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1331 Pennsylvania Avenue, N W
Washington, D C 20004

Peter J. Shudtz
Vice President Federal Regulation &
General Counsel

Direct phone 202-783-8124
Fax 202-783-5929

July 8, 2008

Hon Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C 20423-0001

Re. STB Ex Parte No 677 (Sub No. 1) – Common Carrier
Obligation of Railroads – Transportation of Hazardous Materials
-- Comments of CSX Transportation, Inc.

Dear Acting Secretary Quinlan

Enclosed for filing in the above referenced matter are the Comments of CSX
Transportation, Inc

CSXT is e-filing these comments. Thank you for your assistance, and please do
not hesitate to contact me if you have any questions regarding this matter

Respectfully submitted,


Peter J Shudtz *PJS*

PJS/krb

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 677 (Sub-No. 1)

**COMMON CARRIER OBLIGATION OF RAILROADS –TRANSPORTATION
OF HAZARDOUS MATERIALS**

COMMENTS OF CSX TRANSPORTATION, INC.

CSXT thanks the Board for this opportunity to submit written comments on the issues to be discussed at the public hearing on July 22, 2008. CSXT joins in the submission of the Association of American Railroads (AAR), and submits these additional comments. These comments address

- the inherent risks associated with a legally-imposed duty to transport Toxic Inhalation Hazards ("TIH"),
- the growing regulatory burdens as federal authorities seek to impose more and more specialized requirements for transporting TIH, and
- the pressing need for legislation to relieve railroads of the potential ruinous liability resulting from a mandate to transport

The challenges of safely and securely transporting TIH commodities are not unique to CSXT. However, CSXT is one of the largest rail transporters of chemical products in America, and hopes that these separate comments will aid the Board in understanding the impacts of the common carrier obligation as it relates to the transport of TIH commodities from the perspective of a carrier that is required to move these highly hazardous commodities.

For well over half a century, railroads have actively helped American industry solve the supply chain challenges that had to be overcome to move large quantities of these chemicals from production site to consumption site. Railroads have long been seen by shippers, the public and by government officials as the preferred way of transporting these commodities. The rail mode, with its lower cost and superior safety record, was widely accepted as the distribution channel of choice. With the railroad network available to distribute TIH products, the economic efficiencies of high-volume production facilities could be achieved. When lower production costs make overseas sourcing cheaper, some users of TIH have been able to import large quantities through ports in major cities, storing the TIH in large tanks and using the railroad network to distribute the product safely and efficiently. Manufacturers, industrial consumers, and the public benefited from, and broadly supported, rail's role as the solution to their logistical challenges.

The support of the public, and of many policy makers, has greatly eroded since September 11, 2001. Now, railroads, including CSXT, are harshly criticized for transporting these commodities. Sometimes, the criticism is directed toward how the railroad transports these commodities – most often at the open nature of the rail network. For CSXT, that is a network of over 20,000 miles. Other times, the criticism is directed at the fact that the railroad transports these commodities through a particular community.

The fact is this. Under the current state of the law, CSXT is required to transport these commodities "on reasonable request" when tendered to it in conformity with DOT regulations. See, 49 USC Sec. 11101(a) and *Classification Ratings on Chemicals, Conrail*, 3 ICC 2d 331 (1986). Yet, the federal government provides the railroads with no protection from the risks that it mandates they undertake.

Today, many major policy figures and interest groups will not accept the movement of TIH through cities under any set of conditions. Others that do accept it are questioning whether rail is still an acceptable mode for moving TIH, with its inherent stops in transit to make connecting trains, interchange between carriers at locations that are not guarded, and the need to conduct generally open operations. Railroad companies have been vilified in the media and accused of putting balance sheets before public responsibility, for simply complying with their legally-imposed duties.

CSXT has changed its own views as a consequence of the additional risks, the reputational damage, and new requirements that government now seeks to impose upon the handling of TIH. If given a choice, the company would decline to participate in the business under any circumstances not essential to the public health of the communities we serve. Federal policy needs to recognize the changed paradigm. TIH simply cannot continue to move by railroad indefinitely. Federal policy should encourage conversion of industrial processes that use these chemicals to eliminate the need to move them long distances. Until that is achieved, prudent interim policies must be adopted to reduce the number and distance of TIH shipments by rail. More robust tank car designs for TIH shipments must be implemented as quickly as practicable. Legislation capping liability and sharing the remaining risk must be passed to relieve the railroads of risk, while those who have long called on the railroads to transport TIH have a fair opportunity to adjust to new modes of distribution and production.

Inherent Risks

The risk inherent in transporting TIH commodities is not new. But, there is a new paradigm in the 21st Century. The tort system in the United States -- as a practical matter -- has deemphasized fault. It is a system where juries are routinely led to find events that no one reasonably foresaw, should have been anticipated. Juries do not hesitate to attribute some negligence to large entities with deep pockets. If no other negligence can be argued, plaintiffs' lawyers will

allege negligence for not preventing someone else's negligence Runaway jury verdicts create the risk of huge liability

Communities, by and large, blame the railroad for bringing these chemicals through their cities Some have pursued legislation to ban movement of TIH's through their jurisdictions Activists generally focus attention on the railroad, rather than the companies that demand that the railroad transport these ultra-hazardous commodities

The simplistic view that if a company does nothing wrong, it will not be held liable is no longer valid Under the current liability system, creative plaintiffs' counsel make accusations of negligence, and juries often impose liability -- whether or not there are facts to support those accusations For example, vehicles drive in front of trains, stop in front of trains, and even drive into the side of trains Yet, juries have held the railroad liable for such incidents, knowing that the railroad has deep pockets

Attached to these comments is a New York Times article entitled "Port Authority Found Negligent in 1993 Bombing"¹ A trial court jury found that the Port Authority did not heed warnings to close the public parking garage under the World Trade Center The plaintiffs' position apparently was that, knowing that terrorists could plant bombs in vehicles under the building was enough to impose on the Port Authority (which managed the building) an obligation to close the

¹ New York Times, "Port Authority Found Negligent in 1993 Bombing", Section A, Oct 27, 2005

parking lot to public parking. Consider what that means. While the World Trade Center (before the 9/11 attacks) was certainly prominent, it was hardly the only major building in America with a public parking garage. Indeed, many ordinary office buildings in Washington offer this service. Is it now – as a matter of law – negligent to operate a public parking garage under an office building? Should all public parking under buildings be prohibited anywhere in the country?

Perhaps most telling in this example of America's tort system in the 21st Century is the jury's allocation of fault in the lawsuit over the bombing. Many states provide that fault must be allocated by the jury among the defendants. Here, the jury found that the Port Authority was 68 per cent at fault, and the international terrorists who perpetrated the crime were 32 per cent at fault. Under New York law, a defendant found to be more than 50 per cent responsible can be compelled to pay 100 per cent of all damages.² This is not the case in other states. In Hawaii, a defendant that is found only one per cent at fault for a plaintiff's injury can be required to pay 100 per cent of the damages if the 99 per cent at fault defendant is unable to pay. A drunken driver in Honolulu ran off the road, killing a passenger. The trial judge refused to tell the jury that if the city of Honolulu was found to be at all negligent, it could become responsible for all damages. The jury found the city 1 per cent negligent for failing to make the winding road "safe." The under-insured driver had no assets and under the law, the City was legally required to pay the full

² NY CPLR §1601

amount That outcome was, ultimately, reversed³ Thus far, the Port Authority of New York and New Jersey has not been as successful A New York state appeals court recently upheld the jury's verdict⁴

Now, the final appeals in the World Trade Center bombing case have not run their course Appellate judges do apply their states' laws of liability, foreseeability and fault – within their power to review jury decisions The Hawaii Supreme Court's decision cited is a good example Our nation has not officially turned its back on its legal structure But in today's tort litigation environment, a lack of fault gives little comfort to a large corporate defendant in a case where human lives have been torn apart by tragedy Appeals are not a guarantee against jury verdicts driven more by emotion and sympathy than fact This liability backdrop lies behind every discussion of TIH and the common carrier obligation of railroads like CSXT

Regulatory Burdens

Growing regulatory attention to TIH is imposing additional burdens on the obligation to transport these ultra-hazardous commodities Some of these requirements merely add cost Others may require circuitous routings and speed

³ It took an appeal all the way to the Hawaii Supreme Court for common sense to prevail The Supreme Court said that the jury must be told the ramifications of finding the City negligent and remanded the case A second jury, hearing the explanation of the consequences should the city have any liability, found no fault on the City's part See *Kaeo v Davis*, 68 Haw 447, 719 P 2d 387, (Hawai'i May 14, 1986)

⁴ *Nash v Port Auth of NY & NJ*, 856 N Y S 2d 583 (1 Dept 2008) See, also, New York Times, "Bombing Verdict Upheld Against Port Authority", Section A, April 30, 2008 (See attached)

restrictions that will affect CSXT's network operations – and shippers of non-TIH commodities representing over 99% of all CSXT Shipments Other regulatory initiatives, such as proposals to prohibit use of certain interchanges may make some movements impossible

It is not CSXT's intent here to criticize well-intended regulatory initiatives designed to reduce the risk to the public, which is inherent in moving large quantities of these commodities long distances And, in a post 9/11 world, public concerns about international and domestic terrorism must be addressed However, no meaningful discussion of the common carrier obligation as it relates to the reasonableness of demands to transport TIH can take place without considering the growing federal regulatory burdens on the railroads

Transportation Security Administration Voluntary Guidelines.

Formal Federal agency reaction to the risks inherent in transporting TIH by rail in the Post 9/11 World began as a cooperative and collaborative effort between TSA and the rail industry Immediately after 9/11, and well before the creation of TSA, the Rail Industry moved rapidly to address the new threat environment The industry rapidly developed a security plan, with each railroad implementing 53 countermeasures, based on people, process, and technology This concept of

escalating alert levels, borrowed from US Military Defense Condition (DefCon) protocols, is also used by TSA today ⁵

Over time, TSA saw a need to move to a more formal interaction with the rail industry over transportation of TIH materials. This began with a lengthy set of 24 voluntary action items that were mutually developed through constructive discussions between the rail industry, TSA and other interested Federal agencies ⁶

TSA, however, felt it was also necessary to issue additional voluntary guidelines that exceeded the ability of the rail industry to implement on a 100 per cent compliance basis. On November 21, 2006, TSA issued further voluntary "action items" for the handling of TIH. These voluntary guidelines challenge railroads to reduce "dwell" time in "High Population Density Areas" ⁷. In a spirit of cooperation, the industry agreed to make its best reasonable efforts to meet the substance and goals of those guidelines and CSXT continues to work with TSA on those and other guidelines ⁸. But, some of these requirements call for

⁵ The Board and the public at large are aware of TSA's program to escalate security measures at higher alert levels.

⁶ TSA Recommended Security Action Items for the Rail Transportation of Toxic Inhalation Hazard Materials, issued June 23, 2006

(http://www.tsa.gov/what_we_do/layers/tnp/freight_rail_security.shtml)

⁷ TSA Supplemental Security Action Item No. 1 calls on railroads to "[r]educe the number of hours TIH cars are held in yards, terminals, and on railroad-controlled leased track in" high population density areas. (http://www.tsa.gov/assets/pdf/Supplement_No%201TIH-SAI.pdf) (November 21, 2006)

⁸ TSA Supplemental Security Action Item No. 2 was issued on February 12, 2007, and provides further guidance on the recommended scope and procedures for voluntarily conducted background checks. (http://www.tsa.gov/assets/pdf/sai_for_tih_supplement2.pdf) (February 12, 2007)

operations that are simply not possible to achieve in all situations, given the realities of operating in terminals with existing fixed infrastructure

These voluntary guidelines, as will be discussed below, are being gradually supplanted by progressively more active formal regulations, which are at times inconsistent with the voluntary guidelines and which will add more burden on the rail industry. This burden comes, not as a consequence of a business decision to participate in a line of business, but as a result of the obligation to handle TIH – about one-half of one percent of CSXT's traffic.

Department of Transportation Routing Regulations

The DOT routing regulations (adopted by PHMSA and enforced by FRA) represent a commendable effort to address the public's routing concerns, while recognizing that the rail route structure does not offer anything like the flexibility of the highway network. In these regulations, the DOT has tried to add more detail and structure to the trip planning process.

The interim final rule will require railroads to compile annual data on specified shipments of hazardous materials (all this), use the data to analyze safety and security risks along the relevant rail transportation routes, assess alternative routing options and make routing decisions based upon those assessments. At the heart of the routing requirement is a list of 27 factors that must be considered in all route analyses. Those factors are

- 1 Volume of hazardous material transported**
- 2 Rail traffic density**
- 3 Trip length for route**
- 4 Presence and characteristics of railroad facilities**
- 5 Track type, class, and maintenance schedule**
- 6 Track grade and curvature**
- 7 Presence or absence of signals and train control systems along the route ("dark" versus signaled territory)**
- 8 Presence or absence of wayside hazard detectors**
- 9 Number and types of grade crossings**
- 10 Single versus double track territory**
- 11 Frequency and location of track turnouts**
- 12 Proximity to iconic targets**
- 13 Environmentally sensitive or significant areas**
- 14 Population density along the route**
- 15 Venues along the route (stations, events, places of congregation)**
- 16 Emergency response capability along the route**
- 17 Areas of high consequence along the route, including high consequence targets as defined in §172.820(c)**
- 18 Presence of passenger traffic along route (shared track)**
- 19 Speed of train operations**
- 20 Proximity to en-route storage or repair facilities**
- 21 Known threats (including any non-public threat scenarios provided by the Department of Homeland Security or the Department of Transportation for carrier use in the development of the route assessment)**
- 22 Measures in place to address apparent safety and security risks**
- 23 Availability of practicable alternative routes**
- 24 Past incidents**
- 25 Overall times in transit**
- 26 Training and skill level of crews**
- 27 Impact on rail network traffic and congestion**

The rule also requires railroads to conduct enhanced safety and security inspections of all railcars carrying placarded loads of hazardous materials

CSXT commends the DOT for recognizing the risks inherent in transporting large quantities of TIH. And, CSXT fully supports the goals of these regulations. If the government is going to regulate in this area, it has chosen a fundamentally sound approach. Requiring the railroads to periodically examine the routing plans for shipments may well help identify prudent changes that should be made.

Nonetheless, implementing the new regulations will prove exceedingly difficult. It is one thing to consider a factor, such as track curvature, and quite another to assemble a database sufficient to administer a review process. It may make sense to consider proximity to iconic targets, but judgments must be made in determining what those are. CSXT does not know, at this juncture how to grade the emergency response capabilities of fire departments in the 17,000 communities along its right of way. And no evaluation of threats can be made until DHS makes its non-public threat assessments available to the railroads. CSXT is dedicating a great deal of management time and resources to meet these challenges.

The extent to which these new routing regulations will result in operations that are inconsistent with the voluntary TSA guidelines remains an open question. Some of the route selection criteria may dictate route selection via track

segments that, in some instances, will make simultaneous compliance with both mandatory regulations and voluntary guidelines impossible CSXT will, of course, attempt to do both as often as reasonably practical, but our ultimate commitment is, and must of course be, to comply with the law

CSXT also commends the FRA's willingness to support development of the complicated data systems required for optimum application of the route selection criteria set out in the new rules CSXT is fully supportive of that process and is playing an active role in the development process, offering management time, data and insight, as well as participating in support of the federal grant award program

The route analysis requirement is a complicated process It will impose significant demands on CSXT management time While this is important and necessary work, we ask the STB to keep in mind at all times that TIH traffic is a very small portion of our total traffic base, and that these efforts are consuming – and will continue to consume – a disproportionate share of management resources

Transportation Security Administration Proposed Regulations

In contrast to the DOT regulations, which we anticipate will lead to changes in routing but not severe operational impediments, proposals by TSA for attended

handoffs, including interchanges, promise to have significant operating effects and unintended consequences

TSA's proposed rules would require the railroads to,

- 1 Be subject to government inspection,
- 2 Report significant security concerns,
- 3 Provide location and shipping information for TIH commodities,
- 4 Provide a "secure chain of custody" – defined as attended pickup, delivery, and interchange

The first three of these requirements present some uncertainties and potential complications, but should be manageable as reasonable interpretations become available. On the other hand, TSA's proposed requirement for attended interchange is a special handling requirement that cannot be accommodated in a common carriage network. The premise underlying a common carriage model is that the network can take any tendered load from any location to any location (with only a very limited number of exceptions). When the requirements of a shipment extend beyond the capability of the network, the common carriage model breaks down. Consider for example, excessively high or wide loads. A railroad's network cannot accommodate loads with unlimited widths. A load that exceeds the network's clearance limitations cannot be accommodated in common carriage. It might, upon careful review, be "cleared" for movement over a specific route from A to B, but it cannot be accepted for movement anywhere and everywhere the shipper would like to send it.

Similarly, if the rail network does not provide the capabilities required by the proposed TSA regulations for all movements, a shipment that would have to follow a non-complying route cannot be accepted in "common carriage" service. Many interchange locations do not have employees on-location at all times. These existing interchange locations will therefore not qualify as legal locations for the interchange of TIH traffic. Systems will have to be designed to close these interchanges to TIH traffic. To ensure compliance, interchanges will have to be moved to yards where employees are present 24 X 7. In most cases, this will mean routing changes to larger cities. Of course, cars can only move where trains go. Unless there is train service between two yards, neither is an option to handle TIH cars, regardless of employee staffing. Since train service links major terminals and most heavily staffed yards are in major terminals, it is inevitable that compliance with the TSA regulation will move more TIH traffic through major cities than occurs today. This will make it nearly impossible for railroads to meet the TSA voluntary guideline goal of 25 % reduction in time TIH cars spend in HPDA's.

Compliance with the TSA regulations will effectively add an additional route selection factor, which will override the 27-factor analysis. Thus, compliance with TSA's rule may at times change an interline route selection from that resulting from the DOT-mandated analysis to an alternative route where interchange will comply with the TSA rule. CSXT anticipates increased mileage as a result, once

TSA's rules are effective, but does not at this time anticipate that compliance will lead to significant yard congestion

Department of Transportation Tank Car NPRM

CSXT applauds DOT for recognizing the need for more robust tank cars for use if TIH is to move by rail. DOT's proposed rule would require tank cars used to transport TIH materials to meet enhanced performance standards for tank-head and shell puncture resistance. More robust tank car designs for TIH shipments must be implemented as quickly as practicable.

The Tank Car Committee has developed a new interchange standard for tank cars used to transport TIH materials. CSXT believes that, while DOT's rulemaking is underway, shippers should be encouraged to build to the new interchange standard. The AAR, in a joint proposal with the American Chemistry Council (ACC), the American Short Line Regional Railroad Association (ASLRRA), the Chlorine Institute (CI), and the Railway Supply Institute (RSI), has asked DOT to implement an interim standard identical to the Tank Car Committee's interchange standard (which provides for the construction of tank cars that significantly reduce the probability of release of product using existing technology) and to grandfather those cars for twenty-five years following issuance of the final rule.⁹ CSXT supports this proposal. We hope that a consensus view among all shippers, car manufacturers, and the railroads can be

⁹ Joint petition filed July 3, 2008

developed on this grandfathering issue. This success shows that, where the parties are motivated and committed to working constructively on specific issues, productive compromise can be reached in the interest of all.

Unfortunately, PHMSA's proposed rulemaking proposes restrictions on maximum operating speed for trains transporting TIH materials. As currently proposed, the rulemaking would impose a maximum operating speed of 50 mph for trains carrying tank cars transporting TIH materials, and would restrict trains to a maximum speed to 30 mph in non-signaled territory if they carry TIH tank cars that do not meet the new tank car puncture-resistance standard.¹⁰ The 50 mph limit can be accommodated with some, but manageable, adverse effects on the network. But, the 30 mph speed limit would create a significant number of impediments to network fluidity on CSXT, with ancillary effects on the 99.5 percent of CSXT traffic that is not TIH. Train schedules will have to be designed on the assumption that the 30 mph limit will apply every day on every train that might be called upon to carry a TIH car on covered territory. (Schedules are not modified day-by-day based on actual train consists.) The proposed speed limit reflects just one more operational burden that federal authorities are considering imposing -- one after the other -- on the entire network for the sake of a fraction of a percent of CSXT's total traffic base. This would, ironically, be counterproductive -- impeding CSXT's efforts to add capacity to meet future transportation demands.

¹⁰ Technically, the rule would only impose the 30 mph speed limit on trains with TIH materials in older-design cars, but as CSXT has pointed out in its comments to PHMSA, train schedules are not adjusted depending on the consist on a particular day.

Ultimately, policy makers cannot continue to force the railroad industry to reinvent its operations across-the-board, in a misguided attempt to force it to accommodate such a tiny portion of its traffic. A common carriage business model is designed to permit any shipper anywhere to ship to any other shipper anywhere on reasonable request. Every additional special requirement adds a burden. Each of these new regulatory requirements, taken separately, might pass muster as a legally reasonable requirement, but the compounded effects begin to present the railroads with unreasonable demands. Federal policy cannot impose more and more special handling requirements on a tiny fraction of CSXT's traffic base, and simultaneously preserve a common carrier obligation with traditional service expectations.

The Pressing Need for Liability Legislation

America's railroads, including CSXT, are facing a liability risk that threatens our country's transportation system. No one has seriously questioned the threat of ruinous liability that railroads face as they are forced to transport these products. Some may say that the inherent risk to railroads like CSXT in transporting TIH products is "small," but no one denies it exists. We believe the Board fully understands and appreciates the threat to every railroad that is called upon to bear that risk.

Insurance is not the sole answer as there simply is not enough available for the huge TIH exposure CSXT believes that the long-term solution is to move away from reliance on transportation of these chemicals Changes in manufacturing processes will not occur overnight Manufacturers will say that it is "too expensive" to convert, or that alternatives are "not as efficient " Occasionally, they will say that "there is no substitute" for "chlorine " ¹¹ These points are not spurious But, they represent economic and policy tradeoffs – tradeoffs made at the railroad's risk

If the social and political policy decision were to be made that our nation must preserve the ability of manufacturers to ship Chlorine, Anhydrous Ammonia, and other TIH products by rail – whether because it is "absolutely necessary" or is merely economically expedient – then national policy must relieve the railroads of the potential for ruinous liability inherent in such a decision That will require legislation at the federal level ¹²

The centerpiece of any liability legislation has to be an absolute liability cap Congress recognized this in the Price-Anderson Act addressing liability in the Nuclear Industry, and the precedent has application here The lack of available insurance, along with the common carrier obligation to haul TIH, leaves the rail

¹¹ The Board should listen carefully to ensure that "Chlorine" means the chemical element, not "diatomic chlorine gas" The element Chlorine is indeed necessary to make polyvinylchloride But, the fact that one needs Chlorine atoms to make polyvinylchloride is very different than saying that Chlorine must move to a plastics factory in the form of diatomic Chlorine gas

¹² Some communities and municipalities have pursued legislation to ban the movement of TIH through their jurisdictions For example, the City of Baltimore has from time-to-time considered legislation that could restrict the movement of these materials through Baltimore The Board is fully aware of the District of Columbia's legislation

industry with no other viable solution to this liability burden. Railroads risk ruinous liability with every move. Without a liability cap, insurance or any other risk management arrangement is, at best, less than a half measure. Railroads simply can no longer bear the financial risks of solving of the chemical industry's supply chain challenges.

Within the parameters of an absolute liability cap, legislation will have to address who should be asked to share the risk. There is no single answer to that question and many constructive suggestions are being actively considered. CSXT has had several productive discussions with individual customers and some of their representatives on the subject of TIH liability legislation since the STB's first hearing on the Common Carrier obligation. Some of those customers have expressed an interest in progressing those discussions, and we are hopeful that progress can be made.

We believe that the major beneficiaries of a liability cap are the buyers and sellers of these ultra-hazardous products. CSXT is not looking for legislation to enable it to expand its profits. Rather, given the opportunity, CSXT would decline to transport TIH except where absolutely necessary for public health. No freight rate CSXT could charge would compensate for the huge risk. CSXT would support a liability cap that would extend protection to all parties associated with movement by rail, and limit the exposure of shipper, car manufacturers and car owners, in addition to railroads. The major beneficiaries of liability legislation

would be the Chemical shippers that want to be able to rely on railroads to solve their transportation and distribution needs

Product Substitution

TIH issues are not exclusively a matter of liability. It is important to remember, that even if the potential for ruinous liability were somehow erased, the widespread social disapproval of TIH transport by rail would remain. Federal policy makers seem to feel that the rail transportation business model -- as designed for all customers -- does not meet the specialized needs of TIH products. Many local officials will never accept TIH movement through their communities. Environmental groups have strongly held views. These positions are not likely to change. At the end of the day, public policy will likely gravitate toward product substitution.

Short term, CSXT has encouraged customers to purchase TIH products from closer sources. In the longer term, however, none of these options truly solves the problem. Eventually, shippers and receivers will be asked to find alternative products that do not create such risk to the public in transit. It is true that some of these alternatives may be expensive, inconvenient, and in a few cases may require development of new technology. But, ultimately, they will be urged to find ways that these commodities need not move at all.

There are alternatives to the movement of TIH chemicals, including Chlorine and Anhydrous Ammonia, albeit they may be expensive. Many of CSXT's customers tell us that there are substantial cost savings that are derived from transporting Chlorine or Ammonia long distances rather than producing on-site or using alternatives. And, it is fair to discuss those economic considerations --and how they should be weighed. But they should be considered as such-economic efficiencies gained by shippers and receivers. They are the beneficiaries of TIH transportation by rail. Yet, today, they bear few of the risks, and little of the public criticism. Fundamentally, shipment of TIH by rail is a public policy issue in which the social benefits must be weighed against the costs.

Conclusion

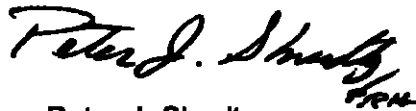
Given a choice, CSXT would decline to transport these chemicals. It is a business that CSXT does not choose to be in. The financial risk should an incident occur -- whether or not CSXT were at fault -- is tremendous. The new regulatory burdens that are being imposed, with consequent operational impacts that will have to be addressed, are substantial. Our company's reputation has been, and will continue to be, assailed.

Federal policy needs to recognize the changed paradigm. Railroads cannot be expected to bear the risks while shippers and receivers receive the benefits. Federal policy should encourage conversion of industrial processes that use

these chemicals to eliminate the need to move them long distances. Federal policies should discourage long distance shipments of TIH by rail. More robust tank car designs for TIH shipments must be implemented as quickly as practicable. Liability caps and risk sharing legislation must be passed to relieve the railroads of risk, while those who have long called on the railroads to transport TIH have a fair opportunity to adjust to new modes of distribution and production.

While CSXT does not seek this traffic, and is urging TIH customers to adopt safer alternatives, we want to emphasize that we understand our obligations under the current state of the law. We take our responsibility to transport these commodities very seriously and remain totally dedicated to the safe and secure movement of these products whenever we are required to transport them.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter J. Shudtz".

Peter J. Shudtz
Paul R. Hitchcock
Kathryn R. Barney
Attorneys for CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
904-359-3100

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April 30, 2008

Bombing Verdict Upheld Against Port Authority

By JOHN SULLIVAN

A New York State appeals court on Tuesday upheld a jury's verdict that the Port Authority of New York and New Jersey was negligent in safeguarding World Trade Center before a 1993 terrorist attack that killed six people and injured 1,000.

The ruling could prove costly for the Port Authority. Damages have not yet been determined, but lawyers for roughly 50 plaintiffs remaining in the case estimated the potential total amount at over \$50 million.

"This is a very significant decision," said David Dean, one of the lawyers for the plaintiffs. "This is a vindication of the jury's verdict."

A jury in State Supreme Court in Manhattan found in 2005 that the Port Authority failed to heed warnings that the trade center's underground parking garage was vulnerable to an attack and should be closed. Islamic militants detonated explosives in a van parked in the garage on Feb. 26, 1993.

During the trial, lawyers for the Port Authority argued that the bombers who carried out the attack should bear responsibility and not the agency. Marc Kasowitz, the lead lawyer for the authority, said at the time that the attack "was the act of terrorists for which terrorists alone are responsible."

In a decision released Tuesday, the appeals court, the First Department of the Appellate Division of the State Supreme Court, unanimously affirmed the jury's verdict that the Port Authority's failure to safeguard the World Trade Center made it liable.

"The evidence placed before the jury entitled it to conclude that the defendant's negligence was, if not gross, dramatically out of the ordinary," the court found. "The documentary proof persuasively demonstrated that the defendant, years in advance of the bombing, had been repeatedly placed on notice of a gaping vulnerability in its subgrade parking facilities rendering its premises susceptible to a potentially catastrophic car bombing; indeed, defendant was repeatedly advised, not simply to the vulnerability, but as to the precise manner in which it could with little practical difficulty be exploited to devastating effect."

The Port Authority declined to say Tuesday whether it planned to appeal.

"We have resolved all but a few dozen of the remaining cases from the 1993 World Trade Center bombing and we look forward to resolving those as well," Steve Coleman, a spokesman for the authority, said.

The Port Authority said it originally faced 575 lawsuits stemming from the 1993 attack and over the years all but about 50 have been resolved. Mr. Coleman said he did not know how much the authority has paid to settle the cases so far.

Because Tuesday's decision by the appellate court was unanimous, the Port Authority does not have an automatic right to appeal to the state's highest court, the Court of Appeals, Mr. Dean said. He said that if the authority chose to appeal the ruling, it would have 30 days to do so after receiving the decision by the Appellate Division, and the Appellate Division would decide whether the appeal could proceed.

The jury found that the Port Authority bore more than half of the legal responsibility for the attack. Under New York State law, that makes the agency responsible for the legal damages in the case, Mr. Dean said.

In its ruling on Tuesday, the Appellate Division discussed the apportionment of responsibility, noting that the failure to secure the parking garage would have been "obvious to any terrorist who cared to investigate and exploit it." The court found that the bombers' wrongdoing did not excuse the Port Authority's negligence in failing to secure the garage and noted "the clear connection shown between that negligence and the intentional wrongdoing."

"To the contrary, as this case so vividly illustrates, the blameworthiness of negligence may actually be increased by the heinousness of the wrongdoing it directly and foreseeably facilitates," the court found.

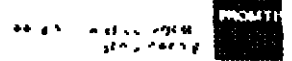
Mr. Dean said the jury was criticized after the initial decision after finding that the Port Authority bore 68 percent of the legal liability of the attack. But he said the appeals court's ruling on Tuesday confirmed that the jury had made a sound decision.

"The jury above all were the people who knew more about the evidence than anyone else," he said. "In a very scholarly decision, the Appellate Division affirmed the jury's allocation of responsibility."

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Port Authority Found Negligent in 1993 Bombing

By **ANEMONA HARTOCOLLIS**

A Manhattan jury said yesterday that the Port Authority of New York and New Jersey was negligent in safeguarding the World Trade Center before the first terror attack on the twin towers, the 1993 bombing that killed six people and injured 1,000

In a verdict that could prove costly for the Port Authority, the six-member jury in State Supreme Court unanimously found that the agency did not heed warnings that the underground garage was vulnerable to terrorist attack and should be closed to public parking. This failure, the jury said, was "a substantial factor" in allowing the bombing to occur.

It was in the basement garage below the trade center that Islamic terrorists detonated a van packed with explosives on Feb. 26, 1993, foreshadowing the attack that brought down the towers and killed nearly 3,000 people on Sept. 11, 2001.

The verdict came after four weeks of testimony from security experts and three former directors of the Port Authority. The jury took just over a day to reach its decision.

Although Port Authority lawyers said they would appeal, it was the most significant moment yet in a 12-year battle to hold the agency accountable for the events of that February day, which ushered in a new era of security consciousness in New York City and across the country.

The victims of the 1993 bombings never received the outpouring of public support or government compensation that went to those of the much more devastating 9/11 attacks.

More than 400 plaintiffs, including people hurt in the attack, families of the dead and businesses, have lawsuits pending against the Port Authority, lawyers said yesterday. The negligence verdict clears the way for them to press forward with claims for lost wages, damage to businesses, and pain and suffering.

Lawyers for the plaintiffs said they were seeking a total of as much as \$1.8 billion. Those cases will be decided through separate legal proceedings, which could end in trials or settlements. The authority also faces lawsuits relating to the 9/11 attacks.

David J. Dean, the lead lawyer for the plaintiffs, called the verdict "an extraordinary victory." The jury, he said, clearly accepted the plaintiffs' argument that the Port Authority should have foreseen the terrorist attack, based on warnings from its own experts as early as 1985, and shut down the public parking garage.

"The case was never about blaming the terrorists," Mr. Dean said yesterday. "It was about what the Port Authority should have done. They disregarded the advice of their own experts and other experts. They were motivated by money. They should have thought about the ultimate sacrifice of human lives."

Marc Kasowitz, the lead lawyer for the Port Authority, said the jury was wrong in blaming the authority. "The Feb. 26, 1993, attack on the World Trade Center was the act of terrorists for which terrorists alone are

responsible," he said "The Port Authority believes in our American jury system. It strongly believes that the decision in this case was egregiously incorrect."

He said there were strong grounds for appeal of the verdict, "based on errors made by the court during this trial."

The burden on the plaintiffs was to show that the Port Authority should have foreseen the likelihood of a terrorist attack and taken steps to prevent it.

In order to reach a verdict, at least five of the six jurors had to agree. The jury voted unanimously that the Port Authority was negligent. It found the authority 68 percent at fault for the bombing, while the terrorists who carried it out were 32 percent at fault.

Mr. Dean, the plaintiffs' lawyer, said that because the jury apportioned more than half the blame to the Port Authority, the agency will have to pay 100 percent of any damages for pain and suffering, the so-called non-economic damages, that might be awarded.

Regardless of how the blame was shared, the Port Authority would have to pay 100 percent of any economic damages, like lost business, he said.

The jury deadlocked, 4 to 2 in favor of the Port Authority, on whether that negligence rose to the level of recklessness.

The plaintiffs, however, indicated that they considered the 4-to-2 vote a hung jury, leaving open the possibility of a retrial on that question. Mr. Kasowitz, the Port Authority lawyer, said he considered the verdict on recklessness a no vote. Justice Nicholas Figueroa said that the lawyers would return to court to discuss that portion of the verdict.

During the four weeks of testimony, the trial focused on a 1985 report by the Office of Special Planning, an antiterrorist task force convened by Peter Goldmark, who was the executive director of the Port Authority from 1977 to 1985.

Mr. Goldmark created the office in 1984, after becoming concerned that, given terrorist activities in other parts of the world, the trade center, as a symbol of American capitalism and strength, could be a target. After a visit to Scotland Yard in London that year, he wrote a memo saying that Scotland Yard was "appalled" that there would be public transient parking beneath a facility like the World Trade Center.

The report concluded "A time-bomb-laden vehicle could be driven into the W T C and parked in the public parking area. The driver would then exit via elevator into the W T C and proceed with his business unnoticed. At a predetermined time, the bomb could be exploded in the basement. The amount of explosives used will determine the severity of damage to that area."

Among the report's recommendations was "Eliminate all public parking in the World Trade Center." It also recommended a series of compromise steps, including guarded entrances to the parking lots, random searches of vehicles and restrictions on pedestrian access.

The report came out about four months after Mr. Goldmark left the Port Authority, and his successors decided not to close the public lot, citing the potential loss of revenue and inconvenience to tenants, according to evidence at the trial. They also decided against most of the compromise measures.

In 1991, according to the testimony, the Port Authority commissioned a second report, from Burns and Roe Securacom, a private security company. That report found that the major risk to the trade center was from a package or hand-held bomb, and that the shopping and pedestrian areas, not the parking garage, would be the

most likely targets

Several jurors interviewed after the verdict yesterday said the mere fact that the 1985 predictions came true had weighed heavily in the verdict

One of the jurors, Rafael Garcia, a development executive at Nickelodeon, who lives in Chelsea, called the report "irrefutable evidence" that was "eerily prescient as far as what could happen "

"The O S P report was paramount," said Ray Gonzalez, another juror, who lives in Murray Hill and is the director of housekeeping for a nursing home "Unfortunately, from there, everybody seemed to drop the ball "

Jurors said that they were impressed by Mr Goldmark, who testified for the plaintiffs and wept on the stand, and that they found the witnesses for the defense less credible "Goldmark was the only one who didn't seem to be a Port Authority company man," said the jury foreman, Alan Nelson, 54, of Washington Heights, who works in the services department of a law firm

In contrast, he said, the witnesses for the Port Authority, "seemed highly programmed in their answers," and seemed to be speaking, "from a bureaucratic, organization-man point of view "

The jurors said they had been offended, as the plaintiffs had hoped, by the Port Authority's focus on the potential for economic losses of a terrorist attack

One defense witness, a security consultant, Robert Ducibella, referred to the loss of human life as "collateral damage " In one of the reports highlighted by the plaintiffs, the Port Authority rated the window-washing machine as a potentially important loss From the beginning, the Sept 11 attack hung over the trial like a ghost The judge forbade both sides from mentioning it, saying that what happened after 1993 was not relevant

But both sides knew 9/11 would be in the minds of the jury, and the Port Authority repeatedly tried to capitalize on that by suggesting that nothing was going to stop terrorists from one day trying to take down the towers

Mr Nelson, the jury foreman, said that while he was satisfied with the verdict, "it's kind of an empty feeling in a way "

"We're talking about a building that is no longer there," he said

Colin Moynihan contributed reporting for this article