BEFORE THE

SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 677 (Sub. No. 1)

COMMON CARRIER OBLIGATION OF RAILROADS—

TRANSPORTATION OF HAZARDOUS MATERIALS

COMMENTS OF THE

U.S. DEPARTMENT OF AGRICULTURE

Bruce I. Knight
Under Secretary
Marketing and Regulatory Programs
U.S. Department of Agriculture
Washington, D.C. 20250

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AUTHORITY AND INTEREST

The Secretary of Agriculture is charged with the responsibility under the Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 to represent the interests of agricultural producers and shippers in improving transportation services and facilities by, among other things, initiating and participating in Surface Transportation Board (Board) proceedings involving rates, charges, tariffs, practices, and services.

INTRODUCTION

The Department of Agriculture (USDA) commends the Surface Transportation Board (Board) for holding this hearing to allow interested parties to present their views concerning the Common Carrier Obligation (CCO) as it relates to the obligation of railroads to transport hazardous materials. USDA appreciates the willingness of the Board to take into consideration the views of interested parties in its efforts to better understand, monitor and enforce the CCO.

USDA contends that the CCO applies to the movement of hazardous materials. USDA supports the preservation of current CCO requirements to haul hazardous materials, particularly anhydrous ammonia, and opposes the relaxation of those CCO requirements.

USDA understands that liability issues involved in the transportation of hazardous materials are a serious problem. USDA believes that the appropriate resolution of these issues would be in the public interest. USDA urges railroads, shippers, receivers, and railcar providers to work together in crafting a feasible solution to the liability issue of transporting toxic by inhalation hazard (TIH) commodities.

BACKGROUND

The Board's April hearing relating to the CCO produced a wide range of comments from shippers, railroads, governmental agencies, and others relating to the obligation of railroads to haul hazardous materials, including TIH commodities. It is in the public interest to transport TIH commodities by rail because rail is clearly the safest and most efficient transportation mode. Furthermore, the transportation of TIH commodities is necessary for the public health and necessity. An example is the societal need for the production of an adequate supply of food.

Railroads contend that the transportation of these materials subjects them to ruinous liability in the event of an accident. In addition, the Rail-Shipper Transportation Advisory Council (RSTAC) states that there could be insufficient assets available to satisfy proven claims in the event of a catastrophic release of TIH commodities. RSTAC also raised concerns that TIH accidents could jeopardize the continuation of rail service on parts of the national rail system should damage claims exceed insurance proceeds and the assets of the rail carrier involved (RSTAC comments, May 19, 2008, page 1).

USDA understands that both Class I railroads and producers of TIH can obtain up to about $1 billion of liability insurance to cover their individual liability for the transportation of TIH, and that shippers may be able to procure insurance that provides additional insurance coverage for the railroads. Insurance costs for the railroads are approximately $10 to $20 million per year. The insurance railroads and shippers can purchase may, however, be insufficient to cover all claims resulting from a catastrophic release of TIH in a densely populated urban area. The impact of a TIH release is influenced by a variety of factors including the time of day of the incident, the ability of

emergency responders to deal with the release, weather conditions, release quantity, and the location of people to the released material.

Adequate resolution of liability issues for those involved in the transportation of hazardous materials would be in the public interest and will require the cooperation and consensus of all parties (railroads, shippers, receivers, fertilizer industry, railcar manufacturers, etc.). In the event that a railroad fails due to a catastrophic event linked to the transportation of TIH, agricultural shippers and rural economies most likely would be harmed.

Railroads are seeking a solution modeled on the Price-Anderson Act of 1957, which would require Congressional action. The Price-Anderson Act was designed to ensure that adequate funds would be available to satisfy liability claims of members of the public for personal injury and property damage in the event of a catastrophic nuclear accident.

The Price-Anderson Act makes the following changes to typical civil court procedures:

- Jurisdiction is automatically transferred to federal courts no matter where the accident occurred.
- All claims from the same incident are consolidated into one Federal court, which is responsible for prioritizing payouts and sharing funds equitably should there be a shortfall.
- Companies are expressly forbidden to defend any action for damages on the grounds that an incident was not their fault.
- An open-ended time limit is applied, which allows claimants three years to file a claim starting from the time they discover damage.
- Individuals are not allowed to claim punitive damages against companies. The act makes no provision for punishing companies responsible for an

incident, but nuclear licensing regulations specify fines for breaches of safety regulations and criminal charges apply unaffected.

Other suggestions made by the railroads and RSTAC include changes in routing, operating practices, safety regulations, and pricing. In addition, they have recommended product substitution where feasible.

IMPORTANCE OF ANHYDROUS AMMONIA

The use of commercial fertilizers is a key tool that assists U.S. agricultural producers in becoming more economically and environmentally efficient as well as more productive. Using fertilizer judiciously and in an environmentally safe way is critical for our planet's ability to supply the increasing need for food, feed, fuel, and fiber.

Anhydrous ammonia is a good example of a necessary hazardous material that should be hauled by rail for public convenience and necessity. Anhydrous ammonia, a product often used for agricultural purposes, is the second largest user of railroad transportation for TIH products. Although anhydrous ammonia is transported by rail, truck, barge, or pipeline, the majority is shipped by rail. During 2006, railroads transported 48,852 tank cars of anhydrous ammonia, totaling nearly 3.9 million tons.

At this time it is usually not feasible to substitute other products for anhydrous ammonia, which is essential in growing sufficient crops to feed the planet, as well as other critical uses. Anhydrous ammonia is the base material for nearly all other nitrogen fertilizers and some phosphate fertilizers. Anhydrous ammonia is the most economical and efficient source of nitrogen for most farmers. Fertilizers high in nitrogen are essential for crops such as corn, which is the largest user of directly applied anhydrous ammonia. A single rail car of anhydrous ammonia contributes to the production of

approximately 128,000 bushels of corn. The U.S. corn crop is used not only for food, but also in the production of ethanol fuel, in soft drinks, and even windshield wiper fluid. Agricultural producers also rely upon the use of anhydrous ammonia for the production of several crops other than corn, either as a direct fertilizer or as a key ingredient in another fertilizer. Furthermore, without anhydrous ammonia, U.S. farmers would be unable to replace the major sources of phosphate fertilizer with another suitable phosphate source without grave economic harm. Thus, anhydrous ammonia is essential to the growing of food for millions of Americans and in helping meet the nation's energy needs.

The railroad industry has suggested that agricultural producers could use safer alternatives than anhydrous ammonia. In some limited cases, this may be a feasible and desirable solution. However, in nearly all cases, it is not a suitable solution and it is not the only option that should be under consideration. This option should be considered only after the careful study of all options, which should include careful consideration of the benefits of using anhydrous ammonia, and whether the current non-rail infrastructure would support such a change. Consideration should also be given to the anticipated costs of building infrastructure that could accommodate such a change, and the speed at which the needed infrastructure could be built, and environmental impacts that could arise.

Substituting other sources of nitrogen for anhydrous ammonia usually is not feasible because of increased costs and the need to apply those alternatives at the time of planting. It usually would take at least three tons of an alternative source of nitrogen to accomplish the same results as one ton of anhydrous ammonia. Not only would this add

further congestion to the nation's highways, waterways, and rail lines, it would also add to the transportation costs, and to the base cost of each pound of actual nitrogen.

Furthermore, anhydrous ammonia is often applied in the fall because it bonds with the soil and is still available for spring planted crops because it does not leach out of the soil due to snow or rainfall. By substituting other forms of nitrogen, which would be applied in the spring, agricultural producers would have an increased risk of the nitrogen leaching out of the soil. Due to this tendency of other forms of nitrogen to leach from the soil quite easily in the presence of heavy rainfall, agricultural producers may need to apply the alternative form of nitrogen more than once.

The infrastructure for producing alternative sources of nitrogen fertilizer can produce only a small fraction of the nitrogen currently provided by anhydrous ammonia. Increasing the capacity to produce these alternative sources of nitrogen will take many years due to the time required to weigh environmental impacts, secure sufficient investment capital, and build the necessary production plants. The fertilizer industry, like the railroad industry, relies on capital markets, which seek the maximum return on investment. Thus, any proposal to immediately shift to large shares of alternative sources of nitrogen is probably not feasible.

In addition, because anhydrous ammonia is the base for nearly all of the alternative sources of nitrogen, these alternatives would still require the transportation of anhydrous ammonia to the fertilizer manufacturing site. Therefore, shifting to alternative sources of nitrogen for crop production likely would not change the quantities of anhydrous ammonia that would need to be transported significantly, if at all.

Although the railroad industry is actively discouraging the movement of hazardous materials, USDA believes the CCO and concept of public convenience and necessity must be fully considered in addressing cost and safety issues in the transportation of hazardous materials by rail.

The railroad industry efforts to discourage the movement of hazardous materials by rail would likely shift the transportation of hazardous materials from rail to truck. Rail unquestionably provides the safest movement of these materials as the Association of American Railroads has stated for many years. Shifting hazardous materials from rail to trucks would require 4 trucks for every railcar, which would unquestionably compromise public safety due to the less favorable safety record of the trucking industry and the presence of an increased number of trucks on public highways.

In addition, rather than solving the problem of transporting these materials, railroad industry efforts to discourage the transportation of hazardous materials by rail would shift the liability burden to the trucking industry, which also would be devastated by a catastrophic accident. Thus, with the lack of sufficient infrastructure to manufacture enough alternative materials, public convenience and necessity requires railroads to continue to move these hazardous materials for basic public safety.

If railroads were relieved of their common carrier obligation, switching from rail to truck transportation would increase the volume of hazardous materials transported on our nation's highways. There are not enough drivers having a hazmat endorsement or cargo tanks to support the increased truck shipments.

In addition, USDA notes that a shift from rail to truck transportation would significantly increase road maintenance costs for local and state governments due to

increased road damage from large trucks. Furthermore, rail transportation is nearly 4 times as fuel efficient as truck transportation. The fuel efficiency of rail compared to truck becomes increasingly important during periods of high fuel costs, which reduce the cost-effectiveness of truck competition. The fuel efficiency and decreased greenhouse gas emissions of rail transportation are also advantages when calculating environmental impacts as rail reduces greenhouse gas emissions by two-thirds or more per ton-mile compared to trucks.

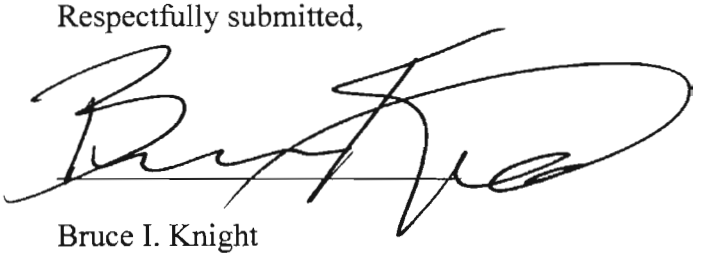
USDA recommends that the Board, in determining the CCO requirements for hazardous materials such as anhydrous ammonia, consider: (1) the lack of substitutability, (2) the relative safety and efficiency of rail movement compared to truck movement, and (3) the concept of public convenience and necessity.

SUMMARY

USDA urges the Board to enforce CCO laws due to the public necessity and convenience, public safety, and the need of farmers for anhydrous ammonia. In addition, even though railroads are privately owned and operated, USDA and many agricultural shippers believe that railroads have a responsibility to the public due to the initial governmental investment in the rail network and because railroads are for-hire transportation providers. USDA opposes the relaxation of those CCO requirements.

USDA also believes that a resolution of liability issues involved in the transportation of hazardous materials would be in the public interest. USDA urges railroads, shippers, receivers, and railcar providers to work together in crafting a feasible solution to the issue of liability in transporting TIH commodities.

Respectfully submitted,



Bruce I. Knight
Under Secretary
Marketing and Regulatory Programs
U.S. Department of Agriculture
Washington, D.C. 20250

CERTIFICATE OF SERVICE

I, Bruce Blanton, certify that on this 8th day of July, 2008, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all parties of record in STB Ex Parte No. 677 (Sub. No. 1).

Bruce Blanton
Director
Transportation Services Division
U.S. Department of Agriculture
Washington, D.C. 20250