STFPTOF & JOHNSON LLP

ATTORNEYS AT LAW

Anthony J LaRocca
202 429 8119
alarocca@steptoe com

1330 Connecticut Avenue NW
Washington DC 20036-1795
Tel 202 429 3000
Fax 202 429 3902
steptoe com

224477

February 4, 2009

Honorable Anne K Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

RE: Ex Parte No 681, Class I Railroad Accounting and Financial Reporting -- Transportation of Hazardous Materials

Dear Acting Secretary Quinlan

Attached are the Comments of BNSF Railway Company in Ex Parte No 681, Class I Railroad Accounting and Financial Reporting -- Transportation of Hazardous Materials Please note that this filing contains a color exhibit

Sincerely,

Anthony J LaRocca

Enclosure

BEFORE THE SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 681

CLASS I RAILROAD ACCOUNTING AND FINANCIAL REPORTING – TRANSPORTATION OF HAZARDOUS MATERIALS

COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company ("BNSF") hereby submits comments in response to the Surface Transportation Board's ("STB" or "Board") Advance Notice of Proposed Rulemaking in Ex Parte No 681, Class I Railroad Accounting and Financial Reporting – Transportation of Hazardous Materials (Served January 5, 2009)

The Advance Notice seeks comments on four questions relating to railroads' transportation of hazardous materials (1) Whether it is appropriate to refine the Uniform Rail Costing System ("URCS") to better reflect the costs of hazmat operations, (2) Whether the Board should improve its accounting and reporting rules to better identify the costs specifically associated with hazmat operations, (3) Whether any URCS or data reporting changes should be focused on hazmat operations generally or on operations involving movements of Toxic Inhalation Hazards ("TIH"), and (4) If URCS is modified to reflect hazmat- or TIH-specific costs, what is the best operating statistic to allocate the specific costs to individual movements

The transportation of hazardous materials, particularly TIH materials, imposes a wide range of substantial and unique costs on railroads, subjects railroads to new requirements for substantial capital infrastructure and, due to the possibility of a significant accident where the costs greatly exceed any commercially available insurance make BNSF's shareholders the ultimate insurer of TIH shipments Railroads must have an opportunity to recover those costs and the Board must be prepared to address those costs in any challenges to individual rates

In this proceeding, BNSF is concerned that should the Board adopt a narrow focus on the formulaic historic accounting based costs of transporting TIH materials utilizing the URCS methodology, then any changes to URCS would neither adequately reflect those existing and upcoming costs nor address the potentially catastrophic and uninsurable risk that the transportation of these commodities place on a railroad As BNSF's representative, David Burt, Assistant Vice President, Fuel & Risk Management, explained at the Board's July 22, 2008 hearing in STB Ex Parte No. 677 (Sub-No 1), Common Carrier Obligation of Railroads – Transportation of Hazardous Materials, BNSF's greatest concern with the transportation of TIH materials is BNSF's exposure to the potentially massive risk of liability from a catastrophic accident (a risk BNSF may otherwise choose not to accept were it not for the common carrier obligation) At this time, BNSF is unable to purchase liability insurance to cover the full extent of this extraordinary risk, this lack of insurance above a minimal level is unlikely to improve and would be significantly exacerbated in the event of a future TIH release Accordingly, URCS, which deals only with actual costs incurred by a railroad and reported in its R-1 Annual Report, simply cannot reflect a railroad's full liability risk Therefore, even if the Board makes changes to URCS in this proceeding, the Board must recognize that a further policy solution to the problem of liability exposure must be found

Assuming that the Board agrees that a solution to the more fundamental problem of addressing catastrophic TIH risk will still be necessary even after this proceeding, BNSF believes that changes to URCS to better reflect actual costs and forthcoming costs incurred as a result of our legal obligation to transport TIH would be appropriate In particular, it is possible to make a relatively straightforward adjustment to URCS to allocate to TIH movements the direct costs of the liability insurance a railroad has been able to purchase to cover the risk of loss from transporting TIH BNSF explains its proposal on this subject below

BNSF also incurs a range of other unique costs associated with TIH and hazmat transportation, and those costs are going to increase dramatically as new laws and regulations relating to the handling of TIH materials come into effect New and expensive operating protocols will need to be established and massive new investments will need to be made to comply with existing and newly enacted government requirements BNSF believes that while difficult, the Board in this proceeding must acknowledge and allow BNSF to fully recover these costs If the Board cannot fully determine and allocate all of these costs in URCS consistent with this statement (and the AAR statement with which we concur), then the Board must allow railroads to present evidence relating to their TIH-specific costs in individual rate cases so that railroads have an opportunity to recover these costs

I. While Railroads Incur Substantial Costs Associated With TIH Movements, BNSF's Main Concern With The Transportation Of TIH Materials Is The Risk Of A Catastrophic Accident.

Clearly there are unique and substantial costs incurred by railroads to handle hazardous materials This issue was the subject of two hearings that the Board held in the past year On April 24-25, 2008, the Board held a hearing in Ex Parte No 677, Common Carrier Obligation of Railroads, to address a number of issues relating to the scope of a railroad's common carrier obligations A significant focus of comments at the hearing involved railroads' burdensome and costly obligations relating to the transportation of hazardous materials in general, and TIH materials in particular In response to comments and information obtained at the April 24-25, 2008 hearing, the Board scheduled another hearing for July 22, 2008, to focus exclusively on issues relating to the transportation of hazardous materials Extensive comments were submitted and several parties commented on the unique characteristics and costs of transporting hazardous materials by rail, particularly the transportation of TIH materials

As explained by various witnesses at the July 22, 2008 hearing, the railroads have already made numerous changes in their operations and have incurred substantial operating and investment costs to deal with the risks of handling TIH materials *See e g*, Written Testimony of the Association of American Railroads, Attachment 4, STB Ex Parte No 677 (Sub-No 1), Common Carrier Obligation of Railroads – Transportation of Hazardous Materials (filed July 10, 2008) (describing numerous operating restrictions, special operating practices, inspections and investment in equipment attributable to TIH transportation) New federal laws and regulations will significantly increase the special efforts and investments that will be required to handle TIH materials in the future

For example, the Interim Final Rule adopted by PHMSA/DOT in April 2008 -- Hazardous Materials Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, 73 Fed Reg 20752 -- imposes new security planning requirements and routing obligations for the transportation of certain explosives, TIH and radioactive materials Railroad safety and security plans will have to address, among other things, procedures for minimizing the duration of storage of highly hazardous materials, mitigating the risk to population centers from storage of such materials and the prevention of unauthorized access to such materials The new routing obligations will require extensive data collection and analysis and will obviously have an impact on operations as route modifications are implemented

Since the Board's July 22, 2008 hearing new laws and regulations have been adopted The Rail Safety Improvement Act of 2008, Pub Law 110-432, 122 Stat 4848 (Oct 16, 2008)

("Safety Act"), includes two provisions relating specifically to TIH transportation The Safety Act requires that railroads adopt a plan for implementing positive train control on "main line over which poison- or toxic-by-inhalation hazardous materials are transported " 122 Stat 4857 Implementation of positive train control will involve substantial new investment in equipment and facilities for the lines at issue The Safety Act also requires that certain data be maintained regarding inspection and maintenance of tunnels In addition, on November 26, 2008, the Transportation Security Administration issued a final rule that will require the railroads to adopt new security measures, appoint a rail security coordinator, and implement new measures to "provide for a secure chain of custody and control of rail cars" containing certain hazardous materials *See* Final Rule, Rail Transportation Security, 73 Fed Reg 72130 (Nov 26, 2008)

Nevertheless, it is important for the Board to recognize and acknowledge that the main challenge facing the railroad industry from the transportation of TIH materials is not from the additional operating and investment costs incurred to provide such transportation, as significant as those costs are BNSF emphasized at the July 22, 2008 hearing that BNSF's greatest concern with the transportation of TIH materials is the risk of a catastrophic accident As railroad witnesses explained at the July 22, 2008 hearing, adoption and careful implementation of the most extreme safety measures cannot fully protect against the risk of a catastrophic release of TIH materials While the risk of an accidental release is small, if a release occurs its impact is immediate and extremely difficult to mitigate Recent incidents involving the accidental release of TIH could have had much more serious consequences if just a few circumstances, largely out of the control of the railroads, had been different

BNSF purchases liability insurance to deal with these risks But as BNSF's representative David Burr explained at the July 22, 2008 hearing, BNSF is unable to purchase liability insurance sufficient to cover the full extent of its exposure to the consequences of an accidental release of TIH material BNSF has recently been able to purchase coverage up to only $1 billion dollars of liability exposure A catastrophic release of TIH materials could generate liability far in excess of that amount As Mr Burr explained, many insurance companies refuse to issue any liability insurance to railroads The relatively few insurers willing to issue liability insurance have limits on the amount of coverage they will provide Mr Burr presented a chart showing the patchwork of insurance coverage that BNSF has been to put together adding up to $1 billion in coverage A copy of that chart is attached to the verified statement submitted by Mr Burr with these comments

If BNSF were able to obtain insurance to cover its full liability exposure from the transportation of TIH materials, the cost of the insurance would likely be extraordinarily high But at least the cost of BNSF's liability exposure could then be quantified, captured within URCS and spread among the specific movements that give rise to the cost As it currently stands, however, the full extent of the enormous risk of liability that railroads face from transporting TIH materials is not reflected anywhere in the actual costs that BNSF incurs As a result, the railroads are compelled to provide service without compensation for the liability exposure created by the movement of TIH materials

As BNSF noted at the July 22, 2008 hearing, this situation is untenable The common carrier obligation to transport TIH materials should be eliminated unless there is a solution to this critical problem Changes to URCS to capture additional costs incurred in transporting TIH may improve the Board's regulatory costing model, but they would not provide a solution to the more fundamental problem of liability risk

II If The Board Is Going To Adjust URCS, It Should Change URCS' Treatment Of Insurance Costs.

While railroads have been unable to purchase insurance to cover the full liability risk associated with TIH movements, some of the liability insurance they do obtain is attributable to the liability risk associated with TIH movement If the Board wishes to improve URCS' treatment of the variable costs of TIH movements, it would be appropriate for the Board to make a modest adjustment to URCS to allocate these actual insurance costs exclusively to TIH movements

An URCS adjustment could be established by estimating the portion of a railroad's actual insurance coverage that is attributable to TIH risks, determining the amount the railroad pays for that insurance coverage and allocating the cost of that coverage within URCS exclusively to TIH movements As explained in the attached verified statement. Mr Burr suggests that it would be reasonable for the Board to assume that all liability insurance exceeding $500 million in coverage is attributable principally to TIH movements No liability losses have exceeded $150 to $200 million that did not involve TIH Thus, it is reasonable to assume that insurance coverage up to two or three times the maximum historic liability is attributable to the full range of railroad operations, not just to the risks from TIH transportation While some of the coverage below this threshold is clearly attributable to TIH risk, Mr Burr recognizes that it could be difficult to allocate the first $500 million in coverage between TIH and non-TIH movements To simplify the URCS adjustment, it would be reasonable and conservative to assume that all coverage exceeding $500 million is substantially attributable to TIH risk while coverage below this threshold is attributable generally to all railroad operations The Board could solicit comments on whether $500 million is an appropriate threshold

Each railroad could then report in its R-1 Annual Report the amount of its overall insurance cost attributable to coverage exceeding the $500 million threshold Mr Burr estimates that this amount would be around one-third of BNSF's total insurance costs URCS could be adjusted to spread this cost exclusively to TIH movements As the Board proposed in the Advance Notice, it would be appropriate to treat this cost as 100 percent variable, since a railroad would not likely acquire any of this coverage if it did not handle TIH movements

III. It Would Take A Substantial Effort To Adjust URCS To Account For Other Operating And Investment Costs Attributable To TIH Movements.

While it would be a relatively straightforward matter to adjust URCS in the manner described above to account for the liability insurance costs attributable to TIH movements, any attempt to adjust URCS to address costs other than insurance would face considerable difficulties Such an attempt would require complicated and potentially burdensome special studies to identify the full range of TIH-specific costs, to determine methodologies for allocating portions of railroad operating and capital expenditures to TIH and non-TIH commodities and to determine appropriate adjustment factors within URCS to allocate those costs to individual TIH movements This effort would be complicated by the fact that the many of the laws and regulations addressing a railroad's handling requirements for TIH are new and the railroads' operating and investment responses to these new laws and regulations are still evolving Moreover, once appropriate adjustment factors were identified, the data reporting burdens that would be necessary to apply the special TIH adjustments each year could be substantial

Several complex issues would have to be addressed through potentially burdensome special studies A railroad may add crew members on particular TIH trains or include empty buffer cars between TIH and non-TIH cars Information would be needed on the scope and frequency of these operating changes Special line inspections may be made prior to running particular TIH trains The costs of additional crew time and additional equipment used in the line inspection would have to be estimated Additional switching activity is often required in yards and more time is spent inspecting TIH cars and switching them into and out of trains New regulations will require more direct monitoring and control of cars containing TIH materials, including longer physical custody of TIH cars, which will increase the time spent by yard crew personnel and train crews handling TIH materials Speed restrictions on TIH trains affect the efficiency of a railroad's operations over line segments on which TIH materials are handled A significant amount of line-specific and network-wide information would be needed to evaluate and quantify the resulting costs

IV. Given The Importance Of TIH-Specific Costs, The Board Should Allow Parties In Individual Rate Cases Involving TIH To Present Movement-Specific Cost Evidence.

An appropriate approach to dealing with the extraordinary costs associated with TIH movements would be to allow parties in individual rate cases involving TIH movements to address those costs, if they choose to do so, through movement-specific cost evidence While the Board has disallowed movement-specific adjustments in rate cases, an exception would be justified for cases involving TIH movements The railroads carry relatively few TIH carloads so the exception would be very limited In addition, many of the unique costs associated with TIH movements relate to the investments made to particular line segments where TIH materials are handled A movement-specific adjustment would be superior to a system-wide modification of URCS in capturing those line-specific investments and allocating the investment costs to the movements on the affected line segments that actually benefit from the investments

Moreover, if the Board allows movement-specific adjustments in individual rate cases it is possible that there will never be a need to address the issue of TIH-specific costs The parties to particular cases may decide that an URCS adjustment is not likely to affect the outcome of the case and that there is no reason to propose movement-specific adjustments On the other hand, if litigation over TIH-specific costs does result, the Board could use its experience in those rate cases to determine whether it would be appropriate to make a system-wide adjustment to URCS in the future and, if so, how the issue of TIH-specific costs should be approached in such a proceeding

Respectfully submitted,

Samuel M Sipe, Jr
Anthony J LaRocca
Steptoe & Johnson LLP
1330 Connecticut Avenue, N W
Washington, D C 20036
(202) 429-6486

Attorneys for BNSF Railway Company

Richard E Weicher
Jill K Mulligan
BNSF Railway Company
2500 Lou Menk Drive
P O Box 961039
Fort Worth, TX 76131-0039

February 4, 2009

VERIFIED STATEMENT OF DAVID BURR
IN SUPPORT OF COMMENTS OF BNSF RAILWAY COMPANY
EX PARTE NO. 681, CLASS I RAILROAD ACCOUNTING AND FINANCIAL REPORTING – TRANSPORTATION OF HAZARDOUS MATERIALS

My name is David Burr I am the Assistant Vice President, Fuel & Risk Management, for BNSF Railway Company In that position, I am responsible, among other things, for evaluating BNSF's risk management strategies and managing BNSF's purchase of liability insurance I presented testimony to the Board on July 22, 2008 at a hearing in STB Ex Parte No 677 (Sub-No 1), Common Carrier Obligation of Railroads – Transportation of Hazardous Materials. I am submitting this Verified Statement in response to the Board's Advance Notice of Proposed Rulemaking in Ex Parte No 681, Class I Railroad Accounting and Financial Reporting – Transportation of Hazardous Materials (Served January 5, 2009) I understand that the Board is soliciting comments on the possibility of changing its regulatory costing methodology to address the costs associated with the transportation of hazardous materials, and in particular Toxic Inhalation Hazards ("TIH")

As I explained at the July 22, 2008 hearing, BNSF has serious concerns with the transportation of TIH materials BNSF incurs significant operating and investment costs that are directly associated with transportation of TIH materials But BNSF's greatest concern with the transportation of TIH materials is the risk of a catastrophic accident The risk of an accidental release of TIH material is small, but if a release occurs BNSF has no control over the consequences and the impact could be enormous BNSF is not able to purchase liability insurance to cover the full extent of its liability risk from handling TIH BNSF has recently been able to purchase $1 billion in coverage, but a catastrophic release of TIH could generate liability far in excess of that amount BNSF continues to pursue additional liability insurance coverage without any meaningful impact Many insurers do not write any railroad liability insurance and where liability insurance can be obtained, the coverage is limited I presented to the Board a chart at the July 22 2008 hearing that showed how BNSF has put together a program of insurance coverage consisting of multiple different policies from different insurers A copy of that chart is attached to this Verified Statement

The Board must recognize and acknowledge the issue of a railroad's liability risk from the transportation of TIH materials Railroads are being forced to provide TIH transportation without protection from the enormous liability risks that cannot be covered through insurance A solution to the problem of liability exposure must be found But it is important for the Board to realize in the meantime that the problem of liability risk cannot be addressed through changes to its regulatory costing model While the Board may want to improve its regulatory cost model, the problem of a railroad's liability risk will have to be addressed through a different mechanism

Nevertheless if the Board wishes to refine its regulatory cost model to reflect more accurately the costs of transporting TIH, the Board could adjust its cost model to allocate specifically to TIH movements the insurance cost that a railroad *does* incur to cover the risk of transporting TIH materials While there is no hard and fast rule for determining how much of a railroad's insurance coverage is attributable to TIH movements, it would be reasonable for the Board to assume that all liability insurance exceeding $500 million in coverage is attributable to TIH movements This estimate is conservative To the best of my knowledge, no liability losses have exceeded $150-$200 million that did not involve TIH In my judgment, insurance coverage up to two or three times this maximum historic liability could reasonably be attributed to the full range of railroad operations and not specifically to the risks of a TIH accident While some of the insurance coverage up to $500 million could be attributed to TIH risk it could be difficult to allocate the first $500 million in coverage between TIH and non-TIH movements A reasonable alternative would be to make the simplifying assumption that all coverage exceeding $500 million is attributable to TIH risk, while coverage below this threshold is attributable generally to all railroad operations

I estimate that about one-third of BNSF's total payments for liability insurance purchases are for insurance coverage exceeding $500 million More precise calculations could be made in the context of an annual supplement to the R-1 Annual Report I believe it would be appropriate for the Board to allocate these insurance costs through the Board's regulatory cost model exclusively to TIH movements

VERIFICATION

I, David Burr, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to sponsor this testimony

David J Burr

February 3, 2009

BNSF Liability Insurance