



- the release, unloading, transfer, delivery, treatment, dumping, storage, or disposal of commodity not caused by the sole or concurring negligence or fault of UP;
- any fines, penalties, or suits resulting from alleged or actual violation of Federal, state, or local law, statute, ordinance, code or regulation that was not attributable to UP; and
- any loss caused by the sole negligence or fault of customer (i.e., the shipper).

*Pet. For Declaratory Order, Ex. A.* In other words, UP's tariff requires shippers of TIH materials to indemnify the railroad against liabilities resulting from not only the negligence or fault of the shippers themselves, but also from acts of God, acts of third parties, and for any liability arising from the shipment of the TIH materials not caused by UP's negligence. A second tariff provision provides that responsibility for any liabilities shall be adjudicated under principles of comparative fault in which the trier of fact determines the percentage of responsibility among the parties. *Id.*

Noting the significance of the issues to TIH materials shippers, railroads, and other interested parties, the Board opened this declaratory order proceeding for public participation. *Decision* at 4. By letter dated December 27, 2011, the United States Department of Transportation ("DOT" or "Department") provided notice to the Board of its intent to participate in the proceeding. The Department hereby submits its comments in response to the Board's invitation. In sum, as DOT has stated in previous STB proceedings, TIH materials are essential to the economy and national health, rail movement of these materials is extremely safe, and diversion of TIH materials traffic from rail to other modes is not practicable. The Federal regulatory framework that

**governs the packaging, handling, and rail transportation of TIH materials is comprehensive and specifically designed to mitigate the safety and security risks associated with the transportation of these materials. DOT recognizes, however, that the safety and security risks associated with such transportation of these materials will never be zero. Accordingly, DOT continues to encourage TIH materials shippers and railroads to work together to find market-based solutions to ease the liability exposure associated with the rail movement of these materials.**

**Safety is DOT's number one priority. Any policy shift that would make our roads or rails less safe is of grave concern. While the Department takes no position regarding the reasonableness of the tariff in question, it is possible that in their quest to relieve themselves of liability exposure, the railroads may create a situation whereby more TIH materials traffic is moved via the highways. Tariff requirements imposed by railroads, however, cannot be allowed to be so onerous as to drive TIH materials traffic off the railroads and onto the highways. Though we have not seen evidence suggesting that TIH materials are moving from the railroads to the highways, such movements could have far-reaching adverse effects on transportation safety. In this proceeding, the Board must consider the consequences of its decision if it chooses to find UP's tariff provisions reasonable and should monitor any trends towards the shifting of TIH materials shipments from the railroads to the highways.**

## **II. Discussion**

### **A. Rail Transportation of TIH Materials is a Safe Method for Moving These Materials Over Long Distances, and it is Not Feasible to Transfer Large Amounts of this Traffic to Other Modes**

Railroads carry approximately 2 million shipments of hazardous materials annually, including millions of tons of explosive, poisonous, corrosive flammable, and radioactive materials. Over 87 percent of these shipments by weight are in tank cars. Approximately 100,000 carloads of this hazardous material traffic are TIH materials, with chlorine and anhydrous ammonia representing nearly 70 percent of the TIH materials traffic.

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 (36 percent); track and structures (34 percent); equipment (11 percent); signal and train control (2 percent); and miscellaneous (17 percent), based on Federal Railroad Administration ("FRA") data for the period January thru November, 2011. 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. The Department has taken a variety of actions to address human factor- and track-caused accidents including the recent promulgation of the passenger hours of service rules, regulations requiring the installation of positive train control systems on certain lines (as discussed below),

regulations governing conductor certification, and the issuance of a notice of proposed rulemaking on training of certain railroad employees.

The overwhelming majority of hazardous materials shipments transported by railroad tank car each year arrive at their destinations safely and without incident. In the calendar year 2010, for example, out of the approximately 2 million shipments of hazardous materials transported by rail, there were 20 accidents in which a hazardous material was released. In these accidents, a total of 40 hazardous material cars released some amount of product; thus, the risk of a release is approximately 2.4 in every 100,000 shipments. The DOT Hazardous Materials Information System's ten-year incident data for 2002 through 2011 identifies a total of 16 fatalities resulting from rail hazardous materials incidents; 15 were the result of accidents and derailments, and one was 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).

It is generally accepted that the safest, most cost effective, and efficient way for moving TIH materials is by rail. Transferring large amounts of TIH materials to barges or pipeline are not viable options. 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. Transport by water is limited by the lack of specially built equipment to transport these materials and the fact that barges can only serve those in close proximity to navigable waterways. While some anhydrous ammonia shipments may move by truck, all chlorine essentially travels by rail.

It takes about four tank trucks to haul the amount of product that can be moved in a single rail tank car, and trucks operate in close proximity with passenger vehicles. Shifting the movement of the TIH commodities to highways would lead to increased fuel consumption, air pollution, and costs of essential goods, and would likely result in more deaths and injuries since trucks are involved in many more accidents than rail tank cars. The public interest would be ill served if there were a significant shift to the transportation of these commodities by truck.

**B. The Comprehensive Federal Regulatory Framework Applicable to the Rail Transportation of Hazardous Materials, Including TIH Materials, Effectively Mitigates Safety and Security Risks**

As noted above and as the Department has explained in detail in previous STB proceedings, the vast majority of hazardous materials shipped by rail each year arrive at their destinations safely and without incident. *See Finance Docket No. 35219, Comments of the United States Department of Transportation* (Apr. 10, 2009) and *Common Carrier Obligation of Railroads – Transport of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1), Written Statement of the United States Department of Transportation, Presented by Clifford Eby, Deputy Federal Railroad Administrator (July 22, 2008). The Board itself has noted that continued rail movement of hazardous materials, including TIH materials, is vital to the national economy, and that “[f]or many hazardous materials, including TIH [materials], rail is the safest and most efficient mode of transportation.” *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1), Notice of Public Hearing (June 4, 2008) at 2.

However, recognizing that shipments of hazardous materials by rail frequently move through densely populated or environmentally-sensitive areas where consequences

of an incident could be considerable loss of life, serious injury, or significant environmental damage, in accordance with Congress' direction, DOT and the Transportation Security Administration ("TSA") have taken steps to safeguard the public.

DOT has developed and enforces a comprehensive regulatory framework applicable to the rail transportation of hazardous materials. This comprehensive regulatory program serves to effectively mitigate the safety risk associated with the rail transportation of hazardous materials, including TIH materials. Regulations promulgated and enforced by two operating administrations within the Department apply to the transportation of hazardous materials by rail. First, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") promulgates and enforces the hazardous materials regulations ("HMR") in accordance with Federal hazardous materials transportation law.<sup>2</sup> PHMSA's hazardous material regulatory system is a risk management system that is prevention-oriented and focused on identifying safety or security hazards and reducing the probability and quantity of a hazardous materials release. The HMR are designed to achieve three goals: (1) ensure that hazardous materials are packaged and handled safely and securely during transportation; (2) provide effective communication to transportation workers and emergency responders of the hazards of the materials being transported; and (3) minimize the consequences of an incident should one occur.

As applicable to the rail transportation of hazardous materials, working closely with FRA, PHMSA has issued numerous regulations designed to improve the accident survivability of rail tank cars carrying hazardous materials. Most recently, in 2009, PHMSA issued a final rule requiring newly constructed TIH materials tank cars to have

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<sup>2</sup> See 49 U.S.C. § 5101 *et seq.*; 49 C.F.R. pts. 171-180.

increased side and head-impact puncture resistance by requiring a combination of thicker outer jackets and/or inner shells and the use of full head shields where not already mandated by regulation. 74 Fed. Reg. 1770 (Jan. 13, 2009). The rule also establishes enhanced standards and features to protect the valves, top fittings and nozzles of newly constructed TIH materials tank cars and imposes a 50 mile per hour speed limit for all trains transporting loaded TIH materials tank cars. By the Association of American Railroads' own calculations, such cars will lower by more than half the risk associated with transporting TIH materials in the historical tank car fleet. Despite these safety advancements, FRA and PHMSA are continuing to conduct research designed to support additional performance standards for tank cars carrying TIH materials.

In addition, in late 2008 PHMSA issued a final rule regarding the rail routing of security-sensitive hazardous materials (including TIH materials).<sup>3</sup> 49 C.F.R. § 172.820. The rule requires railroads to annually gather traffic data on these movements, to analyze the safety and security on the routes used and alternative practicable routes over which they have authority to operate, and to solicit input from State, local and tribal officials regarding security risks to high-consequence targets along or in proximity to the routes. After considering mitigation measures to reduce safety and security risks, the railroads are to select the practicable routes that pose the least overall safety and security risks. The rule does not provide railroads with the option of declining to transport TIH materials that are tendered in compliance with DOT regulations. Since promulgation of

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<sup>3</sup> At the same time, TSA published a rail security rule to enhance the security of the nation's rail transportation system. 49 C.F.R. pt. 1580. TSA's rule designates certain materials, including TIH materials such as chlorine, as "rail security-sensitive materials" and requires that freight rail carriers and certain facilities handling such materials be able to report location and shipping information to TSA upon request. The rule also implements chain of custody requirements to ensure a positive and secure exchange of these materials.

this rule, FRA has led the Department's efforts to oversee railroads' implementation of this rule.

The HMR also specifically address the transportation of TIH materials by railroad in commodity-specific provisions tailored to the hazards of the specific materials. *See, e.g.,* 49 C.F.R. § 172.800 (requiring offerors and carriers of certain hazardous materials, including TIH materials, to perform assessments of possible transportation security risks and develop, implement, and maintain security plans addressing such risks); 173.31(e) (general requirements for tank cars transporting TIH materials); 173.244 (bulk packaging requirements for poisonous liquids with inhalation hazards); 173.249 (bulk packaging requirements for bromine, a TIH material); 173.314 (including specific requirements for the transport of chlorine in paragraph (k)); and 179.102-2 (including specific requirements for railroad tank cars used to transport chlorine).

At the same time, FRA promulgates and enforces a comprehensive regulatory program in accordance with the Federal railroad safety laws.<sup>4</sup> FRA's rail safety regulations address issues such as: railroad track, signal systems, railroad communications, rolling stock, rear-end marking devices, safety glazing, railroad accident/incident reporting, operating practices, alcohol and drug testing, locomotive engineer and conductor certification, workplace safety, hours of service for passenger train employees, and positive train control system implementation. In other words, FRA's rail safety regulations target the causes of train accidents which can potentially lead to the breach of a rail car transporting hazardous materials. FRA also inspects

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<sup>4</sup> *See* 49 U.S.C. § 20101 *et seq.*; 49 C.F.R. pts. 200-244.

railroads and hazardous materials shippers for compliance with both FRA and PHMSA regulations.

### **C. The Common Carrier Obligation**

Under 49 U.S.C. § 11101(b), UP, as a rail common carrier, is obligated to transport hazardous materials and must provide this service on reasonable request by shippers. A hazardous materials 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).

Congress is well aware of the safety and security risks posed by the rail movement of TIH materials. However, Congress has rejected railroads' repeated requests for the enactment of legislation that would either eliminate the railroads' common carrier obligation to transport TIH materials or cap the railroads' liability for transportation incidents involving the movement of TIH materials. Instead, Congress has chosen to pass legislation that directs DOT and the Department of Homeland Security ("DHS") to safeguard the public from the safety and security risks posed by the rail movement of TIH materials shipments, and that provides protection to railroads against tort suits when they comply with the Federal standards.

For example, in 2008 Congress passed the Rail Safety Improvement Act of 2008 (Pub. L. No. 110-432, Div. A, 122 Stat. 4848-4906), a comprehensive rail safety bill that contains specific provisions aimed at further reducing the safety risks presented by rail transportation, including the transportation of hazardous materials. Section 20157 of the Act requires each Class I railroad to submit for DOT's approval by April 2010, a plan for

implementing a positive train control system by the end of 2015.<sup>5</sup> The plans would govern operations on (1) each main line over which intercity rail passenger transportation or commuter rail passenger transportation is regularly provided; (2) each main line (lines carrying 5 million gross tons of traffic annually) over which TIH materials are transported; and (3) such other tracks as the Secretary may prescribe by regulation or order. 49 U.S.C. § 20157. FRA's implementing regulations are codified primarily in subpart I to 49 C.F.R. pt. 236.

In section 1528 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act; Pub. L. 110-53; 121 Stat. 266) Congress amended the preemption provision of 49 U.S.C. § 20106 to make clear that actions under State tort law seeking damages for personal injury, death, or property damages are permitted only in limited circumstances. Specifically, pursuant to amended section 20106, a railroad may be liable if it has violated (1) the Federal standard of care created by a safety regulation or order issued by the Secretary of Transportation or a security regulation or order issued by the Secretary of DHS; (2) the terms of its own plan required to be created by a DOT or DHS regulation or order; or (3) a State law, regulation, or order that is not incompatible with section 20106(a). Accordingly, a railroad can minimize its liability exposure by ensuring better employee compliance with its 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

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<sup>5</sup> Positive train control refers to technology that is capable of preventing train-to-train collisions, train movements through switches left in the wrong position, over-speed derailments, and casualties or injuries to roadway workers (e.g., maintenance-of-way workers, bridge workers, signal maintainers) operating within their limits of authority.

railroads themselves, the railroads' liability exposure associated with the movement of TIH materials will continue to decrease.

### **III. Conclusion**

TIH shipments by rail are safe and essential to the economy and national health. Diversion of TIH materials traffic from rail to the highways is neither practicable nor consistent with public safety. The railroads have an outstanding safety record and the overwhelming majority of TIH materials shipped by rail tank car every year arrive safely and without incident. DOT is working closely with the railroad industry, chemical shippers, and other stakeholders to address the causes of train accidents that have resulted in the release of hazardous materials, and to develop new regulations 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 TIH materials transported by rail, and thereby reduce railroad liability exposure.

DOT recognizes, however, that the safety and security risks associated with the transportation of TIH materials will never be zero. Accordingly, DOT encourages TIH materials shippers to continue exploring ways to reduce TIH ton-miles (such as changing shipping patterns; co-location of plants at the end-user; and product substitutions), and shippers and railroads to work together to find market-based solutions to ease the liability exposure associated with the rail movement of these materials. Tariff requirements imposed by railroads cannot be so onerous as to drive TIH materials traffic off the railroads and onto the highways. In this proceeding, the Board must consider the consequences of its decision if it chooses to find UP's tariff provisions reasonable and

should monitor any trends towards the shifting of TIH materials shipments from the railroads to the highways.

Respectfully submitted,

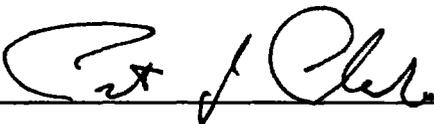
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**ROBERT S. RIVKIN**  
General Counsel

March 12, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of March, 2012, I caused this document to be served by first class mail, postage prepaid, upon all Parties of Record in this proceeding.



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