

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**Public Hearing
April 24-25, 2008**

**COMMENTS OF JACK N. GERARD,
PRESIDENT AND CHIEF EXECUTIVE OFFICER,
AMERICAN CHEMISTRY COUNCIL**

Mr. Chairman, and members of the Board, I am Jack Gerard, President and CEO of the American Chemistry Council. I would like to thank you for inviting me to discuss the importance of the railroad common carrier obligation, which is indeed critical to our industry and to the US economy as a whole.

Our \$635 billion dollar industry employs more than 850,000 people in all 50 states, and accounts for 10 percent of all US merchandise exports. In fact, more than 96% of all manufactured goods are directly touched by chemistry.

Products supplied by the chemistry sector are essential in manufacturing, agriculture, energy, transportation, technology, communications, health, education, defense, and virtually every aspect of our lives. Basic industrial chemicals are the raw materials for thousands of other products including plastics, water treatment chemicals, detergents, pharmaceuticals and agricultural chemicals. These applications include medicines and medical technologies that save our lives, computers that expand our horizons, foods we eat, water we drink, cars we drive, homes in which we live, and the clothes we wear.

The business of chemistry depends on the nation's railroads to deliver approximately 170 million tons of products each year, accounting for more than \$6 billion in annual railroad freight revenues, making chemicals the second-largest railroad commodity, behind only coal, in terms of volume, and third-largest revenue contributor to rail revenues, behind only coal and intermodal.

At the outset, I want to make it clear that railroads have been, and will continue to be, our partners. All major North American railroads are Partners of our Responsible Care[®] initiative, a program originated and managed by the Council, which since its inception has been dedicated to continuous improvement in health, safety, security and environmental performance, including the safety of chemical transportation. So plainly, while we and the railroads have some differences in our regulatory and legislative priorities to promote improved access to competitive and reliable rail service, we will always strive to have a cooperative and constructive relationship with them on issues of safety.

Turning to the issue at hand, the Interstate Commerce Clause of the Constitution grants power to Congress to write the laws that govern our nation's commerce. Congress recognizes the common carrier obligation as the bedrock on which the entire national railroad transportation system is built, and that obligation is expressly written into the governing statute. Railroads are chartered to operate in the public interest because the public depends on safe and reliable service in the delivery of a wide range of products on which we all rely. Congress wisely recognized the importance of the common carrier obligation as being fundamental to the effective operation of a rail system to serve the needs of the nation.

As long as a railroad holds the operating authority over a line of track, it must respond to all reasonable requests for transportation service on that line. The railroad cannot pick and choose what traffic it will serve, and cannot simply walk away from its responsibilities to serve the customers on a particular line, short of presenting to this Board legally sufficient reasons why it should be permitted to abandon that line.

Yet, as fundamental as the common carrier obligation is, that principle is now being questioned. It appears the interest in re-examining the common carrier obligation coincides with a period of traffic growth and perceived capacity constraints. Diminishing the obligation would presumably allow railroads to pick and choose the traffic they serve. While they may argue this will improve their efficiency, it will erode their ability to serve the nation's economic needs. The railroads have even gone to Congress and argued they should be relieved of their common carrier obligation to transport certain chemical products. They are seeking legislative relief, because as they themselves recognize, their position would require an amendment of the statute requiring them to provide transportation in response to reasonable requests, a requirement found in section 11101(a) of title 49 of the US Code.

While Congress has given the Board the authority to enforce the common carrier obligation, the power to amend that obligation rests solely with Congress.

In its notice setting this hearing the Board posed eight questions. Because of the importance to my members of Question 2 regarding the common carrier obligation with respect to the

transportation of hazardous materials, I am going to limit my remarks to addressing that question.

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

As I just mentioned, and as the Board is aware, the railroads have suggested they should not be obligated to carry certain hazardous materials without some sort of congressionally imposed cap on their liability in case of accidents resulting in the release of such materials.

I want to emphasize that, while no form of transportation is absolutely risk-free, rail transportation for hazardous materials has proven to be a generally safe mode. ACC members are committed to the safe movement of our products, and thanks to efforts on all sides -- railroads, shippers, car designers, and government regulators -- rail transportation is getting even safer. Following extensive study and tests, the U.S. Department of Transportation has just published proposed rules that we expect will lead to a much safer design for the tank cars that our members own and control. DOT also just released a rule that aims to establish the safest and most secure rail routes for transporting hazardous materials. In addition, the Federal Railroad Administration recently completed work on a final rule to help reduce rail accidents caused by human factors, such as crew fatigue and operating errors. The FRA has identified such human factors as the leading cause of rail accidents. See the rules published on February 13, 2008 in volume 73 of the Federal Register, beginning at page 8442.

Our members are concerned that effort to avoid the common carrier obligation for hazardous materials is not about safety or the public welfare. If railroads no longer were obligated to carry them, many of these products would not move at all. This would in turn seriously disrupt the production of life saving medications and medical devices, body armor used by our military and law enforcement officers, energy saving solar panels, and so much more.

It is important to remember that questions surrounding the common carrier obligation and transportation of hazardous materials have been raised before and settled by previous case law. The current discussion regarding the transportation of hazardous materials is reminiscent of efforts in the late 1970s to avoid the transportation of spent nuclear fuel (in casks) and certain other radioactive wastes. Taking the view that hauling these materials was too risky, the railroads refused to publish tariffs until ordered to do so by this Board's predecessor, the Interstate Commerce Commission (the ICC). The railroads then went to court seeking an order that the ICC had exceeded its authority in requiring them to publish tariffs. The Sixth Circuit US Court of Appeals (in the Akron, Canton & Youngstown case in 1979) upheld the ICC's order, and set out a rule that remains good law – I'm quoting now from the court's decision: "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."

No one is suggesting that the American Chemistry Council's members have not complied with the DOT rules governing the tank cars that are to be used to transport their products. And, as I mentioned, DOT continues to be active in overseeing tank car design. DOT's Pipeline and

Hazardous Materials Safety Administration, in conjunction with the Federal Railroad Administration, recently published for comment a proposed rule that will, we hope, lead to an even safer tank car design, specifically for materials posing a risk of toxicity when inhaled.

I should point out, while on the subject of that rulemaking, that DOT in its Notice of Proposed Rulemaking strongly affirmed the common carrier obligation. In its discussion of the regulatory framework governing tank cars, DOT said that the railroads would be violating the common carrier obligation if they attempted, through their interchange rules, to prevent the movement of hazardous materials through the application of tank car specifications different from those duly considered and approved by DOT. I refer you to pages 17824 and 17825 of volume 63 of the Federal Register, published on April 1, 2008.

In sum, the common carrier obligation is vital to my members and the products they produce, which in turn are part of the lifeblood of our economy and the thousands of essential goods we take for granted every day.

Thank you again for allowing the American Chemistry Council to present its views to the Board. I would be glad to respond to any questions.

**Jack N. Gerard
President and Chief Executive Office
American Chemistry Council
1300 Wilson Boulevard
Arlington, VA 22209**

Submitted: April 17, 2008