

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO 677 (Sub-No 1)
COMMON CARRIER OBLIGATION OF RAILROADS -
TRANSPORTATION OF HAZARDOUS MATERIALS

COMMENTS OF THE
NORTH DAKOTA GRAIN DEALERS ASSOCIATION

Identification

The North Dakota Grain Dealers Association (NDGDA) is a 97-year-old nonpolitical voluntary membership trade association of 150 companies that operate over 300 country grain elevators in North Dakota. These grain elevators are the first point of sale for nearly all grain produced in the state. These businesses receive, clean, condition, blend and ship grain on to domestic and worldwide markets. NDGDA's governing Board consists of managers of nine companies operating 15 of those elevators.

NDGDA filed written comments and testified at the April 24, 2008 hearing in Ex Parte 677 – Common Carrier Obligation of Railroads. On May 23, 2008 NDGDA also filed post-hearing comments, dealing primarily with the liability imposed on its members by railroad leases and track agreements.

NDGDA's Interest

Many NDGDA members sell crop protectants and fertilizers, including anhydrous ammonia. Without these ag inputs the productions from farmers served by NDGDA members would be reduced in quantity and quality. That would have far-reaching effects into domestic and export food markets. The June 4 Public Notice of this hearing identifies rail as "the safest and most efficient mode of transportation" for many hazardous material. The continued reliable rail transportation of those ag inputs at reasonable cost is critical to farmers, ag input suppliers, grain handlers, and consumers.

Hearing Delay

NDGDA believes that granting the hearing delay into September, as requested by several parties with intense interest and expertise, would have provided for more thoughtful input and not seriously delayed consideration of the matter. We suggest the record be kept open for 45 days after the hearing. Board actions on matters of intense concern to rail customers have sometimes been delayed much longer.

Why Transfer Liability?

In its June 4 Notice of Public Hearing the Board said it "is interested in specific policy solutions to the liability issue, including solutions modeled on the Price-Anderson Act of 1957." This appears to already assume there is a need for a transfer of liability. We understand the railroads have risk and liability. However, the manufacturers, distributors and retailers of these products each bear risk and liability when the products are under their control. Why should railroads conducting their normal business be any different? NDGDA is skeptical of any link in the chain passing off its liability to another link or someone outside the chain. Being liable for one's own acts provides discipline to operate as prudently as possible and being able to "pass the buck" is not good policy.

Rail Customers Already Bear Some Railroad Liability

Many rail customers are already the unwilling recipients of this buck-passing through property leases and track agreements that shift liability from the railroad. If they want to remain in business at that location, rail customers have no choice on accepting those obligations. Some provisions were detailed in our post-hearing comments in Ex Parte 677. For the record here we will repeat one sentence of lease language that is very descriptive: "LESSEE WILL INDEMNIFY, DEFEND AND HOLD THE INDEMNITEES HARMLESS FROM ANY AND ALL SUCH CLAIMS REGARDLESS OF THE NEGLIGENCE OF THE INDEMNITEES" (underlining added). There should be no further buck-passing from railroads to others. In fact the public and rail customers would be well-served by the Board looking into the adverse effects of lease language like that quoted above.

When railcars in poor condition are spotted for loading a great deal of heavy work often goes into preparing them for loading. There is no remuneration from the railroad for this or the cost of injuries that may result.

The Board's Role

The June 4 Notice of Public Hearing requests comments on the appropriate role of the Board in developing a policy solution. Because the common carrier obligation is in statute we will respectfully suggest the Board's role does not include redefining the obligation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Steven D. Strege hereby certifies that on July 8, 2008 a copy of this document was sent by first class mail to all parties of record as of this date.