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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. FD 35964

American Chemistry Council, The Chlorine Institute, and The Fertilizer Institute - Petition for
Declaratory Order - Positive Train Control

Reply Comments

Submitted by

National Association of Chemical Distributors

Dated: October 13, 2015

The National Association of Chemical Distributors (NACD) submits these reply comments in support for the Petition for Declaratory Order on Positive Train Control (PTC) that has been filed by the American Chemistry Council, The Chlorine Institute, and The Fertilizer Institute. We are supportive of the common carrier obligation of railroads to ship toxic inhalation hazard (TIH) materials in light of the PTC implementation deadline mandated by the Rail Safety Improvement Act of 2008 for lines carrying TIH materials and passenger or commuter rail. Action from the Surface Transportation Board (STB) is needed to enforce the common carrier obligation and prevent disruption of essential freight rail shipments of TIH materials.

NACD members, operating in all 50 states through nearly 1,800 facilities, are responsible for more than 155,000 direct and indirect jobs in the United States. NACD members are predominantly small regional businesses, many of which are multi-generational and family owned. The typical chemical distributor has 26 employees and operates under an extremely low margin.

NACD and its nearly 440 member companies are vital to the chemical supply chain providing products to over 750,000 diverse companies such as aerospace, agriculture, cosmetics, detergents, electronics, automotive, plastics, paints and coatings, pharmaceuticals, food ingredients, water treatment, and more. Hazardous materials transportation is an integral part of the chemical distribution business. Nearly 40% of NACD members receive product via rail. For those who do, the average amount received annually is 55,328 tons per company.

Chemical distributors play a unique and integral role in the supply chain. Chemical manufacturers increasingly rely on chemical distributors to market and sell their products in a variety of packaging sizes (smaller quantities) to an incredibly varied customer base. The inability to move TIH materials will have a significant impact on NACD members unable to receive product via rail from the manufacturers. While NACD members represent the immediate downstream customer, there will be further impact to NACD member's customer base including plastics, fertilizer, and water treatment facilities. For NACD members serving water treatment facilities, the inability to deliver these chemicals to small municipalities presents a public health risk far greater than the immediate and calculable economic impact.

In addition, recipients of TIH materials will be put in the difficult and potentially dangerous position of stockpiling their supplies in advance of the deadline in order to be able to serve the needs of their customers, increasing the presence of TIH on facility sites. Being a significant safety concern, under no circumstances should this be considered an easy or costless solution in the absence of a PTC extension.

Moreover, a letter from BNSF Railway¹ stated, “Our review includes analysis of the possibility that, if Congress has not extended the deadline for PTC operations, as of January 1, 2016, neither passenger nor freight traffic would operate on BNSF lines that are required by federal law and regulation to have an interoperable PTC system as of that date.” BNSF’s cessation of shipping freight traffic on lines required to implement PTC would further impact NACD members who receive a variety of non-TIH products by rail.

NACD shares the concern that the TIH embargoes threatened by the railroads would violate the common carrier obligation. NACD, therefore, encourages the STB to address the petition favorably in light of the railroads’ threats.

Thank you for your consideration. If you have questions or require additional information, please do not hesitate to contact Jennifer Gibson or Laura Chambers.

Respectfully submitted,



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Attachment

¹ Letter to The Honorable John Thune, Chairman of the Senate Committee on Commerce, Science and Transportation dated September 9, 2015. Attachment.



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President and
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September 9, 2015

The Honorable John Thune
Chairman, Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

Dear Senator Thune:

I write in response to your letter of August 28, 2015, regarding the potential consequences of a failure to extend the current December 31, 2015, Positive Train Control (PTC) implementation deadline contained in the Rail Safety Improvement Act of 2008 (RSIA).

BNSF has invested over \$1.5 billion in the testing, development, purchase, and installation of PTC components out of an estimated total exceeding \$2 billion. PTC will be deployed on roughly half of our system; these lines host 80 percent of BNSF's freight density. We expect to have a significant portion of the necessary PTC system implemented on the network by the current December 31, 2015, deadline, but after that date we still require ongoing installation and extensive testing, as discussed below.

PTC deployment is an unprecedented technical and operational challenge that requires the entire U.S. railroad network to develop, test and implement this new safety system, and avoid impacts to network capacity and fluidity as we do. Despite our strong commitment to this technology, BNSF has faced significant technical, regulatory and operational obstacles to meeting the PTC implementation deadline imposed by the RSIA and will not meet the RSIA deadline for deployment. As a result, BNSF believes that Congress must move the PTC deadline in order to achieve successful PTC implementation and to avoid potential significant and unnecessary congestion and shipper service impacts.

Challenges to PTC Deployment and Related Impacts on Train Operations

As should be expected in the development and implementation of any "Next Generation" technology, there have been significant challenges to nationwide, interoperable PTC deployment. First, fully functional, interoperable and production-ready PTC hardware or software did not exist in 2008. The development and production of PTC systems has been affected by the availability and reliability of hardware components, spectrum and software.

Second, as you know, one of the biggest impediments to PTC deployment was the more than a year period of time during which railroads were unable to obtain necessary Federal Communications Commission permits for radio tower and antennae construction. Third, as we deploy and test PTC on BNSF, we continue to experience technical issues related to software, component reliability and availability. In addition, construction and “cut-over” (or turning on) of PTC systems across subdivisions must be carefully timed, as it can impact network capacity.

The component and software challenges that our real world use of PTC in revenue service continue to uncover adverse impacts to train operations. For example, we are seeing the PTC system trigger unnecessary braking events in which trains are stopped with a full-service brake application. This means that significant work has to occur before the train can re-start. These kinds of delays are numerous and cumulatively consume railroad capacity. Our experience thus far shows that railroads will need a reasonable period of time to test PTC and “work the bugs out” after PTC is deployed to avoid significant service impacts.

Legal Considerations if PTC Deadline is Not Extended

BNSF has evaluated the competing statutory and regulatory requirements regarding operations on mandated lines where PTC has not been installed and operational as of January 1, 2016, and our legal analysis calls into question whether we legally may operate any freight or passenger service on such lines. There are several legal and policy reasons why BNSF believes this is so.

First, BNSF reads the RSIA and the Federal Railroad Administration’s (FRA) PTC implementing regulations as requiring PTC on lines that are part of the FRA-approved PTC Implementation Plan in order for *any train* to originate on such a line as of January 1, 2016. Under this plain reading of the RSIA, the deadline will impact all freight service, as opposed to only TIH-PIH and passenger trains, on the lines where PTC is not fully installed and implemented, which we noted in our recent “Fall Peak” letter to the Surface Transportation Board.

Second, BNSF recognizes that, in addition to the RSIA PTC requirement, it continues to have a common carrier obligation to provide service upon reasonable request pursuant to 49 U.S.C. 11101, but is concerned whether it can reconcile its duty to provide common carrier service on lines not in compliance with the PTC mandate as of January 1, 2016. BNSF believes that the common carrier obligation is tempered by reasonableness, and must be read as subject to the later-enacted RSIA safety rules, such as the requirement to have an interoperable PTC system. BNSF is concerned that it is not reasonable to operate in violation of a legal safety requirement in order to fulfill its common carrier obligation.

Third, BNSF, as a matter of law, corporate policy and principle, does not willfully violate safety statutes or regulations or ask our employees to do so. The announced enforcement policy by the FRA of imposing fines for non-performance puts BNSF in a position that will be difficult to reconcile with our aforementioned unwillingness to willfully violate safety laws or regulations. BNSF does not believe that it can pick and choose which safety rules must be followed. And even if a railroad, in theory, was ordered by a governmental entity to or simply was inclined to direct its employees to operate over lines where PTC is required but is not yet installed, another

federal statute protects employees from acting to perform tasks in violation of law. (Specifically, 49 U.S.C. 20109(a)(2) protects employees who “refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security.”)

Fourth, in addition to the statutory PTC deadline, BNSF’s commuter contracts generally require that such service be operated in compliance with all applicable laws and regulations, which we believe would include the current mandate for PTC operation over certain rail lines. That is, BNSF may not be able to provide all existing commuter service to various agencies, such as Chicago, Seattle and Minnesota, as well as certain Amtrak lines. Thus, BNSF would be faced with the difficult choice of operating in violation of the PTC statute or risking breach of contract claims for not operating the service. This does not even take into account the potential social and economic costs to communities were BNSF to not operate commuter service.

Finally, were BNSF or any other railroad to attempt to operate over lines where PTC is not yet in place and an accident were to occur that is found to be PTC-preventable, the exposure to legal claims, including punitive damages, would pose a significant financial and reputational risk.

Consequences of Failing to Extend the PTC Deadline

As I have indicated above, BNSF has serious questions whether it should operate on subdivisions that have not been equipped with PTC in knowing violation of the federal law that mandated PTC as of January 1, 2016. Enormous congestion could result from efforts to re-route traffic that moves on the PTC lines, which are maintained to handle the most density, to lines on which PTC is not required. These are generally low-density territories where we do not have crews and maintenance resources positioned for those volumes. We have analyzed what train operations could continue if operations are halted on mandated subdivisions without PTC installed and believe that operations across our entire network will likely be compromised by congestion and effectively shut down. BNSF would do whatever is reasonably possible to mitigate this impact, but the consequences for the economy and for our company would be substantial.

Furthermore, if we knowingly operate in violation of the law on mandated portions of the network without PTC and FRA engaged in enforcement against BNSF, it’s unclear what kind of operational choices, and related network impacts, BNSF would face in order to minimize its exposure to enforcement and liability risk.

If Congress does not act to move the deadline and BNSF operations are out of compliance with the PTC statute and regulations, BNSF could be left with few acceptable options. You may be assured that we have, and will continue, to update Congress and our customers on whatever actions we believe we are compelled to take in that circumstance. We are developing potential communications to our customers and passenger rail tenants in the event that no extension is enacted by the end of October, as these stakeholders may need to make preparations or alternative plans well before the current December 31, 2015, deadline.

BNSF Railway Company

September 9, 2015

Page -4-

We appreciate the action that you and your colleagues in the Senate have taken to responsibly extend the PTC deadline, thereby ensuring that railroads can deploy reliable PTC as soon as possible. We remain hopeful that Congress will take appropriate action.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carl R. Ice', written in a cursive style.

Carl R. Ice
President & CEO

cc: The Honorable Bill Nelson
The Honorable Deb Fischer
The Honorable Cory Booker
The Honorable Anthony Foxx, United States Secretary of Transportation
The Honorable Sarah Feinberg, Acting Administrator, Federal Railroad Administration
The Honorable Daniel R. Elliott III, Chairman, Surface Transportation Board
The Honorable Ann D. Begeman, Vice Chairman, Surface Transportation Board
The Honorable Deb Miller, Board Member, Surface Transportation Board

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2015, I have served copies of document upon all parties of record in this proceeding by First Class Mail or more expeditious means:

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Sincerely,

A handwritten signature in black ink that reads "Laura E. Chambers". The signature is written in a cursive, flowing style.

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