

lawsuits brought by private shareholders. "Through the creative management of the [NCRR]'s rail line, the State has the potential to exert a positive influence on economic development in North Carolina," the committee found. "A flexible lease structure could open new avenues for the productive use of the [NCRR] corridor. . . . Unlike the minority shareholders, the primary value of the [NCRR] to the State is not based on the monetary return on its investment, but on the ability to leverage [NCRR]'s assets to promote economic growth throughout the State."<sup>19</sup>

The committee found the NCRR's legal obligations to its private shareholders and to the public to be ambiguous. As a private corporation, it must maximize profits for shareholders. But because the state has granted it governmental powers, such as the right of eminent domain, it also has a legal obligation to serve its intended public purpose.

However, the committee found, "The case law does not address whether providing rail service to the citizens of North Carolina is merely ancillary to the private shareholders' rights to profit from their enterprise, or is a more fundamental purpose of the

## *Railroad's Ownership Structure Governs Lease Negotiations*

**T**he latest long-term lease for the North Carolina Railroad was negotiated in strict secrecy by a committee of the railroad's board dealing directly with the lessee, Norfolk Southern Corporation. State officials, from the governor on down, say they took a hands-off stance once the negotiations got underway, even though the state owns three-quarters of the stock in this multimillion dollar corporation.

Is this any way to run a railroad? Yes, according to the N.C. Attorney General's Office. In fact, says Deputy Attorney General Grayson Kelly, it's the *only* way to run a railroad with an ownership structure like the NCRR.

"There is no legal reason why the governor should or could be involved in the negotiations," says Kelly, who is representing the governor and the state in lawsuits filed over the announced lease agreement between the NCRR and Norfolk Southern. "As the major stockholder of a corporation, your power is limited to voting your shares."

Of course the governor has the authority to appoint the majority of the NCRR board, which would seem to give him power over the board's negotiating positions. But Kelly says even that power is circumscribed. "He could let his views be known to the directors, but the director's first duty is to the corporation." Legally, that leaves the state out of direct negotiations, and it limits

the state's ability to pursue policy options that might hurt the profitability of the railroad.

This fiduciary responsibility to the corporation protects the interests of the private shareholders in the railroad. And it isn't their only protection. According to Kelly, the railroad's bylaws require a 50 percent vote of the private shareholders to ratify any substantial action.

That means opponents of the new lease can block its ratification if they can convince half the private shareholders to vote against it. "If they can get proxies or 50 percent of the private shareholders to vote against the lease, they [the NCRR] won't be able to ratify it," says Kelly.

The state could resolve some of these issues by buying out the private shareholders. If the state were the sole shareholder, Kelly says, "it could define its interests however it wanted to."

An issue in discussion of a buy-out of private shareholders has been when such a buy-out would occur, Kelly says. The state wants a buy-out after the lease issue is settled, because a lease would help determine the value of the private shares. Private shareholders, if they want a buy-out at all, would prefer it to happen before the lease is settled in hopes of fetching a higher price for their shares.

The dispute is yet another illustration of the railroad's awkward ownership structure. "It's reached a point where I think it's going to have to be resolved eventually," says Kelly.

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*—Mike McLaughlin*