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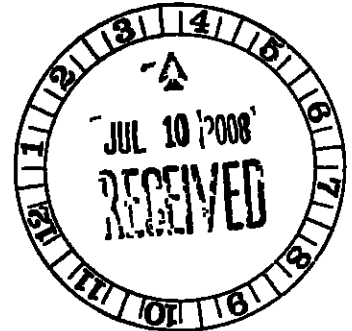
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July 10, 2008

By Hand Delivery

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S W
Washington, D C 20024-0001

222832



**Re: STB Ex Parte No. 677 (Sub No. 1),
Common Carrier Obligation of Railroads**

Dear Secretary Quinlan

Pursuant to the Notice of the Surface Transportation Board served on June 4, 2008 and subsequent notices of June 19 and June 23, 2008, CF Industries, Inc. hereby submits an original and 10 copies of the Written Testimony of Patrick E. Groomes on Behalf of CF Industries, Inc. and Supplement Comments of CF Industries, Inc.

An additional 4 copies of this submission are enclosed herewith. Please date-stamp these additional copies and return them to our messenger.

Should you have any questions concerning this matter, please do not hesitate to contact the undersigned.

Sincerely,

Patrick E. Groomes

Counsel for CF Industries, Inc.

Enclosures

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JUL 10 2008
Public Hearing

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No 677 (Sub-No. 1)

222832



COMMON CARRIER OBLIGATION OF RAILROADS

**TESTIMONY OF PATRICK E. GROOMES
ON BEHALF OF
CF INDUSTRIES, INC.**

ENTERED
Office of Proceedings
JUL 10 2008
Part of
Public Record

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July 10, 2008

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INTRODUCTION

With soaring food prices, skyrocketing fuel costs, and congested highways, the railroads propose to exacerbate these problems by circumventing their obligation to transport anhydrous ammonia, an essential fertilizer for American farmers. Responding to the purported concern that transporting anhydrous ammonia and other toxic inhalation hazard (“TIH”) materials subjects railroads “to ruinous liability,” the Surface Transportation Board (the “Board”) has scheduled a public hearing to “explore the issues surrounding the transportation of hazardous materials by rail.”¹ CF Industries, Inc. (“CF Industries”) is submitting these comments to address the issues raised by the Board in its public notice and, of equal importance, to emphasize crucial limits on the Board’s authority. For the reasons explained below, the Board should reject the railroads’ attempts to circumvent their common carrier obligation.

- Railroads have a common carrier obligation to transport anhydrous ammonia and other TIH materials, as both the Interstate Commerce Commission (the “ICC”) and the Courts have consistently held.
- The Board has no authority to impose rail safety standards or to regulate the transportation of hazardous materials, that jurisdiction resides with the Federal Railroad Administration (the “FRA”) and the Pipeline and Hazardous Materials Safety Administration (the “PHMSA”).
- Congress recently amended the Federal Railroad Safety Act (the “FRSA”) to make railroads responsible for their negligent failure to comply with federal and state standards of care. The Board cannot overturn Congress’ clear intent by allowing railroads to shift liability onto shippers.
- Even if the Board did have authority to take action to limit railroads’ common carrier obligation, the Board should decline to do so for strong public policy reasons. As explained below, American farmers have no ready economic substitute for anhydrous ammonia, and if railroads were successful in their attempt to effectively outlaw anhydrous ammonia, corn production would

¹ *Common Carrier Obligation of Railroads – Transp. of Hazardous Materials*, Notice of Public Hearing, STB Ex Parte No. 677, 73 Fed. Reg. 37,786 (June 10, 2008).

decrease while corn prices would increase — at a time when prices have already reached record levels

- Rail is the safest and most efficient method of transporting anhydrous ammonia to vital corn-belt destinations. There is no infrastructure to handle increased rail shipments of other fertilizers or to replace rail shipments with truck shipments of anhydrous ammonia.

Although the Board lacks authority to modify railroads' common carrier obligation or to regulate the transportation of hazardous materials, the Board still has a constructive role to play. The Board should encourage the railroads to work with shippers in crafting commercially viable solutions that address the railroads' liability concerns, while ensuring delivery of vital commodities at reasonable rates. In this regard, the fertilizer industry has proposed balanced commercial solutions that combine insurance coverage to address railroad liability and rate certainty to address shipper issues. These proposals are described in the comments of The Fertilizer Institute. While the railroads have proposed a potential legislative mechanism to address their concerns through a Price-Anderson-like liability cap for the railroads, as explained in the testimony of the Edison Electric Institute, there are complexities, regulations, and costs inherent in a Price-Anderson model that the railroads have failed to address.

BACKGROUND

The following provides a brief overview of CF Industries' interest in these proceedings and the essential role that anhydrous ammonia performs in the nation's agricultural industry. Because there are no cost-effective substitutes for anhydrous ammonia, without safe and reliable rail service to transport anhydrous ammonia, the nation's farmers and the crops they grow will inevitably suffer.

A. CF Industries' Interest in This Proceeding

CF Industries is one of the largest manufacturers and distributors of nitrogen and phosphate fertilizer products in North America. Its principal nitrogen products are ammonia, urea, and urea ammonium nitrate solution ("UAN"); its principal phosphate products are diammonium phosphate ("DAP") and monoammonium phosphate ("MAP"). For the 12-month period ending June 30, 2006, CF Industries supplied approximately 21% of the nitrogen and approximately 14% of the phosphate used in agricultural fertilizer applications in the United States.

CF Industries' core market and distribution facilities are concentrated in the Midwest grain-producing states. CF Industries owns the largest nitrogen fertilizer complex in North America (Donaldsonville, Louisiana), and a 66% economic interest in the largest nitrogen fertilizer complex in Canada (Medicine Hat, Alberta). In 2007, the combined production capacity of these two facilities represented approximately 20% of North American ammonia capacity, 34% of North American dry urea capacity, and 19% of North American UAN capacity. CF Industries also owns one of the largest integrated ammonium phosphate fertilizer complexes in the United States (Plant City, Florida).

CF Industries, like others in the fertilizer industry, relies on rail service to transport its fertilizer products safely and cost-effectively to farmers, other customers, and storage facilities throughout the United States and Canada. CF Industries' facilities in Medicine Hat, for example, include two world-scale ammonia plants with a combined gross annual production capacity of approximately 1.3 million tons, as well as a world-scale urea plant with a gross annual production capacity of 810,000 tons. Each year, CF Industries' Medicine Hat facilities ship approximately 400,000 tons (5,100 carloads) of their ammonia production to the Midwest to serve American farmers in the corn belt. Because the closest destination from Medicine Hat is

532 miles and the farthest is 1,504 miles, CF Industries depends on rail service to transport its ammonia and urea products to the customers that need them ²

CF Industries' Plant City phosphate fertilizer complex is one of the largest phosphate fertilizer facilities in North America. At one million tons per year, its phosphoric acid capacity represents approximately 10% of the total U S capacity. All of Plant City's phosphoric acid is converted into ammonium phosphates (DAP and MAP), representing approximately 12% of U S capacity for ammonium phosphate fertilizer products in 2007. The phosphate fertilizer production process requires anhydrous ammonia. Plant City's full requirements for anhydrous ammonia (389,000 tons per year or 4,900 carloads) are shipped 27 miles by rail from the CF Industries' Tampa terminal to Plant City.

B. American Farmers In The Corn Belt Need Ammonia Fertilizers.

As explained in the attached supplemental statements of CF Industries, nitrogen fertilizers are crucial to corn-belt farmers because they significantly improve crop yields. Nitrogen fertilizers are a basic component of efficient and sustainable crop production in North America.

Anhydrous ammonia is the most efficient and cost-effective source of nitrogen fertilizers. It has the highest nitrogen content of any fertilizer and contains substantially more nitrogen than other fertilizers, such as UAN or urea. It is also less expensive — both because the cost per unit is lower than other nitrogen fertilizers, and because it takes significantly larger volumes of other nitrogen fertilizers to provide the same volume of nitrogen contained in anhydrous ammonia. Moreover, there are more opportunities during the year to apply anhydrous ammonia, providing

² Truck service is not a viable substitute for rail service and generally is used only for shipments of 100 miles or less.

farmers with greater flexibility to adjust to weather (such as recent floods) and other events that may prevent application on any one occasion. Other nitrogen fertilizers, such as UAN and urea, do not provide this flexibility and are recommended for application only in spring. In short, anhydrous ammonia is the most economic nitrogen fertilizer available on the market today.

Given these economic realities, substantial infrastructure exists to support farmers' use of anhydrous ammonia. Manufacturers such as CF Industries, local distributors (such as farm cooperatives), and farmers themselves all have substantial investments in anhydrous ammonia infrastructure.³ In contrast, sufficient infrastructure does not exist to support a shift by corn-belt farmers from anhydrous ammonia to other nitrogen fertilizers. The higher volumes of other fertilizers needed to replace anhydrous ammonia would require significant investment by producers, distributors, and farmers in additional production facilities, railcars, handling and storage facilities, and distribution systems. Much of the existing infrastructure that is dedicated to anhydrous ammonia would have to be abandoned. If any policy change results in a shift of TIH materials off rail, current trucking and highway infrastructure will be unable to fill the void and, even if it could, moving fertilizer traffic from rail to highway is inefficient, risky, and inconsistent with the public interest.⁴ There is thus no way to move the volume of other fertilizers needed to replace anhydrous ammonia into the corn belt.

³ *Hazardous Materials Enhancing Rail Transp. Safety and Sec. for Hazardous Materials Shipments*, Interim Final Rule, 73 Fed. Reg. 20,752, 20,769 (Apr. 16, 2008) ("A farm cooperative or agricultural products distributor typically receives large quantities of anhydrous ammonia by rail car and offloads the materials into storage tanks for subsequent truck movement to local customers")

⁴ *Id.* (noting that "the current fleet of cargo tank motor vehicles is insufficient to handle a significant shift of [TIH] cargoes from rail to highway" and that "[b]ecause it takes about four tank trucks to haul the amount of product that can be moved in a rail tank car, the industry would have to build many more trucks to accommodate a shift in transportation from rail to highway")

Accordingly, contrary to the railroads' assertions, corn-belt farmers have no alternative to rail-delivered anhydrous ammonia in many locations. As explained in the attached supplemental comments of CF Industries, the railroads' proposal to effectively outlaw anhydrous ammonia or otherwise relieve them of their common carrier obligation is impractical, uneconomical, and inconsistent with the public interest. If anhydrous ammonia is unavailable to corn-belt farmers, the price of other nitrogen fertilizers will increase, corn crop acreage will decrease, yields on planted acreage will plummet, the supply of corn in the U.S. will drop, and corn prices will increase. In addition, an already taxed transportation infrastructure will be burdened with increased volumes of other nitrogen fertilizers, which will affect not only farmers, but all shippers.

COMMENTS

The railroads have urged the Board to adopt rules or policies that would impose sweeping changes to their traditional common carrier obligation. In particular, the railroads contend that because they may face "potentially ruinous liability" for accidents involving the transportation of hazardous materials, the Board should either redefine what it means to make a "reasonable" service request for transporting such materials, or adopt policies that would discourage shipments of hazardous materials and induce farmers and shippers to use alternative products. The Board should reject this attempt to avoid the railroads' common carrier obligation.

I. The Board Has No Authority To Relieve Railroads Of Their Common Carrier Obligation.

Hazardous materials, including TIH materials, “are essential to the economy of the United States and the well being of its people”⁵ Because hazardous materials are needed to support essential services, including for use in agricultural applications, the “transportation of hazardous materials is unavoidable”⁶ Rail transportation is especially important because, as the Board acknowledges, “[f]or many hazardous materials, including TIH, rail is the safest and most efficient mode of transportation”⁷

Railroads have a statutory duty to provide “transportation or service on reasonable request”⁸ As common carriers, railroads are therefore obligated to accept all commodities, including hazardous cargo, that are tendered in compliance with legal requirements and upon reasonable request⁹ This common carrier obligation ensures that shippers “are given the opportunity to ship hazardous materials, including the most dangerous hazardous materials, in the safest, most secure manner possible”¹⁰

A reasonable request is one that is specific as to volume, commodity, and time of shipment.¹¹ The reasonableness of a request does *not* relate to, and has never been held to depend on, the nature of the commodity being transported “From the earliest days, common

⁵ *Id* at 20,752

⁶ *Id*

⁷ *Common Carrier Obligations of Railroads*, 73 Fed Reg at 32,786

⁸ 49 U S C § 11101(a) (1996)

⁹ *See Hazardous Materials*, 73 Fed Reg at 20,752

¹⁰ *Id*

¹¹ *Michael H Meyer, Tr in Bankr for Cal W R R , Inc v Northcoast R R Auth , d/b/a N W Pac R R* , 2007 WL 268796, at *3 (S T B Jan 31, 2007)

carriers have had a duty to carry *all* goods offered for transportation”¹² Although there are exceptions for activities that “lie outside” the common carrier’s duties, those exceptions are well defined and very limited.¹³ A railroad may not avoid its common carrier obligation merely because it would be inconvenient, unprofitable, or not “worth it” from the carrier’s perspective ¹⁴ As the Supreme Court has recognized, “[the railroads’] obligation as common carriers is comprehensive and exceptions are not to be implied”¹⁵

There are no exceptions to the railroads’ common carrier obligation for transportation of TIH materials that meet the safety standards established by the appropriate regulatory authorities The duty to transport hazardous materials has been recognized from the earliest days of railroading ¹⁶ Consistent with decades of precedent, the courts and the ICC have rejected attempts by railroads to create an exception for hazardous materials,¹⁷ emphasizing that “[a] carrier may not assert ... that, as a general proposition, shipments meeting DOT and NRC

¹² *American Trucking Ass'ns, Inc v Atchison, T & S F Ry Co*, 387 U S 397, 406 (1967), *reh'g denied*, 389 U S 889 (1967) (emphasis added) (citing *New Jersey Steam Nav Co, v Merchants Bank of Boston*, 12 L Ed 465 (1848)) (“*Am Trucking v Atchison*”)

¹³ Exceptions include transporting circuses requiring special services, *see Transp of Circuses and Show Outfits*, 299 I C C 330 (1956), and transporting goldware and silverware where the carrier has never previously transported such items *See Emporium v New York Cent R R Co*, 214 I C C 153 (1936), *see also*, Michael McBride, *Railroad Transportation of Nuclear Waste and Other Hazardous Materials*, 21 THE ELECTRICITY JOURNAL, Apr 2008

¹⁴ *Decatur County Comm'rs v Surface Transp Bd*, 308 F 3d 710, 715 (7th Cir 2002), citing *G S Roofing Prods Co v S T B*, 143 F 3d 387, 391 (8th Cir 1998), *Pejepscot Indus Park, Inc, d/b/a Grimmell Indus – Petition for Declaratory Order*, 2003 WL 21108198, at *6 (S T B May 15, 2003), *reconsideration granted in part*, 2003 WL 22521399 (S T B Nov 5, 2003)

¹⁵ *Am Trucking v Atchison*, 387 U S at 407

¹⁶ *See, e g, Actiesselskabet Ingrid v Central R Co of New Jersey*, 216 F 72, 75 (2nd Cir 1914) (recognizing the long-standing duty of railroads to accept and transport dynamite)

¹⁷ *See, e g, Radioactive Materials, Missouri-Kansas-Texas R R Co*, 357 I C C 458 (1977) (“*Radioactive I*”), *Radioactive Materials, Special Train Serv Nationwide*, 359 I C C 70, 74-75 (1978) (“*Radioactive II*”) (Railroads may not impose special routing handling or routing conditions in the form of mandatory special train service on the movement of radioactive materials)

requirements are too hazardous to transport ”¹⁸ One such case relates to the very same type of commodities at issue in this proceeding

Twenty-two years ago, in 1986, Consolidated Rail Corp (“Conrail”) sought relief from its common carrier obligation to transport hazardous chemicals, relying on the same arguments resurrected by the railroads in this proceeding ¹⁹ In particular, Conrail attempted to avoid transporting hazardous chemicals as a common carrier by “flagging out” or excluding certain chemicals from its tariff ²⁰ In the aftermath of the methyl isocyanate release at a Union Carbide plant in Bhopal, India, Conrail contended that the hazardous chemicals were so lethal that a catastrophic occurrence would economically cripple the railroad The ICC rejected Conrail’s arguments, just as the ICC and courts have rejected similar railroad attempts to avoid carrying other hazardous materials The ICC noted that, in the absence of the railroads’ common carrier obligation or contract carriage, shippers would be at a significant disadvantage and without means to transport hazardous chemicals.²¹ The ICC therefore reaffirmed that “[o]nce a reasonable request for transportation of these chemicals is made, Conrail has a common carrier obligation to transport them ”²²

The courts have likewise agreed that the railroads’ common carrier obligation has no exception for hazardous materials. Writing as if it had this very proceeding in mind, the Sixth Circuit held in *Akron* “[A] carrier may not ask the Commission to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are regulations governing

¹⁸ *Radioactive I*, 357 I C C at 464

¹⁹ *Classification Ratings of Chemicals, Conrail*, 3 I C C 2d 331 (1986) (“*Conrail*”)

²⁰ *Id.*, 3 I C C 2d at 331

²¹ *Id.*

²² *Id.* at 338

such transport, and these regulations have been met”²³ Where hazardous materials meet the safety standards set by the appropriate agency, railroads have a duty to handle such materials²⁴ The failure to transport such materials violates the common carrier obligation and national transportation policy.²⁵

These authorities are dispositive here and require that the Board reject the railroads’ renewed request to limit their common carrier obligation There can be no reasonable dispute that railroads have a common carrier obligation to transport TIH materials Moreover, pursuant to authority delegated under the FRSA, the FRA and PHMSA have promulgated comprehensive regulations governing the transportation of hazardous materials, including TIH materials. As long as shippers comply with those regulations, the railroads must continue to transport TIH materials Railroad carriage of TIH materials is vital to America’s agricultural economy and to fulfilling national transportation policy²⁶ The railroads’ desire to cease carrying TIH materials and other hazardous materials does not change their obligation to do so

II. The Board Has No Authority To Impose Stricter Safety Standards Or Unreasonable Conditions on Carriage.

Even if the Board could modify railroads’ common carrier obligation, it enjoys no delegated authority to implement the regulatory changes requested by the railroads The Board

²³ *Akron, Canton & Youngstown R R Co v I C C*, 611 F 2d 1162, 1169 (6th Cir 1979), *aff’g*, *U S Energy Res & Dev Admin v Akron, Canton & Youngstown R R Co*, 359 I C C 639 (1978), *cert denied*, 449 U S 830 (1980) (“*Akron*”) See also, *Consolidated Rail Corp v I C C*, 646 F 2d 642, 650 (D C Cir 1981), *cert denied*, 454 U S 1047 (1981) (“*Conrail v ICC*”)

²⁴ Although the radioactive materials cases noted that the Price-Anderson Act applied to limit the carrier’s liability, the courts’ rulings were not based on the existence of a liability limiting mechanism

²⁵ *U S Energy Research & Dev Admin v Akron, Canton and Youngstown R R Co*, 359 I C C 639 (1978), *cert denied sub nom Akron*

²⁶ See *Akron*, 611 F 2d at 1166 and 1168 (“A carrier’s statutory duties run not to shippers alone but to the public”)

should not interfere with the regulatory prerogatives of the FRA and PHMSA. Nor should the Board exempt the railroads from its existing regulations.

A. The Board Has No Authority To Interfere With The Regulatory Authority Delegated To The FRA And PHMSA.

Our Constitution is grounded in the bedrock of a defined and limited delegation of legislative power from the people to the Congress.²⁷ This elemental constitutional precept applies to executive agencies acting within the modern administrative state. Because legislative power under the Constitution comes ultimately by way of delegation from the people, it may come to rest in executive agencies only via valid statutory delegations from Congress, the repository of the people's lawmaking authority in the first instance. The Supreme Court has thus recognized that "an agency literally has no power to act unless and until Congress confers power upon it."²⁸ The Administrative Procedures Act likewise requires courts to "hold unlawful and set aside agency action" that exceeds the scope of an agency's "statutory jurisdiction" or "authority."²⁹

It is therefore significant that Congress vested in the Secretary of Transportation authority to "prescribe regulations and issue orders for every area of railroad safety,"³⁰ and that the Secretary in turn delegated authority over railroad safety and hazardous materials transportation

²⁷ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (the "powers of the legislature are defined, and limited, and that those limits may not be mistaken or forgotten, the constitution is written")

²⁸ *New York v. FERC*, 535 U.S. 1, 18 (2002) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)), see also *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (with statutory authorization, an agency may not "promulgate even reasonable regulations that claim the force of law"), *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994) (absent delegated authority, an agency may not take policy position and enact them as binding legislative or interpretive rules carrying the "force of law")

²⁹ 5 U.S.C. § 706(2)(c)

³⁰ 49 U.S.C. § 20103(a) (2002)

to the FRA and PHMSA — not to the Board.³¹ Acting pursuant to authority delegated under the federal hazardous material transportation law, 49 U S C § 5101, *et seq*, the PHMSA has “prescribe[d] regulations for the safe transportation ... of hazardous materials in intrastate, interstate, and foreign commerce ” Similarly, acting pursuant to authority delegated under the federal railroad safety laws, 49 U S C § 20101, the FRA has promulgated and enforced a comprehensive regulatory program over all areas of railroad transportation safety ³² In contrast, the Board has been delegated no authority to regulate either railroad transportation safety or the transportation of hazardous materials, as recent court decisions have unequivocally confirmed ³³

Consistent with the Secretary’s delegation of authority, the FRA and PHMSA are currently conducting extensive proceedings addressing various aspects of the transportation of TIH materials.³⁴ These proceedings have considered precisely the same liability issues on which the railroads have focused their comments to the Board ³⁵ The PHMSA has nonetheless chosen not to discourage or otherwise prohibit the shipment of hazardous materials Instead, it has implemented a comprehensive regulatory system that is designed to manage risk (not eliminate it), taking into account that hazardous materials, including TIH materials, “are essential” to our

³¹ See 49 U S C §§ 103 & 108 (2002 & 2004), *see also* 49 C F R §§ 1 49, 1 53(b)

³² See 49 CFR parts 200-244

³³ *Boston and Maine Corp v Surface Transp Bd*, 364 F 3d 318, 321 (D C Cir 2004) (“primary jurisdiction over railroad safety belongs to the FRA, not the Board”), *Tyrrell v Norfolk S Ry Co*, 248 F 3d 517, 523 (6th Cir 2001) (there is “no evidence that Congress intended for the Board to supplant the FRA’s authority over rail safety”)

³⁴ Docket No FRA-2006-25169 (railroad tank car design specifications for tank cars transporting TIH materials), Docket No PHMSA-RSPA-2004-18730 (data compilation regarding transportation of hazardous materials), Docket No FRA 2007-28573 (appeal of routing decisions for hazardous materials)

³⁵ *Hazardous Materials Improving the Safety of R R Tank Car Transp of Hazardous Materials*, 73 Fed Reg 17,818, 17,831 (Apr 1, 2008) (addressing railroads’ concern that “‘railroads can suffer multi-billion dollar judgments’ from accidents involving highly-hazardous materials”)

economy and that “the vast majority of hazardous materials shipped by railroad tank car each year arrive at their destinations safely and without incident ”³⁶ If this Board were to accept the railroads’ invitation to adopt supplemental policies to restrict or discourage transportation of hazardous materials, those policies no matter how well intended, would inevitably conflict with the FRA’s and PHMSA’s responsibility to strike a delicate balance between the safe and economical transportation of hazardous materials and whatever limitations on such transportation are absolutely and unavoidably necessary³⁷ Board regulation that imposes additional or different burdens on shippers of hazardous materials will unavoidably upset the FRA’s and PHMSA’s own reconciliation of competing federal interests.

The Board should therefore defer to the FRA and PHMSA with respect to safety issues and should not interfere with the carefully calibrated regulatory judgments made by the FRA and PHMSA concerning the transportation of hazardous materials If the railroads have concerns about appropriate safety measures, they should address them in the pending FRA and PHMSA proceedings³⁸

B. The Railroads Have Not Satisfied Their Heavy Burden To Show That Existing Regulations Are Inadequate Or Unreasonable

Even assuming for sake of argument that the Board has authority to impose stricter safety requirements on the transportation of TIH materials, such requirements are not justified unless

³⁶ *Id* , 73 Fed Reg at 17,819, 17,822 (“The hazardous material regulatory system is a risk management system that is prevention-oriented and focused on identifying a safety or security hazard and reducing the probability and quantity of a hazardous material release ”)

³⁷ *Cf Rodriguez v United States*, 480 U S 522, 528 (1987) (“[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law”)

³⁸ *Hazardous Materials*, 73 Fed Reg at 17,820 (“[i]mproving the safety and security of hazardous materials transportation via railroad tank car is an on-going process”)

the railroads show that the relevant FRA and PHMSA regulations are inadequate and that a stricter practice is just and reasonable³⁹ The railroads have not met this heavy burden

First, there is a strong presumption that safety requirements stricter than those imposed by the FRA and PHMSA are unnecessary⁴⁰ For example, when railroads attempted to impose special train service on the transportation of radioactive materials, the Sixth Circuit determined there was no evidence to suggest the federal regulations were inadequate.⁴¹ It found that the DOT's and NRC's regulations were comprehensive in character and that the agencies had attempted to fully satisfy their statutory duty to assure the safe transportation of radioactive materials The court also noted that there was no evidence that the DOT and NRC were unaware of the option to impose special train service requirements when they drafted their regulations⁴² The FRA's and PHMSA's regulation of TIH materials transportation is similarly comprehensive and warrants the same presumption against the need for special train service or other stricter safety requirements. Indeed, in light of the ongoing FRA and PHMSA proceedings, the railroads have a full and complete opportunity to advocate any safety measures that they deem adequate

Second, as with the railroad's imposition of special train service for radioactive materials⁴³ and Conrail's flag-out for hazardous chemicals,⁴⁴ the railroads have not exhausted

³⁹ *Conrail v ICC*, 646 F 2d at 650 ("The railroads may indeed seek to prove the reasonableness of additional safety measures, but the burden is on them to show that, for some reason, the presumptively valid DOT/NRC regulations are unsatisfactory or inadequate in their particular circumstance")

⁴⁰ *Id* at 650-652

⁴¹ *Id*

⁴² *Id* at 651-652

⁴³ *Id* at 652 ("Any evidence indicating that significant safety benefits could be achieved by [special train service] may be considered by DOT and NRC pursuant to the procedures each agency has established ")

their administrative remedies regarding TIH materials. Any evidence that special train service or other stricter safety requirements are necessary should be submitted to the FRA and PHMSA before additional relief is sought from the Board. As long as the FRA and PHMSA continue to view regulating the transportation of TIH materials and other hazardous materials as an on-going process, the Board should stay its hand and allow that process to continue.

Third, railroads must prove that their proposals are just and reasonable. In the case of radioactive materials, the ICC found that special train service would result in added fuel consumption, increased air pollution, additional accidents, and higher costs with no commensurate increase in safety.⁴⁵ In light of these findings, the ICC held that such service provided no cognizable benefit and, hence, expenditures for it and tariffs based on it were unreasonable.⁴⁶ The same is true here.

C. The Board May Not Exempt TIH Materials From Its Regulatory Requirements.

The Board has authority to exempt a person, class of persons, transportation, or service from its regulations in whole or in part.⁴⁷ But its authority to do so is extremely limited. There is no basis for exempting TIH materials from the Board's existing regulations.

The Board may issue an exemption only if (i) the application of a regulation is not necessary to carry out national rail transportation policy, *and* (ii) either the transaction or service

⁴⁴ *Conrail*, 3 I C C 2d at 337 ("Conrail presented no specific evidence as to why DOT regulations are inadequate. Insofar as the "lethality" ratings for the involved chemicals, it has not exhausted its remedies with DOT. DOT regulations provide for initiation of rulemakings and Conrail could seek higher "lethality" ratings or even stricter safety standards through a DOT rulemaking.")

⁴⁵ *Radioactive II*, 359 I C C at 74-75, *Trainload Rates on Radioactive Materials*, E R R, 362 I C C 756, 773 (1980), *aff'd*, *Conrail v ICC*, 646 F 2d 642, *supplemented by*, 364 I C C 981 (1981)

⁴⁶ *Id*. See, also, *Conrail v ICC*, 646 F 2d at 652

⁴⁷ 49 U S C § 10502 (1995)

is of limited scope, or the application of a regulation is not needed to protect shippers from the abuse of market power⁴⁸ An exemption is intended to encourage competition by eliminating unnecessary railroad regulation⁴⁹ It does not make lawful any “competitive practice that is unfair, destructive, predatory, or otherwise undermines competition.”⁵⁰ Nor does it diminish the Board’s role in protecting shippers and the public from abusive railroad practices⁵¹ Any exemption for the transportation of TIH materials fails to meet this test

Continuing the common carrier obligation to transport TIH materials is necessary to effectuate national rail transportation policy The Board has approved commodity exemptions upon finding that they will encourage competition, promote energy conservation, and/or further other aspects of the policy by allowing railroads with limited market share to attract traffic from trucks and other modes of transportation⁵² An exemption for TIH materials would have the opposite effect. Railroads are essential to the safe, cost-efficient, and energy-efficient transportation of TIH materials. The railroads have stated that they would not transport TIH materials unless they were obligated to do so In other words, even if TIH materials otherwise

⁴⁸ 49 U S C § 10502(a) (1995)

⁴⁹ *Coal Exporters Ass’n of U S, Inc v U S*, 745 F 2d 76, 82 (D C Cir 1984), *cert denied*, 471 U S 1072 (1985) (“*Coal Exporters*”) (citing *American Trucking Ass’ns, Inc v ICC*, 656 F 2d 1115, 1118-1120 (5th Cir 1981) (“*Am Trucking v ICC*”))

⁵⁰ *Am Trucking v ICC*, 656 F 2d at 1123-24

⁵¹ *Coal Exporters*, 745 F 2d at 81

⁵² See, e g, *Surface Transp Bd, Rail Gen Exemption Auth - Exemption of Rock Salt, Salt*, 10 I C C 2d 241, 245-246 (1994) (“*Rock Salt*”), *Surface Transp Bd - Liquid Iron Chloride*, 367 I C C 347, 350 (1983) (“*Liquid Iron*”), *Surface Transp Bd, Rail Gen Exemption Auth - Used Motor Vehicles*, 9 I C C 2d 884, 885-886 (1993) (“*Used Motor Vehicles*”)

qualify for an exemption — which they do not — granting such an exemption would run counter to the public interest and undermine national rail transportation policy ⁵³

An exemption also would fail to satisfy either the limited scope or market power prong of the statutory test. The limited scope prong takes into account several factors, including a small or declining market share, geographic coverage, extent of use, volume of shipments, seasonality of shipments, distance, and the number of shippers and carriers involved ⁵⁴. Commodity exemptions have been found to be of limited scope because of railroads' small market share, their deteriorating market share, and/or the extremely limited or concentrated volume of shipments ⁵⁵. In contrast, an exemption for TIH materials would have a widespread effect on shippers and the public and thus fail the limited scope prong.

Finally, an exemption would fail the market power prong. In approving commodity exemptions, the agency considers the availability of alternative modes of transportation ⁵⁶. As noted in the supplemental comments of CF Industries, railroads dominate the transportation market for TIH materials and there are no viable alternatives to rail transportation for TIH materials to crucial corn-belt locations. Continuation of the common carrier obligation to transport TIH materials is necessary to protect shippers against market power abuse.

⁵³ See 49 U.S.C. 10101(1), (4), (8), (12), and (14) (1995).

⁵⁴ See *Surface Transp. Bd. - Rail General Exemption Authority - Fresh Fruits and Vegetables*, 361 I.C.C. 211, 213-214 (1979), *Surface Transp. Bd. - Exemption from Regulation - Poultry, Meat, and Dairy Products*, 1 I.C.C. 2d 173, 177-178 (1984) ("Poultry"), *Surface Transp. Bd. - Exemption from Regulation - Rail Transp. Frozen Food*, 367 I.C.C. 859, 864-865 (1983) ("Frozen Food"), *Liquid Iron*, 367 I.C.C. at 350-351,

⁵⁵ *Id.*

⁵⁶ See, e.g., *Frozen Food*, 367 I.C.C. at 865-867, *Used Motor Vehicles*, 9 I.C.C. 2d at 886, *Poultry*, 1 I.C.C. 2d at 178-180, *Rock Salt*, 10 I.C.C. 2d at 246-248.

III. The Board Should Not Undermine Congress' Legislative Judgment That Railroads Should Be Held Liable For Their Own Negligence.

The railroads urge the Board to limit their liability for incidents involving TIH materials. But in cases where the railroads are not at fault, the law already limits the railroads' liability. In fact, until last year, courts generally held that state law negligence claims related to the transportation of TIH materials were preempted by federal law (including, in particular, the FRSA), regardless of whether the railroad complied with federal regulations.⁵⁷ In 2007, Congress amended the FRSA clarifying that state law negligence claims based on a railroad's failure to comply with federal regulations, state regulations not otherwise preempted by federal law, or a railroad's own operating procedures are not preempted by federal law.⁵⁸ It is thus the express intent of Congress that, as part of the federal railroad safety scheme, *the railroads are to be liable for their own negligence*.⁵⁹ As the Eighth Circuit stated only a week ago, Congress clarified that, prior to the amendment to the FRSA, it was not its intent "that an injured person be denied the mere chance to *hold a railroad accountable* when its negligence not only violated state common law standards, but the very federal laws and regulations approved by Congress in an effort to further railroad safety."⁶⁰ The circumstances that caused Congress to change the law — and the railroads' attempt to circumvent it in this proceeding — all involved railroads that did something wrong. The Board cannot overturn Congress and absolve railroads of liability for their wrongful actions.

⁵⁷ See, e.g., *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) ("*Easterwood*"), *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000) ("*Shanklin*"), *Lundeen v. Can. Pac. Ry. Co.*, 447 F.3d 606 (8th Cir. 2006), *Mehl v. Can. Pac. Ry. Ltd.*, 417 F. Supp. 2d 1104 (2006) ("*Mehl*").

⁵⁸ Pub. L. No. 110-53, § 1528, 121 Stat. 266 (2007) (codified at 49 U.S.C. § 20106(b)).

⁵⁹ *Lundeen v. Can. Pac. Ry. Co.*, __ F.3d __, 2008 WL 2597958, at *10-12 (8th Cir. July 2, 2008).

⁶⁰ *Id.*, 2008 WL at *4.

A. Congress Has Chosen To Subject Railroads To Liability for Negligence Under The FRSA.

Congress enacted the FRSA in 1970 “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents”⁶¹ The FRSA is *the* statute governing railroad safety and it is pursuant to the FRSA that the Secretary of Transportation has delegated authority to the FRA to implement regulations governing railroad safety

In addition to requiring the Secretary of Transportation to promulgate regulations concerning railroad safety,⁶² the statute includes express savings and pre-emption provisions⁶³ Under the FRSA (recodified as subsequently amended at 49 U S C § 20106(a)(2)), the states are permitted to “adopt or continue in force a law, regulation, or order related to railroad safety or security” in the absence of a federal rule, regulation, or order on that subject⁶⁴ In addition, where the Secretary has promulgated such a federal standard, the states are nonetheless permitted to adopt “an additional or more stringent” safety standard when “necessary to eliminate or reduce an essentially local safety or security hazard,” so long as the state standard is “not incompatible with a [federal] law, regulation, or order,” and the state standard would not place an undue burden on interstate commerce.⁶⁵

The Supreme Court previously held that regulations issued under the FRSA preempted state common law claims, including claims based on negligence, to the extent that the federal

⁶¹ 49 U S C § 20101 (2000)

⁶² 49 U S C § 20103(a) (2000)

⁶³ 49 U S C § 20106(a)(2) (2000)

⁶⁴ *Id*

⁶⁵ *Id* at § 20106(a)(2)(B)

regulation “cover[s]” the same subject matter ⁶⁶ Accordingly, the Court held that a claim that a railroad was negligent in operating a train at an excessive speed was preempted by federal regulations “covering the subject matter of train speed.”⁶⁷ Federal regulations requiring the installation and use of “particular warning devices” also have been held to preempt all state tort claims concerning the adequacy of warning devices installed with the support of federal funding ⁶⁸

A series of recent incidents, however, caused Congress to reconsider the preemptive scope of the FRSA. Both incidents resulted not from the inherent dangers of transporting hazardous materials, but from the railroads’ own negligence.

The Minot Incident. On January 18, 2002, a Canadian Pacific Railway train derailed near Minot, North Dakota, while traveling from Edmonton, Alberta to St. Paul, Minnesota ⁶⁹ Over 220,000 gallons of anhydrous ammonia owned by CF Industries were released, causing one death and over 300 major injuries ⁷⁰ The National Transportation Safety Board (the “NTSB”) found that the accident was caused by “an ineffective Canadian Pacific Railway inspection and

⁶⁶ *Easterwood*, 507 U S at 664

⁶⁷ *Id* at 659

⁶⁸ *Id* at 670 (discussing 23 C F R §§ 646.214(b)(3) and 4), *Shanklin*, 529 U S at 354-55 (noting that federally-mandated forms of warning devices have “been specifically found to be adequate under a regulation issued by the Secretary” and thus “displace[s] state and private decisionmaking authority”) (citations omitted)

⁶⁹ *See In re Soo Line R Co Derailment of January 18, 2002*, No MC04-007726, 2006 WL 1153359, at *1 (Minn Dist Ct Apr 24, 2006)

⁷⁰ *Lundeen v Can Pac. Ry Co*, 507 F Supp 2d 1006, 1008 (D Minn 2007) (“One person died as a result of the vapor plume, 11 people sustained serious injuries, and 322 people sustained major injuries”)

maintenance program that did not identify and replace cracked joint bars before they completely fractured and led to the breaking of the rail at the joint ”⁷¹

Plaintiffs brought class actions in the U S District Courts of North Dakota and Minnesota. The U.S. District Court for the District of North Dakota, in *Mehl v Canadian Pacific Railway, Ltd* , dismissed state law claims (including those based on negligent inspection, maintenance, operation, and training) brought by the Minot plaintiffs, determining that they were preempted by federal regulations concerning railroad safety covering the same subject ⁷² The District Court also rejected the notion that the defendant railroads must establish not only that the federal regulations covered the same subject matter, but also “compliance” with the federal standards, in order for preemption to apply.⁷³ Under the court’s analysis, “the determination of whether federal law has preempted a state law cause of action is not dependent upon the compliance or non-compliance with a federal regulation ”⁷⁴ The U S Court of Appeals for the Eighth Circuit reached a similar result in other cases stemming from the Minot incident, holding that “the [FRSA] regulations are intended to prevent negligent track inspection and there is no indication the [FRSA] meant to leave open a state law cause of action ”⁷⁵ The courts did not reach their decisions lightly, recognizing the harsh impact in leaving plaintiffs without any

⁷¹ *Id* (quoting Track Safety Standards, Inspections of Joints in Continuous Welded Rail (CWR), 71 Fed Reg 59,677, 59,678-79 (Oct 11, 2006))

⁷² *See Mehl*, 417 F Supp 2d, *see also Lundeen v Can Pac Ry Co* , 507 F Supp 2d at 1017

⁷³ *Mehl*, 417 F Supp 2d at 1112 (noting that this approach would “turn Congress’s preemption on its head”)

⁷⁴ *Id* at 1116 (citing *Shanklin*, 529 U S at 357-58), *id* at 1116 (“compliance is *not* a part of the preemption analysis”) (emphasis in original)

⁷⁵ *Lundeen v Can Pac Ry. Co* , 447 F 3d 606, 614 (8th Cir 2006)

remedy in the wake of this tragic accident ⁷⁶ Nonetheless, in the view of these courts, it remained “the province of Congress, not the judicial branch, to address this inequity.”⁷⁷

The Graniteville Incident. On January 6, 2005, an accident occurred at the Avondale Mills, Inc facility in Graniteville, South Carolina, resulting in the release of TIH materials The NTSB report concluded that the “failure of the crew of NS train P22 to return a main track switch to the normal position,” in violation of the railroad’s own operating rules, was the cause of the accident.⁷⁸ According to the FRA, “the lack of intra-crew communication” at the time of the accident “was particularly significant”⁷⁹ As with the Minot incident, significant litigation arose due to the release of TIH materials in Graniteville

In the wake of these events, Congress accepted the *Mehl* court’s invitation to amend the FRSA.⁸⁰ The change in law was given retroactive effect to “apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002,” viz , the date of the Minot train derailment ⁸¹

49 U.S.C. § 20106(b)(2), as amended, clarifies that “[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging” the following (i) a violation of the federal standard of care established by regulation or order issued by the Secretary of Transportation (with respect to

⁷⁶ See *Mehl*, 417 F Supp 2d at 1120

⁷⁷ *Id* at 1120-21

⁷⁸ *Operating Rules Program of Op Tests and Inspections, R R Op Practices Handling Equipment, Switches and Fixed Derails*, 73 Fed Reg 8,442, 8,444 (Feb 13, 2008) (codified at 49 C F R Parts 217 and 218)

⁷⁹ *Id*

⁸⁰ Pub L No 110-53, § 1528, 121 Stat 266 (2007) (codified at 49 U S C § 20106(b))

⁸¹ 49 U S C § 20106(b)(2) (2000)

railroad safety) or the Secretary of Homeland Security (with respect to railroad security), (ii) a party's violation of, or failure to comply with, its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries, and (iii) a party's violation of a state standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a federal law, regulation, or order, and does not unreasonably burden interstate commerce ⁸²

The amendment was intended to "rectify the Federal court decisions related to the Minot, North Dakota accident."⁸³ Courts have since held the effect of the amendment to the FRSA is to "allow[] state tort law claims to proceed if a railroad did not comply with a railroad safety federal regulation even if such regulation covered the subject matter of the state requirement "⁸⁴ Courts have held that the changes to the FRSA, while not overruling the Supreme Court's decisions in *Shanklin* and *Easterwood*, alter "the approach courts take when analyzing whether state law is preempted by federal law."⁸⁵ Common law negligence claims remain preempted to the extent that the claims are covered by federal regulations on the same subject; however, "non-compliance with federal regulations or rules created pursuant to a federal regulation," and the "purpose of the regulation or rule," must now to be taken into account.⁸⁶ The amendment thus operates to save state law tort claims from preemption "specifically when a party has failed to comply with a federal standard of care established by a federal regulation or order or when it has

⁸² *Id* § 20106(b)(1) (2000)

⁸³ See H R Rep No 110-259, 110th Cong , at 351 (2007)

⁸⁴ *Murrell v Union Pac R Co* , 544 F Supp 2d 1138, 1145 (D Or 2008)

⁸⁵ *Id* at 1148

⁸⁶ *Id*

failed to comply with its own plan, rule or standard ”⁸⁷ Courts addressing the new preemption analysis have found that claims of negligence based on excessive speed (irrespective of federal speed requirements) and inadequacy of federally-mandated warning devices remain preempted ⁸⁸

B. The Board Cannot Overturn Congress’ Legislative Judgment And Relieve Railroads From Liability Arising From Their Own Negligence.

In both the Minot and Graniteville incidents, it was a *failure of the railroads* that lead to the breach of tank cars and the subsequent release of TIH materials. Both of these incidents resulted in negligence cases being brought against the railroads. Prior to the amendment to the FRSA, these cases likely would have been preempted and the railroads shielded from liability for their own negligence. Now, however, railroads may be held liable for their negligence. It is this change — Congress’ clear and unambiguous amendment to the FRSA removing this shield from liability in response to the Minot incident — that has given rise to the railroads’ resurrected concerns regarding the transportation of TIH materials.

This Board should not interfere with Congress’ decision, not even indirectly. For the Board, as with any administrative agency, “must give effect to the unambiguously expressed intent of Congress ”⁸⁹ As the Supreme Court recognized in other contexts, the common law

⁸⁷ *Id*

⁸⁸ *Id* at 1151-53

⁸⁹ *Chevron USA, Inc v Natural Res Def Council*, 467 U S 837, 842-43 (1984) (if “Congress has directly spoken to the precise question at issue,” both the agency and courts “must give effect to the unambiguously expressed intent of Congress”) See also *Federal Election Comm’n v Democratic Senatorial Campaign Comm*, 454 U S 27, 38 (1981) (rejecting agency actions that are “inconsistent with” a “statutory mandate or that frustrate the policy that Congress sought to implement”), *Independent Ins Agents of Am, Inc v Hawke*, 211 F 3d 638, 643 (D C Cir 2000) (an agency interpretation must be “reasonable and consistent with the statute’s purpose”), *NLRB Union v Federal Labor Relations Authority*, 834 F 2d 191, 198-99 (D C Cir 1987) (where agency interpretations are “clearly at odds” with “Congress’ intent,” then “they must be struck down”), *National Ass’n of Broadcasters v FCC*, 740 F 2d 1190, 1203 (D C Cir 1984) (“agencies must ‘seek out the broader purposes—the overriding statutory goals—constitutive of the general categorical term in

(Continued)

forms an integral part of the law's comprehensive regulation of private conduct⁹⁰ Taken in combination with statutory and regulatory enactments, the common law imposes a continuous spectrum of legal requirements, obligations, and standards that are designed to influence and regulate the actions of businesses and individual citizens. Congress' decision to subject railroads to legal liability in certain narrowly defined circumstances where a railroad is negligent reflects a legislative judgment that imposing additional layers of regulation on the nation's railroads is appropriate

Against this backdrop, it is clear that the railroads are seeking to be excused from liability flowing from their own negligence. In particular, they seek either a Board endorsement of an impermissible distortion of the common carrier obligation or a Board-created liability shifting mechanism that would transfer liability for a railroad's negligence to a third party. The Board lacks authority to take either step because both would conflict with Congress' determination that as part of the federal safety regulations governing rail transportation, railroads should be liable for their own negligence. Neither the Board nor any other governmental agency should look lightly upon Congress' considered judgment that railroads should be held liable for their own negligence. It is Congress' amendment to the FRSA with which the railroads take issue and it is before Congress that the railroads must air their complaint.

which Congress has embodied its will"), *National Wildlife Federation v Gorsuch*, 693 F.2d 156, 171 (D.C. Cir. 1982) (where an agency position is "inconsistent with" statute or "'frustrate[s] the policy that Congress sought to implement,' no amount of deference can save it")

⁹⁰ See, e.g., *Medtronic, Inc. v Lohr*, 518 U.S. 470 (1996), *Cipollone v Liggett Group, Inc.*, 505 U.S. 504 (1992)

CONCLUSION

Anhydrous ammonia is crucial to corn-belt farmers and the United States' economy. There is no economical substitute for anhydrous ammonia in the corn belt and there is no safer and more efficient mode of transportation of anhydrous ammonia to vital corn-belt locations than by rail. The Board cannot relieve the railroads of their common carrier obligation to transport TIH materials, including anhydrous ammonia, impose unreasonable conditions on the carriage of such materials; or exempt such materials from its existing regulations. Nor can the Board impose safety restrictions on the transportation of such materials, because transportation safety matters associated with TIH materials are within the jurisdiction of the FRA. Nor should the Board attempt to craft a regulatory easement sheltering railroads from liability arising from their own negligence — liability that Congress has made clear the railroads should bear. Instead, what the Board can and should do is encourage the railroads to work in good faith with the fertilizer industry and other interested parties in an effort to devise reasonable commercial solutions to the railroads' concerns regarding the transportation of TIH materials.

Respectfully submitted,



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July 10, 2008

BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

SUPPLEMENTAL COMMENTS OF CF INDUSTRIES, INC.

BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

**Written Testimony of Robert G. Hoeft
Professor and Head
Department of Crop Sciences
University of Illinois
Champaign-Urbana, Illinois
On Behalf of CF Industries, Inc.**

**IMPACT OF ELIMINATION OF RAILROAD TRANSPORTATION OF ANHYDROUS
AMMONIA ON MIDWEST CROP PRODUCTION**

Qualifications

My name is Dr. Robert G. Hoeft, Ph.D. My business address is Department of Crop Sciences, University of Illinois, 1102 S. Goodwin Ave., Urbana, Illinois 61801. My present title is Professor of Soil Fertility Extension and Head, Department of Crop Sciences. From 1973 to 2005, I served as Extension Soil Fertility specialist for the University of Illinois. In that capacity, I provided educational programs to farmers, fertilizer dealers, and consultants with program emphasis on nitrogen management for optimum crop yield with minimum negative impact on the environment. I also conducted research on the efficacy of nitrogen management, including fertilizer materials

Purpose

The purpose of my statement is to demonstrate that 1) anhydrous ammonia plays a unique and significant role in today's high yielding Midwest corn production and 2) any disruption in the current distribution system for anhydrous ammonia will have severe negative economic repercussions on the Midwest economy and on the ability of Midwest corn farmers to produce the quantity of corn required to meet the ever increasing demand for food, feed and fuel in both the U S and offshore markets

Nitrogen Fertilizer Market and Major Products

In order to understand the role of anhydrous ammonia in Midwest corn production, it is critical to have a general understanding of the fertilizer market in the Midwest, including the importance of nitrogen in corn production, the size of the nitrogen fertilizer market and the unique characteristics and role of the major fertilizer products

Nitrogen is an essential plant nutrient that is required for plant growth and is particularly important for grass crops such as corn. This is why nearly half of the nitrogen fertilizer consumed in the U.S. and approximately two-thirds of the nitrogen fertilizer used in the Midwest is applied on corn

According to university research, 30-45% of corn grown in the Midwest can be directly attributable to the use of nitrogen fertilizers (Figure 1) This is particularly important when considering that the U S produces more than 40% of the world's corn production and that 85% of the U S production is grown in the Midwest Using the USDA average season corn price from last year, this equates to roughly \$20 billion in corn revenue in the Midwest alone that is attributable to nitrogen

Figure 1. Corn Grain Yield Attributable to Nitrogen Fertilizer

State	Crop rotation	
	Continuous Corn	Corn Soybean
	% of Optimum Yield Attributable to Nitrogen	
Illinois	46	34
Iowa	55	25
Minnesota	40	24
Wisconsin	29	23
Mean*	44	30

*Total of 271 CC and 427 SC sites

On corn, nitrogen can be applied either in the fall, in the spring season prior to planting (pre-plant) and/or after the plant is up and growing ("side-dress") Although weather conditions can have a significant impact on the data, 30-40% of the nitrogen used on corn in the Midwest is typically applied in the fall, 40-50% pre-plant in the spring and 10-20% as a side-dress application.

The primary nitrogen fertilizer products used in the U S are anhydrous ammonia, urea-ammonium nitrate solutions ("UAN") and urea, which combined account for roughly three-fourths of total U S nitrogen fertilizer demand. Each of these products have unique characteristics which give them a particular role within a given farm operation

Anhydrous ammonia, for example, is a gas at room temperature and pressure and, therefore, requires specific refrigerated and/or pressurized equipment to store, handle and transport the product Since anhydrous ammonia is injected into the soil at a depth of six to nine inches, it also requires specialized equipment to apply the product to the field Anhydrous ammonia has the highest nitrogen content (82% N) of the major nitrogen products which makes it ideally suited to the high yielding corn production areas in the Midwest It is also less

susceptible to leaching and volatilization (loss to the atmosphere) and, as a result, is the only one of the three major products that is recommended for fall nitrogen application. This is particularly important when considering that approximately 30-40% of the nitrogen used on corn in the Midwest is applied in the fall and is the major reason for anhydrous ammonia's dominant position in the Midwest nitrogen market. Given its suitability for high yielding corn production, approximately 80% of the total anhydrous ammonia fertilizer used in the U S is consumed in the Midwest.

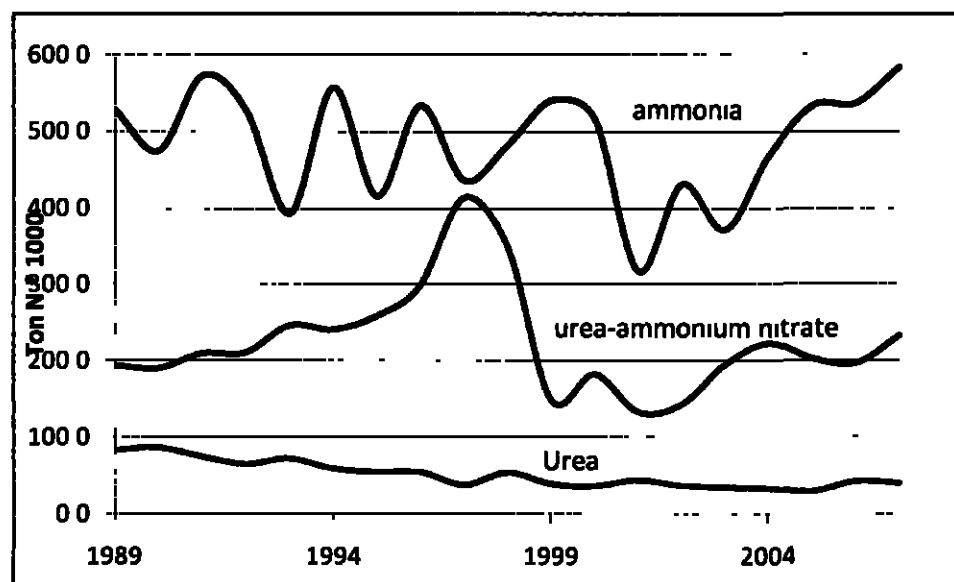
Urea is a dry product containing 46% nitrogen and is typically applied broadcast across the field with a dry bulk spreader. Urea is a highly soluble product that is subject to both leaching and volatilization. As a result, it is not recommended on corn for fall application. University of Illinois research has shown yield decreases associated with winter application of urea to be as great as 40-50 bushels per acre when compared with spring application. Urea is also less suitable than either anhydrous ammonia or UAN for side-dress application since the granules can get caught in the whorl of the plant and cause leaf burn. As a result, urea is primarily used as a pre-plant product.

UAN is a liquid product containing 28-32% nitrogen. Since most pre-plant herbicides come in liquid form and are easily mixed with UAN, the product is mostly used in the Midwest as an herbicide carrier applied before planting. UAN is also used widely as a side-dress fertilizer. Given the low nitrogen content of UAN, it is almost always used in conjunction with a fertilizer program that includes anhydrous ammonia and/or urea in order to ensure adequate nitrogen fertilization. Farmers select their fertilizer program and products based on a number of

factors such as agronomic efficacy, ability to limit risk, compatibility of the product with the particular farm operation, convenience and price

In the Midwest, anhydrous ammonia has for decades been the dominant nitrogen fertilizer product accounting for over 60% of the total nitrogen used for direct application (Figure 2). Although the data shown is for Illinois, it is typical of most of the major corn-belt states. The dominance of ammonia in the Midwest is due in large part to its high nitrogen content and to the fact that it is the only product recommended on corn for fall application. Outside of the Midwest, urea and UAN are the primary nitrogen products of choice due to their suitability for close sown crops (small grains) and perennial grasses (hay and pastures). The handling, storage and application characteristics for urea and UAN are also preferred over anhydrous ammonia on the smaller farm operations in the eastern and southern parts of the U.S. The heavy clay and sandy soils found mostly outside of the Midwest are also more suitable for urea and UAN due to the difficulty in injecting anhydrous ammonia into these types of soils.

Figure 2. Nitrogen Consumption by Product in Illinois



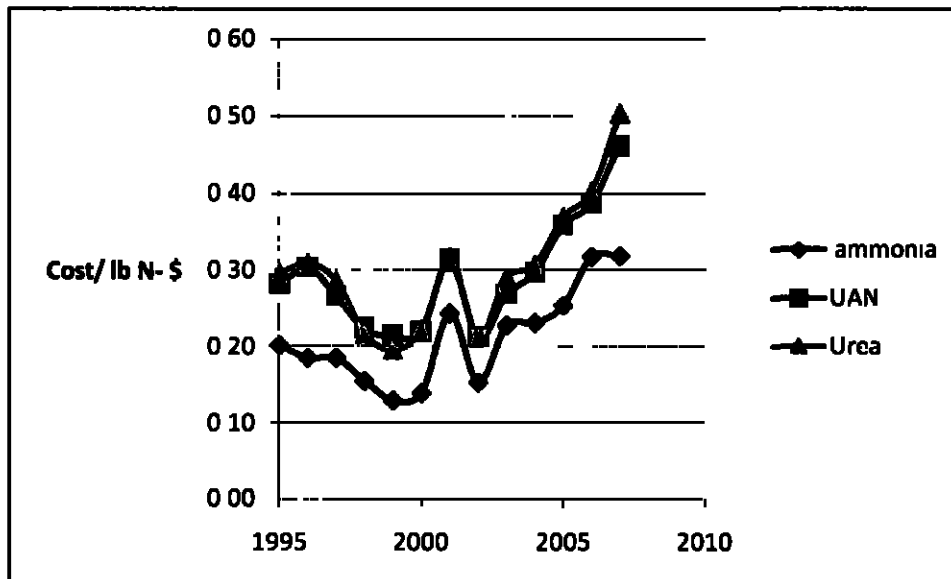
Impact of Eliminating Railroad Transportation of Anhydrous Ammonia

Elimination of rail transportation of anhydrous ammonia will have a significant negative impact on Midwest farmers and reduce the ability of U S farmers to meet the growing demand for corn in both the food and fuel sectors

Increase in the Cost of Nitrogen Fertilization

One of the more direct and immediate impacts will be the farm cost of nitrogen fertilization. Historically, the price delivered to the farm gate for anhydrous ammonia has been 40-60% less than for the other sources. In 2007, for example, the average farm level price for anhydrous ammonia per pound of nitrogen was \$0.32 compared to an average price for UAN of \$0.47 and an average price of urea of \$0.52 (Figure 3). Assuming an application rate on corn of 150 pounds per acre, the shift from anhydrous ammonia to other forms of nitrogen would result in an added cost to a Midwest farmer of \$24 per acre for UAN and \$32 per acre for urea. Conversion of all the 3.1 million tons of nitrogen in anhydrous ammonia to half urea and half UAN would increase the cost to U S farmers by \$1 billion. Since approximately 80% of the anhydrous ammonia consumed in the U S is in the Midwest, nearly all of that increased cost would be to corn-belt farmers.

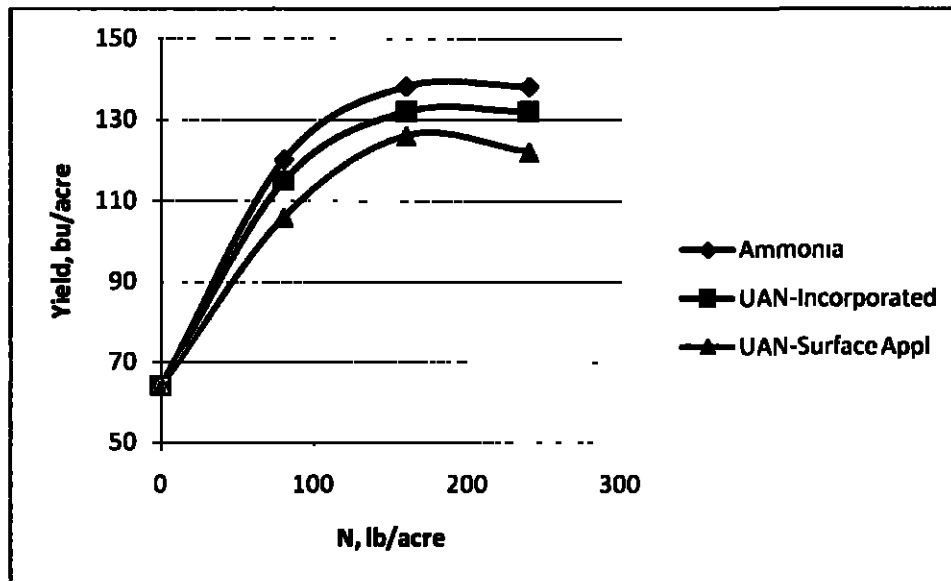
Figure 3. Historical Price of Nitrogen from Major Nitrogen Sources



Reduction in Corn Production and Corn Revenues

A forced switch away from anhydrous ammonia to other nitrogen forms due to lack of ammonia supply would also have a major impact on corn production, corn revenues and corn profitability. Research from the University of Illinois clearly shows that anhydrous ammonia is more effective in increasing corn yields than either urea or UAN. As shown in the chart below, yields were 4-5% lower using pre-plant UAN that was incorporated into the soil and 10-12% lower when it was surface applied (Figure 4). Similar results were also found for urea. Using a typical Illinois corn farmer with a thousand acres of corn, this would translate into a loss of nearly 7,000 bushels of corn and a decline in revenue of approximately \$40,000.

Figure 4. Effect of Nitrogen Fertilizer Source and Method of Application on Corn Yield



In addition to the lower yields resulting from using less effective fertilizer materials, Midwest corn yields would also be reduced due to the higher cost of nitrogen fertilization. Farmers typically determine how much nitrogen they are going to apply each year based on their calculated maximum return on investment. In other words, if their nitrogen fertilizer cost goes up, the amount of fertilizer they use per acre will go down. Holding corn price constant, a shift from a nitrogen/corn price ratio of 0.1 to 0.2 will reduce nitrogen rates enough to decrease yield by another 3%. A further shift in the price ratio to 0.4 will reduce nitrogen rates enough to decrease yield by 10%. A 3% reduction in corn yield would cost corn-belt farmers another 300 million bushels of corn and reduce corn revenues at current prices by approximately \$1.8 billion.

The potential loss of anhydrous ammonia for fall fertilization would also have a major impact on corn yields. The major reason for fall fertilization is to reduce the amount of field work required during the spring season. Data from the University of Illinois shows that the yield potential for corn begins to decline on corn planted after May 1 and accelerates to an

average loss of one bushel per day on corn planted after May 10th and 1.5 bushels per day after May 17th. The elimination of anhydrous ammonia for fall application could add as much as two weeks of field work to the spring season. Considering that farmers typically have a window of only six to eight weeks to prepare fields and get their corn in the ground, this additional time could easily push planting dates past the optimum May 1 date. The spring of 2008 was a classic example. As a result of persistent rainfall this spring and delays in planting throughout the entire Midwest, the USDA's most recent average yield estimate for the U.S. was dropped by nearly ten bushels per acre from trend yield. For the Midwest, this equates to potential production loss of roughly 700 million bushels and a potential loss in revenue at today's corn price of approximately \$4 billion.

Adding up these factors, the loss of ammonia as the major source of nitrogen fertilization would result in a decline in Midwest corn production of roughly 1.0 to 1.5 billion bushels and a loss in revenue of \$6 to \$9 billion. Factoring in the \$1 billion dollars in added fertilization cost, the total impact on Midwest farmers could total as much as \$10 billion.

Impact on the Fertilizer Storage and Distribution System

A disruption in anhydrous ammonia supply to the Midwest would also require a major capital investment in new storage and distribution facilities throughout the marketing chain. The infrastructure for storage and distribution of nitrogen fertilizer from the manufacturer to the soil currently in place would need substantial modification if anhydrous ammonia were no longer the primary source of nitrogen. Although most dealerships are equipped to handle all three products, anhydrous ammonia, urea and UAN, they are not equipped to shift entirely away from ammonia. The current investment in anhydrous ammonia storage and application equipment would not be useable for either of the other two products. The amount of equipment currently available for

urea and UAN would be woefully inadequate to handle the large volume of these materials needed to complete the application in a timely manner. Although the timing of this hearing prevented any detailed estimates, there is no doubt that the cost of adding new storage and distribution assets to the system would easily be in the billions of dollars

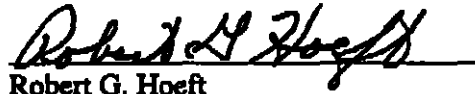
Summary

Disruption of the nitrogen fertilizer distribution system by elimination of the rail transportation system for anhydrous ammonia will have serious consequences on the profitability of Midwest farmers and bring into question the ability of U.S. Midwest farmers to produce enough corn to meet the growing demand for food, feed and fuel. Shifting from ammonia to a urea/UAN based system could cause a yield reduction of from 5-12%. An additional 3-10% reduction could occur depending on the change in price as farmers reduce their rate of application. Delays in planting and/or shift in acreage because of inability of the new system to provide timely delivery of nitrogen fertilizers could cause an added reduction of 10% of the yield.

It is conceivable that elimination of railroad transportation of anhydrous ammonia could reduce corn productivity by as much as 15%. A 15% reduction in corn production in the corn belt translates to 1.5 billion bushels of corn, an amount that would provide the minimum caloric intake for one year for over 200 million people or 4.2 billion gallons of ethanol. At the current price of corn, this would mean a loss of \$9 billion in productivity and increase the expenditure for nitrogen fertilizer by at least another billion dollars.

VERIFICATION

I, Robert G. Hoefft, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this testimony.

A handwritten signature in black ink, appearing to read "Robert G. Hoefft", is written over a horizontal line.

Robert G. Hoefft
Professor and Head
Department of Crop
Sciences, University of Illinois

Executed on July 10, 2008.

BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

**Written Testimony of John J. Schmitter
President, KEP LLC
On Behalf of CF Industries, Inc.**

Qualifications

My name is John J. Schmitter and I am President of KEP LLC. My business address is 16877 E. Prentice Circle, Centennial, Colorado 80015. I have over 30 years experience in the transportation industry. I have held management positions with Conrail and Southern Pacific and in the less-than-truckload and truckload/intermodal industries. I have worked with numerous clients on issues related to rail and truck transportation. I also am an adjunct professor of supply chain management at the University of Denver. A copy of my resume is included as Attachment A.

Purpose

The purpose of this statement is to provide additional detail to the testimony of CF Industries, Inc. ("CF Industries") on the company's supply chain and the critical importance of rail transportation in that supply chain. It also will address the effects of eliminating the railroad common carrier obligation with respect to rail transport of toxic inhalation hazard ("TIH") materials and the railroads' subsequent refusal to handle TIH shipments.

CF Industries' Supply Chain

CF Industries manufactures anhydrous ammonia, a TIH material, at plants in Donaldsonville, Louisiana, and Medicine Hat, Alberta, Canada. CF Industries also ships anhydrous ammonia from its terminal in Tampa, Florida to its phosphate manufacturing plant in Plant City, Florida. Donaldsonville is the largest nitrogen fertilizer manufacturing plant in North America. Medicine Hat is the largest nitrogen fertilizer manufacturing plant in Canada. These plants are located near the key raw material source, natural gas. For the 12-month period ending June 30, 2006, CF Industries supplied approximately 21% of the nitrogen used in agricultural fertilizer applications in United States.

The majority of CF Industries' anhydrous ammonia production goes to agricultural uses. CF Industries serves its agricultural customers primarily with a network of 19 ammonia terminals located in Illinois, Indiana, Iowa, Minnesota, Missouri, Nebraska, North Dakota and Washington. The terminals are positioned close to the markets where the product is used. CF Industries ships via pipeline, barge or rail to these facilities, which contain sophisticated storage, loading and unloading systems. Eleven of the terminals handle rail shipments. Rail service to the terminals is via CP, BNSF or ICE. Shipments move by truck 100 miles or less from the terminal to the final destination. Sales are Free On Board ("FOB") the terminal and customers control the final part of the transportation.

Anhydrous ammonia is used primarily in the fall and spring. CF Industries must manufacture and accumulate inventory in the terminals year round in order to insure that sufficient product is available when customers need it. Each of these terminals receives and ships about 50,000 tons of anhydrous ammonia per year.

Anhydrous ammonia shipped from the CF Industries Tampa terminal to Plant City is used as an integral ingredient in the production of over two million tons of phosphate fertilizer annually. The phosphate fertilizer production process requires anhydrous ammonia and there is no substitute. CF Industries ships finished product to customers and to the company's Port of Tampa warehouse for cross-Gulf and export sales. For 2007, Plant City's ammonium phosphate production (diammonium phosphate and monoammonium phosphate) represented approximately 12% of U.S. capacity for ammonium phosphate fertilizer products.

CF Industries also participates in the industrial market for ammonia in which shipments mostly go direct to customers. These sales have been exclusively via barge or FOB terminal.

The company ships ammonia by the safest, most efficient mode possible. Donaldsonville ships 100% of its volume either via pipeline or barge. Medicine Hat ships most of its production via rail, about 400,000 tons (5,100 carloads) per year, to U.S. Midwest and Northwest destinations. The closest destination is 532 miles and the farthest is 1,504 miles. Five of the destination terminals are more than 1,300 miles from Medicine Hat. There is no pipeline or barge availability at Medicine Hat. As such, rail represents the best transportation mode for both safety and efficiency. Medicine Hat is served by CP Railway and the plant is designed around rail-based transportation.

Tampa ships 100% of its volume, 389,000 tons per year (4,900 carloads), by rail 27 miles to CF Industries' phosphate plant at Plant City, where it is used in the manufacturing process. Rail service is provided by CSX, which runs shuttle trains made up of ammonia cars running loaded eastbound and empty westbound and phosphate cars running loaded westbound and empty eastbound. Running both of these movements on the same trains makes the shuttle train operation efficient for CSX. There is no pipeline or barge availability on this lane so rail represents the safest and most efficient mode of transportation.

CF Industries Investments in Rail Infrastructure

CF Industries has considerable investment in rail facilities. The Medicine Hat and Tampa facilities and most of the terminals were built around a rail-based supply chain. Safety and efficiency are CF Industries' key objectives and the company invests the capital required to maintain a high performing rail operation. Some of CF Industries' investments have been and are being made to help reduce costs, increase efficiencies and improve safety for the rail carriers. The following are some of CF Industries' rail related investments:

- Eleven rail capable ammonia terminals – average replacement cost of \$15 million, total replacement cost of \$165 million,
- Track expansion at several CF Industries terminals to accommodate more railcars inside the fence line, budgeted at \$2.6 million in 2008-2009,
- \$1 million/year in maintenance and regulatory compliance expenses,
- Ammonia tank car fleet of over 550 cars with lease and maintenance costs of \$5.1 million/year, and
- Over an 18 month period CF Industries, on its own initiative, replaced most of its leased tank cars built with non-normalized steel at a cost of \$2.5 million. The remaining 24 cars built with non-normalized steel will be eliminated by October 2008.

CF Industries works closely with its rail carriers to make ongoing operational improvements and to improve safety

Safety Recognition

CF Industries has received many railroad awards for operating a full calendar year without a non-accident release. A non-accident release is defined as an unintentional release of a hazardous material during transportation not caused by an accident or derailment.

- BNSF Stewardship award – nine consecutive annual awards since 1999,
- UP Pinnacle Award – five consecutive annual awards since 2003,
- CSX Chemical Safety Excellence Award – 2003, 2005, 2006 and 2007

Five of the 11 CF Industries ammonia terminals serviced by rail have also achieved Star Status in OSHA's Voluntary Protection Program, and two additional ammonia terminals are in the process of being certified. Certification in this program involves a detailed review of all loading and off-loading safety procedures, a physical inspection of the site and equipment in the loading and off-loading area, in-depth interviews of all employees to ensure they are familiar with the safety and operating procedures and policies, a detailed review of maintenance procedures and maintenance history, and a review of safety records, including a review of any releases and/or occurrences. Only 1/10,000 or 1% of OSHA regulated facilities achieve this safety distinction. Clearly safety is CF Industries' number one priority.

Transportation Alternatives for Ammonia

If the railroad common carrier obligation were eliminated for TIIH materials and CF Industries' rail carriers subsequently refused to handle anhydrous ammonia, CF

Industries would have no safe or cost-effective transportation alternative to serve the U S Midwest from Medicine Hat. CF Industries maintains relationships with motor carriers serving the area and none have expressed interest in serving U S destinations 500 to 1,500 miles away. To my knowledge, there are very few anhydrous ammonia shipments moving those distances anywhere in the U S or Canada. In addition, the cost per ton of trucking anhydrous ammonia is many orders of magnitude higher than the per ton cost of rail shipments.

While the anhydrous ammonia movement from Tampa to Plant City is much shorter, the large volumes far exceed the current trucking capacity. CF Industries is constantly analyzing transportation options in this lane and it has tried trucking anhydrous ammonia shipments to Plant City, but found it both less efficient and less safe than rail. Thus trucking in this lane would be much more costly than shipments by rail without providing any increase in value or safety.

If trucking anhydrous ammonia were possible and the market could bear the price, shifting CF Industries' volume to truck would have the following implications:

- From Medicine Hat to the U S Midwest, 23,000 new truckloads of ammonia would move on U S highways, most of them traveling more than 1,000 miles.
- All 23,000 of these truckloads would also move at least several hundred miles over highways in Canada, a significant increase in risk for a foreign country resulting from a U S action.
- 19,000 new truckloads would move over Interstate 4 in Florida, a heavily traveled route.
- The safety of the movements would deteriorate relative to the current movements because truck transportation is less safe than rail.
- Costs would increase for the biofuels and food sectors of the economy, and
- Fuel consumption and emissions would increase because of the reliance upon less efficient truck transportation and the added highway congestion.

All of the public policy implications of a shift from rail to truck are negative. The only alleged beneficiary of this action would be the U.S. railroads who would be relieved of the obligation to handle TIIH materials.

However, the more likely outcome is that there will not be sufficient truck capacity at a price that the market can bear. CF Industries will no longer be able to sell anhydrous ammonia into rail markets from Medicine Hat, phosphate production from anhydrous ammonia would be jeopardized, and the market place would lose approximately 2.4 million tons annually of key ingredients (anhydrous ammonia and phosphate) in the production of food and biofuels that have no practical alternative.

Conclusion

CF Industries understands the risks taken by its rail carriers in handling anhydrous ammonia. It is willing to work with its rail carriers to improve processes and make investments to both reduce the potential causes of accidents and to mitigate their impact. This testimony has cited several examples of CF Industries' efforts in this area that have been well received by its railroads.

CF Industries is supporting the current efforts of The Fertilizer Institute to work with each of the U.S. railroads to find a way to manage the potential liability for train accidents and derailments involving anhydrous ammonia.

I recommend that the Board encourage and facilitate the ongoing discussions between each of the Class I railroads and the fertilizer industry to develop a commercial solution that would enable the continued movement of anhydrous ammonia by rail. For the reasons stated above, I would suggest that any change that would eliminate or restrict the railroad common carrier obligation to handle TIIH materials be rejected.

Attachment A

Resume of

John J Schmitter

KEP LLC

16877 E Prentice Cir
Centennial, CO 80015
Phone 303 862 4453
Mobile 303 378 5368
john@kepllc.com

Current Position

John Schmitter is the founder and president of KEP LLC. KEP LLC was developed to provide strategic, management and economic consulting services to industrial companies, energy producers, retailers and transportation companies. Mr. Schmitter is an expert in transportation issues. His specialties include transportation market, pricing, yield management and competitive analysis, railcar fleet planning and management, transportation procurement strategies, education and litigation support. Mr. Schmitter has worked with clients in many industries. He has made numerous speeches and presentations before various conferences and seminars and his comments have appeared in various trade publications.

Mr. Schmitter is also Adjunct Professor of Supply Chain Management at the Daniels College of Business, University of Denver.

Consulting Specialties

Strategic planning Transportation procurement Transportation management and organization studies
Negotiating transportation agreements Transportation rate forecasting Railcar fleet acquisition,
management and maintenance planning

Prior Professional Experience

DTE Rail Services, Inc (1996-2006) Vice President – Business Development. Launched and built DTERS' railcar tracking software and services business and helped develop its railcar maintenance management and software business, integrating it with the company's railcar repair operations. Activities included working with clients to develop railcar maintenance and fleet management strategies, transportation organization assessments and rail rate negotiation and support.

Southern Pacific Transportation Company (1991 – 1996) Managing Director – Metals and Ores Business Group. As Managing Director, Metals and Ores Business Group, developed business strategy, negotiated numerous complex rail and rail/truck rate contracts, developed and implemented strategies for acquisition and utilization of several railcar fleets and service plans for each business. Served also as Director – Non-Ferrous Metals and Ores and Director National Accounts. Developed business strategies and negotiated rates on numerous commodities including metals and many types of chemicals.

Hub Group (1989-1991) President – Philadelphia. As head of the Philadelphia office, launched the business and developed a customer base. Developed intermodal and truckload plans and negotiated contracts with rail and truckload carriers.

Jones Truck Lines, Inc (1984-1989) Director Marketing Services. As Director of Marketing Services for this regional LTL carrier, Mr. Schmitter had responsibility for all pricing, rate, tariff and cost management. Developed and implemented marketing strategies and conducted major negotiations with clients. As National Account Manager, developed business and negotiated agreements with large accounts.

Conrail (1977-1984) Intermodal Market Manager, Manager, Service, Equipment and Facilities Planning, Trainmaster. As Intermodal Market Manager, developed and implemented marketing and pricing strategy for a large portion of Conrail's intermodal business. Responsible for pricing and rate negotiations, negotiated numerous agreements with customers. As Trainmaster managed all aspects of a large industrial and road territory.

Education

The Pennsylvania State University – Master of Business Administration, 1977
Northeastern University – Bachelor of Science in Business Administration, 1975

Professional Affiliations

American Society of Transportation and Logistics - CTL

VERIFICATION

I, John J. Schmitter, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this testimony.



John J. Schmitter
President, KEP LLC

Executed on July 10, 2008.

BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

**Written Testimony of Glen N. Buckley
Chief Economist and Director of Agribusiness Analysis
On Behalf of CF Industries, Inc.**

**Implications of the Elimination and/or Disruption of the Anhydrous Ammonia Rail
Transportation System**

Qualifications

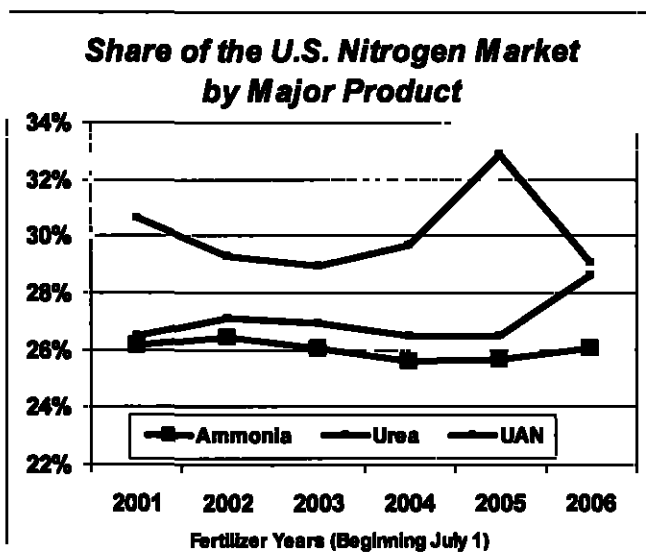
My name is Glen N. Buckley, Chief Economist and Director of Agribusiness Analysis at CF Industries, Inc ("CF Industries") CF Industries is one of the largest producers and manufacturers of nitrogen and phosphate fertilizer in the U.S. CF Industries is also one of the largest producers and marketers of anhydrous ammonia and owns and operates an extensive ammonia distribution system located throughout the Midwest As Chief Economist, my primary responsibility is to provide the company with analysis and forecast of the fertilizer and agricultural sectors. I joined CF Industries in 1980 and have been involved in agriculture for over 30 years I am currently the Chairman of The Fertilizer Institute's Economics Committee, the Chairman of the International Fertilizer Association's Demand Working Group and the past Chairman of the U S. Grains Council and Ag Chem Division of the American Marketing Association. I have served and continue to serve in leadership positions in a number of other agriculture and fertilizer industry organizations

Statement

The elimination or disruption in the rail transportation system for anhydrous ammonia would have direct and significant negative implications for U.S. agriculture as well as for the U.S. fertilizer manufacturing and distribution system. Given that 1) there is only limited substitutability between ammonia and other nitrogen fertilizer products and 2) there are no safe, economic alternatives for shipping anhydrous ammonia, any loss in rail transportation for anhydrous ammonia would not only result in significant reductions in farm productivity and profitability, but would also require massive investment in new infrastructure at all levels of the supply chain. Since domestic urea and urea-ammonium nitrate ("UAN") production facilities are already running at close to full capacity, the switch from ammonia to urea and UAN would push up import volumes and make U.S. farmers increasingly dependent on countries such as Venezuela, Saudi Arabia and Russia for their nitrogen fertilizer supplies. A forced switch from ammonia to urea and UAN would, no doubt, also bid up world prices for both of these products at a time when world urea and UAN prices are already at record highs.

Substitutability between the major nitrogen products is limited due to the specific characteristics of each of the major products and their suitability to particular farming practices and operations.

As discussed in Dr. Hoeft's statement, specific characteristics for each of the major products limits their substitutability. For example, ammonia is the only product that is recommended for fall application. The lack of wide scale substitutability between ammonia and the other major fertilizers products can be further evidenced by the fact that ammonia's share of the nitrogen market has remained steady despite wide swings



in both product prices and product price differentials. As shown in the figure above, ammonia's share of the market has remained virtually flat at approximately 26 percent of the market. In contrast, both urea's and UAN's share of the market has shown significant volatility. This suggests that while there is some substitutability between urea and UAN, there is very little substitutability between ammonia and urea and/or ammonia and UAN.

A forced shift from ammonia to urea and/or UAN would, no doubt, result in a significant increase in the cost of nitrogen fertilizers to U.S. farmers.

Ammonia, urea and UAN are classic commodity products that are highly price sensitive to incremental changes on either the supply or demand side of the equation. This high degree of sensitivity was clearly demonstrated this year when China imposed a 135% tax on urea exports in order to ensure adequate supplies to their domestic market. Considering that China exported 5.9 million tonnes of urea in 2007 and that the total world trade market for urea is approximately 36 million tonnes, the tax virtually eliminated roughly 16 percent of the world export volume. The net impact was a dramatic spike in the market with U.S. Gulf prices climbing from \$380 per ton in mid-April when the tax was imposed to \$490 at the end of April and to \$625 per ton by mid-May – an increase of \$245 per ton or 64% in one month. Assuming that the current ammonia market of 3.8 million product tons was shifted to 50% urea and 50% UAN, demand for urea would increase by approximately 3.1 million tons and the demand for UAN would jump by almost 5.0 million tons. As discussed later in this statement, virtually all of this increase would have to be sourced from offshore suppliers. Given the impact that the 5.9 million tonne loss in Chinese exports had on world market prices, it is clear that even a fractional decline in the ammonia rail system would have a dramatic and immediate impact on the fertilizer market.

A forced switch away from ammonia would require a massive investment in new infrastructure as well as the abandonment of a significant investment in the existing ammonia storage and distribution system.

The fertilizer business is highly seasonal with the vast majority of the product being applied within a very narrow time frame (6-8 weeks) in either the spring and/or, to

a lesser extent, in the fall. Consequently, any product that is not sold in a particular season must be carried over to the next season. This not only results in significant carrying cost, but also ties up working capital. This is particularly critical at the local dealer level. As a result, the existing fertilizer storage and distribution system as well as the volume of equipment to apply nitrogen to the field has been designed over the years to try to exactly match supply with expected demand (i.e. historical trends) with very little excess capacity to handle any significant change in product mix.

Given the balance between capacity and demand within the existing system, any permanent loss of ammonia supply due to the elimination and/or disruption of rail transportation would not only force fertilizers marketers to make a massive investment in new storage and handling facilities, but would also result in the abandonment of a significant investments in the existing ammonia system. To put this into perspective, the table below shows rough cost estimates of some of the major capital items involved in the distribution system. Although not included, the shift would also force farmers to make a significant investment in new tool bars and applicators.

Cost Estimates for Selected Distribution Assets

Product/Item	Marketing Level	Cost
<i>Ammonia</i>		
30,000 Ton Refrigerated Tank	Manufacturer	\$10-12 MM
200 Ton Bullet	Local Dealer	\$500,000+
<i>UAN</i>		
30,000 Ton Stainless Steel Tank	Manufacturer/Distributor	\$2.0-2.5 MM
5,000 Storage Tank	Local Dealer	\$750,000+
Liquid Sprayer - "Hi Boy"	Local Dealer	\$250,000
<i>Urea</i>		
30,000 Ton Dry Storage	Manufacturer/Distributor	\$8-12 MM
Dry Bulk Applicator	Local Dealer/Custom Applicator	\$250,000

U.S. farmers would be forced into further dependence on nitrogen imports from countries such as Venezuela, Saudi Arabia, Kuwait and Russia.

Domestic urea and UAN producers are currently running at close to full capacity. Consequently, any shift away from ammonia to urea and/or UAN would have to be supplied by a highly uncertain offshore market

The table to the right shows U S imports by country of origin for both urea and UAN As can be seen, U.S. imports of urea have almost doubled since 2000 with virtually all of the increase coming from the Middle East as well as countries such as Venezuela, Libya and China. UAN imports have also increased dramatically since 2000 with most of that increase being sourced from Russia, Ukraine and other Eastern Bloc countries.

The loss of ammonia and resulting switch to offshore imports of urea and UAN would result in further dependence of U S farmers for their nitrogen requirements on a highly uncertain and highly volatile supply base that is subject not only to political events, but also changes in world market conditions This was particularly evident at the beginning of both Gulf Wars when shipping out of the Middle East was completely shut down

***U S Urea and UAN Imports by
Country of Origin
(000 Product Tons)***

	FY2000	FY2007	Change
Urea			
Canada	2,032	2,015	-18
Trinidad	297	454	158
Venezuela	38	457	420
Middle East	976	2,159	1,184
Lybia	0	314	314
China	0	417	417
Other	264	436	171
Total Imports	3,607	6,252	2,646
% of U.S. Supply	41%	66%	
UAN			
Canada	290	673	383
Russia	399	681	283
Ukraine	156	131	-25
Belarus	0	142	142
Lithuania	0	168	168
Romania	0	301	301
Other	53	292	239
Total Imports	898	2,389	1,490
% of U.S. Supply	9%	21%	

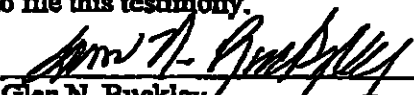
It is also important to recognize that producers in these countries have no commitment to the U.S market and will ship product to the markets where they can get the best net back price. This was certainly the case this year when a number of cargoes that were intended for the U.S market were diverted to Latin America. Increasing

dependence on offshore production also makes U S farmers vulnerable to the highly volatile ocean bound freight market For example, freight rates from the Middle East to the U S gulf have recently spiked to \$109 per tonne This compares to a historical average prices of approximately \$40 per tonne

Given the importance of nitrogen to crop production, further increasing our reliance on offshore supplies from areas such as the Middle East, Venezuela or Russia for such a critical nutrient is clearly not good policy and could threaten U S food security This is particularly important right now for crops such as corn and wheat where supplies are at extremely low levels and prices are at record highs

VERIFICATION

I, Glen N. Buckley, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this testimony.



Glen N. Buckley
Chief Economist and Director of
Agribusiness Analysis, CP Industries, Inc.

Executed on July 10, 2008.