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April 9, 2009

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

**Re: STB Finance Docket No. 35219, *Union Pacific Railroad Company –
Petition for a Declaratory Order***

Dear Acting Secretary Quinlan:

Enclosed for filing in the above referenced matter are the Comments of CSX
Transportation, Inc.

CSXT is e-filing these comments. Thank you for your assistance, and please do not hesitate
to contact me if you have any questions regarding this matter.

Respectfully submitted,

A handwritten signature in black ink that reads "Paul R. Hitchcock". The signature is written in a cursive, flowing style.

Paul R. Hitchcock

PRH/krb

Enclosure

cc: Tonya Conley (via e-mail)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35219

**UNION PACIFIC RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER**

COMMENTS OF CSX TRANSPORTATION, INC.

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Counsel for: CSX TRANSPORTATION,
INC.

Dated: April 9, 2009

In response to the Surface Transportation Board's ("Board") decision served March 10, 2009, instituting this proceeding, CSXT hereby submits the following comments on Union Pacific Railroad Company's ("UP") Petition for Declaratory Order. CSXT appreciates the Board's invitation to the public to submit comments in this declaratory order proceeding. The issues raised are important to all rail carriers that are required by law to transport highly hazardous commodities.

In the Petition filed February 18, 2009, UP requests the Board to clarify the extent of its common carrier obligation to transport chlorine, a toxic inhalation hazard ("TIH") material, long distances and through TSA-designated High Threat Urban Areas (HTUAs) and other population centers to destinations where an ample supply of chlorine is available to the receiver from substantially closer sources.¹

As CSXT has indicated in comments to the Board in other proceedings, the company understands that, under the current state of the law, CSXT has a legal obligation to accept and transport TIH commodities on reasonable request. And, as has been said many times before, CSXT does not solicit this traffic. If given a choice, CSXT would decline to participate in the business under any circumstances not essential to the public health of the communities we serve. Our reasons are well known. The inherent risk of transporting large quantities of

¹ In its Petition, UP asserts it declined to quote common carriage rates to transport chlorine over 1,400 miles to destinations that are located within 300 miles from ample alternative chlorine supplies. UP believes the risk of potential exposure from long-distance chlorine movements is unnecessary, and asks the Board to clarify the common carrier obligation to quote rates for new lengthy movements of TIH materials.

TIH commodities (especially over long distances) creates potentially huge liability risks and exposes the public to unnecessary risks.

CSXT supports UP's request to the Board for guidance on whether the transportation of TIH materials long distances is reasonable when alternative sources of Chlorine are available much closer to the receiver. On the facts presented, CSXT believes that the request for transportation service is unreasonable within the meaning of 49 USC Sec. 11101(a).

In addressing the complex issues raised in this proceeding, the Board need not reach the sweeping and fundamental issue of whether any common carrier obligation whatsoever still exists for TIH. The statute has always included a reasonableness standard, and the issues presented should be examined in light of this particular fact pattern. See, 49 USC Sec. 11101(a) and *Classification Ratings on Chemicals, Conrail*, 3 ICC 2d 331 (1986). The issue here is framed narrowly, and the Board's decision should be similarly narrow.

Over the next decade, the Board will most likely confront many common carrier issues as the rail network strives to become more efficient while the nation's transportation demands continue to grow. These issues will often arise from conflicts between rail customers. For example, longstanding rail customers may object to sharing finite car supply with new entrants to the customers' markets.

New shippers located in awkward-to-serve locations may ask for service even though to do so would compromise rail service to other established customers.

The traditional common carriage business model assumes any shipper anywhere may ship to any other shipper anywhere on reasonable request. Yet, new and future government requirements challenge this fundamental premise.

The Transportation Security Administration (“TSA”), the Department of Transportation (“DOT”) and other agencies have recently adopted and proposed new regulations that give heightened attention to rail transportation of TIH materials. It will be exceedingly difficult to implement these well-intended, new and proposed safety and security rules that are designed to reduce the risk to the public, which is inherent in moving these commodities. The compounded effects of growing regulatory burdens and heightened attention to rail transportation of TIH are beginning to present the railroads with unreasonable demands.

These government-imposed mandates include:

- A fifty mile per hour speed limit on any train that contains a TIH car²
- TIH route analysis regulations require railroads to compile annual data on movement of TIH (and a few other ultra-hazardous materials), use the data to analyze the safety and security risks along the relevant routes applying 27 risk factors, assess

² Hazardous Materials, Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials; Final Rule (50 mph limit), Docket No. FRA 2006-25169, Effective March 16, 2009.

alternative routing options and make routing decisions based upon those assessments.³

- A requirement to interchange TIH cars only at locations where they are attended, and mandating an entirely new procedure for train crews to follow in picking up and delivering TIH cars in certain locations.⁴
- Positive Train Control on main lines where TIH is to be transported – an undeveloped technology currently estimated to cost \$5 billion nationwide.⁵

CSXT urges the Board and all interested parties to keep in mind that common carriage is not a universal service obligation. Neither is it an unlimited capacity obligation. The scope of a railroad carrier's obligation to provide service is -- and always has been -- subject to a reasonableness standard. The common carrier obligation should not frustrate well-intended regulatory initiatives in the area of TIH safety and security. Federal policy cannot impose more and more special handling requirements and simultaneously preserve a common carrier obligation with traditional service expectations.

³ PHMSA Docket No. RSPA-04-18730; 'Hazardous Materials Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments', Interim Final Rule Effective June 1 2008; Final Rule Effective December 26, 2008.

⁴ TSA Rail Transportation Security: Final Rule, Docket No. TSA-2006-26514, Amendment Nos. 1520-5, 1580-1(New) RIN 1652-AA51, Final Rule Effective December 26, 2008, 49 CFR 1580.107 (Chain of Custody Rules) Effective April 1, 2009.

⁵Rail Safety Improvement Act of 2008, Enacted October 16, 2008.

CSXT submits that it is plainly unreasonable to demand that a railroad move TIH commodities, including chlorine, long distances when multiple alternative sources not otherwise reasonably evidenced as unsuitable for use are closer-by.

Common sense teaches that short hauls with fewer miles have inherent advantages in safety over long distance movements. Further, customer requests to ship TIH materials unnecessarily long distances across the country work contrary to federal regulatory and non-regulatory initiatives in the area of TIH safety and security.

Whatever decision the STB reaches in this proceeding will require a difficult and delicate balancing of the public interest and two private economic interests.

Shippers and receivers obviously seek to have the maximum commercial flexibility in their purchasing and sales alternatives. Producers want to be able to sell their product to any buyer they can find. Buyers want the flexibility to purchase from any supplier anywhere. Union Pacific seeks to reduce its exposure to a potentially ruinous financial liability given that no other solutions to this exposure are adequate at this time.

In prior hearings before the Board, no party was heard to seriously dispute the potential for ruinous liability that is faced by every rail carrier of TIH products every day. Some interest groups took the position that the risk of such an event is so small that it should not even be considered, but even they did not deny the existence of some such risk.

Public policy should discourage unnecessary shipment of TIH materials, especially long distance movements. Yet, current policy does not provide any incentives for shippers to reduce or eliminate unnecessary shipments of TIH. Indeed, market dynamics actually encourage long distance shipments from time to time. Shippers and receivers are the beneficiaries of TIH transportation by rail; yet, they bear few of the risks associated with moving these commodities long distances.

The Board's authority to address this huge liability exposure is limited to its powers under its enabling statute. CSXT urges the Board to take a small step and to lead the formation of national TIH transportation policy by recognizing the reasonableness of Union Pacific's position in this case.

That said, only Congress can act to cap the financial exposure of industry, including the rail carriers who are called upon to assume the burden and risk of moving those commodities. Realistically, in order for that to happen, shippers and railroads must first come to a consensus. We are pleased to be able to say that real progress is being made.

Since the Board's hearing on common carrier issues and TIH transportation in July 2008, CSXT has continued a series of active discussions with major customers and their representatives in an attempt to develop a consensus around a legislative proposal. We are pleased with the progress of our

discussions. CSXT and several of our customers have reached agreement on a general framework whereby railroads would continue to have an “at fault” liability up to a substantial limit. A layer of shipper-funded coverage, likely funded by a federal tax with all amounts (and earnings) going into a managed trust fund would grow over time up to a total liability cap of \$2 billion. We continue to discuss the possibility of private shipper-funded insurance – if commercially available – as a middle layer between the railroad’s self-funded liability and the overall \$2 billion cap.⁶

Even if liability legislation is adopted, CSXT believes that if TIH must move, it is better that these ultra-hazardous commodities move over shorter distances rather than longer distances. There are clear alternatives to the long distance movements of TIH materials – closer sources and product substitution. But the balancing of carrier and shipper economic interests would be much changed if the carrier were not facing such huge exposure, and the right outcome of this case might well be different with a liability cap in place. Today, CSXT encourages its customers to purchase TIH products from closer sources and to adopt safer alternative products.

Federal policy should encourage gradual conversion of industrial processes that use these chemicals to eliminate the need to move them long distances. Until that is achieved, prudent interim policies must be adopted to reduce the number

⁶ The progress in these discussions, while limited, further supports our earlier suggestion that the Board should confine its decision narrowly to the facts presented here.

and distance of TIH shipments by rail, and railroads and shippers must come together to support a sound liability policy.

While CSXT does not seek this traffic, and urges TIH customers to adopt safer alternatives, we want to emphasize that we understand our obligations under the current state of the law. We take our responsibility to transport these commodities very seriously and remain totally dedicated to the safe and secure movement of these products whenever we are required to transport them.

Respectfully submitted,



Peter J. Shutz
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Kathryn R. Barney
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904-359-1192

April 9, 2009

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that pursuant to the Board's Decision, served March 10, 2009 a copy of the foregoing Comments of CSX Transportation, Inc. was sent via electronic mail on April 9, 2009, to Tonya W. Conley, Union Pacific Railroad Company (twconley@up.com).



Paul R. Hitchcock

April 9, 2009