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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No 677 (Sub-No 1)

*COMMON CARRIER OBLIGATION OF RAILROADS—
TRANSPORTATION OF HAZARDOUS MATERIALS*

COMMENTS

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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WRITTEN TESTIMONY

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THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") submits this Written Testimony in response to the invitation of the Board set forth in a Notice of Public Hearing ("Notice") served on June 4, 2008, in which the Board announced that it would hold a public hearing to examine issues related to the common carrier obligation of railroads with respect to the transportation of hazardous materials. The League is an association of companies interested in transportation, and many of its members ship goods via rail, including hazardous commodities. The League appreciates the opportunity to make its views known in this important matter, which was partially and more generally discussed by the League in its testimony in Ex Parte 677, *Common Carrier Obligation of Railroads*.

I. RAIL TRANSPORTATION IS THE SAFEST MODE FOR TRANSPORTING LARGE QUANTITIES OF HAZARDOUS MATERIALS AND IS COMPREHENSIVELY REGULATED BY DOT AND TSA. BOTH AGENCIES HAVE TAKEN EXTENSIVE RECENT ACTIONS TO ENHANCE THE SAFE TRANSPORTATION OF HAZARDOUS MATERIALS BY RAIL

As the Board well knows, rail carriage is the safest mode of transporting hazardous materials. In the prior proceeding in Ex Parte 677, the railroad industry noted that over 99 99

percent of all hazardous materials shipments by rail reach their destination without incident, and rail hazardous materials accidents have been reduced by 86% from 1980 through 2005.

American Association of Railroads, Policy & Economics Dept., "Hazmat Transport by Rail," February 2008, available at www.aar.org/industryinitiatives/~media/images/Get_the_Facts.ashx

Every participant in the industry, including the railroads, agrees that rail transportation of hazardous materials is substantially safer than transportation via truck, in part because of the nature of rail transportation, which is confined to its own right of way without sharing that network with other parties.

The transportation of hazardous materials by rail is, as the Board also well knows, extensively regulated by DOT. However, the Board may not be aware that DOT has in recent years been taking even more extensive steps to insure that hazardous materials are transported safely. For example, the Federal Railroad Administration ("FRA") and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") have recently promulgated interim rules that incorporate the 9/11 Recommendations Act of 2007 (Pub. L. 110-53) regarding safety and security measures for the transportation of hazardous materials by rail. See, 73 Fed. Reg. 20752 (April 16, 2008). The rule requires extensive data compilation and analysis to assess potential safety and security risks, and sets forth requirements for transportation delays, interim storage safety, and pre-transportation inspections.

PHMSA and FRA have also recently issued a Notice of Proposed Rule Making that proposes new tank car safety standards in response to National Transportation Safety Board ("NTSB") recommendations on tank car structural integrity after the accidents at Minot, ND and Graniteville, SC. See 73 Fed. Reg. 17817 (April 1, 2008). The rule proposes new tank car structural requirements as well as maximum speeds for trains carrying toxic-by-inhalation

("TIH") materials. FRA also addressed the issue of railroad operating practices in order to deal with the issue of human error in the rail industry, which was the cause of both the Minot and Graniteville accidents. See, 73 Fed. Reg. 8442 (February 13, 2008). Finally, FRA has revised its track safety standards in response to several railroad accidents where rail joint failure was a key contributing factor. See 71 Fed. Reg. 59677 (October 11, 2006).

Finally, the Transportation Security Administration ("TSA") has announced an important new rulemaking to address the security risks associated with the shipment of TIH materials. See 71 Fed. Reg. 76852 (December 21, 2006). The proposed rule requires hazardous materials shippers to conduct inspections prior to tendering a shipment to the carrier, and provides for chain of custody requirements. The rule also proposes location reporting in certain high-threat urban areas, and a variety of other actions.

Thus, the Board's current inquiry must take into account this extensive and growing web of regulations that directly address safety and security issues in the transportation of hazardous materials, and the Board must take extreme care not to undermine the important safety initiatives of these other federal agencies with a direct interest in the matter. As set forth in more detail below, the League believes that the Board must continue to broadly apply the common carrier obligation in order to insure the safe transportation of hazardous materials, and conversely must not do anything that could undermine the requirements and incentives for safe operation.

Finally, any discussion of hazardous materials transportation would be incomplete without an understanding that shippers, in addition to railroads, participate extensively in assuring that hazardous materials are transported safely. Shippers expend large amounts of money in equipment, training, and operations and processes to insure that hazardous materials are transported safely. The League is aware that a number of individual shippers will be

submitting testimony in this proceeding that details their own efforts in this regard. The League encourages the Board to take careful note of shippers' focus on safety in evaluating the issue of the safe transportation of hazardous materials.

II. THE COMMON CARRIER OBLIGATION IS AN INTEGRAL PART OF THE SAFE TRANSPORTATION OF HAZARDOUS MATERIALS, AND THE BOARD MUST CONTINUE TO GIVE THE BROADEST POSSIBLE INTERPRETATION TO THAT OBLIGATION IN ORDER TO INSURE THE SAFE TRANSPORTATION OF THESE MATERIALS

From its very inception a century ago, the Board's predecessor, the Interstate Commerce Commission ("ICC"), dealt with situations in which rail carriers did not wish to carry commodities that were considered highly dangerous. Many years ago, these included explosives in various forms¹ and various chemicals². In all of these cases, the ICC and the courts ruled that railroads were common carriers with respect to these products and were under a broad duty to transport them³. Thus, from its very early days, the ICC broadly applied the common carrier obligation to the transportation of dangerous commodities.

In more recent years, the concerns of rail carriers have shifted to the risks of transporting chemicals and nuclear materials. The ICC, however, has continued to broadly apply the common carrier obligation.

In a series of decisions over the last thirty years, the Board and its predecessor have soundly and firmly rejected railroad attempts to "flag out" of their common carrier obligation.

¹ *Actiesselskabet Ingrid v. Central R. Co. of N.J.*, 216 F. 72 (2d Cir. 1914), *U.S. v. Wharton & N.R. Co.*, 26 I.C.C. 309 (1913), *DuPont de Nemours Powder Co. v. L. & N.R. Co.*, 33 I.C.C. 288 (1914).

² *National Petroleum Association v. Atchison, T. & S.F. Ry.*, 38 I.C.C. 65 (1915).

³ See, e.g., *Actiesselskabet Ingrid v. Central R. Co. of N.J.*, 216 F. 72 (2d Cir. 1914) (common carrier has a duty to transport dynamite), *Regulations for the Transportation of Explosives*, 53 I.C.C. 533 (1919), *Bruskas v. Railway Express Agency*, 172 F. 2d 915 (10th Cir. 1949) (common carrier has duty to transport fireworks when packed in accordance with ICC regulations).

with respect to hazardous materials of various types.⁴ The agency held in these decisions that, where transportation by rail is subject to the statutory safety jurisdiction of another federal agency, railroads may not avoid their common carrier obligation on the ground that to do so is unsafe. In affirming the agency's decisions, the courts of appeal have resoundingly reaffirmed the common carrier obligation of railroads to haul even the most dangerous hazardous materials.

For example, in *Radioactive II*, the ICC stated that "a carrier may not refuse to haul a commodity by charging that it is too dangerous to do so." *Radioactive II*, 359 I.C.C. at 73. Similarly, in *Radioactive IV*, a post-Staggers Act ruling, the agency held that "a carrier may not refuse to transport radioactive materials on the grounds that they are too hazardous if the shipments meet DOT safety standards." 364 I.C.C. at 956. In *Radioactive I*, the agency held that if a carrier believes that DOT regulations are insufficient, the carrier should approach DOT for an amendment to its regulations. *Radioactive I*, 357 I.C.C. 458, 464 (1978). In *Commonwealth Edison Co. v. Aberdeen & R.R. Co.*, 2 I.C.C.2d 642 (1986), the agency found that railroads would engage in an unreasonable practice by attempting to avoid their common carrier obligation to handle the involved traffic. Most importantly, in *Akron*, the Sixth Circuit ruled that the public need for rail transportation of hazardous materials defines the boundaries of the common carrier obligation, and is an essential factor in determining whether a request for rail transportation of TIH materials is reasonable. *Akron*, 611 F.2d at 1168. This is consistent with

⁴ See, *Radioactive Materials, Missouri-Kansas-Texas R. Co.*, 357 I.C.C. 458 (1978) ("*Radioactive I*"), *Radioactive Materials, Special Train Service, Nationwide*, 359 I.C.C. 70 (1978) ("*Radioactive II*"), *U.S. Energy Research and Development Administration v. Akron, C. & Y. R. Co.*, 359 I.C.C. 639, 640-41 (1978), *aff'd Akron, Canton and Youngstown Railroad Company v. Interstate Commerce Commission*, 611 F.2d 1162 (6th cir. 1979), *cert. denied*, 449 U.S. 830 (1980), *Trainload Rates on Radioactive Materials, Eastern Railroads*, 362 I.C.C. 756 (1980), *aff'd sum. nom.*, *Consolidated Rail Corporation v. Interstate Commerce Commission*, 646 F.2d 642 (D.C. Cir. 1981), *cert. denied*, 459 U.S. 1047 (1981), *supplemented*, 364 I.C.C. 981 (1981) ("*Radioactive III*"), *U.S. Department of Energy v. Baltimore and Ohio R. Co.*, 364 I.C.C. 951 (1981) ("*Radioactive IV*").

the Board's observation, in its Notice in this proceeding, that it is well-settled that a railroad cannot deny service merely because it is inconvenient or unprofitable to do so

Moreover, strong case precedent has rejected safety arguments as grounds to narrow the common carrier obligation. The overriding public interest in transporting hazardous materials safely, and the role of rail transportation as the safest mode, has prevailed over all claims that such transportation is unsafe. In *Akron*, the court held that a railroad may not ask the Board "to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT regulations governing such transport, and these regulations have been met." *Akron*, 611 F.2d at 1169. See also, *US Dept of Energy v The B & O R R Co*, 364 I.C.C. 951, 959 (1981) ("*DOE*"). As noted above, there are extensive federal regulations that govern the safe transportation of hazardous materials by rail. Also, just as with the radioactive materials at issue in the *Akron* case, "no other mode of transportation is more suited to the economical carriage of these materials than train carriage." *Akron* at 1168.⁵ While courts have held that "railroads may seek to prove the reasonableness of additional safety measures," there is a heavy burden upon carriers to show that, "for some reason, the presumptively valid [DOT] regulations are unsatisfactory or inadequate in their particular circumstance." *Consolidated Rail Corp v ICC*, 646 F.2d 642, 650 (D.C. Cir. 1981) ("*Conrail*"), See also, *DOE* at 959-60. Because DOT has paramount jurisdiction over rail safety matters, there is a rebuttable presumption "that expenditures for safety measures not specified by [it] are unnecessary and fail to satisfy the criteria of reasonableness." *Akron*, at 650.

⁵ The ICC found that "truck shipments of nuclear wastes would, because of the greater number of smaller shipments required, increase the probability of accidents involving nuclear materials." *Id.* The same would be true of TIH materials.

There is an extremely strong public policy reason why the ICC has for so many years so broadly interpreted the common carrier obligation with respect to hazardous materials – in a word, safety. Because of the extremely high barriers to entry in the rail industry, a rail carrier's refusal to transport a particular hazardous commodity would mean that shippers of that commodity would be without railroad service entirely, since no other railroad could be called to serve the shipper. Thus, the common carrier obligation insures that rail transportation – the safest mode for transporting hazardous materials long distances over land – is always available

What is true of flat refusals to serve is also true of restrictions to serve. As discussed further below, restrictions and conditions imposed by a railroad beyond those required by DOT, the federal agency with preeminent safety jurisdiction, could discourage a shipper from using rail transportation.

Any attempt to narrow the common carrier obligation would be directly contrary to public interest in safety, which is the principle set forth in the *Akron* decision when the agency ruled that "a carrier's statutory duties run not to shippers alone, but to the public," and that the public need for safe transportation determines the boundaries of common carrier obligation. *Akron*, p. 1168. Thus, the Board should continue to give the common carrier obligation the broadest possible reading with respect to hazardous materials, and to reject any attempts to limit or condition rail transportation beyond requirements imposed by DOT, in order to insure that rail transportation – the safest mode for transporting these products – is always available.

III. STB JURISDICTION TO ADDRESS THE LIABILITY OF HAZARDOUS MATERIALS TRANSPORTATION IS EXTREMELY LIMITED

The Board's jurisdiction over railroad liability concerns is limited to its authority, under 49 U.S.C. 10704, to review the reasonableness of railroad practices established pursuant to 49 U.S.C. 10702. Even then, the Board cannot exercise that jurisdiction in a manner that adversely

affects safety. In addition, the Board's jurisdiction is limited by recent federal legislation in which Congress determined that railroads should be subject to state law tort claims for the consequences of their own negligence when railroads violate federal safety standards.

In *Classification Ratings on Chemicals, Conrail*, April 30, 1986, 31 C C 2d 331 (1986) ("*Classification Ratings*"), Conrail attempted to flag out a group of hazardous chemicals, contending that these commodities were too dangerous to transport *Id* at 332 The railroad argued that its flag outs were "reasonable precautions to protect the public interest and its own corporate financial integrity " *Id* The ICC flatly rejected Conrail's flag outs, despite the fact that, unlike the transportation of nuclear materials where carrier liability is limited by the Price-Anderson Act, there are no limits on carrier liability for the transportation of hazardous chemicals *Id* at 336 The agency ruled that Conrail had not demonstrated an inability to use its tariffs to address its operating and liability concerns, it had not provided any financial evidence regarding insurance, indemnification, or the extent of its potential liability, and – most importantly – it had not demonstrated that the DOT regulations were inadequate or exhausted its remedies with DOT *Id* at 337 On the other hand, the ICC concluded that the harm to shippers was "very clear," because without the common carrier obligation, these hazardous chemicals might not be transported at all *Id* at 337-38. Thus, rail carriers bear an extremely high burden of proof to show that any restrictions on the common carrier obligation are reasonable

The question of liability also has been addressed As the *Akron* court observed, "[a] question of possible liability for damage resulting from carriage of a commodity is within the Commission's jurisdiction as the regulator of the economics of interstate rail transport " *Akron*, 611 F 2d at 1170. But the court also noted that DOT has exclusive authority to promulgate industry-wide safety standards, and that the ICC/STB may permit carriers to make more, but not

less, stringent rules for their carriage of hazardous materials *Id* Thus, it follows that the Board's jurisdiction to address liability issues must not be exercised in a manner that even conceivably adversely impacts safety

Finally, the Board should be aware that recent Congressional action expanding railroad liability for a railroad's negligence limits, is highly relevant to, and may well be determinative of, the question of the Board's unreasonable practice review of any attempt by rail carriers to limit their liability. In 2007, Congress passed the Recommendations of the 9/11 Commission Act of 2007, Pub L No 110-53, which amended 49 U.S.C 20106 to clarify that the Federal Railroad Safety Act does not preempt state law negligence claims Congress enacted this provision in response to federal court decisions holding that state law tort claims for the accidental release of anhydrous ammonia arising from a Canadian Pacific derailment near Minot, North Dakota, were preempted by federal law. *E g , Lundeen v Canadian Pac Ry Co* , 447 F 3d 606 (8th Cir 2006), *Mehl v Canadian Pac Ry* , 417 F Supp 2d 1104 (D N D. 2006). In amending Section 20106 in 2007 in this regard, Congress declared that state law causes of action are not preempted when a railroad has failed to comply with federal regulations or with the railroad's own standards created pursuant to federal regulation 49 U S C 20106(b)(1) (2008)

Thus, Congress expressly expanded railroads' liability for damages resulting from their own negligence for accidents, including those involving the release of TIH materials This action by Congress would be highly relevant in any Board review of a limitation of liability imposed by a rail carrier, since it would be difficult or impossible to show that a limitation of liability is a "reasonable" practice when Congress has so recently and expressly expanded carriers' liability under state tort law Moreover, especially in light of Congress' action, any

ruling by the Board that a limitation of liability is "reasonable" would not in any event preempt state tort law

V. The STB Historically Has Favored Private Sector Solutions to Transportation Problems, and Should Do So In This Highly Complex and Controversial Area

Over the years, the STB has favored private sector solutions to complex transportation problems. This sound approach is rooted in the realization that often the parties, rather than the Board, are in the best position to have full knowledge of a problem and are in the best position to assess their interests and reach a sound solution. The League believes that this is such a case. The policy areas set out by the Board in its Notice in this proceeding involve highly complex and difficult issues that should be discussed in the first instance by the numerous interests involved. The League believes that the Board should encourage and/or facilitate such private-sector discussions.

VI. The STB Should Defer to Congress In the Area of Liability

It is clear from the above discussion that the question of liability in the case of the transportation of hazardous materials involves broad policy matters, many of which are beyond the Board's jurisdiction and expertise. These include the intersection of tort law and regulation; the safety jurisdiction of other federal agencies, issues of insurance, and the complex effect of liability caps and other devices for limiting or shifting liability. Moreover the question of liability in the transportation of hazardous materials involves complex trade-offs among various interests, some of which regularly appear before the Board, but many of which do not. The Board is not in a position to make these difficult, complex and often controversial choices - they are properly a matter for the Congress.

Thus, although the Board may be interested in "specific potential policy solutions to the liability issue, including solutions modeled on the Price-Anderson Act of 1957," the League strongly believes that, as a matter of prudence and comity, the Board should defer to Congress on this matter. In view of the currency and importance of the issue, however, the League would find it appropriate for the Board to recommend that Congress appoint a blue-ribbon panel to develop sound policy in this area, as the Congress has done in other areas of transportation policy ⁶

VII. Any Revision to the Current Liability Regime Must Be Very Carefully Considered and Must Be Based on Sound Principles

In light of all the above, the League submits that any revision to the current liability regime must be very carefully considered, and must be based on sound principles. The League would suggest that the following principles are a starting point for developing a useful dialogue on this matter:

1) The current liability regime is based upon fault (i.e., negligence) which means that a party that violates a standard of care should be liable. This regime has deep historical roots and is central to our legal system. For that reason alone, the system should not be lightly tampered with, and any revisions should be done with extreme care.

2) Hazardous materials play an important role in our nation's life and economy. These materials have a wide variety of uses, among them water purification, the manufacture of fertilizer for our nation's crops, and a wide variety of important industrial applications. These products need to be transported, often long distances, from place of manufacture to place of use.

⁶ National Surface Transportation Infrastructure Financing Commission, The Path Forward: Funding and Financing Our Surface Transportation System. Interim Report of The National Surface Transportation Financing Commission (2008)

Our national policy, as implemented by our laws and regulations, should promote and facilitate the safest mode of transport for these products

3) The safest mode of transport for these products is by rail. There are, and should be, strong national rules to assure safe and secure rail transportation. Once these rules are complied with, no entity should further restrict rail transportation of these products on the grounds of safety, security or risk.

4) In light of the benefits to the nation of these products, there is a national interest in assuring that any liability for transporting these goods is covered, in order to assure the continued availability of these goods.

5) It would be useful for all interested parties to explore, in an appropriate setting, liability arrangements other than those that currently exist. These could include a reasonable cap on liability.

6) All parties must recognize that liability arrangements for the transport of these goods is an extremely complicated issue that implicates safety. Any new liability arrangement must continue to strongly encourage every party in the supply chain to carefully load, transport, and unload hazardous materials and to make investments in safer infrastructure. Any revision to the current fault-based liability regime may mean that entities that are not responsible for an accident would pay in part for the costs of an accident. All parties interested in this issue need to recognize that the issue of who should pay for the fault of another, how, and how much, are difficult, complex and controversial matters that must be addressed holistically.

7) A Price-Anderson Act model cannot simply be transferred to the railroad industry because of the significant differences between the nuclear power industry and the railroad industry, and the Congressional objectives underlying the Price-Anderson Act. Parties engaged

in these discussions must recognize that Price-Anderson cannot serve as a solution without a clearly defined set of policy objectives developed with the participation of all stakeholders, in order to achieve the best balance between safety, liability risk, and public compensation

The League appreciates the opportunity to make its views known on this important matter.

Respectfully submitted,

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