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Railroads' Common Carrier Obligation:

Its Legal and Economic Context

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April 2020

INTRODUCTION

Purpose and Finding

The purpose of this study is to review and analyze the common carrier obligation (CCO) of railroads and determine whether or not any legislative or regulatory changes are necessary to ensure that shippers continue to have reasonable access to the nation's rail network. Railroads and shippers differ widely in their views as to whether railroads are fulfilling their CCO.

Numerous railroads, shippers, public officials, and transportation professionals were interviewed for this study, and papers, both academic and testimonial, were reviewed. The views of both shippers and railroads are summarized. The principal takeaway is that the CCO must be preserved, but there needs to be a better definition of the concept and clarification of its meaning and applicability in today's transportation environment.

Historical Background on the Common Carrier Obligation

Public-sector intervention in the marketplace is hardly a recent phenomenon. The idea of governmental involvement in economic activity through regulation traces back to the earliest legal code. The Code of Hammurabi, which is a Babylonian Code of Law of ancient Mesopotamia dated to

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about 1754 BC, set forth numerous requirements on various trades as to their behavior and performance.

In the Middle Ages, certain activities were considered to be vested with the public interest. Activities such as drayage, inn-keeping, blacksmithing, and others fell into this category. Purveyors were expected to serve all who sought their services in a fair and non-discriminatory manner. The CCO is a concept that developed from this notion of "common callings." The CCO of the railroads today derives from this common-law heritage and has been incorporated into statutes.[2]

The CCO was discussed in Blackstone's *Commentaries*, an influential exposition on English common law first published in the United States in 1765.[3] However, the CCO has never been defined by Congress, but merely carried over from the English common law. The 1887 Act to Regulate Commerce mentioned the CCO without a definition and assigned "just and reasonable" and "non-discriminatory" responsibilities to it, while the 1903 Hepburn Act added to the railroads' responsibilities.

The nation's railroads, because of the nature of their operations, typically possessed significant monopoly power, especially in the Nineteenth Century. Railroads have significant fixed costs associated with their infrastructure. Because fixed costs cannot be associated with any particular movement, the railroads can recover them based on the nature of the demand.

Railroads typically use differential pricing—charging relatively higher rates to customers who have fewer competitive options than to customers with more competitive options—to cover their fixed costs. After the Civil War, many shippers, most of all farmers, felt that the railroads were abusing their power. In

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[2] E.g., 49 U.S.C. § 11101; *see* Michael F. McBride, *Railroads May Not Refuse to Carry Dangerous Commodities*, 69 J. Transp. L. Logist. & Pol'y, 391, 393-94 (2002).

[3] *See* William Blackstone, *Commentaries*, 451-52, http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf. There have been three stages in the historical development of the common law liability of the organization for hire to transport the goods. Beginning as an absolute responsibility in the early common law, it gradually shifted to a less drastic rule of non-fault liability, except for "Act of God" or "Act of the King's Enemies." It finally crystallized into its modern doctrine in the Eighteenth Century under the influence of Lord Holt's distinction between transporters exercising public employment and others.

the 1870's, several states, especially those in the Upper Midwest, enacted legislation to rein in the railroads. For numerous reasons, this patchwork quilt of state regulation did not succeed. Finally, in 1887, Congress passed the Interstate Commerce Act which created the Interstate Commerce Commission (ICC) and vested in that agency the power to economically regulate the nation's railroads. The ICC's authority was broadened over the years. However, after World War II, the nation's railroads fell on hard times and at least part of the blame fell on the ICC for excessive regulation. For many years, railroads and shippers were not allowed to enter into contracts that set rates for service. The only legal railroad rate was the published rate, i.e., the rate filed with the ICC. Other modes of transportation could have contract rates, which disadvantaged railroads. Congress largely deregulated the railroads in the Staggers Rail Act of 1980. In Section 208(a) of the Staggers Rail Act, Congress allowed rail transportation contracts, but expressed concern that such contract responsibilities might adversely impact the railroads' CCO.[4] Neither the ICC nor the STB have ever found that a railroad's contractual obligations impaired its CCO or excused it from providing common carrier service.

Congress enacted the ICC Termination Act of 1995[5] abolishing the ICC and assigning some of its powers to a much smaller agency, the Surface Transportation Board (STB). While the ICC regulated virtually all railroad traffic, the STB's mandate was much more limited, confined to certain traffic that was truly captive—in other words, that for which there are no reasonable options. Economic regulation today is largely confined to certain bulk commodities (e.g., coal, grain, chemicals) for which there is the potential for no viable alternate forms of transportation. This is the so-called captive or market-dominant traffic.

[4] Pub. L. No. 96-448, Title 11 § 208(a), 94 Stat. 1895, 1908.
[5] Pub. L. No. 104-88, 109 Stat. 803.

DISCUSSION

The Common Carrier Obligation—Definition and Determination

The CCO requires that railroads must honor a shipper's reasonable request to transport traffic under reasonable conditions at reasonable rates by offering to carry the traffic. In a 2015 report, the Transportation Research Board (TRB) noted that, "more than 30 years after the Staggers Rail Act, the [CCO] remains poorly defined."[6] Whether or not the nation's railroads are living up to their CCO to carry cargo offered to them under reasonable conditions is a controversial subject. The railroads believe they are meeting their obligation, but many shippers are skeptical. It has long been held that railroads provide a vital public service and that they have an obligation to meet that public need. The requirement is not absolute, but exceptions are rare.[7]

The term "reasonable" is obviously a subjective concept, and the STB is the organization charged with the task of deciding what is "reasonable." The STB has primarily determined the reasonableness of rates through the stand-alone cost (SAC) test, a rather mechanical, if somewhat flawed, approach to judging whether a rate is justified.[8] Under that test, a shipper contesting the reasonableness of a rate must demonstrate that it could create a railroad and carry the traffic at issue (along with other cargo) at a rate less than that proposed by the railroad and still cover all of its costs and earn a reasonable return on capital. In its report, the TRB criticized STB's rate reasonableness process and recommended that alternatives be examined.[9] The STB created a Joint Rate Reform Task Force to consider

[6] Nat'l Acad. of Sciences, Med & Eng., Transp. Research Bd., *Modernizing Freight Rail Regulation*, at 146 (2015) (TRB Report), https://www.nap.edu/read/21759/chapter/1#ii.

[7] Historically, railroads were relieved of their obligation to carry "sterling and gold silverware." *Emporium v. N.Y. Cent. R.R.*, 214 ICC 153, 156 (1936) and circus trains where the shipper has requested "limited and special services." *Transp. Servs. & Show Outputs*, 299 ICC 300, 333 (1956).

[8] The SAC test was adopted in *Coal Rate Guidelines, Nationwide*, 1 ICC 2d 520 (1985), *aff'd*, *Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

[9] *See* TRB Report, *supra* note 7.

alternative rate reasonableness methodologies, which published its findings and recommendations in April 2019.[10]

The SAC approach requires that the shipper create a hypothetical railroad. This has long been a contentious issue as it is costly and the shipper is often at a disadvantage with regards to data. One approach suggested by the STB staff would be to employ an Incumbent Railroad Cost Analysis (INCA). The INCA approach would assess rate reasonableness based on an actual railroad's assets and operating expenses rather than those of a hypothetical railroad.[11]

Following up on its April 2019 Task Force Report, the STB began pursuing some of the TRB's recommendations. For example, in September 2019, the STB issued a notice of proposed rulemaking to examine "final offer rate review," which is based on final offer arbitration in Canada, but would rely on adjudication rather than arbitration.[12] The reasonableness of the conditions of service, as opposed to rates, that may be imposed by a railroad before a railroad must accept the traffic is more subjective and is likely more difficult to evaluate.

Limits and Extent of the CCO

While, as noted, exceptions are rare, the CCO is not absolute and the government can relieve the carriers of their obligation if it deems necessary for safety or security reasons. The U.S. Department of Transportation (DOT) has the authority to establish regulations for the safe movement of traffic.[13] Other agencies, such as the Nuclear Regulatory Commission (NRC), can also establish safety standards, if their jurisdiction is involved.[14] The U.S. Department of

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[10] Rate Reform Task Force Report, *Report to the Surface Transportation Board* (Apr. 25, 2019) (Task Force Report), https://www.stb.gov/stb/rail/Rate_Reform_Task_Force_Report.pdf.

[11] The STB has attempted to make its rate reasonable methodology more accessible and simpler. One approach was Simplified SAC, which is similar to INCA (except that Simplified SAC is based on a hypothetical railroad's costs, whereas INCA is based on the incumbent railroad's actual costs). Simplified SAC, however, has not been successful.

[12] Final Offer Rate Review, Ex Parte No. 755, EP Nos. 755, 665 (Sub-No. 2) (served Sept. 12, 2019).

[13] Hazardous Materials Transportation Act, 49 U.S.C. § 5101, *et seq.*

[14] For example, if spent nuclear fuel is shipped, it must be shipped in very substantial cask cars whose designs are certified by the NRC. Substantial tests are mandated by federal regulation and have been conducted on casks to demonstrate their ability to withstand possible accidents when transported by rail.

Homeland Security may also be involved with respect to security arrangements, including routing. Generally, as long as shippers follow the rules set by the agencies responsible for the safety or security of transport, railroads—as common carriers—are obliged to carry their cargo.[15]

Occasionally, the railroads can suspend hauling certain traffic over certain tracks for a period of time.[16] For example, the railroads embargoed traffic they deemed hazardous for a relatively short amount of time following the terrorist attacks on the World Trade Center in New York, but these embargoes were never formally approved by the government. More often, the railroads can embargo traffic following a washout or other disruptions to their lines which are typically caused by "acts of God," but could also occur if tracks are unsafe for transport for whatever reason. Embargoes are relatively common, but they are generally temporary, and the service must resume following the line's restoration, unless abandonment authority is sought and approved.[17]

The use of embargoes to suspend the railroads' CCO is not unique to the United States. In April 2019, the Canadian Transportation Agency (CTA) issued a ruling finding that the Canadian National Railway (CN) had violated its statutory service obligation by announcing it was embargoing wood pulp movements in the Vancouver, British Columbia area during the peak traffic period in December 2018. Ostensibly, the embargo was designed to alleviate congestion. Following numerous shipper complaints, the CTA initiated an investigation of rail traffic in the Vancouver area. CTA's investigation also included the Canadian Pacific Railway (CP) and Burlington Northern Santa Fe Railway (BNSF), but these two were not found to be violating their service obligations. The CTA ordered CN to develop a three-year plan to show how it would respond to seasonal traffic surges without resorting to embargoes. This was the CTA's first use of its "own motion" power granted to it by the Transportation Modernization Act of 2018.[18] CTA no

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[15] *See Consol. Rail Corp. v. United States*, 646 F.2d. 642 (D.C. Cir.), *cert. denied*, 454 U.S.1047 (1981); *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162, 1168-70 (6th Cir. 1979), *cert. denied*, 449 US 830 (1980).
[16] McBride, *supra* note 2, at 394-96.
[17] *See ICC v. Baltimore & Ohio R.R.*, 398 F. Supp. 454 (D. Md. 1975), *aff'd*, 537 F.2d 77 (4th Cir. 1976).
[18] R.S.C. 2018, c. 10 (Can.).

longer has to wait for shippers to submit formal complaints before it can investigate.[19]

In its "Determination," CTA noted that the service obligation was not absolute, but also that railways have the obligation to make every effort to provide service even in the face of challenges beyond their control. However, they were not expected to do the impossible. CTA ruled that CN should identify recurring seasonal challenges and identify the necessary measures to minimize the impacts. The CTA noted that the Transportation Modernization Act of 2018 did not change the railroads' service obligation, but the Act did offer an interpretation. The threshold obligation that a railway must meet is the highest level of service it could reasonably be expected to provide given the circumstances.[20]

Perhaps the broadest application of relief from the CCO in the United States came with the creation of Amtrak. In the late 1960's, U.S. railroads were in very poor financial condition. Roughly one-third of the network was in bankruptcy and most of the remaining carriers were in poor financial condition. There were many reasons for the railroads' economic distress, but one of them was their CCO to carry passengers as well as freight. With the rise of air and automobile travel, ridership on the nation's passenger trains plummeted, especially after World War II. While the railroads were able to abandon some lightly used passenger operations, they still were operating roughly 50,000 miles of passenger train service in 1970 and many of these trains carried few riders. The railroads were relieved of their CCO to carry passengers by the National Railroad Passenger Act of 1970,[21] which created Amtrak. The railroads turned over their passenger equipment to the new quasi-public corporation in return for cash payments, stock in the new corporation, relief from their CCO to transport

[19] As a parallel, the STB was given increased authority to conduct investigations through the STB Reauthorization Act of 2015 (Pub L. No. 114-110, 129 Stat. 2228). More specifically, the STB can investigate, on its own initiative, issues that are "of national or regional significance" and within its jurisdiction. The STB has not formally exercised this authority. *Id.* § 12, 129 Stat. 2234.
[20] Canadian Transportation Agency, *Determination: Freight Rail Service in the Vancouver Area,* Letter Decision No. CONF-9-2019 (Apr. 15, 2019), https://otc-cta.gc.ca/eng/ruling/conf-9-2019.
[21] Pub. L. No. 91-518, 84 Stat. 1327.

passengers, and the obligation to permit Amtrak to operate over the freight railroads' lines at a low fee based on avoidable costs. All but four smaller railroads accepted the offer and the other railroads ceased having the CCO to transport passengers on May 1, 1971.[22] Total route miles of intercity passenger train service fell by roughly one-half the day Amtrak began operations.

The issue of the CCO sometimes arises with respect to the traffic at issue. The Staggers Rail Act largely deregulated the railroad industry, and many commodities have been declared exempt from STB regulation in the belief that alternative modes are available. The CCO applies only to regulated traffic; exempt commodities do not fall under the CCO. Some materials that are exempt are still "bulk" commodities, such as salt or scrap metal that moves to steel-making plants, which need to be shipped by rail.[23] Truck is generally not a viable option for these materials either because distances are long or volumes are too heavy, or both. Notwithstanding deregulation and commodity exemptions, the STB can still step in and ensure that shippers are reasonably served and that railroads adhere to a CCO to provide reasonable service. The case of Pyco Industries is illustrative.

In 2006, Pyco Industries Inc., a cottonseed oil producer in Texas, complained to the STB that it was receiving exceptionally poor service from a local railroad, South Plains Shipping Ltd. Co. (SAW). Cottonseed oil is an exempt commodity. The STB lifted the exemption in this case and, after reviewing the evidence, ordered that service to Pyco Industries be provided by another carrier, the West Texas and Lubbock Railway. Under STB policy, the shipper must be able to identify another carrier able and willing to handle the traffic. The STB required SAW to allow the replacement carrier to use its track to serve Pyco Industries. Therefore, relying on the CCO, the STB exercised its authority to ensure that shippers receive reasonable service.[24]

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[22] *See* Rail Passenger Services Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327.
[23] For a list of commodities and traffic that is exempt from rail regulation, see 49 CF.R. Part 1039 (2019).
[24] *Pyco Indus. Inc.*, STB Docket No. FD 34890 (served Aug. 31, 2007), https://dcms-external.s3.amazonaws.com/MPD/62491/5B804E9E8D849D3D85257348004E38B8/37914.pdf.

Economic Issues and the Common Carrier Obligation

In general, railroads oppose a blanket application of the CCO because it requires them to transport certain commodities that they consider to be hazardous or dangerous. Spent nuclear fuel, high-level radioactive waste, anhydrous ammonia, and chlorine are the commodities most often cited. The latter two are of particular concern to the agricultural sector in which their use is essential. Chlorine is also often employed in water treatment as well as many other uses. A recent case in California is illustrative. In August 2019, HASA Inc., a chlorine shipper, filed an emergency application with the STB to stop the Union Pacific Railroad (UP) from reducing its service from daily to three times a week or less. UP has been providing daily service to HASA for 50 years and the chlorine is used to treat water for Southern California. HASA claimed it could not continue operations without daily service from UP. This becomes a question as to what constitutes reasonable service. The day after HASA filed its application, the STB issued an emergency service order requiring five-day-a-week service to continue while the proceeding was pending.[25] Later, the parties agreed to have the emergency service order vacated, because HASA did not need five-day-a-week service in the Fall. With the onset of the Spring and Summer seasons, HASA will likely require daily service if it is to stay economically viable.

While the railroads are generally opposed to the CCO, there are occasions when they rely on it to advance their own economic interests. In return for adhering to the CCO, railroads received the right to build and operate the interstate network of rights-of-way, which can be difficult and costly to procure. In general, railroads have argued that because rail transport is a network industry, there is an interdependence of different parts of the network. Problems or bottlenecks in one part of the system can have ripple effects throughout the network. This understanding of the interdependence of the rail system is also partly responsible for concentrating regulation of the industry at the national level. Local restrictions on common carrier service would undermine the strong

[25] *See HASA, Inc. v. Union Pac. R.R. Co.*, STB Docket No. NOR 42165 (served Aug. 21, 2019), https://dcms-external.s3.amazonaws.com/MPD/62491/54E35E38A309FE9A8525845D007A72C5/47192.pdf.

public interest in an efficient rail network. Local communities may have valid concerns about railroad activity in their area, but the national interest in an efficient rail network precludes local interference with movements that have interstate consequences.

There have been several cases where local concerns and proposed restrictions came in conflict with the broader public interest promoted by the CCO. One case involved the movement of chlorine in the nation's capital close to office buildings of the House of Representatives. Despite the fact that the safety of Congresspersons was involved, the U.S. Court of Appeals for the District of Columbia Circuit held that local restrictions on the movements could not be justified.[26] The material has since been rerouted, however.

Another case involved the movement of crude oil over Indian land in Washington State. The Swinomish Indian Tribal Community (Swinomish Tribe) had a lease agreement with BNSF limiting the number of cars that could cross the reservation. BNSF argued that it was obligated by its CCO to deliver Bakken crude oil to the Tesoro refinery in Anacortes, Washington notwithstanding the lease. The U.S. District Court for the Western District of Washington sided with the Swinomish Tribe in holding that, due to the lease, BNSF was limited as to the number of railcars per train and the number of trains that could cross the reservation. The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) upheld the ruling of the District Court.[27] BNSF sought a panel rehearing or an *en banc* review of the Ninth Circuit panel decision, which was denied.[28] BNSF could seek review by the U.S. Supreme Court.

Absent the requirements of the CCO, the nation's railroads could be subject to a patchwork of restrictive laws which would have a significant negative impact on the economy. Many plants could be forced to close, and shippers would have

[26] *CSX Transp. Inc. v. Williams*, 406 F.3d. 667, 672 (D.C. Cir. 2005).
[27] *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142 (9th Cir. 2020).
[28] *See* BNSF Ry. Co. Petition for Rehearing or Rehearing *En Banc*, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. 18-35704 (9th Cir. Mar. 30, 2020); Order, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, No. 18-35704 (9th Cir. Apr. 22, 2020), ECF No. 68 (order denying petition for rehearing and rehearing *en banc*).

to make location decisions and investments without the assurance that they will be served by the nation's railroads. In the case of the Tesoro plant, a study by Western Washington University argued that the refining of Bakken crude was an important component of the Skagit County, Washington and the overall Washington State economies.[29]

The economic analysis by Western Washington University demonstrated through multiplier models how the jobs and products created by the Tesoro facility impacted the State's economy. An increase (or decrease) in economic activity will have direct impacts (e.g., income and jobs) on the sector being affected and will also have an impact on income and jobs in other industries that deal with the sector. The total effect, direct and indirect, in related industries and the induced effect from increased spending will be some multiple of the initial change. Thus, a potential consequence of the absence of a CCO for railroads could be a catastrophic loss of jobs as local governmental or tribal entities enact restrictions that trump the national interest. Of course, it is not possible to transfer the local, regional, or state impacts to the national level. In the case of the Bakken crude movements to the Tesoro refinery, if the Swinomish Tribe ultimately succeeds in limiting BNSF from moving longer unit trains over its property, the crude likely would either go elsewhere or would move by a different route and perhaps partly by other modes. Regardless, the losses calculated by the Western Washington University analysts would be offset, at least partly, by benefits at the alternative site or reduced if a different route were employed. Nonetheless, BNSF must comply with the CCO to move the product, as long as it also abides by the court rulings with regard to the lease with the Swinomish Tribe.

As noted, the STB has the authority to determine what constitutes reasonable service. Over time, the composition of the STB changes and different members from different backgrounds may adopt different notions as to what constitutes reasonable service. Several observers believe that the STB has adopted a more "shipper friendly" attitude as reflected in recent decisions. The

[29] *See* Energy Transitions Laboratory, Western Washington University, *A Refining History of Washington State*, at 2, 6 (Aug. 2015), https://www.energytrans.org/uploads/4/7/9/7/47971323/2015-08-20_jones_refineries.pdf.

STB, nonetheless, does look to prior rulings in deciding cases. Another school argues that the changes seen in the STB's rulings are more reflective of the changing financial health of the railroad industry than of changes in the composition of the STB. The railroads' poor financial condition in the middle and later part of the last century had led to provisions of the Staggers Rail Act and ICC decisions that were sympathetic to the need of the carriers for adequate revenues. As railroads achieve revenue adequacy, customer needs, as a result, could receive increased priority.

Some railroad executives argue that the CCO serves to frustrate changes in railroad operations that improve the quality and affordability of rail service to most shippers, while leaving a relatively small number of shippers with little or no service. They view the situation as analogous to a large supermarket opening and driving small grocery stores out of business. The supermarket can offer more products and it can purchase supplies at a lower cost than the smaller operations. When a railroad introduces new services, such as multi-car unit trains, some operations, such as grain elevators that lack the capacity to support longer-unit trains, can be forced to shut down and the farmers who utilize them may have to move their grain greater distances to elevators that can handle the longer trains. This, the railroads would argue, is the price of progress and an attempt to require railroads to serve all shippers, including would-be shippers, is anathema to progress. Those shippers who lose rail service might argue that the CCO is absolute (or nearly so, as discussed above), and that the railroads are not permitted to use cost/benefit analysis to favor some shippers with better service while denying service to others.

The underlying issue of the CCO arises on many occasions in cases brought before the STB. For example, as the railroads shifted to longer-unit trains they began to require grain shippers to build ever-larger elevators to handle the multi-car operations. The railroads argued that the longer trains were more efficient and reduced unit costs. On the other hand, changes to the required minimum size of grain elevators were a burden on shippers, many of whom are part owners of local grain elevators and such changes threatened some shippers with lost

service. Now, some railroads are moving away from unit trains towards Precision Scheduled Railroading (PSR). PSR generally results in more frequent, scheduled service, with railroads employing fewer assets (e.g., locomotives, cars, and crews). While contributing to lower costs, use of fewer assets could pose a threat to their ability to fulfill their CCO. Moreover, the large elevators may end up being redundant or inefficient, because they are not designed for smaller shipments at frequent intervals. Again, these changes to railroad operations have implications for the CCO. Some shippers claim that PSR has not led to improved service. One industry spokesperson said that a comparison of service levels pre- and post-PSR found service levels to have declined rather than improved. The spokesperson said that there was very little precision in PSR.

In addition, some shippers claim that, because pursuing a case before the STB is too costly and takes too long, they negotiate directly with the railroads to ensure they receive the appropriate number of cars at appropriate times. These shippers report that, after negotiations, the service provided by the railroad improves for a while, but after a few months railroad cars are once again "bunched"[30] or arrive at inconvenient times or don't arrive at all. Shippers note that even though the vast majority of rail cars today are shipper-owned, the railroads impose a car storage fee on cars that might be on a shipper side track. The amount of "free time" has also been drastically reduced, while demurrage charges and other fees, such as accessorial charges, have soared. Some shipper groups have been active in STB's recent proceedings on demurrage charges.

In cases where a railroad line has multiple shippers, including those that the railroad does not wish to cease serving, the railroad can elect to raise rates on less desirable traffic. In such circumstances, the shipper's only recourse is to appeal to the STB. However, the STB's SAC approach to rate reasonableness is likely to work to the disadvantage of shippers with multiple destinations over a large network. This would obviously include chemical plants and large grain elevators. The SAC test requires a shipper demonstrate it could move the traffic itself at a

[30] Bunching refers to more cars being delivered by a railroad to a shipper's site than the shipper can reasonably handle.

rate less than that charged or proposed to be charged by the railroad. This approach often requires the shipper to virtually replicate much of the railroad's route network—a costly and likely unrewarding exercise. In this case, the railroad could be viewed as fulfilling its CCO but passing the cost of doing so to the shipper.

Other shipper representatives believe that the railroads have used PSR as a way to make arbitrary service changes without regard to the needs of shippers. Railroads have placed numerical requirements on the number of cars that can be placed at a plant and have penalized shippers who fail to follow the new rules. For example, the railroads are now employing 60-foot boxcars while many shippers are set up for 50-foot cars. The increase in capacity for shippers is 20 percent, but railroads increased rates by 30 percent. Moreover, many of the changes imposed by the railroads are made without consultation with the shipper.

The issue of the CCO came up again in another recent case before the STB. Jackson County, Missouri acquired a line of railroad from the UP in 2016. The County informed the STB that it was going to use the line to provide commuter rail service and the tracks would be available for freight operations. However, notwithstanding its statement to the STB, the County began removing the tracks and constructing a trail, indicating that it had no intention of fulfilling its CCO. Reversionary landowners[31] filed for a reversal of the STB's initial approval. The landowners cited the removal of track as evidence that the County was not going to fulfill its CCO. The STB directed Jackson County to cease removing the track and to respond to the landowners' petition. The CCO was critical to the STB's ruling.[32]

There are literally hundreds of cases where the CCO, which is the basis for providing shippers with reasonable service, can collide with the railroads' desire

[31] Reversionary landowners are those who owned or whose predecessor owners owned the land that was taken to build the railroads. When railroads abandon service, many adjoining landowners prefer to have the land returned.

[32] *Jackson Cty. Mo.,* STB Docket No. FD 35982 (served July 31, 2019), https://dcms-external.s3.amazonaws.com/MPD/62491/DB0076F0848A0E1F85258448004664FF/47066.pdf.

to provide efficient service that maximizes the return on investment. The STB must balance the two often-conflicting objectives. In general, the nation's railroads have been earning their cost of capital in recent years, but there are some clouds on the horizon that could cause difficulties in the not-too-distant future. For example, nearly 40 percent of railroad car-miles are dedicated to the movement of coal but coal movements have been declining in recent years.[33] As utilities, both in the United States and abroad, continue to cut back on their consumption of coal, this mainstay of railroad traffic is likely to atrophy significantly. In addition, the recent trade dispute between the United States and China has had an impact on agricultural exports, but it is unclear as to how long and how significant the impact will be for the railroads. Finally, the outbreak of the coronavirus could have serious consequences for the nation's railroads because of a significant (if short-term) reduction in economic activity, as well as if a significant number of train crew members are infected. Because the requirements to operate a train are so extensive, railroads could not simply hire more engineers, at least on a short-term basis. The railroads might need to shift to one-person crews, current labor agreements notwithstanding.[34] A related impact on the nation's railroads from the coronavirus could be their ability to recover once the economy recovers. A spike in demand as the economy recovers, combined with the concentration of rail assets on densely traveled corridors, could have very negative consequences.

<u>Liability, Insurance and the Common Carrier Obligation</u>

Historically, liability has rested in the hands of the entity with control over the cargo. The shipper is liable for the cargo while it is being produced and prepared for shipment. As long as the shipment is properly prepared for transport, liability transfers to the carrier once the product is loaded and the carrier accepts it for transport. As long as the product is in the carrier's possession, the carrier is responsible for its safe transport and is liable (absent

[33] *See* Ass'n of American Railroads, *Railroads & Coal* (May 2019.)
[34] Frank Wilner, *The Coronavirus: A Silver Lining for Labor?*, Railway Age, Mar. 10, 2020, https://www.railwayage.com/regulatory/coronavirus-a-silver-lining-for-labor/.

events outside its control) for any damage done to third-parties from any accident or incident en route. Once the carrier delivers the product to the consignee, however, liability transfers to the receiver. The situation with hazardous materials is somewhat more complicated because of the CCO. If a railroad does not want to accept the liability associated with the transportation of the materials, it cannot simply refuse to move them because of the CCO. Both the railroads and shippers have at various times proposed a program of shared liability.

For example, in January 2005 two Norfolk Southern (NS) trains collided in Graniteville, South Carolina. One of the trains was carrying chlorine gas. Nine people were killed and 250 were treated for toxic chlorine exposure. The railroad industry suggested after the Graniteville accident that shippers contribute 85 percent of the added insurance cost of transporting hazardous materials while the railroads would contribute 15 percent. The STB declined to move in this direction. Moreover, Congress would have to enact legislation to impose shared liability on railroads and hazardous materials shippers for accidents leading to injuries, loss of life, or property damage. Thus, the issue as to whether railroads are attempting to avoid their CCO to carry materials such as anhydrous ammonia and chlorine have focused on changes to railroad operating practices.

The railroads have suggested that the Price-Anderson Act[35] represents a potential approach to covering the costs associated with a truly catastrophic accident involving materials that are toxic by inhalation (TIH) or other hazardous materials. The Price-Anderson Act was passed in 1957 and was designed to cover the liabilities resulting from an accident or incident at a nuclear power plant. Basically, the licensed operator of each nuclear power facility is required to obtain the maximum amount of commercial liability insurance (as determined by the Nuclear Regulatory Commission, or NRC) that is available in the market for an accident at its facility. Every other operator of a commercial reactor provides additional funding in the form of indemnification that would cover the liability

[35] Price-Anderson Nuclear Industries Indemnity Act, Pub. L. No. 85-256, 71 Stat. 576 (1957).

from a nuclear accident or incident above the insurance coverage of the plant where the incident occurred. Thus, contributions are provided in "layers." The first layer is provided by the operator of the plant where the incident occurred, and the second layer is provided by the operators of other plants (again as determined by the NRC). If the liability exceeded the amount available in the two layers, the liability is capped. However, Congress has expressed a willingness to provide an additional contribution if it were ever necessary. So far, no such additional contribution has been required.

The railroads' concern about the CCO to carry hazardous materials revolves around the issue of adequate insurance in case of a catastrophic accident. Fortunately, there have been relatively few accidents that have taken many lives and those serious accidents that have occurred, happened in relatively sparsely populated places. A truly serious spill of a hazardous material in a densely populated environment could bankrupt even the largest railroad. A true catastrophe involving the loss of hundreds or even thousands of lives would be virtually impossible to insure adequately. It is a classic case of a very low-likelihood event with an almost limitless potential liability. The Association of American Railroads (AAR) has estimated potential losses from such a catastrophe to be as high as $5 billion. Class I railroads generally self-insure for about $100 million and rely on insurance markets for $1.0-1.5 billion in insurance coverage. Class II and Class III railroads carry much less.[36]

Railroads can take precautions against such an incident, but not every negative outcome can be avoided. Rerouting is one way to avoid the risk of exposing many people to a deadly spill. As mentioned previously, rerouting CSX Transportation, Inc. (CSX) trains carrying hazardous materials through the City of Washington, D.C. and near the U.S. Capitol was suggested by the then-Mayor. However, such a change in routing typically adds many additional miles to the

[36] U.S. Department of Transportation, Pipeline and Hazardous Materials Administration, *Hazardous Materials by Rail Liability Study: Report to Congress* at 9, 87(Nov. 29, 2017) (PHMSA 2017 Report), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/news/57011/report-congress-hazardous-materials-rail-liability-study-nov-2017_1.pdf.

movement and exposes other individuals. Nonetheless, the traffic has since been rerouted.

A major railroad accident occurred in Lac-Megantic, Quebec in July 2013. A 74-car freight train carrying Bakken crude from North Dakota to the Irving Oil Refinery in St. Johns, New Brunswick derailed in Lac-Megantic causing an explosion and fire that left 42 confirmed dead, as well as five missing and presumed dead. Also, 30 buildings were completely destroyed (about one-half of the town). All but three of the remaining downtown buildings had to be razed because of contamination. In addition, there was substantial environmental damage. The accident resulted from the brakes being improperly set by the engineer (the sole crewman on the train) when he disembarked to spend the night at a local hotel. The railway transporting the crude oil was the Montreal Maine and Atlantic (MMA) which operated over track previously owned by CP. The MMA had $25 million in insurance coverage, but the damages ran into the hundreds of millions. The MMA filed for bankruptcy protection in both the United States and Canada. Interestingly, a proposal to reroute the train around the town of Lac-Megantic was never implemented because it was deemed too costly. The point here is that even though the cargo was not TIH material and the affected community was relatively small, the losses greatly exceeded the capacity of the railroad to insure.

In November 2017, the DOT issued the PHMSA 2017 Report to Congress examining the rail transportation of hazardous materials in response to a directive in the Fixing America's Surface Transportation Act of 2015 (FAST Act).[37] The report examined the level and structure of railroads' insurance available in the private market versus what would be required in case of a train accident involving hazardous materials. The report also attempted to evaluate how insurance can be structured so that responsibility for damages could be allocated efficiently and that a railroad transporting hazardous materials could continue to operate

[37] *See id.*; FAST Act, Pub. L. No. 114-94, 129 Stat. 1312.

despite the risk of an accident. Finally, the report examined alternative insurance models including insurance pools and government-supplied insurance.[38]

The DOT report largely relied on statistics for the period 1995 through 2014. Anhydrous ammonia and chlorine were noted to be particularly hazardous because they are TIH materials. Unlike other hazardous materials (such as ethanol and crude oil), ton-miles of anhydrous ammonia and chlorine actually declined by about one-third between 1995 and 2014. The number of cars used for shipping these TIH hazardous materials also declined, but less so. Average miles shipped for anhydrous ammonia increased by roughly 20 percent while average miles shipped for chlorine fell about 40 percent over the same period.

The safety record of rail transport of hazardous materials has improved dramatically. For all hazardous materials, between 2001 and 2014, releases fell to one for every 300 million ton-miles moved by rail--a reduction of about 75 percent. Releases of anhydrous ammonia and chlorine fell to one every 2.7 billion ton-miles moved.

TIH materials are particularly important to the nation's economy as well to key sectors. In 2014, TIH products added about $735 billion to the national economy (4.2 percent of the gross domestic product). Industries using TIH materials employ 2.4 million people and generate gross output of $2.1 trillion annually. In particular, the agriculture sector, which as discussed above uses TIH, employs over 800,000 people.

While the amount of TIH materials transported has grown little or declined, rates charged by the railroads for transporting them have risen dramatically. Revenue per ton-mile for anhydrous ammonia rose more than 300 percent while rates for chlorine movements increased nearly 400 percent. The railroads argue that higher charges for TIH products are necessary because of the added risk from transporting them. Shippers, on the other hand, note that there is no evidence that the extra charges for these movements are being spent on enhanced safety

[38] PHMSA 2017 Report at 55-86.

or security. As noted above, the STB is the agency that decides whether rates are reasonable, and it employs the SAC test to evaluate whether a rate is reasonable. Shippers argue that the process is too expensive and the likelihood of a shipper winning a case before the STB is low. Railroads, on the other hand, believe the STB's SAC approach underestimates the true cost of TIH movements because it does not adequately account for the insurance cost of transporting hazardous materials. Railroad insurance costs are spread over all of a carrier's traffic rather than being directly assigned to the traffic that directly affects the cost. Insurance providers are not required to break out the portion of the premium that is occasioned by the movement of hazardous materials. As noted above, the STB is currently examining several alternatives to the SAC method although it has stated informally that the SAC is the "gold standard" for determining maximum reasonable rates.

While there are additional costs in transporting TIH material, the primary source of added costs would likely be the cost of insuring against a catastrophic accident. The PHMSA 2018 Report attempted to estimate what the cost of a catastrophic accident could be and whether railroads were adequately insured. In terms of adequate insurance, DOT concluded that the Class I railroads generally carried $1.0-1.5 billion in coverage which should be adequate to cover any but the most serious accident. Class I railroads are concerned that a truly catastrophic accident would be beyond their insurance limits. As noted above, the AAR has postulated a $5 billion liability if a truly catastrophic accident were to occur. Moreover, Class I railroads are unable to purchase insurance, at least at a reasonable cost, beyond what they already have. Class II and III carriers carry less coverage and as demonstrated by the Lac Megantic accident, the amount of insurance carried by smaller railroads would not be sufficient to cover the costs of a major incident.

CONCLUSION AND POTENTIAL SOLUTIONS

The primary question that this report seeks to address is what changes in the CCO, if any, are necessary to ensure that shippers, especially those shipping anhydrous ammonia and chlorine, continue to have access to the nation's rail

transportation network. There is a wide range of options. At one extreme, the CCO can be made absolute. Except for temporary service suspensions due to embargoes when a line is disrupted (generally for the short-term) due to "acts of God" (or permanent discontinuance following abandonment), railroads must provide service to any shipper requesting it. If a railroad introduced a new service, such as PSR or longer-unit trains, it would be required to continue to serve all shippers with the level of service and rates comparable to those which prevailed before the change in operations. Railroads would no longer be able to employ service changes as a tool for evading their CCO. There are some obvious drawbacks to this approach. First, it could effectively freeze railroads at their current level of operations and could dissuade them from innovation. This would be similar to the approach to regulation by the ICC that resulted in the railroad industry's decline. While the purpose might have been different (the ICC's limits on railroad innovation primarily sought to ensure that the competing modes hauled the traffic over which they had an inherent advantage) the result was to discourage innovation. Moreover, such a requirement could raise railroad operating costs and reduce profitability.

At the other extreme, the railroads could be relieved entirely of their CCO. If it were decided that the CCO was no longer necessary to promote the public interest and railroads were free to choose which shippers and traffic they wished to serve, railroads might choose to cease serving shippers of materials they consider too risky. Much of this traffic would continue to move, however. The traffic would likely move by truck—a more expensive and less-safe form of transportation. The capacity of a single trailer is less than half of a railcar, and so there would be many more trucks on the nation's roads carrying TIH materials and interacting with many other vehicles. Some materials could move by pipeline or barge, but these options are limited. The net result of a major shift of the types of commodities from rail to truck would have terrible consequences for society.

Consistent with the discussion above, a key factor in railroad opposition to the CCO is the perceived inability to purchase adequate insurance or insurance at

reasonable premiums that specifically cover the risk of transporting hazardous materials. Hazardous movement coverage is not separated from overall coverage thereby masking and possibly understating the insurance costs of transporting TIH materials. Several solutions are possible. First, railroad insurers could be required to identify specifically the portion of a railroad's insurance premium that is traceable to TIH traffic. Second, railroads and shippers could agree to mutually contribute to a special fund that would cover the costs of a truly catastrophic release of TIH materials following a railroad. Finally, the government could agree to cover the costs of a serious release after the railroads and shippers cover some predetermined amounts. Any or all of these could address the insurance problem.

A number of proposals to address the liability issue have been advanced. Usually either the railroads or the shippers have rejected the solution as unfair because it places too much responsibility on either the railroad or the shipper. However, it is clear that if shippers are to continue to be assured that railroads have a CCO to carry their goods, and railroads are assured that their long-term existence is not imperiled, there needs to be a common-ground solution.

There is also some indication that railroads attempt to limit their CCO by increasing rates on traffic that they would prefer not to transport to such an extent that shippers can no longer avail themselves of rail service. Shippers argue that they are unable to challenge the rates before the STB because the transaction costs involved are high and the likelihood of a favorable outcome for the shipper is low. Shifting the burden of proof that a proposed rate is fair from shippers to railroads would put the onus on the party with the superior data. Moreover, the issue could be seen less as one challenging the reasonableness of the rate and more of a challenge to the unreasonableness of the practice of "demarketing" by charging rates sufficiently high to cause traffic to stop moving over the railroad.[39] In that circumstance, the STB may want to weigh in if railroads are using the exercise of implementing PSR to cause the "demarketing"

[39] *See* Task Force Report at 9.

of traffic that has historically moved by railroad. It should be noted that the courts have opined on the argument that excessively high rates constitute an unreasonable practice and not a rate dispute and have held that such a complaint must be brought as a rate case and not an unreasonable practice.[40] No court has addressed whether "demarketing" is a violation of the CCO.

The STB could be the agency that weighs the costs and benefits of a particular railroad service change. Railroads would argue that services changes, such as those associated with PSR, benefit many shippers and disadvantage relatively few. Shippers argue that the magnitude of the shipper losses outweigh the benefits to some. Shippers would also generally argue that the CCO is absolute and does not depend on cost/benefit analysis. The STB is well-positioned to assess these opposing arguments.

As noted earlier, Congress requested the TRB to convene a committee to produce a comprehensive report on the nation's railroad industry and the current state of railroad regulation. The TRB Report was highly critical of current STB regulatory practices, and was especially of STB's rate adjudication procedures. The report noted that since deregulation most railroad rates are competitively determined, and these rates should serve as benchmarks for challenged rates. Instead, the STB continues to employ a cost-based methodology for deciding rate reasonableness.[41] The TRB Report also called for arbitration (using a final-offer process sometimes referred to as "baseball arbitration") to replace STB proceedings to decide rate-reasonableness. Arbitration would provide a much less costly and much timelier resolution of rate disputes. In addition, the TRB Report called for the elimination of STB's annual revenue adequacy determination as well as calling for the STB to give priority to the data needed to oversee the railroads' response to their CCO by collecting and analyzing shipment-level data on service quality. The committee was sensitive to the railroads' need to earn

[40] *Union Pac. v. ICC*, 867 F.2d 646, 647 (D.C. Cir. 1989).
[41] It is worth noting, as a regulatory body, the STB's ability to respond and adjust its procedures is affected by statutory limitations. For example, the statute has a limitation on STB authority, namely that a shipper cannot pursue a rate case if "the rate charged results in a revenue-variable cost percentage for such transportation that is less than 180 percent." Pub. L. No. 104-88, 109 Stat. at 816.

adequate revenues. As reflected in STB's Rate Reform Task Force Report and recent dockets proposing possible rule changes, it is clear STB has reviewed and considered the recommendations from the TRB Report.

In many ways, the issue of the CCO relates back to the fundamental decision to treat railroads differently from most other companies providing a service. Railroads are privately owned corporations and private corporations generally focus on maximizing returns to shareholders, at least in the long run. However, organizations whose operations serve the public interest, such as railroads or utilities, can be required to pursue policies that are suboptimal, at least with regards to profit maximization, as long as the opportunity to earn adequate returns is provided. In the case of railroads, a part of the public goal has been to serve the public to the greatest extent possible consistent with the opportunity to earn adequate revenues. However, there is some concern that some railroads have shifted the focus of their operations more toward profit maximization and promoting shareholder returns rather than their obligation to serve the public.

Profit-maximization can lead to some lines being abandoned. As a result, locomotives and rolling stock can be idled and the railroad can reduce its labor force. Revenues and expenses both would decline, but the profitability of the railroad rate could improve if revenues decline less than expenses. Increased profitability could lead to an increase in share value and return on investment. Those who have expressed such concerns believe that railroads are focusing on the needs and desires of shareholders rather than their obligation to serve the public or the society-at-large.

As noted above, the CCO has been raised with regards to the implementation of PSR and its associated operating changes. One issue under PSR is that at least one railroad has apparently decided not to publish rates for grain car blocks of 69-91 cars. All railroads which have adopted PSR are pursuing more frequent (and more predictable) service. The most aggressive example of PSR has been the CSX railroad. CSX has adopted the PSR approach by abandoning much of its service for exempt commodities in the Trans-Appalachian area,

thereby freeing up crews and equipment for service on more densely traveled lines. The railroad's traffic and revenues have declined significantly, but profitability, especially as measured by returns on assets, has increased dramatically.

Moreover, it is also true that traffic has declined for railroads overall, even those such as BNSF, which has not pursued PSR. CSX believes that by assigning crews and equipment to densely traveled corridors and providing more frequent and predictable scheduled service, it can eventually successfully compete with truck traffic and re-establish traffic and revenue growth. Some have argued that this approach puts the interests of investors over the needs of shippers and violates the statutory duty of the railroads providing a public service. CSX does not believe that maximizing value for shareholders is inconsistent with its CCO. In fact, CSX believes that the fundamental statutory framework for the railroad industry created by the Staggers Rail Act was to allow railroads to attract the capital needed to invest and maintain the railroad network. Finally, some have argued that PSR can lead to railroads avoiding their duty to society to alleviate the negative externalities from truck traffic. Defenders of PSR counter that improved service, in fact, can result in reduced externalities as railroads can recapture traffic from trucks.

RECOMMENDATIONS

As a starting point in addressing the underlying purpose of this report, it is clear that the CCO must be preserved for both economic and environmental reasons. The question, therefore, is simply how the CCO should be interpreted and to identify what changes could be made to the CCO to render it more appropriate to the present railroad transportation operating environment.

The first change should be in the STB's definition of the CCO. The STB itself admits that the current definition (carry all traffic offered at reasonable rates under reasonable conditions) is vague. The CTA in addressing the situation in Vancouver, British Columbia clarified its understanding of the service obligation of railroads serving Canada. The Canadian regulators held that a railroad must

establish plans to meet foreseeable service issues and that the threshold obligation that a railway must meet is the highest level of service it could reasonably be expected to provide given the circumstances. The Canadian authorities did not expect the railroad to do the impossible nor did the agency establish any metrics by which to judge compliance. Although the Canadian definition did not add metrics, the clarification is an improvement over what prevails today in the United States. The STB should examine the current understanding of the CCO, perhaps after a public proceeding, and issue a clarification that would remove much, if not all, of the ambiguity.

The second change that could be adopted to ensure that the CCO survives as an effective component of the need for shippers to receive adequate service would be to address the problems that shippers encounter in achieving rate relief from the STB. Shippers complain that they effectively have no access to the STB's processes. Currently, the burden of proof is on the complaining shippers and the cost of bringing a case before the STB is prohibitively expensive for all but the largest shippers. Attempts at reducing the time and cost of the rate relief process—the simplified SAC and the "three benchmark" approaches—have not been useful. Moreover, the SAC approach to determine rate reasonableness has been widely criticized, despite the STB's characterization of it as the "gold standard." The STB is currently examining alternatives to the SAC approach, but the final offer approach (but not final offer arbitration) appears to have the most promise. This process requires that both parties present "reasonable" offers and the STB would then choose between the two. Both sides are encouraged to provide a "reasonable" estimate lest their offer be dismissed in favor of the presumably more reasonable alternative proposed by their opposition. There may also be consideration of a revenue adequacy constraint.

From discussions with shipper groups, it is clear that the railroads need to improve their communications with shippers. In the shippers' view, too often railroads appear to act only in their own interest and not demonstrate an understanding of shipper operations or needs. The evidence of effort to meet

shipper needs should be a factor in STB assessment of complaints against the railroads.

Another area where change would be desirable is in the area of insurance responsibility. Both the railroads and shippers have made proposals for cost sharing for insurance premiums to cover a catastrophic accident. Each side claims that the cost that they would be expected to bear is unfairly high. One of the problems is that no one knows the portion of railroad insurance that is due to the transportation of hazardous materials such as chlorine and anhydrous ammonia. Railroads claim that rate increases reflect the added cost of carrying the commodities, but the portion of insurance costs occasioned by the movements is unknown. Insurers should be required to identify the proportion of a railroad's premium that is tied to the transportation of hazardous materials. Following this, a federal agency, such as the STB or DOT, could mediate a distribution of the responsibility between shippers and railroads.

Finally, while the CCO applies only to STB-regulated traffic, there is some concern that the railroads implementing PSR are using the efficiency gains justification for eliminating service to less profitable traffic. Although it would not be desirable to restrict the railroads entirely from pursuing improved operating ratios, it would be in the public interest to require that they demonstrate that the efficiency gains outweigh the loss to shippers losing rail service.

The STB might consider whether the CCO should be the basis for relief in the event of "demarketing;" that is, charging rates sufficiently high to drive traffic from the railroad. In this circumstance, as stated above, the remedy would be to establish a rate sufficiently below the current increased level to allow the traffic to move providing the rate is sufficient to generate at least an adequate return in excess of the jurisdictional threshold in the statute, rather than prescribe a maximum reasonable rate.[42]

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[42] 49 U.S.C. § 10707(d)(1)(A).

Regardless of what changes are adopted, it is important that the results be closely monitored. It would not be in the national interest to adopt changes that result in a deterioration of the nation's rail transportation system. It would be counterproductive to initiate changes that led to the recreation of a rail system akin to what prevailed in the 1950's and 60's.

APPENDIX

To gather views and perspectives on the Common Carrier Obligation of the railroads, the authors interviewed a number of organizations that had relevant experience or expertise. Among those contacted were:

- The American Chemistry Council
- American Fuel and Petrochemical Manufacturers
- The Association of American Railroads
- Burlington Northern Santa Fe Railway
- The Chlorine Institute
- CSX Corp.
- The Fertilizer Institute
- Institute for Scrap Recycling Industries
- National Grain and Feed Association
- National Industrial Traffic League
- Norfolk Southern Railway
- Surface Transportation Board (past and current Board Members as well as Directors of specific offices)
- Whiteside Associates
- Individual researchers who had published or given presentations at meetings of professional societies.

Nearly all of the individuals who we interviewed provided documentation or reports to support or bolster their positions. Because some interviewees expressed concerns about retaliation, no names are provided and positions are generally described as those of railroads or shippers rather than specific firms.