



# Railroads' Common Carrier Obligation (Summary)

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This is a summary of “Railroads’ Common Carrier Obligation: Its Legal and Economic Context” by Francis P. Mulvey and Michael F. McBride. Mulvey is a former commissioner and acting chair of the Surface Transportation Board (STB), and Michael F. McBride is a partner with the law firm Van Ness Feldman LLP. This paper received funding from USDA’s Agricultural Marketing Service (AMS) through cooperative agreement number 19-TMTSD-MD-0007. The opinions and conclusions expressed are the authors’ and do not necessarily reflect the views of USDA or AMS. The full report is available online at <https://ageconsearch.umn.edu/record/303739>.

## WHAT IS THE ISSUE?

Serving a wide range of shippers, railroads are a key connector in the industrial supply chain. As private-sector companies, railroads have control over their business decisions and operations. However, their control is not absolute. Besides their own business interests, railroads are entrusted with serving the wider public—a function historically embedded in common law and referred to as the “common carrier obligation” (CCO). This fundamental element of rail policy requires railroads provide reasonable service for a reasonable rate upon a reasonable request from a shipper.<sup>1</sup>

As described in the report and summarized below, CCO remains a source of contention between shippers and railroads. The authors delineated the following specific sources of tension:

*Lack of a clear definition.* The term “reasonable” is highly subjective. In a landmark 2015 study, the Transportation Research Board (TRB) wrote, “More than 30 years after the Staggers Rail Act, CCO remains poorly defined.”<sup>2</sup> Rate review procedures, while controversial to many, have helped to clarify what constitutes “reasonable rates.”<sup>3</sup> However, what makes for reasonable service is much less clear.

<sup>1</sup> CCO is codified in 49 U.S. Code § 11101, “Common carrier transportation, service, and rates.” While CCO applies only to regulated traffic (e.g., coal, grain, chemicals, etc.), the STB has stepped in to ensure shippers are reasonably served even for exempt commodities.

<sup>2</sup> Transportation Research Board, Special Report 318, *Modernizing Freight Rail Regulation*, 2015.

<sup>3</sup> Currently, the STB has multiple methods to evaluate the reasonableness of a rate, such as the stand-alone cost (SAC) test and three-benchmark test. In the SAC test, shippers must demonstrate a newly created, hypothetical railroad could transit the cargo in question at a lower rate than the current railroad and still receive an adequate return on capital. To date, shippers have found the test inaccessible, citing data requirements and high costs as obstacles to creating a hypothetical railroad.

*Largely opposing views between shippers and carriers.* Railroads contend CCO restricts their ability to make operational changes that improve quality (on net) to shippers and attract needed capital from investors. On the other side of the argument, shippers maintain that, amid an uncompetitive railroad market, operational changes disregard their needs, impose extra costs, and ignore the CCO. An analogy of these two perspectives is the opening of a large supermarket that displaces some stores. While the new supermarket may benefit some customers through more convenience, variety of service, or lower prices, other customers may incur additional costs to travel longer distances for access, pay more for the same products, or receive a lower level of service than was previously offered by the displaced stores.

*Liability and insurance.* In many cases, railroads are disincentivized from transiting high-risk or unprofitable goods, even if doing so is in the public interest. To comply with CCO, rail companies cannot refuse to carry hazardous materials, such as anhydrous ammonia and chlorine—even if the railroads’ risk outweighs their potential reward. Estimates show remediation of a truly catastrophic release of toxic inhalant (TIH) chemicals could cost more than \$5 billion, which though rare, could bankrupt a railroad. Rail companies would prefer not to carry TIH materials. They claim the risk from transporting TIH chemicals manifests in high insurance premiums and that STB’s rate review procedures do not consider these higher costs. Conversely, shippers say the costs and risks to society need to be taken into account and that CCO is needed to promote the public interest. They point out that shifting hazardous materials to truck transportation is more expensive and less safe, which would ultimately lead to a poor outcome for society.

## **WHAT DID THE STUDY FIND?**

The authors cite evidence of conflict between railroads and shippers on CCO. One example is Precision Scheduled Railroading (PSR)—a rail operations approach characterized by frequent, scheduled service and high asset use—which many Class I railroads have implemented.<sup>4</sup> According to railroads, PSR leads to greater efficiencies, better service, and more capital to invest and maintain the rail network. In contrast, some shippers find PSR imposes additional costs, because their operations are not designed for small shipments at frequent intervals.

One of the study’s main contributions is identifying possible ways to improve CCO and make it more effective. The authors proposed several changes, as first steps toward resolving issues related to the CCO.

First, they recommend STB clarify the definition of CCO to remove ambiguity. They see Canada’s action as a step in this direction. Through the Transportation Modernization Act of 2018, Canadian railroads were instructed to provide “the highest level of service” to fulfill their obligations, while taking into account both railroad and shipper concerns. In Canada, railroads are required to consider, among other factors, “the traffic to which the service obligations relate,” “the reasonableness of the shipper’s requests,” and “the service that the shipper requires with respect to the traffic.”<sup>5</sup> No parallel set of factors currently exists in the United States.

Additionally, the authors support measures to improve rate review, such as STB’s proposed final-offer approach. The measure reduces the evidentiary burden on shippers and incentivizes reasonable offers from shippers and rail carriers (since STB chooses one or the other, rather than a compromise between the two). The final-offer approach represents a timelier and less expensive process than the SAC test.<sup>6</sup>

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<sup>4</sup> This is in comparison to other railroad operation models, such as “hub-and-spoke,” or one focused on unit train service (a train made up of a single commodity).

<sup>5</sup> Transportation Modernization Act (S.C. 2018, c. 10).

<sup>6</sup> In their [April 2019 report](#), STB’s Rate Reform Task Force described the final-offer approach as, “an administrative approach that would take advantage of procedural limitations, rather than substantive limitations, to constrain the cost and complexity of a rate reasonableness case.”

The authors suggest STB could weigh in as to whether rail carriers are using service changes, such as PSR, to elude their CCO. Before a railroad implements a new service change, STB could require the railroad to demonstrate the gains of the service change outweigh the losses. In effect, STB could preapprove individual service changes, instead of requiring multiple parties to undergo the complaint process.

Finally, the authors offer several solutions to address insurance and liability problems that affect rail transportation. Transport of chemicals (especially, TIH chemicals) is risky and represents a frequent cause of disputes. For example, both rail carriers and shippers have suggested shared liability agreements, but frequently disagree on how to divide responsibility. STB could determine that dividing line. Additionally, shippers and railroads could pay into a common liability fund that would cover the cost of a catastrophic event. Alternatively, Congress could agree to fund the cost of a truly catastrophic event, lessening the cost on industry.<sup>7</sup>

In sum, the authors believe the CCO must be preserved as it underpins national rail policy and provides important protections and assurances to railroads and shippers alike. However, CCO also needs to be clarified and better applied to address today's transportation environment.

## **HOW WAS THE STUDY CONDUCTED?**

To gather information for the study, researchers reviewed academic and testimonial papers, as well as interviewed railroads (e.g., BNSF Railway, CSX Transportation, and Norfolk Southern Railway), shipper associations (e.g., American Chemistry Council, National Grain and Feed Association), public officials, and transportation professionals. The report summarized and weighed perspectives from railroads and shippers in drawing its conclusions. To protect confidentiality, names of interviewees were not included.

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<sup>7</sup> Rail carriers have also proposed applying the Price-Anderson Nuclear Industries Indemnity Act, which currently governs liability for nuclear power facilities. The act requires nuclear power plants to hold the maximum amount of insurance coverage available on market plus contribute to a general industry pool. That is, in the event of a catastrophe, the plant would first pay to its ability ("layer 1"), with other plants kicking in a portion (up to a cap) if necessary ("layer 2"). The liability would be capped after the first two rounds of payments, and Congress would allocate public funds for the remainder.