

Effectiveness of the Virginia Rail Advisory Board

Report of the Virginia Rail Policy Institute

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Virginia Rail Policy Institute

5101 Monument Avenue

Richmond, Virginia 23230

INTRODUCTION

The Virginia Rail Policy Institute (“VRPI”) is an assembly of individuals who share both a common interest and a high level of expertise in the legal, financial and policy issues affecting rail transportation in Virginia and the United States. The primary function of VRPI is to identify, study, and analyze policy issues of particular pertinence to rail transportation in Virginia and to share its conclusions and recommendations with the appropriate public authorities. To that end, a VRPI committee, chaired by Charles Walker of Richmond, was asked to study the legislative history of the Rail Enhancement Fund (“REF”) and of the Rail Advisory Board (“RAB”), including the report of the Governor’s Commission on Rail Enhancement for the 21st Century and to evaluate their overall effectiveness in meeting the objectives which led to their creation. In conducting this study, the Committee was asked to perform the following tasks:

- (i) To review the activities of the RAB during the 4 years since it was created as those activities relate to the identification, prioritization, and approval of projects funded by the REF, and to evaluate its effectiveness;
- (ii) To examine the strategic and administrative relationship between the RAB, Department of Rail and Public Transportation (“DRPT”) and the Commonwealth Transportation Board and assess the effectiveness of that relationship;
- (iii) To determine and evaluate the process by which DRPT identifies projects to be funded by the REF and the role played by the RAB in that process;
- (iv) To identify the full range of non-transit funding administered by DRPT, including federal grants and General Fund appropriations, and determine the process by which such expenditures are prioritized and approved;

- (v) To make such recommendations as the Committee thinks appropriate to improve the administrative system by which rail-related expenditures of public funds are currently being made.

BACKGROUND

Five years ago, the Report of the Governor's Commission on Rail Enhancement for the 21st Century in the Commonwealth of Virginia was delivered to Governor Mark Warner (the Executive Summary of that report is included as Appendix I), but the genesis of this endeavor and the resulting report began more than two decades earlier. Advocates for recognizing both passenger and freight rail as essential components in transportation planning urged the adoption of this point of view throughout the 1980s and 90s before gaining recognition and some traction. With many issues competing for legislative attention, rail lacked sufficient appeal at the time to attract political capital and rail did not have sufficient priority among other more pressing issues. During that time, critical highway needs were paramount and the inclusion of rail as an alternative was given little or no consideration. In reality, the Department of Transportation lacked the planning resources or the interest to embark on a comprehensive plan that included rail. Nevertheless, the longer term vision for rail was not lost.

The creation of the DRPT began to change this dynamic; however, reluctance on the part of those making transportation policy to consider rail as a serious component of the Commonwealth's transportation planning remained, and DRPT's ability to overcome that reluctance was severely constrained by a lack of dedicated funding. The private sector railroad companies were concerned with potential disruption of freight movement by any expansion of passenger rail service and, more specifically, wanted no intrusion into their ability to control their own operations. The reputation of Amtrak was bad and not improving as Congress almost continuously threatened to cut off its funding. Meanwhile, the private sector railroads were

cutting costs and in the process were abandoning unprofitable routes and disposing of rights-of-way. This was alarming, especially since these potentially valuable transportation arteries might never be reassembled. Nevertheless, rail advocates continued to make the case for rail's strategic importance, while at the same time seeking a path to insure the inclusion of rail alternatives in studies and planning to relieve highways of congestion. The Governor's Commission was a significant step toward creating a structure to achieve a more inclusive role for rail in public transportation planning and solutions.

The Governor's Commission produced an unbiased, comprehensive report. It recognized the potential value of studying and including rail alternatives in the overall planning process for transportation and expressed in rather bold terms the cultural changes needed to accomplish that objective, which included changes at the railroads and the Department of Transportation. It struggled with the appropriate authority to be vested in a "Rail Advisory Commission," finally concluding that the CTB should for the time being have final authority over rail's inclusion in transportation projects. The Commission, which fully acknowledged the difficulty of accomplishing cultural change, went on to state that eventually a Rail Authority might be necessary.

In the five years since the Commission's report, the Secretary of Transportation and the General Assembly have taken a series of significant actions in response to the Commission's recommendations. The Rail Enhancement Fund was created and is in place and functioning. The Rail Advisory Board, the entity that ultimately emerged from the vision of the Commission, likewise is in place and functioning. However, the RAB as established was stripped of most of the authority recommended by the Governor's Commission. The Commission's Report contemplated that the RAB would actively participate in the development of rail projects in

partnership with DRPT. Further, the Commission envisioned an active interface between the RAB and the CTB. Inasmuch as neither objective appears to have been accomplished, the question is whether the plan envisioned by the Governor's Commission is functioning as intended and is producing the desired results.

PRIMARY STATE RAIL TRANSPORTATION ENTITIES

Set forth below is a summary of the legislation granting authority to the primary state entities involved in rail transportation in the Commonwealth.

Secretary of Transportation

The Secretary of Transportation is responsible for implementing the Commonwealth's transportation program. The Secretary is appointed by the Governor, subject to confirmation by the General Assembly (Virginia Code § 2.2-200), and among other things serves as the chair of the Commonwealth Transportation Board (Va. Code § 33.1-1). He is responsible for the Department of Rail and Public Transportation, the Department of Transportation, and other transportation agencies (Va. Code § 2.2-228). In addition, state law establishes the Office of Intermodal Planning and Investment of the Secretary of Transportation. This office advises the Secretary and the CTB on intermodal issues and, among other things, assists the CTB in developing the Statewide Transportation Plan and works with the DRPT to promote intermodal and multimodal solutions in strategic and long-range plans (Va. Code § 2.2-229).

Commonwealth Transportation Board

State law establishes the CTB as a 17-member board comprised of the Secretary of Transportation (who is the chair of the CTB), the Commonwealth Transportation Commissioner (who is the vice-chair), the Director of DRPT, and fourteen citizen members appointed by the Governor subject to confirmation by the General Assembly. (Va. Code § 33.1-1.) The CTB is

the Commonwealth's transportation policy board, and it has a wide range of powers and duties that impact all forms of transportation in Virginia.

The CTB's authority over rail policy includes oversight of DRPT "to ensure ... the enhancement of rail transportation;" the coordination of rail plans with highway programs; reviewing and assisting in establishing policies and objectives of DRPT; awarding all rail-related contracts over \$2 million that are to be administered by DRPT; and allocating funds for programs and projects. (Va. Code § 33.1-12.) The administration and expenditure of funds from the Rail Enhancement Fund are subject to the approval of the CTB, and the REF can only be used for projects that the CTB has determined will "result in public benefits to the Commonwealth or to a region of the Commonwealth that are equal to or greater than the investment" of REF funds. (Va. Code § 33.1-221.1:1.1.) Upon approval and allocation of funds for projects funded by the REF, the CTB incorporates these projects into the state Six-Year Improvement Program. The administration and expenditure of funds for the construction of industrial access railroad track and funds from the Shortline Railway Preservation and Development Fund are similarly subject to the approval of the CTB. (Va. Code § 33.1-221.1:1; § 33.1-221.1:1.2.)

Department of Rail and Public Transportation (DRPT)

DRPT is the state agency responsible for rail, public transportation, and commuter assistance services. It reports to the Secretary of Transportation and is overseen by the CTB. Among other things, DRPT is charged with representing and promoting Virginia's interests in freight and passenger rail. (Va. Code § 33.1-3914.4.) The Department's statutory responsibilities include developing and implementing plans and programs to retain and improve rail services and corridors, as well as assisting other public and private entities in implementing

and improving rail services (Va. Code § 33.1-391.5). DRPT is also authorized to acquire, lease, improve and construct railway lines and rail facilities (Va. Code § 33.1-391.4).

The Virginia Code provides that the Director of DRPT “shall administer and expend or commit, subject to the approval of the Commonwealth Transportation Board,” funds from the REF. (Va. Code § 33.1-121.1:1.1.) In carrying out this statutory charge, DRPT analyzes potential projects and proposals, selects projects to be considered by the RAB and makes recommendations to the CTB for allocations from the REF. DRPT also negotiates agreements with each applicant for projects approved by the CTB, and provides periodic progress reports to the CTB and the RAB. The Director of DRPT is charged with the administration and expenditure of funds for the construction of industrial access railroad track and of funds from the Shortline Railway Preservation and Development Fund, subject in both cases to the approval of the CTB. (Va. Code § 33.1-221.1:1; § 33.1-221.1:1.2.)

Rail Advisory Board

Section 33.1-121.1:1.1 of the Code of Virginia establishes the Rail Advisory Board, a nine-member board appointed by the Governor including one at-large member of the CTB. It is the statutory responsibility of the RAB – “[i]n consultation with, and with the assistance of the Director” of DRPT – to develop recommendations to be presented to the CTB “regarding all proposed allocations of funds from the Rail Enhancement Fund.” (Va. Code § 33.1-221.1:1.1.) In addition, the Board is charged with working cooperatively with the Director of DRPT and with any affected railroad “in identifying, developing, and advocating projects and policies to enhance the quality and utility to the public of rail transportation in the Commonwealth.” Finally, it is the responsibility of the RAB, at the Director of DRPT’s request, to “consider and advise the Director and the Department on any other matter or matters pertaining to transportation in the Commonwealth.”

ANALYSIS

As the Governor's Commission Report recognized, if rail is to achieve its full potential it must be an integral component of the study, planning and development of transportation projects and must be fully considered in the development and implementation of the statewide transportation plan. This approach undoubtedly requires resorting to the sometimes overused term, "thinking outside the box." The development of the State Rail Plan was a commendable effort and goes a long way toward stating the goals for rail, but the truth is that rail is not yet being included among the top priorities of transportation planning in Virginia. An active RAB could move Virginia toward this objective, but the legislation that created the RAB fell far short of granting it sufficient authority to act or react to insure this result.

Included in the Appendix Ethics Report are excerpts from one of the latest versions of the CTB Multimodal Long Range Plan. (See Appendix VII.) Although the CTB currently is concentrating on budget cuts and funding levels and sources, rail is included in the list of issues to be addressed. Significantly, however, in the CTB's posting of Hot Topics for the 2009-2014 Six Year Improvement Program, rail is not on the "hot" list.

DRPT has a budget approaching \$600 million, excluding the Dulles Airport project, but only about 10% goes to rail projects. The responsibility for this disparity lies not with DRPT, whose flexibility has been, and continues to be limited by restrictions on the funding it receives. For example, although DRPT is permitted to use Rail Enhancement funds for a wide variety of things, including project development and the acquisition of rights of way, the funding DRPT receives from the REF is in reality a very small portion of its overall budget. To put the role of rail in perspective, it must be observed that DRPT is charged with administration of numerous federal grants spread across the Commonwealth that cover a range of separate programs. These include developing public transportation projects, monitoring and maintaining transportation

statistics, and overseeing transportation development projects, including the massive Dulles Metro Rail project. DRPT is also involved in adopting and organizing public transportation plans for the disabled and in many other similar programs. Concurrently, the agency must deal with its own unique staffing issues. Although rail is a separate program, it is certainly affected by the overall budgetary situation. Included in the appendix are excerpts from DRPT's strategic plan and budget for 2008-9. (See Appendix IV and V.) It is obvious that the Agency stretches its resources across a broad programmatic landscape, of which transit is by far the most significant component.

As noted previously, the Governor's Commission recommended that rail projects funded by the REF be developed jointly with the RAB, with final approval required by the CTB. DRPT's approach to project development has created a very extensive application program under which applications for funding projects came directly from the railroads. DRPT has done a commendable job of developing the process, particularly in view of the statutory provisions limiting its flexibility. The project development applications received from the railroad are evaluated by DRPT to determine feasibility, consistency with the State's rail plan, and the extent to which each proposal promotes the public interest. Absent from the process, however, is any apparent effort by DRPT to solicit or encourage proposals which it considers to be in the public interest. Moreover, involvement of the RAB comes only after specific projects have been selected and approved by DRPT from among those proposed by the railroads. RAB meeting minutes include several instances where requests were made to DRPT for an opportunity to review and prioritize projects before they are selected and brought to the RAB for approval. This does not appear to have been done.

Another very significant limitation on the effectiveness of the RAB is the absence of any involvement by the Board in rail projects considered by DRPT that are not funded by the Rail Enhancement Fund. The result is that many important and costly rail projects are never evaluated by the RAB.

The link between the RAB and CTB exists only through the member of the CTB who sits on the RAB. There is no record to indicate that there has ever been a joint session between the RAB and the CTB or even an invitation from the CTB to meet with the RAB. In fact, there is no evidence of any direct contact between the two Boards. It seems clear that if rail is to be a viable alternative that is integrated into state transportation planning, the RAB should be more directly involved with the CTB, and with the process of identifying and prioritizing rail projects, whatever the source of funding.

The information collected to date suggests that attention to rail has increased significantly in recent years but that the current structure of policymaking with regard to rail is not functioning as envisioned, nor is it functioning adequately. The RAB has not been fully engaged with DRPT in identifying, selecting, developing and prioritizing rail projects, and its role to date has been largely that of spectator. DRPT by its admission is somewhat understaffed and may lose even more talent to retirement and budget cuts. It can ill afford the substantial investment of time and effort currently required to prepare for meetings of the RAB unless the Board is given the authority to play a more meaningful role in identifying, developing, and approving publicly funded rail projects. The General Assembly did not envision the creation of a Board of Spectators. This is a time to look for innovative solutions, including making the most of the resources available. In this endeavor, the RAB is one of the Commonwealth's most underutilized resources.

The recent progress made by freight and passenger rail is significant, and those involved should be commended. But progress toward integrating rail as a serious and feasible component of the Commonwealth of Virginia's transportation planning at the CTB level has yet to become a reality. The envisioned inclusion of RAB as a vehicle to accomplish that objective has not occurred.

As a result of these shortcomings, the appropriate measure of rail's inclusion in the overall transportation process remains to be established.

RECOMMENDATIONS

Some of the weaknesses inherent in the legislation establishing the Rail Enhancement Fund and the Rail Advisory Board were obvious during the 2010 session of the General Assembly, when it became necessary to waive several statutory constrictions in order to secure funding for a rail project which enjoyed near unanimous support from those who will be affected by its completion. Rectification of those weaknesses is one of the reasons for these recommendations, but it is not the only reason. We have had nearly five years of experience with the REF and the RAB and have had the opportunity to learn from that experience. Virginia's foresight in setting aside a designated source of revenue in support of rail projects determined to be in the public interest is both unique and commendable, but if the underlying objective of elevating the status of rail transportation, and of taking full advantage of its potential in the movement of freight and passengers is to be achieved, changes in the current program are clearly needed. Some of the needed changes could clearly be implemented administratively, but experience has taught us that we cannot always rely – nor should we be required to rely – on administrative discretion to insure that the Rail Advisory Board plays the role it was designed to pay in making and implementing rail policy in the Commonwealth. The Rail Policy Institute's study suggests that the following changes would significantly improve the overall effectiveness

of both the process and the program, and would enhance in a major way the potential contribution of rail transportation to the resolution of the Commonwealth's transportation problems.

1. The RAB should be reconstituted and renamed the Rail Development Authority, and should be given the statutory responsibility to identify, develop, prioritize, solicit, and approve projects jointly with DRPT.

2. The Virginia Code should be amended to require specifically that the Rail Development Authority be regularly consulted by the Director of DRPT, and afforded an opportunity to actively participate in the deliberative process concerning strategic and tactical planning for rail development in the Commonwealth, including, but not limited to, the development, and reissue from time to time, of the State Rail Plan. In addition, VDOT, DRPT, and the CTB should be required to seek and consider the Rail Authority's recommendations in formulating, promulgating, and implementing policies, practices, and procedures for the administration of all rail programs currently authorized by the General Assembly, as well as those that may in the future be authorized. Finally, it should be made clear that the Authority, on its own initiative, is free to make advisory recommendations concerning rail transportation programs and policies to the Director, the Secretary of Transportation, and the CTB.

3. The Rail Development Authority should be authorized to propose rail projects it determines to be in the public interest without regard to whether such projects have been proposed by a railroad and to use funds from the Rail Enhancement fund to encourage the approval of such projects by the affected railroad or railroads.

4. With the approval of the Director of DRPT, the Rail Development Authority should be authorized to prioritize proposed rail projects and to use differential levels of funding to encourage the approval and construction of such projects by the affected railroads.

5. As recommended on at least two occasions by the RAB, the Director of DRPT, with the approval of the Rail Development Authority and the CTB, should be authorized to waive or reduce the 30 % match requirement with respect to projects proposed for funding from the Rail Enhancement Fund, when it is determined that it is in the public interest to do so.

6. The Code should be amended so as to permit the REF to be used to provide the local match necessary to obtain federal funding for rail projects.

7. The Code should be amended so as to permit the CTB, on recommendation of the Rail Development Authority and the DRPT, to use funds from the REF to support bonds issued by the CTB for the construction of rail projects.

8. The Rail Development Authority should have no independent authority to issue bonds, or to incur debt.

9. The Rail Development Authority should consider and make recommendations to the CTB with respect to requests for funding of all proposed rail projects, whether such projects are funded from the REF or from some other source.

10. In all instances in which the CTB is required to approve funding for rail projects, the recommendations of the Rail Development Authority should be made directly to the CTB by or through the Chair of the Rail Development Authority.

11. At least once each calendar year, the members of the Rail Development Authority and the members of the CTB should meet jointly to consider transportation issues in which the two Boards have a common interest.

12. The terms of the members of the Rail Development Authority should coincide with the term of the Governor by whom they were appointed, subject to a provision permitting each member to serve until his or her successor is named.

13. Finally, and perhaps most important of all, in both long range and short term planning, and in the development of transportation alternatives, the law of the Commonwealth should require that rail be considered and evaluated as a potential solution, either in whole or in part, to every surface transportation problem, including specifically those problems proposed to be addressed by the construction of a new highway or the expansion or extension of an existing highway.

CONCLUSIONS

It is our belief that adoption of these recommendations will significantly elevate the role of rail and take greater advantage of the enormous potential rail projects offer to resolve Virginia's transportation problems. We acknowledge that these recommendations will inevitably enhance the responsibilities of the Department of Rail and Public Transportation. However, as the Governor's Commission recognized more than six years ago, a change in culture is necessary to insure that rail is adequately included in the overall mix of transportation planning and development, and the challenge of effecting that change will require the involvement and coordination of all of the agencies that are a part of transportation planning in Virginia. For understandable reasons, much of DRPT's focus has in the past been on public transit. Without diminishing the attention public transit understandably requires, DRPT will be required to broaden its efforts to include an equal focus on freight and passenger rail.

With respect to the Rail Advisory Board, unless its responsibilities and its authority are significantly broadened, the question of whether the Board is making a contribution to rail

transportation in Virginia sufficient to justify the time and expense DRPT is required to invest in preparing for its meetings, should be carefully considered.

APPENDIX

- I. Excerpts From Governor's Commission on Rail Enhancement for the 21st Century in the Commonwealth of Virginia
- II. Rail Enhancement Fund/Rail Advisory Board
- III. Organization Chart DRPT
- IV. DRPT Budget 2009
- V. Excerpts From DRPT Agency Strategic Plan
- VI. DRPT/VDOT Six Year Program
- VII. VTrans 2035 Multimodal Long Range Plan