

Surface Transportation Board
STB Ex Parte No. 677 (Sub No. 1)
Oral Hearing

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Written Statement of
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1. Introduction

E I du Pont de Nemours and Company ("DuPont" or "Company") respectfully urges the Board to reject the railroads' efforts to gut the statutory common carriage obligation as it applies to the transport of hazardous materials, including toxic inhalation hazards ("TIH"). Neither relieving the railroads of their duty to carry those materials nor absolving them of responsibility when their negligence causes accidents would be an appropriate undertaking for this Board given its jurisdictional constraints and the serious public policy implications. Moreover, as explained below, either approach would have serious consequences for the safety of rail transport, the U S economy and the American public.

DuPont is a global company founded 206 years ago in Wilmington, Delaware. In the Company's third century, the people of DuPont are bringing together biology and chemistry to meet societal needs for safe and abundant food, alternative fuels, and other sustainable solutions to enable a better, safer and healthier life for people everywhere. DuPont has annual revenues of about \$30 billion, operates 135 manufacturing and processing sites in 70 countries, and employs over 60,000 people. In the United States alone, DuPont has about 36,000 employees in 33 states.

One thing has remained unchanged throughout the history of DuPont - its uncompromising commitment to safety. The Company's founder, E I du Pont, built safety into the very fabric of DuPont culture by living, and requiring managers to live, on the Company's first manufacturing sites. That culture and clear personal accountability remain just as strong today. They account for the Company's extraordinary history of safe performance despite its routine handling of many regulated chemicals, including ten TIH commodities. The Company's safety expertise and reputation are so strong that DuPont has a business unit that provides safety consulting services to other companies. Indeed, even some of the Class I railroads have availed themselves of our services and all have recognized the Company's safety commitment and performance through numerous "safe shipper" awards.¹

¹ For example, in 2007 DuPont received the Chemical Safety Excellence Award from CSX I and the Thoroughbred Chemical Safety Award for the Belle site from Norfolk Southern.

Our commitment to safety is also reflected in many of our products, which are designed to protect human life. DuPont Kevlar¹ high-performance fiber, for example, is credited with the survival of over 3,000 law enforcement officers in the United States over the last thirty years. It is also used for military helmets, vehicle armor, aircraft parts, bridge construction and numerous other functions. Another DuPont fiber, Nomex², is used for personal protection by first responders, including firefighters. Our SentryGlas³ technology helps to protect both private citizens in skyscrapers and other structures around the world and government employees at critical governmental installations such as federal courthouses and embassies.

2 Like Most U.S. Manufacturing Companies, DuPont is Dependent on the Railroads and the Common Carriage Obligation

America's freight railroads have been vital to DuPont operations since 1858, when the Pennsylvania Railroad first transported our products. Although the common law duty of common carriage did not automatically extend to all goods and services,² once a carrier held itself out to transport certain types of goods, the duty to transport those goods upon reasonable request became part of its common carrier obligation. The Transportation Act of 1920 ("Transportation Act") codified the common law obligations of railroads as common carriers and granted the Interstate Commerce Commission ("ICC") jurisdiction over this issue. See *American Trucking Association, Inc. v. Atchison, T. & Santa Fe Ry. Co.*, 387 U.S. 397, 406 (1967).

The ICC and the courts have interpreted the Transportation Act and subsequent legislation to impose common carrier duties beyond those that existed at common law. For example, while the common law permitted common carriers to pick and choose the goods that they would transport in common carriage, railroads "whose property and facilities are affected with a public interest, (were) ordinarily held to be common carriers of goods delivered to them for transportation." *Akron*, 611 F.2d at 1166, quoting 13 C.J.S. Carriers § 6. The common carrier status of railroads has been considered just and reasonable "in view of the governmental largess which railroads have received, and in view of the unique importance to commerce of rail transportation."³ *Id.* [footnote omitted]. The *Akron* decision, at page 1168, succinctly summarizes the present state of the law:

[I]n the almost one hundred years since the passage of the [Transportation] Act there has developed a new "common" law of transportation under which the public duty of railroads has been broadened beyond that extant under the common law of carriers. It is not only "common carriage," but transportation which is subject to the Act and to the Commission's statutory powers. See, e.g., Cincinnati, N.O. & T.P. Ry. v. Chesapeake & O. Ry., 441 F.2d 483 (4th Cir. 1971), Republic Carloading Co. v. Missouri Pacific

² *Akron, Canton & Youngstown RR Co. v. ICC*, 611 F.2d 1162, 1166 (6th Cir. 1979) ("Akron") ("It is true that common law carriers could pick and choose which goods they transport in common carriage.")

³ Examples of such governmental largess include sizeable public land grants, loans and subsidies, antitrust exemptions, extensive preemption of state and local laws, and eminent domain powers.

R.R., 302 F.2d 381 (8th Cir. 1962) (per Blackmun, J.) *A carrier's statutory duties run not to shippers alone, but to the public*
Brotherhood of Ry. Clerks v. Florida E.C. Ry., 384 U.S. 238, 86 S.Ct. 1420, 16 L. Ed. 2d 501 (1966) *Therefore, public needs must shape the boundaries of these duties* [italics added]

Thus, railroads may not pick and choose the commodities that they haul, but instead are required to provide service for all shipments tendered upon reasonable request to fulfill the transportation needs of both shippers and the general public.⁴

The common carrier obligation remains essential to the Company's business. To make highly beneficial products such as Kevlar® and Nomex®, DuPont requires numerous chemicals, including many hazardous materials and some TIH commodities. DuPont also produces chemicals used by other manufacturers for indispensable items as diverse as tires and electronics. Quite often, either because of volume or safety considerations, these chemicals must be transported by rail. In short, a safe, efficient and cost-effective rail transportation system is critical to practically all DuPont businesses and to our country's manufacturing community.

The dependence of industry and the *general public* on such a rail system is particularly marked relative to TIH commodities and other hazardous materials, because rail is unquestionably the safest mode of land transport over long distances. Permitting the railroads to refuse hazardous materials because they would rather carry cargo that is more profitable or has a lower risk profile would not only be contrary to long-standing practice and legal principles, but would also contravene the American public's interest in safety and a strong domestic manufacturing economy that can sustain jobs.

3. STB Jurisdiction is Limited

The rail industry seeks to be relieved of its common carrier obligation to haul TIH materials because it reportedly fears the risk of economic liability. Although the Board has jurisdiction to consider economic issues, the actions it may take in response to the railroads' liability concerns are few. First, the approaches available to the Board are constrained by its limited jurisdiction. Second, to the extent the Board acts within its jurisdiction, it must do so in a way that does not adversely impact the safety of transporting TIH materials. Third, any Board ruling must be consistent with a statute Congress enacted in 2007 *expanding* railroads' liability for their own negligence.

⁴ Although there are exceptions to the general statutory common carrier obligations of railroads, those exceptions are limited to a few clearly defined circumstances. *Akron*, 611 F.2d at 1166-67. None of these circumstances are relevant to the common carrier obligation to transport TIH materials.

a. The Board's role in addressing the liability issue is limited to its unreasonable practice jurisdiction.

Congress has granted the Board jurisdiction over "transportation by rail carrier " 49 U.S.C. §10501(a)(1). That jurisdiction extends to "remedies with respect to rates, classifications, rules, practices, routes, services, and facilities of such carriers " 49 U.S.C. §10501(b)(1). This jurisdiction covers the operations of rail carriers and the terms and conditions of carriage between carriers and shippers.

There are essentially three possible approaches for addressing railroads' liability for damages related to the transport of TIH commodities and other hazardous materials: liability caps, insurance pools, and indemnification. Implementing either of the first two approaches is unquestionably beyond the Board's jurisdiction. Third parties not engaged in transportation by rail carrier (such as the victims of a rail accident who would be subject to a liability cap) are outside the Board's jurisdictional mandate. Nor does the limited jurisdiction granted by 49 U.S.C. § 10501 permit the Board to preempt state laws governing tort liability or to create and administer insurance pools.

The third approach, indemnification, arguably falls within the Board's authority under 49 U.S.C. § 10704 to review the reasonableness of railroad practices established pursuant to 49 U.S.C. §10702. Thus, if a railroad were to publish a tariff provision requiring shippers to indemnify it for damages caused by TIH releases in rail accidents, the Board could evaluate and rule on the reasonableness of that provision. Even then, however, the Board's jurisdiction may not intrude into the domain of state tort law.

As a general matter, the law disfavors contract provisions which relieve individuals and corporations from their own negligence. The Connecticut Supreme Court recently reviewed the reasons underlying this principle:

[E]xculpatory [contractual] provisions undermine the policy considerations governing our tort system. "The fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct. An equally compelling function of the tort system is the prophylactic factor of preventing future harm. . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer" (Citations omitted, internal quotation marks omitted.) *Lodge v. Arett Sales Corp.*, 246 Conn. 563, 578-79, 717 A.2d 215 (1998).

Hanks v. Powder Ridge Restaurant Corp., 885 A.2d 734, 742 (Conn. 2005) [underline added]. Indemnification clauses are a form of exculpatory clause because they relieve the negligent actor of liability for its conduct. Because a tariff indemnification provision would vitiate the

prophylactic policy considerations underlying state law tort systems, such provisions are likely to be unenforceable in many if not all states

An often cited case on the public policy enforceability of exculpatory clauses is *Tunkl v. The Regents of the University of California*, 383 P.2d 441 (Cal. 1963). After surveying various decisions from other states, the California Supreme Court noted that "cases have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest'." *Id.* at 443. The Court proceeded to identify the following six-factor test to determine whether a contract is affected with a public interest.

[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Id. at 444-46 [footnotes omitted]. Although not each and every factor need be satisfied in order to affect a contract with a public interest,⁵ it is clear that common carrier transportation of hazardous and T.H. materials does satisfy the test. Indeed, many states and the Restatement of Contracts have abridged this list by referring specifically to common carriers.⁶

Because indemnification clauses that absolve parties from the consequences of their own negligence, like exculpatory clauses, violate fundamental tort law principles within the jurisdiction of the states, they are beyond the scope of the Board's exclusive and preemptive

⁵ *Id.* at 446.

⁶ See *Hanks* at 743 (surveying state decisions applying variations on the *Tunkl* factors), Restatement 2d Contracts, § 195 ("A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty.")

jurisdiction under 49 U.S.C. § 10501(b). Indeed, to the extent that Congress has preempted state tort laws, it has done so in the Federal Rail Safety Act, at 49 U.S.C. § 20106, rather than the Interstate Commerce Act. Thus, a tariff indemnification provision is certain to be unenforceable in many if not all states.

b. The Board may not exercise its jurisdiction in a manner that adversely affects safety.

The Sixth Circuit observed in *Akron* that "[a] question of possible liability for damage resulting from carriage of a commodity is within the [STB's] jurisdiction as the regulator of the economics of interstate rail transport." *Akron*, 611 F.2d at 1170. But the court also noted that questions of safety are also questions of risk liability, that the Department of Transportation ("DOT") has exclusive authority to promulgate industry-wide safety standards, and that the STB may permit carriers to make more, but not less, stringent rules for their carriage of hazardous materials. *Id.* It follows, then, that the Board's jurisdiction to address liability issues must not be exercised in a manner that adversely affects safety.

Liability limits inherently affect safety in multiple ways. First, by reducing or eliminating railroads' financial responsibility for their own negligent acts, liability limits would reduce incentives for safe behavior. The most serious rail accidents involving the release of TIIH materials occurred between 2002 and 2005 at Minot, ND, Macdona, TX, and Graniteville, SC. In all three cases, the National Transportation Safety Board ("NTSB") attributed the accidents to conditions that were within the control of the railroads, including inadequate track inspection and other errors by railroad employees.⁷ Relieving the railroads from responsibility for such deficiencies is inappropriate given that they have complete control of shipments once tendered. Moreover, it would effectively eliminate a key incentive for railroads to correct problems and to implement preventative measures that would lessen the likelihood of future accidents. In other

⁷ Derailment of Canadian Pacific Railway Freight train 292-16 and Subsequent Release of Anhydrous Ammonia near Minot, North Dakota, January 18, 2002, NTSB/RAR-04-01, PB 2004-916301, Notation 7461A (March 9, 2004) at vi, 32-33, 55-57, 68-69 (stating that the accident was caused by inadequate track inspection, which failed to identify failed track joints and noting that inadequate training and maintenance of training activity reports were contributing factors), Collision of Union Pacific Railroad Train MHOTU-23 with BNSF Railway Company Train MEAP-111-126-D with Subsequent Derailment and Hazardous Materials Release Macdona, Texas June 28, 2004, NTSB/RAR-06-03, PB2006-916303, Notation 765D (July 6, 2006) at vi, 16-18, 26-31, 36-43, 58-59 (finding that the accident was caused by the train crew's failure to follow a stop signal according to operational rules, the crew's lack of sleep and long duty hours, the conductor's alcohol consumption, the likelihood that the conductor slept for most of the train trip, and limbo time as it related to crew fatigue), 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, 2005, NTSB/RAR-05-04, PB2005-916304, Notation 7710A (November 29, 2005) (finding that the accident was caused by the train crew's failure to reline a mainline after use leading to an unexpected diversion of train 192 where it struck P22 and derailed, also finding that the failure to reline may have been due to the crew's inattentiveness to the switch due their attempt to secure the train before reaching hours-of-service-limits and the location and lack of visibility of the switch to the crew, also noting that if the conductor had followed operating rules and held a job briefing the crew may have attended to the main line switch, which would have prevented the accident).

words, any shift of liability from the railroads to shippers or the taxpayers is likely to have the perverse result of reducing the safety of TIIH transport and, by extension, the safety of the American public

Second, liability limits distort the economic incentives for investments in safety-related equipment and infrastructure. The three accidents referenced above may have been avoided altogether (or the magnitude of the harm they caused reduced) by such investments. For example, the Graniteville derailment occurred in "dark" (i.e., unsignaled) territory. In signaled territory, the misaligned switch that contributed to the accident most likely would have been detected and the train stopped before the derailment. Limits upon their liability may not provide railroads with the proper economic incentives to make desirable investments in safety-enhancing infrastructure.

Third, to the extent premised on indemnification, liability limits that benefit only railroads may encourage shippers to shift more traffic to trucks in order to avoid exposure. This incentive would be especially strong if the liability risk associated with railroad negligence is shifted to shippers through indemnification provisions in rail tariffs. Because transport by rail is at least sixteen times safer than transport by truck,⁸ a significant shift of hazardous and TIIH materials from rail to the Nation's highways would be enormously detrimental to the public interest in the safe transport of such materials.

The Board must account for these factors in deciding what, if any, action to take within its limited jurisdiction to address the liability issue. Failure to do so could constitute unreasonable restrictions upon the common carrier obligation and an impermissible intrusion upon the safety jurisdiction of the Pipeline and Hazardous Materials Safety Administration ("PHMSA") and the Federal Railroad Administration ("FRA").

c. Recent Legislation Expands the Liability of Railroads for Negligence.

Recent Congressional action expanding railroads' liability for their own negligence also calls into question the reasonableness of any liability limitation the Board might consider. Just last year, Congress passed and the President signed into law the Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, which amended 49 U.S.C. § 20106 so that the Federal Railroad Safety Act no longer preempts all state law negligence claims.

Congress enacted this provision in response to several federal court decisions holding that state law tort claims for the accidental release of anhydrous ammonia arising from a Canadian Pacific derailment near Minot, North Dakota, were completely preempted by the Federal Railroad Safety Act. *E.g., Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606 (8th Cir. 2006) ("*Lundeen*"); *Mehl v. Canadian Pac. Ry.*, 417 F. Supp. 2d 1104 (D.N.D. 2006). The courts had held that preemption is complete not just when a railroad has complied with minimum federal safety regulations, but also even when it has failed to comply. In amending Section 20106, Congress declared that state law causes of action are not preempted when a railroad has failed to

⁸ Shuster, *The Railroads' Burden*, Pittsburgh-Tribune Review, February 2, 2007.

comply with federal regulations or with the railroad's own standards created pursuant to federal regulations 49 U.S.C. § 20106(b)(1) (2008). In a decision issued only last week, the Eighth Circuit vacated its prior ruling in *Lundeen* based upon its determination that "[t]he statute's clear language indicates state law causes of action are no longer preempted under § 20106." *Lundeen v. Canadian Pac. Ry. Co.*, No. 07-1656, slip op. at 17-18 (July 2, 2008).

The link between this legislation and the Minot incident is explicit in the legislative history. Congress expressed that the retroactivity provision in subsection (b)(2) "applies to all pending State law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota derailment." H.R. Rep. No. 110-259, 100th Cong. 1st Sess. at 351 (2007). That is, as recently as last year Congress enacted a statutory provision *expanding* the railroads' liability for damages when their negligence results in accidents, including accidents involving the release of TIH materials. Accordingly, in addition to being of questionable validity, any action by this Board relieving the railroads from such liability would be clearly inconsistent with the intent of Congress.

4. What constitutes a "Reasonable Request for Transportation" of Hazardous Materials, Including TIH Materials?

Because the public need for rail transportation of TIH materials defines the boundaries of the common carrier obligation, *see Akron* at 1168, it is an essential factor in determining whether a request for rail transportation of TIH materials is reasonable. Hazardous materials, including TIH commodities, are essential to the health and welfare of the citizenry and to our Nation's economy. Because there are no viable substitutes for TIH materials, there is an indisputable and great public need for their safe transport. As the Association of American Railroads recently noted:

The rail hazmat safety record is extremely favorable. In 2005 (the most recent year for which data are available), 99.997 percent of rail hazmat shipments reached their final destination without a release caused by an accident. Railroads reduced hazmat accident rates by 86 percent from 1980 through 2005.

Association of American Railroads, *Hazmat Transport by Rail*, February 2008. *See also* 73 Fed. Reg. 17818, 17838 (April 1, 2008) (noting that rail is the safest mode of transporting TIH commodities over land). This overriding public need, coupled with the long history of railroads safely transporting TIH materials as common carriers, establishes a strong presumption of reasonableness for any request to transport TIH materials in compliance with applicable safety regulations.

The principal arguments against the reasonableness of a request to transport TIH materials relate to safety and liability. Both issues have been addressed in multiple federal court and ICC decisions. Only in the most limited of circumstances may either of these issues render a request for transportation of TIH materials unreasonable.

- a. **There is an overriding public interest in rail transportation of TIH materials that meet DOT safety standards.**

Two lines of ICC decisions that involved the transportation of radioactive materials have rejected safety arguments as grounds to narrow the common carrier obligation when there is an important public need for rail transportation of a hazardous material. In both lines of ICC cases, which have been affirmed by the courts, the overriding public interest in transporting radioactive materials by rail – again, the safest mode – has prevailed over all claims that such transportation is unsafe. Although the courts provided guidance concerning when railroads may impose more stringent safety requirements than those adopted by DOT, no such requirements ever have been approved under the courts' guidelines.

The first line of safety cases held that a railroad may not ask the Board "to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT regulations governing such transport, and these regulations have been met." *Akron*, 611 F.2d at 1169. See also, *U.S. Dept. of Energy v. The B & O R.R. Co.*, 364 I.C.C. 951, 959 (1981) ("DOE"). There are extensive DOT regulations, promulgated by PHMSA and FRA, that govern the safe transportation of TIH materials by rail. Moreover, significant additional safety-enhancing regulations either recently have been adopted or are under consideration by PHMSA, FRA and TSA. See Part 6, *infra*. Also, just as with radioactive materials, "no other mode of transportation is more suited to the economical carriage of these materials than train carriage." *Akron* at 1168.⁹ Indeed, the railroads have not claimed that TIH materials are too dangerous to transport. Given the long record of safe movement of such materials by rail, such a claim would not pass the "red face" test.

The second line of safety cases held that "railroads may seek to prove the reasonableness of additional safety measures, but the burden is upon them to show that, for some reason, the presumptively valid [DOT] regulations are unsatisfactory or inadequate in their particular circumstance." *Consolidated Rail Corp. v. ICC*, 646 F.2d 642, 650 (D.C. Cir. 1981) ("*Conrail*"), See also, *DOE* at 959-60. In general, "(no) party has a right to insist upon a wasteful or excessive service for which the consumer must ultimately pay." *Conrail* at 647, quoting *Atchafalaya Ry. Co. v. U.S.*, 232 U.S. 199, 217 (1914). "The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their cost, and second, that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit." *Id.* at 648. Because DOT has paramount jurisdiction over rail safety matters, there is a rebuttable presumption "that expenditures for safety measures not specified by [it] are unnecessary and fail to satisfy the criteria of reasonableness." *Id.* at 650.

⁹ The ICC found that "truck shipments of nuclear wastes would, because of the greater number of smaller shipments required, increase the probability of accidents involving nuclear materials." *Id.* The same would be true of TIH materials.

b. Railroads are not entitled to special treatment for their liability risks.

Concerns over liability, not safety, have dominated the current debate over when a request to transport TIIH materials is reasonable. The railroad industry's principal focus is its potential liability exposure in the event of an accidental release of TIIH materials. Specifically, the railroads contend that their liability should be limited because they have no choice but to carry TIIH materials given the common carriage obligation imposed upon them for the public interest. This contention inherently questions whether a request for transportation of TIIH materials without liability limits is reasonable. What the rail industry seeks, however, is special treatment of a risk that is far from unique. The mere fact that railroads are obliged to assume this risk by the common carrier obligation does not justify such treatment.

In the absence of a Congressional determination to the contrary, the law actually disfavors liability limits upon common carriers precisely because they have been entrusted with a public interest. In particular, the strong public need for rail transportation of indispensable TIIH materials, the relative bargaining strength of the railroads over TIIH shippers, and the exclusive control exercised by railroads over TIIH materials during transport fit squarely within the factors that have prompted most states to void contractual clauses that exculpate a party for its own negligence. See Part 3 a, *supra*, and the state law cases discussed therein.

In addition, although the liability issue poses economic questions that are within the Board's jurisdiction to decide, it cannot be divorced from the safety issues, which are within the jurisdiction of DOT. *Akron* at 1170 ("Questions of safety are also questions of risk liability"). Consequently, the Board must be cognizant of the safety impacts of any action it takes within its economic jurisdiction. In other words, the Board must consider questions such as whether limiting the railroads' liability for their own negligence would undermine their incentives to provide service in the safest manner possible, or would induce shippers to shift to other, potentially higher risk, transportation modes. To the extent any Board action could adversely affect the safety of TIIH transportation, that action would constitute an unreasonable restriction upon the common carrier obligation.

While DuPont, as a shipper, has no choice but to take the railroads at their word when they say that but for the common carrier obligation they would not haul TIIH commodities given their liability exposure, the Board is not under the same constraint. As a threshold matter, the Board must critically scrutinize that claim and establish its reasonableness before there can be any basis for questioning the reasonableness of a request for TIIH transportation.

Historical evidence seriously undermines the railroads' claims. The railroad industry has hauled TIIH materials for almost a century, and railroads have, in fact, actively pursued the business. Only recently have railroads begun asserting that they no longer would choose to haul TIIH materials. But, by choosing to be a common carrier, and by hauling TIIH materials as a common carrier for nearly a hundred years, railroads have chosen to accept all the benefits and obligations of common carriage. This means that the railroads have chosen to haul TIIH materials along with all the other commodities that common carriers are required to transport. This long history of transporting TIIH materials as common carriers establishes the presumptive

reasonableness of any request for such transportation. Cf. *Akron*, 611 F.2d at 1167 ("[I]t is the long history of the present petitioners' carriage of nuclear materials, and the continuing national need for such carriage, which takes the petitioners' transport of nuclear materials from the realm of 'accommodation or special engagement' where the Act's ratemaking provisions do not apply.")

Moreover, because railroads are the only entities in the TIH supply chain of producers, consumers, and transporters who claim that TIH materials are too risky to handle, their claim is inherently suspect. The proof, as they say, is in the proverbial pudding and the railroads have achieved strong financial performance without the liability limits they now claim are so vital to their success. Companies like DuPont, which use and manufacture TIH materials every day, face risks similar to a railroad's risk in transporting TIH materials, yet they continue to conduct their businesses profitably and without liability limits. Most notably, trucking firms choose to transport TIH commodities without such limits, even though trucks are considered a higher risk mode of TIH transport.

Unlike the trucking industry, however, where if one trucker does not want to transport a product, another trucker can readily serve the shipper, there are practically insurmountable barriers to entry in the rail industry. If one railroad opts not to haul TIH materials, there is no land alternative that would be equally as safe, and in many cases there is no alternative at all. Thus, railroad claims that the common carrier obligation is unfair to them absent limits on their liability exposure are fundamentally unreasonable, given that other participants in the TIH industry bear similar liability risks and yet make no such claims.

Indeed, under these circumstances, it is the common carrier obligation itself that ensures that TIH materials are transported by the safest mode possible because it guarantees that rail transportation is always available. Thus, liability limits for rail carriers hauling TIH materials would be contrary to the public interest and should not be required to render a request for rail transportation of TIH materials "reasonable."

5. The Transportation of Hazardous Materials by Rail is Safe and Becoming Even Safer as a Result of Ongoing Public Initiatives

As the AAR itself acknowledges, the transportation of hazardous materials has never been safer. What's more, there are extensive regulatory initiatives underway to further enhance its safety. PHMSA and FRA are the two federal agencies with paramount jurisdiction over rail safety matters. The Transportation Security Administration ("TSA") also has jurisdiction over rail transportation security. All three agencies either have concluded or are currently conducting rulemakings directed to the safety and security of transporting hazardous materials by rail.

PHMSA and FRA have promulgated interim final rules that incorporate the Recommendations of the 9/11 Commission Act of 2007 (Pub. L. 110-53) regarding safety and security measures for the transport of hazardous materials by rail. 73 Fed. Reg. 20752 (April 16, 2008). The rule revises the Hazardous Materials Regulations ("HMR") to require carriers to compile data regarding hazardous commodities transported and routing for such commodities.

The carriers are also required to use the accumulated data to assess potential safety and security risks and to propose alternative routing that is economically practical. Such analysis must be conducted annually and carriers must complete a comprehensive review of all operational changes, infrastructure modifications, traffic adjustments, or other changes within five years. The rule also addresses transportation delays and interim storage safety concerns and requires pre-transportation security inspections.

PHMSA and FRA recently issued a Notice of Proposed Rule Making that proposes new tank car safety standards in response to NTSB recommendations on tank car structural integrity in the wake of the Minot, Macdonald, and Graniteville accidents. 73 Fed. Reg. 17817 (April 1, 2008). The rules create new requirements for tank car construction, including increases in the puncture resistance of tank car shells and heads. The proposed rules also set the maximum speed for trains carrying TIH materials at 50 miles per hour everywhere except in dark territory, where the speed is to be 30 miles per hour.

In response to the Minot, Macdonald and Graniteville accidents, which were largely attributable to mistakes made by train crews or other railroad employees, FRA recently amended its railroad operating rules and practices to address the problem of human error as a primary factor in railroad accidents. 73 Fed. Reg. 8442 (February 13, 2008). The rules require railroads to qualify testing officers who will be charged with conducting safety tests and inspections. They also require railroads to conduct at least a minimum number of tests per year and require a qualified inspector to conduct quarterly reviews to determine trends regarding the rules most often violated as well as relationships between rules that have been violated and accidents or incidents. The rules also allow employees to make good faith challenges when asked to perform actions that violate operating rules, and require enhanced communication in the form of pre-work job briefings before engaging in tasks such as "pushing and shoving" rail cars and operating manual cross over switches.

FRA has revised its track safety standards in response to several accidents, including derailments on the Canadian Pacific in Minot, ND, and the Union Pacific in Rico Rivera, CA, where rail joint failure was a key contributing factor. 71 Fed. Reg. 59677 (Oct. 11, 2006). The rules address the inspection and maintenance of continuous welded rail ("CWR"). They focus on CWR joints and require track owners to address CWR joints in their CWR plans, or alternatively, to inspect CWR joints at minimum intervals based on class of track, annual tonnage, and passenger or freight carriage. The rules also require FRA reporting when a cracked CWR joint is found during an inspection and they establish measures to prevent CWR joint cracking by utilizing inspection to determine CWR failures based upon an FRA list of conditions. In addition, FRA's Office of Research and Development is funding research to develop an automated vehicle-mounted visual imaging system to conduct CWR joint inspections in the future.

TSA announced a Notice of Proposed Rule Making to address the security risks associated with the shipment of TIH materials. 71 Fed. Reg. 76852 (Dec. 21, 2006). The rule augments and complements PHMSA's regulatory regime by requiring hazardous materials shippers to conduct inspections before tendering shipments to carriers. The proposed rule also

creates chain of custody requirements, including monitored and protected transfer locations and documented transfers for TIH shipments. Similarly, the rule requires location reporting in high threat urban areas to expedite the response when an incident occurs. The rule will also require shippers, carriers, receivers, and transit systems to appoint a Rail Security Coordinator to interface with TSA regarding security issues. Finally, the proposed regulation requires carriers, receivers, and shippers to report threats, incidents and suspicious activities to the Department of Homeland Security.

6. Eliminating Or Reducing The Railroads' Obligation To Carry Hazardous Materials, Including TIH Commodities, Would Have A Broad Impact On The American Way Of Life And Economy

DuPont can serve to illustrate the impact that eliminating the railroads' common carriage obligation would have on our Nation's manufacturing base and the American public. DuPont produces basic chemicals and intermediates used by such essential industries as agriculture, mining, manufacturing, energy, electronics, pharmaceuticals, transportation, and building and construction. Roughly sixty percent of the products DuPont makes and transports throughout the world are regulated by the United States or through international Dangerous Goods conventions. Eight of the hazardous materials DuPont manufactures are TIH commodities. In addition, DuPont receives significant quantities of two additional TIH materials. All of these materials are involved in applications that preserve the security, safety, health, well-being and lifestyle that we, as Americans, enjoy and expect.

Two of the non-TIH hazardous materials DuPont produces are sulfuric acid and refrigerant gasses, two classes of hazardous materials the railroads might refuse to transport absent the common carrier obligation. Sulfuric acid is so widely used that its production volume is viewed as an indicator of general industrial activity. It is used in the manufacturing of additives for clean burning fuels, car batteries, mining, fertilizers, pharmaceuticals, a vast array of chemicals, electronics, paper making and power generation, to name but a few. It is also produced as a byproduct from pollution abatement facilities, converting what had previously been emitted as sulfur dioxide. Clearly, giving the railroads the right to refuse to carry sulfuric acid in bulk quantities would have a significant adverse impact on both our Nation's economy and its very way of life.

Regarding refrigerant gasses, DuPont pioneered much of the science and technology that makes today's refrigeration and air-conditioning possible, and is committed to harnessing the Science of Cool™ in the search for new cooling solutions to enhance the quality and safety of life around the world. Expanding populations and a greater reliance on technology have driven the demand for cooling to astounding levels. The refrigeration and air conditioning industries are being called upon to provide cooling to a rapidly growing global population and help deliver safe food and medicines to the world community at an affordable cost. In fact, the fresh fruits, vegetables, meat and fish on American dinner tables, many medicines required to fight illness, and the interior environment that makes life in many temperate zones tolerable depend on the ability of

DuPont and other manufactures of refrigerant gases to transport hazardous materials in bulk on the railroads

Another example involves anhydrous hydrogen fluoride, a TIH material which is essential to the manufacture of some refrigerants -- including DuPont SUVA® and Halon®, a fire suppression product -- that are made as replacements for CFC-containing products such as Freon®. DuPont manufactures HF at one of its facilities in Texas, and uses it in the manufacturing process at a different site in Texas and at plants in Kentucky and New Jersey. There are currently no viable substitutes for HF in the production of these materials. Were HF unavailable, DuPont would not be able to make SUVA®. The likely alternative would be the import of needed refrigerants from Europe and Asia, further contributing to a loss of U.S. manufacturing jobs and negatively contributing to our Nation's trade deficit.

The above examples illustrate some of the adverse effects the curtailment of the railroads' common carriage obligation as it relates to hazardous materials could have on the health, safety and general well-being of individuals and the environment. But there are also significant and adverse implications for the United States. For example, DuPont currently ships approximately 29,286 carloads of hazardous materials on the nation's railroads. If these materials were forced from the railroads onto the Nation's highways, approximately 117,114 additional trucks would be traveling on our already crowded and deteriorating highway infrastructure. DuPont annual shipments of TIH materials exceed 7,969 carloads or the equivalent of 31,876 truckloads. This additional truck traffic would be concentrated in our southern states -- east of the Mississippi as well as Texas. These are the very areas that, according to the American Trucking Association, contain some of the Nation's major "choke points" and which will see significant increases in truck and other non-commercial traffic in the coming decades.¹⁰

Moving more regulated products via our Nation's highways is neither realistic nor good for the American people. Moving hazardous materials by rail is, as noted previously, sixteen times safer than moving the same materials by truck and far more energy efficient. Given rising fuel costs and global warming, the AAR is justifiably proud of the railroads' energy efficiency: trains can move one ton of freight 436 miles per gallon of diesel.¹¹ Thus, rail transport reduces both the congestion that causes Americans to spend 3.5 billion hours per year stuck in traffic -- the equivalent of one week's vacation for each affected driver -- at a cost of \$63 billion, and the air pollution trucks generate.¹² Also, the risks to our national security arising from the potential commandeering of hazardous materials by terrorists are far greater when those materials are moved by truck instead of train. In short, shifting hazardous materials from rail to truck would increase fuel consumption, air pollution and highway congestion, adversely impact an already fragile highway infrastructure and reduce transportation safety and security.

¹⁰ Lynch, Timothy, Power Point Presentation 40th Transportation Law Institute (November 2, 2007).

¹¹ *Climate Change Impacts on the Transportation Sector, 2008*. Before the U.S. Senate Committee on Commerce, Science and Transportation (statement of Edward R. Hamberger, President & Chief Executive Officer, Association of American Railroads).

¹² *Transportation Congestion: Observations of the Transportation Lawyer as Legislator*, by Mark S. Norris, Sr., of Adams and Reese LLP.

DuPont has first hand experience concerning the potential impact on American business of allowing the railroads to refuse carriage of hazardous materials. In October 2005, DuPont was notified that within two weeks our rail carrier would no longer transport TIH materials in inter-modal service, a decision enabled by an existing exemption to the common carrier obligation. At that time, DuPont used this carrier's inter-modal service to supply a customer in Mexico with a TIH contained in ISO tanks approved by the FRA and the DOT. The carrier not only refused to carry the loaded ISO tanks that were already in the supply chain *en route* to the customer, but also declined to transport the empty tanks from the customer's facility back to the DuPont site. Because the customer could not accept rail tank cars, DuPont was forced to ship the product by truck to meet its contractual obligations. Ultimately, DuPont lost the customer to a producer in India because of the higher transportation costs associated with trucking. About a month ago, another Class I carrier issued a tariff circular prohibiting the movement of certain commodities and flammable and non-flammable gases in ISO tanks in inter-modal service. Because we were given only one month notice of this change, DuPont faced considerable supply chain disruption and was forced to move the ISO tanks by truck to a west coast port for export.

Should the railroads be permitted and elect to behave in the same way relative to TIH commodities shipped in bulk or all hazardous materials, plants that manufacture or use such products would be forced to close. Production would be shifted overseas and U.S. jobs would be lost. Exports would decline and imports would increase, exacerbating the United States' already significant trade imbalance. Local economies and small towns dependent on the jobs and tax revenues generated by the affected manufacturing facilities would experience serious downturns. The national economy would suffer a similar, but much larger, impact. The availability of goods that require hazardous raw materials or intermediaries, including safety and security products, food, basic commodities such as gasoline and many medicines, would be reduced. Alternatively, their cost would escalate or, worse yet, the Country would endure both scarcity and high costs. To put it differently, the elimination or significant curtailment of the railroads' common carrier obligation would create far more problems than it would solve and this Board should not even entertain it, let alone undertake it.

7. A Price-Anderson Model Would Be Very Difficult To Adapt To The Railroad Industry.

The Board has expressed interest in the Price-Anderson Act of 1957 ("PAA") as a model for addressing the railroads' liability concerns. However, the PAA model, which applies to the nuclear power industry, is not easily adapted to the railroad industry due to significant differences between the two industries and the Congressional objectives underlying the PAA. Furthermore, any such model is strictly within the purview of Congress and would require the enactment of legislation after careful Congressional analysis of the risks and benefits and weighing of competing public policy considerations.

Under the PAA, as amended, nuclear reactor licensees are required to obtain the maximum amount of private insurance available to them, which the Nuclear Regulatory Commission ("NRC") has determined to be \$300 million at present. 10 C.F.R. 140.10. If the

financial damages from a nuclear incident exceed this private insurance coverage, all nuclear reactor licensees, after an accident, must contribute proportionately up to \$100.6 million per reactor per incident into a secondary insurance fund. *Id.* Total liability for a nuclear incident is capped at the sum of these two insurance pools, which currently is over \$10 billion. Although both insurance pools are funded only by reactor licensees, the proceeds cover the liability of all entities associated with the nuclear industry, from reactor designers and parts manufacturers to the transporters of radioactive waste.

Congress had two main objectives when it adopted the PAA: To ensure that the public would be compensated if an accident occurred at a nuclear facility, and to set a limit on the liability of private industry in order to remove a major deterrent to private participation in the development of nuclear energy. S. Rep. No. 99-310, 99th Cong., 2d Sess. 3 (1986). Congress had opened up the nuclear industry to the private sector in the Atomic Energy Act of 1954, but found few takers due to liability concerns in the event of a reactor meltdown. S. Rep. No. 296, 85 Cong., 1st Sess., 2 U.S.C.A.N. 1803-04, and the unavailability of substantial private insurance (approximately \$60 million in 1957). *Id.* at 1808.

In enacting the PAA, Congress was concerned with liability as a deterrent to participation in an entire industry, while the TIIH liability issue is focused on railroad transportation of a single commodity group. Because Congress designed the PAA to cover the entire nuclear industry, rather than a single category of actor, a true PAA-based model for TIIH liability would cover the activities of all participants in the TIIH industry, not just the railroads. This would include, at a minimum, the activities of TIIH producers, consumers, tank car manufacturers, and all transporters.¹³ However, because the entire TIIH industry is not threatening a mass market exodus due to liability risks, not even TIIH transporters aside from railroads, there is justifiable doubt concerning whether the rail industry's liability risks differ so much from those of other participants that they warrant special legislation exclusively for the railroads' benefit.

Ironically, most of the costs of a PAA-model for the rail industry would fall upon the railroads themselves. Under the PAA, only reactor licensees are required to contribute to the insurance pools that cover *all* nuclear industry participants. A reactor licensee, as the operator of a nuclear reactor, is the single entity most likely to be in control over the most serious and costly nuclear incidents. Indeed, the legislative history of the PAA indicates that Congress was most concerned with damages caused by the operation of nuclear reactors.¹⁴ When Congress extended

¹³ Unless all transporters of TIIH material are covered by a PAA model, a railroad-only liability cap and insurance pool would encourage shippers to favor other, less safe, modes that are not subject to caps or indemnification.

¹⁴ 2 U.S.C.A.N. at 1803 ("[T]he problem of possible liability in connection with the operation of reactors is a major deterrent to further industrial participation in the program"), 1804 ("the companies which are interested in participating in the reactor program are hesitant about assuming the liabilities which could ensue in the remote event of a reactor meltdown"), 1807 (Congress requested a study "of the possible effects of a runaway reactor"), 1810 ("If a runaway reactor should cause any further damages beyond [the coverage provided by the PAA] the way was left open for Federal contributions"), 1813 ("Congress should not only try to give financial protection to innocent members of the public who might suffer in the unexpected case of a runaway reactor, but should also provide all possible statutory requirements for assuring that reactors should be as safe as possible").

the PAA's protection to third parties, it had in mind isolated situations such as the negligent maintenance of an airplane engine that caused the plane to crash into a reactor.¹⁵ The extension of protection to carriers, such as railroads, was made with the expectation that a reactor licensee would "see that appropriate safety measures are taken during the shipment."¹⁶ Thus, Congress gave substantial consideration in the PAA to keeping liability with the most probable negligent actor to the greatest extent practicable. This would be a particularly important factor in a PAA model for railroad liability, since all three of the most costly TIH releases during rail transport have been attributed to railroad error.¹⁷

A PAA model for railroad liability also would require each railroad to purchase the full amount of private insurance coverage available to it. While the nuclear industry has access to only \$300 million in private insurance, the rail industry is believed to have access to over \$1 billion per Class I railroad.¹⁸ This requirement would ensure that the railroads retain liability, and thus their safety incentives, to the maximum extent insurable.

Furthermore, a PAA model would require each railroad to contribute to a secondary insurance pool to its maximum ability without jeopardizing its rail investment and subjecting stockholders, bond holders, and rate payers to unreasonably high financial risk. These are the same factors Congress considered when it determined that reactor licensees should contribute \$100.6 million each to the PAA's secondary insurance fund. H.R. Rep. 99-636, 99th Cong. 2d Sess. (1986). This requirement would further reinforce the safety incentives of the rail industry to the maximum extent, but without causing financial ruin because the greatest liability risks are spread across all railroads.

There is a fundamental difference, however, between the nuclear and railroad industries that could require grossly inequitable changes in a PAA model for railroad liability. Due to the substantially smaller number of Class I railroads (7) compared to reactor licensees (104), individual railroad contributions to a secondary insurance fund would have to be much greater or additional contributors could be needed to fund a sizeable pool. As the most obvious potential source of additional funding, the small number of TIH shippers would not significantly expand the size of this pool. Moreover, it would not be fair to require TIH shippers to fund the pool without also applying the liability caps and insurance coverage to their operations. Although expanding the pool to all hazardous materials shippers might provide a critical mass of contributors, all hazardous materials do not pose the same risks or have the potential to cause damages beyond private insurance coverage limits. Thus, a policy decision would have to be

¹⁵ *Id.* at 1818.

¹⁶ *Id.* Another reason for extending coverage to all persons under a single policy was to parallel the policies at the request of the insurance companies, which wanted to avoid pyramiding of insurance at a reactor that could result from designers, owners, contractors, and other parties taking out separate insurance policies. *Id.* at 1818-19.

¹⁷ See note 7, *supra*.

¹⁸ Norfolk Southern reportedly carries \$1 billion in liability insurance. We have no reliable information concerning current coverage levels for the other Class I railroads, but they are rumored to be insured for between \$500 million to \$1 billion per carrier. Estimates based on insurance industry data suggests that the maximum insurance available to each railroad is over \$1 billion.

made to require shippers of hazardous materials to subsidize an insurance pool that would never benefit them

Finally, any practical PAA-based model for railroad liability will be far more difficult to administer than the PAA itself. The NRC can easily enforce the PAA through its licensing of nuclear reactors. In addition, the NRC only collects the secondary insurance pool if and *after* an accident causing damages exceeding the private insurance coverage has occurred (this has never happened, not even at Three Mile Island). A railroad insurance pool, however, would need to collect funds from potentially thousands of shippers, possibly on a per shipment basis, which would require extensive record-keeping and enforcement. Moreover, these funds would need to be collected in advance of a TIH incident in order to ensure their prompt availability, rather than after an accident as is the case with the PAA. Another governmental entity would have to be created to collect, maintain, and disburse funds.

The only reasonable justification for a PAA-model for TIH liability is to ensure that the public will be compensated if an accident occurs. This requires a thorough analysis of the potential costs of a TIH release during transportation, the probability of such a scenario, the available insurance protection, and the railroad industry's capacity to make up the difference. These questions must be asked in the context of all participants in the TIH supply chain, since it may be necessary to include them within the scope of any PAA liability model. The costs and benefits of creating and administering this complex model for a catastrophic event that may never occur must be weighed against other, *ad hoc*, alternatives.

Because the PAA model presents potential trade-offs between accident prevention, damage mitigation, and compensation, there must be a complete and careful assessment of multiple economic and safety issues. Such issues should only and can only properly be addressed by Congress, just as it when it enacted the PAA.

Approximately one year ago, the AAR circulated draft legislative language that purported to adopt a PAA-based liability model for the TIH industry. That proposal, however, lacked several key features of the PAA that rendered it unacceptable:

- Railroads were required to maintain only \$300 million of private insurance to cover their own negligence, even though they have access to over \$1 billion of private insurance.
- Railroads were not required to contribute at all to the secondary insurance pool, much less assume joint liability for any damages in excess of private insurance coverage. Although the AAR proposal established a \$5 billion liability cap, the negligent railroad's portion would only be \$300 million, or just 6% of the total damages permitted by the overall liability cap.
- Under the AAR proposal, each railroad was responsible only for its own negligence, while all shippers were held jointly liable for the balance, which would be 94% of all liability under the cap. A PAA model does not impose liability upon utility ratepayers, who have no control over the safety practices of nuclear reactor operators. Similarly, it is

inappropriate to shift liability for the secondary insurance pool to railroad customers, which have no control over railroad safety practices

- Despite placing 94% of a potential \$5 billion liability upon shippers and receivers, there was no liability protection extended to shippers or receivers for their own activities beyond rail transportation
- The AAR proposal required shippers and receivers of all hazardous materials, not just TIIH materials, to contribute to a secondary insurance pool, although most hazardous materials do not pose the same risks or have the same potential to cause damages beyond the private insurance coverage limits
- The AAR proposal failed to address many questions concerning its applicability to third parties which have not contributed to the secondary fund, but may be at fault, such as tank car manufacturers and rail car repair facilities

In summary, the AAR proposal focused solely upon minimizing the railroads' own liability to the greatest extent possible by shifting that liability to non-negligent third parties who would have no control over railroad operations and who would receive little or no benefit from the liability caps or the insurance pools. This legislation would have been both substantially inequitable and tremendously detrimental to the safe transportation of TIIH materials. Despite AAR's claims, this was not a liability regime modeled on Price-Anderson.

8. Any Revision To The Current Liability Regime Must Be Carefully Considered.

The current liability regime for damages caused by the release of TIIH materials is based upon negligence. This regime establishes a standard of care and assigns liability for damages caused by a breach of that standard to the party or parties at fault. For the rail industry, federal safety standards adopted by DOT establish the proper standard of care. These standards have served the public and the rail industry well over the past 30 years, as the overall rail safety record has improved dramatically. Recent and pending rulemaking proceedings promise even greater safety improvements. They, in turn, would further reduce the already very low risk associated with rail shipments of hazardous materials, 99.997% of which arrive at their final destination without release caused by an accident.

Congress has determined that, if a railroad breaches the standards established by DOT, it should be responsible for the damages caused by its negligence. 49 U.S.C. § 20106(b)(1). Conversely, however, if a railroad has an accident despite meeting that standard of care, a state law tort action would be preempted. *Crubbe v. Norfolk Southern*, 2007 U.S. Dist. LEXIS 8095 (E.D. Mich. 2007) (preemption still applied where plaintiff did not allege a failure to follow federal regulation). Thus, Congress already has established a liability limit that would not apply in the absence of federal preemption. Any alteration to this regime must not be made lightly or hastily.

Any changes to the liability regime require a holistic assessment of economic and safety issues that only Congress can and should make. The issues and potential solutions are difficult, complex and controversial. The Board, to which Congress has assigned responsibility for only a limited subset of these issues, cannot fairly and holistically make the necessary judgments.

Accordingly, DuPont respectfully urges the Board to refrain from injecting itself into this carefully balanced liability structure, where the Board's jurisdiction to act is significantly constrained. There is great potential for the Board to do more harm than good by creating unintended safety consequences and by undermining on-going DOT efforts to enhance safety and reduce risks.