7. UNDERSTANDING AMERICAN RAILROADS

7.1. FRA Requirements

This Chapter of the Virginia Statewide Rail Plan (VSRP) presents information related to Virginia's Transportation Network in historical context. This is not a requirement of 49 CFR § 266.15

7.2. Private Freight Railroads

In addressing the rail needs of the Commonwealth, it is critical to understand that, unlike the nationalized railroads in some other countries, the railroads in the U.S. are private corporations with complete ownership of their rail rights-of-way. These companies are large publicly owned stock companies who have a fiduciary responsibility to conduct their business in such a manner as to maximize fiscal returns for their stockholders. In developing effective public-private partnerships, we must recognize the business models of the railroads in the development of "win-win" situations where the railroads meet their responsibility to minimize risk and maximize profits for their shareholders, while at the same time the public need for effective and efficient rail service is provided.

Railroads operate in a highly competitive environment, particularly in Virginia where NS and CSX are major competitors and serve several of the same major markets. The transparency expected of government agencies in the use of taxpayer dollars on transportation projects is oftentimes a challenge in providing analysis of rail projects where the railroads (rightly so) consider the detailed operations of their companies as privileged information that would adversely impact their competitiveness in the global marketplace if not treated as highly confidential and not available for public use.

NS and CSX operate in many states other than Virginia, and corporate decisions on which rail improvement projects are to be financed within any particular year are based on the best interests of the respective railroads with consideration of the business climate, risk and return on investment. Rail projects that are important to the Commonwealth are in competition with other states requesting NS and CSX to use the railroad's limited financial resources as a partner to implement rail improvement projects in their states. Figure 7-1 depicts the revenues for the five U.S. Class I Railroads, and the revenue generated for moving one ton of freight one mile. The revenue per ton-mile is an important metric to the railroads because many of their operating costs, such as fuel, are driven by the tonnage handled and the miles traveled by their trains.

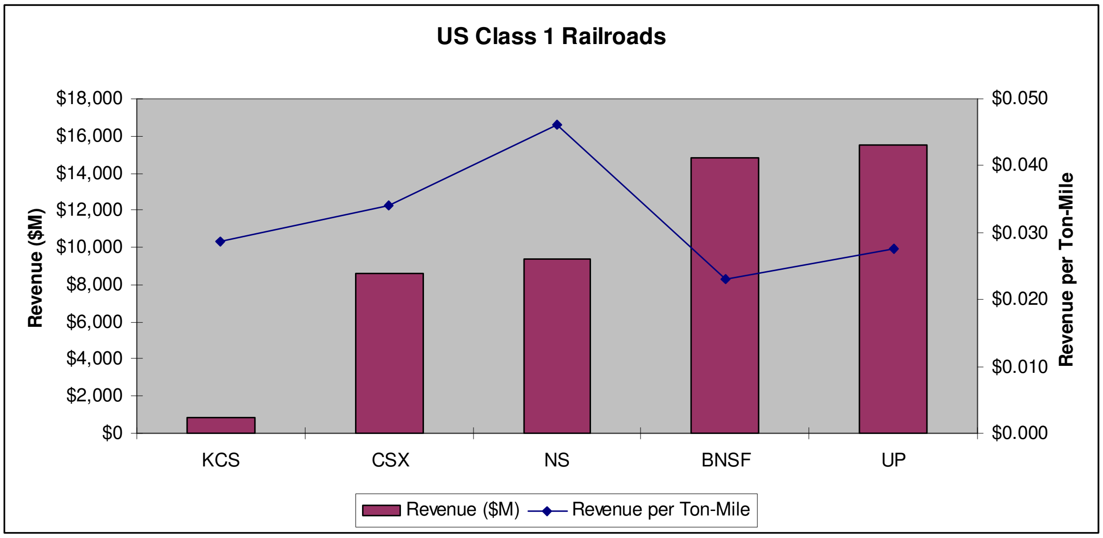

Figure 7 - 1 Railroad Revenue

7.2.1. Norfolk Southern

According to the company's profile, Norfolk Southern Corporation is a Norfolk, Virginia, based company that controls a major freight railroad, Norfolk Southern Railway Company. The railway operates approximately 21,000 route miles in 22 eastern states and the District of Columbia, serves all major eastern ports, and connects with rail partners in the West and Canada, linking customers to markets around the world. Norfolk Southern provides comprehensive logistics services and offers the most extensive intermodal network in the East. In 2008 the principal operating revenue sources were: coal, coke, and iron ore (29 percent); intermodal containers (19 percent; metals and construction (12 percent); chemicals (12 percent); agricultural, consumer, products and government (11 percent); automotive (10 percent); and paper, clay and forest products (9 percent). In 2008, rail revenue ton miles equaled $195 billion; and rail shipments (including containers and trailers) equaled approximately $7.6 million.

7.2.2. CSX Transportation

According to the Company's profile, CSX Corporation, based in Jacksonville, Florida, owns companies providing rail, intermodal and rail-to-truck transload services that are among the nation's leading transportation companies, connecting more than 70 river, ocean and lake ports, as well as more than 200 shortline railroads. Its principal operating company, CSX Transportation Inc., operates one of the largest railroads in the eastern United States with a 21,000-mile rail network linking commercial markets in 23 states, the District of Columbia, and two Canadian provinces. In 2007 the principal operating revenue sources were: merchandise – containers/trailers (58 percent); coal, coke and iron ore (29 percent); automotive (10 percent); and other miscellaneous freight (2 percent).

7.3. Preemptive Rights: The Railroad's Right to Build Facilities

Class I railroads are regulated by the Surface Transportation Board (STB), (the former Interstate Commerce Commission [ICC], not by local or state governments). The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), shields railroad operations and facilities from the application of most state and local laws. This is known as the Federal preemption provision, and is contained in 49 U.S.C. 10501(b). While railroads can be required to comply with some local health and safety rules, such as fire and electric codes, this provision exempts railroads from local land use and zoning requirements. Preemptive rights, however, do not exempt railroads from certain Federal environmental statutes, such as the Clean Air Act (locomotive emissions), and the Clean Water Act (e.g., wetlands protection).

Projects that utilize federal funds must be in compliance with appropriate NEPA requirements as administered by the Federal Railroad Administration (FRA) and/or the Federal Highway Administration (FHWA). Since most rail improvement projects are within existing rights-of-way with minimal environmental impacts, the majority of rail projects qualify for a Categorical Exclusion in accordance with federal NEPA requirements and regulations. In situations where the anticipated environmental impacts might be moderate, FRA and/or FHWA may require the preparation on an Environmental Assessment; or for large projects with portions of the project outside of existing rail rights-of-way and where the anticipated environmental impacts might be significant an Environmental Impact Statement may be required. The preemptive rights of railroads exempt railroads from local land use and zoning requirements. However, these rights do not exempt the railroads from these environmental requirements.

7.4. Passenger Rail Service on Property Owned by Freight Railroads

The nation's privately-owned freight railroads want passenger rail to succeed, and at present, freight railroads are successful partners with passenger rail operators across the country, including in Virginia.

7.4.1. Amtrak

Amtrak is the only continental U.S. intercity passenger railroad. Approximately 97 percent of the 22,000 miles that Amtrak currently operates over is owned by freight railroads. Many new passenger rail routes are being considered in Virginia and throughout the nation to relieve highway traffic congestion, improve travel mobility, and improve the environment; most of these are on tracks owned by freight railroads. In 1970, for permission to exit the passenger business, freight railroads agreed to a number of Amtrak terms:

- Freight railroads must give Amtrak access to their tracks upon request
- Freight railroads must charge heavily discounted rates for that access
- Freight railroads must give Amtrak trains priority over all other trains

Amtrak pays fees to freight railroads to cover some of the costs associated with Amtrak corridor and long-distance intercity passenger train operations on fright tracks, but according the freight industry, these do not come even close to the full costs incurred by freight railroads for hosting Amtrak trains. However, passenger trains run at higher speeds and rigorous schedules and require certain track standards and design to do so. The freight trains benefit from a higher grade track and can then run their trains at higher speeds and even better schedules. Tighter schedules could be equivalent to those necessary in order to operate intermodal freight movement

7.4.2. Non-Amtrak Passenger Service

Non-Amtrak Passenger service includes all passenger services operating outside of the Amtrak legislation providing for intercity passenger rail. Commuter railroads such as VRE typically fit into this classification. It is some times confusing when a commuter railroad like VRE or the Massachusetts Bay Transportation Authority contracts with Amtrak to provide operating services for the commuter railroad to think that it is an Amtrak passenger operation, when in actuality the service is not covered by the Amtrak Intercity legislation.

The position of the freight industry with respect to non-Amtrak passenger rail service has been clear and consistent:

- Passenger rail service must be complimentary to, not in conflict with, freight rail development
- Freight railroads should be fully compensated for the use of their property by passenger trains
- Absent voluntary negotiated agreements, freight railroads should not be forced to give passenger rail operators access to their property
- Freight railroads should not be expected to subsidize passenger rail
- Freight railroads do not want any liability associated with passenger train service or at a minimum some enforceable limits on freight rail liability. Without such limits set at a policy level by the federal government this will remain a major obstacle in the growth of passenger rail service.

Based on Association of American Railroad data, the issue of full compensation has become more important in recent years as rail capacity has become more constrained. When Amtrak was created in 1970 there were few commuter trains providing corridor services. Since then, average freight rail density has increased 379 percent, with the result that available train “slots” on major rail corridors have become very scarce. If passenger trains fill these slots at below-market prices, the result is a major subsidy from freight to passenger rail. This also limits the ability of freight railroads to serve those areas, because slots are not available to freight trains.

The AAR reports that in 2007 the Class I railroads operating in the US had an average Revenue per Ton Mile of $0.0299, and that the average Tons per Train was 3,163. It can be calculated that, on average, a US Class I railroad makes approximately $94.57 per Train-Mile. VRE, as an example, pays the host freight railroad a $17.47 per Train-Mile access fee under its operating agreements. The host railroad must honor the passenger slot that the passenger rail agency has contracted for, and delay or not operate its own freight trains that generate five times the revenue of a passenger train. This situation is much more of an issue on corridors where intermodal trains and other high priority scheduled freight trains are operated since the railroads charge shippers more for the expedited service.

The current VRE operating agreement requires the replacement of track capacity foregone by CSX in 1992 for the initiation of commuter services. This requirement must be fulfilled for additional train capacity necessary to operate increased commuter rail service in the corridor.

7.5. Indemnification

It is standard practice for railroads to request indemnification and hold harmless contractual language in its access agreements with public entities related accidents or incidents that occur as a result of allowing passenger rail operations on freight rail. The request to be indemnified and held harmless is often broad and includes coverage for events that are attributable to gross negligence or unsafe practices by the host railroad. This language is problematic for special transportation districts but can be a “deal breaker” for state governments who are unwilling to waive sovereign immunity. Typically, states require activity by its Legislature before allowing a state agency to enter into an agreement that holds a private company harmless form liability for damages, loss, or injuries caused by the sole or joint negligence of the private company.

The cost for insurance for public entities that enter into these agreements is typically very expensive, especially in the early years of operation given that there is insufficient accident information for an insurance carrier to assess risk. VRE for example, has paid $2.5 million per year for $250 million of general liability coverage, plus $600,000 per year for special coverage related to terrorist acts. A key benefit for investing in intercity passenger rail service with Amtrak is based on its national operations. For three decades, Amtrak has been paying liability claims associated with passenger rail accidents, regardless of fault, as a condition for using the freight lines' tracks.