



**American Short Line and
Regional Railroad Association**

222/34

April 17, 2008

Anne K. Quinlan
Acting Secretary
Surface Transportation Board
Room 1149
395 E Street S.W.
Washington, DC 20423-0001

Re: STB Ex Parte No. 677: COMMON CARRIER OBLIGATIONS OF RAILROADS

Dear Acting Secretary Quinlan:

Attached is the testimony of Richard F. Timmons, President, American Short Line and Regional Railroad Association for the April 24-25, 2008 Hearing in the above referenced matter.

Sincerely,

Keith T. Borman

Keith T. Borman
Vice President & General Counsel

cc: Richard F. Timmons

Common Carrier Obligation Hearing: April 25, 2008

Testimony of Richard F. Timmons, President,

American Short Line and Regional Railroad Association

America's small railroads have a unique perspective on the implications of the Common Carrier Obligation because they are at the same time both subject to and beneficiaries of the obligations it traditionally connotes. Virtually without exception they stand ready to accept and deliver all legitimate traffic tendered from shippers on reasonable request. Contemporary conditions which may be at odds with the common carrier obligation, such as capacity constraint and free market pricing, do not, affect class II and class III railroads in the same way that they impact large railroads or other modes of transportation. Generally speaking, small railroads are not constrained by the capacity of their networks to accept larger volumes of freight. Their constraint often is the robustness of the infrastructure they acquired from past owners. Further, free market pricing is largely a foreign concept to small railroads because their pricing power is relatively limited. Half of the industry is composed of handling lines whose prices are set by their class I connections through contracts. Nevertheless, as common carriers small railroads welcome all the business they can find.

But small railroads also rely on the principles of the common carrier obligation in their role as customers of the large class I rail carriers. They rely on the willingness of the class I railroads to accept the traffic they tender on a timely and commercially reasonable basis. As "retail" railroads that typically provide the last mile of service to the ultimate customer, they expect traffic to be interchanged to them in a similar timely and reliable manner.

Unquestionably, though, there are now practical forces at work that limit the role of the common carrier obligation in the contemporary economy. Evolving technical standards make it impossible for some small railroads with less robust track and bridge structures to accept certain

oversized or heavy shipments. Congested rights of way dis-incent large railroads from seeking new industrial customers to locate on properties served by those carriers. Pricing freedom available to class I carriers on most commodities gives them an effective means to discourage uneconomic traffic.

You will receive testimony from some small railroads in this hearing who have experienced firsthand the disconnect between the promise of the common carrier obligation and today's economic realities. Differential pricing of certain routes or products by class I carriers, a rational strategy during times of capacity constraint, have eliminated marginal customers who may be a small railroad's only source of business on its line, effectively putting the small railroad out of business. Some small railroads who want to provide service to new customers meet resistance from connecting carriers whose marketing plans are inconsistent with the small railroad's proposed business.

This situation does not mean that ASLRRRA supports a return to government regulated pricing in the rail industry to preserve the sanctity of the common carrier obligation. Rather, it means that the traditional notion of what constitutes the common carrier obligation must be reexamined and reinterpreted in light of the current and future realities of a market based economic system.

For example, traditional application of the common carrier obligation with reference to the transportation of hazardous materials has placed small railroads who handle this material in an untenable and potentially ruinous checkmate with grave public policy consequences. As with class I railroads, the common carrier obligation requires small railroads to accept even the most toxic materials for transportation over their systems. The often less-robust operating networks inherited from their former class I owners present special risks and challenges to small railroads, but the inability of small railroads to pass along anything near the actual cost of insuring these shipments makes each one a threat to the continued existence of the railroad enterprise. While large carriers have demonstrated their ability to withstand catastrophic incidents involving

hazardous materials, no small railroad can survive claims in the hundreds of millions of dollars or more. Yet the small railroads have been historically unable to pass along the actual cost of insuring a hazardous materials movement to the customer. This is because the potential actual cost of insuring hazardous materials movements is much above the average industry cost allowed in the Uniform Railroad Costing System and charging that actual cost would make the railroad vulnerable to a rate challenge before this Board. The result is that most, if not all, T-I-H movements over small railroads have not been insured, leaving the small railroad, and more importantly, the public, vulnerable should a catastrophic incident occur. If the small carrier is bankrupt by claims arising from a T-I-H incident on its line, the victims will have no source from which to recover its damages. From a public policy viewpoint this should be an unacceptable result. It is an example of where the public interest conflicts with the common carrier obligation.

In response to this crisis, ASLRRA has joined the AAR in proposing Price-Anderson type legislation modeled after the law created to deal with similar liability in the nuclear waste disposal context. Now ASLRRA urges all relevant stakeholders – carriers, manufacturers, shippers and government – to work together to seek creative solutions to this huge problem. We ask the Surface Transportation Board to take a leadership role in this cause.

Does the traditional common carrier obligation have a role to play in the capacity constrained, free market economic system we must operate in today? Frankly, probably not as we have known it in the past; there are too many powerful economic forces in action which are simply inconsistent with it, and that means there are effective ways to evade it in most cases. Yet the notion of making transportation available to all legitimate shippers is still central to a healthy economy and free society. Rather than ask carriers to undertake service obligations which do not make economic sense, we urge the Board to support the common carrier obligation by encouraging transportation options which do make economic sense. For example, historically big railroad mergers have been approved with very few conditions to enhance the ability of small railroads to provide service

alternatives; liberal granting of trackage rights and haulage rights to small railroads in exchange for large railroad consolidation can go along ways to providing shippers transportation alternatives, which in turn makes the common carrier obligation a meaningful promise for them.

Clearly, a more modern paradigm for the common carrier obligation is needed, and the American Short Line and Regional Railroad Association commends the Surface Transportation Board for creating a forum to answer the question of what that new paradigm must be.