

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 677

Common Carrier Obligation of Railroads

**STATEMENT OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The National Industrial Transportation League ("League") hereby submits this written statement to the Surface Transportation Board ("STB" or "Board") in response to the STB's Notice of Public Hearing on the Common Carrier Obligation of Railroads. Mr. Doug J. Kratzberg (Rail Planning & Operations Manager of ExxonMobil Chemical Company) in his role as Chairman of the League's Rail Transportation Committee, will serve as the League's primary witness at the hearing. Mr. Nicholas J. DiMichael, counsel for the League, will also attend the hearing on behalf of the League.

INTEREST OF THE LEAGUE

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and currently has over 600 company members. These company members range from some of the largest users of the nation's and the world's transportation system, to smaller companies engaged in the shipment and receipt of goods. The League's members includes shippers and receivers of goods as well as carriers, third party intermediaries, logistics companies, and similar entities. Members of the League are engaged in all forms of

transportation, including rail, motor, ocean and air carriage. Members of the League ship large quantities of goods by rail, and therefore have a vital interest in the railroads' common carrier obligation.

STATEMENT OF THE LEAGUE

The League appreciates the opportunity to appear before the Board at this hearing which is designed to examine issues related to the railroad common carrier obligation. The diverse membership of the League includes many companies that are dependent on safe, reliable, and cost effective rail service to meet their business requirements. These member companies are involved in a variety of industries, some of whom rely on rail transportation as their primary transportation mode, such as chemicals, petroleum, agricultural, steel, and paper shippers, and others of whom use rail as a component of intermodal transportation service.

The Board's Notice of Hearing stated that the agency intends to focus the hearing on 8 topics related to the scope and application of the common carrier obligation. These topics include: (1) service limitations based on capacity constraints; (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) the impact of volume requirements or incentives; (5) economically motivated service reductions and metering of the demand for service; (6) the proper use of rail embargoes; (7) when it becomes necessary to obtain abandonment authorization; and (8) to whom does the common carrier obligation apply. The League's testimony will address a number of these topics and, specifically, will focus on the following:

- The common carrier obligation is the cornerstone of the regulatory system of the U.S. rail industry and can be changed only by Congress;

- There is a compelling public interest in ensuring that shippers of all types of commodities that require rail service can obtain such service on reasonable request;
- The STB has the authority to determine compliance with the common carrier obligation, regardless of market conditions and possible capacity limitations;
- The law is clear that rail carriers must transport TIH commodities based on the common carrier obligation and there are strong public safety reasons for ensuring that TIH commodities are transported by rail and not on the public highways;
- A shipper should not be required to invest in rail infrastructure as a condition for receiving rail service;
- The inclusion of volume requirements or incentives in a tariff should not transform common carriage into contract carriage, thereby relieving a railroad of its common carrier obligation;
- Many rail shippers are facing unprecedented price increases which are perceived to be a deliberate attempt to "de-market" the traffic which arguably violates the common carrier obligation; and
- The common carrier obligation broadly applies to all non-exempt tariff-based services performed by rail carriers that are subject to the jurisdiction of the STB.

A. Background of the Common Carrier Obligation.

For more than a century, rail carriers operating in the United States have been charged with a public duty to provide service to those who demand it, subject to reasonable conditions and limited exceptions. This long-standing obligation can be traced back to the common law from the late 1800s. Missouri Pacific Railway Co. v. Larabee Flour Mills Co., 211 U.S. 612, 619 (1909) ("No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose the fact that it was a common carrier"). At common law, railroads were "ordinarily held to be common carriers of the goods delivered to them for transportation" based on their duty of being "affected with the public interest."¹ Moreover, in the late 19th century rail service was found to be akin to public highways: "That railroads, though constructed by private corporations and owned by them, are public highways,

¹ Akron, Canton & Youngstown R.R. Co. v. Interstate Commerce Commission et al., 611 F.2d at 1162, 1166 (6th Cir. 1979) (quoting 13 C.J.S. *Carriers* § 6) ("Akron").

has been the doctrine of nearly all the courts ever since conveniences for passage and transportation have had any existence.. .". Olcott v. Supervisors, 16 Wall 678, 694 (1872).

However, under the common law, a railroad was not obliged to receive and transport all kinds of goods for which a shipper desired carriage. Rather, a common carrier's obligation was coextensive with, and limited by, its public profession as to the kinds of goods it "held out" to carry. Therefore, at common law, a railroad could refuse to receive and transport goods that were not of the kind it proclaimed to undertake or was accustomed to carrying for the public.²

In 1906, the common carrier obligation was first codified into U.S. law with passage of the Hepburn Act of 1906.³ This fundamental duty has been a cornerstone of the regulatory structure of the U.S. rail industry ever since, having been maintained with various modifications in the Transportation Act of 1920, the Staggers Rail Act of 1980, and the ICC Termination Act of 1995.⁴

Today, the statutory duty comprising the common carrier obligation of railroads states as follows: "A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request." 49 U.S.C. § 11101(a). This obligation is broad and straightforward, lacking the common-law

² 13 Am. Jur. 2d *Carriers* § 306 (2000); Akron, 611 F.2d at 1166.

³ Hepburn Act, 34 Stat. 584 (1906).

⁴ The first statutory reference to common carriage occurred with the passage of the 1906 Hepburn Act, which designated railroads as common carriers and imposed a duty on carriers to furnish cars Pennsylvania Railroad Company v. Sonman Shaft Coal Co., 242 U.S. 120 (1916) (holding that a shipper of coal was able to bring an action under the common law when the carrier failed to provide the requisite number of cars and transportation upon reasonable request). Subsequently, the passage of the Transportation Act of 1920 codified the common carrier obligation and provided the with Interstate Commerce Commission with jurisdiction over this issue. The Transportation Act of 1920 defined a common carrier as "all persons, natural, or artificial, engaged in such transportation or transmission aforesaid as common carriers for hire." Transportation Act of 1920 as cited in Rogers MacVeagh, The Transportation Act of 1920: its sources, history, and text et al. 178 (Holt and Co 2004)(1923). The 1920 Transportation Act also codified specific common carrier duties including, but not limited to: providing transportation upon reasonable request, establishing routes with reasonable rates, providing reasonable rules and regulations with regard to operation of routes, and providing reasonable and equitable divisions between carriers in carriage involving through routes Id

nuance of any "holding-out" to perform only certain specified services.⁵ Instead, the obligation has been interpreted to encompass a clear cut duty to accept virtually all kinds of cargo from the shipping public, as long as the requested service is "reasonable." Moreover, "this duty reflects the well-established principle that railroads 'are held to a higher standard of responsibility than most private enterprises'."⁶

Rail carriers also may not fulfill contract requirements for service at the expense of the common carrier obligation. 49 U.S.C. § 11101(a) ("[Contract] commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable."). Indeed, when the Staggers Rail Act was adopted providing rail carriers with contracting authority, the Congress commented that:

The Committee believes that the common carrier obligation must be retained to prevent railroads from having the ability to serve only their most profitable business. If railroads were to contract only with shippers of the most profitable traffic, and there were no common carrier obligation, the burden of poor service and perhaps higher rates would fall on the shipper with low volume or low value traffic. The Committee believes that the retention of a common carrier obligation under contract rate making is necessary to protect the smaller shipper with little bargaining power and minimal traffic volumes to offer the railroad.⁷

In modern times, the common carrier obligation has evolved so that railroads cannot pick and choose the commodities they will carry. For example, a railroad cannot deny service because it is merely inconvenient or unprofitable. GS Roofing Products Co. et al. v. Surface Transportation Board, 143 F.3d 387, 391 (8th Cir. 1997). It is also unlawful for railroads to refuse to transport a commodity based on its dangerous characteristics, when such products are tendered in

⁵ Akron, 611 F.2d at 1166 (rejecting petitioner's attempt to "encrust common-law concepts onto the Act's straightforward provisions").

⁶ GS Roofing Products Co. et al. v. Surface Transportation Board, 143 F.3d 387, 391 (8th Cir. 1997) (citations omitted).

⁷ H.R. Report No. 96-1035, at 57 (1980) reprinted in 1980 U.S.C.A.N. 3978, 4002

accordance with applicable safety regulations and standards. U.S. Energy Res. & Development Admin. v. Akron, 359 I.C.C. 630 (1978), aff'd, Akron Canton and Youngstown R.R. Co. v. I.C.C., 611 F.2d 1162 (6th Cir. 1979).

However, the statutory duty imposed on railroads is not absolute.⁸ To determine whether a railroad has failed to adhere to its common carrier obligation, the Surface Transportation Board ("STB") is required to conduct an inquiry into the facts and circumstances in order to determine whether the service requested by a shipper is "reasonable."⁹ Although the Board maintains the authority to ensure that railroads comply with this statutory duty, it does not possess the authority to change, limit or restrict the common carrier obligation, as this right rests solely with the Congress.

B. The Common Carrier Obligation is a Vital Component of the U.S. Railroad Regulatory System for which Board Oversight and Enforcement is Critical.

It is the League's strong view that the common carrier obligation remains an essential requirement of the U.S. regulatory system governing railroads that are subject to the Board's jurisdiction. The railroads' duty to fulfill the "common good" and further the nation's commerce is as critical today as when the obligation was first recognized over 100 years ago. Railroads continue to serve a unique and special role, especially for large bulk commodity shippers or shippers of very hazardous chemicals, that cannot be replaced by any other mode. The issues facing today's rail industry, including a limited number of service providers and infrastructure

⁸ Granite State Concrete Co. Inc. v. Milford Bennington R.R. Co. Inc. v. STB, 143 F.3d 387, 391 (8th Cir. 1998)(affirming the STB's determination that railroad acted reasonably when it imposed time window on another carrier for safety reasons); Decatur County Commissioners et al. v. STB, 308 F.3d 710,715 (7th Cir. 2002)(affirming STB decision that railroad did not act unreasonably when it rerouted a line and assessed surcharge after the original line was washed out by heavy rain) It should also be noted that a carrier may declare an embargo on service in very limited situations under force majeure conditions.

⁹ Granite State Concrete Co., Inc. et al v. Surface Transportation Board, 417 F.3d 85, 92 (1st Cir. 2005) ("The STB has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning to these terms [adequate service on reasonable request], which are not self-defining, in the wide variety of factual circumstances encountered.")

and capacity constraints, creates a compelling need for government oversight of the manner in which railroads allocate their supply of services. These issues have increased the potential for unreasonable refusals of service or discriminatory allocations of the same to occur compared to any other time. The League is aware that railroads are taking actions to increase revenue through unprecedented price increases and reduce liability risks by refusing to provide service, such as in the case of intermodal service of TIH commodities. While the rail industry has the right to make rational pricing and service decisions based on market conditions and the economics of their business, as a regulated industry, such factors are not and should not solely determine who receives rail service and who does not.

As noted above, historically, the railroads network has been compared to that of public highways. The national interest must take into account the shipping public's need for rail service to allow for safe and cost-effective product deliveries. If left to their own devices, the League is very concerned that railroads would refuse to transport hazardous commodities that qualify as TIHs, and perhaps other traffic as well. Some shippers already suffer from service problems that adversely affect their businesses, including insufficient car supply as well as unreliable and inconsistent service. Capacity constraints have only served to exacerbate service shortcomings and allow for even higher price increases.

Notwithstanding the current challenges faced by the rail industry and its customers, the common carrier obligation has long served to guarantee that shippers can at least obtain some level of service as compared to no service at all. This fundamental duty helps to ensure that the commercial needs of the U.S. shipping public are met, subject to a "reasonableness" standard. The League strongly believes that the Board's regulatory oversight of the common carrier obligation is absolutely essential to ensuring that railroads provide service upon reasonable

request, and do not seek to transport only their most profitable and least risky traffic.

Accordingly, the agency should not narrow or dilute its interpretation or enforcement of the common carrier obligation based on alleged capacity constraints.

C. The Law is Clear that the Common Carrier Obligation Requires Rail Carriers To Transport TIH Commodities and There are Strong Public Safety Reasons for Ensuring that TIH Commodities are Transported by Rail and Not on the Public Highways.

Class I railroads have made no secret of their preference not to transport hazardous materials that qualify as TIHs. Indeed, based on liability concerns with the transport of TIHs, the AAR recently pronounced that chemical manufacturers should stop producing extremely dangerous products altogether. But the law is crystal clear that railroads cannot refuse to carry goods based solely on their dangerous nature or characteristics, as long as such goods are tendered for shipment in accordance with applicable safety laws and regulations. See, Akron, supra; Radioactive Materials, Missouri-Kansas-Texas R.R. Co., 357 I.C.C. 458 (1977); Radioactive Materials, Special Train Service, 359 I.C.C. 70 (1978). Within the hazardous materials context, requests for transportation service are deemed reasonable when such requests conform with minimum safety standards such as Department of Transportation ("DOT") and Nuclear Regulatory Commission ("NRC") requirements. Id.

In Akron, the petitioner railroads challenged the authority of the Interstate Commerce Commission ("ICC") to compel them to perform transportation of low-level reactor waste and spent nuclear fuel. The railroads admitted their status as common carriers, but asserted that they are not common carriers "as to" the radioactive wastes at issue because they had never published tariffs and rates for the carriage of such goods. Any transport of such goods, they argued, was -done on a private, contractual basis. The court, however, rejected this argument.

The court specifically held that even though a common carrier may become a private carrier as a contractual matter when the carrier undertakes "a special engagement" to transport goods outside of its normal scope of business, the court found that the petitioners could not refuse to carry the radioactive waste based on the facts at issue: "it is the long history of the present petitioners' carriage of nuclear materials, and the continuing national need for such carriage, which takes the petitioners' transport of nuclear materials from the realm of accommodation or special engagement" to that common carriage.¹⁰ Thus, the Akron court cited both the petitioners' history of transportation of hazardous materials and the public need for such transportation as reasons for ordering the cancellation of the railroads' abstentions.

The Akron court also held that safety concerns were not a valid reason for a railroad's abstention from the transportation of hazardous materials.¹¹ Indeed, the court relied on the findings of the ICC that "No other mode of transportation is more suited to the economical carriage of these materials than train carriage" and "truck shipment of nuclear wastes would, because of the greater number of smaller shipments required, increase the probability of accidents involving nuclear materials, and, even if no mishap occurs, result in greater exposure to radiation of transportation workers and the general populace."¹² See also, Classification Ratings of Chemicals, Conrail, 3 I.C.C.2d 331 (1986) (ICC determined that Conrail could not refuse to transport hazardous chemicals based on the associated liability risks finding that such abstentions "will only be allowed in exceptional circumstances, which make such action reasonable.")¹³

¹⁰ Id. at 1167.

¹¹ Id. at 1168-71

¹² Id. at 1168.

¹³ Conrail, 3 I.C.C.2d at 337.

In sum, a railroad's common carrier obligation is comprehensive, and the circumstances under which a carrier could refuse transportation of hazardous goods are few. Under the nuclear materials cases, safety concerns do not justify a railroad's refusal to carry such commodities. The Conrail decision applied that principle to hazardous chemicals and struck down a railroad's liability concerns for refusing carriage. Guiding these legal determination as to a railroad's common carrier obligation was the notion that railroads play a vital role in effecting the national interest in the efficient transportation of goods.¹⁴

These same principles apply with equal importance today. TIH products are used in many contexts to purify the water we drink, to operate pollution control systems, and as a component in many manufactured products across a variety of industries, such as automotive, defense, health care, among others. Based on the dangerous nature of these commodities, rail transportation, rather than highway transportation, is the safest manner in which to move these products to necessary delivery points. Thus, strong public safety considerations continue to require strict enforcement of the common carrier obligation with respect to the carriage of TIH products. If the railroads begin refusing to carry TIH commodities or impose unreasonable conditions for such carriage, producers of these commodities will be forced to either ship these products by truck or to not ship these products at all. The latter choice is simply not a viable option and will lead such producers to shift their production overseas, at the cost of American jobs. The Board must be vigilant in ensuring that the railroads' concern over TIH liability risks, which can be managed and mitigated through insurance and other commercial means, is not translated into refusals to transport such products in violation of the law.

¹⁴ See Akron, 611 F.2d at 1168

D. A Shipper Should Not Be Required to Invest in Rail Infrastructure as a Condition for Receiving Rail Service.

The League is aware that rail carriers are increasingly requiring shippers to make investments in rail infrastructure as a condition to obtaining rail service. In many cases, shippers are being asked to pay for new track construction or improvements that relate to the requested service. While the League believes that it is reasonable for a carrier to make proposals to its customers regarding infrastructure investments that directly concern the service requested by the shipper, the League does not believe that it is appropriate or lawful for a carrier to condition the provision of rail service required by a shipper in exchange for the funding of infrastructure improvements.

Shippers, in general, broadly support the need to invest in new or improved rail facilities. A number of shippers have and will continue to provide funding for this purpose. In many cases incentives exist for the shipper to make infrastructure investments, since doing so provides the opportunity to improve efficiencies in the handling of the shipper's traffic. However, assuming that existing track other essential facilities meets FRA safety standards, and a shipper makes a reasonable request for service, the League believes that a railroad must fulfill its common carrier obligation and provide the service, even if a shipper refuses to make the investments demanded by the carrier. It would be contrary to the common carrier obligation for a carrier to refuse to perform the service unless or until the shipper commits to funding infrastructure improvements desired by the rail carrier.

E. The Inclusion of Volume Requirements or Incentives in a Tariff Should Not Transform Common Carriage into Contract Carriage, Thereby Relieving a Railroad of its Common Carrier Obligation.

With regard to whether volume requirements or incentives included in a rail service arrangement affects the common carrier obligation, the League would simply note that a rail carrier should not be permitted to divorce itself from its common carrier obligation merely by inserting such requirements or incentives into its common carrier tariffs. This issue appears to be related to another STB proceeding, Ex Parte 676, Rail Transportation Contracts Under 49 U.S.C. § 10709, in which the Board desires to establish a rule that will help to distinguish common carrier rates and service from contract rates and service. The League does not believe that the inclusion of volume requirements and rate incentives in a tariff automatically transforms the document into a contract, which would not be subject to the common carrier obligation. Indeed, time/volume tariffs have existed in the U.S domestic and international shipping arenas for decades. If rail carriers could avoid the common carrier obligation simply by requiring a tariff shipper to ship a minimum volume of cargo, the League is concerned that that carriers would begin to add such requirements to their tariffs on a broad basis in order to circumvent the regulatory regime. The Board should clarify that such a practice would not transform common carriage into contract carriage.

F. Unprecedented Price Increases Intended to "De-market" Traffic Arguably Violate the Common Carrier Obligation.

In its Notice of Hearing, the Board identified "economically motivated service reductions and metering of the demand for service" as a topic of interest. In surveying the members of the League's Rail Transportation Committee confidentially with respect to this hearing, the responses broadly demonstrate that shippers are experiencing double and triple digit price increases at paces never seen before. However, in some cases, including shippers of TIH

commodities, among others, there appears to be a growing perception that the aggressive price increases are offered not only to secure market-based compensation, but to directly discourage the shipper from tendering the shipment. League members report such actions as the following:

- Price increases of 100 percent or more.
- High rates to discourage interchange with connecting carriers.
- Pricing TIHs with the stated goal of discouraging their transportation by rail.
- Rate increases that are biased against shorter hauls and low-rated commodities.
- Price increases that appear to be intended to move the traffic off rail.
- Statements from carriers indicating that they intend to raise prices on TIHs to the point where customers stop shipping via rail, including triple-digit price increases.
- Price increases on TIHs that far exceed similar movements of non-TIH commodities.
- Refusal in some circumstances to quote rates.

A number of League members believe that the pricing practices of the railroads are designed in certain cases to discourage the movement of the traffic altogether. This is a very troubling phenomenon if these perceptions are in fact true. Although a shipper could attempt to challenge the level of rate offered by a rail carrier as being unreasonably high, as the Board knows that rate challenges have not been widely employed by the shipper community in the past, for various reasons. The League believes that a legitimate question exists as to whether railroads that price traffic at extremely high levels for the purpose of discouraging the movement of the commodities is a violation of the common carrier obligation. Assuming that the shipper seeking rail service has made a "reasonable" request, a response from a rail carrier that is directly

intended to discourage the movement appears to be inconsistent with the statutory duty to provide service upon reasonable request.

The League believes that it would be appropriate for the Board to evaluate this issue, in light of current pricing practices of rail carriers. Currently, it is not clear whether the Board believes that a shipper faced with high pricing proposals has no other remedy than to file a rate challenge at the Board, rather than filing a claim that such conduct is in violation of the common carrier obligation. It would be helpful to industry if the Board could clarify this issue.

G. The Common Carrier Obligation Broadly Applies to All Non-Exempt Tariff-Based Services Performed by Rail Carriers that are Subject to the Jurisdiction of the STB.

The Board has also asked for input on the question of who is subject to the common carrier obligation. The League believes that this question is answered by the statute, which broadly applies the obligation to any "rail carrier providing transportation or service subject to the jurisdiction of the Board." 49 U.S.C. § 11101(a). It is well understood that the common carrier obligation applies to transportation provided under a tariff or rate schedule issued by a rail carrier. It does not apply to contract traffic or traffic that is subject to an exemption previously granted by the Board or its predecessor under 49 U.S.C. § 10502(a). However, it would be possible for the common carrier obligation to apply to the transportation of commodities or traffic that were previously exempt from regulation, if the Board were to revoke the exemption, based on findings made pursuant to a petition filed under 49 U.S.C. § 10502(d).

CONCLUSION

The League appreciates the Board's consideration of its comments. Based on the foregoing, the League strongly believes that the common carrier obligation serves a crucial role in ensuring that shippers dependent on rail service can obtain transportation upon reasonable request. As rail transportation is the safest means of transporting highly hazardous products, the public interest is well served by continued enforcement of the common carrier obligation. Although this long-standing fundamental duty can be modified only by the Congress, the Board should continue to monitor and interpret the common carrier obligation on a case-by-case basis, consistent with existing case law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karyn A. Booth", is written over a horizontal line.

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