

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423**

COMMON CARRIER OBLIGATION OF RAILROADS	)))))	
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STB Ex Parte No. 677

**COMMENTS SUBMITTED BY
HIGHROAD CONSULTING, LTD.**

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Dated: April 17, 2008

**Before the
SURFACE TRANSPORTATION BOARD
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STB EX PARTE 677

COMMON CARRIER OBLIGATION OF RAILROADS

**COMMENTS SUBMITTED BY
DIVERSIFIED CPC INTERNATIONAL, INC.**

My name is Sandra Dearden, I am President of Highroad Consulting, Ltd. (Highroad), a transportation and logistics consulting firm with offices in Chicago, Illinois. Highroad has a diverse client base that includes purchasers of transportation services, railroads, and equipment leasing companies. Our Consultants have performed projects in all regions of the United States and Canada; thru Tera International, Inc. we performed a project in Beijing for the Ministry of Railways of the People's Republic of China.

Prior to forming my firm in 1996, I was General Manager Marketing & Sales for a strategic business unit at Chicago & North Western Transportation Company. During my 26-year career in the railroad industry, I held profit and loss responsibility for various commodities including metals and machinery, food and consumer products, and non-metallic minerals. However, I spent most of my career marketing transportation for chemicals, including agricultural chemicals. I also chaired the railroad's Hazardous Commodities Committee, which was responsible for developing policies relative to the handling of hazardous

commodities. Committee members included management personnel from Transportation Operations, Law, and Safety Departments, and policies were subject to senior management approval.

During my tenure as Market Manager - Chemicals, I served as North Western's expert marketing witness on numerous abandonment proceedings before the STB's predecessor agency, the Interstate Commerce Commission. In 1981-1982, I conceived and implemented a truck competitive marketing program for dry and liquid fertilizers which received recognition in 1983, when North Western was awarded a *Golden Freight Car Award* for distinguished marketing by Modern Railroads magazine, which led to my promotion to General Manager.

Highroad represents four of the shippers that have filed statements in this proceeding, Barilla America, Inc., Italgrani USA, Corn Products International, Inc. and Diversified CPC International, Inc. In addition to addressing topics covered in those statements, my testimony will cover other topics and related events/issues that I have observed during my career as a professional consultant. Key topics include:

1. Service limitation resulting from capacity constrained environment – the impact of railroad routing protocols on common carrier obligations and competition.
2. Cost and safety issues related to the transportation of hazardous materials, especially toxic inhalation hazards.
3. Carrier-imposed requirements for infrastructure investments by shippers.
4. Economically motivated service reductions and metering of the demand for service. Railroad de-marketing of business and when it should be necessary to obtain abandonment authorization.
5. To whom does the common carrier obligation apply.

We commend the Board for initiating this proceeding and we appreciate the opportunity to present our views. As you know, since the passage of the Staggers Rail Act of 1980, the business landscape of the rail industry has changed significantly due to mergers and rationalization of the U.S. rail system. The number of Class I railroads consolidated from 22 companies in 1980 down to only seven in 2001. Citing capacity issues, all of the Class I railroads have changed their business models in a fashion that limits, and oftentimes attempts to eliminate, their common carrier obligation, in favor of placing ever-increasing burdens and restrictions on their shippers. Consequently, the STB's confirmation of the continued existence of a common carrier obligation on the part of the railroads, and a corresponding definition of the scope and components of that obligation, is vitally important to our clients that rely on rail transportation.

I. Service limitation resulting from capacity constrained environment – the impact of railroad routing protocols on common carrier obligations and competition.

In 2005, Class I railroads announced routing protocol agreements to streamline their exchange of rail traffic at major gateways. The objective was to address congestion by directing rail traffic flows through the most efficient interchange locations and to improve transit times and asset utilization for rail customers.

There is little doubt that, when the railroads developed the routing protocol agreements, they were acting in the public interest, and there is no question that routing protocols were successful in addressing congestion in some major lanes. However, as more and more problems surfaced with respect to transit times on particular routes, customers brought these problems to the attention of railroad personnel. Unfortunately, because routing protocols are being strictly enforced by

the railroads, it appears the customers do not have the option to use alternative routes. As a result, some customers have experienced increased transit times and, since alternative routes evidently are no longer available, the routing protocols are having a negative impact on rail-rail competition as well as the competitiveness of our customers in the broader marketplace. A question to be addressed in this proceeding: if the railroads refuse to handle cars via alternative routes, are they failing to comply with their common carrier obligation? If so, then what recourse do the customers have to address the violations?

Summarized below are only two examples related to me by some rail shippers:

- A. A routing protocol was established precluding use of potential alternative routes. Because the objective of protocols is to address congestion, the route selected may be based on operating objectives including filling existing train capacity and may not be the most efficient route. The customer is made captive to one route which potentially eliminates rail-rail competition.
- B. A routing protocol was established for shipments of a TIH commodity, which allowed the originating carrier to reduce its length of haul and potential exposure to liability; by changing the point of interchange, the destination carrier increased its length of haul. Transit times increased, with a corresponding increase in (1) car turn-around time and (2) costs for the customers' private cars.

Railroads' enforcement of routing protocols is indicative of a broader trend in which carriers, and particularly the Class I carriers, have become market makers instead of market service providers. They handle the traffic that they want to handle, and de-market the traffic they are not interested in handling. This, effectively, is an erosion of their common carrier obligation.

II. Cost and safety issues related to the transportation of hazardous materials, especially toxic inhalation hazards.

The railroad industry has experienced a number of fatal accidents in recent years involving the transportation of toxic inhalation hazardous commodities. As a result, the AAR has ordered new design standards for tank cars used to transport those commodities.

Certainly, we have no quarrel with the implementation of railcar standards designed to improve transportation safety. However, some of the major railroads have taken this issue one step further. They assert the right to impose all liability for the transportation of these commodities on the shippers, even when the shipments are transported pursuant to regulated rates. For example, Canadian Pacific recently issued an announcement concerning the movement of ammonia and toxic-by-inhalation (TIH) commodities with an indemnification and liability provision that states, "...it is being intended that Customer assume all liability that is in any way connected with the transportation of the hazardous commodities under this Tariff."

This shift of liability to TIH shippers is patently unfair, particularly since our (and our customers') research indicates that all of the rail accidents in recent years involving TIH commodities have been the result of track defects, or caused by human failure on the part of the rail crews. If the railroads are allowed to limit their liability and, correspondingly their common carrier obligation for the transportation of TIH commodities, we expect to see a cascade effect in which the liability shift expands to shippers of other hazardous commodities.

The chemical industry is very safety conscious. Major rail accidents involving TIH commodities have generally not been caused by the shippers or the rail

equipment, and new safety rules and standards for car design have been established in recent years, further enhancing the safety of shipments of hazardous commodities. Forcing rail shippers to assume 100% of the liability for shipments of hazardous commodities, thereby enabling the railroads to limit their common carrier obligation on shipments of certain hazardous commodities, does not address the root cause of the problem – that being the need of the railroads to improve their own safety standards and procedures. Indeed, if the railroads are not required to assume liability for their personnel and infrastructure, they will have no incentive to improve their own safety procedures.

The AAR has been working with railcar builders and shippers on these issues and we believe that is the appropriate forum if car design standards need to be addressed. However, limitation of common carrier liability obligations for the transportation of hazardous commodities would not only be unfair to shippers, it would be a decided detriment to the general public.

III. Carrier-imposed requirements for infrastructure investments by shippers.

Many rail shippers and receivers are being forced to spend millions of dollars in additional rail infrastructure or, alternatively, to either exit the market or incur substantially higher rail costs for rates and/or charges. This includes:

- Adopting policies to force use of larger size unit trains, requiring shippers and receivers to build track space and storage at destination for the larger units. Often when private cars are used, the shipper is required to acquire additional cars to develop train sets for the larger trains.
- Forcing use of larger cars which results in the need to make infrastructure changes to their unloading facilities.
- Cancellation of lease track agreements or increase lease track charges with the objective to de-market the lease track operation. As a result,

the rail customers are required to reengineer their rail operations and to make capital improvements to their rail infrastructure.

Many rail customers have made decisions to locate plants and distribution facilities on railroads based on agreements that were subsequently cancelled. Some have the space and ability to commit capital to make the infrastructure changes that become necessary when the serving carriers change their policies, while others do not have the room to expand. The railroads acknowledge that there is not enough business to go around if all of the grain shippers in a region expand their operations to 100-car trains, forcing some to go out of business. This is, again, indicative of a broader trend in which carriers, and particularly the Class I carriers, have become market makers instead of market service providers. They handle the traffic that they want to handle, and de-market the traffic they are not interested in handling. This, effectively, is an erosion of their common carrier obligation.

IV. Economically motivated service reductions and metering of the demand for service. Railroad de-marketing of business and when it should be necessary to obtain abandonment authorization.

The concept of de-marketing is really not new to the railroad industry. Initially, when the railroads developed plans to rationalize their systems and implemented abandonment programs in the early 80's, the abandonments focused on lines that clearly did not have adequate volumes and revenues to support continued maintenance of the lines. However, once those lines were eliminated, some railroads adopted policies to de-market business on marginal lines. This was accomplished by reducing service, thereby forcing shippers to ship by truck. Eventually, rail volumes and revenues on those lines declined to the point that they met the regulatory guidelines for abandonment.

Since I started Highroad Consulting, Ltd. in 1996, I have become aware of numerous examples of railroads de-marketing lines. One example was a client who asked us to represent them in negotiations with a Class I railroad. In order to fill contractual commitments to their customers, the shipper needed to move a high volume of rock in multiple car shipments during a construction season. Scheduled service on the line was three times/week. However, when the client contacted us they had not received a switch in more than three weeks. In the initial meeting with the serving carrier's sales representative, she told us that her company was de-marketing the business on the line because it interfered with the railroad's main line operations. Ultimately, we were successful in restoring service and securing cars from the railroad for loading, but this is a good example of how a railroad can disregard their responsibility to serve customers.

Other customers have complained that carriers are demarketing their lines by the simple expediency of cutting switch connections to industry tracks. Evidently, if a carrier believes that service to a shipper is not consistent with the availability of capacity on the adjoining mainline, the carrier simply opts to cut the industry switch connections. Whatever happened to a shipper's right to obtain a connection to carriers' mainlines? The statutory requirements still appear to be in existence, but in practice, industry switches are being unilaterally cut off at an alarming pace.

There are numerous ways a railroad can de-market business. Examples include reductions in service, failure to furnish cars for loading, cutting switches to industry spur track connections, adopting policies for larger size unit trains forcing some customers to go out of business, and raising transportation rates abruptly and

in sizeable percentages (one shipper told me that the railroad that served his facility increased his rates 150%).

De-marketing flies in the face of the railroads' common carrier obligations. Stricter guidelines need to be established regarding abandonments, and procedures need to be established so rail customers have recourse when de-marketing occurs and railroads are not meeting their common carrier obligation.

V. To whom does the common carrier obligation apply.

A major area of substantial concern is the calculated manner in which Class I's can manipulate the usage of contract rates versus regulated rates to evade common carrier obligations. The Board is well aware that the issue of what constitutes a "contract" has recently come to the forefront, and it has been attempting to address that issue in other proceedings. However, perhaps the Board is not aware of the ancillary effects of this issue on the Class I railroads' perception of their common carrier obligation.

Class I railroads have the ability to choose whether their rates are provided as regulated rates or contract rates. Make no mistake – smaller shippers on lines served by one carrier do not have the "arms length" ability to negotiate that choice. Typically, the contract rates are lower than the regulated "tariff" rates. But these lower rates comes with a steep price – the Class I's do not believe that they have any common carrier obligation with respect to movement of contract shipments.

We see the occurrence of several scenarios. In one type of instance, the carriers offer relatively high rates in the tariff and offer market competitive rates in a contract. Of course, no service guarantees are provided in the contract. Thus, if the shipper has any hope of moving its traffic at market competitive rates, it

naturally accepts the contract, not realizing that, from the carriers' perspective, no further common carrier obligation exists for movement of that traffic. In a second scenario, the carriers obscure the concept of whether a shipper is receiving a regulated rate or a contract rate. The Board is well aware of this confusion and is addressing it in a separate proceeding. However, for purposes of this proceeding, the Board must understand that the carriers' decision to call a particular transportation document a "contract" versus a document containing "regulated rates" has significant consequences as to that carrier's view of its common carrier obligation. Once a carrier calls a document a "contract," from its perspective the common carrier obligation is non-existent. Similarly, we have seen the railroads converting some public tariffs into private tariffs which they, in turn, consider to be contracts, and therefore exempt from common carrier obligations.

Finally, and perhaps more disturbingly, the Class I's have taken the position that they have no common carrier obligation with respect to the movement of exempt commodities, regardless of whether the rates are included in contracts or not.

The traditional common carrier concept of "reasonable service upon reasonable demand" is virtually non-existent for small shippers where contract, private tariff, and exempt rates are concerned. This cannot have been what Congress, the Interstate Commerce Commission or the Surface Transportation Board intended during the course of deregulation since the Staggers Act, and we urge the Board to take a close look at the scope of carriers' (and particularly Class I carriers') common carrier obligations for movement of contract and exempt traffic.

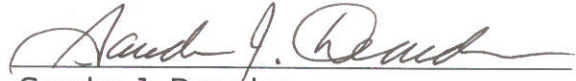
It is not reasonable for the railroads to eliminate their common carrier obligation when they require rail shippers to commit volumes in contracts. We believe the common carrier obligation applies to all shipments, whether covered by tariff, exempt quote, or "unilateral" (non-arms length) contract. We request the Board's confirmation of this point of view.

Conclusions

1. A procedure should be established so rail customers have recourse if routing protocols result in the lessening or elimination of competition, and if they result in a negative impact on service.
2. We urge the Board to reaffirm the fundamental common carrier obligation on all regulated commodities, including hazardous commodities.
3. What is the Board's view of railroads forcing rail infrastructure investments on to shippers by through policy changes?
4. What is the Board's view of "reasonable dispatch" and what remedies does the shipper have to enforce the railroads' common carrier obligation? We request that the Board establish procedural guidelines and the define role the Board's Office of Compliance and Consumer Assistance will have in ensuring that the carriers fulfill their common carrier obligation.
5. Stricter guidelines need to be established regarding abandonments and procedures need to be established so rail customers have recourse when de-marketing occurs and railroads are not meeting their common carrier obligation.

6. We would like the Board to clarify and define what is the common carrier obligation for traffic moving under "unilateral" contracts or exempt quotes. We also have concerns that the railroads in general have converted some public tariffs to private tariffs and considered them to be contracts and therefore exempt from common carrier obligations.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Sandra J. Dearden", written over a horizontal line.

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Dated: April 17, 2008