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REPORT
110–893

TAKING RESPONSIBLE ACTION FOR COMMUNITY SAFETY ACT

SEPTEMBER 26, 2008.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. OBERSTAR, from the Committee on Transportation and Infrastructure, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 6707]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 6707) to require Surface Transportation Board consideration of the impacts of certain railroad transactions on local communities, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Taking Responsible Action for Community Safety Act".

SEC. 2. EFFECT OF MERGERS ON LOCAL COMMUNITIES AND RAIL PASSENGER TRANSPORTATION.

Section 11324 of title 49, United States Code, is amended—

(1) in subsection (a)—

(A) by striking the last sentence and inserting "The Board shall hold public hearings on the proposed transaction, including public hearings in the affected communities, unless the Board determines that public hearings are not necessary in the public interest.";

(2) in subsection (b)—

(A) by striking "which involves the merger or control of at least two Class I railroads," and inserting "with respect to a transaction that involves at least one Class I railroad,";

(B) by inserting "the effect on the public interest, including" after "the Board shall consider";

(C) in paragraph (2), by striking "on the public interest";

(D) by striking "and" at the end of paragraph (4);

(E) by striking the period at the end of paragraph (5) and inserting a semicolon; and

(F) by adding at the end the following new paragraphs:

"(6) the safety and environmental effects of the proposed transaction, including the effects on local communities, such as public safety, grade crossing safety, hazardous materials transportation safety, emergency response time, noise, and socioeconomic impacts; and

"(7) the effect of the proposed transaction on intercity rail passenger transportation and commuter rail passenger transportation, as defined by section 24102 of this title.";

(3) by redesignating subsections (c), (d), (e), and (f) as subsections (d), (e), (f), and (g) and inserting a new subsection (c) as follows:

"(c) The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board shall not approve a transaction described in subsection (b) if it finds that the transaction's impacts on safety and on all affected communities, as defined under subsection (b), outweigh the transportation benefits of the transaction. The Board may impose conditions governing a transaction under this section, including conditions to mitigate the effects of the transaction on local communities.";

(4) in subsection (d), as redesignated, by striking "The Board shall approve" and all that follows through "the transaction, including" and inserting "The conditions the Board may impose under this section include"; and

(5) in subsection (e), as redesignated, by striking "the merger or control of at least two Class I railroads, as defined by the Board" and inserting "a transaction described in subsection (b)".

SEC. 3. EFFECTIVE DATE.

The amendments made in this Act shall be applied to all transactions that have not been approved by the Board as of August 1, 2008.

PURPOSE OF THE LEGISLATION

H.R. 6707, as amended, the "Taking Responsible Action for Community Safety Act", requires the Surface Transportation Board ("STB") to consider the impacts of certain railroad transactions on local communities.

BACKGROUND AND NEED FOR LEGISLATION

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

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

they have authority under existing law to disapprove a merger involving a Class II or Class III rail carrier on environmental grounds. If the Board did take this position, there is a substantial possibility that a reviewing Court would not accept their interpretation of existing law, for reasons discussed below.

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

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

Proponents of the transaction maintain that the CN acquisition would be beneficial to the region and help mitigate freight rail congestion in the nation's freight rail bottleneck. They also maintain that the transaction would benefit communities along CN's current lines to and from Chicago through decreased accidents, noise, congestion, and delay as a result of a reduction in train traffic. The

SEA found that the transaction would reduce CN traffic in some minority and low-income communities by eight trains per day. The SEA also found that the transaction would not affect existing Metra commuter rail service or Amtrak service on rail lines in the area in which CN now operates, and it would not preclude implementation of the proposed STAR line and Southeast Service, but could introduce potential operating complexities. In addition, the SEA found that while the total number of train accidents on the EJ&E rail line is likely to increase by 28 percent, the likely number of rail accidents on the existing CN rail lines would decline 77 percent, a change directly related to the decrease in train-miles on CN's existing rail lines. The SEA also found that the consequences of increased train traffic on the EJ&E rail line would increase the risk for pedestrians and bicycles at 21 train/rail crossings and decrease the risk at 36 trail/rail crossings along existing CN lines.

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

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

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

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

The Staggers Act added a new section to govern rail consolidations not involving the merger or control of two or more Class I railroads (such as CN–EJ&E). This section, now found in section 11324(d) of Title 49, United States Code, provides that the Board "shall approve" this type of consolidation "unless" the Board finds

that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

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

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

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

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

The case in point is *People of the State of Illinois, Illinois Commerce Commission and Patrick W. Simmons v. Interstate Commerce Commission and United States of America* (687 F.2d 1047; 1982 U.S. App.), of the United States Court of Appeals for the Seventh Circuit. The court affirmed a decision of the ICC (predecessor of the STB) refusing to consider public interest factors involving effects on

employment of a Class I/Class II merger which was not anti-competitive. The court ruled that if there were not anti-competitive effects, the ICC was required to approve the merger. The court found the Staggers Act separated rail consolidation proposals into two distinct groups: major rail consolidations, which involve the merger or control of two or more Class I rail carriers, and minor rail consolidations, which do not involve the consolidation of two or more Class I rail carriers. The court concluded that a careful reading of the law in its entirety "discloses that the broad public interest standard of [section 11324(c)] applies only to consolidations of two or more Class I railroads whereas the more limited criteria of (d) apply to all other rail consolidations."

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

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

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

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

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

It is worth noting that, in *People of the State of Illinois v. Interstate Commerce Commission and United States of America*, the court stated that the law "could benefit from more artful drafts-

manship" on the question of public interest considerations. In addition, on November 10, 1981, a little more than one year after the Staggers Act was enacted, ICC Chairman Reese H. Taylor, Jr. testified before the Surface Transportation Subcommittee of the Senate Committee on Commerce, Science, and Transportation that the interplay between the two different sets of standards for considering rail mergers and consolidations and the requirement for considering the public interest was "a problem area in the legislation possibly in need of redrafting."

Further, at the Committee on Transportation and Infrastructure's September 9, 2008 hearing on H.R. 6707, the "Taking Responsible Action for Community Safety Act", STB Chairman Nottingham acknowledged that the Board's authority to disapprove a transaction on general public interest grounds was "a legal issue of first impression that has not been addressed by the Board or any court."

SUMMARY OF THE LEGISLATION

Section 1. Short title

This section designates the title of the Act as the "Taking Responsible Action for Community Safety Act".

Section 2. Effect of mergers on local communities and rail passenger transportation

This section makes a number of amendments to section 11324(a) of title 49, which governs the Board's consideration of a proposed consolidation, merger, and acquisition of control of a railroad. It amends subsection (a) to require the Board to hold public hearings in the affected communities of a proposed transaction, unless the Board determines that public hearings are not necessary to the public interest.

It amends section 11324 that governs the Board's consideration of a merger, consolidation, or acquisition of control for a transaction involving at least two Class I railroads to apply to any proposed transaction that involves at least one Class I railroad.

This section adds two new factors to the current list of five factors that the Board must consider in reviewing a proposed transaction that involves at least one Class I railroad. These new factors are: (1) The safety and environmental effects of the proposed transaction, including the effects on local communities, such as public safety, grade crossing safety, hazardous materials transportation safety, emergency response time, noise, and socioeconomic impacts; and (2) the effect of the proposed transaction on intercity rail passenger transportation and commuter rail passenger transportation. The Board shall consider the effect on the public interest that includes at least these seven factors.

Finally, this section requires the Board to approve and authorize a transaction involving at least one Class I railroad when the Board finds the transaction is consistent with the public interest. This section prohibits the Board from approving a transaction if it finds that the transaction's impacts on safety and on the affected communities outweigh the transportation benefits of the transaction. This section also authorizes the Board to impose conditions

governing the transaction, including conditions to mitigate the effects of the transaction on local communities.

Section 3. Effective date

The amendments made by H.R. 6707 are to be applied to all transactions that have not been approved by the Board as of August 1, 2008.

LEGISLATIVE HISTORY AND COMMITTEE CONSIDERATION

On July 31, 2008, Chairman James L. Oberstar introduced H.R. 6707, the 'Taking Responsible Action for Community Safety Act". This bill had not been introduced in previous Congresses.

On September 9, 2008, the Committee on Transportation and Infrastructure held a hearing entitled "H.R. 6707, the Taking Responsible Action for Community Safety Act.'"

On September 24, 2008, the Committee on Transportation and Infrastructure met in open session to consider H.R. 6707. The Committee adopted by voice vote a manager's amendment to the bill. The manager's amendment clarified that the Board's finding of public interest in a transaction involving at least one Class I railroad must include consideration of safety and environmental impacts of the proposed transaction and any impacts on intercity passenger or commuter rail transportation. The manager's amendment also clarified that the Board must consider all of the impacts—both positive and negative—to safety on all the affected communities when determining whether the transaction's impacts outweigh the transportation benefits. The Committee ordered the bill, as amended, reported favorably to the House by voice vote with a quorum present.

RECORDED VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. There were no recorded votes taken in connection with consideration of H.R. 6707 or ordering the bill reported. A motion to order H.R. 6707, as amended, reported favorably to the House was agreed to by voice vote with a quorum present.

COMMITTEE OVERSIGHT FINDINGS

With respect to the requirements of clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in this report.

COST OF LEGISLATION

Clause 3(c)(2) is satisfied when a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. The Committee has not yet received a cost estimate for H.R. 6707 from the Director of the Congressional Budget Office. The

Committee references the Committee Cost Estimate, included below.

COMPLIANCE WITH HOUSE RULE XIII

1. With respect to the requirement of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, and 308(a) of the Congressional Budget Act of 1974, the Committee references the Committee Cost Estimate, included below.

2. With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to require the Surface Transportation Board to consider the impacts of certain railroad transactions on local communities.

3. With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, a cost estimate from the Director of the Congressional Budget Office is not available.

COMMITTEE COST ESTIMATE

H.R. 6707 clarifies the factors that must be considered by the Surface Transportation Board when approving or disapproving a merger involving at least one Class I rail carrier. It does not authorize or make available any new budget authority, nor does it cause any increase in direct spending or decrease in revenues. Therefore, the Committee estimates that enacting H.R. 6707 would have no significant impact on the Federal budget.

The Committee will file a supplemental report containing a cost estimate prepared by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act when it becomes available.

COMPLIANCE WITH HOUSE RULE XXI

Pursuant to clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 6707, as amended, does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI of the Rules of the House of Representatives.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, committee reports on a bill or joint resolution of a public character shall include a statement citing the specific powers granted to the Congress in the Constitution to enact the measure. The Committee on Transportation and Infrastructure finds that Congress has the authority to enact this measure pursuant to its powers granted under article I, section 8 of the Constitution.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt State, local, or tribal law. The Committee states that H.R. 6707 does not preempt any State, local, or tribal law.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act are created by this legislation.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104–1).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 49, UNITED STATES CODE

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SUBTITLE IV—INTERSTATE TRANSPORTATION

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PART A—RAIL

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CHAPTER 113—FINANCE

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SUBCHAPTER II—COMBINATIONS

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§ 11324. Consolidation, merger, and acquisition of control: conditions of approval

(a) The Board may begin a proceeding to approve and authorize a transaction referred to in section 11323 of this title on application of the person seeking that authority. When an application is filed with the Board, the Board shall notify the chief executive officer of each State in which property of the rail carriers involved in the proposed transaction is located and shall notify those rail carriers. [The Board shall hold a public hearing unless the Board determines that a public hearing is not necessary in the public interest.] *The Board shall hold public hearings on the proposed transaction,*

including public hearings in the affected communities, unless the Board determines that public hearings are not necessary in the public interest.

(b) In a proceeding under this section [which involves the merger or control of at least two Class I railroads,] *with respect to a transaction that involves at least one Class I railroad,* as defined by the Board, the Board shall consider *the effect on the public interest, including* at least—

(1) * * *

(2) the effect [on the public interest] of including, or failing to include, other rail carriers in the area involved in the proposed transaction;

* * * * * * *

(4) the interest of rail carrier employees affected by the proposed transaction; [and]

(5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system[.]*;*

(6) the safety and environmental effects of the proposed transaction, including the effects on local communities, such as public safety, grade crossing safety, hazardous materials transportation safety, emergency response time, noise, and socioeconomic impacts; and

(7) the effect of the proposed transaction on intercity rail passenger transportation and commuter rail passenger transportation, as defined by section 24102 of this title.

(c) The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board shall not approve a transaction described in subsection (b) if it finds that the transaction's impacts on safety and on all affected communities, as defined under subsection (b), outweigh the transportation benefits of the transaction. The Board may impose conditions governing a transaction under this section, including conditions to mitigate the effects of the transaction on local communities.

[(c) The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board may impose conditions governing the transaction, including] *(d) The conditions the Board may impose under this section include* the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. Any trackage rights and related conditions imposed to alleviate anticompetitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Board may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. The Board may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Board finds their inclusion to be consistent with the public interest.

[(d)] *(e)* In a proceeding under this section which does not involve [the merger or control of at least two Class I railroads, as

defined by the Board] *a transaction described in subsection (b)*, the Board shall approve such an application unless it finds that—

(1) * * *

* * * * * * *

[(e)] *(f)* No transaction described in section 11326(b) may have the effect of avoiding a collective bargaining agreement or shifting work from a rail carrier with a collective bargaining agreement to a rail carrier without a collective bargaining agreement.

[(f)] *(g)*(1) * * *

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MINORITY VIEWS

This legislation will have dramatic consequences on railroad merger and acquisition transactions.

It will enlarge the universe of transactions subject to the full STB environmental review by requiring close analysis for even the most minor Class I transactions. This is likely to discourage railroads from engaging in transactions that would enhance underutilized infrastructure controlled by smaller railroads.

This legislation also creates a new balancing test whereby the Board will be required to weigh the transportation benefits of a transaction versus the effects on communities impacted by the transaction. It is likely that the creation of a new balancing test in the STB merger review process will make it more difficult, costly, and time consuming for railroad mergers and acquisitions to be approved.

Additionally, this legislation will have a retroactive impact on railroad transactions entered into months or even years ago. Retroactive Congressional action must be taken with great care, or confidence in the regulatory regime is undermined. This legislation has the potential to affect not only the CN/EJ&E transaction, it could impact other pending deals before the Board, including Norfolk Southern's planned Patriot Corridor, and Canadian Pacific's merger with Dakota, Minnesota & Eastern. All parties involved in these proposed transactions have incurred significant expenses in the review process that is now being changed midstream. CN in particular expects to spend up to $25 million in environmental review expenses for their proposed EJ&E acquisition.

It is also unclear if this legislation addresses the root concern of the communities that would be affected by the CN/EJ&E transaction, which is an increase in train traffic. Even if this legislation results in the cancellation of this transaction, it is possible that the communities will see an increase in traffic with the existing owner. Nothing in this legislation would prevent the EJ&E from increasing the number of trains it runs on its own property. Further, CN is offering at least $40 million to communities to mitigate the effects of an increase in traffic if they become the owner, funds which will not be available if the current ownership remains in place.

Also, STB staff has expressed concern that this legislation was drafted without their input, and could have unintended consequences if passed into law. For instance, STB staff has stated that by explicitly requiring environmental review and "balancing" of impacts versus benefits on Class I transactions, Congress is implicitly stating that no such review is required for transactions involving Class II and Class III railroads (not involving a Class I). Class II and III transactions can, in some cases, have much greater environmental impacts than Class I railroad's acquisition of a short branch line, for example.

Goals of rail transportation policy, as set forth at 49 U.S.C. Section 10101 include ensuring the development of a sound rail transportation system to meet the needs of the public, and providing for the expeditious handling and resolution of required STB proceedings. For the above reasons, the minority is concerned that this legislation will result in focus away from these goals by discouraging parties from entering into mergers and acquisitions.

BILL SHUSTER.

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