

**OPENING STATEMENT of
CHARLES D. NOTTINGHAM, CHAIRMAN
COMMON CARRIER OBLIGATION HEARING
April 24-25, 2008**

Good morning and welcome. Today we will hear testimony on a topic that has generated much interest both within and outside this agency – the common carrier obligation. I am sure that it will be often mentioned today that the common carrier obligation is a long standing legal principle. In fact, as one historian has noted, the principle that common carriage is open to all, upon reasonable request, has been imposed upon transportation companies as a feature of English common law since the Middle Ages, and its roots go back even farther, to commercial codes enacted by the Roman Empire.¹

Today, that common law principle, as it applies to railroads, is codified in the Interstate Commerce Act, in the provision stating that “a rail carrier providing transportation or service subject to the jurisdiction of the Board . . . shall provide the transportation or service on reasonable request.”²

At the heart of the Board’s mission is our responsibility to serve as a forum for resolving disputes – both formal and informal – between shippers and railroads (and even between a railroad and another railroad) regarding whether, and how well, the railroads are carrying out that obligation to “provide service on reasonable request.” Recently, for example, a shipper in Lubbock, Texas, complained that it was receiving inadequate service from the railroad serving it. In that case, the Board first issued an order permitting another railroad to operate over the incumbent railroad’s lines to serve the shipper, and ultimately, we forced the incumbent railroad to sell its line to another carrier that demonstrated a commitment to improved rail service to shippers. This particular “forced sale” was complex and lengthy, but demonstrates this Board’s commitment to enforcing the common carrier obligation and protecting shippers from unreasonable denial of service.

The Board acted to preserve shippers’ service options in another recent case in Ohio involving a railroad that would not let another railroad cross its line. In that case, a Class I railroad had unilaterally removed the crossing diamonds that were needed for a shortline to serve several potential shippers. The Board made clear that a carrier may not undercut another carrier’s ability to fulfill its common carrier obligation by unilaterally severing track of the other carrier that is part of the national transportation system. The Board directed the Class I carrier to promptly reinstall the crossing.

¹ Paul Steven Dempsey, PhD, “Transportation: A Legal History,” 30 *Transp. L.J.* 235, 241-42, 363 (2003).

² 49 U.S.C. 11101(a).

And pending before the Board right now, as Congressman DeFazio has discussed, is a proceeding involving a line of railroad at Coos Bay, Oregon, which was embargoed by the shortline that owns it last fall. In that case, we are looking into whether that railroad has violated its common carrier obligation by failing to restore the line to service (and failing to even begin the process of restoring the line to service). In fact, we will hear testimony at this hearing from some of the principals involved in that case.

As we examine today and tomorrow many of the questions and controversies related to the common carrier obligation, one thing is clear: the common carrier obligation must not be allowed to be re-defined, either by railroads or by shippers, in a manner that is inconsistent with the broad public interest in the free flow of interstate commerce.

However, exactly what is a “reasonable request” for service is a matter of great debate as is revealed in the statements you have filed with us. There are tensions and trends surrounding the common carrier obligation that I am sure we will hear discussed today, including:

- the railroads’ need to make market based decisions versus the national interest in ensuring that all markets are served;
- the status of exempt commodities, which the Board has found are not subject to a common carrier obligation unless the exemption is revoked;
- the trend in agricultural transportation towards large unit trains and the effects of that trend on single-car shippers;
- the effect of the modern day tort liability system and security concerns, and resulting insurance costs on the common carrier obligation
- whether service to a shipper can be conditioned on a shipper contributing to the capacity investment the railroad would need to serve that shipper

The strain on the common carrier obligation is even more acute given the transportation trends that demonstrate there will be increased pressure on the railroads to carry more and more freight, in light of factors such as highway congestion, truck driver shortages, and increased fuel costs that make rail more attractive than less fuel efficient modes. We heard about many of those trends just over a year ago, when we gathered in this hearing room to discuss infrastructure demands and capacity constraints in the railroad industry. At that hearing, a representative of one of the Nation’s ports testified that container traffic typically carried by truck or rail entering North American ports from overseas will grow by more than 100% by the year 2020, from over 48 million Twenty Foot Equivalent Units in 2005 to an anticipated 130 million TEUs. Furthermore, representatives of the Class I railroad industry testified that – despite their plans to

increase investment levels in the system every year – their anticipated capacity investments will not keep up with forecasted increases in rail service demands.

Some have suggested that the common carrier obligation must change with the times – that it cannot mean the same thing in a capacity constrained environment that it meant in an excess capacity environment. Some have likewise suggested that the common carrier obligation must yield when the commodity to be transported is extremely hazardous, or when a line imposes a severe financial drain on a railroad. Others believe that some commodities are simply so important to our economy that they should receive some type of priority treatment in a capacity-constrained environment.

I did not initiate this hearing with any preconceived notions that the common carrier obligation has changed or should change. I am certain your testimony over the next couple of days will provide meaningful details of how the dynamics of this obligation play out in the marketplace, and how you, the shippers and carriers, navigate the bounds of the common carrier obligation.

As you seek to navigate that sometimes rough water, please remember that the Board is available to help resolve problems both informally and formally. You may have seen our announcement last week that we have reorganized a couple of our Board offices into a new Office of Public Assistance, Governmental Affairs and Compliance. As part of that reorganization, we are expanding our Rail Consumer Assistance program which will now seek to reach a much broader audience. Instead of a Rail Consumer Assistance Program and a separate Public Assistance hotline, this new, merged program will address both operational and service issues among all Board stakeholders, as well as questions pertaining to Board procedures. Information about the program is available on the information table in the back hallway.

Finally, just a few procedural notes regarding the testimony itself. As usual, we will hear from all the speakers on a Panel prior to questions from the Commissioners. Speakers, please note that the timing lights are in front of me on the dais. You will see a yellow light when you have one minute remaining, and a red light when your time has expired. As you can see from the published schedule, we have quite a few witnesses appearing at this hearing. Therefore, I will be keeping an eye on the clock and ask that you please keep to the time you have been allotted. I assure you that we have read all of your submissions, and there is no need to read them here. After hearing from the entire panel, we will rotate with questions from each Board Member until we have exhausted the questions. Additionally, just a reminder to please turn off your cell phones.

I look forward to hearing the testimony of the parties.