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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

STATEMENT OF
NATIONAL GRAIN AND FEED ASSOCIATION

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I INTRODUCTION

The National Grain and Feed Association ("NGFA") files these comments in response to the Board's decisions of June 4 and June 19, 2008, in which the Board announced that it will hold a public hearing and accept written comments "to examine issues related to the common carrier obligation of railroads with respect to the transportation of hazardous materials "

NGFA is a U.S.-based trade association with 900 member companies that own or operate more than 6,000 facilities throughout the U.S. NGFA's membership encompasses all sectors of the industry, including grain shippers, feed manufacturers, grain and oil seed processors, millers, and exporters. As relevant to this proceeding, NGFA membership includes some of the nation's largest producers of ethanol and other liquid fuels derived from agricultural products, which are classified for transportation purposes as hazardous materials. In these comments, NGFA will concentrate on the common carrier obligation of railroads as it relates to ethanol, but these comments apply with equal force to other agricultural-based fuels, such as bio-diesel.

However, before focusing on agricultural-based hazardous materials, NGFA wishes to take note that the Board has singled out "toxic by inhalation hazards" (TIH) for what appears to be special consideration in this proceeding. See June 4 Decision, p. 2. One TIH that is often the subject of discussion when hazmat liability issues arise is anhydrous ammonia, extensively used as a fertilizer. Anhydrous ammonia provides nitrogen to the soil and is especially important to the production of corn and grain sorghum (milo). In fact, without anhydrous ammonia, corn yields per acre would drop substantially and

the country would face enhanced shortages of corn as both an animal feed and a source of ethanol

NGFA recognizes that the Board faces a difficult task if it is inclined to propose the institution of risk management policies for the transportation of hazmats.¹ NGFA urges the Board to bear clearly in mind that it is, in simple terms, impossible for the agricultural community to obtain an adequate supply of anhydrous ammonia by truck, and that rail service remains an essential conduit for that particular type of hazmat. The Board should keep squarely in focus the fact that the characteristics of a commodity tendered to a railroad for transportation, even if they may, in certain circumstances, be dangerous or cause damages, generally do not cause damage absent mishandling by the railroad itself, according to data maintained by the Federal Railroad Administration ("FRA")

II

THE SCOPE OF THIS PROCEEDING

The June 4, 2008 Decision states that the hearing held in this proceeding on April 24-25 –

raised many issues involving the obligation of railroads to haul hazardous materials, including toxic inhalation hazards (TIH). For many hazardous materials, including TIH, rail is the safest and most efficient mode of transportation. Thus, according to the railroads, the transportation of these materials subjects them to *ruinous liability* in the event of an accident (emphasis added).

Unfortunately, the antecedent to which the Board refers when saying that "the transportation of *these materials* subjects [railroads] to *ruinous liability*" (emphasis

¹ NGFA does not concede that the Board presently has the authority to undertake risk management programs for hazmats such as those "modeled on the Price-Anderson Act of 1957." June 4 Decision, p. 2. As with Price-Anderson itself, such a liability regime would have to be implemented by Congress.

added) is unclear. Does the Board intend to include all hazardous materials, or just TIH hazmats, when addressing the railroads' concerns about "ruinous liability"? NGFA believes it must be the latter, as we are unaware of any claim made by the railroads or others that the transportation of hazardous materials such as ethanol could lead to "ruinous liability" for a railroad. On the contrary, the Notice of Intent to Participate filed July 2, 2008 by the Association of American Railroads states "Although the Board's Notice references hazardous materials generally, including TIH materials, the AAR's testimony will focus solely on TIIH materials." Evidently the Railroad Industry sees no need for a change in the status quo with respect to the common carrier obligation as it applies to other hazardous materials.

Recognition of these facts should assist the Board and the parties to this sub-docket of Ex Parte No. 677. There are some 800,000 shipments per day of hazardous materials in the US, ranging from well-recognized hazardous materials such as spent nuclear fuel and infectious agents, to numerous commodities in common everyday use that qualify as hazardous because they are flammable. Examples include cosmetics containing alcohol. As detailed below, ethanol is far closer to the latter than the former end of the hazmat spectrum.

Attempting to address all hazardous materials transported by railroads, when over 90% of those commodities are non-controversial or entail little or no danger of "ruinous" liability, is not a good use of the resources of the Board and parties. Accordingly, NGFA urges the Board to focus on more highly hazardous materials. Even as to such materials, however, the issues presented are not simple, because the more hazardous materials are,

the more extensively they are regulated by other agencies in DOT, including the Pipeline and Hazardous Materials Safety Administration ("PHMSA")

In addition, the levels of care taken by shippers, carriers including railroads, and receivers in handling hazardous materials tend to increase as commodities become more hazardous. Enhanced regulation and enhanced compliance and protective efforts should reduce the exposure of carriers to spills or other incidents, and to liability. The Board is not writing on a blank slate in this proceeding.

III

ETHANOL MUST BE DISTINGUISHED FROM THE HAZARDOUS MATERIALS

As the Board has explained, "the common carrier obligation refers to the statutory duty of railroads to provide transportation or service on reasonable request."² Established legal precedents dealing with far more hazardous commodities than ethanol hold that railroads may not refuse reasonable requests to transport such commodities, so long as they are tendered in compliance with applicable government regulations. See, e.g., Akron, Canton & Youngstown R.R. v. ICC, 611 F.2d 1162, 1166-67 (6th Cir. 1979), in which the court affirmed the ICC's decision in US Energy Research & Development Administration v. Akron, Canton & Youngstown R.R., et al., 359 I.C.C. 639 (1979). If the common carrier obligation requires railroads to accept shipments of spent nuclear fuel, as held in Akron, Canton, there is no legal basis for railroads to refuse to transport anhydrous ammonia, let alone ethanol. At the same time, the degree of risk posed by

² June 4 Decision, slip op. at 2

various commodities may be a valid concern. Indeed, the Board seems to recognize that TIH commodities may present greater risks than other hazardous materials.³

Regulations promulgated by the Department of Transportation support a clear distinction between ethanol and TIH hazmats such as anhydrous ammonia. See, e.g., 49 C.F.R. Parts 172, 174 and 209. Ethanol tendered to railroads for transportation in this country mainly is alcohol derived from corn to which approximately 5 percent gasoline is added to provide a denatured product that is not intended or safe for human consumption. Occasionally, other primary products are used to create the alcohol base of ethanol, such as wood chips or garbage, but the overwhelming majority of ethanol transported in this country by rail is corn-derived alcohol altered by the addition of gasoline.

Ethanol in that form bears almost no risk of explosion caused merely by trauma, such as a train collision. It is flammable, but ethanol fires can be contained by firefighters using foams that are highly effective. Few fatalities or serious injuries result from ethanol fires. NGFA is unaware of any derailment of ethanol cars that has ever resulted in, or even posed the risk of "ruinous liability" for a railroad.

TIH hazmats, on the other hand, may involve a greater risk of causing serious bodily harm or even death to persons exposed directly to poisonous fumes, if such fumes are emitted when a TIH car is mishandled by a railroad.

Hazardous commodities do not all have the same propensities when involved in a railroad collision or other type of mishap. In addition, first responders treat different types of hazmat releases differently. As indicated previously, NGFA is not conceding that the Board can relieve railroads of their common carrier obligation to transport

³ "Parties are invited to comment on what constitutes a reasonable request for service involving the movement of TIH." June 4 Decision, slip op. at 2. No similar request is made by the Board regarding other specified classes of hazardous material.

hazmats, assuming they are packaged in accordance with applicable legal and safety requirements⁴ But if the Board is inclined to the opposite view, it must be exceedingly careful to make all necessary and appropriate distinctions between types of hazmats and not exaggerate risks posed by rail transportation of ethanol

IV

PRICE-ANDERSON ACT ISSUES

The Board states in its June 4 Decision that it "is interested in specific potential policy solutions to the liability issue, including solutions modeled on the Price-Anderson Act of 1957" NGFA has reviewed the Price-Anderson Act and questions whether it provides an appropriate basis for a policy solution to the hazmat liability issue, although NGFA recognizes that certain hazmats, excluding flammable liquids such as ethanol, may require some methodology to distribute risk

According to a Report to Congress on the Price-Anderson Act in March 1999 by the U S Department of Energy ("P-A Report")

Congress enacted the Price-Anderson Act . . . to encourage the development of the nuclear industry and to insure prompt and equitable compensation in the event of a nuclear incident Specifically, the Price-Anderson Act established a system of financial protection for persons who may be liable for and persons who may be injured by a nuclear incident The Price-Anderson Act achieved these objectives by requiring DOE to include an indemnification in each contract that involves the risk of a nuclear incident This DOE indemnification (1) provides omnibus coverage of all persons who might be legally liable, (2) indemnifies fully all legal liability up to the statutory limit on such liability (currently \$9.43 billion for a nuclear incident in the United States, (3) covers all DOE contractual activity that

⁴ See, in addition to Akron, Canton, supra, Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir. 1981), and Classification Ratings of Chemicals, Conrail, 31 C.C. 2d 331 (1986)

might result in a nuclear incident in the United States, (4) is not subject to the usual limitation on the availability of appropriated funds, and (5) is mandatory and exclusive

From that description, it is clear that there are significant factual distinctions between the setting and details of the Price-Anderson Act and a railroad's common carrier obligation to haul hazardous materials

First and foremost, the Price-Anderson Act applies under very limited circumstances involving what amounts to a single commodity that is generated at a licensed nuclear facility where operations are tightly regulated by the U S government. Railroads, on the other hand, are loosely regulated. While railroad operations are subject to federal operating regulations, not every train is, in fact, inspected by federal regulators and compliance with federal rail regulations is policed by the railroad industry itself.

The Price-Anderson Act is blind to the cause of an incident, in part because the cause ultimately may prove impossible to determine and in part because the aim of Price-Anderson is "to encourage the development of the nuclear industry" by removing liability disputes as a barrier to payment for injuries incurred. The transportation of hazmats by railroad, on the other hand, does not stand as a barrier to the development of the railroad industry, which has attracted all manner of traffic (and investment) despite the presence on the rails of hazmats. As the P-A Report stated "elimination of the DOE indemnification would have a serious effect on the ability of DOE to perform its missions. Without indemnification, DOE believes that it would be difficult to obtain responsible, competent contractors, subcontractors, suppliers and other entities to carry out work involving nuclear materials." There is no evidence of a lack of competent contractors, subcontractors,

suppliers and other entities willing to undertake commercial relationships with railroads merely because they handle hazmats

So far as NGFA can determine, the Price-Anderson Act is funded by assessments levied against nuclear licensees, i.e., those licensed to construct or operate a nuclear facility. The rail network analogy would be to treat each railroad as a licensee for each hazmat it handles and to require it to make a contribution for each hazmat to a pool of funds available for reimbursement. Price-Anderson, however, appears to cap licensee liability at the upper limits of the pool (limits that change periodically). The government is empowered to determine each licensee's contribution to the pool.

If that system were applied to the transportation of hazardous materials by rail, answers would have to be developed to a series of questions that do not appear to arise in connection with nuclear facilities. For example, there is an extremely wide range of hazardous materials, only a relatively few of which arguably pose the threat of "ruinous liability" to rail facilities. Unlike operators of nuclear facilities, where each licensee produces the same product, railroads are licensees of scores of separate hazardous materials which would have to be sorted through for a determination of which ones require the imposition of a mandatory contribution to a reimbursement pool. The Board's empowering statute does not appear to authorize the Board to engage in such activities.

Moreover, once railroads are treated as licensees for the purpose of imposing mandatory contributions to a risk distribution pool, public policy should require regulatory oversight and clear rules to determine which individual railroad licenses carry with them a duty to make contributions to a hazardous materials reimbursement pool and to

regulate efforts by railroads to pass the costs of such contributions through to their customers

In short, efforts to apply Price-Anderson Act principles to the transportation of hazardous materials by railroad would require extensive new statutory authority for the Board, accompanied by provision for the Board to hire personnel trained to make the types of evaluations necessary to implement new hazardous materials responsibilities

V.

REQUESTS FOR SERVICE

The June 4 Decision solicits comments “on what constitutes a reasonable request for service involving the movement of TII, as well as whether there are unique costs associated with the transportation of hazardous materials, and if so, how railroads recover those costs ” NGFA will not discuss service requests for the movement of TIH commodities, but will address the question of “whether there are unique costs associated with the transportation of hazardous materials, and if so, how railroads recover those costs ”

While it is tempting to assume that there are indeed “unique costs associated with the transportation of hazardous materials” and to proceed directly to a discussion of “how railroads recover those costs” from their customers, NGFA urges the Board to approach this issue cautiously and with deliberation The issue raised by the Board is highly significant and answers should not be based on assumptions There are scores of different hazmats, each of which will have its own unique costs ranging from nonexistent or unproven additional handling costs upward Some of these costs may be absorbed by shippers before the hazmat is tendered to the railroad in the form of specialized equipment, e g , cask cars for spent nuclear fuel, or specialized facilities

Some railroads may simply offer as “unique costs” undiscounted quotations from an insurance carrier, made available to the railroad at the insurance carrier’s highest level because the railroad has not negotiated lower rates. Other carriers may develop a fully allocated cost that includes extensive overhead contributions. Some carriers may have historic fact bases from which to develop accurate and actual cost information, others may not have such data or may be reluctant to use it.

It is necessary, in the opinion of NGFA, for the Board to create¹ a process whereby any railroad claim of “unique cost associated with the transportation of hazardous materials” can be examined and tested, to make sure such claims are not exaggerated. DOT records will show a great many incidents involving ethanol, but a thorough inspection of DOT’s records will disclose that the overwhelming majority of these “incidents” are nothing but a leaky outlet valve on the tank car, rather than a fire or explosion posing any risk of serious injury.

Routine “incidents” involving freight cars incur daily. A covered hopper car transporting grain, for example, may have a leaky outlet gate from which grain is escaping. Under AAR rules, or rules of individual carriers, a car of that nature is repaired by the handling carrier or, if damage is too great, the car owner is asked to designate a repair shop to which the car should be sent. If there are rules applicable to minor problems that arise in connection with the transportation of non-TIH hazmats, the industry structure already in place will take care of making and paying for the necessary car repairs. TIH hazmats, however, obviously may present a greater challenge when it comes to dealing with car repairs.

Of course, the railroads enjoy significant pricing freedom under the Act. Absent a Board finding of market dominance, the railroads can charge any rate, and even railroads found market dominant can charge any rate up to a maximum set by the Board's SAC, Simplified SAC or Three Benchmark test, as the case may be. These rate levels may be very high.

The railroads may argue that, if not relieved of their common carrier obligation with respect to hazardous materials or to TIH hazmats, they will be forced or tempted to use their pricing power to reject shipments they regard as too dangerous, just as they may use their pricing power to "demarket" freight they find commercially undesirable. The problem with this approach is that the railroads would be doing indirectly what the Act forbids them to do directly, making common carrier service not an obligation but an option.

The railroads may also support the use of hazmat surcharges. Such surcharges are often imposed by motor carriers. However, as with railroad fuel surcharges, the Board should exercise its unreasonable practice jurisdiction to keep such surcharges from becoming profit centers.

The Board may wish to explore the possibility of forming a working group comprised of rail industry and shipper representatives. The task of this group would be to consider hazmats according to their potential for causing damage, injuries, and fatalities, and to assess the role played by railroad error in bringing about damage, personal injury

or death resulting from hazmat "incidents " After that task is completed, further analysis in all likelihood will be required

Respectfully submitted.

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