

222805

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

**COMMON CARRIER OBLIGATION
OF RAILROADS**

)
)
) **STB Ex Parte No. 677 (Sub-No. 1)**
)
)

**COMMENTS OF
DIVERSIFIED CPC INTERNATIONAL, INC.**

CONSULTANT:

HIGHROAD Consulting, Ltd.
55 E. Jackson, Blvd., Suite 625
Chicago, IL 60604
(312) 765-0250

By: Sandra J. Dearden
HIGHROAD Consulting, Ltd.
55 E. Jackson Blvd., Suite 625
Chicago, IL 60604

Dated: July 9, 2008

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423**

**STB EX PARTE 677 (Sub. No. 1)
COMMON CARRIER OBLIGATION OF RAILROADS**

**COMMENTS OF
DIVERSIFIED CPC INTERNATIONAL, INC.**

Diversified CPC International, Inc. (Diversified) hereby provides these Comments in response to the Board's Notice of Public Hearing served June 4, 2008 ("Notice"). Therein, the Board expresses its intention to examine issues related to the common carrier obligation of railroads with respect to the transportation of hazardous materials. In the decision, the Board invited comments on what constitutes a reasonable request for service involving the movement of TIH, as well as whether there are unique costs associated with the transportation of hazardous materials, and if so, how the railroads recover those costs.

Diversified is a manufacturer of blowing agents for the plastic foam industry, propellants for consumer aerosol products, and various specialty gases, headquartered in Channahon, IL. Diversified has six manufacturing and distribution facilities in North America; all are rail served. Its largest plant at Channahon, IL (rail station Lorenzo, IL) is served by Burlington Northern Santa Fe Railroad (BNSF); other plants are located at Anaheim, CA served by Union Pacific Railroad (UPRR); Petal, MS (rail station Dragon, MS) served by Norfolk Southern Railroad

(NS); and Sparta, NJ which is served by the New York & Susquehanna & Western Railway (NYSW). Diversified also has a distribution facility operated by a partner company at Ajax, ON and a distribution facility in Miami, FL that serves customers in Florida, the Caribbean, and South America.

Diversified is an ISO 9000 certified company that ships and receives hazardous commodities in tank cars, including Di-methyl Ether, STCC 28 182 24; Petro Pentane, STCC 29 121 20; and Propane and finished products that move under STCC 29 121 90, Liquefied Petroleum Gas. Diversified's annual spend for rail transportation is more than \$2.6 million; 52% of their finished products move via rail. They also receive two-thirds of our inbound raw materials by rail; the ratio of inbound raw materials to carloads of finished products is approximately 2:1.

Diversified is extremely safety conscious. All of its operating employees are required to complete safety training and to adhere to Diversified's safety rules. Rail is a safe mode of transportation. In more than 20 years, Diversified has had only one rail transportation related non-accidental release (NAR) caused by a design defect in the plug on the gauging device valve on a leased rail car. Following that incident Diversified's management immediately ordered a thorough inspection of the other cars in Diversified's fleet with similar gauging devices to confirm that the plugs did not have orifices drilled through them. With the exception of that incident, Diversified's record has been spotless. This "track record" is not serendipitous – Diversified personnel work hard to ensure safe transportation of their shipments

COMMENTS

Cost and Safety Issues Related to Transportation of Hazardous Materials

The chemical industry is very safety conscious. Major rail accidents involving TIH commodities have not been caused by the shippers or the rail equipment, yet new safety rules and standards for car design have been established in recent years, further enhancing the safety of shipments of hazardous commodities. Forcing rail shippers to assume 100% of the liability for shipments of hazardous commodities, thereby enabling the railroads to limit their common carrier obligation on shipments of certain hazardous commodities (particularly when railroad track or railroad operating personnel caused the recent accidents involving TIH commodities) does not address the root cause of the problem – that being the need of the railroads to improve their own infrastructure, safety standards and procedures. Indeed, if the railroads are not required to assume liability for their personnel and infrastructure, they will have no incentive to improve their own safety procedures.

The AAR has been working with railcar manufacturers and shippers on these issues and we believe that is the appropriate forum for addressing rail car design standards. However, limitation of common carrier obligation on hazardous commodities would be unfair to shippers and it would be a decided detriment to the general public. In the hearing conducted in April, Ex Parte 677, it was clear that the railroads have common carrier obligation to provide service for hazardous commodities, including TIH commodities. The Board should re-confirm that the Law is clear that the Common Carrier Obligation requires rail carriers to transport hazardous commodities, including TIH commodities.

The Board also solicited comments on whether there are unique costs associated with the transportation of hazardous materials and, if so, how railroads recover those costs. Since Uniform Rail Cost System (URCS) costs are required for STB proceedings, we are concerned that such discussions could include the allocation of costs in URCS. Because URCS was developed to calculate system average costs, there is no way to accurately allocate specific costs for handling hazardous commodities or any other commodities in URCS.

We agree that URCS requires review, as the URCS cost model does not accurately report costs. When URCS was initially released in the 80's, the ICC/STB did so with the directive that URCS would be updated every five years – that has never been done. Further, the special studies behind URCS were done in the 50's. As you know, the railroads and technology have changed significantly during the past 50 years, crews have been reduced, they no longer have yardmasters, etc.

Even with the change in methodology for calculation of railroad cost of capital, URCS costs are significantly higher than costs calculated with HIGHROAD's cost model, which is based on the railroads' own financial data reported in the R-1 reports to the STB. However, the allocation of costs in URCS is highly technical in nature and consideration of potential changes to URCS should involve testimony of cost experts and in-depth consideration. In view of the foregoing, any we do not believe costs and allocation of costs in URCS are appropriate for this proceeding. If the Board deems it necessary to review the allocation of costs in URCS, it should be considered in a separate proceeding.

Carrier Imposed Requirements for Infrastructure Investments by Shippers

Diversified's plant in Channahon, IL was constructed in 1981 – 1982 and commissioned in the fall of 1982. The decision to build the plant at Channahon (Lorenzo) was based on agreements reached in negotiations with the Atchison, Topeka & Santa Fe Railway (Santa Fe) which included a demurrage agreement that provided three-days' free time. Diversified's cost estimates and operating plan were predicated on the demurrage agreement, and that agreement was critical to Diversified's operation and ability to be cost competitive.

Since BNSF's acquisition of the Santa Fe, BNSF has engaged in a pattern and practice of shifting policies, which continually increase our costs and infrastructure burdens. At the same time, Diversified personnel are continually left guessing as to what new policy changes are in the offing that will impose new burdens on its operations.

After the BNSF acquisition of the Santa Fe, BNSF terminated the demurrage agreement. Initially, BNSF agreed to reestablish the former agreement. However, after BNSF experienced a series of personnel changes in the Marketing Department, BNSF personnel advised that the agreement would not be reestablished.

Again, we approached BNSF and negotiations were successful – we secured a lease track agreement at a reasonable rate, Diversified modified its operations plan and demurrage was eliminated. The following year, BNSF informed us that they had implemented a new program with rates for track leases that were intended to address capacity issues by geographic location. Without intervention, track lease costs would have increased 375%. Negotiations continued and the railroad agreed to a plan which would transition increased track lease charges over a three-year

period, which would give Diversified time to expand its rail siding. Further, BNSF committed to participation in the growth initiative by providing a per-car allowance for part of Diversified's investment costs.

Diversified made the decision to invest capital in expanding its rail operation, and the track expansion was approved by Diversified's Board of Directors. This included construction of additional track and additional infrastructure changes that were required, including piping for additional loading/unloading facilities. Engineering plans were prepared and approved by BNSF Engineering personnel; however, once again, the railroad tried to back out of the deal and said they were no longer doing track allowance agreements. A compromise agreement was reached, but BNSF's participation in the investment costs was significantly lower than the original offer.

Diversified has invested more than \$2.2 million at its rail-served plants for infrastructure improvements required to maintain and increase rail shipments. In addition to expansion of the lease track at the Channahon plant, projects included.

- Adding a fourth tank car unloading station at the Anaheim, CA plant.
- Rail infrastructure improvements and storage at the Petal, MS (Dragon, MS) plant.
- Installation of an additional rail car unloading station, rail risers, and a bulk storage tank at the Sparta, NJ plant.
- The Channahon plant was originally constructed with eight (8) tank car loading and unloading stations. Prior to the latest expansion to add the fourth siding, we added four additional tank car loading and unloading stations, and we added bulk storage for a new product blend shipped exclusively by rail. With the addition of the 4th rail siding, the plant now has (16) tank car loading and unloading stations, effectively doubling the original loading and unloading facilities of the original plant design. The plant now has a capacity to handle up to 24 tank cars on its four (4) sidings.

While Diversified has invested capital in infrastructure to increase rail shipments, the carrier/shipper relationship often appears to be one-sided. In 2004, one of Diversified's customers asked Diversified's chemical engineer to develop a new product for the customer's packing operations. Diversified developed the new product which was accepted by its customer. We applied to the AAR for a Standard Transportation Commodity Code and negotiated a rail rate, Diversified acquired additional tank cars, and invested more than \$500,000 for construction of a storage tank farm, blending system and associated pumps and piping for the new commodity. During the past three years, rail costs for this move have increased more than 41%. Just last week, Diversified received notice from the customer that because of the dramatic increase in transportation costs, they may no longer purchase the new product from Diversified. This is the second customer that Diversified has lost due to railroad pricing practices. While we respect the fact that the Board does not have jurisdiction over rates we believe it is extremely unfair for railroads to make proposals to rail customers that require capital investments, and subsequently to chase the business away with irresponsible pricing practices. It is not clear if the rail carriers in this route are de-marketing this business, or if this is the result of across-the-board rate increases applied with no attention to the competitive environment. The Board should clarify if such a practice constitutes an unreasonable practice and, if so, if such an unreasonable practice would be subject to jurisdiction of the Surface Transportation Board.

CONCLUSIONS

Diversified appreciates the Board's consideration of its comments. Diversified relies on rail transportation and we have invested significant capital to maintain and increase rail shipments to and from our facilities and we strongly believe that the common carrier obligation serves a crucial role in ensuring that shippers dependent on rail service can obtain transportation upon reasonable request. Since rail transportation is the safest means of transporting hazardous commodities, the public interest is served by continued enforcement of the common carrier obligation.

Decisions regarding the location of manufacturing and distribution facilities have been made based on access to rail service and analyses that included cost projections. Further, Diversified CPC International, Inc. has invested capital to maintain and increase rail shipments. Diversified is prepared to continue to invest in infrastructure if necessary to accommodate growth. In so doing, we will effectively "hold up our end of the bargain" in maintaining capacity, even though the railroads' continual shifts of costs and infrastructure responsibility onto us has dramatically increased our challenges in remaining cost competitive. By the same token, we believe it is imperative that shippers like Diversified be assured that the railroads will "hold up their end of the bargain" - in other words, the common carrier obligation to provide competitive rates and reasonable service on reasonable demand.

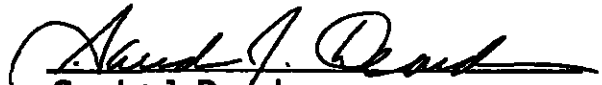
During the course of the hearing in April, Ex Parte 677, it seemed obvious that the railroads have common carrier obligation to provide service for hazardous

commodities, including TIH commodities. We urge the Board to reaffirm this fundamental common carrier obligation.

Further, we need clarification from the Board as to what constitutes an unreasonable practice. In situations where shippers have invested capital to increase rail shipments, and subsequently lost business due to railroad de-marketing practices or irresponsible pricing, the Board should clarify if such practices may constitute an unreasonable practice and, if so, if such an unreasonable practice would be subject to jurisdiction of the Surface Transportation Board. Further, although it seems clear that the railroads have a fundamental duty that can only be modified by Congress, the Board should continue to monitor and interpret the common carrier obligation on a case-by-case basis, and shippers should have the ability to seek relief from the STB when violations occur.

Finally, we are concerned that such discussions could include the allocation of costs in URCS. Because URCS was developed to calculate system average costs, there is no way to accurately allocate specific costs for handling hazardous commodities or any other commodities in URCS. However, if the Board deems it necessary to review the allocation of costs in URCS, it should be considered in a separate proceeding.

Respectfully submitted,



Sandra J. Dearden
HIGHROAD Consulting, Ltd.
55 East Jackson Blvd, Suite 625
Chicago, IL 60604
(312) 765-0250

Dated: July 9, 2008

Consultant for Diversified CPC International, Inc.