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U.S. Department of
Transportation
Office of the Secretary
of Transportation

General Counsel

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

February 4, 2009

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

Re Ex Parte No 681

Dear Secretary Quinlan

Enclosed herewith for filing please find the Comments of the United States Department of Transportation in the above-referenced proceeding. Please contact me if you have any questions.

Respectfully,

A handwritten signature in cursive script that reads "Paul Samuel Smith".

PAUL SAMUEL SMITH
Senior Trial Attorney

(202) 366-9280

Enclosure

**Before the Surface Transportation Board
Washington, D.C.**

_____)
Class I Railroad Accounting and Financial Reporting) Ex Parte No 681
– Transportation of Hazardous Materials)
_____)

**Comments of the
United States Department of Transportation**

Introduction

The Surface Transportation Board (“STB” or “Board”) in this proceeding has issued an Advance Notice of Proposed Rulemaking (“ANPRM”) seeking comment on whether and how to change its accounting and financial reporting rules to better capture the asset and operating costs of transporting hazardous materials (“hazmat”) Class I rail carriers file accounting and financial information into the Board’s Uniform System of Accounts (“USOA”) on an annual basis, which is used by the agency’s Uniform Railroad Costing System (“URCS”) to determine the carriers’ variable costs for regulatory purposes, including adjudication of charges that rail rates are unreasonably high. The United States Department of Transportation (“DOT” or “Department”) hereby submits its comments in response to the ANPRM, and commends the STB for taking this first step in revising its regulatory costs estimation system

Discussion

Their common carrier obligation requires that railroads transport hazardous materials, and the continued movement of these shipments is vital to the national economy *See, generally, Common Carrier Obligation of Railroads – Transport of*

Hazardous Materials, STB Ex Parte No 677 (Sub-No 1) Federal regulations establish a comprehensive scheme to enhance the safe production, packaging, transportation, and use of these products. The instant proceeding is part of an effort to ensure that the rates applicable to their transportation appropriately reflect the costs

URCS is a critical component in determining railroad costs for regulatory purposes. This is especially true for rate reasonableness challenges involving chemical traffic, including hazmat, which (due to typical shipment size and origin-destination characteristics) are potentially more amenable for processing via the recently adopted "three-benchmark" approach to determining rate reasonableness for small shipments *Simplified Standards for Rail Rate Cases*, STB Ex Parte No 646 (Sub-No 1), served September 5, 2007. The three-benchmark approach relies very heavily on the variable cost estimate determined by URCS, and therefore that measure needs to be realistic

The ANPRM seeks comment on whether to require additional data from major railroads regarding the costs of transporting hazmat so as to improve the measurement of the costs of those freight movements. DOT submits that such costs are indeed unique, on the basis of both longstanding and still developing regulatory requirements (see *Appendix*), and on the basis of the record in *Ex Parte No. 677 (Sub-No 1)*, which establishes the insurance and related costs attendant to hazmat shipments. We therefore agree both that additional data should be reported to USAO in order to identify and quantify these costs, and that URCS should attribute these costs to hazmat traffic alone rather than to the entirety of a carrier's business.

The Appendix hereto lists a number of rulemakings, studies, and other actions recently adopted or still under consideration by operating administrations within DOT

and by other federal agencies that will affect railroad costs with respect to the transport of hazmat. These comments do not purport to be exhaustive in this respect, rather, they list only the significant proceedings of which the Department is aware. The STB should be similarly aware not only of their existence but of uncertainty about their final outcomes, and therefore about the extent of the financial burdens they may actually impose. In these circumstances we encourage the Board to be flexible in taking these still evolving activities into account.

The STB encouraged parties to provide comments on the specific definition of what should constitute a movement of hazardous material for the purposes of its costing and reporting systems. The Department recommends that in addition to toxic by inhalation hazard ("TIH") materials (also known as poisonous by inhalation hazard ("PIH") materials), the Board should also consider including two other categories of traffic in this definition. The first is time sensitive materials ("TSM"), due to the extra costs associated with monitoring and expediting such shipments, the second is environmentally sensitive chemicals ("ESC"), due to the special handling needs that are directly related to the high cost of cleanup when spills occur.¹ The materials covered by these terms are defined and enumerated in 49 C.F.R. §§ 171.8 (defining "material poisonous by inhalation"), 173.31(f)(2), (ESCs, also known as "hazardous substances"), 173.314(g), and 173.319(a)(3) (TSMs, including hydrogen chloride, refrigerated liquid, vinyl fluoride, stabilized, and flammable cryogenic liquids).

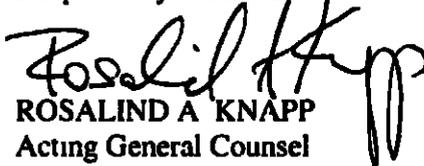
¹ Spill cleanup costs for ESCs average \$14 million making it the second most expensive hazmat spill to remediate (after TIH materials)

The Department reaffirms its view that the Board's regulation of the rates at which hazmat traffic moves should fully and fairly reflect its true costs, but we offer one last caution. As the STB noted earlier in this proceeding, "[f]or many hazardous materials, including TIH, rail is the safest and most efficient mode of transportation." Notice of Public Hearing (served June 4, 2008) at 2. Although it is not likely that TIH materials will be diverted from rail to other transportation modes because of practical limitations on modal infrastructure and the risks associated with such traffic shifts, it is possible that cost considerations reflected in the rate could lead to diversion of TSMs, ESCs, and other hazardous materials to less safe alternative modes. Accordingly, the public interest requires considering the impacts of such potential diversion.

Conclusion

The Department welcomes the revision of the USAO reporting requirements and of URCS costing processes to improve the Board's regulatory oversight of hazmat shipments by rail. DOT expects changes developed in this proceeding to be a step forward in ensuring that the Board possesses the data and the analytical tools necessary to comply with its responsibilities. Since the overall regulatory regime for hazmat is evolving, the STB must be mindful as it moves forward that further changes in the costs of transporting hazardous materials may yet result.

Respectfully submitted,


ROSALIND A. KNAPP
Acting General Counsel

February 4, 2009

APPENDIX

Ongoing Federal Activities Involving Hazardous Materials Transportation

Rail Safety Improvement Act of 2008 ("RSIA") Pub.L No 110-432 RSIA mandates the installation of Positive Train Control ("PTC") equipment by December 31, 2015, on all main lines where inter-city, commuter, and hazmat trains move. Also, it requires carriers to provide crewmembers with emergency breathing equipment on trains carrying PIH.

DOT Final Rule (73 Fed Reg 72182, November 26, 2008)

Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments Requires rail carriers annually to compile data on certain shipments of TIH/PIH materials, explosives, and radioactive materials. Railroads must use the data to analyze safety and security risks along rail routes where these materials are transported, assess alternative routing options, and make routing determinations based on those assessments. *See also* 73 Fed Reg 72194 (November 26, 2008)

Transportation Security Administration Final Rule (73 Fed Reg 72130, November 26, 2008) *Rail Transportation Security* Requires rail carriers to report certain requested facility, location, and shipping information for certain hazardous materials, and to implement chain-of-custody procedures to ensure a positive and secure exchange of certain hazmat.

DOT Final Rule (74 Fed Reg, 1770, January 13, 2009)

Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials. Mandates commodity-specific improvements in safety features and design standards for newly manufactured DOT-specification tank cars used to transport TIH/PIH materials, and adopts a 50 mph speed restriction for loaded rail tank cars transporting these materials.

DOT Congressional Report (Forthcoming)

The Transportation of Hazardous Materials: Insurance, Security, and Safety Costs Pursuant to Section 1555(b) of the *Implementing Recommendations of the 9/11 Commission Act of 2007* (Pub L No 110-53), the Department, in conjunction with the Department of Homeland Security, is currently examining insurance, security, and safety costs borne by carriers, and the extent to which those costs are reflected in the rates paid by shippers for the transport of hazardous materials.