

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 677

Common Carrier Obligation of Railroads

**COMMENTS OF
PPG INDUSTRIES, INC.**

PPG Industries, Inc. ("PPG") appreciates the opportunity to submit comments to the Surface Transportation Board ("STB" or "Board") in response to the Board's Notice of Public Hearing regarding the common carrier obligation of railroads, to be held on April 24-25 in Washington, D.C. The Board has scheduled the hearing in order to examine issues related to scope and extent of the railroad common carrier obligation, in light of current industry practices and arrangements between shippers and carriers. The STB Notice of Hearing identifies eight separate topics pertaining to the railroad common carrier obligation, including the cost and safety issues related to the transportation of hazardous materials, especially toxic inhalation hazards ("TIH"). PPG's comments address several of these topics. However, as a TIH producer that is dependent on safe and efficient rail transportation, our comments focus primarily on the specific transportation needs and issues facing TIH shippers. PPG is a member of the Chlorine Institute, Inc ("CI") and hereby incorporates CI's comments on this matter herein by reference.

Interest of PPG

PPG is a diversified manufacturer of chemicals, protective coatings, glass and fiber glass with over 22,000 employees in the United States and more than 50 major facilities in 23 states. Total sales in 2007 for the company were \$11.2 billion. It is expected that in 2008 almost half of these sales will be in the U.S. PPG operates in more than 60 countries around the globe.

PPG's commodity chemicals segment produces chlor-alkali and derivatives including chlorine, caustic soda, vinyl chloride monomer, chlorinated solvents, chlorinated benzenes, calcium hypochlorite, and other chemicals. Most of these products are sold directly to manufacturing companies in the chemical processing, plastics and rubber, paper, minerals, metals, and water treatment industries. Price, availability, product quality and customer service are the key competitive factors in these businesses. Therefore, efficient and affordable rail transportation is crucial. PPG's North American chlor-alkali chemicals business operates three production facilities and employed over 2000 persons in 2007.

Cost pressures have made it exceedingly difficult for PPG's businesses, including commodity chemicals, to compete in a global market and to maintain jobs in the United States. The commodity chemicals sector of our business has faced tremendous cost pressures, where we have seen the rail cost to ship chlorine skyrocket more than 80% since 2004. Another example of skyrocketing costs can be evidenced with the cost of natural gas. The chlor-alkali industry estimates that every \$1.00/mmbtu change in natural gas price impacts costs by \$25.00 to \$30.00 per ECU (1 ton of chlorine and 1.1 tons of liquid caustic soda). Also on the rise is the cost of labor and materials in the Gulf Coast. All of these are impacting the competitive position of PPG's business.

PPG is one of the nation's largest manufacturers of chlorine, a toxic inhalation hazard. Despite chlorine's hazardous characteristics, it is crucial to society. Chlorine is most known for its use in water purification, but this accounts for only approximately 6% of its consumption. Chlorine's importance to society is immense. It is an essential chemical building block in manufactured products to the automotive, construction, defense, electronics, food processing, health care, medical, metals, and outdoor recreation industries. The list of products derived from chlorine chemistry accounts for approximately 45% of the nation's GDP. Chlorine also is deemed an essential asset by the Department of Homeland Security as critical infrastructure.

**Why Rail Transportation is Required for
PPG's Products and is in the Best Interest of the Public**

Many of PPG's businesses are dependent upon reliable rail service. An efficient, reliable and competitive rail industry is absolutely essential to a healthy U.S. economy and critical to PPG's success.

PPG requires efficient rail transportation, as some of PPG's products cannot be moved by other modes and many of PPG's customers cannot receive our products via alternative modes. In North America, PPG only uses rail to ship its chlorine over land. In that regard, PPG ships chlorine approximately 25% to 30% by rail and ships the remainder of the chlorine through pipelines or barges.

It is undisputed that rail is the safest over-land method of transporting hazardous materials, including TIHs such as chlorine. The railroads' trade association, the AAR, promotes rail as an extraordinarily safe and efficient way to transport goods. "Railroads the Safe Way to Move" AAR March 2008, www.aar.org/getfile.asp?file_ID=161. Further, the AAR publishes statistics which show a steady and dramatic reduction in rail accident rates over the last 27 years

(1980 to 2007). AAR Press release, October 17, 2007. Currently rail accident rates are less than four accidents per million train miles, according to AAR published statistics. Also, the safety record on chlorine rail transportation has been excellent with over 2 million shipments made since 1909 with just 6 fatal releases. Failure of the railroads to accept TIH materials could ultimately result in a significant increase in highway shipments posing greater risk from both a safety and security perspective.

Rail transportation is also the most fuel efficient method of transporting cargo over land. A popular CSXT advertisement boasts that one gallon of diesel fuel can transport one ton of rail freight over 400 miles. This exemplifies not just the tremendous fuel efficiency of rail transportation, but the parallel benefits of controlling fossil fuel emissions which impact our environment.

Recent Actions By the Railroads
Demonstrate Their Desire Not to Ship TIH Products

Over the past few years (since approximately 2004), the actions of the railroads demonstrate to PPG that the carriers wish to disavow their common carrier obligation to transport PPG's manufactured hazardous materials, in particular, materials classified as TIHs.

For example:

- The AAR is attempting to mandate new tank car standards, without appropriate scientific analysis or proof of an appreciable enhancement in safety. PPG supports the effort to enhance the design of a new chlorine tank car and the efforts of the DOT; however, a collaborative approach using sound technical evidence must be employed. In addition, a justifiable, achievable timetable for implementation must be developed. This action will result in a significant expense to PPG and the chemical industry and is yet another impediment being implemented by the railroads to avoid shipping TIH materials by rail.
- Senior Class I rail executives have bluntly told PPG on numerous occasions that they do not want to handle TIH materials.

- PPG's TIH rail rates continue to escalate dramatically with the only justification being the railroads continued effort to dissuade shipment of TIH materials by rail. The carriers also are attempting to move pricing from contract to tariff, enabling them ultimate flexibility.
- Because of aggressive pricing actions for TIH materials, PPG knows of chemical receivers that are considering moving TIH away from the railroads and onto the highway, which could increase the safety and security risk to the public.
- In a February 27 press release denouncing the chemical industry for making "extremely dangerous" chemicals, the AAR referred to a report by the "Center for American Progress" in which some water treatment facilities converted from chlorine gas to less toxic "bleach". The press release failed to point out that water purification represents approximately only 6% of chlorine end-use. PPG strongly contends that any further limitations of the common carrier obligation of railroads to handle TIH materials could harm the public and our society as a whole because of the vast importance of chlorine chemistry to human lives.

The above actions by the railroads are very troubling to PPG, based on its heavy reliance on efficient and affordable rail service. Based on recent negotiations with the railroads, PPG has every expectation that the railroads will continue to impose significant price increases on TIH shipments and develop practices to discourage the shipment of TIHs by rail. PPG believes that such conduct is inconsistent with the railroads' public duty to transport these products, as long as the request for transportation is reasonable. As shown below, the law establishes that the dangerous characteristics of a commodity is not a valid basis for refusing to transport such commodity, as long as the product is tendered in accordance with applicable safety laws and regulations. See Akron, Canton & Youngstown R.R. Co. v. I.C.C., 611 F.2d 1162 (6th Cir. 1979)("Akron").

**The Common Carrier Obligation is a
Critical Element of the Railroad Regulatory System**

The common carrier obligation is a broad and fundamental duty that requires rail carriers to "provide the transportation or service on reasonable request." 49 U.S.C. § 11101. This

straightforward obligation has a long tradition in the regulation of the railroad industry, arising initially from the common law in the late 19th century. The common carrier obligation was first codified in the U.S. more than 100 years ago with the passage of the Hepburn Act of 1906. Hepburn Act, 34 Stat. 584 (1906). The retention of the common carrier obligation for more than a century demonstrates the special role that rail transportation plays in the commerce of our nation. PPG strongly believes that it is a sound transportation policy to ensure that freight shippers have access to rail service, as long as the service requirements are determined to be “reasonable.”

Arguably, shippers like PPG that are dependent on railroads face greater challenges in obtaining reliable and cost-effective service than ever before. It is for this very reason that PPG believes that the importance of the common carrier obligation may be at its peak today. PPG commends the Board for its interest in this topic and urges the Board to remain vigilant in its enforcement of the common carrier obligation to ensure that reasonable requests for service are in fact met by the railroad community. Moreover, the long-standing policy in the U.S. to impose a basic service obligation on railroads, while enforced by the Board, only can be changed by the Congress. It is our view that there is no justification for modifying the common carrier obligation.

**The Common Carrier Obligation Requires Railroads
To Transport TIH Shipments That Comply with DOT Safety Regulations**

In its Notice of Hearing, the STB identified “cost and safety issues related to hazardous materials transportation, especially toxic inhalation hazards,” as a topic of interest. As specified above, it is without question that rail is the safest mode of land transport for the carriage of TIHs and many customers cannot receive chlorine other than by rail. Furthermore, government agencies, such as the Department of Transportation (“DOT”), are vested with the authority to set

standards and regulations for the safe transportation of hazardous materials. It is not appropriate, or lawful, for the railroads to decide not to transport a TIH or other hazardous material based solely on the hazardous characteristics of the product, if the product is tendered to the carrier in accordance with DOT safety regulations. Akron, supra, 611 F.2d at 1169. (“The Commission’s deference to the safety regulations of its sister agencies must extend only this far: a carrier may not ask the Commission to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT and NRC regulations governing such transport, and these regulations have been met.”)

If the railroads believe that there is a need to change existing safety regulations to address the risks of carriage then the proper course of action is to petition DOT for a rulemaking. Akron, 611 F.2d at 1169, citing, Radioactive Materials, Special Train Service, Nationwide, 359 I.C.C. 70 (1978) (March 8, 1978) (“A carrier thus cannot refuse to haul any materials which meet DOT and NRC standards, but it may seek approval of a stricter practice which is shown to be just and reasonable.”). Instead of unilateral actions by the railroads imposing new safety requirements on TIH shippers (such as tank car design standards), the industry as a whole would be better served if the railroads sought to address their safety concerns via a rulemaking proceeding before the safety regulators. This process would provide all interested parties with the opportunity to provide input on such concerns.

As railroads are the safest means of transporting hazardous materials (including TIHs), the public interest is best served if the railroads uphold their common carrier obligation to transport these products. As determined by the Akron court and the ICC, a hazmat shipper’s request for rail service is “reasonable” as long as the applicable safety regulations are met.

Therefore, the dangerous nature of a product is not an appropriate or lawful means for a carrier to refuse to perform rail transportation.

Simply stated, the common carrier obligation is a duty to carry all goods by rail, even if hazardous. The railroads cannot and should not be permitted to determine unilaterally and arbitrarily if a commodity is too dangerous for carriage.

Carrier-Imposed Requirements for Infrastructure Investments by Shippers

To date, PPG has not experienced railroad imposed infrastructure investment as a condition for receiving rail service.¹ However, the AAR's tank car design proposal that would impose more stringent standards on cars used to transport chlorine than is currently required under federal safety regulations is viewed by PPG as an unreasonable condition to obtaining rail service. While PPG supports an enhanced chlorine rail car design, the proposed AAR tank car design standards are not founded upon sound science or approval from safety regulators.

It is troubling to PPG that, in developing its proposal, the AAR ignored concerns that the new standards offer only marginal safety improvements, fail to address potential issues that would be created by the use of heavier tank cars, and do not address the most important cause of two recent incidents that the NTSB attributed to railroad operational failure. The requirement for these new cars would in many cases require upgrading of track to and inside of facilities, placing another burden on the shipper and receiver. The only way to avoid the track upgrade cost is to light load rail cars. However, light loading of cars would result in a need for more cars to carry the same amount of product, leading to greater costs and the additional risks of creating congestion.

¹ PPG is aware of rail carriers imposing requirements on receivers to increase in plant track capacity to accommodate rail deliveries.

In addition, the AAR has sought to impose the new standards over significant industry objections. PPG is hopeful that the AAR will abandon its tank car proposal now that the DOT has issued its own tank car standards in a rulemaking proceeding. Moreover, PPG believes that the tank car issue calls into question the unreasonableness of the AAR's actions. Specifically, the unprecedented unilateral process employed by the AAR disregarded input from industry experts and the rulemaking process and did not include a comprehensive approach to rail safety.

PPG and the chemical industry have a significant capital investment in rail transportation to ship and receive products. Such investments are in the form of track, equipment, loading/unloading facilities, safety training, security and emergency response capability. As noted, PPG supports an enhanced chlorine rail car design, however, the law requires justifying the significant capital investments that have been and will be made in conjunction with the enhanced car design.

**The Imposition of Volume Requirements or
Incentives Should Not Obviate the Common Carrier Obligation**

The Board has also asked for input on the impact of volume requirements or incentives on the common carrier obligation. Volume requirements or commitments involve a commercial agreement between a railroad and its customer. As such, volume commitments should have no bearing on the statutory obligation of a carrier to provide service to a shipper that makes a reasonable request.

Recently, the STB initiated a proceeding in which it questioned whether railroad tariffs that contain volume commitments should be treated as contracts that are outside of the STB's jurisdiction, instead of tariffs (or other pricing arrangements) that are subject to regulation, including the common carrier obligation. See STB Ex Parte No. 669, Interpretation of the Term

"Contract" In 49 U.S.C. 10709, served March 29, 2007. PPG believes that the mere insertion of a volume commitment in a railroad's tariff should not transform the tariff into a contract, thereby relieving the carrier of its regulatory duties. There are instances where a customer does not have any competitive options and the pricing, with volume commitment is "dictated" by the carrier without negotiation. It would be unreasonable for the Board to determine that all such arrangements qualify as contract carriage.

To Whom Does the Common Carrier Obligation Apply

The statute makes it clear that the common carrier obligation applies to *all* rail carriers that perform non-exempt, tariff-based transportation services. Although the railroads have taken overt measures to narrow or avoid their common carrier obligation with respect to the carriage of TIH products, PPG contends that it is critical that the law continue to ensure that shippers of such products are not foreclosed from obtaining service based solely on the hazardous nature of the product, when safety regulations are met. Moreover, as explained above, the public interest is best served when TIHs are transported by rail, instead of over the public highways. Thus, the Board should continue to enforce the common carrier obligation of railroads based on existing law and precedent, which requires the Board to ensure that all reasonable requests for rail service are fulfilled.

Respectfully submitted,

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

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