

**Opening Statement of Commissioner Buttrey  
Hearing, STB Ex Parte No. 677 (Sub-No. 1),  
“COMMON CARRIER OBLIGATION OF RAILROADS —  
TRANSPORTATION OF HAZARDOUS MATERIALS”  
July 22, 2008, Washington, D.C.**

The common carrier obligation requires rail carriers to provide transportation or service upon reasonable request. That’s what the statute says. But the trick is to figure out what those seemingly simple words mean, against the backdrop of today’s constrained global transportation marketplace.

Take the question of whether railroads are obligated to transport the most extremely toxic “TIH” hazardous materials without sufficient recognition of the massive liability exposure that could ensue. That’s a problem. It is of concern to this Board because of our responsibilities to ensure a safe, efficient and economically sound rail transportation system, as set out in the National Rail Transportation Policy. There is a tension between the common carrier obligation, as interpreted by some to be

practically without limits, and the goal of an economically sound railroad industry. That is the reason we are holding this hearing today.

The Board has authority over the economics of interstate rail transport, and as such is properly responsible for dealing with issues of possible economic damage resulting from carriage of a commodity. Our sister agency, the Federal Railroad Administration, has jurisdiction over rail safety. FRA recently issued a new rule known as “HM-235.” It requires that railroads handling certain categories of extremely hazardous materials must file a route analysis and alternate route analysis with FRA in certain circumstances. This FRA rule is aimed at rail safety matters, as appropriate to FRA’s jurisdiction. But it does not address the economic issues that railroads are exposed to because of the potential liability of transporting these extremely hazardous materials. These economic issues fall under the jurisdiction of the Board.

This potentially devastating railroad liability exposure is a problem that the U.S. Congress could address by putting in place a liability cap for TIH hazmat transport. But Congress does not appear to be poised to address this issue soon. Therefore I believe that it falls to the Board.

I personally believe that rail carriers may well be within their rights to refuse to carry the most extremely toxic hazmats without indemnification. 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.

For rail traffic that falls under the Board's regulatory authority, by which I mean rail traffic that moves under tariffs, not contracts, I believe that it could well be found to be a reasonable

practice today if railroads were to add liability ceilings to their tariff terms as a condition of their carriage of TIH commodities, or require execution of an indemnification agreement prior to carriage. Of course, under this approach, the amount and the terms of such liability ceilings or indemnification agreements would need to be such that they would be found to be reasonable.

I do not envision that it would be a “one-size-fits-all” exercise, or that a single solution or approach would fit all carriers and all situations. These protections against excessive liability for tariff shipments of these dangerous but important commodities would need to be carefully tailored. They would need to reflect specific facts and circumstances including the commodity, the transportation to be provided, the route and equipment to be used, the specific carrier and shipper involved, etc., in order that the record would be found to support the reasonableness of the tariff term if it were challenged.

For contract traffic that falls outside the Board's jurisdiction, of course, the parties can deal with liability caps and indemnification matters in any way that they agree is appropriate.

This is only one idea. I am sure there are other approaches that we should explore and consider. I'm here to listen, and I am very much looking forward to hearing the testimony of the witnesses.