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**American
Chemistry
Council**



October 12, 2005

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423



Attention: STB Ex Parte No.658: The 25th Anniversary of the
Staggers Rail Act of 1980: A Review and Look Ahead

Dear Secretary Williams:

Pursuant to the Notice of Public Hearing, which was issued in the above-captioned proceeding on September 14, 2005, the American Chemistry Council ("ACC") requested five minutes to present its comments on October 19, 2005.

That same Notice called for the submission of written comments by October 12, 2005. In accordance with the Notice's provisions, the original and ten copies of ACC's comments are enclosed. Please contact me if you have any questions about ACC's comments.

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Sincerely,

OCT 12 2005

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Public Record

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SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 658

THE 25TH ANNIVERSARY OF THE STAGGERS RAIL ACT OF 1980:

A REVIEW AND LOOK AHEAD

COMMENTS OF THE AMERICAN CHEMISTRY COUNCIL

October 12, 2005



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The American Chemistry Council ("ACC") appreciates the opportunity to participate in this hearing on the Staggers Rail Act of 1980 ("Staggers"). ACC commends the Surface Transportation Board ("STB") for bringing attention to the 25th anniversary of this important legislation.

ACC represents the companies that make the products that make modern life possible, while working to protect the environment, public health, and the security of our nation. The member companies of ACC depend on the U.S. rail industry for the safe, secure and efficient transportation of approximately 160 million tons of chemical products to customers each year, accounting for about \$5 billion in annual railroad industry revenues.

At the 25th anniversary of Staggers, ACC respectfully recommends that STB reverse a long line of agency policy determinations that are harming the competitiveness of the U.S. chemical industry and other key sectors of the American economy. In the long-run, unless reversed, those policies will also impair the ability of the U.S rail industry to serve all of its customers.

To be frank, ACC's concern is not with Staggers – as Congress wrote it – but rather with the way that federal regulators have implemented that law over the past quarter century. The statute clearly and carefully "de-regulated" those rail rate and service matters that take place in circumstances where shippers really do have competitive transportation alternatives. Because the marketplace works for such rail customers, Congress appropriately removed the unnecessary regulatory involvement of STB's predecessor, the Interstate Commerce Commission ("ICC"). ACC believes that Staggers has been successful in that regard.

But in enacting Staggers, Congress also recognized that railroads have what the law calls "market dominance" over certain shippers. In fact, were it not for those situations, there would have been no need to retain a federal regulatory agency with exclusive jurisdiction over rail industry rates and commercial practices, the construction and abandonment of rail lines, railroad mergers, etc. As written, Staggers was meant to de-regulate only those aspects of shipper-carrier commercial relationships that take place in competitive markets. Clearly ICC was retained in 1980 – and STB exists today – to deal with the non-competitive situations.

ACC is participating in this hearing because, for a substantial proportion of the shipments from chemical manufacturing facilities operated by ACC members, there is no alternative to using the rail mode. For 63% of those facilities, the shipper has access to only one rail carrier. Those shipments are subject to market dominance, which is often described as being "captive" to a single railroad. (Additional monopoly conditions exist when the shipper's customer location is itself captive to a single railroad.) For a captive shipper, regardless of its size or location, the efficient movement of its traffic – in some cases even the very survival of its businesses – depends on the rates and service provided by that single railroad.

Heightening ACC's concern is that there is no forum other than STB in which to address issues involving railroads and captive shippers. In enacting Staggers, Congress wisely left those issues in the jurisdiction of the regulatory agency. It clearly did not "de-regulate" rail service in non-competitive situations.

So what has happened in the past 25 years? ICC, followed by STB, interpreted Staggers in ways that tend to deprive captive rail shippers of the protections that Congress included in the law. Since Staggers became law, the two successive federal agencies charged with its implementation have refused to recognize its pro-competitive features and have instead erected administrative barriers to competition. Here are just a few important examples:

- Staggers allows captive shippers with facilities located in "terminal areas" to seek the agency's approval for competitive access to another carrier that also serves that same terminal area. But the precedent created by ICC's "Midtec" decision has effectively prevented shippers from even requesting, let alone obtaining, such relief. Thus, despite the existence of this statutory provision, no shipper has obtained competitive access in a terminal area. *ACC therefore requests that STB overturn Midtec, or at a minimum conduct a thorough re-examination of its validity after two decades of further consolidation in the rail industry.*
- STB's "bottleneck" decisions, issued at the end of 1996, allow a railroad with monopoly power over a segment of a shipper-to-consignee movement to extend that power to the entire movement. This agency-created bottleneck doctrine permits a railroad to refuse to quote a rate over a bottleneck segment as long as it can provide service for the entire movement. Yet Staggers

neither includes such a provision nor requires such an interpretation. Regardless of how one feels about the usefulness of STB's procedures for resolving rail rate disputes – and there are strong feelings on that matter in the captive shipper community – Congress has empowered the agency to be the sole forum for such matters. But the bottleneck doctrine arbitrarily denies a captive shipper access to STB to determine a just and reasonable rate for what may be a relatively short monopoly portion of an overall movement. As a practical matter, this policy nullifies the other railroad's potential to compete for the non-bottleneck portion of the movement. (While an exception to the bottleneck doctrine exists when a shipper already has the other portion of the movement under contract, it is virtually meaningless with the rail industry consisting of local monopolies and regional duopolies.) ***STB should discard its anti-competitive bottleneck doctrine. Railroads should be required to quote a rate for service between any captive origin or destination on its system and any point of interchange with another carrier.***

- The terms of sale of Class I rail assets to short-line operators often include “paper barriers” that preclude competition by requiring that traffic be routed over the road that sold the short-line. But the rail customers that produce traffic are the shippers located on the short-line. Paper barriers prevent those shippers from obtaining competitive service from other Class I carriers that connect with the same short-line. ***STB should implement a pro-competitive policy for short-line sales.***
- Another area of concern is rail mergers, even though STB has not been presented with another transaction involving two or more Class I carriers since revising its merger guidelines in 2001. But as ACC has noted in the past, railroad mergers inevitably reduce shipper options, regardless of the conditions that are applied by the agency. Bottlenecks are extended when lines serving captive shippers are acquired by connecting carriers. Efficient service from independent “bridge” carriers disappears. Competition for service to new industrial sites is reduced or eliminated. In conjunction with other ICC-STB policies that curtail competition between railroads, mergers have generally harmed captive shippers. There will only be one more round of Class I rail mergers. ***ACC therefore recommends that in any future rail merger proceeding, STB's review should focus on enhancing rail-to-rail competition and improving service to shippers.***

Although other examples could be discussed, those above illustrate why ACC is extremely concerned about the agency's past and future implementation of Staggers. The anti-competitive policies implemented by ICC and STB are not included in the statute. Staggers did not mandate such policies. To the contrary, the agency has acknowledged that it has the statutory authority to reverse such interpretations. (In fact, several years ago a federal appellate court upheld the rare instance in which STB reversed one of its precedents by re-assessing and then revising its rules on “product and geographic” competition in the market-dominance phase of rail rate challenges. ACC supported that

change.) Unfortunately, STB almost invariably declines to exercise its discretion in favor of pro-competitive solutions to railroad issues.

After 25 years, ACC recommends that STB seriously consider reversing a long line of administrative precedents that are harming the competitiveness of the U.S. chemical industry and other key sectors of the American economy. Indeed, unless reversed, those policies will ultimately weaken the U.S rail industry, to the detriment of rail-dependent domestic industries and the Nation as a whole.

Submitted on behalf of ACC by

A handwritten signature in black ink, appearing to read 'T. E. Schick', written in a cursive style.

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