



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

General Counsel

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

July 10, 2008

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-001

Re: Common Carrier Obligation of Railroads –
Transport of Hazardous Materials
STB, Ex Parte No. 677 (Sub-No. 1)

Dear Secretary Quinlan:

Pursuant to the Board's Notice served June 4, 2008 and supplemented by procedural decisions served June 19 and June 23, 2008, the United States Department of Transportation ("DOT" or "Department") hereby gives notice of its intent to participate in the above-referenced proceeding. Enclosed herewith is the Department's Statement.

DOT will be represented by Mr. Clifford Eby, the Deputy Administrator of the Federal Railroad Administration, at the hearing on July 22, 2008. DOT requests five minutes at the hearing to present its testimony.

Sincerely,

PAUL SAMUEL SMITH
Senior Trial Counsel
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Enclosure

**STATEMENT OF THE UNITED STATES
DEPARTMENT OF TRANSPORTATION**

**PRESENTED BY CLIFFORD EBY
DEPUTY FEDERAL RAILROAD ADMINISTRATOR**

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

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

JULY 22, 2008

Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey, I am very pleased to be here today on behalf of the Secretary of Transportation as you examine issues related to the common carrier obligation of railroads with respect to the transportation of hazardous materials. As the agency charged by Congress with oversight of rail safety matters, the Federal Railroad Administration (FRA) has a keen interest in this topic and has a number of initiatives under way working with other Department of Transportation (DOT) modal administrations and the Department of Homeland Security (DHS) and its Transportation Security Administration (TSA) to improve the safety and security of the rail movement of hazardous materials.

As the Board's June 4 notice points out, railroads have a common carrier obligation to transport hazardous materials and cannot refuse to provide this service merely because to do so would be inconvenient or unprofitable. While the railroads have expressed concern over this obligation, particularly with respect to their potential liability exposure arising from train accidents involving the release of poisonous by inhalation hazard or toxic inhalation hazard (referred to as PIH or TIH) materials, DOT believes that

that there is no reason to change this common carrier obligation. Rail transportation of hazardous materials is currently very safe and DOT has been working with railroads, shippers, and tank car builders to make the rail transportation of PIH and other hazardous materials even safer and more secure. My testimony will begin with an overview of the importance of hazardous materials to the Nation's economy and the safety record of the railroad industry in moving these materials. I will then highlight the numerous initiatives of DOT to prevent rail accidents, improve the safety of rail tank cars, enhance rail security, and train first responders to handle rail hazardous material releases. Finally, I will touch upon the questions the Board has asked participants to address.

HAZARDOUS MATERIALS MOVED BY RAIL ARE ESSENTIAL TO THE NATION'S SECURITY, ECONOMIC WELL-BEING, AND PUBLIC HEALTH

Hazardous materials moved by rail include chemicals used to purify water supplies, the weapons and munitions required by the military, fertilizers needed for crop production, and chemicals needed to produce pharmaceuticals, food and everyday products like glass and plastic. Transporting hazardous materials to their destination in a timely manner is essential to our daily lives. As an example, timely delivery of chlorine for drinking water systems is critical to the public safety and health, and without the delivery of anhydrous ammonia, an essential fertilizer, agricultural production would plummet. The need for hazardous materials to support essential services means that the transportation of these materials is unavoidable.

RAILROADS MOVE THE BULK OF HAZARDOUS MATERIALS AND DIVERSION OF THIS TRAFFIC TO THE HIGHWAYS OR OTHER MODES IS NOT PRACTICABLE

Railroads carry over 1.7 million shipments of hazardous materials annually, including millions of tons of explosive, poisonous, corrosive, flammable, and radioactive materials. Almost 87 percent of these shipments are in tank cars. Approximately 100,000 carloads of this hazardous material traffic are PIH materials, with chlorine and anhydrous ammonia representing over 78 percent of the PIH traffic.

The vast majority of PIH offerors ship by rail; indeed, many do not have the infrastructure (loading racks, product transfer facilities) necessary to utilize trucks for such transportation. Moreover, the current fleet of cargo tank motor vehicles is insufficient to handle a significant shift of PIH cargoes from rail to highway – for example, there are only about 85 cargo tank motor vehicles used for the transportation of chlorine; by contrast there are approximately 5,900 chlorine rail tank cars that engage in 36,470 rail tank car movements of chlorine each year.

The fact that it takes about four tank trucks to haul the amount of product that can be moved in a single rail tank car has important implications. First, many more of these trucks would be required to accommodate a shift in transportation from rail to highway, necessitating a significant expansion in current tank truck manufacturing capacity. Second, the much smaller capacity of these vehicles means that it generally is only cost-effective to utilize trucks for relatively limited distances. A farm cooperative or agricultural products distributor, for example, typically receives large quantities of anhydrous ammonia by rail car and offloads the material into storage tanks for subsequent truck movement to local customers. Changing these established

transportation patterns to move PIH materials by truck would: (1) require substantial investment in new capacity, infrastructure, and number of hazmat drivers; (2) lead to increased fuel consumption, air pollution, highway congestion, and the costs of essential goods; and (3) likely result in more deaths and injuries since trucks are involved in many more accidents than rail tank cars.

Transferring PIH commodities to vessel or pipeline are not viable options either. Chlorine pipeline operations are limited to “over the fence” operations involving relatively short moves of the material; generally from one facility to an adjoining end-user operation. Ammonia pipelines exist from the Gulf Coast to the Midwest but these pipelines are already capacity constrained and new infrastructure would be needed to handle the transportation gaps from the pipeline terminations to the end-users. Transport via water carriage is also limited by several factors. The nation’s barge fleet, for example, contains but a fraction of the purpose-built equipment that would be required for this material following elimination or significant diminution of railroads’ common carrier obligation. Similarly, barges would also be able to serve only those in close proximity to navigable waterways absent substantial investment in specialized infrastructure that does not now exist.

RAIL TRANSPORTATION OF HAZARDOUS MATERIALS IS A SAFE METHOD FOR MOVING LARGE QUANTITIES OF HAZARDOUS MATERIALS OVER LONG DISTANCES

The railroad industry’s overall safety record is very positive, and most safety trends are moving in the right direction. Over the last three decades, the number and rate of train accidents, total deaths arising from rail operations, and employee fatalities and

injuries, all have fallen dramatically. The causes of train accidents are generally grouped into five categories: human factors (38 percent); track and structures (36 percent); equipment (12 percent); signal and train control (2 percent); and miscellaneous (13 percent). In recent years, most of the serious events involving train collisions or derailments resulting in release of hazardous materials, or harm to rail passengers, have resulted from human factors and track causes. As I will discuss later, FRA has taken a variety of actions to address human factor- and track-caused accidents.

The overwhelming majority of hazardous materials shipped by railroad tank car each year arrive at their destinations safely and without incident. In the calendar year 2007, for example, out of the approximately 1.7 million shipments of hazardous materials transported by rail, there were 46 accidents in which a hazardous material was released. In these accidents, a total of 73 hazardous material cars released some amount of product; thus, the risk of a release is approximately 4 in every 100,000 shipments. The DOT Hazardous Materials Information System's ten-year incident data for 1997 through 2006 identifies a total of 17 fatalities resulting from rail hazardous materials incidents; 14 were the result of accidents and derailments and three were related to an unloading incident that occurred in a plant facility. While even one death is too many, these statistics show that train accidents involving a release of hazardous materials that causes death are very rare (one death per million shipments).

RECENT TRAIN ACCIDENTS INVOLVING RELEASE OF PIH MATERIALS, AND DOT ACTIONS TO ADDRESS THE CAUSES OF THESE ACCIDENTS

We recognize that rail shipments of hazardous materials frequently move through densely populated or environmentally-sensitive areas where the consequences of an

incident could be considerable loss of life, serious injury, or significant environmental damage, and that public concern has been raised in some geographic areas by the publication of worst-case scenarios. In the last several years there have been several high profile train accidents in which one or more PIH tank cars were breached and product released onto the ground or into the atmosphere, leading to fatalities, injuries, evacuations, property and environmental damage, and large payouts by the railroads involved in the accidents. FRA has taken action to address the specific factors that caused these accidents in order to make the movement of hazardous materials and other rail transportation safer.

First, on January 18, 2002, a Canadian Pacific Railway Company (CP) train derailed in Minot, North Dakota, resulting in one death and 11 serious injuries due to the release of anhydrous ammonia when five tank cars carrying the product catastrophically ruptured and a vapor plume covered the derailment site and surrounding area. The National Transportation Safety Board (NTSB) determined the probable cause of the derailment to be an ineffective track inspection and maintenance program by CP that did not identify and replace cracked joint bars inserts in continuous welded rail before they completely fractured and led to the breaking of a rail at the joint. On October 11, 2006, FRA issued a final rule that requires on-foot inspections of joint bars in continuous welded rail to detect cracks.

Second, on June 28, 2004, a Union Pacific Railroad Company (UP) train collided with a Burlington Northern and Santa Fe Railway Company (now known as BNSF Railway Company) train in Macdona, Texas, breaching a loaded tank car containing chlorine and causing the deaths of three people and serious injury to 30 others. The cause

of the accident was train crew fatigue resulting in the failure of the engineer and conductor to appropriately respond to wayside signals governing the movement of their train. As a result of this and other accidents, FRA entered into a safety compliance agreement with UP, addressing three geographical UP service units of concern. (A compliance agreement is a written agreement related to railroad safety, entered into between FRA and a railroad company, in which the railroad agrees to take certain stated actions to remedy existing or past violations of Federal railroad safety laws or to prevent future violations, or both, and, agrees that if it fails to take those actions it will waive its rights to contest safety fines and consent to entry of a compliance order enforceable in Federal court.) The UP agreements required UP to re-instruct all of the testing managers in these service units on the railroad's program of operational tests and inspections. On its own initiative, the railroad extended elements of the agreement to the balance of its system to strengthen management oversight of its program of operational tests.

Although FRA currently lacks statutory authority to adopt hours-of-service rules in the face of Congress' very specific prescriptions on this subject, we also supplied UP and the rest of the rail industry with a fatigue model that can be used by the railroads to improve scheduling of work/rest cycles of train crews. Finally, DOT submitted to Congress a rail safety reauthorization proposal that includes a request for authority to regulate rail hours-of-service and fatigue prevention. The House and Senate currently have separate rail safety reauthorization bills under consideration that incorporate many of DOT's proposals; however, these bills would not give FRA full authority to regulate hours-of-service.

Third, on January 6, 2005, a Norfolk Southern Railway Company (NS) train

collided with a standing NS train on a siding in Graniteville, South Carolina. The accident resulted in the breach of a tank car containing chlorine, and nine people died from the inhalation of chlorine vapors. The NTSB determined that the probable cause of the accident was the failure of the train crew to follow NS's operating rules and return a main line switch to its normal position. Hours after this error, the next train to traverse the main track was misdirected onto the wrong track, where it collided with a standing train. On February 13, 2008, FRA issued a regulation directing carriers to improve their oversight of employee compliance with railroad operating rules in eight areas that have been responsible for approximately half of the train accidents related to human factors, including leaving main line switches in an improper position.

DOT IS WORKING ON ENHANCING THE INTEGRITY OF PIH TANK CARS IN RAIL ACCIDENTS

Historically, DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA), working closely with FRA, has issued a number of regulations to improve the integrity of rail tank cars in accidents. Among other things, these regulations require hazardous material tank cars to be equipped with tank-head puncture resistance systems (head protection), coupler vertical restraint systems (shelf couplers), insulation, and for certain high-hazard materials, thermal protection systems. The historical safety record of railroad tank car hazardous material transportation demonstrates that these systems, working in combination, have been successful in greatly reducing the potential harm to human health and the environment when tank cars are involved in accidents.

Although none of the previously discussed accidents involving PIH releases were triggered by any flaw in the tank cars themselves, these incidents have caused DOT, the

railroads, and PIH shippers and manufacturers to focus their attention on developing new, enhanced tank car designs for PIH materials.

FRA and PHMSA initiated a comprehensive review of design and operational factors that affect rail tank car safety, including soliciting public input. Building upon the public input that was received, and modeling and tank car testing done by the Volpe National Transportation Systems Center, PHMSA and FRA, in consultation with TSA, issued a notice of proposed rulemaking (NPRM) on April 1, 2008. The NPRM proposes (1) significantly enhanced tank-head and shell puncture resistance performance standards for railroad tank cars used to transport PIH materials, implemented over an 8-year period; (2) 50 mph speed limit for all railroad tank cars used to transport PIH materials; (3) 30 mph interim speed limit for tank cars not meeting the enhanced standards proposed, but used to transport PIH materials in non-signalized territory; (4) the expedited replacement of PIH tank cars manufactured before 1989 with non-normalized steel; and (5) an allowance to increase the gross weight on rail of tank cars meeting the proposed standards. The proposed new performance-based standard will increase by 500 percent on average the amount of energy a PIH tank car must absorb during a train accident before a catastrophic failure may occur.

FRA and PHMSA are currently evaluating comments received in response to the NPRM and are advancing the development of final PIH tank car performance standards as quickly as possible. DOT has now received petitions from the major chemical shippers, tank car builders, and railroads requesting approval of requirements for interim cars that will be built while current research progresses through full-scale testing and while tank car builders respond to the proposed performance standards with new designs.

By the Association of American Railroads' calculations, such "interim" cars would lower by more than half the risk associated with transporting TIH commodities in the existing tank car fleet. Thus, although significant risk will remain until that fleet is fully replaced, risk should be progressively reduced as a result of safer operations and the phased introduction of more crashworthy cars.

DOT HAS BEEN WORKING WITH THE RAILROADS AND THE DEPARTMENT OF HOMELAND SECURITY TO ENHANCE RAIL SECURITY OF THE MOVEMENT OF HAZARDOUS MATERIALS

In 2003, PHMSA published a final rule that requires shippers and carriers of most bulk shipments of hazardous materials and select agents to develop and implement security plans. These security plans must address personnel security, unauthorized access, and en route security and contain an assessment of possible transportation security risks, including appropriate measures to address the identified risks. To address en route security, the plans must include measures to mitigate security risks during transportation, including the security of shipments stored temporarily en route to their destinations. Railroads subject to the rule are required to give their employees two types of security training: security awareness training that provides an awareness of risks associated with hazardous materials transportation and methods designed to enhance hazardous materials transportation security, and in-depth security training concerning the company's security plan and its implementation. Employees must receive the required training at least every three years. FRA has reviewed the railroads' security plans prepared pursuant to these rules and worked with the railroads on improvements to their plans.

On April 16, 2008, PHMSA, in close cooperation with FRA and TSA, issued an

interim final rule that went into effect on June 1, 2008. The interim final rule requires railroads moving certain specified hazardous materials, including PIH materials, to gather traffic data on these movements, to analyze the safety and security on the routes used and alternative practicable routes, and to select the routes posing the least safety and security risk. As part of the route selection process, railroads are required to consider possible interchange of their PIH traffic with other railroads. As I will discuss, FRA has sponsored an on-going conference under 49 U.S.C. §333 (referred to as the Section 333 conference) that railroads may use in exploring possible interchanges of PIH traffic.

If in the course of a routine review of a railroad's hazmat security plan, FRA determines that the rail carrier's analysis does not satisfy the minimum criteria for performing a safety and security risk analysis, and that an alternative route poses the least safety and security risks based on the information available, under the interim final rule the FRA Associate Administrator for Safety may require the use of an alternative route until such time as identified deficiencies are satisfactorily addressed. The interim final rule also requires railroads to address en route storage and delays in transit, and to conduct pre-trip inspections of placarded rail cars for signs of tampering. The public comment period on the interim final rule has closed and DOT is in the process of preparing a final rule that responds to the public comments.

At the request of the Association of American Railroads and the American Chemistry Council, FRA convened a Section 333 conference in late 2005. The parties requested the conference to provide them with the antitrust immunity they need to exchange information and study the feasibility of and benefits from potential coordinated industry approaches to reduce rail ton-miles of PIH materials, and to reduce the safety

and security risks associated with the rail movement of PIH materials. At FRA's request, representatives of the STB, Department of Justice, Federal Trade Commission, PHMSA, the Office of the Secretary of Transportation, and TSA participated and assisted the parties in their discussions. The government parties have met separately with each of the major chlorine and anhydrous ammonia shippers to discuss ways in which these shippers could assist in reducing rail ton-miles of PIH materials, including market swaps, changes to their shipping patterns, co-location of plants at the end user, and product substitutions. The government parties have also met with the railroads to discuss the current routing of chlorine and anhydrous ammonia traffic that originates in the U.S.; these discussions have permitted railroads to learn about routing considerations over their connecting carriers' rail lines. I cannot get into details regarding the content of the discussions at the conference due to confidentiality agreements that all the parties have signed. Nevertheless, the discussions that have occurred between the railroads should facilitate their consideration of possible rerouting of PIH traffic.

DOT has also worked with DHS on the following action items designed to improve the security of the rail movement of hazardous materials:

- Vulnerability Assessments (2004 – to date). The two departments worked with the railroads and emergency responders to conduct vulnerability assessments of high-threat urban areas (HTUAs) where the large quantities of PIH chemicals are transported by rail: Buffalo; Chicago; Cleveland; Houston; Los Angeles; New Jersey; New Orleans; Philadelphia; and Washington, D.C. Railroads have taken steps to address the vulnerabilities identified.

- Voluntary Security Action Items (2006). The two departments worked with railroads to develop 27 security measures that the railroads agreed to voluntarily put in place, including measures to decrease the time PIH tank cars spend in HTUAs, and improve the security of the cars and reduce the vulnerability of the public while these cars are in HTUAs. DHS has determined that carriers have significantly reduced the dwell time of PIH cars in HTUAs and the amount of time these cars are left unattended.
- Protective coatings for rail hazmat cars (ongoing research and development). FRA and DHS have been working with the railroads and tank car manufacturers to analyze protective coatings for rail hazardous materials cars that may enable the cars to better survive terrorist attacks.

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DOT AND THE RAILROAD INDUSTRY HAVE BEEN WORKING WITH FIRST RESPONDERS TO PREPARE THEM TO DEAL WITH RAIL INCIDENTS INVOLVING THE RELEASE OF HAZARDOUS MATERIALS

PHMSA has been very active in training and equipping first responders in local communities to handle rail incidents involving hazardous materials. In 2008, PHMSA will provide \$26.8 million in public sector training and planning grants. Of this amount, (1) \$21.8 million will be distributed to States, Territories, and Native American Tribes to enable the development and updating of 3,000 local and tribal emergency plans and the training of 180,000 local and tribal hazmat responders; (2) \$1 million will go to the International Association of Fire Fighters for hazardous material responder “train the trainer” courses; and (3) \$4 million will be provided to nonprofit hazardous material employer organizations to train hazardous material employees in the proper handling of

hazardous materials. In addition, PHMSA, major railroads and shippers participate in the Transportation Community Awareness and Emergency Response (TRANSCAER®) program, a voluntary national outreach effort made up of representatives of chemical manufacturers, transporters, distributors, emergency responders, and government that focuses on assisting communities to prepare for and respond to a possible hazardous material transportation incident.

PHMSA has also distributed over 1.75 million hard copies of its 2008 Emergency Response Guide (ERG) to first responders, and other Federal agencies have additional copies of ERG printed for their own use. An electronic version of the ERG is published on PHMSA's website (<http://www.phmsa.dot.gov>), and PHMSA understands that commercial suppliers regularly print and sell many additional copies of the ERG.

PHMSA is also working with the International Association of Fire Chiefs to develop a web-based portal to serve as a central location for the collection of information on responses to hazardous materials incidents by hazardous materials teams. Finally, PHMSA is investigating the feasibility of promoting and authorizing the use of electronic documentation and information-sharing to provide the necessary safety information and hazard communication requirements related to the transportation of hazardous materials.

POTENTIAL SOLUTIONS TO THE RAILROADS' LIABILITY EXPOSURE ARISING FROM THE MOVEMENT OF PIH MATERIALS

The Board has asked participants to address specific potential *policy* solutions to the liability issue faced by railroads over the transportation of hazardous materials, including solutions modeled on the Price-Anderson Nuclear Industries Indemnity Act

(commonly referred to as the Price-Anderson Act), and the appropriate role of the Board in the development of such a policy solution.

Only Congress, of course, can pass special legislation to deal with the risks associated the rail movement of PIH materials. Over the years Congress has enacted a variety of legislation limiting private parties' liability from tort suits when it felt that such legislation was appropriate. The following are examples of legislation limiting liability of private parties: nuclear industry accidents (Price-Anderson Act; 42 U.S.C. § 2210 note and Pub. Law No. 109-58); oil spills (33 U.S.C. §§ 2701-2703); rail passenger operations (49 U.S.C. §§ 28102 and 28103); air carrier operations and the 9/11 attacks (Air Safety Act of 2001, Pub. L. 107-42); use of DHS-certified technologies and services related to combating terrorism (Homeland Security Act of 2002, Title VIII, Subtitle G of Pub. L. No. 107-296); and terrorism losses arising out of the 9/11 attacks (Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297).

In the past couple of years, the railroads have requested that Congress pass legislation that would cap the railroads' liability for incidents involving the movement of PIH materials. To date Congress has been unwilling to pass such legislation. At present, the Administration has not taken a position to support or oppose any such legislation were it to be seriously entertained by the Congress.

Congress has, however, enacted legislation that facilitates the development of uniform Federal railroad safety and security standards and provides protection to railroads against tort suits when they comply with these standards. Under the Federal Railroad Safety Act, when DOT issues a regulation or order covering railroad safety, or DHS issues a regulation or order covering railroad security, this regulation or order (and

a railroad's plan created pursuant to that regulation or order) establishes a Federal standard of care that displaces any State standard of care covering the same subject matter, other than a provision necessary to eliminate or reduce an essentially local safety or security hazard so long as the State provision is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. 49 U.S.C. §20106. Similarly, under the Federal Hazardous Materials Transportation Act, DOT regulations preempt any State, local, or Indian tribe requirement that conflicts with DOT's regulations. 49 U.S.C. §5125(b).

As previously discussed, recent major PIH tank car releases have been the result of accidents caused by the railroads themselves. A railroad can therefore minimize its liability exposure by ensuring better employee compliance with the railroad's own operating rules, as well as with DOT and DHS safety and security standards. As rail safety and security continues to improve as a result of Federal safety and security initiatives and the initiatives of the railroads themselves, the railroads' liability exposure associated with the movement of PIH materials will continue to decrease. This is particularly true when DOT issues final standards for improved PIH tank cars, and tank cars meeting that standard replace the existing PIH tank car fleets.

In addition, PIH shippers and railroads can work together to find market-based solutions to ease the liability exposure associated with the rail movement of PIH materials. Dow reported to this Board, in its April 24th testimony, that it is committed to reducing the number of hazardous material shipments and associated miles in half. In one example, Dow noted that it had reduced the number of miles that it was shipping chlorine from 1,400 to 450 miles. In fact a review of the STB Carload Waybill Sample

shows that from 2004 through 2006 (the last year that data are available) tons of chlorine shipped by all shippers declined by 8 percent while ton-miles fell by nearly 17 percent. Dow and other shippers of the same mindset should be commended for their proactive efforts. FRA also supports the ongoing efforts by the anhydrous ammonia shippers to work out arrangements with the individual railroads to provide the railroads with supplemental insurance in exchange for more flexible rate terms.

The Fertilizer Institute (TFI), in its testimony before the Board on April 24th, indicated that TFI had advanced a proposal to the Class I railroads where it would be willing to obtain as much excess insurance as possible and share the costs of that insurance and make the maximum amount available to the rail industry in the event of an accident involving the release of anhydrous ammonia. Under the proposal, railroads would carry the primary insurance coverage and TFI shippers would pick up the remainder. Since TFI shippers would be carrying a portion of the insurance, the organization is asking that the railroads provide rate reductions to reflect this insurance expense borne by TFI members. At the last hearing, TFI reported the Class I railroads have expressed an interest in the proposal, and it our understanding that serious talks are continuing between the parties. I am sure that TFI will report further on this today. If this approach proves to be successful and mutually beneficial to all parties, it could serve as a model for other PIH shippers to work with the rail industry to explore and develop market-based solutions that address the insurance and liability issue and truly serve the public interest.

WHAT CONSTITUTES A REASONABLE REQUEST FOR SERVICE INVOLVING THE MOVEMENT OF PIH MATERIALS

Under 49 U.S.C. § 11101, railroads have a common carrier obligation to transport hazardous materials and must provide this service on reasonable request by shippers. A hazardous material shipper has made a reasonable request for rail transportation service when it tenders its product to a rail carrier in a rail car meeting DOT packaging and mechanical requirements. Surface Transportation Board Shippers Committee, OT-5 v. The Ann Arbor R.R., 5 I.C.C. 856 (1989). A railroad cannot refuse to provide service to a hazardous material shipper merely because to do so would be inconvenient or the railroad's profits are declining. G.S Roofing Prods. Co. v. Surface Transp. Bd., 143 F.3d 387, 391 (8th Cir. 2998). Nevertheless, as the court in the G.S. Roofing Prods. Co. case noted, the common carrier obligation is not absolute. Railroads can abandon unprofitable lines, and railroads need to make a profit on the traffic that they do carry in order to stay in business over the long-term.

FRA notes that railroads have been aggressively raising the rates they charge for moving PIH materials in recent years, and there is no reason to believe that carriers are not making a profit on PIH and other hazardous materials traffic. As previously noted, transferring significant amounts of PIH traffic to other modes of transportation is not feasible and there is no basis for exempting rail PIH traffic from rate regulation.

WHETHER THERE ARE UNIQUE COSTS ASSOCIATED WITH THE TRANSPORTATION OF HAZARDOUS MATERIALS AND, IF SO, HOW RAILROADS RECOVER THOSE COSTS

The railroads themselves are perhaps in a better position to address this issue. But from DOT's perspective there clearly are additional costs associated with hazardous

material traffic that rail carriers need to cover and that differ from the costs of transporting other rail traffic. First, compliance with the HMR generally entails higher costs for packaging, carrying, and handling that do not apply to other freight. Second and more specifically, as previously discussed, DOT has issued regulations that require rail carriers to prepare hazardous materials security plans, including rail routing analysis for PIH and certain other hazardous materials, and to provide hazardous materials training to their employees. Third, railroads have voluntarily agreed to implement security action items jointly recommended by DOT and DHS. Fourth, DHS is preparing a final rule that will require additional hazardous materials security measures by railroads. Finally, there are risks associated with the rail transportation of hazardous materials, particularly PIH materials, that may drive up a railroad's insurance costs.

Just as with freight generally, the need for railroads to appropriately price and recover those costs associated with the transport of hazardous materials is essential. Without sufficient revenues and profits on hazardous materials traffic as well as all traffic, railroads would be unable to make investments in infrastructure to: (1) maintain a system that is safe and efficient; and (2) continue to provide adequate infrastructure to meet customer demands. As this Board is aware, DOT estimates that freight tonnage on the railroad system will increase by 88 percent through 2035. To meet this growth, the industry has been ramping up investment and expanding capacity. In addition to new track and facilities, this investment is also focused on new cost-effective technological improvements that will advance safety, service, environmental stewardship and asset utilization over the coming years. These technologies include but are not limited to positive train control and electronically controlled pneumatic brakes. In its deliberations

beyond this hearing, the Board must be cognizant of the capital needs of the railroad industry.

CONCLUSION

I want to thank the Board for holding this hearing and inviting DOT to testify. The overwhelming majority of hazardous materials shipped by rail tank car every year arrive safely and without incident, and railroads generally have an outstanding record in moving shipments of hazardous materials safely. DOT is working aggressively with the railroad industry, chemical shippers, and tank car builders to address the causes of train accidents that have resulted in the release of hazardous materials, and to develop new PIH tank car standards that will minimize hazardous material releases in railroad accidents that do occur. By improving railroad safety overall, DOT expects to achieve further improvement in the safety of hazardous materials transported by rail, and thereby reduce railroad liability exposure.