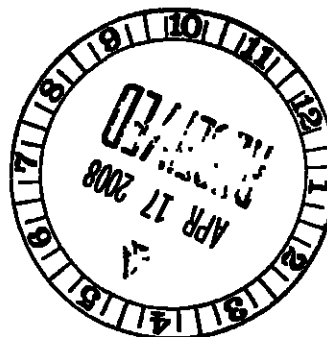


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April 17, 2006



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Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington DC 20423

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Re: STB Ex Parte No. 677, Common Carrier Obligation of Railroads

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding are an original and 10 copies of the Written Testimony of Henry B. Lampe, President of Chicago SouthShore & South Bend Railroad Co.

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,

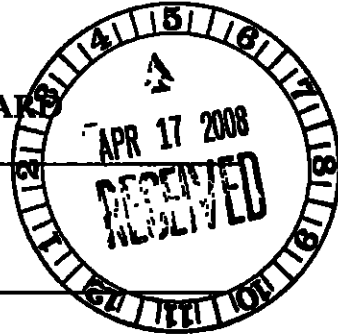
Rose-Michele Nardi

Enclosures

222/45

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 677



**WRITTEN TESTIMONY OF HENRY B. LAMPE, PRESIDENT
CHICAGO SOUTHSORE & SOUTH BEND RAILROAD CO.**

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Counsel for
Chicago SouthShore & South Bend
Railroad Co.

Dated· April 17, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 677

**WRITTEN TESTIMONY OF HENRY B. LAMPE, PRESIDENT
CHICAGO SOUTHSORE & SOUTH BEND RAILROAD CO.**

By Notice served February 22, 2008, the Surface Transportation Board ("Board") commenced this proceeding and announced a public hearing, "to examine issues related to the common carrier obligation of railroads." The Notice stated that the hearing would focus on, among other things, "cost and safety issues related to the transportation of hazardous materials, especially toxic inhalation hazards. . ."

The Board's consideration of the common carrier obligation as it relates to the transportation of toxic/poisonous by inhalation hazardous materials ("TIH")¹ is particularly timely. A string of recent rail accidents involving TIH, combined

¹ TIH, such as chlorine and anhydrous ammonia, are classified by the Pipeline and Hazardous Materials Safety Administration as Division 2.3 materials (gas poisonous by inhalation). 49 C.F.R. §§ 173.115(c) and 172.101

with the security threat TIH poses in a post 9/11 world, has prompted other government agencies, including the Pipeline and Hazardous Materials Safety Administration ("PHMSA") the Federal Railroad Administration ("FRA") and Transportation Safety Administration, to consider and/or adopt regulations designed to improve rail safety in connection with shipments of TIH. The magnitude of the risks posed by transporting TIH was most recently demonstrated by a 2005 rail accident in Graniteville, SC that resulted in a release of chlorine gas.

Chicago SouthShore & South Bend Railroad Co. ("CSS"), a Class III rail carrier, hereby submits to the Board its comments with respect to the common carrier obligation of small railroads² to transport hazardous materials categorized as TIH. CSS handles approximately 200 carloads of TIH annually, which constitutes less than one-third of one percent of its annual carloads. In the wake of recent TIH-release incidents in Graniteville, SC and Macdona, TX, among others, and in light of heightened concerns of possible terrorist attacks directed against railroads and chemical companies, CSS has spent considerable time over the past two years trying to address the risks presented by transporting TIH.

These efforts have included rerouting TIH to avoid population centers, investing

² The use of the term "small railroads" herein refers to Class III carriers. See 49 C.F.R. Part 1201, 1-1(a). However, many of same challenges TIH poses to Class III carriers are equally applicable to Class II carriers

in infrastructure improvements for facilities used for TIH and shopping for excess liability insurance coverage commensurate with the risks presented by TIH

However, despite these efforts, a TIH release with the attributes of the Graniteville accident – which involved the breach of a single TIH car in a sparsely populated, rural area – would, without question, bankrupt CSS and leave scores of injured parties holding hundreds of millions of dollars of unpaid claims. If, rather than occurring in a rural area, like Graniteville, a TIH release were to occur on a CSS train in Chicago, South Bend, IN or even Michigan City, IN (where CSS handles TIH over tracks that run through the middle of a downtown street), the unpaid losses likely would be measured in the billions of dollars. The unfortunate but inescapable truth is that every time CSS handles TIH, the railroad jeopardizes its continued existence and exposes the communities it serves to potentially catastrophic losses.

In light of this reality, and as discussed below, CSS urges the Board to clarify that the common carrier obligation of small railroads does not include the obligation to handle TIH. Rather than requiring small railroads to handle TIH, the Board should permit small railroads to serve shippers and receivers of TIH on a contract carriage basis, enabling each carrier to evaluate independently its ability to manage the risks presented by TIH on a case-by-case basis. At a

minimum, if the Board declines to exclude TIH carriage from a small railroad's common carrier obligation, the Board should (1) clarify the extent to which a small railroad can require TIH shippers and receivers to share in the extraordinary risks presented by TIH (*e.g.*, through tariff terms that impose insurance and indemnification requirements), (2) clarify that premiums paid by small railroad for excess insurance coverage to address TIH risks will be treated as permissible movement-specific adjustments in small rate cases involving TIH movements, and (3) urge Congress to initiate legislation similar to the Price-Anderson Nuclear Industries Indemnity Act ("Price-Anderson Act") in order to spread the risk associated with TIH incidents among producers of those products and the federal government.

I. General Operations of CSS

CSS is a class III carrier that operates approximately 97 miles of rail lines. It operates primarily on an east-west line from South Bend, IN to Kensington, IL (including operations via trackage rights in the Chicago terminal area) and on a north-south branch from Michigan City, IN to Stillwell, IN (the "Stillwell Branch"). Most of the track over which CSS operates is owned by and shared with a high-density commuter operator, Northern Indiana Commuter Transportation District ("NICTD"), which operates approximately 41 commuter trains per day. The NICTD track is maintained to FRA Class 4 condition, which

permits freight operations at speeds up to 50 m.p.h. and passenger operations at speeds up to 79 m.p.h.³ CSS's operations over the NICTD track are dispatched by NICTD. CSS's train service has to be scheduled so as to minimize potential conflicts between commuter and passenger service. Despite these efforts, as recently as September 2006, a NICTD train ran into a CSS freight train. Although the CSS train did not include any TIH cars, and CSS is unaware of any resultant injuries, the collision underscores the potential for accidents that could be catastrophic if TIH were involved.

CSS does not share the Stillwell Branch, approximately 20.6 miles of track, with NICTD. This line is generally maintained by CSS to FRA Class 2 condition and is not signaled. CSS uses a traditional track warrant system to control train movements on these lines.

In 2007, CSS handled 50,993 revenue carloads. Of these, 176 carloads – less than one-third of one percent – were TIH. The majority of the TIH traffic consisted of 138 carloads of chlorine destined to a single receiver located on the Stillwell Branch in Kingsbury, IN. One other customer, located in Michigan City, also received 14 cars of chlorine. In addition, CSS handled 24 cars of anhydrous

³ In a notice of proposed rulemaking, PIIMSA recommends speed limits of 50 mph for TIH rail tank cars, generally, and 30 m p h limits in non-signalized areas. *See Hazardous Materials Impairing the Safety of Railroad Tank Car Transportation of Hazardous Materials*, 73 FR 17818 (April 1, 2008). However, these restrictions, if adopted, would not appear similarly to limit the speed of NICTD trains (or any other train sharing a railroad's track that was not carrying TIH).

ammonia to a single customer located at the east end of CSS's rail line in New Carlisle, IN.

All of the TIH currently handled by CSS moves in interline service with one of three Class I carriers. Historically, this traffic has been interchanged in Chicago through one of two intermediate switch carriers. The cars destined to the customers located in Michigan City were handled by CSS over the NICTD line from Chicago to the destination. The cars destined to the customer located in Kingsbury were handled over the NICTD line to Michigan City and then over the Stillwell Branch to the customer.

II. The Risks Presented By TIH

On January 6, 2005, at 2:39 a.m., in Graniteville, South Carolina, a Norfolk Southern Railway Company ("NS") train was improperly diverted from its main line to an industry track, where it struck another NS train. As a result of the collision, three chlorine tank cars were derailed, one of which was breached and released chlorine gas. Nine people died from the inhalation of chlorine gas. Six of those who died were employees of the textile manufacturing company, Avondale Mills, which was served by the industry track where the collision took place. Approximately 554 people were taken to area hospitals, 75 of whom were admitted, and approximately 5,400 people were evacuated for several days.

Those evacuees appear to be all the people who lived within a one-mile radius of the derailment.⁴

This incident took place in a sparsely populated town in rural South Carolina. The population of Graniteville is approximately 1,200 people (1990 data). See NTSB Graniteville Report at 1. The county in which Graniteville is located, Aiken County, has an estimated 132.9 people per square mile (2000).⁵

Publicly available information indicates that the claims on behalf of all the parties injured, killed or otherwise affected by the Graniteville incident will exceed \$500 million. Avondale Mills alone asserted a claim against NS in excess of \$420 million.⁶ However, despite the magnitude of these claims, NS's continued existence is not threatened by the accident in Graniteville. NS had more than \$8.5 billion of revenue in the year of the accident (2005)⁷. Through a combination of insurance coverage and its own financial resources, NS will be able to compensate injured parties in Graniteville and continue its operations without material disruption.⁸

⁴ See National Transportation Safety Board Railroad Accident Report, *Collision of Norfolk Southern Freight Train 192 With Standing Norfolk Southern Local Train P22 With Subsequent Hazardous Materials Release at Graniteville, South Carolina January 6, 2006*, 1, 17, adopted November 29, 2005 (the "NTSB Graniteville Report")

⁵ See Aiken County QuickFacts from the U.S. Census Bureau

⁶ See Associated Press, McG Kinnard, *SC Firm, Railroad Settle Suit Over Spill*, April 7, 2008. Four weeks after the trial had begun, NS and Avondale Mills settled the claim for an undisclosed amount. See April 7, 2008 news release on the NS website.

⁷ *Norfolk Southern Corp.*, Annual Report (Form 10-K), Feb. 21, 2006

⁸ Although the Graniteville incident did not cripple NS, a similar accident in an urban area could have a material adverse effect on NS or any other Class I carrier.

The Graniteville accident was not an isolated incident. In 2004, a collision involving trains of Union Pacific Railroad ("UP") and BNSF Railway Company ("BNSF") near Macdona, TX, resulted in the breach of tank car carrying chlorine. Macdona is a small town with several hundred residents, located approximately 20 miles outside of San Antonio. Three people were killed and 40 were treated at hospitals. The Railroad Accident Report issued by the National Transportation Safety Board states that the damages in this accident to rolling stock, track and signals were \$5.7 million, and environmental clean-up costs were \$150,000⁹. These amounts do not address the liability in connection with the deaths and personal injuries in that accident.

In 2002, a Canadian Pacific Railway train derailed 31 cars outside of Minot, ND. Five tank cars carrying anhydrous ammonia ruptured. The accident resulted in one fatality and injuries to 333 people. CSS understands that the Minot accident resulted in losses of approximately \$125 million.

Similarly, in 1996, a derailment of a Montana Rail Link, Inc. train two miles outside of the small town of Alberton, MT, population 350, resulted in the rupture of a single tank car carrying chlorine. The incident caused one fatality. CSS understands that this incident caused approximately \$43 million in liability.

⁹ National Transportation Safety Board Accident Report, *Collision of Union Pacific Railroad Train MIIOTU-23 with BNSF Railway Company Train MEAP-TUL-126-D With Subsequent Derailment and Hazardous Materials Release at Macdona, Texas June 28, 2004*, 1, adopted June 28, 2004.

Although the Macdona, Minot and Alberton accidents involved significantly lower losses than Graniteville, that result was largely happenstance (the location of the accident, time of day, weather conditions, topography, etc). Any one of those accidents could have produced losses on the scale of the Graniteville losses had the facts of the accident been slightly different. Moreover, for a typical Class III carrier, which has less than \$5 million in annual revenue,¹⁰ the difference between \$40 million of liability and \$400 million of liability is immaterial because the company could not survive such losses in either case.

The Graniteville, Macdona and Alberton incidents were extremely serious but did not have cataclysmic consequences for the public. This primarily reflects three common attributes of those accidents. *First*, each incident occurred in rural, sparsely populated area. *Second*, each incident involved the release of chlorine from a single tank car. And *third*, the carriers involved in each of these incidents – three Class I carriers and a major Class II carrier – were large companies with considerable financial resources. The harm to the public in these accidents would have been vastly worse had they occurred in densely populated locales, involved releases from more than one tank car, and/or involved Class III carriers.¹¹

¹⁰ *Short line and Regional Railroad Facts and Figures*, American Short Line and Regional Railroad Association (2007 ed) at 11

¹¹ See 73 FR 17818, 17829 (April 1, 2008) (stating that the Graniteville, Macdona and Minot accidents “share certain similarities that effectively minimized the catastrophic results of the accidents,” noting the

If an accident similar to the ones in Graniteville, Macdona, Minot and Alberton occurred in Chicago, a major city with a population of approximately three million (and an estimated 12,750.3 people per square mile)¹², the results would be horrific. A recent study conducted by Risk Management Solutions, entitled *Catastrophe, Injury & Insurance: The Impact of Catastrophes on Workers Compensation, Life and Health Insurance* (2004) (the "RMS Study"), concluded that a rush hour rail accident in Chicago involving a chlorine release from a single car could result in 10,000 fatalities, 32,600 other casualties and more than \$7 billion in claims. RMS Study at 54-59. If such an incident involved the release of TIH from multiple cars, the losses would be considerably higher.

If the carrier involved in a TIH accident in a major population center such as Chicago were a Class III railroad, a catastrophic situation would be made even worse. A tiny fraction of the claims against the carrier would get paid. The overwhelming majority of injured parties would go without compensation. The railroad undoubtedly would go into bankruptcy, with a resultant disruption in service.

III. CSS Has Taken Steps To Reduce TIH Risk

CSS recognizes the extraordinary risks the carriage of TIH poses to its

incidents occurred early in the morning, in relatively rural areas, and under weather conditions that limited the expansion of the toxic plume)

¹² See U S Census Bureau (2000)

operations and the communities it serves, and it has not been content simply to roll the dice and hope for the best. Instead, CSS has taken affirmative steps to manage the risks presented by TIH. However, CSS has concluded that, despite its best efforts, it is unable adequately to address the magnitude of potential losses that could result from an accident involving cars of TIH.

A. CSS Re-routed TIH Traffic Away From Chicago

Historically, CSS received TIH in interchange in Chicago for delivery to receivers located on the eastern portion of CSS's rail line in Kingsbury, Michigan City and New Carlisle. As part of its efforts to reduce TIH risk, CSS looked at ways it could re-route TIH traffic away from Chicago. CSS's biggest TIH customer (138 out of 176 TIH cars in 2007) is located in Kingsbury on the Stillwell Branch. The Class I railroad that interchanges most of this chlorine traffic with CSS also connects to CSS in Stillwell. CSS requested that the Class I deliver that traffic at Stillwell, IN rather than in Chicago. After several months of negotiations, the parties agreed (subject to certain conditions) to move the interchange to Stillwell. This re-routing of traffic eliminates the need for CSS to handle more than 100 cars of chlorine in Chicago and over 39 miles of track it shares with a high-speed commuter operation.

Although re-routing of TIH in this manner is a positive development, it is a less than perfect solution for managing CSS's TIH risk for several reasons.

First, such a re-routing is not possible for shippers/receivers of TIH located in or near the population centers CSS serves. If and when CSS has a customer near Chicago that ships or receives TIH, it will be impossible to route that traffic so as to avoid Chicago. The same will be true if a TIH customer locates in Gary, IN, Michigan City, South Bend or any other densely populated area in CSS's service territory.

Second, CSS could not have changed the interchange location for the subject TIH traffic without the cooperation of its connecting carrier (and the shipper¹³), and such cooperation is not guaranteed. The re-routing of traffic was operationally feasible in this case but would not be in all cases.¹⁴ In some cases, it would be impossible (absent the addition of another carrier to the route). For example, CSS interchanges with UP and BNSF in Chicago (via intermediate switching carriers), but those interchanges could not be relocated to the east end of CSS's system because neither of those carriers connects with CSS east of Chicago.

¹³ Historically, shippers have had the right to direct the route by which their traffic will be handled. However, in light of the PHMSA regulations published on April 16, 2008, it appears that it is no longer the case where the routing of TIH is concerned. See *Hazardous Materials Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments*, 73 Fed. Reg. 20752. Accordingly, the Board should clarify that shippers do not have the right to insist on routings that are contrary to the carriers' obligations under the PHMSA regulations.

¹⁴ Although the newly adopted PHMSA regulations note that, in determining the availability of practicable alternative routes a railroad "must consider the use of interchange agreements," these regulations also define a practicable route as one that is "within the limits of the railroad's particular operating constraints and, further, economically viable given the economics of the commodity, route, and customer relationship." See 73 FR 20760-61 (April 16, 2008).

Third, even assuming CSS can successfully route its traffic away from the more densely populated portions of its system, the Graniteville incident amply demonstrates that a TIH release need not occur in a city to result in claims exceeding \$500 million. CSS simply would be unable to survive in the face of such claims.

B. CSS Upgraded Infrastructure

In connection with the relocation of its interchange point for TIH shipments bound for Kingsbury, IN, CSS will spend approximately \$210,000 constructing new interchange tracks in Stillwell to facilitate safer interchange of TIH cars at that location. In addition, since CSS commenced operations on the Stillwell Branch in 2000, the company has spent approximately \$1.3 million to upgrade the line.

These types of infrastructure improvements undoubtedly reduce the risk of CSS's handling of TIH. However, this traffic will still move over FRA Class 2 track in unsignaled territory. Given the relatively small volume of TIH traffic handled by CSS (only 176 cars in 2007), it is not financially feasible for CSS to reduce risk on the Stillwell line by upgrading its track to FRA Class 3 or higher, or by installing centralized traffic control or a similar signal system. CSS's operations on the Stillwell line do not require high-speed operations. CSS could

never recoup the capital investment required to upgrade the lines in that manner.

C. CSS Attempted to Obtain Additional Insurance

CSS has worked closely with its insurance brokers to obtain additional insurance commensurate with the risk posed by TIH. As a preliminary matter, CSS has increased the limits of its primary liability insurance coverage to levels considerably in excess of the Class III railroad norm, but still less than \$100 million. CSS is able to obtain this coverage at an acceptable cost because it shops for insurance along with three other railroads.

Although its primary coverage exceeds the standards for Class III carriers, CSS recognized that its coverage likely would be inadequate in the event of a TIH release (especially if that release occurred in Chicago or one of the other population centers CSS serves). CSS asked its brokers to determine the availability and cost of an excess liability policy that would increase CSS's coverage up to \$1 billion or more.¹⁵ CSS was advised by its brokers that such coverage, up to a maximum of \$1 billion (which apparently is the highest limit available even for Class I carriers), would be available in the London market. However, the annual premium for such

¹⁵ The RMS Study estimated that a release from a single chlorine car in a rush hour accident in Chicago would cause \$7 billion of liability. In light of this study, a railroad that carries TIH in a major urban area, like CSS, would be under-insured with a \$1 billion liability policy

an excess policy would be approximately \$3 million. That coverage is not remotely affordable for a railroad of CSS's size.

CSS then investigated less traditional insurance products in an effort to increase its coverage at affordable rates. To that end, CSS has become involved with an on-going insurance initiative by an insurance broker to offer excess liability policies to Class II and Class III railroads on a cooperative basis. After collecting data from approximately 25 small railroads and contacting the insurance markets, the broker structuring the cooperative program concluded that, in the current market, such a program could provide excess policies with a maximum limit of \$100 million over and above the participant's existing coverage. The preliminary pricing of this product appears to be affordable, but \$100 million of excess coverage still would leave CSS with insurance coverage well below \$200 million.¹⁶ Although this level of coverage would be adequate for some TIH incidents, the Graniteville accident makes clear that this amount of insurance could be inadequate even for some incidents involving a single car in a rural area.

In addition, the preliminary quotes in this program require that the excess coverage attach at a loss level that is considerably higher than the limit that most Class III carriers have on their primary liability policies. This "gap" in coverage

¹⁶ In addition, once the aggregate of paid claims to all participants in the program reach a certain level during a policy year, no further claims will be paid on account of incidents during that year. Thus, depending on the number and timing of incidents experienced by the participating carriers, the policy could provide no coverage to an individual participant

would be catastrophic for many small railroads (*i.e.*, the losses in the uninsured “gap” would be sufficient to put those companies out of business). In light of this and other issues, it is not clear there will be sufficient interest in the program for it to go forward.

Thus, under current market conditions, it appears that CSS may be able to obtain coverage approaching \$200 million. This amount of coverage would be unprecedented for a Class III carrier. Although such coverage would protect the company in some TIH incidents, it would be insufficient in others. For larger scale TIH releases and in any TIH release in a densely populated area, the company and the public would be unprotected to a significant degree even with that coverage in place.

IV. Small Railroads Are Particularly Ill-Suited To Carry TIH As Part Of Their Common Carrier Obligation.

The struggles faced by CSS to manage risks presented by the transportation of TIH are not unique. Small railroads, by their nature, are particularly ill-suited for the forced carriage of TIH. These companies simply do not have the financial resources or infrastructure to manage adequately the magnitude of risks associated with the carriage of TIH.

A. Short Line Revenue Is Limited

According to the American Short Line and Regional Railroad Association (“ASLRRRA”), there are 386 Class III carriers in the United States. By definition, a

class III rail carrier generates annual operating revenue that does not exceed approximately \$27,750,000 million (based on the most recent adjustment of the railroad revenue deflator formula). *See* 29 CFR Part 1201, 1-1(a). In fact, though, the typical class III rail carrier has annual freight revenue of less than \$5 million.¹⁷ To put the size of small railroads in perspective *vis a vis* TIH risk, claims resulting from the Graniteville incident are in the range of *100 times* the annual revenue of a typical class III carrier. By contrast, the Graniteville claims were *less than 10 percent* of NS's \$8.5 billion of freight revenue in the year of the accident (2005). As discussed below, the relatively modest revenue of Class III carriers makes it extremely difficult for those companies to manage TIH risk.

1. Infrastructure

The rail lines of a Class III carrier often were slated for abandonment by Class I railroads and suffered through years of deferred maintenance prior to being acquired by the small railroad. Accordingly, such lines rarely will have continuous welded rail or concrete ties, and these types of upgrades cannot be justified given the low-density nature of the traffic base and the rail carrier's limited revenue. For the same reasons, many lines of small railroads do not have signal systems or state-of-the art computer dispatching systems.

¹⁷ *Short Line and Regional Railroads Facts and Figures*, American Short Line and Regional Railroad Association (2007 ed) at 11

Accordingly to estimates provided by ASLRRA, the typical Class III railroad operates approximately 73 miles of track. The track generally is maintained to FRA Class 1 condition, which permits operations up to 10 m.p.h., or FRA Class 2 condition, which permits operations up to 20 m.p.h.¹⁸ In light of the relatively short distances over which these railroads operate, and given the relatively low density of the traffic on those lines, FRA class 1 or 2 condition track is generally adequate and safe for its transportation needs. Although the risk of derailment or other mishap is greater on Class 1 or 2 track than on better condition track, Class III carriers cannot afford the capital expenditures and on-going maintenance expenses required to maintain the track to a higher FRA condition class.

Similarly, Class III carriers typically do not have centralized traffic control ("CTC") or similar signal systems for monitoring and dispatching train operations on their systems. Instead, small railroad track is generally unsigned, with the small railroad relying on a track warrant system in which

¹⁸ An analysis by the FRA of prior chlorine and anhydrous ammonia incidents from 1965 through 2005 found that the average speed when these incidents occurred was 38 mph. Interestingly, the FRA noted "80% of the losses occurred at speeds greater than 30 mph" and that "no catastrophic losses of chlorine occurred at speeds below 30 mph." See 73 FR 17818, 17821 (April 16, 2008) (It is unclear whether the FRA determined that catastrophic losses of anhydrous ammonia occurred at speeds of less than 30 m p h). However, the corollary of this statement is that 20% of chlorine losses *did* occur in accidents at less than 30 m p h. Moreover, as this same rulemaking later notes, a slight change in the variables surrounding an incident (e.g., a change in weather conditions, or time of day), can significantly affect the magnitude of the loss and damage. See *id.* at 17829. In fact, the rulemaking expressly states "it is unrealistic to assume that absent the [TIH handling] improvements proposed, consequences from future accidents involving hazardous materials tank cars would be of the same order of frequency and severity as in the past." *Id.*

the train crew communicates with dispatchers by radio.¹⁹ Although CTC includes several important safety enhancements (including main line switch point indicators), the cost of this or similar technology is beyond the reach of most Class III carriers.

The track condition and dispatching technology present on most Class III carriers is perfectly adequate and safe for the handling of all commodities other than TIH. Moreover, as a practical matter, the modest revenues generated by these carriers preclude them from making the types of capital investments and on-going expenditures that would be required to upgrade their infrastructure, especially when such upgrades are necessary only to minimize the aberrationally high risks presented by TIH.

2. Insurance

One obvious way for small railroads to address the risk of handling TIH is through insuring that risk. As discussed below, the problem is that the magnitude of the TIH risk is so great that small railroads cannot obtain coverages that are commensurate with that risk.

Even if improved design tank cars can significantly minimize the likelihood of accidents at lower speeds, the lead time before such tank cars are widely used by small railroads would presumably be several years.

¹⁹ An analysis by FRA of incidents involving chlorine between 1965 and 2005, and incidents involving anhydrous ammonia between 1981 and 2005 "suggests that a disproportionate number of those incidents occurred in non-signalized (dark) territory, as compared to the percentage of total train miles in dark territory." See 73 FR 17818, 17821 (April 1, 2008)

The typical small railroad has per incident and aggregate liability insurance that ranges from \$5 million to \$25 million, and has a self-insured retention (“SIR”), if at all, in an amount ranging from \$25,000 to \$250,000. (Often, a Class III carrier is contractually prohibited from having a SIR or such amount is contractually limited.) This level of insurance should be entirely adequate for a small railroad in most situations. However, for TIH liability, coverage of even \$25 million is plainly inadequate.

By contrast, the Class I railroads have a markedly different insurance profile. Class I railroads typically will self-insure a substantial amount of the “first layer” risk, and obtain insurance policies only for the catastrophic layers of liability. A Class I railroad might self-insure the first \$25 million of liability, and obtain insurance for losses in excess of \$25 million up to \$750 million. For example, in the event of a TIH accident that produces liability of the magnitude of the Graniteville incident, a Class I railroad might bear the first \$25 million dollars of loss, but then would be covered for most, if not all, of the additional liability ²⁰

²⁰ In a TIH incident in an urban area, it is likely that claims would exceed even a Class I’s insurance coverage

This insurance model does not work for the Class III rail carrier. *First*, small railroads simply cannot afford to self-insure tens of million of dollars of loss before its insurance coverage attaches (even if it were contractually permitted to do so). This means that a typical small railroad must obtain insurance coverage that attaches at a point between the first dollar of loss and \$250,000, which makes increasing the policy limit much more expensive. Even a policy limit of \$100 million dollars (which would not be adequate to cover the Graniteville claims) could cost up to 10 times more than the premiums for the insurance policy currently held by a typical small railroad. It would be difficult for any small railroad to absorb such an increase. In addition, even if a Class III carrier could afford such premiums, this expenditure would be difficult to justify given (1) the limited resources of Class III rail carriers for needed investments in track upgrades, bridges, locomotives, etc., (2) the small volume of TIH that most Class III carriers move and the general adequacy of their current insurance for all other commodities, and (3) the possibility that, in the event of a TIH incident, the short line carrier still would be forced into bankruptcy with a coverage level of \$100 million.

B. Pricing Authority Constraints

A common carrier obligation that includes the movement of TIH is also particularly troublesome for short line railroads because Class III rail carriers suffer from constraints on their pricing authority. In fact, many if not most short line railroads spun off from Class I carriers after the passage of the Staggers Act do not have the ability to price their portion of interline moves. Instead, as part of the original spin-off transaction, the selling Class I and the small railroad often entered into a marketing agreement under which (1) the short line carrier gave the Class I seller power of attorney to establish rates for all the traffic the Class I railroad interchanges with the short line carrier, and (2) the short line carrier agreed to receive, often in perpetuity, a fixed per carload allowance (subject only to an inflation index) for all the interline traffic it handled with the Class I carrier.

Sometimes the small railroad's allowance amount varied by commodity or geographical area, but often the allowance was established without regard to the commodity being shipped. (Where an allowance schedule had commodity-specific rates, these rates generally applied only to a few commodities, with the remaining commodities falling under a catch-all rate. CSS is unaware of any allowance schedule that provided a short line carrier with a specific rate for the carriage of TIH.) Accordingly, these short line carriers have no ability to engage in differential pricing with respect to TIH.

The inability of many small railroads to use differential pricing for TIH deprives those carriers of the opportunity to (1) generate additional revenue for investments to minimize the risks posed by TIH (*e.g.*, state of the art equipment and infrastructure; additional insurance coverage; etc.), (2) generate additional revenue to cover the cost of any additional safety measures (*e.g.*, special trains) it adopts for its carriage of TIH, and (3) be financially rewarded for the risks it faces in moving TIH. Class III railroads without pricing authority do not receive any financial benefits to help them manage the enormous risks associated with the movement of TIH.²¹

Even if a Class III carrier has retained authority to price its traffic, the carrier still faces significant obstacles to establishing a price that even remotely enables it to manage the risks of TIH traffic. *First*, the typical short line carrier handles relatively low volumes of TIH traffic. Accordingly, any per carload rate additive related to the carriage of TIH is unlikely to aggregate into an amount sufficient to minimize the TIH risks.²² *Second*, if a small railroad is market

²¹ In its notice of proposed rulemaking, PIISMA notes that the “increase in railroad insurance rates, coupled with the actual costs of the accidents, has resulted in increased shipping rates” for TIH at a minimum of 100%. *See* 73 FR 17818, 17831 (April 1, 2008). However, small railroads without pricing authority suffer the increased insurance costs and high risk without any commensurate increase in rates.

²² PIISMA noted in its final interim rule the “devastating” consequences of the Graniteville incident and stated that “[t]he safety and security risks posed by [TIH] shipments are significant even if a rail carrier only transports a single carload.” *See* 73 FR 20752, 20760 (April 16, 2008).

dominant for the move in question, it runs the risk that its rate or division will be found to be unreasonably high, even if the “excessive” portion of the rate or division merely reflects the additional costs directly and exclusively related to the carriage of TIH (e.g., the cost of additional insurance). For example, the Board recently stated that, in determining the reasonableness of a rate pursuant to Simplified-SAC methodology, the Uniform Rail Costing System could not be altered to reflect the special costs related to the movement of hazardous materials. *See* STB Ex Parte 646 (SUB-1), Simplified Standards for Rail Rate Cases, at * 47, Served Sept 5, 2007.

Accordingly, CSS requests that the Board reconsider this position with respect to TIH rates, and permit a railroad’s rate to reflect the additional cost of insurance premiums necessary to obtain catastrophic coverage for the movement of TIH. However, CSS recognizes that this, too, would be an imperfect solution. It would mean that a railroad would have to incur the cost of the additional insurance up front, even though the TIH shippers and receivers could subsequently determine not to use rail service if they decided the new rate was unacceptable. In addition, because it appears that no insurance policy currently offers in excess of a billion dollars in coverage, insurance, alone, likely would not be sufficient to protect a Class III carrier from bankruptcy if a TIH release were to occur in a major metropolitan area.

V. The Board Must Balance the Common Carrier Obligation Against the Greater Public Interest

As demonstrated above, the movement of TIH by Class III rail carriers raises serious public interest concerns. Small railroads neither have the financial resources to manage the TIH risks preemptively (*i.e.*, by investing in infrastructure and equipment upgrades), nor the financial resources to manage such risks after-the-fact (*i.e.*, by adequately compensating parties injured as a result of a TIH accident). The ICC Termination Act provides that the Board's policy in regulating railroads includes the following principle: "to operate transportation facilities and equipment without detriment to the public health and safety." *See* 49 USC 10101(8). Accordingly, the common carrier obligation must be balanced against the interests of public health and safety.

The STB common carrier obligation is not absolute²³. Instead, the common carrier obligation only encompasses *reasonable* requests for service. 49 USC § 11101(a). In *Granite Stated Concrete Co., Inc. v. Surface Transportation Board*,²⁴ the First Circuit noted that the Board "has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning [to the term "adequate

²³ *See* STB Ex Parte No 677, Common Carrier Obligation of Railroads, served Feb 22, 2008 (*citing* *G S Roofing Prods Co v Surface Transportation Board* 143 F 3d 387, 391 (8th Cir. 1998), *See also* *Decatur County Commissioners v Surface Transportation Board*, 308 F 3d 710, 715 (7th Cir 2002)

²⁴ *See* 417 F3d 85, 92 (1st Cir. 2005)

service on reasonable request”], which [is] not self-defining, in the wide variety of factual circumstances encountered.” Similarly, in *Classification of Ratings of Chemicals, Conrail, April 30, 1986*,²⁵ the Board’s predecessor, the Interstate Commerce Commission (“Commission”), stated it “has discretion to determine if there may be limitations on a carrier’s tariff publication/common carrier obligation.”²⁶ It is against this backdrop that the Board must evaluate a small railroad’s common carrier obligation to carry TIH.

The particular characteristics of a Class III railroad, combined with the extraordinary risks posed by TIH, render small railroads particularly ill-suited to the forced carriage of TIH. As discussed above, a single TIH incident likely would not only put the small railroad out of business but would leave the injured public without adequate compensation. CSS urges the Board to exercise its discretion and determine that it is unreasonable under these circumstances to force Class III railroads to carry TIH.

More than 20 years ago, the Commission addressed the issue of whether a Class I carrier should be permitted to “flag out” from published tariff rates the transportation of certain hazardous chemicals. In addressing this issue, the Commission stated it would look several factors. These factors included “the

²⁵ 3 ICC 2d 331, Dec 19, 1986

²⁶ Id at 337

hazard posed by the involved commodity, the need for stricter safety standards, and financial evidence including insurance costs and the extent of carrier liability.” *Id.* In that case, the Commission concluded that the Class I railroad had not meant its burden of proof with respect to the flag out, and noted that the railroad had “not provided any financial evidence about insurance, indemnification or the extent of its potential liability.” *Id.* CSS has addressed each of these issues.

A. Hazard and Extent of Liability

The hazard and extent of the liability presented by TIH are amply demonstrated by the Graniteville incident. The Graniteville release involved a single ruptured tank car in a sparsely populated area. In that sense, the Graniteville incident represents one of the “best-case” scenarios for a TIH release. Even so, nine people died from toxic inhalation, approximately 554 people were taken to area hospitals, 75 were admitted to hospitals, approximately 5,400 people were evacuated from the area for several days, and claims against NS can be estimated to exceed \$500 million.

As described above, the hazards to the public are magnified if a small railroad is involved in the TIH release. The average small railroad has very limited financial resources and annual freight revenues of less than \$5 million. Whether a “best case” scenario (*i.e.*, single car ruptured in sparsely populated

area, \$500 million in claims) or “worst case” scenario (*i.e.*, multiple cars ruptured in major city, more than \$1 billion in claims), a TIH release would almost assuredly bankrupt the small carrier and leave the injured public without adequate compensation.

These public hazards are directly related to the extent of TIH liability a small railroad is expected to incur. Unlike the carriage of radioactive materials, the movement of TIH is not governed by legislation similar to the Price-Anderson Act. (Under that Act, 42 USC § 2210, the federal government provided rail carriers with indemnity insurance, without any cost allocated to the carriers²⁷. In addition, the risks presented by the transportation of radioactive materials was considerably more manageable than those presented by TIH.²⁸) Without similar legislation, the liability burden on a small railroad is crippling. It is simply unreasonable to force a small railroad to expose itself to a billion dollar-plus claim as a result of a single accident, especially if the same railroad is precluded from establishing rates that fully price that risk.²⁹

²⁷ See *United States Department of Energy and the United States Department of Defense v. Baltimore and Ohio Railroad Company et al.*, 10 I.C.C.2d 112, 120 served (May 31, 1994).

²⁸ Moreover, with respect to radioactive materials, the Commission issued an Environmental Impact Statement that concluded “[t]he risk of accident resulting in the loss of human life is extremely low,” that the “worst case” scenario for regular train accidents would result in one latent cancer fatality every half year,” and that such a scenario “would be extremely unlikely.” See *Transload Rates on Radioactive Materials, Eastern Railroads*, 362 ICC 756, 772 (April 11, 1980) (“1980 Radioactive Case”), supplemented by 364 ICC 981, *aff’d by Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981). The same cannot be said for losses resulting from a TIH release.

²⁹ The indemnity protection afforded to the railroads by the Price-Anderson Act was a principle factor in the Commission’s determination that a railroad could not “flag out” its transportation of radioactive materials without violating its common carrier obligation. See *U.S. Department of Energy, et al. v. The*

B. Insurance Costs

As noted above, there currently is no affordable insurance policy that could adequately protect a small railroad from a Graniteville-type incident (*e.g.*, \$500 million).³⁰ Moreover, there is no policy available at all that could protect a small railroad from a TIH spill in a major metropolitan area (*e.g.*, in excess of \$1 billion). Unlike Class I railroads, small railroads do not have the financial resources to augment their insurance coverage to any meaningful extent to deal with losses above the limit of the small railroads' insurance coverage.

C. Safety Standards

In the last few years, there have been a variety of proposed rulemakings and regulations affecting rail transportation of TIH. Most recently, , a rulemaking was published aiming to improve the safety of tank cars, *see* 73 FR 17818-01, April 1, 2008, and an interim final rule was published focusing on the security of TIH shipments in a post 9/11 world, *see* 73 FR 20752, April 16, 2008.³¹

Baltimore and Ohio Railroad Company. Et Al 364 ICC 951, 954 (May 13, 1981) (summarizing a prior decision and noting that "[a]fter observing that [the railroad] was adequately indemnified against damages from a nuclear incident by the Price-Anderson Act, the Commission found that the flag outs violated [the railroad's] common carrier duty . . ."

³⁰ As noted above, to the extent a small railroad has pricing authority, it would be restricted from raising rates as a way to pay for increased insurance premiums given the Board's recent finding precluding such movement specific adjustments. In the 1980 Radioactive Case, the Commission appeared to deny the inclusion of insurance costs as part of the cost data comprising the railroad's special train rates for radioactive material because "[n]uclear liability arising out of all shipments of spent fuel or radioactive waste is insured under both the Facility Form purchased by the reactor operator, and by the indemnity provided by NRC to the reactor operator." This is not the case with respect to railroads' liability for TIH shipments

³¹ This latter rulemaking makes clear that TIH releases resulting from accidents are not the only concern for railroads. Railroads carrying TIH are potential targets of terrorist acts. *Id.* at 20757 (noting TIH is an 'attractive target[] for terrorists – because of the potential for their materials to be used as weapons of

Although all or some of these rulemakings and regulations may, in the future, significantly improve the safety of transporting TIH, railroads currently remain vulnerable to intentional and accidental TIH leaks.³² Furthermore, no safety regulation can ensure that a TIH release will not occur. Accordingly, safety regulations cannot address the heart of the common carrier issues as it relates to short line railroads. Is it reasonable for the common carrier obligation to extend to activities in which a single incident could *both* force a railroad out of existence *and* leave the injured public without adequate redress?

D. Analysis Supports Exclusion from Common Carrier Obligation

The analysis of the above factors demonstrates that the Board should use its discretion and exclude the carriage of TIH from the common carrier obligation of small railroads. The potential harm to the public outweighs the benefits of requiring small railroads to carry TIH, where such an obligation forces a small railroad to incur unmanageable risks that threaten its very existence and the health and welfare of the communities it serves.

opportunity or weapons of mass destruction” *See also Rail Transportation Security*, 71 FR 76852, December 21, 2006 (notice of proposed rulemaking), which identified Chicago as a “High Threat Urban Area,” “warranting “special consideration with respect to transportation security.” *See id* at 76861.

³² For example, in the NTSB Graniteville Report at 55, the NTSB notes that “[a]s shown in the Graniteville accident, even the strongest tank cars in service can be punctured in accidents involving trains operating at moderate speeds”)

VI. Remedies Requested

Until reasonable risk management tools are available for small railroads, these carriers should not be forced to carry TIH. Accordingly, CSS urges the Board to determine that a Class III carrier has no common carrier obligation to move TIH. Instead, small railroads and TIH shippers should work together to reasonably address the risk management concerns of the small railroad, and then enter into contracts for the carriage of TIH. At a minimum, if the Board concludes that the common carrier obligation does apply to small railroads, CSS respectfully requests the Board to consider taking one or all of the following actions:

1. Currently, it is unclear what types of liability-related requirements a small railroad can impose on shippers and receivers of TIH. The Board should clarify the manner and extent to which a small railroad can publish tariff provisions that require TIH customers to insure TIH-related losses incurred by third parties and the railroad and to indemnify the small railroad handling TIH.
2. In rate reasonableness cases involving movements of TIH, the Board should permit the insurance premiums paid by small

railroads for catastrophic coverage to be treated as a movement-specific adjustment.

3. The Board should urge Congress to enact legislation similar to the Price-Anderson Act that covers the movement of TIH.

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