

Tom Donohue

U.S. Chamber of Commerce President Oversees
Renegade Corporations While Pushing for Limits to
Corporate Accountability



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Executive Summary

As president of the U.S. Chamber of Commerce, Thomas J. Donohue leads a national campaign to limit plaintiffs' rights in civil lawsuits, seeks to defeat judicial and attorney general candidates whom he deems as insufficiently pro-business, and opposes regulatory oversight of businesses and other measures that would lead to increased accountability for American companies.

Donohue's message has a constant drumbeat: Businesses are the victims of greedy trial lawyers and overzealous regulators. Donohue claimed the Chamber was forced to abandon its traditional political neutrality in the 2004 presidential campaign solely because Democratic vice presidential nominee John Edwards was a former trial lawyer and, therefore, a threat to business.¹ He said New York Attorney General Eliot Spitzer was guilty of the "most egregious and unacceptable form of intimidation that we have seen in this country in modern time."² Meanwhile, he has praised American business as "the one thing that works in this country."³

Donohue acknowledges the responsibility of board members to make sure companies hold up their end of the bargain. "The due diligence issues of board membership suggest that you damn well better do your homework, you better understand the issues, you better be in communication between meetings, because you need to give your best advice," Donohue told *Directors & Boards* magazine in 2000. "Boards have to support the chief executive, but they also have to cajole, they have to prod, they have to help the CEO be successful. Save me from a bunch of people on a board who are going to tell me what I want to hear."⁴

But Donohue himself sits on the boards of two publicly traded companies – Qwest Communications International Inc. and Union Pacific Corp. – that have committed numerous egregious acts since Donohue's arrival. Between them, the two companies have engaged in a monumental deception of investors, violated federal and state regulations on a massive scale, jeopardized public safety, and perverted the American judicial system through alteration and destruction of evidence.

In other words, Donohue is a steward of two companies that serve as vivid examples for why we need a strong civil justice system and vigorous regulatory oversight.

Section I: Chamber Seeks to Reduce Plaintiffs' Rights and Limit the Checks on Corporate Accountability

Since Donohue took over, the Chamber of Commerce has adopted a "take no prisoners" position in its strident attempts to limit federal and state regulators and plaintiffs' rights.

- Under Donohue's tenure, the Chamber created the Institute for Legal Reform, a non-profit corporation formed under Section 501(c)(6) of the tax code. The Institute lists educating the public "on reform of [the] American legal system" as its purpose. According to federal tax records, the Institute raised more than \$105 million between 2001 and 2003. It has spent the money on everything from media campaigns to

congressional lobbying to political campaigns for “pro-business” candidates running for state supreme court and state attorney general seats.⁵

- The Chamber combined with the Institute for Legal Reform has spent \$168.6 million since 2000 to lobby the federal government, making it one of the most powerful lobbying forces in Washington.
- The Chamber and Institute have launched huge media campaigns aimed at criticizing states they have labeled as anti-business. In Mississippi, the Chamber took out full-page newspaper ads saying jury verdicts favorable to plaintiffs had created an anti-business atmosphere and criticized the state for not enacting laws to halt such verdicts.
- The Chamber and Institute have led the seven-year campaign for anti-consumer, anti-worker class action legislation in Congress. The measure, approved in February 2005, moves most class action lawsuits from state courts to federal courts, where they are far less likely to be certified for trial. The result: many consumers and workers will be locked out of court for legitimate claims.
- The Chamber and Institute have carried out a major push, since 2000, to defeat state supreme court candidates whom the Chamber views as anti-business. For example, the Chamber pumped more than \$1 million into independent groups, including one called “Mississippians for Economic Progress,” as part of its effort to defeat Mississippi’s Justice Chuck McRae in 2002.⁶
- Donohue and the Chamber have launched an offensive against state attorneys general with reputations for pursuing corporate fraud and malfeasance. In Washington state, the Chamber gave \$1.5 million to a front group, the Voters Education Committee, to run commercials hostile to Democratic attorney general candidate Deborah Senn during the state primary in 2004.⁷ Donohue charged New York Attorney General Eliot Spitzer, who has recouped billions of dollars of ill-gotten gains from corporations, with being guilty of “the most egregious and unacceptable form of intimidation that we have seen in this country in modern time.”⁸
- In 2004, Donohue claimed the Chamber was forced to abandon its traditional political neutrality in presidential campaigns on the basis that Democratic vice presidential nominee John Edwards was a former trial lawyer and, by implication, an abuser of lawsuits. “When voters go to the polls, they need to know lawsuit abuse destroys jobs, drives doctors out of business and forces companies into bankruptcy,” Donohue said.⁹

The Chamber launched a major corporate lobbying campaign seeking to prevent the Securities and Exchange Commission (SEC) from enacting a rule that would allow shareholders to have greater influence over the makeup of the boards of directors of publicly traded corporations and has threatened to sue the SEC if it promulgates the rule.¹⁰ Donohue’s opposition to the shareholder access rule is relevant to his role as a board member of Qwest and Union Pacific because an independent research firm has recommended against his re-election to both boards, and a group of Qwest shareholders has also recommended against his re-election.¹¹

Section II: Donohue Serves as a Board Member for Companies that Have Engaged in Egregious Behavior

While trying to limit the legal rights of plaintiffs who have been injured or defrauded by corporations, Donohue has served on the corporate boards of two companies – Qwest Communications International Inc. and Union Pacific Corp. The two corporations are at least partially defined by misdeeds that have led to numerous civil lawsuits and enforcement actions. In addition to these two boards, Donohue also serves as a director for two other corporations. He is paid a total of at least \$150,000 annually by the four corporations.

Though Donohue urges American business to act with “a high degree of integrity,”¹² overwhelming evidence exists that Qwest and Union Pacific have failed to conduct themselves with such integrity. There is also nothing on the public record to indicate that Donohue, in his capacity as a director, has pushed the companies toward a more responsible pattern of conduct.

Qwest Communications International Inc.

Donohue’s tenure on Qwest’s board of directors, which began in February 2001, has been marked by massive accounting fraud and wholesale violations of state and federal regulations. Meanwhile, Donohue sits on the compensation committees at Qwest and Union Pacific, both of which have received dismal ratings from two independent research organizations for their roles in furnishing executives with exorbitant pay packages in relation to the firm’s performance.

Glass Lewis & Co. recommended shareholders vote “Withhold” on Donohue’s nomination to Qwest’s board in 2004. Glass Lewis made its recommendation, in part, because of Donohue’s role in approving the firm’s executive pay packages.¹³

Corporate Library, an independent research firm that specializes in corporate governance issues, gave Qwest’s board a grade of “F” for CEO compensation and gave Qwest’s “Overall Board Effectiveness” an “F” for 2004.¹⁴

Those ratings were made after a wave of federal and state enforcement actions that followed numerous fraudulent acts by Qwest.

- Qwest overstated its earnings in 2000 and 2001 by \$2.5 billion. The overstatement included \$1.6 billion in 2001, during which Donohue served nearly 11 months on Qwest’s board.¹⁵
- Qwest has paid \$250 million to settle fraud charges brought by the SEC for its faulty bookkeeping,¹⁶ it has paid \$25 million to settle five lawsuits concerning alleged insider trading,¹⁷ and it still faces billions of dollars in potential civil litigation liabilities.¹⁸
- Since Donohue has joined Qwest’s board, the company has been assessed more than \$114 million in fines by ten states plus the federal government.

- Qwest agreed in 2003 to pay the Federal Communications Commission (FCC), \$6.5 million, the largest payment in FCC history, for violating the terms of its merger order with U.S. West.¹⁹
- The FCC later fined Qwest \$9 million for failing to disclose secret agreements with local telephone companies in Arizona and Minnesota. The FCC “called Qwest’s actions ‘egregious,’ and its apparent violations ‘willful and repeated.’”²⁰
- Ten states have negotiated settlements with Qwest or imposed fines against the corporation for making secret deals with its competitors, charging its customers for services they never requested, or switching the long distance phone service accounts of consumers without their permission. These sanctions have included record breaking fines or settlements in at least four states.

Union Pacific Corp.

Since Donohue joined the Union Pacific board in 1998, the company has repeatedly been found liable in accidents resulting from poor training or unsatisfactory upkeep of tracks; has repeatedly been found responsible for intimidating its workers; and has repeatedly been found responsible by the courts for manipulating or destroying evidence.

Meanwhile, the compensation committee of the Union Pacific board, upon which Donohue sits, has rewarded executives at the firm with ever higher pay. Glass Lewis & Co., an independent research firm, recommended against retaining Donohue as a board member for his role on the firm’s compensation committee in providing executives with inordinate pay and in assenting to an accounting trick to trigger a multimillion dollar incentive for executives.²¹

- From January 1999 to November 2000, Federal Railroad Administration (FRA) inspectors found 13 suspected violations of anti-harassment rules. Most of the cases concerned Union Pacific’s attempts to prevent injuries from being reported. The FRA said it settled one of those cases, was considering administrative penalties in four others and was seeking civil penalties in a sixth case.²²
- In July 2001, a federal judge in Arkansas fined Union Pacific \$168,000 for destroying evidence in a case stemming from a November 1998 railway crossing accident that left a motorist dead. “Documents have been routinely destroyed despite defendant’s knowledge that they are relevant to this lawsuit. Moreover, documents have been routinely destroyed after plaintiffs have formally requested them in discovery,” Judge William Wilson wrote.²³
- In November 2001, a Union Pacific train conductor was prevented by his supervisor from seeking medical care after he received a severe gash in the head. The manager told the conductor that if he got stitches, which a doctor later said he needed, it would make the

incident reportable and harm his career.²⁴ The train conductor claimed during his civil suit to be suffering from debilitating headaches.

- In February 2002, a federal judge censured Union Pacific after a company manager admitted he replaced possibly faulty parts in the signal at a Washington state railroad crossing, where a motorist had been killed by a Union Pacific train, before the parts were collected as evidence. The Union Pacific manager stated under oath that he replaced the parts a few hours before a lawyer for the driver's family was to inspect the signal. The manager also acknowledged that Union Pacific had been warned by the manufacturer a dozen years earlier that the parts were potentially defective and should be replaced.²⁵
- In April 2002, the National Transportation Safety Board (NTSB) blamed poor track conditions, ineffective track inspection, and ineffective management oversight for a train derailment in 2000 that caused the leakage of potentially hazardous chemicals, forcing the evacuation of nearly 3,500 residents from their homes in Eunice, La. The NTSB also found that Union Pacific was on notice well before the accident that its tracks were in poor condition and that Union Pacific misled the NTSB on its inspection protocols.²⁶
- Following a string of serious accidents in 2004, the FRA required Union Pacific to sign a "compliance agreement," calling for Union Pacific to "repair 'notable deficiencies' that regulators found when they inspected [Union Pacific's] operation in southern Texas."²⁷
- The Arkansas Supreme Court said in a 2004 decision involving a fatal accident "the record in this case reflects the development of a corporate policy at Union Pacific that put company profits before public safety." The justices were issuing a ruling in a case in which a truck driver was killed and his passenger injured after their vehicle was struck by a Union Pacific train. In upholding a \$30.1 million judgment against the company (including \$25 million in punitive damages) the court found that Union Pacific had "intentionally destroyed" track inspection records and disregarded safety warnings "in reckless disregard of the consequences."²⁸
- The *New York Times* reported in summer 2004 that in a recent 18-month period seven federal and state courts had imposed sanctions on Union Pacific "for destroying or failing to preserve evidence in crossing accidents, and an eighth court ordered a case retried." The *Times* noted that one sanction had since been overturned on appeal.²⁹

As a member of the boards of directors of both Qwest and Union Pacific, Donohue was empowered to turn his rhetoric into action by pushing for corporate reforms at the two companies that might have made headlines across the country. At the very least, since Donohue serves on the corporate compensation committees of both companies (and even chairs Union Pacific's compensation committee), he was well situated to punish executives for the misdeeds that occurred on their watch. He might have publicly called for their dismissals or, at the very least, lowered their pay.

But Donohue has done nothing of the sort. Qwest and Union Pacific executives have been amply rewarded during Donohue's tenure on the company's boards. So much so, in fact, that two

independent research organizations have given the boards of Qwest and Union Pacific dismal grades for sanctioning excessive executive pay. And one group, Glass Lewis & Co., has recommended against the reappointment of Donohue himself to both boards.³⁰

Section I: The Chamber Seeks to Reduce Plaintiffs' Rights and Checks on Corporate Accountability

During his tenure as president of the U.S. Chamber of Commerce, Donohue has led efforts to minimize the legal liabilities of American businesses.

- Donohue has castigated class action lawsuits as “the single biggest impediment to economic growth and stability”³¹ and successfully pursued legislation that will significantly weaken consumers’ ability to use such suits to hold companies accountable for fraud and other misdeeds.
- The Chamber and the Institute for Legal Reform, an affiliated group established by Donohue and the Chamber, spent \$53.4 million on lobbying in 2004 and employed a platoon of 54 lobbyists to work on tort issues.³²
- The Chamber and the Institute for Legal Reform have spent millions of dollars opposing state judicial and attorney general candidates, dating back to 2000.
- Donohue has played a leading role in a major corporate lobbying campaign seeking to prevent the SEC from enacting a rule that would allow shareholders to have greater influence over the makeup of the boards of directors of publicly traded corporations and has threatened to sue the SEC if it promulgates the rule.
- Donohue counseled voters to oppose the Democratic ticket for president in 2004 on the basis that vice presidential nominee John Edwards was a former trial lawyer and, by implication, an abuser of lawsuits. “When voters go to the polls, they need to know lawsuit abuse destroys jobs, drives doctors out of business and forces companies into bankruptcy.”³³
- Donohue has attacked New York Attorney General Eliot Spitzer, who has recouped billions of dollars of ill-gotten gains from corporations. He described Spitzer as “the investigator, the prosecutor, the judge, the jury and the executioner.” Spitzer’s actions amount to “the most egregious and unacceptable form of intimidation that we have seen in this country in modern time,” Donohue said.³⁴

The Chamber's Campaign to Limit Plaintiffs' Legal Rights Through Legislation

The Chamber is the unquestioned leader in a national campaign to greatly limit the rights of consumers, patients and workers.

The Chamber's efforts are most clearly reflected in the group's creation, during Donohue's tenure, of the Institute for Legal Reform, a non-profit corporation formed under Section 501(c)(6) of the tax code. The Institute lists educating the public "on reform of [the] American legal system" as its purpose.³⁵ It raised more than \$105 million from 2001 to 2003 (the most recent year for which its revenue is available) and has spent \$71.9 million on lobbying since 2000, according to disclosure records. [See Figure 1]

Figure 1: Revenue and Lobbying Expenditures of the U.S. Chamber of Commerce and Institute for Legal Reform, 2000-2004

Year	U.S. Chamber		Institute for Legal Reform		Combined	
	Revenue	Lobbying Expenses	Revenue	Lobbying Expenses	Revenue	Lobbying Expenses
2000	\$95,150,251	\$17,131,000	\$6,418,196	\$1,278,500	\$101,568,447	\$18,409,500
2001	\$69,195,425	\$14,900,000	\$21,434,141	\$5,762,880	\$90,629,566	\$20,662,880
2002	\$80,011,356	\$19,260,000	\$46,276,631	\$22,300,000	\$126,287,987	\$41,560,000
2003	\$76,227,227	\$16,578,785	\$38,116,501	\$18,023,855	\$114,343,728	\$34,602,640
2004	\$78,000,000*	\$28,840,000	\$42,000,000*	\$24,540,000	\$120,000,000*	\$53,380,000
Total	\$398,584,259	\$96,709,785	\$154,245,469	\$71,905,235	\$552,829,728	\$168,615,020

Sources: U.S Chamber of Commerce and Institute for Legal Reform 990 forms, 2000-2003 and Public Citizen analysis of records filed with the Secretary of the Senate and the Clerk of the House. (Available at sopr.senate.org)

* Projected, based on average of previous two years. Note: Based on the increase in the lobbying expenditures of the Chamber and the Institute in 2004, the projected figures probably are lower than actual. Actual figures will not be available until May 2005, at the earliest, when the groups' 990 forms become available.

Between them, the Chamber and the Institute spent a combined \$53.4 million on lobbying in 2004, which constitutes an all-time record if they are treated as a single entity. They employed 54 lobbyists to work on tort issues in 2004 alone. The two groups have spent \$168.6 million on lobbying since 2000 and have employed at least 88 lobbyists to work on tort issues in that time span.³⁶ [See Figure 2]

The top federal legislative priority of the Chamber and the Institute in recent years has been passage of federal legislation that would make it much more difficult for consumers and workers to bring class action lawsuits against corporations that have endangered the public or cheated consumers (the legislation was approved in February 2005). The primary function of the

business-backed bill (S. 5) will be to move most class action lawsuits from state courts to federal courts, where they are far less likely to be certified for trial.

Figure 2: Number of Lobbyists Employed by the U.S. Chamber of Commerce and Institute for Legal Reform on Tort Issues, 2000-2004*

Issue	U.S. Chamber						Institute for Legal Reform						Combined					
	2000	2001	2002	2003	2004	Total**	2000	2001	2002	2003	2004	Total**	2000	2001	2002	2003	2004	Total**
Class Action	12	26	24	33	31	51	2	9	8	3	4	13	14	35	32	36	35	64
Medical Malpractice	0	0	0	0	3	3	0	0	0	0	0	0	0	0	0	0	3	3
Asbestos	7	2	0	7	7	13	0	0	0	11	10	12	7	2	0	18	17	25
Other Tort Issues	11	10	20	22	13	33	0	0	0	6	10	10	11	10	20	28	23	42
Total**	19	29	38	47	36	62	2	9	8	17	18	28	21	38	45	63	54	88

Source: Public Citizen analysis of records filed with the Secretary of the Senate and the Clerk of the House. (Available at sopr.senate.org)

* Includes lobbyists from outside firms that were retained by the Chamber or Institute.

**The sum of the categories may exceed totals because certain lobbyists worked on more than one issue, worked for the Chamber or the Institute in more than one year or worked for both the Chamber and the Institute.

To help secure passage of the class action bill, the Chamber and the Institute have employed at least 64 lobbyists since 2000.³⁷ The other top legislative priority pursued by the Institute is to restrict asbestos litigation, to which the group devoted 17 lobbyists in 2004.

The Chamber and Institute have also sought to weaken state civil justice systems. The Institute has attempted to shape public opinion by publishing full-page newspaper ads that ranked the purported fairness of state liability systems. Only in fine print at the bottom of the ads did the Institute disclose that rankings were based on surveys of “senior attorneys.”³⁸ Harris Interactive Inc., the company that conducts the surveys, went a step further, disclosing that those “senior attorneys” were, in fact, “senior *corporate* attorneys.”³⁹ [emphasis added]

Not surprisingly, given that they reflect the perceptions of corporate lawyers, the survey results have provided fodder for the Chamber to castigate the states’ civil justice systems in general (average 2003 grade: C-) and certain states in particular. In 2002, for instance, the Chamber warned its business members to stay out of Mississippi, which Donohue dubbed “the lawsuit Mecca of America.”⁴⁰

The Chamber’s purported reverence for fairness in the civil litigation system does not always apply to how it characterizes the effects of civil litigation system. Following its declaration of Mississippi as America’s lawsuit “Mecca,” Donohue declared that businesses were leaving the state because of high jury verdicts, while the Chamber separately alleged that its system had cost Mississippi “thousands” of jobs. But, when challenged by the president of the Mississippi

Economic Council to substantiate the Donohue's claim during a Mississippi television show, the spokesman for the Institute for Legal Reform was unable to name a single example of a business leaving the state because of flaws in its civil justice system.⁴¹

While the Chamber ran newspaper ads castigating Mississippi's tort system, the group has also used propaganda to alter the legal climate in states it has targeted. For example, the Chamber created and financed a newspaper in Southern Illinois called the *Madison County Record*. While keeping its ownership quiet, the publication ran a long string of articles criticizing the civil justice system.⁴²

The Chamber has had success in its various state campaigns. For example, in Mississippi, it won passage of a comprehensive measure that capped "pain and suffering" medical malpractice damages at \$500,000 without adjusting for inflation. The measure also capped pain and suffering awards in civil cases at \$1 million, and further capped punitive damages. Upon passage of the bill, the Institute ran ads in Mississippi declaring that the state was now "open for business."⁴³

The Institute for Legal Reform doesn't disclose the identity of its corporate contributors. But news reports indicate that some of those contributions – as much as \$1 million – have been made by companies and trade groups such as Aegon, the American Council of Life Insurers, DaimlerChrysler, General Motors, Home Depot, Household Financial Group, Massachusetts Mutual Life Insurance, Morgan Stanley, and State Farm Insurance.⁴⁴

The Chamber's Campaign to Elect Judicial and Attorney General Candidates Who Will Limit Consumers' Rights

Since 2000, the Chamber has taken a keen interest in state judicial and attorney general contests, with an emphasis on defeating candidates whom it views as sympathetic to plaintiffs' rights. The group has often masked its work by relying on outside organizations to serve as fronts for its broadcast ads. It has also been accused of violating state campaign finance disclosure laws, and has regularly avoided taxes by failing to report to the IRS its expenditures to influence elections.

In 2004, the Institute was involved in 13 judicial races, winning 12 of them, *Roll Call* reported.⁴⁵ The Chamber has not disclosed a list of states in which it was active. However, it is known that the Chamber was involved in the Illinois race for a seat on the state supreme court, pitting Lloyd Karmier (R) against Gordon Maag (D) and in two Ohio Supreme Court contests. In Illinois, the Chamber contributed more than \$2 million to the state Republican Party, which, in turn, contributed at least \$1.8 million to Karmier's campaign.⁴⁶ In Ohio, the Chamber contributed \$1 million to Citizens for a Strong Ohio, an affiliate of the Ohio Chamber of Commerce that ran commercials on behalf of two Republican Supreme Court candidates.⁴⁷

Aside from its work in judicial races, the Chamber in 2004 gave \$1.5 million to a front group, the Voters Education Committee, to run commercials hostile to Democratic attorney general candidate Deborah Senn during the primary in Washington state. The Chamber's role in the advertisements was revealed after the state's Public Disclosure Commission forced the Voters Education Committee to reveal its funding source.⁴⁸

The Chamber also served in 2004 as the primary backer of the November Fund, a Section 527 organization that disseminated messages criticizing Democratic vice presidential candidate John Edwards for his prior career as a plaintiffs' lawyer who worked on medical malpractice cases. The November Fund raised \$3.2 million in 2004, \$3 million of which came from the U.S. Chamber.⁴⁹

Between 2000 and 2003, the Chamber spent money to influence 24 judicial contests (winning 21) and had successfully intervened in 11 attorneys general contests, *Forbes* reported.⁵⁰

In 2000, the Chamber was involved in at least four judicial contests in Mississippi, two in Michigan, and two in Ohio, including a collaborative effort in which the U.S. Chamber spent an unspecified amount and an affiliate of the Ohio Chamber of Commerce spent an estimated \$4 million trying unsuccessfully to unseat Ohio Supreme Court Justice Alice Resnick.⁵¹

The Chamber was ordered to pull one of its ads off the air in Mississippi days before the 2000 elections for a suspected violation of the state's election law.⁵² The Ohio Elections Commission ruled in 2003 that ads the Chamber had aired in 2000 violated state law against the use by non-profit corporations of money "in aid of, or opposition to, a candidate."⁵³

The Chamber also has provided funding to at least two groups besides the Voters Education Committee that have run ads influencing state judicial and attorney general contests. In 2002, the Chamber gave \$2.6 million to American Taxpayers Alliance (ATA), nearly half the ATA's revenue for that year.⁵⁴ The ATA, in turn, reportedly spent \$300,000 to influence a Supreme Court contest in Illinois.⁵⁵ The Chamber also pumped more than \$1 million into independent groups, including one called "Mississippians for Economic Progress," as part of its effort to defeat Mississippi Justice Chuck McRae in 2002.⁵⁶ The *Wall Street Journal* speculated that the Chamber also gave money that year to the Law Enforcement Alliance of America, which would be consistent with the LEAA's reported expenditure of \$500,000 on anti-McRae ads. (The Chamber did not comment to the *Journal*.)⁵⁷

Despite evidence of its payments to other groups, neither the Chamber nor its Institute for Legal Reform, reported any expenditures from 2000 to 2003 on the line of their tax forms that called for "political" expenditures,⁵⁸ which the IRS defines as those for activities "intended to influence the selection, nomination, election, or appointment of anyone to a federal, state, or local public office."⁵⁹ In so doing, the Chamber claimed that none of its advertisements or contributions to other groups were intended to influence the outcomes of elections, including those in Ohio in 2000 that the state's election commission found to be advocating for a candidate.

These false claims have allowed the Chamber to avoid paying taxes. Groups incorporated under Section 501(c) of the tax code are obliged to pay taxes, at the highest corporate rate, on the lesser of their expenditures to influence elections or their investment income for the year in question.⁶⁰

The Chamber Works to Block the Rights of Shareholders to Replace Corporate Directors

The Chamber has been a leading opponent of the Securities and Exchange Commission's proposed shareholder access rule, which would in certain situations allow shareholders controlling a significant portion of a company's stock to place nominees for director positions on the official company ballot. Currently there is no practical way for shareholders to elect directors if they are not nominated by the incumbent board.

An October 2004 Public Citizen report, *Corporate Cronies: How the Bush Administration Has Stalled a Major Corporate Reform and Placed the Interests of Donors over the Nation's Investors* (http://www.whitehouseforsale.org/documents/1027corp_rpt.pdf), chronicled the lobbying effort of the Chamber, the Business Roundtable and their member companies to defeat the rule.

The Chamber's efforts to limit shareholders' ability to submit nominees for boards is relevant to Donohue's position as a Qwest and Union Pacific board member because Donohue's continued tenure has been challenged.

The independent research firm Glass Lewis & Co. recommended against Donohue's re-election to both boards in 2004. Glass Lewis was limited in its options, however, because no alternative to Donohue was on the ballot. Thus, the firm's strongest option was to recommend a vote of "Withhold" on the Donohue line.⁶¹

The Association of U.S. West Retirees, which has recommended against Donohue's re-election to the Qwest board, has petitioned the SEC for permission to submit its nominees on company ballots for the Qwest board, U.S. West Retirees Executive Director Nelson Phelps told Public Citizen. (Qwest acquired U.S. West in 2000.) Qwest opposed the request, and the SEC turned down the Retirees' request in February 2004, Phelps said.⁶²

Phelps told Public Citizen that if his group were granted access to the ballot, it would attempt to defeat Donohue, who "works for" Qwest founder Philip Anschutz.⁶³ Anschutz was the largest shareholder of both Qwest and Union Pacific when Donohue was appointed to their boards.⁶⁴

Phelps said the Retirees' don't oppose the right of Anschutz to remain on Qwest's board, but said they believe Anschutz's degree of control over the board is excessive. "We believe Anschutz should give up one or two seats."

The Chamber's efforts to combat the shareholder access rule include:

- The Chamber submitted written comments to the SEC strongly opposing the rule.⁶⁵

- Donohue provided testimony at an SEC hearing in which he strongly opposed the rule and threatened to sue the SEC if it were adopted. “If the commission proceeds with this proposal, we will challenge it in court,” he said.⁶⁶
- The Chamber joined eight other organizations to form “Shareholders for Growth,” an alliance opposing the shareholder access proposal. Each member of the coalition submitted comments to the SEC on the rule, and each signed an advertisement that appeared in the *Wall Street Journal* and *Washington Post*.⁶⁷

Section II: Donohue Serves on Boards of Companies that Repeatedly Engage in Egregious Behavior

*"The due diligence issues of board membership suggest that you damn well better do your homework, you better understand the issues, you better be in communication between meetings, because you need to give your best advice."*⁶⁸

—Thomas J. Donohue
January 2000

Donohue became president of the Chamber in 1997. Since then, he has joined the boards of three publicly traded companies: Qwest Communications International Inc., Union Pacific Corp. and XM Satellite Radio Holdings Inc. His membership on the board of a fourth corporation, Sunrise Senior Living Inc., preceded his assumption of the Chamber's presidency. Donohue's compensation for serving on these boards is at least \$151,000 a year. [See Figure 3]

Two of these companies – Qwest and Union Pacific – have acted as poster children for why we need a strong civil justice system and aggressive regulatory oversight.

Since Donohue joined Qwest's board, the company has engaged in massive accounting fraud that resulted in a \$250 million SEC fine and numerous lawsuits. Qwest also has been assessed more than \$114.1 million in fines or settlements by ten states plus the federal government for fraudulent billing practices and entering into secret deals with other companies.

Figure 3: Donohue's Compensation for Service on Boards of Publicly Traded Corporations

Company	Year Donohue Joined Board	2004 Compensation
Qwest Communications International Inc.	2001	\$30,000, plus \$2,000 per meeting
Union Pacific Corp.	1998	\$105,000 (including \$15,000 for serving as chair of compensation committee)
Sunrise Senior Living Inc.	1995	Received a grant of ten-year non-qualified stock options for 27,000 shares of common stock at an exercise price of \$24.93 per share in 2003. Received a grant of ten-year non-qualified stock options for 12,000 shares of common stock at an exercise price of \$26.05 per share.
XM Satellite Radio Holdings Inc.	1999	\$16,000 (including a total of \$6,000 for serving on the compensation committee and nominating committee), plus \$2,000 per meeting attended in person

Since Donohue joined Union Pacific's board, the company has been found liable for causing numerous fatal accidents that have been caused by systemic failures rather than by the types of mistakes that would invariably occur in the process of running the nation's largest railroad. One court went so far as to find Union Pacific guilty of maintaining a corporate policy that put company profits before human lives. During Donohue's tenure, Union Pacific has repeatedly perverted the court system by destroying and altering evidence.

Lest Donohue claim that he was out of the loop in the misdeeds of these companies, the Chamber president said at the dawn of the 21st century that he understood full well the responsibilities attendant to board members of publicly traded corporations.

Donohue told *Directors & Boards* in 2000, "Boards have to support the chief executive, but they also have to cajole, they have to prod, they have to help the CEO be successful. Save me from a bunch of people on a board who are going to tell me what I want to hear."⁶⁹

As a member of the boards of directors of Qwest and Union Pacific, Donohue was empowered to turn his rhetoric into action by pushing for corporate reforms at the two companies that might have made headlines across the country. Since Donohue serves on the corporate compensation committees of both companies (and even chairs Union Pacific's committee), he was well situated to punish executives for the misdeeds that occurred on their watch. He might have publicly called for their dismissals or, at the very least, lowered their pay. Instead, the Qwest and Union Pacific executives in question got huge raises.

Two independent research organizations have given the boards of Qwest and Union Pacific dismal grades for sanctioning excessive executive pay. One group, Glass Lewis & Co., recommended withholding votes for the re-election of Donohue to both boards.⁷⁰

Case Study: Qwest Communications International Inc.

Date Donohue Joined Board: Feb. 6, 2001⁷¹

Committees: Nominating and Governance, Finance, Compensation and Human Resources⁷²

Compensation: \$30,000 per year and \$2,000 per meeting⁷³

Donohue's tenure on Qwest's board of directors has been marked by massive accounting fraud and wholesale violations of state and federal regulations.

Since Donohue joined Qwest's board, the firm has restated its earnings to reflect \$2.5 billion less than the firm originally reported for the years 2000 and 2001. The restatement included a reduction of \$1.6 billion in 2001, during which Donohue served nearly 11 months on Qwest's board.⁷⁴

The firm has paid \$250 million to settle fraud charges brought by the SEC for its overstatements of earnings,⁷⁵ it has paid \$25 million to settle five individual lawsuits concerning alleged insider trading,⁷⁶ and still faces billions of dollars in potential civil litigation liabilities.⁷⁷

Qwest has been assessed at least \$114.1 million in fines and settlements by ten states and the federal government since Donohue's arrival.

Donohue's Poor Performance on Qwest's Board

In 2004, two independent research organizations have criticized the performance of Qwest's board and one specifically took Donohue to task.

- Glass Lewis & Co. recommended shareholders vote "Withhold" on Donohue's nomination to Qwest's board. Glass Lewis made its recommendation because of Donohue's role in approving the firm's executive pay packages and because he was not sufficiently independent for his committee assignments.

"Donahue [sic] served as a member of the compensation and human resources committee in fiscal year 2003, during which time the company paid slightly more compensation to its top executives but performed worse than its peers ... it appears to us that the members of this committee have not fulfilled their duties," Glass Lewis wrote.⁷⁸

Glass Lewis gave Qwest a grade of "D" for its executive compensation practices.

Glass Lewis further wrote, "Mr. Donahue is the president and CEO of the U.S. Chamber of Commerce, to which Qwest contributed \$100,000 in 2003." The firm went on to note, "Mr. Donahue serves on the compensation and human resources committee and the nominating and governance committee, both of which we believe should consist of

independent directors. In addition, due to the lack of a two-thirds independent board, we recommend withholding votes from this nominee based on his status as an affiliate.”

In addition to the \$100,000 in 2003, the *Wall Street Journal* reported in September 2001 that the Chamber had already received \$100,000 from Qwest. The *Journal* also reported that Donohue, “considered [Qwest founder and chief stockholder Phil] Anschutz a potential \$1 million donor to the Chamber,” and offered in the summer of 2000 to help Anschutz defeat legislation that would have prevented Qwest from expanding overseas. The legislation was defeated.⁷⁹

- The Corporate Library, an independent research firm that specializes in corporate governance issues, gave Qwest’s board an “F” for CEO compensation and gave Qwest’s “Overall Board Effectiveness” an “F” in 2004.⁸⁰

Qwest’s Accounting Fraud

Qwest overstated its earnings for 2000 and 2001 by \$2.5 billion. The action led to a \$250 million SEC fine and a spree of civil lawsuits. Qwest has set aside \$500 million to cover judgments and/or settlements stemming from those lawsuits. Yet the company itself admits that may not be enough. It acknowledged in a 2004 SEC filing that the plaintiffs’ lawyer in one case has told Qwest he will seek damages “in the tens of billions of dollars.”⁸¹

As a member of Qwest’s board and as one of the leaders of the effort to pass federal legislation governing class action lawsuits, two key questions concern Chamber president Donohue:

- Was Donohue complicit in Qwest’s accounting fraud?
- Did Qwest stand to benefit from the class action bills Donohue pushed in Congress, thus constituting a conflict of interest between Donohue’s roles as president of the Chamber and as a member of Qwest’s board of directors?

Was Donohue Complicit in Qwest’s Accounting Fraud?

Donohue was in a position to know of Qwest’s fraudulent accounting practices shortly after he joined the firm’s board. From his February 2001 arrival through July of that year, Qwest’s board was warned on at least four occasions that the company was on thin ice in its accounting practices. Meanwhile, Qwest’s use of fraudulent accounting practices appears to have increased after Donohue’s arrival on the board. This conclusion is based on the fact that Qwest’s \$2.5 billion restatement included \$1.6 billion from 2001. Donohue served nearly 11 months as a Qwest board member in 2001.⁸²

- In a February 2001 report to Qwest’s audit committee, outside auditor Arthur Andersen characterized Qwest’s practice of swapping the use of its telecommunications network with another company and treating the exchange as a sale, as an accounting practice of “maximum risk,” bordering on unacceptable. But, the auditor said the practice could pass legal muster.⁸³

- In April 2001, just prior to a board meeting, Mark Iwan of Arthur Andersen sent an e-mail to Qwest Audit Committee Chairman Tom Stephens, stating “Tom: I am wondering if we should chat prior to the meeting. There are several items I would like to make you aware of so you can ask the right questions on the call.” Stephens used a printout of the e-mail to take notes on a subsequent conversation about the questionable accounting practice, presumably with Iwan. “The sky is falling” Stephens wrote on one part of an e-mail. Separately, next to a reference of a specific deal, Stephens wrote: “This one stinks.”⁸⁴ Stephens’ notes on the e-mail suggest, but do not prove, that he brought up the topic of Qwest’s questionable accounting practices during the board meeting.
- In June and July 2001, Morgan Stanley published separate reports that raised questions about Qwest’s practice of swapping the use of another company’s telecommunications lines to create the illusion of higher revenue.⁸⁵

Qwest’s board did not appear to heed the warnings. From April through June 2001, Qwest reported \$300 million in illusory revenue from swaps with other telecommunications companies.⁸⁶

It appears Qwest’s board was aware of the accounting problems. In the board’s evaluation of CEO Joseph Nacchio in September 2001, an anonymous board member stated that Nacchio “must deal with the accounting credibility issue more effectively.” Another anonymous comment said that “fostering legal and ethical conduct” was a “key development need” for Nacchio.⁸⁷

Despite the criticism in the evaluation, the board signed Nacchio to a five-year contract in September 2001 and raised his annual compensation 40 percent to \$5.2 million. Donohue was a member of the compensation committee.⁸⁸

In June 2002, Nacchio was forced to resign. He received a \$12.2 million severance payment and was awarded a \$3 million consulting contract.⁸⁹

News reports about Qwest’s restatement have offered little or no insight into the views expressed by the various individual board members, so it is impossible to know if Donohue was among those who were criticizing Nacchio at the time of his evaluation. But it does not appear likely that Donohue was critical. Nacchio said that the criticism he received in his evaluation was likely from the board members who were holdovers from U.S. West, which Qwest acquired in 2000. “I had a hostile board,” Nacchio told a congressional panel in 2002, in reference to his board evaluation of a year earlier. “Half of my board members were, as a result of a hostile acquisition of U.S. West ... hostile to me as the CEO from day one.”⁹⁰

By all appearances, Donohue is an ally of Philip Anschutz, who was the largest shareholder of Qwest when Qwest instigated the hostile takeover of U.S. West. Donohue has been appointed to the boards of two companies in which Anschutz was the largest shareholder, has discussed seeking a seven-figure contribution from Anschutz to the Chamber and once took up a lobbying initiative at the Chamber to help Anschutz.⁹¹ If Donohue was in fact allied with Anschutz and

other Qwest faithful, that would have put him squarely out of the U.S. West contingent that Nacchio believes was responsible for the negative board comments.

In October 2003, Qwest restated its 2000 and 2001 financial statements, which reduced earnings by \$2.5 billion for those years, including \$1.6 billion for 2001, during which Donohue served nearly 11 months on Qwest's board.⁹²

In October 2004, Qwest agreed to pay \$250 million to settle fraud allegations brought by the SEC.⁹³ The same month, the firm announced that it set up a legal fund of \$500 million, which it deemed to be the minimum loss stemming from several lawsuits pending against the company. In one lawsuit, Qwest announced, a counsel for one of the plaintiffs had indicated he would seek "tens of billions of dollars" in damages.⁹⁴

Has Qwest stood to benefit from the class action legislation Donohue has pushed in Congress?

Donohue and the Chamber have pushed for years for a version of federal class action legislation that would have benefited Qwest by subjecting class action lawsuits to lengthy delays.

Qwest is facing an array of securities class action lawsuits stemming from its accounting issues that the firm is trying to settle.⁹⁵ Because securities class actions are automatically heard in federal court, these suits do not stand to be affected by the primary facet of class action legislation that was approved in February 2005, the provision that will allow defendants to transfer class action lawsuits from state to federal court, where many consumers will be locked out of court because federal judges are loathe to certify for trial class actions involving plaintiffs from numerous states.

But the House versions of the legislation since 2001,⁹⁶ which have always been the Chamber's preferred bill, have included a provision that would have benefited Qwest considerably in its efforts to parry the securities actions it is facing.

The provision (Section 6) would have granted an automatic interlocutory appeal upon any court decision granting class certification, including decisions involving securities cases. Interlocutory appeals occur before final judgments in a case, can be pursued as high as the U.S. Supreme Court and can take years to resolve.

Currently, federal class action rules give judges discretion to permit appeals of decisions to allow or deny certification of the class *only for good cause*. Typically, for efficiency reasons, all appeals must wait until the final judgment by the court, when all the legal issues in the case are heard in a single appeal. Absent this "final decision" rule, as it is known, a defendant seeking to delay resolution of a case could appeal every court ruling and delay final resolution for years by taking the case all the way to the Supreme Court. Moreover, there is no evidence of a problem with the current rules.⁹⁷

However, the House class action bills would have provided an automatic appeal whenever certification is granted or denied. This would have ensured that virtually *every* decision to certify

a class action would have been appealed by defendants. In addition, all discovery and other proceedings presumptively would have been stayed (halted) pending appeals outcome. An automatic appeal provision would have significantly delayed cases, added considerable costs, and prevented the gathering of evidence from defendants as long as the appeal was pending.⁹⁸

Appeals are currently at an all-time high in federal courts. Filings in regional courts of appeals rose 6 percent to 60,847 in 2003, the eighth consecutive record-breaking year. The median time from the filing of a notice of appeal to the final disposition was 10.5 months in 2003.⁹⁹ The seventh and ninth judicial circuits had median delays of 16.8 and 14.0 months, respectively. To add these significant delays in the middle of a class action would have greatly undermined the value of the plaintiffs' claims and delayed justice for thousands of harmed consumers.

Regulatory Sanctions Against Qwest

The Chamber's Institute for Legal Reform's Web site lists so-called "activist attorneys general" as one of the "growing threats to a legal system that is fair and just." And Donohue himself has recently gone on the offensive against New York Attorney General Eliot Spitzer, whom he disparaged as being guilty of the "most egregious and unacceptable form of intimidation that we have seen in this country in modern time."¹⁰⁰

As a board member of Qwest, Donohue is well placed to understand the powers of state attorneys general and other state and federal regulatory agencies. Since Donohue joined Qwest's board, the company has been fined or paid settlements totaling at least \$114.1 million to ten states plus the federal government. [See Figure 4]

The allegations against Qwest fit into three broad categories: defrauding customers, entering into illegal secret agreements with competitors and violating the terms of its merger agreement with U.S. West in 2000.

Qwest's misdeeds are startling, as are the size of the penalties exacted from the firm. Qwest set a new record at the FCC by paying the largest payment the agency's history. The corporation has also paid record breaking fines or settlements to a number of states, including Arizona, California, Minnesota, Washington and, possibly, Colorado.¹⁰¹

Allegations against the company for defrauding customers are widespread and have followed a familiar pattern. The company has repeatedly been accused of billing customers for services not requested (known as "cramming") and for switching residents' long-distance carrier without their permission (known as "slamming").

February 2002: In Oregon, Qwest agreed to a \$575,000 settlement and to "significantly change the ways in which [the company's] employees represent the costs and availability of basic service, line features and line feature packages." State Attorney General Harry Myers received reports from consumers and "whistleblower" employees concerning the practice of billing customers for services they did not request and of misrepresenting to customers the characteristics of wireless and DSL [broadband Internet access] services. According to Myers,

“Qwest’s unethical practices railroaded new customers into paying increased fees for services they did not need ... their practices were particularly predatory against the elderly and non-English speaking ‘new connect’ customers.”¹⁰³

July 2002: Qwest agreed to pay Florida \$3.25 million to settle charges that contractors employed by Qwest switched residents’ long distance service provider without their permission. The attorney’s general office enumerated more than 1,000 instances of the practice. The investigation began prior to Donohue’s arrival on Qwest’s board and may not have involved instances that occurred during his tenure.¹⁰⁴

August 2002: The state of Colorado settled a case against Qwest for \$1 million along with restitution. The company was accused of billing customers for unauthorized services and for using overly aggressive sales techniques. The state’s attorney general, Ken Salazar, said the deal represented one of the state’s largest consumer protection settlements, and was possibly the largest ever.¹⁰⁵

October 2002: In Idaho, Qwest reached an agreement with the state’s attorney general, including a \$200,000 fine, for placing unauthorized charges on telephone bills, misrepresenting its services and not disclosing certain charges. Qwest also agreed to provide refunds to customers.¹⁰⁶

November 2002: In Washington state, Qwest agreed to pay a \$1.3 million fine and to make restitution to customers for billing them for unwanted or misrepresented services. At the announcement of the settlement, state Attorney General Christine Gregoire said the state had received more complaints against Qwest in the previous two years than against any other company.¹⁰⁷

December 2002: The Nebraska Public Service Commission ruled in favor of three companies – Cox Nebraska Telcom, Illuminet Inc. and Alltel Nebraska Inc. – that alleged that they had been improperly billed by Qwest, and ordered Qwest to provide refunds. Though the order did not specify a total dollar amount, Qwest referred in a 2004 filing with the SEC to a \$4.8 million award made on behalf of Illuminet by the Nebraska commission. The Nebraska Supreme Court dismissed an appeal by Qwest on October 8, 2004 and, on November 12, 2004, directed the commission to “proceed to enter judgment” consistent with its October 8, 2004 decision.¹⁰⁸

February 2003: The Minnesota Public Utilities Commission imposed a record \$25.6 million fine on Qwest for making secret deals favoring certain competitors.¹⁰⁹ Qwest appealed the fine. In August 2004 a federal judge upheld the fine, but dismissed the PUC’s order that Qwest pay an additional \$10 million in restitution.¹¹⁰

April 2003: The Idaho Public Utilities Commission found in favor of the Idaho Telephone Association, Citizens Telecommunications Company of Idaho, Illuminet Inc. and other complainants who had alleged that Qwest violated the commission’s policy on billing matters. The commission did not tally a total dollar figure that the complainants were to be reimbursed.

Qwest referred in a 2004 filing with the SEC to a \$1.5 million award made by the Idaho commission.¹¹¹

May 2003: Qwest agreed to pay \$6.5 million to the FCC, the largest payment in the agency's history, for violating terms of its merger order with U.S. West.¹¹²

May 2003: In California, Qwest paid a record \$20.3 million at the behest of the state's public utilities commission for switching customers' long-distance service without their permission (slamming) and putting unauthorized charges on their telephone bills (cramming). The violations occurred in 1999 and 2000, before Donohue joined Qwest's board.¹¹³

July 2003: In Arizona, Qwest agreed to pay \$3.75 million to the state and to comply with restrictions on its business practices in response to a consumer fraud lawsuit brought by the state's attorney general.¹¹⁴

July 2003: In Utah, Qwest agreed to pay \$375,000 and to provide refunds or credits to eligible customers for advertising services it was not prepared to supply, falsely representing to customers that they could save money by purchasing Qwest's long-distance wireless service, and falsely representing benefits of Qwest's wireless services. The agreement provided relief for abuses alleged to have occurred from April 2001 to July 2003.¹¹⁵

March 2004: The FCC fined Qwest \$9 million for failing to disclose agreements with local telephone companies in Arizona and Minnesota. The FCC "called Qwest's actions 'egregious,' and its apparent violations 'willful and repeated,'" the *Rocky Mountain News* reported.¹¹⁶

April 2004: The Arizona Corporation Commission sanctioned Qwest \$20.7 million for what an administrative judge had previously termed "willful and intentional violations" of regulations designed to create a level playing field for telephone competition. The commission said it believed the penalty was "the highest fine and penalty ever handed down by the Arizona Corporation Commission."¹¹⁷

April 2004: To partially settle allegations that it violated state law by making illegal agreements with wholesalers, Qwest agreed with the Colorado Office of Consumer Counsel to pay \$5.5 million to a low-income telephone assistance fund and \$2 million to an emergency 911 center. The settlement also required Qwest to provide a 10 percent credit to certain competitors for purchases made between Jan. 1, 2001, and June 30, 2002. The Colorado Private Utility Commission staff had previously concluded that Qwest had "willfully and repeatedly" violated federal and state law by giving secret discounts and preferential treatment to certain competitors.¹¹⁸

November 2004: Qwest agreed to pay a \$7.8 million fine in Washington state "to settle allegations that it violated laws by giving secret discounts and services to certain re-salers." If approved by Washington's commissioners, the fine will be the largest ever assessed by the Washington Utilities Transportation Commission.¹¹⁹

Figure 4: Qwest’s Regulatory Fines and Settlements, 2002-2004

Date	State	Fine or Settlement
February 2002	Oregon	\$575,000
July 2002	Florida	\$3.25 million
August 2002	Colorado (Attorney’s General office)	\$1 million
October 2002	Idaho (Attorney’s General office)	\$200,000
November 2002	Washington state (Attorney’s General office)	\$1.3 million
December 2002	Nebraska	\$4.8 million
February 2003	Minnesota	\$25.6 million
April 2003	Idaho (Public Utilities Commission)	\$1.5 million
May 2003	Federal Government (FCC)	\$6.5 million
May 2003	California	\$20.3 million
July 2003	Arizona (Attorney’s General office)	\$3.75 million
July 2003	Utah	\$375,000
March 2004	Federal Government (FCC)	\$9 million
April 2004	Arizona (Arizona Corporate Commission)	\$20.7 million
April 2004	Colorado (Office of Consumer Counsel)	\$7.5 million
November 2004	Washington state (Washington Utilities Transportation Commission)	\$7.8 million
Total		\$114.1 million

Case Study: Union Pacific Corp.

Union Pacific Corp.

Director Since: November 23, 1998¹²⁰

Committees: Compensation and Benefits Committee (chair), Audit Committee, Executive Committee¹²¹

Annual Pay: \$105,000¹²²

Since Donohue joined the Union Pacific board in 1998, the company has repeatedly been found liable for accidents resulting from poor training or unsatisfactory upkeep of tracks; has repeatedly been found responsible for intimidating its workers; and has repeatedly been found responsible by the courts for manipulating or destroying evidence.

Rather than penalizing Union Pacific's executives for failing to curtail the company's safety lapses or its unethical behavior in civil suits, Donohue appears to have played a leading role, as chair of the firm's compensation committee, in rewarding executives with abnormally high pay.

Donohue's Poor Performance on Union Pacific's Board

Two independent research firms have criticized Donohue's performance on Union Pacific's board of directors in much the same way he was taken to task for his performance on the Qwest board. One firm recommended against his re-election to the board.

- Glass Lewis & Co. recommended that shareholders withhold their support for Donohue's re-election on the board in part because of his complicity in the use of an accounting trick that rewarded executives with millions of dollars in compensation for meeting a long-term incentive plan (LTIP). The incentive was to be triggered if Union Pacific's stock price met certain targets or if the company achieved \$13.50 in earnings per share over a three-year period ending in January 2004. By the fourth quarter of 2003, it did not appear the company would meet either target. At that juncture, the compensation committee decided to include proceeds from Union Pacific's sale of a subsidiary in its calculation of earnings per share, which was enough to meet the incentive.¹²³

"The executives eligible under the [incentive plan] were paid millions in additional compensation, due to that decision," Glass Lewis wrote. "In our view, the committee should have used the company's operational earnings and excluded the proceeds from a one-time event to determine whether the targets were achieved."¹²⁴

CEO Richard Davidson made \$1.4 million through the incentive deal.¹²⁵

- Glass Lewis & Co. said that in fiscal 2003, when Donohue served as chairman of the compensation committee, the company "paid substantially more compensation to its top executives but performed about the same as its peers. The members of the compensation committee have the responsibility of reviewing all aspects of the compensation program for

the company's executive officers. It appears to us that members of this committee have not fulfilled their duties."¹²⁶

Glass Lewis gave Union Pacific a "D" in the area of executive compensation after it applied a "pay-for-performance" formula to the corporation's top executives. The Corporate Library, an independent research firm that specializes in corporate governance issues also bestowed a "D" on Union Pacific's board for CEO compensation.¹²⁷

Union Pacific's Negligent and Dishonest Actions

- **On November 6, 1998**, an Arkansas woman, Mary E. Stevenson, was killed and her husband, Frank Stevenson, suffered severe brain damage after a Union Pacific train struck their car. Union Pacific's lawyer acknowledged that vegetation at the crossing, which the railroad is supposed to keep cut, was overgrown and thus obstructed motorists' views of on-coming trains. Frank Stevenson was awarded \$2 million.¹²⁸ In 2001, a federal judge, William Wilson, found that Union Pacific destroyed evidence in the aftermath of the accident, an offense for which he fined the company \$168,000.¹²⁹ While Union Pacific claimed that documents and audio tapes were destroyed as part of a routine policy, Wilson concluded that the railroad should have known not to destroy evidence relating to a fatal accident. He also noted the "railroad had preserved favorable tapes in a subsequent accident for use in pursuit of its own claims."

The following excerpt is from Wilson's opinion:¹³⁰

I am disturbed by the apparent lack of communication and cooperation within [Union Pacific]. Documents have been routinely destroyed despite defendant's knowledge that they are relevant to this lawsuit. Moreover, documents have been routinely destroyed after plaintiffs have formally requested them in discovery. This does not square with the discovery rules, nor with "traditional notions of fair play and justice."

Defendant's excuse has been lack of knowledge: that it did not know the documents were relevant; it did not know the documents existed; it did not know where the documents were; and so forth. Defendant, in essence, contends that its right hand often knows not what its left hand is doing. Defendant has either made an effort to keep evidence out of the hands of plaintiffs or it has remained willfully blind and uninformed, intending to rely on its document retention policies to avoid discovery. Either way, sanctions are appropriate.

- **1999-2000:** FRA inspectors recommended finding Union Pacific in violation of anti-harassment rules on 13 separate occasions from January 1999 to November 2000. Most of the cases concerned Union Pacific's attempts to prevent accidents from being reported. Among them, the company removed an employee from a job site with the "purpose of harassing or intimidating the employee into changing a previously submitted accident report;" pressured an employee to use a non-prescription drug to treat an injury because use of prescription drugs would have made the incident reportable; and prevented another

employee from reporting an illness.¹³¹ The FRA said it settled one of those cases, was considering administrative penalties in four others and was seeking civil penalties in a sixth case.¹³²

- **May 27, 2000:** A Union Pacific train derailed and leaked potentially hazardous chemicals, forcing the evacuation of nearly 3,500 residents from their homes in Eunice, La. Of the 113 train cars, 34 derailed and three exploded.¹³³

The National Transportation Safety Board blamed poor track conditions, ineffective track inspection, and ineffective management oversight for the accident.¹³⁴ The NTSB also found that Union Pacific was on notice well before the accident that its tracks were in poor condition and that Union Pacific misled the NTSB on its inspection protocols.¹³⁵

Union Pacific agreed to a \$65 million class action settlement, which a federal judge approved in September 2004.¹³⁶

Marion C. Blakey, Chairman of the NTSB testified before the Senate Subcommittee on Surface Transportation and Merchant Marine on July 10, 2002:¹³⁷

After the derailment, a thorough inspection of the jointed rail territory revealed track conditions that did not meet the requirements for the type of track used. Furthermore, it was more than likely that these track conditions existed for some time.

The [FRA's] records for the five years preceding the accident documented a history of weak tie conditions and cracked joint bars in the jointed rail section at the accident location. During a walking inspection in 1996, the FRA discovered 36 broken joint bars and identified several areas with weak crossties. FRA inspectors inspected the track in January 1999 and discovered areas with insufficient crossties and defective joint bars. Although an FRA inspector found that the situation had been corrected in a follow-up inspection in March 1999, he found defective tie conditions at 11 locations and 2 cracked joint bars in other areas.

During the Safety Board's investigation, Union Pacific advised NTSB staff that the track at the scene was inspected daily. A post-accident inspection by the Safety Board's investigative team, however, revealed numerous track defects – including 403 cracked and broken splice bars. Since this accident, Union Pacific has implemented a more stringent inspection program for jointed track.

The NTSB believes that the FRA needs to increase track inspections, and recommended – as a result of the Eunice, La., accident – that the FRA modify its track inspection program to consider the volume of hazardous materials shipments made over the tracks in determining the frequency and type of track inspections.

- **November 2001:** A Union Pacific conductor, Greg Haskin, claimed he was prevented from seeking medical attention after his scalp was seriously gashed from being struck in the head in November 2001. Haskin alleged that his supervisor initially prevented him from seeking medical care because it would constitute a “reportable accident.” Haskin was eventually taken to a doctor, who, Haskin said, told him he would need stitches. A manager then warned Haskin that taking stitches would make the incident reportable and harm his career, Haskin testified. He suffered debilitating headaches so severe that he resorted to a treatment in which “doctors inserted a probe heated to 176 degrees into the back of his skull, court records show. The idea was to create a block on the occipital nerve that branches along the base of the skull.” The treatment was unsuccessful. He was awarded \$3 million in 2004.¹³⁸
- **February 2002:** A federal district court sanctioned Union Pacific in February 2002 on the basis that a manager for the company had changed the parts at a Washington state railroad crossing prior to inspection by the family lawyer of Blas Lopez, who had been killed at the intersection by a Union Pacific train. Union Pacific, notably, had initially sought damages against Lopez’s estate for damage incurred to its locomotive in the accident. The Union Pacific manager, Robert Ryan, stated under oath that he replaced potentially defective signal parts a few hours before a lawyer for the Lopez family was set to inspect the signal. Ryan conceded that a manufacturer of the original parts had warned prior to the accident that they might be defective and recommended that they be replaced. Ryan said that as many as 60 percent of the crossings in the region appeared to have the same possibly defective parts. Ryan’s “actions were not that of a rogue underling,” said federal District Court Judge John C. Coughenour. “His acts were egregious. Severe sanctions are appropriate.” Coughenour prohibited Union Pacific from disputing that the “defect caused the crossing signals to fail.” Union Pacific settled with the Lopez family shortly after Coughenour issued his sanctions.¹³⁹
- **February 2004:** The Arkansas Supreme Court, in upholding a \$30.1 million judgment against Union Pacific (including \$25 million in punitive damages) found that the company “intentionally destroyed” track inspection records and disregarded safety warnings “in reckless disregard of the consequences” following a January 1998 accident that killed an Arkansas garbage truck driver and left a passenger severely injured. Union Pacific employees and local officials testified that the company had “ignored warnings that the crossing was overgrown with shrubbery and unsafe.”

The following is from the opinion of the Arkansas Supreme Court.¹⁴⁰

There is evidence that Union Pacific was on notice of the dangerous and life threatening nature of this crossing through the complaints of its own personnel and the complaints of the public. There is also evidence that several near-misses occurred at this crossing. Furthermore, the record reflects that Union Pacific destroyed important evidence directly related to this accident, including voice tapes and track inspection records. Viewing the proof and all the evidence in the light most favorable to the Barbers, we conclude that Union Pacific knew, or should have known of the extreme danger presented to

the public at Crossing 123. In recognizing that danger, Union Pacific still consciously refused to remedy the situation. As such, Union Pacific's conduct reflects that it intentionally put the traveling public in harm's way. Under these circumstances, the enormity of the wrong is substantial.

There was also evidence to indicate a malicious intent perpetuated by Union Pacific. As noted by the Barbers in their brief, the record in this case reflects the development of a corporate policy at Union Pacific that put company profits before public safety. In addition to evincing that corporate policy through the handbooks given to claims representatives, the Barbers presented expert testimony from Dr. Harvey Levine who performed an economic study and opined that Union Pacific's practices reflected that policy.

- **February 2004:** A Union Pacific train in Arkansas struck Joshua Armstrong, who was driving through a crossing that lacked both lights and gates, leaving him in a coma for two months. Shortly after the accident, a police officer at the accident scene spotted Union Pacific workers cutting vegetation around the intersection, interfering with an investigation into whether the vegetation may have blocked Armstrong's view. The police officer also noticed that Union Pacific employees moved a parked train, which also might have blocked Anderson's view.¹⁴¹
- **May-November 2004:** Union Pacific was involved in numerous accidents, prompting a federal investigation and the creation of a compliance agreement between the railroad and the federal government. In May, three men were injured after a Union Pacific derailment caused 5,600 gallons of diesel fuel to spill into the San Antonio River.¹⁴²

In June, three people were killed and 49 people were sickened or injured from release of chlorine gas after a Union Pacific train derailed, also in San Antonio.¹⁴³

In both cases the FRA concluded that train crews failed to obey traffic signals, and that fatigue may also have been a factor.¹⁴⁴ Those accidents, plus several others that killed a total of seven people in Texas in the previous year, prompted the FRA to require Union Pacific to sign a "compliance agreement." The agreement called for Union Pacific "to repair 'notable deficiencies' that regulators found when they inspected [Union Pacific's] operation in southern Texas. Union Pacific crews had not been following the railroad's own safety rules, [FRA] officials said." The agreement also called on the FRA to send 10 additional inspectors to the area and to require managers to have new safety training.¹⁴⁵

- **July 2004:** The *New York Times* reported that in a recent 18-month period, seven federal and state courts imposed sanctions on Union Pacific "for destroying or failing to preserve evidence in crossing accidents, and an eighth court ordered a case retried." The *Times* noted that one sanction had since been overturned on appeal.¹⁴⁶

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