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**HEAL, Utah  
LEAGUE OF WOMEN VOTERS OF UTAH  
SEVIER CITIZENS FOR CLEAN AIR AND WATER  
UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT  
WASATCH CLEAN AIR COALITION**

April 10, 2009

The Honorable Anne K Quinlan  
Acting Secretary  
Surface Transportation Board (STB)  
395 H Street, SW MAR 23 2009  
Washington, DC 20423

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

Dear Ms. Quinlan:

The Healthy Environment Alliance of Utah, League of Women Voters of Utah, Sevier Citizens for Clean Air and Water, Utah Physicians for a Healthy Environment and the Wasatch Clean Air Coalition wish our comments to be added to the docket regarding the Union Pacific Railroad Company (UP) petition seeking relief from certain obligations as a common carrier. We are not requesting participation as official party of record.

1.

During a routine annual review of rates for the transport of chlorine from US Magnesium to its various chlorine customers, UP has taken the unusual step of petitioning for relief from its obligation as monopoly carrier serving USM to transport chlorine to certain distant customers.

The recent petition by UP to the US Surface Transportation Board [STB] is unprecedented and opens to public view a unique window upon an ultrahazardous practice: the shipments of chlorine by railcars through the Salt Lake metropolitan area and many other U.S. population centers.

In its petition, UP claims that certain shipments [which have been occurring] impose "unnecessary risks" on the public and rail workers by "*unnecessarily exposing the millions of people in HTUAs [High Threat Urban Areas] in the requested routings (Salt Lake City, UT, Kansas City, KS/MO, and Fort Worth, TX) and other large cities to remote but deadly risks*."

In its petition, UP asks STB to "clarify" the railroad's common carrier obligation as to whether the railroad can refuse ["flag out" of] certain shipments, specifically the toxic by inhalation (TIH)<sup>1</sup> cargo, chlorine gas, in the case of the current petition proceeding.

Also in a separate action, the railroads and shipper industries are contesting before this Board in the parallel Ex Parte Docket No 677, the scope of the common carrier obligation regarding ultra hazardous chemicals.

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<sup>1</sup> See *Chemical Security 101: What You Don't Have Can't Leak, or Be Blown Up by Terrorists* By Paul Drum Reece Rushing, Nov 2008 [http://www.americanprogress.org/issues/2008/11/chemical\\_security.html](http://www.americanprogress.org/issues/2008/11/chemical_security.html)

As you know, currently no local, state or federal law requires US Magnesium, or any TII producer or consumer to consider the risks of chlorine, or other TIH chemical shipments to corridor cities. The railroads currently bear all the liability for en route risks, and have dramatically raised their rates in an effort to re-coup their insurance costs or to discourage TIH shipments.

The Association of American Railroads has testified in Congress that when railroads transport toxic gas cargoes through major cities they are "risking the company"<sup>2</sup>. Since each railroad can get only \$1 Billion of catastrophe insurance from the private insurance industry, they are uninsured for most of potential \$10 Billion in damages that could result from a major release. Insurance can't be purchased to cover the liability.

In the seven years since 9/11, none of the 46 major target cities in the US are protected by even the most basic of TII re-routing measures. As with the current global financial disaster, important decisions have been left solely to market forces with unfortunate results.

2.

In recent years, chemical releases from railcars in major cities have forced the evacuation of thousands of residents for days at a time, costing the cities hundreds of thousands of dollars during the emergency and resulting in settlements that individually cost the cities and/or railroads millions of dollars to reimburse residents and businesses harmed by the releases. In January 2005, the derailment of a Norfolk Southern railcar in Graniteville SC<sup>3</sup>, released at least 90 tons of chlorine gas, resulting in nine deaths, 250 injuries and the evacuation of 5400 residents for nearly two weeks.

The Department of Homeland Security has identified a deliberate attack on a chlorine storage tank as a top concern. According to agency estimates, as many as 100,000 people would be hospitalized and 10,000 would die if a chlorine storage tank was attacked in an urban area. In 2007, terrorists used chlorine gas in at least seven attacks on U.S. troops<sup>4</sup>.

The Chlorine Institute's Pamphlet 74<sup>5</sup> estimates that one chlorine tank car can release a cloud at a potentially lethal level that extends 15 miles downwind and four miles wide.

3.

In railroad and shipper arguments on who should decide about the national shipment patterns of TIH cargoes, the at-risk stakeholders who most often are ignored include emergency responders<sup>6</sup>, state and local officials, rail workers and citizens in at-risk cities.

Shippers and railroads assert that current regulations are adequate, and oppose efforts to "re-

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<sup>2</sup> See testimony, Edward R. Hamberger, President/CEO, Association of American Railroads starting pg 51. DOMESTIC PASSENGER AND FREIGHT RAIL SECURITY HEARING, Senate Committee on Commerce, Science, and Transportation, Oct 20, 2005 <http://commerce.senate.gov/public/files/railsecurity102005.pdf>  
Also, Edward R. Hamberger testimony, May 22, 2007, pg 9  
<http://commerce.senate.gov/public/files/testimonyEdwardHambergerAARAAARSenateSafety1estimonyMay2007.pdt>

<sup>3</sup> See Graniteville Train Accident <http://chronicle.augusta.com/train/>

<sup>4</sup> New study examines effects of Graniteville, S.C. chlorine gas disaster <http://www.physorg.com/news/149769639.html>

<sup>5</sup> Pamphlet 74 Guidance on Complying with EPA Requirements under the Clean Air Act Estimating the Area Affected by a Chlorine Release Edition 4, Revision 1, February 2006  
<http://www.chlorineinstitute.org/Bookstore/ProductDetail.cfm?ItemNumber=2893>

<sup>6</sup> Emergency Response Guidebook <http://phmsa.dot.gov/hazmat/library/erg>

regulate” after 9/11, but currently no party has a duty to assess the full risks, costs and benefits of long TIH routes through urban areas. Leaving such decisions to “the free market”, with no real government oversight over virtually unregulated shipper and carrier decision-making, has clearly resulted in huge and unacceptable risks

4.

We are writing to ask that the STB explore mechanisms to encourage risk reduction measures by shippers and carriers. We have great concern about the transport of TIH cargoes, which now routinely travel through, and are stored in railyards in our metropolitan area and in others as outlined in the UP’s petition, subsequent filings and Docket No 677. We are also concerned about truck TIH cargoes, but they are not relevant for this proceeding

In this post-9/11, post-financial collapse world, citizens increasingly recognize that reckless corporate decisions take place without our knowledge and in an absence of adequate regulation, which have injured us dramatically, which will continue to injure us absent regulatory change.

Citizens need a shift in the power of decision regarding the transportation of TIH cargoes. We are fortunate that UP brought this petition so we can now ask you to start a substantial conversation about who should decide and how the decision should be made about the transportation of TIH cargoes across our nation. These are decisions that have great impact on public safety and should not be made by the shippers, the producers or the consumers of TIH cargoes on the basis of their corporate economic benefit. These decisions should be made, in consultation with many stakeholders and interests, by our government, which exists to protect our life, liberty and pursuit of happiness

We need a responsible decision making process that better accounts for these risks in addition to corporate economic analysis that is the current basis. While the STB may not be best-suited agency for dealing with these concerns, the STB could proactively suggest creative ways forward, for example implementation of Inherently Safer Technology or protective re-routing, that do not weaken the common carrier obligation

## ALTERNATIVES

**Protective Routing.** Congress enacted a weak hazmat routing law, the 9/11 Commission Act of 2008 with its implementing rules finalized 12/26/08 by the Federal Railroad Administration. These rules say each railroad will unilaterally analyze and select their hazardous cargo urban routes and urban railcar storage patterns. Some cities and the National Conference of State Legislatures have protested being cut out of major public safety decisions. Rep Ed Markey has stated that by design this rule will not protect target cities<sup>7</sup>.

The new rules require railroads only to ‘consider’ using competitors’ rail lines around urban

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<sup>7</sup> “Unfortunately, the rule created by the Bush administration to meet the rail rerouting requirement I fought for in the 9/11 law is a weak, industry-friendly measure that won’t ensure that any rerouting will actually take place. By requiring the rail industry merely to assess alternate route options, the administration is adopting a low standard that falls short of what is needed,” Markey said, adding that he will watch how railroads follow the law and may revisit the routing issue in the coming year. The National Conference of State Legislatures objects to the absence of any role for state and local authorities in routing decisions for railcars bearing hazardous materials. “If a railroad wants to route a train through the middle of Philadelphia, for example, carrying explosives or hazardous waste, it can do that and there is nothing in the final rule that even provides for input” from state and local officials, said Susan Parnas Frederick, federal affairs counsel for the conference. “If they want to talk to us they can, and if they don’t, they don’t have to.” <http://www.msnbc.msn.com/id/28257981/wid/21370087/>

areas. Despite requests of shippers and state and local governments, it does not require railroads to allow other carriers to use their tracks, nor to consider allowing another carrier access to their customers. It is a fatal flaw that the rules do not mandate a railroad to implement this 'interchanging' of cargoes, which would be essential in many areas for protective re-routing.

In its recent statement submitted to a federal regulatory docket, major chlorine "captive shipper" PPG Industries indicates that railroads may have available alternative routes that can lower both the distance and the terrorism risk potentials for chlorine shipments, but that the railroads can and do refuse to do so, instead unnecessarily forcing shipments onto routes hundreds of miles longer and through major target cities.

**Stationary 'incidental to movement storage' in populated areas** The Icamsters earlier testified in Congress that, "Wherever possible, high-hazard shipments should also be prohibited from being placed in stationary 'incidental to movement' storage in high-population areas. This only makes sense given that the stated goal of terror organizations is to cause mass casualties... [T]he impact of such an attack occurring in a remotely populated area would not achieve the terrorist's stated goal of causing mass casualties."<sup>8</sup>

The graffiti that covers many railcars is evidence of lack of security in railyards. Specific risk reduction strategies should be implemented whenever TIH cargoes are stationary in railyards.

**Market swaps/re-sourcing.** Beyond the most basic measure of protective routing, we need federal intervention to ensure that a sensible division of markets can reduce the current long and reckless routings of chlorine and perhaps other TIH cargoes.

**Market incentives on liability** Not shipping TIH substances by rail will resolve the greater part of the liability issue. If facilities that produce or receive TIH materials by rail were required to cover liability insurance commensurate with the hazard that would add an important incentive to use and develop feasible alternatives.

Rail carriers are unable to effectively price risks into what they charge customers. If railroads can charge liability fees on TIH rail shipments, it creates a market-based incentive for chemical producers and users to adopt proven alternatives. This should improve the overall financial condition of the railroads, since they face potentially catastrophic exposure from TIH shipments that represent a tiny portion of their overall business.

If there are commercially feasible alternatives that can eliminate the need to transport the TIH by rail, then a mechanism and timeline should be developed when it is no longer allowed to ship that TIH to that user.<sup>9</sup>

Thus it may be appropriate to allow railroads to shift some portion of their liability costs to shippers, thereby creating some private sector incentives, which over time will promote the use of inherently safer chemicals and transportation practices. Only the government is positioned to make the needed objective, cost-benefit analyses based on corporate and public interests. Critical decisions are needed as to what kind of market swaps, relocation of facilities, re-routing using

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<sup>8</sup> John Murphy, Director, Icamsters Rail Conference, Hearing on Rail and Mass Transit Security, February 13, 2007, US House Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection <http://homeland.house.gov/SiteDocuments/20070213174649-30260.pdf>

<sup>9</sup> Market incentives on liability comment based on testimony of Paul Orum, 7/22/08 before S113 at public hearing for Ex Parte Docket No 677

interchanges with other mainline and shortline rail carriers, etc ; which can decisively and equitably eliminate or significantly diminish the currently grave urban TIH transportation safety and security risks.

5

We ask the STB to urge the new Congress and the new Administration to revise the routing law and the routing rule to include requirements that railroads work together, with mandated inputs from state and local officials, to determine the safest and most secure routes (including urban railcar storage siting) that involve all carriers

We further ask the STB to urge the railroads to open their currently secret route analysis and selection processes and grant a seat at the table to state and local officials, including a plan for the latter to assess the adequacy of the vulnerability assessments and security plans produced by the railroads for routing and storage of hazardous shipments that place our citizens at risk throughout the area.

Crucial decisions on these matters should be in the hands of government regulators, including needed mandates for security training for rail workers, with inputs from federal, state and local levels. The current unilateral power held by the railroads in life-and-death TIH transportation decisions is unacceptable.

Thank you for your consideration of our comments

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I hereby certify that this day, April 14, 2009, I have submitted [by email or 1st class mail as noted] a copy of comments on STB Finance Docket No 35219, Union Pacific Railroad Company - Petition for Declaratory Order, submitted 4/10/09 on behalf of HEAL, Utah, LEAGUE OF WOMEN VOTERS OF UTAH, SEVIER CITIZENS FOR CLEAN AIR AND WATER, UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT, and WASATCH CLEAN AIR COALITION to

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