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August 21, 2008

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

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

Dear Acting Secretary Quinlan.

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

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

Respectfully submitted,

*Peter J. Shudtz* /PJS#  
Peter J. Shudtz

PJS/krb

Enclosure

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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

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**SUPPLEMENTAL COMMENTS OF CSX TRANSPORTATION, INC.**

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CSX Transportation, Inc. (CSXT) thanks the Board for this opportunity to submit these supplemental comments in response to the Board's invitation to the parties at the close of its July 22, 2008, Public Hearing in the above proceeding. CSXT joins in the submission of the Association of American Railroads (AAR), and submits these additional comments.

These separate comments by CSXT are primarily intended to respond to the specific questions presented to CSXT at the Hearing, but we will briefly address what CSXT considers to be the central policy issue for TIR transportation – the pressing need for legislation.

**Commissioner Buttrey's Question:**

**"After Katrina, did CSX have insurance cancelled or was it hard to obtain?"**

This question was posed by Commissioner Buttrey, recalling his experience when the three members of the Board visited CSXT's Gentilly Yard and inspected the damage in New Orleans only a few days after the hurricane had hit.

When Hurricane Katrina made landfall near Buras, Louisiana on August 29, 2005, it damaged 85 miles of a major CSXT line east of New Orleans and five major bridges. Hurricane Katrina caused nearly \$450 million in damages to CSXT. At the time, CSXT carried property coverage in excess of these losses with a \$25 million deductible.

Following Hurricane Katrina, CSXT's property insurance costs increased substantially. Because CSXT's multiyear insurance policies were set to renew, CSXT had anticipated an increase in the cost of insurance premiums, regardless of an incident. (As Commissioner Buttrey has observed in other Hearings in a different context, when a company has a long-term contract with advantageous pricing, and the marketplace has shifted, that company should expect that its renewal contract rates will be significantly higher than those it enjoyed during the contract period.)

However, we believe the increase in premiums that we saw was far greater than it would have been without Katrina. In response to the hurricane, CSXT's insurance carriers priced coverage to effectively mandate much higher deductibles. Despite this, after Katrina, CSXT's premium increased 800 percent from the prior year. In short, following Hurricane Katrina, CSXT paid a great deal more for much less coverage.

It should be noted that these considerations all involve insurance to CSXT's property – not liability insurance. However, both property insurance and liability insurance follow the same basic rule of thumb: as insurance carriers see more exposure (actual or potential), the premium they demand goes up, the retention limits increase, and the amount of available insurance tends to decrease.

#### **Central Policy Issue Is the Pressing Need For Liability Legislation**

The central policy issue is driven by uninsurable liability exposure. It is not a question of the cost of the insurance that is available. That cost is significant, and cost should be considered by the STB in its maximum rate proceedings. But, this proceeding is not, and should not be, about costs. It is about the risk of an incident that far exceeds any available insurance coverage and poses huge financial risk to the railroad industry.

CSXT urges the Board to help frame the issue as one of risk – not cost. Indeed, only a very few of the most energetic advocates at the Hearing made any effort to deny the risk of ruinous liability. Despite all that was said about secondary issues, it was clear that most participants understand the issue well. The main differences among the participants were whether or not the issue needs to be addressed.

CSXT believes that the Board fully understands the dilemma that all railroads, large and small, face. The statute calls on the railroads to provide service. When they do, they face potentially ruinous liability. Even reasonable insurance coverage that approaches a billion dollars would not be sufficient to provide protection if the unthinkable should happen. We believe that there is little real debate: a truly catastrophic incident could result in liability running into the billions.

**The only truly effective way to resolve this issue will be through legislation supported by both railroads and their customers. The centerpiece of any such legislation must be a cap on overall liability exposure for a release of TIH products in, or related to, rail transportation. Such legislation need not be a win-lose proposition. Railroads, producers, manufacturers, and farmers could all benefit. The public, which the producer- and receiver-witnesses maintained is the primary beneficiary of TIH products, would benefit. If the case for continued movement of TIH products by rail is as sound as speakers at the Hearing maintained, Congress should be receptive to a proposal from all of American Industry.**

**CSXT has been very actively engaged in discussions with many of our customers about the shape that such legislation might take. (Many of them testified at the Hearing.) Without exception, our customers and their representatives have had good insights and helpful suggestions. We continue our efforts to find a common ground with so many individual interests. Of course, many have suggested that a legislative change in the legal environment should also change some of the dynamics of the commercial marketplace – a not unreasonable expectation.**

**It was with great optimism that CSXT heard The Fertilizer Institute come forward earlier this year to speak favorably of a cooperative legislative effort. And, it was with added optimism that CSXT heard some chemical companies speak at the Board's July 22 Hearing of alternative legal frameworks that might better address the current, utterly untenable situation.**

**CSXT will continue to work diligently with any participants in the TIH supply chain that are willing to consider legislative alternatives that include a cap on overall TIH liability. It will not be easy, but with effort and cooperation it can be done. While it is probably premature to prevail upon the Board to become directly involved in the legislative discussions, the Board's offer to play a role in bringing parties together might prove invaluable as further progress is made among the current active participants.**

#### **Escalating Governmental Hurdles to TIH Transportation May Vitalize Any Common Carriage Obligation**

**One disappointing aspect of the Hearing to CSXT was that – of all the parties that testified, and all the time that was taken – only the railroads addressed the implications of the growing regulatory restrictions on the common carrier obligation.**

**CSXT and Norfolk Southern showed how it will prove exceedingly difficult to implement well-intended, new and proposed safety and security rules. Some proposals, depending upon their final form, may prove impossible to meet in common carriage. The combination of new and proposed safety and security**

regulations may be mutually exclusive, making some service impossible. Restrictions are being piled upon sometimes inconsistent restrictions. They are gradually – perhaps inexorably – tipping the reasonableness balance against TIH transportation. Each new regulatory requirement, taken separately, might pass muster as a legally reasonable requirement, but the compounded effects begin to present the railroads with unreasonable demands, inconsistent with common carriage.

Yet, not a single shipper or receiver voiced concerns over these proposals, or their implications for the common carrier obligation. Possibly, the shipping community believes that the railroads will “find a way” to meet the regulations and somehow make sure that the products they deem so essential continue to move. Or, they may expect the STB to step in and solve those unsolvable problems when the physical design of the rail network and the realities of railroad operations run into a regulatory brick wall that prohibits movement of TIH cars in a particular way, in a particular place, at a particular time. Shippers and receivers of TIH products may well be underestimating the difficulties the proposed regulations present, and overestimating the scope of the “reasonable demand” standard.

### **Conclusion**

The lack of available insurance sufficient to address the full catastrophic exposure of TIH transportation, along with the common carrier obligation to haul TIH, leaves the rail industry with no currently viable solution to this liability burden. CSXT risks ruinous liability with each move. If one accepts the testimony of those who maintain that TIH products are essential, then – much like the nuclear energy industry – those public benefits require a legislative solution. The prudent legislative solution will define maximum risk and responsibility. It will provide funding mechanisms, recognizing that no one party is fully able to bear the catastrophic risks inherent in TIH transportation. Until a legislative solution is found, the traditional common carrier obligation of railroads will stand in direct conflict with this currently unsolved problem. What is needed is a legislative solution supported by railroads, shippers, and receivers. Until then, the railroads' situation remains untenable.

Respectfully submitted,

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