

**Opening Statement of Commissioner Buttrey
Hearing, STB Ex Parte No. 677,
“COMMON CARRIER OBLIGATION OF RAILROADS”
April 24, 2008, Washington, D.C.**

The term “**common carrier obligation**” has been around for a long time. It is said to arise in statute, yet the Interstate Commerce Act does not define that precise term. That Act does have a section - section 11101 — with the heading: “**Common carrier transportation, service and rates.**” In that section, the statute says that a rail carrier shall provide transportation or service upon reasonable request.

It is the meaning of that somewhat cryptic phrase — provide transportation or service upon reasonable request — that we are here to probe and consider at this hearing. I say “cryptic” because those words used in the statute are so very general and non-specific in nature and require quite a lot of interpretation and fleshing out in order to ascertain exactly what they mean. That is the job of this Board and the courts. There is quite a lot of history that we can

look at to determine what this Board and the ICC before it, and the courts, have thought the “common carrier obligation” meant in the past. But it is clear to me that the interpretation of this cryptic phrase must change over time as circumstances change, and that it may be found to impose different requirements on rail carriers today, in the present capacity-constrained environment, than it did ten, or fifty, or one hundred years ago.

I know at least one person who claims that the concept of the “common carrier obligation” is so well-established that it actually originated with Hammurabi’s Code of ancient Babylon! There are probably some who would argue that the concept has some connection to the Dead Sea Scrolls. I am advised that the concept actually has roots in English common law dealing with public utilities. And, we have all heard it said that the concept is as old as dust.

Now there is an old story about an arrogant young man who was feeling pretty confident one day and he challenged God by saying that he could make a man, just like God did. God responded by saying that He accepted the challenge and would meet the young man in the Gobi desert. At that meeting, God bent down and took a handful of dust and said . . . “From this dust, I will make a man.” Then, the young man bent down and took a handful of dust. At that moment, God said . . . “You have to provide your own dust!”

Now, I am not suggesting that we repudiate or dishonor the progress that has been made under the original concept, but I am suggesting that it may be time to get our own dust — we may need to get our own concept of the “common carrier obligation” that recognizes the new realities in the current constrained global transportation marketplace.

Take the question of whether railroads are obligated to transport the most extremely toxic hazardous materials without being properly protected against the horrendous liability exposure that could ensue. In my view, there must be enacted a liability cap for hazmat transport — perhaps something akin to Price-Anderson. I believe that would be good public policy. Until the Congress deals with the liability cap issue, I, for one, believe that rail carriers may well be within their rights to refuse to carry the extremely toxic hazmats without indemnification. I can tell you that as a businessman, that's the decision I would make. I simply do not feel that it is a "reasonable request" for a shipper to ask a railroad to transport these types of commodities without some kind of meaningful protection from the unreasonably high, "bet-the-company"-type liability exposure.

While I know we need to stay focused today on the concept of "common carrier obligation," I cannot resist the temptation to comment on some things I have observed over the past few months

and which persists today. There are people and groups who seem to be espousing legislative or regulatory proposals that are based on totally incorrect information. I have tried to find explanations for such activity: faulty advice, misunderstanding, intentional deception or a combination of these. Whoever is paying for these activities might consider asking for a refund. It is clear to me that deception and diversion are the true “evil twins” when it comes to today’s debate in the public arena.

We could spend a couple of days, at least, looking into these specious claims but we do not have the time. However, I must expose a couple of them that bother me the most. First, it is simply a misunderstanding of the current state of the law to state that the railroads are not subject to the antitrust laws. They are and always have been subject to the antitrust laws. Congress has carved out very limited exceptions that generally apply to those specific activities that are covered by official Board actions which are directly and immediately reviewable by the Federal courts. But

that leaves a very broad range of egregious conduct that is subject to the full weight of our antitrust laws, including price fixing, bid rigging, and market allocation.

Another fallacy that I've heard asserted as gospel truth by some is the claim that the Staggers Act was intended to spur, or increase, competition, and that the Board has somehow failed to live up to that goal. But I've looked at the legislative history, and it is clear that the balance that Congress struck in the Staggers Act is that where competition exists, it should be the regulator of rail rates to the extent possible; and only where competition does not exist is regulatory rate relief available. The Staggers Act does not contain a mandate to increase competition, and anyone who says it does is trying to rewrite history. Another misconception I hear is that "captive shippers" cannot get meaningful rate relief. But that term "captive shipper" is often used inaccurately. A shipper that has a truck alternative simply is not a captive shipper — the Staggers Act makes that very clear.

Turning now to some good news, I am very pleased that the Board is going to start making agricultural contract summaries readily available and accessible on the Board's website. Section 10709(d)(1) of the Act directs the Board to ensure that the essential terms of each contract for the transportation of agricultural products including grain are made available to the general public. This new web posting procedure is a good first step to help to do that. It will help to shed more light on what is going on with grain contracts and make this very dynamic market a bit more transparent.

And now, I'm here to listen. I look forward to hearing the testimony of the witnesses.