222109

Before the

SURFACE TRANSPORTATION BOARD

Washington, D.C. 20423

COMMON CARRIER OBLIGATION OF RAILROADS	)))))	**STB Ex Parte No. 677**

COMMENTS SUBMITTED BY

DIVERSIFIED CPC INTERNATIONAL, INC.

William A. Frauenheim III
Vice President - Operations
Diversified CPC International, Inc.
24338 W. Durkee Road
Channahon, IL 60410

HIGHROAD Consulting, Ltd.
55 E. Jackson, Blvd, Suite 625
Chicago, IL 60604
(312) 765-0250

Dated: April 17, 2008

Consultant for Petitioner

Before the

SURFACE TRANSPORTATION BOARD

Washington, D.C. 20423

STB EX PARTE 677

COMMON CARRIER OBLIGATION OF RAILROADS

COMMENTS SUBMITTED BY
DIVERSIFIED CPC INTERNATIONAL, INC.

My name is William Frauenheim, I am Vice President of Operations for Diversified CPC International, Inc. (Diversified). Diversified is a manufacturer of blowing agents and propellants for aerosols, headquartered in Channahon, IL.

Diversified has six manufacturing and distribution facilities in North America; all are rail served. Our largest plant at Channahon, IL (rail station Lorenzo, IL) is served by Burlington Northern Santa Fe Railroad (BNSF); other plants are located at Anaheim, CA served by Union Pacific Railroad (UPRR); Petal, MS (rail station Dragon, MS) served by Norfolk Southern Railroad (NS); and Sparta, NJ which is served by the New York & Susquehanna & Western Railway (NYSW). Diversified also has a distribution facility operated by a partner company at Ajax, ON and a distribution facility in Miami, FL that serves customers in Florida, the Caribbean, and South America.

We commend the Board for initiating this proceeding and the opportunity to present our views. My statement will focus on two key issues: (1) cost and safety issues related to the transportation of hazardous materials, especially toxic inhalation hazards, and (2) carrier-imposed requirements for infrastructure investments by shippers.

As you know, the business landscape of the rail industry has changed significantly since the passage of the Staggers Rail Act of 1980 due to mergers and rationalization of the rail system. The number of Class I railroads consolidated from 22 companies in 1980 down to only seven in 2001. Citing capacity issues, all of the railroads have changed their business models so common carrier obligation of railroads not only covers a number of interesting topics, but confirmation and definition of common carrier obligation of the railroads is vitally important to Diversified and other rail customers that rely on rail transportation.

Cost and Safety Issues Related to Transportation of Hazardous Materials

Diversified is an ISO 9000 certified company that ships and receives hazardous commodities in tank cars, including Di-methyl Ether, STCC 28 182 24; Petro Pentane, STCC 29 121 20; and Propane and finished products that move under STCC 29 121 90, Liquified Petroleum Gas. Our annual spend for rail transportation is more than $2.6 million; 52% of our finished products move via rail. We also receive two-thirds of our inbound raw materials by rail; the ratio of inbound raw materials to carloads of finished products is approximately 2:1.

We are extremely safety conscious. All of our operating employees are required to complete safety training and to adhere to Diversified's safety rules. It has been our experience that rail is a safe mode of transportation. In more than 20 years, Diversified has had only one rail transportation related non-accidental release (NAR) caused by a design defect in the plug on the gauging device valve on the rail car. Following that incident we immediately ordered the other cars in our fleet with similar gauging devices to confirm that the plugs did not have orifices drilled through them. With the exception of that incident, our record has been spotless. This "track record" is not serendipitous – we work hard to ensure safe transportation of our shipments.

The record of the railroad industry has not been so spotless. For example, in recent years the railroad industry has had a number of fatal accidents in recent years involving toxic inhalation commodities. As a result, the AAR has ordered new design standards for tank cars used to transport those commodities.

Certainly, we have no quarrel with the implementation of railcar standards designed to improve transportation safety. However, some of the major railroads have taken this issue one step further. They assert the right to impose all liability for the transportation of these commodities on the shippers, even when the shipments are transported pursuant to regulated rates. For example, Canadian Pacific recently issued an announcement concerning the movement of ammonia and toxic-by-inhalation (TIH) commodities with an indemnification and liability provision that states, "...it is being intended that Customer assume all liability that is in any way connected with the transportation of the hazardous commodities under this Tariff."

This shift of liability to TIH shippers is patently unfair, particularly since our research indicates that all of the rail accidents in recent years involving TIH commodities have been the result of track defects, or caused by human failure on the part of the rail crews. While Diversified does not ship or receive TIH commodities, if the railroads are allowed to limit their liability and, correspondingly their common carrier obligation for the transportation of TIH commodities, we expect to see a cascade effect in which the liability shift expands to shippers of other hazardous commodities.

The chemical industry is very safety conscious. Major rail accidents involving TIH commodities have not been caused by the shippers or the rail equipment, yet new safety rules and standards for car design have been established in recent years, further enhancing the safety of shipments of hazardous commodities. Forcing rail shippers to assume 100% of the liability for shipments of hazardous commodities, thereby enabling the railroads to limit their common carrier obligation on shipments of certain hazardous commodities (particularly when railroad track or railroad operating personnel caused the recent accidents involving TIH commodities) does not address the root cause of the problem – that being the need of the railroads to improve their own safety standards and procedures. Indeed, if the railroads are not required to assume liability for their personnel and infrastructure, they will have no incentive to improve their own safety procedures.

The AAR has been working with railcar builders and shippers on these issues and we believe that is the appropriate forum if car design standards need to be addressed. However, limitation of common carrier obligation on hazardous commodities would be unfair to shippers, it would be a decided detriment to the general public.

<u>Carrier Imposed Requirements for Infrastructure Investments by Shippers</u>

Diversified's plant in Channahon, IL was constructed in 1981 – 1982 and commissioned in the fall of 1982. The decision to build the plant at Channahon (Lorenzo) was based on agreements reached in negotiations with the Atchison, Topeka & Santa Fe Railway (Santa Fe) which included a demurrage agreement that provided three-days' free time. Diversified's cost estimates and operating plan were predicated on the demurrage agreement, and that agreement was critical to Diversified's operation and ability to be cost competitive.

Since BNSF's acquisition of the Santa Fe, BNSF has engaged in a pattern and practice of shifting policies which continually increase our costs and infrastructure burdens. At the same time, we are continually left guessing as to what new policy changes are in the offing that will impose new burdens on us.

After the BNSF acquisition of the Santa Fe, BNSF terminated the demurrage agreement. Initially, BNSF agreed to reestablish the former agreement. However, after BNSF experienced a series of personnel changes in the Marketing Department, BNSF personnel advised that the agreement would not be reestablished.

Again, we approached BNSF and negotiations were successful – we secured a lease track agreement at a reasonable rate, we modified our operations plan and demurrage was eliminated. The following year, BNSF informed us that they had implemented a new program with rates for track leases that were intended to address capacity issues by geographic location. As a result, our track lease costs would have increased 375%. Negotiations continued and the railroad agreed to a plan which would transition increased track lease charges over a three-year period, which would give Diversified time to expand its rail siding. Further, if Diversified made the decision to invest capital in expanding its rail operation, BNSF would participate in the growth initiative by providing a per-car allowance for part of the investment costs.

I secured approval from Diversified's Board of Directors to add an additional track and for additional infrastructure changes that were required, including piping for additional loading/unloading facilities. Engineering plans were prepared and approved by BNSF Engineering personnel; however, once again, the railroad tried to back out of the deal and said they were no longer doing track allowance agreements. A compromise agreement was reached, but BNSF's participation in the investment costs was significantly lower than the original offer.

Diversified has invested more than $2.2 million at its rail-served plants for infrastructure improvements required to maintain and increase rail shipments. In addition to expansion of the lease track at the Channahon plant, projects included:

- Adding a fourth tank car unloading station at the Anaheim, CA plant.
- Rail infrastructure improvements and storage at the Petal, MS (Dragon, MS) plant.
- Installation of an additional rail car unloading station, rail risers, and a bulk storage tank at the Sparta, NJ plant.
- The Channahon plant was originally constructed with eight (8) tank car loading and unloading stations. Prior to the latest expansion to add the fourth siding, we added four additional tank car loading and unloading stations, and we added bulk storage for a new product blend shipped exclusively by rail. With the addition of the 4^{th} rail siding, the plant now has (16) tank car loading and unloading stations, effectively doubling the original loading and unloading facilities of the original plant design.

Certainly, some of these infrastructure investments were made to increase our capacity. However, many of these infrastructure investments were necessitated by the railroads' continuing shifts in policy as to the costs to be imposed on us and the scope of infrastructure necessary to receive adequate service. We are prepared to make necessary infrastructure investments. However, unless we are assured that the railroads still have common carrier obligation, there is no assurance that the railroads will continue to provide service despite our heavy infrastructure expenditure.

Conclusions

Diversified relies on rail transportation and we have invested significant capital to maintain and increase rail shipments to and from our facilities. We respectfully request that the Board re-affirm that the railroads have an obligation to continue to provide rail service to our facilities. Decisions regarding the location of manufacturing and distribution facilities have been made based on access to rail service and analyses that included cost projections. Further, Diversified CPC International, Inc. has invested capital to maintain and increase rail shipments. Diversified is prepared to continue to invest in infrastructure if necessary to accommodate growth. In so doing, we will effectively "hold up our end of the bargain" in maintaining capacity, even though the railroads' continual shifts of costs and infrastructure responsibility onto us has dramatically increased our challenges in remaining cost competitive. By the same token, we believe it is imperative that shippers like Diversified be assured that the railroads will "hold up their end of the bargain" – in other words, the common carrier obligation to provide competitive rates and reasonable service on reasonable demand. We urge the Board to reaffirm this fundamental common carrier obligation.

There is no evidence that would support a decision to allow rail carriers to limit their common carrier obligation on shipments of hazardous materials. Major accidents involving TIH commodities in recent years have not been caused by the shippers or the shippers' cars used for those shipments. Limitation of Common Carrier Obligation on hazardous commodities would be unfair to shippers and it would be a decided detriment to the general public.

Respectfully submitted,

William A. Frauenheim III

William A. Frauenheim III
Diversified CPC International, Inc.
24338 W. Durkee Road
Channahon, IL 60410

HIGHROAD Consulting, Ltd.
55 East Jackson Blvd
Suite 625
Chicago, IL 60604
(312) 765-0250

Dated: April 17, 2008

Consultant for Petitioner

1411236