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BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

**TESTIMONY OF SHARON PICIACCHIO
AND SUPPLEMENTAL WRITTEN SUBMISSION
ON BEHALF OF
PPG INDUSTRIES, INC.**

PPG INDUSTRIES, INC

By Its Attorney

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PPG Industries, Inc. ("PPG") appreciates the opportunity to submit testimony and supplemental written comments to the Surface Transportation Board ("STB" or "Board") in response to the Board's Notice of Public Hearing regarding the *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials* to be held on July 22, 2008 in Washington, DC. Ms. Sharon Piciacchio, Vice President of Marketing, Services and Cal Hypo, Chlor-Alkali & Derivatives, will testify on behalf of PPG at the hearing.

Less than three months ago, the Board held a hearing on the common carrier obligation of railroads. At that hearing, opposing testimony was provided by the railroads and chemical shippers on the issue of the transportation of hazardous materials and, in particular, materials classified as toxic inhalation hazards, i.e. "TIH" commodities. The railroads expressed concerns that the common carrier obligation requires them to haul TIHs, which creates liability risks that could be ruinous in the event of an accident. TIH shippers explained the critical uses and importance of TIH commodities to public citizens and emphasized that railroads by far are the

safest means of transporting such materials over-land The Board was informed at the hearing that the railroads have bluntly notified chemical shippers of their preference not to haul TIHs and that the common carrier obligation is essential to ensuring that TIH shippers obtain access to rail service and, most importantly, that the public interest in ensuring the safe transport of these materials is fulfilled

In response thereto, the Board has now scheduled this hearing to explore the issues surrounding the transportation of hazardous materials by rail, including what constitutes a reasonable request for service involving the movement of TIH materials, the appropriate role of the Board in developing potential policy solutions to the hazardous materials liability issue (such as Price Anderson Act type solutions); whether there are unique costs associated with the transportation of hazardous materials and whether the railroads recover such costs, and efforts by federal agencies including the Federal Railroad Administration ("FRA") and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") to address the transportation of hazardous materials.

PPG is concerned that the Board may be considering taking action that would narrow or eliminate the railroads' common carrier obligation as applied to the transport of hazardous materials and, in particular, TIHs in order to address the liability concerns of the railroads PPG believes that such action would be contrary to the long-standing case precedent that establishes that it is a violation of the common carrier obligation for railroads to refuse to transport commodities based solely on their dangerous characteristics, when such commodities are tendered in compliance with existing Department of Transportation ("DOT") safety standards PPG further believes that there are limitations on the Board's authority to broadly address all of the complex issues presented by the carriage of TIHs, since other federal agencies have

jurisdiction over rail safety, and that the issues raised by the Board in this hearing are better addressed by Congress. Moreover, any action that may be taken by the Board to limit the common carrier obligation with respect to the carriage of TIHs would likely have a profound negative impact on PPG's, the chemical industry's, and the public's interest in ensuring that TIHs are safely transported across the nation.

I. INTEREST OF PPG

PPG is a diversified manufacturer of chemicals, protective coatings, glass and fiber glass with over 22,000 employees in the United States and more than 50 major shipping facilities in 23 states. Total sales for the company in 2007 were approximately \$11 billion. It is expected that in 2008 almost half of PPG's total gross sales will be in the US. PPG is a global company and operates in more than 60 countries.

PPG's commodity chemicals segment produces chlor-alkali and derivatives including chlorine, caustic soda, vinyl chloride monomer, chlorinated solvents, chlorinated benzenes, calcium hypochlorite, and other chemicals. Most of these products are sold to other manufacturing companies in a variety of industries including, without limitation, plastics and rubber, chemical processing, minerals, metals, paper, and water treatment industries. Price, availability, product quality, customer service and effective transportation are the key competitive factors in these businesses. Efficient and affordable rail transportation is a business-critical component to PPG. PPG's chlor-alkali business segment operates three primary-production facilities (two in the US and one in Canada) and employed over 2,000 people in 2007.

Dramatic cost increases, particularly in transportation and energy, have had a significant impact on PPG's businesses, including the commodity chemicals segment. In recent years, such cost pressures are threatening PPG's ability to compete in a global marketplace. PPG has seen

the rail cost to ship chlorine increase more than 80% since 2004. In the case of natural gas price inflation, PPG estimates that every \$1.00/MMBtu incremental increase in natural gas price impacts PPG's costs by approximately \$60 to \$70 million dollars annually. The effects of this cost escalation are further exacerbated by rising costs for labor and materials, particularly in the Gulf Coast region. All of these are impacting the competitive landscape and continued viability of the marketplaces in which PPG competes.

PPG is one of the nation's largest manufacturers of chlorine, a TIH commodity. PPG has a crucial reliance upon rail transportation for a large portion of its chlorine distribution, while also using two other modes, barge and pipeline.

Despite its hazardous characteristics, chlorine is essential to the nation's economy and to human life:

- it is needed in the production of 85% of all pharmaceuticals
- it is used to disinfect and purify 98% of the US water supply
- it is required in the production of 95% of crop protection chemicals
- it is involved in products that represent approximately 45% of the nation's Gross Domestic Product
- for 95% of the uses for chlorine, there is no ready substitute and it cannot be replaced in the nation's economy
- it is used in a broad range of other products from the paint on rail cars to finished goods transported to the railroads' customers, thus, without chlorine transportation by rail, those other products upon which the railroads depend would not be available, thereby negatively impacting the railroads' own viability

The US economy and modern society depend on the safe distribution of chlorine and it is undisputed that rail is the safest over-land method of transporting this commodity. The vast majority of chlorine consumers cannot physically receive chlorine by barge or pipeline.

PPG takes its responsibility to ensure the safe transport of chlorine very seriously. In 2007, PPG was recognized by all five class I rail carriers for completing the year without a shipper caused hazardous material release

II. RAIL TRANSPORTATION OF TIH SHIPMENTS THAT COMPLY WITH DOT SAFETY STANDARDS ARE REASONABLE UNDER THE EXISTING LAW OF THE COMMON CARRIER OBLIGATION

The common carrier obligation is a broad and fundamental duty that requires rail carriers to "provide the transportation or service on reasonable request " 49 U S C § 11101 The Board has asked for comments on what constitutes a reasonable request for service when the commodity involved is a TIH PPG asserts that the history of the common carrier obligation, as well as existing case precedent applying that obligation, demonstrate that no new conditions must be imposed on the rail transportation of TIHs in order for such transportation to satisfy the "reasonable request for service" requirement The law of the common carrier obligation emphasizes the importance of the public interest, including the issue of rail safety, when determining reasonable requests for service. These factors override the railroads' liability concerns

A. Public Need Defines the Boundaries of the Common Carrier Obligation.

The common carrier obligation, which is rooted in the English common law system, is older than railroading itself The American legal concept of common carriage for railroads has evolved from this common law into an explicit statutory framework that defines the common carrier obligation in terms of the public need for rail transportation

The common law duty of common carriage did not extend automatically to all goods and services Courts did not force a carrier to undertake the carriage of goods that it was unaccustomed to carrying *Akron, Canton & Youngstown R R Co v ICC*, 611 F 2d 1162, 1166 (6th Cir 1979) ("*Akron*") ("It is true that common law carriers could pick and choose which

goods they transport in common carriage "). However, once it was established that a carrier did hold itself out to transport certain goods, the duty to transport those goods upon reasonable request became part of its common carrier obligation.

Although the United States began to regulate rail transportation via statute with the passage of the Act to Regulate Commerce in 1887, the common carrier obligation itself remained a derivative of common law for several more decades. *See Missouri Pac Ry Co v Larabee Flour Mills Co* , 211 U S 612 (1909) (noting that in the absence of a federal law addressing common carrier duties in interstate commerce, a state could enforce such a duty based on the common law) Under the common law, courts held that "[w]hile no one can be compelled to engage in the business of a common carrier, yet when he does so certain duties are imposed which can be enforced by mandamus or other suitable remedy " *Id* at 619

The Transportation Act of 1920 codified the common law obligations of railroads as common carriers *See American Trucking Association, Inc v Atchison, T & Santa Fe Ry Co* , 387 U.S. 397, 406 (1967) The Act also codified specific common carrier duties, including the provision of transportation upon reasonable request. This was the first statutory attempt to clearly delineate the common carrier obligation and to vest jurisdiction that had rested previously solely in the courts with the Interstate Commerce Commission ("ICC") ¹

The ICC and the courts have interpreted the 1920 Transportation Act and subsequent legislation to impose common carrier duties upon railroads beyond those that exist in the common law For example, although at common law only carriers who "held themselves out to the public" were common carriers, the Interstate Commerce Act defined common carrier as including railroads. *Akron*, 611 F 2d at 1166 Also, while the common law permitted common

¹ Frank Cusham, *Manual of Transportation Law*, The Transportation Press, Dallas, TX, 1951 at 95

carriers to pick and choose the goods that they would transport in common carriage, railroads "whose property and facilities are affected with a public interest, (were) ordinarily held to be common carriers of goods delivered to them for transportation " *Id*, quoting 13 C J S

Carriers § 6 This declaration of the common carrier status of railroads has been considered just and reasonable "in view of the governmental largess which railroads have received, and in view of the unique importance to commerce of rail transportation " ² *Id* [footnote omitted]

The *Akron* decision, at page 1168, succinctly summarizes the present state of the law.

This "holding out" may have indeed been one of the earmarks of common carriers at common law, but in the almost one hundred years since the passage of the Act there has developed a new "common" law of transportation under which the public duty of railroads has been broadened beyond that extant under the common law of carriers. It is not only "common carriage," but transportation which is subject to the Act and to the Commission's statutory powers See, e g., Cincinnati, N.O. & T P Ry v Chesapeake & O Ry, 441 F 2d 483 (4th Cir 1971), Republic Carloading Co v. Missouri Pacific R R, 302 F 2d 381 (8th Cir. 1962) (per Blackmun, J) *A carrier's statutory duties run not to shippers alone, but to the public* Brotherhood of Ry Clerks v. Florida E.C Ry., 384 U.S. 238, 86 S Ct 1420, 16 L Ed 2d 501 (1966) *Therefore, public needs must shape the boundaries of these duties.* [italics added]

Thus, railroads may no longer pick and choose the commodities that they haul, but instead are required to provide service for all commodities tendered upon reasonable request to fulfill the transportation needs of both shippers and the general public.³

B. The Public Need for the Safe Transport of TIH Materials is Fundamental to Whether a Request for Rail Transportation is Reasonable.

As noted above, because the public need for rail transportation of TIH materials defines the boundaries of the common carrier obligation, *see Akron* at 1168, it is an essential factor in

² Examples of such governmental largess include public land grants, loans and subsidies, antitrust exemptions, extensive preemption of state and local laws, and eminent domain powers

³ Although there are exceptions to the general statutory common carrier obligations of railroads, those exceptions are limited to a few clearly defined circumstances *Akron*, 611 F 2d at 1166-67 None of these circumstances are relevant to the common carrier obligation to transport TIH materials

determining whether a request for rail transportation of TIH materials is reasonable. The importance of TIH materials to the public health and welfare, including shipments of chlorine, was repeated many times at the April 24-25 STB hearing on the common carrier obligation. That testimony has left no doubt that there is a great public need for the safe transportation of TIH materials. Furthermore, there is broad agreement among railroads and shippers, which is shared by both PIIMSA and FRA, that rail transportation is the safest mode by which to transport TIH materials over-land. 73 Fed Reg 17818, 17838 (April 1, 2008). This overriding public need, and the long history of railroads transporting TIH materials as common carriers, establishes a strong presumption of reasonableness for any request to transport TIH materials in compliance with applicable safety regulations. It is incumbent upon a railroad to rebut this strong presumption.

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

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

Two lines of ICC decisions affirmed by the courts that involved the transportation of radioactive materials have rejected safety arguments as grounds to narrow the common carrier obligation when there is an important public need for rail transportation of a hazardous material. In both lines of cases, the overriding public interest in transporting the radioactive materials and the role of rail transportation as the safest mode has prevailed over all claims that such transportation is unsafe. The courts, however, have provided guidance as to when railroads may

impose more stringent safety requirements than those adopted by DOT, although no such requirements ever have been approved under those guidelines.

The first line of safety cases held that a railroad may not ask the Board "to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT regulations governing such transport, and these regulations have been met " *Akron*, 611 F.2d at 1169. *See also, U S Dept of Energy v The B & O R R Co*, 364 I.C.C. 951, 959 (1981) ("DOE") There are extensive DOT regulations, promulgated by PHMSA and FRA, that govern the safe transportation of TIH materials by rail Moreover, significant additional safety enhancing regulations either recently have been adopted or are under consideration by PHMSA, FRA and the Transportation Safety Administration ("TSA") *See Part IV, infra* Also, just as with radioactive materials, "no other mode of transportation is more suited to the economical carriage of these materials than train carriage...." *Akron* at 1168 ⁴ Thus, there can be no claim that TIH materials are too dangerous to transport, nor has the rail industry provided evidence in support of such a claim

The second line of safety cases held that "railroads may seek to prove the reasonableness of additional safety measures, but the burden is upon them to show that, for some reason, the presumptively valid [DOT] regulations are unsatisfactory or inadequate in their particular circumstance " *Consolidated Rail Corp v ICC*, 646 F.2d 642, 650 (D.C. Cir. 1981) ("*Conrail*"); *See also, DOE* at 959-60 In general, "(no) party has a right to insist upon a wasteful or excessive service for which the consumer must ultimately pay " *Conrail* at 647, quoting *Atchafalpa Ry Co v U S*, 232 U.S. 199, 217 (1914). "The safety measures for which

⁴ The ICC found that "truck shipments of nuclear wastes would, because of the greater number of smaller shipments required, increase the probability of accidents involving nuclear materials " *Id* The same would be true of TIH materials

expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their cost, and second, that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit " *Id* at 648 Because DOT has paramount jurisdiction over rail safety matters, there is a rebuttable presumption "that expenditures for safety measures not specified by [it] are unnecessary and fail to satisfy the criteria of reasonableness.. ." *Id* at 650.

With respect to TIH materials, the rail industry has not attempted to impose stricter requirements upon shippers than those adopted by DOT, except for a recent attempt by the Association of American Railroads ("AAR") to impose a more stringent requirement for tank cars In the FRA's recent Notice of Proposed Rulemaking on new tank car standards, however, FRA rejected AAR's standards, which the AAR Tank Car Committee had adopted over unanimous opposition by shipper members and near unanimous opposition by all but one tank car manufacturer 73 Fed Reg. 17818, 17825 (April 1, 2008). Various shipper trade associations and the AAR have attempted to avoid a dispute over the AAR's tank car requirements by jointly asking FRA to adopt their proposed interim tank car standard while FRA considers the content of a final rule Thus, there currently are no railroad actions that would implicate this second line of safety cases, as they relate to the reasonableness of a request for rail transportation of TIH materials.

2. Railroads are not entitled to special treatment for their liability risks just because they are obligated as common carriers to transport TIH materials in the public interest.

In contrast to the safety issues, the liability issue has dominated the current discussion over when a request to transport TIH materials is reasonable The railroad industry's principal concern is its potential liability exposure in the event of an accidental release of TIH materials The railroad industry contends that, because railroads have a common carrier obligation to

handle TIH materials that is imposed upon them for the public interest, their liability should be limited. This contention has raised the question whether a request for transportation of TIH materials without liability limits is reasonable. What the rail industry seeks, however, is special treatment of a risk that is not unique to the rail industry. The mere fact that railroads are obliged to assume this risk by the common carrier obligation does not justify special treatment.

In reviewing this issue, the Board first must critically scrutinize railroad claims that, but for the common carrier obligation, they would not haul TIH materials because of their liability exposure. The validity of those claims must be established before there can be any basis for questioning the reasonableness of a request for TIH transportation.

Historical evidence seriously undermines such railroad claims. The railroad industry has hauled TIH materials for many decades, and in fact has competed to haul these materials. Only recently have railroads asserted that they no longer would choose to haul TIH materials and attempted to "demarket" those commodities in their pricing. But, by choosing to be common carriers, and then by hauling TIH materials as common carriers for nearly a century, railroads have chosen to accept all the associated benefits and obligations of common carriage. This means that railroads in fact have chosen to haul TIH materials along with all the other commodities that a common carrier is required to transport. The long history of transporting TIH materials as common carriers, and the strong public need for such transportation that is as great as it ever has been, establishes the presumptive reasonableness of a request for such transportation.⁵

⁵ *Cf. Akron*, 611 F.2d at 1167 ("[I]t is the long history of the present petitioners' carriage of nuclear materials, and the continuing national need for such carriage, which takes the petitioners' transport of nuclear materials from the realm of 'accommodation or special engagement' where the Act's ratemaking provisions do not apply.")

Although the rail industry claims that times have changed, the common carrier obligation does not permit the *a la carte* selection of commodities based upon the convenience to each railroad at any particular point in time. Moreover, the changed circumstances alleged by the rail industry implicate tort reform issues, which are not unique to railroads and have imposed greater liability upon all industries. This is a subject that only Congress can address through more comprehensive reforms well beyond just the rail industry. Companies that manufacture and use TIH materials every day face risks similar to a railroad's risk in transporting TIH materials, yet they continue to engage in their businesses and without liability limits.

Trucking firms choose to transport TIH commodities without liability limits. Unlike the trucking industry, however, where if one trucker does not want to transport a product, another trucker can readily serve the shipper, there are substantial barriers to entry in the rail industry. If one railroad decides that it does not want to transport TIH materials, there is no alternative that would be equally as safe, and in some cases no alternative at all. Thus, railroad claims that the common carrier obligation is unfair to them without liability limits do not seem reasonable when no other TIH industry participant with similar liability risks has made such claims.

Thus, it is the common carrier obligation itself that ensures that TIH materials are transported by the safest mode possible, because it guarantees that rail transportation is always available.

3. Railroads must be held accountable for their actions.

It is often stated in the shipper community that liability limits inherently affect safety. Absolving railroads of financial responsibility in whole or even in part for their own negligent acts may reduce incentives for safe behavior. The most costly rail accidents involving the release of TIH materials have occurred at Minot, ND, Macdona, TX, and Graniteville, SC. The

National Transportation Safety Board ("NTSB") attributed all three accidents to conditions that were within the control of the railroads.⁶ The railroads must be held accountable.

Selective liability limits that would increase the cost to transport TIH materials even higher may encourage consumers to shift more demand to trucks. Any shift from rail to truck would potentially have a cascading risk effect on both the transportation and loading/unloading of TIH materials. Added truck volumes would compound practical concerns around highway congestion, accident prevention and a shortage of specialized tank trucks and drivers. This would be detrimental to the public need for the safe transport of TIH materials.

4. Recent legislation expands liability of railroads for negligence.

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

⁶ Derailement of Canadian Pacific Railway Freight train 292-16 and Subsequent Release of Anhydrous Ammonia near Minot, North Dakota, January 18, 2002, NTSB/RAR04-01, PB 2004-916301, Notation 7461A (March 9, 2004) at vi, 32-33, 55-57, 68-69 (stating that the accident was caused by inadequate track inspection, which failed to identify failed track joints and noting that inadequate training and maintenance of training activity reports were contributing factors), Collision of Union Pacific Railroad Train MHOTU-23 with BNSF Railway Company Train MEAP-TUL-126-D with Subsequent Derailement and Hazardous Materials Release, Macdona, Texas, June 28, 2004, NTSB/RAR-06-03, PB2006-916303, Notation 765D (July 6, 2006) at vi, 16-18, 26-31, 36-43, 58-59 (finding that the accident was caused by the train crew's failure to follow a stop signal according to operational rules, the crew's lack of sleep and long duty tours, the conductor's alcohol consumption, the likelihood that the conductor slept for most of the train trip, and limbo time as it related to crew fatigue), Collision of Norfolk Southern Freight Train 192 with Standing Norfolk Southern Local train P22 with Subsequent Hazardous Materials Release at Graniteville, South Carolina, January 6, 2005, NTSB/RAR-05/04, PB2005-916304, Notation 7710A (November 29, 2005) (finding that the accident was caused by the train crew's failure to reline a mainline after use leading to an unexpected diversion of train 192 where it struck P22 and derailed, also finding that the failure to reline may have been due to the crew's inattentiveness to the switch due their attempt to secure the train before reaching hours-of-service-limits, and the location and lack of visibility of the switch to the crew, also noting that if the conductor had followed operating rules and held a job briefing, the crew may have attended to the main line switch, which would have prevented the accident).

Congress enacted this provision in response to several federal court decisions holding that state law tort claims for the accidental release of anhydrous ammonia, a TIH material, arising from a Canadian Pacific derailment near Minot, North Dakota, were completely preempted by the Federal Railroad Safety Act. *E.g., Lundeen v Canadian Pac Ry Co*, 447 F.3d 606 (8th Cir. 2006); *Mehl v Canadian Pac Ry*, 417 F. Supp. 2d 1104 (D.N.D. 2006). The courts had held that preemption is complete not just when a railroad has complied with minimum federal safety regulations, but also even when it has not done so. In amending Section 20106, Congress declared that state law causes of action are not preempted when a railroad has failed to comply with federal regulations or with the railroad's own standards created pursuant to federal regulation. 49 U.S.C. 20106(b)(1) (2008).

The link between this legislation and the Minot incident is explicit in the legislative history, which states that the retroactivity provision in subsection (b)(2) "applies to all pending State law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota derailment." H.R. Rep. No. 110-259, 100th Cong. 1st Sess. at 351 (2007). Thus, it is clear that, as recently as last year, Congress enacted an express statutory provision to expand the railroads' liability for damages resulting from their own negligence for accidents, including those involving the release of TIH materials. This Board must not take any action that is inconsistent with Congress' intent.

III. THERE IS NO EVIDENCE THAT TIH INSURANCE AND HANDLING COSTS JUSTIFY CHANGES TO THE COMMON CARRIER OBLIGATION

The railroads have asserted that rates for the transportation of chlorine have increased substantially to cover rising costs for insurance to handle chlorine and to cover costs to comply with operational requirements of chlorine transportation. However, to PPG's knowledge, the railroads have never quantified or provided data supporting the unique costs that are claimed to

be required to handle TIHs. Given that PPG has seen the rail cost to ship chlorine increase more than 80% since 2004, PPG seriously questions whether the substantial rate increases that it has experienced are solely intended to cover TIH shipment costs. Rather, we suspect that the extraordinary price increases are due in large part to the substantial market power possessed by the railroads, especially over captive shippers and that, based on the railroads' blunt assertions that they would prefer not to haul TIHs, the increases are intended to "demarket" this traffic and discourage PPG from making chlorine shipments, especially those of longer hauls. Unless the railroads can establish through supporting data that their rates for TIH shipments are non-compensatory, there is no justification for the Board to consider changes to the common carrier obligation based on TIH shipment handling costs.

IV. ANY CHANGE TO THE COMMON CARRIER OBLIGATION TO ADDRESS RAILROAD LIABILITY MUST BE THOROUGHLY EVALUATED AND UNDERTAKEN BY CONGRESS

A. The Board's Role in Addressing Liability is Limited.

The Board's jurisdiction is limited to the economic factors related to application of the common carrier obligation. Specifically, Congress has granted the Board jurisdiction over "transportation by rail carrier" 49 U.S.C. 10501(a)(1). That jurisdiction extends to "remedies with respect to rates, classifications, rules, practices, routes, services, and facilities of such carriers." 49 U.S.C. 10501(b)(1). This jurisdiction covers the operations of rail carriers and the terms and conditions of carriage between carriers and shippers. Other federal agencies have primary jurisdiction over transportation safety and security, e.g. FRA, PHMSA, TSA, and the Department of Homeland Security ("DHS"). PPG believes that one means of addressing the railroads' liability concerns is for the government to continue to focus on improvements to rail transportation safety and security in order to prevent accidents involving hazardous materials from ever occurring. There have been a number of recent rail safety and

security initiatives related to the transport of hazardous materials undertaken in recent years PHMSA and the FRA have promulgated interim final rules that incorporate the 9/11 Recommendations Act of 2007 (73 Fed. Reg. 20752, April 16, 2008); PHMSA and FRA have issued a Notice of Proposed Rulemaking on new tank car safety standards (73 Fed. Reg. 17817, April 1, 2008), and TSA issued a Notice of Proposed Rulemaking to address security risks associated with TIH shipments (71 Fed. Reg. 76852, Dec. 21, 2006). These initiatives are excellent examples of the role the federal government needs to take to improve the safe handling of TIH shipments. Moreover, these important safety and security matters which are inextricably associated with the transport of TIH shipments are beyond the Board's jurisdiction.

B. Due to the Board's Limited Role, if any Review is Undertaken, it Should be Undertaken by Congress.

PPG does not agree that a review of the common carrier obligation for TIH shipments is warranted or justified. However, if any government initiative were undertaken for this purpose, it should be undertaken by Congress and must involve a comprehensive evaluation of the safety, liability and public interest considerations simultaneously. We are concerned that limitations on the Board's jurisdiction over safety and state tort laws would render any proceedings or actions taken by the Board on this issue incomplete. Moreover, any desire by the railroads for liability limits or caps to be established for TIH shipments under a model similar to the Price-Andersen Act presents complex issues involving insurance pools, joint and several liability in the case of an accident, parties to be covered by any liability caps (e.g., railroads, shippers, etc.), and important public policies relating to accident prevention.

In that respect, for any such Congressional initiative regarding liability limitations for TIH shipments to be successful, it must include the following key items:

- Railroads should be required to disclose to Congress the details of “unique and extra costs” associated with transporting TIHs and that information should be reviewed in conjunction with potential liability limitations and rate structures
- Any liability cap or limitation applicable to the transportation of TIH shipments must include funding, in some form, which is borne primarily by the railroads (insurance, etc.)
- If adopted, liability caps should be extended to shippers and not just the railroads, with conditions or exceptions included to address intentional or grossly negligent acts
- Improved safety requirements for the railroads and mandatory audits to assess compliance with the requirements
- Rate Relief

Congress should evaluate the adoption of a liability limit in conjunction with options for providing reasonable rate structures for TIH shipments, including long-term rate relief for tariff and contract shipments and other potential reforms to the rate relief procedures administered by the Board

The STB 's rate reasonableness standards and procedures should be further streamlined to allow rate challenges to be brought in a more cost and time efficient process

V. CONCLUSION

PPG appreciates the opportunity to comment and provide testimony on the “Common Carrier Obligations of Railroads – Transportation of Hazardous Materials ” The common carrier obligation to transport TIH materials safely and at reasonable rates is vital to our economy and our customers and satisfies a critical public need In that regard, PPG is willing to work collaboratively with other key stakeholders to develop an appropriate model to address the key concerns of stakeholders related to TIH shipments including, without limitation, reasonable rate structures, liability risks, and safety issues As noted, these are complex issues that will require a comprehensive review and analysis and, by necessity, require that all key stakeholders cooperate

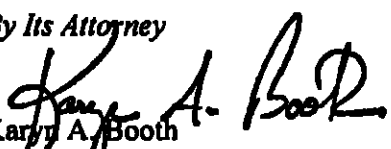
and provide the necessary resources and information in order to develop and achieve a workable resolution

For the foregoing reasons, PPG does not believe that the Board should undertake action to review or change the common carrier obligation with respect to the transport of chlorine or other TIH commodities.

Respectfully submitted,

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