

SURFACE TRANSPORTATION BOARD

Ex Parte No. 677

COMMON CARRIER OBLIGATION OF RAILROADS

**TESTIMONY OF MICHAEL F. McBRIDE AND
SUPPLEMENTAL WRITTEN SUBMISSION
ON BEHALF OF EDISON ELECTRIC INSTITUTE**

Pursuant to the Notice of Public Hearing ("Notice") of the Surface Transportation Board ("STB" or "Board") served February 22, 2008 in this proceeding, Edison Electric Institute ("EEI") hereby submits its Testimony, and a Supplemental Written Submission, on the common carrier obligation of railroads.

Interest of EEI

EEI is the association of U.S. shareholder-owned electric companies. Its members serve 95% of the ultimate customers in the shareholder-owned segment of the industry, and represent approximately 70% of the U.S. electric power industry. It also has as Affiliate members more than 65 International electric companies and, as Associate members, more than 170 industry suppliers and related organizations. Those EEI members who provide electric transmission and distribution service are themselves common carriers, and generally have an obligation to serve all who request their service.

**TESTIMONY OF MICHAEL F. McBRIDE
ON BEHALF OF EDISON ELECTRIC INSTITUTE**

Introduction

As the Board knows, the electric industry depends on the Nation's railroads to transport approximately 70% of the coal used to generate electricity. Coal is used to generate approximately 50% of the Nation's electricity. Therefore, railroad service is vital to assuring that sufficient electricity is generated to meet the Nation's ever-growing demand for it.

Of necessity, EEI member companies also rely on the railroads to transport other vital commodities. Of particular importance to EEI and its member companies, insofar as the issues in this proceeding are concerned, is that (1) there is an adequate rail transportation network in the United States, (2) that costs of expanding the capacity of the rail transportation network be borne appropriately by railroads and their customers, (3) that railroads continue to be required to carry coal as common carriers if so requested; and (4) that railroads continue to be required to carry various hazardous materials (such as anhydrous ammonia, chlorine, and radioactive materials) that are necessary to operate pollution control equipment or that are used with respect to, or generated by, coal-fired and other types of power plants (such as nuclear facilities).

Safety Requires Railroads to Carry Hazardous Materials

It is especially significant to this proceeding that, in the 1970s, the ICC held that railroads are and must remain common carriers of spent nuclear fuel and high-level radioactive waste despite any risks associated with carrying those commodities,¹ and that it found that, when it issued a Final Environmental Impact Statement with respect to then-pending litigation over the

transportation of radioactive materials, the rail mode was found to be several times safer than trucks to move radioactive and other hazardous materials.² Those circumstances are unchanged today. Moreover, many hazardous materials such as anhydrous ammonia and spent nuclear fuel are typically not transported by truck for various economic and safety reasons unless absolutely necessary. In nearly all instances, there is simply no practical alternative to rail transportation. Therefore, it is not only in the public interest to require railroads to carry these vital materials for EEI member companies and the rest of American industry – it is absolutely necessary that they do so.

The Common Carrier Obligation

Railroads are obliged, with only a very few exceptions, to provide transportation for *all* commodities tendered to them. The only exceptions are for historical and practical reasons, having nothing to do with safety, for such things as money, gold and silverware, and circuses. As Norfolk Southern's Form 10-K for fiscal year ending December 31, 2007 candidly states (at p. K13, included in NS's 2007 Annual Report): "NS, as a common carrier by rail, must offer to transport hazardous materials, regardless of risk."³

¹ *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980) ("*Akron, Canton*"), *aff'g U.S. Energy Research & Dev. Admin. v. Akron, Canton & Youngstown R.R., et al.*, 359 I.C.C. 639 (1979).

² *See generally, Conrail v. ICC*, 646 F.2d 642, 650-53 (D.C. Cir.) ("*Conrail v. ICC*"), *cert. denied*, 454 U.S. 1047 (1981), *aff'g Trainload Rates on Radioactive Materials, Eastern Railroads*, 362 I.C.C. 756 (1980).

³ *See also*, Canadian National's 2007 Annual Report (at 53): (CN, "as a common carrier, ... has a duty to transport" "hazardous materials such as chlorine and anhydrous ammonia, commodities that are essential to the public health and welfare"); CSX's Form 10-K for the period through December 28, 2007 (at 8): "CSXT, as a common carrier by rail, is required by law to transport hazardous materials...."; and UP's 2007 Form 10-K (at 7): "Federal laws require railroads, including us, to transport hazardous materials regardless of risk or potential exposure of loss.").

Because rail transportation is generally much safer than truck transportation, it is essential to the public interest that railroads continue to be required to carry all commodities (other than the few exceptions stated *supra*). As the Board is well-aware, railroads are regulated by the STB when acting as common carriers, not when acting as contract or private carriers. Moreover, STB rate regulation is available only when (a) the railroad is acting as a common carrier, (b) there is no effective transportation competition (*i.e.*, where there is market dominance) and (c) the railroad is charging very high rates. But in such circumstances, STB regulation is vital, because the shipper has no option but to transport his or her commodities at the rate set by the railroad or the STB. The STB's unreasonable practice regulation is available without a showing of market dominance. The Board's ability to fashion a reasonable solution to service problems may be constrained by practicalities and fairness to other shippers as well as the complainant.

The Board is well-aware that, at times in recent years, railroad service problems have gotten worse, due first to merger-related problems and then due to capacity constraints and operational deficiencies. (Of late, railroads have apparently been able to deliver enough coal and other commodities to EEI members, sometimes with self-help by the electricity generators, but the quality of the railroads' service has declined somewhat in recent months, based on shipper surveys. The system is still prone to delays.)

While the Board's ability to address service problems may, as a practical matter (if not as a legal matter) be limited (*see, e.g., DeBruce Grain Co. v. Union Pacific R.R.*, 2 S.T.B. 773 (1997)), and the best solution is a commercial one (*if both parties are being reasonable*), it is vital that the STB remain an effective regulator, to encourage commercial resolutions of rate and

service disputes. The only way that the STB can remain an effective regulator is to preserve, and to provide clear guidance and parameters with respect to, the railroads' common carrier obligation, without diluting the effectiveness of that obligation or exempting vital commodities that are dependent on the railroad mode from that obligation.

If the railroad industry believes that a cap on liability is appropriate, it must seek that change from Congress, not the STB. For example, Congress adopted the Price-Anderson Act, as amended, to limit the liability of those involved with nuclear power plants and transportation of nuclear materials (including railroads). There is, therefore, substantial reason to believe that Congress would act in a manner favorable to the railroads if the railroads have a compelling case for liability protection when they transport hazardous commodities. But railroads have not asked Congress to do so, or to amend the common carrier obligation.

EEI's response to the specific issues the Board raised in its Notice is as follows: (1) There are no reasons at the present time to conclude that railroads are incapable of meeting demands for service due to capacity constraints. If the economy improves, however, recent history suggests that the railroads may not provide adequate service to all customers, because parts of the rail system have little or no excess capacity. (2) There are no cost or safety reasons to make exceptions to railroads' common carrier obligations. (3) EEI has no objection to a policy that requires shippers to pay for the cost of installing facilities intended to serve only *that* shipper, but there may need to be exceptions to such a policy for other, smaller shippers (such as new ethanol plants), because those shippers may not be able to raise the capital for such facilities, whereas EEI members typically can. By law, railroads are generally required by statute to provide facilities or equipment upon reasonable request, but many EEI members own their own railcars, and obtaining railcars to move coal or other vital commodities has not been a problem for many

years so far as EEI is aware. However, EEI's willingness to have shippers pay for facilities or equipment intended to serve *only them* does not extend to separate payments for improvements to common facilities or equipment, because the expansion of those common facilities or equipment are, and should be, the responsibility of the *railroad* (because they benefit *all shippers, or at least more than one shipper*) and the costs of those common facilities cannot logically be directly allocated to only one shipper. The STB must be vigilant to ensure that railroads do not abuse those situations to try to charge one or a few shippers directly for *common* facilities or equipment. (4) EEI's members have a great interest in the issue of volume commitments or incentive requirements to obtain railroad transportation, because the Western railroads have been imposing those on EEI's members and others to obtain PRB coal transportation. In and of themselves, such commitments or requirements typically do not create contracts, because a shipper must agree to them without the ability to negotiate different terms, and neither the shipper nor the carrier typically intends such to be a contract. There are exceptions, however, as the Board also found in ruling on Union Pacific's Petition for Declaratory Order. Finance Docket No. 35021 (served May 16, 2007). (5) Rationing or metering service for economic reasons is directly contrary to the common carrier obligation, which requires "reasonable" rates and service terms in response to "reasonable" requests for transportation. Because a railroad may charge "any rate" for transportation provided as a common carrier, there is no reason to permit railroads to ration or meter service for economic reasons. Doing so may effectively negate the common carrier obligation by attempting to deprive the STB of control over the satisfaction of the common carrier obligation. (6) A railroad may only embargo service on a line if it is incapable of providing the service safely, and then only for the temporary period it is incapable of providing safe service. (7) A rail carrier

may abandon a line permanently only after the STB has approved, after making the necessary showing that the costs of providing the service exceed the benefits of doing so. (8) The common carrier obligation applies to rail carriers and to owners of non-abandoned rail lines unless the common carrier obligation was retained by a rail carrier or transferred to a rail carrier with the Board's approval. (9) The Board's Office of Compliance and Consumer Assistance ("OCCA")(now renamed the Office of Public Assistance, Governmental Affairs, and Compliance ("OPAGAC")) may be able to resolve minor, temporary disputes over rates and service, but EEI believes that OPAGAC is unlikely to be able to resolve major disputes, because of the likelihood that major disputes will already have been brought to the attention of senior managements of the railroad and the shipper.

If there is to be any change in the railroads' common carrier obligation (including any cap on liability, as the railroads have proposed, or a refusal to carry certain commodities), neither the Board nor the railroads are empowered to take such actions. Rather, Congress would need to do so, because the existing statutes require railroads to carry all hazardous commodities tendered in conformance with all applicable governmental regulations. EEI is, as it has always been, willing to discuss legislative issues with the railroad industry, but this proceeding is not the appropriate venue for doing so.

Supplemental Written Submission of EEI

I.

The Common Carrier Obligation Requires That Railroads Carry Hazardous Materials.

Introduction

Railroads act as common carriers, contract carriers, or private carriers. Railroads are common carriers when they provide transportation to the public in published tariffs or rate schedules, rather than in contracts or under other special circumstances or arrangements. 49 U.S.C. § 11101(a). A railroad is a contract carrier when it is carrying goods under a contract that satisfies the limited provisions of 49 U.S.C. § 10709.⁴

The Rationale for Regulation of the Railroads

Railroads are not just private businesses, but are regulated because they have a substantial impact on the public interest. Since the Supreme Court's decision in *Munn v. Illinois*, 94 U.S. 113 (1877), a business that has a substantial impact on the public may be regulated. There, the Supreme Court stated: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must

⁴ A railroad is a private carrier "when, as a matter of accommodation or special arrangement, he undertakes to carry something which it is not his business to carry." *New York Cent. R.R. v. Lockwood*, 84 U.S. 357, 376 (1889). Private carriage is an exceptional circumstance, and so we will not dwell on it here.

submit to the control." *Id.* at 126. In a series of cases decided at the same time as *Munn v. Illinois*, the Supreme Court sustained the validity of "Granger" statutes regulating railroad rates.⁵

So, because of federal largess, and in view of the unique importance to commerce of rail transportation, railroads have a common carrier obligation to carry even hazardous commodities. *Akron, Canton*, 611 F.2d at 1166. In *Akron, Canton*, the Eastern railroads were refusing to acknowledge that they were common carriers of radioactive materials, but the ICC held that they were, and the Sixth Circuit affirmed the ICC. It was especially important to those holdings by the ICC and the Court of Appeals that the rail mode was safer than trucks for the transportation of hazardous materials. *Id.* at 1168. The Sixth Circuit held that, in view of the need for rail transportation of radioactive materials, and the duty that the railroads owe to the public in effecting the National Transportation Policy, it is proper to hold that they are common carriers (in that case, of radioactive materials). *Id.* at 1167-68. That point applies still today, where the railroads may be seeking to be relieved of their duty to carry hazardous materials.

⁵ *E.g., Chicago, Burlington and Quincy R.R. v. Cutts*, 94 U.S. 94 (1877). The duties of a common carrier were, prior to the passage of the Interstate Commerce Act, established on a case-by-case basis. While the Act codified the common law obligations of railroads as common carriers, *American Trucking Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397 (1967), the Act also imposed purely statutory duties on railroads. *Akron, Canton & Y. R.R. v. ICC*, 611 F.2d 1162, 1166 (D.C. Cir. 1979), *aff'g*, *U.S. Energy Res. & Dev. Adm'n v. Akron, Canton & Youngstown Railway Co.*, 359 I.C.C. 639 (1978), *cert. denied*, 449 U.S. 830 (1980). It is true that railroads may engage in "activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act." *Kansas City So. Ry. v. United States*, 282 U.S. 760, 764 (1931)(citations omitted). "But a common carrier dealing with transportation that is subject to the act cannot escape its statutory obligations by calling itself a private carrier as to the transportation." *Akron, Canton, supra*. As the *Akron, Canton* court put it so well: "in the almost 100 years since the passage of the act there has developed a new 'common' law of transportation under which the public duty of railroads has been broadened beyond that extant under the common law of carriers. It is not only 'common carriage' but transportation which is subject to the act and to the commission's statutory powers." 611 F.2d at 1168. It concluded by stating "[a] carrier's duties run not to shippers alone but to the public," *citing Brotherhood of Ry. Clerks v. Florida E. C. Ry.*, 384 U.S. 238 (1966), and that "[t]herefore, public needs must shape the boundaries of these duties." *Id.*

Therefore, the common carrier obligation is the essential basis for economic regulation of the railroads by the STB, whatever the commodity at issue.

The Common Carrier Obligation Is Broader Than the STB's Notice Implies

The part of the common carrier obligation cited by the STB in its Notice is codified in 49 U.S.C. § 11101(a), which reads: "A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request." The Board held recently that "In order to be found to have violated the common carrier obligation at 49 U.S.C. § 11101(a), a carrier must have failed to provide service upon reasonable request....It has been held that a reasonable request is one that is specific as to the volume, commodity, and time of shipment." *Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Auth., d/b/a Northwestern Pacific Railroad*, Finance Docket No. 34337 (served July 27, 2005). With only a few exceptions, railroads have a duty to transport *all* commodities tendered to them in conformance with applicable governmental regulations. *Akron, Canton, supra*, 611 F.2d at 1166-67.⁶ None of the exceptions is a result of the allegedly hazardous nature of the transportation. *Id.* at 1169.

In *Interpretation of "Contract" in 49 U.S.C. § 10709*, Ex Parte No. 669 (served March 12, 2008), the Board held that railroads must, consistent with their common carrier obligation, quote a common carrier rate to any shipper which has made a reasonable request for such

⁶ The *Akron, Canton* Court held that "[t]here are exceptions to the general statutory common-carrier obligations of railroads." *Id.* Among those commodities subject to the exception are money (because of the train robberies of the 19th Century), "sterling and gold silverware," *Emporium v. New York Cent. R.R.*, 214 I.C.C. 153 (1936), and circus trains where the shipper has requested "limited and special services." *Transportation of Circuses and Show Outfits*, 229 I.C.C. 330 (1956).

transportation. EEI is gratified by that holding, because in recent years railroads have not always been willing to quote a common carrier rate upon request, or in some instances have made their willingness to do so contingent on a shipper agreeing to *all* of the rates that the shipper and the railroad are then negotiating. It is unreasonable to require a shipper to agree to an unreasonable rate or other contractual term as a price for entering into a contract for rates and service terms on other transportation being provided by the same railroad.

Reportedly, the railroads recently have become even more obstinate than just refusing to quote common carrier rates.⁷ The railroads' trade association has even gone so far as to call on American industry to stop making what AAR calls "extremely dangerous chemicals" (www.aar.org, February 27, 2008 Press Release). This is far beyond the railroads' appropriate role as common carriers. Indeed, it stands on its head their duty to carry all commodities, no matter how dangerous, with the exception of those few that were exceptions at common law.⁸

Frankly, the railroads' stated position presents a fundamental challenge to this Board – it is the most fundamental duty of this Board to enforce the railroads' common carrier obligation, because without it, the Interstate Commerce Act has no meaning for shippers, because they have no ability to compel railroads to carry what American industry absolutely needs them to carry. Electric utilities, for example, cannot meet their Clean Air Act obligations if they cannot receive anhydrous ammonia to operate pollution control equipment. Moreover, radioactive materials must eventually be moved from nuclear power plants, and railroads must transport those materials. Many other important industries have similar concerns.

⁷ "Truckers Gain Hazmat Business as Railroads Spurn Toxic Gases," *Transport Topics* (March 24, 2008).

⁸ See M. McBride, "Railroads Must Carry Dangerous Commodities," 69 *J. Transp. L. Logist. & Pol'y* 391 (2002), *citing* the Interstate Commerce Act and various cases, including, *inter alia*, *Akron*, *Canton*, *supra*, and *Conrail v. ICC*, *supra*, and the ICC decisions those cases affirmed.

Other aspects of the railroads' common carrier obligation include the duty to provide clean, safe railcars and other facilities and equipment, 49 U.S.C. § 11121,⁹ and the provisions with respect to liability for loss and damage, 49 U.S.C. §§11706-07. *Id.* But, broadly speaking, any duty a railroad may have when acting as a common carrier is part of its "common carrier obligation," not just the duty to quote a rate or provide equipment and facilities for the transportation. So, for example, the duty to permit the use of terminal facilities (49 U.S.C. § 11102) or switch connections and tracks (49 U.S.C. § 11103) are also part of its duties (even though it may have those duties not only as a common carrier, but also as a contract carrier). *See also, National Grain and Feed Ass'n v. United States*, 5 F.3d 306, 309 (8th Cir. 1993)(provisions of statute with respect to contract were intended to preserve railroads' common carrier obligations).

In any event, the common carrier obligation is partly a creation of statute, and partly a creation of the common law. *Akron, Canton, supra*, 611 F.2d at 1166, and note 2, *supra*. As such, it is certainly not the province of the railroads to determine the extent of their own obligations. We respectfully submit that the STB also may not relieve the railroads of their statutory duties.¹⁰

⁹ *Liability for Contaminated Covered Hopper Cars (Illinois Central Railroad Company)*, 10 I.C.C.2d 154, 1994 LEXIS 87 (1994)(tariff items that: (1) require shippers to inspect rail-furnished covered hopper cars; and (2) shift liability for certain damages resulting from the delivery of contaminated cars, redistribute the duties and liabilities envisioned by Congress and, therefore, were found to be an unreasonable practice under 49 U.S.C. § 10701(a), in violation of the Carmack Amendment (49 U.S.C. § 11707), and in violation of the car-service obligation, 49 U.S.C. § 11121(a), and therefore unlawful).

¹⁰ Since the creation of the Department of Transportation and the separation of functions between it and the ICC (now the STB), DOT has the jurisdiction to regulate the safety aspects of railroad transportation, and the STB the jurisdiction to regulate railroads on economic grounds, with a presumption against railroads imposing additional safety restrictions beyond those promulgated as part of the comprehensive scheme of DOT (and NRC, where applicable). *Conrail v. ICC, supra*, 646 F.2d at 648-53; *Akron, Canton, supra*, 611 F.2d at 1168-70, especially 1169 ("a carrier may not ask the Commission to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT and

The Board also has stated that the common carrier obligation is inherently factual, so there are no hard-and-fast rules for determining how the obligation will be applied in any given factual context. *E.g., Groome & Associate, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation*, Docket No. 42087 (served July 27, 2005)(shipper entitled to damages from development agency, owner of non-abandoned rail line, for increased storage, handling and shipping costs, but not for lost business, for 2 years prior to filing the complaint at the STB). But fundamentally, whatever the facts, the railroads have common carrier obligations under the Interstate Commerce Act and at common law that they may not avoid, unless Congress amends the Act. The railroads have not even requested such legislative changes.

Alleged Railroad Revenue Inadequacy Cannot Justify Railroad Refusals to Provide Transportation Demanded by Shippers.

There can be no argument that the railroads' past claims of revenue inadequacy (which may no longer be true in any event for most or all of the Class I railroads, in light of their recent improved financial health and in light of the Board's recent changes in the cost-of-capital methodology) justify a departure from their statutory common carrier obligation. Of late, the railroad industry has signaled that it intends to argue that the Board's revenue-adequacy methodology should be based on replacement costs, rather than net investment, and that on that basis, the railroads are revenue-inadequate. Not only are 49 U.S.C. §§ 11101 and 11121 and the other aspects of the common carrier obligation not conditioned on revenue adequacy, but the

NRC regulations governing such transport, and these regulations have been met"), *aff'g Radioactive Materials, Special Train Service, Nationwide*, ICC Docket No. 36325 (served March 8, 1978). Accordingly, once it is shown that the shipment is tendered in conformance with all applicable governmental regulations, the railroad must carry it. *Id.*

Supreme Court has held that it is not necessary that regulation be based on replacement costs instead of net investment.

In *Smyth v. Ames*, 169 U.S. 466 (1898), the Supreme Court upheld the right of the government to regulate railroads based on the fair market value of their assets. This was pernicious, however, because at the time, during a long recession, fair market value was much lower than the capital invested minus depreciation plus improvements (*i.e.*, the “net investment”) of the assets in question. The test proved to have a fatal flaw, and was thus unworkable, because it required the regulator to periodically re-determine the market value of the assets of the regulated entity.

The so-called “rule” of *Smyth v. Ames* was attacked for many years, *see State of Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm’n of Missouri*, 262 U.S. 276, 289 (1923) (Brandeis and Holmes, JJ., dissenting),¹¹ but it was not until *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602-05 (1944), that the Supreme Court followed Justice Brandeis’ famous dissent, overturned *Smyth v. Ames*, and held that a regulated business could be regulated on the basis of the capital invested in it, rather than the present fair market value of the assets.

The holding in *Hope Natural Gas* is followed in the regulation of every industry, including railroads. The holding was that the level of “just and reasonable” rates permitted must be sufficient to assure the financial integrity of the business, *i.e.*, pay not only the operating costs, but also the capital costs (including debt costs and dividends on the stock). The level of “return” permitted must be comparable to that of other industries with comparable risk and allow

¹¹ See Alfred E. Kahn, “*The Economics of Regulation*,” MIT Press (1988 ed.) at 35-41, especially n.41 (according “[a] place of high honor” to Justice Brandeis for his *Southwestern Bell Tel. Co.* dissent).

the enterprise to attract capital. However, the precise method of setting rates is not important, so long as the “end result” is fair to the investor and the public.¹²

As the Court stated: “Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called “fair value” rate base.” *Hope Natural Gas, supra*, 320 U.S. at 605. So the requirement in *Smyth v. Ames* that regulators must use current market value to measure asset value was overturned, and regulators generally now use the “net investment” rather than “fair value” or replacement costs as the method of regulation to determine revenue adequacy.

Accordingly, the Board’s revenue-adequacy methodology, to the extent it relies on the net investment of the railroads in their assets, is entirely appropriate and consistent with the approach of all other regulatory agencies. Any argument by the railroads that the STB should move to a market value or replacement-cost standard should be rejected as unnecessary and fraught with the same difficulties that caused the Supreme Court to abandon it in *Hope Natural Gas*.

It is true that railroads are not obliged to continue indefinitely to operate losing rail lines, and may seek to abandon them. As a general proposition, the STB (like the ICC) will not order the railroads to continue to serve portions of their system that continuously lose money (so as to protect the rest of the customers from having to cross-subsidize the shippers on the line losing money). But apart from allowing railroads to abandon *certain* lines, or discontinue service over

¹² *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-15 (1989).

certain lines, the Board is not empowered to relieve the railroads of their statutory duty to transport *any* commodity that is tendered in conformance with all applicable governmental regulations, and as to which the shipper's request is specific as to volume, commodity, and time of shipment, regardless of the railroad's overall financial condition. Rather, as common carriers, railroads must carry hazardous materials and virtually everything else, except (as we have discussed) gold, silver, money, and circus trains (when handled under special arrangements). Except for those stated exceptions, there are no other exceptions to the common carrier obligation, no matter how dangerous the commodity.

II.

Responses to the Board's Notice of Public Hearing

In its Notice herein, the Board stated that

“[t]he hearing would focus on various topics related to the extent of the common carrier obligation, including, but not limited to: (1) service limitation resulting from a capacity[-] constrained environment; (2) cost and safety issues related to the transportation of hazardous materials, especially toxic inhalation hazards; (3) carrier-imposed requirements for infrastructure investments by shippers; (4) the impact of volume requirements or incentives; (5) economically motivated service reductions and metering of the demand for service; (6) the proper use of rail embargoes; (7) when it becomes necessary to obtain abandonment authorization; and (8) to whom does the common carrier obligation apply. The hearing will also address the role of the Board's Office of Compliance and Consumer Assistance in ensuring that carriers meet their common carrier obligation.”

EEl responds to each of these topics *infra* to the extent it or its members have an interest in them.

(1) Service Limitation in a Capacity-Constrained Environment. EEl is not aware of any limitations on the ability of the railroads to provide transportation on request at the present time. In the recent past (from about 2003-07), railroads did not deliver all the coal that EEl

members and others required, claiming that their inability to do so was based on derailments in the Powder River Basin (“PRB”). However, there were also shippers of non-PRB coal who could not get sufficient quantities delivered to their power plants, at the same time that railroads were carrying coal to port for export. Also, about 10 years ago, at the time that CSX and Norfolk Southern took control of Conrail, and about 12 years ago, after Union Pacific took control of Southern Pacific, there were significant service failures of considerable duration. EEI is unaware of any capacity constraints that caused those problems, other than perhaps for a limited period while UP and BNSF were adding capacity in the PRB, because such problems did not exist before the Conrail acquisition or the UP-SP merger occurred.¹³

EEI is not privy to the transportation contracts of its members, so cannot comment on whether any particular contract may require railroad service despite the railroad’s unrelated common carrier obligations. It is important to note, however that the statute allows the STB to reject transportation contracts if the contracts cause a railroad to commit too much of its capacity to contract traffic. 49 U.S.C. § 10709(g)(2)(A) provides in relevant part that “A complaint may be filed under this subsection – (1) by a shipper on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title...”¹⁴ 49 U.S.C. § 11101(a) provides that “A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service.”

¹³ In some years, railroads have said that they were temporarily unable to transport all of the grain tendered to them at peak times, but EEI does not have sufficient information to discuss these claims, and defers to grain shippers to do so.

¹⁴ In context, it is clear that the quoted subsection provides such a right to *all* shippers, because 49 U.S.C. § 11101(g)(2)(B) provides additional rights to “a shipper of agricultural commodities.”

Accordingly, Congress has established by law an obligation on the part of the railroad to abide by its contracts. At the same time, 49 U.S.C. § 11101(a) goes on to provide that “Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.” Accordingly, there is a statutory mechanism to disapprove of a rail transportation contract, and to do so because abiding by the contract would cause the railroad to be unable to satisfy its common carrier obligation.

If there are times when railroads simply cannot provide all of the transportation requested of them because of capacity constraints, there is some authority for the proposition that the STB will not order specific performance under a contract where a railroad cannot provide all of the service demanded of it, but instead will expect a railroad to allocate equitably the capacity so as to serve all customers. *E.g., DeBruce Grain Co. v. Union Pacific R.R.*, 2 S.T.B. 773 (1997).

As EEI reads the STB’s *DeBruce Grain* opinion, however, the Board considered the matter subject to its discretion. As a matter of policy, and consistent with the statutory provisions quoted *supra*, EEI believes that, in general, the STB should expect railroads to adhere to their transportation contracts (when it addresses contractual issues on referral from a court, because the STB does not have authority over contracts, or if a challenge to a contract is filed with the STB), unless, after timely complaint, it is determined that to do so would interfere with the railroad’s ability to meet its common carrier obligations, or in an emergency situation such as occurred at the time of the service problems on the UP in 1997-98.¹⁵ This may be especially

¹⁵ In 1997-98, because not enough PRB coal was being delivered, EEI urged the STB to require UP and BNSF simply to inform the STB, weekly, of the number of loaded coal unit trains that those two railroads had transported out of the PRB. EEI did not ask the STB to otherwise take action against either railroad. Within approximately one month, the STB’s action triggered the appropriate response by the two Western railroads, and the problem was resolved. This shows the importance of the STB to ensure adequate transportation.

important if some electricity generators using coal or other vital commodities transported by railroad in common carriage are unable to get sufficient rail service, because such a circumstance might jeopardize the provision of electricity (clearly, a vital public good as to which the railroads have an essential role in assisting utilities and generators to provide).

EEI believes it follows from these principles that, unless the STB has disallowed a transportation contract due to capacity constraints, a court (or the STB on referral from a court) should, in general, assist shippers in forcing railroads to meet their contractual obligations (if need be, through injunctions). Shippers such as EEI members depend on railroads for the transportation of vital commodities, such as coal for electricity generation and anhydrous ammonia for operation of pollution control equipment at coal-fired plants, and so they must have the ability to compel railroads to abide by their contractual agreements. Otherwise, shippers may be required to live up to their contractual obligations, but not railroads, a situation certain to discourage shippers from entering into such contracts. Rather, the STB should encourage both shippers and carriers to enter into contracts where the contracts are mutually beneficial and therefore almost certain to be in the public interest. The public interest includes expecting railroads to make prudent business decisions when they enter into contracts to make sure they have the capacity, facilities, and equipment to live up to their obligations.

(2) Cost and Safety Issues Related to the Transportation of Hazardous Materials, Especially Toxic Inhalation Hazards. EEI firmly believes that, in general, and based on the above-stated considerations, there are *no* cost or safety issues related to the transportation of hazardous materials that are properly within the STB's jurisdiction to consider, for several reasons. Now that railroads have been substantially deregulated, there is no transportation

provided by a railroad that is required to be provided without the rate for the transportation reflecting the legitimate costs of service provided. That is so because the statute permits the railroads to charge “any rate” for transportation, unless a complaint is filed against the rate and the STB determines that the rate is unreasonably high under 49 U.S.C. §§ 10701, 10707. And the STB has never set a rail rate that did not reflect all of the railroad’s costs of service.

As for matters of safety, after the enactment of the legislation creating DOT in the 1960s, safety regulation, as a general matter, is a matter for DOT (and any other agency which may have special statutory authority, such as the Nuclear Regulatory Commission (“NRC”)) to administer, and, as a general matter, safety issues affecting the railroads are simply outside the STB’s statutory authority. *Conrail v. ICC*, 646 F.2d at 647-53; *Akron, Canton, supra*, 611 F.2d at 1169-70.¹⁶ In contrast, DOT (and specialized agencies such as the NRC) have the expertise on their staffs to administer the safety regulations and policies of those agencies. *See, e.g.*, DOT’s recent notice of proposed rulemaking, *Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials*, 73 Fed. Reg. 17818, 17825 (col. 1) (April 1, 2008)(citing *Conrail v. ICC* and *Akron, Canton* with approval).

(3) Carrier-Imposed Requirements for Infrastructure Investments by Shippers.

EEI is aware that railroads require shippers to provide the funds necessary to construct or rehabilitate privately owned *spurs* into a new facility to serve that shipper. There could be

¹⁶ The railroads’ complaint is with the statutory common carrier obligation. It is, therefore, obvious that any remedy for their complaint lies with Congress, not the STB. EEI stands willing, as it always has, to discuss any reasonable concerns that the railroad industry may have with transportation of hazardous materials. In this respect, EEI observes that railroad transportation of radioactive materials with respect to nuclear power plants is, generally, subject to the Price-Anderson Act, as amended, as the ICC found in several prior proceedings involving such transportation. Accordingly, the railroads have a cap on liability for carriage of such materials. Whether it is appropriate to adopt such a cap for shipments of other goods is a matter for Congress to decide.

exceptions to that general policy, if the shipper is unable to provide the funds necessary to build the line (such as new ethanol plants). Railroads are generally required to provide facilities or equipment upon reasonable request, but many EEI members own their own railcars, and obtaining railcars to move coal or other vital commodities has not been a problem for many years so far as EEI is aware. However, EEI's willingness to have shippers pay for facilities or equipment intended to serve *only them* does not extend to a requirement that shippers pay up-front for common facilities or equipment, which EEI understands is an issue that some utility coal shippers have recently faced. The up-front costs of expanding and maintaining common facilities or equipment are the responsibility of the *railroad* because they benefit *all shippers (or at least more than one shipper)*, not just some shippers, and unless the STB is vigilant, the railroads may abuse the situation to try to charge shippers directly for common facilities or equipment.

EEI's members often, but not always, provide their own railcars to move coal. Nevertheless, the statute does require a railroad to provide sufficient facilities and equipment to meet its common carrier obligations. 49 U.S.C. § 11121. EEI is not aware of disputes between its members and railroads over the railroads' obligation to provide railcars.

(4) The Impact of Volume Requirements or Incentives. EEI is of course well-aware that UP and BNSF have imposed volume requirements, under their so-called "public pricing" for PRB common carrier coal shipments, or have provided incentives to PRB coal shippers to obtain somewhat lower rates than would otherwise be applicable. Such volume requirements or incentives do not change the transportation being provided, in and of itself, to contract carriage, as the Board found in the case of Kansas City Power & Light Company's shipments, because

such volume commitments or incentives generally have been required in order to obtain coal transportation from the PRB for the last few years. In any event, such provisions are in concept no different than incentive tariffs with similar or identical provisions.¹⁷

(5) Economically Motivated Service Reductions and Metering of the Demand for Service. EEI believes that, because a railroad may charge “any rate” for transportation (subject to the STB’s authority to prescribe a reasonable rate if a shipper files a complaint and if there is no effective competition for the transportation at issue), it follows that there is no legitimate basis, apart from the applicable rate (or terms of a voluntary contract), for a railroad to be motivated to impose service reductions for economic reasons.¹⁸

(6) The Proper Use of Rail Embargoes and (7) When It Becomes Necessary to Obtain Abandonment Authorization. Railroads may and do impose embargoes on transportation over portions of their lines. *See, e.g., ICC v. The Baltimore and Annapolis RR. Co.*, 398 F. Supp. 454 (D.D.C. Md. 1975), *aff’d*, 537 F.2d 77 (4th Cir. 1976). The propriety of such an embargo is a matter of equity. As the court stated in *Baltimore and Annapolis*, “the determination as to whether an injunction should issue should be viewed as one of equity, *i.e.*, ‘whether it would be equitable to require substantial expenditures when shortly the commission may approve the railroad’s

¹⁷ EEI submitted Comments and Reply Comments in Ex Parte No. 669 on the subject of what constitutes a lawful contract, and it will not repeat those observations here, but rather refers the STB to them and incorporates them by reference herein.

¹⁸ Apparently UP inherited contracts of Southern Pacific that may not be profitable for UP, if they ever were. EEI relies for that proposition on at least one UP letter to the Chairman of the STB, a few years ago, stating that demand exceeded capacity on the Sunset Line, a situation that could only occur, given the statutory right to charge “any rate” and because most of that traffic is exempt from regulation, if UP’s rates were constrained by contract. Because EEI’s members generally do not transport coal or other vital commodities over that Line, EEI does not now take a position on the propriety of such contracts, but revenue losses from such traffic should not be made up in rates charged captive traffic.

abandonment application." 398 F. Supp. at 464, citing *ICC v. Chicago, Rock Island & Pac. RR*, 501 F.2d 908, 914 (8th Cir. 1974).

Recent examples of situations permitting embargoes include the "500-year flood" of 1993 along portions of the Mississippi and the Missouri Rivers, when certain railroads were required to reroute trains for weeks due to flooding of vast segments of their systems. As the Board knows, floods, and sometimes hurricanes, may cause temporary embargoes on many rail lines. It was the legendary 1972 storm Hurricane Agnes, which gave rise to the embargo in *Baltimore and Annapolis, supra*. That court held that "abandonment" is defined as "a permanent or indefinite cessation of rail service," citing *Meyers v. Jay Street Connecting RR*, 259 F.2d 532, 535 (2nd Cir. 1958); *ICC v. Chicago, Rock Island & Pac. RR*, 501 F.2d 908, 911 (8th Cir. 1974). The court also held that if the cessation of operations began and continues because of conditions over which the railroad had no control, no abandonment within the meaning of the Act would be established. *Baltimore and Annapolis*, 398 F. Supp. at 462 (citing cases). The court went on, however, to say that [a]bandonment should be distinguished from the term 'embargo,' which is issued by the carrier alone and which will justify a cessation of service as a temporary emergency measure when for some reason the carrier is unable to perform its duty as a common carrier." *Id.*, citing *Chicago, Rock Island & Pac.* and *ICC v. Maine Central RR*, 505 F.2d 590, 593 (2nd Cir. 1974).

The test, therefore, requires the carrier to be "unable to perform" its duty as a common carrier, not where the carrier may be unwilling to do so.

Because of the court's holding, quoted above, with regard to the equitable factors applicable to issuance of an injunction, the *Baltimore and Annapolis* court held that neither the shipper nor the ICC "is entitled as of right to an injunction against B & A's unlawful abandonment." *Id.* However,

after considering all the relevant factors, including the costs of repairing the line in question, the court held that the embargo was in fact an unlawful abandonment and issued an injunction requiring the railroad to restore service.

A railroad that adopts an embargo when it is able to perform its duty as a common carrier has violated the Act. *A fortiori*, if a railroad has adopted an unlawful embargo and does not need to expend capital to restore service, an injunction should be issued requiring the carrier to cease its embargo and perform its common-carrier obligations.

This is true even if the commodities in question are extremely dangerous. Certainly, the radioactive materials at issue in the *Akron, Canton and Trainload Rates on Radioactive Materials* cases were dangerous (although the container in which they were being transported is virtually impregnable and makes the transportation quite safe). DOT (and sometimes other agencies, such as the NRC) regulates such transportation so that it is safe. If railroads, which have been recognized as safer than trucks for transportation of dangerous commodities, *Akron, Canton*, 611 F.2d at 1168, wish to impose new restrictions for economic reasons on such transportation in rate and service schedules, they may be allowed to do so, subject to the authority of the STB over "unreasonable practices." 49 U.S.C. § 10704(a)(1). Moreover, they may seek to have DOT or other agencies with statutory authority over the particular transportation or commodities establish further restrictions by rule for safety reasons. *Akron, Canton*, 611 F.2d at 1168-70; *Conrail v. ICC, supra*, 46 F.2d at 650-53.

But the railroads may not determine that a commodity is absolutely too dangerous to carry, if the applicable governmental regulations for the transportation of that commodity are met. As the Sixth Circuit held in *Akron, Canton*: "a carrier may not ask the [STB] to take cognizance of a claim

that a commodity is absolutely too dangerous to transport, if there are DOT and NRC regulations governing such transport, and these regulations have been met. Such a claim is properly made before the agencies entrusted with promulgating these minimum safety obligations (footnote omitted)." 611 F.2d at 1169; *accord, Conrail v. ICC, supra*, 646 F.2d at 650.¹⁹

(8) To Whom Does the Common Carrier Obligation Apply. The answer to this question is straightforward: the common carrier obligation applies to *any* "rail carrier providing transportation or service subject to the jurisdiction of the Board under this part," *i.e.*, other than one providing contract or private carriage, when a shipper has made a "reasonable" request for transportation. 49 U.S.C. § 11101(a). As stated *supra* (at 6 & note 3), railroads have a duty to transport *all* commodities tendered to them in conformance with applicable governmental regulations, with only a few exceptions. *Akron, Canton, supra*, 611 F.2d at 1168. The common carrier obligation also applies to a non-carrier which owns a non-abandoned rail line unless the common carrier obligation has been retained by or transferred to a rail carrier. *E.g., Groome & Associate, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation*, Docket No. 42087 (served July 27, 2005)(shipper entitled to damages from development agency, owner of non-abandoned rail line, for increased storage, handling and shipping costs, but not for lost business, for 2 years prior to filing the complaint at the STB).

(9) The Board also stated in the Notice that "the hearing will also address the role of the Board's Office of Compliance and Consumer Assistance in ensuring that carriers meet their common carrier obligation." EEI generally believes that the OCCA (now OPAGAC) may be of value in attempting to resolve disputes that are relatively minor, but that OPAGAC is

¹⁹ See also *M. McBride, "Railroads May Not Refuse to Carry Dangerous Commodities,"* 69 J. Transp. Law, Logist. & Pol'y 391 (Summer 2002), *citing cases.*

unlikely to be able to resolve major disputes because it cannot compel parties to voluntarily change their positions. For example, if a railroad either refused to carry chlorine or anhydrous ammonia or radioactive materials, it is unlikely that the matter would be resolved short of adjudication by the Board itself. See, e.g., *Conrail v. ICC*, *supra*, 646 F.2d 642, and *Akron, Canton*, *supra*, 611 F.2d 1162, where the ICC had to order the railroads to publish appropriate tariffs. For similar reasons, if a railroad has decided to “de-market” chlorine or other hazardous materials, it will almost certainly have elected to do so after only the most serious consideration at the highest levels of the organization. The OPAGAC cannot be expected to convince a railroad, under those circumstances, to voluntarily cease and desist from its deliberately adopted strategy.

The OPAGAC also is unlikely to convince a shipper which depends on railroads to transport its goods to change its position if a rail carrier is not complying with its common carrier obligation. If shippers could use competitive truck or barge or pipeline service to transport their goods, rather than to attempt to compel railroads to do so, they would certainly use such competitive alternatives, instead of attempting to force an unenthusiastic or unwilling service provider to provide the service.

Summary and Conclusions

The electricity industry depends on the Nation's railroads to transport approximately 70 percent of the coal used to generate electricity. EEI member companies and other electricity generators also rely on the railroads to transport other vital commodities, such as the chemicals (especially anhydrous ammonia) used to operate pollution control equipment, chlorine to

maintain fossil-fuel and nuclear facilities, and radioactive materials such as spent nuclear fuel (to the extent that the Department of Energy is not the shipper).

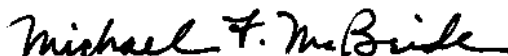
Accordingly, it is of particular importance to EEI and its member companies (and their customers) that (1) there is an adequate rail transportation network in the United States, (2) that railroads continue to be required to carry coal as common carriers if so requested; and (3) that railroads continue to be required to carry various hazardous materials that are necessary to operate pollution control equipment or that are used with respect to other aspects of the operations of coal-fired and nuclear power plants.

EEI was pleased that the ICC, in the 1970s and 1980s, determined that the railroads are common carriers of spent nuclear fuel and high-level radioactive waste, and that the railroads may not impose unnecessary and wasteful rates and terms of service on such transportation. EEI was also pleased that the ICC's decisions were upheld by the U.S. Court of Appeals in both the Sixth and the D.C. Circuits, and that the Supreme Court declined to hear the railroads' petitions for review of those decisions. Those decisions remain good law today, and nothing has changed to justify a change in those holdings.

Of particular importance to this proceeding is that, in the 1970s, the ICC found that the rail mode was many times safer than trucks to move radioactive and other hazardous materials. That is still true. Moreover, as a practical matter, many hazardous materials either cannot be transported by truck or are not transported by truck for various economic and safety reasons. Therefore, it is not only in the public interest to require railroads to carry these vital materials for EEI member companies and the rest of American industry – it is absolutely necessary that they do so.

If there is to be any change in the railroads' common carrier obligation (or any cap on liability, as the railroads have proposed, or permission to refuse to carry certain commodities), neither the Board nor the railroads are empowered to take such actions. Rather, Congress would need to do so, because the existing statutes require railroads to carry all hazardous commodities tendered in conformance with all applicable governmental regulations.

Respectfully submitted,



Michael F. McBride
Van Ness Feldman, PC
1050 Thomas Jefferson Street, NW
Washington, DC 20007
(202)298-1800 (Telephone)
(202)338-2416 (Facsimile)
mfm@vnf.com

April 17, 2008

Attorney for Edison Electric Institute