

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**COMMON CARRIER OBLIGATIONS OF RAILROADS –
TRANSPORTATION OF HAZARDOUS MATERIALS**

**Public Hearing
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**Comments of Arkema Inc.
2000 Market Street
Philadelphia, PA 19103
John O'Leary
Director, Corporate Logistics
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1. Introduction

Arkema Inc ("Arkema" or the "Company") is pleased to provide comments on the Surface Transportation Board's ("STB") examination of issues related to the common carrier obligation of railroads with respect to the transportation of hazardous materials. Arkema is a manufacturer of chemicals with its headquarters in Philadelphia, Pennsylvania. Arkema employs 2400 people in North America, and had sales of approximately \$2 billion in 2007. Arkema owns and operates fifteen manufacturing facilities in North America, and routinely uses railroad carriers to move both raw materials and finished products to and from its plants. As such, Arkema is directly impacted by the common carrier obligations of the railroads.

As a large chemical producer, Arkema's commitment to safety is of utmost priority. The Company continuously monitors its safety performance, and works diligently to improve upon its safety record. Arkema is a member of the American Chemistry Council, and adheres to its Responsible Care® codes. Arkema has been recognized for its safety performance over a dozen times by various railroads over the last 10 years, and applies the same diligence to safety for rail transportation that it does to safety at the Company's manufacturing facilities.

Arkema supports the statutory duty of railroads to provide common carrier transportation or service upon reasonable request. Arkema believes that the common carrier duty to transport hazardous materials via rail is a statutory mandate of Congress.

that cannot be modified by the STB to exclude the transportation of such materials, nor to approve ruinous rate charges for such transportation. Other departments and agencies, including the Department of Transportation, Federal Railroad Administration and the Department of Homeland Security, are working diligently to upgrade the security design of the nation's existing viable and safe rail transportation system, and Arkema is committed to working with these departments and agencies to take the necessary safety and security measures needed to transport hazardous materials throughout the U S

2. Rail Transportation Of Hazardous Materials Is The Safest And Most Efficient Means Of Transportation, And Other Departments And Agencies Are Taking Steps To Further Improve Safety Performance.

It is beyond dispute that rail transportation of hazardous materials is, by any measurement, the safest method to move these materials throughout the country. Unlike highways that are open and accessible to all with a motorized vehicle, railways are privately held and access to them is strictly controlled by the railroads. The current safety record of the railroads with respect to the transportation of hazardous materials is impressive, and the industry's improvement since 1980 in minimizing accidents involving hazardous materials transportation has been dramatic. Clearly, the existing liability and incentive structure currently in place has provided the correct incentives to a sustained and significant improvement in the safety record of hazardous materials rail transportation.

The chemical industry is heavily dependent on the railroads to deliver raw materials and finished goods. Outside of coal and intermodal, chemical industry shipments are the largest volume carried by the nation's rail companies. The nation's chemical infrastructure is geographically dispersed throughout the U S, and its' products, including toxic inhalation ("TIH") compounds such as chlorine and anhydrous ammonia, are used in thousands of local jurisdictions within the 48 states using rail delivery. Chemical manufacturers, distributors and users all rely upon dependable and affordable rail service for the transportation of raw materials and products, including hazardous material shipments. It is a credit to all involved that the overall accident rate for chemical industry rail shipments is less than that for shipments of other types of goods.

It should be noted that the railroads have been strong advocates for even greater safety measures to ensure that their much-improved safety record remains in tact. In this regard, they have been joined fully by the chemical industry. Both the railroads and the chemical industry are working together to assist the Federal Railway Administration ("FRA") in its regulation to improve the safety design of TIH railcars. The FRA recently closed the comment period on an advanced notice of proposed rulemaking to specifically address the design standards for future railcars that are used to transport TIH materials. Both the railroads and the chemical industry are supportive of a reasonable redesign that could potentially limit releases from railcars that are involved in derailments and other accidents.

Both industries are also actively supporting the efforts of the Department of Homeland Security ("DHS") in its efforts to mitigate threats such as terrorism and sabotage. DHS is intimately involved in evaluating the existing rail infrastructure and working with those in the industry to improve upon the security aspects of rail shipments. DHS has taken a number of steps to require improved operational standards for rail shipments that will limit the potential for a significant release caused by terrorism or sabotage. For instance, DHS proposed a rule as part of a package of new security measures that will require freight rail carriers to ensure 100 percent positive hand-off of TIIH materials, establish security protocols for custody transfers of TIIH rail cars in high threat urban areas, and appoint a rail security coordinator to share information with the federal government, as well as formalizing the Transportation Security Administration's freight and passenger rail inspection authority.

Finally, the Pipeline and Hazardous Materials Safety Administration has a number of regulations that apply to the shipment of hazardous materials via rail. These include specific provisions that apply to placarding, loading and unloading, segregation of hazardous materials, handling of placarded cars, and specific regulations involving explosives, gases, flammables, poisonous materials, and radioactive materials. 49 C.F.R. Part 174.

Beyond the regulatory environment, the railroads and chemical industry have also voluntarily teamed with a number of federal, state and local governmental agencies and law enforcement teams to enhance the safety of moving materials by rail. Joint training, coordination with law enforcement officials, and increased internal controls are all working to keep the rail system the safest method of transportation throughout the country.

Materials such as chlorine are basic to our way of life, and routinely used in thousands of processes throughout the U.S. There is no better or safer way to transport these materials than rail. The most likely alternative to rail shipments would involve trucking these materials around the country. Not only would this result in a far less efficient logistical system, it would also subject many more communities to potential impacts from a demonstrably less safe shipping method. The rail industry recognizes that public highways are inherently more dangerous than the nation's rail system, particularly when it comes to transporting hazardous materials. See, *"Railroads the Safe Way to Move," American Association of Railroads, March 2008*, http://www.aar.org/getfile.asp?file_ID=61. The law of unintended consequences is likely to follow any action by the STB to materially alter the common carrier obligations of the railroad industry that would precipitate a shift to more highway transport of TIIH products.

Thus, while the industry already enjoys an enviable safety record in transporting hazardous materials, it is likely that, given the work of other federal agencies and departments, the safety record of the industry will improve in the future, and that rail will continue to be the safest method of transport for hazardous materials. Given the

extensive regulatory and voluntary activity being undertaken, there is no need for the STB to tinker with the common carrier obligations of the railroads as they currently exist

3. The Railroad Industry Has A Statutory Common Carrier Obligation To Move Hazardous Materials By Rail, And The STB Lacks The Authority To Overturn Or Significantly Modify This Legislative Mandate.

The enabling statute that created the STB contains a mandate that the railroads provide common carrier transportation 49 U.S.C. § 11101(a). The common carrier statutory obligation was created by Congress, and can only be modified by Congress. The STB does not have the authority to overturn or even significantly modify the statute.

The common carrier obligation of railroads has a long tradition in the law. It was first recognized in the common law. See, Wisconsin, Minnesota and Pacific Railroad v. Jacobson, 179 U.S. 287, 296-97 (1900) (“[railroads have from the outset been regarded as public highways, and the right and duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon the fact they are organized for the public interests and to subserve primarily the public good and convenience”), see also, Munn v. Illinois, 94 U.S. 113, 130 (1877). The common carrier obligation was codified by Congress over 100 years ago in both the Interstate Commerce Act of 1887 and in the Hepburn Act of 1906. More recently, Congress again considered and codified the common carrier obligation of railroads in the Staggers Act of 1980. Thus, the common carrier obligation of the railroads is one of the most well established principles of common and statutory law in the land.

It is not the railroads themselves that should be able to determine what is “reasonable.” The common carrier obligation is a public need that shapes the boundaries of a carrier’s duties and obligations. The history of railroads in America demonstrates that the people of the U.S. bought the right to the common carrier obligation. Rep. James Oberstar, Chairman of the House of Representatives Committee on Transportation and Infrastructure, stated recently:

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.

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). Because of the tremendous largesse that was granted to the railroads in the U.S., and the indispensable nature of rail transportation as part of the nation’s commerce, the common carrier responsibility is not to be limited except in the most extreme of circumstances. And this situation is not such an extreme circumstance.

The STB has requested comment on what is a "reasonable request" to transport hazardous materials. There is legislative history in the Staggers Act that informs what is "reasonable."

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 the 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. Thus, without the common carrier obligation, the railroads themselves could determine which goods they were willing to ship, and could restrict service or refuse to carry materials from certain industries, farms, mines, and the like. This would allow the railroads a tremendous unilateral ability to impact interstate commerce, and Congress refused to allow for this power to shift to the railroads.

The railroads have previously tried to restrict their responsibility to carry materials that they unilaterally deemed too dangerous to transport. In the 1970s, the railroads refused to publish tariffs to haul spent nuclear fuel and certain other radioactive wastes. The STB's predecessor, the Interstate Commerce Commission, ordered the railroads to publish such tariffs. The railroads sought judicial relief from the ICC's order. However, the U.S. Court of Appeals for the Sixth Circuit ruled against the railroads, stating:

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.

Akron, Canton & Youngstown R.R. Co. v. I.C.C., 611 F.2d 1162, 1169 (6th Cir. 1979). The Akron decision remains good law, and applicable to the railroad industry's latest cargo controversy. In the case of transport of TIIH compounds, there are DOT, FRA and DHS standards governing their transport. As such, there is no need for the STB to limit in any way the railroads' common carrier obligations vis-à-vis TIIH and hazardous material compounds.

Arkema submits that, in many instances, it would be unreasonable for the chemical industry to seek shipment of hazardous materials in any other method but rail. In determining what is meant by a "reasonable request," the STB needs to consider the following:

- a An efficient, cost-effective and reliable rail industry is essential to the health of the U S economy, including its chemical industry,
- b The railroads have an obligation under Akron to transport hazardous materials so long as the chemical industry complies with the regulations of the STB's sister departments and agencies governing such transport,
- c The railroads acknowledge that the safest and most effective way to move hazardous materials is by rail, *see, "Railroads the Safe Way to Move," American Association of Railroads, March 2008, http://www.aar.org/getfile.asp?file_ID=61 .*
- d Many users of the rail system to transport hazardous materials have no viable alternatives for shipment of these materials,
- e. Where alternatives do exist, the most common alternative is highway transport, which has a safety record severely worse than the rail system¹,
- f Rail accidents since 1980 have dramatically been reduced, largely through efforts to improve the railroads' own safety training, infrastructure, and operational logistics, *see, American Association of Railroads, Press Release, October 17, 2007.*
- g Rail transportation is the most fuel efficient method of transporting materials via land-based systems, thus allowing for lower costs and far less environmental impact than other modes of transport,
- h The granting of any limitation on the responsibility of the railroads to transport hazardous materials could be extended to cover multiple other products that the railroad industry may not like to carry, such as munitions, explosives, compressed gases, radioactive materials, nuclear fuel, oil-based products, and the like, which would not be acceptable,
- i There are few "inherently safer alternatives" to many of the chemicals now used to ensure the health of our nation's inhabitants, nor to provide the myriad of products demanded by our modern lifestyles

¹ The STB needs to be cognizant of the ramifications of any actions it may take to limit or otherwise constrain the transportation of hazardous materials by rail. The primary alternative to rail shipment is truck transport. As already noted, the nation's highways are not nearly as safe as the rail lines for transporting hazardous materials. The highway system is significantly more crowded, and has a much worse accident rate than the railroads. Further, each railcar currently holds about 4 - 5 tank trucks of product per rail car. Shifting to tank trucks to transport hazardous materials will result in much greater truck traffic, and the need to load and unload a much higher number of vehicles.

Arkema believes that the chemical industry is not making any unreasonable requests that the railroads transport chemicals. The chemical industry has continually upgraded the tank cars and other equipment used to transport its materials by rail, and has worked diligently to provide for safer transportation. The rail industry has accepted such shipments since the beginning of both industries, and it is difficult to believe that there is any reason not to continue to ship these materials via rail.

4. There Is No Need To Modify The Common Carrier Obligation Or Liability Associated With The Transportation Of Hazardous Materials

While the railroad industry is now arguing that it faces potential "ruinous liability" for transporting hazardous materials, that argument lacks basic support. Following the tremendous consolidation of the Class 1 railroads, and the monopoly power that the railroads now wield in many instances, the railroads are in their best financial condition they have been in for the past few decades. In fact, the returns on investment are so great that they have attracted legendary value investors, such as Warren Buffett, who has increasingly upped Berkshire-Hathaway's equity stake in BNSF. See, http://www.tracksideproductions.com/plugins/p2_news/printarticle.php?p2_articleid=23. The industry as a whole has made immense profits the last few years, and hardly seems the poster-child for economic ruin.

The railroads have argued that the transportation of hazardous materials subjects them to ruinous liability in the event of an accident. However, it is undisputed that U.S. freight railroad accidents have declined markedly since 1980, particularly with respect to hazardous material release accident rates. The Association of American Railroads has stated that "[r]ailroads reduced hazmat accident rates by 86 percent from 1980 through 2005." AAR, *Hazmat Transport by Rail*, February 2008. CSX states on its website that it has achieved a 99.9% success rate for safe transport of hazardous materials. CSX asserts that, while hazardous material loads have increased by 50%, "only 9 of the 518,000 rail cars handled by CSXT released any contents due to derailment, a better than 99.9 percent success rate for transporting hazardous material carloads without incident." CSX, *Safety Is A Way of Life*, http://www.csx.com/?fuseaction=general_csxo_safety. The AAR states that 99.997% of rail shipments carrying hazardous materials reached their final destination without a release caused by an accident. The railroads have been able to reach this tremendous safety record without any of them actually being subjected to "ruinous liability."

No railroad has faced "ruinous" liability where accidents have occurred. The two most recent fatal accidents involving TIH compounds, at Minot, North Dakota and Graniteville, South Carolina, both resulted from the negligence of the railroads themselves. The railroads involved have been able to settle with those injured or impacted by the accidents, and have continued in business with significant profit margins. It is not unusual for any industry to be civilly liable for its own negligence, and given that such accidents happen few and far between, there is no need to carve out any exemption for the railroads as they carry hazardous materials. In fact, it could be argued from a

policy perspective that limiting liability would lead to less safety attention by the railroads, and actually result in more accidents and fatalities.

And the railroads have hardly been idle waiting for STB action to address the situation. The railroads have methodically charged higher and higher rates to those shippers that are moving freight that the railroads have deemed hazardous. In fact, in the recent STB rulings on the Dupont Rate Cases, rates at levels over three or four times the cost to provide service were proscribed for Chlorine. It is hard to fathom that the STB, which has essentially ignored the plight of the shippers being faced with tremendous increases in freight charges that threaten thousands of jobs in the U.S., would now seek to undermine the common carrier obligation of the railroads that is mandated by Congress simply because of unfounded claims of potential financial liability.

The threat of liability has caused the four major Class 1 railroads to use extra care in routing hazardous materials through the best-maintained tracks and on the most direct routes. It has also made them review and modify their operations and enhance their training of employees. Capping liability or otherwise modifying the common carrier obligation of railroads to transport hazardous materials would provide a negative incentive for the railroads to take such care when transporting hazardous materials.

Railroads have made vast improvements in their safety performance because of the fact that they face liability for their negligence. Railroads have also significantly increased their profitability, gained monopoly pricing power over many of their lines, and are now recognized as one of the most financially secure industries in the nation. Reducing the liability exposure of rail carriers would provide an incentive for railroads to regress on their safety performance, not enhance it.

5. Summary

Arkema thanks the STB for the opportunity to participate in the process associated with this critical issue. Arkema is a strong proponent of safety within the chemical and rail industries, and believes that tremendous progress has been made to protect workers and the public from inadvertent releases of hazardous materials during transportation. A number of federal agencies and departments are individually working on regulations and standards to enhance the safety of shipping hazardous materials via rail.

Arkema strongly supports the common carrier obligation of the railroads, and does not believe that any shift in policy is required by the STB to further protect the railroad industry. Rather, Arkema believes that the STB has neglected to act upon numerous complaints to it that the railroad industry is attempting to eliminate the shipment of hazardous materials via rail by unheard of price increases.