

UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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PUBLIC HEARING

+ + + + +

COMMON CARRIER OBLIGATION OF RAILROADS --

TRANSPORTATION OF HAZARDOUS MATERIALS

+ + + + +

STB Ex Parte No 677 (Sub-No. 1)

+ + + + +

Tuesday,
July 22, 2008

+ + + + +

The hearing came to order at 9:00 a.m.
in the Board Hearing Room of 395 E Street, SW,
Washington, DC.

BEFORE:

CHARLES D. NOTTINGHAM, Chairman
FRANCIS P. MULVEY, Vice Chairman
W. DOUGLAS BUTTREY, Commissioner

C-O-N-T-E-N-T-S

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1 P-R-O-C-E-E-D-I-N-G-S

2 (10:03 a.m.)

3 CHAIRMAN NOTTINGHAM: Good morning
4 and welcome.

5 We will be joined in a few minutes
6 by Commissioner Buttrey who has been delayed
7 due to some problems out on the rail system
8 apparently. So I'm sure he'll be in good
9 spirits when he gets here. And we will work
10 in his opening statement as soon as it's
11 reasonable possible when he joins us.

12 Today we will hear further
13 testimony on the common carrier obligation,
14 the topic of a prior board hearing held on
15 April 24th and 25th of this year. During
16 those two days of testimony, we heard from a
17 number of parties, discussing specifically how
18 the common carrier obligation applies to the
19 transportation of hazardous materials.

20 It is on that more narrow topic
21 that we will hear further testimony today.
22 For those who may be attempting to read the

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1 tea leaves, I will say at the outset that I
2 have not called this hearing with any specific
3 outcome or proposal in mind. There is much
4 discussion in the written testimony about
5 whether the Board has the ability to determine
6 the scope of the common carrier obligation.
7 I would respond to that testimony by noting
8 that it is certainly within the Board's
9 authority to define what we will consider to
10 be a reasonable request for service, and there
11 is room for discretion within that analysis.

12 However it is not my intention at
13 this point for the Board to eliminate the
14 common carrier obligation as it applies to the
15 transportation of hazardous chemicals.
16 Instead I hope to hear in the testimony today
17 how the parties involved in this segment of
18 the transportation industry can work together
19 to find solutions to the liability challenge
20 that the transportation of these commodities
21 presents.

22 I think we can all agree that for

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1 many hazardous materials including TIH rail is
2 the safest and most efficient mode of
3 transportation. However we have also heard
4 that the railroads fear ruinous liability in
5 the event of an accident involving TIH.

6 A potential bankruptcy, closure or
7 sale of a railroad due to liability exposure
8 is more than an academic concern to this
9 Board. A railroad bankruptcy and liquidation
10 would likely disrupt commerce, eliminate jobs,
11 hurt railroad customers and stock owners, and
12 would likely result in less competition in the
13 market for rail services.

14 We have an obligation to ensure
15 that the risk of such a scenario is minimized.
16 Our hearing notice focused in large part on
17 obtaining input into potential policy
18 solutions to this liability issue.

19 I hope to hear today about the
20 Price-Anderson model and how it could be
21 applied here; the role of the Board in
22 developing a solution; and the basis for a

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1 wide range of views held by our stakeholders
2 as it relates to this matter.

3 It is my hope that as you hear
4 each other's testimony today as well as the
5 views expressed by myself and my fellow board
6 members that we can get closer to finding a
7 policy solution to the very challenge this
8 issue presents.

9 Let's not permit the resolution of
10 this important issue to be held captive by the
11 policy agenda of any one particular interest
12 group.

13 Finally just a few procedural
14 notes regarding the testimony itself. As
15 usual, we will hear from all the speakers on
16 a panel prior to questions from the
17 commissioners.

18 Speakers please note that the
19 timing lights are in front of me on the dais.
20 You will see a yellow light when you have one
21 minute remaining, and a red light when your
22 time has expired.

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1 As you can see from the published
2 schedule we have quite a few witnesses
3 appearing at this hearing. Therefore I will
4 be keeping an eye on the clock, and we will
5 ask that you please keep to the time that you
6 have been allotted.

7 I assure you that we have read all
8 your submissions, and there is no need to hear
9 them here. After hearing from the entire
10 panel, we will rotate the questions from each
11 board member until we have exhausted the
12 questions.

13 Additionally, just a reminder to
14 please turn off your cellphones.

15 I look forward to hearing the
16 testimony of the partners. I would now like
17 to turn to Vice Chairman Mulvey for his
18 opening remarks.

19 MR. MULVEY: Thank you, Chairman
20 Nottingham.

21 Good morning, and welcome to our
22 panelists and other attendees.

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1 I have thoroughly read the
2 testimony submitted for this hearing, and I am
3 eager to engage in discussions with our
4 panelists.

5 I also want to thank those
6 stakeholders who submitted written testimony
7 only, which I found very helpful in framing
8 our inquiry today.

9 I want to especially thank the
10 Railway Supply Institute for the excellent
11 testimony that they submitted, they raised
12 some interesting issues, and provided a lot of
13 food for thought.

14 This hearing, as the chairman
15 mentioned, follows our more general hearing on
16 the common carrier obligation that we held in
17 April. That hearing underscored that the
18 common carrier obligation is the foundation on
19 which the Board's regulatory framework is
20 based.

21 The common carrier obligation is
22 the basis on which our transportation system

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1 has developed, and it has been around far
2 longer than the hazardous materials that are
3 at issue today.

4 Safe and efficient transportation
5 of hazardous materials and especially certain
6 toxic inhalants is critical to our nation's
7 economy, and is often best accomplished by
8 rail.

9 These materials are essential for
10 our nation's manufacturing industries,
11 agriculture, and the overall public welfare.
12 And generally they are not materials for which
13 they are many substitutes.

14 Now I sympathize with the
15 railroad's fears about the potential
16 consequences of accidents and other incidents
17 involving hazardous materials. But many firms
18 operate in an environment in which there is a
19 potential for catastrophic harm. In an ideal
20 world there may be a way to make whole any of
21 those people who are harmed by an accident.

22 But that does not mean we should

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1 shield the railroads from their share of the
2 responsibility for such occurrences. In my
3 view the Board's overriding duty is to enforce
4 the common carrier obligation, not to exempt
5 or protect railroads from it.

6 Indeed, the railroads themselves,
7 in their testimony today, note that they are
8 not seeking to be exempted from their common
9 carrier obligation to haul hazardous
10 materials.

11 I am very interested in listening
12 to suggestions about how a balance can be
13 struck between the need for shippers to move
14 TIH and other HAZMATs by rail with a desire
15 for the railroads not to have to bet the farm
16 every time they transport these materials.

17 I look forward to hearing today's
18 testimony, and thank you very much, Chairman
19 Nottingham.

20 CHAIRMAN NOTTINGHAM: Thank you,
21 Vice Chairman Mulvey.

22 We will now invite our first panel

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1 to please come forward, and take a seat. I'd
2 like to call forward from the Office of
3 Congressman James P. Moran, his chief of
4 staff, Frank Shafroth from the U.S. Department
5 of Transportation, the deputy administrator of
6 the Federal Railroad Administration, Clifford
7 Eby; and from the city of Alexandria,
8 Virginia, Vice Mayor Redella S. Pepper.

9 Welcome, good morning. We are
10 glad you could be with us today. And we may
11 well be joined, while we are in the midst of
12 your panel, by Commissioner Buttrey. Just
13 don't be surprised if a third commissioner;
14 joins us. We are expecting him any minute,
15 and we'll find an opportunity soon to let him
16 get his opening statement.

17 I'd like to ask - I understand
18 Congressman Moran was detained due to
19 scheduling challenges, and I certainly
20 understand what that can be like up there in
21 the Congress. And I've had the personal
22 privilege of working very closely with

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1 Congressman Moran primarily in the past when
2 I worked for Congressman Tom Davis' neighbor
3 geographically, and also when I worked for the
4 Commonwealth of Virginia.

5 Anyone from his staff is always
6 welcome here, and Mr. Shafroth, we will turn
7 it over to you now to give us some remarks.

8 PANEL I: GOVERNMENT

9 MR. SHAFROTH: Thank you, Mr.
10 Chairman. And Congressman did send his
11 personal regards. I think you have a copy of
12 his personal testimony that was submitted last
13 night.

14 So I'll try and be very brief.

15 I think his view is that you all
16 sit in a unique situation. He believes,
17 particularly over the last 18 months, you have
18 demonstrated some extraordinary innovation in
19 addressing some of these issues.

20 Obviously his concern here is
21 dealing with an issue that is probably going
22 to explode and explode on your watch and on

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1 the watch of the U.S. Department of
2 Transportation, and that is the tremendous
3 explosion of ethanol. And ethanol, because of
4 its unique characteristics, can't be
5 transported by pipeline, so it must be
6 transported by rail and truck.

7 Clearly rail is the safer
8 alternative than truck, so the idea will be to
9 get it from Iowa and other places as close to
10 tank farms and distribution points as
11 possible.

12 Nevertheless, because it is
13 transported and transported in bulk, it can
14 present the threat of a catastrophic problem.
15 It can be a - it's clearly a public safety
16 problem. It's potentially an environmental
17 problem. It's potentially a problem dealing
18 with access to terrorists or others who might
19 choose to take advantage of such a thing.

20 I think the Congressman's greatest
21 interest is some of the innovation the board
22 has shown in dealing with situations not

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1 dissimilar, in this case dealing with solid
2 waste. Whether it was not a clear line of
3 your authority, or a clear line when you could
4 say to a railroad before you actually open for
5 business here is a minimum check list of items
6 that need to be done, so that there is
7 assurance that there is protection in the
8 community that could potentially be affected.

9 So I think the thrust of his
10 remarks as you have in the testimony, he both
11 asks and is prepared to introduce legislation
12 if that would clarify the board's authority in
13 this regard, because he is not certain.

14 So he is really seeking your
15 advice, but he is prepared to act to clarify
16 the board's authority on this issue, in great
17 part because if you look at the volume of
18 ethanol that is being produced, that is going
19 to have to be produced under federal law,
20 there is going to be a huge increase in the
21 number of transfer facilities, probably in
22 urbanized areas, therefore probably close to

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1 hospitals, to schools, to Metro stations, to
2 other things. So the kinds of actions that
3 you want to make sure railroads take into
4 account before they get the green light to
5 open such facilities.

6 Thank you very much, Mr. Chairman.

7 CHAIRMAN NOTTINGHAM: Thank you,
8 and please give our regards to the
9 Congressman.

10 I want to pause to acknowledge
11 that we have been joined by Commissioner
12 Buttrey. Mr. Shafroth is the first witness on
13 this panel to speak.

14 Commissioner, I wanted to offer
15 you a chance to give your opening statement
16 now or when this panel finishes at your
17 discretion.

18 MR. BUTTREY: I think out of
19 courtesy to the witnesses, we need to go ahead
20 with the witnesses. And then I'll work my
21 statement in at some point. Thank you.

22 CHAIRMAN NOTTINGHAM: Sure, that is

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1 no problem.

2 Next it is my pleasure to welcome
3 and recognize Cliff Eby from the U.S.
4 Department of Transportation.

5 Deputy Administrator, the dais is
6 yours.

7 MR. EBY: Thank you, Mr. Chairman.

8 Gentlemen, on behalf of Secretary
9 Peters and Administrator of the Federal
10 Railroad Administration Joseph Boardman, it's
11 a pleasure and a privilege to be here.

12 Joe Boardman regrets that he had
13 other conflicts today and is unable to attend.

14 HAZMAT in general and tank cars,
15 PIH specifically, have been a real priority
16 for him during his time here. And while we
17 both agree on DOT's position, and that's
18 similar, the energy and the passion that he
19 has for it now I hope I can display.

20 In my five minutes I'd like to
21 really highlight three areas of my written
22 testimony. First, that DOT does not believe

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1 that the common carrier obligation should be
2 changed.

3 Second, that DOT has a very active
4 regulatory program to reduce the transport
5 risk of TIH and PIH.

6 And finally, DOT and the STB
7 should encourage market-based solutions to
8 respond to changes in risk tolerance and
9 improvements to risk mitigation.

10 Every year we move about 100,000
11 cars of highly concentrated toxic chemicals
12 across the country by rail. These chemicals
13 are used in fertilizers, plastics, water
14 purification, and for the most part are not
15 discretionary products.

16 At present there are a few
17 economical substitutes for the products.

18 It's in the public interest to use
19 the safest mode of transportation for these
20 poisons, and the common carrier obligation
21 assures that safe rail transportation will be
22 available for shippers and their customers.

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1 Congress has enacted legislation
2 that facilitates the development of uniform
3 federal railroad safety hazardous materials
4 and security standards, and provides
5 protections to railroads against tort
6 liabilities when they comply with these
7 regulations.

8 DOT has the responsibility for
9 prescribing these rail safety and hazardous
10 material regulatory requirements, and DOT has
11 issued comprehensive regulations that permit
12 the safe rail transportation of PIH materials.

13 Let me describe some of those
14 regulatory programs. As you may be aware,
15 2008 is the 100-year anniversary of HAZMAT
16 regulation for transportation in the United
17 States. Following a number of dynamite
18 explosions on rail cars, the Transportation,
19 Explosives and Other Dangerous Articles Act
20 was signed May 30th, 1908.

21 The act charged the Interstate
22 Commerce Commission with formulating

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1 regulations in accord with the best known
2 practical means for securing safety in transit
3 covering the packing, marking, lading and
4 handling while in transit, and other
5 precautions necessary to determine whether the
6 material was offered in proper condition to
7 transport.

8 The ICC was quite successful in
9 its implementation. In 1907 there were 52
10 deaths. In 1908, the year of the act, there
11 were 26 deaths. In 1909 six fatalities. And
12 in 1913, 14 and 15 there were zero fatalities,
13 while shipments increased in number during
14 that period.

15 In recent years DOT has been very
16 active in HAZMAT regulation. As my written
17 testimony covers we have continuous research
18 and study on tank car design standards.

19 On April 4th we proposed a new
20 design and operating standard in a notice of
21 proposed rulemaking.

22 That standard increases by 500

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1 percent the amount of energy that a tank car
2 can absorb. It increases the puncture
3 resistance and recommends protective coatings
4 to protect the contents.

5 We expect that with this standard
6 the cars will be able to survive a 25-mile-an-
7 hour crash in contrast to the 12-mile-an-hour
8 standard that currently exists.

9 We also plan to limit train speed
10 and expect to issue an interim design standard
11 that will allow for quicker transition to
12 these safer cars.

13 Of course, new technologies such
14 as ECP, PTC, will greatly enhance train
15 safety.

16 Security regulations have received
17 even more attention. Until recently, TIH
18 operated under a 2003 general HAZMAT
19 regulation. On April 8th, DOT issued an
20 interim final rule for TIH that goes beyond
21 the requirements of the 9/11 Commission Act.
22 It requires railroads, among other things: to

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1 look at 27 risk factors; to compile data on
2 routings and annually review it; to interview
3 state and local agencies on risk assessment;
4 to consider transit and storage delays; to
5 inspect each shipment for tampering; and
6 importantly it gives FRA authority to require
7 an alternative route, and if an accident were
8 to occur DOT has been quite active in the
9 funding and training of first responders.

10 Finally railroads and shippers
11 need to work together to find market-based
12 solutions to reduce risk and exposure of PIH
13 transport. DOT applauds the suggestion of the
14 Fertilizer Institute to investigate additional
15 insurance layers, and the administration is
16 willing to work with involved parties to shape
17 legislation to govern liability appropriately.

18 As we saw 100 years ago the
19 tolerance for risk and the technologies to
20 mitigate it change rapidly, and the DOT and
21 the STB need to promote market-based solutions
22 that allow risk mitigation to be balanced with

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1 risk tolerance.

2 A process that allows for recovery
3 of extraordinary cost associated with PIH
4 transport is important to finding and
5 improving safety and growing the economy.

6 That concludes my statement.

7 CHAIRMAN NOTTINGHAM: Thank you,
8 Mr. Eby.

9 We will now turn to Vice Mayor
10 "Del" Pepper from the city of Alexandria.

11 Vice Mayor, I do just want to take
12 a moment to let you know that I used to live
13 in your fair city. Very fond memories of your
14 wonderful city, and certainly also just wanted
15 to mention that we do, I think it is widely
16 known that we have a proceeding brought by the
17 city pending before us as we are here today.

18 Fortunately, because we are all
19 here today, the board members, and we are all
20 on the record here together, this proceeding
21 will be transcribed, we are able to discuss
22 the controversy in Alexandria pretty freely as

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1 much as you would like.

2 This hearing wasn't convened to
3 drill into all of the details of the situation
4 in Alexandria. But you are here. We welcome
5 you. And I just wanted to let you know
6 because our procedures and rules aren't widely
7 known. We basically can't chat about pending
8 proceedings when we are not on the record at
9 a public hearing, but when we are on the
10 record at a public hearing we can.

11 So I just wanted to make sure that
12 you knew that, so that you can speak as freely
13 as you would like to.

14 VICE MAYOR PEPPER: Thank you.

15 Good morning, Mr. Chairman and
16 members of the board.

17 I am Del Pepper, vice mayor of the
18 city of Alexandria, Virginia. And with me
19 today, I've got quite a crew here: Jim
20 Hartmann, our city manager; police chief David
21 Baker; fire chief Adam Thiel; and along with
22 us Ignacio Pessoa, our city attorney; and

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1 Charles Spitulnik, our outside special
2 counsel.

3 I want to begin by expressing my
4 appreciation on behalf of the citizens of
5 Alexandria for giving the city the opportunity
6 to address this board today on a subject that
7 in recent months has become a focus of great
8 concern to us, and that is the process used to
9 decide where a railroad can locate a facility
10 for transloading hazardous materials from rail
11 cars to trucks, and from trucks to rail cars.

12 You have already had an
13 opportunity read the statement that I
14 submitted earlier this month, and I will not
15 repeat all that today. However, I want to
16 concentrate today on the need for a process,
17 one that will bring the interests of the
18 public into making decisions about where a
19 railroad can locate a facility for
20 transloading hazardous materials.

21 Railroads in this country own an
22 enormous network of rail lines and yards. The

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1 railroads were an integral part of
2 Alexandria's history, and the city is an
3 excellent example of the way the railroads and
4 the land uses surrounding rail lines and yards
5 have changed.

6 Over the past 20 years the large
7 yards in Alexandria have closed, and the
8 railroads have developed premier residential,
9 retail and residential projects. Some lines
10 and yards that were once surrounded by
11 industrial or commercial uses are now
12 surrounded by and in very close proximity to
13 densely developed residential communities.

14 Other railroad facilities,
15 however, remain surrounded by the industrial
16 or commercial land uses that provided the
17 justification for the railroad to locate their
18 facilities there in the first instance.

19 The aerial photograph on the
20 easel, and I hope on the monitor - there we go
21 - is an excellent example of an area where the
22 use of land surround the railroad facility has

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1 changed. Where once there was a sprawling
2 military base - you may remember that was
3 Cameron Station - there is now a wonderful
4 residential community called Cameron Station,
5 with a park and playground, a community
6 center, and an elementary school.

7 That school is only 600 feet from
8 a site where Norfolk Southern and its
9 predecessor companies for many years operated
10 an intermodal yard. The residences are even
11 closer; that's 270 feet. Just as the use of
12 the surrounding non-rail property has
13 dramatically changed, so too has the railroad
14 radically changed the use of that facility.
15 Gone is that intermodal yard. In April of
16 this year the railroad installed a contractor,
17 RSI Leasing, which operates a facility for
18 unloading ethanol from rail tank cars into
19 trucks for delivery to gasoline tank farms in
20 Fairfax County.

21 Now instead of general freight, as
22 many as 50 tank cars of ethanol are stored,

1 loaded and unloaded at this facility on any
2 given day.

3 I am not going to comment further
4 on whether the change in use was lawful,
5 because that question is the subject of
6 litigation both before this Board and in the
7 federal court in Alexandria.

8 Until now this Board has given
9 railroads wide discretion to determine how
10 they would use and re-use existing railroad
11 property.

12 The city is here today to ask you
13 to place limits on that discretion in one
14 limited instance. The very fact that this
15 Board is holding this hearing about the
16 railroads' common carrier obligation as it
17 relates to hazardous materials confirms that
18 this board recognizes that HAZMATs require
19 special attention.

20 I don't need to belabor the point
21 as to why these materials are different; you
22 already know that, and besides, you will be

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1 hearing a great deal from the railroads and
2 from shipper groups today that will address
3 that difference.

4 Instead what I want to talk to you
5 about for you to consider is our request that
6 the Board adopt a procedure to place the
7 decision about locating a railroad facility
8 for loading and unloading hazardous materials
9 in the public domain before such a facility
10 can be opened.

11 This Board is the agency with
12 expertise in regulating the construction and
13 operation of rail facilities. By holding this
14 hearing today you have acknowledged pretty
15 explicitly that transportation and handling of
16 hazardous materials is in a class by itself
17 and requires special attention.

18 And our proposal today will give
19 the matter the special attention it deserves.

20 You have the authority under the
21 statute to require the railroads to submit a
22 plan and to solicit public comment about a

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1 proposal to open a HAZMAT transloading
2 facility. That is all we are seeking here,
3 the opportunity to be heard.

4 And you know if you lived in
5 Alexandria, we love to be heard, and we have
6 an opinion on everything.

7 The proposal I have outlined in my
8 testimony would give us that opportunity. It
9 would require the railroads to advise this
10 Board, in the form of an application, of its
11 plans to locate a HAZMAT transloading
12 facility.

13 That application would describe
14 the location and the size of the proposed
15 facility, and would describe the materials the
16 railroad proposes to handle there. The public
17 would be notified, and would have an
18 opportunity to comment, or opportunity to
19 speak.

20 Under existing rules state and
21 local governments have the right to receive
22 notice to answer comment when a railroad

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1 proposes to abandon a railroad line in their
2 community. Doesn't it make sense that we
3 should have an opportunity to comment when a
4 new and potentially hazardous facility like
5 this is going to be opened as well?

6 This proceeding can be much like
7 other proceedings permitted under the Board's
8 rules. The railroad would submit information
9 about alternatives considered and rejected,
10 along with an explanation for the choice. The
11 company would be required to document the
12 steps it plans to take to minimize the risks
13 to the surrounding community, and to address
14 any potential environmental impacts.

15 Most importantly the public would
16 have a chance to comment, to participate in
17 the making of a decision that has enormous
18 potential to affect the lives and the property
19 of the residents of the surrounding community.

20 And before I conclude I want to
21 emphasize one point: the city of Alexandria is
22 not here to say, oh but not in my backyard.

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1 We have a big backyard in the city. WE have
2 tried, as the city has grown, and as the needs
3 of our population have changed, to regulate
4 the use of land in that backyard in a way that
5 would allow the neighbors that live across the
6 fence from each other to coexist peacefully.

7 We have commercial and industrial
8 uses. We have residential uses, and we have
9 mixed uses. What we are asking this Board to
10 do is to give and towns and cities like us
11 across the country a chance at least to have
12 some input in the decision to use railroad
13 property in our backyard in a way that might
14 be particularly hazardous to the health and
15 welfare of the neighbors.

16 Once again I want to thank you for
17 giving me this opportunity to be heard today,
18 and I have a team here that is ready to answer
19 your questions.

20 CHAIRMAN NOTTINGHAM: Thank you,
21 Vice Mayor Pepper. Thank all the witnesses.

22 Vice Mayor, I have to admit,

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1 listening to your statement brought back some
2 very vivid memories of when I worked for the
3 Commonwealth and we were trying to get the
4 Woodrow Wilson Bridge permitted. A lot of
5 public comment.

6 VICE MAYOR PEPPER: Oh, my, yes.

7 CHAIRMAN NOTTINGHAM: I'm very
8 accustomed to working in a public comment-rich
9 environment.

10 VICE MAYOR PEPPER: What a nice way
11 to word that. I like that. I'll remember
12 that. Can I use that?

13 CHAIRMAN NOTTINGHAM: Definitely.

14 Let me if I could start with a
15 couple of questions. Your testimony I think
16 alluded to this. Alexandria of course is no
17 stranger to the railroad industry.

18 VICE MAYOR PEPPER: Right.

19 CHAIRMAN NOTTINGHAM: Of course
20 Alexandria is one of - on a percentage basis,
21 one of the relatively few jurisdictions that
22 can clearly claim to have been around long

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1 before railroads as a center of commerce and
2 trade and shipping, and but for a good long
3 while now railroads have been running through
4 Alexandria. You mentioned railroads have
5 played a pretty significant part in these real
6 estate developments.

7 VICE MAYOR PEPPER: Our RF&P
8 project, for example.

9 CHAIRMAN NOTTINGHAM: The RF&P
10 project. I remember when the - some of us who
11 are from Virginia still wish we could have had
12 the Redskins stadium a little closer.

13 VICE MAYOR PEPPER: Forget that
14 one.

15 CHAIRMAN NOTTINGHAM: But I don't
16 want to open up that controversy, and I don't
17 want to talk about all the traffic that is in
18 that area now; I know it's challenging.

19 But tell me, what is the Norfolk
20 Southern's track record been in working
21 generally with the city historically? Is it
22 a good relationship generally? I understand

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1 it's tense right now on this controversy?

2 VICE MAYOR PEPPER: It's very
3 tense.

4 CHAIRMAN NOTTINGHAM: Have they
5 been a railroad that has been -

6 VICE MAYOR PEPPER: Well, before
7 this controversy came along it was okay. But
8 then it was a rather quiet sort of operation,
9 and the relationship was not strained. They
10 were just sort of there, a presence.

11 But now that we have this
12 hazardous material, ethanol, or potentially
13 hazardous for sure, it's really become very
14 strained, and we have had a number of civic
15 meetings, and they have attended that, and
16 they have tried to extend themselves.

17 But this is just not an
18 appropriate use. We have to agree to disagree
19 on that; this is not an appropriate use.

20 If you could actually be there you
21 would see how close the playgrounds are to
22 these tanks, and as you look at it you feel

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1 like they are just within throwing distance,
2 you could throw a coin and hit the tanks, it
3 just feels that close.

4 And you have to remember that we
5 built that school, and we allowed the
6 residences to build there, too, because what
7 was - the facility was not being used for this
8 transloading operation. It was not a threat
9 in any way, and there was no reason for us to
10 foresee, you know, that this could happen.

11 CHAIRMAN NOTTINGHAM: Thank you.
12 You've probably heard about our precedents and
13 policy regarding - relating to federal
14 preemption, and the concept that for an
15 Interstate national system of railroad lines
16 to work it is important not to allow any one
17 local or state jurisdiction to stop the
18 trains, so to speak, for the wrong reasons,
19 let's just say generally.

20 Now in that environment, though,
21 and in those cases - this board has spent a
22 lot of time on this issue around the country,

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1 particularly in the Northeast - we have the
2 police powers exemption, which has long been
3 recognized, that while the preemption
4 exemption and protection for railroads is
5 quite strong in federal law and in the case
6 law, court decisions, there has always been in
7 the state law respect for localities and
8 states to be able to exert and apply their
9 reasonable police powers to make sure that the
10 public is protected from things like fires,
11 explosions and crime and general things that
12 go along with police powers.

13 Do you feel comfortable that the
14 city has exhausted its efforts to impose its
15 police powers authorities over the property at
16 issue?

17 VICE MAYOR PEPPER: Yes, for sure.
18 I don't know if I can talk about a hauling
19 permit, can I?

20 We have, just something as simple
21 as this, like every other firm that works in
22 our city that is hauling anything of any size,

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1 we have a permit that they are required to
2 abide by, and what we are giving them is very
3 reasonable, just as what we would give anybody
4 else. And they are saying, oh, we are
5 preempt; we don't have to abide by that. And
6 we are only asking them to have a certain
7 number of trucks that would come and go. And
8 they are saying, well, we don't have to abide
9 by that, because we are the railroad.

10 Well, we are just asking them to
11 do what we would for anybody else. And we
12 have a path and pattern where we want them -
13 how we want them to be leaving the city, and
14 they feel that they should set their own
15 rules.

16 And we just are asking in that
17 particular instance that our needs be
18 recognized. This is a really dense city.
19 It's one of the most densely populated cities
20 in the whole country.

21 We understand that you have to be
22 careful about blocking what railroads can do.

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1 We understand that you have to have the
2 preemption. But what we want is this
3 opportunity for us to have the board take an
4 individual look at some of these places. You
5 can do that, and we want you to take a look
6 and just tell us, tell each of these cities,
7 if there isn't some way, yes or no, that they
8 could be exempt.

9 Exempt us, that's what we'd like,
10 but we want to be heard. We want to come to
11 the board; we want to be able to present our
12 case, and you can decide if this is an
13 individual case.

14 CHAIRMAN NOTTINGHAM: Thank you.

15 Tell me about the truck permitting
16 process you have tried to impose. This area
17 is pretty close to the Beltway, I-495 and I-95
18 running along the same corridor there.

19 How would your truck permitting
20 system handle a major detour that had to take
21 place if there was a problem on 495 and trucks
22 had to get routed through Alexandria?

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1 VICE MAYOR PEPPER: Well, there are
2 detours, and there are ways that we can take
3 them to a different route. But that would be
4 the exception, and we would understand that.

5 The question is, what are they
6 doing on a daily basis; that is our concern.
7 But we do have other routes there, because
8 there are major roads right around there, not
9 just the Beltway.

10 CHAIRMAN NOTTINGHAM: Thank you.

11 I did have a question for Mr. Eby.
12 Welcome again.

13 You mentioned you have some
14 pending regulations that you are working with,
15 the Pipeline and Hazardous Materials Safety
16 Administration, PHMSA, on - any - and I don't
17 want to intrude into the process
18 inappropriately on that. You are presumably
19 taking comment and going through the
20 Administrative Procedure Act required process.

21 Any sense of timing of when we
22 could expect to see a new rule on the area of

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1 tank car safety?

2 MR. EBY: The comment period is
3 closed. We do hope to issue interim standards
4 for tank car safety by November of this year.

5 As far as the overall notice I
6 think I'd be speculating to say when we could
7 handle all of the comments we received at the
8 four public hearings that we had and other
9 written comments that we received.

10 CHAIRMAN NOTTINGHAM: And we will
11 have some railroad witnesses with us later.
12 I'll probably ask them a little bit about this
13 too.

14 The railroad industry, or some of
15 the rail industry I've heard, would like to
16 move forward with ordering and purchasing
17 safer cars that may or may not comport with
18 the standards that you are working on. Is
19 that -

20 MR. EBY: Yes, and that really is
21 what I was referring to with the interim
22 standard. The railroads have petitioned DOT

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1 to adopt an interim standard. This standard
2 would allow a car that they have developed to
3 be modified in the future to meet the standard
4 that we come up with under the NPRM. And that
5 is what we hope to have issued in the November
6 timeframe.

7 CHAIRMAN NOTTINGHAM: Okay.

8 Really for Mr. Shafroth or Vice
9 Mayor Pepper, have you been able to identify
10 alternative sites? Part of the - one of the
11 complications of the situation in Alexandria
12 which you brought to our attention is, we have
13 this national energy policy. It is in part
14 designed to promote the use of ethanol. So
15 all this ethanol has got to move somehow.
16 Most people agree that moving it by rail the
17 longest distance possible is the safest most
18 efficient mode. Of course this agency doesn't
19 set energy policy, but we have gone to great
20 lengths to increase our awareness of it. We
21 have created something called the Rail Energy
22 Transportation Advisory Committee, working

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1 with the energy sector.

2 But all indications are, in the
3 next few years we are going to be seeing more
4 ethanol moving by rail through communities;
5 not less.

6 Are there alternative sites in
7 Alexandria, or in Fairfax County? These fuel
8 farms I guess are located in the Lorton area,
9 and the Springfield area, and let me just ask
10 that question, are you aware of any
11 alternatives?

12 VICE MAYOR PEPPER: I know that I
13 have been looking into that. There is a
14 property that is just a little bit west of
15 that Vulcan property, and I had looked at
16 that, because it was surrounded more by
17 industrial uses than these - than a school,
18 for example. And as I understand it, for its
19 own reasons it might not work out.

20 But we have been looking to see
21 how - what else there was. But that is not
22 really our job; that is the job of the

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1 railroad that wants to come in this area.

2 I think that there are areas that
3 are less densely populated in Fairfax for
4 example, and I really think that it is more
5 appropriate that they be looking there. As I
6 said Alexandria is one of the most densely
7 populated cities in the entire country. So if
8 there is an appropriate place that is not too
9 close to residences, we would be pleased to
10 accommodate them.

11 CHAIRMAN NOTTINGHAM: Thank you.

12 Mr. Shafroth?

13 MR. SHAFROTH: I guess I would only
14 say, echoing what you said, we are
15 anticipating ethanol shipments by rail will
16 probably triple over the next three or four
17 years. So we almost have an instance of a
18 first case where we have a transloading
19 facility in an area close to schools, metro
20 stations, et cetera.

21 We are hoping this is an
22 opportunity to propagate something along the

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1 lines of what you are discussing: what are the
2 minimal standards that would have to be met.

3 The difficulty now is this fine
4 line between the cities or any city's police
5 power versus the preemption. And it's a fuzzy
6 area.

7 I have talked to Norfolk Southern.
8 Norfolk Southern has an adviser, used to be a
9 member of the council, was in the state
10 senate. I think he feels that Norfolk
11 Southern would like to constructively address
12 this. But how you do it, how you do it so you
13 don't disrupt it.

14 But I think more importantly here
15 before you open such a facility having some
16 lists, so you know certain things are checked
17 off. What is the evacuation plan in the event
18 a catastrophic event happens? As I understand
19 it there still isn't one. It's been in
20 operation two months?

21 VICE MAYOR PEPPER: Since April.

22 MR. SHAFROTH: Since April. The

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1 federal government yesterday proposed a plan
2 to deal with a future Katrina accident. It's
3 been labeled by state safety experts as
4 perhaps a greater disaster than Katrina.

5 So we know something is coming.
6 We are trying to fix this one in Alexandria,
7 hopefully along the lines of your question.
8 Is there a place not quite at that site that
9 might work better for all concerned?

10 But we know there are going to be
11 other Alexandrias occurring around the
12 country. I'm glad you have this subcommittee.
13 I hope there is someone from a civic
14 association, someone from a city that is
15 participating in some way.

16 We want to make sure you have the
17 ability, the legal authority, to set sort of
18 a check list so we all feel much safer before
19 such a facility actually begins operations you
20 have have got the maximum sense of
21 coordination, discussion, and you know what's
22 going to happen. You know that the fire

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1 department has the equipment it needs to
2 respond to the best of its capacity.

3 And think about it: because of the
4 Air Florida crash, this area has the best
5 emergency response capacity of any
6 metropolitan area in the United States. We
7 saw it on 9/11. Twenty nine fire departments
8 reported to the Arlington County fire chief.
9 It was extraordinary compared to say New York
10 City.

11 Nevertheless the steps we can take
12 to reduce any catastrophic incidents and
13 casualties before we open a facility, we
14 really think it would be critical for the
15 board to be able to help define that line, to
16 define what minimal steps can be taken so we
17 don't have to use the response later on after
18 the fact rather than before the fact.

19 CHAIRMAN NOTTINGHAM: Thank you. I
20 have a couple of more questions, but I'd like
21 to give Vice Chair Mulvey an opportunity to
22 ask some questions followed by Commissioner

1 Buttrey.

2 MR. MULVEY: Thank you.

3 Mr. Shafroth, I'd like you to give
4 my regards to Jim Moran. I used to have an
5 office right across from him, and I ran into
6 him everyday, and he was always a delight to
7 talk to and to work with.

8 I'm sorry he couldn't be here
9 today, but I enjoyed your testimony.

10 To the Department of
11 Transportation, Mr. Eby, your testimony was
12 very very helpful in detailing all the
13 measures that the FRA and other agencies have
14 taken to reduce the risk for the movement of
15 HAZMAT commodities.

16 You argue that only the Congress
17 has the power to relieve the railroads of
18 their liability for these movements.

19 Do you think there is anything the
20 board can do or should be doing to facilitate
21 efforts in this area, whether it be by the
22 private sector or by the government?

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1 MR. EBY: I'm sorry, to facilitate
2 efforts in?

3 MR. MULVEY: In coming up with
4 solutions or helping the Congress or helping
5 the department, et cetera, in coming up with
6 solutions to this problem?

7 MR. EBY: Well, as I mentioned in
8 my testimony, the administration is willing to
9 entertain ideas, to discuss the mitigation of
10 this risk and liability.

11 We haven't come to a decision
12 making process where we are looking at the
13 suite of proposals at this point, but would
14 like all the interested parties to come
15 together. So I think that would be the first
16 step.

17 MR. MULVEY: And do you think the
18 board could help facilitate getting the
19 parties to come together and propose
20 solutions?

21 MR. EBY: Yes, and participate with
22 DOT.

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1 MR. MULVEY: In your testimony you
2 mentioned that the Congress has passed some
3 bills governing the hours of service that
4 railroad workers can perform before they time
5 out. And I believe the bill in both the House
6 and Senate both would allow you to put greater
7 restrictions on the amount of hours worked,
8 or they allow you to require more hours on
9 time off.

10 But you say in your testimony that
11 the bills don't go far enough. What more
12 would you like from the Congress, and why do
13 you think they are unwilling to give the
14 department more authority in this area?

15 MR. EBY: FRA or DOT - FRA is the
16 only agency that doesn't have the ability to
17 prescribe hours of service within the
18 transportation modes.

19 The administration's bill which
20 was introduced both in the House and the
21 Senate it was a comprehensive look at hours of
22 service, looked at nighttime work, night

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1 hours; just the whole study of fatigue. And
2 sleep habits. Where both Senate and the House
3 bill only focuses on limbo time, and limbo
4 time is time at the end of a shift that is not
5 worked.

6 And from our perspective, while we
7 discourage the use of limbo time and would
8 like to see it reduced, there is nothing
9 inherently unsafe about limbo time.

10 What the bills don't address is
11 the real study of fatigue that we spent quite
12 a bit of time working on the science of that.

13 MR. MULVEY: Don't the bills
14 specifically say that the department can make
15 policy changes based on scientific evidence?
16 I think both of the bills relate to the use of
17 scientific evidence in making determinations
18 as to whether or not to restrict or time of
19 operation or increase the amount of time of
20 rest.

21 Isn't that true?

22 MR. EBY: Our concern is that this

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1 focus on limbo time takes a lot of the
2 leverage away from our ability to make changes
3 that would reflect real issues of fatigue.

4 MR. MULVEY: You also mentioned
5 some of the work that is being done, new
6 standards for the tank cars that are coming
7 up. And I know this is somewhat speculative,
8 but does the department feel that if those
9 standards had been in place, the outcomes at
10 Minot or Graniteville or Macdona might have
11 been less or reduced by that? Has that been
12 part of the analysis? I'm sure those were the
13 driving forces in it.

14 MR. SHAFROTH: Yes, it has. And
15 our analysis shows that the 14 fatalities that
16 occurred at - well, that there would not have
17 been a release had this new tank car standard
18 been in effect at the time. The speeds, the
19 closing speeds, would have been less than the
20 25 miles an hour - or were less than the 25
21 miles an hour that this tank car standard is
22 being designed to.

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1 MR. MULVEY: So with better
2 standards, then, those fatalities would not
3 have occurred?

4 MR. EBY: Right.

5 MR. MULVEY: With regard to the
6 Alexandria issue and ethanol, this is
7 something which has come before the board,
8 this whole preemption issue, with respect to
9 municipal solid waste. And the board is very
10 very cognizant of having to balance the need
11 for preemption with the need to preserve the
12 common carrier requirement of the railroads to
13 move things in line with the Interstate
14 Commerce Clause, and with the legitimate
15 rights and needs of the cities to exercise
16 their police powers to control operations that
17 they place on the railroad that are not
18 critical to transportation, or incidental to
19 transportation.

20 So I assure you that I and fellow
21 board members, I believe, will continue to
22 look at this to see what we can do to balance

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1 those interests.

2 VICE MAYOR PEPPER: Thank you.

3 MR. MULVEY: With that I'll turn it
4 back over to you.

5 CHAIRMAN NOTTINGHAM: Thank you,
6 Vice Chairman Mulvey.

7 Commission Buttrey, questions?

8 MR. BUTTREY: Thank you, Mr.
9 Chairman.

10 You said you brought your fire
11 chief with you today. Is he here right now?
12 Could he come up to the table?

13 I guess this is almost tantamount
14 to a public hearing on the applications, on
15 the city's pleadings, or turning out to be.

16 In your professional judgment as a
17 - you have been a fire chief for many years I
18 would suspect.

19 MR. THIEL: For some time, yes,
20 sir.

21 MR. BUTTREY: In your professional
22 opinion is ethanol any more volatile than

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1 gasoline?

2 MR. THIEL: Commissioner, Mr.
3 Chairman, ethanol has a wider flammable range
4 than gasoline. And of course what we are
5 talking about in this particular case is E-95,
6 which is 95 percent ethanol, 5 percent
7 gasoline blend, so it shares some of the
8 characteristics of both products.

9 It is in fact, because of the
10 propensity of ethanol to ignite under a wide
11 flammable range, it is a fairly hazardous
12 product. Flammability is in fact the main
13 concern for us. It is not a TIH product,
14 which is a lot of what you are talking about
15 here today. But it is in fact a highly
16 flammable product, and does ignite over a
17 wider range of circumstances than gasoline.

18 MR. BUTTREY: So that speaks to the
19 flammability. What about the explosive
20 qualities of the product?

21 MR. THIEL: E-95 will not explode
22 per se, and that simply - that is the

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1 technical definition fo an explosion. It
2 wouldn't detonate; it would actually under a
3 worst case scenario it would deflagrate.

4 MR. BUTTREY: It would flame at the
5 source.

6 MR. THIEL: Right. To a lay person
7 the outcome, however, if we were watching that
8 deflagration occur, you would probably call it
9 an explosion or you would say it looks like an
10 explosion.

11 MR. BUTTREY: It would look pretty
12 ugly?

13 MR. THIEL: Yes, sir.

14 MR. BUTTREY: How many service
15 stations do you think there are in Alexandria,
16 city of Alexandria?

17 MR. THIEL: There are quite a few,
18 commissioner.

19 MR. BUTTREY: You probably know
20 exactly how many but don't have that with you
21 today. Do you have a permitting requirement
22 for gasoline stations?

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1 MR. THIEL: We do have a special
2 use permitting process for gasoline stations.

3 MR. BUTTREY: Do they require a
4 hearing or not?

5 MR. THIEL: Filling stations under
6 - all of our special use permit processes do
7 require a public hearing and notice period.

8 MR. BUTTREY: So it's a fairly
9 sophisticated process then that you have in
10 place for service stations?

11 MR. THIEL: Yes, sir.

12 MR. BUTTREY: Because they are
13 located in at least as dense or maybe even
14 more dense areas than what we are talking
15 about here? I have seen this transloading
16 facility where we are talking about; in fact
17 I pass by it almost everyday coming in from
18 Manassas on the VRE, and you can see it just
19 right off to the side here as you go by.

20 And there is usually one tanker
21 truck out there at a time, taking the ethanol
22 from the tank car.

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1 I think that is all, Mr. Chairman.

2 CHAIRMAN NOTTINGHAM: Thank you.

3 Mr. Eby, just a couple of
4 questions. The Federal Railroad
5 Administration is uniquely positioned to
6 understand and monitor the - some of the
7 safety challenges faced by the rail industry
8 in our country of course.

9 It is by nature, while it is an
10 extremely safety conscious industry in my
11 opinion and in my experience, and the safety
12 record on a percentage basis if you look at
13 the amount of movements going around, is
14 incredibly strong in my observation.

15 However, just given the volume of
16 the movements, the type of commodities that
17 the railroads are required to move, their
18 inability to deny service to almost any
19 shipper of any material, and the handoffs and
20 the different ownership structure of the
21 actual cars, is it fair to say that despite
22 the best efforts - I know the Federal Railroad

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1 Administration is shooting for a zero accident
2 future - but is it pretty reasonable to assume
3 over the foreseeable future there are going to
4 be occasional accidents despite everyone's
5 best efforts out there in the real network?

6 MR. EBY: Yes, I certainly can't
7 stand here and say we are going to get to zero
8 in the near future. But year after year our
9 safety performance is improving in every area,
10 save one. And that's in the trespassing area.

11 Every year there are about 900
12 fatalities on railroads each year. About 400
13 of those are due to trespassing, about one per
14 day, about 350, at grade crossings.

15 And last year we had 17 fatalities
16 on the railroad property itself. Of those I
17 believe five were contractors.

18 So each year we are seeing very
19 significant improvement across the board, save
20 the trespassing issue.

21 CHAIRMAN NOTTINGHAM: And while we
22 have not seen in recent memory, we have not

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1 seen a railroad, at least not a railroad of
2 large size that I am aware of, have to
3 actually close and go out of business because
4 of liability as a result of an accident,
5 railroads say quite strongly that that is a
6 very real scenario that they worry about
7 greatly.

8 What types of, in your experience
9 with the rail industry, how would that sort of
10 worst case scenario generally play out? Every
11 business has a worst case scenario, sadly.
12 Restaurants can be exposed to food poisoning
13 liability. Banks as we read in the paper have
14 worst case scenarios. Railroads do too,
15 sadly, and it's probably for railroads it's a
16 TIH type release in a dense urban area,
17 resulting in numerous fatalities and massive
18 tort liability. And at a certain point even
19 the biggest railroads would have pretty much
20 no choice but to shut down if faced with that
21 kind of scenario.

22 What I am just trying to - this is

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1 in some sense - you know we have these
2 academic sounding discussions at some of these
3 hearings, but what we don't always seem to
4 focus on enough in my view is, we've seen
5 bankruptcies in the rail industry in the past,
6 the Rock Island, the Penn Central, others.
7 And they can really have devastating impacts
8 on employees, on rail customers. Rail
9 customers who may have nothing to do with TIH.
10 And related hardships. I guess how do you
11 assess that in your experience?

12 I know it's not perhaps part of
13 your day-to-day job to think about what would
14 happen if a railroad had to shut down. But I
15 know we have to think about it occasionally
16 because we have to anticipate things like
17 directed service orders, and figuring out how
18 that would impact the competitive landscape
19 too. Very few real customers come to us to
20 say there is too much competition. We hear
21 the opposite. There is a major national study
22 on the topic coming out in November.

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1 But if you could just give us your
2 assessment of, should we be concerned with
3 this? What type of impacts would you see if
4 a major railroad had to liquidate as a result
5 of massive liability due to a release of
6 hazardous materials?

7 MR. EBY: Okay, let me try to give
8 you an overall perspective here. Clearly we
9 think the transport of this material is safe
10 right now, safe for the public. And if the
11 railroads follow the hazardous materials
12 regulations that are in place, they are
13 protected from liability as long as those
14 rules are followed.

15 So you are really looking at a
16 situation where someone hasn't followed the
17 rules. And if significant enough fo an event,
18 it could be catastrophic and very harmful to
19 the economy. That's why I suggested we need
20 to look at ways to encourage market-based
21 solutions that look to even further mitigate
22 the risk associated with this.

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1 And that is the reformulation that
2 we have talked about. Some of the re-routing
3 that we are going to be looking at under the
4 interim final rule that exists today, moving
5 those products in safer consists, safer
6 locations.

7 So there is a host of things that
8 the market can encourage these highly
9 concentrated poisons from becoming safer into
10 the future, and I think that is the charge
11 that both DOT and STB has in terms of how do
12 we find ways to get rid of the externalities
13 that aren't being priced in the market, and
14 reflected to those that are creating the risks
15 and those that are benefitting from the risks.

16 CHAIRMAN NOTTINGHAM: You touched
17 on re-routing, and I know that this
18 administration has gone to great lengths to
19 convene special forums whereby the chemical
20 industry and the rail industry can get
21 together to talk about these issues a little
22 bit.

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1 I understand, though, when it
2 comes to the details of re-routing, a number
3 of significant antitrust law concerns get
4 raised, and that the Justice Department in the
5 past has either frowned on or not approved of
6 discussions within the chemical industry about
7 how to sort of share customer lists, and
8 figure out how to minimize long movements, and
9 how to really apply what we may consider a
10 pretty reasonable risk management type
11 decision process.

12 How if you could help us
13 understand that landscape, and has the
14 chemical industry, in your opinion, have they
15 strongly appealed to the Justice Department to
16 allow them to discuss reroutings? Or have
17 they just sort of laid back and said, ah,
18 Justice will never let us do that so we are
19 not going to try to do that?

20 MR. EBY: I'm not familiar with
21 what the chemical industry has done. But the
22 administrator has the ability to convene

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1 what's referred to as a three-three-three
2 conference. And we have had I believe three
3 sessions - oh, many more than three sessions
4 with railroads, with shippers. To date those
5 conversations haven't been overly fruitful
6 except to the point where the railroads now
7 understand some of the routing possibilities
8 that exist out there, and how those - how the
9 rerouting would work to improve safety.

10 CHAIRMAN NOTTINGHAM: This may
11 sound a little hypothetical, but I'll ask it
12 anyway. Do you believe that if the chemical
13 industry had to bear some of the liability
14 through some type of indemnification process
15 or some other process, do you think that might
16 change their business planning as far as how
17 far they ship and where they ship and send
18 hazardous materials?

19 MR. EBY: Well, again, since it is
20 hypothetical, I can't - I don't think you can
21 combine every chemical shipper into one bucket
22 and say that all of them would respond in a

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1 certain way. But that's why I was referring
2 to market based solutions to try to identify
3 these externalities so that there is the
4 proper risk-reward basis to make an economic
5 decision.

6 So to the extent that a shipper
7 right now is benefitting from the fact that
8 the railroads are absorbing a great amount of
9 risk than they should, yes, I think that would
10 encourage re-routing, encourage reformulation,
11 et cetera. But I - I don't think you can just
12 say as a group that they all fall under that
13 category.

14 As I mentioned in my oral
15 testimony we were very encouraged by what the
16 Fertilizer Institute proposed as a workable
17 solution in terms of trying to balance some of
18 that risk, and then forcing the market to
19 respond to what the appropriate either routing
20 or reformulation would be.

21 CHAIRMAN NOTTINGHAM: Thank you.

22 Vice Chairman Mulvey, any

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1 additional questions?

2 MR. MULVEY: A couple of small
3 ones.

4 With respect to externalities, one
5 of the problems with externalities is that the
6 market often cannot solve the problem of
7 externalities. It is very very difficult to
8 internalize them or to rely upon the market
9 for dealing with externalities, which is why
10 addressing them is usually considered one of
11 the roles of government.

12 I wanted to follow up on a
13 question that Chairman Nottingham posed, and
14 it's a posing this counter-factual
15 hypothetical, and that is, if indeed there was
16 a HAZMAT release, a TIH release in a major
17 city, and the costs to the railroad were in
18 the tens of billions of dollars, the costs of
19 damage far beyond the ability of the railroad
20 or their insurers to cover, and the railroad
21 was basically forced to go out of business,
22 would that mean that the railroad's service

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1 would disappear? If you look at airlines
2 that go out of business, when they go out of
3 business their routes tend to continue to be
4 operated by somebody else.

5 The railroads sometimes point out
6 that if they were to experience a great loss
7 they would be out of business and shippers
8 would be out of luck. But do you think that
9 would be the case? Or do you think that the
10 government would step in and say, well, okay,
11 somebody else has to take over these lines,
12 and while the shareholders might have to bear
13 the burden of the loss, the shippers would
14 still receive service from either another
15 class one or some other railroad that would be
16 formed to take over those services.

17 What do you think would be the
18 outcome? Do you really envision the railroad
19 shutting down, and we'd go from two railroads
20 to one in either the East or the West
21 depending on to whom this happened?

22 MR. EBY: I think your hypothesis,

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1 it's a reasonable expectation that there would
2 be somebody to follow on. But during that
3 period it would be a huge disruption to the
4 economy, and we would struggle very - quite a
5 bit with the other railroads that were out
6 there seeing the result of this, and how we
7 respond both from a regulatory standpoint and
8 an operating standpoint.

9 MR. MULVEY: I think unfortunately
10 to get action to happen sometimes it takes
11 some tragic event like that to come up with a
12 solution. One sort of hopes that we could
13 solve this problem without having to wait for
14 something like that to happen.

15 Thank you.

16 CHAIRMAN NOTTINGHAM: Mr. Buttrey,
17 any further questions?

18 MR. BUTTREY: Thank you, Mr.
19 Chairman. I'm in the rare position of wishing
20 Mr. Mulvey had asked me that question. I
21 don't think that has ever happened before,
22 wishing that a former member would ask me that

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1 very question.

2 I'm curious about - and let me
3 take off on the Vice Chairman's fact situation
4 there. I think I heard you say, maybe I heard
5 you incorrectly, but I think I heard you
6 suggest anyway that if it's determined that a
7 railroad is in compliance with all the federal
8 rules, that the judge in the lawsuit would
9 rule as a matter of law that the railroad is
10 not liable.

11 Is that what you said?

12 MR. EBY: That is correct.

13 MR. BUTTREY: That is correct,
14 okay. I just want to make sure we get that
15 opinion on the record, because I find it quite
16 unusual that you would come to that
17 conclusion; maybe my understanding of tort law
18 is not as acute as yours and maybe some other
19 people in the room. But I'm intrigued by that
20 position, so I just want to make sure we
21 clarified that for the record.

22 Thank you, Mr. Chairman.

1 CHAIRMAN NOTTINGHAM: Well, that
2 concludes our questions for this panel.

3 Thank you, you have been very
4 generous with your time. Thank you for
5 joining us today. And we welcome you back
6 anytime.

7 So we will dismiss this panel, and
8 we will call up the second panel which is a
9 group of shipper associations from the
10 National Industrial Transportation League: Mr.
11 Bruce Carlton, the new head of the league, and
12 Nichols J. DiMichael from the American
13 Chemistry Council; Thomas E. Schick from the
14 Edison Electric Institute; Michael F. McBride
15 from the Chlorine Institute; Paul M. Donovan
16 and Tom O'Connor.

17 And while you get settled, now
18 might be an opportune time to pause and to
19 allow Commissioner Buttrey to deliver his
20 opening statement.

21 OPENING STATEMENT - MR. BUTTREY

22 MR. BUTTREY: I apologize to the

1 panel for intervening here. But we all have
2 to get our licks in at some point here.

3 Anyway with the panels indulgence
4 I will deliver my very brief opening
5 statement.

6 The common carrier obligation
7 requires rail carriers to provide
8 transportation or service upon reasonable
9 request. That is what the statute says.

10 But the trick is to figure out
11 what those seemingly simple words mean against
12 the backdrop of today's constrained global
13 transportation marketplace.

14 Take the question of whether
15 railroads are obligated to transport the most
16 extremely toxic TIH hazardous materials
17 without sufficient recognition of the massive
18 liability exposure that could ensue. That is
19 a problem.

20 It is of concern to this board
21 because of our responsibilities to ensure a
22 safe, efficient and economically sound rail

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1 transportation system as set out in the
2 national rail transportation policy.

3 There is a tension between the
4 common carrier obligation, as it is
5 interpreted by some to be practically without
6 limits, and the goal of an economically sound
7 railroad industry. And that is the reason we
8 are holding this hearing today.

9 The board has the authority over
10 the economics of interstate rail transport,
11 and as such is properly responsible for
12 dealing with issues of possible economic
13 damage resulting from carriage of a commodity.

14 Our sister agency, the Federal
15 Railroad Administration, has jurisdiction over
16 rail safety. FRA recently issued a new rule
17 known as HEM 235. It requires that railroads
18 handling certain categories of extremely
19 hazardous materials must file a route
20 analysis, an alternative route analysis, with
21 FRA in certain circumstances.

22 This FRA rule is aimed at rail

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1 safety matters as appropriate to the FRA's
2 jurisdiction. But it does not address the
3 economic issues that railroads are exposed to
4 because of the potential liability of
5 transporting these extremely hazardous
6 materials.

7 These economic issues fall under
8 the jurisdiction of the board.

9 This potentially devastating
10 railroad liability exposure is a problem that
11 the U.S. Congress could address by putting in
12 place a liability cap for TIH HAZMAT
13 transport. But Congress does not appear to be
14 poised to address this issue any time soon.

15 Therefore, I believe that it falls
16 to the board. I personally believe that rail
17 carriers may well be within their rights to
18 refuse to carry the most extremely toxic
19 HAZMATS without indemnification. As a
20 businessman that's a decision I would make.
21 I simply do not feel it is a reasonable
22 request for a shipper to ask a railroad to

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1 transport these types of commodities without
2 some type of meaningful protection from the
3 unreasonably high bet-the-company-type
4 liability exposure.

5 For the rail traffic that falls
6 under the board's regulatory authority by
7 which I mean rail traffic that moves under
8 tariffs, not contracts, I believe that it
9 could well be found to be a reasonable
10 practice today if railroads were to add
11 liability ceilings to their tariff terms as a
12 condition of their carriage of TIH
13 commodities, or require execution of an
14 indemnification agreement prior to carriage.

15 Of course under this approach the
16 amount of the terms of such liability
17 ceilings, or indemnification agreements would
18 need to be such that they would be found to be
19 reasonable. I do not envision that it would
20 be a one-size-fits-all exercise, or that a
21 single solution or approach would fit all
22 carriers and all situations.

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1 These protections against
2 excessive liabilities for tariff shipments of
3 these dangerous but important commodities
4 would need to be carefully tailored. They
5 would need to reflect specific facts and
6 circumstances, including the commodity, the
7 transportation to be provided, the route and
8 equipment to be used, the specific carrier and
9 shipper involved; in order that the record
10 would be found to support the reasonableness
11 of the tariff term if it were challenged.

12 For contract traffic that falls
13 outside the Board's jurisdiction, of course,
14 the parties can deal with liability caps and
15 indemnification matters in any way that they
16 believe is appropriate.

17 This is only one idea. I'm sure
18 there are other approaches that we should
19 explore and consider. I'm here to listen. I'm
20 very much looking forward to hearing the
21 testimony of the witnesses today. I welcome
22 this panel aboard.

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1 CHAIRMAN NOTTINGHAM: Thank you,
2 Commissioner Buttrey.

3 We will now start with this second
4 panel. Our first witnesses will be together
5 representing the National Industrial
6 Transportation League: Mr. Bruce Carlton and
7 Nick DiMichael.

8 And we will just say, take a
9 moment of personal privilege to say how great
10 it is to see Mr. Carlton here before us.
11 Really enjoyed working with you over at the
12 U.S. Department of Transportation during your
13 distinguished career at the Maritime
14 Administration. And the National Industrial
15 Transportation League I think is very
16 fortunate to have you at the helm, and we look
17 forward to working with you here at the board.

18 I still will enjoy the option of
19 asking some tough questions if that is all
20 right.

21 Welcome.

22 PANEL IIA: SHIPPERS ASSOCIATIONS

1 MR. CARLTON: Well, thank you very
2 much, Mr. Chairman, for those very nice words,
3 if I might return the compliment. We had the
4 privilege of working together for some number
5 of years, and I certainly enjoyed that
6 relationship.

7 And your second comment is noted,
8 and I understand entirely. Thanks again.

9 Mr. Chairman, Mr. Vice Chairman
10 and Commissioner Buttrey, good morning.

11 Thank you very much for the
12 opportunity for us to present our views on
13 behalf of the members of the National
14 Industrial Transportation League on this
15 important matter.

16 Many of the League's shipper-
17 members use America's railroad network to ship
18 hazardous commodities, including those
19 classified as toxic inhalation hazards. They
20 choose to ship these commodities by rail often
21 because it is the safest means to move these
22 products to market.

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1 The movement of these dangerous
2 materials is of course the subject of
3 extensive regulation by the Department of
4 Transportation, and more recently, the
5 Department of Homeland Security.

6 As a former senior executive at
7 DOT I can readily affirm that the culture of
8 that department is grounded in safety.
9 Indeed, the department has borrowed the
10 ancient navigator's reference point of the
11 North Star to characterize its unique focus on
12 safety in all modes of transportation.

13 This morning Deputy Administrator
14 Eby provided a very good overview of the FRA's
15 recent rulemakings and actions, and I won't
16 belabor that point. We cover them in our
17 testimony as well.

18 We would note that these are only
19 the most recent examples of their extensive
20 engagement in rail safety.

21 This web of safety rules is given
22 effect in their implementation by the

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1 railroads and the shippers they serve. If the
2 DOT is dominated by a culture of safety, then
3 certainly the same can be said of both the
4 shippers and the rail carriers of these
5 hazardous goods.

6 In the League's view, the common
7 carrier obligation of the railroads is an
8 essential element of their safe carriage.
9 Over many decades the Board's predecessor
10 agency, the ICC, and the courts, have
11 repeatedly affirmed the railroad's common
12 carrier obligation to transport dangerous
13 commodities as a matter of public interest.

14 Those cases and decisions are well
15 briefed in our testimony and in the statements
16 of many parties to this hearing. We are very
17 pleased to note that the industry's principal
18 trade association, the Association of American
19 Railroads, does not seek to dilute this
20 obligation, and also reaffirms the Board's own
21 observation that a railroad cannot deny
22 service to a shipper merely because it is

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1 inconvenient or unprofitable to provide such
2 service.

3 The League firmly believes that
4 safety and the common carrier obligations to
5 transport HAZMATs are inextricably linked, and
6 that view is at the core of various agency and
7 court decisions on this question.

8 The common carrier obligation
9 ensures that rail transportation is always
10 available, and rail transportation is the
11 safest mode to move hazardous materials long
12 distances.

13 The League urges the Board to
14 reject any attempt to limit or condition rail
15 transportation beyond the safety requirements
16 of the responsible federal agencies at DOT and
17 DHS.

18 Our collective goal should be to
19 maintain the highest level of safe transport
20 of these and all commodities.

21 With regard to the issue of
22 liability related to the carriage of hazardous

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1 commodities, the League believes that the
2 Board's jurisdiction is limited. There are no
3 statutory or regulatory limitations on rail
4 carriers' liabilities today, nor would we note
5 are there any limitations to the shippers who
6 produce, handle and for the most part load
7 these commodities in DOT-regulated rail cars.

8 So called flag-outs or refusals to
9 carry dangerous goods because of this open-
10 ended liability have been rejected. Most
11 recently the Congress has actually expanded
12 the railroad's liability for negligence by
13 clarifying that the Federal Rail Safety Act
14 does not preempt state tort law claims.

15 This explicit action by the
16 Congress would seem to put to rest any
17 contemplated limitation of liability by any
18 rail carrier.

19 Such a limitation could not be
20 found to be a reasonable practice when the
21 matter had been so recently revisited and
22 resolved by the Congress.

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1 We do not assert that the issue of
2 potentially very high liability costs stemming
3 from an accident is trivial by any means. On
4 the contrary the League recognizes the
5 liability concerns of shippers and carriers
6 alike. And we believe it is those shippers
7 and carriers of hazardous commodities who are
8 the most able to deal effectively with the
9 complex factors that shape this issue.

10 In our view the appropriate forum
11 for developing a full record of all relevant
12 views of a matter of this complexity is the
13 Congress, and that the Board should in fact
14 defer to the Congress for direction.

15 The League believes that the Board
16 should not issue any policy statement as
17 requested by the AAR. The matter is too
18 complex and fact-based for such broad
19 treatment, and the matter involves fundamental
20 policy questions that are properly and
21 lawfully within the purview of Congress alone.

22 At the same time we believe the

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1 Board can provide valuable insights and
2 recommendations to the Congress; dialogue
3 among the affected parties rather than any
4 unilateral action or sweeping policy change on
5 this matter is deemed by the League as the
6 most useful and potentially productive means
7 to address this complex issue.

8 And in response to the Board's
9 stated goal in seeking policy guidance, and
10 ideas on ways forward, the League is pleased
11 to offer a number of guiding principles that
12 we believe would help shape the dialogue.

13 Number one, our fault based
14 liability regime has deep historical roots and
15 is central to our legal system. Any
16 contemplated revision of that regime should be
17 approached with great care.

18 Number two we must respect the
19 importance of these hazardous commodities
20 through our national economy, and their safe
21 transport should remain of paramount concern.

22 Number three, rail is the safest

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1 mode for moving these products, and we have
2 comprehensive safety rules governing their
3 transport.

4 There should be no restrictions or
5 conditions on their movement by rail on the
6 grounds of safety, security, risk or
7 liability, provided there is full compliance
8 with the federal safety regime.

9 Number four, the liability for
10 transporting these commodities should be
11 covered as a matter of national interest in
12 light of their benefits to the nation and in
13 order to ensure their continued availability.

14 Number five, only by bringing
15 together all interested and informed parties
16 can this issue be effectively addressed. Such
17 a discussion could be very useful.

18 Number six, any proposal to
19 establish a new liability regime must incent
20 safety at all level and by all parties. And
21 any proposal to transfer the cost of liability
22 to another entity must be openly debated by

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1 all affected parties, and should not be
2 implemented by a unilateral action.

3 Lastly number seven, the Board's
4 inquiry into a Price-Anderson model for
5 dealing with liability exposure in this
6 industry is noted by the League, but we
7 believe that such a model cannot be simply
8 transferred to the rail industry.

9 Now there are others here who will
10 be testifying who have a much deeper
11 understanding and appreciation of the Price-
12 Anderson Act, and I will stop right there.

13 But thank you very much for this
14 opportunity to testify.

15 CHAIRMAN NOTTINGHAM: Thank you,
16 Mr. Carlton.

17 Now it is my pleasure to welcome
18 and introduce Thomas E. Schick from the
19 American Chemistry Council.

20 Mr. Schick, please proceed.

21 MR. SCHICK: Is this one?

22 CHAIRMAN NOTTINGHAM: Yes.

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1 MR. SCHICK: Thank you. Good
2 morning, Chairman Nottingham, Vice Chairman
3 Mulvey and Commissioner Buttrey.

4 I'm Tom Schick. I'm here today
5 for the American Chemistry Council which
6 represents the leading companies in the
7 business of chemistry.

8 The railroad common carrier
9 obligation is critical to ACC members and to
10 the customers that they serve in key
11 industries around the nation.

12 The safe transportation of
13 products defined as hazardous materials by
14 DOT's regulations makes up a significant share
15 of the shipments of our ACC member companies.

16 Materials that are classified as
17 toxic inhalation hazards are a small but
18 economically significant portion of that
19 traffic.

20 The Board in this docket has
21 identified an important public policy issue:
22 the rail common carrier obligation with

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1 respect to TIH shipments.

2 The Board is concerned that,
3 according to the railroads, the transportation
4 of these materials subjects them to
5 potentially ruinous liability in the event of
6 an accident.

7 ACC recognizes and appreciates
8 this issue, and the opportunity to provide
9 these perspectives today.

10 I am not going to read through the
11 testimony that we filed a couple of weeks ago,
12 but I am going to touch on four issues this
13 morning.

14 The first of those will be on what
15 the appropriate parties are doing to work in
16 the area of TIH safety.

17 The second is comments on the
18 proposal by the AAR, that this board issue a
19 policy statement, and to leave no question in
20 the mind, I'm going to conclude that that is
21 not appropriate.

22 The third topic is going to deal

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1 with the complexity of this issue, and where
2 maybe we ought to be going from this hearing
3 with that issue.

4 And last but not least I wanted to
5 touch on a few comments that are taken from
6 the testimony we filed which cover a broad
7 range of TIH products, since ACC and its
8 members with a couple of exceptions encompass
9 the production and to a great deal the use of
10 those products in the chemical industry.

11 So back to number one, what
12 appropriate parties are working on here. The
13 industries are working on improving safety,
14 there is no question about that. You've heard
15 a lot of that information in the written
16 documents and it's available in the dockets at
17 DOT. This includes the railroads; there is no
18 question the railroads are working on
19 improving their performance. They have worked
20 on tank car design, and they are working on a
21 number of other issues, and cooperating with
22 shippers and with federal agencies, as I'll

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1 mention in a moment.

2 Our individual member companies at
3 ACC are also working with their carriers one
4 on one, and that includes safety as you would
5 expect.

6 The shippers including the five
7 ACC member companies that are here today to
8 testify later on Panel IV have been working
9 not only individually but through industry
10 initiatives.

11 And I wanted to point out, I
12 believe it was when Chairman Nottingham was
13 talking to Deputy Administrator Eby, there is
14 a reference to a petition that the railroads
15 had filed for an interim tank car standard for
16 TIH materials. And this proposal would deal
17 with tank cars that needed to be purchased
18 between now and when the ultimate rule comes
19 out for TIH tank car safety from DOT.

20 I just wanted to clarify for the
21 record here that that petition and the AAR
22 would certainly join me in pointing this out,

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1 that petition was filed by the AAR, the Short
2 Line Association, the Railway Supply
3 Institute, the Chlorine Institute, and the
4 American Chemistry Council.

5 That was a joint petition to deal
6 with that problem as that problem arose during
7 the course of this rulemaking.

8 The shippers and receivers, as I
9 say, are working, and we don't want to leave
10 the receivers out when we talk about things
11 like, is there another product that can be
12 used, what is the effect downstream of
13 shipping or not shipping something. It's not
14 just the producers. There is always someone
15 at the other end, as I've said on these
16 occasions; it's not being shipped without
17 somebody requiring it at the other end.

18 And we shouldn't leave out the
19 tank car supply sector which includes both the
20 tank car builders and also the leasing
21 companies that provide cars. They are very
22 integral to the safety development around this

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1 whole area of TIH and have been participating,
2 as I mentioned, in these things.

3 The federal government is doing a
4 number of things. The deputy administrator
5 went over several of those. They are well
6 laid out in the National Rail Safety Action
7 plan report, that was an initiative that then
8 Secretary Mineta began after the Graniteville
9 accident. And it addresses emergency response
10 to tank car safety, HAZMAT safety, track
11 maintenance, and a whole range of other issues
12 that bear on this, human factors and whatnot.

13 And a number of rulemakings have
14 already been implemented, and other nonrule
15 initiatives by FRA, some of which various
16 railroads and other entities, including in one
17 instance, ACC, have been involved in.

18 PHMSA obviously is involved in
19 this as well. The tank car has HAZMAT
20 packaging, and PHMSA has been closely
21 involved. And as has been mentioned the
22 Transportation Security Administration which

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1 is part of DHS has been involved as well .
2 They have issued a set of voluntary action
3 items to the railroads, which railroads they
4 are working with. And they have also proposed
5 a rule at TSA which is, I believe, working its
6 way toward OMB.

7 So in addition to DOT, TSA is
8 taking a look at the security thing, not
9 pertinent to this hearing but they have also
10 recently issued voluntary security action
11 items for truck transportation of hazardous
12 materials.

13 Others, as well: there was some
14 discussion of Section 333 conversations. I
15 think the point I would make about that is
16 that the complexities and the various
17 stakeholders and the legal issues including
18 the anti-trust issues perhaps illustrate the
19 difficulty of dealing with this in the absence
20 of legislation. Because you really have to
21 kind of be able to cut through that
22 complexity.

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1 The second topic I was going to
2 talk about is the policy statement that was
3 posed by AAR. I'm not going to read it into
4 the record. It's very clearly stated in their
5 filing here. We think that to issue a policy
6 statement would not be a sound idea for the
7 following reasons. Number one, Congress has
8 not authorized this Board to deal with the
9 allocation liability; to deal with
10 indemnification issues; or to in anyway
11 interfere with or affect state tort law.

12 By the way, shippers are
13 potentially liable as well if a shipper is at
14 fault and causes an accident. Under our tort
15 system that's part of the process as well.
16 There is no immunity here for shippers or car
17 builders whose actions - that's the way our
18 tort system works.

19 So the second point beyond the
20 fact that there is no authority to act in this
21 area, is that even if you felt that you should
22 act in this area without authority, there is

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1 no evidence upon which to act.

2 We have heard about insurance
3 costs and the potential costs and the handling
4 costs, but there is no complete record. You
5 don't have a complete set of evidence on that
6 matter at all.

7 Third of all, perhaps most
8 significantly, we think that this would not be
9 a good public policy for you to adopt.

10 Number one, liability should rest
11 on the party that controls the operations. To
12 the extent the railroads are involved in the
13 operation of their own systems, the safety can
14 best be enhanced - again, back to our tort
15 system - by liability resting on them. Others
16 are responsible for what they can control.

17 And second it's very inappropriate
18 to allow carriers that have market power, and
19 in this room we have talked about that many
20 times - certain carriers have a substantial
21 amount of market power over certain shippers -
22 to offload its liability to someone who does

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1 not have market power. That is completely
2 inappropriate, and very very bad public
3 policy. I think there may be some further
4 discussion on that from this panel.

5 Third here I was going to discuss
6 was the complexity of this issue, and the very
7 many different stakeholders. Congress has
8 recently signaled again it is not prepared to
9 make a change in this area. The railroad
10 industry has been in discussions with ACC and
11 its members, the shipper representatives. The
12 Edison Electric Institute has done a wonderful
13 job in this record of explaining how Price
14 Anderson works, so I won't go into the details
15 of that, particularly with the yellow light
16 on.

17 But we think that the Board's
18 issuance of a policy statement could affect
19 congressional action perhaps in ways that no
20 one here can contemplate. To have raised the
21 issue in this public forum is good, because we
22 are all here talking about it. But I think

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1 for the Commission to try to act in the
2 absence of a congressional action would be
3 inappropriate.

4 Finally I just want to point out
5 that while the gist of the appendix to the
6 paper that we submitted had to do with the
7 downstream uses in different industries and
8 different economic sectors of TIH chemicals,
9 chemical by chemical, it's all laid out there
10 for you in a great amount of detail, perhaps
11 we were remiss in not pointing out that a
12 number of railroad movements, a lot of
13 railroad traffic which is not TIH, also
14 depends on these things. The fertilizer, the
15 anhydrous ammonia - can I have one more minute
16 to wrap up?

17 CHAIRMAN NOTTINGHAM: Sir, go ahead
18 and wrap up.

19 MR. SCHICK: Which is used to
20 produce grains, produces a lot of railroad
21 traffic. The anhydrous ammonia and chlorines
22 are used at power plants obviously support a

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1 coal traffic. Chlorine is supportive of
2 production, for example, of plastics which are
3 not in themselves hazardous, but again that is
4 a very large chemical category. Paper
5 manufacture, metals and whatnot; it's all
6 again laid out in there.

7 But we looked at it more for the
8 end use industry. Take a look at that and
9 think how much rail traffic that is not itself
10 TIH is indeed supported by TIH.

11 Thank you for the extra minute of
12 time, and I'll look forward to any questions
13 later.

14 CHAIRMAN NOTTINGHAM: Thank you,
15 Mr. Schick. We will now turn to Mr. Michael
16 F. McBride representing the Edison Electric
17 Institute.

18 Welcome, Mr. McBride.

19 MR. McBRIDE: Thank you, Mr.
20 Chairman, Mr. Vice Chairman, Commissioner
21 Buttrey and staff.

22 I want to first thank you for

1 accommodating my schedule in granting the
2 extension that you did.

3 I appreciate the opportunity to be
4 here today. We've submitted an extensive
5 written statement and I am not going to
6 attempt to read any large portion of it. But
7 I want to just touch on a few key points if I
8 may.

9 First of all just to remind you
10 about the importance of the railroads to the
11 industry that I have the privilege to speak
12 for today: we are partners with the railroads
13 as you know every step of the way. They move
14 about 70 percent of our coal; we couldn't
15 operate our industry without them. And we
16 need the common carrier obligation in order to
17 operate those facilities, not so much for the
18 coal - they are willing to haul that - but for
19 the anhydrous ammonia that we need to operate
20 the pollution control equipment at those
21 facilities. Also to move chlorine for nuclear
22 plants, and to move radioactive materials out

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1 of the nuclear facilities.

2 And I think as the record has now
3 evolved from the April hearing and through the
4 written submissions that are before you today,
5 the railroads concede that common carrier
6 obligation. So I think that issue is perhaps
7 behind us.

8 Second, I just want to say
9 therefore that it's vital to our industry that
10 the railroads continue to move these materials
11 in whatever forum the policy issues are
12 debated we simply can't do it without them.

13 And if the common carrier
14 obligation is to be modified, altered in
15 anyway, it's a matter in our judgment solely
16 for Congress to deal with.

17 Now in your notice you asked us,
18 the parties, to address the Price Anderson
19 Act, and I guess I'm the person that people
20 have asked to try to summarize that as much as
21 possible for you. I'm happy to answer any
22 questions about it. I won't go into any great

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1 detail about it orally except to say the Price
2 Anderson Act is a very unique - was a very
3 unique statute. It was adopted in 1957 in
4 order to permit a nascent industry, the
5 commercial nuclear industry, to actually begin
6 to function. The industry simply couldn't get
7 going without it because of the inability at
8 that time to evaluate the risks, and there
9 simply wasn't enough commercial liability
10 insurance available.

11 So a very unique complicated
12 scheme was adopted. It is hardly simply a
13 limit on liability. But it has a series of
14 tradeoffs in it. The reactor licensees for
15 example are not permitted to adopt certain
16 defenses that would otherwise apply; they must
17 waive those.

18 All the claims are consolidated in
19 one court. They must buy all the insurance
20 the Nuclear Regulatory Commission requires.
21 They must pool and a secondary layer of
22 insurance that is available, liability, so

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1 that an accident at any one facility is the
2 responsibility jointly of them all.

3 And that imposes on them all a
4 great responsibility. Obviously they want to
5 avoid accidents in any event. But
6 collectively they have an obligation to avoid
7 those responsibilities for the benefit of each
8 and everyone of their companies.

9 And for that reason they have
10 created their own safety watchdog to back up
11 what is probably by most accounts the most
12 comprehensive safety regulator in the United
13 States government, the Nuclear Regulatory
14 Commission. The industry created the
15 Institute of Nuclear Power Operations.

16 The CEOs and senior managements of
17 the utilities are heavily involved. That
18 institute grades the reactors every year in
19 public reports. You don't want to get a
20 three; you want to get a one or two. The
21 wrath of God comes down on you if you are not
22 operating safely.

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1 And I think the proof is in the
2 pudding. It's a very safe industry. No
3 member of the public has ever been injured or
4 died as a result of the operation of a
5 commercial nuclear power plant.

6 If we want to talk about how to
7 apply that model to the railroad industry, I'm
8 happy to do that. I'm not going to go into
9 any great detail about it now except to say
10 that tort liability is the province of the
11 courts, the Congress or the state
12 legislatures.

13 And in the situation in the
14 nuclear industry in which the Price Anderson
15 Act has been applied, there has never been a
16 penny paid by the government as a result of
17 any incident at any nuclear power plant.
18 Every incident has always been fully covered.
19 Really only one ever triggered the statute,
20 and that was the Three Mile Island accident.
21 And the liability claims didn't come close to
22 the liability limits under the statute.

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1 So the system has worked very very
2 well. It's not obvious that it ought to be
3 extended to any other industry. If it were
4 you would have to think about applying the
5 statute and the statutory scheme I think more
6 broadly than just to one mode of
7 transportation. But that would be for others
8 to advocate, not for me.

9 Suffice to say that under the
10 Price Anderson Act model, the railroads would
11 remain solely responsible for the safety of
12 their rail operations. After all the
13 railroads, not their customers, are solely
14 responsible for the safe operation of their
15 facilities. When a shipper tenders a car to
16 a railroad in full conformance with all
17 regulations of the federal government, DOT or
18 in a special case of radioactive materials,
19 NRC, there is literally nothing the shipper
20 can do to ensure the safe transportation of
21 that car until it gets to destination.

22 The railroads don't let us control

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1 the routing, even when there is a shorter
2 route available. You may hear testimony later
3 today as you did in April that they won't
4 permit it if it is not in their economic
5 interest.

6 The shippers have nothing to say
7 about the quality of the track, how the trains
8 are dispatched, or God forbid if switches
9 aren't thrown properly or trains collide or
10 what have you; there's simply nothing that the
11 shippers can do to prevent those accidents
12 from occurring.

13 Now as Mr. Schick said, there are
14 circumstances under which shippers can be
15 liable. I had a case where relatively new
16 cars that carry coal it turned out got into an
17 accident, and there was paint in the air
18 lines, in the brake lines. And it turned out
19 the paint was there because the cars were
20 manufactured improperly. A claim was made
21 against the shipper; the shipper claimed over
22 against the car manufacturer. That wasn't the

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1 railroad's responsibility. The shipper wasn't
2 immunized.

3 You can have a situation where if
4 it's the shipper's track that is responsible
5 for the accident, then the shipper can be made
6 liable.

7 So as Mr. Schick said, the
8 shippers are not immune. No party is immune.
9 It's simply that under our system of tort
10 liability we impose liability on the party who
11 is in the position to control the situation,
12 whose actions give rise to the claim.

13 And that's in our judgment the way
14 the system ought to continue to work.

15 So let me just close by saying
16 that we don't believe the board has any
17 statutory authority to indemnify the
18 railroads, to require the shippers to
19 indemnify the railroads, or to permit the
20 railroads to require the shippers to indemnify
21 them.

22 There simply is no statutory

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1 authority that has been given to the Board to
2 do that. And the Board is a creature of
3 statute.

4 We don't believe there is any
5 basis to act on this record. As you know from
6 our prior discussions about the radioactive
7 materials cases, those are cases involving
8 specific tariffs. Shipper complaints, and
9 extensive adjudicatory evidentiary records
10 were developed and withstood challenge in the
11 courts.

12 There is no proposed rule that the
13 Board has adopted either, so there is simply
14 no basis to go forward.

15 I would even suggest to you, and I
16 think you will hear more about this later,
17 that the railroads' proposals here may be
18 counterproductive in that they may be blocking
19 progress on a negotiated basis rather than
20 encouraging it, by attempting to get for
21 themselves what might be part of the quid pro
22 quo that would be part of any of those

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1 discussions.

2 And I think this Board has had a
3 policy for a long time of attempting to
4 encourage private sector solutions. And I
5 think that's what you ought to be doing.

6 I commend you for holding the
7 hearing. This is not a criticism of the
8 hearing. I think it's a criticism of people
9 trying to get what they want without giving
10 something in return that would be the way that
11 things would proceed in a commercial setting.

12 And lastly I guess I should just
13 say that if instead of the arguments I have
14 made the Board should go forward, or permit
15 the railroads to go forward with something
16 that in our judgment is counterproductive and
17 contrary to all the policy arguments you have
18 already heard here this morning, I think you
19 will just see an even greater movement on the
20 part of many companies to deal with railroad
21 problems in whatever form they can find to
22 deal with. And I'm not sure that that is what

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1 the Board really is intending to accomplish
2 either, and I'll just leave it at that.

3 And with that, I want to cede to
4 you the balance of my time.

5 Thank you.

6 CHAIRMAN NOTTINGHAM: Thank you,
7 Mr. McBride.

8 Next it's my pleasure to welcome
9 and introduce Tom O'Connor from the Chlorine
10 Institute, joined by Paul M. Donovan also of
11 the Chlorine Institute.

12 Please proceed.

13 MR. DONOVAN: Actually, Mr.
14 Chairman, it's the other way around. But I'm
15 happy to have Tom here with me.

16 Mr. Chairman, Mr. Vice Chairman,
17 Mr. Buttrey, thank you for the opportunity to
18 address the Board on the subject of the common
19 carrier obligations of railroads to transport
20 TIH materials, particularly chlorine.

21 I am general counsel to the
22 Chlorine Institute, and I am accompanied today

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1 by Mr. Tom O'Connor, as you said, of Snavelly
2 King Majoros O'Connor & Lee.

3 Mr. O'Connor will be available to
4 answer any questions you may have with respect
5 to Exhibit No. 1 to our testimony.

6 Also available in the room should
7 you need to speak to him is Mr. Arthur Duncan,
8 the president of the Chlorine Institute, who
9 testified last April in the 677 docket. Mr.
10 Duncan can answer any questions you have about
11 the uses of chlorine, the alleged
12 substitutability of chlorine, of other
13 products for chlorine, and other technical
14 matters.

15 As this proceeding has evolved
16 several things have become quite clear.

17 First, chlorine is essential to
18 the economy of the nation and the welfare of
19 its people.

20 Second, the railroads have a
21 common carrier obligation to transport
22 chlorine.

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1 Third, the railroads would prefer
2 to be protected from the damages that result
3 from their negligence, gross negligence, and
4 even their wanton or reckless conduct.

5 The only remaining questions are,
6 who is going to pay for the insurance
7 necessary for the railroads to protect
8 themselves; and what is the cost of the
9 insurance.

10 In addressing these questions we
11 must begin by setting aside the hyperbole
12 heaped on by the railroads and repeated
13 without citation or authority.

14 This record does not contain a
15 shred of verifiable evidence to support the
16 railroad assertions that are being made; not
17 a shred.

18 Let's start by examining the
19 ruinous liability issue, as in we face ruinous
20 liability when we transport TIH materials.

21 The ruinous liability faced by the
22 railroads is no greater and probably less than

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1 the ruinous liability faced by most companies
2 in most industries conducting business in this
3 nation everyday, certainly including the
4 chemical industry.

5 Let's continue with no-fault
6 liability, as in, we might be held to ruinous
7 liability when it's not even our fault.

8 Our research has failed to
9 indicate a single case in which a railroad was
10 held liable for damages in an incident where
11 the railroad was not determined to be at
12 fault. There is no such thing as strict TIH
13 liability.

14 Mr. Buttrey, your question earlier
15 about compliance with FRA regulations
16 immunizing you from tort liability, I would
17 invite your attention to CSX v. Easterwood,
18 507 U.S. 658 where that was exactly the
19 holding of the United States Supreme Court.
20 Vice Chairman Mulvey and I sat there and
21 listened to now Chief Justice Roberts drill
22 down on that very case in the D.C. routing

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1 case, and that was the basis for the decision.

2 The concurring opinion of Judge
3 Henderson in that case also pointed out that
4 the Hazardous Materials Transportation Act
5 provides similar immunity from tort liability
6 or police power liability if you put it that
7 way with respect to compliance with the
8 Hazardous Materials Transportation Act.

9 Please consider the argument about
10 the unavailability of insurance, as in, there
11 is no available insurance protecting us from
12 ruinous liability. If there is no available
13 insurance, how does the AAR propose that the
14 shippers go out and buy additional liability
15 insurance to protect them?

16 The obvious answer is: there is
17 liability insurance. The question is, who is
18 going to buy it, who is going to pay for it;
19 that's the only issue.

20 The cost of railroad insurance is
21 escalating, the claim is made. Our Exhibit
22 No.1 shows that that is not the case. In

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1 point of fact the five U.S. railroads have
2 seen their casualty and liability costs
3 decline from \$1.233 billion in 2003 to \$782
4 million in 2007, a decline of 37 percent.

5 This decline is in spite of the
6 recent railroad-caused derailments at
7 McDunough and at Graniteville that the
8 railroads have pointed out in their testimony.

9 The railroads allege they've bet
10 the company every time they handle a shipment
11 of TIH materials. This coupled with the
12 unexplained no-fault ruinous liability, and
13 the wholly fabricated unavailability of
14 insurance is designed to evoke sympathy for
15 those who own railroad stocks.

16 Of course the railroad
17 stockholders are the same sophisticated
18 institutional investors that own all the stock
19 of all the companies before you here today.
20 This isn't a bunch of unsophisticated widows
21 and orphans that own railroad stock; it's the
22 same people.

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1 And those people are fully aware
2 of the common carrier obligations and the
3 risks that are attendant to the common carrier
4 obligations in handling TIHs. In fact the
5 railroad 10Ks require them to disclose that.

6 They also know the value of the
7 franchise monopoly that the railroad has been
8 granted, and in their investment decisions
9 they balance one against the other.

10 Finally, the railroad serves an
11 American industry that uses substitute
12 products because they don't want to carry the
13 products that the economy has determined would
14 move by rail. This would cede to the
15 railroads the right to determine what is made,
16 where it is made, and who shall be allowed to
17 remain in business.

18 As Mr. Dungan testified in April,
19 the ability to substitute other materials for
20 chlorine is very limited.

21 The railroads make their claims
22 about substitute based on sweeping

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1 generalities, not based on sound science, and
2 in complete disregard of the unrebutted
3 testimony of Mr. Dungan, that for 95 percent
4 of chlorine uses there is no readily available
5 substitute.

6 In any event this Board is not the
7 appropriate forum to address those issues.
8 With all due respect I have to say that your
9 expertise is not in the area of chemistry, and
10 no one would expect it to be.

11 Mr. Chairman, as I said at the
12 outset, this case now involves nothing more
13 than who is going to pay for the obviously
14 available insurance to protect the railroad
15 stockholders from damages resulting from the
16 railroad's misconduct.

17 Railroads want the Board to issue
18 a policy statement saying that it is not
19 unlawful under the ICCTA for them to require
20 indemnification as a precondition for them
21 handling TIH materials. But can you do that?
22 Should you do that?

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1 The answer to both questions is
2 no. Regardless of the dictum in the cases
3 cited by the AAR, there is plainly no
4 precedent for a policy statement that the
5 railroads would have you issue. As set forth
6 in our written testimony there is virtually no
7 federal or state jurisdiction that would allow
8 the railroads to shift the liability for their
9 negligence, gross negligence or reckless
10 conduct, from themselves to a shipper.

11 Since any such shipper would have
12 essentially no real bargaining power to resist
13 such an exculpatory clause either in tariff or
14 in contract, the courts would void the
15 provision. That is why the railroads simply
16 haven't demanded those clauses up until now.

17 By the Board issuing a policy
18 statement, however, the railroads would be
19 free to refuse to handle TIH materials unless
20 we provided proof of insurance and
21 indemnification. The incident would probably
22 have never happened. The railroads would

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1 never be able to enforce the indemnification
2 clause. But the insurance would have been
3 purchased, and the shipper would have been
4 irreparably injured having to pay for
5 insurance.

6 More importantly this Board should
7 not countenance the railroad's efforts to
8 exculpate themselves from liability that
9 arises from their own negligent conduct. The
10 reasons for this were set forth in the leading
11 case of *Bisso v. Inland Waterways*, where the
12 Supreme Court voided an attempt by a towing
13 company to relieve itself of liability for its
14 own negligence in the performance of
15 transportation activities.

16 The Court explained the reasons
17 for the rule of voiding such exculpatory
18 clauses, and I quote: The two main reasons for
19 the creation and application of the rules have
20 been, one, to discourage negligence by making
21 wrongdoers pay damages; and two, to protect
22 those in need of goods and services from being

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1 overreached by others who have the power to
2 drive hard bargains. And both reasons apply
3 with equal force whether trucks operate as
4 common carriers or contract carriers, unquote.

5 The AAR has submitted a proposed
6 policy statement that it suggests the Board
7 issue in this proceeding. However based on
8 the Bisso case and other state and federal
9 cases, you cannot lawfully issue that
10 statement.

11 The Board could issue a policy
12 statement saying that it is an unreasonable
13 practice for them to require such
14 indemnification, because they are driving the
15 hard bargain; they've got the market power.

16 But for you to issue a statement
17 saying they can do that is totally contrary to
18 the Bisso case and to all federal public
19 policy.

20 Mr. Chairman, I will skip over
21 Price Anderson. I think Mr. McBride has
22 issued that except to say, the chlorine

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1 industry would be more than happy to engage in
2 discussions about a legislative solution. But
3 any legislative solution on the Price-Anderson
4 model or otherwise would have to remain and
5 keep in place the incentives for the railroads
6 to operate more safely, not less safely; and
7 for them to provide the necessary insurance
8 just like Price Anderson requires.

9 That is the appropriate way to
10 incentivize them to maintain a safe operation.

11 Thank you for your time and
12 attention. I'll be happy to answer any
13 questions.

14 CHAIRMAN NOTTINGHAM: Thank you,
15 Mr. Donovan.

16 We'll now move into questions.
17 I'd like to give Vice Chairman Mulvey the
18 first opportunity to ask questions.

19 MR. MULVEY: Thank you.

20 Most, I guess all TIH or PIH
21 movements fall under the Board's regulations
22 and are subject to the common carrier

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1 obligation.

2 But we have a lot of exempt
3 commodities which are not subject to the
4 common carrier obligation. What if one of
5 those commodities, because of changes in its
6 exempt manufacturing process, et cetera, also
7 took on PIH or TIH characteristics.

8 How would the Board react to that?
9 Would it have to revoke the exemption? Or
10 would it be exempt? You can see that
11 possibility happening in a manufacturing
12 operation.

13 Anybody.

14 MR. McBRIDE: Well, first of all,
15 you and I might have a good faith disagreement
16 about whether exempt commodities are subject
17 to the common carrier obligation. I think
18 they are, and as I told you in April, I think
19 when you exempt it simply means you are not
20 enforcing the obligation for the period of the
21 exemption. But that may be a debate about
22 angels on the head of a pin.

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1 To get to the point of your
2 question, Board decisions clearly state first
3 that exemptions are to be granted only when
4 there is no need for regulation; when there is
5 competition; and if there is market power then
6 the Board generally does not exempt.

7 In any event, if there is an
8 exemption and then someone comes in with a
9 proof of change in circumstances or a need to
10 regulate in part because the particular
11 movement or a particular subset of a commodity
12 may be subject to market power when it was not
13 at the time the exemption was granted, then I
14 think the Board's precedents are clearly to
15 revoke in whole or in part the exemption in
16 order to regulate where that may be necessary.

17 And it seems to me in the
18 circumstances of your question that since the
19 railroads are before you telling you they
20 really would rather not haul these materials,
21 if I were on the Board I would be acutely
22 sensitive to the need to regulate for

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1 precisely that reason, because otherwise the
2 shipper is going to be defensive.

3 MR. SCHICK: Mr. Vice Chairman, if
4 I can add on that.

5 There are a number of commodities
6 that were exempted as commodities. There were
7 also services that were exempted. Intermodal
8 is a leading example of that.

9 There are TIH materials that move
10 in containers. I don't mean drums in
11 containers; I mean in intermodal containers.

12 And the railroads since modal
13 service is exempt, the railroads have taken
14 the position that they do not have to carry
15 those; that the common carrier obligation did
16 not extent.

17 As Mr. McBride suggests, these
18 people on the shipper side may not be happy or
19 may not see that as appropriate, but at the
20 current time that is the situation.

21 Now what has happened is, those
22 materials moving within the United States,

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1 whether it's to destination for use, or
2 whether it's to a port for export, are moving
3 on the highways.

4 So that brings you right back to
5 the public policy question. I think we all
6 concur here, everybody, that rail is a safe
7 mode, perhaps safer than the other mode. And
8 shippers no longer have the option to move
9 those materials on the railroad under the
10 exemption.

11 Now no one has come to you and
12 asked to take the exemption away, and I
13 certainly don't believe that those particular
14 moves that are TIH products were exempted.
15 And this has nothing to do with the
16 formulation or change in the product becoming
17 a TIH. I don't believe the ICC when it
18 exempted those exempted them because they were
19 TIH. It was looking at the economics of the
20 service, and the appropriate criteria under
21 the statute, which orders the role for the
22 Board and regulation, and is there market

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1 power being exercised.

2 So I just wanted to add that to
3 clarify that there is an effect right now on
4 TIH.

5 MR. DiMICHAEL: If I could just
6 simply add to that, this came up you may
7 recall, Vice Chairman Mulvey, at the last
8 hearing. In fact you had asked this of the
9 League. It was about 7:00 o'clock at night.
10 I think everyone had kind of had it.

11 But basically the situation is
12 exactly as Mr. Schick states, that there are
13 TIHs moving in intermodal service that the
14 railroads are not - are refusing to carry.

15 MR. MULVEY: There is an issue of
16 moving regulated commodities in exempt
17 containers that comes up in agriculture now.
18 More agricultural shipments are moving in
19 containers, and it's an obviously exempt
20 movement, but the commodity itself is
21 regulated.

22 Let me turn to the Price Anderson

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1 question, I read with care all the testimony
2 saying why the Price Anderson should not be
3 applied to the movement of PIH and TIH, but I
4 need to say that I didn't come away fully
5 convinced. There was discussion of the
6 Nuclear Regulatory Commission, and the
7 Institute for Nuclear Power Operations which
8 oversees this industry and guarantees its
9 safety.

10 It was also noted that the
11 protection of the Price Anderson bill was to
12 help get the industry started at a time when
13 insurance wasn't available.

14 If we accept for a moment that to
15 insure a really catastrophic risk where tens
16 of thousands or hundreds of thousands of
17 people could be killed or seriously injured,
18 and that that is probably beyond the
19 insurability or the financial resources of the
20 industry, why wouldn't a Price Anderson kind
21 of approach be relevant here?

22 After all there is the Federal

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1 Railroad Administration, the Transportation
2 Security Administration, PHMSA, and of course
3 the railroads themselves have all their
4 technical committees which also are focused on
5 safety.

6 And as Mr. Eby said before, the
7 railroad safety record has been one of
8 continuous improvement. So why don't you feel
9 that there is the same kinds of safety
10 oversight available between both government
11 and private organizations in the railroad
12 industry that there is in the nuclear power
13 industry.

14 And I guess, Mike, you would be
15 the most appropriate responder.

16 MR. McBRIDE: I'm happy to start.

17 First of all, maybe you weren't
18 fully convinced because you read something
19 into my testimony that isn't there.

20 We have not said, and we do not
21 say, that Price Anderson or something like it
22 shouldn't be applicable to the railroad

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1 industry, or perhaps to some larger set of
2 interests. But it's really for them to
3 advocate that.

4 So I have not presented testimony
5 to you opposing any such formulation. We are
6 here simply to answer your questions and to
7 explain how it might unfold.

8 If you look at page four of my
9 testimony I think you will see that what we
10 said was that Price Anderson is a lot more
11 complicated than just a limit on liability.

12 I'm happy to go through and
13 discuss each of those features with you, but
14 we haven't seen a proposal from the railroads
15 that comes close to capturing all of the
16 elements that are embodied in Price Anderson.

17 Some of the things that I put in
18 the testimony and mentioned briefly orally was
19 the waiver of defenses in the event of a
20 covered incident; claims are consolidated in
21 a single report; there is a waiver of
22 governmental and charitable immunity which can

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1 occasionally apply; there is a waiver of
2 statute of limitation; there are - at least
3 certain statutes of limitations; there is a
4 requirement to maintain a primary level of
5 insurance that the NRC mandates; there is a
6 requirement for a secondary layer of
7 insurance, which is an extraordinary form of
8 insurance, which is retrospective premiums
9 which are paid by each of the 103 reactor
10 operators, which are all pooled to provide a
11 total of over \$10 billion in protection.

12 And I meant no offense to the FRA
13 or PHMSA or any of these other agencies to say
14 that the Nuclear Regulatory Commission has
15 extraordinary regulatory authority, an
16 enormous staff, resident inspectors in every
17 nuclear facility, applications that go into
18 the thousands of pages, thousands of
19 technically oriented people who pore over
20 every detail of the written submissions to
21 them, and then this is all backed up by the
22 industry which is obviously very concerned

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1 about maintaining its safe record, and created
2 its own backup regulatory watchdog.

3 But I really want to focus
4 particularly on this pooling in this secondary
5 layer of coverage. When 103 reactor licensees
6 and their senior managements are responsible
7 for incidents that may occur at any one of
8 those 103 facilities, that creates a
9 tremendous incentive on the part of all of
10 those licensees to be sure that each of their
11 brethren are being as safe as they possibly
12 could be.

13 And as I said before you don't
14 want to get a poor grade from the Institute of
15 Nuclear Power Operations, because the NRC will
16 swoop in, and the other companies will swoop
17 in, the insurers will swoop in. So the way
18 the system works is designed to be as safe as
19 possible, obviously. No one ever wants to go
20 through what happened at Three Mile Island
21 again, and I think the proof is in the pudding
22 there.

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1 And I think there are a lot of
2 elements to this, and there are more things I
3 could talk about as well. We could go through
4 the facilities forms and the insurance
5 policies, and I could indicate to you how
6 strict all of these requirements are on the
7 companies to back up the actions of any one of
8 them, which I think collectively has made that
9 an extraordinarily safe industry.

10 And we just haven't seen that
11 comprehensive a proposal. All we are hearing
12 about is a liability cap, and I think that
13 tears one part of Price Anderson out from a
14 whole system, and that is my point; not that
15 they shouldn't have it.

16 MR. MULVEY: Let me follow up a
17 little bit on that.

18 Under the Price Anderson, we are
19 talking about the transportation of the TIHs,
20 or the transportation of nuclear casks. Price
21 Anderson would cover the railroad if it's
22 transporting nuclear casks, would it not?

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1 MR. McBRIDE: Correct.

2 MR. MULVEY: So in other words we
3 are talking here about liability gaps or
4 pooled resources for liability. The railroad
5 could be at fault in terms of the accident,
6 and yet Price Anderson would give it
7 protection from lawsuits for carrying nuclear
8 materials because of the potential for
9 catastrophic damage.

10 We have the same issue here for
11 TIH & PIH materials, don't we? It's the
12 potential for catastrophic damage in handling,
13 say, anhydrous ammonia, in handling a TIH of
14 that nature. The railroad has protection if
15 it's nuclear material but doesn't have
16 protection because it's TIH material, can you
17 explain the difference between those two and
18 why there should be that difference -

19 (Simultaneous speaking.)

20 MR. MULVEY: Nuclear power plants
21 contribute to the fund. The railroads, even
22 though they are involved in the movement, and

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1 even though they may be at fault, they
2 themselves would not contribute to the fund;
3 is that correct?

4 MR. McBRIDE: That is correct. So
5 now let me explain to you why yours is a great
6 question, and superficially I understand the
7 logic of it, but frankly it falls apart in a
8 couple of respects.

9 First of all, Price Anderson
10 insurance indemnity arrangement is a
11 comprehensive scheme that is applicable to the
12 entire nuclear industry, not to one mode of
13 transportation providers, or one group of
14 contractors; it applies to the whole industry.

15 So you don't just apply it to one
16 mode of transportation in some other context.
17 That is not the applicable analogy. In any
18 event the reason why the question breaks down
19 in another entirely different respect is this,
20 and we went through this five times before the
21 Interstate Commerce Commission, and succeeded
22 every time and on appeal.

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1 The railroads' argument was, it
2 was too dangerous to haul radioactive
3 materials. We demonstrated that the casks
4 themselves in which the materials are
5 transported are the safest containers ever
6 devised for the transportation of anything.
7 They are licensed, they themselves, the casks
8 are licensed by the Nuclear Regulatory
9 Commission. They are composed of steel with
10 lead lining. They are of enormous size. They
11 are generally affixed to the rail cars. They
12 can't be opened en route because of the way
13 they hinge, open and close, with a plate at
14 the end to keep it from being open.

15 They are required to be crash
16 tested into mountains, into locomotives, to be
17 fire tested, to be dropped, to be puncture
18 tested, to be put through immersion testing,
19 I could go on and on.

20 There has never been a release in
21 the transportation of any of those materials
22 from one of those casks. Simply none.

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1 MR. MULVEY: Mr. EBY says that if
2 you put these new tank cars in place the three
3 releases that we did have that have caused
4 fatalities would not have happened.

5 And isn't it also true that these
6 casks have changed, and have been upgraded
7 since the original casks were developed.

8 MR. McBRIDE: Absolutely.

9 MR. MULVEY: That would also say
10 then that the original casks were obviously
11 not completely safe, or were not perceived to
12 be. You could always get safer I guess is my
13 point.

14 MR. McBRIDE: The reactors are
15 safer, too. I'm not going to deny the
16 technology has improved substantially in the
17 nuclear industry over 50 years, nor am I going
18 to say anything but good things about improved
19 tank car design obviously.

20 And yes, would it be likely in the
21 future that we are going to have fewer TIH
22 accidents because of improved tank car design

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1 and the change-over of the fleet? Yes. But
2 I think it would be a challenge for any
3 industry to have the safety record of the
4 nuclear industry, quite frankly.

5 I know that in some quarters,
6 people regard that as shocking or ridiculous.
7 But frankly, I'll sit here all day and debate
8 this with Greenpeace or anybody else that is
9 on your agenda. I want to see any proof that
10 anybody has ever been injured or died because
11 of a nuclear incident, either a plant or in
12 transportation. And I'll tell you, it's not
13 just the industry that said that. After Three
14 Mile Island, HHW, then HHS under Secretary
15 Califano, was charged with the duty to
16 determine whether anybody died or was injured
17 at Three Mile Island, and statistically the
18 conclusion was, no.

19 So I'm simply making the point to
20 you that I think the transportation of nuclear
21 materials, by rail or any other mode, is an
22 extraordinarily safe event. And I think it's

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1 up to the Congress, quite frankly, to decide
2 whether it's appropriate to extend that kind
3 of regime, comprehensive as it is, to another
4 non-nuclear situation.

5 And I will repeat again: We're not
6 opposed to it; I'm not here to support it. We
7 are here simply to discuss it with you and try
8 to explain how it might be applied if that's
9 what the judgment is of people who have to
10 decided these things.

11 MR. MULVEY: It does sound like we
12 need to be multi-modal if indeed you are going
13 to do it, so it would cover barge movements or
14 truck movements as well.

15 I want to just add one - you make
16 the point that no one has ever been killed in
17 a nuclear accident, and I want to add to that,
18 in the United States.

19 MR. McBRIDE: Granted; I'm here to
20 speak for the U.S. nuclear industry. I was in
21 Europe when Chernobyl occurred, and I'm still
22 here to talk about it, but other people are

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1 not, and I don't diminish the seriousness of
2 that incident at all.

3 But our reactors bear no
4 resemblance whatsoever to that.

5 MR. MULVEY: I understand that, and
6 I feel very much the same as you do on this
7 issue.

8 I wanted to make a comment on the
9 liability limits. The railroads sometimes
10 claim, because of the deep pockets argument,
11 that even if they are only slightly at fault,
12 jury awards can be pretty outrageous, and the
13 deep pocket which would be the railroad would
14 be the one who would bear the most liability
15 even if they were not particularly the ones at
16 fault.

17 Do you know anything about the
18 history of these kinds of cases? Do the
19 jurors - do these awards often get reversed on
20 appeal?

21 MR. McBRIDE: Yes, I'll just cite
22 you one instance out of CSX's testimony. Foot

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1 note 3, they acknowledge that there was a
2 runaway jury verdict as I think they
3 characterize it, but it was overturned on
4 appeal in the Supreme Court of Hawaii. And it
5 was a truck case. I think the one case they
6 cite where they haven't yet had common sense
7 prevail was involving the World Trade Center,
8 but that has nothing to do with railroads, and
9 if there isn't a more sui generis situation
10 than the World Trade Center I don't know what
11 there is in our court system.

12 So I'm not aware of a single case
13 in which there may have been some jury verdict
14 that frankly we probably wouldn't agree with
15 either than wasn't overturned on appeal.

16 MR. MULVEY: Anyone else on that?

17 MR. DONOVAN: Well, the leaking
18 tank car litigation down in New Orleans did a
19 verdict of some \$6 billion as I recall, and \$4
20 billion of that was overturned, and some of
21 the rest was spread around to shippers who
22 paid - I had a client in that case who paid

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1 \$40 million because they were the intended
2 recipient of the product. They had nothing to
3 do with the transportation. Okay, there's a
4 runaway jury verdict, and we all bemoan that.
5 But I don't think you can establish public
6 policy based on a couple of whacky juries.

7 MR. MULVEY: I may have follow up
8 questions.

9 CHAIRMAN NOTTINGHAM: Mr. Buttrey,
10 any questions of this panel?

11 MR. BUTTREY: We have three lawyers
12 on the panel, is that correct?

13 MR. DONOVAN: Four.

14 MR. BUTTREY: Four lawyers on the
15 panel.

16 I'd just like to sort of poll the
17 lawyers on the panel. So a couple of you guys
18 get a pass here.

19 And I'd like for you all to answer
20 this question.

21 Do you support the concept that
22 railroads should be an insurer as a matter of

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1 law?

2 MR. DONOVAN: Insurer? Of course
3 not. Insurer implies you tender something to
4 somebody and they are responsible, under the
5 Carmack Amendment, for example, yes, they are
6 an insurer under the Carmack Amendment,
7 they've got to deliver the product. If they
8 don't deliver the product they are liable for
9 the value of the product.

10 Should they be an insurer for
11 third party damages resulting from no fault of
12 their own? Of course not.

13 MR. McBRIDE: I think it's a good
14 answer, and I would only add that they should
15 buy insurance so they don't have to be the
16 insurer.

17 MR. SCHICK: I would agree with
18 that, too.

19 MR. DiMICHAEL: I agree, also.

20 MR. BUTTREY: There has been a lot
21 of mention in the testimony here and in the
22 written testimony that we should look to

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1 market-based solutions. Maybe I'm missing
2 something here, and if I am, please enlighten
3 me. These discussions have been going on for
4 quite a long time, and as far as I can tell
5 there has been very little progress made in
6 terms of figuring out a way to address this
7 issue than the heavy hand of government,
8 basically telling companies that you have to
9 do this whether you like it or not.

10 And then turning around and
11 saying, oh by the way if something happens
12 your liability is unlimited, whether you agree
13 with the concept of runaway juries or not. A
14 lot of these verdicts don't get overturned.

15 We are not here to regulate the
16 chemistry - chemical industry or any other
17 industry except the railroad industry. There
18 must be a balancing - the act says there must
19 be a balancing of the interests involved here.

20 There doesn't seem to me to be a
21 market based solution anywhere in the offing.
22 Am I missing the point here, or are we close

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1 to some kind of consensus about how this
2 should be addressed?

3 MR. SCHICK: Go ahead.

4 MR. DONOVAN: I think there is a
5 certain premise that we really need to focus
6 on here, and that is the reason we have a
7 Surface Transportation Board, the reason we
8 have regulations of the railroads, the reason
9 we have a common carrier obligation, is
10 because they have the power. They have the
11 market power; there is no question about that.
12 They publish the tariff; you take it or leave
13 it, or we come to you or we go to court. But
14 we don't have free enterprise, a market
15 solution, in our back pocket; they have all
16 the market power.

17 So having said that, you can't
18 look at this as if we are negotiating with
19 them eyeball to eyeball, and whoever blinks
20 first is going to pay something. Their
21 position is essentially take it or leave it,
22 at least in my experience.

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1 Now with respect to other people
2 and other associations - more importantly
3 other individual companies, have they had any
4 progress here in doing that? I don't know,
5 and quite frankly because of the antitrust
6 laws, I don't want to know. They are going to
7 do what they are going to do, and arrive at
8 whatever solution they arrive at.

9 But from an industry standpoint,
10 have I seen any progress? No, because I don't
11 see the railroads prepared to give an inch.

12 MR. BUTTREY: Now, help me out
13 here, I just want to make sure I correctly
14 heard what I think I heard.

15 I think I heard you say that you
16 and the people that you represent would have
17 no problem with the railroads putting an
18 indemnification clause in their tariff, and
19 requiring indemnification if there is a
20 release of some kind of TIH in the
21 transportation chain.

22 MR. DONOVAN: No, you didn't hear

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1 me say that. If you did hear me say that, I
2 misspoke. Because no, I certainly didn't say
3 that.

4 What I said is, if you had given
5 them their policy statement, they are
6 certainly going to have the market power to do
7 it, and we are going to take it or leave it.
8 That is the market power.

9 Now what are we going to do? We
10 are going to file a lawsuit at some place;
11 maybe in a bunch of places.

12 MR. BUTTREY: Now, what do you
13 think the possibilities are that the Congress
14 is going to, of its own free will so to speak,
15 address this issue during our lifetime?

16 MR. DONOVAN: Vis-a-vis elected
17 representatives of our country, I can't make
18 a statement about that. If this is a serious
19 problem, I assume they are going to reach out
20 and try and do something about it. But I
21 think the Congress is looking at the same
22 financial results from the railroads, and the

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1 buy orders, and all the stockbrokers in the
2 country about railroad stock, and looking at
3 their 10Ks and doing all the rest and saying,
4 these guys aren't doing too badly.

5 So I don't think they are going to
6 rush to indemnify them, while the American
7 economy is going in the tank, the railroads
8 are doing pretty well; so I don't see the
9 political will to do that.

10 MR. SCHICK: And I think,
11 Commissioner, that your question, your last
12 question to Mr. Donovan, underscores the point
13 that several of us made before, which is, this
14 is an issue for Congress to deal with. It's
15 not an issue for this agency. You are not
16 authorized to deal with it.

17 And let me illustrate going back
18 to the vice chairman's comment about exempt
19 traffic, we talked about it before. I don't
20 want anyone sitting behind me - I can't see
21 who is back there at this point in the
22 morning, but there could be people there from

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1 the trade press or others - I don't want
2 anyone to think that hazardous material, TIH
3 that is moving in intermodal service in this
4 country is moving unregulated with respect to
5 DOT safety regulations.

6 It may be exempt from economic
7 regulation here, but there are shipping
8 papers; there are placards; there's emergency
9 response information; there's packaging
10 requirements; et cetera. Hazardous materials
11 are covered for safety purposes. This agency
12 has a certain area to deal in, and I think
13 that generating safety rules is not it. And
14 I think that Congress can act if and when it
15 feels it should act.

16 And I think all the interest
17 groups that are here have been talking to
18 their members and to folks on the Hill about
19 these issues. These are not issues that are
20 not being discussed within associations,
21 within companies, between shippers and
22 railroads or among trade associations. And I

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1 think you are well aware of that from some of
2 the testimony and the written material from
3 April as well as from this hearing.

4 Even individual companies talking
5 to individual carriers. However, the fact
6 that we haven't had a decision doesn't mean
7 that this Board takes on the authority of the
8 Congress.

9 Enough said on the Constitution
10 here.

11 MR. BUTTREY: Anyone else?

12 MR. CARLTON: Just briefly, if I
13 might, I would just add a footnote to that,
14 that I think that most of the associations and
15 their members recognize a trendline in the
16 Congress over decades that the Congress does
17 react when motivated. And if in a case like
18 this or a matter like this if carriers and
19 shippers were to engage in a dialogue, an
20 arms-length dialogue where somehow we redefine
21 the playing field so that there is balance, so
22 that there isn't a unilateral injection of an

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1 order, or you shall indemnify us for example.
2 But if the customer has the opportunity for a
3 quid pro quo, if the used car sale results in
4 a good outcome for both the salesman and the
5 buyer, and if we reach a critical mass in this
6 industry revolving around hazardous material,
7 then a proposal could in fact be taken to
8 Congress for their evaluation.

9 But we need to build a full public
10 record of that. We need to put the facts and
11 circumstances out for all to examine and
12 criticize, and add their own observations and
13 data, and we don't have that.

14 MR. McBRIDE: And if I may,
15 Commissioner Buttrey, I just want to remind
16 you that the testimony in American Shortline
17 and Regional Railroad Association at our April
18 hearing indicated they had been in discussion
19 with Congressional staff. And as I recall the
20 testimony they were told that if there were a
21 consensus of stakeholders then Congress might
22 be inclined to do something.

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1 So I would suggest to you the best
2 way to proceed would be for the parties to try
3 to reach that sort of consensus, and then if
4 legislation is needed to carry it out, then
5 that would probably be the scenario that would
6 fit your question.

7 MR. BUTTREY: Thank you very much.
8 That's all, Mr. Chairman.

9 CHAIRMAN NOTTINGHAM: If I could
10 just jump in and follow up on that, Mr.
11 McBride, let's work through your little
12 hypothetical which I realize may have some
13 premises that you might not agree with. But
14 let's assume the Board decides to deem it
15 somehow a reasonable practice for railroads to
16 require some indemnification, or some partial
17 indemnification, and let's assume that gets
18 upheld in courts - big assumption for you, Mr.
19 Donovan, by the implication of his reference
20 to lawsuits in multiple courts - but do you
21 think at that point this consensus that you
22 just referenced would happen sooner than it

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1 might be on pace to happen now as far as a
2 strong message for the need to address this to
3 be made to Congress? Or would it be less
4 incentive?

5 MR. McBRIDE: We've haven't been in
6 these discussions for the most part that are
7 going on. I reported to you in April we were
8 willing to - there may have been a brief
9 conversation since, but we really haven't been
10 in these detailed negotiations.

11 But if I accept the premises of
12 your question, and I would challenge the first
13 two premises if you permitted, but since you
14 won't I'll accept them; say that you adopted
15 this and it's upheld in court, and would that
16 be more or less likely to achieve consensus.
17 And I would tell you it would be less likely.
18 And I think you will hear from more people
19 today who will tell you that that is just
20 going to divide the parties, make shippers
21 angry and lead to unpredictable consequences.

22 CHAIRMAN NOTTINGHAM: Just to make

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1 sure you understood my question, I was asking
2 whether it would lead to more of a consensus
3 presentation to Congress on the need to
4 actually change the status quo at that point
5 on this issue.

6 MR. McBRIDE: And I did understand
7 that, and my answer is the same, it would not
8 promote that, and the reason is this: the
9 railroads would have what they need, and they
10 would have no incentive to work with the
11 shippers to accommodate the shippers in the
12 concerns that the shippers have expressed.

13 For example, the railroads'
14 concern is that the costs that they incur
15 carrying HAZMAT they say are not fully
16 captured in your costing system. That is
17 their allegation; I'm not agreeing with it,
18 I'm just saying that is there allegation.

19 And if we did as you hypothesize,
20 Mr. Chairman, if you did as we hypothesize
21 over our objection, and it were upheld, then
22 the railroads to a certain extent would be

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1 relieved of those costs.

2 But because their rates are
3 generally market based, demand based rather
4 than cost based, I can confidently predict
5 that we are not going to see any voluntary
6 reductions in the rates. So the shippers
7 would get no benefit out of this.

8 And out of the negotiation that I
9 envision there would be benefits for both
10 sides on this, not the least of which if they
11 end up in some kind of agreement that
12 accommodates the interests of all sides, and
13 perhaps there were routing reductions as a
14 result that we can't achieve today because of
15 the way rates are set and that sort of thing,
16 we would probably have a much safer
17 transportation system for hazardous materials
18 as a result of that consensus.

19 But today I don't see it
20 happening, because the railroads are asking
21 you for what they want and nothing for the
22 shippers.

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1 CHAIRMAN NOTTINGHAM: Thank you.

2 Mr. Schick, at our April hearings,
3 we heard from the American Chemistry Council
4 that there was some interest on the part of
5 ACC in dialogue. There is reference in the
6 record, in statements, that the ACC had
7 engaged in some discussions with the rail
8 industry last year, and there was some
9 reference to a desire to pick up on those
10 discussions.

11 Can you update us? It's now
12 midsummer. We've had a few months in case
13 this issue was not known to be of serious
14 concern to the Board before April it certainly
15 is now.

16 Because it is important to me to
17 gauge and understand the seriousness of the
18 parties when they say they actually intend to
19 or hope to dialogue. Because we do prefer
20 private sector resolution in this matter.

21 But if we don't sense in the
22 record that there is actually any progress

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1 whatsoever towards private sector resolution,
2 and we believe there is still a problem, we
3 may have to do something.

4 So update me on what's going on.

5 MR. SCHICK: Sure, sure, as I said
6 earlier, there have been talks going on.
7 Individuals members of ours, since the April
8 hearing, have been talking to individual
9 railroads. I don't believe there has been a
10 meeting at the ACC slash ARR level, an
11 industry-to-industry association meeting.

12 Since that time, the members have
13 been talking with their carriers, we're sure
14 of that, and we are getting feedback from
15 that.

16 So that is my report in terms of
17 what's been going on. The second aspect of it
18 would be, again, in terms of private sector,
19 even if there were something more detailed to
20 report, I'm not sure that private sector
21 solutions are best reported on in public
22 hearings if you are talking about

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1 negotiations, or you are talking about
2 reaching agreements about how to proceed.

3 But putting that aside as I say,
4 that's the status of where the talks are at
5 this point.

6 CHAIRMAN NOTTINGHAM: Thank you.

7 We heard some reference in the FRA
8 testimony earlier about the U.S. DOT process
9 of convening discussion that had some
10 protections from different statutes, including
11 some antitrust protections, the 303 process
12 that was referenced, 333, correct.

13 And I understand from looking at
14 the testimony referencing those discussions
15 that the - there were concerns raised by the
16 Justice Department, or at least at a minimum
17 concerns about what the Justice Department
18 might do if the chemical industry for example
19 went too far in having internal dialogues
20 amongst member companies about routing,
21 efforts to reduce routes, lengths, and other
22 discussions that might involve sharing

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1 customer lists and details.

2 Help me understand that situation.

3 I want to understand whether or not - it's one
4 thing to say there are perennial Justice
5 Department concerns about an industry sharing
6 amongst competitors customer information. But
7 there are, in other forms, at least, there are
8 ways to petition Justice for some limited
9 waiver or some letter. Were those efforts
10 undertaken? It's been at least alluded to
11 that some chemical companies may not really
12 see it in their interest to share routing
13 lists and try to shorten their shipments
14 because it might lose a customer here or
15 there.

16 So I want to see what the
17 motivations and incentives are, where Justice
18 is really being engaged there.

19 MR. DONOVAN: Let me respond to
20 that, Mr. Chairman, because I was in all those
21 meetings. At least all those meetings
22 involving chlorine as was your staff.

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1 The concerns that Justice had are
2 the same concerns that I had at the outset of
3 the Section 333.

4 Section 333 is a limited antitrust
5 community for railroads to get together and
6 share information on how best to more
7 efficiently run their systems and so on and so
8 forth.

9 Shippers are mentioned in that
10 statute. It comes out of the 4-R act as I
11 recall. Shippers are mentioned in there, but
12 the question of whether shippers would be
13 given any immunity for such discussions
14 amongst themselves as opposed to dealing one-
15 on-one with the government was very much up in
16 the air.

17 What was initially proposed by the
18 Department of Transportation was that all the
19 shippers would come together. And in the case
20 of chlorine you are talking about essentially
21 five major shippers. It's a concentrated
22 industry. And their plants are scattered

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1 around, based on historic inspiration, where
2 the power was cheaper. There are only two
3 costs of chlorine; one is electricity, and the
4 other one is transportation. Salt is not
5 exactly expensive.

6 So the question became where is
7 the chlorine produced and where does it have
8 to go. And if for example a hypothetical
9 which is probably not true but let me give it
10 to you anyway, let's assume that all the
11 consumers of chlorine are located in the
12 Northwest, with the exception of one or two,
13 and all the producers are located in the
14 Southeast.

15 Now if you want to get together
16 and determine how you are going to prevent
17 that traffic from moving, you are in a very
18 fancy territory allocation scheme which would
19 probably be a per se violation of Section 1 of
20 the Sherman Act.

21 Now if that is not to be the case,
22 if you go in with your clients, you are going

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1 to say, okay, Mr. Justice Department, I want
2 you in this proceeding, where you are sitting
3 there, they were there, I want you to give us
4 the effective equivalent of a business review
5 letter, which is the formal process you were
6 alluding to.

7 And the basis for that is to
8 promote security and safety by not allowing
9 these things to move. To put in some
10 artificial barrier so that these companies can
11 more or less allocate their markets and ship
12 only 100 miles instead of 1,200 miles, which
13 sounds good from a safety and security
14 standpoint.

15 The Justice Department, after
16 reviewing that in some depth, said, no, they
17 were not going to give us those assurances.

18 So we walked into those meetings
19 with the five shippers and sat down, we were
20 at our own risk for violating the Sherman Act.

21 Now no lawyer worth the powder to
22 blow him to kingdom come is going to let that

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1 happen. So that was the end of that part of
2 it. But that was not the end of the process.
3 The process went on at some length. And part
4 of our presentation - I say, our, I was there
5 for all five chlorine shippers who presented;
6 they all presented independently and without
7 any knowledge of what each other said, and I
8 didn't prompt them or tell them what to say or
9 do anything like that; they came and made
10 their own presentation. All I did was sit
11 there and monitor the way your staff did.

12 And the fact of the matter is that
13 there were indications that the railroads had
14 put in artificial barriers, paper barriers,
15 steel barriers, that required traffic to move
16 longer distances than it would in a normal
17 commercial setting.

18 And we said, fine, let's eliminate
19 those. You can eliminate those without any
20 market allocation, without anything being
21 unlawful. We all made those presentations;
22 where they went I have no idea, because I

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1 never got briefed as a result of those 333
2 hearings. As far as I know they disappeared.

3 So you asked a question, and that
4 was what happened. But we responded in good
5 faith in an effort to try to reduce the number
6 of ton miles that we moved the product. There
7 is no incentive for a shipper to pay extra
8 freight. That's crazy. We would prefer to
9 move it as short a distance as possible. But
10 that is not what was going to happen unless we
11 violated the Sherman Act, and I wasn't really
12 comfortable doing that for obvious reasons.

13 CHAIRMAN NOTTINGHAM: Thanks, that
14 was very responsive, I appreciate that.

15 MR. SCHICK: Mr. Chairman, if I
16 could add one point to that. I was not in,
17 because after the Section 333 began, it
18 quickly was focused - FRA was the convenor of
19 what they call conferences under 333 - it's a
20 DOT authority but it's delegated to FRA - they
21 quickly narrowed down anhydrous ammonia
22 specifically and chlorine specifically.

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1 So ACC, what you have been in the
2 beginning in proposing this along with AAR to
3 the DOT it was a joint proposal to DOT. We
4 felt that that statute might indeed allow for
5 the kind of discussions that we were
6 contemplating. It was the DOT authority; it's
7 not a DOJ authority; it's not a STB authority.
8 It's clearly at DOT authority.

9 But the way the conferences were
10 convened and among the agencies, they invited
11 STB to come, and TSA, and they obviously
12 invited FTC and Justice. That's the way it
13 came out.

14 So I just wanted to let folks
15 again, know not being able to see whose back
16 there, it began as TIH. It narrowed down. It
17 was a joint initiative, and it got as far as
18 it got. But I wanted to give that kind of
19 background to you again, because we thought in
20 good faith going in that that was the proper
21 place to try to deal with the kind of issues
22 that Paul described.

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1 CHAIRMAN NOTTINGHAM: Have there
2 been any efforts to bring this situation vis-
3 a-vis the Justice Department and antitrust
4 concerns to the attention of the Congress?
5 Is this something that any of the associations
6 deem is important enough to say, hey we need
7 relief, we are trying to do the right thing
8 from the safety perspective. You guys have a
9 pretty strong safety record, and as the
10 railroads do, is it - or just end of the
11 matter. Because I am still concerned that
12 some shippers may prefer to keep the system
13 the way it is, even with this arguably
14 heightened exposure to the public.

15 MR. DONOVAN: The problem, Mr.
16 Chairman, quite frankly is that I haven't
17 heard a word from the FRA since the last
18 hearing. And I think you were in there for or
19 your law firm was, for TFI, and we haven't
20 heard anything. So I don't have anything to
21 react to. I can't go to Justice and say, here
22 is the problem that FRA found, and here is a

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1 way that we could reduce ton miles, and we
2 want some kind of waiver either from Justice
3 or from Congress.

4 And until we have some kind of
5 report, I don't even know what we are talking
6 about. Because they apparently - I say they,
7 apparently, from what I'm told unofficially is
8 that FRA talked to TFI, to the Chlorine
9 Institute, individual members, TFI individual
10 members, and to the railroads, and I don't
11 know whether that was collective or
12 individual, I assume it was individual but I
13 don't know that. It may have been collective
14 because their immunity is a lot broader than
15 shipper immunity would have been, so they may
16 have talked to them collectively.

17 Where that sits I have no way of
18 knowing. My inquiries have not been responded
19 to officially, and my contacts obviously are
20 not at the highest level. They are at the
21 lawyer level with my counterparts, and they
22 can't say anything more. So that's where it

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1 is.

2 CHAIRMAN NOTTINGHAM: I would be
3 happy to offer the Board's good offices if we
4 can help with opening up lines of
5 communication with FRA. In our experience, we
6 have found them very easy to communicate with.

7 Do you, does the Chlorine
8 Institute and their chemistry counsel, for
9 example, agree with sort of the premise of the
10 DOT's going in concerned that we probably have
11 more risk exposure right now as a country
12 because of the way TIH materials are routed,
13 and the lack of discussions about shortening
14 routes, amongst all concerned? Railroads are
15 as you point out may be the cause of some
16 additional miles added to routes for their own
17 reasons. Chemistry companies may be for their
18 own reasons, they want to attract new business
19 for chlorine as well, in other words if you
20 agree with that premise that it's a problem
21 that needs to be addressed, then I would think
22 you wouldn't wait for a call or letter from

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1 the FRA; you would be speaking to the Congress
2 about allowing these discussions to take
3 place.

4 MR. SCHICK: Two comments: first of
5 all we obviously agreed with the premise of
6 the AAR. Or we wouldn't have approached DOT
7 in the first place. This was an industry
8 initiative to government, not the other way
9 around.

10 Second of all to get back to your
11 original question on this particular topic,
12 ACC has from time to time briefed the Hill on
13 the fact that this was going on, and we did
14 not get maybe to the level of going in and
15 saying, unleash this thing or something like
16 that.

17 But it was not a question of not
18 being supportive of it, and we have not hidden
19 it from the Congress in anyway. We have from
20 time to time, in listing things we were
21 engaged in, we have mentioned DOS 333. I'm
22 sure the railroads have. I've seen references

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1 to it in testimony in various places.

2 CHAIRMAN NOTTINGHAM: But it
3 sounds as if the Justice Department concerns
4 described by Mr. Donovan might well be an
5 example of the government economic regulators
6 trumping safety regulators.

7 There has been a lot of - there
8 has been a lot in the record by the parties to
9 say that shouldn't happen.

10 Does anybody want to speak to that
11 issue?

12 MR. DONOVAN: Mr. Chairman, the
13 problem, and I understand the import of your
14 question, and I am inclined to agree with the
15 thought process. The problem I have is that
16 I have no quantifiable way of knowing how much
17 of the problem, quote unquote, let's assume
18 there is a problem, could be solved by any
19 congressional or Justice Department action.

20 I mean if in fact the production
21 is all here, and the consumption is all here,
22 it's going to move, unless you shut down the

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1 plants, and I wish you very good luck in
2 trying to open a new chemical plant these
3 days.

4 So the fact of the matter is, it's
5 going to move because that is where it has to
6 go. And if you can't solve that, and I think
7 over time that will be solved; people don't
8 want to transport this stuff over rails,
9 particularly given the railroad structure
10 right now. They are going to move away from
11 rail transportation. They are going to move
12 away from anything they can in moving that.

13 But in the meantime, while that
14 economic - you can't dislocate the economy of
15 the nation to make that happen all at one
16 time. The stuff, you are still going to have
17 10 million tons produced here, and eight
18 million tons consumed here; that's the way it
19 is - I'm overstating numbers. But it's going
20 to move; it has to move.

21 CHAIRMAN NOTTINGHAM: Would anybody
22 else like to speak to the example of that

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1 being an example of economic regulators
2 trumping safety regulators?

3 MR. SCHICK: I'm not sure that I
4 would characterize it as trumping, or as sort
5 of a generic problem. I would say it is
6 illustrating the interactions, the security
7 issues, the safety issues, the economic
8 issues, the antitrust issues, to the extent
9 those are different than what we normally
10 think of as economic regulatory issues, is a
11 complex business, as is the topic of today's
12 hearing as well. It's very complex, which is
13 why a comprehensive solution is needed rather
14 than picking it all up in one piece and
15 working on that piece. I'm not saying that is
16 what happened in Section 333; maybe to some
17 extent that is what happened, and I certainly
18 don't want to speak for the Justice
19 Department. But there are competing
20 interests, and ultimately that stuff has to
21 filter up, if someone is going to resolve it,
22 it's going to have to filter up to Congress.

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1 That goes back to my initial
2 comments here about the policy statement. It
3 is going to have to move to Congress to get
4 fixed.

5 CHAIRMAN NOTTINGHAM: There has
6 been a lot of reference to insurance, the
7 availability of insurance coverage, insurance
8 costs. I wish we had the insurance industry
9 or some representatives before us, so we could
10 learn a little bit more about the industry.
11 We may be reaching out via letters or some
12 other way to be sure we have an accurate
13 understanding of the insurance marketplace.

14 But it occurs to me that many of
15 you and your members, perhaps all of you and
16 your members, have to deal with insurance
17 companies in a big way, regularly. What is
18 your sense of the market out there? I will
19 probably be asking this question of other
20 panels as well. How hard is it to get
21 insurance? Would you even need additional
22 insurance for example if you were a large

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1 chemical company? You already presumably have
2 a lot of insurance. If we allowed the
3 railroads to require that you partially - let
4 me emphasize that, partially - be indemnified,
5 would you even need to buy more insurance?
6 Would your existing coverage be ample? Let me
7 throw that out.

8 MR. McBRIDE: Well, first of all as
9 I tried to lay out in my testimony, Mr.
10 Chairman, if the railroad industry were to
11 move to the model of the nuclear industry, and
12 I can't tell you categorically that the
13 insurance industry would provide precisely
14 these vehicles. But it hasn't been tested.
15 I'm not sure the railroads could say that they
16 won't be available either.

17 But if the railroads were for
18 example to each have a billion dollars in
19 comprehensive general liability insurance
20 which I believe was the Norfolk Southern
21 testimony, that leaves \$4-5 billion for the
22 \$5-6 billion nightmare scenario that Union

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1 Pacific's general counsel testified to, and
2 that would require another \$600-700 million in
3 secondary insurance by each of the railroads.

4 Because it would be secondary,
5 because it would be pooled, and because it
6 would only apply pro rata, they may well be
7 able to acquire that amount of insurance.
8 They may sit here and tell you no, we got the
9 billion and that's all we can get. But I
10 don't think they have tested a pooled
11 arrangement like that, and the willingness of
12 the insurers to provide it.

13 If instead you want to go to a
14 lower number, I understand that they have put
15 before you the proposal that they provide \$500
16 million in comprehensive general liability
17 insurance, and then there would be some kind
18 of indemnification thereafter. If we
19 substitute for that a pooled arrangement they
20 would need \$4.5 billion to get to their \$5
21 billion threshold. That would be about per
22 Class I about \$700 million, and you would be

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1 within haling distance of the \$1 billion that
2 Norfolk Southern says it has.

3 And what it has is primary
4 insurance. And what I am proposing to you is
5 a system of primary insurance as a first layer
6 that each railroad would have, and then a
7 pooled arrangement of secondary insurance akin
8 to that in the nuclear industry.

9 And I don't see any reason why the
10 insurance industry would be unwilling to
11 seriously consider selling the same kind of
12 thing to the railroads that they sell to the
13 nuclear industry.

14 They may be very scrupulous about
15 how the industry operates, and under what
16 circumstances they would insure, but I'm not
17 sure that those discussions have yet occurred,
18 so I don't know how I could otherwise
19 categorically answer your question except to
20 say that I think that model is a very viable
21 one.

22 MR. DONOVAN: Mr. Chairman, I would

1 add one thing. I don't hold myself out to be
2 an insurance expert. I have done insurance
3 work in the past in some areas akin to this,
4 but not this.

5 It would be extremely difficult in
6 my opinion to purchase insurance for the
7 liability of someone over whom you have no
8 control. No insurance company is going to
9 turn around and give me a policy that insures
10 you without more.

11 They have no way of policing it,
12 they have no way of checking it, and I have no
13 way of determining what your risks are, and so
14 on and so forth.

15 CHAIRMAN NOTTINGHAM: So help me,
16 how does that square with your statement
17 earlier, your written statement, that this is
18 all about who is going to be paying for the
19 insurance. Were you referencing self
20 insurance perhaps?

21 MR. DONOVAN: No, I was referencing
22 the fact that the railroads now want us to

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1 provide that insurance. They want us to buy
2 insurance, and if we were going to buy it, it
3 was going to cost a whole lot more, if we can
4 get it, for them, to insure them, it's going
5 to cost a lot more, because we have no
6 control. The insurance company has no way to
7 monitor railroad performance.

8 Obviously the company that insures
9 the railroad can modify their - can police
10 their performance. They can see the
11 statistics; they know what the risks are. And
12 they write their insurance based on that.

13 But to come to a chemical company
14 and say, okay, by the way, XYZ Chemical
15 Company, you now have to go write a policy for
16 the Norfolk Southern; I think that is going to
17 be resisted by the insurance industry.

18 As I say I'm not an expert on
19 this, but that is my understanding.

20 MR. McBRIDE: And the point, Mr.
21 Chairman, in any event, is if the railroads
22 are the ones who go out and buy the insurance,

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1 we'll be paying for it.

2 CHAIRMAN NOTTINGHAM: So under my
3 partial indemnification hypothetical, Mr.
4 O'Connor, do you believe your members would be
5 able to purchase insurance, but it would be
6 more expensive than -

7 MR. O'CONNOR: I have no way of
8 knowing an answer to that question. I know
9 you can buy insurance if you are prepared to
10 pay a premium high enough. If you want to pay
11 the face value of the insurance policy as a
12 premium, yes, you can buy it. There is always
13 a limit, and there is always a question of how
14 much money.

15 But right now the railroads are
16 disclosing in their 10Ks that they face
17 liability from TIHs. It's right there; it's
18 in all their 10Ks. And at the same time they
19 are providing insurance to protect their
20 shareholders, and their officers and directors
21 for that matter, from losing their
22 investments.

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1 And I assume, as fiduciaries, they
2 are providing enough insurance.

3 So I don't know that there is not
4 insurance available now on their books. All
5 I know is what they say in sweeping
6 generalities. I haven't seen a number about
7 how much they have, how much they can buy.

8 As you point out, it surprises me
9 - in fact it stuns me - that the railroads
10 have not shown up here with their insurance
11 brokers to make some kind of statement about,
12 this is what they can buy, this is what they
13 can't buy, to just say it.

14 I don't think we can accept that,
15 not on this record.

16 CHAIRMAN NOTTINGHAM: There was,
17 and I'll wrap up, but I did want to explore
18 one last line of questioning.

19 Several statements today including
20 I believe the NITL statement, raised concerns
21 and questions about this Board doing anything
22 that could conceivably - and I'm reading from

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1 the top of page 9 of the NITL testimony,
2 paraphrasing, that could conceivably adversely
3 impact safety. And we of course have high
4 regard for the FRA, and defer to the FRA as
5 the lead safety regulator of the railroads.
6 However, it does occur to me that occasionally
7 we have controversies and cases brought to us
8 where it could be downstream and indirect or
9 maybe not so indirect implications on safety,
10 but the issue is a valid economic regulatory
11 one, and we have to do the best we can.

12 Help me understand, is it the
13 position of - let me start with NITL and work
14 my way across the panel, is it any of your or
15 all of your witnesses' position that the Board
16 should never make a decision that could
17 somehow, directly or indirectly, adversely
18 impact safety?

19 For example, making a decision
20 that might cause somebody to move from rail
21 transportation to truck transportation which
22 implicitly would be a riskier - in almost

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1 every scenario - a riskier movement?

2 MR. DiMICHAEL: Mr. Chairman, let
3 me try an answer to that. The Akron case says
4 specifically that questions of liability
5 involve questions of safety. So when you deal
6 in questions like that, you are going to be
7 dealing in incentives for safe conduct or not,
8 and I think what the League was saying in
9 those is, the Board has to be very very
10 careful in this area, precisely because of the
11 need for safety here, and to ensure that
12 whenever it is looking into this it is not
13 doing something that would adversely impact.

14 You said never; I'm not sure never
15 is - never is very sweeping. But certainly
16 that needs to be a thing that is at the top of
17 the Board's consideration whenever it is
18 dealing with one of these kinds of questions.

19 MR. McBRIDE: And Mr. Chairman, as
20 one of the fossils who was involved in the
21 Akron case, let me just add that it was
22 extremely important to my clients that the

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1 rail mode continue to be available to
2 transport these materials, not only because it
3 was economically infeasible to do it
4 otherwise, but it was, from a safety
5 standpoint, far safer to have rail
6 transportation as I testified earlier. Casks
7 tend to be affixed to the rail cars. Is there
8 anything more captive than that? And we
9 demonstrated over and over again, and we are
10 pleased to say so, that the railroads are a
11 safer mode. The ICC's FEIS in those
12 proceedings concluded that the rail mode was
13 about 14 times safer than the trucking mode,
14 I think the statistics are probably at least
15 as good today. The rails are certainly safer
16 than they were in the late '70s when that
17 conclusion was arrived at, and we think that
18 it's a matter of profound public policy in
19 this country that the rails, which we think
20 are the safest transportation mode, continue
21 to have to carry these materials.

22 What other arrangements are

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1 arrived at in order to permit that to continue
2 so that they can do so safely and with a
3 reasonable return on their investment, which
4 we are all in favor of, I think should be left
5 to the parties. But it is absolutely vital to
6 our interest that you continue to require the
7 railroads to transport those materials.

8 Thank you.

9 MR. DONOVAN: Mr. Chairman, I think
10 I will go back to the Bisso case if I may.
11 That was 1955, United States Supreme Court.

12 And the reason for the rule that
13 the Bisso court stated was to discourage
14 negligence by making wrongdoers pay damages.

15 There is a fundamental federal
16 public policy there. Now I am not going to go
17 off on a statement that NITL made about safety
18 or something like that. I'm saying that what
19 this board should never permit itself to do is
20 violate a federal public policy expressed by
21 the United States Supreme Court that says the
22 way you discourage negligence is to make the

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1 wrongdoers pay.

2 It's not by making somebody else
3 pay for their wrongdoing.

4 MR. SCHICK: I think batting fourth
5 here I'm going to agree with my three
6 predecessors.

7 CHAIRMAN NOTTINGHAM: Mr.
8 DiMichael, I suspect if we had a hearing on
9 the subject of differential pricing as a
10 policy matter, we might hear some different
11 views, and some robust views - I don't want to
12 turn this into that hearing, rest assured -
13 but there we often run into concerns that if
14 we were to somehow prevent the railroads from
15 practicing recommended differential pricing we
16 would be limiting their ability to attract
17 freight from the trucking industry by offering
18 low rates, and we might be causing more
19 traffic to go out on the highways.

20 It's just an example. I could
21 give you others. Do you follow me on that
22 one, the logic that one of the arguable

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1 benefits of differential pricing is that it
2 allows railroads to bid real low to offer low
3 prices to truck traffic to entice them onto
4 the rails to help us with our national highway
5 congestion and safety challenges?

6 But the price of that is they have
7 to charge other customers who may be somewhat
8 or very captive higher rates. Again, it's an
9 example of a policy that has arguably strong
10 safety benefits to it, but it may not be very
11 palatable to some parties.

12 I could give you other examples
13 like preemption cases. We had a preemption
14 controversy mentioned earlier today, where the
15 Board made, in accordance with the law, a
16 finding that we need to protect railroad
17 operations from local regulation when in fact
18 in doing so we are increasing in some small
19 way perhaps safety risks. The world might be
20 safer if localities could shut down more rail
21 operations, but there are economic tradeoffs
22 that I think the authors of some of our

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1 statutes have recognized, that safety doesn't
2 always trump economic regulation. I think the
3 Justice Department would probably point out,
4 if they were here the antitrust concerns.

5 I've given you a fair amount to
6 work with there. Is there anything you want
7 to respond to? I'm responding to your line in
8 your statement about almost reads about safety
9 always trumps economic regulation. I just
10 want to make sure we are careful before we all
11 adopt that as a position.

12 MR. DiMICHAEL: Well I think the -
13 I mean when you are talking about differential
14 pricing, certainly there is a certain amount
15 of differential pricing written into the
16 statute. The Board has to respect that. The
17 Board has an obligation under the statute also
18 for adjudicating reasonable rates.

19 There are safety requirements in
20 the statute as well, some of them
21 administered, most of them administered by the
22 FRA which the Board also has to respect.

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1 So there are - and we've heard
2 this here that there are other federal
3 policies such as the antitrust laws that the
4 Board also needs to take into account, and
5 other agencies need to take into account too.

6 There is obviously a need to
7 balance some of these. But certainly safety
8 is something that the Board needs to be very
9 cognizant of, and I think that is the point
10 here.

11 CHAIRMAN NOTTINGHAM: That
12 concludes my question for this panel.

13 Vice Chairman Mulvey, any
14 questions.

15 MR. MULVEY: Some brief questions.
16 We've been here a long time.

17 So Mr. O'Connor, the table one
18 which you prepared, for the Chlorine
19 Institute, you have the insurance laws,
20 casualties, loss in damage claims, et cetera,
21 for a five-year period for the five major
22 Class I railroads, U.S. railroads. And you

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1 note that overall, over the five-year period,
2 the overall cost, insurance cost, was down 37
3 percent.

4 But in fact if you look from 2003
5 to 2004, you would have found that the cost
6 was up about 20 percent.

7 So there seems to be a lot of
8 variation, both across years and across the
9 railroads, and I was wondering whether you
10 looked behind these numbers to see what might
11 explain the variability from year to year for
12 the different railroads over time?

13 I know it's difficult to mix time
14 series across cross-sectional data. But
15 nevertheless as you were doing it, did you try
16 to do any analysis to explain the variability?

17 MR. O'CONNOR: Well, we gave it
18 some thought, Frank, and thanks for the
19 question. That particular comparison when we
20 got behind the data, we did a cross-check of
21 the data as reported in the R-1, and we did a
22 secondary cross-check of the data as reported

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1 in URCS.

2 And in fact for the year 2004 we
3 found an unexplained variation for two of the
4 railroads from the West in the 2004 numbers.
5 So I think we are better off staying with the
6 beginning point, 2003, and ending point, 2007,
7 rather than try to analyze on the surface of
8 the data something that might be not
9 completely evident to us if you will.

10 MR. MULVEY: So there was no
11 attempt at finding some sort of explanatory
12 variables that would explain the overall
13 downward trend by railroad?

14 I noticed that the 2004 increase
15 was largely the result of the increase of the
16 two Western railroads; the other ones in fact
17 all went down. But I was just wondering if
18 there was any kind of things the railroads
19 were doing or the shippers were doing that
20 would help explain the secular - well, it
21 seems to be - I couldn't say secular - five
22 years - but the decline over this five-year

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1 period.

2 MR. DONOVAN: Mr. Vice Chairman,
3 the only thing that the data show, on its
4 face, is that 2004, the two Western railroads
5 bumped up in casualty insurance. I assume a
6 lot of that was casualty, and that was the
7 year of McDunough. That was the year that the
8 UP ran into the BN. Okay?

9 In 2005 you will note that Norfolk
10 Southern numbers bump up. That was the year
11 of Graniteville. So do I say that is the
12 reason? No, but you asked plausible reasons;
13 that is a very plausible reason.

14 MR. MULVEY: And we do know that in
15 subsequent years after those bump ups they go
16 back down again. So they don't seem to be
17 long-term insurance consequences.

18 At any rate, Mr. Schick, can you
19 comment - I think Mr. Nottingham, Chairman
20 Nottingham was making this point too.
21 Everybody is interested in seeing that the
22 railroads increase their overall market share

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1 to divert traffic from the trucks, get the
2 trucks off the road, for the energy and
3 congestion reasons as well as moving TIHs by
4 a safer mode of transportation.

5 But there is also a proposal now
6 with these new tank cars or these interim tank
7 cars, that railroads carrying those operate
8 under reduced speeds. For interim cars I
9 think the speed is 35 miles an hour, with the
10 new cars, 50 miles an hour.

11 But since these movements tend to
12 be in mixed consists, that slows the entire
13 operation down and will probably undercut the
14 ability of the railroads to compete for
15 traffic.

16 Do you have any views of the
17 desirability of putting speed restrictions on
18 the movement of these interim and new tank
19 cars?

20 MR. SCHICK: A couple of responses
21 to that.

22 First of all when we spoke this

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1 morning of the interim tank car, that is the
2 petition for a car that would be - it has not
3 been ruled on yet, but I think Mr. Eby said
4 they were hoping to rule on that by November.
5 So that is not in place. That is limited only
6 for tank car design. There is no speed limit
7 to that. That is specifically for TIH tank
8 cars to bridge over to the tank car design
9 that is in the long run rulemaking that PHMSA
10 and FRA are running.

11 That longer run rulemaking has
12 much more in it than tank car design, and one
13 of the items it does have in it is speed
14 limits. And it would be a variation on speed
15 limits based not on which tank car it is, but
16 on whether or not there is signaling on that
17 line, because as we know dark territory was an
18 issue specifically in the Graniteville
19 accident. And there have been subsequent
20 steps taken by FRA to deal with these kinds of
21 issues.

22 So that's just to kind of clarify

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1 I think some of the points in your question.
2 Certainly if there are speed limits on the
3 operation of trains containing TIH or PTIH in
4 mixed loads - mixed trains, which it usually
5 is; it's merchandise traffic. These aren't
6 unit trains like we've got with coal or grain
7 or something like that. That would affect how
8 the railroads operate.

9 And then the railroads will speak
10 for themselves if you wish to ask them about
11 how that will affect them. They talk to our
12 members; they talk to us about that.
13 Obviously we are interested in good service,
14 not only for TIH but for our other products,
15 and for other people's products as well. That
16 is a balance that is in the long-run
17 rulemaking at DOT, and the comments were
18 mostly in on time by June 2. And I don't know
19 where DOT is going to come out on that speed
20 limit issue. I mean it has been raised as a
21 complicating factor, as have some security
22 regulations and whatnot been raised as well.

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1 But there is nothing final on any
2 of those things, so aside from highlighting
3 for you some of the points of view and
4 concern, I mean we are not in here saying the
5 train should go 100 miles an hour, and we are
6 not in here saying the train should go 10
7 miles an hour.

8 I think FRA is trying - I
9 shouldn't say FRA - DOT is trying to balance
10 a lot of different factors in that long-run
11 rulemaking, which is tank car design, but also
12 other factors such as speed limits. And it is
13 part of that much more comprehensive approach
14 they have taken, for example, checking on
15 continuous welded rail - that is the Minot
16 case. There has been research on
17 nonnormalized steel; that is another issue
18 that is looked at in this rulemaking for the
19 long-run car design and phasing out
20 nonnormalized steel cars more quickly. Again
21 that is an aspect that you saw at Minot.

22 They've done other things at FRA

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1 dealing with human factors, what they call
2 human factors. I think there were some human
3 factors involved at Graniteville like not
4 returning the switch to the mainline
5 direction. There were some human factors at
6 McDunough, Texas involved in what happened.
7 And DOT and in particular FRA in this case,
8 going beyond tank car design, has done a
9 really admirable job of looking at many many
10 different things, providing additional
11 information to emergency responders as well,
12 which you might not think of as tank car
13 design, it's not train speed, but they have
14 done a lot of things in the past three years,
15 and I do commend that final report on the
16 national rail safety action plan, too, because
17 it explains a lot of things not all of which
18 are formal rulemakings that they have done.

19 MR. MULVEY: Tom and the panel at
20 large, is anybody familiar with any studies
21 that show a relationship between average rail
22 speeds, operating speeds, and the probability

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1 of accidents or incidents and spills and
2 seriousness of accidents? And I'm not talking
3 about where there is a rules violation where
4 you are going much much beyond what the
5 specified speed is, but just even when
6 operating within the rules if there is some
7 correlation between speeds and accidents or
8 incidents?

9 MR. DONOVAN: I wouldn't
10 necessarily say accidents or incidents. I'm
11 sure there is. But I do know that getting
12 right to what we are talking about, chlorine
13 cars, you've never had a catastrophic release
14 of chlorine in an accident where the train was
15 going less than 30 miles an hour.

16 These are robust cars. They
17 bounce along pretty good, and you really have
18 a problem when you get above that. At
19 Graniteville, for example, it was at 50, and
20 had no time to even hit the breaks before that
21 collision occurred, because the poor engineer
22 didn't know what was 50 yards ahead of him

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1 because the track wasn't signaled.

2 So that is an answer to your
3 question. If you do slow down, particularly
4 in non-signalized track, you are going to
5 greatly diminish the probability of a release;
6 that I can say. And I think DOT, FRA and
7 PHMSA say that in their rulemaking.

8 MR. McBRIDE: I don't know how
9 helpful this is to you, but in the final
10 environmental impact statement that the ICC
11 prepared, in about 1977, involving radioactive
12 materials cases, in which the issue on the
13 table was special train service, and there
14 were proposals for speed limits on those, the
15 bottom line conclusion, after considering all
16 the relevant factors, was that special train
17 service would not improve the safety of the
18 transportation of radioactive materials at
19 that time.

20 Now of course that was pre-9/11.
21 I think there may be a different attitude in
22 the industry today. But I think there may be

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1 something useful to you there.

2 MR. MULVEY: Thank you all.

3 CHAIRMAN NOTTINGHAM: Any other
4 questions for this panel?

5 MR. MULVEY: No further questions.

6 CHAIRMAN NOTTINGHAM: Thank you,
7 panel. You will be dismissed. Thank you for
8 your patience.

9 (Panel dismissed.)

10 CHAIRMAN NOTTINGHAM: And I will
11 invite the next panel up, Panel IIB, some
12 additional shipper associations including the
13 National Grain and Feed Association,
14 represented by Kendell W. Keith and Andrew P.
15 Goldstein; the Agricultural Retailers
16 Association represented by Dan Weber; the
17 Fertilizer Institute represented by Ford West
18 and Nicholas J. DiMichael; and the Illinois
19 Fertilizer and Chemical Association
20 represented by Jean Payne.

21 And while the panel comes forward,
22 I'll just make a little housekeeping

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1 announcement. It is my intention to recess
2 this hearing for a lunch break at the
3 conclusion of this next panel for 45 minutes,
4 just so you people can pace yourselves and
5 plan your day.

6 So we will get through this panel,
7 and then we will have a lunch recess for 45
8 minutes, and we will regroup promptly after
9 that and get through the rest of the witness
10 participant.

11 We will start with Kendell W.
12 Keith from the National Grain and Feed
13 Association, accompanied by Andrew P.
14 Goldstein.

15 Welcome, it's good to have you
16 back here at the Board. And please proceed.

17 PANEL IIB: SHIPPER ASSOCIATIONS

18 MR. KEITH: Thanks, Mr. Chairman,
19 Commissioners.

20 NGFA is a U.S.-based trade
21 association with 900 member companies that own
22 and operate 6,000 facilities throughout the

1 U.S.

2 I am Kendell Keith. I am
3 accompanied today by Andrew Goldstein, our
4 counsel.

5 In these comments today we are
6 going to concentrate on the common carrier
7 obligations of railroads as it relates to
8 ethanol, but these comments also apply equally
9 to such products as biodiesel.

10 Let me speak first though to what
11 I think most of the rest of the panelists are
12 going to speak to today, which is anhydrous
13 ammonia. From an agricultural perspective,
14 anhydrous ammonia is extremely important to
15 agriculture. U.S. agriculture produces 20
16 percent of global foodstuffs. Corn represents
17 about two-thirds of that total production, and
18 anhydrous ammonia is critical to the
19 production of corn, and without it we would
20 see corn yields drop dramatically.

21 NGFA urges the Board to bear
22 clearly in mind that it is, in simple terms,

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1 impossible for agriculture to obtain an
2 adequate supply of anhydrous ammonia by truck,
3 and that rail service remains an essential
4 conduit for that type of HAZMAT.

5 Let me speak now to ethanol. A
6 question in our mind today is whether the
7 Board intends to include all HAZMAT materials
8 in this rulemaking or just TIH HAZMATs when
9 addressing the railroads' concern about
10 ruinous liability.

11 NGFA believes it must be the
12 latter; that is, just the TIH, as we are
13 unaware of any claim made by the railroads or
14 others than the transportation of hazardous
15 materials such as ethanol would lead to
16 ruinous liability for the carriers.

17 We note that the AAR filing makes
18 it clear that the railroads are interested
19 only in TIH, but is the STB on the same page
20 with the carriers?

21 Established legal precedents
22 dealing with far more hazardous commodities

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1 than ethanol hold that railroads may not
2 refuse reasonable requests to transport such
3 commodities, so long as they are tendered in
4 compliance with applicable government
5 regulations.

6 If the common carrier obligation
7 required railroads to accept shipments of
8 spent nuclear fuel, such as was held in Akron
9 v. Canton, there is no legal basis in our mind
10 for the railroads to refuse to transport
11 anhydrous ammonia, let alone ethanol.

12 Ethanol tendered to railroads for
13 transportation in this country mainly is
14 alcohol derived from corn, of course, which is
15 approximately added to that mixture 5 percent
16 gasoline to provide a denatured product that
17 is not intended or safe for human consumption.

18 Ethanol in that form bears almost
19 no risk of explosion, merely by trauma, such
20 as a train collision. It is of course
21 flammable, but ethanol fires can be contained
22 by firefighters using foams that are highly

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1 effective.

2 Few fatalities or serious injuries
3 result from ethanol fires, and we are aware -
4 not aware of any derailment of ethanol cars
5 that has ever resulted in or posed the risk
6 of, quote, ruinous liability, end quote, for
7 a railroad.

8 As we indicated previously NGFA is
9 not conceding that the Board can relieve
10 railroads of their common carrier obligation
11 to transport HAZMATs, assuming they are
12 packaged in accordance with applicable legal
13 and safety requirements.

14 But if the Board is inclined to
15 the opposite view of that, it must be
16 exceedingly careful to make all necessary and
17 appropriate distinctions between types of
18 HAZMATs and not exaggerate the risk posed by
19 rail transportation of a substance like
20 ethanol.

21 The June 4th decision by the STB
22 solicits comments on what constitutes a

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1 reasonable request for service involving the
2 movement of TIH as well as whether there are
3 unique costs associated with the transport of
4 HAZMAT materials, and if so, how railroads can
5 recover those costs.

6 We would urge the Board to
7 approach this issue very cautiously and with
8 deliberation. There are scores of different
9 HAZMATs, each of which will have its own
10 unique cost ranging from nonexistent or
11 unproven additional handling cost.

12 It is in our opinion - it is
13 necessary in our opinion for the Board to
14 create a process whereby any railroad claim of
15 quote unique costs associated with the
16 transportation of HAZMAT materials can be
17 examined and tested to make sure such claims
18 are not exaggerated.

19 DOT records will show a great many
20 incidents involving ethanol, but a thorough
21 inspection of DOT's records will disclose that
22 the overwhelming majority of these incidents

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1 are nothing but a leaky outlet valve on a tank
2 car.

3 There are rules applicable to
4 minor problems that arise in connection with
5 the transportation of non-TIH HAZMATs, the
6 industry structure already in place will take
7 care of making and paying for the necessary
8 car repairs in our view.

9 The railroads may argue that if
10 not relieved of their common carrier
11 obligation with respect to HAZMAT materials or
12 TIH they will be forced or tempted to use
13 their pricing power to reject shipments they
14 regard as too dangerous.

15 The problem with that approach is
16 that the railroads would be doing indirectly
17 what the act forbids them to do directly, thus
18 making common carrier service not an
19 obligation but an option.

20 We appreciate the opportunity to
21 present our views today, and we look forward
22 to questions.

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1 CHAIRMAN NOTTINGHAM: Thank you.

2 Mr. Goldstein, do you have remarks
3 as well?

4 MR. GOLDSTEIN: Yes, thank you, Mr.
5 Chairman.

6 I just wanted to add one small
7 comment. After reading the AAR's filing which
8 of course we didn't have when we prepared our
9 own comments. And that is, we notice that
10 they are claiming you have the authority to
11 act as they propose you act under Section
12 1110.3 of your rules, which is a provision
13 that basically says you can adopt informal
14 rules.

15 We think they have stretched that
16 way beyond its intended purpose, and that
17 Section 1110.3 is really a housekeeping
18 section, and if you read it in the context of
19 all your rules, we don't believe that what
20 it's intended to do is to permit the Board to
21 adopt a - as in the railroads' own words - a
22 formal statement that makes clear that a

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1 railroad can impose liability on a shipper.

2 And we would urge that you take a
3 hard look at that section to see whether you
4 agree that in fact it does comprise the
5 authority they suggest it does.

6 We disagree with that.

7 Thank you.

8 CHAIRMAN NOTTINGHAM: Thank you,
9 Mr. Goldstein.

10 We will now hear from the
11 Agricultural Retailers Association, Mr. Dan
12 Weber.

13 MR. WEBER: Chairman Nottingham and
14 members of the Board, thank you for inviting
15 me to testify today on behalf of the Ag
16 Retailers Association concerning railroads'
17 common carrier obligation to transport
18 hazardous materials.

19 I'm Dan Weber, vice president of
20 Agronomy with Serious Solutions. We are an
21 LLP farmer-owned cooperative selling crop
22 inputs and application services to farmers in

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1 the state of Indiana.

2 I am also chairman of the board of
3 directors of the Ag Retailers Association
4 which represents a significant majority of the
5 nation's retailers and dealers here in
6 Washington, D.C. offices.

7 Serious Solutions is an
8 agricultural cooperative with 26 full-time
9 agronomy retail locations and about 34
10 locations receiving and storing anhydrous
11 ammonia, serving about 5,000 cooperative
12 members, and other customers of agricultural
13 producers in western Indiana.

14 My background includes 34 years in
15 agricultural retail sales and management.

16 In our retail organization, as
17 with many ag retailers, rail services have
18 played and continue to play a critical role in
19 distributing necessary crop inputs at a
20 reasonable cost effective transport
21 alternative to trucking.

22 In my job I oversee the

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1 procurement of about 125,000 tons of
2 fertilizer, approximately 30,000 tons of that
3 of which is anhydrous ammonia, which is about
4 one-third delivered by rail.

5 How are the railroads doing? As I
6 look at it from an ag retailer's perspective,
7 and doing business with the railroads over the
8 past three decades, I have encountered a
9 deterioration in timely service of the
10 agricultural industry.

11 As a background for my comments I
12 would say that in the 1960s the industry moved
13 away from animal manure and bag fertilizer to
14 bulk rail shipments and manufactured
15 fertilizer. This was a change in the genetics
16 moving from open pollinated corn to the hybrid
17 selections of corn we have that responded
18 better to the fertilizer.

19 This is a new business for the
20 railroads, and they embrace the ag industry
21 and new fertilizer retail facilities were
22 built next to the railroads, with the idea the

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1 rail system would provide ag retailers with
2 the best economics in getting product in
3 house.

4 This service continued to be
5 acceptable through the `70s, but beginning in
6 the `80s and `90s it began to change.
7 Railroads began to abandon the rail lines
8 through smaller communities, and ag business
9 operations that were located there deemed to
10 be too costly were left without service.

11 This discontinued or reduced rail
12 service resulted in ag retailers dependence on
13 more products distributed at a higher cost by
14 trucks. Please remember, for every rail car
15 product not delivered by rail, we added four
16 trucks to our already crowded highways
17 carrying this same volume of fertilizer.

18 This increases the distribution
19 costs, and increases the general public's
20 exposure to potentially more danger when
21 anhydrous ammonia is involved.

22 These increased costs are

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1 ultimately passed on to the farmer by us, the
2 retailers, and then also eventually to the
3 American consumer.

4 As consumers of food we all pay
5 for the loss of this efficiency in
6 transportation.

7 Currently the railroads are asking
8 to be relieved of their responsibility to
9 transport hazardous material like anhydrous
10 ammonia used by many of our farmers through
11 the ag retailers outlet.

12 It is our belief you should not
13 and cannot let them out of their
14 responsibility under the Staggers Act. Since
15 the 1960s anhydrous ammonia has been
16 recognized as the most cost-efficient of the
17 nitrogen products on a per unit basis, for
18 most of our farmer operations use when growing
19 corn.

20 More than four decades ago a whole
21 infrastructure was developed by the ag
22 retailers in cooperation with the railroads

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1 and the manufacturers to facilitate the
2 production, distribution, storage and
3 application of this lower cost fertilizer for
4 the farmers who were using anhydrous ammonia.

5 It has taken a tremendous amount
6 of investment by everybody involved over the
7 years. As an example of the investment; ag
8 retailers might have Serious Solutions, as a
9 farmer-owned cooperative, has investments in
10 over 40 large storage tanks with a market
11 value of about \$2 per gallon, and we average
12 probably 12,000-30,000 gallons for each of
13 those tanks, which would make about an
14 \$880,000 investment just in the storage of
15 anhydrous ammonia at our retail operations.

16 Along with this investment in
17 storage, we have about \$900,000 in some 1,500
18 nurse tanks and wagons that farmers use in
19 their fields.

20 We need to continue timely rail
21 distribution of anhydrous ammonia to supply
22 the needed volumes in the tight windows of

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1 season application a farmer has in injecting
2 the anhydrous ammonia in the soil.

3 If the railroads were allowed
4 relief from their responsibilities as a common
5 carrier, it would be devastating for many of
6 the ag retailers who provide anhydrous ammonia
7 to the farmers. This huge investment in
8 infrastructure that we have to carry out that
9 mission.

10 Most ag retailers would suffer
11 financial hardship if their capital
12 investments in storage and distribution of
13 anhydrous ammonia were suddenly devalued.

14 There is a shortage of truck
15 transportation already in our industry. Since
16 we have the new CBL with the HAZMAT
17 endorsement that has taken place. The need
18 for ag retailers to receive all their
19 anhydrous tonnage by truck would cause longer
20 lines in terminals and increase the already
21 severe shortage of qualified CBL drivers.

22 Why is anhydrous so important to

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1 the farmers? Anhydrous ammonia is the lowest
2 cost per of nitrogen a farmer can buy for this
3 crop. For every ton of NIT3 it would take
4 1.78 tons of urea to provide the same units of
5 actual nitrogen, and if you were using the
6 liquid nitrogen solution, it would take 2.93
7 tons to provide that same amount of nitrogen
8 for that corn crop.

9 The farmers' cost savings using
10 anhydrous ammonia over the other two available
11 nitrogen products of urea and UAN, there is
12 about \$40 per acre at current costs. If a
13 farmer uses 200 units of nitrogen as anhydrous
14 ammonia on his 1,000 acres of corn, it saves
15 him roughly \$40,000 versus using a urea or UAN
16 solution.

17 The railroads need to provide
18 timely dependable service for ag industries to
19 meet the ever increasing global food and fiber
20 demand. Without the continued delivery of
21 anhydrous ammonia food costs will go up and
22 America will suffer.

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1 There are other issues that I've
2 submitted in my written comments that I have
3 regarding the rail responsibilities and the
4 STB Board in their oversight responsibility
5 but I will not review all of those.

6 In conclusion ARA recommends first
7 the railroad common carrier obligation should
8 be maintained by hazardous chemicals like
9 anhydrous ammonia.

10 Second, the STB board should
11 provide stronger oversight of the railroads in
12 fulfilling this important obligation.

13 Thank you for considering the
14 ARA's views. We appreciate the Board's
15 interests concerning a very important and
16 critical responsibility the railroad has in
17 serving the ag retailer industry.

18 Mr. Chairman, I welcome the
19 opportunity to provide further input to the
20 Board.

21 CHAIRMAN NOTTINGHAM: Thank you,
22 Mr. Weber.

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1 We will now hear from the
2 Fertilizer Institute represented by Ford West
3 and Nicholas J. DiMichael.

4 Please proceed.

5 MR. WEST: Thank you, Mr. Chairman.

6 Today you just heard from Dan.
7 You are going to hear from Gene. We got
8 another fertilizer panel coming later. You
9 are going to hear all you want about anhydrous
10 ammonia and its role in agriculture and in the
11 role fo these businesses that have built their
12 system around rail delivery of ammonia. So I
13 won't go into that.

14 In late 2006, following the
15 testimony before Congress, the Association of
16 American Railroads where they stated that they
17 either wanted out from under their common
18 carrier obligation or they wanted to be
19 provided some liability protection.

20 We became aware of an AAR
21 proposal, legislation that would put a
22 liability on - put a cap on railroad

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1 liability.

2 TFI as well as other hazardous
3 material shippers objected to the AAR
4 proposal. We thought it was one sided,
5 unfair, reduced incentives for the safe
6 transportation of anhydrous ammonia.

7 Now we are - this is a business.
8 We are businessmen. We prefer business
9 solutions to problems. And rather than get
10 into a legislative fight with the AAR, we
11 decided to see if we could do something on the
12 liability side of the equation.

13 And we sat down and began to
14 develop kind of a business solution we thought
15 to the problem. And we didn't take it to the
16 Board, and we didn't take it to the media or
17 DOT; we took it to, and sat down with, the
18 AAR, and sat down with my good friend, Ed
19 Hamburger, and told him that given the two
20 options that he laid on the table, we would
21 fight to maintain our common carrier
22 obligation because we felt like it - in the

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1 broadest sense because we felt like it was a
2 safety issue for us, hauling ammonia on the
3 railroads was a safety issue. But maybe there
4 was something we could do together on dealing
5 with their concern over liability.

6 We began developing this, and
7 worked with the AAR, and kept Ed informed all
8 the way through the process, and gave them a
9 formal proposal in writing in November of
10 2007.

11 Our proposal basically outlined a
12 process where TFI members would be willing to
13 enter into an agreement with a Class I
14 railroad under which shippers would assume a
15 part of the cost of liability insurance for
16 the transportation of anhydrous ammonia in
17 exchange for rate caps on anhydrous ammonia at
18 a level to be negotiated.

19 We saw this as, they didn't like
20 their liability, we didn't like the rate caps
21 - the rates we were getting. Maybe there was
22 something here we could negotiate.

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1 We made it clear from the
2 beginning that anhydrous ammonia shippers
3 would not accept any liability, but would
4 simply arrange and maintain certain excess
5 liability insurance coverage above the primary
6 insurance level agreed to by the railroads.

7 And this would relieve rail
8 carriers of part of the cost of their
9 liability insurance.

10 Now we sat down with two insurance
11 providers, Marsh and Willis. They told us
12 that they thought that there was insurance
13 available in the marketplace, and they were
14 excited about taking on this project with us
15 to see how much insurance we could find.

16 Under the plan TFI would act as an
17 agent for ammonia shippers by forming the
18 ammonia shippers captive insurance group,
19 including members and non-members of TFI, and
20 the group would purchase an amount of
21 insurance in excess of the primary amount of
22 insurance that the railroad would agree to

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1 maintain. And this insurance would compensate
2 for third party bodily injury and property
3 damage, liability cost, arising out of the
4 release of anhydrous ammonia associated with
5 a rail accident.

6 In exchange for providing this
7 excess insurance, TFI acting as an agent for
8 the shippers who have joined the group would
9 negotiate an overall kind of rate cap with the
10 railroads. And to be more specific our
11 initiative proposed would ask the railroads to
12 carry 500 million in primary insurance. In
13 return our group would purchase \$1 billion in
14 excess insurance, or more depending if we
15 could find it in the insurance market.

16 The railroads then would agree to
17 kind of a rate cap, and if agreement was
18 reached with all parties, then TFI would be
19 willing to work with the AAR, go back to
20 Capitol Hill, explain that we have gone into
21 the marketplace, purchased all the insurance
22 available, and therefore work together on a

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1 legislative proposal to cap the overall
2 liability for the railroad.

3 AAR's response, once they finally
4 got the written proposal, they expressed some
5 concerns over antitrust. I don't want to put
6 words in their mouth, but they kind of felt
7 like any discussions between carriers and
8 shippers should be done between carriers and
9 shippers, and they didn't necessarily want to
10 be involved in that.

11 So they asked for us not to pursue
12 our proposal through them. They asked that
13 we begin meeting with the individual
14 railroads, and we have done that. TFI sent
15 letters to the CFOs of all seven Class I
16 railroads on March 18th of 2008, and over the
17 next month we received a response from all
18 seven Class I railroads expressing interest in
19 further development of the concept.

20 We have now completed face-to-face
21 meetings with the CSX and the Canadian
22 Pacific, the Burlington Northern Santa Fe, the

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1 Norfolk Southern and the Canadian National.

2 I'm meeting with the Union Pacific
3 and Kansas City Southern is scheduled for this
4 week, Thursday and Friday.

5 Participants in the meetings have
6 included usually one ammonia shipper that is
7 shipping on the railroad. The company's risk
8 management professional. Several
9 representatives from the railroad including
10 their risk management folks. Counsel, and
11 normally a TFI representative.

12 These meetings we think, thought,
13 were productive, and there seems to have been
14 willingness by each railroad to continue the
15 discussions.

16 I think the next step after we
17 have our meetings would be to go back to our
18 insurance provider, perfect our insurance
19 vehicle a little bit, and then come back and
20 show the railroad.

21 The railroads have asked, and
22 we've agreed, that any discussion on rates be

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1 between the customers and the railroads as it
2 should be.

3 We have advised each railroad in
4 our meeting that once TFI is advised that
5 there is agreement between the carrier and the
6 shippers, or the railroads and the ammonia
7 shipper, that once they have worked out a rate
8 reconstruction, then we would provide the
9 insurance and cover that.

10 And then we've also had
11 discussions on kind of the best approach to go
12 to the Hill, and what would be the offer we
13 would put in place to seek some legislative
14 cap.

15 Now that's where we are at on our
16 discussions, and now comes the proposal that
17 the AAR put before the Board that is kind of
18 acting like we haven't even had any
19 discussions with them.

20 And I can tell you that what the
21 AAR has put before the Board is about 180
22 degrees from the content of the discussion we

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1 have had with the individual railroads.

2 Now we've got to decide whether we
3 were getting lip service from the railroads,
4 or do they really want to proceed as expressed
5 in our individual discussion.

6 And it would appear that maybe the
7 railroads do not want to negotiate liability
8 issues; what they really want is with your
9 help they want to dictate indemnification to
10 the shippers.

11 And so instead of sincere
12 discussions with us, the railroads have come
13 to you, as I see it, the board, and asked that
14 you weigh in on our discussions on their
15 behalf to form this policy statement which
16 gives them all the power in our negotiations
17 in order that they can dictate indemnification
18 to us.

19 The railroad has testified on the
20 Hill that they want liability protection. We
21 were trying to offer them some liability
22 protection. And I'm not sure exactly right

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1 now what they want. Because they have come to
2 you to require the shipper of TIH to indemnify
3 them. They want the shipper to attain
4 insurance to assure that indemnification, and
5 then to add insult to injury, they have
6 indicated that with this shared liability and
7 indemnification, maybe you can do us some
8 good, because with that you can direct us to
9 make some what they call product changes or
10 changes in our use of ammonia kind of like we
11 are too stupid to understand the risk there is
12 of ammonia, and maybe we need to do some
13 product substitutions.

14 When I saw the proposal from the
15 railroads, given our work with the railroads,
16 my immediate reaction was, this is very
17 simple, what the railroads want. They want
18 the cake, they want to eat it too, and they
19 want to eat it in our presence as we sit at
20 the table negotiating with them.

21 We are very serious about our
22 proposal. We spent \$100,000 with the

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1 insurance companies to put our proposal
2 together, and prepared to spend more to
3 perfect our policy.

4 Thank you very much.

5 CHAIRMAN NOTTINGHAM: Thank you,
6 Mr. West.

7 We will now hear from Jean Payne
8 from the Illinois Fertilizer & Chemical
9 Association.

10 Welcome.

11 MS. PAYNE: Thank you.

12 I really appreciate the
13 opportunity to be here today. I am not an
14 attorney. Happen to be out in Washington,
15 D.C. with seven of my board members who are
16 here today, five of which are ag retailers
17 from Illinois, so guys who are not real
18 comfortable in suits, but this happened to
19 fall during our congressional visit. So I
20 think it's really neat that they can hear all
21 this testimony today. Because they deal with
22 ammonia everyday. In fact three of them are

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1 probably some of our largest ag retailers who
2 handle ammonia in Illinois everyday.

3 So my purpose here is really just
4 to explain to you the impact of this issue on
5 a particular state like Illinois. Our farmers
6 in Illinois use 1.6 million tons of nitrogen
7 every year. That's what they used last year
8 to grow the 2007 corn and wheat product.

9 Of that 1.6 million tons which is
10 an impressive amount, almost half is in the
11 form of anhydrous ammonia, because we have
12 great soils for growing corn in Illinois.

13 We also have been blessed with a
14 wonderful distribution system to get that
15 ammonia to our retailers and to our farmers.
16 We have 11 ammonia terminals, and they are
17 fortunate enough to be able to be fed by barge
18 on the Mississippi and Illinois Rivers, and
19 also by pipeline, which is wonderful, and also
20 by rail.

21 But our ammonia distribution
22 system, which is probably the best in the

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1 country in Illinois, is also incredibly
2 fragile. It is susceptible to any disruption
3 in the supply chain, and weather also can
4 wreak havoc on it. But I'm not talking about
5 storms or tornadoes. I'm really talking about
6 good weather.

7 And it happened to us in the fall
8 of 2007. We had an excellent fall season for
9 anhydrous ammonia. Congress passed the
10 renewable fuel standard which increased the
11 demand for corn, and our farmers jumped right
12 to the starting date to get that corn in the
13 ground which built up our demand for ammonia.

14 When the good weather didn't
15 break, and we actually ran out of ammonia in
16 our 11 terminals. And in order to finish up
17 the season for the fall, our dealers had to
18 drive as far as Mississippi, Arkansas,
19 Oklahoma, and even Minsk, Minnesota, to find
20 a product to bring it back to Illinois to
21 finish getting the corn season taken care of.

22 So while we had an excellent fall

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1 season, it really ended on a somber note,
2 because we recognized, even with the
3 impressive system we have, really how fragile
4 it is.

5 But now I want to talk about where
6 rail fits into this in Illinois. Like I said
7 we are using 753,000 tons of ammonia every
8 year in Illinois. About 75,000 tons are
9 transported by rail. It's not a big
10 percentage, as you can easily figure out, but
11 it's a huge amount; in fact, 75,000 tons by
12 rail is probably more than most agricultural
13 states do all year is what we do by rail.

14 If we had to replace those rail
15 tons with cargo tanks, it would take another
16 3,700 truck loads to meet the needs of our
17 Illinois farmers.

18 And even if we had the trucks,
19 which we don't, we don't have the drivers.
20 The biggest drivers our retail members face is
21 finding qualified HAZMAT and CBL-endorsed
22 drivers that meet the TFA regulations who want

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1 to work in the ag industry which is not the
2 most glamorous of industries. You put in a
3 lot of hours, it's dirty, you know, we work
4 with farmers who can be a little testy at
5 times. So it's very hard to get people to
6 work in our industry, even harder to find
7 qualified drivers.

8 So we don't have really any
9 options for coming up with those 3,700 cargo
10 tanks we would need.

11 And when our ag retailers, when I
12 called them and told them that I had this
13 opportunity to represent them today, and a lot
14 of them carry ammonia. Some of the guys in
15 the room here get ammonia by rail.

16 What I heard from them was a
17 concern about this issue with the
18 indemnification. But mostly what I heard from
19 them was their appreciation for the rail
20 industry's role in our industry. I mean we
21 are all aware of the hazards of handling
22 anhydrous ammonia. These guys could tell you

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1 stories back here that would be quite
2 entertaining, I guarantee you, because I've
3 heard them, because a lot of them have been
4 handling it since they were kids.

5 We have 23,000 nurse tanks in
6 Illinois. These are the 1,000 or 1,500 gallon
7 white tanks that we fill up at the retail site
8 and take to the farm field; 23,000 we have in
9 Illinois. We are very aware of all the
10 maintenance issues and the driver issues and
11 the pre- and post-trip inspections, and
12 everything it takes to get those products to
13 the farm safely everyday.

14 We really - I mean I sympathize
15 with the railroads on that, because we live
16 with it. And even when you do everything right
17 we still have accidents, just from the sheer
18 amount of ammonia that we move every year.

19 That's why we do the best to
20 handle the product carefully on our end. We
21 bring our farmers in for training so they can
22 handle it properly on their end once they get

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1 it to the field. And the railroads have also
2 done a fabulous job with it, and we really
3 commend them for that, and want to work more
4 with them, because as we continue to grow corn
5 in Illinois, and we will because we have the
6 best soils for it - no offense to my Indiana
7 friends, but we do - and we are going to need
8 that rail. Because it gives us another
9 opportunity, when everybody else is lined up
10 at the terminals and the trucks, we can get
11 rail cars in a less frenzied period of time
12 where we can offload them in a more manageable
13 level. They can then get them to other sites
14 where it's needed, where it is not that three
15 and four-week crazy season where everybody is
16 trying to get the product at once. Rail gives
17 us some important breathing room to fill those
18 gaps in Illinois.

19 And I know that a lot of our guys
20 would invest in more rails first for ammonia
21 if they felt that rail was going to be their
22 reliable shipper well into the future. They

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1 are interested in looking at these
2 opportunities, and there are obviously
3 excellent opportunities to grow this industry
4 in Illinois, and we really hope to have that
5 opportunity.

6 So on behalf of my ag retail
7 members in the fertilizer industry, we just
8 ask you to please consider everything that has
9 been talked about here today. We are
10 affiliated with The Fertilizer Institute back
11 at the state level, and I really give them
12 credit for thinking outside the box in dealing
13 with this because, as I indicated, when we
14 pass the ammonia on to the farmers, when I
15 heard about the indemnification issue, which
16 is kind of new to me, I can tell you that
17 there wouldn't be one of the guys in the room
18 behind me who would ever conceive of asking
19 the farmer to cover the liability for our
20 members.

21 We consider ammonia to be our
22 responsibility. We have a healthy respect and

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1 fear for that product, as everyone needs to
2 handle it safely. It just isn't even a
3 concept that would cross these guys minds,
4 because they feel they have to handle it
5 responsibly to keep this product around.

6 So it's an interesting concept, we
7 look at trying to pass that on. And I know
8 there are a lot of farmers here in the room
9 today, and I'd like to speak for them a little
10 bit. Because they have a lot of things going
11 on, and they have a lot of challenges, the
12 ethanol gate everyone knows about. And I know
13 that they are concerned about the availability
14 of this product, because they wouldn't be
15 using 1.6 million tons of nitrogen, 750,000
16 tons of ammonia, if there was a better
17 alternative in Illinois. Farmers like it, and
18 farmers demand it. We do the best we can to
19 meet the needs for them. And the rail
20 industry is a very important part of that
21 equation.

22 I really appreciate your time. We

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1 have a small association with three people.
2 We do our best to bring forth the perspectives
3 of the people that are out there everyday with
4 the farmers working with this product.

5 Thank you.

6 CHAIRMAN NOTTINGHAM: Thank you,
7 Ms. Payne.

8 Mr. Buttrey, do you want to start
9 with questions for this panel?

10 MR. BUTTREY: I don't have any
11 questions per se of the panel, but I would
12 like to just say that in listening to Mr.
13 West's testimony, I think you and your
14 association should certainly be commended for
15 taking the bull by the horns so to speak in
16 trying to address this issue.

17 We've heard a lot about market
18 based solutions and private sector solutions
19 and so forth, and I think your example today
20 of what you had tried to do is a perfect
21 example of how that can be done.

22 I'm going to be interested to hear

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1 what the American Association of Railroads has
2 to say about your views about how this is
3 turned around, or turned out basically.
4 Because I had gotten the impression from what
5 I had read and what I had heard that there had
6 sort of been a really strong effort on both
7 sides to reach some kind of accommodation
8 here.

9 And your association is basically
10 the only evidence that I can see, really, of
11 a concerted effort to do that. I know a lot
12 of people say a lot about it, but I'm not too
13 sure too many people are doing anything about
14 it.

15 And so I'm really interested to
16 hear what they are going to have to say, and
17 we are going to hear from them in a few
18 minutes here, and they are in the room right
19 now. And I'd like to hear their explanation
20 about how they view what's happened with this
21 issue.

22 I think it's clear that the board

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1 is very concerned about the issue, and it
2 doesn't seem that anybody else is. And I hope
3 we get the test, the hypothesis that has been
4 proffered here today, that the board has no
5 jurisdiction to do anything about this, I hope
6 we get that chance - I don't know whether we
7 will or not - but I'd like to see that case
8 argued before the Court of Appeals further on
9 down the road, but I don't know whether we'll
10 ever get that chance or not, because we don't
11 have a complete record yet, and we'll have to
12 look at that when we do.

13 But I just wanted to commend your
14 organization, and maybe I can commend the
15 other groups as well when the day is over.
16 But I think what you have done is a perfect
17 example of trying to bring a private sector
18 solution to the table, and I'm just anxious to
19 hear what the other side has to say later on.

20 Thank you, Mr. Chairman.

21 MR. WEST: Can I respond?

22 CHAIRMAN NOTTINGHAM: Sure.

1 MR. WEST: We have talked to AAR,
2 and they tell us that they don't see that
3 their statement is inconsistent with our
4 efforts.

5 They say that as railroads reach
6 agreement with customers, it addresses the
7 liability issue and the AAR position is no
8 longer relevant.

9 However, they think if our effort
10 fails they need a backup plan.

11 Well if you come down with what
12 they call the backup plan, then our
13 negotiation with the railroad is probably
14 over, because instead of us negotiating, they
15 are going to tell us, the shippers and
16 receivers, how and when and how much liability
17 we've got to have to move ammonia.

18 We still want this to move
19 forward, but we'll have to wait and see you
20 all act, coming down.

21 CHAIRMAN NOTTINGHAM: Thank you.

22 Ms. Payne, you mentioned that in

1 your job occasionally your members had to work
2 with farmers, and on some occasions they can
3 be testy?

4 MS. PAYNE: Yes.

5 CHAIRMAN NOTTINGHAM: It brought a
6 smile to my face. I saw Mr. Keith was smiling
7 a little bit too. If you like working with
8 testy farmers, you should consider working
9 with the STB. Because we can make them testy
10 with the best of them despite our best
11 efforts.

12 But on a more serious note, let me
13 ask Mr. West, I do commend you for showing
14 some real initiative. I would say I've been
15 a little bit underwhelmed by some of the other
16 associations and companies who one would think
17 would have a lot at stake in this issue but
18 haven't really been producing much in the way
19 of meaningful discussions and proposals.

20 But you have, and I think you
21 deserve tremendous credit, and it really
22 heightens your credibility in my eyes.

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1 Let me ask, how did you kind of
2 arrive at the \$500 million-\$1 billion
3 insurance levels? Did you ever think about it
4 from another perspective, just above a certain
5 level of liability there would be a share, a
6 percentage basis, 50-50 above a certain level?
7 Is that hard to implement?

8 MR. WEST: Well, the first question
9 we had to deal with is, is insurance
10 available. And we brought the two firms in,
11 and they gave us some assurance, they thought
12 it was.

13 So how much can we get in the
14 marketplace? A billion? A billion and a
15 half? Go offshore? What's available?

16 And then we tried to deal with a
17 catastrophic event, you know. So we just
18 picked \$500 million, and named that level,
19 then we'll go a billion on top of that. I
20 understand most railroads carry about a
21 billion dollars worth of insurance. We're
22 trying to raise that level as high as we

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1 could.

2 And we thought then if we got as
3 much insurance as we could together then that
4 would pass the giggle test if we went to
5 Congress and said, look, this is all there is
6 in the marketplace.

7 CHAIRMAN NOTTINGHAM: Vice Chairman
8 Mulvey, any questions?

9 MR. MULVEY: Just a couple.

10 Mr. Keith, in your testimony on
11 page eight with respect to Price Anderson, you
12 compare the railroads to the nuclear industry,
13 and you say that the railroads are loosely
14 regulated.

15 I mean, I guess compared to what?
16 The FRA, the PSA, PHMSA, the railroads' own
17 committees, we're not talking about economic
18 regulation, and I don't think you are either
19 here. We are talking about safety regulation.
20 Do you really think that the railroads are
21 loosely regulated given all the agencies that
22 they have to deal with?

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1 Mr. Goldstein, if you want to take
2 that also.

3 MR. GOLDSTEIN: Yes, thank you. I
4 think as you heard mentioned earlier today
5 there are Nuclear Regulatory Agency inspectors
6 on site in every nuclear facility.

7 And what we were simply pointing
8 out is that to a great extent implementation
9 of federal regulations involving railroads is
10 left to the railroads.

11 The car men for example, who used
12 to inspect trains to make sure that they were
13 in compliance with the safety regulations have
14 largely been retired or gone by attrition.
15 There is just a lower level of day-to-day
16 inspection of railroad trains than there used
17 to be, and a lower level of day-to-day
18 supervision of railroad operations compared to
19 a nuclear facility.

20 MR. MULVEY: Yet their safety
21 record continues to improve over time. As
22 pointed out the one area where the record has

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1 not improved has been in trespassing, and that
2 is pretty difficult to control. But there has
3 been an improvement in the safety record.

4 I was going to ask you about the
5 cost of getting insurance, and passing those
6 costs on. We have a - there's this process
7 called URCS as you know, Uniform Rail Cost
8 System. It's based on pretty old data, and in
9 my view probably needs to be updated. But do
10 you think URCS could be adjusted in order to
11 take into account the incremental costs to the
12 railroad to carry TIH or PIH?

13 MR. GOLDSTEIN: Well, I think that
14 the URCS system - I'm not clear first of all
15 whether you are talking about just adjusting
16 URCS in general, or whether you are suggesting
17 it in a rate case.

18 MR. MULVEY: I'm thinking here
19 about adjusting URCS in general in the sense
20 that it really has, despite the legislation to
21 the contrary which says it's supposed to be
22 updated every five years, this thing has not

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1 been updated very much, and in fact it's
2 really based on some relationships that go
3 back decades.

4 So it'd probably be better in
5 general to update the entire thing, which
6 would include perhaps taking into account any
7 incremental costs or costs that are directly
8 assignable to the carriage of materials like
9 TIH and PIH.

10 MR. GOLDSTEIN: Unfortunately, I am
11 not an expert on URCS. I think some of the
12 cost people, one of whom has already testified
13 today, probably would have been better
14 qualified to answer that.

15 My understanding is that the
16 railroads' costs, whatever they may be, are
17 currently in URCS, and that is about as much
18 as I know about it.

19 MR. MULVEY: Anhydrous ammonia is
20 carried by railroads, and it's an important
21 and a safe way to carry it. But it's also
22 carried by barge or by pipeline.

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1 And it's been asserted that rail
2 is the safest way to move TIHs like anhydrous
3 ammonia, and it's generally compared to truck
4 transport. We all know that we've had some
5 numbers quoted here about rail being 14 or 16
6 times safer than truck.

7 But is it safer than pipelines or
8 safer than barge transport? And in terms of
9 incidents or accidents in however you want to
10 - millions of ton miles or whatever? Or are
11 pipeline and barge equally unsafe?

12 Mr. Weber?

13 MR. WEBER: Pipeline, which is,
14 goes across, comes up through Donaldsonville
15 up the Mississippi River and then splits going
16 across Illinois and Indiana into the eastern
17 part of Indiana where we pull the service, it
18 is maximized as far as the capacity of it.

19 It obviously is the safest,
20 probably distribution form of anhydrous
21 ammonia versus any other, but the problem is
22 we are allocated a number of tons we can get

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1 off the pipeline, so we have to rely again on
2 rail cars and then truck transportation from
3 other terminals to pull those products,
4 because we pull all the allocated tons
5 available to us on pipe.

6 MR. MULVEY: My understanding is
7 that most of the anhydrous ammonia comes out
8 of Louisiana and Texas, and that it's
9 basically two major pipeline companies that
10 transport most of this.

11 Is there any opportunity for
12 building another line and increasing the
13 capacity of pipelines? Or are the profits not
14 great enough to justify making that
15 investment?

16 MR. WEST: Let me try to take that.
17 No, I don't think that - I'm not aware of any
18 project underway to build a new pipeline. Our
19 pipeline is at capacity. But we do import
20 quite a bit of ammonia, and it comes into
21 Tampa. So we do import and we can also import
22 to inject into the pipeline down in

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1 Donaldsonville.

2 From the barge side, I think there
3 are only about 30 barges in service, and we
4 haven't built a new ammonia barge in a long
5 time. So as these barges go out of service,
6 they are probably not coming back.

7 MR. MULVEY: I understand one of
8 the alternative fertilizers, so I guess it's
9 also related to anhydrous, is UAN, and
10 according to one testimony UAN is no longer
11 being manufactured in the United States, and
12 it's all being imported. Is that your
13 understanding, or are we still manufacturing
14 UAN here?

15 MR. WEST: No, I don't think that
16 is correct.

17 MR. MULVEY: Okay, that was in
18 written testimony.

19 MR. WEST: We are probably
20 producing more UAN solution, because UAN
21 solution is 28 or 32 percent nitrogen.
22 Ammonia is 82 percent nitrogen. That's why if

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1 you haul nitrogen, your cost per
2 transportation pound end basis is lower.

3 And when you import UAN solution
4 you've got to pay for all that weight that's
5 in that product.

6 MR. MULVEY: Ms. Payne, would your
7 members have objections to paying a portion of
8 an insurance premium for railroads
9 transporting anhydrous ammonia, providing
10 indemnification in cases involving
11 catastrophic accidents, involving TIH products
12 where the railroad was not held negligent?
13 Would there be a willingness to do that?

14 MS. PAYNE: All I can tell you is
15 that one of the biggest challenges we have is
16 getting property, casualty and liability
17 insurance for ag retail pipes, particularly
18 since, because we handle ammonia we now fall
19 under the Department of Homeland Security
20 purview, and it's becoming more and more
21 difficult.

22 I would say that, yes, on the

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1 surface that they would have a lot of
2 questions about that, because already what we
3 pay to carry this to the farm.

4 MR. MULVEY: The concern today is
5 about a catastrophic spill and the railroads'
6 liability for that. But as you say the final
7 movements are by truck. Have there been any
8 serious incidents and spills involving
9 fatalities from accidents involving trucks or
10 other modes of transportation including
11 pipelines? Or has anhydrous ammonia here in
12 this country pretty much moved almost like
13 nuclear materials without really an accident
14 that has involved the loss of life and serious
15 injuries?

16 MR. WEST: We had a serious
17 accident involving trucked ammonia probably 25
18 years ago in Houston. That was a huge
19 accident where it went off the top layer of a
20 highway exchange, and that was a serious
21 accident.

22 I'm not aware of a serious truck

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1 accident.

2 MR. WEBER: I'm not either.

3 MR. MULVEY: I mean considering all
4 the HAZMATs that are moved around the country
5 every year, it really is quite amazing that
6 virtually all modes of transportation have
7 performed so well, and it obviously speaks
8 well for our transportation systems.

9 MR. WEST: Yes, I would agree.
10 Because we do transport hazardous materials,
11 and do it in a very safe way. And we spend a
12 lot of time and energy in training the
13 individuals to do that very thing.

14 MR. MULVEY: Thank you, that's all
15 I have.

16 CHAIRMAN NOTTINGHAM: Mr. West, we
17 heard some testimony from one of the previous
18 panels about arguably the point was raised
19 that it's just not right - I'll paraphrase,
20 it's just not fair, it's not consistent with
21 many people's understanding of tort law and
22 the way it should work in our country for a

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1 party to ever bear responsibility for the
2 insurance costs or liability costs of handling
3 materials that that party can't control over
4 a period of time.

5 Your proposal seems to break
6 through that barrier a little bit and
7 recognize that it may just make good common
8 sense, and business sense, to work something
9 out in this regard, where it would be possible
10 and reasonable for a party to bear some of
11 that responsibility in a shared way, but
12 obviously you are asking for some benefits to
13 be conferred back to your members to justify
14 that cost.

15 MR. WEST: Well, I think the issue
16 there is responsibility. We told the
17 railroads, we'll try to get some liability
18 protection for them, but we were not accepting
19 responsibility for a movement that we had no
20 control over.

21 CHAIRMAN NOTTINGHAM: Okay.

22 Mr. Buttrey, any other questions?

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1 Mr. Mulvey?

2 Thank you panel. You are
3 dismissed.

4 (Panel dismissed.)

5 We will now recess for 45 minutes.
6 We will come back at 1:40 p.m. promptly and
7 pick up with the next panel.

8 Thank you.

9 (Whereupon at 12:56 p.m. the
10 proceeding in the above-entitled
11 matter went off the record and
12 resumed at 1:43 p.m.)

13 CHAIRMAN NOTTINGHAM: Good
14 afternoon. I would like to call our hearing
15 back to order, and invite the next panel,
16 panel #3, consisting of the Association of
17 American Railroads represented by Edward R.
18 Hamberger, and the American Short Line and
19 Regional Railroad Association represented by
20 Richard F. Timmons.

21 Welcome, and we will start with
22 remarks from Mr. Hamberger.

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1 PANEL III: RAILROAD ASSOCIATIONS

2 MR. HAMBERGER: Thank you, Mr.
3 Chairman. Good morning or good afternoon, as
4 the case may be, Mr. Vice Chairman,
5 Commissioner Buttrey.

6 On behalf of our members thank you
7 for this opportunity to testify on the
8 railroad industry's common carrier obligation
9 to carry hazardous materials, most
10 specifically those that are labeled toxic by
11 inhalation hazards, TIH.

12 Now I want to emphasize up front
13 that we are talking about toxic by inhalation
14 standards only; we are not talking about any
15 other commodity that the railroad carries.

16 And to put that into perspective,
17 last year we had about 100,000 carloads of TIH
18 material out of 32 million carloads. So we
19 are talking about 0.3 percent of all of our
20 traffic.

21 There's been a lot of talk this
22 morning, a lot of writing, about not lettering

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1 the railroads out of their common carrier
2 obligation. So let me put that to rest right
3 now by saying that the railroad industry, the
4 AAR members, are not seeking to eliminate our
5 common carrier obligation to carry these
6 materials at this time.

7 And as much as I appreciate Mr.
8 McBride interpreting my testimony, let me
9 state for the record that I do not concede his
10 point that we are conceding the right of a
11 railroad to come and challenge that common
12 carrier obligation at further proceedings
13 depending on how things materialize.

14 We recognize that many TIHs play
15 an important role in the economy, and that
16 rail is the safest and most secure mode of
17 transporting these highly dangerous
18 substances.

19 Nothing in fact is more important
20 than the safety of our employees and the
21 communities through which we operate. The
22 freight rail industry is doing its part to

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1 ensure that highly hazardous chemicals are
2 being delivered safely.

3 Railroads spend billions of
4 dollars each year to ensure the safety of our
5 rail network. We train thousands of local
6 emergency responders, and have implemented
7 costly yet necessary special operating
8 procedures on trains carrying TIH.

9 Just recently we implemented new
10 AAR standards for tank cars carrying TIH,
11 standards designed to sharply reduce the risk
12 of toxic releases should an accident occur.

13 Our concentrated efforts to
14 enhance the safe transport of TIH have
15 produced superior results. In 2006, the most
16 recent year for which we have final data,
17 99.996 percent of all hazardous materials
18 shipped by rail arrived safely at their final
19 destination.

20 In fact I have to say it was
21 gratifying to hear this morning and listen to
22 so many of our customers and customer

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1 representatives laud the industry for our
2 safety record. And I want to say that it is
3 not something that is done in a vacuum; we
4 work closely with our customers, with the
5 shippers and with the receivers, both on the
6 safety and security side, to make sure we can
7 continue to maintain that record.

8 Notwithstanding the record,
9 notwithstanding the cooperative efforts that
10 we have in that regard, the current risk
11 profile for transporting TIH by rail is
12 untenable.

13 To repeat we are not seeking to
14 eliminate the common carrier obligation at
15 this point, but what we are seeking, as I put
16 in our written statement, we are asking that
17 you issue a policy statement based on the
18 record in this proceeding that a railroad if
19 it chooses to do so may establish common
20 carrier service terms that, one, require the
21 shipper of TIH materials to indemnify the
22 carrier for the full amount of any liability

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1 or exposure resulting from the release of TIH
2 materials above a threshold level that would
3 be set at the higher of \$500 million or the
4 amount of insurance if the amount of insurance
5 is greater than that, that the railroad is
6 carrying.

7 Now some have questioned your
8 power to make such a determination. I note
9 that they have offered no citations to support
10 their assertion that you lack power, but let
11 me address that quickly.

12 The Interstate Commerce Act
13 requires that a request for service be
14 reasonable. It also requires that the carrier
15 response is reasonable.

16 Reason, of course, is in the eye
17 of the beholder, and there is therefore the
18 need in some cases for an arbiter to decide:
19 is the request reasonable? Is the response
20 reasonable?

21 And in the seminal case of Granite
22 State Concrete the 1st Circuit Court of

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1 Appeals made it clear and explicitly found
2 that you are that arbiter.

3 In fact this court said, quote,
4 the two statutory provisions do not provide
5 precise definitions for the operative
6 standards. Section 111.01 does not define
7 what is adequate service, unreasonable
8 request, and Section 107.02 does not define
9 what would be reasonable rules and practices.

10 The court went on to say further
11 that under the statutory scheme of ICCTA,
12 quote, the definition and scope of these terms
13 are to be determined by the Board on a case-
14 by-case basis in light of all the relevant
15 facts and circumstances.

16 I think it is clear that you have
17 the authority, and Mr. Chairman, you mentioned
18 it this morning in your opening remarks, and
19 I think that you have the authority to make a
20 policy decision as we are asking.

21 So why is the request to transport
22 TIH not reasonable? We believe that as you

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1 take a look at risk in general, there are two
2 impacts of risk. One is that you do
3 everything you can to reduce the risk. You do
4 everything you can to reduce the impact of the
5 event should it occur. You do everything you
6 can to make sure that you can recover, and
7 that the damage is short, and not terminal.

8 You will hear later from the
9 railroad panel about the security steps we
10 take, the safety steps we take, the operating
11 steps we take, to make sure that we are
12 mitigating the risk, trying to reduce its
13 impact, and making sure that we can recover
14 from an event.

15 But the second impact of risk is,
16 once you go through step one, and you make
17 everything you can, you then make a
18 determination: do I want to undertake this
19 action? Do I want to undertake this risk?
20 And if you don't want to, you exit the
21 activity.

22 We are not asking to exit the

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1 activity at this point, but we also understand
2 the common carrier obligation therefore do not
3 have that opportunity to walk away if we
4 determine that it is an unreasonable risk.

5 Each one of the class I members,
6 and one of the panelists mentioned it this
7 morning in their 10Ks where they are required
8 by Sarbanes-Oxley to rate their highest risk,
9 each one has transportation of TIH as the
10 number one risk.

11 Norfolk Southern in a previous
12 proceeding, CSX in this proceeding, have
13 indicated that but for the common carrier
14 obligation they would exit that activity.

15 It is the threat to the network,
16 not just the individual railroad, to the
17 employees, to the citizens of the communities
18 in which we operate, that is being endangered
19 each day when we are forced to carry TIH
20 materials.

21 We think that asking us to do so
22 without recognizing and sharing in the

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1 liability for doing so is unreasonable.

2 The second branch of your
3 determination - you don't need to find both,
4 but the other one is - is our response
5 reasonable? Would a requirement to share in
6 the liability be reasonable?

7 Again, we believe that it is. The
8 industry is not walking away from its
9 responsibility. It is suggesting right now a
10 \$500 million minimum insurance requirement.
11 Some railroads will carry more.

12 But it is the nature of the
13 product itself that is requiring higher
14 insurance, and that is raising the liability
15 level.

16 Someone this morning quoted the
17 Bisso, in our Supreme Court Case, and talked
18 about wrongdoers getting away without any
19 responsibility. I bridle at the aspect that
20 our railroads are wrongdoers. But in any
21 case, the Bisso case was a case where the
22 company was trying to shift all of its

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1 liability. It was not taking any
2 responsibility. That is not the case here.

3 We believe that the companies that
4 produce, market and profit from these
5 materials should share in the substantial
6 liability.

7 If you issued the policy statement
8 we propose, I believe it would be a spur for
9 the private sector to evolve solutions.

10 In April I was pleased to commend
11 the Fertilizer Institute for their assertive
12 action proposing a partnership in buying
13 liability insurance.

14 I repeat that praise today. I
15 think Ford West and his members have done an
16 outstanding job in trying to address the
17 concerns that we have addressed.

18 I disagree that a policy statement
19 from you would undermine those negotiations.
20 We see them as complementary.

21 In fact the discussions between
22 the Fertilizer Institute and the individual

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1 railroads would address the issue of
2 liability, and it would be up to the railroad
3 to make a determination at that point that
4 that satisfies the need for liability sharing,
5 and therefore a further tariff requirement
6 would be unnecessary.

7 I would also just like to mention
8 very quickly if I can, Mr. Chairman, a lot of
9 discussion about market-based solutions.
10 Right now it is not a market-based solution.
11 The industry is under an obligation to carry
12 this material and to bear all of the costs.

13 I believe that it would be spur to
14 private sector discussions if you were to
15 issue this statement.

16 Let me just close, therefore, by
17 saying that there has been a lot of talk about
18 a lot of important issues - tank car
19 standards, and the Bisso case, Federal Rail
20 Safety Act amendments - but at its heart what
21 we are asking is really very straightforward
22 and a very simple proposition.

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1 One, the policy we are asking for
2 is driven by real world events.

3 Two, you have the authority to
4 issue that policy.

5 Three, the policy is consistent
6 with the common carrier obligation and
7 definition of what is reasonable.

8 Four, the record is complete
9 enough for you to make the determination.

10 And five, the policy would achieve
11 a further public goal of driving private
12 sector discussions.

13 Thank you.

14 CHAIRMAN NOTTINGHAM: Thank you,
15 Mr. Hamberger.

16 We will now hear from General
17 Timmons from the American Short Line and
18 Regional Railroad Association.

19 Welcome.

20 MR. TIMMONS: Good afternoon, Mr.
21 Chairman, and thank you very much.

22 Mr. Vice Chairman, Mr. Buttrey,

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1 it's a pleasure to be here this afternoon, and
2 I thank you for the opportunity to testify on
3 this important subject of common carrier
4 obligations as they affect the short line
5 railroads.

6 This is an important opportunity
7 to influence and correct what I perceive as a
8 longstanding public policy shortcoming, that
9 threatens our citizens, our communities, rail
10 freight transportation, and obviously the
11 employees that work in the short line railroad
12 industry.

13 The unreasonableness of the
14 current situation has brought together
15 numerous stakeholders, all of whom will speak
16 forcefully on this subject of TIH movements.

17 You possess the authority to forge
18 a practical and equitable solution to this
19 serious dilemma short line railroads, and
20 indeed, the railroad industry, faces every day
21 of the year, that being of course the tragic
22 consequences of a TIH spill and its extreme

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1 costs.

2 I am proud of the consistent and
3 safe performance of the short line and
4 regional railroads and of their contributions
5 to freight movement across the country. They
6 are the first mile/last mile of our system,
7 and tie the network together for both shipper
8 and user with an unprecedented safety record
9 for the transportation of TIH materials.

10 The Short Line Association is
11 pleased to have the opportunity to participate
12 in these proceedings, and to specifically
13 address the application of common carrier
14 obligations to hazardous materials.

15 Our comments focus on the
16 transportation of TIH and propose a framework
17 under which the stakeholders in TIH
18 transportation share in the liability risks
19 presented by TIH.

20 All those small railroads are
21 generally well equipped to handle the risks
22 related to common carrier freight obligations.

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1 These railroads despite an unprecedented
2 safety record of TIH handling, simply cannot
3 manage the extraordinary potential risk
4 presented by a TIH mishap.

5 Small railroads do not have the
6 financial resources and cannot reliably obtain
7 insurance coverage to address claims in the
8 hundreds of millions of dollars, let alone
9 claims in the billions of dollars.

10 A TIH incident on a Class III or
11 Class II railroad likely would bankrupt the
12 carrier and leave vast numbers of people
13 without remedy for losses resulting from
14 injury, death or destruction of property.

15 In light of the disproportionate
16 risks to the public presented by TIH, and the
17 limited financial resources of small
18 railroads, an unconditional requirement that
19 small railroads carry those commodities does
20 not serve the public interest.

21 On the other hand, the Short Line
22 Association recognizes that it is in the

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1 public interest that rail transportation be
2 available for TIH movement. Therefore balance
3 must be reached between the obligation of
4 small railroads to handle the traffic tendered
5 by TIH shippers, and the inherent limitations
6 on those carriers to manage the risks.

7 The Short Line Association
8 believes that it is not reasonable to force a
9 small railroad to bear 100 percent of the risk
10 associated with TIH movements when it is
11 beyond dispute that a small railroad does not
12 have the financial resources to manage such a
13 risk.

14 Both court and agency decisions
15 indicate that the Board has the discretion to
16 determine the scope of the common carrier
17 obligation. The Short Line Association
18 respectfully urges the Board to use its
19 discretion to determine that it is reasonable
20 for a small railroad to condition its
21 willingness to handle a TIH shipment on the
22 existence of a liability sharing arrangement

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1 that protects the public from TIH risks.

2 The ASLRR thereby proposes that if
3 the smaller railroad satisfies certain minimum
4 insurance requirements, they be permitted to
5 publish a tariff that conditions their
6 obligation to carry TIH on the other
7 stakeholders similarly assuming certain
8 insurance and liability obligations.

9 In other words if the other
10 stakeholders in a TIH move agree to the
11 conditions in the tariff, their request for
12 service is reasonable, and the small railroad
13 is bound by its common carrier obligation.
14 However if the other stakeholders choose not
15 to comply with the conditions, then the small
16 railroad is not required to serve the TIH
17 shipper.

18 In order to implement this
19 proposal, the Short Line Association urges the
20 STB to promptly issue a policy statement that
21 interprets the term, reasonable request, as
22 applied to TIH shipments in a manner

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1 consistent with this proposal.

2 So in order for a small railroad
3 to be able to publish a tariff that conditions
4 its handling of TIH on the criteria below, a
5 class III railroad must have liability
6 insurance coverage with a minimum limit that
7 meets or exceeds the lesser of 200 percent of
8 its freight revenue, or \$25 million. And a
9 Class II railroad must have a liability
10 insurance coverage with a minimum limit of \$25
11 million.

12 A Class I railroad must have
13 liability coverage in the amount the Board
14 determines. The policy must name the Class
15 III or Class II railroad as an additional
16 insured for inter-line moves of TIH. In the
17 event of a loss-producing incident, or one
18 caused by the Class III or Class II railroad,
19 the insurance of the Class III or Class II
20 railroad, would be the primary coverage.

21 To the extent that the Class I
22 railroad's insurance policy has an attachment

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1 point that is greater than the limit on the
2 Class III or the Class II railroad's insurance
3 policy, the Class I railroad would indemnify
4 the Class III or Class II railroad for the
5 TIH-related losses that fall within the
6 coverage gap.

7 The TIH shipper must have excess
8 insurance in an amount the Board determines,
9 which coverage attaches at the limit of the
10 Class I railroad's insurance policy. The
11 excess policy must name the Class III or the
12 Class II railroad as an additional insured,
13 unless the Board determines that it is
14 commercially unreasonable to do so based on
15 insurance industry capacity limitations for
16 TIH hazards.

17 The TIH shipper must indemnify the
18 Class III or the Class II railroad for the TIH
19 losses above the limit of the shipper's excess
20 insurance policy.

21 Now in order for a Class III or a
22 Class II railroad to qualify to issue a tariff

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1 that requires Inter-line Class I carriers and
2 TIH shippers to share in the liability for a
3 TIH move, the Class III or the Class II
4 carrier would be required to obtain a sizeable
5 amount of insurance of at least \$25 million.
6 This requirement would increase the insurance
7 coverage maintained by many small railroads
8 today which is in the public interest.

9 In addition the small railroad's
10 insurance under the proposal is primary. The
11 Class I interline carrier, and/or the TIH
12 shipper, would become responsible for a
13 portion of the small railroad's liability only
14 if the TIH incident products liability in
15 excess of the small railroad's required
16 insurance limit, a condition that has rarely
17 if ever occurred for short line HAZMAT
18 carriers.

19 The \$25 million amount of primary
20 insurance this proposal requires a small
21 railroad to maintain is intended to reflect
22 the small railroad's responsibility and

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1 commitment to protect the public interest, but
2 is also meant to recognize the inherent
3 financial limitations of a small business, and
4 the many benefits that many small railroads
5 derive from the carriage of TIH.

6 In conclusion the ASLRRA has
7 attempted to craft a liability sharing
8 framework that is workable and equitable,
9 given the financial limitations of small
10 railroads and the immense liability risks that
11 arise from the handling of TIH.

12 The Short Line Association
13 acknowledges that although its proposal will
14 provide adequate coverage for the vast
15 majority of TIH incidents, it likely would not
16 be sufficient to address all losses arising
17 from a significant TIH spill, particularly in
18 a metropolitan area. In order to address that
19 situation, the ASLRRA urges the Board to
20 support a legislative solution similar to the
21 Price-Anderson approach developed by the AAR
22 and the Short Line Association two years ago.

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1 I respectfully request that you
2 seriously considered this tiered option that
3 draws together those responsible for TIH
4 production and movement.

5 Now there will be other approaches
6 to this problem that merit serious review, and
7 my expectation is that from these proposals a
8 much overdue remedy may be crafted that serves
9 the best interests of shippers, railroads, and
10 the businesses and communities they serve.

11 I thank you very much for your
12 attention this afternoon, and I will be happy
13 to address any questions you may have at the
14 appropriate time.

15 Thank you.

16 CHAIRMAN NOTTINGHAM: Thank you,
17 General Timmons.

18 Mr. Hamberger, we've heard a lot
19 about tort law today. We have heard a little
20 bit about bankruptcy law in a worst case
21 situation which of course is that we are here
22 today unfortunately having to talk about,

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1 because it is we hope we never see that
2 situation, but we have to at least think about
3 it and plan.

4 It occurs to me that if you assume
5 a massive liability imposed on a Class I
6 railroad that would require that Class I
7 railroad to go out of business, you are
8 basically looking at situation where you are
9 going to presumably have some injured parties
10 not getting compensated according to my
11 understanding, my very basic understanding of
12 tort law and bankruptcy law.

13 So any notion that the current
14 system is actually a healthy one from the
15 perspective of protecting people who might
16 need and deserve compensation in the event of
17 a worst case scenario, I call it into question
18 I guess.

19 I just want to know if you have
20 thought through that at all. I know it's not
21 a super positive thing for you to be thinking
22 through everyday. But railroads in the past

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1 have had to go into bankruptcy. Not any real
2 big ones real recently that I'm aware of, but
3 I've certainly heard a little about the Rock
4 Island and the Penn Central.

5 Any reaction to any of those
6 comments?

7 MR. HAMBERGER: Yes, sir, thank
8 you, Mr. Chairman.

9 The thinking that we have done
10 about it is based more on what would be the
11 impact on the network rather than whether or
12 not victims would be totally compensated.

13 You are I believe exactly correct
14 in that the - if there was indeed a
15 catastrophic event that the damages would
16 exceed the amount of insurance; they would
17 exceed the amount of available cash that the
18 railroad could put against those damages; and
19 the railroad would be forced into bankruptcy.

20 Now as Mr. Vice Chairman Mulvey
21 has indicated airlines have gone into
22 bankruptcy. But our concern is that in this

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1 case if a railroad were to be forced into
2 bankruptcy absent an intervening event by
3 Congress or the federal government that the
4 natural course of events would be that the
5 trustee in bankruptcy would certainly cut any
6 - any spending that he or she determined was,
7 quote, unnecessary.

8 And I would anticipate that any
9 expansion capital would be dried up very
10 quickly; that something called deferred
11 maintenance might become the order of the day
12 on that railroad; and that an analysis would
13 have to be done of what assets can be sold,
14 and I listened to the city councilwoman from
15 Alexandria talking about the real estate that
16 is currently a rail yard. I suppose a trustee
17 in bankruptcy might decide that that rail yard
18 should become condos looking out over the
19 Potomac, and that the railroad in question
20 would certainly be in a much different
21 configuration. And that then would have a
22 ripple effect with the rest of the network

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1 even if it wasn't chopped up and sold. The
2 fact that the investment was not keeping pace
3 with what was needed to expand and maintain it
4 at a ready state would have a ripple effect
5 throughout the entire network, as we are as
6 you know a North American network.

7 So I think it would have an effect
8 on all shippers, and it's something that
9 sometimes I think the other shippers don't
10 recognize, that they are at risk should
11 something like this occur.

12 CHAIRMAN NOTTINGHAM: You
13 referenced the airline industry. In the
14 airline industry, the U.S. passenger rail
15 industry, particularly Amtrak, the nuclear
16 power industry we heard about earlier today,
17 there are probably others, all seem to have
18 some protections. There is some recognition
19 in statute that they are being asked to take
20 on some significant risks, and that there
21 ought to be some limit on those risks.

22 How did we get to this point where

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1 arguably the freight rail industry is sort of
2 the only one out there that is left hanging
3 with all its fully exposure for being
4 obligated by statute to handle the most
5 dangerous materials? Is this something you
6 guys asked for?

7 MR. HAMBERGER: Well, we certainly
8 did not ask for it. But we have, as General
9 Timmons indicated, been trying to interest
10 members of the House and Senate in some sort
11 of liability cap legislation. We have our own
12 proposal out there. We have shared that with
13 our customers in the chemical industry.

14 We have not reached consensus with
15 them, to say the least, nor have we been
16 encouraged by the reaction on Capitol Hill.

17 CHAIRMAN NOTTINGHAM: Thinking
18 through a worst case scenario, if one of your
19 members had to go into bankruptcy because of
20 a significant release of TIH and massive
21 lawsuits, injured people aren't getting
22 compensated presumably, and what do you then -

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1 how does that ripple out in two directions I
2 want to pursue, attracting capital and
3 investors to your industry, and what if any
4 consideration should we give to that kind of
5 scenario when we look at something as
6 important as revenue adequacy?

7 MR. HAMBERGER: Well, I think the
8 question of what is the impact, and I won't
9 pretend to be a bankruptcy lawyer, but as I
10 recall from my legal days back in Georgetown
11 there is a Chapter 7 and a Chapter 11, and I
12 believe the aviation industry went into
13 voluntary bankruptcy with a goal of
14 reorganizing, changing some of their operating
15 practices and coming back out as an operating
16 entity.

17 They were not forced into
18 bankruptcy by a catastrophe like this. I am
19 not sure that a trustee in bankruptcy would
20 even have the ability, depending on the size
21 of the liens against it, to even consider
22 trying to come back out, or whether it would

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1 be a liquidation bankruptcy in which case all
2 employees would be out of a job; all customers
3 on that particular railroad would be out of
4 that railroad's service; the connecting
5 carriers would no longer have anyone to
6 connect with.

7 So I think it would have an
8 incredibly deleterious impact on the entire
9 rail network.

10 I think that obviously at that
11 point the ability to attract capital would be
12 questioned. I know that Mr. Dave Burr of BNSF
13 is on two panels next, and he is the insurance
14 expert for BNSF, and I'd like to reserve his -
15 ask him about what that would do about the
16 ability to get insurance.

17 I have heard others opine that the
18 next major TIH accident means that there will
19 be no TIH insurance available.

20 CHAIRMAN NOTTINGHAM: And with -
21 history tells us that when we have had large
22 railroad failures or bankruptcies, the Board

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1 or in the past the ICC has had to come in and
2 direct service in many cases, and Congress has
3 felt obligated I'm told on occasion to
4 actually appropriate funds to make sure that
5 the serving railroad that is standing in as an
6 emergency provider actually gets compensated.

7 I think if we got into that level
8 of worst case scenario, and you used to work
9 in the Congress I know, do you think it would
10 be reasonable for the Congress at that future
11 point to stop and ask, how did we get to this
12 point? Who is the regulator here? We are
13 having to fork over money to keep a rail line
14 because there wasn't adequate insurance, and
15 there actually were multiple hearings before
16 the regulatory agency and nothing was done.

17 In your experience as a former
18 congressional staff person, do you expect this
19 Board or future members of this Board should
20 look forward to that kind of scrutiny from the
21 Congress?

22 MR. HAMBERGER: I would expect that

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1 the investigations, subcommittees, any number
2 of committees would want to know what
3 happened, how was it allowed to devolve into
4 this situation. Why is the federal government
5 being called in to prop up what should be an
6 ongoing and profitable railroad?

7 And so I would not be at all
8 surprised that that would be Congress'
9 reaction. I don't know that they would step
10 forward with the money. It's hard to know
11 what their view would be at that point.

12 But I think that there would be an
13 awful lot of questions asked as to why it was
14 allowed to get to this point.

15 CHAIRMAN NOTTINGHAM: Let me turn
16 it over to Vice Chairman Mulvey for questions.

17 MR. MULVEY: A couple of things.

18 I think realistically of course
19 it's the railroads carry the coal to power our
20 utilities and the food from our farms, et
21 cetera. The likelihood of a railroad being
22 shut down and sold off, and the shippers not

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1 being served, is probably zero. All members
2 of this panel including yourself have all
3 worked for the Congress, and Congress I would
4 think would almost be forced to do something,
5 whether it would be something as radical as
6 nationalization or creating some kind of
7 Conrail alternative, et cetera. But I think
8 it's clear that you could not just simply
9 abandon one-third or one-fourth of the Class
10 I railroads if one of the major ones -

11 MR. HAMBERGER: I'm not sure I'd
12 disagree. I was just trying to play out the
13 hypothetical scenario of the chairman.

14 But I will, I think, hopefully
15 agree with you that even under that scenario
16 the railroad would be under much different
17 management with much different goals than
18 expansion in -

19 MR. MULVEY: And I agree, it might
20 not have the expansion capital that both you
21 and I think is necessary for this railroad to
22 meet -

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1 MR. HAMBERGER: Right, exactly.

2 MR. MULVEY: - the future demands.

3 In your testimony you talk about
4 what constitutes a reasonable request on the
5 railroads, and doesn't adherence to the FRA
6 and PHMSA and TSA regulations, doesn't that
7 imply or doesn't that confer reasonableness on
8 a request for carriage, if you are complying
9 with all those rules and regulations, and if
10 the shipper is complying with the rules and
11 regulations in terms of how the tank and the
12 tank car - the quality of the tank car, et
13 cetera, and how it's filled, and complies with
14 all the rules and regulations, and asks the
15 carrier, isn't that a reasonable request per
16 se?

17 MR. HAMBERGER: Not per se. It is
18 reasonable with respect to complying with all
19 the rules and regulations. But it is
20 unreasonable because it puts that railroad in
21 an untenable position, in an uninsurable
22 position, where it is, notwithstanding what

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1 some may believe, where it is a bet-the-
2 company process.

3 We are fortunate that that has not
4 occurred; that every accident to date has been
5 within the coverage limits of insurance. But
6 that is not a guaranteed outcome in the
7 future. So from that standpoint, because of
8 the very nature of the product that is being
9 tendered to be carried, is what makes it
10 unreasonable.

11 MR. MULVEY: Previous witnesses,
12 Mr. McBride in particular, tried to draw the
13 distinction between the railroad industry and
14 the nuclear industry in terms of the
15 applicability of a Price Anderson kind of a
16 model to the railroad industry. And he listed
17 off several characteristics of the nuclear
18 industry under Price Anderson and what they've
19 had to agree to.

20 I raise the issue as to whether or
21 not carrying - if you have an accident
22 carrying nuclear materials, you have no

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1 liability for that. You are completely
2 covered by Price Anderson.

3 Do you think that that should be
4 extended to the railroads for carrying TIHs or
5 PIHs?

6 MR. HAMBERGER: That was our
7 legislative effort, which as I indicated in
8 the earlier questioning has not gotten a lot
9 of traction in the House and Senate. And I
10 will defer to Mr. McBride in his knowledge of
11 the nuclear industry. We are open to
12 discussions of how that would be structured,
13 how it would be funded. I think that that
14 might be a longer term goal.

15 What we believe right now is that
16 you have the authority to issue the policy
17 that we are asking; that that would drive
18 certain behavior including, which I did not
19 mention in my opening statement because I was
20 dinged down, including driving private sector
21 activity on behalf of the chemical
22 manufacturers and their customers to figure

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1 out, is there another way to do this?

2 And I was impressed with the
3 previous panel, Ms. Payne and Mr. Weber,
4 talking about the importance of anhydrous
5 ammonia to the farmers in their states.

6 I also was struck by the fact that
7 they make that decision to use anhydrous
8 ammonia rather than urea because it is a
9 little bit more effective and it is cheaper.
10 That is their decision, and we are saddled
11 with uninsurable liability because it is their
12 decision, economic decision, to use urea
13 rather - to use anhydrous ammonia rather than
14 urea. I'm not sure that that is a reasonable
15 request.

16 MR. MULVEY: And none of us here
17 are chemists or agricultural specialists or
18 for that matter even waste water treatment
19 specialists. Chlorine is another example.
20 Chlorine, again, you have suggested many many
21 times that it would be a good idea for waste
22 water treatment plants around the country to

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1 switch from chlorine to bleaches and other
2 less toxic materials. But the industry comes
3 back and says, well, maybe that can be done in
4 some places, but it takes a long time for that
5 to happen, and chlorine for one has many many
6 more uses than simply waste water treatment,
7 and so many movements, it really has no
8 effective substitute. It sort of has to move.

9 Are you willing to move back a
10 little bit from your previous statement that -

11 MR. HAMBERGER: No, I don't want to
12 move back, but I will concede to Mr. Donovan
13 that I am not a chemist. But I believe that
14 if the manufacturers of this material were
15 forced to have a share of the responsibility
16 of not only the manufacture but also the
17 transport of this material, that there would
18 be in this business model a new openness to
19 looking at additional technologies or new ways
20 to accomplish the same thing.

21 You have some witnesses at the end
22 of the day who are much more informed on this

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1 issue than I am, but from what I've read there
2 are some applications where chlorine bleach
3 can be used. Out here at Blue Plains Water
4 Treatment Plant, it is not today a total
5 substitutability factor.

6 However I would draw your
7 attention to when the Montreal protocols were
8 enacted on chlorofluorocarbons, they were
9 given 10 years to make the transition from
10 CFCs to no CFCs. I can give you for the
11 record comments by chemical company CEOs at
12 the time believing that it would drive their
13 company out of business; it would drive
14 thousands of jobs overseas; and it could not
15 be done. It was accomplished in five years.

16 MR. MULVEY: We have a lot of
17 experience along those lines. It's funny when
18 you said Montreal protocols, of course with my
19 background I thought of the Montreal Protocols
20 of the Warsaw Convention limiting airlines'
21 liability in international trip making.

22 You cited some cases where the

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1 railroads have experienced recently where they
2 had fairly significant costs. But I was
3 noticing that, and some of these actually took
4 place in urban areas or near urban areas. One
5 occurred near San Antonio for example.
6 Another one occurred - Minot, that's not a
7 larger city, but it's still a fairly
8 significant urban area for that part of the
9 country.

10 I was just wondering if there were
11 any more breakdowns of how much monies have
12 actually been paid out rather than what the
13 claims were. Because as you know, it's been
14 argued before that, while, yes, sometimes
15 there are outrageous jury awards or runaway
16 juries or whatever you want to call them,
17 those are very often overturned by the courts
18 on appeal, especially when the carrier or the
19 party only partly at fault or even fully at
20 fault, the amounts are considered to be
21 excessive.

22 Do you want to comment on that?

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1 Is there any more documentation or data on
2 some of these that you presented here?

3 MR. HAMBERGER: That would have to
4 be from the individual carriers. I do know in
5 the Graniteville situation that the cost data
6 that I have been made aware of, and I don't
7 know whether it is public or not, so I'll just
8 defer to the NS representative. But it is
9 very compelling in the amount of damages paid
10 out in that particular case, in a relatively
11 rural setting at 2:00 o'clock in the morning,
12 with a terrible tragic end result of nine
13 deaths, but it could have been a lot worse,
14 much more tragic, if it had occurred at 10:00
15 o'clock in the morning instead of 2:00 o'clock
16 in the morning when the textile mill would
17 have been at full employment and the grade
18 school that was within half a mile.

19 So I don't know what is public and
20 what is not, but let me check on that for the
21 record.

22 MR. MULVEY: Thank you. ;

1 General Timmons, you claim that
2 small railroads cannot afford and, quote, are
3 often contractually prohibited from having a
4 significant amount of self insurance.

5 By whom are the short lines
6 prohibited? Is it the Class Is?

7 MR. TIMMONS: No, basically it's a
8 financial matter. The costs of insurance to
9 insure the movement of those TIHs is
10 prohibitive for the small railroads.

11 MR. MULVEY: But you say
12 contractually prohibited. That assumes that
13 there is somebody who has signed the contract
14 and says you can't self insure. Is that a
15 Class I-Class III relationship? Or is that
16 with shippers?

17 MR. TIMMONS: It is basically with
18 shippers.

19 MR. MULVEY: Thank you.

20 CHAIRMAN NOTTINGHAM: Mr. Buttrey,
21 questions.

22 MR. BUTTREY: I was just thinking,

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1 Mr. Chairman, as you were saying something
2 about being called up to Congress to explain
3 why the agency had not addressed this issue,
4 I just want to say, and I have no questions
5 for these witnesses, I just want to say that
6 I hope you enjoy being up there, because I am
7 probably going to be doing something else that
8 day.

9 I had that unpleasant experience
10 once, and I remember it well. So I just say
11 that I hope we never have to do that.

12 CHAIRMAN NOTTINGHAM: Mr.
13 Hamberger, you mentioned uninsurable
14 liability. I need to ask this: why shouldn't
15 Class Is just buy a lot more insurance and
16 raise their rates to pay for the costs?

17 MR. HAMBERGER: Two interrelated
18 questions if I might. One is the amount of
19 insurance, and I think we heard - again,
20 notwithstanding what we heard this morning,
21 Mr. West indicated that his involvement and
22 his investigation is that together the

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1 railroad industry and the fertilizer industry
2 could perhaps eke out \$1.5 billion.

3 Mr. Burr can talk to you more
4 about what an individual company can get as
5 opposed to a company in the secondary market
6 supported by the Fertilizer Institute.

7 So the amount of insurance is
8 finite in both the insurance and reinsurance
9 markets, so that limits what could be
10 purchased.

11 The issue of rates is of course
12 the secondary issue that we raised in our
13 comments, and it was talked about I believe by
14 you, Mr. Vice Chairman, earlier today, and
15 that is whether or not your SSAC and three
16 benchmark case approach would allow for the
17 costs to be allocated to the shipper who
18 forces those costs to be borne.

19 It is our belief that you have
20 made a mistake in that regard by saying that
21 you will not allow URCSS to be adjusted to
22 allow that.

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1 And yes, many of those costs are
2 being collected. They are part of the URCS
3 system. But in a rate case they are not
4 allocated specifically against that shipment.

5 So number one from the rate
6 standpoint you would therefore not be able to
7 get those costs reimbursed. And number two,
8 in addition to the costs, what we are really
9 talking about here is the liability which you
10 can't charge enough. The liability is just so
11 large that it's not monetizable, if that is a
12 word.

13 CHAIRMAN NOTTINGHAM: We are going
14 to keep the record open for 30 days, which is
15 often our custom, after today. It would be
16 very helpful to the Board, I believe, helpful
17 to me, to get some more concrete information
18 from the insurance industry.

19 If you could be of any help in
20 that regard.

21 MR. HAMBERGER: Okay.

22 CHAIRMAN NOTTINGHAM: Work with

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1 your members who are in touch with their
2 insurance providers. Because we are talking
3 about entertaining and looking at some very
4 significant possible potential policy
5 initiatives here, and we have to have more
6 than just your good word that there is - that
7 the insurance just isn't available.

8 MR. HAMBERGER: I know there was
9 testimony on the record a couple of years ago
10 in the House T&I Committee, a representative
11 of Aon testified there. So I know we can at
12 least dig that out of the records and send
13 that up.

14 CHAIRMAN NOTTINGHAM: And to follow
15 up on your point about our pre-benchmark,
16 simplified small rate case dispute resolution
17 process, wouldn't the natural result of that
18 then be, you have got to recover your - you
19 are entitled to recover your costs of being in
20 the railroad business through your rate
21 structure. If you can't assign it to the 0.3
22 percent of your traffic that you think is

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1 causing the bulk of your insurance proceeds,
2 you will have to presumably assign it across
3 the board to all your customers on the theory
4 that society generally benefits by having
5 agricultural products grown efficiently with
6 fertilizer, and utilities producing energy
7 with the help of some chemicals, et cetera,
8 that we all benefit by the flow of chemicals
9 into the economy, and so we all pay for the
10 cost.

11 Have you guys thought through that
12 at all? In that way if rates got really high
13 people could either bring a rate case or look
14 at their options for transportation.

15 MR. HAMBERGER: Well, as I say,
16 because those costs have to be allocated
17 across 32-, 33 million carloads, it does not
18 have them apply to the traffic which is
19 causing that cost to be incurred, and in - I
20 want to be careful here because I think if I'm
21 not mistaken we have an appeal on that matter
22 pending. So I'm not sure - I mean if it's

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1 okay to talk about it we can talk about it.
2 But we believe that it should be- that URCS at
3 least in those cases should be adjustable so
4 that the customers who are forcing those costs
5 to be incurred pay those costs and are not
6 cross-subsidized by the rest of our customer
7 base.

8 CHAIRMAN NOTTINGHAM: If I could
9 just follow up on Vice Chairman Mulvey's point
10 earlier about the rail transportation of
11 nuclear material, am I correct in saying that
12 if you have an accident today, at one of your
13 member companies, where spent nuclear fuel is
14 released and people are hurt, and let's say
15 it's because of the negligence of a railroad
16 employee, Price-Anderson would actually cover
17 the liability?

18 MR. HAMBERGER: It is my belief,
19 and correct me if I am wrong, General Counsel
20 Warchot, that we are responsible for \$300
21 million.

22 (Off-mic comment.)

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1 CHAIRMAN NOTTINGHAM: Okay, so it's
2 limited responsibility.

3 MR. HAMBERGER: Right.

4 CHAIRMAN NOTTINGHAM: So the notion
5 that we have never crossed the threshold of
6 ever asking parties who make something to
7 actually step up and bear some of the
8 responsibility for the accidental or negligent
9 release of it, at least part of the
10 responsibility, we've sort of crossed that
11 threshold?

12 MR. HAMBERGER: Well I think not
13 only in that case, but just a short time ago
14 Mr. West indicated, and I want to be very
15 careful, because in our private conversations
16 he made it very clear that he is not assuming
17 the liability, but that he is, and his
18 members, stepping in to help assume the
19 economic cost of buying that insurance.

20 So it seems to me the Fertilizer
21 Institute has crossed that line as well.

22 CHAIRMAN NOTTINGHAM: General

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1 Timmons, in looking at this puzzle I want to
2 make sure that we don't do anything that harms
3 the short line industry. That is certainly
4 not our intent, not my intent.

5 You came up with a couple of
6 thresholds, \$25 million if I follow your
7 testimony of insurance. How did you sort of
8 arrive at your threshold? Did you kind of
9 look at short line industry averages for
10 insurance? As you know better than anyone
11 there is enormous diversity within your
12 membership.

13 MR. TIMMONS: There is.

14 CHAIRMAN NOTTINGHAM: You have
15 extremely small railroads, maybe a couple of
16 employees, mom and pop, maybe a couple of
17 miles of track, and then you've got the pretty
18 sophisticated multi-state significant players.

19 MR. TIMMONS: We do.

20 CHAIRMAN NOTTINGHAM: And nothing
21 that - looking at a change of rules or
22 policies that impact all of them, how to hit

1 that correctly is going to be a challenge if
2 we go down that road.

3 MR. TIMMONS: It certainly requires
4 an awful lot of in depth study. But roughly
5 half of our members, if you moved that
6 threshold to \$25 million, it would require
7 about half our members that move TIHs or more,
8 to bump up to \$25 million.

9 And that number is an estimate of
10 what we think that - that is the appropriate
11 threshold for Class IIs, and clearly for Class
12 IIIs. The adjustment for the Class III of
13 course is 200 percent of their annual revenue,
14 which would be something on the average,
15 something less than \$25 million.

16 So in a rough sense without
17 getting into the math of it, \$25 million is
18 the rough threshold that we were looking at
19 for Class II and Class III railroads.

20 In terms of the implications for
21 the small railroad industry at large, when you
22 say you want to make sure there are no adverse

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1 implications for them based on policy change,
2 the difficulty they have to be honest about it
3 is that they do not have the option of
4 rejecting this.

5 And so they are driven to accept
6 it, to move it, and traditionally have done a
7 very very good job in this regard, simply
8 because it's generally a daylight move in low
9 volumes at low speeds. So their traffic -
10 their history of moving this stuff is
11 extremely good.

12 Last year the insurance industry
13 picked apart the small rail industry TIH
14 movement profile, and was very very impressed
15 to include Lloyds of London and Berkshire
16 Hathaway offering to be reinsurers for the
17 small railroad industry for private insurance.

18 So the issue is, if you have the
19 option, many of these small railroads would
20 choose not to move it. But if we can't get
21 away from the common carrier obligation, and
22 we are not suggesting that we should, at least

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1 set a range of conditions that permit them to
2 reasonably haul it without being compelled to
3 go out of business if a mishap should occur.

4 CHAIRMAN NOTTINGHAM: Thank you.

5 Vice Chairman Mulvey.

6 MR. MULVEY: Just to follow up on
7 one thing with you, Ed. And that is, with
8 regard to the cost of insurance, are the
9 railroads to your knowledge able to separate
10 out the incremental costs that they have for
11 carrying HAZMATs as opposed to their overall
12 liability? That's the first part of the
13 question.

14 MR. TIMMONS: I assume the answer
15 to that is yes, but please, if I could defer
16 to Mr. Burr.

17 MR. MULVEY: The second part of
18 that is, you mentioned about adjusting - of
19 course the reason for going for the simplified
20 standards is that we don't want to have the
21 parties fighting over everything all the time,
22 and just take it as it is.

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1 But it is also clear that this is
2 something that has been around for a long time
3 and probably needs updating. Is the
4 Association of American Railroads and the
5 American Short Line Association, are both of
6 you amenable to seeing URCS updated?

7 MR. HAMBERGER: The only formal
8 position we have taken is in this particular
9 proceeding as far as the general approach, let
10 me check with our members in the back.

11 MR. MULVEY: Thank you.

12 MR. TIMMONS: We would certainly be
13 open to looking at that.

14 MR. MULVEY: Thank you very much.

15 CHAIRMAN NOTTINGHAM: Thank you.

16 Any further questions? Mr.
17 Buttrey?

18 MR. BUTTREY: I'd just like to
19 clarify. I know you didn't mean to give an
20 incomplete answer, but maybe I missed it when
21 we were talking about Price Anderson and the
22 liability of the railroads and the cap on the

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1 liability - not the cap on the liability, but
2 the insurance provisions.

3 Did I hear you say that if there
4 were an incident, catastrophic incident, which
5 you would assume nuclear radioactive would be,
6 under Price Anderson the railroad's liability
7 would be limited or capped at \$300 million?

8 MR. HAMBERGER: Three hundred
9 million, yes.

10 MR. BUTTREY: And then it would go
11 to the pool, is that correct?

12 MR. HAMBERGER: I believe that's
13 the way it works, yes.

14 MR. BUTTREY: So the rest of it
15 goes to the pool up to -

16 MR. HAMBERGER: Five billion.

17 MR. BUTTREY: Is it \$5 billion?

18 MR. HAMBERGER: Closer to \$10
19 billion.

20 MR. BUTTREY: Ten billion? Okay.
21 I know it goes - but my question is, then it
22 goes to the pool.

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1 And that pool is spread over what
2 I believe to be a fairly large number of
3 participants shall we say in the industry?

4 MR. HAMBERGER: It is my
5 understanding all the nuclear utilities,
6 right?

7 MR. BUTTREY: But in your case the
8 pool would be a handful, less than a handful
9 of participants; is that correct? If there
10 were a pool?

11 MR. HAMBERGER: You mean in the
12 draft legislation, is that what you are
13 talking about?

14 MR. BUTTREY: Yes. I'm talking, if
15 there were a similar Price-Anderson type
16 mechanism. Your pool would not be a broad
17 pool of many participants; it would be a very
18 limited number of participants in that pool.

19 MR. HAMBERGER: That's correct.

20 MR. BUTTREY: Which would tend to
21 limit the ability of the pool to meet the
22 demand that is being made on the pool if there

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1 were a catastrophic incident; is that correct?

2 MR. HAMBERGER: The way that was
3 designed in that draft legislation was, it was
4 a contribution based on per carload by the
5 shipper up to a threshold of \$10 billion.

6 MR. BUTTREY: Per incident?

7 MR. HAMBERGER: Per incident. And
8 then you would go - both Class I, II, III
9 railroads, shippers, and tank car
10 manufacturers, all had insurance thresholds.

11 And in theory I suppose you would
12 work through that entire - all of those
13 thresholds before you go to the pool. Then
14 the pool would contribute whatever was
15 necessary to meet the liability losses that
16 were incurred as a result of the incident.

17 MR. BUTTREY: And the tank car
18 producers, the manufacturers of the tank cars
19 -

20 MR. HAMBERGER: That's correct.

21 MR. BUTTREY: - which are
22 presumably the safest in the world.

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1 MR. HAMBERGER: Right.

2 MR. BUTTREY: Anybody who knows
3 anything about it, they would participate in
4 the pool.

5 MR. HAMBERGER: Not the pool; they
6 would carry an insurance level.

7 MR. BUTTREY: They would carry an
8 insurance level.

9 MR. HAMBERGER: The shippers are
10 the pool contributors by carload. And so it
11 was - the discrimination was based on how many
12 carloads you moved each year, and you
13 contributed.

14 Once you reached the pool
15 threshold you didn't contribute any more; you
16 stopped. And the pool sat there until there
17 was some pressure on the pool, and then they
18 contribute to meet the needs of the mishap.
19 And the Secretary of Transportation was the
20 manager, monitor, overseer and judge of when
21 the incident fund - that's the name of it, the
22 incident fund - was to be tapped.

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1 MR. BUTTREY: So you would work
2 through all the - you work through potentially
3 the railroad's insurance, the shipper's
4 insurance, the tank car insurance, before you
5 got to the incident pool? Thank you.

6 MR. MULVEY: But to clarify on that
7 point, Mr. Butz, you were saying that the pool
8 for the Price Anderson consists of 103
9 utilities. Your pool would actually have many
10 many more shippers than - many many more
11 contributors than 103, right? Because there
12 are that many more shippers of TIH?

13 MR. TIMMONS: Well, yes, that's
14 right, there are many.

15 MR. HAMBERGER: There are many
16 receivers. I don't know how many shippers
17 there are.

18 MR. MULVEY: Well, that's the
19 question. He said that there were fewer or -
20 and I want to be clear - would it only be the
21 producers? Or would it also be the receivers
22 as well that would contribute to the pool?

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1 Okay, so then that is a relatively
2 few number of chemical companies.

3 Thank you.

4 CHAIRMAN NOTTINGHAM: Any further
5 questions?

6 This panel is dismissed. Thank
7 you.

8 We will now call up the next
9 panel, panel IV, a group of representatives of
10 the chemical industry.

11 From Dow Chemical Company Cindy
12 Elliott and Jeffrey Moren; from PPG
13 Industries, Inc., Sharon Piciacchio and Karyn
14 Booth; from Occidental Chemical Corporation
15 Robin A. Burns; from E.I. du Pont de Nemours
16 and Company, Gary W Spitzer; and from Olin
17 Corporation, John McIntosh.

18 Welcome, and we will invite you
19 forward and get you going. Our first speaker
20 will be Cindy Elliott and Jeff Moreno.

21 Whenever you are ready you can
22 proceed. Thank you.

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1 PANEL IV: CHEMICAL SHIPPERS

2 MS. ELLIOT: Chairman Nottingham,
3 Vice Chairman Mulvey, Commissioner Buttrey, I
4 am pleased to present testimony again today on
5 an issue that is so important to Dow, the
6 common carrier obligation of railroads to
7 transport hazardous materials.

8 The common carrier obligation
9 ensures that all chemicals continue to move by
10 rail when that is the safest mode available.
11 Currently 20 percent of Dow's 2.2 million
12 product shipments annually are regulated as
13 hazardous materials, and our culture of safety
14 and responsibility pervades all activities in
15 their production, use and transportation.
16 Because the topics listed in the Board's
17 hearing notice touched on both commercial and
18 legal matters, I am joined by Jeff Moreno who
19 will comment on legal aspects of this hearing.

20 I am proud of the fact that
21 transportation fo hazardous materials has
22 never been safer with extensive private and

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1 regulatory initiatives underway to further
2 reduce risks.

3 Consistent with the principles of
4 responsible care, Dow is working with our
5 railroad partners and other industry
6 stakeholders on a number of projects that
7 focus on prevention and risk reduction.

8 First our overall objective is to
9 reduce the number of shipments and container
10 miles traveled by TIH materials by 50 percent
11 by 2015 from our 2005 baseline.

12 Second, DOW, UP and Union Tank Car
13 are in the process of implementing a next
14 generation tank car for TIH materials to
15 increase the survivability of a tank car
16 involved in accidents.

17 Third, for more than two decades
18 DOW and UP have provided emergency
19 preparedness and response training through
20 TRANSCAER to the communities along rail
21 routes.

22 And finally to improve shipment

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1 visibility Dow has installed GPS and sensor
2 technologies on all of our TIH tank cars.

3 These programs illustrate the
4 financial commitment, cooperation and progress
5 toward a common goal of reducing the risks of
6 hazardous materials transportation to both
7 railroads and the public at large

8 In addition to private industry
9 initiatives, FRA, PHMSA and TSA either
10 recently have adopted or are considering new
11 rules to resist the risk of transporting
12 hazardous materials by rail. These include
13 rules for routing, and operating practices, as
14 well as standards for tank cars, routing and
15 track safety standards.

16 These new programs deserve a
17 chance to demonstrate results. A rush by the
18 Board to impose liability limits for railroads
19 could undermine these efforts.

20 Dow is asking the Board to defend
21 the common carrier obligation against erosion.
22 The Board must not take any action that

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1 unintentionally undermines the safety of
2 transporting hazardous materials by rail.

3 This means ensuring that liability
4 remains with the responsible party,
5 specifically the party in control of the
6 material.

7 I will now turn the microphone
8 over to Dow's counsel to discuss the limits of
9 the Board's authority to address liability
10 limits, and the issues to be considered in any
11 change to the liability regime.

12 Jeff.

13 MR. MORENO: Thank you, Cindy.

14 Good afternoon. I wish to begin
15 by noting the common ground between the rail
16 industry and hazardous material shippers.

17 The current fault-based liability
18 regime has generated substantial cooperation
19 between railroads, shippers and regulators to
20 greatly reduce the risk of accident TIH
21 releases, and to mitigate the impact of any
22 release that may occur.

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1 Now several members of the board
2 this morning expressed some doubt or
3 skepticism as to what other shipper, TIH
4 shippers other than perhaps TFI, is doing to
5 address the liability issue.

6 I submit that the Board's question
7 seems to suggest that indemnification or
8 railroad liability caps through legislation
9 are the only solutions to the liability
10 question. But risk reduction efforts are an
11 equally valid activity that is deserving of
12 recognition by this Board including the
13 efforts that Cindy has just discussed.

14 Any tinkering with the current
15 fault-based system that fosters this type of
16 cooperation must not be done lightly. Any
17 action that would permit railroads to impose
18 indemnification requirements in their tariffs
19 is precisely the type of tinkering that this
20 Board cannot and should not undertake.

21 As a threshold matter, the Board
22 may not exercise its economic jurisdiction in

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1 a manner that adversely affects safety. Now
2 Chairman Nottingham, this morning you asked a
3 question of the association's panel as to
4 whether the STB can ever make a decision that
5 adversely affects safety.

6 While I think it's important to
7 distinguish between those decisions that have
8 a direct impact on safety, and those that have
9 incidentally impacts, the - as the Akron court
10 has noted, questions of risk liability are
11 also questions of safety.

12 Therefore, any action that this
13 Board takes with respect to liability has
14 direct impacts on safety, and when we are
15 talking about such direct impacts on safety,
16 this board must be very careful on how it
17 exercises its jurisdiction to ensure that it
18 does not do so in a way to adversely affect
19 safety.

20 A major function of our fault-
21 based liability system is to prevent future
22 harm through admonition of the wrongdoer. An

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1 indemnification provision undermines that
2 function by reducing the financial incentives
3 to operate safely.

4 Moreover, indemnification also
5 distorts the cost-benefit analysis that occurs
6 when deciding whether to make safety-related
7 investments such as signaling dark territory
8 or investing in positive train control.

9 Moreover, a fatal safety related
10 flaw in any indemnification proposal is that
11 it can only apply to railroads since this
12 Board's jurisdiction only extends to that
13 mode. This will create undesirable incentives
14 for shippers to use trucks which provide
15 service without an indemnification
16 requirement.

17 All of these results are contrary
18 to the broader public needs that shape the
19 boundaries of the common carrier obligation.

20 A tariff indemnification provision
21 may also not be enforceable in many, perhaps
22 most states, because indemnification is a

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1 matter of state tort law, and in most states
2 a railroad acting as a common carrier may not
3 exculpate itself from its own negligence; and
4 therefore such provisions are void as a matter
5 of public policy.

6 But when a state is acting within
7 its police powers to protect the public health
8 and safety, such as when it voids
9 indemnification laws on its public policy, the
10 board's jurisdiction does not preempt those
11 laws unless those laws unreasonably interfere
12 with railroad transportation.

13 I would submit the fact that the
14 railroad industry has hauled TIHs for nearly
15 100 years without indemnification provisions
16 would strongly suggest that this Board cannot
17 reach that conclusion.

18 To the extent that Congress has in
19 fact preempted state tort laws it has done so
20 through the Federal Rail Safety Act, and until
21 just last year, that act granted railroads
22 broad liability protection by preempting all

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1 state law claims related to any matter covered
2 by federal safety regulations, even when a
3 railroad was in violation of the federal
4 safety standard that caused the damages.

5 But just last year in 2007
6 Congress amended the act to revoke that
7 protection, and it did so in response to
8 preemption rulings arising from TIH releases
9 in the Minot incident. With Congress having
10 so recently expressed its intent to subject
11 the railroads to full liability for their
12 negligence for TIH releases, I do not see how
13 the board can reasonably assert discretion to
14 approve a contrary result.

15 At its essence this hearing is
16 about the risk of transporting TIH materials
17 by rail and who should bear those risks. But
18 what the rail industry has requested is
19 special treatment, which is an unprecedented
20 quid pro quo for the common carrier
21 obligation.

22 Dow submits that the risks faced

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1 by a railroad when it transports TIH materials
2 are not so different than those risks that
3 other businesses confront on a daily basis, so
4 as to merit this form of special treatment.

5 Other businesses, including other
6 TIH transporters, manage similar risk at a
7 cost of doing business - as a cost of doing
8 business, yet they continue to engage in those
9 businesses profitably.

10 What makes railroads unique is the
11 market power they possess to demand special
12 treatment. The common carrier obligation
13 ensures that despite this market power TIH
14 materials continue to move by rail when that
15 is the safest mode available.

16 The rail industry has tried to
17 distinguish itself from these other businesses
18 on the grounds that TIH materials account for
19 only a small fraction of the railroad
20 business. But this claim ignores all the
21 other traffic that railroads handle for which
22 TIH materials are essential.

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1 For example chlorine is essential
2 in the production of all plastics that
3 railroads transport. Anhydrous ammonia is
4 essential for growing the corn that railroads
5 transport, and that corn is essential to
6 producing the ethanol that railroads
7 transport.

8 Anhydrous ammonia is also
9 essential to enabling coal-fired power plants
10 to meet their clean air act requirements,
11 which enables railroads to haul more coal.

12 Furthermore the rail industry
13 already has a quid pro quo for the common
14 carrier obligation: they are and have been the
15 recipients of substantial government largesse
16 in the form of public land grants, loans and
17 subsidies, antitrust exemption, widescale
18 preemption of state and local laws; eminent
19 domain powers; and bottleneck franchise
20 protections.

21 There simply is not a reasonable
22 basis for special treatment of railroad

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1 liability risk. Any change in the existing
2 liability regime for TIH transportation cannot
3 and should not be made by this Board, because
4 it cannot make a holistic determination that
5 require tradeoffs between safety and economic
6 matters. Only Congress can do so.

7 CHAIRMAN NOTTINGHAM: Thank you,
8 Mr. Moreno.

9 We will now turn to Sharon
10 Piciacchio. I hope I didn't mangle too badly.
11 And Karen Booth. Welcome.

12 MS. PICIACCHIO: Chairman
13 Nottingham, Vice Chairman Mulvey, and
14 Commissioner Buttrey, I am Sharon Piciacchio,
15 Vice President of Marketing Services and Cal-
16 Hypo for the Chlor-Alkali business unit of PPG
17 Industries.

18 I appreciate the opportunity to
19 appear before you today to explain why PPG
20 strongly believes that the railroad's common
21 carrier obligation must continue to apply to
22 the transportation of chlorine, a commodity

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1 that is critical to the U.S. economy and our
2 way of life.

3 Appearing with me is our legal
4 counsel, Karen Booth.

5 PPG is a diversified manufacturer
6 of chemicals, protective coatings, glass and
7 fiber glass, with over 22,000 employees in the
8 United States, and more than 50 shipping
9 facilities; and we are one of the largest
10 manufacturers of chlorine, a commodity
11 classified as a TIH.

12 At the hearing in April the Board
13 heard compelling arguments as to why the
14 common carrier obligation is critical to
15 companies like PPG that depend on the
16 railroads to safely transport chlorine, and
17 why chlorine is essential to the nation's
18 economy and to human life despite its
19 hazardous characteristic.

20 It is undisputed that rail
21 transportation is the safest overland method
22 of transporting this commodity, as we've heard

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1 many times today. This has made the railroads
2 critical to our chlorine network. Although
3 PPG can ship to a limited extent by barge, and
4 to certain customers by pipeline, the vast
5 majority of our chlorine consumers cannot
6 physically receive chlorine by barge or
7 pipeline, and due to safety considerations,
8 PPG does not ship chlorine by truck in North
9 America.

10 Safety in the production and
11 shipment of chlorine is the highest priority
12 of our business, and we are proud of our
13 safety record. In 2007 PPG was recognized by
14 all five Class I railroad carriers for
15 completing the year without a single shipper
16 caused hazardous materials release.

17 This hearing was initiated in
18 response to the claims of the railroads that
19 shipments of hazardous materials, and in
20 particular, TIH commodities, create
21 extraordinary liability risks that make
22 requests for transportation of these materials

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1 unreasonable in the absence of liability
2 limits.

3 I would like to summarize why PPG
4 believes that the railroads' concerns do not
5 warrant any action by the Board to change the
6 common carrier obligation.

7 First we believe that railroad
8 transportation of chlorine is reasonable under
9 the common carrier obligation based on the
10 longstanding history of the carriage of this
11 commodity by the railroads, and the importance
12 of chlorine to the public health and welfare.

13 The courts have previously decided
14 that railroads cannot refuse to transport a
15 commodity simply because it is dangerous, as
16 long as it is shipped in accordance with
17 federal safety regulations.

18 We believe that this logic and
19 legal precedent still holds true today.

20 Second, the railroad industry
21 contends that absent the common carrier
22 obligation they would not choose to transport

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1 chlorine and other TIH materials, and that
2 this public duty justifies a limitation of
3 their liability by the government.

4 The railroads are asking for
5 special treatment. Companies that manufacture
6 and use TIH materials and other transporters
7 everyday face and manage similar risks. Yet
8 these companies continue to engage in their
9 businesses without protection from the
10 government.

11 Furthermore the railroads have a
12 long history of safely transporting chlorine,
13 and only recently have attempted to discourage
14 the transportation of this commodity through
15 extraordinary double digit price increases.
16 The rail industry claims that times have
17 changed, and that the risk of liability and
18 the cost of transporting chlorine has
19 increased.

20 The real change is that the
21 railroads are now choosing to exert their
22 market leverage over shippers to achieve their

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1 goals. The lack of bargaining power,
2 especially of captive shippers, is allowing
3 the railroads to implement unreasonable
4 pricing for instance that manufacturers and
5 consumers cannot fully absorb and remain
6 competitive in the global economy.

7 Furthermore we have customers that
8 are distressed over the rising rail
9 transportation costs and have requested PPG to
10 consider truck alternatives. However such
11 requests have not been accommodated by PPG for
12 safety reasons.

13 Our company is concerned that the
14 continuing rise of rail transportation costs
15 may add to the factors that are causing some
16 of our customers to shift their production
17 operations outside of the continental United
18 States, or simply curtail operations causing
19 a loss of business for PPG, and a loss of
20 American jobs.

21 Third, the railroads claim that
22 rates for the transportation of chlorine have

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1 increased to cover rising costs for insurance
2 and to comply with special handling and
3 operational requirements have never been
4 sufficiently justified.

5 To PPG's knowledge the railroads
6 have not adequately quantified the rising
7 costs that are claimed to apply to TIH
8 shipment.

9 PPG questions whether the
10 substantial rate increases that it has
11 experienced are solely intended to cover TIH
12 shipment costs. No detailed evidence has been
13 presented that insurance and shipment handling
14 costs for TIH justify the adoption of
15 liability limits.

16 Fourth, PPG is concerned that
17 applying liability limits to the
18 transportation of chlorine could reduce the
19 incentives for carriers to make safety-related
20 investments. The most widely cited of rail
21 incidents involving the releases of TIHs have
22 been determined by the National Transportation

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1 Safety Board to have resulted from railroad
2 error. PPG believes that the railroad should
3 continue to be held accountable for their
4 actions, and that the federal government
5 should address the railroads' liability
6 concerns by continuing to focus on
7 improvements to rail transportation safety and
8 security in order to prevent hazardous
9 materials accidents from ever occurring.

10 Recent rail safety and security
11 initiatives related to the transport of
12 hazardous materials undertaken by the FRA,
13 PHMSA and TSA are excellent examples of how
14 the government can enhance the safe transport
15 of TIH shipments. These important safety-
16 security matters are within the jurisdiction
17 of other federal agencies.

18 We are concerned that the
19 limitations on the Board's jurisdiction over
20 safety restricts the Board from reviewing and
21 acting on the liability issue in a complete
22 and comprehensive manner.

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1 Fifth, PPG is aware and heard
2 today that the Association of American
3 Railroads is asking the Board to issue a
4 policy statement at the conclusion of this
5 hearing that would endorse tariff provisions
6 that would require TIH shippers to indemnify
7 the railroads for liability in excess of \$500
8 million.

9 PPG strongly believes that it
10 would be inappropriate for the Board to take
11 such action. The policy requested by the
12 railroads improperly assumes that TIH shippers
13 do not share liability risks with the
14 railroads, when in fact shippers today may be
15 held liable for release of their product if
16 due to the shipper's fault.

17 Also no evidence has been
18 presented by the railroads that would support
19 adoption of this specific liability cap
20 proposed by the ARR, including whether shipper
21 indemnifies for railroad negligence is sound
22 public policy; what impact the proposal would

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1 have on safety; and whether railroads'
2 insurance obligations should be limited to an
3 amount lower than what the market may in fact
4 allow.

5 Finally, although PPG does not
6 agree that the liability concerns of the
7 railroad justify changes to the common carrier
8 obligation to the shipper, if any initiative
9 were undertaken for this purpose, it should be
10 undertaken by Congress. And it must involve
11 a thorough evaluation of the safety, liability
12 and public interest considerations.

13 Any congressional initiative
14 regarding liability limitations for TIH
15 shipments to be successful must include the
16 following:

17 Railroads should be required to
18 disclose the Congress the details of extra
19 costs associated with handling TIHs. Any
20 liability cap or limitation applicable to rail
21 transportation of TIHs must include railroad
22 funding.

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1 If adopted liability caps should
2 be extended to shippers and not just the
3 railroads with conditions or exceptions
4 included to address intentional or grossly
5 negligent acts.

6 Improved safety requirements for
7 the railroads and mandatory audits to assess
8 compliance with requirements.

9 And finally, rate relief must be
10 considered in conjunction with any liability
11 limitation including long term rate relief for
12 both tariff and contract shipments, and other
13 potential reforms to the rate relief
14 procedures administered by the Board.

15 If Congress were to initiate a
16 review of the common carrier obligation, PPG
17 is willing to work with other industry
18 stakeholders to address key concerns related
19 to chlorine shipment.

20 I would like to thank the Board
21 for allowing PPG to provide its testimony on
22 this important subject, and I would be happy

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1 to answer any questions.

2 CHAIRMAN NOTTINGHAM: Thank you.

3 Now we will hear from Robin A.
4 Burns from the Occidental Chemical
5 Corporation.

6 Welcome.

7 MS. BURNS: Thank you.

8 My name is Robin Burns, vice
9 president, supply chain for Occidental
10 Chemical Corporation, otherwise known as Occi
11 Chem.

12 I am here today to Occi Chem's
13 position on the common carrier obligation for
14 transportation of hazardous materials
15 including TIH such as chlorine.

16 As noted during the earlier
17 hearing on common carrier obligations, it is
18 extremely important that Occi Chem have access
19 to an adequate rail transportation network
20 throughout the United States.

21 Railroads must continue to be
22 required as common carriers to carry hazardous

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1 materials that are necessary for many of the
2 industrial applications essential to our
3 economy.

4 The common carrier doctrine is a
5 bedrock of remaining rail legislation, and
6 mitigates public discomfort with rail industry
7 consolidation.

8 Occi Chem is a leading North
9 American manufacturer of basic chemicals and
10 vinyl resins including chlorine, caustic soda
11 and PVC, the building blocks for a range of
12 products.

13 Occi Chem employs, 3,100 people at
14 23 domestic locations spread throughout the
15 central to eastern United States. Our
16 products, which are used in water
17 purification, medical supplies,
18 pharmaceuticals, construction materials and
19 agricultural chemicals are vital to the
20 economy of the United States.

21 Our various business units make
22 over 70,000 rail shipments per year of these

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1 48,000 hazardous materials. Of these 48,000
2 shipments, about 20 percent are chlorine.

3 Due to the locations and needs of
4 our many customers and users across the United
5 States, rail transportation is essential for
6 this critical building block. Pipeline
7 transportation is not feasible for small or
8 geographically distant customers.

9 Generally trucks are not cost
10 effective, and are inherently riskier
11 considering the number and distance required
12 to handle the volume.

13 Before getting into details
14 regarding a possible solution I want to remind
15 the board that as a shipper we have absolutely
16 no control over a rail car once tendered to
17 the railroad. We have no say in the routing
18 of the safe or unsafe movement of that car,
19 while in the hands of the railroad.

20 Over the past four years we
21 experienced exorbitant rail rate increases
22 ranging from as high as 70 percent for non-TIH

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1 to 238 percent for TIH commodities.

2 We believe these rates are
3 directly related to the market dominance of
4 the railroads. Over 70 percent of our origin
5 and destination carriers are served by only
6 one railroad.

7 This effectively provides the
8 railroad with market power in pricing their
9 service. One of the reasons given for these
10 extreme rate increases is the liability for
11 the transportation of TIH materials.

12 We understand that the railroads
13 have suggested that we look to the Price
14 Anderson Act as a possible model for a risk-
15 shifting mechanism. Although a complete
16 discussion of all the public policy and other
17 considerations underlying the Price Anderson
18 Act is beyond the scope of this testimony, we
19 think the railroads have misrepresented the
20 substance of the Act.

21 With respect to the Act and how it
22 works, Occi Chem here adopts the testimony of

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1 the Edison Electric Institute.

2 Moreover, the Act explicitly
3 stands for unified limits that would also
4 apply to shippers, and thus in this instance
5 would limit the liability of the chemical
6 industry as well as that of the railroads.

7 Occi is opposed to any shift in
8 the liability allocation to shippers, unless
9 that model continues to make railroads
10 responsible for any incidents due to their
11 gross negligence or willful misconduct.

12 In that regard, in all three
13 accidents involving TIH releases which have
14 been referred to it was concluded by
15 government finding that the railroads were at
16 fault.

17 Occi is opposed to supporting a
18 program which provides multiple layers of
19 coverage provided by both the carriers and
20 shippers unless the discussions take place
21 with all major shippers and railroads, and
22 involve profit limits and material price

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1 concessions to offset any agreed shift in
2 liability.

3 Occi would be opposed to a new
4 risk allocation model unless the railroads
5 accept the preceding conditions; agree to
6 negotiate long term multi-year contracts that
7 permit shippers to plan their business; and
8 promote meaningful reform of the current STB
9 rate review mechanism.

10 In our proposed model the
11 railroads including the short lines would
12 jointly secure insurance up to a predetermined
13 amount. Shippers would also jointly purchase
14 insurance for the next layer of coverage.

15 Effective immediately shippers
16 would begin paying a surcharge on a per
17 shipment basis for all TIH moves. Surcharges
18 are to be accumulated into a fund managed by
19 a third party to be used in the event both
20 levels of insurance coverage are exhausted.

21 Congress would be required to
22 limit the liability of the total amount

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1 covered by the three levels. In return we
2 would ask that the STB limit the rates on TIH
3 moves to an RVCR of 250 percent. In addition
4 railroads must negotiate in good faith long
5 term multi-year contracts as stated earlier;
6 make capital investments to promote safety
7 infrastructure; and continue to work with us,
8 the shippers, to implement safety and security
9 improvements.

10 I'm sure that you will hear
11 objection from the railroads on regulating
12 rates for these moves, but as reported by the
13 AAR, the TIH moves represent 0.3 percent of
14 rail carloads.

15 I would hope that the railroads
16 would be willing to do a fair and equitable
17 trade of regulation of 0.3 percent of their
18 business in return for a fair liability
19 mitigation in the event of an accident.

20 As mentioned in earlier testimony,
21 Occi Chem is actively engaged in the new tank
22 car design for chlorine. We have made a

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1 public commitment to replace our entire
2 chlorine rail fleet by - the new design by
3 2017. We estimate this will cost us, Occi,
4 \$250-300 million.

5 Based on our own commitment and
6 attention to safety in our manufacturing
7 facilities, our commitment to strengthen the
8 car used to transport the material, our
9 partnership with the railroads in emergency
10 response and safe handling, and the importance
11 of this product to the safety and health of
12 the United States, we believe that the request
13 to move chlorine is a reasonable request for
14 service, and that railroads should continue to
15 be obliged with the common carrier obligation.

16 We understand that there are
17 limited costs associated with the
18 transportation of hazardous materials. These
19 may include resources for positive handoff;
20 time required to constructively place the car
21 in a specific spot within the train; and the
22 cost of running the train at a slower speed.

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1 However each of these actions is
2 done for a specific reason to ensure the safe
3 and secure movement of that car. We believe
4 that these costs are already being recouped by
5 the exorbitant rates being charged TIH
6 shippers.

7 If the STB believes that a fair
8 and equitable revenue-to-variable cost ratio
9 is 180, then an RVCR of 250 should cover any
10 unique costs associated with TIH moves.

11 However, Occi Chem and its
12 customers are currently paying rates for
13 chlorine shipments that have an RVCR in excess
14 of 1,000.

15 If the railroad industry believes
16 that changes to statutory common carrier
17 obligation are appropriate, it must seek these
18 changes from Congress not the STB. Courts
19 have held that the Board has no authority to
20 regulate the railroads on the grounds of
21 safety. DOT, FRA, PHMSA and TSA are the only
22 agencies with authority to issue safety and

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1 security regulations governing the movement of
2 these materials, and are actively engaged in
3 looking for ways to continue to improve on the
4 safe and secure movements of these materials.

5 However, Occi Chem is willing as
6 described above to discuss liability issues
7 with the railroad industry.

8 We are grateful for the
9 opportunity to speak today on the need to
10 maintain the common carrier obligation.
11 Chlorine and its derivative products are vital
12 to the way we live. It is imperative that the
13 STB continue to enforce the railroads' current
14 common carrier obligation in order to ensure
15 the continued safe transport of TIH materials
16 including chlorine.

17 Thank you for your consideration.

18 CHAIRMAN NOTTINGHAM: Thank you,
19 Ms. Burns.

20 We will now hear from Gary W.
21 Spitzer from the du Pont Company.

22 MR. SPITZER: Chairman Nottingham,

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1 Vice Chairman Mulvey, Commissioner Buttrey,
2 good afternoon.

3 I am Gary Spitzer, vice president
4 and general management for a segment of the du
5 Pont Company, a global science corporation,
6 with revenues over \$30 billion a year.

7 We operate in more than 70
8 countries, employ 36,000 people in the U.S.,
9 and over 70,000 products and services for a
10 variety of markets.

11 I am here today to testify in
12 support of the retention of the common carrier
13 obligation as it currently exists. It is
14 clearly in our nation's best interests to
15 require our freight railroads to transport
16 hazardous materials including TIHs.

17 Du Pont believes that neither
18 relieving the railroads of their duty to carry
19 TIH materials nor absolving them of their
20 responsibility when their negligence causes
21 accidents would be an appropriate undertaking
22 for this board.

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1 Either of these approaches would
2 have negative consequences for the safe
3 transport of these commodities, and for the
4 manufacturing of everyday products which drive
5 the U.S. economy and are essential to the
6 American public and quality of life.

7 Before continuing I would like to
8 note that I appear before you as a witness
9 qualified to speak to the commercial aspects
10 of the issues at hand. Since I am not a
11 lawyer I will not address legal questions.
12 Instead I refer you to the written statement
13 du Pont submitted which fully outlines our
14 legal position.

15 For more than 150 years du Pont
16 has had a strong and vested interest in the
17 success of the railroads. Like others in our
18 industry du Pont has worked with railroads to
19 develop rail cars, systems, and processes to
20 safely transport materials, including
21 hazardous materials and TIH.

22 This has benefitted the railroads,

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1 our nation's economy, and the American
2 standard of living. Jointly we have achieved
3 an outstanding safety record. Despite our
4 long history of safe and mutually beneficial
5 collaboration, the railroads would now prefer
6 not to carry our hazardous freight.

7 Du Pont and others use and make
8 these products because the American people
9 need clean water, they need abundant food,
10 medicines, clean burning fuels, and numerous
11 other products that make our lives better,
12 safer, and healthier.

13 They also need jobs. Du Pont
14 alone employs 36,000 people in the United
15 States, and chemical companies employ over
16 860,000.

17 Where viable substitutes for
18 hazardous and TIH materials exist, we use
19 them. Industry has every incentive to reduce
20 risk where possible. However, because in most
21 cases there are no viable substitutes for TIH
22 commodities, there is an undeniable public

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1 need for their safe transport.

2 Relieving the railroads of
3 liability when they cause accidents would not
4 address that need, nor would gutting the
5 common carrier obligation by permitting the
6 railroads to pick and choose which commodities
7 they haul.

8 Either approach, while arguably
9 beneficial to the railroads, would harm
10 thousands of other American businesses and the
11 American people.

12 I'd like to share a few examples
13 to illustrate this potential negative impact.

14 Du Pont produces a variety of
15 sulfuric acid products, a class of hazardous
16 materials the railroads might refuse to
17 transport absent the common carrier
18 obligation.

19 Sulfuric acid is so widely used,
20 its production volume is viewed as an
21 indicator of general economic activity. It is
22 used in a vast array of central products and

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1 services including electricity generation,
2 additives for clean burning fuels, car
3 batteries, mining, papermaking, fertilizers,
4 pharmaceuticals, electronics, many chemicals,
5 and others.

6 It is also produced as a co-
7 product from pollution abatement facilities,
8 converting what had previously been emitted as
9 sulfur dioxide.

10 Clearly in light of sulfuric
11 acid's importance to such a wide range of
12 industries, giving railroads the right to
13 refuse to carry it would have a significant
14 and adverse impact on America.

15 Another example involves anhydrous
16 hydrogen fluoride, or HF. The TIH material
17 which must be used to manufacture some
18 refrigerants including the Du Pont Suva line.
19 Du Pont pioneered much of the science and
20 technology that makes today's air conditioning
21 and refrigeration possible.

22 Much of the food the American

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1 public consumes, medicines, and systems that
2 maintain tolerable temperatures in our homes,
3 cars, and even passenger trains depend upon
4 these refrigeration products. On a day like
5 today we are sure glad we have them, and they
6 all begin with HF.

7 There are currently no substitutes
8 for HF in these areas. Were we unable to
9 viably ship this material the likely
10 consequence would be increased imports of
11 finished refrigerants, causing the loss of yet
12 more U.S. manufacturing jobs, and negatively
13 contributing to our nation's trade deficit.

14 Moving more regulated products via
15 our nation's highways it would be neither
16 realistic nor good for our American people.

17 Moving these products by rail is
18 16 times safer than moving the same materials
19 by truck. In this period of skyrocketing fuel
20 costs, the AAR is justifiably proud of the
21 railroad's energy efficiency, since railroads
22 can move one ton of freight 436 miles per

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1 gallon of diesel.

2 Shifting transportation of
3 materials from rail to truck would increase
4 emissions of greenhouse gases, exacerbate
5 highway congestion, and decrease our
6 collective security.

7 Undoubtedly it is in the national
8 interest to keep and move regulated materials
9 on the railroads. The railroads have made it
10 clear that they seek to be relieved of their
11 obligation to haul TIH materials because they
12 reportedly fear the risk of economic
13 liability.

14 Du Pont believes that liability
15 should fall on the individual or company that
16 causes the event which results in the loss.
17 If the shipper causes the loss or damage, the
18 shipper should be responsible. If the carrier
19 causes the loss or damage, the carrier should
20 be responsible.

21 If a third party or force, such as
22 a terrorist act, causes the loss or damage,

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1 neither the shipper nor the carrier should be
2 responsible. No party should be permitted to
3 shift the responsibility or liability for its
4 own negligence, or misconduct, to another.

5 The basic principle that seems to
6 have been lost in the last panel discussion is
7 that people and companies should be
8 responsible and accountable for their own
9 actions.

10 In the 19th century the railroads
11 received vast land grants to develop rail
12 service for the public use, convenience and
13 necessity. Along with the land came the
14 enormous wealth associated with the
15 accompanying mineral, oil, gas, and timber
16 rights.

17 The common carrier obligation was
18 thus bought and paid for by the American
19 people to ensure the growth and prosperity of
20 the United States. Allowing the railroads to
21 reduce or eliminate the common carrier
22 obligation for TIH and other hazardous

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1 materials would put companies like du Pont in
2 grave risk of no longer being able to produce
3 products important for the health, safety and
4 security of the American people.

5 This would also put at risk jobs
6 that support local economies and help balance
7 our nation's trade deficit.

8 In closing, Chairman Nottingham,
9 Vice Chairman Mulvey, and Mr. Buttrey, the
10 railroads must continue to fulfill the crucial
11 role they play in our nation's economy. This
12 role includes moving TIH and other hazardous
13 materials.

14 Thank you for allowing me to share
15 my company's views today. Du Pont stands
16 prepared to continue to work with the
17 railroads, with government, and with others in
18 industry to enhance the safety and efficiency
19 of the rail transportation system on which our
20 nation's safety and economic well-being so
21 depend.

22 Thank you.

1 CHAIRMAN NOTTINGHAM: Thank you,
2 Mr. Spitzer.

3 We will now hear from John
4 McIntosh from the Olin Corporation.

5 Welcome.

6 MR. McINTOSH: Chairman and members
7 of the Board, I'm pleased to be here this
8 afternoon.

9 I represent Olin Corporation, a
10 company headquartered in Missouri. And I
11 function as president of Olin's Chlor Alkali
12 division.

13 We are headquartered in Tennessee,
14 Cleveland, Tennessee, and we have
15 manufacturing locations across the United
16 States, from New York to the California
17 coast, as well as facilities in Canada.

18 My testimony today will focus on
19 the importance of common carrier obligation
20 as it relates to the transportation of
21 chlorine, a chemical of paramount concern and
22 importance to our business.

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1 The metrics for chlorine shipments
2 by Olin are relatively simple and I think
3 compelling. One hundred percent of our
4 manufacturing locations are served by only
5 one railroad; no competition, only one
6 railroad.

7 Eighty percent of the customers we
8 serve and the chlorine that we transport by
9 rail is transported to customers who have no
10 other option than to receive the products
11 important to their business by rail.

12 So the metrics of the importance
13 of the common carrier obligation to ship
14 chlorine and service our customers is
15 paramount to us.

16 For a captive shipper like Olin,
17 regardless of the size of the location in
18 which we are talking, the efficient movement
19 of chlorine is a franchise issue for us. It
20 is the very survival of our business. And it
21 depends we believe on common carrier
22 obligation.

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1 As a preface to my testimony, and
2 as we stated in April, Olin unequivocally
3 believes that the railroad carriers, if not
4 required to do so by law, would not carry TIH
5 chemicals.

6 This is based on public and
7 private pronouncements as well as any
8 affirmative response to the contrary by the
9 railroads during the April hearings.

10 I know that in a previous panel
11 there has been testimony that their current
12 objective, the railroads' current objective,
13 is only to ask the STB to establish a policy,
14 a policy we think is appropriate, related to
15 liability. But I believe the long term
16 objective they have is still to not have the
17 obligation, the legal obligation, to move TIH
18 chemicals.

19 Olin believes that as has been
20 testified by many that liability should rest
21 with the party that has caused the damage, or
22 the incident, and that that should be -

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1 continue to be applied to TIH shipments as
2 well.

3 We believe that shifting this
4 liability away from the carriers, in whole or
5 in part, to the shippers, is not a good
6 public policy for reasons mentioned by many
7 others, but most notably because it transfers
8 the obligations and the financial
9 responsibility away from those who are most
10 directly in control of those events and
11 issues that create the liability in the first
12 place.

13 We don't believe that when the
14 common carrier obligation was crafted by
15 Congress that their intent was that the
16 obligation be dependent upon cost or risk
17 versus benefit or whether the railroads could
18 operate without derailments or liability
19 claims associated with the transportation of
20 TIHs.

21 So we believe that these excuses,
22 or these reasons which have been used by some

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1 in testimony, should not be and cannot be a
2 reason to deny service to shippers like Olin
3 under the common carrier obligation.

4 Olin is aware of various proposals
5 that have been testified about in both
6 written and oral testimony to create a
7 liability cap that is modeled on or similar
8 to the Price Anderson Act. Olin believes
9 that there is merit to indemnification on a
10 model that could in effect be based on a
11 concept similar to the Price-Anderson Act.

12 But we establish conditions that
13 we believe must go along with that. And the
14 conditions have been spoken to previously.
15 We believe that there needs to be something
16 in it for the shipper. We believe that
17 support of some concept for indemnification
18 or liability sharing or liability cap should
19 include an agreement by the railroads to
20 provide a significant reduction in current
21 rates, both private rates and tariff rates;
22 it should obligate the parties to enter into

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1 long-term written contracts, to provide
2 stability and predictability that are needed
3 by both American producers and consumers of
4 TIH.

5 The benefits of any liability cap
6 should be extended to the shippers who are an
7 integral part of the process, and that the
8 rate process going forward should be
9 simplified and more equitable than it
10 currently is.

11 If these standards were met, Olin
12 would be supportive of a liability cap model
13 as one type of solution.

14 I testified back in April that at
15 the time Olin was willing to, and had engaged
16 in conversations with certain railroads about
17 its willingness to share incremental
18 liability costs that railroads were incurring
19 in their insurance premiums associated with
20 moving TIH materials.

21 At the time, and still to this
22 time, we have been unable to make any headway

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1 in establishing a model for sharing based on
2 that kind of a concept, because nobody has
3 been willing to share with us incremental
4 premiums or incremental liability insurance
5 costs, or the unique costs associated with
6 the transaction.

7 We are currently in discussion
8 with railroads looking for other commercial
9 approaches to resolve liability, structured
10 more about liability cap provisions that are
11 not inconsistent with some of the models that
12 have been spoken to in earlier testimony.

13 We believe it is vital that
14 whatever liability arrangement ultimately
15 comes to fruition, if one does, that everyone
16 involved in it needs to be a part of the
17 process.

18 We believe it's important to
19 recognize that there are other liability
20 models besides Price Anderson that are out
21 there that have come in to play since 9/11,
22 and form the backdrop of some other you know

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1 entities today that have had to resort to
2 unique arrangements to provide the insurance
3 backstop they need for property and/or
4 casualty insurance protection.

5 Common carrier obligation is a
6 result of a federal statute, and we believe
7 that that statute requires action by Congress
8 to change, and would support testimony that
9 has been given that the STB's oversight in
10 this case would be to advise on and provide
11 input to Congress who ultimately would have
12 the responsibility for so changing any part
13 of the common carrier obligation.

14 Much has been talked about in
15 terms of what would be classified as a
16 reasonable request for service involving the
17 movement of TIH. We believe that the
18 obligation as set in the exact words of the
19 U.S. code are very specific in that it
20 doesn't provide conditions or obligations
21 that might otherwise have been referenced by
22 others who have testified.

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1 We as I mentioned earlier have
2 been pursuing commercial arrangements,
3 commercial resolutions to this issue focused
4 on liability caps. We were unsuccessful in
5 doing that based on incremental liability
6 cost sharing.

7 We are not, as I mentioned
8 earlier, adverse to or unsympathetic to the
9 issues the railroad raises about liability.
10 We are not unsympathetic to the issues they
11 raise about unique costs, either. We have
12 several of those very same unique costs that
13 we are incurring in our operation, and quite
14 honestly, we operate in an environment in
15 which we can't just ask a regulatory agency
16 to issue a policy and allow us to recover
17 those costs. And we operate in a competitive
18 environment in which we can't just pass those
19 costs along.

20 We believe that there are
21 important issues at hand here. We commend
22 the STB for their willingness to understand

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1 and take testimony on this issue.

2 We believe it's important, and
3 it's key to the survival of all the parties
4 that are involved in this.

5 And we look forward to being a
6 part of any constructive conversations,
7 constructive resolutions of a liability model
8 that will meet equitably the needs of all the
9 interested parties.

10 Thank you for the opportunity, and
11 I'm prepared to answer any questions.

12 CHAIRMAN NOTTINGHAM: Thank you,
13 Mr. McIntosh, and other panelists.

14 I'd like to start with Vice
15 Chairman Mulvey with questions if you would
16 like.

17 MR. MULVEY: I'll start off with
18 Dow Chemical. You talked about risk
19 reduction, and one of the things the AAR has
20 suggested is that there may be some
21 substantial risk reduction with co-location
22 of the production HAZMATs and their

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1 consumption.

2 How feasible is it to increase the
3 co-location of TIH and PIH materials with
4 their final use, their final uses?

5 MS. ELLIOT: We have looked at
6 those types of opportunities, and it is
7 feasible when there is either a new
8 production facility that needs to be built
9 that it could perhaps be put on a current
10 site.

11 So there are a couple of examples
12 of that. However, in most instances, the
13 customers are where they are located, and
14 coming from a commercial background that I
15 do, in many instances our customers cannot
16 use one chemical from one of our plants that,
17 even though we use the same process, is made
18 in a different location. You have so many
19 variables when you make a product such as the
20 raw materials, the reactors, the piping, the
21 types of - you end up then with what you
22 would think would be a homogeneous type

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1 product when in fact they are much different.
2 And our customers design their plants around
3 those products.

4 So I've had many instances where
5 the customers couldn't even use a product
6 from one of our plants versus another one of
7 our locations due to their design of their
8 product and their end use specification.

9 So it's very difficult to do.

10 MR. MULVEY: Thank you. It's
11 interesting, you might have the same
12 observation when it comes to coal. You would
13 think coal is a fairly homogeneous product,
14 but in fact coal utilities have
15 specifications for their boilers for coals
16 from certain areas, and they can't just
17 readily switch from one type to another.

18 PPG, you say that the railroad
19 accountability makes the railroad safe. The
20 railroads were here before saying that
21 placing more of this burden on the shippers
22 for indemnification will make the shippers

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1 safer.

2 It seems that people are saying
3 that unless you are subject to a massive
4 lawsuit you are not going to operate safely,
5 or there is going to be a tendency to operate
6 without due regard for the public health and
7 well-being.

8 Do you have a comment on that?

9 MS. PICCIACCHIO: I would say with
10 respect to the railroads and the industry, we
11 are all very conscious of safety, and we all
12 move forward everyday with continuous
13 improvement to make things safer.

14 But I think what we said is, it
15 could impact a decision, because every
16 decision is an economic decision at times,
17 and you are evaluating the cost for a safety
18 improvement versus you know what benefit you
19 will get from it and what the outcome will
20 be, and what risks you may mitigate.

21 So our statement was that it could
22 impact, but not necessarily would. And again

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1 we respect both the railroads and the
2 industry for their safe efforts.

3 MR. MULVEY: The railroads have
4 something of a unique problem facing them in
5 the sense that while your plants are located
6 in a fixed geographic area, where you can
7 monitor activities, the railroads operate
8 over a 140,000 mile linear factory if you
9 like, and is virtually impossible to
10 constantly police it. You could always have
11 vandalism. You could have rogue employees
12 once in awhile who doesn't take care of
13 themselves. We've just heard recently about
14 people driving trucks around the country who
15 have commercial drivers licenses despite the
16 fact that they should not have them because
17 they have heart conditions and the like. And
18 this happens with the railroads as well.

19 There are also weather factors on
20 these 140,000 mile systems that also causes
21 rail - so they have much less control over
22 their destiny than do shippers.

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1 Does that give them some
2 credibility in making their argument that it
3 really can't underwrite these losses and be
4 subject to them, and that they should really
5 be the responsibility of those firms that can
6 control or can better control their
7 facilities?

8 MS. PICCIACCHIO: I think producers
9 and the railroads face things that they can't
10 always control. For example when the Gulf
11 Coast was hit by severe hurricanes recently
12 those were things we couldn't control. We
13 had to do everything we could to mitigate any
14 risks or safety.

15 I will also say that I'm not an
16 expert on all the controls and safety
17 mechanisms that the railroads put into place
18 and have the opportunity to put into place to
19 make their networks safer.

20 So I would say it's just a matter
21 of looking at each unique situation and
22 saying, can they improve what they have. And

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1 that is what we are looking for, improvement.

2 MR. MULVEY: With regard to Occi
3 Chem and the revenue to variable cost ratio
4 of 180, I don't think it's fair to say that
5 the Board feels that 180 is a fair and
6 equitable rate. It's the rate at which we
7 presume that the railroad has market
8 dominance.

9 If it's that or higher, our
10 presumption is that it's likely to have
11 market dominance. It's not really much to do
12 about whether that rate is fair or equitable
13 or not. The rate could be 180, or it could
14 be higher and would still be the fair rate.

15 But that's all I have right now.

16 CHAIRMAN NOTTINGHAM: Mr. Buttrey,
17 any questions?

18 MR. BUTTREY: I just wanted to
19 explore something if I could with Mr.
20 McIntosh. Since you mentioned my home state
21 of Tennessee, I thought I just might ask him
22 a question.

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1 I'm envisioning a situation where
2 - let me just ask you this first. Your
3 production capability, is it - say for
4 instance you decided you didn't want to make
5 chlorine any more, you wanted to make some
6 other chemical for commercial use. How
7 quickly could you change your technology from
8 chemistry, from the chemistry producing
9 chlorine to the chemistry of producing some
10 other commercially viable and feasible
11 product?

12 MR. McINTOSH: I couldn't. The
13 fact of the matter is that if I couldn't move
14 chlorine effectively and economically to my
15 customers, what's left of my business that
16 isn't supported by chlorine and its co-
17 product caustic is of such magnitude that my
18 \$1.2 billion business would not be viable,
19 and there would be no more Olin for alkalyde
20 products.

21 MR. BUTTREY: There would be an
22 Olin Corporation, but it wouldn't be

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1 producing chlorine?

2 MR. McINTOSH: It wouldn't be
3 producing chlorine. The assets are
4 specialized and useable only for the most
5 part for the chemicals that are produced, and
6 are not readily transferrable or convertible
7 to other chemicals of commerce, even if,
8 outside of the matter of whether it is
9 economically feasible or not, it's not
10 technically feasible.

11 MR. BUTTREY: So it wouldn't be
12 like an oil refinery, for instance, which
13 involves a distillation process where you
14 produce, depending on how long you keep the
15 product in the distillation process, you can
16 pull off different kinds of products off of
17 that crude product until you get to the point
18 where you want to be in terms of what you are
19 producing, your diesel or gasoline or
20 kerosene or some other product. It's not
21 like that?

22 MR. McINTOSH: No, sir, it's not.

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1 MR. BUTTREY: Okay, is that true
2 for Occidental? Is that true for everybody?
3 Okay, so you really couldn't - so those
4 production facilities would basically be
5 obsolete.

6 MR. McINTOSH: That's correct.

7 MR. BUTTREY: If you no longer
8 produce chlorine. So you'd have to write off
9 what would be a huge - presumably a huge
10 asset on your books because it would be no
11 longer useful to produce anything because
12 it's set up to produce chlorine and nothing
13 else; is that correct?

14 MR. McINTOSH: Correct. And I
15 would also add that out of the hundreds of
16 customers we have, I would think a fairly
17 high percentage of them would be faced with
18 the same technical reality that absent the
19 ability to source chlorine, their processes
20 which would use that as a raw material to
21 make another product, are not readily
22 transferrable to something else, another

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1 product; and in most cases, in the majority
2 of cases, there is not a substitute for
3 chlorine as the raw material precursor for
4 what our customers are producing.

5 MR. BUTTREY: Is that true for
6 sulfuric acid as well?

7 MR. SPITZER: In many cases that is
8 the case; in some cases there are
9 substitutes. But in a large number of cases
10 it is the product that is needed.

11 If I could just add to what Mr.
12 McIntosh said, in the case of chlorine we use
13 it to produce kevlar fiber which is used in
14 bulletproof body and vehicle armor, protects
15 troops as well as law enforcement at home.
16 Talk about life saving, it's credited with
17 saving the lives of over 3,000 people.

18 We need chlorine ultimately in the
19 process to make NOMEX, a fire retardant
20 fabric used in aerospace applications.

21 The fact is for this chemistry as
22 it exists today we do not have a substitute

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1 for chlorine.

2 MR. BUTTREY: Just curious, does
3 PPG make the heat shield for the space
4 vehicles? You do not. Too bad.

5 I'm thinking about a situation
6 where a large TIH facility, heaven forbid,
7 would suffer some type of catastrophic
8 release. I went through a chlorine plant one
9 day, and they loaded me down with a lot of
10 gear. And including hard hat and goggles and
11 everything else that goes along with that.
12 And I just casually asked, are we expecting a
13 problem? And they said, no, but if there is
14 one you are going to be prepared to deal with
15 it, because we are going to give you a
16 respirator and a breathing device that will
17 allow you to continue to move and get out of
18 here in case something goes wrong.

19 If that were to happen I presume
20 that there is a plume, as they call it, a
21 plume of troubling gas which would go into
22 the atmosphere, and potentially anyway affect

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1 some community of human beings or animals as
2 the case may be, and that there would be a
3 pretty serious problem ensuing from that.

4 And so if that were to happen our
5 company may decide, well, you know, we are
6 not going to do this anymore. We have
7 essentially been wiped out here, and so we
8 are not going to continue this. And the
9 government comes and says, oh, but this is
10 required and necessary, and you really have
11 to do this.

12 And I'm wondering under what
13 circumstances you would agree to continue to
14 be involved in that business when the
15 government says, you are going to do this,
16 you are going to produce this stuff because
17 it is required for our national security or
18 our public health, whatever.

19 Could it be that you might be
20 interested in being protected against
21 liability in a situation where the government
22 tells you you are going to have to produce

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1 this stuff whether you want to or not.

2 Anybody like to take a crack at
3 that?

4 MR. SPITZER: I'd like to if I can.
5 Because I think when this question comes up,
6 I think a point that needs to be made is, a
7 railroad is a very different type of
8 business. We were not given vast land
9 grants. We do not have what I would call a
10 federally protected monopoly like the
11 railroads have. We function in a free and
12 fair competitive environment.

13 There are certain responsibilities
14 that the railroads therefore took on in
15 return for that, and that was the common
16 carrier obligation, and to act in our
17 nation's interests.

18 So I think that is the first
19 point, that they are in a different type of
20 business.

21 The second is, there's been a lot
22 of discussion relative to insurance and

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1 liability and caps, but I think it's
2 extremely important to look at what's done to
3 reduce risk.

4 Because when I hear the proposals
5 from the railroads, and I quote, it is
6 require indemnification for any liability or
7 exposure greater than \$500 million. But what
8 I heard from the last panel is that even if
9 it was the case where the railroad was at
10 fault, or the railroad had misconduct or
11 negligence, they are expecting shippers to go
12 ahead and take on that liability.

13 I suggest that what we do in our
14 industry is, we have a scientific approach to
15 identifying the risk; to identifying the
16 failure mechanisms; and to taking the actions
17 in terms of equipment, people and processes
18 to reduce those risks and mitigate those
19 potential actions.

20 That scientific-based approach I
21 am assuming that the railroad takes that in
22 what they do.

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1 I'll just finish up that given the
2 long history that we have with the railroads,
3 greater than 99.997 percent safety record,
4 and getting safer based on what PHMSA and
5 what FRA and the new tank car ruling I
6 believe that we have an opportunity to
7 continue the shipment.

8 And I believe it is a bit of an
9 exaggeration in the prior panels when we hear
10 about the so-called ruinous liability.

11 MR. BUTTREY: Thank you.

12 CHAIRMAN NOTTINGHAM: Several
13 witnesses today on different panels have
14 mentioned that this Board is not authorized
15 to make any decisions that could either
16 directly or inadvertently or indirectly
17 result in lessening safety conditions. I
18 know I'm paraphrasing. I'm sure no witness
19 actually said it exactly that way.

20 But it does cause some concern to
21 me. Because as I look back, I was just
22 thinking about our docket on any day of the

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1 week, the types of garden variety of things
2 this Board does, licensing, line
3 discontinuance, abandonments, rates, review
4 of rates, rate cases, costs of capital and
5 setting the appropriate cost of capital
6 termination, the revenue adequacy review,
7 looking at preemption and what rail
8 transportation operations are preempted from
9 state and local regulation, perhaps even
10 merger review, when we decide to approve or
11 disapprove a merger.

12 Under a certain set of
13 circumstances, in all those proceedings we
14 could actually follow the law, statute and
15 regulation and precedent, survive appeal, but
16 despite our best intentions it could cause
17 somebody to decide it's a better business
18 option to revert to truck traffic and thereby
19 we see a deterioration in safety.

20 So I guess I'm having trouble
21 accepting the premise that we can't do our
22 work because there might be a chance that

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1 someone out there might decide to opt for a
2 truck route.

3 Can somehow help me, am I
4 misunderstanding the position? Help me on
5 this.

6 MR. MORENO: I think I can address
7 that issue, because that was what I was
8 trying to get at at the beginning of my
9 verbal testimony.

10 The examples that you have
11 provided, Chairman Nottingham, are, those
12 where the safety effects are largely
13 incidental.

14 I think maybe one exception is the
15 merger scenario, and in that case I believe
16 you are required to consult with the Federal
17 Railroad Administration, DOT, on various
18 safety matters, and the merging carriers are
19 supposed to submit safety plans.

20 But when you are talking about
21 rates or something like that, you are talking
22 about very incidental issues. When we are

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1 talking about indemnification the Akron court
2 said specifically liability issues are safety
3 issues. They are two sides of the same coin.

4 So when you are addressing
5 liability directly you are also directly
6 addressing safety, and therefore you have to
7 be much more careful about what you do and
8 the impacts you have on safety, when you were
9 talking about liability and indemnification
10 provisions.

11 CHAIRMAN NOTTINGHAM: So your
12 position is that liability has nothing to do
13 with economics?

14 MR. MORENO: I didn't say nothing
15 to do with economics. Because clearly there
16 is a part that has to do with economics. But
17 it is also equally safety, and therefore you
18 have to walk a fine line between what is your
19 jurisdiction and what is DOT's jurisdiction
20 for example.

21 CHAIRMAN NOTTINGHAM: So just to
22 pick an example - and again you mentioned

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1 merger review. Yes, absolutely, we could
2 dutifully and studiously and very consciously
3 go through all the right checks and groups
4 and do our best and still find out that a
5 couple of years later, boy, we just didn't -
6 we met the legal test, but we didn't
7 anticipate that those 12 people were going to
8 feel obliged to go retain truck services, and
9 then unfortunately one of them has an
10 accident.

11 So we make the best decisions we
12 can on all these issues based on the record
13 before us, but I've never heard anyone before
14 today, before this proceeding, suggest that
15 if there is any possibility of somebody
16 moving to a truck option that we have crossed
17 and line and entered an area where we should
18 not wander.

19 So I'm going to be struggling with
20 that. And we are not setting, or proposing
21 to set safety standards, or tread on anyone
22 else's terrain, even if we were to entertain

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1 any proposal or hybrid proposal that might be
2 before us.

3 But I just wanted to call that
4 into question.

5 Any other questions from my
6 colleagues?

7 MR. MULVEY: Just a comment, one
8 question and a comment.

9 The issue of the land grants, most
10 of the studies that I'm aware of conclude
11 that the railroads paid back the value of the
12 land grants by 1947. That's the first time
13 that came up. When I hear this land grant
14 argument made, I'm always a little taken back
15 by it, because I'm not sure that's a good
16 basis for looking at whether or not the
17 railroad should be treated differently
18 because they received the land grants.

19 And secondly this common carrier
20 obligation that was mentioned as being in
21 law, it is enshrined in law, but the common
22 carrier obligation as a matter of common law,

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1 goes back to the Middle Ages. So it is not
2 something that was created by ICCTA or by the
3 Interstate Commerce Act of 1887. It's a
4 longstanding obligation for those who offer
5 themselves out to transport people or goods.

6 I did have one question. For a
7 Price Anderson type scenario, in Dow's
8 testimony they indicate that a second pool
9 funded by a small number of TIH shippers
10 would not significantly expand the size of
11 this pool to cover a TIH accident.

12 However, Dow and Dupont and some
13 other TIH shippers really dwarf the size of
14 the Class I railroads with regard to their
15 revenues or even their assets. So would it
16 be possible for these large producers of TIHs
17 to contribute more meaningful to these pools,
18 or to create something that would perhaps not
19 be as large as the nuclear pool but the Price
20 Anderson pool would be something that would
21 be able to accommodate a serious TIH
22 accident.

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1 Anybody? Dow is the one I was
2 calling for, so -

3 MR. MORENO: Theoretically, yes, it
4 might be possible to contribute more. But
5 that still begs the question of whether they
6 should be required to contribute more, and
7 whether that really is the Price Anderson
8 model.

9 I believe, Vice Chairman Mulvey,
10 that this morning you asked a question on
11 Price Anderson, quoting the railroads getting
12 off - without making any contribution to the
13 pool in the nuclear context.

14 In the nuclear context the
15 railroads are third party contractors. Yes,
16 they get a free ride, but it's the entire
17 nuclear industry that is covered by Price
18 Anderson.

19 If you were to superimpose that
20 model and treat the railroads as third party
21 contractors in the TIH context and require
22 TIH shippers to fund that pool, you would

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1 need to create a liability cap and an
2 insurance scheme that protects the entire
3 industry, all TIH producers and everyone
4 downstream from them.

5 And that's why we think the
6 railroads haven't really proposed a true
7 Price Anderson model.

8 MR. MULVEY: So in other words it's
9 more complicated than the Price Anderson,
10 because with Price Anderson there are 103
11 countable utilities, where you may only have
12 30 TIH shippers, but you have many thousands
13 of recipients, right?

14 MR. MORENO: That certainly is the
15 factor that makes creating the pool of a
16 proper size an issue. Now there is the
17 question in Price Anderson as to whether we
18 need a Price Anderson type solution.

19 And what we are submitting is that
20 what the railroads are calling for doesn't
21 call for Price Anderson. Dow isn't saying
22 that Price Anderson, there might not be

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1 objectives, or legitimate objectives, for
2 Price Anderson, such as assuring compensation
3 of the public. But that is a determination
4 that has to be made by Congress for the
5 various tradeoffs. And what we are talking
6 about here is what everyone calls the worst
7 case scenario.

8 Well, we don't necessarily plan
9 everything we do around the worst case
10 scenario, and we need to also be asking the
11 question, how probable is that scenario.

12 And what we hear most often from
13 the rail industry is, what would happen if
14 instead of Graniteville it was Washington,
15 D.C. Well, you can't simply take all the
16 circumstances surrounding the Graniteville
17 accident and simply replace Graniteville with
18 Washington. Because I doubt in Washington
19 that the railroads would have been traveling
20 at 50 miles an hour through a major
21 metropolitan area on unsignaled track. So
22 the accident probably wouldn't have occurred

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1 if this was a Washington scenario, because
2 all the other variables would have changed as
3 well.

4 And we need to really ask
5 ourselves, what is the probability of this
6 incident, and do we need to legislator to
7 address what is the worst case but probably
8 least probable scenario.

9 MR. MULVEY: Thank you very much.

10 CHAIRMAN NOTTINGHAM: Just
11 following up, I think that is a fair point.
12 And there might be - I say might - be some
13 way to come up with some sharing of risk
14 between the TIH producers and railroad
15 companies where TIH producers don't actually
16 have to part with any money. They could self
17 insure, set aside a reserve, chances are you
18 will never need to spend it, and we can have
19 a little better sense of security that we are
20 not going to wake up tomorrow and have a
21 Class I railroad, or god forbid, two, two in
22 an accident, going out of business, leaving

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1 shippers and rail customers a very serious
2 problem.

3 So I just offer that up. It's
4 good to know that you think it's a remote
5 risk. That means that properly structured
6 there might be very little chance that it
7 could actually ever inconvenience TIH
8 producers if in fact a wise and balanced
9 policy were to be found.

10 MR. MORENO: Well, Price Anderson
11 is in fact structured much that way, because
12 the secondary insurance pool that the nuclear
13 reactor licensees pay into is actually paid
14 into after the fact.

15 I think you do have to address
16 some of the concerns though of trying to
17 collect from a much larger pool of potential
18 contributors after the fact than has occurred
19 in Price Anderson.

20 CHAIRMAN NOTTINGHAM: Any other
21 questions for this panel?

22 MR. BUTTREY: I'm just curious

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1 about - we spent a lot of time talking about
2 today and hearing about inspection rules and
3 inspectors and who regulates who.

4 Who else other than OSHA would be
5 on your property at any given time in terms
6 of federal regulation? Who other than OSHA?
7 I know OSHA is.

8 MR. McINTOSH: EPA, Department of
9 Homeland Security, the FBI, the Coast Guard.
10 TSA, immigration, or ICE as it's now called.

11 MR. BUTTREY: Does that pretty much
12 complete the list? Can anybody think of
13 anybody else?

14 MS. BOOTH: FRA.

15 MR. BUTTREY: Thank you.

16 CHAIRMAN NOTTINGHAM: Any other
17 questions for this panel?

18 MR. BUTTREY: No.

19 CHAIRMAN NOTTINGHAM: This panel is
20 dismissed.

21 (Panel dismissed.)

22 CHAIRMAN NOTTINGHAM: We will call

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1 for the next panel, which is comprised of
2 representatives of the freight railroad
3 industry.

4 From the Union Pacific Railroad
5 Company, Diane Duren. From the Norfolk
6 Southern Railway Company, Fred M. Ehlers.
7 From the CSX Transportation Company, Howard
8 R. Elliott. And from the BNSF Railway
9 Company, David T. Burr and Richard E.
10 Weicher.

11 Good afternoon and welcome
12 panelists. We will start today by hearing
13 from Diane Duren of the Union Pacific Railway
14 Company.

15 Thank you, welcome.

16 PANEL V: FREIGHT RAILROADS

17 MS. DUREN: Thank you.

18 Good afternoon, and thank you for
19 the opportunity to speak with you today about
20 Union Pacific's perspective on the railroad's
21 common carrier obligation to handle TIH
22 commodities.

1 I would like to start out by
2 saying that Union Pacific agrees with and
3 fully supports the testimony submitted by the
4 AAR. My testimony will focus on TIH supply
5 chain economics.

6 We do have some slides I think
7 that we are going to be showing.

8 As I said in my written comments,
9 the safe and efficient handling of TIH
10 throughout the supply chain is one of our
11 highest priorities, because it is our biggest
12 single risk.

13 The fair allocation of the burdens
14 of risk and liability across the supply chain
15 is also a high priority.

16 Union Pacific accepts our
17 obligation as a common carrier to transport
18 TIH in the absence of safer and more logical
19 alternatives, but we should not be forced to
20 accept the full burden of risk and liability
21 associated with the transportation of these
22 products.

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1 The way current supply chain
2 economics work for TIH is ill conceived.
3 It's broken, and it needs to be fixed.

4 Currently faulty economics
5 actually encourage the transportation of TIH,
6 exposing railroads and the public to
7 unnecessary risk. The reasons for this, the
8 customers are not required to bear all the
9 cost or share the liability for their
10 distribution decisions.

11 These exclusions are in effect an
12 economic subsidy for TIH production and
13 transport.

14 Let me give you an example. This
15 is a simplified depiction of the supply
16 economics for a tank of corn syrup. When the
17 producers of corn syrup decide where to
18 distribute their products, and how much to
19 charge their customers for the product, they
20 include the costs you see up there -
21 procurement, raw materials, production,
22 inventory storage costs, transportation

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1 costs.

2 In this example the railroad is
3 providing the transportation of the product
4 and charging the shipper a price that covers
5 all of its cost.

6 The supply chain participants will
7 then determine the margin they need, or are
8 able to secure from their customers for the
9 corn syrup. But TIH products are not the
10 same as corn syrup.

11 The risks and liabilities for TIH
12 are significantly different. Take for
13 instance the 2004 incident at McDonough,
14 Texas, near San Antonio. There was one car
15 of hazardous material on the train in
16 McDonough that day, and it was chlorine.

17 Had the car been corn syrup or
18 even sulfuric acid, and not TIH, there would
19 have been no loss of life. Certainly we
20 would have experienced property damage and
21 the liability that comes with that damage,
22 but three people wouldn't have died, and the

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1 liability equation would have been very
2 different.

3 Whether it was corn syrup or
4 chlorine doesn't change the facts of the
5 actual incident, but does change the
6 economics and the transportation choices that
7 were influenced by those economics.

8 Properly allocated risk would
9 change transportation decisions. It is less
10 likely that TIH would move where it doesn't
11 have to move.

12 Now let's look at a depiction of
13 the supply chain economics of a carload of
14 TIH, say for instance chlorine. Once again
15 you see all the same type of costs that the
16 producer of corn syrup takes into
17 consideration. You see transportation costs
18 as the rail rate we charge for moving the
19 product.

20 But there are some things that are
21 missing as depicted by the items noted in
22 red. First of all there are some quantified

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1 capital costs and operating expenses,
2 including insurance costs. Our insurance
3 costs are up four to five times from the
4 level they were since 9/11, and have remained
5 at that level.

6 We also have less coverage because
7 deductibles have risen steeply at the same
8 time.

9 The cost that Union Pacific incurs
10 are not under current STB rules allocated
11 specifically to these movements, even though
12 the only reason we incur these costs is
13 because of TIH.

14 Actually in rate cases, and as a
15 result of them, these costs are allocated
16 across all the business we transport. So the
17 costs we incur specifically for the 31,000
18 carloads of TIH that we handle are borne, and
19 we would say subsidized, by all shippers.

20 The Board can and should address
21 this issue by allowing railroads to reflect
22 these incremental costs in their rates for

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1 TIH, as well as in rate cases for these
2 products.

3 More importantly a significant
4 element of risk to the transporters of TIH
5 that is not shared by the rest of the supply
6 chain participants is its potentially huge,
7 unpredictable and therefore unknown liability
8 for a catastrophic incident that could occur
9 in the transportation of the product. An
10 incident that could occur through no fault of
11 the railroad, one which according to the
12 experts could cost billions of dollars.

13 Consider for instance the incident
14 in January of this year in which a train in a
15 developed area outside of Chicago was struck
16 by a tornado derailing 12 cars. One of these
17 cars was loaded with ethylene oxide, a TIH
18 product. This car landed on its side, was
19 badly damaged, and had its steel jacket and
20 body bolsters torn off. It did not leak, but
21 a 1.5 mile area was evacuated.

22 Union Pacific handled this car

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1 safely and according to all the rules yet
2 came close to a catastrophic event.

3 Another example also in January of
4 this year, is that of a coal train that
5 derailed, 33 cars in Iowa. This occurred on
6 a double main line, high speed, signal lights
7 track, and it was last inspected the day
8 before the incident. New track of the
9 highest grade had been laid the year before
10 in 2007. The train derailed due to a
11 catastrophic track failure that no one could
12 have predicted or prevented. This track was
13 as good as it gets.

14 As it was the cost of the incident
15 was over \$2 million. If TIH had been
16 involved, the cost and liability picture
17 could have been totally different.

18 Finally everyday on our railroad
19 cars and trucks drive around gates and pull
20 in front of moving cars. So far in 2008 235
21 of these vehicles have run into or been hit
22 by a train. If the trains hit were carrying

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1 chlorine or other TIH the consequences could
2 have been disastrous.

3 Incorporating elements of risk
4 management, related transportation liability,
5 would result in a redesign of the TIH supply
6 chain. The costs, risk and liability
7 exposure associated with TIH are not
8 allocated proportionately within the current
9 regulatory model. If these TIH commodities
10 were a bet-the-company proposition for the
11 shippers of the product like it is for the
12 railroads, shippers would change their
13 distribution decisions and practices.

14 The fact that all of the liability
15 risk for transportation is borne by the
16 railroad actually encourages the chemical
17 producers to develop new long distance TIH
18 movements in spite of governmental and public
19 concerns.

20 One site is being developed on
21 Union Pacific which will require the movement
22 of between 500 and 1,000 new TIH shipments.

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1 These movements are over 1,900 miles in
2 length and travel through many states and
3 communities.

4 The site was selected because of
5 supply proximity and costs of other raw
6 materials needed in the production process.
7 There was no economic incentive for the
8 producer to factor in the transportation
9 liability risk, because the railroad and the
10 public are expected to bear this risk.

11 If even a portion of this
12 liability were borne by the producers or
13 users of this product as it should be, their
14 cost-profit margin calculations would change
15 considerably. This would economically incent
16 different behavior that would significantly
17 reduce the rail and truck transport of TIH.

18 We believe that adding a
19 transportation risk element to TIH
20 distribution decision models would result in
21 a redesign of at least some portions of that
22 supply chain. Producers and users of TIH

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1 would make different distribution decisions.

2 You would see more co-location of
3 TIH production near the consumption of these
4 products, rather than an economic decision to
5 ship TIH products thousands of miles because
6 of an abundant low cost supply of other raw
7 materials.

8 You would see an increase in
9 product substitution as we are seeing in the
10 use of urea, ammonia nitrate, and other
11 nitrogen products, other than anhydrous
12 ammonia, for direct field application.

13 And as we are seeing in the use of
14 new water cleansing products and processes in
15 the place of chlorine. You would see more
16 product swaps as producers would seek to ship
17 these products fewer miles.

18 The Board can fix this broken
19 system. If you leave the current system in
20 place, you are negatively impacting safety.

21 First, as I stated earlier, the
22 Board should allow railroads to reflect

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1 properly the incremental costs for handling
2 TIH in their rates and in rate cases
3 involving these products.

4 In the near term the Board should
5 issue a general policy statement which allows
6 the railroads to impose conditions that
7 properly assign liability exposure above
8 reasonable railroad liability to those who
9 ship these TIH products.

10 Those who produce and use these
11 products should share the risk and economic
12 responsibility for their distribution
13 decisions.

14 In addition the Board should
15 encourage the exploration of legislative and
16 policy solutions to create economic
17 incentives for measures such as product
18 substitution and onsite manufacture of these
19 commodities, with the goal of eliminating the
20 transportation of TIH over the longer term.

21 Thank you again for the
22 opportunity to speak with you.

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1 CHAIRMAN NOTTINGHAM: Thank you.

2 Now we will hear from Fred Ehlers
3 from Norfolk Southern Corporation.

4 Welcome.

5 MR. EHLERS: Thank you, and I too
6 have some slides.

7 Good afternoon. My name is Fred
8 Ehlers, vice president of customer service at
9 Norfolk Southern.

10 Within the customer service
11 organization I also have responsibility for
12 the network management function including our
13 control center, transportation planning,
14 service design, terminal operations,
15 locomotive distribution and crew management.

16 I would like to talk to you for a
17 few minutes about the network cost of
18 handling TIH cars under the three proposed
19 and final PHMSA and TSA rules.

20 But before discussing the impacts
21 let me quickly review the relevant portion of
22 the rules that I will cover in my testimony.

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1 First, the PHMSA proposed rules
2 which cover speed limits and tank car
3 standards.

4 Second, the PHMSA interim final
5 rules which cover safety security analysis,
6 and routing using the 27 factors.

7 And finally the TSA-proposed rules
8 which speak to chain of custody, secured
9 handoffs, and attended cars.

10 This map represents Norfolk
11 Southern traffic density for TIH cars
12 traversing the Norfolk Southern system for
13 the year 2007.

14 The thickness of the red line
15 corresponds to the number of rail cars, TIH
16 rail cars, traversing that particular segment
17 of the network.

18 The thicker the red line the more
19 cars traverse the line segment.

20 As you can see TIH cars move
21 throughout our network. Shipments are not
22 confined to a few lines, or a geographic

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1 region, but traverse our primary trunk lines
2 as well as many of our secondary lines.

3 Now let me talk to you a little
4 bit about how those cars move through the
5 network. In 2007 we handled just under
6 49,000 TIH loads and residuals on Norfolk
7 Southern. While it seems like a large
8 number, it only represents, and you have
9 heard this before, 0.3, or three-tenths of a
10 percent, of our total shipments.

11 Those 49,000 cars traverse just
12 over 23 million miles for an average of 473
13 miles per trip, and were switched 117,990
14 times for an average of 2.42 times a trip.

15 Of particular significance is the
16 fact that these cars do not move in any great
17 volumes together. For instance the largest
18 block, and by block I mean a group of cars
19 moving together on a train, to an
20 intermediate or final destination as defined
21 by the operating plan, the largest block of
22 TIH cars that move on the NS network is from

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1 McIntosh, Alabama to Birmingham, Alabama,
2 with a volume on average of 11.7 cars a day.

3 In fact only four blocks on our
4 system carry more than 10 cars a day.

5 What this means is that there are
6 virtually no unit train opportunities on the
7 network, and I'm not sure we would want them
8 anyway if they were available. But more
9 often than not when a train is carrying TIH
10 traffic, we will have just one, two or three
11 TIH cars in the consist, and as you can see
12 in the next two slides, these cars will
13 determine the handling of the entire train,
14 and every car riding on that train.

15 This is the same traffic density
16 map that we saw a couple of slides ago.
17 However I overlaid the areas on the Norfolk
18 Southern system that are non-signaled and
19 operated under track one authority.

20 And this leads into a discussion
21 of the cost that TIH cars will generate under
22 the PHMSA proposed rules.

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1 Of particular concern is the
2 proposed rule that would limit trains with
3 TIH cars to 30 miles per hour in nonsignaled
4 territory. Since as we discussed no real
5 unit train opportunities exist to minimize
6 the network impact, TIH cars will continue to
7 move in general merchandise service.

8 Additional costs will be incurred
9 including overtime, hiring, training, and
10 locomotives on all line segments subject to
11 this restriction.

12 Based on RTC studies, at current
13 volumes two lines, Macon to Augusta and Macon
14 to Savannah, could not support a 30 mile per
15 hour, or even a 35 mile per hour operation.
16 The model just won't even run.

17 Just to support the current
18 operation at slower speeds, additional
19 infrastructure, two passing sidings will be
20 required. Even with additional
21 infrastructure, under the proposed rule every
22 merchandised train will need to be re-crewed

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1 in mid-route.

2 The majority non-TIH traffic will
3 be impacted as well due to longer transit
4 times over the road, and the resulting missed
5 connections at terminals. As a result there
6 will be direct costs related to car hire and
7 the customer supply chain and shipment
8 pipeline requirements.

9 And as overall traffic volumes
10 increase on the network, more lines will
11 become capacity constrained, requiring
12 additional infrastructure improvements.

13 With regard to PHMSA's interim
14 final rule that addresses the safety and
15 security risk analysis, and route selection
16 using the 27 factors, first, understand the
17 definitions, significance and interplay of
18 the 27 routing factors is extremely complex
19 and anything but clear.

20 In just trying to understand the
21 routing factors, all the railroads have
22 invested and will continue to invest

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1 significant manpower in developing a routing
2 model to guide us through route selection.

3 To illustrate the issue our
4 existing car routing algorithms are designed
5 to minimize distance and handling, for all
6 shipments taking into account network
7 capabilities and constraints, and as a
8 consequence, our operating plan is designed
9 around this precept, with the resulting yard
10 blocking and train service plans in place.

11 The problem lies that in the
12 extent that current routings are no longer
13 preferred, additional switching, blocking and
14 train service requirements will need to be
15 incorporated into the operating plan.

16 At the least this will cause us to
17 increase the complexity, and will likely -
18 and the likely outcome of displacing the most
19 productive uses of our capacity.

20 Let me give you an example. Each
21 yard on Norfolk Southern has the capability
22 of creating a finite number of blocks to be

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1 carried by outgoing trains. We refer to this
2 as our blocking plan.

3 We spend a lot of time working,
4 refining and ensuring our blocking plan is
5 the most efficient we can make it, because an
6 efficient blocking plan allows us to bypass
7 downstream yards and get the traffic to
8 destination with fewer handlings and in a
9 shorter amount of time.

10 If TIH routings require special
11 blocking, then we will have to displace some
12 general block requirements to accommodate a
13 TIH specialty block.

14 And now for a few comments about
15 the impact of the TSA's proposed rule,
16 specifically the chain of custody and control
17 rules for TIH shipments.

18 This rule could have devastating
19 consequences on railroad operations with the
20 required person-to-person handoffs and
21 maintaining line of sight on all TIH
22 shipments.

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1 Let me give you a couple of
2 examples of how this rule will impact us.
3 Consider the situation where NS has a TIH
4 receiver located in a high threat urban area,
5 and even though we thought we had coordinated
6 delivery, the customer did not have a secured
7 area, or was unable to receive the car in
8 person when we arrived with the TIH car.

9 We would have two options: have
10 the crew wait while we contacted the
11 receiver, possibly outlawing under the hours
12 of service act, or we return the car to the
13 attendant serving area.

14 Whatever the solution, the result
15 is less than efficient operations impacting
16 all customers and consuming capacity.

17 The rule also states that cars may
18 not be left unattended at any time during the
19 physical transfer of custody, and the
20 receiving railroad must perform security
21 inspections.

22 What defines unattended? Where we

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1 execute run through interchanges, where one
2 railroad crew gets off the train and the next
3 railroad crew gets on, is an inspection
4 required?

5 What would be the impact if this
6 inspection had to be made on line of road on
7 crew safety, block crossings and the movement
8 of trains.

9 And finally what does unattended
10 mean?

11 Here is a view of our main tower
12 from our Macon, Georgia facility. The best
13 vantage point in the yard, looking south
14 towards the receiving yard.

15 This is a medium sized yard. It
16 is six miles long, and processes
17 approximately 1,600 cars a day. It has eight
18 receiving tracks, 50 classification tracks,
19 nine departure tracks, and the longest track
20 in the yard is over 12,000 feet.

21 Do you think a single individual
22 is going to be able to keep a line of sight

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1 view on a car positioned just half the
2 distance in this photograph?

3 Furthermore this photograph was
4 taken on a bright sunny summer day, and you
5 still can't see every car.

6 Now consider time and weather,
7 imagine if it's night, foggy or rainy, you
8 won't know what ultimately is required by
9 this rule, but it is not difficult to imagine
10 having to hire more people, 24 by seven, and
11 make infrastructure improvements to maintain
12 a line of sight requirement.

13 Here is a view looking north into
14 the classification yard with the departure
15 yard on the right. Remember cars are
16 processed through a classification yard.
17 They just don't arrive in one place, and sit
18 in that same place for the departure. They
19 arrive in the receiving hard, are processed
20 in the classification yard, are made into
21 blocks of cars, and finally get made into
22 outbound trains in the forwarding yard.

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1 So the idea of holding cars in a
2 specially monitored area runs contrary to the
3 basic operation of the yard.

4 And getting down to the ground
5 level doesn't help much. From our parallel
6 access road an individual can only see the
7 cars on the near track, and not the half
8 dozen tracks sitting behind the train.

9 Norfolk Southern alone has 13 of
10 these classification yards. Dozens of
11 smaller but still large regional yards. And
12 still dozens more for our industrial support
13 yard, not to mention the 21,000 route miles
14 that link these yards.

15 In conclusion, the cumulative
16 impact of these rules will have a significant
17 and direct impact on costs, just to name a
18 few, infrastructure, locomotive, crews, car
19 hire, training, information technology,
20 administration and a significant ripple
21 effect on the NS network that affects all
22 customers.

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1 And finally these rules are the
2 ones we know about today. We don't know what
3 is yet to hit us, and quite frankly, I don't
4 think we fully comprehend the extent of what
5 has already been communicated.

6 Thank you.

7 CHAIRMAN NOTTINGHAM: Thank you,
8 Mr. Ehlers.

9 We will now hear from Howard
10 Elliott from the CSX Company.

11 MR. ELLIOTT: Chairman Nottingham,
12 Vice Chairman Mulvey, Commissioner Buttrey,
13 thank you for allowing me this opportunity to
14 speak with you today.

15 I'd like to start with
16 Commissioner Buttrey by offering my apology
17 for our part in your lateness to this meeting
18 this morning. I understand that the cause of
19 the delay of the area trains has been fully
20 researched, and we understand.

21 MR. BUTTREY: Let me just respond
22 if I may and tell you that the BRE people

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1 responded in stellar fashion as far as I'm
2 concerned. They apprised us of the
3 situation. They kept us informed all the way
4 along the line with verbal information.

5 I did not really arrive all that
6 late. In fact I didn't even qualify for a
7 free ride certificate, and I didn't take a
8 free ride certificate.

9 But I think the BRE people did a
10 stellar job this morning responding to the
11 situation, and I'm sorry that it happened,
12 but I think that's about the only time it's
13 ever happened in over a year.

14 So I'm a happy camper with respect
15 to that, anyway.

16 MR. ELLIOTT: And I would also be
17 remiss as we focus our attention to the
18 current Atlantic storm season and earlier
19 talk about mother nature's effect on rail
20 operations, our journey a few years ago as we
21 walked through the 9th Ward of New Orleans and
22 you saw our Gentilly yard, and you saw

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1 firsthand the kind of impact that mother
2 nature can have on rail operations, pretty
3 significant.

4 I too have a few slides that I'd
5 like to share with you this afternoon.

6 Given a choice, CSX Transportation
7 would decline to handle toxic inhalation
8 hazard materials. Because there is in fact a
9 new paradigm. There is a very real risk of
10 ruinous liability.

11 Chairman Nottingham, you mentioned
12 this morning that there is more than just an
13 academic concern about moving these products.

14 Mr. Hamberger from the Association
15 of American Railroads also referred to it as
16 real world events that have changed the
17 perception, the real perception, about how we
18 move, and the concerns we have in moving
19 toxic inhalation hazards.

20 And of course there is
21 reputational damage. Being the railroad that
22 operated hazardous materials through the

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1 heart of Washington, D.C., during the D.C.
2 council re-routing regulation, we know
3 firsthand what kind of damage can be done to
4 reputation through moving TIHs.

5 And of course the growing
6 regulatory demands that are inconsistent with
7 common carriage. Deputy Secretary Eby noted
8 that the DOT had been very active in recent
9 years in HAZMAT and security regulations, and
10 that's okay as long as there is consistency
11 in those regulations, and they are achievable
12 for the railroads.

13 CSX Transportation does not
14 solicit new TIH business, nor do we encourage
15 - but we do encourage alternative products
16 and shorter hauls.

17 As a matter of fact in the last
18 three years our average haul length has been
19 reduced by about 12 percent for TIH
20 materials.

21 Like some of the other carriers
22 you have heard from today, TIHs account for

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1 about one-half of one percent of all CSX
2 traffic.

3 Perhaps spend a second on a
4 different perspective, on the TIH
5 transportation topic. The rail industry is
6 one that is hugely proud of our security
7 efforts to ensure the safe transportation of
8 toxic inhalation hazards.

9 The rail industry acted
10 immediately after the tragic events of
11 September 11th, 2001, and developed a
12 comprehensive risk analysis and security
13 plan.

14 We established four escalating
15 alert levels; implemented countermeasures for
16 baseline and escalating threat conditions for
17 our critical assets, our most critical
18 bridges, tunnels, railyards, fuel storage
19 sites, data centers and dispatch centers.
20 Our security plan is aligned with security
21 federal plans. For example, the national
22 infrastructure protection plan and the

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1 transportation sector specific plan as well.

2 It's a dynamic security plan that
3 is continually updated, and as viable today
4 as it was in 2001. As a matter of fact we
5 just completed a line by line, page by page,
6 section by section, complete review of the
7 industry security plan to make sure that it
8 is in fact as viable today as it was when it
9 was created after September 11th.

10 But much has been done since the
11 initial rail efforts after September 11th. We
12 saw the implementation of DHS security alert
13 levels in 2002, followed by the United States
14 Coast Guard port security laws that affect a
15 number of rail carriers today, followed by
16 border security, Customs and trade partners
17 against terrorism, regulations that came
18 about in 2006.

19 And in 2006 we also saw the TSA
20 voluntary security action items, 24 action
21 items mutually developed by the rail
22 industry. And then a few months later four

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1 supplemental action items, special
2 requirements that were inconsistent with
3 common carriage business models, especially
4 when we talk about dwell time reductions.

5 There is a growing regulatory
6 burden. But TSA voluntary action items are
7 being supplanted by formal regulations that
8 impose specialized handling of TIH materials.

9 The DOT route analysis rules that
10 we're working with today involving 27
11 mandatory factors. Unfortunately we cannot
12 adequately consider some of the factors that
13 we need to do good sound route assessments.
14 Information such as venues, high consequence
15 targets and known threats, information that
16 needs to be provided to us by other federal
17 agencies, those agencies at this point in
18 time are not appearing to be willing to give
19 us that information to factor into our route
20 assessments.

21 TSA's chain of custody that was
22 talked about by my colleague from the Norfolk

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1 Southern earlier, requirements for attendant
2 interchange compliance, and may in fact
3 override DOT's mandated 27 factor route
4 analysis.

5 And of course the tank car safety
6 proposed rulemaking that sets certain speed
7 limits that will in fact have some impacts on
8 our operation.

9 And of course too we can't rule
10 out the fact that states and municipalities
11 will remain interested in wanting to
12 regulate, even though they may not be able
13 to, the movement of toxic inhalation
14 standards.

15 These compounded effects of
16 specialized requirements will begin to
17 present some unreasonable demands on rail
18 carriers.

19 At CSX Transportation safety each
20 and everyday is a way of life. We take the
21 transportation of these hazardous materials
22 very seriously, and we take our obligation

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1 seriously, and our record speaks for itself.

2 I'm pleased that I can sit here
3 today and say that we too can offer up a
4 better than 99.99 percent safety record in
5 moving all hazardous materials from origin to
6 destination safely.

7 We certainly understand our
8 obligations under the current state of law.
9 We take our responsibility to transport these
10 commodities very seriously.

11 We are dedicated to the safe and
12 secure movement of these products whenever we
13 are required to transport them.

14 At CSX noncompliance is not an
15 option. CSX is committed to maintaining high
16 ethical and legal standards in every aspect
17 of our business. But growing regulatory
18 burdens may make transportation of toxic
19 inhalation hazard commodities unreasonable.

20 Again, TIH dwell time reductions,
21 line of sight security, attended
22 interchanges, circuitous routes, conflict and

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1 compliance where TSA's regulations may
2 override DOT's mandated 27 factor route
3 analysis; speed restrictions that could
4 severely affect networks; and some things
5 that aren't mentioned here, transportation
6 worker identification credentials that affect
7 all railroad employees that operate in
8 certain port areas.

9 The combination of regulations may
10 be mutually exclusive, making some service
11 impossible. And CSX will not design any
12 operation that we are not confident that we
13 can comply with, or that does not comply
14 with, governing regulations.

15 We must at all times be able to
16 maintain sustained compliance, and we simply
17 will not violate the law.

18 Chairman Nottingham, Vice Chairman
19 Mulvey, Commissioner Buttrey, thank you for
20 your time.

21 CHAIRMAN NOTTINGHAM: Thank you,
22 Mr. Elliott.

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1 We will now hear from David Burr
2 and Richard Weicher from the BNSF Railway
3 Company.

4 Please proceed.

5 MR. BURR: Good afternoon, Chairman
6 Nottingham, Vice Chairman Mulvey and
7 Commissioner Buttrey.

8 I am assistant vice president,
9 fuel and risk management, for BNSF Railway
10 Company.

11 CHAIRMAN NOTTINGHAM: I'm sorry, we
12 are not hearing you too well. I mean I can
13 hear it; I'm worried people in the back might
14 not. Make sure the red light is on by
15 pushing that button.

16 MR. BURR: Sorry.

17 I am assistant vice president,
18 fuel and risk management, with BNSF Railway
19 with 30 years experience in insurance and
20 risk management.

21 BNSF is willing to maintain its
22 common carrier obligation. However the risk

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1 associated with transportation of high hazard
2 commodities must be addressed.

3 Specifically BNSF is concerned
4 that a small percentage of shipments creates
5 an enormous risk to the public and to rail
6 carriers, potentially threatening the
7 viability of the rail network, and hence
8 transport of other commodities.

9 The shipment of high hazard
10 commodities is not one that is accepted by
11 choice, but one that is forced upon rail
12 carriers as a result of our common carrier
13 obligation.

14 The risks associated with the
15 release of these commodities is one that is
16 unquantifiable, and the potential for an
17 accident cannot be fully eliminated.

18 Further, available insurance can
19 only satisfy a small portion of the total
20 risk we are forced to accept.

21 Therefore it is our position that
22 BNSF should be able to condition the

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1 transport of these materials on reasonable
2 terms.

3 To put it in perspective, we are
4 talking about a small volume of traffic that
5 is considered high hazard: less than one-half
6 of one percent of the shipments handled by
7 BNSF.

8 Of the total high hazard traffic
9 handled, the majority is made up of anhydrous
10 ammonia and chlorine gas.

11 Numerous regulations have been
12 implemented or promulgated to reduce the risk
13 associated with the transportation of
14 hazardous materials.

15 BNSF has implemented operating
16 practices recommended by the AAR and
17 developed multiple changes to operations to
18 minimize the potential for accidents.

19 BNSF has also developed a list of
20 at-risk commodities based on environmental,
21 safety and health hazards, as well as
22 historic liabilities associated with such

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1 commodities.

2 Despite these efforts it is not
3 possible to fully eliminate the potential for
4 release of these commodities.

5 This slide just lists some of the
6 operating practices that have been
7 implemented by BNSF.

8 Although the probability of an
9 accident is small, if one of the commodities
10 that we are required to transport is
11 released, it is impossible to control the
12 commodity once released, and the resulting
13 loss is unquantifiable.

14 Even with legislative and private
15 initiatives, the risk of an accident cannot
16 be fully eliminated.

17 Prior comments indicate the rail
18 industry has not presented any evidence
19 regarding the availability of insurance, and
20 I'm here to address those issues to the
21 extent I can.

22 Further insurance is not

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1 commercially available to sufficiently
2 protect us against catastrophic losses.
3 Limited insurance that we can purchase has
4 increased substantially. Subsequent to 9/11
5 insurance costs for BNSF has increased by 250
6 percent.

7 This slide shows the insurance
8 that we are able to purchase. Currently we
9 are able to purchase \$1 billion in liability
10 insurance, which is the total amount that is
11 available to the freight railroad industry.

12 Of this the first \$25 million is
13 covered by our self-insured retention. Even
14 though \$1 billion seems large, it is not
15 sufficient to cover the catastrophic exposure
16 that high hazard chemicals present.

17 While this slide may appear to be
18 an eye chart, what it shows is that
19 purchasing insurance for a railroad is not
20 like calling up your local State Farm agent.
21 The chart on the left shows how we have to
22 piece together coverage with every known

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1 insurer who will write liability insurance
2 for a railroad.

3 Approximately 20 companies are
4 currently willing to write such coverage.

5 Even to find this limited amount
6 of insurance coverage, railroads must
7 approach the global market as depicted on the
8 right side. As you can see we are very
9 dependent on foreign insurance for coverage.

10 Over the last five years the
11 number of companies willing to write
12 insurance coverage for freight railroads has
13 decreased. As a result the total amount of
14 insurance available to BNSF has shrunk by
15 about \$500 million.

16 Further the self insurance
17 required to purchase this coverage has more
18 than doubled.

19 Despite these reductions the costs
20 have increased substantially as I previously
21 mentioned.

22 For the past several years

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1 insurance companies have increased their
2 focus on BNSF's handling of hazardous
3 materials, due to the fact that these
4 commodities have been the proximate cause of
5 most of the largest losses in the rail
6 industry.

7 Had Graniteville, South Carolina
8 occurred at a different time of day or in a
9 different location it is likely the loss
10 could have exceeded available insurance
11 coverage.

12 In my opinion if the rail industry
13 experiences another large loss involving
14 hazardous materials, insurance coverage will
15 be significantly reduced, and the cost for
16 any remaining coverage will spike.

17 Such a loss could result in the
18 collapse of the insurance market for the rail
19 industry.

20 The limitless exposure created by
21 these high hazard commodities which we are
22 required to handle jeopardizes our obligation

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1 to all shippers and our ability to invest in
2 infrastructure.

3 If the rail transport of these
4 commodities is in the public interest, then
5 the shareholders of BNSF should not be the
6 ultimate insurers.

7 BNSF believes that the Board
8 should support efforts to formulate private
9 sector solutions to share these risks. BNSF
10 is developing alternative approaches to
11 address these risks which we anticipate
12 publishing as part of our common carrier
13 obligation to handle these commodities.

14 MR. WEICHER: Chairman, Vice
15 Chairman and Commissioner, I'm Rick Weicher,
16 Richard Weicher from BNSF Railway.

17 I'll make a couple of comments on
18 these last slides with respect to the nature
19 of the common carrier obligation.

20 One thing that was on the last
21 slide that Dave Burr mentioned, I'll just
22 briefly comment on. We have been active

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1 participants in discussions with the TFI and
2 customer representatives about that program.
3 We are encouraged by that. It is by no means
4 necessarily an overall solution to things,
5 but it is a promising step. We are exploring
6 it in good faith. We don't view it as
7 inconsistent with the kind of policy the AAR
8 is seeking. It is an alternative; it is
9 another possible way to go. And it only
10 addresses one commodity and one subset of
11 shippers, not the entire picture.

12 With respect to the nature of the
13 common carrier obligation, there have been
14 many comments this morning, including in the
15 Chairman, Vice Chairman and Commissioner's
16 opening statements and other statements that
17 safety general boilerplate law that the
18 common carrier obligation is to provide
19 transportation on reasonable demand on
20 reasonable terms and conditions.

21 That does not mean, and we are not
22 suggesting, because we respect enormously the

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1 common carrier obligation, that doesn't mean
2 any requirement a carrier might seek if it
3 were for example unachievable was necessarily
4 reasonable.

5 Certain requirements, if they were
6 under the circumstances of a given shipment
7 or shipper, unachievable, impossible,
8 whatever, could be an unreasonable term or
9 condition.

10 By the same token that doesn't
11 mean that any or every term or condition of
12 common carriage including on these type of
13 commodities should be considered
14 unreasonable.

15 Ultimately it would be a case by
16 case issue of what a carrier was proposing,
17 and it's holding out for movement of these
18 commodities.

19 And indeed as the world has
20 evolved and conditions of transportation and
21 risk have evolved, some risk sharing in the
22 terms offered by a carrier could very well be

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1 and should be considered reasonable, and
2 could encourage and incentivize safer and the
3 safest most economical handling of these
4 commodities which present unique and growing
5 risks as they evolve in the transportation
6 world.

7 We ask the Board to consider those
8 factors, and adopt the kind of policy that is
9 open to private carrier initiatives and terms
10 and conditions for these that would be
11 reasonable, and that would condition in ways
12 that enhance those incentives and have
13 elements of risk share.

14 And we think that flexibility is
15 not inconsistent with the Board's authority,
16 or the common carrier obligation.

17 Thank you.

18 CHAIRMAN NOTTINGHAM: Thank you,
19 Mr. Burr and Mr. Weicher, and all the
20 witnesses.

21 I'd like to give Commissioner
22 Buttrey the opportunity to start questions.

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1 MR. BUTTREY: Mr. Ehlers, you
2 referred to a segment of business in and
3 around Birmingham, Alabama, where you said a
4 huge amount of TIH moves over a very short
5 distance.

6 MR. EHLERS: What I was addressing
7 was the largest block, a block being the
8 blocks that we move on trains of cars going
9 to an intermediate or final destination,
10 moves from McIntosh, Alabama to Birmingham,
11 Alabama.

12 MR. BUTTREY: And how far is that?

13 MR. EHLERS: One hundred and fifty
14 miles, 200 miles. And once again -

15 MR. BUTTREY: How many cars a day
16 would that be?

17 MR. EHLERS: On average, it's 11.7
18 cars a day.

19 MR. BUTTREY: And that translates
20 into how many trucks?

21 MR. EHLERS: You will have to ask
22 somebody else for that translation.

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1 MR. BUTTREY: That sounds like a
2 perfect truck market to me.

3 MR. EHLERS: Well, to be very
4 clear, it goes to Birmingham, and then it
5 gets reclassified and it gets moved
6 throughout the network. My point was that as
7 far as unit train operations, or the ability
8 to minimize the 30 mile an hour restriction
9 on the network, I mean if you could you would
10 want to grab all the TIHs, put them on a
11 train, and one could argue that may not be
12 the best thing because you have just created
13 a super target.

14 But from a network impact
15 standpoint you would want to group all those
16 cars together. The 11.7 speaks to the fact
17 that that is the largest block of cars that
18 move together on regular train service. Now
19 when those cars get to Birmingham, I'm sure
20 99.9 percent of them get forwarded onto other
21 destinations, other trains. They do not
22 terminate at Birmingham.

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1 MR. BUTTREY: So they go through a
2 hump yard at Birmingham and get on some other
3 train.

4 MR. EHLERS: Birmingham is one of
5 our largest classification -

6 MR. BUTTREY: Onesies and twosies
7 if you will on -

8 MR. EHLERS: Exactly, and it gets
9 to the point later on in my presentation -

10 MR. BUTTREY: But they move from
11 the production facility to Birmingham in a
12 little mini unit train; is that what they do?

13 MR. EHLERS: They move on a
14 merchandise train, and on average 11.7 cars a
15 day in a block that move from McIntosh to
16 Birmingham for furtherance into the network
17 either on NS destination or offline.

18 MR. BUTTREY: Altogether?

19 MR. EHLERS: No, once they get to
20 Birmingham, they get broken up.

21 MR. BUTTREY: No, when they go to
22 Birmingham, they are moving altogether on the

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1 same train, they go on a merchandise train
2 that is headed for a classification yard.

3 MR. EHLERS: Right, they are all
4 moving together, correct.

5 MR. BUTTREY: Okay. Interesting.

6 MR. EHLERS: And again, my
7 discussion about the blocking, most of the
8 TIH cars that move in our network move in
9 one, two or three cars on the entire train.
10 Ten, 11.7 is at the very far end of the
11 spectrum. You get down to onesies and
12 twosies every other day in much of the rest
13 of the network.

14 MR. BUTTREY: You make an effort,
15 then to keep these cars grouped together when
16 they go on the big merchandise train out of
17 Birmingham. If there are three cars going on
18 a train, and they are all going on the same
19 train, you are going to bunch those cars up
20 together, you are going to try to or not?

21 MR. EHLERS: No, we don't try to,
22 no. They will get switched out as they get

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1 processed through the yards, they will get
2 switched out. If they are traveling together
3 for the most part they will stay together
4 from the same origin to the destination if
5 they are going to a common destination.

6 MR. BUTTREY: Mr. Burr, I think
7 maybe you are the only insurance expert we
8 have had here today, which is unfortunate,
9 really. Is that correct? I think that is
10 correct. You are the closest thing we have
11 all day long to an insurance expert, and we
12 are glad you are here.

13 Are you familiar with this Price
14 Anderson pooling idea? Are you familiar with
15 that process?

16 MR. BURR: I'm generally familiar
17 with it, yes.

18 MR. BUTTREY: Okay.

19 Is there any way to create, in
20 your view, a pooling arrangement like that
21 for the railroads? In other words there
22 would be a ground level insurable on a per

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1 occurrence basis there would be a cap if you
2 will or a liability limit, and then above
3 that it would go to a pool of some kind, and
4 that pool would be contributed to by
5 whomever.

6 Is there - have you thought about
7 that? Have you given that any thought about
8 how that might work?

9 MR. BURR: Well, we have considered
10 different options. That is one that we would
11 consider. One of the problems we would have
12 is, without the ability to talk freely
13 amongst the shippers and the rail industry,
14 it is difficult to establish the appropriate
15 rate for that.

16 However it is a concept that if we
17 can get past that issue could hold merit.

18 Other issues that we are
19 considering is essentially establishing our
20 own internal loss funding mechanism whereby
21 through an assessment mechanism we would
22 charge the shippers to build up a fund held

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1 by a third party to pay for losses over and
2 above the insurance we have.

3 MR. BUTTREY: So Mr. Weicher, how
4 do we get past that roadblock?

5 MR. WEICHER: The first roadblock,
6 if you're trying to do a parallel with Price
7 Anderson, is, it would take legislation to
8 have a cap, because the other essence of
9 Price Anderson in its broadest terms is a cap
10 on damages and/or federal public
11 responsibility at certain levels
12 administering this whole thing, and
13 administering the form of pool.

14 It is not clear without some form
15 of legislation how - at least to me - how you
16 could have a similar pool structure with
17 liability limitations and contribution
18 required by parties.

19 MR. BUTTREY: When you say
20 legislation, do you mean that word in the
21 purest sense, or do you mean legislation or
22 regulation?

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1 MR. WEICHER: I meant that in the
2 pure sense I believe.

3 MR. BUTTREY: Something passed by
4 the people down the street.

5 MR. WEICHER: Yes, something passed
6 by the people down the street. Now there
7 could be elements of pooling in the
8 traditional STB Interstate Commerce Act sense
9 among carriers and/or people in the
10 transportation element that could conceivably
11 deal with some elements of these issues, but
12 not with the tort limitation or mandatory
13 elements that are in the federal statute, if
14 I understand the question.

15 MR. BUTTREY: Now do you quarrel
16 with the idea that the Board is powerless to
17 do anything in this area?

18 MR. WEICHER: I don't believe - the
19 Board is the ultimate arbiter of the nature
20 of the common carrier obligation. And the
21 Board I believe has jurisdiction to determine
22 how that obligation should be applied and

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1 interpreted in the circumstances of all
2 shipments that are regulated, and have been
3 exempt from regulation, and none of this is,
4 in carload scenario, and then rule upon and
5 determine the reasonableness of proposals
6 carriers might bring to them, and also set
7 policies or guidelines that would encourage
8 private sector solutions to this.

9 MR. BUTTREY: In your view that is
10 perfectly consistent with the Akron case?

11 MR. WEICHER: Yes, the Akron case -
12 we are not discussing from our standpoint,
13 from BNSF's standpoint, a refusal to handle
14 these commodities. The Akron case, that was
15 a far more Draconian - at least where we are
16 now in this, in this evolution of dealing
17 with these commodities, I don't believe we
18 are talking about the same thing.

19 MR. BUTTREY: Well, we've been
20 citing the Akron case all day long saying we
21 don't have any jurisdiction here. I don't
22 read the Akron case to say that, but what do

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1 you think?

2 MR. WEICHER: If I may, sir, the
3 Akron case I think stands for the proposition
4 that if a carrier, or the predecessor,
5 Conrail - if a carrier at that time said, we
6 will not handle this at all, or only under
7 terms that are patently unachievable,
8 unreasonable, can't do it, then the Board
9 properly had the jurisdiction to say, no, you
10 can't take that position. That is against
11 the law, we - excuse me, you, the Board,
12 administer, and find that unlawful, and that
13 is an enforceable order. That is an exercise
14 of the Board's jurisdiction and the
15 predecessor's jurisdiction in those
16 circumstances under the law, and that's what
17 it did.

18 MR. BUTTREY: And do you see any
19 movement whatsoever in the Congress to take
20 on this issue? Or do you subscribe to the
21 theory that the reason the Surface
22 Transportation Board is here is to grapple

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1 with these thorny issues instead of the
2 Congress?

3 MR. WEICHER: I'm a - I consider
4 myself experienced in transportation law.
5 I'm out of my league when I talk about
6 Congressional thrust. But having said that,
7 from a governmental relations standpoint,
8 it's hard to picture the appetite to take
9 this issue on in the current climate, that
10 being the issue of creating a Price Anderson
11 for the railroads, absent the unity which
12 doesn't appear to be here between all aspects
13 of the rail transportation sector with the
14 customers and the shippers.

15 And I think that leaves the Board
16 to exercise the jurisdiction it has within
17 its areas to interpret common carrier
18 obligations.

19 MR. BUTTREY: And then we'll see
20 what the court of appeals has to say about
21 that.

22 MR. WEICHER: Yes, sir, and I think

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1 what happens is, if you do a policy, and you
2 do a policy saying there are things that
3 could be done, or whether or not you do a
4 policy, if at some point a carrier publishes
5 something, does something, takes a position,
6 you are the arbiter in the first instance,
7 subject to review by the court of appeals, of
8 whether that is a proper interpretation of
9 common carrier obligation.

10 MR. BUTTREY: Thank you.

11 CHAIRMAN NOTTINGHAM: Mr. Weicher,
12 why the suggestion that we adopt or issue a
13 policy statement as opposed to going through
14 a rulemaking proceeding? Obviously a
15 rulemaking would take a little longer, but it
16 would typically get more comment. You build
17 a bigger record.

18 MR. WEICHER: Chairman, I'm not
19 sure where the direction of these proceedings
20 started, when the Board had the first hearing
21 which some of us testified at, and it was
22 clear that this was an important issue that

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1 required a great deal of focus.

2 This proceeding as it stands now,
3 and I would certainly defer to the Board and
4 its staff on how best to think of this, it is
5 not at this point a rulemaking which would
6 suggest that it could become one if there
7 were concrete rules proposed, but in the
8 absence of that it is a proper vehicle as the
9 Board has done in some other areas in past
10 years to promulgate a policy statement. That
11 is where we are in this.

12 That would not preclude the Board
13 establishing formal rules through an ANPR and
14 an NPR and so forth, which is a longer
15 process, and has greater in the panoply of
16 things a greater legal effect. But that
17 doesn't mean it's inappropriate I think to
18 establish or set out certain policies.

19 CHAIRMAN NOTTINGHAM: I'd like to
20 ask each of the witnesses on this panel to
21 help us better understand the availability of
22 insurance question. It has been

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1 characterized differently by different
2 witnesses, different panels today.

3 Some shipper witnesses have
4 basically said they are not aware of any
5 shortage or difficulty whatsoever in
6 railroads getting insurance, and that you
7 have basically just contrived this issue for
8 some other devious purposes.

9 So we need - Mr. Burr's testimony
10 was quite helpful, it actually was the first
11 very specific information we'd gotten on
12 that, and that is helpful.

13 I think each of you would be
14 helping yourselves if you helped us develop
15 that record more thoroughly over the next 30
16 days with, perhaps with correspondence from
17 insurance carriers about - sort of what types
18 of efforts have you done.

19 And maybe I will ask Mr. Burr,
20 since it sounds like you labor in this area
21 on a regular basis, you call your 20
22 insurance providers that are out there, you

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1 say you need more, you'd like to have \$5
2 billion in coverage. What are those
3 conversations like? What do they say, what
4 are you kidding? How does that work? You
5 are able to get to a billion through a
6 checkerboard approach which you showed us
7 which was interesting, tiered and everything.

8 Can you elaborate on what the
9 market is like?

10 MR. BURR: Sure, I think there are
11 actually two issues you have to take into
12 consideration. First, the insurers that we
13 do business with are only willing to offer a
14 finite amount of coverage, so they will only
15 put out \$100 million on any one railroad for
16 example. So we are limited in the amount I
17 can buy from the 20 companies that are
18 willing to write the coverage.

19 The second issue though is, there
20 are vastly more than 20 insurers in this
21 world. The problem we face, the vast
22 majority of them are precluded from writing

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1 railroad liability insurance, because when an
2 insurance company issues a policy they
3 typically buy reinsurance as well either on a
4 specific risk basis or to cover the entire
5 portfolio, and that is called tree
6 reinsurance, or reinsurance.

7 The reinsurance market does not
8 allow the primary carrier to write railroad
9 liability coverage. So then the primary
10 carrier is faced with the dilemma of, if I
11 put out \$50 million in coverage, and normally
12 I'm expecting my reinsurer to pick up 90
13 percent of that, I no longer have that
14 luxury.

15 So most of the companies will say,
16 no, we will not write insurance on railroad
17 companies.

18 CHAIRMAN NOTTINGHAM: Now what
19 about self insurance? Another approach would
20 be that a large successful company like BNSF
21 could have a very significant reserve fund or
22 contingency fund. Do you do any of that, or

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1 is that something you have entertained doing?

2 MR. BURR: Well, currently our
3 self-insured retention is \$25 million as the
4 chart showed, which has increased by 150
5 percent actually over the last several years.

6 So yes, we do use self insurance
7 as a vehicle. Going forward what we are
8 looking at is using an assessment mechanism
9 to charge our shippers to build up a fund to
10 pay for those losses only under certain
11 circumstances.

12 CHAIRMAN NOTTINGHAM: Also I think
13 a couple of witnesses have mentioned
14 significant insurance cost increases since
15 2001. I heard 400-500 percent and 200-300
16 percent, if I recall.

17 If each of the railroads could for
18 the record get back to us with that
19 information of what your experience has been
20 in the last, since 2001, the last seven years
21 in the area of insurance costs.

22 Vice Chairman Mulvey?

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1 MR. MULVEY: Thank you, I have a
2 couple of questions.

3 The recommendation for a policy
4 statement, as opposed to say giving advice to
5 the Congress, what is the legal import of a
6 policy statement from this Board with regard
7 to this issue? I mean would that be binding
8 if we had a policy statement saying that we
9 thought agreements between railroads and TIH
10 shippers ought to include an indemnity
11 feature, would that be dispositive, or would
12 that just be a suggestion and have no legal
13 import?

14 MR. MULVEY: Vice Chairman Mulvey,
15 I'll be happy to try to address that. A
16 couple of things.

17 On your first comment in terms of
18 approaching Congress, of course the Board has
19 a voice, but how that process would work and
20 how long it would take and what it is
21 directed to, more like the Price Anderson,
22 something else entirely.

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1 From the standpoint of a policy
2 statement, a policy statement could
3 facilitate the parties, the carriers working
4 with their shippers, or offering to their
5 shippers, and give some guidelines.

6 But I again defer, but I would
7 believe that it is not binding on the Board
8 in terms of when it had a specific proposal
9 before it and examined it in the light of the
10 policy and the law, it would make the de novo
11 determination or adjudication or whatever
12 would be the proper term for what came before
13 it; but as the Board has done in other areas,
14 it could help give guidance and suggestions
15 and promote trying to find solutions by
16 suggesting the criteria or the directions the
17 Board thought were important in those areas.

18 MR. MULVEY: Of course the shippers
19 have said it would frustrate the development
20 of cooperation and agreement. But the
21 railroads feel that it would actually spur
22 that cooperation and agreement.

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1 BNSF, you were talking about
2 unreasonable requests. Do you have any real
3 world examples of unreasonable requests where
4 shippers have made requests that you have
5 turned down because they were unreasonable,
6 especially as they relate to TIH or PIH
7 movements?

8 MR. WEICHER: Not on our company.
9 I am not aware we have ever done anything
10 like that.

11 I suppose the extreme - although I
12 didn't go back and read the record - whatever
13 happened in the Akron nuclear case, as the
14 Board implicitly if not explicitly found
15 there, there was something unreasonable going
16 on there by the carrier in that case.

17 MR. MULVEY: You mentioned in your
18 testimony on page eight about let's see about
19 number of incidents where UP did however
20 experience six shipper caused releases of TIH
21 two of which occurred in HDPAs.

22 MS. DUREN: Yes.

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1 MR. MULVEY: But none that were
2 railroad caused. This seems to run counter
3 to what the shippers have testified that
4 virtually all the incidents that have
5 occurred out there were the fault of the
6 railroad as opposed to the shippers.

7 MS. DUREN: Well, the safe
8 securement of the tank cars is the
9 responsibility of the customers. And we do
10 find, particularly on residue cars, where all
11 of the tank cars are not completely secured,
12 and will have some residual release. But
13 that is the responsibility of the shipper.

14 MR. MULVEY: One last question.

15 What other industries or events
16 are not subject to the availability of
17 reinsurance?

18 MR. BURR: If that question is
19 directed at me, I'm not sure I can answer
20 that, because obviously I focus on the rail
21 liability insurance market, and not the rest.
22 So I don't know the answer to that.

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1 MR. MULVEY: It seems to me,
2 virtually this could come up in other
3 industries as well.

4 CHAIRMAN NOTTINGHAM: Mr. Mulvey,
5 something tells me that the largest
6 shareholder of BNSF stock probably knows the
7 answer, but he is not here with us today.

8 MR. MULVEY: Can you see if he can
9 come next time? Thank you.

10 (Laughter.)

11 MR. MULVEY: That's all I have.
12 Thank you.

13 CHAIRMAN NOTTINGHAM: Mr. Buttrey,
14 any other questions for this panel?

15 MR. BUTTREY: I'm just curious, Mr.
16 Elliott - sorry to interrupt your note taking
17 there - after the catastrophic events of
18 Katrina, did you have a hard time getting
19 insurance? Did companies cancel policies
20 down there on your company after - because
21 you - the best I could tell when I was down
22 there was that there was nothing where it was

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1 supposed to be. I mean it was just the most
2 bizarre thing I have ever seen. Everything
3 was in the wrong place. Eight barges were
4 laying right on top of your mainline track
5 for instance. You and I both have pictures
6 of that, I think.

7 What effect did that have? In
8 other words after a catastrophic event, what
9 is the aftermath of all of that? Are you at
10 liberty to discuss that at all?

11 MR. ELLIOTT: Well, Mr. Buttrey,
12 obviously insurance and the availability -

13 CHAIRMAN NOTTINGHAM: I'm sorry,
14 can you pull that mike over. I can hear you
15 fine, but the people in the back probably
16 can't.

17 MR. ELLIOTT: I'm sorry.

18 The risk management side of CSX is
19 not my specialty, so the best answer I can
20 give you is that we have taken note of that,
21 and will include that in our comments about
22 insurability.

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1 I will tell you that I am not
2 aware of any, but again, you and the Vice
3 Chairman saw firsthand some of what you never
4 thought you could see before as far as the
5 damage that could be imposed on rail
6 infrastructure by Mother Nature, and by other
7 infrastructure that came to rest on railroad.

8 I suspect there were some real
9 significant impacts, but we will have to - I
10 will have to make sure that we do our
11 research and get back to you with an adequate
12 answer to that.

13 MR. BUTTREY: I don't know whether
14 you can answer this or not, Mr. Ehlers, but
15 you may not be able to for proprietary
16 reasons, are the claims emanating from the
17 accident at Graniteville, is that all over,
18 or are there some things still pending with
19 respect to that incident, unfortunate
20 incident?

21 MR. EHLERS: The word falls in the
22 other category, which I just don't know. And

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1 I have to tell you, I am just not into that.
2 That is not an area that I have communication
3 with the folks that are dealing with that.
4 So I just can't tell you.

5 MR. BUTTREY: Okay.

6 Thank you, Mr. Chairman.

7 CHAIRMAN NOTTINGHAM: Mr. Ehlers,
8 you can respond on the record if you prefer,
9 on this, because I know when we announced
10 this hearing it was not to get into details
11 on any one particular dispute or controversy.
12 But we did have witnesses this morning from
13 Alexandria about the ethanol transloading
14 facility there. There is an active
15 proceeding before us in the form of a request
16 for declaratory judgment. And we will be
17 working our way through that soon.

18 But if you could give it to us now
19 or for the record some background - the city
20 seemed to indicate that there wasn't adequate
21 communication from the railroad, that they
22 were surprised to learn about this facility,

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1 and we also heard a little bit this morning
2 that there was some extensive land use
3 planning that has gone on in the past period
4 of years since the area around your facility
5 there, which formerly was primarily a
6 military facility, has now become a vibrant
7 community of some 4,000 people; an elementary
8 school right there.

9 I would also appreciate knowing
10 for the record just what kind of
11 communication you got at the time during the
12 land use process from the city as to whether
13 or not, hey, is this a good idea, we are
14 putting a school next to your property. And
15 you have been there for a long time operating
16 facilities. And it just kind of -
17 communication is a two-way street, and I just
18 wanted to give you an opportunity or your
19 colleagues a chance to respond, either today
20 or for the record on that.

21 MR. EHLERS: I know very little
22 about the Alexandria issue. I do know we

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1 filed comments with you.

2 I can tell you, we have been
3 talking, or the appropriate people have been
4 talking to Alexandria for about two years
5 now. Beyond that, as far as details, we are
6 just going to have to include it in the
7 record.

8 CHAIRMAN NOTTINGHAM: Okay, and we
9 see this I think it's a natural outgrowth of
10 the resurgence in rail traffic, and the
11 attractiveness of the rail industry to
12 shippers who are faced with severe highway
13 congestion. We are seeing more track getting
14 busier, and occasionally homeowners and
15 neighbors and communities claim to be
16 surprised that they are living near a rail
17 line that could get busier.

18 So I am always interested in ways
19 to figure out how to get better information
20 out, because in this environment that we live
21 in now, and the economy we live in with
22 traffic and forecasts, nobody who lives

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1 within earshot or eyesight of a railroad
2 should assume, unless they have really
3 checked it out and confirmed it's been
4 abandoned or something, should assume that
5 there is not going to be any kind of increase
6 in rail activity.

7 MR. EHLERS: You are certainly
8 right.

9 CHAIRMAN NOTTINGHAM: But
10 unfortunately we don't see a lot of that
11 information coming out. Don't have the
12 answer to that today, and it's not the
13 purpose for today, but welcome any thoughts
14 on that for the record.

15 Any other questions for this
16 panel?

17 MR. MULVEY: No, thank you.

18 CHAIRMAN NOTTINGHAM: Thank you,
19 this panel will be dismissed, and we will
20 call up the next panel, Panel VI, Terra
21 Industries, Inc., represented by Joseph
22 Geisler; CF Industries, Inc., represented by

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1 Patrick E. Groomes; and The McGregor Company,
2 represented by Alex McGregor.

3 I think we can begin. You can
4 begin, Mr. Geisler.

5 PANEL VI: AGRICULTURAL (FERTILIZER) SHIPPERS

6 MR. GEISLER: Geisler. I've been
7 called a lot worse. It's fine.

8 Good afternoon, Chairman, Vice
9 Chairman, and Commissioner.

10 Terra Industries is the leading
11 nitrogen producer in the United States. We
12 are also a leading international importer of
13 nitrogen products also, and Vice Chairman
14 Mulvey, you asked a question about UAN
15 solutions earlier today. Terra Industries is
16 the largest producer of UAN in the world, and
17 it's all produced in North America.

18 Our nitrogen products are sold
19 into the agricultural markets as fertilizers,
20 and into industrial markets as feedstocks for
21 other processes; and as reagents to scrub
22 emissions from power plants, diesel engines

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1 and other sources.

2 Approximately 70 percent of our
3 business is agricultural. Nitrogen
4 fertilizers are essential to nourishing the
5 crops that are used to produce biofuels, and
6 more importantly, to feed a growing global
7 population.

8 Thank you for recognizing the
9 importance of the railroads' common carrier
10 obligation. Terra is particularly concerned
11 with this issue as it applies to ammonia
12 transportation by railroad. If not properly
13 resolved it will have devastating effects on
14 our food and energy supplies; certain
15 industrial production; air quality; and the
16 overall economy.

17 My written testimony provides a
18 good description on ammonia uses, so I won't
19 repeat it here. What I'd like to discuss is
20 substitutability of ammonia, which has been
21 brought up today during the meetings, and I
22 would like to do it by our customer segments.

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1 In 2007 Terra serviced more than
2 125 agricultural customers, dealers who sell
3 direct to thousands of farmers, with ammonia
4 served by rail. We served a lot more
5 customers than that with ammonia, but those
6 were the only ones serviced by rail.

7 We supplied approximately 200,000
8 tons or 2,500 shipments to these customers.

9 The rail industry has suggested
10 that farmers replace ammonia with non-
11 hazardous fertilizer such as UAN and urea,
12 but because those products contain less
13 nitrogen per ton, it would take nearly three
14 times as many tons of UAN and approximately
15 twice as many tons of urea to deliver the
16 same amount of nitrogen.

17 Not only are the railroads today
18 incapable of handling these quantities, these
19 quantities are not available to be purchased,
20 and I think that is even more important.

21 Due to the demand to feed our
22 growing world population, nitrogen is in a

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1 tight balance today and forecasted to
2 continue. The International Fertilizer
3 Association forecasts show that the new world
4 fertilizer capacity will barely keep up with
5 consumption needed through 2015.

6 The railroads suggest this ammonia
7 be substituted with other forms of nitrogen.
8 However in today's environment with the
9 railroads near capacity and demand for
10 nitrogen extremely high, it is not possible.

11 All producers in North America are
12 upgrading ammonia at maximum rates. Several
13 producers have announced upgrade projects for
14 the future, however those are several years
15 away.

16 Terra's industrial customers are
17 similarly dependent on ammonia rail
18 transportation. In 2007 Terra serviced over
19 60 industrial customers with ammonia that was
20 shipped directly to their sites to be used as
21 chemical intermediates or as reagents to
22 clean nitrous oxide emissions.

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1 Most of these customers fall into
2 three categories. The first is the mining
3 services. There is no alternative for
4 ammonia as a raw material to produce
5 explosives, and what we in many cases, we
6 have talked about moving or putting
7 facilities closer to the production of the
8 ammonia. In 2005 Terra partnered with Orica,
9 and we did - we revamped a plant that Terra
10 owned so we could produce the upgraded
11 materials.

12 However that was the last plant in
13 North America that had the capability to
14 modify existing equipment to do so. Any
15 change at this point would require hundreds
16 of millions of dollars to move a facility and
17 provide the upgrading capacity. It would be
18 very similar to doing a UAN upgrade; it's
19 going to take several hundreds of millions to
20 build the upgrading capability to move
21 forward on that.

22 The second category is power

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1 generation, specifically coal and natural gas
2 fired generating facilities. Other products
3 can be substituted for ammonia in these
4 applications if they are available. But the
5 cost associated with converting facility feed
6 systems would be in the tens of millions of
7 dollars per location; plus the rail track
8 infrastructure improvements and freight costs
9 associated with handling up to four times the
10 shipments of products to these facilities.

11 Terra has attempted to work with
12 carriers to change this business. However it
13 has always come back that the carriers want
14 to - even after the increase in rates that
15 have taken place, and several of these are
16 well over 200 and some odd percent of the
17 ammonia increases, the carriers still want to
18 receive the same revenue generation for the
19 different products.

20 Now you are going to be taking in
21 four times as much product, and the customers
22 don't see an incentive, and no guarantee that

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1 the rates are going to be stable, it makes it
2 very difficult to change their mind to expend
3 the money to upgrade it.

4 Finally there is a category of
5 customers in refinery, nylon production,
6 resins and pharmaceuticals, who have no
7 alternatives to ammonia as a raw material.

8 I'd like to turn your attention
9 now to safety, security and costs associated
10 with ammonia transportation. For Terra to
11 convert its ammonia shipments from rail to
12 truck would be a staggering undertaking both
13 logistically and economically. It would take
14 over 27,000 truck shipments averaging a
15 round-trip distance of over 1,300 miles. We
16 estimate the additional costs associated with
17 truck freight over current costs would exceed
18 \$70 million annually.

19 Also there simply are not enough
20 trucks, equipment and personnel to make this
21 possible.

22 Terra takes safety and the

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1 environment very seriously. We have a
2 dedicated EH&S manager at each facility who's
3 role is to document policies and procedures;
4 provide training for inspection, handling and
5 loading hazardous materials; ensure that each
6 person is provided with specialized
7 protective equipment.

8 We at Terra have been judiciously
9 involved in assuring we were adhering to
10 provide the safest environment for our
11 employees, carriers and customers throughout
12 our existence.

13 I will admit the amount of dollars
14 the railroads have put forward to assure
15 safer transit is substantial. I applaud them
16 for doing this.

17 However it appears it just
18 recently started. It hasn't been a long term
19 practice. If the efforts had taken place
20 over time, as it should have been, we may not
21 be here today, and the costs would have been
22 gradual versus extreme one-year payments.

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1 Terra itself spends well over
2 \$1,000 per shipment per year for TIH
3 shipments. Car costs are almost \$1,000
4 themselves. Terra has worked closely with
5 the other TFI ammonia members to craft
6 liability program for consideration by Class
7 I railroads. As TFI's president spoke
8 earlier, Terra is also very concerned with
9 the position taken in written testimony by
10 the Association of American Railroads that
11 calls for TIH shippers to indemnify and hold
12 harmless the railroad.

13 We have spent endless hours and
14 committed substantial funds to work with the
15 railroads on a business solution to their
16 concern over liability.

17 With the position that their trade
18 association has taken, and if the Board acts
19 to accommodate them, we are concerned that
20 there is no incentive for the railroads to
21 continue to work with us. They will get
22 exactly what they want, with a workable

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1 liability program, and a continuation of the
2 common carrier obligation as is, Terra
3 believes costability and ammonia supply chain
4 predictability would be restored in enabling
5 business to make sound future decisions.

6 Terra understands the concerns of
7 the railroads pertaining to the potential
8 risk associated with transporting TIH by
9 rail, and has attempted to work with them to
10 make our industry safer. We also believe
11 however that the STB should not take any
12 action that would allow the railroads to
13 continue to impede the movement of TIH by
14 rail. Any proposal that shifts liability
15 from carriers to shippers when an accident
16 and a release occurs due solely to the fault
17 of the railroad is unacceptable.

18 I believe that the economic
19 incentives of our current fault-based tort
20 system encourages greater safety measures,
21 and that tinkering with that system by
22 imposing liability limits jeopardizes overall

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1 safety.

2 Every business in this nitrogen
3 supply chain including transporters has
4 risks, but as a result they do not have
5 insurance for a total catastrophic event, and
6 that is why the focus on safety an
7 appropriate maintenance is of utmost
8 importance, not indemnification
9 responsibility.

10 Although the STB must not take any
11 action to narrow or eliminate the common
12 carrier obligation to all hazardous
13 materials, Terra believes that the STB can
14 facilitate and negotiate a business or
15 political solution to railroad liability
16 concerns that will not jeopardize the public
17 safety.

18 Thank you.

19 CHAIRMAN NOTTINGHAM: Thank you,
20 Mr. Geisler.

21 We will now hear from Patrick E.
22 Groomes from the CF Industries Company.

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1 MR. GROOMES: Chairman Nottingham,
2 Vice Chairman Mulvey, Commissioner Buttrey,
3 of course I prepared comments coming into
4 this, but so much has been said today, I'd
5 like to revisit a couple of the comments that
6 have been made, and maybe draw a little bit
7 of a finer point on some of them.

8 First of all, I think the Board's
9 role here is really not what the railroads
10 have requested. There is a very important
11 role for you to play; it's just not what they
12 are asking.

13 Everyone has talked about the
14 business solutions proposed by, for example,
15 TFI, and we certainly think that the Board
16 could facilitate those proposals. I know
17 that in at least one instance the Board has
18 filed comments with one of the other agencies
19 in one of the rulemakings to make sure that
20 they are made aware of what's going on in
21 that proceeding. I would submit that your
22 continued participation in those proceedings

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1 will allow those agencies to take your
2 economic expertise into consideration.

3 A lot of the economic issues were
4 just discussed with you by the railroads
5 about what was going on in the FRA
6 proceeding, and I think it's important that
7 you continue to follow up with that.

8 What I would also suggest is very
9 important is that you require the railroads
10 to submit evidence of everything they are
11 asserting in this proceeding. I know at
12 least one witness today has referenced the
13 woeful inadequacy of just about every
14 assertion they have made.

15 I would think that any decision
16 that comes out of this proceeding should be
17 based on facts and not just suppositions.

18 I know that each of you have had a
19 question about the authority of the Board to
20 act in this proceeding, and particularly
21 Commissioner Buttrey has had some questions
22 about exactly where is the Board's authority

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1 here.

2 I don't want to focus on the
3 broader authority of the Board to address
4 what the railroads have requested, but
5 specifically the Board's authority to act
6 specifically as the railroads requested in
7 this proceeding. They have requested that
8 you grant them a right to impose
9 indemnification upon shippers. That
10 constitutes legislative rulemaking, and we
11 have not gone through a rulemaking
12 proceeding.

13 Now if you were to issue a policy
14 statement that was not binding, did not give
15 them the right to impose that obligation,
16 perhaps we are somewhat short of that. But
17 what they have requested is not that; what
18 they have requested is that you adopt a rule.

19 And as I said before, I think that
20 whatever decision you may come to, I don't
21 think the record as it currently stands is
22 sufficient to come to any conclusion.

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1 Another thing that I think we can
2 draw a finer point on is the scope of
3 liability. Everyone has talked about it; I
4 understand that, and I hope I'm not beating a
5 dead horse at 5:00 o'clock in the afternoon,
6 a long day. But what we are talking about is
7 a much smaller category of liability that
8 what the railroads would have you believe.

9 As I believe you heard from the
10 FRA, if the railroads comply with federal
11 regulations, they have the protection of
12 preemption. That means that state law
13 negligence claims cannot be brought against
14 them, preempted by the federal regulatory
15 scheme.

16 So what does that leave you with?
17 That leaves you with instances where they are
18 not complying with law. So now they have
19 come to you and asked you to take the
20 position that it is reasonable for them to
21 impose indemnification requirements on
22 shippers in cases where they haven't complied

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1 with federal law.

2 I have a hard time coming to the
3 conclusion that that is a reasonable request,
4 but that seems to be what they are asking.

5 I know there has also been some
6 debate about, particularly from you, Chairman
7 Nottingham, about the question of the
8 intermingling of safety and economic
9 regulation. And one thing I would note is
10 that the liability that the railroads are
11 concerned with here arises specifically under
12 the FRSA. It comes about because of an
13 amendment to the FRSA last year.

14 If you go back and look at the
15 Minot decision prior to that amendment, the
16 8th Circuit held that all - all claims - based
17 on state law of negligence were preempted.
18 And based on Congress' amendment just a few
19 weeks ago, we now have a decision from the 8th
20 Circuit that says, in cases where they don't
21 comply with law, they are not preempted.

22 So that liability arises under the

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1 FRSA, a statute that the FRA is charged with
2 administering, and it is part of the safety
3 scheme, so I think that is a little bit finer
4 point, much along the lines of what Mr.
5 Moreno was discussing with you.

6 So I think it's a little bit
7 clearer that it's a safety issue and not an
8 economic issue.

9 You had a few questions also, Mr.
10 Chairman, about the issue of bankruptcy and
11 what the implications might be for a railroad
12 after a release.

13 I've been through a few very large
14 bankruptcies, and what I will tell you is
15 that it's not the normal course of business
16 for whatever reason that an entity stops
17 business overnight, especially if it's got
18 going concern value. It will operate, most
19 likely, as a debtor in possession. It will
20 continue to operate; it will serve its
21 customers; and it will continue to make
22 money.

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1 The claims that came about will be
2 settled through bankruptcy most likely. So
3 there is a mechanism in place to ensure that
4 the railroads continue to operate in such a
5 situation.

6 One thing that I was a little
7 disappointed when the railroads were up here
8 speaking, there was a lot of hope that they
9 would talk about the proposal by TFI, and I
10 think but for one, we didn't hear anything
11 from them about it.

12 So I question whether or not there
13 should be some additional follow up with them
14 on that.

15 And then just one clarification on
16 the modes of transportation that have been
17 discussed as the safest manner for
18 transporting TIH materials. For shipments
19 from Canada, specifically for CF, there is no
20 alternative to rail. No barge, no pipeline.
21 So while certainly with certain customers and
22 shippers they may have that alternative; we

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1 do not.

2 That concludes my remarks, and
3 thank you very much.

4 CHAIRMAN NOTTINGHAM: Thank you.
5 We will now hear from Alex McGregor of the
6 McGregor Company.

7 MR. MCGREGOR: Good afternoon.

8 Thanks for the opportunity to
9 discuss anhydrous ammonia and its importance
10 for farm families.

11 I'm president of a 126-year-old
12 family wheat and livestock ranch, and a
13 family business that supplies and other
14 agricultural inputs in over 40 rural
15 communities in the inland Pacific Northwest.

16 Since my dad brought the first
17 rail car of anhydrous ammonia to our region
18 over half a century ago, has become a
19 cornerstone to grain production. Farmers,
20 scientists, local businesses like ours have
21 helped increase yields 2-1/2 fold, reduced
22 tillage and decreased soil erosion more than

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1 80 percent.

2 Gone are the chin-high ditches and
3 dust storms of my youth. We've come a long
4 way, and anhydrous ammonia has been a big
5 part of a striking environmental success
6 story.

7 It was but two years ago that farm
8 families for the first time since the Great
9 Depression paid more for a gallon of fuel
10 than they received for a bushel of grain they
11 produced.

12 Grain prices have since risen, but
13 increases in energy costs, diesel and
14 nitrogen in particular, have advanced at a
15 breathtaking pace. AAR's plan to avoid
16 potential demands of trial lawyers should its
17 members have accidents would worsen the
18 picture.

19 The AAR has taken an interesting
20 approach, seeking your okay to discourage
21 shipments of the product upon which we depend
22 while maintaining steadfastly that they have

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1 got a strong safety record at delivering it.

2 They tell us they have plenty of
3 business; that intermodal shipments are
4 booming; that we are small fry shippers to
5 them; and that they would rather not take
6 risks with us, exceedingly rare though they
7 might be.

8 Let's look at the consequences for
9 agriculture and for consumers of this
10 frenzied risk avoidance tactic. Anhydrous
11 ammonia is the feedstock from which other
12 nitrogen materials are made. Take away rail
13 access and you will put under siege a
14 domestic fertilizer industry that at the
15 manufacturing level has had to shutter
16 permanently many plants in the past 10 years.

17 NH3 has long been our most
18 efficient and cost effective nitrogen product
19 for direct field application. We have
20 handled over 1,100,000 tons of anhydrous
21 ammonia ourselves as an organization, and
22 we've done so safely over the years. More

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1 than 12,000 rail cars.

2 The keystone is remarkable
3 dedicated people, intensively trained, and
4 forever diligent in maintenance and
5 stewardship. Allow AAR participants to
6 renege on serving us and we'd have to get
7 ammonia from ocean ports. The nearest
8 ammonia barges that serve rivers, and the
9 nearest ammonia pipelines are half a
10 continent away for us in the Pacific
11 Northwest.

12 We'd average 660 round trip
13 highway miles to move each truckload of NH3,
14 not our current 128. Our cost of bringing
15 NH3 to our branches would increase from
16 \$300,000 to more than \$1.5 million with
17 reduced safety, driver fatigue, squandered
18 fuel and delayed shipments as part of the
19 equation.

20 Does it make sense to be
21 handicapping American agriculture in this
22 fashion?

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1 If we tried to avoid this forced
2 march toward financial lunacy by switching to
3 more dilute products made from anhydrous
4 ammonia, those AAR misleadingly regards as
5 inherently safer technology, the consequences
6 would be different but severe nonetheless.

7 Urea, a less concentrated dry
8 fertilizer, would require twice as many truck
9 trips to the nearest rail siding for the same
10 amount of nutrients; twice as many rail cars
11 or more, too. This is no small feat in
12 itself. We can't get cars delivered on time
13 right now.

14 We don't have the tools or the
15 expertise to ensure uniform placement of the
16 product in the root zone on steep hillsides.

17 But there would be more very bad
18 news for farm families. Costs vary by the
19 day, but here is a sampler from spring work.
20 The farmers we serve would have had to pay a
21 premium of 17 percent more for dry urea, and
22 29 percent more for UAN. On average the cost

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1 of nitrogen to farmers would have increased
2 more than 25 percent to switch from NH3.

3 This on top of production costs
4 already up more than 67 percent in the last
5 decade, from \$3.97 per bushel to \$6.64, with
6 233 percent increases in fuel, and 91 percent
7 increases in fertilizer leading the way.

8 Energy prices have moved up
9 further since those early '08 estimates, too.

10 The idea of sidetracking a rail
11 distribution system its representatives and
12 those who regulate it describe as having a
13 safety record that is exceedingly favorable
14 and remarkable is hard to understand from a
15 public policy perspective.

16 Ammonia shippers are already
17 treated as unwanted customers. They have
18 been hit with exponential shipping rate
19 increases of as much as 300 - 400 percent
20 since 2005. Policy statements enabling rail
21 lines to further burden shipping of this
22 vital nutrient will put more traffic on

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1 beleagured highways, increase congestion and
2 decrease safety, and put our food production
3 system at risk.

4 This when all rail shipments to
5 and from agricultural heartlands have already
6 grown less reliable and more expensive. The
7 AAR risk avoidance strategy would increase
8 costs for food stuffs and energy just as
9 Congress examines way to lower them.

10 Let's be realistic. One of us can
11 plausibly make a case for changing a system
12 that works to a costly cumbersome and
13 wasteful one that doesn't. We in agriculture
14 cannot maintain railroads and do the
15 maintenance for them. We cannot prevent two
16 trains from running into each other, causes
17 of some recent serious accidents.

18 Only carriers can do that. One
19 can create doomsday worst case scenarios,
20 about gasoline, propane, diesel, ammonia, and
21 many other products. My family's record of
22 56 years of safe product use and similar

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1 experiences of many across our land are
2 evidence that the real world of NH3 has been
3 one of responsible transportation and
4 responsible use.

5 We have limited liability the best
6 way we can, by an all out commitment to
7 central maintenance, and by training good
8 people, and we have done it well.

9 We urge you to be unwavering in
10 maintaining common carrier responsibilities.
11 Please consider carefully before writing
12 policies that allow a system that has
13 provided safe and affordable plant nutrients
14 to be derailed.

15 We should consider the issue that
16 underlies all of this, railroad concerns
17 about potential liability. Kudos to the
18 Fertilizer Institute for offering on behalf
19 of shippers to purchase a billion dollars in
20 excess umbrella insurance, and to propose
21 legislative action to cap overall liabilities
22 in exchange for putting a governor on rapidly

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1 surging rail shipping charges.

2 We hope you will encourage good
3 faith efforts to pursue the initiative now on
4 the table.

5 Anhydrous ammonia provides the
6 proteins today for a billion humans at least,
7 and a meat supply for half a billion more via
8 livestock feed. Ammonia is an engine of
9 productivity directly, and as a feedstock
10 that makes possible much of our agricultural
11 plenty.

12 Firms like ours help stoke the
13 coals of local economies in the farm towns we
14 serve. Following the advice of pioneer
15 settlers, measuring twice and cutting once,
16 would seem appropriate, when our firm and
17 thousands like it across our heartland have
18 shown that we can handle ammonia safely and
19 responsibly year after year, decade after
20 decade.

21 We urge you to consider America's
22 farm families, stewards of 97 percent of the

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1 farms across our heartland, before allowing
2 railroads to scuttle a system that works,
3 please be wary of the consequences of
4 handicapping people just now emerging from a
5 prolonged economic crisis.

6 We lost way too many farm families
7 in the last few years, four or five in each
8 of the dozens of farm communities we serve.
9 Growers are facing unprecedented high costs
10 for fuel, fertilizer and other inputs. Let's
11 put aside an Alice in Wonderland board room
12 scheme where it becomes logical somehow to
13 dump or impede a safe transportation system,
14 while opening the floodgates to higher priced
15 energy on the farm, and higher priced
16 foodstuffs in the supermarket.

17 I'm reminded of Nobel Prize
18 winning plant breeder Norman Borlag's warning
19 that if we as Americans let misconceptions,
20 not science and good judgment, dictate the
21 future of agriculture, we will be guilty of
22 displaying a diminished gene frequency for

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1 commonsense.

2 Please don't let our efficient
3 production system get overburdened with
4 tariffs, with policy statements that allow
5 backdoor ways of scuttling a safe and
6 efficient system, or by taking at face value
7 impractical notions of supposedly safer
8 technologies.

9 Out in the real world of
10 production agriculture, it is so much more
11 complicated than that. As former President
12 Dwight Eisenhower once put it, farming looks
13 mighty simple when your plow is a pencil and
14 you are a thousand miles from the field.

15 We are all for safety, and we have
16 demonstrated our excellent record in our
17 stores and on the road and on the farm.

18 Please help us avoid a destructive
19 blind alley. The consequences are too
20 severe, for the remarkable people who are
21 American agriculture, and for American
22 consumers, too.

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1 I thank you.

2 CHAIRMAN NOTTINGHAM: Thank you,
3 Mr. McGregor, and other witnesses.

4 I have a question for Mr. Groomes.

5 I noticed in your statement on the
6 first page it says that the Board has no
7 authority to impose rail safety standards,
8 and I don't think we have ever proposed to
9 impose rail safety standards, and then you go
10 on to say, or to regulate the transportation
11 of hazardous materials.

12 That second statement might be
13 news to companies like Dupont for example,
14 who just won four rate cases before us
15 involving the movement of hazardous
16 materials, TIH, and we have all kinds of
17 movements of hazardous materials that we have
18 regulatory oversight over.

19 MR. GROOMES: I would submit that
20 that is the regulation, not the rate, the
21 regulation, the actual transportation, the
22 safety transportation.

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1 CHAIRMAN NOTTINGHAM: Okay, so -
2 and our authority to exempt commodities from
3 regulation, if we applied that to exempting
4 hazardous materials, hypothetically, that
5 would be an example of deregulating something
6 we never had regulatory oversight over under
7 your -

8 MR. GROOMES: Well, again, your
9 regulatory authority is over the rates for
10 the most part, and then what we are talking
11 about here. And so what you would be doing is
12 exempting that from rate regulation.

13 CHAIRMAN NOTTINGHAM: I would just
14 submit that the thousands of producers of
15 hazardous materials who come to the Board and
16 tell us they are relying on our stewardship
17 of our regulatory oversight so they can stay
18 in business might beg to disagree with the
19 way you phrase that statement.

20 MR. GROOMES: I certainly didn't
21 mean to diminish the Board's role. But I do
22 mean to imply that with regard to safety

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1 issues, that is within the Federal Railroad
2 Administration's jurisdiction.

3 CHAIRMAN NOTTINGHAM: Okay, and
4 that first part of the statement certainly is
5 perfectly sound. I was worried when you got
6 into saying we can't regulate the
7 transportation of hazardous materials in any
8 respect.

9 You mentioned your experience with
10 bankruptcy. I don't have deep experience
11 with bankruptcy law, I'll say that. But I
12 will just point you to the history of the
13 Rock Island Railroad, and the Penn Central.
14 If you were to be advising a client who was
15 looking for freight rail transportation you
16 would probably have trouble finding those two
17 companies in the Yellow Pages as providers.
18 It is more than just a paperwork issue, when
19 a railroad goes bankrupt, bills get settled,
20 and then they go merrily on providing good
21 service in a seamless way.

22 We've seen railroads, especially

1 in the '70s, completely going under,
2 disappearing, very severe hardships imposed
3 on rail customers out of that. It's not
4 something we should be cavalier about. And I
5 was just worried that your statement sounded
6 a little bit cavalier, that it's not
7 something we should be too worried about.

8 MR. GROOMES: And again, I didn't
9 mean to be cavalier about it, but again,
10 given what a number of the other witnesses
11 have said, that government would likely step
12 in, and the pools afforded a debtor in
13 possession, I think the assumption, I think
14 what we were fearful of is that the
15 assumption here was if any railroad were to
16 become financially troubled it would
17 automatically go into Chapter 7. And what I
18 wanted to make clear was that there is the
19 option of Chapter 11, and in fact a lot of
20 companies do it and they are very successful
21 at it.

22 CHAIRMAN NOTTINGHAM: In the real

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1 world thankfully I haven't had to personally
2 experience managing through a directed
3 service situation on a large scale that would
4 be required arguably under a large bankruptcy
5 scenario, or Chapter 7 even.

6 But we've got about 142 employees,
7 and the notion that we would be able to
8 seamlessly with no impact or inconvenience to
9 rail shippers be able to start operating a
10 railroad and then seamlessly convince
11 Congress with no objections and no concerns
12 to write the checks to reimburse the new
13 railroad that stands in, which is the way
14 that works, and that all that would be kind
15 of a pleasant experience with - and not to
16 mention the impact on reduced competition,
17 which is already a big concern of shippers.

18 I just think, we don't want to
19 understate the importance of trying to stay
20 as clear as we can of major shutdowns of
21 railroads out there.

22 MR. GROOMES: I couldn't agree with

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1 you more, Mr. Chairman. If someone is
2 calling me about a bankruptcy issue, it's a
3 bad day, and nobody wants to be there.

4 I just didn't want the record to
5 sort of keep gravitating toward this idea
6 that the only option if something goes bad is
7 to liquidate a company, because it's not.
8 And I understand the burdens imposed on this
9 Board in such a situation, and I don't mean
10 to diminish that at all.

11 But I think part of the problem
12 is, again, that the railroads have talked
13 about nothing but ruinous liability, and not
14 distilled the issue to what we are really
15 talking about. And that is troublesome to
16 shippers in this case. If we really distill
17 it down to what we are talking about,
18 liability in instances where they failed to
19 comply with law, and the fact that they are
20 afforded essentially a safe harbor if they
21 comply with law, it's a little bit of a
22 different issue.

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1 CHAIRMAN NOTTINGHAM: Vice Chairman
2 Mulvey.

3 MR. MULVEY: I have no questions
4 for these witnesses, thank you.

5 CHAIRMAN NOTTINGHAM: Commissioner
6 Buttrey?

7 That will complete the questions
8 for this panel. You are dismissed. Thank
9 you for being with us today.

10 We will call forward our final
11 panel today, Mr. Paul Orum from the Center
12 for American Progress; Mr. Eric S. Strohmeier
13 from CNJ Rail Corporation; and Mr. Rick Hind
14 from Greenpeace.

15 As soon as you are ready, Mr.
16 Orum, you can start. Do we have everyone
17 here?

18 Mr. Hind? Is Mr. Hind here?

19 MR. ORUM: I don't see him here.

20 CHAIRMAN NOTTINGHAM: Well, go
21 ahead, and if he has anything to put in the
22 record in the next 30 days, he can.

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1 Mr. Orum, if you would go ahead
2 and start with your statement. Welcome.

3 PANEL VII: OTHER INTERESTED PERSONS

4 MR. ORUM: Thank you for this
5 opportunity to comment on rail transportation
6 of hazardous materials.

7 I am here to comment on one
8 specific aspect, namely, opportunities to get
9 these hazardous materials, toxic inhalation
10 hazardous materials, off the rails through
11 safer and more secure chemicals.

12 I wrote a report in 2007, Toxic
13 Trains and the Terrorist Threat, as a
14 consultant to the Center for American
15 Progress. The report documented the
16 opportunity to eliminate chlorine gas
17 shipments by rail to water utilities, and I'm
18 submitting that report into the record.

19 Basically we found it's quite
20 affordable. Very few water utilities still
21 use the railcar amount of chlorine gas, and
22 really don't need to.

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1 But water is just one industry.
2 I'd like to just give some other examples of
3 changes that can eliminate these TIH
4 shipments.

5 Bleach manufacturers can produce
6 bleach by generating the chlorine gas onsite,
7 from salt and electricity, the same way the
8 major manufacturer would produce it. And
9 then without bulk storage, that eliminates
10 the need to send a railcar of chlorine gas
11 around.

12 By some estimates possibly up to a
13 third of all chlorine rail shipments would be
14 off the rails if bleach manufacturers
15 uniformly were to make that change.

16 There are many types of food
17 processors that use sulfur dioxide gas for
18 various things, wet corn milling, cherry
19 brining, sugar processing; it's not that
20 uncommon to have a sulfur burner onsite to
21 generate the sulfur dioxide that's needed for
22 that sort of process. Something like half

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1 the sulfur that is used around the world is
2 generated at the site where it is used.

3 Wastewater utilities that replace
4 chlorine gas can also replace sulfur dioxide
5 gas with sodium bisulfite. It's a different
6 form to do the same thing.

7 Soap and detergent manufacturers
8 can also use the sulfur burner to create
9 their sulfur trioxide on site as opposed to
10 bringing it in by rail.

11 Secondary aluminum smelters, some
12 of them are gone from rail cars of chlorine
13 gas, which isn't real common but does happen,
14 over two alternatives, nitrogen gas.

15 Paper mills, going off chlorine
16 shipped by rail to chlorine dioxide generated
17 onsite. Or chlorine free alternatives.

18 And various manufacturers do
19 collate near the producers of toxic
20 inhalation hazard chemicals, and receive by
21 pipeline. And the bulk of chlorine is used
22 up at or near where it is produced.

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1 That is by no means a complete
2 review. It's just a few examples, and
3 basically I'm here to urge you not to neglect
4 this aspect.

5 There are many changes that can be
6 made, and that I think will happen for a
7 variety of reasons. We need to be encouraged
8 with the right incentives.

9 All these examples by the way are
10 based on things that people are already doing
11 somewhere.

12 I'm not a chemical engineer,
13 neither are you from what I gather. And I
14 urge you, maybe that is not where you should
15 go, into chemical engineering. Rather it
16 would be to try to associate the economic
17 incentives to use a chemical with all the
18 hazards of using that chemical.

19 That's the goal that I think you
20 all can play very well, because requiring
21 facilities to produce or receive these toxic
22 inhalation hazard materials by rail to cover

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1 liability insurance commensurate with the
2 hazard would add a very important incentive
3 to use and develop feasible alternatives.

4 Right now we have the wrong
5 incentive structure. I know of one water
6 utility spending \$120 million to put up
7 containment structures for their rail cars of
8 chlorine gas, which helps them out as long as
9 nobody destroys that building. ; it doesn't
10 do anything to protect that rail car on the
11 way in.

12 It's sort of a mutually
13 reinforcing inertia in which the user doesn't
14 pay the full cost and doesn't have the real
15 incentives to switch off to something else
16 that might be readily available, and yet the
17 rail car has to carry it.

18 With that I can conclude.

19 CHAIRMAN NOTTINGHAM: Thank you.

20 We will now hear from Eric
21 Strohmeier.

22 MR. STROHMEYER: Good afternoon,

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1 Mr. Chairman. My name is Eric Strohmeier, of
2 CMJ Rail Corporation.

3 It has been a very informative
4 hearing today. I will end very briefly with
5 some comments and some observations which I
6 thought the Board should take into
7 consideration.

8 We'll let the shippers and the
9 Class Is put into the record most of the
10 stuff they have already done. But I do want
11 to bring to the Board's attention the concept
12 the chemical shippers are very reluctant to
13 embrace is the concept that eventually we may
14 need to get to a liability cap, a straight
15 liability cap.

16 One of the things that 20 years
17 ago Congress realized there was great
18 reluctance to allow passenger service back
19 under the nation's rail network. And in
20 order to do that, they had to produce an
21 incentive for the railroads to allow
22 passengers to physically get on the nation's

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1 rail networks again.

2 And they did so by providing a
3 mechanism with a liability cap to Amtrak,
4 originally to the VRE, which both
5 Commissioner Buttrey and Chairman Nottingham
6 actually take everyday .

7 These liability caps also had
8 indemnifications for the railroads.

9 This has been going on since the
10 1990s, so the idea of a liability cap for the
11 railroad industry has been around for some
12 time, and has actually been endorsed and
13 supported and continued and actually been
14 codified in our statute today, 49 USC 28.103
15 and 28.102.

16 So we do actually have a form of
17 liability cap. And it was a straight cap.
18 And an indemnification agreement already
19 precedent which exists today.

20 Today we hear that the shippers
21 are concerned over the fact that railroads
22 would have this liability shifted to third

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1 parties when they are negligent has already
2 been done.

3 And to that extent we just wanted
4 to bring that to the Board's attention, and
5 the Amtrak statutes that we cited, that this
6 issue has actually, been there done that.

7 And to that extent, that is the
8 only real issue that we have to bring to this
9 table. I know it took a lot of people a lot
10 of time to actually make that happen. I know
11 a gentleman in our organization actually
12 started that process in 1983, through
13 legislative action initiated in New Jersey.

14 Eventually the first liability cap
15 was the BRE, approximately 1988, '89, I
16 forget when the BRE actually started.

17 We actually saw that come to
18 fruition. Today if there were to be an
19 accident on the VRE, and a trainload of
20 passengers were to succumb to an unpleasant
21 fate, the liability cap is only \$200 million,
22 I believe. To that extent if it was 500

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1 people on board, each person is worth
2 \$400,000. It sounds a little gory, but that
3 is the reality. And the railroads are
4 indemnified.

5 So to that extent it has already
6 been done once, so that is the only issue we
7 would like to bring to the Board's attention
8 today.

9 It's already out there, and the
10 TIH issue is just something, nothing more
11 than an extension of yet another possibility,
12 whether it's catastrophic, potential for loss
13 of life. And I can certainly see why the
14 railroads are pushing for it, and I don't
15 envy your decisions with regards to what you
16 have to do.

17 So to that extent I will conclude
18 my testimony, and if you should have any
19 questions I'll be more than happy to answer
20 them.

21 CHAIRMAN NOTTINGHAM: Thank you.

22 Mr. Orum, your affiliation with

1 the Center for American Progress, did you say
2 you are a past consultant, current, just for
3 the record, are you a full-time employee
4 there?

5 MR. ORUM: I'm not a full-time
6 employee; a consultant. I have written two
7 reports. I mentioned one. The other was
8 called, Preventing Toxic Terrorism, and am
9 currently doing additional work as a
10 consultant on this issue to the Center for
11 American Progress.

12 CHAIRMAN NOTTINGHAM: And Mr.
13 Strohmeier, CNJ Rail, what does that business
14 actually do? Do you operate trains? Or what
15 -

16 MR. STROHMEYER: CNJ Rail
17 Corporation provides I would call it
18 management consulting services to the rail
19 industry. We've got a couple of entities
20 we've worked with around the country.

21 We work with Mr. Raymond English
22 in foam packaging down in Vicksburg,

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1 Mississippi in a case recently before you. We
2 have also worked with other individuals
3 around the country.

4 We currently have our greatest
5 work in progress up the road in
6 Cockeysville, Maryland, that we have been
7 trying to turn into a railroad. It has been
8 difficult at best, but we are doing the best
9 we can. We have actually been working with
10 folks out in Oklahoma City on another case
11 that I spoke about, the last time we had a
12 get-together here, with regards to some of
13 their issues.

14 And I believe there is already now
15 another pending case before the Board, and I
16 can inform the Board there is going to be a
17 second case in regards to that sometime
18 shortly thereafter as well.

19 So we get around the country from
20 time to time where management is necessary.
21 I myself have been involved in the operation
22 of short lines, Somerset Terminal Railroad

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1 Corporation. I'm from New Jersey. I've held
2 every position from the car knocker to the
3 president of the organization.

4 So we know a little bit about the
5 short line and railroad industry, and I've
6 been doing this since I first hired on with
7 the railroad in 1988.

8 CHAIRMAN NOTTINGHAM: And which
9 railroad was that? What was the name of that
10 railroad?

11 MR. STROHMEYER: Which railroad?

12 CHAIRMAN NOTTINGHAM: Yes, the
13 railroad you were employed by?

14 MR. STROHMEYER: Oh, Somerset
15 Terminal Railroad Corporation, Finance Docket
16 33999.

17 CHAIRMAN NOTTINGHAM: Commissioner
18 Buttrey, any questions for these witnesses?

19 Vice Chairman Mulvey?

20 MR. MULVEY: I don't have a
21 question. An observation. I'm familiar of
22 course with the commuter railroads and how

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1 there are agreements on liability.

2 But what we are talking about here
3 with regard to the freight railroads and
4 carriage of TIHs is catastrophic losses,
5 which go far beyond \$400 million, and even
6 with the current administration's reductions
7 lately in the value of human life, it still
8 comes out to be an awful lot of money if you
9 kill 10,000 or 100,000 people. And I think
10 that there is something to be said for the
11 idea of working out agreements with commuter
12 railroads, and Amtrak, and that has been
13 successful.

14 But I do think it's going to be a
15 little more difficult to find a solution to
16 situations where the potential is
17 catastrophic loss.

18 MR. STROHMEYER: One of the issues,
19 if I might just respond to that for just a
20 second, we have heard a lot about the
21 relationship between, if you take away the
22 liability, that the safety aspect will

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1 decrease. We have heard about it. I've
2 heard numerous testimony today with regard to
3 the Akron case, the holding that there is
4 some sort of relationship between the two.

5 But I would like to point out the
6 safety record, that when you took the
7 liability away from the freight carriers, do
8 you feel any less safe getting on a commuter
9 rail network knowing that the liability? No,
10 you actually feel safer. You actually see a
11 degree of safety, because that has actually
12 led to investments in infrastructure, has
13 actually brought the infrastructure up to a
14 higher standard, and actually brought the FRA
15 to the property.

16 And so while I hear we relieve the
17 freight carriers of their obligation, the net
18 result has actually been an improvement in
19 the issue of safety, which if you go by what
20 everybody is telling you, at least the
21 shippers are arguing, there's going to be no
22 incentive.

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1 Well, we've taken away the stick
2 with regards to the passenger service, but
3 there has been no down side. And if you
4 listen to the ratio, you should be seeing
5 commuter trains falling off the track. And
6 you are not doing that.

7 MR. MULVEY: Well, the railroads
8 have plenty of other incentives, including
9 FELA, for example, to encourage them to
10 operate safely.

11 So Mr. Hamberger is chuckling away
12 at that. But no, I have always thought that
13 the liability incentive is always one which I
14 suppose is there, but I do think responsible
15 people try to behave responsibly.

16 With that I have no further
17 questions.

18 CHAIRMAN NOTTINGHAM: Thank you,
19 witnesses. You are dismissed.

20 (Panel dismissed.)

21 CHAIRMAN NOTTINGHAM: This
22 concludes the hearing. We will adjourn. We

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1 will keep the record open for 30 days, and I
2 appreciate everyone's patience in getting
3 through a long day. Also appreciate the hard
4 work of the many staff who it took to make
5 this hearing happen.

6 Thank you, everybody.

7 (Whereupon at 5:48 p.m. the
8 proceeding in the above-entitled
9 matter was adjourned.)

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