



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

General Counsel

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

April 10, 2009

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

Re: Finance Docket No. 35219

224871

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,

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Senior Trial Attorney

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Enclosure

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

\_\_\_\_\_) Finance Docket No. 35219  
Union Pacific Railroad Company – )  
Petition for Declaratory Order )  
\_\_\_\_\_)

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

**I. Introduction**

The Surface Transportation Board (“STB” or “Board”) has instituted a declaratory order proceeding under 49 U.S.C. 721 and 5 U.S.C. 554(e) in response to a petition filed by the Union Pacific Railroad Company (“UP”) requesting that the Board “clarify” the extent of its common carrier obligation to quote rates for “new, lengthy movements of chlorine,” a toxic inhalation hazard (“TIH”) material.<sup>1</sup> *Decision* served March 10, 2009. UP states that each of the movements at issue would traverse at least two High Threat Urban Areas (“HTUAs”)<sup>2</sup> and other large communities to destinations in Louisiana and Texas despite what UP reports as the apparent availability of “an ample supply of chlorine . . . from nearby sources.” Specifically asserting that such movements present “unnecessary risks” and would contravene federal efforts to reduce such risks, UP states that under the circumstances it declined to quote rates for this traffic. UP suggested that the Board consult with the Federal Railroad Administration (“FRA”) and the

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<sup>1</sup> TIH materials are also known as materials poisonous by inhalation or “PIH” materials. See 49 CFR 171.8 (defining “material poisonous by inhalation”).

<sup>2</sup> HTUA’s are designated by the Transportation Security Administration (“TSA”) at Appendix A to 49 CFR Part 1580 and TSA regulations impose specific security measures on the handling and transportation of hazardous materials shipments within HTUAs. See 49 CFR Part 1580.

Transportation Security Administration (“TSA”) in this matter because of those agencies’ responsibilities regarding the safe and secure transport of hazardous materials.

The United States Department of Transportation (“DOT” or “Department”) hereby submits its comments in response to the Board’s request for comments in this proceeding. In sum, DOT concludes that the Board should decline UP’s invitation to dispense with that carrier’s common carrier obligation to transport the materials at issue. Compliance with existing regulatory safeguards would appropriately mitigate the relevant risks.

## **II. Discussion**

### **A. The Common Carrier Obligation**

As the Board notes in its *Decision*, 49 U.S.C. 11101(b) obligates UP, as a rail common carrier, to provide common carrier rates and other service terms upon reasonable request. Although UP frames its petition in terms of “clarifying” its common carrier obligation, by asking to be relieved of the requirement to publish rates for particular movements of chlorine, the railroad is effectively seeking to avoid its common carrier obligation to quote rates to ship the material to certain locations.

The Department indicated just last year in another STB proceeding that there is no reason to change the common carrier obligation of railroads with respect to shipment of PIH materials such as chlorine. *See 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) at 1-2 (“2008 Statement”). That

earlier proceeding reaffirmed that the continued rail movement of hazardous materials, including PIH materials, is vital to the national economy, and the Board itself noted 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.

Congress is well aware of the safety and security risks posed by the rail movement of PIH materials and has tasked DOT and the Department of Homeland Security (“DHS”) with the responsibility to take steps to safeguard the public. DOT believes that the comprehensive Federal regulatory framework applicable to rail transportation of hazardous materials, including PIH materials, effectively mitigates the safety and security risks associated with such transportation.

Moreover, after meetings with railroads and shippers of these materials (see pages 11-12, *infra*), the Department is concerned that allowing carriers to determine what destinations should be served from which origins will have unintended consequences for the economy. Shippers and receivers have a significant economic incentive to determine the best source and destination for their products. Allowing a carrier to overrule the marketplace decisions of shippers and receivers in selecting the best sources and destinations for their products may force the use of particular sources despite any one of a number of critical reasons the receiver had for selecting a particular source in the first place. For example, concerns about shipment reliability, product quality and/or availability may be critical factors in a receiver’s selection of the origin and destination of

the product. Ignoring these concerns could have significant economic impacts on the shippers and receivers.

Allowing railroads to select preferred origins and destinations could also lead to concerns about railroad favoritism of particular regions or shippers. If allowed such discretion, a railroad could potentially steer traffic to shippers with which it has a particularly favorable contract by choosing not to quote rates for traffic where it has a less advantageous position.

**B. Congress Has Refused to Modify Rail Common Carriers' Obligation to Transport PIH Materials**

As noted in DOT's 2008 Statement, only Congress, by the passage of legislation addressing the risks associated with the rail movement of PIH materials, can modify a common carrier's obligation to transport such materials. *See 2008 Statement* at 15. Congress has rejected railroads' repeated requests for the enactment of legislation that would either eliminate the railroads' common carrier obligation to transport PIH materials or cap the railroads' liability for transportation incidents involving the movement of PIH materials. Instead, Congress has chosen to pass legislation that directs DOT and DHS to safeguard the public from the safety and security risks posed by the rail movement of PIH shipments, and that provides protection to railroads against tort suits when they comply with the Federal standards.

In 2007, Congress directed the Secretary of Transportation, in consultation with the Secretary of Homeland Security, to issue a final rule regarding the rail routing of security-sensitive hazardous materials (including PIH materials such as chlorine). Section 1551 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act; Pub. L. 110-53; 121 Stat. 266). Paragraph (e) of section

1551 puts the initial burden of analyzing the safety and security of rail routes on the carriers themselves. Specifically, that section mandated a final routing rule that requires rail carriers of security-sensitive materials to “select the safest and most secure route to be used in transporting” those materials, based on the rail carrier’s analysis of the safety and security risks on primary and alternate transportation routes over which the carrier has authority to operate. On November 26, 2008, DOT’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued a rail routing rule. 73 Fed. Reg. 72182. As explained in more detail later, this rule requires railroads to analyze the safety and security risks over which they transport security-sensitive materials, and to use routes with the fewest overall safety and security risks to transport security-sensitive hazardous materials. FRA will review such routing decisions. The rule does not allow railroads to decline to transport PIH materials between certain shippers and receivers.

Similarly, in section 1512 of the 9/11 Commission Act Congress charged DHS with issuing regulations requiring each railroad to conduct a vulnerability assessment and prepare, submit to the DHS Secretary for approval, and implement a security plan. Vulnerability assessments encompass the security of security-sensitive hazardous materials being transported by railroad or stored on railroad property, and security plans include a strategy for implementing enhanced security for shipments of security-sensitive hazardous materials. DOT understands that DHS is in the process of developing a proposed rule to implement section 1512.

In section 1528 of the 9/11 Commission Act 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. 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). As noted in the 2008 Statement, a railroad can minimize its liability exposure by ensuring better employee compliance with the DOT and DHS regulations.

Moreover, last year 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 which 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>3</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 over which PIH materials are transported; and (3) such other tracks as the Secretary may prescribe by regulation or order. 49 U.S.C. 20157. FRA is working with its Railroad Safety Advisory Committee in developing a proposed rule implementing section 20157.

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<sup>3</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

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

As explained in detail in DOT's 2008 Statement, the vast majority of hazardous materials shipped by rail each year arrive at their destinations safely and without incident. 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 DHS 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 PIH materials.

Regulations promulgated and enforced by two operating administrations within the Department apply to the transportation of hazardous materials by rail. First, PHMSA promulgates and enforces the hazardous materials regulations ("HMR") in accordance with Federal hazardous materials transportation law.<sup>4</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

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<sup>4</sup> See 49 U.S.C. 5101 *et seq* and 49 CFR parts 171-180.

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 historically issued a number of regulations to improve the accident survivability of rail tank cars carrying hazardous materials.<sup>5</sup> The HMR also specifically address the transportation of PIH materials by railroad in commodity-specific provisions tailored to the hazards of the specific materials. *See, e.g.*, 49 CFR 172.800 (requiring offerors and carriers of certain hazardous materials, including PIH 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 PIH materials); 173.244 (bulk packaging requirements for poisonous liquids with inhalation hazards); 173.249 (bulk packaging requirements for bromine, a PIH 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).

FRA promulgates and enforces a comprehensive regulatory program in accordance with the Federal railroad safety laws.<sup>6</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 certification, and workplace safety. 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.

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<sup>5</sup> *See DOT's July 2008 Statement* for a more detailed discussion of PHMSA regulation of rail tank cars as a hazardous materials packaging. *See also* 73 FR 17818, 17819 (Apr. 1, 2008)

<sup>6</sup> *See* 49 U.S.C. 20101 *et seq.* and 49 CFR parts 200-244.

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

Although statistics demonstrate that the rail transportation of hazardous materials is a safe method for moving large quantities of hazardous materials over long distances, in recent years rail accidents in which one or more tank cars containing PIH material were breached led the Department to take additional steps to further enhance the safety of such shipments. For example, as a result of an FRA and PHMSA comprehensive review of the safety of hazardous materials shipments in rail tank cars, early this year PHMSA issued a final rule requiring newly constructed PIH tank cars to have 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 PIH tank cars and imposes a 50 mile per hour speed limit for all trains transporting loaded PIH tank cars. By the Association of American Railroads' own calculations, such cars would lower by more than half the risk associated with transporting PIH materials in the existing tank car fleet. FRA and PHMSA are continuing to conduct research designed to support additional performance standards for tank cars carrying PIH materials.

As particularly relevant here, in accordance with section 1551 of the 9/11 Commission Act, in close cooperation with FRA and TSA, in late 2008 PHMSA issued a final rail routing rule requiring railroads moving certain security-sensitive hazardous materials designated by DHS, 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 73 Fed. Reg. 72182 (Nov. 26, 2008).<sup>7</sup> As part of the route selection process, railroads are required to consider possible interchange of the PIH materials traffic with other railroads. The route assessment must consider a minimum of 27 risk factors, including rail infrastructure characteristics along the route, proximity to iconic targets, environmentally sensitive or significant areas, population density, length of the route, and emergency response capabilities. Short routes are not necessarily the safest and most secure 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. Railroads can elect to make their initial routing decisions by September 1, 2009, based on analysis of six-month data (from July to December 2008), or by March 31, 2010, based on full year 2008 data.<sup>8</sup> The rule does not provide railroads with the option of declining to transport PIH materials that are tendered in compliance with DOT regulations.

In developing this rail routing rule, PHMSA and FRA, in close consultation with TSA, assessed the safety and security vulnerabilities associated with the transportation of different types and classes of hazardous materials, including PIH materials, and the

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<sup>7</sup> At the same time, TSA published a rail security rule to enhance the security of the nation's rail transportation system 73 Fed. Reg. 72130 (Nov. 26, 2008). TSA's rule designates certain materials, including PIH 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 and implements chain of custody requirements to ensure a positive and secure exchange of these materials.

<sup>8</sup> DOT notes that UP is the only rail carrier that has indicated that it intends to utilize a full year of 2008 data in making its initial routing decisions. Accordingly, UP's initial routing decisions must be complete by March 31, 2010. See 73 Fed. Reg. at 72193.

enhanced rail security requirements of the rule are specifically designed to mitigate the risks associated with the rail transportation of these materials. DOT is confident that, if railroads undertake the analysis required in the rule, the routes they utilize will be safe and secure no matter the distance traveled or the population along the route. FRA enforces the PHMSA routing rule and will be reviewing the railroads' routing decisions. FRA, after consulting with PHMSA, TSA, and STB, can require a railroad to use an alternative route if it is determined that the railroad's route selection documentation and underlying analysis are deficient and fail to establish that the route chosen poses the least overall safety and security risks based on the information available.<sup>9</sup>

#### **D. Other Safety and Security Initiatives**

As also explained in detail in DOT's 2008 Statement, DOT has participated in several initiatives outside of the formal regulatory process to further improve the security of rail transportation of hazardous materials, and PIH materials in particular. For example, in late 2005, at the request of the Association of American Railroads and the American Chemistry Council, FRA convened a conference under 49 U.S.C. 333 ("Section 333 conference"). The Section 333 conference consisted of a series of meetings and related exchanges of information among railroads, shippers and receivers of hazardous materials, and federal officials that provided a forum to study the feasibility of and benefits from potential coordinated industry approaches (e.g., market swaps, changes to shipping patterns, co-location of plants at end user locations, and product substitution)

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<sup>9</sup> See 73 Fed. Reg. 20752, 20765 (Apr. 16, 2008). See also 73 Fed. Reg. 72194 (Nov. 26, 2008) (FRA rule providing enforcement, appeal, and hearing procedures for rail routing decisions). DOT notes that in promulgating the PHMSA routing rule, as well as FRA's enforcement procedures rule, DOT adopted STB's recommendation that prior to making a determination requiring a rail carrier to use an alternative route, FRA and TSA obtain the comments of the Board as to whether the contemplated alternative route(s) would be commercially practicable. See 73 Fed. Reg. at 20765.

to reduce rail ton-miles of PIH materials, and to further mitigate the safety and security risks associated with the rail movement of PIH materials.<sup>10</sup> The conference made clear the complex, market-based decisions behind the historical routing of this traffic. FRA has decided to gain experience under the new hazardous materials routing rules noted previously, and may reconvene discussions if it appears they may lead to safer, more secure movements.

DOT has also worked with DHS on numerous other initiatives designed to further enhance the security of the rail transportation of PIH materials, including conducting vulnerability assessments of HTUAs through which large quantities of PIH materials are transported by rail; the development of voluntary security measures implemented by railroads aimed at improving the security of rail shipments of hazardous materials, particularly while those shipments are within HTUAs; and on-going research and development initiatives aimed at improving the ability of railroad tank cars to withstand terrorist attacks.

**E. Holding UP to its Obligations as a Common Carrier Does Not Conflict with DOT Policy**

In its petition, UP notes that “governmental agencies . . . have pressed [railroads] to find ways to reduce TIH [material] transportation risks,” and asserts that requiring it to publish rates for the proposed movements appears to conflict with TSA and FRA policies. Although it is true that the Section 333 conference was held to explore possible ways to reduce the ton-mileage of hazardous materials shipments, as discussed above,

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<sup>10</sup> Representatives of the STB, Department of Justice, Federal Trade Commission, PHMSA, the Office of the Secretary of Transportation, and TSA participated and assisted the parties with their discussions, which should facilitate the railroad’s consideration of possible rerouting of PIH materials traffic pursuant to PHMSA’s routing rule

there are numerous and varied reasons why individual movements may not be or cannot be susceptible to modifications that would lower the ton-miles transported.

As explained above, DOT's regulatory framework applicable to the transportation of hazardous materials by rail is comprehensive and specifically designed to mitigate the safety and security risks associated with the transportation of the materials. DOT recognizes, however, that the safety and security risk associated with the transportation of hazardous materials, and PIH materials in particular, will never be zero. Both carriers and shippers have incentives to reduce the costs and risks of this traffic. Accordingly, DOT has encouraged PIH materials shippers and railroads to work together to find market-based solutions to ease the liability exposure associated with the rail movement of the materials.

As explained in DOT's 2008 Statement, the vast majority of PIH materials ship by rail. Although diversion of this traffic to highways or other transportation modes is currently not practicable, if such diversion does occur (for example, if the Board were to grant UP's petition which could effectively impede the rail movement of particular shipments), it could lead to a general increase in exposure of HTUA's to PIH materials as more trucks transporting PIH materials may traverse the areas to replace the rail shipments.

DOT also notes that recent major PIH tank car releases have been the result of accidents caused by the railroads themselves (e.g., ineffective track inspection and maintenance programs or human factor failings). Although FRA has taken specific regulatory action to address these causal factors, DOT believes that a railroad can minimize its liability exposure by ensuring better employee compliance with the

railroad's own operating rules, as well as with DOT and DHS safety and security standards.

UP's petition effectively asks the STB to relieve the carrier of its obligations under Section 1551(e) of the 9/11 Commission Act and the Department's implementing regulations, because by seeking permission to avoid quoting a rate it is in reality making a routing decision that is not based on all the factors in the DOT rule, and shifting the oversight of this safety and security determination from DOT to the Board. As demonstrated by PHMSA's routing rule, and particularly the 27 identified "rail risk analysis factors," selecting the safest and most secure route for particular hazardous materials shipments is a fact-intensive task requiring detailed knowledge of the specific rail operating environment and rail infrastructure involved, the volume and types of hazardous materials being shipped, as well as the hazards of those materials, the emergency response capabilities of localities along the routes, specific security threats and vulnerabilities along the routes, along with any number of additional facts or circumstances that may affect the safety and security of the route. In directing the Department to issue a final rule that requires railroads transporting security-sensitive (including PIH) materials to select the safest and most secure route(s), Congress has recognized that carriers should perform the initial analysis of all these factors, and DOT must oversee this process and if necessary to protect rail safety and security, after consultation with TSA and the Board, DOT may override a carrier's routing decision. Consequently, as both a legal and a practical matter, the task of initial route selection is best left to the railroads, based on all the factors set out in the Routing Rule, and any

potential modifications to a carrier's routing decisions should only be made according to the regulations implementing Congress' judgment.

### **III. Conclusion**

The comprehensive Federal regulatory framework which has long governed the packaging, handling, and rail transportation of hazardous materials, including PIH materials, effectively mitigates the safety and security risks associated with such transportation. More recent rules expressly extend to the safe and secure routing of these movements by rail and in accordance with Congress' mandate, recognize that rail carriers are the parties best suited to initially analyze safety and security risks along the routes over which they operate, while allowing for DOT oversight in consultation with TSA and STB. Accordingly, there is no reason for the STB to entertain pleas to avoid the basic common carrier obligation or the application of the rules designed to ensure the safe and secure fulfillment of that obligation. DOT therefore recommends that STB dismiss the UP's petition

Respectfully submitted,

  
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Acting General Counsel

April 10, 2009