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Counsel's Report
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MAP-21 and Pending Regulatory Issues Affecting Shippers and Carriers.

That would be "Moving Ahead for Progress in the 21st Century" providing $52.2 billion for fiscal 2013 and $55.95 billion for 2014, replacing SAFETEA-LU and expiring 9/30/2014.

A $2 billion provision to help states add capacity to the freight highway network did not survive the conference committee. Another provision means states no longer require approval to toll new lanes added to the Interstate but remain barred from tolling existing Interstate lanes. The previously authorized pilot program – limited to Missouri (not activated), North Carolina and Virginia – permits tolling of existing Interstates, which accounts for pending applications to toll I-95.

Truck Size and Weight and Other "Studies" **–** The mandated size and weight study will compare impacts on highways in places with the 80,000 pound limit to those in states where exemptions up to 100,000 pounds have been granted. The can kicked down the road via this study was a proposed increase to 97,000 pounds and the length of doubles trailers from 28.5 to 33 feet.

MAP-21 calls for a field 34-hour restart provision of the HOS rules scheduled to become effective in 2013. The restart rule is said to effectively limit drivers to five-day work weeks and requires rest from 1:00 a.m. to 5:00 a.m. on two consecutive days. Opponents say the unintended consequence is to take trucks off the road during low traffic night hours and push them into high traffic morning rush hours, adding to congestion.

Another provision mandates a study of truck cab safety standards, roof and pillar strength, front and back wall standards and air bags and other occupant protections. The study report to congress is due 1/2014. Also mandated, a study of truck parking capacity.

EOBRs – MAP-21 mandated FMCSA to write rules to require EOBRs for all CMVs ("Commercial Motor Vehicles") . The House voted in June to pass an appropriations bill that included an amendment blocking the mandate for EOBRs. As we meet the senate has not acted on the appropriations bil1. The main sponsor of the blocking amendment, Rep. Jeff Landry (R-La.), says he is prepared to do whatever he can to stop the federal government from mandating such devices.

American Trucking Associations is a staunch supporter of the federal mandate requiring electronic logging devices to monitor hours-of-service compliance for all CMVs. ATA believes the research shows that they promote compliance with hours-of-service rules and lead to fewer accidents by reducing fatigued driving. OOIDA ("Owner-Operators Independent Drivers Association") is equally staunch in its opposition, asserting that there is no proven link to safety to justify the $344 million cost. FMCSA now says its estimate of the cost in 2011 at $1,775 per unit has now dropped to as low as $500 per unit.

CSA and Accident Causality – The goal of FMCSA's CSA ("Compliance, Safety Accountability") program is to facilitate public and private sector efforts to reduce accidents, injuries and fatalities. CSA, however, currently assigns the same weight to each CMV-involved accident whether or not the CMV contributed to the cause of the accident. So, an accident in which the CMV was legally parked and one in which the CMV rear-ended a school bus count the same for the carrier and the driver.

Other CSA issues cited by trucking are how the agency oversees hazardous materials shipments, how it continues to use citations that have been dismissed against fleets' safety ratings, and the severity it attaches to some violations that the industry believes are not truly indicative of a carrier's safety performance.

An industry survey indicates 72% of carriers report that some of their shippers are concerned about CSA scores. Underwriters are concerned about CSA, particularly continuing changes to the program, but unsure how to deal with it. In other words, insurers are not looking for increasing volume, and premiums are on the rise. Misuse of CSA scores, particularly in litigation, is a continuing problem for carriers, brokers and shippers.

Under pressure from "safety" advocacy groups, FMCSA backed down on using police reports for assigning accident accountability. A 2010 FMCSA study had found such reports to be reliable. Under pressure from trucking, FMCSA this week announced it will research how it could assign blame for truck crashes based on a carrier's fault, and publish the results of its study in summer 2013. The focus of the study is whether assigning crash accountability would allow it to predict a carrier's

risk of future crashes better than the current system. In the summer of 2013, FMCSA will release its findings and seek public comment on its next steps.

OOIDA (plus four owner-operator named plaintiffs) have filed suit in the U.S. District Court for the District of Columbia, claiming among other things, that FMCSA's data on drivers violates the Federal Credit Reporting Act, and other legislation specifically governing MCMIS ("Motor Carrier Management Information System"). Three of the plaintiff drivers have been found not guilty of alleged violations or had their cases dismissed, while the fourth driver is currently fighting his violation in court. OOIDA contends that since no court has found any of the four drivers guilty of their violations, those violations should be expunged from MCMIS. Allegedly, FMCSA has failed to respond to requests that violations for which the three drivers have been found not guilty be removed.

Implications of MAP-21's Expiration Date – What is the significance of the expiration date, 9/30/2014, a little better than one month ahead of the mid-term elections? Duh.

Let's start a pool on how many "extensions" it will take for Congress to pass the next reauthorization.

An interesting quirk in the MAP-21 conference process was deletion of a rail title. Unlike highway authorization, which already was expiring, existing law governing the nation's rail system is not due to expire until next year. The Senate version included a provision on rail-to-rail competition which the railroads branded "re-regulations". The Senate rail title would have made Amtrak eligible to receive passenger rail grants that now go to states and gave Amtrak authority to conduct its own National Environmental Policy Act reviews but did not do likewise for states. The House side viewed these provisions to be anticompetitive and to thwart private sector participation in passenger rail.

Our prediction – Transportation funding and regulation are going to be front-and-center, contentious, hot-button issues from the early days of the next Congress through at least 2014.

Wisconsin Central Group Update.

Until recently, the CN/WCG 2012 Joint Projects Initiative has been slowed by a round of promotions for key contacts at CN. We now scheduled to meet September 4, 2012.

The agenda will address each of the three Projects. CN this month agreed to our proposal for establishment of an "Advisory Board". We anticipate that the agenda is will also include consideration of a name, the structure and function, membership and a process for scheduling the first meeting of the Advisory Board.

In the interim, we have pursued a series of contacts and attended industry conferences that have added dimension to our three Joint Projects: Chicago Gateway, Intermodal and Logs.

The Midwest Rail Shippers Association meeting, Lake Geneva, July 10, 2012, provided contacts and insights on: (a) extending our reach on car supply for raw forest products (*i.e.,* rebuilds at under $30,000 per unit) to add to our "supply chain visibility" objective; (b) a CN/Potash Corp. project that confirms key components of our Chicago Gateway Optimization Project; (c) cooperation and coordination of auto shippers and railroads on operating a specialized car fleet through a structure and under antitrust guidelines similar to WCGroup and the Lake States Shipper Association (Log Project); and (d) extending the shortline investment tax credit to all facilities and projects, regardless of ownership, which affected the viability of light density rail lines (*i.e.,* essentially all WC lines other than the Superior-Chicago mainline).

The Association of Transportation Law Professionals Annual Meeting and and the Traffic Club of Chicago Annual Dinner, Chicago, June 23-25, 2012 provided: (a) opportunities to meet with CN and other rail officials; (b) case study examples of siting, timing, funding and legal issues, and real world experience on major projects in the key geographic area for potential future facilities for our Chicago Gateway distribution and transload operations.

The National Association of Rail Shippers Annual Meeting, Chicago, May 24-25, 2012 provided: (a) insight on a possible shift in perception by the Class Is for non-captive freight requiring Class Is to master "first/last mile" (*i.e.,* "switch intensive") operations; (b) a better understanding of the potential utility of well cars and containers for moving frac sand, logs and biomass; and (c) information on potential surplus of coal cars for rebuild and alternative service.

The Mid-America Freight Coalition Annual Meeting, Minneapolis, April 18-19, 2012 provided: (a) insights on public funding potential for aspects of the CN/WCGroup Log Project; (b) a case study and walk through of a benefit-cost-analysis for "TIGER-type" funding (applicable to seeking funding for the CN/WCGroup Log Project, supply chain visibility component; and (c) information on current problems faced by Twin Cities shippers on intermodal connections to markets east of the Mississippi. The latter included contacts and information on early efforts to

site a third intermodal terminal in the Twin Cities, rationale for Canadian National becoming the serving rail carrier and implications for Chippewa Falls and other operations in and through Wisconsin.

For the CN/WCGroup Intermodal Project, we engaged in a series of meetings and contacts with key Wisconsin-based truckers, Schneider and Marten Transport, regarding Green Bay, Chippewa Falls and other potential locations, and with "Advance: Green Bay Economic Development" which is exploring feasibility of intermodal operation to serve the Green Bay, Northeastern Wisconsin and Fox Valley. These contacts are ongoing and will be extended to shippers not currently active in WCGroup and to other Wisconsin-based motor carriers who have an interest in developing connections for our region to the emerging national intermodal network.

Upcoming for WCGroup, we anticipate a further small group planning session with CN representatives in late August or early September. Our objective is to conclude 2012 with an announcement of how our collaboration with CN will proceed in 2013 including, for each of the three CN/WCGroup Joint Projects, a more refined statement of objectives, anticipated deployment of resources and steps toward implementation.

Railroad Fuel Surcharge Antitrust Cases –
An Effective Way To Make National Freight Transportation Policy?

The sheer magnitude of the time and resources involved in major antitrust and antitrust class action litigation means "settlement" is the most likely outcome. Interests and incentives in such settlements do not necessarily – and, frankly, are not likely to – coincide with the public interest in promoting and establishing a sound national freight transportation policy and plan.

As a means for sorting out competitiveness problems, antitrust litigation is a notoriously slow, indirect and inefficient process, with significant potential for unintended consequences and harm to public interest in a healthy rail industry and healthy economy.

BNSF, Union Pacific Railroad, Norfolk Southern and CSX are defendants in the class-action price-fixing lawsuit. Plaintiffs allege the railroads conspired to fix, raise, maintain or stabilize prices, leading to shippers being overcharged from mid-2003 until 2008. The railroads have consistently denied the allegations.

Plaintiffs allege that before conspiring, the railroads increased fuel surcharges for "a limited number of shippers," so as not to lose a competitive edge to their rivals. Plaintiffs claim the railroads were able to conspire on fuel surcharges by creating a cost escalation index at Association of American Railroads meetings.

On 6/21/2012, in the U.S. District Court for the District of Columbia, where the several cases filed in various District Courts have been assigned by the Multi-District Panel, Judge Paul Friedman entered an order granting class action status. The plaintiff class (excluding certain entities related to the defendants) is defined as follows:

> All entities or persons that at any time from July 1, 2003 until December 31, 2008 (the "Class Period") purchased rate-unregulated rail freight transportation services directly from one or more of the Defendants, as to which Defendants assessed a stand-alone rail freight fuel surcharge applied as a percentage of the base rate for the freight transport (or where some or all of the fuel surcharge was included in the base rate through a method referred to as "rebasing") ("Fuel Surcharge").

On 7/13/2012, Judge Friedman's opinion granting class action was released to the public.

Typically, before a case is over, appeals cannot be filed. However, in a case this big, the railroads can seek leave of the Court of Appeals to permit the filing of an appeal that will not automatically stay the case in the District Court. They would have to ask Judge Friedman, the trial judge, to stay the case. It seems unlikely Judge Friedman will stay the case because it has been pending for five years already.

Because the efforts of various shippers and shipper organizations seeking regulatory relief from an alleged lack of competition in the railroad industry have been stymied in Congress and appear to be on a slow and uncertain track before the Surface Transportation Board, the price-fixing, antitrust class action may provide the spark to re-kindle the push for rail regulation.

Adding fuel to the re-regulation fervor, allegations of price-fixing are not limited to the railroads, as illustrated by the U.S.-Puerto Rico ocean carriers' collusion of rates and the European Union's antitrust fines against 13 air forwarders.