



The Fertilizer Institute

Nourish, Replenish, Grow

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte 677 (Sub-No. 1)

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

TESTIMONY
OF
THE FERTILIZER INSTITUTE

The Fertilizer Institute (TFI) is the national trade association whose membership consist of fertilizer producers, importers, retailers, wholesalers and others involved in the business of fertilizer. The mission of TFI is to represent, promote and protect the fertilizer industry. Fertilizer nutrients provide the "food" plants need to grow, insure there is an adequate supply of nutritious food and animal feed, and a bountiful supply of fiber as well as biofuels to help meet the nation's energy needs. Without fertilizer in general and in particular ammonia, our nation's food and energy supply would be adversely affected and the world would be without forty to sixty percent of today's harvest.

We are pleased that the STB has recognized the importance of the common carrier obligation and is holding its second public hearing to receive testimony on the many issues that are involved with this obligation

I RAIL TRANSPORTATION OF ANHYDROUS AMMONIA

Fertilizers are transported by all modes pipeline, barge, rail, truck and ocean vessels. Many fertilizers are not hazardous materials. However, anhydrous ammonia, the basic building block for all nitrogen fertilizers and a key ingredient in the production of phosphate fertilizers, is a toxic inhalation hazard (TIH) material. Anhydrous ammonia is the second largest TIH commodity by volume transported by rail. As a result, many issues surrounding anhydrous ammonia by rail and the railroads' common carrier obligation have arisen in recent years

A. Importance of Anhydrous Ammonia to U.S. Agricultural and Energy Policies

Anhydrous ammonia is essential to growing food for millions of Americans. It is the least costly and most effective source of nitrogen fertilizer for American farmers. In addition to its direct application as a fertilizer, anhydrous ammonia is the primary ingredient in all other nitrogen fertilizers, such as urea and urea ammonium nitrate solution ("UAN"), and is also a necessary component of phosphate fertilizers, such as diammonium phosphate ("DAP") and monoammonium phosphate ("MAP"). DAP and MAP are the primary forms of phosphate fertilizer and the nation would be unable to replace them with a suitable source of phosphate if fertilizer manufacturers could not get the ammonia to the phosphate production facilities

Fertilizers high in nitrogen are essential for crops such as corn, which is the largest consumer of direct applied anhydrous ammonia. A single rail car of ammonia produces approximately 128,000 bushels of corn, which can feed approximately 1600 cattle or produce 345,600 gallons of ethanol. Corn also is used in thousands of basic food products found on your

grocers' shelves. There simply is no substitute for anhydrous ammonia in maintaining our nation's food supply.

Anhydrous ammonia is also vital to a variety of industrial applications and is the only raw material available for the production of some consumer goods. For example, anhydrous ammonia is necessary to produce certain pharmaceuticals, adhesives, feed supplements, personal care products and nylon fibers. Coal burning power plants use anhydrous ammonia to comply with Clean Air Act emission standards. For most industrial users, there is no substitute for anhydrous ammonia.

The rail industry has suggested that farmers replace anhydrous ammonia with other nitrogen fertilizers such as urea and UAN in order to reduce the volume of anhydrous ammonia that must be transported. There are several reasons why this is not realistic. First, because anhydrous ammonia is necessary to produce urea, UAN, and most phosphate fertilizers, it still must be available to the production sites for these "substitutes." Second, these "substitutes" must be used in much greater quantities and at much greater cost, which would further burden our nation's capacity-constrained transportation network and increase already rising food and fuel costs. Third, ammonia producers, distributors, and farmers have made extraordinary investments in infrastructure, including production facilities, storage tanks, pipelines, barges, rail cars, tank trucks, nurse tanks and applicators, that would be stranded by switching to alternative sources of nitrogen. Fourth, there is not enough excess production capacity for these substitutes to replace substantial volumes of anhydrous ammonia. Fifth, unlike anhydrous ammonia, which bonds with soil after application in the Fall, other sources of nitrogen tend to leach out of the ground before Spring, resulting in potential environmental issues. Anhydrous ammonia is typically the only nitrogen source recommended by universities for fall application to spring planted crops.

The current nitrogen fertilizer distribution and transportation infrastructure is inadequate to allow huge shifts toward Spring applications of nitrogen where anhydrous ammonia has been or is the predominant nitrogen source. Any large shifts away from anhydrous ammonia to alternative nitrogen sources, which would need to be applied in the spring, could prove expensive to farmers and fertilizer retailers, could pose risks of sizeable damage to local and state economies, and, most importantly, could result in a substantial decline in the crop yields per acre

For the fiscal years 2000 – 2006 (year ending June 30), agricultural use of anhydrous ammonia averaged 3.941 million tons of material. With a concentration of 82 percent nitrogen (N), this quantity of ammonia is equivalent to 3.232 million tons of N. If use of anhydrous ammonia were discontinued, these 3.232 million tons of N would have to be supplied by other nitrogen fertilizers. Other options like urea (46 percent N), nitrogen solutions (28-32 percent N) and/or ammonium nitrate (34 percent N) all contain much lower concentrations of N so significantly more product would need to be applied in order to attain the same amount of N.

For example, if the N in the ammonia that farmers currently apply had to be replaced by urea, an additional 7.025 million material tons of urea would have to be applied annually. This is an increase of 131 percent, or more than twice the urea currently applied (5.37 million material tons in FY2005/06) by U.S. farmers. Use of nitrogen solutions, which stood at 10.104 million tons of material in FY2005/06, would also have to more than double (107 percent) to supplant the N currently supplied in the form of ammonia. Use of ammonium nitrate would have to increase 10 fold from 0.964 million material tons in FY2005/06, because an additional 9.5 million material tons would be required to replace the N currently applied by U.S. farmers in the form of ammonia.

Realistically, the N currently applied in the form of ammonia would be provided by some combination of an increase in the use of all three materials, however, even a scenario which relies on urea, nitrogen solutions and ammonium nitrate to replace 45, 45, and 10 percent of the ammonia-sourced N, respectively, would require an additional 3.16 million material tons of urea, 4.85 million material tons of nitrogen solutions and 0.95 million material tons of ammonium nitrate, or 9 million additional tons of material. Even if these materials were readily available on the world market, the addition of 9 million tons of material would significantly strain the U.S. agricultural transportation and distribution systems. However, under the current tight U.S. and world fertilizer supply-demand balance, it is not possible to source the significant quantities of these materials necessary to supplant the N currently supplied by anhydrous ammonia.

The problem for the U.S. farmer is further exacerbated by the fact that any increase in alternative sources of non-ammonia nitrogen materials would significantly increase field costs. More importantly, field and weather conditions already limit the window during which fertilizer materials can be applied. Having to apply significantly more tons of material (9 million in the scenario presented above) to supply the same quantity of N will further constrain field operations and increase the probability of sub-optimal nutrient applications and sub-optimal crop yields. This scenario also doesn't consider that farmers and fertilizer dealers do not have the necessary equipment to make large shifts from anhydrous ammonia to sources like urea or UAN solutions, which would need to be applied only in the spring for crops such as corn and would require a different transportation and application infrastructure.

Furthermore, agricultural use of anhydrous ammonia is only part of the picture. The U.S. industrial market, defined as anhydrous ammonia which is not directly applied in agriculture or used in the manufacture of fertilizer materials, uses an additional 6-6.5 million material tons of anhydrous ammonia annually. While some of this material is imported and used at plants located

near port facilities, over 80 percent (5.1-5.2 million material tons) is transported significant distances by barge, pipeline and rail. Approximately 45 percent of this share, or 2.3-2.4 million tons, moves by rail. In some manufacturing processes which use ammonia, product substitution is not even possible. But even when it is, sourcing substitute products for industrial ammonia use for the 2.3-2.4 million material tons currently transported by rail will be a significant and costly burden to the U.S. industries.

The rail industry also has suggested that anhydrous ammonia could be shipped in a diluted solution known as aqua ammonia (which is 20 percent anhydrous ammonia). This would require three times the current number of rail shipments, with a greater increase in infrastructure investment, such as rail cars and storage facilities that are not currently in place for most shippers. In addition to tripling rail shipments, making costly production modifications, and significantly increasing infrastructure investment, aqua ammonia would require the treatment and disposal of over two billion gallons of water annually.

B. Safety, Security and the Cost Associated with Anhydrous Ammonia Transportation

The AAR has stated, and TFI agrees, rail transportation of hazardous materials including anhydrous ammonia is the safest mode for transportation of these materials. According to AAR statistics, there were an average of 50,860 shipments totaling 4,070,000 tons of ammonia shipped by rail annually between 2000-2005. One tank car can transport as much ammonia as four trucks. Thus, this total rail volume of ammonia equates to almost 203,450 truck shipments. Rail transportation not only is more efficient than trucks, it takes a highly hazardous commodity off our nation's highways where the potential for accidents and public release are many times greater.

The cost of shipping anhydrous ammonia is not just a cost borne by the rail carrier. Shippers and receivers of anhydrous ammonia incur enormous cost as well. Specialized personal protective equipment, hazardous material registration, liability insurance, security, driver training, training for compliance with Department of Transportation (DOT), Occupational Health and Safety Administration (OSHA) and Environmental Protection Agency (EPA) regulations, and compliance with state and local regulations are examples of costs incurred by shippers and receivers for handling anhydrous ammonia. Additionally, there are strict requirements for storage facilities and containers used in transportation.

II. THE COMMON CARRIER OBLIGATION IS AN INTEGRAL PART OF THE SAFE TRANSPORTATION OF ANHYDROUS AMMONIA

Under the common law, 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, the Transportation Act of 1920 codified the common law obligations of railroads as common carriers and granted the Interstate Commerce Commission ("ICC") jurisdiction over this issue. See *American Trucking Association, Inc. v. Atchison, T. & Santa Fe Ry. Co.*, 387 U.S. 397, 406 (1967). The Act defined a common carrier as "all persons, natural, or artificial, engaged in such transportation or transmission aforesaid as common carriers for hire...." See, MacVeagh, *Rogers The Transportation Act of 1920: its Sources, History and Text*, New York, 1922, p. 179. The Act also codified specific common carrier duties, including the provision of transportation upon reasonable request. The ICC and the courts interpreted the 1920 Transportation Act and subsequent legislation as imposing a clear-cut duty to accept cargo from the general public, and

thus rail carriers could no longer pick and choose which commodities that they would serve See *Akron*, p. 1167-1168

Since the 1920 Transportation Act, the ICC and the STB have continued to protect the common carrier obligation, as the statute requires. The agency has held that a railroad cannot deny service just because it is "inconvenient" or "unprofitable " *GS Roofing Products Co. et al v. Surface Transportation Board*, 143 F.3d 387, 391 (8th Cir 1998); *Decatur County Commissioners et al v. STB*, 308 F.3d 710, 715 (7th Cir 2002)

Moreover, it is important to note that the common carrier obligation is rooted in the public interest As noted in the *Akron* decision at page 1168.

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, the public need for rail transportation of hazardous materials defines the boundaries of the common carrier obligation, and is an essential factor in determining whether a request for rail transportation of TIH materials is reasonable

This has important implications in the area of safety In the motor carrier industry, if one trucker does not want to transport a product, another trucker can readily serve the shipper But this is not true in the case of the railroad industry Because of the extremely high barriers to entry, a refusal by a rail carrier to serve a shipper would mean that that a shipper would be

without railroad service entirely, since the shipper could not simply "call another railroad" to replace the service of a rail carrier who declined the shipper's business

The nature of the rail industry, then, requires the broadest application of the common carrier obligation in the transportation of hazardous materials. With respect to hazardous materials, the common carrier obligation ensures that anhydrous ammonia, and other hazardous materials, are transported in the safest manner possible, by ensuring that rail transportation is always available Any attempt to narrow the common carrier obligation would be directly contrary to public safety. As noted above, anhydrous ammonia must be transported. The question for the Board then is: will it be transported by rail – when rail is the safest mode possible – or will it be transported in some other manner?

In this respect, the Board plays a key part in the complex web of laws and regulations that insures public safety. DOT safety regulations insure that, when hazardous materials are transported by rail, they are transported in the safest manner possible. But the common carrier obligation is just as fundamental to public safety, since the common carrier obligation insures that transportation by rail - the safest mode possible – is available

Strong case precedent have rejected safety arguments as grounds to narrow the common carrier obligation. In these cases, the overriding public interest in transporting hazardous materials and the role of rail transportation as the safest mode has prevailed over all claims that such transportation is unsafe. In *Akron*, the court 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 hazardous materials by rail. Moreover, significant additional safety

enhancing regulations either recently have been adopted or are under consideration by PHMSA, FRA and TSA. Also, just as with the radioactive materials at issue in the *Akron* case, "no other mode of transportation is more suited to the economical carriage of these materials than train carriage " *Akron* at 1168.¹

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

Finally, it is important to note that, despite the wide changes in law made by the Staggers Act of 1980, the Staggers Act did not change in any respect the common carrier obligation. Indeed, the evidence is that the Congress, in the Staggers Act, wanted to retain in full the common carrier obligation despite the changes wrought by that Act. For example, a major shift in rail regulation occurred in the Staggers Act's authorization of private contracts. Yet Congress was clear that it authorized such contracts only to the extent that they not impair the common

¹ 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 TII materials

carrier obligation. Staggers Act of 1980, P L. 96-448, 96 U.S.C.C.A.N 3978, 4002 ("The Committee bill authorizes contracts subject only to the requirement that the contract not duly impair the common carrier obligation ")

III. THE STB'S JURISDICTION OVER THE SAFE TRANSPORTATION OF HAZARDOUS MATERIALS IS LIMITED

Although TFI welcomes the Board's inquiry into this matter in order to air the important issues involved, TFI must caution that the Board has limited authority in this area. Moreover, to the extent the Board does acts within its limited jurisdiction, it must do so in a way that does not adversely impact the safety of transporting hazardous materials. Finally, the Board needs to be cognizant that the Congress has recently acted to expand rail carriers' liability for the transportation of hazardous materials, and the Board must not act in derogation of this Congressional intent.

The Board's jurisdiction encompasses "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. The Board's jurisdiction, however, clearly does not permit it to impose liability caps, create insurance pools, or preempt state tort laws, which is exactly what is required for adoption of a Price-Anderson Act liability model or any form of indemnification. The Board's jurisdiction is limited to its authority, under 49 U.S.C. 10704, to review the reasonableness of railroad practices established pursuant to 49 U.S.C. 10702. Even then, the Board cannot exercise that jurisdiction in a manner that adversely affects safety.

In *Classification Ratings on Chemicals, Conrail, April 30, 1986*, 3 I.C.C.2d 331 (1986) ("*Classification Ratings*"), Conrail had attempted to flag out a group of hazardous chemicals as too dangerous to transport based upon the 1984 chlorine release at a chemical production plant in

Bhopal, India *Id* at 332. Conrail contended that "a catastrophic occurrence from transporting these commodities would economically cripple the carrier and thus affect its ability to provide common carrier service" and that "its risk factors are compounded because it operates through one of the most populated areas in the country " *Id* In addition, Conrail asserted that "the potential hazard presented by the involved commodities is one for which no rate additive can compensate " *Id.* at 333. Consequently, Conrail argued that its flag outs were "reasonable precautions to protect the public interest and its own corporate financial integrity." *Id.* 332 Conrail claimed that it would continue to haul these chemicals under contracts, by which it could better control the transportation and require indemnification from the shipper *Id.* at 333, 337. The rail industry has repeated most of these same arguments today in its opposition to hauling TIH materials.

The ICC rejected Conrail's flag outs, but in doing so, noted that, unlike the transportation of nuclear materials where carrier liability is limited by the Price-Anderson Act, there are no limits on carrier liability for the transportation of hazardous chemicals *Id* at 336 Despite this difference, the ICC still concluded that Conrail's flag outs were unreasonable because Conrail had not demonstrated an inability to use its tariffs to address its operating and liability concerns, it had not provided any financial evidence regarding insurance, indemnification, or the extent of its potential liability; and it had not demonstrated that the DOT regulations were inadequate or exhausted its remedies with DOT *Id* at 337 On the other hand, the ICC concluded that the harm to shippers was "very clear," because without the common carrier obligation, these hazardous chemicals might not be transported at all *Id.* at 337-38.

It also is clear from the ICC's decision that any liability limitation must not impair the public need for the safe transportation of hazardous materials that is guaranteed by the common carrier obligation Furthermore, as noted in the Akron decision, DOT has exclusive authority to

promulgate industry-wide safety standards and the ICC/STB may permit carriers to make more, but not less, stringent rules for their carriage of hazardous materials. *Akron*, 611 F. 2d at 1170. Thus, it follows that the Board's jurisdiction to address liability issues must not be exercised in a manner that adversely impacts safety

Finally, recent Congressional action expanding railroad liability for a railroad's negligence, as a matter of law and national policy, limits any action that the Board might take with respect to the reasonableness of liability limits. In 2007, Congress passed the Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, which amended 49 U.S.C. 20106 to clarify that the Federal Railroad Safety Act does not preempt state law negligence claims

Congress enacted this provision in response to several federal court decisions holding that state law tort claims for the accidental release of anhydrous ammonia arising from a Canadian Pacific derailment near Minot, North Dakota, were completely preempted by the Federal Railroad Safety Act. *E.g., Lundeen v. Canadian Pac. Ry. Co.*, 447 F. 3d 606 (8th Cir. 2006), *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). In a decision issued by the Eighth Circuit on July 2nd, the Court vacated its decision in *Lundeen* based upon its determination that "[t]he statute's clear language indicates state law causes of action are no longer preempted under §20106." *Lundeen v. Canadian Pac. Ry. Co.*, No. 07-1656, slip op. at 17-18 (July 2, 2008). 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.

IV. THERE ARE SUBSTANTIAL REGULATORY AND PRIVATE INITIATIVES FOR ENHANCING HAZARDOUS MATERIAL TRANSPORTATION SAFETY

The Department of Transportation (DOT) is proposing new standards for tank cars carrying TIH materials. TFI and its ammonia shippers support DOT's efforts for enhanced safety of tank cars and is committed to doing its part to minimize the occurrence of accidents and to reduce the probability of a release should an accident occur. It is because of recent accidents involving the release of TIH material from tank cars that the railroad industry is calling for relief from its common carrier obligation. Ammonia shippers expect that the next generation tank car will cost approximately \$200,000 per car for construction which will increase the current \$700 per month lease rate per car considerably. Due to safety concerns around the use of pre-1989 non-normalized tank cars, ammonia shippers have voluntarily removed these tank cars from ammonia service at an accelerated rate. By doing so, it has cost the industry over \$2 million annually to replace these with newer cars. Ammonia shippers lease approximately 4,500 tank cars and spend on average approximately \$5 million each annually on tank car leases.

In addition, TSA has announced a Notice of Proposed Rulemaking to address the risks associated with the shipments of TIH materials. 71 Fed. Reg. 76852 (December 21, 2006). The proposed rule expands hazardous materials shippers inspection requirements before tendering a shipment, and provides for increased "chain of custody" requirements. The proposed rule also provides for a variety of other actions to help insure safety.

There is no higher priority for ammonia shippers and receivers than the safety and security measures surrounding this product. Not just for their employees who are responsible for

loading and unloading, but for the prevention of environmental damage and the safety of the local communities and emergency responders. Many TFI member ammonia shippers participate in the Transportation Community Awareness and Emergency Response (TRANSCAER®) which has regularly scheduled emergency response training for local responders. Several are also members of the Occupational Safety and Health Administration (OSHA) Voluntary Protection Program (VPP) and have qualified for VPP Star status. OSHA created the VPP program to recognize and partner with facilities that have taken extraordinary steps to protect the safety and health of their employees.

V. TFI HAS APPROACHED THE RAIL INDUSTRY WITH A PROPOSAL TO HELP ALLEVIATE THE RAILROADS COST FOR INSURING THE TRANSPORTATION OF ANHYDROUS AMMONIA

In late 2006 TFI became aware of a proposed legislative liability cap proposal by the Association of American Railroads (AAR). TFI, as well as other affected hazardous materials shippers, strongly objected to the AAR proposal as it was one-sided, unfair and reduced incentives for the safe transportation of hazardous materials.

Preferring a business solution rather than a legislative solution to the railroads' concern over liability, in 2007 TFI and our ammonia shipper members began to develop a concept for a business solution. Informal discussions were held with the AAR and a formal proposal was submitted in writing to the AAR in November 2007

Our proposal outlined a process whereby TFI members would be willing to enter into an agreement with the Class I railroads under which shippers would assume part of the cost of liability insurance for the transportation of anhydrous ammonia in exchange for rate caps. Anhydrous ammonia shippers would not accept any liability but would simply arrange and

maintain certain excess liability insurance coverage above the primary insurance level agreed to by the railroads. This would relieve rail carriers of part of the cost of their liability insurance.

Under this plan, TFI would act as an agent for ammonia shippers by forming an ammonia shippers insurance group for participating ammonia shippers, including members and non-members of TFI. The group would purchase an amount of insurance in excess of the primary insurance that the railroad would agree to maintain. This insurance would compensate for third-party bodily injury and property damage liability costs arising out of the release of anhydrous ammonia associated with a rail accident.

In exchange for providing this excess insurance, TFI, acting as an agent for the shippers who have joined the group, would negotiate an overall rate cap with the railroad.

To be more specific, TFI's proposal would –

- Ask the railroads to carry \$500 million in primary insurance;**
- In return, our group would purchase \$1 billion in excess insurance or more depending on the insurance market;**
- Each railroad would agree to rate caps,**
- If agreement was reached by all parties, TFI would be willing to work with railroads on a legislative proposal to cap overall liability**

AAR's response to TFI's proposal expressed concerns over anti-trust issues although our proposal never intended to include the AAR or to negotiate collectively with the railroads. We were simply seeking AAR's support. The AAR asked that TFI pursue our concept individually with the Class I railroads. Individual meetings with each of the Class I railroads are currently ongoing.

TFI sent letters to the CEOs of all seven Class I railroads on March 18, 2008. Over the next month, we received a response from all seven Class I railroads, expressing interest in further discussions. We have now completed face-to-face meetings with CSX Transportation, the Canadian Pacific, the Burlington Northern Santa Fe, the Norfolk Southern and the Canadian National. Meetings with the Union Pacific and Kansas City Southern are scheduled for July 24 and 25. Participants in the meetings have included one ammonia shipper including the company's risk manager, several representatives from the railroad including its risk manager and counsel and a TFI representative.

The meetings have been productive and there has been willingness by each railroad thus far to continue the discussions. The railroads have asked, and we agree, that any discussions on rates be between their customers and the railroad. We have advised each railroad in our meetings that once TFI is advised by each of its ammonia shippers participating in the group that they are satisfied in this regard, we will move forward on the insurance. Discussions on the best approach to a legislative proposal on an overall liability cap continue as well.

VI. ANY REVISION TO THE CURRENT LIABILITY REGIME MUST BE VERY CAREFULLY CONSIDERED, SINCE DIFFICULT AND COMPLEX PUBLIC POLICY ISSUES ARE INVOLVED. A PRICE-ANDERSON MODEL CANNOT SIMPLY BE TRANSFERRED TO THE RAILROAD INDUSTRY BECAUSE OF THE SIGNIFICANT DIFFERENCES BETWEEN THE NUCLEAR POWER INDUSTRY AND THE TRANSPORTATION OF HAZARDOUS MATERIALS.

As the Board knows, the current liability regime applicable to the rail industry (and most other industries) is based on the concept of fault, or negligence. That principle means that a party that violates a standard of care should be liable to compensate an injured party for that party's injuries. The concept is one of the fundamental precepts of law.

As noted above, about one year ago TFI reviewed an informal legislative proposal from the railroad industry to drastically limit the rail industry's liability. TFI strongly opposed that

proposal as one-sided, unfair, and because it reduced incentives for the safe transportation of hazardous materials, including the transportation of anhydrous ammonia. However, as TFI has stated to the rail industry, we are not opposed to exploring, in an appropriate setting with the railroad industry and other stakeholders (including shippers of other commodities, car manufacturers, and others), other liability arrangements and structures for the transportation of hazardous materials.

But great care must be taken, as this issue implicates important public safety matters. For example, it must be recognized that a limitation of liability could reduce safety incentives and thereby increase the potential for an accidental release. Thus, any new liability arrangement must continue to insure that there are large incentives for the safe transportation of hazardous materials.

Moreover, there are extremely difficult and complex public policy issues involved. This is a subject in which a sound result, consistent with public safety, will only be arrived at with detailed analysis and a complex balancing of interests. Public posturing and sound bites will not do. For example, any new liability regime may spread the cost of that regime more widely than the current system. But if this is to occur, to whom, how widely, and how much of that cost should be spread? Should, for example, Railroad A be required to contribute to a fund despite the fact that Railroad B was responsible for an accident involving a TIH, and if so, how much and how is that to be funded? Should a shipper of a TIH commodity on Railroad A be required to contribute to a fund despite the fact that Railroad B was responsible for an accident, and if so, how much, and how is that to be funded? Should a shipper of a non-TIH commodity be required to contribute to that fund, despite the fact that that shipper's commodity, while "hazardous," could not possibly have caused the extent of the damage regardless of the nature of an accident, and if so, how much, and how is that to be funded? Should car manufacturers be required to

contribute? These are not idle questions, but rather go to the heart of any change in the current liability system

Finally, TFI notes that the Board has expressed interest in specific public policy solutions, "including solutions modeled on the Price-Anderson Act " TFI would caution that a Price-Anderson model cannot simply be transferred to the railroad industry, because, among other reasons, there are significant differences between the nuclear power industry and the railroad industry. The Price-Anderson Act ("PAA") was originally passed as a mechanism to promote a nascent private nuclear energy market. See, Sen. Rep No 296, reprinted in 1957 U.S.C.A.N. 1804, 1811. At the time, there was little experience with nuclear reactor accidents, and thus there was no robust insurance market that could support the fledgling industry. *Id.* at 1808 This situation, of course, is very different from the current situation involving TIHs, which have been transported for nearly a century and for which there is a well-established insurance market.

Under the PAA, the 104 Nuclear Regulatory Commission (NRC) licensees (i.e., nuclear reactor operators) are required to obtain insurance in the amount of \$300 million, which the NRC has determined to be the maximum amount of private insurance available to them. 10 C.F.R. 140.10. In the event of an accident, these parties would be required to pay up to an additional \$100.6 million from their own funds, forming a nationwide "insurance" pool of approximately \$10 billion. *Id.*

This model cannot be easily transferred to the railroad industry, as there are substantial differences TFI understands, for example, that rail carriers have far higher amounts of insurance – about \$1 billion per carrier – available to them in the private market While there are, for example, a limited amount of nuclear power operators, together they still form enough of a "group" to be able to contribute to a large insurance pool A PAA model would require other

Class I rail carriers – the equivalent of other nuclear plant operators – to contribute toward a pool above and beyond the primary insurance that each rail carrier already carries. But there are not enough Class I carriers to form a large pool. If the pool is based on a wider participation, for example some or all hazmat shippers, substantial questions arise, some of which were posed in the previous paragraphs of this statement. Even the administration of such a fund would be difficult, involving, as it would, potentially thousands of shippers with varying shipping patterns.

Most importantly, the nuclear power industry is composed of pervasively regulated entities whose rates are set by public regulators. But the thousands of shippers of TIHs or other hazardous materials do not operate in a regulated market. Since their transportation is taking place in a worldwide market for these commodities, new funding requirements will act as an additional tax on American industry, favoring foreign suppliers.

VII. CONCLUSION

Anhydrous ammonia is essential to growing food for millions of Americans. It is crucial to American agriculture and our economy. There is no existing or economical substitute for anhydrous ammonia in the corn-belt and in the production of phosphate fertilizer and no safer or more efficient mode of transportation for this commodity than by rail. Anhydrous ammonia shippers take their safety obligation seriously and spend millions of dollars each year to ensure the safe transport of this essential agricultural nutrient. TFI believes that the STB's jurisdiction over the safe transportation of hazardous materials is limited and there already exists substantial regulatory and private initiatives for enhancing hazardous material transportation safety. Furthermore, the STB must not take any action that is inconsistent with the express statutory provision recently enacted by Congress to expand the railroads' liability for damages resulting from their own negligence for accidents, including those involving the release of TIH materials.

The Board should encourage the railroads to work with TFI on a commercial solution to address the railroads liability concerns. TFI appreciates the opportunity to make its views known to the Board on this important subject.

Respectfully Submitted,

Ford West, President
The Fertilizer Institute
Union Center Plaza
820 First ST NE
Suite 430
Washington, D C 20002

Nicholas J. DiMichael
Jeffrey O. Moreno
Thompson Hinc, LLP
1920 N Street, N W
Washington, D C 20036

Counsel to The Fertilizer Institute

July 10, 2008