The CIP Report

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Surface Transportation Issue

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This issue of The CIP Report focuses on the surface transportation industry and in particular on the railroad sector.

Transportation is a critical infrastructure of the United States. It is vital to our economic growth and national security. At least 17 percent of the nation's Gross National Product is accounted for by public and private expenditures on transportation. Americans depend on some form of transportation in nearly every aspect of life. Transportation is critical to the military and other governmental functions. The disruption of transportation systems in the United States could have a disastrous impact on the economy and security of the nation.

The railroad industry has been operating in this country for the past 175 years. Today it carries approximately 40 percent of the ton-miles of freight over 123,000 miles of track that is built, owned, and operated by the railroad companies.

Many other industries are dependent on the railroad industry for moving raw materials to production centers, and finished products to consumers. The military also depends on railroads--the Department of Defense has designated over 30,000 miles of rail corridors as essential to national defense. The uninterrupted service of this

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industry is critical to the nation's well-being, and the industry has worked for many years to establish strong cooperation among its own members, as well as with other critical sectors.

The Association of American Railroads (AAR) has shown exceptional leadership as the Sector Coordinator for surface transportation. Based on Presidential Decision Directive 63, the Federal government paired critical infrastructure Sector Coordinators with government partners. As a sector lead, the AAR has worked especially closely with the Department of Transportation, but also multiple other Federal and State & local entities to forge a public- private relationship of trust and cooperation around complex critical infrastructure challenges.

This issue of The CIP Report examines some of the efforts undertaken within the surface transportation sector, legislative issues faced by the industry, and some of the leaders that have pushed these initiatives forward.

RAIL SECURITY

Position Paper by the American Association of Railroads

U.S. freight railroads are proud of the success they achieved in keeping our nation's vital rail-transport link open following the September 11 terrorist attacks. Nevertheless, it is clear that terrorist actions against freight railroads could result in significant economic and military disruptions, and create serious public health risks.

U.S. freight railroads have tightened security while maintaining the efficient flow of commerce. The Association of American Railroads now operates a 24-hour command center that is cleared at the "Secret" level and is linked to federal security personnel, law enforcement and the railroads' operations centers. Railroads have delineated graduated security procedures that are implemented based upon the current level of threat. Railroad police guard critical infrastructure and inspections have intensified throughout the system. The industry has increased infrastructure protection through measures such as video surveillance and computer card access systems, and has restricted access to sensitive Web-based information systems. And the industry is continuing to provide emergency response training to railroad and customer personnel, fire and police departments, and other emergency response officials, at the Transportation Technology Center, Inc. in Pueblo, Colorado.

Immediately following the terrorist attacks, the railroad industry established five Critical Action Teams to assess both short-term and long-term security needs in light of the increased threats to our nation. The teams analyzed information technology and communications, physical infrastructure, train operations, hazardous materials transport, and military transport preparedness. In consultation with outside counter-terrorism experts retained by the rail industry, these teams evaluated threats to the rail system, identified vulnerabilities, quantified risks and devised appropriate countermeasures.

The risk assessment work of the Critical Action Teams was performed using CIA and national intelligence community best practices in the context of the impact on the general population, the national economy and national defense. The resulting Railroad Security Plan identifies industry actions and government support required to enhance the security of our nation's freight rail network. Indeed, while the rail industry has already implemented many steps to enhance security, the enormity of the challenge railroads face — and the costs that will be incurred to continue operating the railroads safely consistent with national security interests in the existing environment of terrorism — has become clear.

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What Should Be Done?	*The federal government must provide resources to help protect critical railroad service and infrastructure at the highest levels of alert.*
Why?	*Freight railroads are absolutely critical to our nation's health, economic well-being and national security. Enhanced rail security would enhance our national security.*

Justification for Desired Policy in the Rail Industry

- Freight railroads are indispensable to the economic and physical well-being of our nation, accounting for more than 40 percent of intercity freight ton-miles, more than any other mode. Railroads move approximately two-thirds of coal used by coal-fired power plants, 70 percent of motor vehicles, huge amounts of grain and chemicals, and countless other commodities. Virtually all chlorine used by water treatment facilities moves by rail. Freight rails handle hundreds of thousands of passenger trips daily.
- The Department of Defense relies on freight railroads to move ordnance and supplies. The Military Traffic Management Command (MTMC) has designated 30,000 miles of rail corridors — known as the Strategic Rail Corridor Network (STRACNET) — as essential to the national defense. The railroads maintain a close working relationship with the military to determine immediate and ongoing military traffic requirements and to identify capacity, security, and equipment needs of the industry to meet military demand.
- Presidential Decision Directive 63 (May 22, 1998) recognizes the freight railroad industry as a critical infrastructure "essential to the minimum operations of the economy and government."
- In addition to normal expenditures made by the rail industry to ensure the safety of rail operations, railroads have been financing expenditures to promote national security for the benefit of the general public and for national defense. Additional protective measures required at the highest alert levels cannot be sustained by the industry alone. Federal government support is required.
- The extra costs borne by freight railroads in the aftermath of September 11 constitute a significant burden. Federal government support would help ensure our national security and protect our nation's economic and military capabilities.
- As common carriers, freight railroads are required by law to transport commodities tendered to them, including commodities classified as hazardous materials. Thus, railroads cannot limit potential risks in the same way that firms in other industries can.

Position Paper, continued from page 2

To provide necessary resources for extraordinary measures necessary at the highest levels of alert, the rail industry and the Federal Government must work in partnership to help meet the country's rail security requirements. These requirements include security and redundancy for critical data communications and train control systems; operational support to include surveillance and protection of certain critical assets; and research and development to support hazardous materials security needs. ◆

Surface Transportation ISAC

Edward R. Hamberger, President and CEO of the Association of American Railroads (AAR), and John W. Lindquist, President and CEO of EWA Information Infrastructures Technologies Inc. (EWA IIT) announced in May 2002 the creation of an Information Sharing and Analysis Center (ISAC) to promote physical and cyber security in the surface transportation sector.

Mr. Hamberger was asked by the Department of Transportation to serve as sector coordinator and to establish a Surface Transportation ISAC. Freight railroads rely heavily on information technology in their daily operations.

The Surface Transportation ISAC (ST-ISAC) collects, analyzes and distributes critical security and threat information from worldwide resources. Best security practices and information on threats, attacks, vulnerabilities and countermeasures are drawn upon to protect members' vital physical infrastructures and information technology systems from attack. Services are customized to protect members against a range of threats.

The services provided by the ST-

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Government / Industry Partnerships in Transportation

by Thomas J. Falvey, U.S. Department of Transportation

Presidential Decision Directive 63 presented some unique challenges for the Department of Transportation as the transportation sector lead. One of the most challenging was to identify a transportation sector coordinator. With six modes of transportation - aviation, rail, mass transit, trucking and highways, maritime, and pipelines - a private sector coordinator that would represent the entire transportation sector would be difficult to find.

Clearly we had to first bound the scope of our efforts. Using the intent of PDD-63, we defined transportation critical infrastructure as those systems whose loss would have a significant national impact. Fortunately our definition closely aligned with that later used in the Patriot Act. The nation's rail system clearly stood out as fitting this definition, and soon became DOT's first priority in establishing a sector coordinator and Information Sharing and Analysis Center, or ISAC.

Mr. Ed Hamburger, President and CEO of the Association of American Railroads (AAR), quickly agreed to approach his Board of Directors with the idea of taking on not only the role of Sector Coordinator for rail, but also to sponsor an ISAC for all of surface transportation, soon to be called the ST-ISAC. AAR's cross-modal approach fit nicely with the Department's position to minimize the number of ISACs for transportation. The increasing growth of intermodalism, with growing numbers of trailers on flat cars and direct rail connections with seaports, made it imperative that we tie the various competing but mutually supportive modes of transportation together. Multiple centers would only encourage the compartmenting of information, and limit the timely and effective sharing of information so critical to an integrated response to emerging threats.

AAR contracted with EWA Inc, a defense contractor with top level security clearances, access to daily threat intelligence, and a background in CIP, to run the ST-ISAC. At the same time AAR set up a 24x7 operation center to take incident reports and establish connectivity with the network of rail dispatch and control centers around the country. AAR's ongoing close working relationship with DOT and their support to the Department of Defense on defense mobilization provided a key cadre of personnel

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Thomas J. Falvey
Acting Deputy Director and
Associate Director for
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Secretary of Transportation

Having served almost two years as a Commissioner on the President's Commission on Critical Infrastructure Protection, Mr. Falvey is currently the Acting Deputy Director, and Associate Director for National Security, in Secretary Mineta's Office of Intelligence and Security. Mr. Falvey is responsible for coordinating all Departmental activities with the Office of Homeland Security, oversight over all Departmental Critical Infrastructure Protection efforts, and for developing the private-public sector partnership with the transportation industry. He is responsible for all national security, critical infrastructure, and drug interdiction issues within the Department.

Mr. Falvey is a graduate of the United States Coast Guard Academy, holds a Masters Degree in Transportation Management from the State University of New York, and is a Captain in the Coast Guard reserve.

MORE FOCUS ON MASS TRANSIT SECURITY AND INVESTMENT

by Lee M. Zeichner, Esq.

Now that industry and government are addressing aviation and port security problems, we are witnessing signs that government is turning more focused attention to mass transit security - including operational security enhancements, jurisdiction and responsibility in the Federal government, and sources of funding for long-term capital expenditures. A report issued in December by the General Accounting Office (GAO) revolves around three issues:

1. What are the principal security challenges?
2. What steps have government agencies taken to enhance security?
3. What is the proper role for the Federal government given that security and risk assessment responsibilities are shared by Federal and State & local governments, industry owners and operators, and across multiple industry sectors?

The role of the Transportation Security Administration, according to the GAO, is "evolving" and TSA's role in coordinating security for all transportation modes is not yet clear. Congress created the TSA in the aftermath of the 9/11 attacks, and since then it has aggressively addressed aviation security. But the agency has not outlined and detailed its responsibility for security policy in other modes. The TSA and the Federal Transit Administration (FTA) will need to negotiate roles and responsibilities. Both agencies are negotiating a memorandum of agreement to begin working through jurisdiction issues and security challenges. At the State and local levels, GAO estimates that there are approximately 6,000 "transit agencies," which are responsible for administering and managing transit activities. Mass transit agencies include both public and private institutions.

GAO preliminarily concludes that initial security costs would exceed $700 million to address the most immediate and identified security problems.

- Sources of Funding: The largest source of Federal funding for transit agencies is the "Urbanized Area Formula Grant Program." These funds account for almost 50 percent of the total authorized funding for all transit programs under the Transportation Equity Act for the 21st Century (TEA-21). Recipients of funds must spend at least one percent to improve security of existing or planned mass transportation systems - unless transit agencies certify that the expenditures are unnecessary.

- Restrictions on Funds: Capital versus Operating: Congress prohibits large urban centers (population over 200,000) from using funds for operating expenses. Cost recovery for capital versus operating expenses is a recurrent theme across all sectors. In the electric power sector, for example, Federal Energy Regulatory Commission (FERC) policies support cost-recovery only where outlays can be categorized as capital expenses. Similarly, for security investments in mass transit, Congress believes that the Federal government should only pay for the construction of mass transit systems and not their operations. GAO recommends that Congress revisit this restriction and provide additional funding to support operating activities - such as immediate security enhancements, training, education, and salaries.

Industry has clearly identified what is needed from the government and the package includes more information sharing on common threats and vulnerabilities, support for security clearances, and increased funding for research and development. GAO correctly focuses on the lack of governance structure in the sector to address forms of funding for security, funding criteria, performance metrics, and the extent of assistance. A GAO survey concludes, however, that the largest problem is insufficient funding and not lack of technology or other security-related issues. ◆

Administration's Rail and Mass Transportation Anti-Terrorism Bill

Proposed legislation transmitted by the Secretary of Transportation to the Speaker of the House of Representatives and the President of the Senate on August 23, 2002 would strengthen the Federal criminal laws related to terrorist attacks and other violence against railroads and mass transportation systems in two major ways.

First, the bill would expand the recently enacted criminal sanctions against terrorist attacks on mass transportation systems so as to cover such attacks on railroads. In the USA PATRIOT ACT, adopted in 2001, Congress established new criminal sanctions for a wide range of terrorist acts against mass transportation systems (18 U.S.C. 1993), but not for such acts against railroads, and added a conspiracy provision to the existing "wrecking trains" statute (18 U.S.C. 1992). The bill would update the latter statute, first enacted in 1948, to cover the modern forms of terrorism prohibited in the new mass-transportation anti-terrorism provision and to reduce the Federal jurisdictional and *mens rea* requirements of the wrecking trains statute to the level of the mass-transportation provision in order to make it easier for the United States to prosecute the prohibited acts.

Second, the bill would prohibit additional types of terrorist attacks on both railroads and mass transportation systems and otherwise toughen the law, in order to deter terrorist attacks on rail or mass transportation systems and, if they do occur, to ensure that they are adequately punished. For example, the bill would do the following:

(1) extend to mass transportation systems a similar provision in the existing wrecking trains statute that makes it a crime to undermine or make unsafe railroad infrastructure;

(2) add "track" to the list of types of mass transportation infrastructure protected;

(3) make causing the release of a hazardous material or a biological agent or toxin on railroad or mass transportation property a crime; and

(4) clarify the definition of "mass transportation" as being limited to surface transportation and ferry boats that provide regular and continuing general or special transportation in the United States. Regarding the latter, S. 2621, recently passed by the Senate, would define a mass transportation vehicle under section 1993 as including, e.g., a commercial airplane; the letter transmitting the Department's bill to Congress notes that the Department has no objection to that approach.

The proposed legislation is expected to be introduced during the 108th Congress. ◆

Bus Association Backs Homeland Security Advisory System

The American Bus Association has published an Anti-Terrorism Action Plan (ATAP), emphasizing three key areas: (1) Reduce the industry's vulnerability to a terrorist attack through heightened security vigilance and partnering with law enforcement, (2) Consolidate the industry's business position as a "Strategic Transportation Reserve, (3) Help to preserve America's transportation infrastructure.

This plan, which was formulated by the American Bus Association in close cooperation with the Office of Homeland Security, also adopts the Homeland Security Advisory System (HSAS) – the color-coded chart for communicating threat conditions. Specifically, the ATAP adopts the framework for the motor coach industry and also includes suggested protective measures associated with each of the threat levels appropriate for motor coach owners and operators.

Motor Coach Security and the National Economy

According to a Congress, which failed to pass $200 million in funding for bus security last session, the following metrics indicate the importance of the sector to the national economy:

- Annual passengers: 774 million compared with Amtrak's 650 million passengers
- Bus operators: 4,000
- Motor coaches: 40,000
- Terrorist attacks that involve a bus or bus facility: 49% (according to analysis on worldwide attacks from 1920 to 2000).

Over-the Road Bus Security and Safety Act of 2002, H. Report 107-507, 107th Cong. 2nd Sess. (June 13, 2002) at 2-3.

LEGAL INSIGHTS

Securing Transportation: Integrating the Patriot Act and the Homeland Security Act of 2002

by Emily Frye, Associate Director, Legal Programs, CIP Project

Like other sectors, the Transportation sector has undergone tremendous changes in the last fifteen months. Transporting goods and people is crucial to both the economy and national security, and we have long taken for granted our ability to safely and quickly transport virtually anything to its intended location.

The events of September 11, 2001, and the West Coast dock workers' strike have cast doubt on some of our basic assumptions about convenience. Conceiving of planes – or trains, buses, and boats – as anything other than safe and reliable tools for getting us where we need to be is a new and frightening prospect. Calculating the risk that our pharmacy may not have received its just-in-time shipment of a necessary heart medication calls into question our definition of efficiency.

Congress has attempted to address some of the nation's transportation-related concerns in two broad-reaching pieces of legislation. These two laws create three notable changes in our transportation framework.

The Patriot Act (Public Law 107-56), which became effective October 26, 2001, begins to federalize the process of governing the transportation of hazardous materials. Heretofore, issuing a Commercial Driver's License (CDL) that permits someone to transport hazardous material was a state function. Section 1012 of the Patriot Act changes this format: now, "a State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the [U.S.] Secretary of Transportation has first determined … that the individual does not pose a security risk warranting denial." In order to make such a determination, the Secretary of Transportation is to rely upon a "background records check" made by the Attorney General. The Attorney General's background records check is to include criminal databases and immigration records. It is not clear, however, what the results of these background checks will be. For instance, can a legal alien from a primarily Muslim country obtain a CDL to transport hazardous materials? Organizations such as the American Association of Motor Vehicle Administrators have called for a rulemaking by the Department of Transportation to clarify such cloudy matters.

In addition to addressing hazmat transport, the Patriot Act also creates a new crime: attacking mass transportation systems. The language in the Act covers a wide range of activities. Wrecking or setting fire to a mass transportation vehicle, placing a toxic biological agent in or near mass transport, and interfering with staff operation of a mass transportation vehicle are the types of acts explicitly criminalized. If any such activity actually results in a death, the crime is punishable by life in prison. (An Administration-favored extension to the Patriot Act that explicitly deals with rail transport has not yet been proposed, but is expected to be presented to Congress in the next year.)

A year after the Patriot Act altered hazmat licenses and mass-transportation crime, Congress created the Department of Homeland Security (DHS). The DHS is intended to subsume all non-military functions related to protecting the nation. Title IV of the Homeland Security Act of 2002 creates the position of Under Secretary for Border and Transportation Security within the DHS. This secretariat is charged with supervising the protection of U.S. borders, waterways, ports, and terminals, as well as air, land, and sea transportation systems. Immigration and naturalization also are to be consolidated within this division. A tall order – but this component of the DHS will receive approximately two-thirds of the Department's budget. In November 2002, Asa Hutchinson was named as the

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Richard Little Named Visiting Scholar for Spring Semester at James Madison University

James Madison University is honored to have Richard Little of the National Research Council as a visiting scholar for the Spring Semester. As Director of the Board on Infrastructure and the Constructed Environment (BICE), Rich develops and directs a program of technical studies in building and infrastructure research. The BICE's program of studies and activities examines issues such as infrastructure systems performance, physical security and hazard mitigation, and infrastructure and community building among others.

As a visiting scholar, Rich will work with JMU's Institute for Infrastructure and Information Assurance in developing their mission. In his work with the National Research Council, Mr. Little has proposed a new infrastructure assurance degree program in a paper "Educating the Infrastructure Professional: A New Curriculum for a New Discipline" and has also organized many national level conferences and workshops related to infrastructure assurance. These experiences will allow Rich to work with faculty members from JMU's Integrated Science and Technology and Computer Science Departments develop a senior level seminar examining critical infrastructure systems.

Along with the above-mentioned activities, Mr. Little will present a lecture on Wednesday, March 5th, 4:00 PM at James Madison University's CISAT building entitled "A Multi-Hazard Approach for Protecting Critical Infrastructure." The public is invited. The lecture will provide a unique viewpoint into policy and technology issues facing the federal government. This presentation builds from an article authored by Rich Little in the *Journal of Urban Technology*, "Controlling Cascading Failure: Understanding the Vulnerabilities of Interconnected Infrastructures." Mr. Little will also be available to students and faculty in the Integrated Science and Technology Department who are researching topics pertaining to critical infrastructures. ◆

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Administration's nominee for Under Secretary of Border and Transportation Security. Mr. Hutchinson is a former Republican congressman from Arkansas who currently heads the Drug Enforcement Agency (DEA). Under his tenure, the DEA has served the first indictments of terrorists for drug trafficking. He is known for combining federal enforcement efforts with community-based support and information. Both of these precedents may serve him well in his new position.

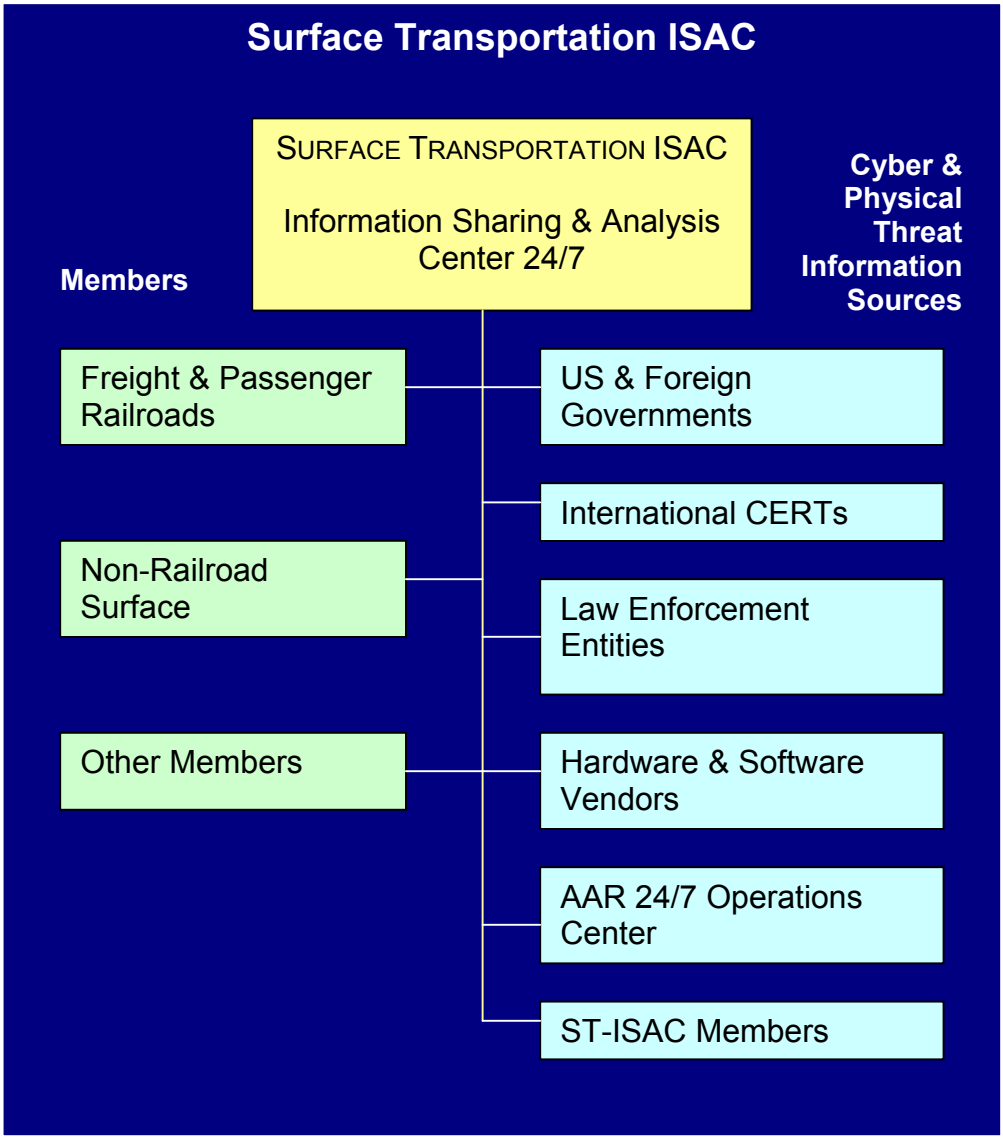
While both the Patriot Act and the creation of a Department of Homeland Security were designed to enhance prosecutorial authority in defense of the nation, the difference between an enhanced legal framework and enhanced public safety is pronounced. The Department's first challenge is to find some way to manage its immense diversity and the mass – possibly the duplication – of information sources coming into it. As a defense-statistics analyst commented recently, "Data is useless without analysis." As we know from the testimony of FBI Counsel Coleen Rowley, September 11 was not a result of information dearth or legal paucity; it was a communication and analysis gap. Real safety comes from accurately discerning real threats in an environment of pervasive fear, and that is no small challenge. ◆

The CIP Project would like to recognize the exceptional leadership and vision of John S. Tritak, who served as Director of the Critical Infrastructure Assurance Office from 1999 to 2003. Mr. Tritak resigned from his position on January 10 to return to the private sector. We wish him the very best in his future endeavors, and extend our gratitude for his significant contribution toward protecting the nation's critical infrastructure.

Rail Security Act of 2003

Senate democrats have introduced a homeland security bill that would not only dramatically increase industry risk regulation, but also generate significant capital investments in infrastructure security. The *Comprehensive Homeland Security Act of 2003* includes a basket of legislative proposals impacting multiple sectors of the national economy, several of which were not affected by the initial round of homeland security laws adopted after the 9/11 attacks. The railroad industry is addressed in the *Rail Security Act of 2003*, which re-defines "rail safety" to include "security," and requires the Department of Transportation (DOT) and the Federal Rail Administration to prepare needed "rail security" regulations. Specifically, the law requires DOT to –

- Perform a sector-wide risk assessment of rail transportation security risks and to convey prioritized recommendations for mitigating those risks.
- Consider the impact of recommended security measures on rail reliability as well as the national economy.
- Work with industry to implement new security and risk assessment rules.
- Report on the need for Federal funding – including financial support, technological assistance, and research & development. ◆



ST-ISAC, continued from page 3

ISAC create a robust physical- and cyber-security capability for the surface transportation infrastructure. ST ISAC services are specifically tailored to meet the security demands of each one of its members. All owners, operators and users of critical infrastructures are encouraged to join the ST-ISAC. ◆

Gov't / Industry, continued from page 4

with high level security clearances and secure communications.

This close partnership proved its worth in the days and weeks following the attacks of 9/11. The rail sector quickly increased security measures focused on the current threat and intelligence picture. Further recognizing their critical role in national security and the economy, the industry established a series of work groups to assess vulnerabilities throughout the rail system, both physical and cyber, and to develop measures to address those vulnerabilities. AAR then developed a rail security contingency plan, aligned with Governor Ridge's Homeland Security Advisory System, that defines measures to respond to increased threats, and establishes a process to rapidly disseminate and share threat information.

As the role of the ISAC and the railroads evolves, we are seeing closer cooperation between AAR and intelligence and law enforcement community. AAR is now providing subject matter expertise in analyzing rail-related threats. This industry – government partnership gives us a great example of how the federal government can partner with industry, on a completely voluntary basis, to help protect our nation during this ongoing crisis.

Nonetheless, we have been fortunate that key personnel in the railroads have access to classified information. But even with industry clearances, we find ourselves limited on how far we can disseminate sensitive security information. Trust is the key issue in the success of this partnership. AAR trusts DOT when we are unable to give them specifics on a threat, only that it is serious and railroads should increase security. AAR's members also trust AAR when AAR is unable to describe the threat, only that prescribed security measures must be taken. Competitive issues aside, we hope this same trusted relationship can be built with the rest of surface transportation.

We have made considerable progress in organizing the rest of the transportation sector. Pipelines are now well integrated into the Oil and Gas ISAC, through the cooperation and support of the Department of Energy. We now have a preliminary agreement with the American Public Transit Association, (APTA) and its President Bill Millar, to serve as the public transportation Sector Coordinator. We anticipate APTA will join the ST-ISAC, at least on a trial basis. The trucking industry, through the leadership of the American Trucking Association, is also exploring designation as sector coordinator. The Aviation Sector Coordinator, Airports Councils International – North America (ACI-NA), and its President David Plavin, have focused recent efforts in supporting the Transportation Security Administration in meeting the strict Congressional deadlines for baggage screening and other increased security measures at airports. During this period ACI-NA depended on a virtual ISAC to share information among its members.

The President's National Strategy for Homeland Security assigned the Department of Homeland Security as the lead agency to protect critical infrastructures and key assets for the transportation sector. How best to transition these responsibilities and maintain the trust and partnerships already established between the industry and government is yet to be seen, and will undoubtedly present many challenges in the months to come. ◆

The CIP Report is published by LegalNet Works, Inc. on behalf of the CIP Project. Formed in 1996, LegalNet Works Incorporated focuses on the development of information security laws and regulations with an emphasis on liability, risk management, national security, regulatory compliance, and privacy. LegalNet consults both government and industry officials on legal and policy reform in these complex areas.

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