



September 24, 2010

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Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Comments of E.I. du Pont de Nemours and Company on Proposed Establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee (Surface Transportation Board Docket No. EP 698)

Gentlemen:

Through this letter, E.I. du Pont de Nemours and Company (“DuPont”) responds to the Surface Transportation Board’s request for comments on the proposed creation of a Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee (“Committee”). In its Decision Docket No. 698 issued on August 3, 2010 (“Decision”), the STB properly declined the Association of American Railroads’ invitation to issue a policy statement permitting AAR members to refuse carriage of TIH materials unless shippers agree to provide indemnity for liability exceeding the greater of insurance limits or \$500 million. See Decision at 3. Instead, the STB has opted to put the pending dockets on the scope of the common carriage obligation in abeyance and to establish an Advisory Committee to “provide advice on issues pertaining to the common carrier obligation with respect to the rail transportation of TIH, and specifically, the question of what is a railroad’s reasonable response to such a request.” *Id.* DuPont welcomes the STB’s effort. Below, we offer comments on certain specific subject areas as requested by the STB.

Additionally, although these are not subjects specifically identified for comment in the Decision, we note at the outset that the work of the Committee raises both antitrust and confidentiality concerns for potential participants. A discussion of the economic aspects of the transportation of TIH materials will likely encompass both various approaches to risk allocation and their relative impact on freight rates. Accordingly, the antitrust implications of the proposed Committee’s work should be explored and addressed by the STB, in consultation with the United States Department of Justice, before the Committee’s efforts commence. Relative to confidentiality, we recommend that the STB take steps, consistent with §§ 10(d) of the Federal Advisory Committee Act, and 41 C.F.R. 102-3.35 and 102-3.70(c), to protect confidential business information made available to the STB by private parties in order to facilitate the work of the Committee.

BACKGROUND

DuPont is a global company founded over 200 years ago in Wilmington, Delaware. Now, in its third century, DuPont is combining biology and chemistry to meet societal needs for safe and abundant food, alternative fuels, fibers such as Kevlar® and Nomex® (used to protect first responders, police and military personnel), and other sustainable solutions to enable a better, safer and healthier life for people everywhere. In 2009, DuPont had revenues of over \$26 billion, with 250 manufacturing and processing sites in 90 countries and over 58,000 employees. In the United States alone, DuPont employs over 26,000 workers in 47 states. According to statistics released by the Journal of Commerce, in 2009 DuPont was our nation's 11th largest exporter.

As the STB recognizes in the Decision, "the safe transportation of hazardous materials [is] crucial to this nation's economic and national security, and the transportation by rail of hazardous materials [is] vital to our nation's industrial production . . ." Decision at 3. In fact, America's rail freight network has been vital to DuPont operations since 1858 and remains so today. To produce products essential to the health, safety and security of the American people, DuPont requires many raw materials and intermediates, many of which are regulated by the Department of Transportation (DOT). DuPont also produces chemicals used by other industries for indispensable products such as tires and electronics. Freight rail is the safest, most energy efficient and environmentally sound method of land transport. It is also, therefore, generally the best alternative available to transport the raw materials and products that enable DuPont to operate manufacturing facilities in the United States and offer both jobs and tax revenues to communities in nearly every state in the Union.

SPECIFIC COMMENTS

1. *Advisory Committee's Mandate*

Because issues related to the transportation of TIH materials by rail have been the subject of significant and unresolved public debate between the railroads and manufacturers such as DuPont, which are the backbone of the U.S. economy, our Company welcomes the STB's creation of an Advisory Committee. DuPont agrees with the STB that a joint effort by representatives of all stakeholders involved in the transport and use of TIH cargo may yield a better and more economically sustainable solution than may be achieved otherwise. That said, it is crucial that the scope of the Committee's effort be targeted and defined at the outset. For the Committee to be effective, it must operate pursuant to a clear mission and with a clear understanding of the desired outcomes.

We offer the following specific comments. First, the work of the Committee must respect and be conducted within the existing legal boundaries. That is, because curtailment of the common carrier obligation codified at 49 U.S.C. §11101(a) would require an act of Congress, the recommendations of the Committee must be limited to

solutions within the STB's statutory authority as interpreted by current case law. The Committee should not become a forum for debating the appropriateness of the common carrier obligation. Despite the railroads' frequent protestations to the contrary, the duty to carry all goods upon reasonable request is justifiably placed on rail companies because they have been the beneficiaries of extraordinary (indeed, *sui generis*) public largess.¹ In exchange for this largess, the railroads undertook to transport all goods -- an obligation that remains as indispensable to our Nation's security and economic well-being today as it was in the 19th Century.

Second, the Committee's mandate should be clearly limited to materials that are toxic by inhalation. Although the railroads argue that such materials present the highest risk to their business, at least one railroad has endeavored to impose additional conditions on the transport of chemicals that are not toxic by inhalation and thus do not present the same type of risk from exposure. This is a subject of concern for shippers such as DuPont, which has seen significant and unjustified freight cost escalation on both TIH and non-TIH materials.

Third, the Committee's mandate should set forth the clear expectation that historical data concerning accidents involving TIH materials, including the frequency, cost and cause of such accidents, must be taken into account by the Committee in developing any proposed economic solutions. Accidents involving TIH materials have been infrequent, and despite the railroads' advocacy for liability caps, no railroad has ever experienced "bet the company" losses in connection with any accident involving such materials. Moreover, in recent years, additional measures have been, and continue to be, implemented that further reduce the already remote risk of such incidents.

Fourth, and perhaps most important, the Committee's mandate should make clear that its recommendations cannot create disincentives for the railroads to maximize their investment on safety. This is a fundamental concern not only because safety regulations are outside the STB's jurisdiction, but also because the three accidents involving TIH materials that have occurred in the last decade were all caused by operational errors made by railroad employees.²

¹ *Hearing Before the Committee on Transportation and Infrastructure of the House of Representatives, 110th Cong., 1st Sess. 70 (2007) (Statement of James L. Oberstar, Chairman) (emphasis added). ("The railroads received enormous grants of land in the 19th Century in the public interest to develop rail service for the public use, convenience and necessity. They received some 278,000 square miles of public land. That is about 8 percent of the total land surface of the United States They were given the surface timber rights, surface mineral rights, subsurface mineral rights, coal, oil in some cases, gas in others that they could use for themselves or to sell off, worth billions of dollars.")*

² Derailment of Canadian Pacific Railway Freight train 292-16 and Subsequent Release of Anhydrous Ammonia Near Minot, North Dakota, January 18, 2002, NTSB/RAR04-01, PB 2004-916301, Notation 7461A (March 9, 2004) at vi, 32-33, 55-57, 68-69 (stating that the accident was caused by inadequate track inspection, which failed to identify failed track joints and noting that inadequate training and maintenance of training activity reports were contributing factors); Collision of Union Pacific Railroad Train MHOTU-23 with BNSF Railway Company Train MEAP-TUL-126-D with Subsequent Derailment and Hazardous Materials Release, Macdonia, Texas, June 28, 2004, NTSB/RAR-06-03, PB2006-916303, Notation 765D

2. Proposed Committee Composition and Size

DuPont has several primary concerns related to the proposed composition of the Committee. First, as envisioned in the Decision, all of the representatives of the shipper community will originate from companies moving anhydrous ammonia and chlorine. While DuPont recognizes that about 80% of TIH traffic involves those two chemicals, there are other TIH materials and they implicate different technical and economic concerns. The absence of representatives from shippers of other TIH materials could both deprive the Committee of technical expertise and create the potential that its recommendations will not reflect the input and interests of a significant group of stakeholders.

Similarly, DuPont recommends that the STB consider including on the Committee representatives of companies that receive TIH materials as well as shippers of those materials. Companies that buy and use TIH materials to manufacture goods are an important group of stakeholders since they, along with consumers, are likely to bear a significant portion of the costs of any reallocation of risks from the railroads to shippers.

Third, the STB should ensure that the Committee includes representatives from small and medium size companies as well as large corporations. Smaller companies are likely to bring important information to the dialogue. While any recommended solution that allocates to shippers the cost of railroad insurance or the risks associated with accidents resulting from the railroads' operational conduct is likely to have a significant effect on all shippers regardless of size, the impact on smaller businesses is likely to be most acute.

Fourth, while including individuals with insurance and underwriting expertise would be helpful, the STB should clarify how it will ensure that the representatives selected will not have a conflict of interest. The Committee should not include persons affiliated with insurance providers or other companies likely to realize a financial gain from the STB's implementation of any recommendation that relies on insurance coverage. Even if representatives of the insurance industry are included as consultants to

(July 6, 2006) at vi, 16-18, 26-31, 36-43, 58-59 (finding that the accident was caused by the train crew's failure to follow a stop signal according to operational rules, the crew's lack of sleep and long duty tours, the conductor's alcohol consumption, the likelihood that the conductor slept for most of the train trip, and limbo time as it related to crew fatigue); Collision of Norfolk Southern Freight Train 192 with Standing Norfolk Southern Local Train P22 with Subsequent Hazardous Materials Release at Graniteville, South Carolina, January 6, 2005, NTSB/RAR-05/04, PB2005-916304, Notation 7710A (November 29, 2005)(finding that the accident was caused by the train crew's failure to reline a mainline after use leading to an unexpected diversion of train 192 where it struck P22 and derailed; also finding that the failure to reline may have been due to the crew's inattentiveness to the switch due to their attempt to secure the train before reaching hours-of-service-limits, and the location and lack of visibility of the switch to the crew; also noting that if the conductor had followed operating rules and held a job briefing, the crew may have attended to the main line switch, which would have prevented the accident).

provide technical expertise, we recommend that they not be voting members of the Committee.

Fifth, the Decision envisions that Committee members will come from the General Counsel and Vice President ranks at the participating companies. Because of the complexity of the subject matter the proposed Committee is to consider, we suggest that the selection criteria should focus on potential participants' level of expertise and experience with the relevant issues. We recommend that companies be permitted to nominate representatives of their choosing provided they possess the knowledge and transportation industry background that would enable them to be effective contributors to the Committee's efforts.

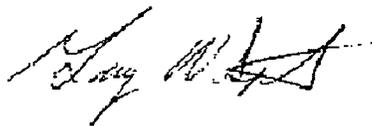
Sixth, the proposed allocation of voting seats on the Committee also raises concerns. As the Committee is currently envisioned, the Class I railroads would be disproportionately represented among the voting membership. That is, because there are only seven Class I railroads in the United States, allocating seven seats to the Class I and II railroads virtually guarantees that all of the Class I railroads will be voting members of the Committee. Most shippers, on the other hand, will be relying on other companies to represent their views since there are many more shippers than there are railroads and the current proposal also allots shippers seven votes. We suggest that the STB consider reducing the number of votes allocated to the Class I and II railroads, thus preserving the representational nature of the body and permitting the inclusion of users and receivers of TIH materials without any increase in the already large size of the Committee. Including fewer railroads than shippers and receivers on the Committee would create no disadvantage to the railroads. This is because the Decision provides that no proposal can become a recommendation of the proposed Committee absent the agreement of a majority of the participating railroads and shippers.

Finally, while we appreciate that the Decision envisions ad hoc participation from the DOT agencies charged with regulating railroad safety, we believe that both the Federal Railroad Administration and the Pipeline and Hazardous Materials Safety Administration should have designated representatives on the proposed Committee, even if in a non-voting capacity. Any recommendation that involves the reallocation of risk from the railroads to shippers could implicate safety concerns by creating disincentives for railroad investment in safety. Therefore, it would benefit the Committee's efforts and the public interest to permit the safety regulators to contribute their expertise as the Committee deliberates on different approaches.

CONCLUSION

DuPont appreciates the opportunity to offer the above comments. Should the members of the Board or its staff have any questions, please feel free to contact me at 302-999-3020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary W. Spitzer". The signature is stylized and written in a cursive-like font.

Gary W. Spitzer
President
DuPont Chemicals & Fluoroproducts