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U.S. Department of Transportation
Docket Operations
M-30
West Building Ground Floor
Room W12-140
1200 New Jersey Avenue, SE
Washington, DC 20590

**Re: STB Ex Parte No. 677 (Sub-No. 1)
Common Carrier Obligation of Railroads – Liability Caps For
Transportation of Hazardous Materials**

The Railway Supply Institute is pleased to respond to the STB's Notice of Public Hearing and request for written comments on certain issues related to the transportation of hazardous material by rail. The STB's June 10, 2008 notice requested comments on: 1) "specific potential policy solutions to the liability issue, including solutions modeled on the Price-Anderson Act of 1957, and 2) "what constitutes a reasonable request for service involving the movement of TIH, as well as whether there are unique costs associated with the transportation of hazardous materials."

The Railway Supply Institute ("RSI") is the international trade association of suppliers to the nation's freight railroads and rail passenger systems. The RSI Committee for Tank Cars ("RSI-CTC") is a standing committee of the RSI that addresses issues of importance to tank car builders and owners. The RSI-CTC represents companies that manufacture virtually all of the tank cars operated in North America, and also own, manage and full service lease over 70% of the Nation's tank car fleet. RSI-CTC membership includes American Railcar Leasing, CIT Rail, GATX Corporation, General Electric Railcar Services Corp, Trinity Industries, Inc., and Union Tank Car Company. The RSI-CTC is pleased to provide insight and information on both of the issues of concern to the STB.

I. Specific Potential Policy Solutions Re: Liability For Hazardous Materials Transport

It is well established that rail shipment of vital raw materials that are classified as hazardous materials is by far the safest means of transportation available. Approximately 1.7 million carloads of hazardous materials are transported by rail throughout the United States each year, and 99.998 percent of these shipments reach their destination without release caused by an

accident. Transportation statistics demonstrate that it is 16 times safer to move hazardous materials by rail compared to highway transport. Importantly, this safety record is improving over time. Data from FRA's Office of Safety Analysis indicates that the total number of annual train accidents has actually decreased over the last seven years by about 23% ¹. Similarly, PHMSA data on reportable hazardous materials incidents shows a decrease in incidents of about 30% between 2000 and 2007 ².

In spite of these significant improvements, the railroads report that the cost of insurance has gone up materially. This trend in the availability and cost of insurance stems from two factors that have arisen since 2001. The first is the increased awareness of the threat that terrorists pose to the nation's transportation infrastructure. The second is the coincidental occurrence of several major freight train derailments during this same relatively short six-year period.

With regard to the STB's request for "specific policy" solutions, there is no question that the most efficient, effective, and productive solution to improving the safety of rail transportation of hazardous materials is to develop policies and technologies that reduce or eliminate the occurrence of derailments and other incidents in the first place, and by taking steps to reduce the quantity of material released in the event that an incident does actually occur. In addition to reducing the cost of insurance, these types of specific policy solutions have the additional benefit of reducing the harm to the public that can result from these types of incidents. These specific preventative solutions involve a) implementing new train operating and track maintenance practices b) improving the impact resistance of TIH tank cars; and c) implementing enhanced security measures to prevent rail terrorism.

The DOT's Federal Railroad Administration and Pipeline and Hazardous Materials Safety Administration are already taking aggressive steps to address most of these root cause issues in the form of a formal agency rulemaking. On April 1, 2008 the DOT issued a Notice of Proposed Rulemaking to improve the safety of rail transport of hazardous materials by creating specific new train operating rules, including maximum train speeds for certain hazardous materials trains, and performance standards applicable to the construction of tank cars carrying TIH materials intended to enhance crashworthiness ("NPRM") ³. In contrast to federal liability caps and mandatory insurance regimes, these specific measures are being proposed to reduce the occurrence of accidents in the first place and reduce the consequences of accidents that cannot be prevented. In addition, a number of these measures may be implemented long before any type of statutory insurance regime could be navigated through Congress to become law and implementing regulations promulgated. For all of these reasons, these ongoing measures represent inherently superior policy solutions to common carrier liability issues that have been raised by the railroads. The RSI-CTC and other industry stakeholders have noted their conceptual support of this overall DOT initiative, and are actively working with the DOT to address areas of specific concern that will enable the development of an effective and practicable set of final rules.

¹ Federal Railroad Administration, Office of Safety Analysis Accident Trends data from 2000 and 2007.

² DOT, Pipeline and Hazardous Materials Administration 10-year Report on hazardous materials transportation incidents reportable under 49 CFR § 171.15 and § 171.16.

³ 73 Fed. Reg. 17819 (April 1, 2008) (Docket No. FRA-2006-25169).

Additionally, within the NPRM is the opportunity to address new policies and procedures concerned with security issues. While the NPRM addresses hazardous materials transportation *safety*, and, in its proposed form, does not address rail hazardous materials *security*, it offers a current vehicle for proposing security as part of the performance or other standards that emerge from a final rule. According to representations by the railroads and the insurance industry, security concerns are also playing a significant role affecting the cost and availability of insurance. It makes sense, therefore, to expand the NPRM to include the development of security enhancements on these same TIH cars, and to do so within the same timeframe and context as the NPRM. Increased coordination and cooperation between the DOT and DHS to develop uniform security and safety enhancements provides the best means to improve the ongoing efforts and create a more comprehensive federal policy. Introduction of another "insurance" scheme for limiting liability does not add to the safety or security of the nation's rail system.

In light of the significant ongoing rulemaking efforts, legislative proposals to enact liability caps and/or Price-Anderson-like federal insurance regimes are now outdated and have been superseded by more direct and effective root cause policy solutions. Previous proposals for a Price-Anderson-like insurance regime raised many serious questions related to implementation, legal effect, costs, fairness, and impact on long-term safety that were never resolved. Even if these questions were resolved, the previous proposals most likely would have been found unworkable. For instance, the Price-Anderson regime that was occasionally invoked last year as the model for the rail liability proposal has only been used once (in 1979) since it was created in 1957. The 1979 Three Mile Island incident did not trigger the secondary coverage provisions of the regime, and it is fair to say that, overall, the Price Anderson regime has never really been tested. Furthermore, Price-Anderson was enacted to overcome the refusal of investment capital to become engaged in nuclear power generation absent some form of liability protection. This is not the case with the transportation of TIH materials on the nation's rail system. Like the railroad proposals, many of the provisions of Price Anderson have not been triggered or litigated, and open legal questions remain in the nuclear industry about Price Anderson, such as: Exactly who can be sued? Do the jurisdictional limitations work? Would the indemnification provisions and limits stand-up in court?

RSI-CTC believes that AAR's legislative proposals represent a poorly defined response to an issue that argues in favor of a solution imbedded in enhanced rail safety and security – the very issues that are being vetted through the current NPRM for TIH tank car transport. The AAR proposal does nothing to improve the manner and method of eliminating or modifying the risk associated with TIH transport, but seeks simply to cap liability when the risk manifests. Additionally, legislated liability caps and mandatory insurance requirements do not take advantage of industry stakeholder coordination for improving rail safety and security, and may actually compromise the existing regulatory and legal regime established over time via the Federal Railroad Safety Act ("FRSA") and the Hazardous Materials Transportation Act ("HMTA"). It is critical that the NPRM be permitted to run its course in light of its focus on rail safety and security. Participants in all facets of the nation's rail industry are engaged in the NPRM as evidence by the multitude of filed responses. It is precisely this industry-wide interest that will foster safety and security improvements; a result that would be less expected from a liability cap initiative.

II. Reasonable Requests For Rail Service and Unique Costs

The STB has also asked, "what constitutes a reasonable request for service involving the movement of TIH" and "whether there are unique costs associated with the transportation of hazardous materials." These questions are closely related. A reasonable request for service involving a TIH shipment is a request for shipment of a car that is fully compliant with the layers of existing federal legal requirements that have been developed to insure that such shipments are safe and secure. Shipments of hazardous materials by rail are subject to a labyrinth of federal regulations promulgated by the FRA, PHMSA (previously RSPA) and the Department of Homeland Security/ Transportation Security Administration. These regulations and requirements address the very same liability risks that are of concern to the railroads and their insurers. These regulatory programs already impose significant "unique costs" associated with the transportation of hazardous materials that have been imposed in a coordinated manner, in consultation with all the regulating agencies, and which have been implemented only after a careful cost-benefit analysis. The duplicative approach of improving rail safety and security via the NPRM and legislating liability caps via the AAR proposal may impose unanticipated costs and portend unintended results that ultimately engineer adverse impact on the longer-term safety and security focus that best serves the nation's rail transportation system.

The RSI-CTC appreciated this opportunity to provide the STB input on these important issues.

Sincerely,



Thomas D. Simpson, Executive Director