



September 12, 2023

Hon. Martin Oberman
Chair
Surface Transportation Board

Hon. Michelle Schultz
Member
Surface Transportation Board

Hon. Patrick Fuchs
Member
Surface Transportation Board

Hon. Robert Primus
Member
Surface Transportation Board

Hon. Karen Hedlund
Vice Chair
Surface Transportation Board

RE: Railroad Liability and Insurance Requirements for Shipments of Hazardous Materials

Dear Chair Oberman, Vice Chair Hedlund, and Members, Fuchs, Primus and Schultz:

On behalf of the American Chemistry Council, I am writing to express serious concerns related to Class I Railroads' efforts to shift liability for hazardous materials incidents to rail shippers. Railroads leverage their market power to impose requirements on customers beyond what would be possible in a more competitive marketplace. These requirements inappropriately minimize railroad liability for transportation risks that the railroad itself has the greatest ability to mitigate. This potentially undermines both the safety and viability of shipping hazardous materials by rail.

Hazardous materials, including Toxic Inhalation Hazard (TIH) products such as chlorine and anhydrous ammonia, are the building blocks of chemistry and essential to nearly every aspect of our daily lives, including food production, water purification, energy production, and countless manufacturing processes. It is essential to our nation's economy and public safety that these materials continue to move by rail.

Transportation of hazardous materials is covered by a comprehensive federal regulatory framework. Rail is widely recognized as the safest and most efficient transportation mode for many hazardous materials, including TIH products. And by working together, shippers and rail carriers along with the federal government can build on existing efforts to further prevent rail accidents, protect communities, and deliver vital products to where they are needed without incident.

ACC and its member companies are committed to pursuing further safety enhancements for every aspect of hazmat transportation through Responsible Care®, the chemical industry's world-class environmental, health, safety, and security performance initiative. Working with our transportation partners, we have invested billions of dollars in training, technology, and tank car safety, and we will continue to do so in the future.

Elements of the U.S. Rail Hazmat Liability Framework

The current U.S. rail liability framework is based on a fundamental principle that each party generally maintains liability for activities under its operational control. Shippers appropriately retain liability for what they control, such as the proper loading and securement of a tank car. Once the rail car is placed in a railroad's custody, however, control passes to the railroad, which has the greatest ability to mitigate transportation risks. Therefore, railroads appropriately hold liability for transportation risks, including those posed by third party actions and natural forces. Disputes about liability for a particular incident are addressed through tort law.

This framework provides incentives for continuous safety improvements. If the costs and consequences of risk taking are not felt by the party in control of the product, it creates a "moral hazard" because there is less incentive for that party to reduce the risk of an incident.

Railroad insurance serves as the primary mechanism to address rail hazmat liability, providing effective coverage for health, environmental, property, and economic injuries. In a 2017 Report to Congress, the Department of Transportation (DOT) concluded that Class I railroads' liability coverage levels are typically in the range of \$1 billion to \$1.5 billion.¹ With this amount of insurance, combined with substantial corporate resources to self-insure, Class I railroads are likely to have the ability to cover the vast majority of foreseeable incidents.

Shippers share in the cost of insurance and legal liability through the rates they pay for rail service. ACC is not aware of evidence in the public record to quantify the unique railroad costs for transporting hazardous materials. However, railroads have wide latitude to recoup such costs through ratemaking. Railroads have commonly told ACC member companies that the high rates charged for carrying hazardous materials are driven by the cost for insurance and the additional liability posed by these materials.

Railroads Leverage their Market Power to Shift Liability to Rail Shippers

Most Class I railroads have imposed tariff provisions that include insurance and indemnity requirements for TIH shipments in addition to the very high rates those shippers already pay. In theory, rail shippers have an opportunity to negotiate different terms in their service contracts. However, many shippers, particularly those who are captive to a single railroad, are effectively forced to accept railroad requirements.

ACC is particularly concerned with CPKC's extensive indemnification and insurance requirements for TIH shipments. Under these terms, CPKC accepts liability for its own negligent or willful misconduct and assigns the shipper liability for everything else, which includes third party liability and Acts of God. TIH shippers must indemnify CPKC for those liabilities and procure at least \$100 million of insurance to cover their indemnity obligations. CPKC imposes this cost upon TIH shippers above and beyond its exceedingly high transportation rates for TIH shipments.

¹ U.S. Department of Transportation; *Hazardous Materials by Rail Liability Study: Report to Congress* (2017); p.9.

During the CP/KCS merger proceeding (FD 36500), ACC and other shippers expressed concern that the merger would directly lead to an extension of CP's TIH liability, indemnification, and insurance requirements, which were the most onerous of the Class I railroads.² The STB declined to adopt our requested condition to prevent CP from imposing its onerous tariff terms on shipments on the pre-merger KCS network. As a result, CPKC immediately imposed the terms across its combined network, with little regard for the challenges faced by hazardous materials shippers in obtaining the requisite insurance coverage for their full range of products. CPKC indicated that it would reject shipments of TIH/PIH materials from customers who are not fully in compliance with the requirements, threatening to disrupt critical supply chains.

CPKC's action may be a harbinger of further railroad actions to shift liability to shippers. The Association of American Railroads publicly advocates for policies to make hazmat producers and users "share in the added liability and costs associated with transporting them," without acknowledging the costs and liability that shippers already bear. Railroads seem poised to require shippers to obtain higher levels of insurance and to accept liability for more types of hazmat products beyond just TIH. Given the market power exerted by the Class I railroads, shippers have few options to resist these requirements.

Shifting Liability May Undermine Safety and Viability of Shipping Hazardous Materials by Rail

The economically efficient allocation of risk occurs when all of the parties to the risk are held accountable for their contribution to the risk. As stated in the DOT Report:

The main means for accountability is financial responsibility: the requirement to pay for damages creates an incentive to avoid preventable risk. For all aspects of risk, the parties ideally face incentives to internalize the risk and pass it on in the cost of their services to the shippers, who are the ones to decide whether the risk is worth incurring in order to secure the benefits of the transport. Shipper efforts to reduce the preventable risk generally are reflected in the prices charged to shippers by carriers.³

Railroad insurance has provided effective coverage for health, environmental, property and economic liabilities for the vast majority of rail hazmat incidents. It should remain the primary mechanism to address liability.

As observed by DOT, most insurance policies have elements designed to align the incentives between insurer and insured, such as deductibles and copayments. Insurers may also directly monitor an insured's activities. However, shifting liability away from the railroads also shifts some incentives away from the party with the greatest ability to mitigate transportation risks. To maintain the strongest incentives to further advance rail hazmat safety, liability should continue to rest on the party with operational control.

ACC is also concerned that onerous railroad liability and insurance requirements for shippers could undermine the commercial viability of transporting hazardous materials by rail. The DOT Report states:

² Comments and Request for Conditions of The American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League (Feb 28, 2022); STB Docket No. FD 36500.

³ DOT *Rail Liability Study*; p. 37.

The market for railroad liability coverage appears to be a highly-specialized field, with a limited number of insurers who have the necessary industry expertise to assess risk and conduct underwriting.⁴

Raising minimum insurance levels and requiring indemnification for more types of hazardous materials could create significant new challenges for covering such liabilities and make the insurance market less viable. To the extent that shippers have other transportation options, onerous railroad requirements could result in a transfer of more hazardous materials to other modes, undermining overall hazmat transportation safety.

Conclusion

A workable liability framework is crucial to the safe and efficient transportation of essential products throughout the economy. While the current U.S. rail hazmat liability framework provides effective coverage for health, environmental, property and economic liabilities, ACC stands ready to work with railroads and other partners to address remaining challenges.

Thank you for your consideration of these important issues.

Sincerely,

A handwritten signature in blue ink, appearing to read "CJahn", with a long horizontal flourish extending to the right.

Chris Jahn
President and CEO

⁴ Id. p. 9.