

**Surface Transportation Board
STB Ex Parte No. 677
Oral Hearing**

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Written Testimony of

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1. Introduction

Chairman Nottingham, Vice Chairman Mulvey, Mr. Buttrey, good afternoon. My name is Gary Spitzer and I am a Vice President at E. I. du Pont de Nemours and Company ("DuPont"). I am here to testify in strong support of the retention of the statutory common carriage obligation of the railroads and to urge the Board to consider eliminating an existing exemption to that obligation. Without common carriage, the railroads would almost certainly refuse to carry regulated materials essential to our modern way of life and our Nation's economy.

DuPont is a global corporation founded 206 years ago on the banks of the Brandywine River in Wilmington, Delaware. Initially, DuPont made only one product, black powder. A century later, its focus shifted to chemicals, materials and energy. In our third century, we are bringing together biology and chemistry to meet societal needs for safe and abundant food, alternative fuels, and other sustainable solutions to enable a better, safer and healthier life for people everywhere. DuPont has revenues of over \$30 billion a year, with 135 manufacturing and processing sites in 70 countries and over 60,000 employees. In the United States alone, DuPont employs about 36,000 workers in 33 states.

One thing has remained unchanged throughout the history of DuPont - our uncompromising commitment to safety. Our Company's founder, E. I. du Pont, built safety into the very fabric of DuPont culture by living, and requiring managers to live, on the Company's first manufacturing sites. That culture and clear personal accountability remain just as strong today. Safety is the foundation of every system and process, including transportation, in DuPont. Indeed, our safety culture has been the underpinning for many DuPont products through the years. Our discovery of nylon made safer parachutes for D-Day, and our development of Neoprene[®], a synthetic rubber, made

military transportation easier and safer. Today, products such as DuPont Kevlar[®] high-performance fiber, which is credited with the survival of over 3,000 law enforcement officers in the United States over the last thirty years, help save lives. In addition to being used for bullet proof vests, Kevlar[®] is used for helmets, vehicle armor, aircraft parts, bridge construction, fiber optic cable and numerous other functions. Another DuPont fiber, Nomex[®], is used for personal protection by first responders, including firefighters. Our SentryGlas[®] technology helps to protect both private citizens in skyscrapers and other structures around the world and government employees at critical governmental installations such as federal courthouses and embassies

America's freight trains have been vital to DuPont operations since 1858 when the Pennsylvania Railroad first transported our products. They remain essential to our business today. To produce Kevlar[®], Nomex[®] and many of our other products, DuPont requires many chemicals, some regulated by the Department of Transportation (DOT) and some not. DuPont also produces chemicals used by other industries for indispensable products such as tires and electronics. Quite often, due to their composition, characteristics or volume, these chemicals must be transported by rail. Therefore, a safe, efficient, cost-effective, and responsive rail transportation system is critical to my business, the majority of businesses within DuPont, and our country's manufacturing community as a whole. Were the railroads free to decline transport of commodities because they would rather carry more profitable or less hazardous cargo, we would be at grave risk of no longer being able to make products in the United States that are essential to the health, safety and security of the American people or to provide jobs to support local economies, or to contribute exports to help balance our nation's trade deficit.

2. Common Carriage is the Foundation of the Rail Transportation System and Should Not be Curtailed

Common carriage is the historical bedrock of this Nation's rail transportation system. Initially recognized in the common law of England, the common carriage obligation of the railroads was codified in the Interstate Commerce Act of 1887 ("ICC Act"), in the Hepburn Act of 1906 and again in the Staggers Act of 1980. It remains the statutory law of the United States today. Section 11101(a) of Title 49 of the United States Code expressly states that "[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"

As this Board noted in its Notice of this hearing, "a railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable."¹ This is

¹ See also *GS Roofing Products Company v. Surface Transportation Board*, 143 F.3d 387, 391 (8th Cir. 1998).

because “*public needs* must shape the boundaries of [carriers’] duties.”² To quote the U.S. Court of Appeals:

In the almost one hundred years since the passage of the [Interstate Commerce Act] there has developed a new ‘common’ law of transportation under which the public duty of railroads has been broadened beyond that extant under the common law of carriers. It is not only ‘common carriage,’ but transportation which is subject to the Act and to the Commission’s statutory powers. . . . (*internal citations omitted*).

Id. (emphasis added). A carrier’s statutory duty runs not to shippers alone, but to the public.³

This duty is justifiably placed on the railroads. The common carriage obligation was bought and paid for by the American people to ensure the growth and prosperity of the United States. As Representative James Oberstar, Chairman of the House of Representatives Committee on Transportation and Infrastructure, recently recounted.

The railroads received enormous grants of land in the 19th Century in the public interest to develop rail service for the public use, convenience and necessity. They received some 278,000 square miles of public land. That is about 8 percent of the total land surface of the United States They were given the surface timber rights, surface mineral rights, subsurface mineral rights, coal, oil in some cases, gas in others that they could use for themselves or to sell off, worth billions of dollars.⁴

To put it in the words of the Court in *Akron*, the “Act’s declaration of the common-carrier status of railroads is not an unjust one, in view of the governmental largess which railroads have received, and in view of the unique importance to commerce of rail transportation.”⁵ The obligation remains as indispensable to our Nation’s economic well-being today as it was in the 19th Century.

Safety is a DuPont core value and a principle our Company has lived by throughout its 206 year history. DuPont is also committed to sustainability. Thus, the Company transports by rail both because there are often no viable alternatives and because rail is the safest, most energy efficient and environmentally sound method of

² *Akron, Canton & Youngstown R. Co. v. ICC*, 611 F.2d 1162, 1168 (6th Cir. 1979), cert. denied, 449 U.S. 830 (1980) (emphasis added).

³ *Brotherhood of Ry. Clerks v. Florida E.C. Ry.*, 384 U.S. 238, 245, 86 S.Ct. 1420, 1424, 16 L.Ed.2d 501 (1966).

⁴ *Hearing Before the Committee on Transportation and Infrastructure of the House of Representatives*, 110th Cong., 1st Sess. 70 (2007) (statement of James I. Oberstar, Chairman) (emphasis added).

⁵ *Akron*, 611 F.2d at 1166.

land transport. Contrary to the position now advocated by several railroads and the American Association of Railroads ("AAR"), however, safety is not a primary factor in the discussion about the continuing viability of the common carriage obligation before this Board. Railroads "may not ask . . . [the STB] to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are . . . regulations governing such transport and those regulations have been met" ⁶

This precedent remains valid today. Issues involving the safe transport of goods by rail are more properly addressed by the Department of Transportation (DOT) and its various agencies. DuPont and the American Chemistry Council's other Responsible Care partners already are working with these agencies and the railroads to enhance and improve the freight rail system's already excellent safety performance. ⁷

3. *Curtailing Common Carriage Would Serve Only to Enhance the Railroads' Already Significant Economic Leverage Over their Customers and Would Harm the Public Interest*

The common carriage obligation imposed by the United States Code was the basis upon which the railroads operated prior to the enactment of the Staggers Act. The Staggers Act empowered railroads and their customers to enter into mutually agreeable, binding contracts for the carriage of goods. However, in the absence of such contracts, railroads remain obligated to "provide transportation upon reasonable request." The legislative history leaves no doubt that when Congress enacted the Staggers Act, it recognized 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 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.

96 U.S.C.A.N. 4002 (emphasis added). That is, without the requirement of common carriage, the railroads could restrict service or completely refuse to carry the output of American manufacturing facilities, mines and farms. This would create enormous commercial leverage for the rail carriers. If exercised, this economic leverage could

⁶ *Id.* at 1169

⁷ See discussion *infra* at page 6

wreak havoc on the Nation's economy, disrupting industries as fundamental as food, energy, transportation, pharmaceuticals, consumer products, and even national defense

A bedrock principle of transportation, the common carriage obligation cannot and should not be sacrificed to benefit the railroads' oligopoly at the expense of the general population. Rather, the obligation must be viewed and judged in the interest of the "public need." That obligation must be retained and preserved if this Nation and its citizens are to prosper and maintain their economic security.

4. Existing Exemptions from Common Carriage Impose Adverse Consequences on the American Public and Economy

Even today, the railroads can avoid the common carriage obligation if an exemption is granted to the requesting railroad by this Board. Such exemptions may be granted if the Board determines that sufficient competition exists such that the marketplace will regulate the transport services and rates and the public interest will be protected. The Board, as you know, is also empowered to withdraw an exemption if it determines that the competitive conditions no longer warrant it.

Recent actions by the railroads suggest that existing exemptions pose the risk of further erosion of the common carriage principle and should be eliminated. To cite just one example, under an exemption granted by this Board's predecessor (the ICC), the railroads are currently refusing inter-modal transport of certain regulated materials contained in portable ISO containers. In October 2005, DuPont was notified that within two weeks our rail carrier would no longer transport toxic inhalation ("TIH") materials in inter-modal service. At that time, DuPont used this carrier's inter-modal service to supply a customer in Mexico with a TIH contained in ISO tanks approved by the Federal Railroad Administration and the Department of Transportation. The carrier not only refused to carry the loaded ISO tanks that were already in the supply chain *en route* to the customer, but also declined to transport the empty tanks from the customer's facility back to the DuPont site. Because the customer could not accept rail tank cars, DuPont was forced to ship by truck to meet its contractual obligations. Ultimately, DuPont lost the customer to a producer in India because of the higher transportation costs associated with trucking.

As the above example illustrates, the exemption that enables the railroads to decline to transport ISO tanks of TIH materials has potentially detrimental consequences. First, it forces companies to use a less efficient and less safe method of transport for small amounts of these materials or to trans-load them in populated areas near the port of export. Second, it may force the manufacture of these necessary products abroad. In the first case, the environment and the public are exposed to greater risk than would be the case if the materials were safely transported by rail in government-approved packaging. In the second case, U.S. manufacturing is curtailed and jobs are put at risk, the trade

deficit is exacerbated and local economies are adversely affected. Accordingly, this Board should revisit the exemption for inter-modal transport that permits carriers to refuse to carry regulated materials via the rail system and forces their movement over the public highways.

5. *The Railroads are the Safest, Most Environmentally-Friendly and Energy Efficient Mode of Land Transport for Most Products, Including Essential Regulated Chemicals*

The railroads are also eroding their common carriage obligation in more subtle ways. As Bud Shuster, a current advisor to the AAR and former chairman of the House of Representatives' Transportation and Infrastructure Committee, has acknowledged, "[r]ailroads would rather not carry hazardous materials."⁸ Be that as it may, our society and economy depend on many of those materials and rail is the safest method of land transportation. According to the AAR:

The rail hazmat safety record is extremely favorable. In 2005 (the most recent year for which data are available), 99.997 percent of rail hazmat shipments reached their final destination without a release caused by an accident. Railroads reduced hazmat accident rates by 86 percent from 1980 through 2005.⁹

Yet despite their excellent safety record and the obvious benefit to the general public, railroads are seeking to avoid the carriage of regulated materials; they have determined to increase their risk of economic loss and generate lower profits. In the experience of DuPont, railroad companies are placing unjustified conditions and establishing prohibitive rates for the transport of regulated materials.

Many of the regulated materials the railroads are now so reluctant to carry are vital to the public health and to our Nation's economic well-being. For many, if not most, there are no viable substitutes. For example, chlorine is critical to providing safe drinking water and protecting public health. The widespread use of chlorination and other water treatment methods has been recognized by the CDC and the National Academy of Engineering as one of the most important advances in modern history. More than 85 percent of all pharmaceuticals and 95 percent of crop protection chemicals rely on chlorine chemistry. A significant number of DuPont products that contribute to the U.S. economy and to the standard of living Americans enjoy rely on rail transport of chlorine for use at Company facilities. Another chemical the railroads wish to exclude is anhydrous ammonia, a key ingredient for fertilizers used by American agriculture.

⁸ Shuster, *The Railroads' Burden*, Pittsburgh-Inbune Review, February 2, 2007.

⁹ Association of American Railroads, *Hazmat Transport by Rail*, February 2008.

Some may assume that the common carrier obligation is not critical to the “public use, convenience and necessity” since alternative means of transportation exist. That assumption would be incorrect. Neither the United States’ inland waterway system nor its highway network, which are sometimes identified as alternatives for moving materials the railroads would prefer not to handle, is in fact a realistic, competitive option in most cases.

As a rule, the Nation’s inland waterways are not a viable alternative to rail transport. DuPont prefers to transport regulated and other materials by barge whenever possible since the mode is very safe and economical: “a single barge can move the same amount of cargo as 58 semitrucks at one-tenth the cost.”¹⁰ However, the realities of geography impose significant limitations on this mode of transportation, since there is not always navigable water between the points of origin and destination. Even when navigable waters exist, the pertinent plant sites’ infrastructure may render transport by barge practically impossible. Additionally, moving product by barge is becoming more difficult because 50% of the locks on the waterways operated by the U.S. Army Corps of Engineer are now functionally obsolete, and that number is expected to increase to 80% in just twelve years *Id.*

Moving more regulated products via our Nation’s highways is neither realistic nor good for the American people. As previously indicated, moving those products by rail is 16 times safer than moving the same materials by truck. Each rail car can carry the equivalent of four-truckloads, and a “typical train takes the freight equivalent of several hundred trucks off our highways”¹¹ In this period of rising fuel costs, the AAR is justifiably proud of the railroads’ energy efficiency, since trains can move one ton of freight 423 miles per gallon of diesel.¹² Thus, rail transport reduces both the congestion that causes Americans to spend 3.5 billion hours per year stuck in traffic (at an annual cost of \$63 billion to the economy) and the air pollution trucks generate.¹³ In short, shifting transportation of materials from rail to truck would increase air pollution and fuel consumption, exacerbate highway congestion, and decrease our collective security. Clearly, it is in the national interest to keep and move more regulated materials on the railroads, and not move them onto the highways.

6. *The Pursuit of Inherently-Safer Technologies is Already Underway In Our Free Market Society*

The AAR has argued that rather than transporting regulated materials under common carriage by rail, the chemical industry should simply adopt inherently safer

¹ National Chamber Foundation, *The Transportation Challenge: Moving the US Economy* (2008) at 59

¹¹ Association of American Railroads, *Freight Railroads Relieve Highway Congestion*, February 2008.

¹² <http://www.aar.org/newsroom/imphylkewa45.htm>

¹³ *The Transportation Challenge* at 59

technologies¹⁴ The AAR has urged the industry to either develop more benign products for transport or alter manufacturing processes to eliminate the need for these chemicals altogether. Despite the previously discussed, adverse precedent on the issue, the railroads argue that the common carrier obligation should not apply to these materials

These arguments fail to recognize two basic realities. First, companies like DuPont already pursue and employ inherently-safer technologies where possible and viable to do so. For example, the Clean Technologies Business Unit in DuPont recently announced the startup of plants in El Paso, Texas and Linden, New Jersey to provide oil refineries with on-site spent sulfuric acid regeneration and sulfur gas recovery services which result in significant reductions in sulfur dioxide emissions. These custom-designed DuPont facilities will also reduce the amount of sulfuric acid transported to these refineries. This approach, however, is not always possible or practical.

Second, just as people require oxygen to sustain life, many products essential to modern life require specific chemicals for which there are no substitutes. The manufacture of tens of thousands of products the American people need and take for granted would be impossible without many of the very chemicals the railroads would rather not transport. Instead of advocating for the right to decline transport of regulated materials, America's railroads should continue to work with their customers and the Department of Transportation to further enhance their already excellent safety record.

7. Conclusion

Allowing our Nation's railroads to reduce or eliminate their common carriage obligation to transport all non-exempt goods, regulated or not, would have significant adverse implications for our manufacturing base and, consequently, our economy. Expanding the railroads' vast leverage by enabling them to refuse carriage could leave companies like DuPont unable to move basic raw materials and products at any price, and force them to move manufacturing operations abroad. As you know, such a transfer of the United States' manufacturing base is already happening in many industries, imposing on the American people the costs of lost jobs and a trade imbalance driven by fewer exports.

In closing, Chairman Nottingham, Vice Chairman Mulvey, and Mr. Buttrey, I thank you for allowing me to share my Company's views today. DuPont stands prepared to work with the railroads, with government and with others in industry to enhance the safety and efficiency of the rail transportation system on which our Nation's safety and economic well-being so depend.

¹⁴ See note 9 above