Despite the fact that GAO has concluded that it does,¹⁸ until the issue is litigated at least some freight rail operators refuse to rely on the cap in setting required insurance levels for commuter rail agencies in shared-use agreements. Section 35601 would complicate this issue.
- Whether the ARAA liability cap deprives passengers of due process of law. Plaintiffs in the Chatsworth raised this issue initially, but the settlement has been approved and no appeals have been taken.
- Whether retroactively raising the ARAA liability cap is lawful.

¹⁶ STB June 2010 Liability Letter, p. 7. The STB distinguishes between “no-fault” and “but-for” liability. *Id.* at 10.

¹⁷ Pan Am Railways in New Hampshire insisted on indemnification except for gross negligence. *Line judges: lawmakers weigh purchase of lines for commuter rail*, New Hampshire Business Review, March 13, 2009.

¹⁸ The GAO has concluded that the plain language of the statute shows that the cap cover commuter rail agencies. GAO-09-282, p. 21.

- Whether the ARAA provision concerning allocation of liability preempts state law requirements concerning indemnification. The Second Circuit has held that it does.¹⁹ A Massachusetts District Court, however, has ruled that the ARAA provision does not preempt the commonwealth’s policy of not enforcing indemnification agreements for gross negligence.²⁰ The STB has taken the position that indemnifying against gross negligence or willful misconduct violates public policy.²¹ STB staff has indicated that because the Second Circuit opinion deals with preempting state law, not the STB’s federal jurisdiction, they believe the Second Circuit opinion will not affect future STB decisions.²² Until the Second Circuit holding is more widely considered settled law, the following issues remain:
 - Whether rail agencies may indemnify against negligence. Assuming no preemption, this depends on state law.
 - Whether rail agencies may indemnify against gross negligence or similar conduct. Assuming no preemption, this depends on state law.
 - Whether the ARAA provisions preempt state law requirements concerning sovereign immunity. The Third Circuit has held that it does.²³ Again it remains to be seen whether this position will be more widely adopted.

Section 35601: This provision would have amended 49 U.S.C. §10901 to establish new certification requirements for persons providing passenger rail transportation over a rail line subject to STB jurisdiction. Proposed subsection (h) would have set forth the determinations the STB must make before granting the required certification. Paragraph (4) would have required that the Secretary determine the applicant “maintains a total minimum liability coverage for claims through insurance and self-insurance of not less than the amount required by section 28103(a)(2) per accident or incident.” Thus, the proposed (h)(4) required a minimum amount of liability coverage, without acknowledging that some state laws may provide a lower cap on liability exposure for public agencies.

Policy Issues

The cost of potential liability for accidents is a significant barrier for establishing²⁴ commuter rail service or maintaining existing levels of existing service—the more open-ended the liability,

¹⁹ *O&G Industries v. National Railroad Passenger Corp.*, 537 F. 3d 153 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2043 (2009).

²⁰ *CSX Transportation, Inc. v. Massachusetts Bay Transportation Authority*, 697 F. Supp. 2d 213 (D. Mass. 2010).

²¹ *Boston and Maine Corp. and Springfield Terminal Railway Co. v. New England Central Railroad*, STB Finance Docket No. 34612 (2006), at 1-2.

²² GAO-09-282, p. 23.

²³ *Deweese v. National Railroad Passenger Corp.*, 590 F.3d 239 (3d Cir. 2009).

²⁴ *See, e.g.*, Developing Viable High Speed Rail Projects under the Recovery Act and Beyond, October 14, 2009, GAO-10-162T, p. 4, www.gao.gov/new.items/d10162t.pdf; Cindy Kibbe, *Funding the big issue for*

the more expensive the required insurance. For example, a \$75 million cap on commuter rail liability in New Hampshire was estimated to cut the cost of insurance by two-thirds.²⁵ There are a number of policy issues that could affect how liability costs are addressed.

- Whether the ARAA liability cap should be extended to cover third party claims. Currently these claims are additional liability beyond the statutory cap.
- Whether federal law should standardize liability and indemnity provisions, for example by explicitly extending the \$200 million insurance requirement to carriers other than Amtrak, and if so, how the federal government would assist the states in managing the extra costs imposed by this unnecessary expansion of insurance costs.
- Doing so could affect other provisions of shared use agreements.²⁶
- Doing so could disadvantage commuter rail operators that currently carry liability coverage to the (lower) limitation of liability under state law.
- Federal law already mandates a \$200 million liability coverage floor in its limitation of liability for Virginia commuter rail providers for incidents in the District of Columbia.²⁷
- The May 12, 2010 FRA guidance on stakeholder agreements for the High-Speed Intercity Rail Program would have required grantees and/or operators of projects funded under Tracks 1 or 2 of the program using railroad right-of-way to carry a minimum of \$200 million of liability coverage through insurance and self-insurance.²⁸ We have found no indication thus far that FRA has extended such requirements to commuter rail operations, which may be the genesis for §35601.
- Whether federal law should mandate commuter rail access to freight rail/Amtrak facilities. This could provide more negotiating leverage for commuter rail agencies.

transportation projects, New Hampshire Business Review, May 7, 2010, www.nhbr.com/business/transportation/726545-285/funding-the-big-issue-for-transportation-projects.html (noting that passing liability cap was “fundamental” to bringing passenger rail to New Hampshire).

²⁵ *Line judges: lawmakers weigh purchase of lines for commuter rail*, New Hampshire Business Review, March 13, 2009.

²⁶ STB June 2010 Liability Letter, p. 3.

²⁷ 49 U.S.C. 28102.

²⁸ Paragraph 39, p. 15. It is unknown whether this requirement will remain in the guidance if and when it is reissued. *FRA rethinking guidance for HrSR corridors*, Railway Age, August 20, 2010, <http://www.railwayage.com/index.php/news/fra-rethinking-guidance-for-hrsr-corridors.html#.T9Zyvj5YtKo>.

- Whether federal law should facilitate alternatives to commercial insurance to alleviate commuter rail agencies' difficulties in procuring insurance. However, commercial insurance can prove to be less expensive than public transit liability pools.²⁹
- Whether Congress should appropriate funding to provide compensation in excess of the statutory cap (modeled on Price-Anderson Act for nuclear disasters).³⁰

Recent Negotiations

In 2008 the Boston transit system reached a compromise for an extension of a commuter rail line, breaking an impasse in liability negotiations. A similar compromise was adopted to resolve part of SunRail's contentious liability situation. These are described below.

MBTA and CSX (Boston to Worcester line): Negotiations were held up by the question of indemnification for gross negligence. The Massachusetts delegation advised CSX that if an agreement were not reached on the issue, congressional action, "including potential legislative solutions mandating what is acceptable in freight-commuter rail contracts" was possible.³¹ The parties subsequently reached agreement: CSX will contribute \$500,000 toward the cost of MBTA's \$3.9 million liability insurance policy; CSX will have to pay the deductible, up to \$7.5 million per accident, for any accident in which the freight railroad is "clearly at fault because of willful misconduct." This standard eliminates the requirement that MBTA indemnify for gross negligence/willful misconduct, as would be required under the "industry standard" strict no-fault provision. However, in order to avoid indemnification for a particular accident, the MBTA would have to establish willful misconduct, a bar described by at least one plaintiff's lawyer as "challenging."³²

SunRail, CSX, and Amtrak: Approval of the SunRail commuter service has been a matter of contention in Florida for years;³³ indemnifying CSX has been a critical stumbling block. Supporters who supported amending Florida law to allow indemnification have raised the

²⁹ The board of directors of the Richmond, Virginia, transit agency voted in 2010 to purchase commercial insurance rather than continue with the public transit liability pool that the agency helped to found. Michael Martz, *GRTC gets new insurance policy*, Richmond Times-Dispatch, July 21, 2010.

³⁰ Erica Werner, *Damages limit a concern in wake of train crash*, *supra*.

³¹ Ralph Ranalli, *No fault? No way, CSX told*, The Boston Globe, April 10, 2008, www.boston.com/news/local/articles/2008/04/10/no_fault_no_way_csx_told/.

³² Priyanka Dayal and John J. Monahan, *CSX deal hailed*, Sept. 24, 2009, Worcester Telegram & Gazette, www.telegram.com/article/20090924/NEWS/909240679/1116; Noah Bierman, *Deal expected to boost commuter rail service*, The Boston Globe, September 24, 2009, www.boston.com/news/local/massachusetts/articles/2009/09/24/deal_expected_to_boost_commuter_rail_service/.

³³ Joe Follick, *CSX-SunRail Deal Faces Showdown in Senate*, The Ledger, Apr. 29, 2009, www.theledger.com/article/20090429/NEWS/904295049/1134?p=1&tc=pg.

argument that no-fault indemnification will in fact speed resolution of claims.³⁴ The CSX indemnification issue was finally resolved based on the MBTA model: Florida agreed to purchase a \$200 million liability insurance policy, with CSX agreeing to pay a portion of the premium and the approximately \$10 million deductible in cases caused by CSX's willful misconduct.³⁵ Amtrak has also requested the same indemnification that was approved for CSX. In response to the argument that this is more protection than Amtrak has in its operating agreement with Tri-Rail, Amtrak asserted that the Tri-Rail agreement should not be continued. Although Amtrak dropped its absolute insistence on receiving the same protection as that afforded CSX,³⁶ Florida recently enacted a bill providing such protection, effective July 1, 2012.³⁷ The \$200 million indemnification may cover tracks shared with Tri-Rail.³⁸

Position of Freight Railroads

Freight railroads by and large take the position in negotiations that risks of injury to rail passengers, persons picking up and dropping off passengers, etc. would not arise "but for" the operation of passenger rail, and that therefore passenger rail operators should be responsible for all such "but for" liability, and should indemnify the host railroads for such liability.³⁹ There is some indication that freight railroads view indemnification as the price for carrying passengers on their tracks.⁴⁰ The Association of American Railroads takes the position that sharing tracks or right-of-way with passenger trains requires that liability issues be "responsibly and fairly addressed" by providing coverage for "but for" liability.⁴¹

³⁴ Keith Laing, *Sparks Fly on Liability Early in Senate Rail Debate*, The News Service of Florida, December 3, 2009, <http://cftlaw.com/news.php?category=Florida+Legislature+News+Headlines&headline=THE+NEWS+SERVICE+OF+FLORIDA%3A++Sparks+Fly+on+Liability+Early+in+Senate+Rail+Debate>.

³⁵ Marc Caputo and Lee Logan, *Senate clears rail bill, on to Gov. Crist*, St. Petersburg Times, Dec. 9, 2009, www.tampabay.com/news/politics/stateroundup/senate-clears-rail-bill-on-to-gov-crist/1057417; Abel Harding, *CSX's Ward: SunRail good deal for state, high-speed will cost billions*, the Florida Times-Union, December 16, 2009, http://jacksonville.com/interact/blog/abel_harding/2009-12-16/csxs_ward_sunrail_good_deal_for_state_high_speed_will_cost_bill. See also, George F. McClure, *SunRail Liability Fully Protects At-Risk CSX*, Florida Political Press, July 6, 2011, <http://www.floridapoliticalpress.com/2011/07/06/sunrail-liability-fully-protects-at-risk-csx/>.

³⁶ Dan Tracy, *SunRail back on track after Amtrak backs down*, Orlando Sentinel, December 8, 2010, http://articles.orlandosentinel.com/2010-12-08/business/os-amtrak-sunrail-20101208_1_sunrail-supporters-central-florida-commuter-train-amtrak-officials.

³⁷ <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=47811>.

³⁸ Michael Van Sickler, *Florida taxpayers would pay tab for damages caused by train crashes*, Miami Herald, Feb. 26, 2012, <http://www.miamiherald.com/2012/02/26/2662931/florida-taxpayers-would-pay-tab.html#storylink=cpy>.

³⁹ See, e.g., STB June 2010 Liability Letter, p. 3.

⁴⁰ Walt Bogdanich, *Amtrak Pays Millions for Others' Fatal Errors*, *supra*.

⁴¹ Freight and Passenger Rail: Finding the Right Balance, Association of American Railroads (March 2011), p. 2, <http://www.aar.org/~/media/aar/Background-Papers/Freight-and-Passenger-Rail.ashx>.

An accident involving a passenger train on freight-owned property, though rare, could involve major casualties and potentially ruinous liability claims. Because of this risk, freight railroads must be adequately protected from liability that would not have resulted but for the presence of passenger service.

However, AAR has changed its position paper from 2010 by striking a third sentence: "Inadequate liability protection would constitute an unwarranted subsidy of passenger railroads by freight railroads."

Freight railroads also argue that eliminating litigation over fault in fact speeds recovery by injured parties.⁴² Although freight railroads have described complete indemnification as the industry standard and "nonnegotiable," the point has in fact been negotiated (see MBTA and CSX, above). Freight railroads also argue that indemnification for gross negligence is not a disincentive to safety.⁴³

Position of Commuter Railroads

APTA has clearly stated that increasing the statutory cap on liability will increase insurance costs for commuter rail operators.⁴⁴ In addition, APTA has expressed interest in establishing a national insurance pool.⁴⁵ However, we were not able to find a clear statement of APTA's position on no-fault indemnification; APTA's letter opposing §35601 did not touch on alternatives such as insurance pooling. At least one commuter rail body arguably defended the existence of the statutory cap.⁴⁶

CONTRACTOR CERTIFICATION

As to the efficacy of the proposed requirement that contracted operators be licensed under rules and requirements to be determined by the Surface Transportation Board, we do not see any such benefit to our customers and we fear that besides adding additional costs that we will eventually bear, this will also erect an unfair barrier to market entry that will have a direct impact on the competitive pricing we all seek in our contract agreements.

Today there are but only five qualified, active competitors in this marketplace: Amtrak Commuter Services, Veolia Transportation, Keolis, Bombardier and Herzog, and Keolis has only entered this market within the past two years. During our last competitive procurement, all

⁴² Ralph Ranalli, *No fault? No way, CSX told, supra*.

⁴³ Walt Bogdanich, *Amtrak Pays Millions for Others' Fatal Errors, supra*.

⁴⁴ September 23, 2010 letter from APTA to Representative Gallegly, opposing H.R. 6150, www.apta.com/gap/letters/2010/Pages/100923_gallegly.aspx.

⁴⁵ *E.g.*, VRE Board Agenda, May 18, 2007, http://www.vre.org/about/Ops_board_items/2007/May/Action_Item_8A_CSX.pdf.

⁴⁶ Teresa Rochester, Kathleen Wilson, *\$200 MILLION SETTLEMENT CRITICIZED BY METROLINK VICTIMS, supra*.

three proposers (Veolia, Amtrak and Keolis) were deemed to be qualified bidders following our in-depth analysis of their experience and capabilities. I do not believe that any other agency, federal, state or local, could have conducted a more detailed analysis than what was completed here, and therefore I am fearful that the provisions concerning a federal licensing process would only serve to limit competition and thus result in higher costs to an agency such as SFRTA.

I have seen the arguments put forward in support of the licensing provision in S.1813, comparing the licensing and safety monitoring systems in place with the Federal Motor Carrier Safety Administration and I am neither convinced that our current operating environment requires such additional federal oversight, nor am I in agreement that this is a fair comparison. Current operating requirements and safety oversight for all rail operators (public and private; passenger and freight) are enforced through the Federal Railroad Administration and there is nothing to indicate that this oversight is in any way lacking. Further, oversight of contracted trucking and freight hauling services is in my view an apples and oranges comparison.

CONCLUSION

Mr. Chairman, in conclusion, let me summarize several key points of my testimony before this committee: (1) competitive contracting for Train Operations and Maintenance Services has served us well since we commenced passenger services in 1989; (2) there is no need or justification for adding new certification and/or liability coverage requirements as was proposed in S. 1813 earlier this year, and; (3) while we welcome Amtrak's participation in the commuter rail industry on a level playing field with other private contractors, we fear that their recent lawsuit over whether one contractor can approach employees of another for submission in a competitive procurement will chill the marketplace and only make the job of evaluating competing proposals more difficult.

As I have summarized here, the experience over the past 23 years at SFRTA with competitive contracting has provided us with unique insights into the marketplace and process for selecting contractors and we could have a separate hearing alone on the process and experience and lessons learned. Suffice to say that it is a process that requires forethought, diligence and attention to details. With the lessons learned at SFRTA and other agencies across the country, I believe it is a method that can prove successful for all public entities evaluating their options for rail services.

Because we have a strong record of success with our procurements for contracted services, I do not believe there is a need for further federal intervention into the process to set new standards for certifying potential proposers or requiring additional liability insurance coverages. The process employed by SFRTA and many other commuter rail agencies evaluating contractor bids, not only ensures that the most qualified bidders are considered, but it ensures that the best price available in the marketplace is achieved. And it is our belief that this is the most economic option available to us today.

If the Congress wishes to further explore the concepts of certification and/or liability coverages, we would be very interested to participate in that discussion and welcome the opportunity to express in detail the significant cost implications associated with these two issues.

Finally, as noted earlier, SFRTA has a long-standing business relationship with Amtrak through the agreement for dispatching services and through our coordination with Amtrak Intercity Passenger Services. In addition, we have welcomed their past participation in our competitive bidding process for commuter rail services and we envision continuing to do so in the future. We are concerned about the implications resulting from their recent lawsuit with Veolia and hope that the past practices of contractors allowing employees of one organization to speak with others without fear of legal actions will continue. As a public agency official, I view this issue as a critical component of our contract evaluation process.

Mr. Chairman, thank you again for the opportunity to appear here today on behalf of SFRTA. I would be pleased to answer questions now or in the future.



**SOUTH FLORIDA
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October 16, 2012

The Honorable Corrine Brown
Ranking Democratic Member
Subcommittee on Railroads, Pipelines,
and Hazardous Materials
Committee on Transportation and Infrastructure
U. S. House of Representatives
Washington, DC 20515

Dear Representative Brown,

Thank you for allowing me to be of service to you by addressing your questions. Attached you will find my responses to the Questions for the Record sent on October 3, 2012 as a follow-up to my committee testimony on September 11, 2012.

Should you require further information or an expanded explanation, please feel free to contact me at

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph Giuliotti". The signature is written in a cursive style with a large initial "J".

Joseph Giuliotti, Executive Director
South Florida Regional Transportation Authority

Attachments

Responses to Questions for the Record

Ranking Member Corrine Brown has requested that Mr. Giulietti respond to eight supplemental questions. Below are responses to all questions.

Question 1: Section 8102 of H.R. 7 prohibits Amtrak from using any Federal funds for (A) Hiring or contracting with any outside legal professional for the purpose of filing, litigating, or otherwise pursuing any cause of action in a Federal or State court against a passenger rail service provider; and (B) Filing, litigating, or otherwise pursuing in any Federal or State court any cause of action against a passenger rail service provider arising from a competitive bid process in which Amtrak and the passenger rail service provider participated. For purposes of the section, the term “outside legal professional” means any individual, corporation, partnership, limited liability corporation, limited liability partnership, or other private entity in the business of providing legal services that is not employed on a full-time basis solely by Amtrak; and the term “passenger rail service provider” means any company, partnership, or other public or private entity that operates passenger rail service or bids to operate passenger rail service in a competitive process.”.

As Executive Director of an agency that receives public funding, if section 8102 of H.R. 7 were amended to prohibit any commuter railroad that receives public funding from taking legal action or defending itself in court, what concerns would this raise for Tri-Rail, if any?

Response to #1: Prohibiting Tri-Rail from protecting its legal interests would of course raise serious concerns for the agency. Such a prohibition could ultimately lead to the dissolution of the agency, which naturally would have severe negative repercussions for the millions of Florida residents who ride Tri-Rail every year, not to mention those residents who would be affected by the increase in highway congestion that would result from the loss of Tri-Rail service. Even if the prohibition were to be limited to that in section 8102 (prohibition against hiring outside counsel), the effect on Tri-Rail service could ultimately be the same, as the agency requires the resources to defend against complex liability lawsuits, and such lawsuits frequently raise legal issues for which Tri-Rail’s in-house counsel would not necessarily have the expertise to appropriately respond to such issues.

Question 2: You stated that it has been a normal practice to be able to freely approach employees of competing firms to discuss possible employment options when preparing proposal teams. But you also stated that employees should not in any way violate their obligations to their current employer. The U.S. District Court for the District of Columbia found that the Amtrak employees who were working against Amtrak in the competitive bid for Tri-Rail had breached their fiduciary duty of loyalty to the company and that Veolia had encouraged the breach. Does Tri-Rail have a response to this?

Response to #2: We do believe that employees should not violate their obligations to their employers. For example, we do not condone employees sharing bid information or otherwise disclosing confidential information to competitors. However, in terms of the

Amtrak lawsuit, the District Court did not hold that as a matter of law there was a breach of fiduciary duty or that Veolia had encouraged a breach. In fact, the Court noted that as a matter of law, participation by employees in a bid of the employer's rival is not necessarily a breach of fiduciary duty. Rather the court held that the existence of a breach or of encouragement of breach were questions of fact. 791 F. Supp.2d 33, 49-50. The jury findings on the particular facts of this case do not mean that the common practice itself of using employees from other companies for proposals is unlawful. Indeed, the court noted "the fact that Amtrak extended offers to Herzog employees when it had not been definitively established that Herzog would not be seeking renewal of the Tri-Rail contract provides peripheral support for Veolia's belief that its conduct did not amount to interference with Amtrak's bid." Id. at 61. We remain concerned that the jury verdict in the Amtrak case could chill the marketplace.

Tri-Rail believes that where commuter rail agencies choose to contract out operations, public policy is better served by allowing robust competition for selecting contractors. It would not be practical to require contractors to hire team members before proposals are accepted, as such a rule would either render the contracting process economically unviable or result in personnel for unsuccessful teams being thrown out of work. The current informal system is far more efficient and fairer to all parties.

Moreover, since Amtrak already employs many of the personnel—albeit not necessarily in commuter rail positions—that would be eligible to take part in proposal teams, putting all of those Amtrak employees out of bounds for competitive proposals would unduly stifle robust competition. And even Amtrak from time to time seeks employees of other operators for its own teams, and could ultimately be harmed by a rule prohibiting discussions with outside personnel concerning proposal teams.

Accordingly, we believe that public policy clearly is better served by having the federal government not create special rules for transportation procurements governing what is ordinarily an issue of state tort law, and an issue that is determined by a specific finding of facts at that.

Question 3: You stated that you are currently evaluating whether it is a better time in the market to combine Tri-Rail's train operations and maintenance contracts. Why?

Response to #3: SFRTA made a decision to unbundle the operations and maintenance contracts five years ago because there were limited bidders in the industry who had the ability to be able to bid on both. Our experience at the time of bid showed that only 2 bidders bid on our operating contract. Since that time several industry bids went out with bundled services and received multiple bids. We are currently assessing whether we would give the 3year extension of our existing contract, or if we would put it out to the market in a bundled contract. The driver on this decision has been the industry response to provide these services. The more that the private sector looks to bid these services and the more players in this market, the better the competition and the rates that public agencies like ours get to employ.

Question 4: Does Tri-Rail support or oppose section 35108 of S.1813?

Response to #4: Tri-Rail opposes subsection (a) of section 35108 for reasons discussed in our response to Question 8. We are open to further discussion with the Committee about subsection (b).

Question 5: Does Tri-Rail support or oppose requiring the Federal Government to verify that a passenger rail provider has an agreement in place with the infrastructure owner over which the passenger rail transportation will be provided (or contractual or statutory authority that provides for access to such infrastructure) prior to operating on a route? Why?

Response to #5: Tri-Rail opposes such a requirement as an unnecessary barrier to entry that does not provide meaningful benefits to either the commuter rail operator or the public. Such an agreement is duplicative where the commuter operator has such an agreement with the owner of the infrastructure. However, even where such agreement is not in place, the possibility of the provider not reaching agreement is better addressed through the contract between the commuter rail operator and the contract provider, than by adding additional Federal review requirements. Tri-Rail does support legislation that would require infrastructure owners to provide reasonable commuter rail access.

Question 6: Does Tri-Rail support or oppose having to demonstrate to the Federal Government [that the contract provider has] sufficient financial capacity and operating experience to provide passenger rail transportation prior to operating a route? Why?

Response to #6: Tri-Rail opposes such a requirement as an unnecessary barrier to entry, an unreasonable impediment to competition, and a driver of increased costs that would be borne by commuter rail operators and ultimately our customers. The financial capacity of the contract provider should not be an issue because the commuter rail operator's liability insurance (*e.g.*, Tri-Rail's insurance) should be sufficient to cover operating liability. The cost to contract providers—which would of course be passed on to the public agencies—would be artificially inflated by their lack of operating history, without providing any additional benefit to the public, as the public agencies already carry liability insurance.

The commuter rail operator should be able to establish criteria for determining whether a contractor is financially stable enough to be reliable, as well as the criteria for determining whether a contractor has sufficient operating experience. Commuter operators who, like Tri-Rail, have many years of experience in evaluating the financial and operating capabilities under existing applicable state-law procurement requirements would be burdened, not assisted, by having an additional set of requirements imposed on the already complex process for selecting a contractor.

Question 7: Does Tri-Rail support or oppose having to meet all applicable safety and security requirements under the law? Why?

Response to #7: Tri-Rail supports meeting all applicable legal requirements. FRA provides comprehensive effective oversight of the safety and security of commuter rail operations. Tri-Rail has supported, and continues to support, meeting FRA requirements.

Question 8: Does Tri-Rail support or oppose having to maintain a total minimum liability coverage for claims through insurance and self-insurance of not less than the amount required by section 28103(a)(2) per accident or incident? Why?

Response to #8: Tri-Rail is open to discussing current commuter rail liability coverage and what it should be. Although those issues are worthy of discussion, it is important to note that commuter railroads are not in the same position as Amtrak in either the need for liability coverage or the ability to secure such coverage. All of Amtrak's requirements for liability coverage and other insurance coverage are addressed through federal mandates; this places Amtrak in a unique posture with respect to both issues.

As noted in my testimony before the Committee, the \$200 million cap for Amtrak is higher than limitations of liability currently applicable to public agencies under some state laws. Across-the-board increases in commuter rail liability to \$200 million would at a minimum be very expensive for Tri-Rail and similarly situated commuter rail operators and potentially make insurance impossible to secure, thereby threatening to destroy commuter rail service in southern Florida and other parts of the country. Moreover, it is important to recognize that if Amtrak had been the contract operator for Metrolink, the claims in the Chatsworth accident still would have exceeded the liability cap. Again, alternative methods of providing compensation, or the formation of federally sponsored pools of insurance to cover all participants in the industry, in the event of incidents like that in Chatsworth may provide more public benefit than requiring commuter rail operators to carry excessive liability insurance coverage.

September 11, 2012

C. H. (Chuck) Harvey, Deputy CEO
Peninsula Corridor Joint Powers Board – Caltrain

Thank you Mister Chairman and members of the Committee. My remarks this morning will cover the recent procurement process followed by Caltrain to secure an operating contractor for our rail service.

To place this recent procurement into context, the Peninsula Corridor Joint Powers Board, known as Caltrain, assumed operation of the system in 1992, when it was acquired from the Southern Pacific Transportation Corporation. The Joint Powers Board consists of three public partners from San Francisco, San Mateo, and Santa Clara Counties who share the ownership of Caltrain including the entire 50-mile right-of-way which runs from San Jose to San Francisco, all rolling stock, stations and an equipment maintenance facility. Since 1992 the system has grown significantly with ridership recently surpassing 50,000 per day. Amtrak was selected as Caltrain's operator in 1992 and was again selected in 2001 after a competitive solicitation. Caltrain's partnership with Amtrak over the past 20 years has contributed to the growth and success of the system.

The decision to solicit competitive proposals for this contract was based on good procurement practice, the expiration of the current contract and the presence of potential new proposers in the marketplace that enhanced the competitive environment.

The specific objectives of Caltrain included improving operating performance and customer service, realizing efficiencies, and ensuring the continuity and enhancement of a robust safety culture. In order to achieve these objectives, Caltrain adopted a unique new compensation methodology that would have the effect of providing the contractor's profit for performance in areas that were identified as important to Caltrain. This "performance fee" program provides for no minimum or guaranteed level of profit and establishes amounts that will be paid for meeting or exceeding certain performance targets. In this manner, alignment with the Caltrain's objectives would be ensured. This is in contrast to the guaranteed fixed fee that has been paid as part of previous contracts.

The procurement process took over two years to complete. The requirements for the new contract were identified including the scope of services, evaluation criteria and scoring methodology, compensation methodology, and commercial terms and conditions. The request for proposals was then issued, which generated a great amount of interest among qualified firms both inside and outside the United States.

Caltrain received proposals from five firms: Keolis; PCRS, a joint venture of Amtrak and Bombardier; PRS, a joint venture of RailAmerica and Ratp Dev; TASI, a subsidiary of Herzog Transit Services, Inc.; and Veolia.

A committee was formed for evaluating the proposals, which included more than 30 individuals from Caltrain and our partners who offered expertise in all key technical areas, with a scoring team comprised of five senior team members.

In order to ensure that a fair and objective mechanism was used to evaluate the proposals, weighted criteria were established in order to score the proposals. Qualifications and Experience of the Firm and Key Personnel was worth up to 20 points, Management, Operations and Maintenance Plans was worth up to 55 points, and the Cost Proposal was worth up to 25 points for a total of 100 points.

After initial scoring of proposals, Caltrain determined that four firms were in the competitive range and invited them for interviews. These interviews were rigorous, all day sessions, which were followed by committee representatives making site visits to rail properties to solicit feedback on each firm's performance. The next step in the process was to request "Best and Final Offers" from the firms. These final offers were evaluated and scored and a consensus ranking was established. The highest ranked proposer was TASI with the Amtrak joint venture ranked second. While the TASI cost proposal was not the lowest, it was a realistic proposal that provides cost efficiencies over the term of the contract. It was also 5 to 10 percent lower on an annualized basis than the second ranked proposal from the Amtrak joint venture.

In the end TASI's overall proposal clearly stood out above the others and a contract award was recommended. It is important to note that none of the firms participating in this process filed a formal protest of the award as allowed in the solicitation process and the contract was awarded to TASI.

The transition from Amtrak to TASI operation was complex and took many months to complete. At the onset of this transition it was important for Caltrain and TASI to work closely with organized labor to ensure their questions and concerns were addressed. Federal labor law required all existing employees be protected in various aspects of their jobs requiring TASI to negotiate 11 different implementing agreements with the unions. Approximately 90 percent of the existing workforce agreed to become TASI employees and continue to provide Caltrain service. A close collaboration with the regulatory agencies including the Federal Railroad Administration also ensured that those charged with the safety oversight of Caltrain understood and supported our transition plans. Finally, the close out of the Amtrak contract and a nearly 20 year relationship has required a lot of due diligence. Amtrak has been fully cooperative throughout this process with a lesson learned to ensure that all future contracts cover the provisions needed to demobilize an existing contractor. TASI assumed operation of the Caltrain service on May 26, 2012 and the service is operating normally and as expected.

Mister Chairman, I have included for the committee an Appendix to my testimony that provides many more details of the procurement process followed by Caltrain that I could not cover in the time allotted. I thank you again for the opportunity to appear today and look forward to answering your questions.

**Summary of Request For Proposals, Evaluation and Selection Process
for
Contract to Provide Rail Operations, Maintenance and Support Services
for the
Peninsula Corridor Joint Powers Board
Contract 10-PCJPB-S-025**

Recommendation

After considerable interest in, and the receipt and evaluation of five proposals from well-qualified firms for, the Rail Operations, Maintenance and Support Services Contract for Caltrain, the Ad Hoc Committee of the Peninsula Corridor Joint Powers Board (JPB), having been briefed on the work and findings of the Evaluation Committee and with the full support of the executive staff, has concluded that the proposal from TransitAmerica Services, Inc. (TransitAmerica) is the most efficacious in achieving the JPB's goals and meeting the challenges of the Caltrain service in the years ahead and offers the best value. Accordingly, a recommendation will be presented to the Board to award this contract to TransitAmerica at the meeting of September 1, 2011.

An explanation of the Request for Proposals (RFP) solicitation and evaluation process that lead to this conclusion is set forth below.

Background

The current contract with Amtrak continues on a month-to-month basis through the time the Board authorizes transition to a new contract, with an ultimate expiration date of June 30, 2012. Amtrak has served as the JPB's contract operator since the JPB assumed responsibility for the Caltrain service from the Southern Pacific Transportation Company in 1992. The JPB has conducted a competitive solicitation to select an operator on two occasions during this period and each time Amtrak was the successful proposer.

The decision to solicit competitive proposals for this contract was based on the following considerations:

- Expiration of the current contract which had been in place for a decade;
- Potential new proposers enhancing the competitive procurement environment;
- Increased visibility of Caltrain within the rail industry; and
- Good procurement practice.

The JPB has learned from its prior experiences soliciting proposals for this contract that labor protection provisions mandated under federal law and the US Department of Labor regulations, commonly referred to as 13(c) requirements, present a unique challenge in the context of Caltrain. The JPB's 13(c) agreements require that there be "contractor-to-contractor" protections for the affected employees if there is a change from the current contractor to a new contractor. As a result, in any procurement solicitation the JPB must ensure that all proposers clearly understand the impact of this requirement, which for all practical purposes results in the agreement of any proposer to initially assume all existing collective bargaining agreements, including wages, and terms and conditions of employment. Since it would be the responsibility of any new contractor to ensure compliance with the 13(c) agreements, the JPB would require the new contractor to also assume the financial risk of any resultant claims for 13(c) violations with the exception of those claims that may arise from JPB-directed actions.

JPB's Goals and Objectives

In preparation for this RFP solicitation, the goal of the JPB was to enter into an agreement with a contract operator that would be most capable of providing flexibility, stability and skill in an environment of

financial constraints and significant operational changes with the implementation of Positive Train Control (PTC), electrification and high speed rail on the horizon.

The specific objectives of the JPB included improving operating performance and customer service, realizing efficiencies, and ensuring the continuity and enhancement of a robust safety culture. In order to achieve these critical objectives, the RFP adopted a new compensation methodology that would have the effect of providing the contractor profit for performance in areas that were identified as important to the JPB. This “performance fee” program provides for no minimum or guaranteed level of profit and indicates amounts that will be paid for meeting or exceeding certain performance targets related to JPB objectives. In this manner, alignment with the JPB’s objectives would be ensured. This is in contrast to the guaranteed fixed fee that has been paid as part of previous contracts.

The RFP specified that the contractor would be incentivized and compensated for superior performance in the following areas that are of key importance to the JPB: management of the business; safety; on-time performance; customer service; and the state of good repair of rolling stock, track, and signal and communications infrastructure.

Request for Proposals Issuance

The RFP process commenced more than 15 months ago with the issuance of the RFP on May 5, 2010. The solicitation information was advertised in *Railway Age* and *Passenger Transport*, national industry publications, on both publications’ websites, and on the JPB’s procurement website. Solicitation notices also were sent to interested proposers, small business enterprises and disadvantaged business enterprises (DBEs). The solicitation generated a great amount of interest among qualified proposers both inside and outside the United States. Prior to the date proposals were due, the JPB conducted a pre-proposal conference on May 26, 2010 and a facilities tour on May 27, 2010, which were attended by 61 individuals associated with 18 firms.

On September 27, 2010 proposals were received from five firms (none of which are DBEs) as follows: Keolis Rail Services America (Keolis); Peninsula Corridor Rail Services (PCRS), a joint venture of Amtrak and Bombardier; Peninsula Rail Services (PRS), a joint venture of RailAmerica and Ratp Dev; TransitAmerica Services, Inc. (TASI), a subsidiary of Herzog Transit Services, Inc. and formerly a subsidiary of Herzog Contracting Corporation; and Veolia Transportation, Inc. (Veolia).

The RFP’s comprehensive methodology for evaluating the proposals was implemented with the assembly of a formal Evaluation Committee (Committee) to have primary responsibility for evaluating the proposals and developing a recommendation to the Executive Committee, the JPB’s Ad Hoc Committee and the Board. The Committee, which included more than 30 individuals, was composed of qualified JPB staff, consultants, and personnel from the JPB’s member agencies who offered expertise in all key technical areas, including finance, maintenance of way, maintenance of equipment, station and facility maintenance, train operations, safety, risk management, and information technology. The Committee included a scoring team comprised of five senior staff members.

Evaluation Criteria

In order to ensure that a fair and objective mechanism was used to evaluate the proposals, the following weighted criteria were established in order to score the proposals:

- Qualifications and Experience of Firm and Key Personnel 0-20 points
- Management, Operations, and Maintenance Plans 0-55 points
- Cost Proposal 0-25 points

Total
points

100

Within each of the three key evaluation criteria noted above, all five proposals received were examined and evaluated based on the following sub-elements:

- I. *Qualifications and Experience of Firm and Key Personnel:***
 - A. Organization Structure
 - B. Passenger Rail Operator Experience
 - C. Customer Service Experience
 - D. Construction Support Experience
 - E. Key Management Personnel
 - F. Financial Qualifications
 - G. Safety and Regulatory Compliance
- II. *Management, Operations and Maintenance Plans:***
 - A. Understanding of the Caltrain System
 - B. Personnel and Staffing Plan
 - C. Mobilization, Transition and Start-Up Plans
 - D. Management of Construction Support and Operations Interface
 - E. Management and Integration of Key Function
 1. Safety Plan
 2. Transportation Plan
 3. Dispatch and Rail System Management Plan
 4. Maintenance of Service Equipment Plan
 5. Maintenance of Rail Lines Plan
 6. Stations and Facilities Plan
 7. Material Management Plan
 - F. Management Control and Decision Making Plan
 - G. Plans for Cost Containment/Reduction and Productivity Improvement
 - H. Performance (Award) Fee Program
 - I. Sustainability Plan
 - J. Customer Service Plan
- III. *Cost Proposal:***
 - A. Mobilization, Transition and Start-Up Services
 - B. Basic Service Plan
 - C. Additional Services

Evaluation Process

After initial review, evaluation, and scoring of proposals, the IPB determined that the four firms listed below were in the competitive range:

- Keolis Rail Services America

- Peninsula Corridor Rail Services
- TransitAmerica Services, Inc.
- Veolia Transportation, Inc.

Each of these firms was invited for an interview and oral presentation. These interviews were rigorous, all day sessions and included a crisis incident scenario to which each firm was required to respond. Following the interviews, Committee representatives made site visits to rail properties that are being operated by each of the proposers and received feedback on the proposers' performance.

Subsequent meetings were held with the four proposers for the purposes of: (1) providing the status on the solicitation process; (2) clarifying JPB goals and objectives for its new contractor, including enhancing safety, improving operating performance and realizing efficiencies; (3) clarifying the Scope of Services to be provided; (4) providing each proposer with specific feedback on their proposal; and (5) describing the Best and Final Offer (BAFO) process and schedule. Following these discussions, all four firms were afforded and accepted the opportunity to submit a BAFO.

Final Scoring

The Scoring Team met once more in early August 2011 to evaluate and score all of the BAFOs. The scoring resulted in a final consensus ranking of the firms, as follows:

- TransitAmerica Services, Inc.
- Peninsula Corridor Rail Services
- Veolia Transportation, Inc.
- Keolis Rail Services America

Evaluation Criteria	TASI	PCRS	Veolia	Keolis
Qualifications and Experience of Firm and Key Personnel (20 Points)	18.2	14.8	12.6	11.8
Management, Operations and Maintenance Plans (55 Points)	50.2	41.2	36.0	30.0
Cost Proposal (25 Points)	22.8	22.2	25.0	22.5
Total	91.2	78.2	73.6	64.3

The JPB was fortunate to attract the level of interest it did from these very capable organizations. Each proposer is qualified to serve and offers relevant experience. As the process evolved, each firm had the opportunity to sharpen its focus in response to the JPB's questions and suggestions, resulting in BAFOs from each that could reflect an enhanced understanding of the JPB's goals, objectives and needs. Each of the four firms demonstrates appropriate capabilities and proposes acceptable solutions to most, if not all, areas of responsibility. At the end of the day, however, TransitAmerica's overall proposal clearly stood out above the others, exhibiting a higher level of understanding and clarity for the following reasons:

Highest quality General Manager and management team

TransitAmerica provides a well-rounded management team with experienced personnel in key positions. The proposed team is led by a first-rate General Manager and offers an excellent combination of skills and qualifications. TransitAmerica also has a history of consistency and stability in management that is demonstrated at its other rail properties.

Strong safety culture

The safety culture of TransitAmerica and its parent Herzog Transit Services are held in high regard in the rail industry. The extent of this culture was reinforced during site visits where it was experienced firsthand.

High level of experience and expertise in all required areas

TransitAmerica has accumulated many successful years of passenger rail, customer service, and construction support experience at similar rail properties throughout the country. Given its past and continuing relationship with Herzog Contracting Corporation and its place in the construction industry, the provision of these services is second nature. They understand how to interface with active operations to complete projects with minimal disruption.

Local authority and autonomy providing adaptability to meet JPB needs

TransitAmerica presents an organization structure of local authority and autonomy allowing for a high degree of flexibility and adaptability while still exhibiting a willingness to lead and take ownership. Strong and readily-available corporate support is available when needed, but the local firm is empowered to make the decisions it needs to succeed and flourish, which was further confirmed in conversations with TransitAmerica and Herzog Transit Services clients.

Offered optimal Staffing Plan and a path to achieve it

Instead of just settling for "business as usual", TransitAmerica's proposal includes an optimal staffing plan to transition the service to its model of operation while also providing much-needed efficiencies over time. The staffing plan fully recognizes and addresses 13(c) requirements and attendant financial risks, allowing the necessary changes to occur gradually, while offering the required services.

Solid and detailed management, operations and maintenance plans

Experience and expertise can only be put to good use if the plans to implement and utilize them also are good ones. TransitAmerica's plans show a high level of understanding regarding the Caltrain operating environment and customer needs and offer solutions that are detailed, thorough and reasonable. Additionally, TransitAmerica was found to be the most aligned with the JPB's goals and priorities.

Extensive transition and mobilization experience

Having provided services at many rail properties across the country, TransitAmerica has extensive experience when it comes to mobilizing or transitioning a service. It has assumed services from several different rail contract operators and has a great understanding of how to do that with personnel governed by collective bargaining agreements.

Excellent, consistent references

Site visits and reference checks demonstrate that TransitAmerica superiority "on paper" also translates to the real world. Consistently positive, the feedback received reinforces that the firm and the service it provides is held in the highest regard by its client properties and customers.

Best overall value to the JPB

While TransitAmerica's cost proposal is not the lowest provided, it is a realistic proposal that provides a high quality service while also providing quantified efficiencies over the term of the contract. It is the best balance of quality, savings, and overall value.

Treatment of Cost Proposals

In light of the JPB's ongoing financial challenges and projected budget deficits, the treatment of the cost factor deserves special mention although this factor was not attributed points to make it the most significant criterion in the evaluation process.

Although the RFP did not require the proposal with the lowest price to be awarded the most points, the JPB determined that the prices contained in each proposer's BAFO were ostensibly based on providing the same level of services and assuming all 13(c) labor protection obligations. Therefore, a simple arithmetic formula was employed in the final scoring process to determine the point ranking for the cost proposals. The proposal with the lowest grand total price was awarded the most points (25). The other proposals received points in proportion to the ratio of the lowest overall price to the overall price of the proposal under review.

A summary of the cost comparison based on the BAFOs is as follows:

Proposal	Mobilization	FY2012*	FY2013	Estimated Grand Total**
TASI	\$2.5M	\$62.9M	\$65.1M	\$409.8M
PCRS	\$1.6M	\$66.4M	\$67.1M	\$421.1M
Veolia	\$2.6M	\$53.7M	\$56.5M	\$374.5M
Keolis	\$3.7M	\$62.8M	\$65.6M	\$416.4M

*FY2012 amounts are annualized based on the four-month budget provided by proposers.

**The Estimated Grand Total includes all costs associated with Mobilization, four months of the Basic Service Plan and Additional Services in FY2012, and five additional full years of the Basic Service Plan and Additional Services.

Under the formula described above, Veolia received the full 25 points, while TransitAmerica received 22.8 points, Keolis received 22.5 points and PCRS received 22.2 points. Although TransitAmerica's cost proposal was not the lowest, it fell in second place and the Evaluation Committee was convinced that it comprehensively covered all of the projected costs.

Through negotiations contemplated by the RFP to take place after submission of BAFOs and subsequent final evaluation and ranking of proposers, TransitAmerica's cost proposal was further reduced as follows:

Proposal	Mobilization	FY2012	FY2013	Estimated Grand Total
TASI	\$2.4M	\$61.1M	\$62.5M	\$398.6M

TransitAmerica's negotiated costs are affordable as they fall within the current and projected operating budgets for fiscal years 2012 and 2013, and the negotiated level of costs will be incorporated into any new agreement with TransitAmerica.

Conclusion

Based on the above summary review and analysis of the RFP process, the proposal evaluation due diligence, the findings and ratings of the Evaluation Committee, and the input and support of the Executive Staff, the Ad Hoc Committee of the Board has concluded that TransitAmerica's proposal for the Rail Operations, Maintenance and Support Services Contract for Caltrain provides the strongest combination of resources, technical expertise, solid operations and maintenance plans, alignment with JPB's goals and objectives, and overall best value for the JPB.

Based on this conclusion, the Ad Hoc Committee is recommending to the Board of Directors of the JPB a contract award to TransitAmerica Services, Inc. as of September 1, 2011.

Bio

Charles H. Harvey

Charles H. (Chuck) Harvey is the Deputy CEO for the San Mateo County Transit District, the Peninsula Corridor Joint Powers Board (known as Caltrain), and the San Mateo County Transportation Authority. He is a 30 plus year veteran of the transit industry, having spent 8 years in the private sector before joining the District in 1989.

Chuck is responsible for all bus and commuter rail operations, engineering, and all construction activities for the three agencies. His team was responsible for the development and execution of the recent rail operations procurement process, which resulted in the selection of a new contract operator for the Caltrain service.

REPUBLICAN MEMBER QUESTIONS FOR THE RECORD
Full T&I Committee Oversight Hearing – High Cost of Amtrak’s Monopoly Mentality
In Commuter Rail Competitions
Tuesday, September 11, 2012, 10:00 a.m.

Questions for Chuck Harvey, Caltrain

1. Please describe in more detail Caltrain’s performance fee contract model.

Answer:

In the previous operating contract with Amtrak, they received reimbursement for all allowable direct expenses, plus approved G&A (General and Administrative Overhead) fees on the expenses, plus a 5% fixed-fee which represented their “profit” for the work performed.

Under the new operating contract with TASI, they also receive reimbursement for all allowable direct expenses, plus approved G&A (General and Administrative Overhead) fees on the expenses. They do not automatically receive any guaranteed profit similar to the Amtrak 5% fixed fee. Instead the agency and TASI have agreed to make available a dollar amount equivalent to approx.. 8% of the basic service plan costs which equates to a potential profit of up to \$4.5 million dollars per year. This Performance Fee Program must then be earned by TASI by delivering service to the agency that meets and exceeds established benchmarks of performance.

The Performance Fee Program awards portions of the total available award fee in areas identified as important to Caltrain and our customers. 35% of the fee can be earned in the Management category which includes budget adherence, staffing, and related administrative responses to meet Caltrain’s needs. 20% of the fee can be earned in the Safety category which includes employee injury rates, and reportable regulatory incidents and violations. 15% of the fee can be earned in the On-Time Performance of the train service, 10% can be earned in the Customer Service area based on surveys and compliant levels, and 20% can be earned by minimizing Equipment, Track, and Signal related delays to the service provide to Caltrain customers. It should be noted that the benchmarks established in the Performance Fee Program are ambitious and extremely difficult for the contractor to fully earn. They were designed to create stretch goals for TASI to aspire to achieve, which Caltrain would be willing to pay since the result would be world class train service to our customers.

A copy of the Performance Fee Program chart is attached as part of this response.

Exhibit C
Performance Fee Program

Category Total Points	Management 35					Safety 20					On-time Performance 15					Customer Service 10					Equipment-reliability Days Per 100,000 train miles					Track-related Days Per 100,000 train miles					C and S-related Days Per 100,000 train miles				
	Points	Scale	Points	Scale	Points	Mix 5	Points	Scale	Injuries 1	Points	Scale	FRA Violations 5	Points	Scale	FRA Accident/incident 5	Points	Scale	Points	Scale	Points	Scale	Points	Scale	Points	Scale	Points	Scale	Points	Scale	Points	Scale	Points	Scale		
Sub-Category Subtotal	5	Within 0.0% over or 1% under budget	5	97.0 - 100.0%	5	97.0 - 100.0%	20	354 or fewer	10	0 - 2.00	5	0	5	0	15	99.0 - 100.0%	5	4.20 - 5.00	5	0.000 - 0.019	10	0 - 300	5	0 - 16	5	0 - 25	5	0 - 16	5	0 - 25					
	3	Within 1.0% over or 2% under budget	3	93.0 - 96.9%	3	93.0 - 96.9%	18	301 - 350	8	2.01 - 2.40	3	1	2	1	13	97.0 - 97.9%	3	3.00 - 3.99	3	0.020 - 0.039	8	300 - 370	3	17 - 45	3	17 - 45	3	17 - 45	3	17 - 45					
	2	Within 2% over or 3% under budget	2	91.0 - 92.9%	2	91.0 - 92.9%	17	308 - 370	7	2.41 - 2.80	2	0	0	0	12	96.0 - 96.9%	2	3.00 - 3.79	2	0.040 - 0.049	7	371 - 405	2	46 - 80	2	46 - 80	2	46 - 80	2	46 - 80	2	46 - 80			
	1	Within 3% over or 4% under budget	1	89.0 - 90.9%	1	89.0 - 90.9%	16	371 - 375	6	2.81 - 2.80	1	0	0	0	11	95.0 - 95.9%	1	3.40 - 3.59	1	0.050 - 0.059	5	444 - 475	1	81 - 77	1	81 - 77	1	81 - 77	1	81 - 77	1	81 - 77			
	0	Above 2.5% over or 0.5% under budget	0	Below 80.0%	0	Below 80.0%	12	301 - 395	4	3.01 - 3.20	0	0	0	0	9	93.0 - 93.9%	0	Below 3.60	0	Above 0.059	4	476 - 510	0	Above 77	0	Above 200	0	Above 200	0	Above 200	0	Above 200			
							10	396 - 390	3	3.21 - 3.40					8	92.0 - 92.9%					3	511 - 545													
							8	391 - 395	2	3.41 - 3.60					7	91.0 - 91.9%					2	546 - 580													
							4	401 - 405	0	Above 3.75					5	89.0 - 89.9%					0	Above 600													
							2	406 - 410	0						4	88.0 - 88.9%																			
							0		0						2	86.0 - 86.9%																			
							0		0						1	85.0 - 85.9%																			
							0		0						0	Below 85.0%																			

* The mix for Budget Adherence will be measured and paid twice per year at the end of the fiscal year. The mix for the Onboard Survey will be measured and paid twice per year. Onboard Survey will be measured and paid at the end of each quarter.

Witness Questions For The Record
The Honorable Corrine Brown To
Mr. Chuck Harvey, Chief Operating Officer, Caltrain Peninsula Corridor Joint
Powers Board
Hearing On
“A Review of Amtrak Operations Part 2: The High Cost of Amtrak’s Monopoly
Mentality in Commuter Rail Competitions”
September 11, 2012

Q1. Section 8102 of H.R. 7 prohibits Amtrak from using any Federal funds for (A) Hiring or contracting with any outside legal professional for the purpose of filing, litigating, or otherwise pursuing any cause of action in a Federal or State court against a passenger rail service provider; and (B) Filing, litigating, or otherwise pursuing in any Federal or State court any cause of action against a passenger rail service provider arising from a competitive bid process in which Amtrak and the passenger rail service provider participated.

For purposes of the section, the term 'outside legal professional' means any individual, corporation, partnership, limited liability corporation, limited liability partnership, or other private entity in the business of providing legal services that is not employed on a full-time basis solely by Amtrak; and the term 'passenger rail service provider' means any company, partnership, or other public or private entity that operates passenger rail service or bids to operate passenger rail service in a competitive process.

As Chief Operating Officer of an agency that receives public funding, if section 8102 of H.R. 7 were amended to prohibit any commuter railroad that receives public funding from taking legal action or defending itself in court, what concerns would this raise for Caltrain, if any?

A1: The suggested amendment to Section 8102 of H.R. 7 would severely hamstring the ability of commuter railroads to protect themselves against a variety of legal challenges. Provisions in H.R. 7 that prohibit Amtrak from using federal funds for litigation purposes do not eliminate the need for commuter railroads to protect themselves against legal action more generally, and from parties other than Amtrak. A blanket policy that prohibits commuter railroads from any legal action or legal defense would in effect foreclose access to the judicial system, leaving these systems vulnerable on a number of fronts with no ability to protect themselves from even the most illegitimate legal threats.

Q 2. You mentioned that Caltrain’s partnership with Amtrak over the past 20 years has contributed to the growth and success of the system. Please explain.

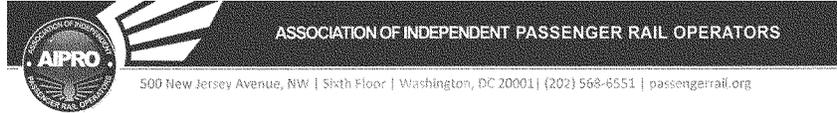
A2: Amtrak was instrumental in providing the turn-key rail operations expertise to successfully transition the Caltrain passenger service that had been previously operated by a private operator, the Southern Pacific Transportation Corporation, to public ownership under the Peninsula Corridor Joint Powers Board (“JPB”). Since the assumption of public ownership of the service the JPB and Amtrak collaborated to improve both the infrastructure and service to the public through a series of capital improvement projects and service enhancements. Amtrak partnered with the JPB when it decided to reinvent its service model to introduce the Baby Bullet express train service model, which significantly increased the efficiency of the operations and dramatically increased ridership and revenue.

Q3. How did Amtrak work with Caltrain in the transition to the new operator?

A3: The transition of any rail operation to a new contractor is a complex endeavor that requires close collaboration and cooperation on a variety of fronts including: safety, labor relations/employment, record retention and retrieval, material inventory, systems and infrastructure, and asset condition at turnover to name just a few. Amtrak pledged its cooperation when the contract was awarded to TASI and assigned key management staff to oversee the on-going transition activities and follow up/troubleshoot issues that were identified by the JPB. Additionally until a final transition date is selected for turnover of the daily operation the existing contractor must continue to provide the safe, reliable services to the public that are expected. Amtrak made a commitment to provide this continuity of service until the final date for transition to TASI.

Q4. Your testimony states that Amtrak was the highest price bidder out of the four proposals that were submitted, yet they were ranked 2nd in your evaluation. Why?

A4: As stated in my testimony on September 11, 2012 and as further explained in the Appendix to my testimony that was provided to the Committee this contract solicitation was a "Request For Proposals" with an evaluation methodology and criteria that selected the best value for the JPB to select. Under the RFP best value methodology, price was worth up to 25 points out of a total point scale of 100. Other criteria that was reviewed and rated during the process were: Qualifications and Experience of Firm and Key Personnel (up to 20 points), and Management, Operations and Maintenance Plans (up to 55 points). Even though they were the highest cost proposal, Amtrak scored higher than two of the competing firms (Veolia and Keolis) in the other two rating areas, which resulted in their total score/ranking of second in total points. Generally the Amtrak proposal was stronger than Veolia's and Keolis' due to their prior experience in operating the Caltrain service and their detailed plans for how to do so over the life of the new contract. The TASI proposal was rated higher in all respects compared to the Amtrak proposal which resulted in their being the highest ranked firm and the recommended awardee of the new contract. The detailed scoring chart for the four proposals is listed in the Appendix provided to the Committee.



A REVIEW OF AMTRAK OPERATIONS PART 2 – COMMUTER RAIL COMPETITIONS

Hearing Before the House Transportation and Infrastructure Committee

2167 Rayburn House Office Building

Testimony of Ray B. Chambers, Executive Director (AIPRO)

Association of Independent Passenger Rail Operators

September 11, 2012

Executive Summary of Testimony

I appreciate this invitation to testify on behalf of AIPRO. AIPRO is an organization of 5 independent railroad operators who compete against each other and Amtrak to provide passenger rail operations under contract to public commuter authorities. AIPRO was established to actively encourage the expansion of passenger rail service in the United States. Our mission is to promote the public benefits of our current passenger rail system while working with our partners in industry to increase passenger rail opportunities through a competitive marketplace. We believe there should be a bipartisan national commitment to establish a viable intercity and urban high performance passenger rail network in America over the coming years. This network should build on the existing framework of commuter and intercity passenger service and should be implemented through public-private partnerships and competitive processes.

An expanded passenger rail network in the US, made possible by additional quality operators offering competitive pricing and innovation will expand America's mobility options, reduce urban congestion, and most importantly, create jobs that would not otherwise be available.

Today Amtrak maintains a de facto monopoly in intercity passenger rail service. However, there is vigorous competition in the commuter passenger arena, which is the focus of this hearing.

There seems to be a widely held opinion that Amtrak is the only realistic option as a provider of passenger rail service. This myth holds that independent operators are "fly by night," relatively small and anti-union. That is patently not true. Our members have wide global reach as well as vast American experience operating thousands of trains and carrying in excess of a billion passengers every year. In fact, many of our members, by themselves, are significantly larger

than Amtrak. In the United States, three independent AIPRO carriers are operating more than 252,000 trains per year carrying more than 72 million passengers. In 2011 Amtrak claimed about 110,000 annual trains with 30.2 million passengers. While Amtrak is tasked with operating long distance trains with some different requirements, the point is that AIPRO members are a major competitive force in American passenger rail operations today. Further, every AIPRO member works with the railroad operating unions. Coast to coast, operations from the MBTA in Massachusetts to Virginia Railway Express to Caltrain are fully unionized.

The commuter agencies of this country are increasingly turning to competition. Of the 25 commuter railroads reporting to the National Transit Database, 17 agencies purchase transportation service under contract and 8 directly operate their service. Of the 17 commuter systems that contract for various services, 11 have gone to competitive bid for operations and several have gone to bid for maintenance. Amtrak has been involved in 9 properties that have gone to competitive bidding. Amtrak did not win any of these bids losing on both price and quality of service. It is clear a growing number of commuter agencies recognize that competition between operators for service provides the best operation at the lowest cost.

Looking to the future, we can assure you the AIPRO members are interested in expanding beyond commuter to intercity operations. We submit the commuter model points the way to the states for introducing competition into our national intercity passenger rail network. Section 209 of the Passenger Rail Investment & Improvement Act of 2008 (PRIIA) requires states to pay nearly the full subsidy costs of all corridor passenger service under 750 miles. There are some 27 corridors that will be nearly fully subsidized by 15 states. As PRIIA is reauthorized, a good reform would be to incentivize the states to apply the commuter model to the intercity corridor service. I can assure you our members will be active participants in that process.

Thank you.

Full Testimony

Thank you for this invitation to testify on behalf of the Association of Independent Passenger Rail Operators (AIPRO). We are an organization of 5 independent railroad operators who compete against each other and Amtrak to provide passenger rail operations under contract to public commuter authorities.

Time for a New Bipartisan Rail Plan

AIPRO was established to actively support the expansion of passenger rail service in the United States. Our mission is to promote the public benefits of our current passenger rail system while working with our partners in industry to increase passenger rail opportunities through a competitive marketplace.

Our population is growing. Highways are increasingly congested. Fuel prices continue to rise. There is a need for a functional premium passenger rail network. To reach that goal there should be a new bipartisan national commitment to establish a viable intercity and urban high performance passenger rail system in America that will provide travelers with a third option to highways and aviation. We should get back to bipartisanship. AIPRO is committed to working with the Congress, states, freight railroads, labor and all of those with an interest in expanding passenger rail service to craft a plan that will best promote this goal.

This emerging passenger rail network should build on the existing framework of commuter and intercity passenger service and be implemented through public-private partnerships and competitive procurement processes.

An expanded passenger rail network in the US, made possible by additional quality operators offering competitive pricing and innovation will expand America's mobility options, reduce urban congestion, and most importantly, create jobs that would not otherwise be available.

Today Amtrak maintains a de facto monopoly in intercity passenger rail service. However, there is vigorous competition in the commuter passenger arena, which is the focus of this hearing. We suggest the American commuter experience should be the cornerstone for American intercity passenger reform.

Independent Passenger Operators in Competition

There seems to be a widely held opinion that Amtrak is the only realistic option as a provider of passenger rail service. This myth holds that independent operators are "fly by night" in the "Ma and Pa" or "railfan" category and are relatively small and anti-union. That is patently not true.

The five members of AIPRO are all substantial companies. They are: First Transit & First Services America; Herzog Transit Services; Keolis Rail Services of America; and RATP-Dev USA. These are substantial companies with vast knowledge in moving people with efficiency and quality service. The depth of our experience is comprehensive. Our members have wide global reach as well as American experience operating thousands of trains and carrying more than a billion rail passengers every year. All of our companies are committed to substantial growth in the American commuter and intercity passenger rail arena.

The existing American rail passenger footprint of this group of competitors is large. In the United States, three independent carriers are operating in excess of 252,000 trains per year carrying more than 72 million passengers. According to a recent AIPRO survey, our members operate this train service with just under 3000 employees. In 2011 Amtrak claimed about 110,000 annual trains with 30.2 million passengers. Amtrak has about 20,000 employees. We acknowledge this is not an apples to apples comparison; Amtrak mostly operates long distance trains that have some different requirements. The point is that AIPRO members are a major

competitive force in American rail operations today. Our companies operate efficiently and are prepared to take on challenges of any size or complexity.

Further, all of our members work with the railroad operating unions. While we have the normal management-union issues we strive to maintain good relationships. Operations from coast to coast including the MBTA in Massachusetts, Virginia Railway Express and Caltrain are fully unionized. In these commuter competitions Amtrak offers no special advantage to organized labor. We believe the unions as well as freight railroads must be our key partners in a new public private partnering program to expand passenger rail service in America.

Commuter Agencies and Competition

The commuter agencies of this country are increasingly turning to competition. Of the 25 commuter railroads reporting to the National Transit Database, 17 agencies purchase transportation service under competitive contract and 8 directly operate their service. Of the 17 commuter systems that contract for various services, 11 have gone to competitive bid for operations and several have gone to bid for maintenance. Amtrak has been involved in 9 properties that have gone to competitive bidding over the last decade. Amtrak did not win any of these bids and as nearly as we can determine lost on both price and service.

The following are the commuter routes that have engaged in competitive bidding for Operations:

- San Diego Sprinter – 2.5 million riders - Veolia
- Miami Tri-Rail – 5.8 million riders – Veolia (Amtrak bid and lost)
- Boston MBTA – 51.1 million riders – Veolia (Amtrak incumbent for 17 years, but didn't bid)
- North County - San Diego Coaster – 1.6 million riders – Herzog (Amtrak was the incumbent for 10 years – bid and lost)
- Dallas Dart-TRE – 20.3 million riders – Herzog (Amtrak bid and lost)
- Austin Metro – Herzog (Amtrak bid and lost)
- Albuquerque Railrunner – 1.4 million riders – Herzog (Amtrak bid and lost)
- San Francisco – San Jose Caltrain – 12 million riders – Herzog (bid newly won replacing Amtrak who had also bid)
- San Jose ACE – 1.4 million riders – Herzog
- Virginia Railway Express – 4.7 million riders Keolis (Amtrak incumbent for 18 years, bid & lost)
- Maryland MARC – Out for competitive bid – Currently CSX operated (declined to bid)

5 examples where Amtrak was involved in a bid that went to an independent operator are Boston MBTA; Caltrain; North County Coaster; Tri-Rail and Virginia Railway Express.

It is clear a growing number of commuter agencies recognize that competition between operators for service provides the best deal at the lowest cost. The competitive model works and it should be encouraged by federal policy.

The Commuter Model for Intercity Passenger Service

We submit the Commuter Model points the way to the states for introducing competition into our national intercity passenger rail network. The bipartisan Passenger Rail Investment & Improvement Act of 2008 (PRIIA) expires in 2013 and provides a good platform for further intercity passenger reform.

Because of population growth and demographics AIPRO calls for establishing a high performance urban/ intercity passenger rail network in America. That system should be built on the following two principles:

1. Based on the successful highway and aviation programs, the federal role should be restricted to essential oversight necessary to safety and interoperability with financial support for capital as was provided in PRIIA.
2. Maximum state-centric governance and competitive private sector involvement in the financing, design, operation and maintenance of the corridor rail passenger network.

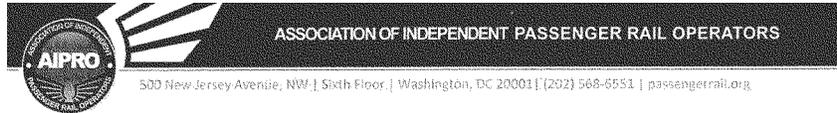
Amtrak has a de facto intercity rail passenger monopoly. Their network is clearly defined in 3 categories: 1) Northeast Corridor (NEC); 2) Long Distance Routes; 3) State-supported routes (all routes under 750 miles). The NEC is a major national asset that must be handled carefully. Currently some 2200 trains carry three quarters of a million people each day. Amtrak has announced ambitious plans for the corridor, but admit the source of finance is unknown. As Chairmen Mica and Shuster have suggested, there is no reason that private participation cannot be introduced in a manner that will lead to a true high speed rail corridor.

The long distance routes are difficult as they lose a great deal of money, although there are options to introduce public-private partnering in order to provide the best service at the lowest possible subsidy. At a future point, AIPRO will be pleased to advance proposals for competition and maximum privatization on the NEC and Long Distance Routes

We suggest for the near term, the commuter competitive model, can be introduced to advance the state supported routes. Currently, 15 states are providing Amtrak with substantial subsidies on 27 routes. The states have made serious capital contributions and are providing operating subsidies to Amtrak. Under PRIIA Section 209 the states will soon have responsibility to nearly fully subsidize all of these intercity passenger routes. Starting October 2013, it is estimated this will add approximately \$200 million in operating subsidy costs to already stressed state budgets plus additional amounts in capital costs.

An excellent intercity passenger reform would be to incentivize the states to apply the commuter model to intercity corridor service. This will result in efficient and expanded quality rail passenger service. I can assure you AIPRO companies will be more than pleased to work with Congress and key stakeholders, such as labor and freight railroads, to bring about true reform.

Thank you.



AIPRO is a voluntary association of 5 transportation companies who are significant players in the American and international passenger rail transportation marketplace. Around the world our members transport by rail more than a billion passengers each year. In the United States, these companies operate ten commuter railroads and over 252,000 trains per year carrying over 72 million annual riders to their jobs, school and other destinations.

AIPRO is dedicated to expanding passenger rail service in the United States as a necessity in meeting the demands of population growth, increasing travel and coming gridlock. Ultimately we envision a national high performance passenger rail network that will provide our children and grandchildren a viable third transportation option to highways and airports. The program should be developed in harmony with the three following principles:

- *The network should be built on the foundation of the existing urban, state supported intercity and long-distance routes.*
- *Under federal guidelines, not unlike the interstate highway program, the passenger rail network should be developed and operated through state and multi-state authority.*
- *There should be maximum private involvement and competition in the design, build, operation and maintenance of the emerging rail passenger network.*

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HERZOG
TRANSIT SERVICES INC.

Keolis
America

 **RATP Dev**

 **VEOLIA**
TRANSPORTATION

For more information, please visit www.passengerrail.org

REPUBLICAN MEMBER QUESTIONS FOR THE RECORD
Full T&I Committee Oversight Hearing – High Cost of Amtrak’s Monopoly Mentality
In Commuter Rail Competitions
Tuesday, September 11, 2012, 10:00 a.m.

Republican T&I Questions for Ray Chambers, AIPRO

1. Given that Amtrak is a federally subsidized entity, do you believe that this gives Amtrak an advantage when competing with private rail operators?

Answer: Because of the fact that Amtrak receives a substantial federal subsidy for operating, capital and debt reduction, they have a clear advantage over any company that does not have such a subsidy. Further, in terms of operating intercity passenger service where Amtrak currently enjoys a de facto passenger monopoly, Amtrak has a right to access tracks of the freight carriers at incremental cost. No other passenger operator has similar advantages.

2. What advantages and disadvantages do private rail operators have when competing with Amtrak for commuter rail service contracts?

Answer: There have been an increasing number of competitions for commuter service. Commuter agencies appear to have done a good job in conducting fair competitions. I do not believe the private companies have any particular advantage or disadvantage in these competitions. As already noted, Amtrak has an embedded federal subsidy that private companies, who are compelled to make a profit, do not have. While that would seem to be an advantage to Amtrak, they have not been particularly successful in commuter bids. That may be because they are a quasi-government bureaucracy and do not have the built in flexibility to respond to market requirements of a bid like a private company.

Question from Rep. Petri:

Many independent passenger rail operators have called for utilizing public-private partnerships. As the states take responsibility for funding these corridors, there is a need for a steady source of revenues to cover cost of capital, maintenance and operating losses. Of course in this fiscal climate, federal grants are not a likely option. I have introduced H.R. 4361 with Rep. Lipinski, which would create an initiative that encourages states and localities to capture increasing value from transportation oriented development around stations and make those revenues available to the states or authorities to fund expanding intercity passenger rail service.

1. Could you comment on this proposal and how it may provide a way to expand intercity passenger rail corridors?

Answer to Question from Congressman Petri: Yes, independent passenger operators favor public-private partnerships and competition to reform passenger rail service. That is a central focus of this hearing. I am familiar with H.R. 4361. I support it and am pleased to respond to your specific question as to how it can help expand intercity passenger corridors.

As you indicated, the states will soon have full statutory responsibility to fund the 27 intercity passenger rail corridors with fewer than 750 miles and Amtrak will contribute nothing to the operating deficits and maintenance of this intercity corridor service. In fact, these state supported corridors are growing ridership and most of the states want to expand service just as they are required to take on the full cost of the service. With tight budgets the states will be hard pressed to even maintain service at current levels. Where will the money come from to fund a viable system of interstate rail passenger corridors?

The Petri-Lipinski bill is the best idea that has been put forward to solve that problem. It establishes a national initiative that will allow states and intercity corridor authorities to create a series of station area districts that will capture increasing value of real estate development and invest it back into passenger rail capital, operations and maintenance on a continuing basis. A National Planning Developer, or PD, will oversee the national initiative and apply neutral professional development planning to create the best opportunities for maximum value capture to support rail project financing. Similarly, Corridor Planning Developers will manage the TOD program in each corridor.

Under the bill a qualified authority may use existing programs of low cost repayable federal finance to not only fund rail infrastructure but commercial development projects in the designated station area that contribute a direct quantifiable stream of revenue to passenger rail operations. This will produce a substantial number of jobs quickly which in turn will stabilize and expand intercity rail corridors across the country. The program is completely voluntary to the states and is revenue neutral.

I am hopeful that as passenger reform legislation moves forward this bipartisan initiative to expand intercity passenger service will be a part of it. I believe enactment of H.R. 4361 can be game changing.



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

John L. Altra
Chairman

Rich F. Rahall, III
Ranking Member

James W. Cook II, Chief of Staff

James H. Zola, Democrat Chief of Staff

October 3, 2012

Mr. Ray Chambers
Executive Director
Association of Independent
Passenger Rail Operators
500 New Jersey Avenue NW
Washington, D.C. 20001

Dear Mr. Chambers:

On September 11, 2012, the Committee on Transportation and Infrastructure held a hearing on "A Review of Amtrak Operations, Part 2: The High Cost of Amtrak's Monopoly Mentality in Commuter Rail Competitions."

Attached are further requests and questions to answer for the record. I would appreciate receiving your written response to these requests and questions no later than Wednesday, October 17, 2012. Please send them to Jennifer Homendy by fax at (202) 226-1898 and via email at Jennifer.Homendy@mail.house.gov. Please do not send your responses by U.S. postal mail as we may not receive them before deadline due to the House mail screening process.

Should you have additional questions or need further assistance, please contact Jennifer at (202) 225-3274.

Sincerely,

Corrine Brown
Ranking Democratic Member
Subcommittee on Railroads, Pipelines,
and Hazardous Materials

Attachments

WITNESS QUESTIONS FOR THE RECORD
 THE HONORABLE CORRINE BROWN TO
 MR. RAY B. CHAMBERS, EXECUTIVE DIRECTOR, ASSOCIATION OF INDEPENDENT PASSENGER
 RAIL OPERATORS
 HEARING ON
 "A REVIEW OF AMTRAK OPERATIONS PART 2: THE HIGH COST OF AMTRAK'S MONOPOLY
 MENTALITY IN COMMUTER RAIL COMPETITIONS"
 SEPTEMBER 11, 2012

1. As requested during the hearing, for each of your members, please provide a detailed accounting (by member and bid) of all the costs involved with preparing bids for commuter rail competitions over the last 10 years.
2. Page 3 of your written testimony states: "The five members of [the Association of Independent Passenger Rail Operator] are all substantial companies. They are: First Transit & First Services of America; Herzog Transit Services; Keolis Rail Services of America; and RATP-Dev USA (See Attachment 1)." Attachment 1, however, lists Veolia as a member of the association. Is Veolia a member of AIPRO? If not, was Veolia a member of AIPRO? When did Veolia join AIPRO? If applicable, when did Veolia leave AIPRO and why?
3. Section 8102 of H.R. 7 prohibits Amtrak from using any Federal funds for (A) Hiring or contracting with any outside legal professional for the purpose of filing, litigating, or otherwise pursuing any cause of action in a Federal or State court against a passenger rail service provider; and (B) Filing, litigating, or otherwise pursuing in any Federal or State court any cause of action against a passenger rail service provider arising from a competitive bid process in which Amtrak and the passenger rail service provider participated.

For purposes of the section, the term 'outside legal professional' means any individual, corporation, partnership, limited liability corporation, limited liability partnership, or other private entity in the business of providing legal services that is not employed on a full-time basis solely by Amtrak; and the term 'passenger rail service provider' means any company, partnership, or other public or private entity that operates passenger rail service or bids to operate passenger rail service in a competitive process.'

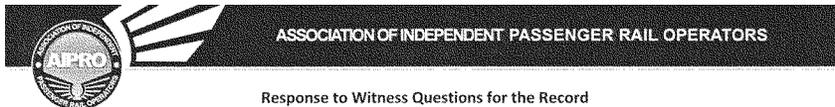
If section 8102 of H.R. 7 were amended to prohibit any commuter railroad that receives any public funding from taking legal action or defending itself in court, what specific concerns would this raise for your members? What impacts (including safety) would this have on the operations of the commuter railroads that your members manage?

4. Does AIPRO and its membership support or oppose section 8102 of H.R. 7?
5. Have you, personally or professionally, ever advocated for inclusion of section 8102 (or a version of section 8102) in H.R. 7 or any other legislation? Please explain.

- a. Have you, personally or professionally, ever provided technical or drafting assistance on section 8102 (or a version of section 8102)? Please explain.
 - b. Did you, personally or professionally, play any role in the development of section 8102? If so, please describe in detail how you participated in the development of the language.
6. Has AIPRO, AIPRO staff or AIPRO contractors, ever advocated for inclusion of section 8102 (or a version of section 8102) in H.R. 7 or any other legislation? Please explain.
 - a. Has AIPRO, AIPRO staff or AIPRO contractors ever provided technical or drafting assistance on section 8102 (or a version of section 8102)? Please explain.
 - b. Did AIPRO, AIPRO staff or AIPRO contractors play any role in the development of section 8102? If so, please describe in detail how you participated in the development of the language.
7. Has any of AIPRO's members, their staff or contractors ever advocated for inclusion of section 8102 (or a version of section 8102) in H.R. 7 or any other legislation? If so, which members? Please explain.
 - a. Has any of AIPRO's members, their staff or contractors ever provided technical or drafting assistance on section 8102 (or a version of section 8102)? If so, which members? Please explain.
 - b. Did any of AIPRO's members, their staff or contractors play any role in the development of section 8102? If so, which members? Please describe in detail how you participated in the development of the language.
8. Please consult directly with Veolia on the following question if Veolia is a member of AIPRO.
 - a. Has Veolia, its staff or its contractors ever advocated for inclusion of section 8102 (or a version of section 8102) in H.R. 7 or any other legislation? Please explain.
 - b. Did Veolia, its staff or its contractors ever provide technical or drafting assistance on section 8102 (or a version of section 8102)? Please explain.
 - c. Did Veolia, its staff or its contractors play any role in the development of section 8102? If so, please describe in detail how you participated in the development of the language.
9. You stated that Mr. Wytkind, President of the Transportation Trades Department, AFL-CIO, misrepresented your position on the applicability of rail labor laws to the existing workforce. According to my staff, however, during consideration of the Passenger Rail Investment and

Improvement Act of 2008, you opposed (via conference call with House and Senate conference staff) applying the grant conditions contained in section 24405 of title 49, United States Code, to a commuter railroad. Those conditions would have deemed any person, including commuter rail operators and their contractors, who conducted operations over rail infrastructure constructed or improved with funded provided in PRIIA as 'rail carriers' for purposes of ensuring that those persons, including commuter rail operators and their contractors, were governed by the Railroad Retirement Act of 1974, the Railway Labor Act, and the Railroad Unemployment Insurance Act. The conditions also provide hiring preference to Amtrak workers when an operator replaces Amtrak service and provides certain protections for existing collective bargaining agreements and arbitration. You, however, advocated for excluding commuter rail operators and their contractors from those conditions (an exclusion which remains in section 24405(e)). Please explain how this relates to your earlier statement that Mr. Wytkind misrepresented your position.

10. Do your members support or oppose section 35108 of S. 1813? Why?
11. Do your members support or oppose requiring the federal government to verify that a passenger rail provider has an agreement in place with the infrastructure owner over which the passenger rail transportation will be provided (or contractual or statutory authority that provides for access to such infrastructure) prior to operating on a route? Why?
12. Do your members support or oppose having to demonstrate to the Federal Government sufficient financial capacity and operating experience to provide passenger rail transportation prior to operating a route? Why?
13. Do your members support or oppose having to meet all applicable safety and security requirements under the law? Why?
14. Do your members support or oppose having to maintain a total minimum liability coverage for claims through insurance and self-insurance of not less than the amount required by section 28103(a)(2) per accident or incident? Why?



Response to Witness Questions for the Record

The Honorable Corrine Brown to

Mr. Ray B. Chambers, Executive Director Association of Independent Passenger Rail Operations

Hearing on

“A Review of Amtrak Operations Part 2: The High Cost of Amtrak’s Monopoly Mentality in Commuter Rail Competitions”

September 11, 2012

1. There are a number of elements that go into a bid in each commuter district. These include such things as company qualifications, experience and key personnel; management capacity, operations and other cost factors. The final results of the scoring are public. However, on a general basis the internal costs involved in preparing a bid are competitively sensitive, proprietary and confidential. Therefore, I cannot provide the information you have requested.
2. Veolia was included in the association overview on page 6 of the testimony, and the omission on page 3 was a typographical error. Veolia is a founding and current member of the association in good standing. I apologize for any confusion this may have caused.
3. AIPRO advocates for the competitive procurement of rail passenger services, and does not take a position on Section 8102 of H.R. 7. As a personal matter, I believe frivolous lawsuits are counterproductive to the growth of the industry and should be discouraged. As I read section 8102 of H.R. 7, it only prohibited Amtrak from using taxpayer provided federal funds to sue companies when involved in a third party competitive bid process. This seems like a reasonable proposition.
4. While I have expressed my personal opinion as a courtesy to the committee. Again, AIPRO does not have a position.
5. AIPRO has not advocated inclusion of section 8102, or provided technical drafting assistance. While I was involved in many discussions concerning transitions of incumbent operators with replacement operators, I had no involvement in the drafting of section 8102.

6. The answer to question #5 is also the answer to question #6. We did not participate in the development of the language.
7. The answer to question #7 is the same as the answer to question #6.
8. Per your instruction, I did consult directly with Mr. Ron Hartman, CEO of Veolia Rail Services. Mr. Hartman serves on the AIPRO board. A wide range of issues including procurement, competition, and workforce transition involving changing of operators were discussed in interviews with the Railroad Subcommittee Members and staff. Veolia did not provide technical or drafting assistance or advocate the inclusion of Section 8102 in H.R. 7 or similar language in any other legislation. Mr. Hartman will be pleased to meet with Railroad Subcommittee Ranking Member Brown to further discuss this issue or any other matter. However, Mr. Hartman shares my personal opinion that Section 8102 has merit.
9. First, Mr. Wytkind did misrepresent the AIPRO position on the applicability of rail labor laws to the existing workforce. The implication is AIPRO members are anti-rail labor. That is simply not true. In terms of whether a rail operation falls under railway labor laws or the standard industrial labor laws of the country is not an issue for AIPRO. We support current law. There is a clear body of law and regulation as to which regulations a commuter railroad operation falls under. AIPRO members happily compete in either environment. So long as all competitors are on the same playing field, our members welcome the opportunity to bid into an existing railway labor law operation.

Second, AIPRO has established a good working relationship with these unions in partnering to run safe and efficient passenger operations. As Mr. Leonard Parker of the Brotherhood of Maintenance Way recently stated publicly at an APTA conference in Seattle, AIPRO members have found common ground with rail labor on several large commuter passenger operations resulting in mutually beneficial agreements. In recent years, our members have entered into multiple productive agreements with rail labor from Boston to San Francisco. The AIPRO board invited a senior rail labor official to attend our last board meeting, who gladly accepted, where we were able to have a roundtable discussion on the shared interests of improving and increasing passenger rail opportunities for all stakeholders. In the coming year we look forward to continuing to strengthen our labor alliances and working together to promote legislation to build a strong intercity and urban high performance passenger rail network in America. This will produce more business for us and more jobs for rail labor. Mr. Wytkind's insinuation that our AIPRO members are anti-rail labor is simply wrong. We are seeking to achieve a good relationship, not an adversarial relationship with rail labor.

You asked me about my role in the development of the PRIIA Act of 2008 and, specifically, the labor protective conditions that were adopted. At that time AIPRO did not exist so the association had no role in its drafting. The founding members of AIPRO

held their first organizational meeting in October of 2010 and the association was incorporated the following year.

However, as a courtesy to the committee, I am pleased to explain my personal role in PRIIA. I was involved as senior transportation advisor to clients including the National Railroad Construction and Maintenance Association (NRC) as well as RAILCET, an organization of railroad construction companies and the two unions with which they hold a national agreement. I don't recall the conference call you reference, and if you can send me minutes or specifics from the call, I will be pleased to provide an additional personal response.

The employees and contractors represented by RAILCET and NRC perform a great deal of work on railroad rights of way and live in a highly competitive environment. Over the last several years, Mr. Wytkind's group has put a number of proposals forward to change federal law in order to bring additional commuter operations under railway labor arrangements that RAILCET and NRC felt would essentially restrict the use of contractors. These proposals would radically alter the status quo and were opposed by the American Public Transportation Association (APTA), as well as NRC and RAILCET. I was active in those discussions.

After a great deal of negotiation and handwringing, a compromise on the labor related issues was reached. Among other things, the compromise included hiring preferences and other protections for Amtrak workers when an alternative operator replaces Amtrak service. While no compromise is perfect, it provided predictability and a comprehensive set of protections for railroad employees and is the law of the land. I personally felt it was a good compromise and AIPRO seeks no change.

At the September 11, 2012 hearing, I felt Mr. Wytkind misrepresented my position in that both AIPRO and I support the applicability of railway labor laws to interstate rail passenger operations or where required by commuter authorities because of historical precedent. Our companies actively compete to provide railway labor act services across the country. As explained in my testimony and in responses to these questions, we fully expect the state supported intercity passenger market to ultimately be opened to competition. Consistent with current practice, we support all of those corridor operations continuing under railway labor law.

The fact is as rail operators in a competitive world, we play the hand we are dealt. We have no interest in undercutting those laws in any fashion. On the other hand, if there are additional moves to force commuter authorities to extend rail labor law to commuter operations in a manner that would restrict contracting and subcontracting or add costs that do not currently exist we will be likely to oppose such proposals as APTA and its allies have in the past. Looking to the future, my guess is our AIPRO position will continue to be unified with that of APTA.

Ultimately, AIPRO is seeking strong relationships with rail labor and we support the status quo in terms of the application of labor law on rail operations. On the labor front we understand the building trades and rail operating unions have an accord to support the status quo under current law. We support that accord.

10. AIPRO took no specific position on Section 35108 of S. 1813. We certainly did not oppose it. Overall, it appeared to contain several items that would be useful if enacted. For example, the enforceability of contracts allocating financial responsibility for claims would seem to be a good thing. A study of options for clarifying and improving passenger rail liability requirements and arrangements could also be helpful. Right now the law is somewhat vague on whether statutory limits apply to third parties to an incident. My understanding is this adds a great deal of confusion in attempting to craft agreements in establishing liability insurance requirements for a passenger operation. Studying the impact of expanding statutory liability limits to third parties and making recommendations could be particularly important.
11. Because of the nature of track ownership in this country, the infrastructure owners are principal stakeholders in the expansion of passenger rail service. Generally speaking, commuter operations are predominately on publicly owned right of way and intercity operations on private right of way owned by the freight railroads. It is in the public interest that as much freight as possible move by rail rather than highway. Therefore, a new passenger operation should not infringe on an existing freight operation. Thus the authority providing the passenger service must have agreements in place with the infrastructure owner prior to the initiation of service that will protect freight capacity and adequately compensate the track owner.

As a practical matter, some commuter operations, in part or in whole, are over private rights of way. AIPRO member companies with such contracts have positive working relationships with the private freight railroads over whose track they operate. As we move to intercity competition we fully expect these good relationships to continue. The fact is on commuter contracts, with the possible exception of Amtrak, the freights now have the ability to reject any alternative operator that is not acceptable to them. This is appropriate. On the intercity routes, of course, Amtrak has forced access.

In the case of the intercity passenger services on corridors fewer than 750 miles, the state or states enter into contracts to subsidize Amtrak service on the route. A hodgepodge of varied contracts is in place between the states and Amtrak on these routes. Here Amtrak has compulsory access and the freight track owner has limited options. PRAIA section 209 requires states to fully subsidize these corridor operations. Current estimates place the added cost of the increased subsidy between \$125 million and \$200 million to the already hard-pressed state budgets. The states will likely move toward competitive procurements to achieve the best service at the best price. Further, subsidy pricing under section 209 has been standardized and will result in additional capital expenditure burdens on the states. Together these events will enable the states

to change corridor governance processes to gain better control and take more ownership over the design, operation and maintenance of their passenger routes. In this case the track owner should be a full partner in the plan of the passenger service. AIPRO would support a proposal that would require the state or group of states, passenger rail provider and the track owner to have an agreement in place prior to operating on a route. While the federal government would have a role in regulating safety and assuring interoperability of the state supported routes as a part of a national network, we see no reason why the federal government should be required to verify *any* contractual arrangements entered into by state, track owner and operator so long as the contractual agreement does not violate safety requirements or interoperability standards.

12. Right now the commuter agencies fully vet the proposed competing passenger operators as to their capacity and fitness to run a commuter service and there has been no demonstrated problem, issue or reason for federal involvement. However, in terms of competing for state supported intercity passenger operations, I could be convinced that there should be an appropriate federal requirement for stipulating that intercity passenger operators have financial capacity and operating experience to provide quality corridor intercity passenger rail service. The devil is in the details and getting to the right answer may be similar for both the company fitness issue and the liability question discussed above.

The Senate Rail Title in the MAP-21 bill attempted to address both liability and the fitness issue. That proposal went way beyond those two issues and essentially authorized the politically appointed 3-person Surface Transportation Board to regulate every aspect of commuter and intercity passenger rail service. It was a throwback to an earlier time of excessive rail regulation and would have set passenger rail service back by a generation. It required commuter agencies and all other stakeholders in a passenger service to each provide \$200 million in insurance coverage. Fortunately the House conferees dug in their heels and the House-Senate Conference on MAP-21 rejected that provision.

Despite the bad experience with the Senate provision, both liability and standards for corporate fitness to operate intercity passenger service are appropriate issues for public policy discussion and resolution in the right forum. AIPRO believes one approach would be to bring together a panel of stakeholders to craft options for addressing liability in the passenger arena. That panel could also look at other issues in establishing a high performance rail passenger network such as establishing standards for experience and financial capacity for those who propose to operate the intercity rail network.

13. If I understand your question correctly, our members support having to meet all applicable safety and security requirements under the law. Why? Because it is the law, and they do meet all applicable safety and security requirements under the law.

14. The consortium of stakeholders that provides any given intercity or commuter rail passenger service today must arrange adequate coverage of insurance and self-insurance. No real problem exists anywhere in the country of which I'm aware. Today, the authority providing the service stipulates the insurance arrangement per state law and regulation. The authority generally indemnifies the operator, but this varies from state to state. As stated in the response to question 12, we would suggest a stakeholder panel empowered to address this issue. That said, liability is an expensive and complex field that has the potential to destroy the growth of intercity and commuter passenger service if it moves in the wrong direction.

Thank you for the opportunity to participate in the panel, as well as the opportunity to further discuss these important questions through these question and answers.



A bold voice for transportation workers

**WRITTEN STATEMENT OF
EDWARD WYTKIND, PRESIDENT
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO**

**BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HEARING ON**

**A REVIEW OF AMTRAK OPERATIONS PART 2: THE HIGH COST OF AMTRAK'S
MONOPOLY MENTALITY IN COMMUTER RAIL COMPETITIONS**

September 11, 2012

Chairman Mica, Ranking Member Rahall, and members of the Committee, thank you for the opportunity to testify today. It is an honor to speak on behalf of the thousands of workers at Amtrak as well as their colleagues at commuter and freight railroads throughout the country. The Transportation Trades Department, AFL-CIO (TTD) consists of 32 affiliated unions that represent workers across all modes of transportation.¹ We speak today, as always, to advance and advocate for an efficient and safe transportation network, the protection and promotion of good jobs, and robust federal investment necessary to make transportation the engine of economic growth.

With this in mind, I must question the purpose of today's hearing. The Committee has had countless hearings and discussion on Amtrak – even a trip to the local McDonald's was squeezed in before the August recess. These events have been mainly used to demonize Amtrak and its dedicated workforce and to promote controversial privatization proposals that have garnered little support. To quote the great Yogi Berra, today's hearing is like "déjà vu all over again." TTD and a number of our rail affiliates have been called to this Committee room time and time again to debate the so-called merits of privatizing Amtrak's Northeast Corridor, outsourcing food and beverage service to companies ill-equipped to take on such responsibilities, or to simply close down routes that don't make a profit. We have reminded members that no passenger operation in the world can operate without government subsidy and passenger rail service must be a part of our inter-connected multi-modal transportation system.

¹ Attached is a list of TTD affiliated unions.

Transportation Trades Department, AFL-CIO

815 16th Street NW / 4th Floor / Washington DC 20006
Tel: 202.628.9262 / Fax: 202.628.0391 / www.ttd.org
Edward Wytkind, President / Larry I. Willis, Secretary-Treasurer

Unfortunately, Chairman Mica has recently announced “a holy jihad” against Amtrak – a carrier he has often referred to as a Soviet-style railroad. I don’t know if anyone is paying attention, but that Soviet-style railroad, with record ridership, reduced costs, and improving on-time performance, is the second-best turnaround story in town – coming in behind, of course, the resurgent Washington Nationals.

On-time performance throughout the Amtrak system is at 84 percent, the best in the carrier’s 41-year history. Ridership records have been broken in eight of the last nine years and fiscal year 2012 is on pace to break another one with the highest monthly rider totals in its history. Last year, ridership rose over 50 percent on lines outside the Northeast Corridor in Michigan, Wisconsin, and the Pacific Northwest. Ridership doubled on routes in California, Pennsylvania, and North Carolina. While demagoguery is alive and well on Capitol Hill, consumers are showing us that Amtrak provides an important service at an affordable price.

In Michigan, Amtrak trains are breaking 110 miles per hour because of recent investments. Within a few months, trains will start to travel 100 miles per hour between Chicago and St. Louis. Service in Virginia has also been expanded to Norfolk and Amtrak is about to take over 100 miles of track in upstate New York. Those who say Amtrak is not changing or improving are ignoring reality. Additionally, long-term debt and capital lease obligations are at their lowest point in 15 years and the trend appears likely to continue.

But when you are on a “jihad,” these facts can be a nuisance. In any event, I have to believe that with millions still looking for work and our transportation system in chronic disrepair, there is more pressing business for the Committee and this Congress to consider, such as finding a long-term funding solution to our aviation, surface, port, and maritime transportation needs.

Amtrak’s role as it relates to commuter rail is especially puzzling as a basis for levying political attacks on the passenger rail carrier. It is a fact that commuter rail authorities can and often do turn to entities other than Amtrak to provide these services. While we would like to see Amtrak grow its commuter portfolio, the reality is that a number of providers compete vigorously in this market.

Let’s be clear – fair, open, and balanced competition for commuter rail services is not behind the motive of Amtrak opponents. What they want is a regulatory and legal framework that disadvantages Amtrak when it dares to bid on commuter rail services. Failing that, they would like to see Amtrak simply exit from the commuter rail business altogether. It is pretty obvious that the goal of Amtrak opponents is to weaken and eventually shut down the railroad.

Too often, private carriers seeking to provide passenger rail service want exclusion from the basic rail and labor laws that cover Amtrak and its workforce. Collective bargaining rights come under attack, coverage under Railroad Retirement is challenged, and other rail laws are to be avoided at all cost. Is it no wonder that a private carrier can come in and under-bid Amtrak? There must be a common set of standards for all rail carriers operating on the interstate rail system.

The Association of Independent Passenger Rail Operators (AIPRO), the association advocating at today's hearing for greater private sector participation in the delivery of passenger rail service, is the same entity that fought efforts in the surface transportation reauthorization to hold all providers of passenger rail service to reasonable and common standards. Specifically, the Senate version of MAP-21 included a proposal creating a certification process and criteria for providers of passenger rail transportation implemented by the Surface Transportation Board (STB). Under that proposed provision, the STB would ensure that applicants demonstrate sufficient financial capacity and experience to operate passenger rail, maintain minimum liability insurance, and meet applicable safety and security requirements under the law. Transportation providers in other modes are routinely required to obtain some type of certification or operating authority from a central agency and there is no reason why this should not be extended to passenger rail providers. Despite claims to the contrary, Amtrak would be covered by this certification requirement and it currently meets the standards that were proposed in the Senate version of MAP-21.

The opponents of this proposal appear particularly concerned with the requirement that passenger carriers have at least \$200 million in liability coverage, which Amtrak is currently statutorily obligated to carry (See 49 U.S.C. 28103 (c)). Setting a unified insurance standard hardly grants special privileges to Amtrak. In actuality, opposition to this standard is an effort to retain a financial advantage since these requirements place an obligation on Amtrak that some other operators do not have to meet. Furthermore, requiring all passenger rail operators to maintain adequate insurance would ensure that injured parties are compensated and that the cost of compensating them is not shifted to Amtrak or taxpayers.

Objections were also raised to language that would require a private intercity passenger rail operator to contribute to the capital costs of providing service. Amtrak would have been exempt from this provision because it already bears responsibility for paying many capital costs. This change would not have placed an undue burden on private passenger rail operators. It would simply require them to pay their fair share. By investing in the necessary infrastructure, the government made passenger rail possible and relieved private railroads of that financial burden. Operators who object to contributing to capital costs are essentially seeking a government subsidy.

Opponents to the Senate language also asserted that it would force entities engaged in building and construction activities to be inadvertently covered by certification requirements. We agree that employers engaged primarily in the building and construction industry performing work as a contractor for a rail carrier should not be considered a rail carrier solely as a result of performance of that work. But this issue could be easily addressed and should not be used as an excuse to avoid applying a common sense set of standards to this growing industry.

As noted above, we are also concerned with efforts to exclude certain passenger rail services from coverage under the Railway Labor Act, the Railroad Retirement Act, the Railroad Unemployment Insurance Act, the Federal Employer's Liability Act, and other related statutes that apply to interstate freight and passenger rail carriers, including Amtrak. We are steadfastly opposed to unfair competition in which Amtrak operates under a statutory framework avoided by other bidders. In recent years several states acquired interstate rail lines from freight railroads in order to provide commuter and other passenger rail service. After acquiring the lines, these states used a variety of complex legal mechanisms to evade basic railroad laws that should cover rail workers. If this practice becomes widespread, it will divide the interstate system into a set of state fiefdoms that fail to adhere to safety and labor standards.

Transportation labor enthusiastically supports commuter rail expansion. We also support Amtrak's right to bid on and participate in this industry. I suspect the 30 million users of Amtrak would rather see this Committee focus on providing the carrier with long-term financial stability and making it the centerpiece of future high-speed rail expansion, not curbing its right to compete in the constantly evolving marketplace.

It is our sincere hope that we can work with this Committee to advance passenger rail policy that gives Amtrak and its employees a chance to grow and prosper in an era when Americans are looking to their elected leaders to fix the growing transportation problems and challenges they live with daily. We will not support proposals before this Committee designed to provide other corporate entities, many of them foreign, an upper hand over Amtrak by giving them the right to evade important rail statutes including Railroad Retirement.

Thank you for allowing transportation labor the opportunity to testify today.

TTD MEMBER UNIONS

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Federation of Professional and Technical Engineers (IFPTE)
International Longshoremen's Association (ILA)
International Longshore and Warehouse Union (ILWU)
International Organization of Masters, Mates & Pilots, ILA (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Aviation Safety Specialists (PASS)
Sailors' Union of the Pacific (SUP)
Sheet Metal Workers International Association (SMWIA)
Transportation · Communications International Union (TCU)
Transport Workers Union of America (TWU)
United Mine Workers of America (UMWA)
*United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,
 Allied Industrial and Service Workers International Union (USW)*
United Transportation Union (UTU)



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

John A. Allen
 Chairman

James W. Cook II, Chief of Staff

Alch F. Sabath, III
 Ranking Member

James H. Zede, Demoral Chief of Staff

October 3, 2012

Mr. Ed Wytkind
 President
 Transportation Trades Department,
 AFL-CIO
 815 16th Street, NW
 Washington, D.C. 20006

Dear Mr. Wytkind:

On September 11, 2012, the Committee on Transportation and Infrastructure held a hearing on "A Review of Amtrak Operations, Part 2: The High Cost of Amtrak's Monopoly Mentality in Commuter Rail Competitions."

Attached are further requests and questions to answer for the record. I would appreciate receiving your written response to these requests and questions no later than Wednesday, October 17, 2012. Please send them to Jennifer Homendy by fax at (202) 226-1898 and via email at Jennifer.Homendy@mail.house.gov. Please do not send your responses by U.S. postal mail as we may not receive them before deadline due to the House mail screening process.

Should you have additional questions or need further assistance, please contact Jennifer at (202) 225-3274.

Sincerely,

Corine Brown
 Ranking Democratic Member
 Subcommittee on Railroads, Pipelines
 and Hazardous Materials

Attachments

WITNESS QUESTIONS FOR THE RECORD
THE HONORABLE CORRINE BROWN TO
MR. EDWARD WYTKIND, PRESIDENT, TRANSPORTATION TRADES DEPARTMENT, AFL-CIO
HEARING ON
"A REVIEW OF AMTRAK OPERATIONS PART 2: THE HIGH COST OF AMTRAK'S MONOPOLY
MENTALITY IN COMMUTER RAIL COMPETITIONS"
SEPTEMBER 11, 2012

1. You mentioned that you are concerned with efforts to exclude certain passenger rail services from coverage under the Railway Labor Act, the Railroad Retirement Act, the Railroad Unemployment Insurance Act, the Federal Employer's Liability Act, and other important statutes. Can you elaborate on that?
2. Mr. Chambers stated that you misrepresented his position on the applicability of rail labor laws to the existing workforce. According to my staff, however, during consideration of the Passenger Rail Investment and Improvement Act of 2008, Mr. Chambers opposed (via conference call with House and Senate conference staff) applying the grant conditions contained in section 24405 of title 49, United States Code, to a commuter railroad. Those conditions would have deemed any person, including commuter rail operators and their contractors, who conducted operations over rail infrastructure constructed or improved with funded provided in PRISA as 'rail carriers' for purposes of ensuring that those persons, including commuter rail operators and their contractors, were governed by the Railroad Retirement Act of 1974, the Railway Labor Act, and the Railroad Unemployment Insurance Act. The conditions also provide hiring preference to Amtrak workers when an operator replaces Amtrak service and provides certain protections for existing collective bargaining agreements and arbitration. Mr. Chambers, however, advocated for excluding commuter rail operators and their contractors from those conditions (an exclusion which remains in section 24405(e)). Are you aware of this? Do you have any comments about this?
3. You mentioned that "in recent years several states acquired interstate rail lines from freight railroads in order to provide commuter and other passenger rail service. After acquiring the lines, these states used a variety of complex legal mechanisms to evade basic railroad laws that should cover rail workers." Can you elaborate on that?
4. Chairman Mica noted Virgin Rail's success on a route in the United Kingdom. What is the status of Virgin Rail? Is the comparison of Virgin Rail and Amtrak a fair comparison?
5. Chairman Mica stated: "This thing that somehow we advocate something that would diminish labor's role, first, I think is not accurate. I think if you could dramatically increase the number of routes and use of passenger service, whether it is transit, intercity, or long distance, or actually high speed rail, there would be countless opportunities for increasing employment. All of those would be union memberships." Do you agree with that statement? If not, why not? Separately, do you have specific examples of cuts to union jobs from contracting out transit, commuter or passenger service?

6. Congresswoman Schmidt stated: "Because of existing labor protections in U.S. transit law, contracting out commuter rail operations to a private operator does not have a negative impact on existing employees." Do you agree with that? If not, why not?

**Witness Response to
Questions for the Record
Submitted on October 26, 2012
Mr. Edward Wytkind, President
Transportation Trades Department, AFL-CIO
to
The Honorable Corrine Brown
Hearing on "A Review of Amtrak Operations Part II"**

Question 1

Workers employed by rail carriers working on the interstate system are covered by rail labor laws including the Railway Labor Act, the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Federal Employer's Liability Act. In recent years, public entities began to use a complicated legal apparatus designed to allow them to acquire rail lines but avoid these important laws. These harmful legal procedures allow a state or other public entity to purchase rail lines within a single state and operate commuter rail as if the line is not part of the interstate network, even as the freight railroad which sold the line continues to use it for interstate rail transportation. Under these arrangements, the selling freight railroad continues operations over the line even as it relinquishes responsibility for maintaining the right of way, line, and signal system. Responsibility for that rail work transfers to the public agency or its contractor. If neither the agency nor the contractor is a rail carrier, the employees cease to be covered by the railroad labor laws.

These arrangements create a legal fiction. After the sale, the lines are still used by the freight railroads for interstate commerce. The only new development is that the public entities also begin intrastate commuter rail operations. This weakens the rights of railroad workers, undermines the Railroad Retirement system throughout the country, and makes it difficult for experienced railroad workers to stay in a job after the loss of statutory protections.

In the vast majority of cases, individual railroad workers want to retain their jobs after the sale but there is no mechanism for them to do so. The acquiring entity and its contractors have no obligation to respect the seniority of these workers or comply with the employment agreements that have been in effect on the acquired lines. In addition, if the work goes to contractors that do not fall under Railroad Retirement, any worker that does move over would lose their "present connection" with the rail industry and thus valuable retirement benefits would be lost.

Question 2

It comes as no surprise that the Association of Independent Passenger Rail Operators (AIPRO) has made conflicting public and private statements regarding the application of rail labor laws. This organization has a long record of opposition to common sense proposals that create a level playing field among passenger rail operators. For example, earlier this year, the Senate Commerce Committee proposed the establishment of new certification requirements for passenger rail operators under 49 U.S.C. §10901 in the rail title of S.1813. Under the provision, the Surface Transportation Board would have required operators to demonstrate sufficient financial capacity and experience to operate passenger rail, maintain minimum liability

insurance, and meet applicable safety and security requirements under the law. This type of requirement is routine in other transportation modes. But rather than offering constructive input on a proposal that was designed to encourage the expansion of safe and reliable passenger rail throughout the country, AIPRO disingenuously argued that it “guarantees a government-sanctioned Amtrak monopoly.”

AIPRO routinely advocates for privatization of passenger rail outside of statutory coverage under rail labor laws. While we do not argue with their right to do so, we will continue to speak out when they assert public support for proposals which they are simultaneously lobbying against.

Question 3

Since 1991, states have acquired interstate rail lines from freight railroads to provide commuter and other types of passenger rail service over 60 times. Unfortunately, in recent years many of them have used this as an opportunity to undermine rail labor statutes. Examples include: the sale of Union Pacific lines to Colorado, Florida’s acquisition of CSXT lines, the procurement of CSXT lines by the Massachusetts Bay Transportation Authority, New Mexico’s purchase of BNSF line, and Utah’s acquisition of rail lines from Union Pacific.

Question 4

It is rather ironic for Chairman Mica to use Virgin Rail in Britain as a model for U.S. passenger rail operation. Given recent events, this should be seen as an example of the failure of the rail franchise model rather than its success.

Within the last few weeks, the British Department for Transport admitted that it made serious errors in the competition for the contract to provide passenger service on the West Coast rail line. As a result, the agreement with Virgin Rail was extended for a year without any type of competition while the government attempts to find a way out of the problem. This illustrates the complexities of conducting contract competitions and the very real risks to taxpayers and passengers that can result.

Regardless of how the Department for Transport eventually awards the contract, the British government has already invested billions into rail infrastructure and provided lavish subsidies to support private rail operators. These massive taxpayer bailouts were required because of the disastrous and deadly experiment with British Rail privatization in the 1990s, when private contractors were responsible for fatal accidents, deferred maintenance, higher fares, and shoddy service. Despite Chairman Mica’s claims of success, delays and service problems continue to plague the system, and jobs have been eliminated. We should see Britain as a warning, not a model.

Here in America, even as Amtrak has fought for its survival during its 40-year lifespan, the railroad continues to set new ridership records and make significant capital investments. The national rail system operated by Amtrak should be strengthened, not destroyed by ideologically driven privatization experiments.

Question 5

Chairman Mica's assertions are incorrect. History has shown that when statutory coverage under the Railway Labor Act is lost, workers experience lower levels of unionization as work functions are unbundled and subcontractors are hired. However, we would be happy to work with any member of Congress who supports protecting labor unions' efforts to strengthen the right of workers to organize unions under the Railway Labor Act, the National Labor Relations Act, or any other statutes.

Question 6

Transit law labor protections, known as 13(c), apply only to transit workers, not freight rail workers. If a rail line that is part of the interstate system is purchased by a state for commuter rail service, freight workers who were employed on the line are not covered under transit labor protections. Furthermore, litigation is often required to enforce these transit labor protections even when 13(c) does apply.