RAIL TRANSPORTATION SECURITY

STATEMENT OF

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COMMITTEE ON HOMELAND SECURITY

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Good morning Chairman Thompson, Ranking Member King, and Members of the Committee. I am pleased to have the opportunity to appear before you today to talk about an issue that is of great concern to many of us who live or work in the Nation's Capital or in any of a host of other major cities throughout the country. That issue is the continuing and worsening vulnerability of our cities to the intentional release or detonation of rail-transported ultra-hazardous materials.[1]

The proposed Rail and Public Transportation Security Act of 2007 provides a vehicle which will mandate the preparation of vulnerability assessments and security plans by surface transportation providers, require that these plans actually meet meaningful standards, and backs these mandates with strong incentives to encourage compliance.[2] All well and good. The bill proposes to get major actors organized, become aware of their responsibilities, and critical lines of communication. This is also good. It is past time that some order supplant a *laissez faire* system characterized by endlessly circulating drafts of interagency memorandums of understanding. And of greatest consequence, in my view, enactment would ensure that dollars, not just lip service, are used to acknowledge the presence of transport-related security threats extending beyond box cutters and lip balm. In terms of cost-effectiveness, the bill's eighteen identified uses of rail security assistance funds are spot-on in order of priority.

But there is one thing that the bill could do, should do, but which it does not do. And that is to preserve all useful and viable options that may be employed to reduce the threat that weaponizable railroad tank cars, especially those laden with toxic inhalation hazards (TIH) such as chlorine, pose to major population centers. The option in danger of succumbing to misguided administrative action and which the Rail Security Bill should expressly revitalize is the authority,

[1] In addition to the District of Columbia, legislation to ban ultra-hazardous shipments has been introduced in Chicago, Boston, Philadelphia, Cleveland, Baltimore, St. Louis, Albany and Buffalo.

[2] The PHMSA's NPRM indicates that standards-based planning is not viewed favorably by all potential affected service providers: *"Commenters are nearly unanimous in opposition to requirement for DOT and DHS to review and approve specific security plans, unless done on-site as part of a compliance or outreach review.*" 71 FR 76838, December 21, 2006.

exercisable by a public entity, to prohibit railroads from moving loaded ultra-hazardous tank cars through high-threat urban areas (HTUA's).

This action is needed because PHMSA has proposed rules that would effectively contract-out to the railroad industry critical authority over public safety. That is, in the guise of requiring carriers to examine "alternative" routings of ultra-hazmat shipments, PHMSA's proposed rule would effectively shield railroads from any attempt to compel diversions. [3] In the process, railroads would enjoy the bonus of a public relations fig leaf – non-diversion would be seen to be compelled through the workings of a government sanctioned, black-box analysis developed, run and with results interpreted all by the very party – the affected railroad - that is meant to be governed by the outcome. There would be no opportunity for the public, local government, or any other interested party to challenge the results of a PHMSA-sponsored alternative routing analysis*:*

> *[D]ata compiled under the proposed regulations would be considered SSI under regulations promulgated by DOT and DHS (49 CFR Parts 15 and 1520, respectively). SSI (sensitive security information) is subject to special handling rules and qualifying information is protected from public disclosure under those regulations if copies of any data are kept or maintained by DOT. See 69 FR 28066 (May 18, 2004) and 70 FR 1379 (January 7, 2005).* 71 FR 76840 (December 21, 2006)

Either purposively or unwittingly, the factors proposed to evaluate alternative rail routes can only revalidate preexisting operating patterns or condemn for rank incompetence railroad management. Appropriately for a private concern but hugely inappropriate for the purposes to which they are proposed to be put, the factors most heavily weight business considerations, in passing ask about the proximity of iconic targets, and for other indicia of risk (e.g., population density) provide a countervailing factor - "emergency response capability along route" which of course correlates with population. The adequacy or inadequacy of the response capability never need be assessed, for all data and analysis performed is protected from prying eyes.

PHMSA strongly suggests that an alternative route must not only be safer and more secure than customary routes, but operating over it should not diminish profitability. Carrier decisions should be based on "the financial management principles generally applied to other business

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[3] Judging by news coverage, the PHMSA proposed rules have already been positioned as "reroute friendly." For example:

The release of deadly chemicals from a rail car in a densely populated city could have catastrophic consequences, whether it's caused by a terrorist attack or a derailment.

Last week, transportation and Homeland security officials proposed ways to make it harder for terrorists to attack rail cars -- and less likely that an accident would result in mass casualties.

Transportation Secretary Mary Peters wants rail companies to send poison gases, like chlorine or anhydrous ammonia, and other hazardous cargo along routes that pose the least danger for nearby residents. Access Controls and Security Systems, December 22,2006

decisions." In evaluating externalities there is no change to the internal hurdle rate? It is hard to believe that this is all meant to pass as a serious methodology applicable to any public purpose:

> *As used in this proposal, ''commercially practicable' means that the route may be utilized byte railroad within the limits of the railroads particular operating constraints and, further, that the route is economically viable given the economics of the commodity, route, and customer relationship. The question of commercial practicability must be reasonably evaluated by each rail carriers a part of its analysis based on the specific circumstances of the route and proposed traffic. If using a possible alternative route would significantly increase a carrier's operating costs, swell as the costs to its customers, the carrier should document these facts units route analysis. We expect that carriers will make these decisions in good faith, using the financial management principles generally applied to their other business decisions*

PHMSA most directly announced its abdication of authority in the NPRM to regulate routing when it noted: "[I]n promulgating its March 2003 security regulations under Docket HM–232, PHMSA specifically required rail carriers to address en route security; however, PHMSA deliberately decided to leave the specifics of hazardous materials rail routing decisions, and other en route security matters covered by transportation security plans, to the judgment of rail carriers."[4]

For its part, TSA's simultaneously-issued NPRM respecting hazmat chain-of-custody (and, more broadly, its increasingly sophisticated strategic processes) are welcome, and partially validate the appointment of a top-tier railroader as its head. More complete success will a far more deft hand at labor relations than is the norm in the industry.[5]

It would be very poor timing indeed to throw away the one crude, but highly effective defense against train weaponization. Because it is now that the malefactors operating in the terrorist proving grounds of Iraq are turning their attention to the potential of chlorine.[6] Five weeks ago, on January 28, a dump truck with explosives and a chlorine tank blew up in Ramadi, killing 16. On February 20, a tanker filled with chlorine was exploded, north of Baghdad, killing nine and wounding 148, The following day in southern Baghdad a truck bomb that combined explosives with chlorine gas blew up killing at least two and injuring 32. Soon after, as reported by Reuters "Al Qaeda militants in Iraq were preparing to make crude chemical weapons using chlorine at a car bomb factory discovered west of Baghdad this week, the U.S. military said."

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[4] 71 FR 76837 December 21, 2006

[5] Even as TSA moves forward strategically, there have been precious few signs that it is advancing in the trenches. Homeland security will be ill-served if TSA morale, never high, engages with the acutely adversarial management-labor relations typical of railroads (the industry reached an interim agreement with seven unions last week – after 28 months of talks). The need for mandatory rerouting can be reduced only with stringent inspections and testing. This in turn requires a motivated force of inspectors. DHS management might reflect on a fundamental difference between TSO's and marines – marines emerge from training with intense pride.

[6] Parenthetically, the growing success of insurgent efforts at downing US aircraft should alert TSA to reenergize programs aimed at countering external, not just in-plane threats to aviation.

US and Iraqi police spokesmen expressed concern that the bombers were in the early learning stages with respect to the maluse of chlorine. The chlorine was largely combusted rather than dispersed, more efficient and sophisticated devices could apparently have been far more deadly. How much more deadly? The Chlorine Institute estimates a chlorine release maintaining a minimum 20 parts per million could be "immediately dangerous to life or health" (IDLH) 0.6 mile downwind in the event of a release of 150 lbs, 2.2 miles for a one ton release, and 14.8 miles downwind in the event of a 90-ton tank car rupture.[7] Since these estimates were made, the chlorine IDLH has been revised by the Federal Government downward, to 10 parts per million, expanding the recognized extent of deadly risk substantially.

The emerging threat represented by terrorist interest in chemical weaponry (the ability to cut a tank car open has already been demonstrated in southern Iraq, according to data compiled by Rand) warrants the inclusion in the Rail and Public Transportation Security Act concrete instructions for the Pipeline and Hazardous Materials Safety Administration (PHMSA) and TSA. Within one year, no ultra-hazmat car should be permitted in any HTUA – and smaller cities as well – if 1) the tank car is not in compliance with the most recently approved tank car specifications which will markedly decrease the risk of penetration by small arms and low-yield explosive devices, 2) the tank car's chain of custody has not been meticulously maintained to TSA requirements, 3) the operating railroad has failed any inspections in the past six months designed to monitor compliance with chain of custody requirements, 4) the originating shipper has been found out of compliance with relevant regulations over a similar period and 5) the rail corridor in the affected urban core is not protected by devices proven effective in deterring attacks or by stationed guards. Successful components of the Washington D.C. corridor's $9.6 million test project could be such qualified devices.

Addenda

This would not be the first that regulation of railroad security has been "contracted out" to the very parties whose activities are intended to be regulated. Most of us who were involved in the District of Columbia's 2005 foray into the regulation of railroad movements (I was the District's rail expert in the ensuing litigation) knew that federal law preempted relevant local or state legislation. But we soldiered on because at the time, there was no federal law to do the preempting. The District had no choice but to defend itself, for the federal government certainly wasn't going to fight for the city. And, sure enough, the Justice Department, Homeland Security, the Surface Transportation Board – all chimed in arguing that federal law trumps.

But what was the preempting federal law? Transportation Security Administration (TSA), which in theory had sole jurisdiction, had not promulgated any rail security regulations; it was too involved in refighting 9/11. All there was a "top-secret" (Association of American Railroads' (AAR's) words) voluntary plan dashed together by the rail industry in December 2001 in a successful effort to forestall regulation by the federal agencies that were supposed to be doing the work. This law was so top secret that it could not be divulged to the District's lawyers,

[7] Chlorine Institute Pamphlet 74, *"Estimating the Area Affected by a Chlorine Release April,* 1998

its lawmakers, or, from what I could discern, a Federal Judge. Of course, all railroads which interchanged with US roads necessarily participated in the planning process, so my understanding is that Canadian and Mexican nationals did receive sufficiently elevated security clearances from the AAR so that they could make a contribution. The AAR then informed anyone who would listen that the plan rated a grade of “A” from this federal agency or that.