

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN

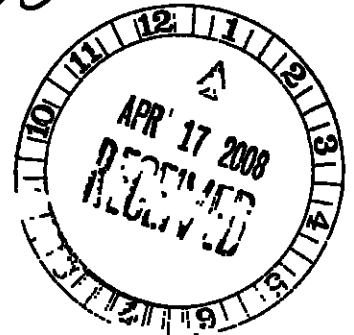
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VIA HAND DELIVERY

April 17, 2008

Anne K. Quinlan, Esquire
Acting Secretary
Surface Transportation Board
395 E Street SW, Suite 1149
Washington, DC 24023-0001

Re: STB Ex Parte No. 677
Common Carrier Obligation of Railroads

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Dear Ms. Quinlan:

In connection with the above-referenced matter, enclosed please find an original and ten (10) copies of the Comments of the Brotherhood of Locomotive Engineers and Trainmen. Thank you for your attention.

Sincerely,

National President

encl

cc: Paul T. Sorrow, First Vice President
John P. Tolman, Vice President and National Legislative Representative
BLET Advisory Board
Harold A. Ross, Esquire, Interim General Counsel

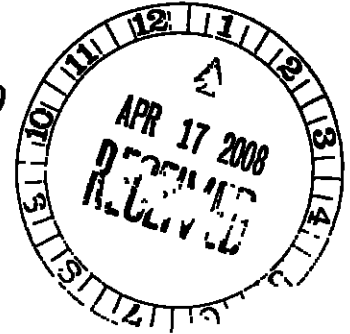
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**Before the United States Department of Transportation
Surface Transportation Board**



**STB Ex Parte No. 677
Common Carrier Obligation of Railroads**

Comments of the Brotherhood of Locomotive Engineers and Trainmen

On February 27, 2008, the Surface Transportation Board ("STB" or "Board") published notice that a Public Hearing in the above matter would be held on April 24, 2008. 73 Fed. Reg. 10509-10510. The notice also specified relevant deadline dates and identified several topics that would serve as focal points for the Public Hearing. Id.

These comments are submitted by the Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference of the International Brotherhood of Teamsters ("BL&ET"), which is the duly designated and recognized collective bargaining representative for the craft or class of Locomotive Engineer employed on all Class I railroads. BL&ET also represents operating and other employees on numerous Class II and Class III railroads. Founded as the Brotherhood of the Footboard on May 8, 1863, the BL&ET is the oldest existing national labor organization in the United States, and was in existence six years before the first transcontinental railroad route was completed. Accordingly, we bring a perspective to this matter that is unique.

We appreciate the opportunity to participate in this matter, which is of great importance to our members and all railroad workers, to the industry, to shippers, and to the American public. The history of the common carrier obligation of railroads is the cornerstone of the development and evolution of the industry and of the nation. Eighteenth Century land grants to railroads spurred expansion and development of the continent, and were the foundation for America becoming the foremost economy in the world. The primacy of the U.S. railroad industry also was a key element in defending the nation during two World Wars.

The Staggers Rail Act of 1980 led to the complete reconfiguration of the industry over the past nearly three decades. At the time, rail labor leadership supported deregulation — knowing full well the consequences for their members — because the wave of bankruptcies plaguing the Class I railroads in the Northeast had begun spreading westward. Substantial rationalization of the infrastructure occurred through "spin-offs" to short line and regional railroads and abandonments. Predictably, this was coupled with massive downsizing of the industry's workforce. This was followed by a wave of mergers in the 1990s that essentially have produced duopolies in all regions of the continental United States for long-haul rail freight transportation.

As a result of the changes triggered by Staggers, the Class I railroad industry has made record profits during the current decade, which reflect in large part significant increases in productivity. For the first time in generations, railroads are investing heavily in their infrastructure, which we applaud. However, railroading continues to be a capital-intensive industry and historic tensions between investors and railroads over the level of capital investment continue.

We believe recent trends in fuel prices and the deteriorating condition of the interstate highway system provide an opportunity for the railroad industry to increase its market share for

both freight and passenger transportation. This potential, combined with capital expenditures needed to merely sustain current market shares, appears to be beyond the capacity of the industry to self-fund. Indeed, a number of so-called public-private partnerships (“PPPs”) currently are in place, which feature public funding or bonding authority to upgrade rail lines, and there is growing interest in expanding PPPs in the future.

In our view, an increase in public investment in railroad infrastructure underscores the continuing need for U.S. railroads to adhere to their historic common carrier obligation. While we do not argue, here, for a significant reregulation of the industry, it should be beyond dispute that the Board still plays a vital role in ensuring that railroads fulfill their common carrier obligations. While markets have evolved and the regulatory scheme has been transformed over the past three decades, the industry should continue to serve the public utility purpose inherent since the first rails were laid. Within this framework, we turn to the specific topics raised by the Board in its notice.

1. Service Limitation Resulting From a Capacity Constrained Environment.

According to a study sponsored by the Association of American Railroads (“AAR”), which was published last September, there currently is almost no capacity constraint in the U.S. railroad industry. Traffic levels are below capacity on 88% of the total mileage, near capacity on 9%, at capacity on 3%, and above capacity on just over 0.2%.¹ Additionally, volume data published by Bear Stearns for the first 11 weeks of 2008 shows a decline in total carloads of between 1.5% and 2.0% both in the year-over-year metric and in the quarter-to-date metric. As a result, average train velocity for the Class I railroads is up 1.1% over 2007, and 1.6% for the quarter; likewise, average dwell times are down 0.8% and 0.7%, respectively.

To the extent these data are reflective of the current economic downturn, is it likely that we will not see a sharp reversal for some time, and perhaps not for the remainder of the year. That said, however, with the next upturn in the business cycle, capacity issues could arise in some corridors, particularly those carrying coal from the Powder River Basin and containers from the West Coast.

It is essential that STB exercise strong oversight with respect to capacity issues. The industry scandal in 2007 was price gouging via fuel surcharges. New life was breathed into this issue in late March, when Archer-Daniels-Midland filed a federal antitrust lawsuit against the five U.S.-based Class I carriers, alleging a price-fixing conspiracy.² Carriers also can manipulate

¹ The study defines “below capacity” as being train volume that is less than 70% of capacity; “near capacity” is when volume is 70%–80% of capacity, and “at capacity” when volume is between 80% and 100%. See National Rail Freight Infrastructure Capacity and Investment Study, Final Report, at pp 4-8 through 4-10.

² According to a contemporaneously published report on the Railway Age website, “The similarities between the railroads’ fuel surcharges are both too precise and too comprehensive to have been independent responses to any common market phenomenon,” the suit says. “Absent collusion, it is extremely unlikely that Defendants operating in similar geographic areas would independently price their rail fuel surcharges to arrive at the identical percentage [trigger point] month after month, year after year, for a period of more than three years.”

routing of traffic to create an artificial capacity crisis as a means of engaging in price gouging and/or to run off business that is relatively less lucrative. Strong Board oversight, coupled with prompt and inexpensive access to a remedy for shippers who believe they have been mistreated via a bogus claim of lack of capacity, is necessary to ensure that common carrier obligations are fairly met.

2. Cost and Safety Issues Related to the Transportation of Hazardous Materials, Especially Toxic Inhalation Hazards.

In June 2006, the House Subcommittee on Railroads, Pipelines, and Hazardous Materials held a public hearing on current issues in rail transportation of hazardous materials, with a special emphasis on toxic inhalation hazards ("TIH"). AAR President & CEO Edward Hamberger decried the current situation as "untenable." Despite listing literally dozens of things the industry claims to be doing to reduce the risk to the public, AAR demands that the federal government protect the industry by (1) relieving railroads of their common carrier obligation when the shipment is a TIH hazardous material, (2) capping a railroad's liability in the event of a TIH hazmat accident and paying liabilities above the cap, or (3) enacting a Price-Anderson style scheme for the railroad industry.³

Addressing the safety case first, this issue is headline material because of three spectacular TIH accidents that occurred in just under a 3-year period between 2002 and 2005. The first accident, in Minot, North Dakota, was caused by a track defect that had gone undetected because the railroad's track inspection program was deficient. In our view, federal legislation and a FRA rulemaking have gone a long way toward correcting this problem.

The other two TIH accidents — in Macdonia, Texas, and Graniteville, South Carolina — were caused by misaligned hand-operated switches in dark territory. FRA instituted emergency switch handling procedures in late 2005 to address the problem, and a new federalized set of switch handling procedures went into effect earlier this month. However, neither has FRA required, nor has the industry acceded to implementation of recommendations by the National Transportation Safety Board (NTSB) in the aftermath of these tragedies that switch position detection be installed, a Proposed Rule addressing tank car safety standards recently published by the Pipeline and Hazardous Materials Safety Administration (PHMSA) would require reduced speeds in dark territory, but is months away from implementation. In the meantime, state-of-the-art electronic switch position technology sits unused on the shelf, gathering dust, instead of eliminating the possibility of a repeat of these two accidents, because the industry will not spend the money absent being compelled to do so.⁴

³ The Price-Anderson Act (Pub. L. 85-256) establishes how catastrophic damages are apportioned in the nuclear power industry. AAR's proposal for implementation of a similar scheme for the railroad industry would strictly limit a railroad's liability, excess damages would be paid from a fund to which producers and end-users of TIH would contribute in the event of an incident.

⁴ The short-sightedness of the industry's position cannot be understated. Every piece of dark territory where Positive Train Control (PTC) will be implemented in the future will require these same devices as an integral and indispensable part of the system.

We strongly believe that there is no legitimate basis for relieving railroads of their common carrier obligation to transport I IH, or any other cargo, for that matter. The common carrier obligation was undertaken in exchange for government provision of land for rights of way and literally generations of protection from market forces. Thirty-five years ago, the federal government relieved the freight rail industry of huge operating losses by assuming responsibility for intercity passenger service, in the form of Amtrak. Next, the taxpayers laid out billions to resurrect and reconstruct the infrastructure of the industry in the Northeast, making it so attractive that CSXT nearly went broke in its fight with NS to divide Conrail.

Deregulation in the 1980s allowed massive shedding of track and traffic, much of which was not to the public benefit, and employment levels have been slashed to about 10% of what they were in the 1950s. When the Class I railroads were, again, lean and mean, the merger mania of the 1990s hit, with an end result that freight rail service in every region of the country now is a duopoly. Moreover, the Class I railroads have, collectively, received net profits in the several billions of dollars in every year. The effective reality of AAR's "untenable" situation is duopoly pricing power and multi-billion dollar annual net profits.

As previously noted, the industry is making a concerted effort to significantly increase public expenditures for its private infrastructure improvements. On Capitol Hill, AAR is promoting legislation that would provide for a 25% tax credit for all infrastructure expansion, in addition to railroads negotiating PPPs that would further increase the percentage of capital improvements funded from public sources. What debt does the industry owe for these continuing and increasing public subsidies, if not continued satisfaction of its common carrier obligation?

For this same reason, we should be wary of federal government assumption of excess liability in any railroad accident for a private, profit-making enterprise. PHMSA's proposed regulation on tank car safety will have a significant positive impact on the safe rail transportation of I IH, and the industry has at hand the technology to prevent dark territory collisions caused by misaligned switches; therefore, there is no need for relief from liability in the form of a cap. As for a railroad industry version of Price-Anderson, we see no advantage for the industry; indeed, the producer/end-user fees could very well drive this traffic to the highways, which actually may produce a higher risk to public safety in some respects.

3. Carrier-Imposed Requirements for Infrastructure Investments by Shippers.

We believe that such requirements, with limited exceptions, are antithetical to the common carrier obligation. Railroads already wield substantial rate-setting power, as compared with the pre-Staggers era, and the burden of these requirements could unfairly fall on the shoulders of small shippers who may lack transportation alternatives. Instead, railroads should develop marketing strategies based on the industry's competitive advantages, such as fuel efficiency.

That being said, it would be appropriate for railroads to negotiate infrastructure investments with the largest shippers, but such programs should be an element of long-term traffic agreements in which the rate reflects the degree of shipper investment. These agreements are consistent with and reflective of the common carrier obligation, and should be enforceable by the STB.

4. The Impact of Volume Requirements or Incentives.

As is the case with infrastructure investment requirements, minimum volume requirements represent a retreat from the common carrier obligation. The history of the rationalization of the Northeast rail infrastructure during the Conrail years and the wave of Class I mergers during the 1990s includes countless examples of business that was literally “chased away” by railroads seeking greater volumes of long-distance freight. We are as concerned with market manipulation via minimum volume requirements as we are with claims of over-capacity, and believe shippers should have prompt, reasonably-priced redress before the Board in such cases. That said, we believe volume incentives are an appropriate pricing tool for railroads, as they provide a means of passing along to a shipper economies of scale for large volumes.

5. Economically Motivated Service Reductions and Metering of the Demand for Service.

Similar to capacity constraints, infrastructure investment requirements, and minimum volume requirements, economically motivated service reductions and metering of the demand for service are contrary to the common carrier obligation to the extent that railroads are permitted to manipulate operations either to deny access to a shipper outright, or as a means of pricing a shipper out of the market for rail transportation. We recognize that — in a deregulated environment — maintaining profitability is not a “slam dunk” and may be a difficult balance to maintain for some cargoes and on some routes.

However, the stellar economic success of the industry for nearly a decade now, particularly among the Class I carriers, establishes beyond serious question that railroads continue to be able to set rates at a level that provides a return sufficient to both satisfy shareholders and maintain and expand infrastructure. The common carrier obligation is not that a railroad must carry all proffered shipments; rather, it is only that railroads provide “transportation or service on reasonable request.” 49 U.S.C. § 11101(a). As with many of the other topics the Board has raised, the best way to prevent railroad abuse — and ensure fulfillment of the common carrier obligation — is strong STB oversight, including providing shippers with prompt and inexpensive access to a process for redress.

6. The Proper Use of Rail Embargoes.

With respect to the Board’s authority to direct embargoes pursuant to 49 U.S.C. Section 11123(a)(4)(A), it is our opinion that the present statute accurately captures the circumstances in which such an embargo may be appropriate. We also believe that, as prescribed by 49 C.F.R. Section 1152.50(b), the imposition of an illegal embargo by a railroad should continue to serve as a basis for denying exemption status for an abandonment petition or a discontinuance of service or trackage rights petition. As for a railroad-imposed embargo, fulfillment of the common carrier obligation means that the only appropriate circumstances are those approaching a level that would trigger STB’s authority to intervene, and shippers should have a redress process if they feel a railroad is abusing its authority to embargo.

7. When It Becomes Necessary to Obtain Abandonment Authorization.

The current statutory requirements set forth in Chapter 109 of Title 49 of the United States Code and the regulatory provisions contained in Part 1152 of Title 49 of the Code of Federal Regulations are the product of a carefully crafted compromise that was a cornerstone of the industry's deregulation as a result of the Staggers Act. It is our opinion that they have served all interested parties well and should not be disturbed.

8. To Whom Does the Common Carrier Obligation Apply?

The transportation policy of the United States is most efficiently and most effectively carried out when there is the maximum possible consistency. For this reason, we strongly feel that the common carrier obligation should apply to all entities providing rail transportation subject to the Board's jurisdiction. This uniformity is in the best interests of shippers and railroads, alike, and — most importantly — in the public interest

In closing, we wish to thank the Board for docketing this matter and for the opportunity to participate. We look forward to the comments of other interested parties and retain the right to respond to those comments if we believe such response is in the best interest of our membership.

Respectfully submitted,

A handwritten signature in black ink, reading "Edward Rodzwicz". The signature is fluid and cursive, with the first name "Edward" and last name "Rodzwicz" clearly distinguishable.

Edward W. Rodzwicz
National President