

222992

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 677 (Sub # 1)
COMMON CARRIER OBLIGATION OF RAILROADS
TRANSPORTATION OF HAZARDOUS MATERIALS

WRITTEN COMMENTS OF
CNJ RAIL CORPORATION

Introduction

CNJ Rail is grateful for the opportunity to address these issues of a common carrier's obligations with the Board.

CNJ recognizes that the Board will be hearing testimony today from a large number of organizations who have significantly more at stake than CNJ does with regards to the Board's examination today of the common carrier obligation of railroads, specifically with regards to the railroads common carrier obligation to handle various hazardous materials, and specifically, commodities commonly known as toxic inhalation hazards (TIH's).

The Class I railroads present here today will talk extensively about the potentially ruinous liability that they face from the possibility of a major

The shippers, and shipping coalitions represented today, will discuss the serious repercussions they will undoubtedly feel should the Board change, or alter, the common carrier obligations of railroads with respect to the movement of TIH's.

The Board appears to be considering a variety of solutions to address the potentially ruinous liability railroads face in the wake of a serious TIH accident. The Board also appears to be analyzing the possibility of whether or not a comprehensive new regulatory initiative, model after the Price Anderson, might be an appropriate remedy for TIH shipments on the national rail network. It is the latter point that has lead CNJ to seek to participate in this proceeding..

The Root Question - "*Lets cut to the chase*"

At this time, CNJ would like to pose this question: What is the real principle concern of today's hearing?

CNJ believes the principle concern being discussed today is not so much the obligation of the railroads to handle hazardous material, it really is the tremendous liability exposure railroads face in the event of release of TIH's into the environment by either accident, (either by negligence or criminal intent), or solely by criminal intent with intent to seriously harm and kill human life.

Indeed the underlying root question is: ***How do we (the American people) deal with the loss of human life, serious injury to human life, and harm to the environment after a serious accident or incident on the national railroad network?***

(Note the above sentence, You will see it again later on in the document.)

What is the primary motive behind this discussion? In a word: Money.

In today's Post 9/11 world, railroads and insurance companies are dreadfully concerned over the very real possibility that the next major TIH release is more likely going to be the result of a criminal act with the intent to maim and kill. The railroads safety record with regards to handling TIH shipments, prior to 9/11, and even post 9/11 is excellent. However, when you add in the possibility of humans intentionally creating the next accident, the risk climbs exponentially. The risk translates into a significant financial consideration.

CNJ believes today's discussion boils down to these two salient questions:

1: Is the potentially ruinous liability railroads face in handling TIH shipments so burdensome that it is appropriate to relieve them from their obligation to handle that traffic?

2. If you can't relieve the railroads of the burden of having to provide said service, what solution is most appropriate for mitigating potential liability concerns? (i.e. the payment of financial awards in the event of a catastrophic accident.)

Price Anderson

Price Anderson is a significant multifaceted legislative solution developed in conjunction with the nuclear industry to produce a comprehensive solution to problems and concerns in the nuclear industry. CNJ will let others speak about the Price Anderson model at length. We simply believe that modeling any solution for the railroad industry after Price Anderson may not be in the best interest of the railroad industry.

Why? The nation's railroads already have the foundation laid for a much simpler, less burdensome regulatory and liability cap system. CNJ believes the nation's railroad needs to simply expand upon their existing system.

The nation's railroads should use and develop their own system, not use someone else's.

CNJ Rail, as small as we are, feels that the Board should consider one additional model in today's discussion; a simple cap on liability similar to the cap routinely granted to all railroads by Congress since the late 1980's. Indeed, CNJ Rail has been surprised to date that neither the Class I's or the chemical shipper groups have looked at this other model. Given how simple and less burdensome it is, CNJ is surprised the Class I's themselves haven't stopped to consider it.

Railroads today already enjoy some limited statutory caps on liability.

While the Board appears to be intent on examining the possibility of modeling a solution to the current worry of potentially ruinous liability after the Price Anderson model, CNJ would like to bring to the Board's attention the very plain, simple, yet highly effective **caps on liability exposure** that Congress has already given all the railroads in the US today.

CNJ would like to discuss with the Board today the provisions of 49 USC 28103 and 49 USC 28102. A copy of both statutes are hereto attached as exhibits #1 and #2 respectively. CNJ believes that instead of a more extensive, and potentially burdensome regulatory scheme, such as in Price Anderson, all the nation's railroads really need is a slight variation of the already existing liability caps Congress gave the railroads in order to promote the development of passenger rail services in the United States.

Make no mistake about it, these statutes are not a comprehensive new regulatory scheme. The plain language of the statute does not take away any party's right to sue. It simply caps the total liability for a single occurrence to \$200,000,000.00 in total. Rail carriers, in most cases, are usually then indemnified by the commuter rail agency, so in essence, they are relieved of all liability exposure all together.

Which leads us to now draw this parallel for the Board.

In order to promote the development of passenger rail use in the US, Congress recognized the nation's railroads concern regarding potentially ruinous liability when it came to passenger

operations and asked itself the following question: *How do we (the American people) deal with the loss of human life, serious injury to human life, and harm to the environment after a serious accident or incident on the national railroad network?*

For nearly twenty years, Congress continued to endorse and support that all the nation's railroads needed for continued development of passenger service was a simple liability cap. (Which incidently, actually puts people in potential harms way) Nothing fancy, just a straight up liability cap. It has lead to a greater developement of passenger rail services and safely protected railroad shareholders from ruinous liability concerns for a long time now So why are we considering today a much more sophisticated regulatory scheme, instead of building on our simple, already existing liability cap model?

Since the underlying root question in the TIIH issue is virtually identical to the root issue Congress grappled with twenty years ago, is it that far of a reach to conclude, as was done in the desire to expand passenger rail services, that in order to promote the continued use of rail to safely transport TIIH commodities, that Congress create a simple liability cap to cover TIIH releases, similar to the above statutes? CNJ believes it is not that much of a variation to the exisitng cap system

Conclusions

In closing, CNJ Rail Corporation thanks the Board for the opportunity to speak with you today. We hope that the Board takes into consideration the existing railroad liability cap system when it debates whether or not the potentially ruinous liability exposure is sufficient justification to relieve rail carriers of the common carrier obligation to move TIIH shipments over the national rail network.

Respectfully submitted,

Eric S. Strohmeier /s/

Eric S. Strohmeier
Vice President, COO
CNJ Rail Corporation

Exhibit # 1

[CITE: 49USC28103]

TITLE 49--TRANSPORTATION

SUBTITLE V--RAIL PROGRAMS

PART E--MISCELLANEOUS

CHAPTER 281--LAW ENFORCEMENT

Sec. 28103. Limitations on rail passenger transportation liability

(a) Limitations.--(1) Notwithstanding any other statutory or common law or public policy, or the nature of the conduct giving rise to damages or liability, in a claim for personal injury to a passenger, death of a passenger, or damage to property of a passenger arising from or in connection with the provision of rail passenger transportation, or from or in connection with any rail passenger transportation operations over or rail passenger transportation use of right-of-way or facilities owned, leased, or maintained by any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State, punitive damages, to the extent permitted by applicable State law, may be awarded in connection with any such claim only if the plaintiff establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others. If, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, this paragraph shall not apply.

(2) The aggregate allowable awards to all rail passengers, against all defendants, for all claims, including claims for punitive damages, arising from a single accident or incident, shall not exceed \$200,000,000.

(b) Contractual Obligations.--A provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims.

(c) Mandatory Coverage.--Amtrak shall maintain a total minimum liability coverage for claims through insurance and self-insurance of at least \$200,000,000 per accident or incident.

(d) Effect of Other Laws.--This section shall not affect the damages that may be recovered under the Act of April 27, 1908 (45 U.S.C. 51 et seq., popularly known as the "Federal Employers' Liability Act") or under any workers compensation Act.

(e) Definition.--For purposes of this section--

(1) the term "claim" means a claim made--

(A) against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State, or

(B) against an officer, employee, affiliate engaged in railroad operations, or agent, of Amtrak, any high-speed

railroad authority or operator, any commuter authority or operator, any rail carrier, or any State;

(2) the term "punitive damages" means damages awarded against any person or entity to punish or deter such person or entity, or others, from engaging in similar behavior in the future; and

(3) the term "rail carrier" includes a person providing excursion, scenic, or museum train service, and an owner or operator of a privately owned rail passenger car.

(Added Pub. L. 105-134, title I, Sec. 161(a), Dec. 2, 1997, 111 Stat. 2577.)

References in Text

The Federal Employers' Liability Act, referred to in subsec. (d), is act Apr. 22, 1908, ch. 149, 35 Stat. 65, as amended, which is classified generally to chapter 2 (Sec. 51 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see Short Title note set out under section 51 of Title 45 and Tables

Exhibit # 2

[CITE: 49USC28102]

TITLE 49--TRANSPORTATION
SUBTITLE V--RAIL PROGRAMS
PART E--MISCELLANEOUS
CHAPTER 281--LAW ENFORCEMENT

Sec. 28102. Limit on certain accident or incident liability

(a) General.--When a publicly financed commuter transportation authority established under Virginia law makes a contract to indemnify Amtrak for liability for operations conducted by or for the authority or to indemnify a rail carrier over whose tracks those operations are conducted, liability against Amtrak, the authority, or the carrier for all claims (including punitive damages) arising from an accident or incident in the District of Columbia related to those operations may not be more than the limits of the liability coverage the authority maintains to indemnify Amtrak or the carrier.

(b) Minimum Required Liability Coverage.--A publicly financed commuter transportation authority referred to in subsection (a) of this section must maintain a total minimum liability coverage of at least \$200,000,000.

(c) Effectiveness.--This section is effective only after Amtrak or a rail carrier seeking an indemnification contract under this section makes an operating agreement with a publicly financed commuter transportation authority established under Virginia law to provide access to its property for revenue transportation related to the operations of the authority.

(Pub. L. 103-272, Sec. 1(a), July 5, 1994, 108 Stat. 940, Sec. 26102; renumbered Sec. 28102, Pub. L. 103-440, title I, Sec. 103(a)(1), Nov. 2, 1994, 108 Stat. 4616.)

Historical and Revision Notes

Revised Section (Statutes at Large)	Source (U.S. Code)	Source
26102(a)	49.649(a) (1st sentence).	
Oct. 30, 1970, Pub. L. 91-518, 84 Stat.		
1327, Sec. 810; added July 6, 1990,		
Pub. L. 101-322, Sec. 3, 104 Stat.		
295.		

26102(b)..... 45 649(a) (last sentence).
26102(c)..... 45:649(b).

In subsection (a), the words 'Notwithstanding any other provision of law'', 'whether for compensatory or'', and 'occurring' are omitted as surplus.

In subsection (c), the words 'an indemnification contract' are substituted for 'coverage' for clarity.

Amendments

1994--Pub. L. 103-440 renumbered section 26102 of this title as this section.