

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**Ex Parte No. 677 (Sub-No. 1)
COMMON CARRIER OBLIGATION OF RAILROADS—
TRANSPORTATION OF HAZARDOUS MATERIALS**

223337

SUPPLEMENTAL COMMENTS

of

**AGRICULTURAL RETAILERS ASSOCIATION, THE AMERICAN CHEMISTRY
COUNCIL, CF INDUSTRIES, INC., THE CHLORINE INSTITUTE, THE DOW CHEMICAL
COMPANY, EDISON ELECTRIC INSTITUTE, E.I. DU PONT DE NEMOURS AND
COMPANY, THE FERTILIZER INSTITUTE, ILLINOIS FERTILIZER & CHEMICAL
ASSOCIATION, THE MCGREGOR COMPANY, NATIONAL GRAIN AND FEED
ASSOCIATION, THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,
OCCIDENTAL CHEMICAL CORPORATION, OLIN CORPORATION, PPG INDUSTRIES,
INC., TERRA INDUSTRIES, INC. AND WESTLAKE CHEMICAL CORPORATION**

August 21, 2008

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I. INTRODUCTION

The Surface Transportation Board ("STB" or "Board") held a public hearing on the common carrier obligation of railroads to transport hazardous materials on July 22, 2008. All of the shippers and associations identified above ("Shipper Parties") testified at that hearing and/or submitted comments. At the conclusion of the hearing, the Board announced that the record would remain open to receive supplemental evidence for thirty days. The Shipper Parties hereby jointly submit these Supplemental Comments, and the attached Verified Statement of Tom O'Connor, to assist the Board in this important matter.

II. A POLICY STATEMENT THAT PERMITS RAILROADS TO REQUIRE SHIPPERS TO INDEMNIFY A RAILROAD FOR THE RAILROAD'S OWN NEGLIGENCE WOULD BE IMPROPER.

A. Amendments to the Federal Rail Safety Act in 2007 Evidence Congressional Intent to Lodge Liability for Railroad Negligence With the Railroads.

The railroads, both individually and through the Association of American Railroads ("AAR"), urge the Board to limit their liability for incidents involving Toxic Inhalation Hazard ("TIH") materials, by requiring shippers to indemnify the railroads for their own negligence as a condition to their common carrier obligation to transport TIH materials. It should first be noted that, in cases where the railroads are not at fault, the law already limits their 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 Federal Rail Safety Act ("FRSA")), regardless whether the railroad complied with federal regulations.¹ However, in 2007, Congress amended the FRSA to clarify that state law negligence claims based on a railroad's failure to comply with federal regulations, with state regulations not otherwise preempted by federal law, or with a railroad's own operating procedures are not preempted by federal law.² It is thus the express intent of Congress that, as part of the federal railroad safety scheme, *railroads are to be liable for their own negligence.*³

As the Eighth Circuit recently observed, Congress clarified that, prior to the 2007 amendment to the FRSA, it was not Congress' intent "that an injured person be denied the mere chance to *hold a railroad accountable* when its negligence not only violated state common law

¹ 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*")

² Pub. L. No. 110-53, § 1528, 121 Stat. 266 (2007) (codified at 49 U.S.C. § 20106(b))

³ *Lundeen v Can Pac Ry Co*, 532 F.3d 682, 696-98 (8th Cir. 2008)

standards, but the very federal laws and regulations approved by Congress in an effort *to further railroad safety*.”⁴ 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.

In the wake of the Minot and Graniteville incidents, Congress accepted the Eighth Circuit’s invitation to amend the FRSA to remove blanket protection for the railroads.⁵ 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.⁶

As amended, 49 U.S.C. § 20106(b)(2) 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 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

⁴ *Id.* at 690.

⁵ Pub. L. No. 110-53, § 1528, 121 Stat. 266 (2007) (codified at 49 U.S.C. § 20106(b)).

⁶ 49 U.S.C. § 20106(b)(2).

unreasonably burden interstate commerce.⁷ The amendment was intended to “rectify the Federal court decisions related to the Minot, North Dakota accident.”⁸

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.”⁹ 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.”¹⁰ 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.¹¹ 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 failed to comply with its own plan, rule or standard.”¹²

B. The Policy Statement Requested by the AAR Would Unlawfully Invade State Tort Law and Be Contrary to the Federal Common Law and Public Policy.

Questions of indemnification and exculpation for negligent or grossly negligent conduct are matters that arise under state tort law. Even federal courts are required to apply the law of

⁷ *Id* § 20106(b)(1)

⁸ See H R Rep. No 110-259, 110th Cong , at 351 (2007).

⁹ *Murrell v. Union Pac R. Co* , 544 F.Supp.2d 1138, 1145 (D. Or 2008).

¹⁰ *Id* at 1148

¹¹ *Id*

¹² *Id*

the state in which the case arose when deciding questions of negligence or gross negligence. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).¹³ For the Board to assert any jurisdiction in the area of state common or statutory law governing negligence or gross negligence, it must find that Congress gave it authority to preempt state tort law by enacting 49 U.S.C. § 10501(b) of the ICCTA. No such finding can be made in this matter.

The law regarding preemption of state tort law with respect to rail operations was set forth in the leading case of *Easterwood*. Here the Supreme Court quoted from an earlier decision stating the well-established rule that "a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption...unless it is 'the clear and manifest purpose of Congress.'" *Easterwood* at 507 U.S. 664, quoting from *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230. Looking at the plain language of Section 434 of the FRSA (45 U.S.C. § 434) the Court held that FRSA specifically preempted state tort law in matters of railroad safety when the Secretary of Transportation had issued regulations that covered "the same subject matter as Georgia negligence law pertaining to the maintenance of, and the operation of trains at grade crossings." *Easterwood*, at 664.

The preempted issue in *Easterwood* involved how fast a train could be moving at a grade crossing. The DOT rules provided for a certain speed at the crossing in question and the plaintiff sought to have Georgia tort law hold that CSX was negligent for operating its train at or below that speed. Under Article VI, Clause 2 of the U.S. Constitution, the state law claim had to give way. The key to the case, however, was the very specific language of the FRSA and the plain intent of Congress to preempt any state statute or common law rule that would conflict with the federal railroad safety law.

¹³ As will be discussed below, the exception to this rule is where there is no state common law involved as in cases in admiralty such as *Bisso v. Inland Waterways Corp.* 349 U.S. 85 (1955).

No one could seriously contend that the Board would have jurisdiction to hear a suit brought by or against a railroad for negligence based on the language of 49 U.S.C. § 10501(b). Tort actions do not constitute the kind of economic regulation of “rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers...and construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks, or facilities” so carefully described in that section. Further, the Conference Report accompanying the ICCTA specifically points out that the Congress had no intention of preempting the general laws of the various states. H.R. Report 104-422, 104th Cong., 1st Sess., 167 (1995). State tort law subsumes the appropriateness and effect of any indemnification provision entered into by parties to any contract including rail contracts whether by tariff or by exempted contracts. The Board therefore has no authority to intrude into that state domain.

For an exculpatory or indemnification clause in a contract to be valid, each party must be a free bargaining agent *Valhal Corp v. Sullivan Associates, Inc.*, 44 F.3d 195 (3d Cir. 1995) (applying Pennsylvania law). If the parties to an exculpatory or indemnification agreement are not on equal footing, so that one is compelled to submit to a provision relieving the other from liability for future negligence, the provision is invalid. *Baltimore & O S W Ry v Voigt*, 176 U.S. (1900); *Del Raso v U.S.*, 244 F.3d 567 (7th Cir. 2001) (applying North Carolina law); *Kansas City Power & Light Co v United Telephone Co of Kan.*, 458 F.2d 177 (10th Cir. 1972) (applying Kansas law).

When federal tort law does apply, as in cases such as admiralty, the Supreme Court has voided exculpatory or indemnification provisions in cases involving transportation entities such as tow boat operators. In *Bisso v Inland Waterways Corp*, 349 U.S. 85 (1955), the Court held

that under federal admiralty law towage companies should not be allowed to relieve themselves of liability for negligence in the performance of their transportation activities. The Court explained the reasons for such a public policy:

The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains....And both reasons apply with equal force whether tugs operate as common carriers [under the Interstate Commerce Act] or contract carriers. 349 U.S. at 91

A railroad publishing a "take it or leave it" tariff has complete bargaining power and a shipper seeking to move its TIH materials in order to stay in business has virtually none. In these circumstances, the Board could not properly permit the use of a tariff publication to require a shipper to indemnify a railroad for its own negligence.

Other federal agencies have recognized that sound public policy does not permit a transportation entity with unequal bargaining power to insist on indemnification as a condition of service. For example, the Federal Maritime Commission prohibits marine terminal operators, who have considerably less market power than do railroads, from publishing tariff schedules containing provisions that exculpate or relieve the marine terminal operator from its own negligence or impose on others an obligation to indemnify the marine terminal operator for its own negligence. 46 C.F.R. § 525.2(a) (1).

There is every reason to require that the party controlling the transportation and able to prevent an incident should and must be the party responsible for doing so. Shifting liability away from a party able to prevent an incident involving the transportation of TIH materials that are so essential to the Nation's economy and so essential to the welfare of its people, would be irresponsible and unlawful.

C. The Policy Statement Requested by the Railroads Invades the Jurisdiction of Another Federal Agency, the FRA, Whose Safety Mandate Would Be Directly Affected.

Our Constitution is grounded in the bedrock of a defined and limited delegation of legislative power from the people to the Congress.¹⁴ 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."¹⁵ The Administrative Procedure Act ("APA") likewise requires courts to "hold unlawful and set aside agency action" that exceeds the scope of an agency's "statutory jurisdiction" or "authority."¹⁶

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,"¹⁷ and that the Secretary in turn delegated authority over railroad safety and hazardous materials transportation to the FRA and PHMSA — not to the Board.¹⁸ Acting pursuant to authority delegated under the

¹⁴ 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").

¹⁵ *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")

¹⁶ 5 U.S.C. § 706(2)(c)

¹⁷ 49 U.S.C. § 20103(a) (2002)

¹⁸ See 49 U.S.C. §§ 103 & 108 (2002 & 2004), see also 49 C.F.R. §§ 1.49, 1.53(b)

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.¹⁹ 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.²⁰

As Deputy Federal Railroad Administrator Clifford Eby testified at the July 22nd hearing, DOT’s regulation of the transportation of TIH materials is extensive and active. 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.²¹ Current proposals include, for example, increasing the amount of energy a tank car must absorb before catastrophic failure by 500%, significantly enhancing tank-head and shell puncture resistance performance standards; and expedited replacement of tank cars manufactured before 1989 with non-normalized steel.²²

¹⁹ See 49 CFR parts 200-244

²⁰ *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”).

²¹ 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)

²² *Hazardous Materials Improving the Safety of R.R. Tank Car Transp. of Hazardous Materials*, 73 Fed. Reg. 17,818, 17,831 (Apr. 1, 2008)

These DOT proceedings have considered precisely the same liability issues on which the railroads have focused their comments to the Board.²³ DOT 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 economy and that “the vast majority of hazardous materials shipped by railroad tank car each year arrive at their destinations safely and without incident.”²⁴ In response to a question at the July 22nd hearing, Mr. Eby stated that, had these new tank car standards been in place at the time of the Minot, Graniteville and Macdonald incidents, no release would have occurred.

If this Board were to accept the railroads’ invitation to issue a policy statement finding that shifting liability arising from a railroad’s negligence to shippers is a reasonable condition of carriage, such a policy statement would 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 necessary.²⁵ Any Board action 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.

²³ *Id.* (addressing railroads’ concern that “railroads can suffer multi-billion dollar judgments’ from accidents involving highly-hazardous materials”).

²⁴ *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”).

²⁵ *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”).

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. Rather, as Mr. Eby suggested, the railroads and shippers should work together to find market-based solutions to reduce risk and liability exposure and DOT and the Board need to promote such solutions. As Mr. Eby further noted, the Administration is willing to work with all parties to shape legislation to govern liability appropriately. The testimony of TIH shippers at the July 22nd hearing shows that shippers, railroads, and DOT are cooperating through multiple projects to reduce risk and liability exposure.

D. The "Policy Statement" Requested by the Railroads is Not a Policy Statement Because It Would Have a Binding Effect on Shippers.

The AAR requests that the Board, "based upon the record at this hearing ... " issue a general policy statement to the effect that:

It would not be an unreasonable practice for a rail carrier, under the provisions of 49 U.S.C. 11101(a) and 49 U.S.C. 10702, to require (if it elected to), as a condition of providing common carrier transportation services, that a TIH material shipper indemnify and hold harmless the railroad against liability arising from a release of such materials in excess of (1) the maximum amount of insurance that the railroad carries for TIH transport or (2) \$500 million for Class I railroads, whichever is greater; and to provide reasonable assurances in the form of insurance or other means to support such indemnity.²⁶

There is no doubt that the APA, 5 U.S.C. § 553(b),²⁷ and the Board's own rules, 49 C.F.R. 1110.3,²⁸ permit the Board to issue a "general statement of policy ... without notice or

²⁶ AAR written testimony, July 10, 2008, p 24 AAR notes that separate minimum thresholds would be established for Class II and Class III railroads

²⁷ 5 U.S.C. § 553 authorizes agencies to engage in rulemaking with certain exceptions, including "general statements of policy"

other public rulemaking proceedings.” What AAR has proposed, however, is not a general policy statement but instead is a rule that will bind shippers ²⁹

A general policy statement announces “the agency’s tentative intention for the future,” *Pacific Gas & Elec Co v Fed Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974). There is, however, nothing “tentative” about the proposed AAR rule; as explained below, it will set in stone circumstances under which shippers will be liable to railroads without the exercise of any further agency discretion, fixing the obligations of shippers for the future. The proposed rule thus cannot qualify as a general policy statement because it is dispositive of a party’s rights. *Panhandle Producers & Royalty Owners Assn. v Economic Regulatory Admin*, 822 F.2d 1105, 1110 (D.C. Cir. 1987).

It is not necessary to go beyond the AAR’s own filing in order to find proof that the railroads propose a system that will preordain shipper liability or redefine a railroad’s common carrier obligation in a manner that permits it to refuse shipments it is obliged by law to transport today. The binding, inflexible nature of the AAR’s proposal is evident in the language of the proposal itself, which states that it “would not be an unreasonable practice for a rail carrier ... to require (if it elected to), as a condition of providing common carrier transportation services, that a TIH materials shipper indemnify and hold harmless the railroad against liability arising from a

²⁸ 49 C.F.R. § 1110.3 allows the Board to issue “general statements of policy” without notice and comment rulemaking.

²⁹ AAR’s proposal also is an attempt to circumvent the exemption standards adopted by Congress at 49 U.S.C. 10502(a). AAR requests that railroads be excused from their common carrier obligation under 49 U.S.C. 11101(a) and 10702, unless a shipper agrees to indemnify the railroad for liability in excess of \$500 million. This would be like a railroad asking the Board to issue a policy statement saying that it is not unlawful for the carrier to refuse to transport automobiles unless the shipper agreed to accept transportation terms dictated by the carrier. The key in both cases is that the carrier position rests on a withdrawal of service. But a railroad may only be excused from compliance with a provision of the Act requiring it to provide service when it has satisfied the standards in Section 10502(a). With regard to TIH transportation, it is difficult to conceive of even an isolated circumstance in which a railroad could satisfy those standards, much less make such a showing for all TIH transportation in general.

release of such materials in excess of (1) the maximum amount of insurance that the railroad carries for TIH transport or (2) \$500 million for Class I railroads, whichever is greater.”

That proposal does not leave any discretion to the Board. Under the proposal, it “would not be an unreasonable practice” for a railroad to choose to withhold common carrier service if it did not receive an indemnity of a satisfactory nature. The Board would have nothing further to say if and when a carrier elected to take the steps outlined, creating what AAR terms a “safe harbor.”³⁰ Depriving the Board of the ability to exercise discretion on a transactional basis contradicts the claim that the AAR proposal can be viewed as a policy statement. *American Bus Ass’n v United States*, 67 F.2d 525, 529 (D.C. Cir. 1980).

The Board should not allow itself to be misled by the AAR’s suggestion that “a carrier should also be allowed to establish conditions of transport setting lower thresholds of carrier liability. . . Those conditions could be assessed by the Board on a case-by-case basis.”³¹ The Board, however, would have no opportunity to exercise discretion unless a carrier attempted to establish lower thresholds of carrier liability, which it is not required to do under the proposed rule. In those instances where there is “liability arising from a release of [TIH] materials in excess of (1) the maximum amount of insurance that the railroad carries for TIH transport or (2) \$500 million for Class I railroads,” and the carrier elects not to establish “lower thresholds of carrier liability,” the proposed rule acts to establish a binding outcome that would be fully determinative of the rights of shippers who seek TIH transportation. The AAR proposal thus cannot qualify as a policy statement because it “establishes a standard of conduct which has the force of law.” *Pacific Gas*, 506 F.2d at 38.

³⁰ See AAR statement at 25.

³¹ AAR Statement at 25.

E. The Record Does Not Support Issuance of the Proposed Policy Statement.

The AAR's pleading, as well as its verbal presentation to the Board, rely on the supposition that a TIH incident will cause a catastrophic level of monetary liability that no railroad can meet on its own. Fortunately, TIH events fulfilling the AAR's doomsday prophecy have not occurred, and the insurance market has been adequate to fulfill railroad liability. If the Board were to accept AAR's assertion that the insurance market cannot fulfill a railroad's reasonable insurance needs, the Board would be indulging AAR in speculation.

Although AAR urges the Board to find that there are extremely high costs that will have to be met by any carrier engaged in TIH transportation, AAR makes no effort to provide a factual basis for any level whatsoever of costs associated with TIH transportation. The Shipper Parties are not suggesting that railroads must wait until they have been involved in catastrophic TIH accidents before presenting a factually reliable record of TIH costs. Surely, however, railroads can quantify their TIH insurance costs, and explain to the Board the nature of the insurance available in the market, *i.e.*, deductible amounts, and other options available to the carrier, such as the costs of self-insurance. Most carriers have neglected quantification of insurance costs altogether. BNSF provided some evidence regarding self-insurance, but without the costs associated with that approach.

The Chlorine Institute has submitted the only transparent evidence of railroad insurance costs in this proceeding. Contrary to railroad allegations of spiraling casualty and insurance costs, the CI evidence shows an overall decline of insurance costs for the U.S. Class I railroads from 2003 to 2007.³² Although there were spikes in insurance costs immediately following the Minot, Macdona, and Graniteville incidents for the railroads involved, even those railroads today

³² Written Testimony of the Chlorine Institute, Inc., pp. 10-11 (July 10, 2008)

have experienced an overall decline in costs. The CI analysis is based upon the R-1 data submitted by the railroads themselves. No railroad witness attempted to refute that data at the July 22nd hearing.

On August 15, 2008, NS filed a letter with the Board claiming that its insurance costs have increased by 248% since 2001. This statement is not accompanied by any analysis or supporting data and is rife with ambiguity. NS has not identified the source of its data. Nor has NS provided the dollar amounts used to calculate the 248% figure to determine how much of a cost increase 248% represents. NS also has not explained how or why its figure differs so significantly from its own R-1 reports³³ NS inappropriately pegs its insurance cost increase to 2001 levels, which is prior to the TIH releases at Minot, Macdona, and Graniteville that gave rise to the liability concerns raised in this proceeding. Finally, NS does not even define what insurance costs it is measuring or why those costs increased. For example, NS could be including all categories of insurance, not just its casualty insurance costs relevant to TIH liabilities; and/or its premiums could have increased because it chose to acquire additional coverage, not because existing coverage costs increased. It simply is not possible to answer these questions and many others from the NS letter. In short, the NS claims have no support in the record and NS has not made any attempt to refute the CI testimony, which has extensive support in the record.

Some of the railroads alluded to additional costs that arise in connection with the transportation of TIH shipments, including, presumably, operating costs, insurance costs, and train costs. However, none of the costs of that nature were quantified by any railroad.

³³ According to the NS R-1 Reports, its casualty costs increased from \$124 million in 2001 to \$153 million in 2007, which is an increase of 24%, not 248%. See the attached Verified Statement of Tom O'Connor. A 24% increase over a six-year span that included both 9/11 and the Graniteville accident is far from "spiralling."

Additionally, the FRA reports that "[m]inimally, shipping rates for PIH materials have doubled; however, many shippers report larger increases (including at least one shipper which has had its rates increased over 4.8 times in a two-year period)."³⁴ These rate increases are far above any likely railroad cost increases, which again, have not been documented.

Perhaps it may seem to the Board that it is foolish for shippers to be critical of the absence of finite cost evidence because the overarching issue is whether shippers can be required by a railroad to participate in costs arising from TIH transportation. The fact is, however, that the railroads have not presented an abstract proposal. They have proposed a very specific general policy statement for prescription by the Board. The AAR proposal sets forth exact numbers representing the burdens to be assumed by each specific shipper of TIH materials if the carrier demands an assumption of responsibility from the shipper. Shippers are thus entitled to know the basis for the AAR claims. The AAR general policy proposal is fatally lacking in supporting detail.

F. Any Policy Statement Would Be Unjustified Because, Under *Akron*, a Detailed Inquiry into Specific Facts is Required.

Even if the Board possessed authority to issue the policy statement requested by the AAR, despite the preceding arguments to the contrary by the Shipper Parties, any policy statement authorizing railroads to publish indemnification requirements in their tariffs would be inappropriate because such a decision must only be made after a detailed inquiry into specific facts. The Sixth Circuit made this absolutely clear in *The Akron, Canton & Youngstown R R. Co v. ICC*, 611 F. 2d 1162 (6th Cir. 1979) ("*Akron*").

³⁴ Notice of Proposed Rulemaking, Hazardous Materials. Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, Docket No. FRA-2006-25169, 73 Fed. Reg. 17818, 17831 (April 1, 2008)

At the July 22nd hearing, many of the Shipper Parties and the Board itself cited to the *Akron* Court's *dicta* that "[q]uestions of safety are also questions of risk of liability." *Id.* at 1170. Therefore, even if the Board had jurisdiction to address the economic issues associated with liability risks through an indemnification requirement (which it does not), it must be careful not to exercise that jurisdiction in a manner that adversely impacts safety. In this case, reducing the liability exposure of the railroads for non-compliance with the regulatory scheme imposed by Congress and the FRA would adversely impact safety. The Board does not have the authority to reduce the liability of the railroads imposed by the FRSA.

Even if the Board had the authority to consider the railroads' request, it has not undertaken the analysis required to decide such a matter. The *Akron* Court held that a railroad cannot refuse to haul any materials that meet DOT safety standards, but that it may seek approval of a stricter practice that is shown to be just and reasonable. *Id.* at 1169. In considering whether a stricter practice is reasonable, the Court stated that the ICC was required to review multiple factors specific to the transportation service at issue. According to the Court, "[t]hese factual matters are properly to be explored after the publication of tariffs. ., not in deciding whether such publication should be ordered." *Id.* at 1169-70 [underline added]. This holding logically extends to consideration of such factual matters in deciding whether to authorize indemnification requirements, because indemnification requirements have a detrimental impact upon safety. No such analysis is possible in the context of a general policy statement where no specific tariff provision has been published for the Board's consideration.

The D.C. Circuit reinforced this holding in *Consolidated Rail Corp. v ICC*, 646 F. 2d 642 (DC Cir. 1981) ("*Conrail*"). In that case, the railroads attempted to publish tariffs that

required special train service for hauling spent nuclear fuel, a stricter standard than required by DOT. The Court observed that:

The basic issue in this case is whether the ICC properly determined that the railroads' tariffs based on STS [special train service] were unreasonable. In resolving it, we must answer two questions: first, to what extent did the ICC have authority independently to evaluate the need for STS safety measures; second, was there sufficient evidence in this record to support the Commission's conclusion that STS was unnecessary as a safety measure.

Id. at 647 [footnote omitted].

In response to the first question, the Court defined the issue as "whether the practice and the tariff based on it is reasonable when viewed from the public perspective of the Commission, which must reconcile a multitude of factors in exercising its expert judgment on tariff issues, including economy, efficiency, fair wages and working conditions, and safety, in addition to the financial condition of the carriers." *Id.* at 647-48. Agreeing with the *Akron* decision, as far as it went, the *Conrail* Court added that "railroads may indeed 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/NRC regulations are unsatisfactory or inadequate in their particular circumstance." *Id.* at 650.

Similarly, even if an indemnification requirement were permissible (and it is not) the railroads have the burden of proving that such a requirement is both reasonable and necessary. That burden cannot be satisfied in the abstract setting of a policy statement. All of the factors identified by the *Akron* and *Conrail* Courts can only be thoroughly weighed and considered in the context of a detailed factual inquiry based upon an actual tariff indemnification provision.

III. THE CONCERNS VOICED AT THE HEARING DO NOT WARRANT A POLICY STATEMENT.

A. The Board Cannot Overturn Congress' Legislative Judgment and Relieve Railroads from Liability Arising from Their Own Negligence.

In the Minot, Macdona and Graniteville incidents, it was a *failure of the railroads* that led to the breach of tank cars and the subsequent release of TIH materials. 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, Congress has clearly declared its intent that railroads 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, even indirectly. For the Board, as with any administrative agency, "must give effect to the unambiguously expressed intent of Congress."³⁵ As the Supreme Court has recognized in other contexts, the common law forms an integral part of the law's comprehensive regulation of private conduct.³⁶ Taken in combination with statutory and regulatory enactments, the common law imposes a continuous spectrum of

³⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 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 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")

³⁶ See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)

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 private conduct of the nation's railroads is appropriate.

Against this backdrop, it is clear that the railroads are seeking to be excused from liability flowing for 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 to third parties liability imposed on the railroads by Congressional amendment of the FRSA — liability which arises from a railroad's own negligence. 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.

B. Claims That Railroads Face Strict Liability in Moving TIH Materials Are Groundless, and in Fact Railroads Are Immune From Many Forms of Tort Liability if They Follow Prescribed DOT Safety Regulations.

Throughout these proceedings, the AAR and various railroads have alluded to, without citation or explanation, a nightmare scenario where a railroad can be held liable for "ruinous liability" even though it has done nothing wrong and is not negligent in any way. In other words, the railroads suggest that they face strict liability for handling TIH materials. No support is offered for this contention, nor could there be any. Railroads face liability only when they are

negligent, or worse, to the same degree as every other enterprise conducting business every day in this country. In fact, the railroads already enjoy limited immunity from liability that others do not enjoy.

In *CSX Transp v Easterwood*, 507 U.S. 658 (1993), the Supreme Court reaffirmed that, when railroads comply with safety regulations promulgated by the DOT, they cannot be found negligent or be forced to pay damages under state tort law. State tort law is fully preempted by the Federal Railroad Safety Act. In such cases, the railroads are protected as a matter of law, and a preempted claim cannot go to the jury. Virtually no other industry enjoys that kind of tort law protection. Thus, railroads have greater protection against state tort law liability than do other industries, and enjoy unique protections against involuntary bankruptcy liquidation. Accordingly, the requested indemnification policy statement should be viewed for what it is; nothing more than an attempt to use the substantial market power of the railroads to demand that blameless shippers pay the costs associated with providing insurance to protect the railroads from their negligent and grossly negligent conduct.

C. U.S. Tort Law is Founded on the Principle that the Party Who Causes the Damage Should Bear the Liability, and the Railroads Proposal Would Undermine That Fundamental Precept.

It is a fundamental principle of the American legal system that the party causing an injury should be required to bear the cost of making victims whole.³⁷ The *Restatement of the Law on Torts*—a summary of the law undertaken by eminent scholars—states that “[a]n actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct

³⁷ See, e.g., W PAGE KEETON, ET AL, PROSSER AND KEETON ON TORTS § 33, at 203-04 (5th ed. 1984) (discussing this general principle), see also *id* § 51, at 341-43 (same in the context of indemnity)

tortious."³⁸ In other words, the law uniformly recognizes that entities are properly held responsible only for their own tortious conduct, and conversely, that where a party is not negligent, or is not in a position to control the activities that result in harm, that party should not be made to bear liability. The railroads seek through their proposal to undo those fundamental principles, because they would seek to transfer liability to shippers even though it is the railroads that supervise and handle freight during transport, and shippers are excluded from any control over their products after they are tendered to the railroad providing the transportation.

Case law shows that liability is consistently placed on the party responsible for undertaking the action whose negligent execution (or lack of execution) causes harm. *See, e.g., In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 373-79 (La. Ct. App. 2001) (awarding damages where railroad negligently failed to inspect tank car); *CSX Transp. Co. v. ExxonMobil Oil Corp.*, 401 F. Supp. 2d 813 (N.D. Ohio 2005) (rejecting railroad's attempt to impose liability on shipper where the railcar during the relevant period was under the control of the railroad); *Gulf Oil Corp. v. Atlantic Coast Line R. Co.*, 196 So. 2d 456 (Fla. Dist. Ct. App. 1967) (concluding that, notwithstanding a broad contractual indemnity agreement, the railroad should not be indemnified for its own negligence).

³⁸ RESTATEMENT (THIRD) ON THE LAW OF TORTS—PERSONAL HARM § 29 (tentative draft Mar. 2008); *see also id.* § 29, comment d ("Central to the limitation on liability . . . is the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious. The term 'scope of liability' is employed to distinguish those harms that fall within this standard and, thus, for which the defendant is subject to liability and, on the other hand, those harms for which the defendant is not liable. This limit on liability serves the purpose of avoiding what might be unjustified or enormous liability by confining liability's scope to the reasons for holding the actor liable in the first place.")

Buttressing the concept that each party bears responsibility for its tortious actions, the law also recognizes the doctrine of superseding cause, whereby "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." RESTATEMENT (SECOND) ON THE LAW OF TORTS § 440 (1965).

Once shippers have ensured that the proper tank cars have been selected for their products, have complied with other regulatory requirements such as placarding and labeling requirements,³⁹ and have placed their products in the care of the railroads, it is, and should remain, the railroads' responsibility to ensure the safe transport and delivery of that cargo. That well-established principle of American tort law should remain undisturbed, and a railroad should not be permitted to force indemnification upon shippers for instances where the railroad itself is negligent

The case law developed in the context of maritime shipping – a federal common law of torts developed under federal courts' admiralty jurisdiction – is also instructive. As the U.S. Supreme Court has held, “liability should properly fall upon the party best situated to adopt protective measures and thereby to reduce the likelihood of injury” *Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co*, 376 U.S. 315, 323-24 (1964).⁴⁰ See also *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 91 (1955) (voiding a contractual indemnification provision demanded by a tow boat operator because allowing a common carrier to shift liability for its own negligence would remove incentives discouraging wrongdoing by making those responsible pay for any harms). The same rule should apply to railroads, which like maritime carriers are entities who accept and transport freight on behalf of their shipping customers, and maintain exclusive control over the goods transported until the product is tendered to the consignee.

³⁹ Regarding tank specifications and other regulatory requirements governing hazardous materials transportation, see generally 49 CFR Parts 172 and 173

⁴⁰ See also *David Crystal Co v Cunard SS Co*, 399 F 2d 295, 300 (2d Cir 1964) (same), *Mitchell v Lone Star Ammunition, Inc*, 913 F 2d 242, 245 (5th Cir 1990) (tort liability principles properly seek to impose liability on the wrongdoer whose act or omission caused the injury)

In sum, the Board should be careful not to undermine this well-established principle of American law by short-circuiting any liability that should properly be placed on railroads whenever their conduct is negligent.

D. The Specter of “Ruinous Liability” Resulting in a Liquidation Under the Bankruptcy Laws is Not Only Unfounded but Legally Impossible.

The railroads have suggested that some undefined event involving TIH materials could cause “ruinous liability” for a railroad. Such ruinous liability could, it is further suggested, even result in a filing for liquidation under Chapter 7 of the Bankruptcy Code. There are two distinct problems with this line of reasoning. First, never in the history of this Nation has a single catastrophic event resulted in a jury verdict so high as to force an enterprise the size of a Class I railroad into bankruptcy. Second, even if such an unprecedented scenario would occur, the railroad at issue could not be forced into Chapter 7 liquidation (11 U.S.C. § 1161), but rather would be managed by a trustee required to consider the public interest in addition to the interests of the debtor, creditors, and equity security holders, 11 U.S.C. § 1165, with the Board participating in the proceedings to insure the protection of the public interest. See, 11 U.S.C. § 1164. Thus, under the law applicable to rail carriers, Chapter 7 liquidation is not even a theoretical result of a catastrophic accident involving hazardous materials, as implied by the railroads and even by some Board members' comments at the July 22nd hearing.

E. Forced Indemnification Would Undermine Safety.

If railroads were to succeed in transferring liability to shippers for the railroads' own negligence, this could drastically undermine public safety, because it would free railroads from incentives to prevent accidents and improve their safety practices.

Courts have long recognized that there is a societal interest in giving incentives to parties to act safely and limit potential torts.⁴¹ "Before any societal benefit can be derived from the deterrent effects of tort liability," one court has stated, "the party in a position to correct the tortious act or omission must be held accountable for the damages caused and thus motivated to prevent future torts."⁴² This is not an academic point, as federal accident investigators have determined that the most recent accidents involving the release of TIH materials resulting in fatalities have been caused by railroad operating errors.⁴³

Should the railroads succeed in forcing indemnity provisions upon shippers, the railroads would have less incentive to maintain the highest standards of safety, and the societal benefit of tort deterrence would hence be compromised. As the Court in *Akron* noted, "questions of safety are also questions of risk liability " *Akron*, at 1170.

The Shipper Parties do not mean to suggest that railroads consciously would choose to act unsafely. Rather, their concern is with railroad decisions to incur certain costs for projects and investments that affect safety. For example, the cost-benefit analyses that underlie investment decisions, such as whether to signal certain track segments or to invest in positive train control, become distorted because, when liability is limited, the benefit side of the equation is artificially deflated. That may result in a railroad deciding not to make a safety-enhancing

⁴¹ See, e.g., *Bisso*, *supra*, 349 U.S. at 91, *Johnston v. United States*, 568 F. Supp. 351, 353 (D. Kan. 1983) ("The imposition of tort liability on a wrongdoer can have a strong prophylactic effect, tortfeasors held liable for damages that flow from their wrongdoing have a strong incentive to prevent the occurrence of future harm.")

⁴² *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 358 (7th Cir. 2008) (Posner, J.)

⁴³ See, e.g. (1) NTSB report on Graniteville, SC, accident, RAR-05-04, available for download at http://ntsb.gov/Publictn/R_Acc.htm, which determined that the accident was caused by the failure of Norfolk Southern crew members to properly realign a switch; (2) NTSB report on Macdona, TX accident, NTSB Report RAR-06-03, available for download at http://ntsb.gov/Publictn/R_Acc.htm, which determined that the accident resulted from crew fatigue and (3) NTSB report on accident at Minot, ND, RAR-04/01, available for download at <http://www.nts.gov/publictn/2004/RAR0401.htm>, which determined that the accident was caused by failures in inspection and maintenance of continuous welded rail, and that the use of non-normalized steel in the tank car was also a factor.

investment when the cost-benefit analysis would have supported such investment absent liability limits.

F. The Railroads and Their Investors Voluntarily Accepted the Common Carrier Obligation with Full Knowledge of the Risks and Rewards.

The railroad industry has been subject to the common carrier obligation since the existence of the first public rail line. Very early in the history of railroads, that obligation included the transportation of hazardous materials, including TIH materials, and the liabilities associated with such transportation. Throughout this history to the present day, railroad investors have factored this risk into their decisions to purchase railroad stocks and bonds.

The "fairness" concerns raised by the railroads and some Board Members at the July 22nd hearing do not justify special treatment for railroads by shifting liability for their own negligence onto their customers. Indeed, "fairness" concerns should prevent the Board from taking such action.

At the hearing, during questioning of a panel of individual chemical companies, Commissioner Buttrey compared the railroad common carrier obligation to a hypothetical new government mandate that TIH producers continue to produce TIH materials even if they no longer desire to do so. But the two situations are not comparable. Railroads have been subject to the common carrier obligation since they entered the business of railroading, and therefore, they knew that they could not selectively choose the traffic that they would transport and that they would be exposed to the risks associated with transporting TIH materials. Anyone who invests in a railroad today also knows these facts before they decide to invest their money, since this information is published in the railroads' Securities and Exchange Commission reports. In contrast, Commissioner Buttrey's hypothetical presupposes imposition of a common carrier-like obligation upon TIH producers long after they entered that business. Consequently, current

investors would be denied any opportunity to consider the risks when deciding whether to invest their money in the TIH production industry. This distinction establishes the "fairness" of the common carrier obligation in contrast to the "unfairness" of Commissioner Buttrey's hypothetical.

The policy statement requested by the AAR would impose a similar type of inequity upon TIH shippers. By requiring TIH shippers to indemnify a railroad for the railroad's own negligence, the Board would grant a windfall to railroad investors at the expense of TIH shippers and their investors. While railroad investors have factored TIH liability risks into their investment decisions, investors in TIH shippers have not factored into their investment decisions potential liability for the negligent acts of a railroad over whose activities they have absolutely no control. Not only would there be a transfer of risk, that risk would be magnified by the fact that liability no longer rests with the responsible actor. That is a far greater "unfairness" than a common carrier obligation that was known to railroad investors before they made their investment decisions.

G. A Policy Statement Would Undermine, Rather Than Advance, Efforts to Address Liability Concerns Through Private Sector Discussions.

At the July 22nd hearing, Chairman Nottingham expressed a view that the Board might facilitate private sector discussions over the railroad TIH liability issue by issuing the policy statement requested by the AAR. Apparently, the Chairman believes that, by shifting a portion of the railroads' TIH liability to shippers, those shippers will be more motivated to change the status quo. This view is flawed in several respects.

First, by shifting liability to TIH shippers, the Board would grant the railroads the very solution that they desire. Consequently, there will be nothing left for the railroads to negotiate. The Fertilizer Institute, which the Chairman commended as the only shipper or shipper group he

believes is taking this matter seriously, stated this in clear and unequivocal terms at the hearing. Specifically, if the railroads are permitted to adopt indemnification requirements in their TIH tariffs, the negotiations between TFI and the railroads would come to an abrupt halt, because the railroads will have obtained more than TFI has offered without providing any consideration in return.

Second, the Chairman's view erroneously assumes that shippers are throwing up road blocks to private sector discussions. The liability issue, however, has significant economic and safety ramifications for TIH shippers as well as railroads. TIH shippers are first and foremost concerned with the safe and secure production, transportation, and consumption of TIH materials. They do not want to rush into a solution that will provide fewer incentives for railroad investments in safety-related infrastructure, such as signaling dark territory and positive train control. Nor do they desire solutions that could encourage the use of trucks over rail. In addition, TIH shippers want assurances that, if railroads are relieved of the TIH liability risk that they claim is not justified by any rate level, there will be an appropriate reduction in skyrocketing rates for TIH transportation. To date, however, the railroads have not offered acceptable assurances to address these safety and economic concerns.

Third, the TIH shipping community is working in many different ways to reduce the risk of TIH transportation by rail, so that special liability measures that could compromise safety are not needed. TIH shippers have established partnerships with railroads and tank car manufacturers to enhance the structural integrity of tank cars in the event of an accident. They have supported proposed rules to minimize the human factor component that has been the cause of some of the largest TIH releases. Some TIH shippers also have voluntarily taken steps to reduce the route-miles traveled by TIH materials. All American Chemistry Council members

participate in Responsible Care® and TRANSCAER® is a cooperative program between shippers and railroads to improve safety and to enhance awareness and emergency preparedness in local communities along TIH routes. By addressing both the potential for an accidental release and the magnitude of any release that might occur, these measures reduce the overall risk of transporting TIH materials, and thus the liability exposure of the rail industry to such risks.

H. "Changing Shipper Behavior" on Safety Matters Is Not the Proper Role of the Board, Especially Because the Matter Is Being Handled By DOT Through Its Section 333 Conference

The Federal Government is addressing rail safety and security with respect to the shipment of TIH and other hazardous materials, so separate action by the Board is neither necessary nor advisable.

Apart from DOT's TIH rail safety rulemaking on rail operations and tank car design,⁴⁴ there is an ongoing proceeding to explore possible ways to reduce the risk of shipping TIH materials – specifically chlorine and anhydrous ammonia, which together account for more than 80 percent of TIH tank car shipments. Those proceedings were initiated by DOT under Section 333 of 49 U.S. Code, at the joint request of the Association of American Railroads and the American Chemistry Council. Section 333 authorizes the Secretary of Transportation to conduct such proceedings, known as "conferences," in a manner that provides immunity from action "under the antitrust laws of the United States for any discussion at the conference and for any agreements reached at the conference, that are entered into with the approval of the Secretary to achieve or determine a plan of action to carry out the unification or coordination project."⁴⁵

⁴⁴ *Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials*, Docket No. FRA-2006-25169, 73 Fed. Reg. 17818 (April 1, 2008). See also *Petitions for Interim Standards for Rail Tank Cars Used to Transport Toxic-by-Inhalation Hazard Materials*, Docket No. PHMSA-2008-0182, 73 Fed. Reg. 42765 (July 23, 2008).

⁴⁵ 49 U.S. Code §333(d)(2)

The conference has considered strategies for reducing the ton-miles of such products that are shipped, including by re-routing such shipments among railroads and the "swapping" of customers among competing TIH producers. Conferences were convened with specific focus on chlorine and anhydrous ammonia (with shippers represented, respectively, by The Chlorine Institute and The Fertilizer Institute). In addition to FRA, to which the Secretary has delegated implementation of Section 333, other agencies – including the Board – have also participated. While the views of the participating antitrust regulatory agencies precluded multilateral discussion of customer swaps among TIH producers,⁴⁶ participating shippers have been encouraged to implement swaps on an individually negotiated bilateral basis where possible.

Finally, the Board has jurisdiction to regulate only carriers and the economic aspects of transportation, not shippers.

I. The Alleged Ability of Shippers to Assume the Costs of Indemnification and Damages Is Irrelevant to the Lawfulness or Propriety of AAR's Request.

Some have suggested that, because certain companies that ship TIH material are of substantial size, they are in a financial position to, as AAR has proposed, "indemnify and hold harmless the railroad against liability arising from the release of such material." There is simply no valid basis for that suggestion. The relative size of a shipper and a carrier are not relevant. Indeed, the rail industry's proposed policy statement would apply to all TIH shippers, with no exclusion for those that happen to be of a smaller financial size than a particular railroad.

Tort liability relates to fault, not to size. As addressed elsewhere in these supplemental comments, the American legal system is based on sound principles. To shift liability in an

⁴⁶ The Department of Justice and Federal Trade Commission representatives participating in the Sec 333 conference determined that, as the statutory purpose of Sec 333 involved coordination of rail transportation, shipper discussions were not covered by the antitrust protection afforded by the section

arbitrary fashion onto the party that is perceived to have the "deeper pockets" would be counter to those fundamental legal principles and would embrace a flawed approach to public policy.

IV. THE BOARD SHOULD NOT REVISE ITS SMALL RATE CASE RULES TO ACCOUNT FOR ALLEGEDLY "UNIQUE COSTS" OF TRANSPORTING TIH MATERIALS.

The AAR alleges that railroads bear a multitude of unique costs associated with TIH materials that they are precluded from recovering in STB rate proceedings. But, the AAR and individual railroads have offered only generalized assertions that they incur additional costs for various types of activities, without making any attempt to quantify those costs. Furthermore, the Shipper Parties do not believe there is any need to modify the small rate case procedures to account for TIH handling costs because the current procedures already are capable of doing so.

AAR refers generally to current and proposed DOT regulations as examples of special TIH handling costs that have been or soon may be imposed upon railroads. The AAR's examples are DOT requirements for security plans and route assessments, proposed speed limits, chain-of-custody requirements, and various security measures in High Threat Urban Areas. However, not a single railroad has attempted to quantify the cost of any of these requirements, despite representations that some of these measures already have been taken. In addition, railroads have shifted some of these costs to shippers (e.g. requiring shippers to construct sufficient storage tracks in secured areas for TIH tank cars), and thus are not in fact incurring all those expenses.

The vagaries of costs, such as speed limits, also are not unique to TIH materials. The AAR asserts that speed limits slow other trains on a rail line, which increases capital and operating costs across the rail network. But every form of traffic imposes similar costs on the rail network. For example, heavier trains may travel at slower speeds that could impact other traffic on the rail network. Conversely, lighter intermodal trains consume more capacity than other trains because of their need to travel at higher speeds and to accommodate railroad traffic

prioritization. Speed limits also may not impose additional costs unless a rail line already is at capacity.

To the extent that there are additional costs associated with TIH traffic that can be identified and assigned to specific movements, the small rate case procedures account for such costs in two ways. First, those costs will be reflected in the rates of the comparable traffic group. Because the small rate case procedures focus upon R/VC ratios (e.g. the relationship of revenue to variable costs), not rates, the R/VC ratios of the comparable TIH traffic group already include revenue that the railroads presumably believe are needed to cover the costs of TIH transportation. No movement-specific adjustments to URCS are necessary, since any understatement or overstatement of TIH costs in URCS will be reflected in both the issue traffic and the comparison group R/VC ratios.

Second, to the extent a railroad can prove that specific TIH handling costs are not captured in the comparison group R/VC ratios, the Board permits parties to introduce such costs as "other relevant factors." Thus, contrary to AAR's claims, the small rate case rules permit railroads to include any unique costs of TIH materials transportation in the rates of TIH shippers.

Finally, movement-specific URCS adjustments for just TIH traffic would grant railroads a monetary windfall. URCS reflects system-average costs. If movement-specific adjustments are made to reflect allegedly above system average costs for TIH traffic, then the costs of some other traffic must be reduced by a corresponding amount. If that does not occur, railroads will over-recover their total costs. In addition, because not all TIH costs would be above system average, there would need to be corresponding off-sets for those lower cost categories.

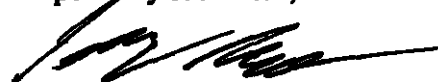
The fact is that the railroads have not attempted to quantify the allegedly unique and higher costs of handling TIH traffic; they have not demonstrated that such costs are inadequately

accounted for in the small rate case procedures; and they have not shown the amount of any alleged distortion caused by the small case procedures.

V. CONCLUSION

The Board is respectfully requested to consider the above views in this proceeding.

Respectfully submitted,



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ATTACHMENT

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

Verified Statement of

**Tom O'Connor
Snaveley King Majoros O'Connor & Lee, Inc.
1111 14th St NW
Washington DC**

August 20, 2008

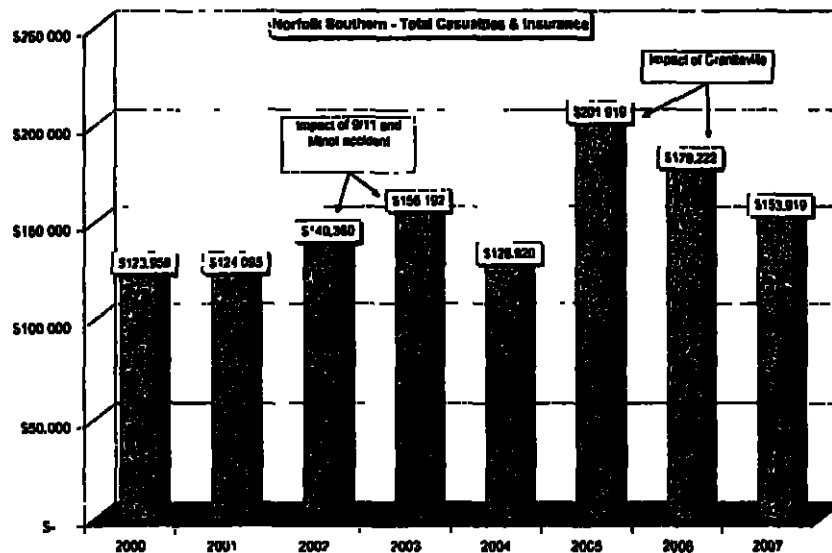
My name is Tom O'Connor. I am Vice President of Snavely King Majoros O'Connor & Lee Inc. I am the same Tom O'Connor who submitted a report in this proceeding in July 2008 on behalf of the Chlorine Institute. A summary of my experience and qualifications was included in that report.

As requested by Counsel, Snavely King has reviewed the descriptions of insurance cost increases filed by the Norfolk Southern Railway ("NS") in its August 15, 2008 letter to the Surface Transportation Board ("STB" or "Board") in Ex Parte 667 (Sub-No.1), Common Carrier Obligations of Railroads – Transportation of Hazardous Materials¹.

In NS's letter to the commissioners, NS states the following.

First, NS was asked to provide the percentage increase in its insurance costs since 2001. Since 2001, the amount NS has paid for insurance has increased 248%. The largest increases year over year were in 2002, following the attacks of September 11, 2001, and the accident in Minot, North Dakota, and in 2005 and 2006, following the Graniteville, South Carolina accident.

Our analysis of NS's R-1 data for the time period shows different results. From 2001 – 2007 SK calculates the percentage increase in NS's reported Total Casualties and Insurance to be 24%.



¹ See NS letter to STB Commissioners dated August 15, 2008

NS's largest Other Casualties and Insurance account, Train Operations. Casualties and Insurance costs, saw a 20% increase from 2001 to 2007. Another significant dollar account which saw a large increase between 2001 and 2007 was Repair and Maintenance, Casualties & Insurance – running, which increased 52%. Both of these increases are well below the 248 percent increase in “the amount NS has paid for insurance”

In its letter to the STB, NS did not dispute Snavelly King's analysis submitted on behalf of the Chlorine Institute. Instead NS merely stated “the amount NS has paid for insurance has increased”

The percentage increase in the data NS reported in its 2001 through 2007 R-1 reports to the STB differs from the percentage increase in the “amount NS paid for insurance” stated in the NS August 15, 2008 letter.

VERIFICATION

I, Tom O'Connor, declare that the foregoing statement is true and correct and was prepared by me or at my direction. Further, I certify that I am qualified and authorized to file this statement.

Executed on August 20, 2008

Tom O'Connor

Tom O'Connor

Subscribed and sworn to before me this 20th day of August 2008 in the District of Columbia.

Michael J. Finch

Notary Public

My Commission expires: March 14, 2011