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BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

**WRITTEN STATEMENT OF
THE DOW CHEMICAL COMPANY**

Pursuant to the Notice of Public Hearing ("Notice") of the Surface Transportation Board ("Board"), served June 4, 2008, as amended by the decisions of June 19 and 23, 2008, The Dow Chemical Company ("Dow") hereby submits its written statement on the common carrier obligation of railroads to transport hazardous materials. Cindy Elliott, Dow's Global Supply Chain Sourcing Director, and Jeffrey Moreno, Dow's legal counsel, will present oral testimony at the hearing on July 22, 2008.

I. IDENTITY AND INTEREST OF DOW.

Dow is a diversified chemical company that harnesses the power of science and technology to constantly improve what is essential to human progress. Dow offers a broad range of innovative products and services to customers in more than 175 countries, helping them to provide everything from fresh water, food and pharmaceuticals to paints, packaging and personal care products. In order to provide many of these essential products and services, Dow both produces and uses hazardous materials, including materials that are classified as toxic inhalation hazards, or "TIH" materials. The broad range of products that Dow produces span virtually

every industry, including railroads, and make possible approximately 90% of the goods people use every day

Precisely because many of the materials that it produces and uses every day are hazardous, Dow has developed a culture of safety and responsibility that pervades all of its activities. This culture has generated a long track record of innovation and investment to improve Dow's safety performance in the production, use and transportation of hazardous materials.

Dow recognizes the risks inherent in transporting hazardous materials and is continually designing and re-designing its supply chain to minimize those risks. This includes efforts to reduce or eliminate the shipment of highly hazardous materials. However, it is not possible to eliminate the transportation of all hazardous materials. Currently, 20 percent of Dow's 2.2 million product shipments annually are regulated as hazardous materials or dangerous goods. Dow's collaborative efforts with carriers across all transportation modes have achieved an incident-free rate of 99.97 percent and earned it award recognition from Norfolk Southern, CSX, Canadian Pacific, Canadian National and BNSF for leadership and performance in safety practices.

Dow's major manufacturing sites in the United States are located in Texas, Louisiana, Michigan, California and West Virginia. These sites, and others around the country, are dependent upon railroads for the safe, secure and reliable transportation of raw materials and products. Dow's business model is built on the fact that rail transportation of hazardous materials represents the safest, most efficient, most economical and most socially acceptable way to transport large volumes of these materials long distances over land.

Because rail is the most effective, lowest risk over land mode of transport for large volumes of hazardous materials over long distances, the common carrier obligation is integral to the safe transportation of hazardous materials. Without the common carrier obligation, many in the rail industry have made it absolutely clear that they would not haul TIH materials at all, and might also refuse to haul other categories of hazardous material. The consequences would compromise public safety and the overall public welfare because these hazardous materials either would move by a less safe mode or not at all.

¹ The Board recently held a hearing on the common carrier obligation on April 24-25. Although that hearing encompassed all aspects of the common carrier obligation, a large portion of the testimony focused on hazardous materials, and particularly TIH materials. The railroad industry expressed concern that the common carrier obligation requires railroads to haul TIH materials that subject them to potentially "ruinous liability" for an accidental release. The chemical industry emphasized the critical role of TIH materials in the daily lives of all Americans and the essential role of railroads in providing safe transportation of TIH materials.

In response to that testimony, the Board scheduled this hearing to focus upon the liability issue raised by the railroads and the appropriate role of the Board to address that issue. In addition, the Board asked parties to discuss the efforts of other federal agencies to address the transportation of hazardous materials. The Board also asked parties to comment upon what constitutes a reasonable request for rail transportation of TIH materials, which is the only statutory qualification upon the common carrier obligation. Finally, the Board has asked whether there are unique costs associated with the transportation of hazardous materials, and if so, how railroads recover those costs.¹

¹ Although the Board has posed this last question in the context of railroad costs, shippers also have extensive costs associated with hazardous materials transportation, which the Board should consider in this proceeding.

Any action by the Board to narrow or eliminate the railroads' common carrier obligation to transport hazardous materials, or even just TIH materials, would have significant unintended safety consequences that are contrary to the public interest. This concern is magnified by the limited scope of the Board's jurisdiction that renders the Board unable to address holistically both the economic and safety aspects of the liability issue. Accordingly, Dow believes that the liability issue is best addressed by Congress, which is the only governmental body capable of balancing all of the multiple conflicting safety and economic concerns that are implicated by the liability issue.

II. THE BOARD'S JURISDICTION TO ADDRESS RAILROAD LIABILITY FOR HAZARDOUS MATERIALS TRANSPORTATION IS LIMITED.

Although the Board has jurisdiction to consider the liability issue raised by the rail industry, its options to address the issue are constrained in three significant ways. First, the approaches available to the Board are constrained by its limited jurisdiction. Second, to the extent the Board acts within its jurisdiction, it must do so in a way that does not adversely impact the safety of transporting TIH materials. Third, the Board must not act inconsistent with a recently enacted statute in which Congress expanded the liability of railroads for their own negligence.

A. The Board's Role in Addressing the Liability Issue is Limited to Its Unreasonable Practice Jurisdiction.

Congress has granted the Board jurisdiction over "transportation by rail carrier " 49 U.S.C. 10501(a)(1). That jurisdiction extends to "remedies with respect to rates, classifications, rules, practices, routes, services, and facilities of such carriers " 49 U.S.C. 10501(b)(1). This jurisdiction covers the operations of rail carriers and the terms and conditions of carriage between carriers and shippers.

There are essentially three approaches to address the railroad liability issue liability caps, insurance pools, and indemnification. The first two approaches are clearly beyond the ability of the railroads, or the Board, to implement. The Board's authority does not extend to third parties not engaged in transportation by rail carrier, such as the victims of a rail accident who would be affected by a liability cap. Nor is the Board authorized to preempt state laws governing tort liability or to create and administer insurance pools.

The third approach, indemnification, may fall within the Board's authority under 49 U.S.C. 10704 to review the reasonableness of railroad practices established pursuant to 49 U.S.C. 10702. Thus, if a railroad were to publish a tariff provision that required a shipper to indemnify the railroad for damages caused by a release of TIH materials in a rail accident caused by the railroad's own negligence, the Board could determine whether that provision is reasonable. Even then, however, it is difficult to conceive of a circumstance in which the Board could approve a tariff indemnification provision without reaching beyond its jurisdiction and intruding upon the domain of state tort laws.

As a general matter, the law does not favor contract provisions that relieve a person from his own negligence. The Connecticut Supreme Court recently reviewed the reasons underlying this principal

[E]xculpatory [contractual] provisions undermine the policy considerations governing our tort system. "The fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct. . . . It is sometimes said that compensation for losses is the primary function of tort law [but it] is perhaps more accurate to describe the primary function as one of determining when compensation [is] required. An equally compelling function of the tort system is the prophylactic factor of preventing future harm. The courts are concerned not only with compensation of the victim, but with admonition of the

wrongdoer " (Citations omitted, internal quotation marks omitted)
Lodge v Arett Sales Corp , 246 Conn 563, 578-79, 717 A 2d 215
(1998)

Hanks v Powder Ridge Restaurant Corp , 885 A 2d 734, 742 (Conn 2005) [underline added]

Indemnification clauses are a form of exculpatory clause because they relieve the negligent actor of liability for its conduct. Because a tariff indemnification provision would vitiate the prophylactic policy considerations underlying state law tort systems, such provisions would be unenforceable under most state laws.

An often cited case on the public policy enforceability of exculpatory clauses is *Tunkl v The Regents of the University of California*, 383 P 2d 441 (Cal 1963). After surveying various decisions from other states, the California Supreme Court noted that those decisions are uniform in one respect. "The cases have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest.'" *Id* at 443. The Court then proceeded to identify the following six factor test to determine whether a contract is affected with a public interest.

[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Id at 444-46 [footnotes omitted] Although it is not necessary to satisfy each and every factor to affect a contract with a public interest, *id* at 446, it is quite clear that common carrier transportation of TIH materials in fact does satisfy each factor. Indeed, many states and the Restatement of Contracts have abridged this list by referring specifically to common carriers.²

Because indemnification clauses are exculpatory clauses that violate fundamental tort law principals within the jurisdiction of the states, they are beyond the Board's exclusive and preemptive jurisdiction under 49 U S C 10501(b). Indeed, to the extent that Congress has preempted state tort laws, it has done so in the Federal Rail Safety Act, at 49 U S C 20106, rather than the Interstate Commerce Act. Thus, a tariff indemnification provision would not be enforceable in most states.

B. The Board May Not Exercise Its Jurisdiction In a Manner That Adversely Affects Safety.

The Sixth Circuit, in *Akron, Canton & Youngstown R R Co v ICC*, 611 F 2d 1162, 1170 (6th Cir 1979) ("*Akron*"), observed that, "[a] question of possible liability for damage resulting from carriage of a commodity is . within the Commission's jurisdiction as the regulator of the economics of interstate rail transport " *Akron*, 611 F 2d at 1170. But the court also noted that questions of safety and risk liability are closely related, that the Department of Transportation ("DOT") has exclusive authority to promulgate industry-wide safety standards; and that the ICC/SIB may permit carriers to make more, but not less, stringent rules for their carriage of hazardous materials. *Id*. Thus, it follows that the Board's economic jurisdiction over liability issues must not be exercised in a manner that adversely impacts safety.

² See *Hanks* at 743 (surveying state decisions applying variations on the *Tunkl* factors), Restatement 2d Contracts, § 195 ("A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty.")

Liability limits inherently affect safety in multiple ways. First, by absolving railroads of financial responsibility in whole or even in part for their own negligent acts, liability limits reduce incentives for safe behavior. The most serious rail accidents involving the release of TIH materials have occurred at Minot, ND, Macdona, TX, and Graniteville, SC. The National Transportation Safety Board ("NTSB") attributed all three accidents to conditions that were within the control of the railroads.³ If the railroads are not held responsible for their own deficiencies, their incentives to fix the problems and to implement preventative measures in the future are substantially lessened.

Second, liability limits distort the economic incentives for investments in safety-related equipment and infrastructure. The three accidents described above may have been avoided altogether, or the magnitude of damage may have been reduced, by such investments. For example, the Graniteville accident occurred in "dark" (i.e. unsignaled) territory. In signaled territory, the misaligned switch that caused the accident might have been detected and the train stopped before the collision with the second train. In addition, the presence of double-shelf couplers on all cars in the train might have prevented one or more tank cars from being

³ Derailement of Canadian Pacific Railway Freight train 292-16 and Subsequent Release of Anhydrous Ammonia Near Minot, North Dakota, January 18, 2002, NTSB/RAR04-01, PB 2004-916301, Notation 7461A (March 9, 2004) at vi, 32-33, 55-57, 68-69 (stating that the accident was caused by inadequate track inspection, which failed to identify failed track joints and noting that inadequate training and maintenance of training activity reports were contributing factors), Collision of Union Pacific Railroad Train MHOTU-23 with BNSF Railway Company Train MEAP-TUL-126-D with Subsequent Derailement and Hazardous Materials Release, Macdona, Texas, June 28, 2004, NTSB/RAR-06-03, PB2006-916303, Notation 765D (July 6, 2006) at vi, 16-18, 26-31, 36-43, 58-59 (finding that the accident was caused by the train crew's failure to follow a stop signal according to operational rules, the crew's lack of sleep and long duty tours, the conductor's alcohol consumption, the likelihood that the conductor slept for most of the train trip, and limbo time as it related to crew fatigue), Collision of Norfolk Southern Freight Train 192 with Standing Norfolk Southern Local Train P22 with Subsequent Hazardous Materials Release at Graniteville, South Carolina, January 6, 2005, NTSB/RAR-05/04, PB2005-916304, Notation 7710A (November 29, 2005)(finding that the accident was caused by the train crew's failure to reline a mainline after use leading to an unexpected diversion of train 192 where it struck P22 and derailed, also finding that the failure to reline may have been due to the crew's inattentiveness to the switch due to their attempt to secure the train before reaching hours-of-service-limits, and the location and lack of visibility of the switch to the crew, also noting that if the conductor had followed operating rules and held a job briefing, the crew may have attended to the main line switch, which would have prevented the accident)

punctured in the derailment, thereby preventing the release of TIH material. Although safety investments may be costly, those costs are likely to be significantly less than the damages caused by an accidental release of TIH material. Liability limits distort that cost-benefit analysis against such investments.

Third, selective liability limits that apply only to railroads, and shift liability to shippers, may encourage shippers to shift more traffic to trucks because there would be no similar liability exposure with that mode. This incentive would be especially strong if the shippers, themselves, are required to bear the liability risk for railroad negligence through indemnification provisions in rail tariffs. Since approximately four trucks are required to transport the same volume as a single rail car, any shift from rail to truck would have a cascading risk effect on both the transportation and loading/unloading of TIH materials. Furthermore, added truck volumes would compound practical concerns around highway congestion, accident prevention and a shortage of specialized tank trucks and drivers. This would be detrimental to the public need for the safe transport of TIH materials.

The Board must account for these factors in deciding what, if any, action to take within its limited jurisdiction to address the liability issue. Failure to do so could constitute unreasonable restrictions upon the common carrier obligation and an impermissible intrusion upon the safety jurisdiction of the Pipeline and Hazardous Materials Safety Administration ("PHMSA") and the Federal Railroad Administration ("FRA").

C. In Recent Legislation, Congress Expressed Its Intent That Railroads Be Liable for Their Negligence.

Recent Congressional action makes it clear that Congress intends for a railroad to be liable for its own negligence. Congress passed and the President signed into law the Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, which amended 49

U.S.C. 20106 so that the Federal Railroad Safety Act no longer preempts all state law negligence claims. Accordingly, this legislation calls into question the legitimacy of any liability limitation the Board might consider.

Congress enacted this provision in response to several federal court decisions holding that state law tort claims for the accidental release of anhydrous ammonia, a TIH material, arising from a Canadian Pacific derailment near Minot, North Dakota, were completely preempted by the Federal Railroad Safety Act. *E.g., Lundeen v Canadian Pac Ry Co*, 447 F.3d 606 (8th Cir. 2006) ("*Lundeen*"); *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 only last week, the Court vacated *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).

The link between this legislation and the Minot incident is explicit in the legislative history, which states that the retroactivity provision in subsection (b)(2) "applies to all pending State law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota derailment." H.R. Rep. No. 110-259, 100th Cong. 1st Sess. at 351 (2007). Thus, just last year, Congress enacted an express statutory provision to ensure that railroads are liable for damages resulting from accidents due to a railroad's own

negligence, including accidents involving the release of TIH materials. This Board must not take any action that is inconsistent with Congress' intent.

III. WHAT IS A REASONABLE REQUEST FOR TRANSPORTATION OF TIH MATERIALS?

The Board has asked for comment on what constitutes a reasonable request for service involving the movement of TIH materials. The answer to that question is best informed by reviewing the origins and evolution of the common carrier obligation and applying those standards in the context of the overall public interest in the safe transportation of TIH materials. This analysis reveals a heavy presumption of reasonableness that may only be rebutted in narrow and compelling circumstances that do not adversely affect rail safety. The liability issue does not constitute such a compelling circumstance.

A. Public Needs Define the Boundaries of the Common Carrier Obligation.

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

The common law duty of common carriage did not automatically extend to all goods and services. Courts did not force a carrier to undertake the carriage of goods that it was unaccustomed to carrying. *Akron*, 611 F.2d at 1166 ("It is true that common law carriers could pick and choose which goods they transport in common carriage.") However, once it was established that a carrier did hold itself out to transport certain goods, the duty to transport those goods upon reasonable request became part of its common carrier obligation.

Although the United States began to regulate rail transportation via statute with the passage of the Act to Regulate Commerce in 1887, the common carrier obligation itself remained

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

The Transportation Act of 1920 codified the common law obligations of railroads as common carriers *See American Trucking Association, Inc v Atchison, T & Santa Fe Ry Co* , 387 U S 397, 406 (1967) The Act also codified specific common carrier duties, including the provision of transportation upon reasonable request. This was the first statutory attempt to clearly delineate the common carrier obligation and to vest jurisdiction that had previously rested solely in the courts with the Interstate Commerce Commission ("ICC") ⁴

The ICC and the courts have interpreted the 1920 Transportation Act and subsequent legislation to impose common carrier duties upon railroads beyond those that exist in the common law For example, although at common law only carriers who "held themselves out to the public" were common carriers, the Interstate Commerce Act defined common carrier as including railroads. *Akron*, 611 F 2d at 1166 Also, while the common law permitted common carriers to pick and choose the goods that they would transport in common carriage, railroads "whose property and facilities are affected with a public interest, (were) ordinarily held to be common carriers of goods delivered to them for transportation " *Id* , quoting 13 C.J.S Carriers § 6 This declaration of the common carrier status of railroads has been considered just

⁴ Frank Cusham, *Manual of Transportation Law*, The Transportation Press, Dallas, TX, 1951 at 95

and reasonable "in view of the governmental largess which railroads have received, and in view of the unique importance to commerce of rail transportation "⁵ *Id* [footnote omitted].

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

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

Thus, railroads may no longer pick and choose the commodities that they haul, but instead are required to provide service for all commodities tendered upon reasonable request to fulfill the transportation needs of both shippers and the general public.⁶

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

As noted above, because the public need for rail transportation of TIH materials defines the boundaries of the common carrier obligation, *see Akron* at 1168, it is an essential factor in determining whether a request for rail transportation of TIH materials is reasonable. The importance of TIH materials to the public health and welfare, particularly the importance for chlorine and anhydrous ammonia which represent the largest volume TIH materials, was

⁵ Examples of such governmental largess include public land grants, loans and subsidies, antitrust exemptions, extensive preemption of state and local laws, eminent domain powers, more permissive merger review standards, and bottleneck franchise protections.

⁶ Although there are exceptions to the general statutory common carrier obligations of railroads, those exceptions are limited to a few clearly defined circumstances. *Akron*, 611 F. 2d at 1166-67. None of these circumstances are relevant to the common carrier obligation to transport TIH materials.

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

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

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

Two lines of ICC decisions affirmed by the courts that involved the transportation of radioactive materials have rejected safety arguments as grounds to narrow the common carrier obligation when there is an important public need for rail transportation of a hazardous material. In both lines of cases, the overriding public interest in transporting the radioactive materials and the role of rail transportation as the safest mode has prevailed over all claims that such transportation is unsafe. The courts, however, have provided guidance as to when railroads may impose more stringent safety requirements than those adopted by DOT, although no such requirements ever have been approved under those guidelines.

The first line of safety cases held that a railroad may not ask the Board "to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT regulations governing such transport, and these regulations have been met " *Akron*, 611 F 2d at 1169 See also, *US Dept of Energy v The B & O R R Co*, 364 I C C 951, 959 (1981) ("DOE") There are extensive DOT regulations, promulgated by PHMSA and FRA, that govern the safe transportation of TIH materials by rail. Moreover, significant additional safety enhancing regulations either recently were adopted or are under consideration by PHMSA, FRA and TSA See Part IV, *infra* Also, just as with radioactive materials, "no other mode of transportation is more suited to the economical carriage of these materials than train carriage " *Akron* at 1168 ⁷ Thus, there can be no claim that TIH materials are too dangerous to transport; nor has the rail industry made such a claim.

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

⁷ The ICC found that "truck shipments of nuclear wastes would, because of the greater number of smaller shipments required, increase the probability of accidents involving nuclear materials " *Id.* The same would be true of TIH materials

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.

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

In contrast to the safety issues, the liability issue has dominated the current discussion over when a request to transport TIH materials is reasonable. The railroad industry's principal concern is its potential liability exposure in the event of an accidental release of TIH materials. The industry contends that, because railroads have a common carrier obligation to handle TIH materials that is imposed upon them for the public interest, their liability should be limited. This contention has raised the question whether a request for transportation of TIH materials without liability limits is reasonable. What the rail industry seeks, however, is special treatment of a risk that is not unique to it. The mere fact that railroads are obliged to assume this risk by the common carrier obligation does not justify special treatment.

In the absence of a Congressional determination to the contrary, the law actually disfavors liability limits upon common carriers precisely because they are vested with a public interest. In particular, the strong public need for rail transportation of TIH materials that is a practical necessity for most TIH shippers, the relative bargaining strength of the railroads over TIH shippers, and the exclusive control exercised by railroads over TIH materials during transport fit squarely within the key factors that have prompted most states to void exculpatory clauses in contracts for one's own negligence. See Part II A, *supra*, and the state law cases discussed therein. Furthermore, as discussed in Part II.C., *supra*, Congress expressly amended 49 U.S.C. 20106 to ensure that railroads would be liable for their actions under state tort laws.

In addition, although the liability issue poses economic questions that are within the Board's jurisdiction to decide, it cannot be divorced from the safety issues, which are within the jurisdiction of DOT *Akron* at 1170 ("Questions of safety are also questions of risk liability ") Consequently, the Board must be cognizant of the safety implications of any action it takes within its economic jurisdiction to address railroad liability. Thus, the Board cannot limit the railroads' liability for their own negligence through caps or indemnification, since doing so would undermine their incentives to provide service in the safest manner possible, or would cause shippers to shift to other, potentially higher risk, transportation modes. *See* Part II B , *supra*. To the extent the Board's actions adversely affect the safety of TIH transportation, those actions would constitute an unreasonable restriction upon the common carrier obligation

3. TIH liability risks are not unique to the rail industry.

But, even before considering these other issues, the Board first must critically scrutinize the reasonableness of railroad claims that, but for the common carrier obligation, they would not haul TIH materials because of their liability exposure. The reasonableness of those claims must be established before they can form a basis for questioning the reasonableness of a request for TIH transportation

History demonstrates that railroads voluntarily chose to transport TIH materials For nearly 100 years, railroads have continuously competed for business hauling TIH materials for their financial gain This competition was open, and pitted railroads against one another and other modes of transport The railroads cannot re-write this history to evade the obvious Having chosen to compete for and transport TIH materials as common carriers, the railroads

cannot now abdicate their responsibility to transport TIH materials in light of the strong public need for such transport.⁸

Although the rail industry claims that times have changed, the common carrier obligation does not permit the *a la carte* selection of commodities based upon the convenience to each railroad at any particular point in time. Moreover, the changed circumstances alleged by the rail industry implicate broader tort reform issues, which are not unique to railroads and have imposed greater liability risks upon all industries. This is a subject that only Congress can address through more comprehensive reforms well beyond just the rail industry

In addition, because railroads are the only entity in the TIH supply chain of producers, consumers, and transporters who claim that TIH materials are too risky, their claims of unfairness lack credibility. Most notable is the fact that trucking firms choose to transport TIH commodities without liability limits. Accordingly, railroad claims that the common carrier obligation is unfair to them without liability limits do not seem reasonable when no other TIH industry participant with similar liability risks has made such claims. Moreover, railroad claims that TIH liability imperils their ability to obtain investor capital in the financial markets is belied both by the strong financial performance of the rail industry without liability limits and by the ability of other industries with similar risks to raise capital.

Finally, unlike the trucking industry, where if one trucker does not want to transport a product, another trucker can readily serve the shipper, there are substantial barriers to entry in the rail industry. If one railroad decides that it does not want to transport TIH materials, there is no alternative that would be equally as safe, and in some cases no alternative at all. But for these barriers, the rail industry would not be in a position to argue for special treatment of its liability

⁸ Cf. *Akron*, 611 F. 2d at 1167 ("[I]t is the long history of the present petitioners' carriage of nuclear materials, and the continuing national need for such carriage, which takes the petitioners' transport of nuclear materials from the realm of 'accommodation or special engagement' where the Act's ratemaking provisions do not apply.")

risks when transporting TIH materials. Indeed, it is the common carrier obligation itself that ensures that TIH materials are transported by the safest mode possible, because it guarantees that rail transportation is always available, despite the railroad market power created by barriers to entry. By imposing liability limits as part of a reasonable request for rail transportation of TIH materials, the Board would improperly abet railroad attempts to use the market advantage provided to them by high barriers to entry to abdicate their liability risks.

IV. REGULATORY AND PRIVATE INITIATIVES TO ENHANCE HAZARDOUS MATERIAL TRANSPORTATION SAFETY.

The transportation of hazardous materials has never been safer and there are extensive regulatory and private initiatives underway to further enhance safety and reduce risk. PHMSA and FRA are the two federal agencies with paramount jurisdiction over rail safety matters. In addition, the Transportation Security Administration ("TSA") has jurisdiction over rail transportation security. All three agencies either have concluded or are currently conducting rulemakings directed to the safety and security of transporting hazardous materials by rail. Moreover, Dow has engaged in multiple collaborative agreements with railroads, tank car builders, and government entities to increase safety and reduce risks. Finally, in the case of terrorist acts, Congress has enacted a law that would provide liability limits for the rail industry.

A. Regulatory Initiatives.

1. Routing Rules.

PHMSA and FRA have promulgated interim final rules that incorporate the Recommendations of the 9/11 Commission Act of 2007 (Pub. L. 110-53) regarding safety and security measures for the transport of hazardous materials by rail. 73 Fed. Reg. 20752 (April 16, 2008). The rule revises the Hazardous Materials Regulations ("HMR") to require carriers to compile data regarding hazardous commodities transported and routing for such commodities.

The carriers then are required to utilize the accumulated data to assess potential safety and security risks and to propose additional alternative routing that is economically practical. Such analysis must be conducted annually and carriers must complete a comprehensive review of all operational changes, infrastructure modifications, traffic adjustments, or other changes within five years. The rule also addresses transportation delays and interim storage safety concerns and requires pre-transportation security inspections. All of these measures are directed towards reducing transportation risks.

2. Tank Car Standards.

PHMSA and FRA recently issued a Notice of Proposed Rule Making that proposes new tank car safety standards to address tank car structural integrity in the wake of the Minot, Macdonald, and Graniteville accidents. 73 Fed. Reg. 17817 (April 1, 2008). The rules create new requirements for tank car construction that increases puncture resistance on tank car shells and heads while increasing the maximum allowable weight for tank cars to accommodate the increased weight imposed by the new construction requirements. The proposed rules also set the maximum speed for trains carrying TIH materials at 50 miles per hour, and further restricted to 30 miles per hour in non-signalized territory for trains carrying TIH materials in tank cars that do not meet the new standards. These measures are designed to make tank cars safer by reducing the risk of a TIH release in the event an accident occurs.

3. Human Factor Rules.

FRA recently amended its railroad operating rules and practices to address the problem of human error as a primary factor in railroad accidents. 73 Fed. Reg. 8442 (February 13, 2008). The rules require railroads to qualify testing officers who will be charged with conducting safety tests and inspections. They also require railroads to conduct at least a minimum number of tests

per year and require a qualified inspector to conduct quarterly reviews to determine trends regarding the rules most often violated as well as relationships between rules that have been violated and accidents or incidents. The rules also allow employees to make good faith challenges when requested to perform actions that violate operating rules and require enhanced communication in the form of pre-work job briefings prior to engaging in certain tasks such as pushing and shoving and hand operated cross over switches.

4. Track Safety Standards.

FRA has revised its track safety standards in response to several accidents, including derailments on the Canadian Pacific in Minot, ND, and the Union Pacific in Rico Rivera, CA, where rail joint failure was a key contributing factor. 71 Fed. Reg. 59677 (Oct 11, 2006). The rules address the inspection and maintenance of continuous welded rail ("CWR") They focus on CWR joints and require track owners to address CWR joints in their CWR plans, or alternatively, to inspect CWR joints at minimum intervals based on class of track, annual tonnage, and passenger/freight carriage. The rules also require FRA reporting when a cracked CWR joint is found during an inspection and they establish preventative measures to prevent CWR joint cracking by utilizing inspection to determine CWR failures based upon an FRA list of conditions. In addition, FRA's Office of Research and Development is funding research to develop an automated vehicle-mounted visual imaging system to conduct CWR joint inspections in the future.

5. TSA Rail Security Rulemaking.

TSA has proposed rules to address the security risks associated with the shipment of TIH materials. 71 Fed. Reg. 76852 (Dec 21, 2006). The rules augment and compliment PHMSA's regulatory regime by expanding inspection to require hazardous materials shippers to conduct

inspections prior to tendering a shipment to the carrier. The rules also provide chain of custody requirements, which include monitored and protected transfer locations and documented transfers for TIH shipments. Similarly, the rules require location reporting in high threat urban areas ("HTUAs") to allow for quick response in the event that an incident occurs. The rules also will require shippers, carriers, receivers, and transit systems to appoint a Rail Security Coordinator to interface with TSA regarding security issues. Finally, they instill reporting requirements where carriers, receivers, and shippers must report threats, incidents, and suspicious activities to the Department of Homeland Security.

B. Dow Individual and Joint Safety Initiatives.

In addition to the minimum measures required by federal regulations for the safe transport of hazardous materials by rail, Dow is proactively engaged in multiple projects, both on its own and with various stakeholders in hazardous materials transportation, including railroads, tank car builders, and the local communities through which Dow's hazardous materials are transported, to enhance safety and reduce risks.

Under the umbrella of Responsible Care[®], the chemical industry and its supply chain partners have worked successfully for many years to improve the safety of hazardous materials transportation. Dow also has joined with its largest rail service provider, Union Pacific ("UP"), to improve rail safety and security. This initiative focuses upon eight areas: (1) supply chain redesign, (2) next generation rail tank car design; (3) improved shipment visibility, (4) a strengthened commitment to TRANSCAER[®]; (5) improved rail operations safety and accident prevention, (6) hazardous materials routing, (7) deployment of communication-based train control/anti-collision systems; and (8) elimination of Non-Accidental Releases.

Dow's various joint and individual initiatives reflect its comprehensive transportation risk management framework. In general, hazardous material transportation risk is a function of the probability of an event occurring and the potential consequences of the event should it occur. By addressing these two primary factors, Dow is contributing to enhanced safety and reducing the overall risk of an accidental release, as well as the magnitude of harm in the event a release does occur

When this risk relationship is broken into smaller pieces, the probability of an event occurring is largely a function of three factors. (1) the number of trips and the miles traveled per trip, (2) the accident frequency rate along the route of travel, and (3) the probability of release should an accident occur

The number of trips and the miles traveled per trip can be affected by shipper sourcing decisions. Longer term, this may involve consideration of opportunities for co-location of production and consuming facilities, where practical. In addition, railroad routing decisions also affect miles traveled. Dow is addressing these issues in the context of its own supply chain redesign initiative. Furthermore, where practical, Dow is evaluating ways to convert highly hazardous products to less hazardous derivatives before shipping. Dow's overall objective is to reduce the shipment of highly hazardous materials by 50 percent from 2005 levels by 2015. As an example of Dow's historical success in this area, the company has reduced chlorine shipments by 80 percent since 1999.

The accident frequency rate along the route of travel most commonly is a function of human factors and infrastructure. This is largely an area that only the railroads themselves can address. In addition, the FRA rulemakings discussed above are intended to address these factors.

The probability of release should an accident occur is a function of the rail tank car design and the operating conditions surrounding the event. Shippers can impact this probability by improving rail tank car designs and railroads can do so through operating practices, such as train speed, train configuration and tank car placement. Dow, in cooperation with UP and Union Tank Car Company, is addressing these factors within the context of the Next Generation Rail Tank Car Project. Their highest priority is to design and implement a "breakthrough" next generation rail tank car for TIH materials that achieves a step change improvement in crashworthiness over existing cars. Drawing on the results of this Project, tank car builders will be designing, building and testing new prototype cars in the coming months. The results of this Project have been, and will continue to be, shared with FRA as it considers new tank car standards. To date, Dow has spent nearly \$7.5 million on this Project and expects to spend over \$160 million to upgrade its TIH tank car fleet with these new design concepts and technologies.

The consequence component of the risk framework is a function of the area potentially impacted and the population potentially exposed in that area. The potential impact area is affected by multiple factors, including the characteristics of the hazardous material, the temperature and pressure of the material inside the container, the possibility of auto-refrigeration, and the size of the shipping container. The potential population exposure is affected by routing decisions and by working with local officials to ensure effective emergency preparedness and response plans are in place. Dow is addressing these factors through its efforts to improve shipment visibility and its commitment to TRANSCAER®.

Dow has improved shipment visibility by installing GPS and sensor technologies on its fleet of TIH tank cars at a capital cost of \$1.2 million and an annual operating cost of \$250,000. This technology enables Dow to know both the location and condition of its tank cars, so that

emergency responders have the information they need when they need it. This will augment information that already is available to responders through CHEMTREC® and the railroads.

Dow and UP founded TRANSCAER® in 1986 to provide community awareness and emergency responder training so that communities are better prepared for potential chemical transportation emergencies. Through a strengthened commitment to TRANSCAER®, Dow is in the midst of a 6 year effort, in collaboration with its railroad carriers, to provide enhanced emergency responder training for the communities along railroad transportation routes for highly hazardous materials. The cost of this program to Dow averages \$500,000 annually plus the cost of additional special events. Dow also is collaborating on research into new sensor technologies to provide early warning of a leak, and the potential for self-sealing technologies that would limit the amount of material released during an incident.

Safe transportation of hazardous materials requires a safe and reliable rail transportation system. That, in turn, requires cooperation among shippers, railroads, rail car builders, and regulators. As the leading chemical manufacturer in the United States, Dow strives for continuous improvement in the safe production, transportation and use of its products. Dow is committed to working in partnership with the rail industry, first, to prevent accidents, and second, to mitigate any potential harm that may be caused by any accidents that may occur. In Dow's safety culture, our commitment is to achieve a safety performance of zero accidents, zero releases, and zero harm to employees, the public and the environment.

C. Statutory Liability Limits for Terrorist Acts.

In the Support Anti-terrorism by Fostering Effective Technologies ("SAFETY") Act of 2002, Congress enacted a law that could extend liability limits to railroads for terrorist acts. This law, which was enacted as part of the Homeland Security Act of 2002 (Title VIII, Subtitle G),

would eliminate or minimize tort liability for a railroad which obtained certification or designation for anti-terror technologies, including products and services, if tort suits were ever filed against them following an act of terrorism. The SAFETY Act was drafted to stimulate the development and deployment of technologies that combat terrorism and encourage preparedness that could mitigate harms resulting from malicious acts. In exchange for a company implementing an effective program to defend against or respond to or recover from a terrorist act, the company could be awarded with limitation of liability under the SAFETY Act

A railroad can submit its anti-terrorism plans to the Department of Homeland Security ("DHS") for a SAFETY Act award. If designation or certification is granted, the railroad is entitled to the benefit of liability limits determined by DHS, provided it also maintains the minimum insurance required by DHS. Typically, DHS has established the liability cap at the required minimum insurance level. Despite the availability of this program for several years, to Dow's knowledge, no railroad has applied for its protection. Dow has obtained an award under the SAFETY Act for its site security services at several of its chemical manufacturing facilities.

Because a Congressionally-enacted program establishing liability limits for terrorist acts already is in place, no action to limit railroad liability for terrorist acts is necessary or appropriate.

V. A PRICE-ANDERSON MODEL MUST CAREFULLY BALANCE LIABILITY, SAFETY, AND COMPENSATION ISSUES.

The Board has shown particular interest in the Price-Anderson Act of 1957 ("PAA") as a model for addressing the railroads' liability concerns. Although there may be arguable merits to adopting a PAA model for TIH liability, any such model would have to be adopted by Congress after carefully analyzing the risks and benefits and weighing competing public policy considerations. Furthermore, the PAA, which applies to the nuclear power industry, is not easily

adapted to the railroad industry due to significant differences between the two industries and the Congressional objectives underlying the PAA. Although the rail industry has advocated a PAA-model, its only proposal to date lacked most of the essential features of the PAA that are needed to balance liability, safety, and compensation issues.

A. A Price-Anderson Model Would Be Very Difficult To Adapt To The Railroad Industry.

Under the PAA, as amended, nuclear reactor licensees are required to obtain the maximum amount of private insurance available to them, which the Nuclear Regulatory Commission ("NRC") has determined to be \$300 million at present. 10 C.F.R. 140.10. If the financial damages from a nuclear incident exceed this private insurance coverage, all nuclear reactor licensees, after an accident, must contribute proportionately up to \$100.6 million per reactor per incident into a secondary insurance fund. *Id.* Total liability for a nuclear incident is capped at the sum of these two insurance pools, which currently is over \$10 billion. Although both insurance pools are funded only by reactor licensees, the proceeds cover the liability of all entities associated with the nuclear industry, from reactor designers and parts manufacturers to the transporters of radioactive waste.

Congress had two main objectives when it adopted the PAA. To ensure that the public would be compensated if an accident occurred at a nuclear facility, and to set a limit on the liability of private industry to remove a major deterrent to private participation in the development of nuclear energy. S. Rep. No. 99-310, 99th Cong., 2d Sess. 3 (1986). Congress had opened up the nuclear industry to the private sector in the Atomic Energy Act of 1954, but, there was little interest due to liability concerns in the event of a reactor meltdown, S. Rep. No. 296, 85 Cong., 1st Sess., 2 U.S.C.A.N. 1803-04, and the unavailability of substantial private insurance (approximately \$60 million in 1957), *id.* at 1808.

Because Congress designed the PAA to cover the entire nuclear industry, rather than a single participant, a true PAA-based model for TIH liability would cover the activities of all participants in the TIH industry, not just the railroads. This would include, at a minimum, the activities of TIH producers, consumers, tank car manufacturers, and all transporters.⁹ However, the entire TIH industry is not threatening a mass market exodus due to liability risks, not even other TIH transporters. Accordingly, serious questions exist as to whether the rail industry's liability risks are so different as to warrant special legislation for only its benefit.

A PAA-model for the rail industry would impose most, if not all, of the costs upon the railroads themselves. Although the PAA only requires reactor licensees to contribute to the insurance pools that cover all nuclear industry participants, a reactor licensee, as the operator of a nuclear reactor, is the single entity most likely to be in control over the most serious and costly nuclear incidents. Indeed, the legislative history to the PAA indicates that Congress was most concerned with damages caused by the operation of nuclear reactors.¹⁰ When Congress extended the PAA's protection to third parties, it had in mind isolated situations such as the negligent maintenance of an airplane engine that caused the plane to crash into a reactor.¹¹ The extension of protection to carriers, such as railroads, was made with the expectation that a reactor licensee

⁹ Unless all transporters of TIH material are covered by a PAA model, a railroad-only liability cap and insurance pool would encourage shippers to favor other, less safe, modes that are not subject to caps or indemnification.

¹⁰ 2 U S C C A N at 1803 ("[T]he problem of possible liability in connection with the operation of reactors is a major deterrent to further industrial participation in the program"), 1804 ("the companies which are interested in participating in the reactor program are hesitant about assuming the liabilities which could ensue in the remote event of a reactor meltdown"), 1807 (Congress requested a study "of the possible effects of a runaway reactor"), 1810 ("If a runaway reactor should cause any further damages beyond [the coverage provided by the PAA], the way was left open for Federal contributions"), 1813 ("Congress should not only try to give financial protection to innocent members of the public who might suffer in the unexpected case of a runaway reactor, but should also provide all possible statutory requirements for assuring that reactors should be as safe as possible.")

¹¹ *Id.* at 1818.

would "see that appropriate safety measures are taken during the shipment "¹² Thus, Congress gave substantial consideration in the PAA to keeping liability with the entity able to exercise the most control over safe operations This would be a particularly important factor in a PAA model for railroad liability, since all three of the most costly TIH releases during rail transport have been attributed to conditions within the control of the railroads ¹³

A PAA model for railroad liability also would require each railroad to purchase the full amount of private insurance coverage available to it This requirement ensures that the railroads retain liability, and thus their safety incentives, to the maximum extent insurable Whereas, the nuclear industry has access to only \$300 million in private insurance, it is generally believed that the rail industry has access to over \$1 billion

Furthermore, a PAA model would require each railroad to contribute to a secondary insurance pool to the maximum extent of its ability, without jeopardizing its rail investment and subjecting stockholders, bond holders, and rate payers to unreasonably high financial risk These are the same factors that Congress considered when it determined that reactor licensees should contribute \$100.6 million each to the PAA's secondary insurance fund. H.R. Rep. 99-310, 99th Cong. 2d Sess. at 8 (1986) This requirement further reinforces the safety incentives of the rail industry to the maximum extent, but without causing financial ruin because the greatest liability risks are spread across all railroads

There is a fundamental difference, however, between the nuclear and railroad industries that could require grossly inequitable changes in a PAA model for railroad liability Due to the substantially smaller number of Class I railroads (7) compared to reactor licensees (104), and the

¹² *Id.* Another reason for extending coverage to all persons under a single policy was to parallel the policies at the request of the insurance companies, which wanted to avoid pyramiding of insurance at a reactor that could result from designers, owners, contractors, and other parties taking out separate insurance policies *Id.* at 1818-19

¹³ See note 3, *supra*

smaller financial resources of Class II and III railroads, individual railroad contributions to a secondary insurance fund would be much greater. Depending upon the desired amount of total coverage, additional contributors could be needed to fund a sizeable secondary insurance pool. As the most obvious potential source of additional funding, the small number of TIH shippers would not significantly expand the size of this pool. Moreover, it would be inconsistent with a PAA model, and fundamentally unfair, to require TIH shippers to fund the secondary pool without also expanding the liability caps and insurance coverage to their operations. Although expanding the pool to all hazardous materials shippers might provide a critical mass of contributors, all hazardous materials do not pose the same risks or have the same potential to cause damages beyond private insurance coverage limits. Thus, a policy decision would have to be made to require hazardous materials shippers to subsidize an insurance pool that would never benefit them.

Finally, any practical PAA-based model for railroad liability will be more difficult to administer than the PAA itself. The NRC can easily enforce the PAA through its licensing of nuclear reactors. In addition, the NRC only collects the secondary insurance pool after an accident where damages exceed private insurance coverage, which has never occurred. A railroad insurance pool, however, would need to collect funds from potentially thousands of shippers, possibly on a per shipment basis, before a TIH incident to ensure their prompt availability. Furthermore, another governmental entity would have to be created to manage the collection, maintenance, and disbursement of funds.

Although one justification for a PAA-model for TIH liability might be to ensure that the public will be compensated if an accident occurs, determining whether a PAA model is the best means to address this issue requires a thorough analysis of the potential costs of a TIH release.

during transportation, the probability of such a scenario, the available insurance protection, and the railroad industry's capacity to make up the difference. Furthermore, these questions must be evaluated in the context of all participants in the TIH supply chain — since it may be necessary to include them within the scope of any PAA liability model. The costs and benefits of creating and administering such a complex model for a catastrophic event that may never occur must be weighed against other, *ad hoc*, alternatives.

Finally, because the PAA model presents potential trade-offs between accident prevention, damage mitigation, and compensation, there must be a complete and careful assessment of multiple economic and safety issues. Such issues should only be addressed by Congress, just as it did in the PAA.

B. The Only Price-Anderson Model Proposed By The Rail Industry Failed To Balance Liability, Safety, and Compensation Issues.

Approximately one year ago, the AAR circulated draft legislative language that purported to adopt a PAA-based liability model for the TIH industry. That proposal, however, lacked many key features of the PAA that are essential to balancing the liability, safety and compensation issues. The AAR proposal was unacceptable because:

- 1 Railroads were required to maintain only \$300 million of private insurance to cover their own negligence, even though they have access to over \$1 billion of private insurance.
- 2 Railroads were not required to contribute at all to the secondary insurance pool, much less assume joint liability for any damages in excess of private insurance coverage. Although the AAR proposal established a \$5 billion liability cap, the negligent railroad's portion would only be \$300 million, or just 6% of the total damages permitted by the overall liability cap.

- 3 Under the AAR proposal, each railroad was responsible only for its own negligence, while all shippers were held jointly liable for the balance, which would be 94% of all liability under the cap. A PAA model does not impose liability upon utility ratepayers, who have no control over the safety practices of nuclear reactor operators. Similarly, it is inappropriate to shift liability for the secondary insurance pool to railroad customers, which have no control over railroad safety practices.
4. Despite placing 94% of a potential \$5 billion liability upon shippers and receivers, there was no liability protection extended to shippers for their own activities beyond rail transportation.
- 5 The AAR proposal required shippers and receivers of all hazardous materials, not just TIIH materials, to contribute to a secondary insurance pool, although most hazardous materials do not pose the same risks or have the same potential to cause damages beyond the private insurance coverage limits.
- 6 The AAR proposal failed to address many questions concerning its application to third parties which have not contributed to the secondary fund, but may be at fault, such as tank car manufacturers and rail car repair facilities.

In summary, the AAR proposal focused solely upon minimizing railroad liability to the greatest extent possible by shifting that liability to non-negligent third parties who would have no control over railroad operations and who would receive little or no benefit from the liability caps or the insurance pools. This legislation would have been both substantially inequitable and tremendously detrimental to the safe transportation of TIIH materials. Despite AAR's claims, these features are the anti-thesis of a Price-Anderson model.

VI. ANY REVISION TO THE CURRENT LIABILITY REGIME MUST BE CAREFULLY CONSIDERED.

The current liability regime for damages caused by the release of T1H materials is based upon fault, e g negligence. This regime establishes a standard of care and assigns liability for damages caused by a breach of that standard to the party or parties at fault. For the rail industry, federal safety standards adopted by DOT establish the proper standard of care. Congress has determined that, if a railroad breaches that standard, it should be responsible for the damages caused by its negligence. 49 U S C 20106(b)(1). Conversely, however, if a railroad has an accident despite meeting that standard of care, a state law tort action would be preempted. *Crabbe v Norfolk Southern*, 2007 U.S. Dist. LEXIS 8095 (E.D. Mich. 2007) (preemption still applied where plaintiff did not allege a failure to follow federal regulation). Thus, Congress already has established an artificial liability limit that would not apply in the absence of federal preemption. Any alteration to this regime must not be made lightly, or hastily.

Furthermore, changes to the liability regime require a holistic assessment of economic and safety issues that only Congress can and should make. The issues and potential solutions are difficult, complex and controversial. The Board, to which Congress has assigned responsibility for only a portion of these issues, cannot fairly and holistically make the necessary judgments.

Finally, any policy solution to the liability issue, if ultimately deemed necessary and desirable, and whether adopted by the Board or Congress, should adhere to certain basic principals. First, any solution must continue to assign liability to the responsible party to the maximum extent practicable without causing financial ruin. This means requiring the responsible actors to secure the maximum insurance coverage available to them, and ensuring that they are major contributors to any secondary insurance pools. Second, the application of a liability limit, whether through caps or indemnification, must be contingent upon measurable

demonstrations of a railroad's commitment to safety. Potential measures include a commitment to continuous improvement in safety practices and performance through participation in collaborative industry safety programs such as the Responsible Care® Partner Program and the national TRANSCAER® community emergency response training initiative, compliance with DOT safety regulations, and a strong record of excellent safety performance. These principals would provide the limits sought by the railroads while mitigating the adverse safety impacts of those limits.

VII. CONCLUSION.

The Board should refrain from taking any steps to address the liability issue at this time for four basic reasons:

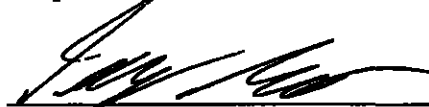
First, the railroads are unable to demonstrate that there is a need for any action that affords them special treatment. In particular, the current balance of responsibilities and liabilities involved in the transport of TIH materials works well. Importantly, railroads have an excellent overall safety record for transporting hazardous materials that has improved dramatically over the past thirty years under the current fault-based liability regime. Any change to the incentives could have significant – and disastrous – consequences for the public health and safety.

Second, the purported need for relief is highly suspect when the Board considers that railroads are the only entities in the TIH supply chain raising liability concerns even though they are not the only entities at risk from an accidental release. This includes the trucking industry that would likely bear the load of changes in shipping patterns attendant to liability limits for railroads. In addition, the issues raised are not unique to railroads, but rather are more reflective of concerns with our tort system in general.

Third, the railroads have engaged in extensive cooperation with shippers, tank car manufacturers, and other TIH stakeholders to improve safety and reduce risk through research and training and the implementation of voluntary measures. Changes in the liability allocations that could impact such cooperation would be contrary to the public interest.

Fourth, the federal agencies responsible for setting rail safety and security standards, FRA, PHMSA and TSA, are adopting even more stringent standards that need to be given a chance to demonstrate that they will reduce risk. A rush by the Board now to impose, or even advocate to Congress, liability limits for railroads will risk undermining these efforts.

Respectfully submitted,



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