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Surface Transportation Board
Attn: STB Ex Parte No. 677
395 E Street, SW
Washington, DC 20423-0001

222/27

Dear Sirs or Madams:

Statement of Support

The Chlorine Institute is pleased to offer our input in response to the request from the Board concerning common carrier obligations of railroads as posted in the Federal Register on February 27, 2008. We appreciate the Board giving the public and the shipping community in particular the opportunity to comment on this topic which is central to our businesses which are vital to the well being of our nation and essential to the U.S. economy.

The Chlorine Institute supports the Surface Transportation Board's effort to establish a more thorough understanding of the common carrier obligation and to inform those who are affected by this obligation either as carriers or shippers. Because of the central role that transportation plays in the U.S. economy, it is important that both carriers and their customers have a consistent understanding of the historical responsibilities of the carrier and the benefits these obligations provide to the public.

Background

The Chlorine Institute, Inc. (CI) is a 220 member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. The Institute's mission is the promotion of safety and protection of human health and the environment in the manufacture, distribution and use of chlorine, sodium hydroxide, potassium hydroxide and sodium hypochlorite, plus the distribution and use of hydrogen chloride. The Institute's North American Producer members account for more than 98 percent of the total chlorine production capacity of the U.S., Canada, and Mexico.

Benefits of Chlorine to Our Society

Chlorine is a naturally-occurring chemical element that is literally essential to life. Chlorine chemistry is used to manufacture thousands of products critical to society's needs and, in particular, provides affordable and reliable disinfectants for the benefit of public health. The best-known chlorine use is most likely as a drinking water disinfectant. According to the American Water Works Association, 84 percent of large drinking water systems (those serving

more than 10,000 people) use elemental chlorine disinfection. But, chlorine disinfectants are also used extensively in food production and healthcare settings to guard against life-threatening germs. Chlorine chemistry is essential to manufacturing 85 percent of all pharmaceuticals, 25 percent of all medical plastics, 70 percent of all disposable medical applications, and 95 percent of crop protection chemicals. The many beneficial and essential uses of chlorine throughout the economy are summarized by the Chlorine Tree (<http://www.chlorinetree.org>).

The largest portion (40%) of chlorine production goes into producing polyvinyl chloride (PVC) — mostly as building and construction materials such as pipe, siding, windows, fences, decks and rails. PVC is also used to manufacture medical devices, artificial limbs, first-responder equipment, and much more. Chlorine chemistry plays a significant role in the production of polyurethane foam insulation, silicon computer chips, and titanium metal for spacecraft and artificial joint replacements.

Chlorine is used throughout the business of chemistry, with the chlorine molecule involved in 60% of the industry's products. Many consumer and industrial products may not, in the end, contain any chlorine, but still rely on chlorine chemistry in their production. Any suggestion that chlorine can be replaced in this nation's economy is pure fantasy. In 95% of the uses there is no ready substitute. Action to limit the production, distribution or use of chlorine would have immediate and severe detrimental impact on the health and safety of the U.S. public.

In order to realize these benefits it is essential to deliver chlorine from the production locations to the end users which are often significant distances apart. Approximately 85 percent of that long distance delivery takes place via railroad tank car. Rail transportation of chlorine has over time proven to be a safe and cost efficient way to move this product. The continued ability to economically transport chlorine via rail is vital to both our economy and to public health and safety.

Historical Origin of the Common Carrier Obligation

To begin a serious discussion of this issue one must first define "common carrier" and the obligations that the term carries from both a historical and contemporary legal perspective. While the common law provided a basis for railroads being considered as common carrier with certain obligations to provide service on demand, the Interstate Commerce Act codified many of those obligations. This Act also created new common carrier obligations independent of the common law.

The Supreme Court held in *Kansas City So. Ry. v. United States*, 282 U.S. 760, 764 (1931), "There is no doubt that common carriers, subject to the Interstate Commerce Act, may have activities which lie outside the performance of their duties as common carriers and are not subject to the Act. But a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation."

Similarly, in *Akron, C. Y. & R. Co. v. I. C. C.*, 611 F.2d 1162, 1166 (6th Cir., 1979) the Court held "It may be true that only carriers who held themselves out to the public were common carriers at common law; but this does not override the clarified Commerce Act's definition of common carrier as including railroads." This designation indicates that the services are of special significance to the economy, and reflects the obligations imposed, at least in part, because of the "government largess which railroads have received, and in view of the unique importance to commerce of rail transportation." (Id., footnote omitted) Of course, neither the Staggers Rail Act nor the ICC Termination Act substantively changed the language creating statutorily imposed common carrier obligation.

Extent of Common Carrier Obligation

There have indeed been an increasing number of questions arising regarding the extent of the railroads common carrier obligations. These questions have primarily been raised by carriers seeking to eliminate or modify their current legal obligation. This obligation has a long tradition and basis in common and statutory law as summarized earlier. The obligation, while not complete, is broad in meeting the needs of the public by responding to the reasonable requests of the shipper. The obligation of the railroads to serve the public need is part of the equation which allows the railroads to operate in a highly concentrated market with very high barriers to entry. Changing this obligation would represent a major change in United States public policy.

April 24 Hearing Focus

The February 27, 2008 Federal Register notice issued by the Surface Transportation Board states that the STB April 24, 2008 hearing will focus on various topics related to the common carrier obligation. The Chlorine Institute offers its testimony to the eight specific items raised by the STB.

1) Service limitation resulting from a constrained environment

The Chlorine Institute understands that the current environment which includes increased international trade and movements within the U.S. have resulted in higher demand on the U.S. rail system. However, as a common carrier, it is the obligation of the carrier to increase capacity to meet this demand. The demand did not come about without warning. This capacity can be met with technological and infrastructure improvements. It is incumbent on the carrier to make the appropriate investments to meet the demand. This is particularly true now when net railway operating income has gone from \$4.1 billion in 2004 to \$7.6 billion in 2006, and railroad stock prices have essentially doubled over the same period. The rate of return on investment by the railroads in 2006 was over 10% for the first time since 1929. The railroads have the ability to provide additional capacity if they choose to do so.

Despite this financial capability and the underlying obligation as a common carrier to make investments to meet the demand for service, the railroads have in many cases elected not to do so. They have publicly stated that new infrastructure will only be added to compete with other modes. Some railroads have even attempted to dictate where new facilities can be built along their rail lines. One railroad, the CSX, has provided a checklist for those considering plant locations in its attempt to dictate those facilities it will serve. This type of action is counter to the health of the U.S. economy.

In fact the preference to serve the import market instead of U.S. industry has been very detrimental to our national economy. This focus on service from the ports to the interior, while profitable to the railroads, has cost domestic jobs. A strong U.S. economy requires a rail system which supports it by providing transportation upon reasonable request.

We are baffled by some actions of certain railroads which seem to reduce system capacity. One member cited an example where a significantly shorter distance was available to the same destination. Interchange to a Class 2 railroad would make a route 120 miles. The Class 1 involved refused to interchange with the Class 2 and instead routed the shipment 409 miles apparently in an effort to retain revenue.

The Chlorine Institute urges the Board to use its regulatory and moral authority to require the U.S. railroads to increase capacity to overcome restraints to shipments.

2) Cost and safety issues related to the transportation of hazardous materials, especially inhalation hazards

The rail transportation of TIH materials and chlorine in particular has been very safe. The Chlorine Institute and its members are working with affected parties, including government regulators, to make such transportation even safer. Since 1909 there have been over 2,000,000 loaded shipments of chlorine with six fatal releases. Of those six releases, two occurred in the 2004-2005 period. National Transportation Safety Board investigations attributed the 2004-2005 releases to railroad operational failures.

A common carrier has a responsibility not only to transport goods upon reasonable request but to do so in a safe and secure manner. Clearly, the railroads have the ability to make their respective systems inherently safer by signaling track and adopting more comprehensive operating procedures. Regrettably, for the most part, these vitally needed improvements have not been made. When an incident has occurred, the railroads have been quick to point the finger of blame to someone else rather than admitting to operational errors. Such responses are not consistent with the public trust that has been given to these common carriers in return for their protection from the normal competitive forces that all other businesses face.

Cost does not mitigate the common carrier obligation. If costs are truly higher for TIH shipments, the railroads have a mechanism to charge reasonable rates based on actual costs.

Railroads should be prepared to defend those higher rates before the Board as allowed by current statute.

Because the common carrier obligation is a statutory obligation, the Board is not an appropriate forum at which to argue for a change in the obligation. Unilateral action by a railroad should not be allowed to change the obligations that have been established by the statute. It is the responsibility of the Board to assure that the statutory requirements of the obligation are not circumvented by actions taken by those who possess the obligation. The Chlorine Institute urges the Board not to make any change to the common carrier obligation unless such change is debated and authorized by elected officials. The Chlorine Institute believes that only Congress has the authority to change the statutory requirements of the common carrier obligation.

3) Carrier-imposed requirements for infrastructure investments by shippers

We are concerned about the reasonableness of some of the carrier imposed requirements for infra-structure investment by shippers. Recently the carrier organization, the Association of American Railroads (AAR), in an unprecedented move, adopted new standards for railroad tank cars transporting TIH material. These requirements were done without sound science or normal government and industry participation or concurrence. Further, these requirements would have provided only marginal improvement in accident survivability at great cost to industry.

In the meantime, a separate initiative was launched which included members of CI, as well as one of the Class I railroads, with the objective to develop a rail car 5 – 10 times stronger than current rail car designs, and significantly improved over the proposed AAR standards. Instead of working with this team, the AAR simply ignored these efforts to develop a significantly more accident resistant railcar. The AAR also ignored the root cause of the incidents that brought about the activity. This unreasonable requirement on shippers to provide railcars which are inconsistent with federal requirements is part of the AAR effort to erect further barriers to rail shipment of TIH materials.

The Chlorine Institute supports the continuous improvement in the design of chlorine rail cars. However, such enhanced design must be based on sound science and must be authorized by the Department of Transportation, not the AAR.

The AAR requirement for these new cars would in many cases require upgrading of track leading into and inside of facilities. This places another burden on the shipper. The only way around the upgrade cost is to light load rail cars. Light loading of cars will result in a more cars – another cost to the shipper. More cars will lead to additional congestion with repercussions as discussed earlier.

Another carrier imposed requirement on receivers is to require an increase in-plant track capacity to accommodate rail deliveries. In the case of TIH rail cars it is necessary to have trackage in a secure area to receive reasonable numbers of cars on a reasonable basis. At the same time, if a

carrier were to demand track infrastructure to allow it to serve a plant monthly when service is required weekly, a requirement to provide that amount of track space would not be reasonable.

4) The impact of volume requirements for infrastructure investment by shippers

Shippers of TIH products and, in fact, bulk chemicals in general either own or lease rail cars from private car owners. The railroads were relieved of the responsibility to provide transport vessels by the Interstate Commerce Act of 1887. Accordingly, the Chlorine Institute believes that volume requirements and incentives are not applicable to this traffic.

5) Economically motivated service reductions and metering of the demand for service

Every business has an economic incentive to seek out those business opportunities which will yield the best return for its investors. In the case of the railroads, we have a special case of an industry which has a unique role and which has been given unique privileges. In contrast to the trucking industry, the rail industry has a much higher barrier to entry from a regulatory perspective and from a capital perspective. Rail rights-of-way were deeded to railroads long ago and, in most cases, on very favorable terms. It is virtually impossible for a new competitor to obtain the necessary new rights-of-way. Therefore, new competitors are effectively barred from the rail business. The common carrier obligation can not reasonably be limited while preserving the public good if the alternatives for transport are limited by the regulatory and industry structure as is the case with rail carriers.

The idea of economic metering of service has no place in rationing of common carrier obligation. It is not the place of the railroads to dictate what will move in the U.S. economy or in effect what ventures will be able to thrive and what ventures will not exist in the U.S. economy. The practices of rationing service and bunching of deliveries all serve to make manufacturers less efficient and the U.S. economy weaker. This is particularly true when preference is given to traffic from the ports for both capital investment and use of available capacity. The railroads have an obligation to serve the entire American public. All economic issues should be determined by the Board in establishing rates based on reasonableness.

6) The proper use of rail embargoes

Embargoes should be used only on very rare occasions.

There is significant case history which interprets the statute and makes it clear that embargoes are to be only temporary and due to very unusual circumstances. These circumstances might include acts of God or other happenings outside of the control of the carrier. It is expected that the carrier will speedily take action to overcome the reasons for the embargo. The duration might go as long as several weeks, or even several months in a very severe instance, but certainly

not for years. An embargo must never be used to selectively penalize a commodity or shipper. In the case of chlorine, an embargo, even on a limited basis, could bring about a national calamity. In 2001 the carriers stopped movement to evaluate security. However, this several day halt to shipments put several water facilities and the public these facilities served in great jeopardy.

A shipper has a responsibility to work with a carrier to overcome the situation that might have brought about an embargo. It is the shippers' responsibility to communicate with a carrier as to where, how much and when he needs service. The Board has no authority to circumvent the common carrier obligation but it does have the responsibility to assure that both parties are meeting their obligations in the case of a dispute.

7) When it becomes necessary to obtain abandonment authority

The public need should be considered when reaching a decision on abandonment of a line or track segment. There is a clear national need for chlorine and the rail transportation of chlorine. Such needs were particularly apparent during the 2001 embargo when pockets of our nation were near crisis in their public water supplies after just a few days without shipments.

8) To whom does the common carrier obligation apply

The common carrier obligation applies to all who hold the rail carrier franchise. This obligation includes the owner of any non-abandoned rail line. This concept is particularly important where public health and safety depends on these materials as is the case with chlorine.

The U.S. rail industry through its industry organization has mounted efforts on several fronts seeking to exclude itself from its common carrier obligation for certain products that are toxic by inhalation. This position denies the unique role and the unique privilege which rail carriers enjoy in the U.S. system. The Chlorine Institute see no justification for limiting the obligation beyond the reasonable request criteria currently in place and the body of law and history which currently apply this obligation.

The Chlorine Institute and the Chlor-Alkali Industry Support Continuous Improvement

The underlying motivation of the U.S. rail industry in attacking the obligation that it has to provide common carrier service to TIH shippers relates to liability for those movements and the costs relating to the two recent incidents that the NTSB attributed to railroad operational failures. The chlor-alkali industry was saddened by the deaths and injuries that resulted from these incidents and understands the costs of the responses and cleanups were significant.

The chlor-alkali industry has undertaken numerous steps to develop rail cars which would be more likely to survive the types of railroads' operational failures that have occurred. It must not be forgotten that there has been a very strong long-term safety record with the current robust standard rail car design. That said, the Chlorine Institute fully supports the development and intent of the DOT-FRA-PHMSA TIH tank car standard (April 1, 2008 Federal Register Proposed Rule) that we expect will result in chlorine and other TIH tank cars with greater accident survivability through the use of new design and fabrication technology and through safer railroad operating procedures and practices.

The work on tank car design being undertaken by the chlor-alkali industry, the car building industry, and the Department of Transportation is in a context of continuous improvement. Continuous improvement is the driver for the chemical industry where nothing short of zero accidents and injuries is acceptable. We urge the rail industry to take that same approach in their operations. With a culture of continuous improvement and a resulting sharp reduction in the accident rate, there would be no reason to limit the common carrier obligation for any product based only on the likelihood of liability in an operational failure.

Summary

The common carrier responsibility particularly as it is applied to railroads has a long history in U.S. law with roots in English Common Law. In fact such a responsibility goes back to the beginning of U.S. rail service. Limiting the applicability to exclude essential chemicals would have a devastating effect on the U.S. economy. There is no justification to limit this obligation. In fact, rail carriers, because of their unique treatment, have this responsibility to the public. The Chlorine Institute believes the Board should base its decision on the history of current laws, the reality that the current law exists, the public good, and the special place rail transportation occupies in the U.S. economy.

Again the Chlorine Institute urges the Board not to make any change to the common carrier obligation unless such change is debated and authorized by Congressional action.

Very truly yours,

Arthur E. Dungan

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