UNITED STATES OF AMERICA

SURFACE TRANSPORTATION BOARD

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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Adjourn
(10:03 a.m.)

CHAIRMAN NOTTINGHAM: Good morning and welcome.

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

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

It is on that more narrow topic that we will hear further testimony today.

For those who may be attempting to read the
tea leaves, I will say at the outset that I have not called this hearing with any specific outcome or proposal in mind. There is much discussion in the written testimony about whether the Board has the ability to determine the scope of the common carrier obligation. I would respond to that testimony by noting that it is certainly within the Board's authority to define what we will consider to be a reasonable request for service, and there is room for discretion within that analysis.

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

I think we can all agree that for
many hazardous materials including TIH rail is the safest and most efficient mode of transportation. However we have also heard that the railroads fear ruinous liability in the event of an accident involving TIH.

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

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

I hope to hear today about the Price-Anderson model and how it could be applied here; the role of the Board in developing a solution; and the basis for a
wide range of views held by our stakeholders as it relates to this matter.

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

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

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

Speakers please note that the timing lights are in front of me on the dais. You will see a yellow light when you have one minute remaining, and a red light when your time has expired.
As you can see from the published schedule we have quite a few witnesses appearing at this hearing. Therefore I will be keeping an eye on the clock, and we will ask that you please keep to the time that you have been allotted.

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

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

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

MR. MULVEY: Thank you, Chairman Nottingham.

Good morning, and welcome to our panelists and other attendees.
I have thoroughly read the testimony submitted for this hearing, and I am eager to engage in discussions with our panelists.

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

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

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

The common carrier obligation is the basis on which our transportation system
has developed, and it has been around far
longer than the hazardous materials that are
at issue today.

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

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

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

But that does not mean we should
shield the railroads from their share of the responsibility for such occurrences. In my view the Board's overriding duty is to enforce the common carrier obligation, not to exempt or protect railroads from it.

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

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

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

CHAIRMAN NOTTINGHAM: Thank you, Vice Chairman Mulvey.

We will now invite our first panel
to please come forward, and take a seat. I'd like to call forward from the Office of Congressman James P. Moran, his chief of staff, Frank Shafroth from the U.S. Department of Transportation, the deputy administrator of the Federal Railroad Administration, Clifford Eby; and from the city of Alexandria, Virginia, Vice Mayor Redella S. Pepper.

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

I'd like to ask - I understand Congressman Moran was detained due to scheduling challenges, and I certainly understand what that can be like up there in the Congress. And I've had the personal privilege of working very closely with
Congressman Moran primarily in the past when
I worked for Congressman Tom Davis' neighbor
geographically, and also when I worked for the
Commonwealth of Virginia.

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

PANEL I: GOVERNMENT

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

So I'll try and be very brief.

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

Obviously his concern here is
dealing with an issue that is probably going
to explode and explode on your watch and on
the watch of the U.S. Department of Transportation, and that is the tremendous explosion of ethanol. And ethanol, because of its unique characteristics, can't be transported by pipeline, so it must be transported by rail and truck.

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

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

I think the Congressman's greatest interest is some of the innovation the board has shown in dealing with situations not
dissimilar, in this case dealing with solid waste. Whether it was not a clear line of your authority, or a clear line when you could say to a railroad before you actually open for business here is a minimum check list of items that need to be done, so that there is assurance that there is protection in the community that could potentially be affected.

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

So he is really seeking your advice, but he is prepared to act to clarify the board's authority on this issue, in great part because if you look at the volume of ethanol that is being produced, that is going to have to be produced under federal law, there is going to be a huge increase in the number of transfer facilities, probably in urbanized areas, therefore probably close to
hospitals, to schools, to Metro stations, to other things. So the kinds of actions that you want to make sure railroads take into account before they get the green light to open such facilities.

Thank you very much, Mr. Chairman.

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

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

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

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

CHAIRMAN NOTTINGHAM: Sure, that is
no problem.

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

Deputy Administrator, the dais is yours.

MR. EBY: Thank you, Mr. Chairman.

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

Joe Boardman regrets that he had other conflicts today and is unable to attend. HAZMAT in general and tank cars, PIH specifically, have been a real priority for him during his time here. And while we both agree on DOT's position, and that's similar, the energy and the passion that he has for it now I hope I can display.

In my five minutes I'd like to really highlight three areas of my written testimony. First, that DOT does not believe
that the common carrier obligation should be
changed.

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

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

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

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

It's in the public interest to use
the safest mode of transportation for these
poisons, and the common carrier obligation
assures that safe rail transportation will be
available for shippers and their customers.
Congress has enacted legislation that facilitates the development of uniform federal railroad safety hazardous materials and security standards, and provides protections to railroads against tort liabilities when they comply with these regulations.

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

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

The act charged the Interstate Commerce Commission with formulating
regulations in accord with the best known practical means for securing safety in transit covering the packing, marking, lading and handling while in transit, and other precautions necessary to determine whether the material was offered in proper condition to transport.

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

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

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

That standard increases by 500
percent the amount of energy that a tank car
can absorb. It increases the puncture
resistance and recommends protective coatings
to protect the contents.

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

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

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

Security regulations have received
even more attention. Until recently, TIH
operated under a 2003 general HAZMAT
regulation. On April 8th, DOT issued an
interim final rule for TIH that goes beyond
the requirements of the 9/11 Commission Act.
It requires railroads, among other things: to
look at 27 risk factors; to compile data on routings and annually review it; to interview state and local agencies on risk assessment; to consider transit and storage delays; to inspect each shipment for tampering; and importantly it gives FRA authority to require an alternative route, and if an accident were to occur DOT has been quite active in the funding and training of first responders.

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

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

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

That concludes my statement.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Eby.

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

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

Fortunately, because we are all here today, the board members, and we are all on the record here together, this proceeding will be transcribed, we are able to discuss the controversy in Alexandria pretty freely as
much as you would like.

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

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

VICE MAYOR PEPPER: Thank you.

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

I am Del Pepper, vice mayor of the city of Alexandria, Virginia. And with me today, I've got quite a crew here: Jim Hartmann, our city manager; police chief David Baker; fire chief Adam Thiel; and along with us Ignacio Pessoa, our city attorney; and
Charles Spitulnik, our outside special counsel.

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

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

Railroads in this country own an enormous network of rail lines and yards. The
railroads were an integral part of Alexandria's history, and the city is an excellent example of the way the railroads and the land uses surrounding rail lines and yards have changed.

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

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

The aerial photograph on the easel, and I hope on the monitor - there we go - is an excellent example of an area where the use of land surround the railroad facility has
changed. Where once there was a sprawling military base— you may remember that was Cameron Station— there is now a wonderful residential community called Cameron Station, with a park and playground, a community center, and an elementary school.

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

Now instead of general freight, as many as 50 tank cars of ethanol are stored,
loaded and unloaded at this facility on any given day.

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

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

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

I don't need to belabor the point as to why these materials are different; you already know that, and besides, you will be
hearing a great deal from the railroads and from shipper groups today that will address that difference.

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

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

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

You have the authority under the statute to require the railroads to submit a plan and to solicit public comment about a
proposal to open a HAZMAT transloading facility. That is all we are seeking here, the opportunity to be heard.

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

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

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

Under existing rules state and local governments have the right to receive notice to answer comment when a railroad
proposes to abandon a railroad line in their community. Doesn't it make sense that we should have an opportunity to comment when a new and potentially hazardous facility like this is going to be opened as well?

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

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

And before I conclude I want to emphasize one point: the city of Alexandria is not here to say, oh but not in my backyard.
We have a big backyard in the city. WE have tried, as the city has grown, and as the needs of our population have changed, to regulate the use of land in that backyard in a way that would allow the neighbors that live across the fence from each other to coexist peacefully.

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

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

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

Vice Mayor, I have to admit,
listening to your statement brought back some very vivid memories of when I worked for the Commonwealth and we were trying to get the Woodrow Wilson Bridge permitted. A lot of public comment.

VICE MAYOR PEPPER: Oh, my, yes.

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

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

CHAIRMAN NOTTINGHAM: Definitely.

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

VICE MAYOR PEPPER: Right.

CHAIRMAN NOTTINGHAM: Of course Alexandria is one of - on a percentage basis, one of the relatively few jurisdictions that can clearly claim to have been around long
before railroads as a center of commerce and trade and shipping, and but for a good long while now railroads have been running through Alexandria. You mentioned railroads have played a pretty significant part in these real estate developments.

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

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

VICE MAYOR PEPPER: Forget that one.

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

But tell me, what is the Norfolk Southern's track record been in working generally with the city historically? Is it a good relationship generally? I understand
It's tense right now on this controversy?

VICE MAYOR PEPPER: It's very tense.

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

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

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

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

If you could actually be there you would see how close the playgrounds are to these tanks, and as you look at it you feel
like they are just within throwing distance, you could throw a coin and hit the tanks, it just feels that close.

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

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

Now in that environment, though, and in those cases - this board has spent a lot of time on this issue around the country,
particularly in the Northeast - we have the police powers exemption, which has long been recognized, that while the preemption exemption and protection for railroads is quite strong in federal law and in the case law, court decisions, there has always been in the state law respect for localities and states to be able to exert and apply their reasonable police powers to make sure that the public is protected from things like fires, explosions and crime and general things that go along with police powers.

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

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

We have, just something as simple as this, like every other firm that works in our city that is hauling anything of any size,
we have a permit that they are required to abide by, and what we are giving them is very reasonable, just as what we would give anybody else. And they are saying, oh, we are preempt; we don't have to abide by that. And we are only asking them to have a certain number of trucks that would come and go. And they are saying, well, we don't have to abide by that, because we are the railroad.

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

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

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

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

CHAIRMAN NOTTINGHAM: Thank you.

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

How would your truck permitting system handle a major detour that had to take place if there was a problem on 495 and trucks had to get routed through Alexandria?
VICE MAYOR PEPPER: Well, there are detours, and there are ways that we can take them to a different route. But that would be the exception, and we would understand that.

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

CHAIRMAN NOTTINGHAM: Thank you.

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

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

Any sense of timing of when we could expect to see a new rule on the area of
tank car safety?

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

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

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

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

MR. EBY: Yes, and that really is what I was referring to with the interim standard. The railroads have petitioned DOT
to adopt an interim standard. This standard
would allow a car that they have developed to
be modified in the future to meet the standard
that we come up with under the NPRM. And that
is what we hope to have issued in the November
timeframe.

CHAIRMAN NOTTINGHAM: Okay.

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

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

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

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

But we have been looking to see how - what else there was. But that is not really our job; that is the job of the
railroad that wants to come in this area.

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

CHAIRMAN NOTTINGHAM: Thank you.

Mr. Shafroth?

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

We are hoping this is an opportunity to propagate something along the
lines of what you are discussing: what are the minimal standards that would have to be met.

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

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

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

VICE MAYOR PEPPER: Since April.

MR. SHAFROTH: Since April. The
federal government yesterday proposed a plan
to deal with a future Katrina accident. It's
been labeled by state safety experts as
perhaps a greater disaster than Katrina.

So we know something is coming.

We are trying to fix this one in Alexandria,
hopefully along the lines of your question.
Is there a place not quite at that site that
might work better for all concerned?

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

We want to make sure you have the
ability, the legal authority, to set sort of
a check list so we all feel much safer before
such a facility actually begins operations you
have have got the maximum sense of
coordination, discussion, and you know what's
going to happen. You know that the fire
department has the equipment it needs to respond to the best of its capacity.

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

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

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

MR. MULVEY: Thank you.

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

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

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

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

Do you think there is anything the board can do or should be doing to facilitate efforts in this area, whether it be by the private sector or by the government?
MR. EBY: I'm sorry, to facilitate efforts in?

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

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

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

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

MR. EBY: Yes, and participate with DOT.
MR. MULVEY: In your testimony you mentioned that the Congress has passed some bills governing the hours of service that railroad workers can perform before they time out. And I believe the bill in both the House and Senate both would allow you to put greater restrictions on the amount of hours worked, or they allow you to require more hours on time off.

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

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

The administration's bill which was introduced both in the House and the Senate it was a comprehensive look at hours of service, looked at nighttime work, night
hours; just the whole study of fatigue. And sleep habits. Where both Senate and the House bill only focuses on limbo time, and limbo time is time at the end of a shift that is not worked.

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

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

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

Isn't that true?

MR. EBY: Our concern is that this
focus on limbo time takes a lot of the leverage away from our ability to make changes that would reflect real issues of fatigue.

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

MR. SHAHROTH: Yes, it has. And our analysis shows that the 14 fatalities that occurred at - well, that there would not have been a release had this new tank car standard been in effect at the time. The speeds, the closing speeds, would have been less than the 25 miles an hour - or were less than the 25 miles an hour that this tank car standard is being designed to.
MR. MULVEY: So with better standards, then, those fatalities would not have occurred?

MR. EBY: Right.

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

So I assure you that I and fellow board members, I believe, will continue to look at this to see what we can do to balance
those interests.

VICE MAYOR PEPPER: Thank you.

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

CHAIRMAN NOTTINGHAM: Thank you, Vice Chairman Mulvey.

Commission Buttrey, questions?

MR. BUTTREY: Thank you, Mr. Chairman.

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

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

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

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

MR. BUTTREY: In your professional opinion is ethanol any more volatile than
gasoline?

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

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

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

MR. THIEL: E-95 will not explode per se, and that simply - that is the
technical definition of an explosion. It wouldn't detonate; it would actually under a worst case scenario it would deflagrate.

MR. BUTTREY: It would flame at the source.

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

MR. BUTTREY: It would look pretty ugly?

MR. THIEL: Yes, sir.

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

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

MR. BUTTREY: You probably know exactly how many but don't have that with you today. Do you have a permitting requirement for gasoline stations?
MR. THIEL: We do have a special use permitting process for gasoline stations.

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

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

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

MR. THIEL: Yes, sir.

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

And there is usually one tanker truck out there at a time, taking the ethanol from the tank car.
I think that is all, Mr. Chairman.

CHAIRMAN NOTTINGHAM: Thank you.

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

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

However, just given the volume of the movements, the type of commodities that the railroads are required to move, their inability to deny service to almost any shipper of any material, and the handoffs and the different ownership structure of the actual cars, is it fair to say that despite the best efforts - I know the Federal Railroad
Administration is shooting for a zero accident future - but is it pretty reasonable to assume over the foreseeable future there are going to be occasional accidents despite everyone's best efforts out there in the real network?

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

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

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

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

CHAIRMAN NOTTINGHAM: And while we have not seen in recent memory, we have not
seen a railroad, at least not a railroad of large size that I am aware of, have to actually close and go out of business because of liability as a result of an accident, railroads say quite strongly that that is a very real scenario that they worry about greatly.

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

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

I know it's not perhaps part of your day-to-day job to think about what would happen if a railroad had to shut down. But I know we have to think about it occasionally because we have to anticipate things like directed service orders, and figuring out how that would impact the competitive landscape too. Very few real customers come to us to say there is too much competition. We hear the opposite. There is a major national study on the topic coming out in November.
But if you could just give us your assessment of, should we be concerned with this? What type of impacts would you see if a major railroad had to liquidate as a result of massive liability due to a release of hazardous materials?

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

So you are really looking at a situation where someone hasn't followed the rules. And if significant enough for an event, it could be catastrophic and very harmful to the economy. That's why I suggested we need to look at ways to encourage market-based solutions that look to even further mitigate the risk associated with this.
And that is the reformulation that we have talked about. Some of the re-routing that we are going to be looking at under the interim final rule that exists today, moving those products in safer consists, safer locations.

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

CHAIRMAN NOTTINGHAM: You touched on re-routing, and I know that this administration has gone to great lengths to convene special forums whereby the chemical industry and the rail industry can get together to talk about these issues a little bit.
I understand, though, when it comes to the details of re-routing, a number of significant antitrust law concerns get raised, and that the Justice Department in the past has either frowned on or not approved of discussions within the chemical industry about how to sort of share customer lists, and figure out how to minimize long movements, and how to really apply what we may consider a pretty reasonable risk management type decision process.

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

MR. EBY: I'm not familiar with what the chemical industry has done. But the administrator has the ability to convene
what's referred to as a three-three-three conference. And we have had I believe three sessions - oh, many more than three sessions with railroads, with shippers. To date those conversations haven't been overly fruitful except to the point where the railroads now understand some of the routing possibilities that exist out there, and how those - how the rerouting would work to improve safety.

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

MR. EBY: Well, again, since it is hypothetical, I can't - I don't think you can combine every chemical shipper into one bucket and say that all of them would respond in a
certain way. But that's why I was referring to market based solutions to try to identify these externalities so that there is the proper risk-reward basis to make an economic decision.

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

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

CHAIRMAN NOTTINGHAM: Thank you.

Vice Chairman Mulvey, any
additional questions?

MR. MULVEY: A couple of small ones.

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

I wanted to follow up on a question that Chairman Nottingham posed, and it's a posing this counter-factual hypothetical, and that is, if indeed there was a HAZMAT release, a TIH release in a major city, and the costs to the railroad were in the tens of billions of dollars, the costs of damage far beyond the ability of the railroad or their insurers to cover, and the railroad was basically forced to go out of business, would that mean that the railroad's service
would disappear? If you look at airlines that go out of business, when they go out of business their routes tend to continue to be operated by somebody else.

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

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

MR. EBY: I think your hypothesis,
it's a reasonable expectation that there would be somebody to follow on. But during that period it would be a huge disruption to the economy, and we would struggle very - quite a bit with the other railroads that were out there seeing the result of this, and how we respond both from a regulatory standpoint and an operating standpoint.

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

Thank you.

CHAIRMAN NOTTINGHAM: Mr. Buttrey, any further questions?

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

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

Is that what you said?

MR. EBY: That is correct.

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

Thank you, Mr. Chairman.
CHAIRMAN NOTTINGHAM: Well, that concludes our questions for this panel.

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

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

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

OPENING STATEMENT - MR. BUTTREY

MR. BUTTREY: I apologize to the
panel for intervening here. But we all have
to get our licks in at some point here.

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

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

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

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

It is of concern to this board
because of our responsibilities to ensure a
safe, efficient and economically sound rail
transportation system as set out in the national rail transportation policy.

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

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

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

This FRA rule is aimed at rail
safety matters as appropriate to the FRA's jurisdiction. But it does not address the economic issues that railroads are exposed to because of the potential liability of transporting these extremely hazardous materials.

These economic issues fall under the jurisdiction of the board.

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

Therefore, I believe that it falls to the board. I personally believe that rail carriers may well be within their rights to refuse to carry the most extremely toxic HAZMATS without indemnification. As a businessman that's a decision I would make. I simply do not feel it is a reasonable request for a shipper to ask a railroad to
transport these types of commodities without
some type of meaningful protection from the
unreasonably high bet-the-company-type
liability exposure.

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

Of course under this approach the
amount of the terms of such liability
ceilings, or indemnification agreements would
need to be such that they would be found to be
reasonable. I do not envision that it would
be a one-size-fits-all exercise, or that a
single solution or approach would fit all
carriers and all situations.
These protections against excessive liabilities for tariff shipments of these dangerous but important commodities would need to be carefully tailored. They would need to reflect specific facts and circumstances, including the commodity, the transportation to be provided, the route and equipment to be used, the specific carrier and shipper involved; in order that the record would be found to support the reasonableness of the tariff term if it were challenged.

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

This is only one idea. I'm sure there are other approaches that we should explore and consider. I'm here to listen. I'm very much looking forward to hearing the testimony of the witnesses today. I welcome this panel aboard.
CHAIRMAN NOTTINGHAM: Thank you, Commissioner Buttrey.

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

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

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

Welcome.

PANEL IIA: SHIPPERS ASSOCIATIONS
MR. CARLTON: Well, thank you very much, Mr. Chairman, for those very nice words, if I might return the compliment. We had the privilege of working together for some number of years, and I certainly enjoyed that relationship.

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

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

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

Many of the League's shipper-members use America's railroad network to ship hazardous commodities, including those classified as toxic inhalation hazards. They choose to ship these commodities by rail often because it is the safest means to move these products to market.
The movement of these dangerous materials is of course the subject of extensive regulation by the Department of Transportation, and more recently, the Department of Homeland Security.

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

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

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

This web of safety rules is given effect in their implementation by the
railroads and the shippers they serve. If the DOT is dominated by a culture of safety, then certainly the same can be said of both the shippers and the rail carriers of these hazardous goods.

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

Those cases and decisions are well briefed in our testimony and in the statements of many parties to this hearing. We are very pleased to note that the industry's principal trade association, the Association of American Railroads, does not seek to dilute this obligation, and also reaffirms the Board's own observation that a railroad cannot deny service to a shipper merely because it is
inconvenient or unprofitable to provide such
service.

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

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

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

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

With regard to the issue of
liability related to the carriage of hazardous
commodities, the League believes that the Board's jurisdiction is limited. There are no statutory or regulatory limitations on rail carriers' liabilities today, nor would we note are there any limitations to the shippers who produce, handle and for the most part load these commodities in DOT-regulated rail cars.

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

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

Such a limitation could not be found to be a reasonable practice when the matter had been so recently revisited and resolved by the Congress.
We do not assert that the issue of potentially very high liability costs stemming from an accident is trivial by any means. On the contrary the League recognizes the liability concerns of shippers and carriers alike. And we believe it is those shippers and carriers of hazardous commodities who are the most able to deal effectively with the complex factors that shape this issue.

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

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

At the same time we believe the
Board can provide valuable insights and recommendations to the Congress; dialogue among the affected parties rather than any unilateral action or sweeping policy change on this matter is deemed by the League as the most useful and potentially productive means to address this complex issue.

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

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

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

Number three, rail is the safest
mode for moving these products, and we have comprehensive safety rules governing their transport.

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

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

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

Number six, any proposal to establish a new liability regime must incent safety at all level and by all parties. And any proposal to transfer the cost of liability to another entity must be openly debated by
all affected parties, and should not be implemented by a unilateral action.

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

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

But thank you very much for this opportunity to testify.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Carlton.

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

Mr. Schick, please proceed.

MR. SCHICK: Is this one?

CHAIRMAN NOTTINGHAM: Yes.
MR. SCHICK: Thank you. Good morning, Chairman Nottingham, Vice Chairman Mulvey and Commissioner Buttrey.

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

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

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

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

The Board in this docket has identified an important public policy issue: the rail common carrier obligation with
respect to TIH shipments.

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

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

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

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

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

The third topic is going to deal
with the complexity of this issue, and where maybe we ought to be going from this hearing with that issue.

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

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

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

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

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

I just wanted to clarify for the
record here that that petition and the AAR
would certainly join me in pointing this out,
that petition was filed by the AAR, the Short Line Association, the Railway Supply Institute, the Chlorine Institute, and the American Chemistry Council.

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

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

And we shouldn't leave out the tank car supply sector which includes both the tank car builders and also the leasing companies that provide cars. They are very integral to the safety development around this
whole area of TIH and have been participating, as I mentioned, in these things.

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

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

PHMSA obviously is involved in this as well. The tank car has HAZMAT packaging, and PHMSA has been closely involved. And as has been mentioned the Transportation Security Administration which
is part of DHS has been involved as well. They have issued a set of voluntary action items to the railroads, which railroads they are working with. And they have also proposed a rule at TSA which is, I believe, working its way toward OMB.

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

Others, as well: there was some discussion of Section 333 conversations. I think the point I would make about that is that the complexities and the various stakeholders and the legal issues including the anti-trust issues perhaps illustrate the difficulty of dealing with this in the absence of legislation. Because you really have to kind of be able to cut through that complexity.
The second topic I was going to talk about is the policy statement that was posed by AAR. I'm not going to read it into the record. It's very clearly stated in their filing here. We think that to issue a policy statement would not be a sound idea for the following reasons. Number one, Congress has not authorized this Board to deal with the allocation liability; to deal with indemnification issues; or to in anyway interfere with or affect state tort law.

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

So the second point beyond the fact that there is no authority to act in this area, is that even if you felt that you should act in this area without authority, there is
no evidence upon which to act.

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

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

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

And second it's very inappropriate to allow carriers that have market power, and in this room we have talked about that many times - certain carriers have a substantial amount of market power over certain shippers - to offload its liability to someone who does
not have market power. That is completely inappropriate, and very very bad public policy. I think there may be some further discussion on that from this panel.

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

But we think that the Board's issuance of a policy statement could affect congressional action perhaps in ways that no one here can contemplate. To have raised the issue in this public forum is good, because we are all here talking about it. But I think
for the Commission to try to act in the absence of a congressional action would be inappropriate.

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

CHAIRMAN NOTTINGHAM: Sir, go ahead and wrap up.

MR. SCHICK: Which is used to produce grains, produces a lot of railroad traffic. The anhydrous ammonia and chlorines are used at power plants obviously support a
coal traffic. Chlorine is supportive of production, for example, of plastics which are not in themselves hazardous, but again that is a very large chemical category. Paper manufacture, metals and whatnot; it's all again laid out in there.

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

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

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

Welcome, Mr. McBride.

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

I want to first thank you for
accommodating my schedule in granting the extension that you did.

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

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

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

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

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

Now in your notice you asked us, the parties, to address the Price Anderson Act, and I guess I'm the person that people have asked to try to summarize that as much as possible for you. I'm happy to answer any questions about it. I won't go into any great
detail about it orally except to say the Price Anderson Act is a very unique - was a very unique statute. It was adopted in 1957 in order to permit a nascent industry, the commercial nuclear industry, to actually begin to function. The industry simply couldn't get going without it because of the inability at that time to evaluate the risks, and there simply wasn't enough commercial liability insurance available.

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

All the claims are consolidated in one court. They must buy all the insurance the Nuclear Regulatory Commission requires. They must pool and a secondary layer of insurance that is available, liability, so
that an accident at any one facility is the responsibility jointly of them all.  

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

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

    The CEOs and senior managements of the utilities are heavily involved. That institute grades the reactors every year in public reports. You don't want to get a three; you want to get a one or two. The wrath of God comes down on you if you are not operating safely.
And I think the proof is in the pudding. It's a very safe industry. No member of the public has ever been injured or died as a result of the operation of a commercial nuclear power plant.

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

And in the situation in the nuclear industry in which the Price Anderson Act has been applied, there has never been a penny paid by the government as a result of any incident at any nuclear power plant. Every incident has always been fully covered. Really only one ever triggered the statute, and that was the Three Mile Island accident. And the liability claims didn't come close to the liability limits under the statute.
So the system has worked very very well. It's not obvious that it ought to be extended to any other industry. If it were you would have to think about applying the statute and the statutory scheme I think more broadly than just to one mode of transportation. But that would be for others to advocate, not for me.

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

The railroads don't let us control
the routing, even when there is a shorter route available. You may hear testimony later today as you did in April that they won't permit it if it is not in their economic interest.

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

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

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

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

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

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

There simply is no statutory
authority that has been given to the Board to
do that. And the Board is a creature of
statute.

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

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

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

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

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

And lastly I guess I should just say that if instead of the arguments I have made the Board should go forward, or permit the railroads to go forward with something that in our judgment is counterproductive and contrary to all the policy arguments you have already heard here this morning, I think you will just see an even greater movement on the part of many companies to deal with railroad problems in whatever form they can find to deal with. And I'm not sure that that is what
the Board really is intending to accomplish
either, and I'll just leave it at that.

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

Thank you.

CHAIRMAN NOTTINGHAM: Thank you,
Mr. McBride.

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

Please proceed.

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

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

I am general counsel to the
Chlorine Institute, and I am accompanied today
by Mr. Tom O'Connor, as you said, of Snavely

King Majoros O'Connor & Lee.

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

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

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

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

Second, the railroads have a
common carrier obligation to transport
chlorine.
Third, the railroads would prefer to be protected from the damages that result from their negligence, gross negligence, and even their wanton or reckless conduct.

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

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

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

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

The ruinous liability faced by the railroads is no greater and probably less than
the ruinous liability faced by most companies in most industries conducting business in this nation everyday, certainly including the chemical industry.

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

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

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

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

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

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

The cost of railroad insurance is escalating, the claim is made. Our Exhibit No.1 shows that that is not the case. In
point of fact the five U.S. railroads have
seen their casualty and liability costs
decline from $1.233 billion in 2003 to $782
million in 2007, a decline of 37 percent.
This decline is in spite of the
recent railroad-caused derailments at
McDunough and at Graniteville that the
railroads have pointed out in their testimony.
The railroads allege they've bet
the company every time they handle a shipment
of TIH materials. This coupled with the
unexplained no-fault ruinous liability, and
the wholly fabricated unavailability of
insurance is designed to evoke sympathy for
those who own railroad stocks.
Of course the railroad
stockholders are the same sophisticated
institutional investors that own all the stock
of all the companies before you here today.
This isn't a bunch of unsophisticated widows
and orphans that own railroad stock; it's the
same people.
And those people are fully aware of the common carrier obligations and the risks that are attendant to the common carrier obligations in handling TIHs. In fact the railroad 10Ks require them to disclose that.

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

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

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

The railroads make their claims about substitute based on sweeping
generalities, not based on sound science, and in complete disregard of the unrebutted testimony of Mr. Dungan, that for 95 percent of chlorine uses there is no readily available substitute.

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

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

Railroads want the Board to issue a policy statement saying that it is not unlawful under the ICCTA for them to require indemnification as a precondition for them handling TIH materials. But can you do that? Should you do that?
The answer to both questions is no. Regardless of the dictum in the cases cited by the AAR, there is plainly no precedent for a policy statement that the railroads would have you issue. As set forth in our written testimony there is virtually no federal or state jurisdiction that would allow the railroads to shift the liability for their negligence, gross negligence or reckless conduct, from themselves to a shipper.

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

By the Board issuing a policy statement, however, the railroads would be free to refuse to handle TIH materials unless we provided proof of insurance and indemnification. The incident would probably have never happened. The railroads would
never be able to enforce the indemnification clause. But the insurance would have been purchased, and the shipper would have been irreparably injured having to pay for insurance.

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

The Court explained the reasons for the rule of voiding such exculpatory clauses, and I quote: The two main reasons for the creation and application of the rules have been, one, to discourage negligence by making wrongdoers pay damages; and two, to protect those in need of goods and services from being
overreached by others who have the power to
drive hard bargains. And both reasons apply
with equal force whether trucks operate as
common carriers or contract carriers, unquote.

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

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

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

Mr. Chairman, I will skip over
Price Anderson. I think Mr. McBride has
issued that except to say, the chlorine
industry would be more than happy to engage in discussions about a legislative solution. But any legislative solution on the Price-Anderson model or otherwise would have to remain and keep in place the incentives for the railroads to operate more safely, not less safely; and for them to provide the necessary insurance just like Price Anderson requires.

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

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

CHAIRMAN NOTTINGHAM: Thank you, Mr. Donovan.

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

MR. MULVEY: Thank you.

Most, I guess all TIH or PIH movements fall under the Board's regulations and are subject to the common carrier
But we have a lot of exempt commodities which are not subject to the common carrier obligation. What if one of those commodities, because of changes in its exempt manufacturing process, et cetera, also took on PIH or TIH characteristics.

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

Anybody.

MR. McBRIDE: Well, first of all, you and I might have a good faith disagreement about whether exempt commodities are subject to the common carrier obligation. I think they are, and as I told you in April, I think when you exempt it simply means you are not enforcing the obligation for the period of the exemption. But that may be a debate about angels on the head of a pin.
To get to the point of your question, Board decisions clearly state first that exemptions are to be granted only when there is no need for regulation; when there is competition; and if there is market power then the Board generally does not exempt.

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

And it seems to me in the circumstances of your question that since the railroads are before you telling you they really would rather not haul these materials, if I were on the Board I would be acutely sensitive to the need to regulate for
precisely that reason, because otherwise the shipper is going to be defensive.

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

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

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

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

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

Now what has happened is, those materials moving within the United States,
whether it's to destination for use, or whether it's to a port for export, are moving on the highways.

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

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

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

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

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

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

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

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

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

After all there is the Federal
Railroad Administration, the Transportation Security Administration, PHMSA, and of course the railroads themselves have all their technical committees which also are focused on safety.

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

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

MR. McBRIEDE: I'm happy to start.

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

We have not said, and we do not say, that Price Anderson or something like it shouldn't be applicable to the railroad
industry, or perhaps to some larger set of
interests. But it's really for them to
advocate that.

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

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

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

Some of the things that I put in
the testimony and mentioned briefly orally was
the waiver of defenses in the event of a
covered incident; claims are consolidated in
a single report; there is a waiver of
governmental and charitable immunity which can
occasionally apply; there is a waiver of statute of limitation; there are – at least certain statutes of limitations; there is a requirement to maintain a primary level of insurance that the NRC mandates; there is a requirement for a secondary layer of insurance, which is an extraordinary form of insurance, which is retrospective premiums which are paid by each of the 103 reactor operators, which are all pooled to provide a total of over $10 billion in protection.

And I meant no offense to the FRA or PHMSA or any of these other agencies to say that the Nuclear Regulatory Commission has extraordinary regulatory authority, an enormous staff, resident inspectors in every nuclear facility, applications that go into the thousands of pages, thousands of technically oriented people who pore over every detail of the written submissions to them, and then this is all backed up by the industry which is obviously very concerned
about maintaining its safe record, and created its own backup regulatory watchdog.

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

And as I said before you don't want to get a poor grade from the Institute of Nuclear Power Operations, because the NRC will swoop in, and the other companies will swoop in, the insurers will swoop in. So the way the system works is designed to be as safe as possible, obviously. No one ever wants to go through what happened at Three Mile Island again, and I think the proof is in the pudding there.
And I think there are a lot of elements to this, and there are more things I could talk about as well. We could go through the facilities forms and the insurance policies, and I could indicate to you how strict all of these requirements are on the companies to back up the actions of any one of them, which I think collectively has made that an extraordinarily safe industry.

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

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

Under the Price Anderson, we are talking about the transportation of the TIHs, or the transportation of nuclear casks. Price Anderson would cover the railroad if it's transporting nuclear casks, would it not?
MR. McBRIDE: Correct.

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

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

(Simultaneous speaking.)

MR. MULVEY: Nuclear power plants contribute to the fund. The railroads, even though they are involved in the movement, and
even though they may be at fault, they
themselves would not contribute to the fund;
is that correct?

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

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

So you don't just apply it to one
mode of transportation in some other context.
That is not the applicable analogy. In any
event the reason why the question breaks down
in another entirely different respect is this,
and we went through this five times before the
Interstate Commerce Commission, and succeeded
every time and on appeal.
The railroads' argument was, it was too dangerous to haul radioactive materials. We demonstrated that the casks themselves in which the materials are transported are the safest containers ever devised for the transportation of anything. They are licensed, they themselves, the casks are licensed by the Nuclear Regulatory Commission. They are composed of steel with lead lining. They are of enormous size. They are generally affixed to the rail cars. They can't be opened en route because of the way they hinge, open and close, with a plate at the end to keep it from being open.

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

There has never been a release in the transportation of any of those materials from one of those casks. Simply none.
MR. MULVEY: Mr. EBY says that if you put these new tank cars in place the three releases that we did have that have caused fatalities would not have happened.

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

MR. McBRIIDE: Absolutely.

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

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

And yes, would it be likely in the future that we are going to have fewer TIH accidents because of improved tank car design
and the change-over of the fleet? Yes. But I think it would be a challenge for any industry to have the safety record of the nuclear industry, quite frankly.

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

So I'm simply making the point to you that I think the transportation of nuclear materials, by rail or any other mode, is an extraordinarily safe event. And I think it's
up to the Congress, quite frankly, to decide whether it's appropriate to extend that kind of regime, comprehensive as it is, to another non-nuclear situation.

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

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

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

MR. McBRIDE: Granted; I'm here to speak for the U.S. nuclear industry. I was in Europe when Chernobyl occurred, and I'm still here to talk about it, but other people are
not, and I don't diminish the seriousness of that incident at all.

But our reactors bear no resemblance whatsoever to that.

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

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

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

MR. MCBRIDE: Yes, I'll just cite you one instance out of CSX's testimony. Foot
note 3, they acknowledge that there was a runaway jury verdict as I think they characterize it, but it was overturned on appeal in the Supreme Court of Hawaii. And it was a truck case. I think the one case they cite where they haven't yet had common sense prevail was involving the World Trade Center, but that has nothing to do with railroads, and if there isn't a more sui generis situation than the World Trade Center I don't know what there is in our court system.

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

MR. MULVEY: Anyone else on that?

MR. DONOVAN: Well, the leaking tank car litigation down in New Orleans did a verdict of some $6 billion as I recall, and $4 billion of that was overturned, and some of the rest was spread around to shippers who paid - I had a client in that case who paid
$40 million because they were the intended recipient of the product. They had nothing to do with the transportation. Okay, there's a runaway jury verdict, and we all bemoan that. But I don't think you can establish public policy based on a couple of whacky juries.

MR. MULVEY: I may have follow up questions.

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

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

MR. DONOVAN: Four.

MR. BUTTREY: Four lawyers on the panel.

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

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

Do you support the concept that railroads should be an insurer as a matter of
law?

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

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

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

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

MR. DiMICHAEL: I agree, also.

MR. BUTTREY: There has been a lot of mention in the testimony here and in the written testimony that we should look to
market-based solutions. Maybe I'm missing something here, and if I am, please enlighten me. These discussions have been going on for quite a long time, and as far as I can tell there has been very little progress made in terms of figuring out a way to address this issue than the heavy hand of government, basically telling companies that you have to do this whether you like it or not.

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

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

There doesn't seem to me to be a market based solution anywhere in the offing. Am I missing the point here, or are we close
to some kind of consensus about how this should be addressed?

MR. SCHICK: Go ahead.

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

So having said that, you can't look at this as if we are negotiating with them eyeball to eyeball, and whoever blinks first is going to pay something. Their position is essentially take it or leave it, at least in my experience.
Now with respect to other people and other associations - more importantly other individual companies, have they had any progress here in doing that? I don't know, and quite frankly because of the antitrust laws, I don't want to know. They are going to do what they are going to do, and arrive at whatever solution they arrive at.

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

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

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

MR. DONOVAN: No, you didn't hear
me say that. If you did hear me say that, I misspoke. Because no, I certainly didn't say that.

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

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

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

MR. DONOVAN: Vis-a-vis elected representatives of our country, I can't make a statement about that. If this is a serious problem, I assume they are going to reach out and try and do something about it. But I think the Congress is looking at the same financial results from the railroads, and the
buy orders, and all the stockbrokers in the
country about railroad stock, and looking at
their 10Ks and doing all the rest and saying,
these guys aren't doing too badly.

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

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

And let me illustrate going back
to the vice chairman's comment about exempt
traffic, we talked about it before. I don't
want anyone sitting behind me - I can't see
who is back there at this point in the
morning, but there could be people there from
the trade press or others - I don't want anyone to think that hazardous material, TIH that is moving in intermodal service in this country is moving unregulated with respect to DOT safety regulations.

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

And I think all the interest groups that are here have been talking to their members and to folks on the Hill about these issues. These are not issues that are not being discussed within associations, within companies, between shippers and railroads or among trade associations. And I
think you are well aware of that from some of the testimony and the written material from April as well as from this hearing.

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

Enough said on the Constitution here.

MR. BUTTREY: Anyone else?

MR. CARLTON: Just briefly, if I might, I would just add a footnote to that, that I think that most of the associations and their members recognize a trendline in the Congress over decades that the Congress does react when motivated. And if in a case like this or a matter like this if carriers and shippers were to engage in a dialogue, an arms-length dialogue where somehow we redefine the playing field so that there is balance, so that there isn't a unilateral injection of an
order, or you shall indemnify us for example. But if the customer has the opportunity for a quid pro quo, if the used car sale results in a good outcome for both the salesman and the buyer, and if we reach a critical mass in this industry revolving around hazardous material, then a proposal could in fact be taken to Congress for their evaluation.

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

MR. McBRIDE: And if I may, Commissioner Buttrey, I just want to remind you that the testimony in American Shortline and Regional Railroad Association at our April hearing indicated they had been in discussion with Congressional staff. And as I recall the testimony they were told that if there were a consensus of stakeholders then Congress might be inclined to do something.
So I would suggest to you the best way to proceed would be for the parties to try to reach that sort of consensus, and then if legislation is needed to carry it out, then that would probably be the scenario that would fit your question.

MR. BUTTREY: Thank you very much.

That's all, Mr. Chairman.

CHAIRMAN NOTTINGHAM: If I could just jump in and follow up on that, Mr. McBride, let's work through your little hypothetical which I realize may have some premises that you might not agree with. But let's assume the Board decides to deem it somehow a reasonable practice for railroads to require some indemnification, or some partial indemnification, and let's assume that gets upheld in courts - big assumption for you, Mr. Donovan, by the implication of his reference to lawsuits in multiple courts - but do you think at that point this consensus that you just referenced would happen sooner than it
might be on pace to happen now as far as a strong message for the need to address this to be made to Congress? Or would it be less incentive?

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

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

CHAIRMAN NOTTINGHAM: Just to make
sure you understood my question, I was asking whether it would lead to more of a consensus presentation to Congress on the need to actually change the status quo at that point on this issue.

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

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

And if we did as you hypothesize, Mr. Chairman, if you did as we hypothesize over our objection, and it were upheld, then the railroads to a certain extent would be
relieved of those costs.

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

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

But today I don't see it happening, because the railroads are asking you for what they want and nothing for the shippers.
CHAIRMAN NOTTINGHAM: Thank you.

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

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

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

But if we don't sense in the record that there is actually any progress
whatsoever towards private sector resolution, and we believe there is still a problem, we may have to do something.

So update me on what's going on.

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

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

So that is my report in terms of what's been going on. The second aspect of it would be, again, in terms of private sector, even if there were something more detailed to report, I'm not sure that private sector solutions are best reported on in public hearings if you are talking about
negotiations, or you are talking about reaching agreements about how to proceed. But putting that aside as I say, that's the status of where the talks are at this point.

CHAIRMAN NOTTINGHAM: Thank you.

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

And I understand from looking at the testimony referencing those discussions that the - there were concerns raised by the Justice Department, or at least at a minimum concerns about what the Justice Department might do if the chemical industry for example went too far in having internal dialogues amongst member companies about routing, efforts to reduce routes, lengths, and other discussions that might involve sharing
customer lists and details.

Help me understand that situation.

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

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

MR. DONOVAN: Let me respond to that, Mr. Chairman, because I was in all those meetings. At least all those meetings involving chlorine as was your staff.
The concerns that Justice had are the same concerns that I had at the outset of the Section 333.

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

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

What was initially proposed by the Department of Transportation was that all the shippers would come together. And in the case of chlorine you are talking about essentially five major shippers. It's a concentrated industry. And their plants are scattered
around, based on historic inspiration, where the power was cheaper. There are only two costs of chlorine; one is electricity, and the other one is transportation. Salt is not exactly expensive.

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

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

Now if that is not to be the case, if you go in with your clients, you are going
to say, okay, Mr. Justice Department, I want
you in this proceeding, where you are sitting
there, they were there, I want you to give us
the effective equivalent of a business review
letter, which is the formal process you were
alluding to.

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

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

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

Now no lawyer worth the powder to
blow him to kingdom come is going to let that
happen. So that was the end of that part of it. But that was not the end of the process. The process went on at some length. And part of our presentation - I say, our, I was there for all five chlorine shippers who presented; they all presented independently and without any knowledge of what each other said, and I didn't prompt them or tell them what to say or do anything like that; they came and made their own presentation. All I did was sit there and monitor the way your staff did.

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

And we said, fine, let's eliminate those. You can eliminate those without any market allocation, without anything being unlawful. We all made those presentations; where they went I have no idea, because I
never got briefed as a result of those 333 hearings. As far as I know they disappeared. So you asked a question, and that was what happened. But we responded in good faith in an effort to try to reduce the number of ton miles that we moved the product. There is no incentive for a shipper to pay extra freight. That's crazy. We would prefer to move it as short a distance as possible. But that is not what was going to happen unless we violated the Sherman Act, and I wasn't really comfortable doing that for obvious reasons.

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

MR. SCHICK: Mr. Chairman, if I could add one point to that. I was not in, because after the Section 333 began, it quickly was focused - FRA was the convenor of what they call conferences under 333 - it's a DOT authority but it's delegated to FRA - they quickly narrowed down anhydrous ammonia specifically and chlorine specifically.
So ACC, what you have been in the beginning in proposing this along with AAR to the DOT it was a joint proposal to DOT. We felt that that statute might indeed allow for the kind of discussions that we were contemplating. It was the DOT authority; it's not a DOJ authority; it's not a STB authority. It's clearly at DOT authority.

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

So I just wanted to let folks again, know not being able to see whose back there, it began as TIH. It narrowed down. It was a joint initiative, and it got as far as it got. But I wanted to give that kind of background to you again, because we thought in good faith going in that that was the proper place to try to deal with the kind of issues that Paul described.
CHAIRMAN NOTTINGHAM: Have there been any efforts to bring this situation vis-a-vis the Justice Department and antitrust concerns to the attention of the Congress? Is this something that any of the associations deem is important enough to say, hey we need relief, we are trying to do the right thing from the safety perspective. You guys have a pretty strong safety record, and as the railroads do, is it - or just end of the matter. Because I am still concerned that some shippers may prefer to keep the system the way it is, even with this arguably heightened exposure to the public.

MR. DONOVAN: The problem, Mr. Chairman, quite frankly is that I haven't heard a word from the FRA since the last hearing. And I think you were in there for or your law firm was, for TFI, and we haven't heard anything. So I don't have anything to react to. I can't go to Justice and say, here is the problem that FRA found, and here is a
way that we could reduce ton miles, and we
want some kind of waiver either from Justice
or from Congress.

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

Where that sits I have no way of
knowing. My inquiries have not been responded
to officially, and my contacts obviously are
not at the highest level. They are at the
lawyer level with my counterparts, and they
can't say anything more. So that's where it
CHAIRMAN NOTTINGHAM: I would be happy to offer the Board's good offices if we can help with opening up lines of communication with FRA. In our experience, we have found them very easy to communicate with.

Do you, does the Chlorine Institute and their chemistry counsel, for example, agree with sort of the premise of the DOT's going in concerned that we probably have more risk exposure right now as a country because of the way TIH materials are routed, and the lack of discussions about shortening routes, amongst all concerned? Railroads are as you point out may be the cause of some additional miles added to routes for their own reasons. Chemistry companies may be for their own reasons, they want to attract new business for chlorine as well, in other words if you agree with that premise that it's a problem that needs to be addressed, then I would think you wouldn't wait for a call or letter from
the FRA; you would be speaking to the Congress about allowing these discussions to take place.

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

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

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

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

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

Does anybody want to speak to that issue?

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

I mean if in fact the production is all here, and the consumption is all here, it's going to move, unless you shut down the
plants, and I wish you very good luck in trying to open a new chemical plant these days.

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

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

CHAIRMAN NOTTINGHAM: Would anybody else like to speak to the example of that
being an example of economic regulators trumping safety regulators?

MR. SCHICK: I'm not sure that I would characterize it as trumping, or as sort of a generic problem. I would say it is illustrating the interactions, the security issues, the safety issues, the economic issues, the antitrust issues, to the extent those are different than what we normally think of as economic regulatory issues, is a complex business, as is the topic of today's hearing as well. It's very complex, which is why a comprehensive solution is needed rather than picking it all up in one piece and working on that piece. I'm not saying that is what happened in Section 333; maybe to some extent that is what happened, and I certainly don't want to speak for the Justice Department. But there are competing interests, and ultimately that stuff has to filter up, if someone is going to resolve it, it's going to have to filter up to Congress.
That goes back to my initial comments here about the policy statement. It is going to have to move to Congress to get fixed.

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

But it occurs to me that many of you and your members, perhaps all of you and your members, have to deal with insurance companies in a big way, regularly. What is your sense of the market out there? I will probably be asking this question of other panels as well. How hard is it to get insurance? Would you even need additional insurance for example if you were a large
chemical company? You already presumably have a lot of insurance. If we allowed the railroads to require that you partially - let me emphasize that, partially - be indemnified, would you even need to buy more insurance? Would your existing coverage be ample? Let me throw that out.

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

But if the railroads were for example to each have a billion dollars in comprehensive general liability insurance which I believe was the Norfolk Southern testimony, that leaves $4-5 billion for the $5-6 billion nightmare scenario that Union
Pacific's general counsel testified to, and that would require another $600-700 million in secondary insurance by each of the railroads. Because it would be secondary, because it would be pooled, and because it would only apply pro rata, they may well be able to acquire that amount of insurance. They may sit here and tell you no, we got the billion and that's all we can get. But I don't think they have tested a pooled arrangement like that, and the willingness of the insurers to provide it.

If instead you want to go to a lower number, I understand that they have put before you the proposal that they provide $500 million in comprehensive general liability insurance, and then there would be some kind of indemnification thereafter. If we substitute for that a pooled arrangement they would need $4.5 billion to get to their $5 billion threshold. That would be about per Class I about $700 million, and you would be
within hailing distance of the $1 billion that Norfolk Southern says it has.

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

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

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

MR. DONOVAN: Mr. Chairman, I would
add one thing. I don't hold myself out to be an insurance expert. I have done insurance work in the past in some areas akin to this, but not this.

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

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

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

MR. DONOVAN: No, I was referencing the fact that the railroads now want us to
provide that insurance. They want us to buy insurance, and if we were going to buy it, it was going to cost a whole lot more, if we can get it, for them, to insure them, it's going to cost a lot more, because we have no control. The insurance company has no way to monitor railroad performance.

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

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

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

MR. McBRIDE: And the point, Mr. Chairman, in any event, is if the railroads are the ones who go out and buy the insurance,
we'll be paying for it.

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

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

But right now the railroads are disclosing in their 10Ks that they face liability from TIHs. It's right there; it's in all their 10Ks. And at the same time they are providing insurance to protect their shareholders, and their officers and directors for that matter, from losing their investments.
And I assume, as fiduciaries, they are providing enough insurance.

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

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

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

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

Several statements today including I believe the NITL statement, raised concerns and questions about this Board doing anything that could conceivably - and I'm reading from
the top of page 9 of the NITL testimony, paraphrasing, that could conceivably adversely impact safety. And we of course have high regard for the FRA, and defer to the FRA as the lead safety regulator of the railroads. However, it does occur to me that occasionally we have controversies and cases brought to us where it could be downstream and indirect or maybe not so indirect implications on safety, but the issue is a valid economic regulatory one, and we have to do the best we can.

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

For example, making a decision that might cause somebody to move from rail transportation to truck transportation which implicitly would be a riskier – in almost
every scenario - a riskier movement?

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

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

MR. McBRIDE: And Mr. Chairman, as one of the fossils who was involved in the Akron case, let me just add that it was extremely important to my clients that the
rail mode continue to be available to transport these materials, not only because it was economically infeasible to do it otherwise, but it was, from a safety standpoint, far safer to have rail transportation as I testified earlier. Casks tend to be affixed to the rail cars. Is there anything more captive than that? And we demonstrated over and over again, and we are pleased to say so, that the railroads are a safer mode. The ICC's FEIS in those proceedings concluded that the rail mode was about 14 times safer than the trucking mode, I think the statistics are probably at least as good today. The rails are certainly safer than they were in the late '70s when that conclusion was arrived at, and we think that it's a matter of profound public policy in this country that the rails, which we think are the safest transportation mode, continue to have to carry these materials.

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

Thank you.

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

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

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

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

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

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

It's just an example. I could give you others. Do you follow me on that one, the logic that one of the arguable
benefits of differential pricing is that it allows railroads to bid real low to offer low prices to truck traffic to entice them onto the rails to help us with our national highway congestion and safety challenges?

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

I could give you other examples like preemption cases. We had a preemption controversy mentioned earlier today, where the Board made, in accordance with the law, a finding that we need to protect railroad operations from local regulation when in fact in doing so we are increasing in some small way perhaps safety risks. The world might be safer if localities could shut down more rail operations, but there are economic tradeoffs that I think the authors of some of our
statutes have recognized, that safety doesn't always trump economic regulation. I think the Justice Department would probably point out, if they were here the antitrust concerns.

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

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

There are safety requirements in the statute as well, some of them administered, most of them administered by the FRA which the Board also has to respect.
So there are - and we've heard this here that there are other federal policies such as the antitrust laws that the Board also needs to take into account, and other agencies need to take into account too.

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

CHAIRMAN NOTTINGHAM: That concludes my question for this panel.

Vice Chairman Mulvey, any questions.

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

So Mr. O'Connor, the table one which you prepared, for the Chlorine Institute, you have the insurance laws, casualties, loss in damage claims, et cetera, for a five-year period for the five major Class I railroads, U.S. railroads. And you
note that overall, over the five-year period, the overall cost, insurance cost, was down 37 percent.

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

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

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

MR. O'CONNOR: Well, we gave it some thought, Frank, and thanks for the question. That particular comparison when we got behind the data, we did a cross-check of the data as reported in the R-1, and we did a secondary cross-check of the data as reported
And in fact for the year 2004 we found an unexplained variation for two of the railroads from the West in the 2004 numbers. So I think we are better off staying with the beginning point, 2003, and ending point, 2007, rather than try to analyze on the surface of the data something that might be not completely evident to us if you will.

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

I noticed that the 2004 increase was largely the result of the increase of the two Western railroads; the other ones in fact all went down. But I was just wondering if there was any kind of things the railroads were doing or the shippers were doing that would help explain the secular - well, it seems to be - I couldn't say secular - five years - but the decline over this five-year
MR. DONOVAN: Mr. Vice Chairman, the only thing that the data show, on its face, is that 2004, the two Western railroads bumped up in casualty insurance. I assume a lot of that was casualty, and that was the year of McDunough. That was the year that the UP ran into the BN. Okay?

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

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

At any rate, Mr. Schick, can you comment - I think Mr. Nottingham, Chairman Nottingham was making this point too. Everybody is interested in seeing that the railroads increase their overall market share
to divert traffic from the trucks, get the
trucks off the road, for the energy and
congestion reasons as well as moving TIHs by
a safer mode of transportation.

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

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

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

MR. SCHICK: A couple of responses
to that.

First of all when we spoke this
morning of the interim tank car, that is the petition for a car that would be - it has not been ruled on yet, but I think Mr. Eby said they were hoping to rule on that by November. So that is not in place. That is limited only for tank car design. There is no speed limit to that. That is specifically for TIH tank cars to bridge over to the tank car design that is in the long run rulemaking that PHMSA and FRA are running.

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

So that's just to kind of clarify
I think some of the points in your question.

Certainly if there are speed limits on the operation of trains containing TIH or PTIH in mixed loads - mixed trains, which it usually is; it's merchandise traffic. These aren't unit trains like we've got with coal or grain or something like that. That would affect how the railroads operate.

And then the railroads will speak for themselves if you wish to ask them about how that will affect them. They talk to our members; they talk to us about that. Obviously we are interested in good service, not only for TIH but for our other products, and for other people's products as well. That is a balance that is in the long-run rulemaking at DOT, and the comments were mostly in on time by June 2. And I don't know where DOT is going to come out on that speed limit issue. I mean it has been raised as a complicating factor, as have some security regulations and whatnot been raised as well.
But there is nothing final on any of those things, so aside from highlighting for you some of the points of view and concern, I mean we are not in here saying the train should go 100 miles an hour, and we are not in here saying the train should go 10 miles an hour.

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

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

MR. MULVEY: Tom and the panel at large, is anybody familiar with any studies that show a relationship between average rail speeds, operating speeds, and the probability
of accidents or incidents and spills and
seriousness of accidents? And I'm not talking
about where there is a rules violation where
you are going much much beyond what the
specified speed is, but just even when
operating within the rules if there is some
correlation between speeds and accidents or
incidents?

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

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

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

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

Now of course that was pre-9/11. I think there may be a different attitude in the industry today. But I think there may be
something useful to you there.

MR. MULVEY: Thank you all.

CHAIRMAN NOTTINGHAM: Any other questions for this panel?

MR. MULVEY: No further questions.

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

(Panel dismissed.)

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

And while the panel comes forward, I'll just make a little housekeeping
announcement. It is my intention to recess this hearing for a lunch break at the conclusion of this next panel for 45 minutes, just so you people can pace yourselves and plan your day.

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

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

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

PANEL IIB: SHIPPER ASSOCIATIONS

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

NGFA is a U.S.-based trade association with 900 member companies that own and operate 6,000 facilities throughout the
I am Kendell Keith. I am accompanied today by Andrew Goldstein, our counsel.

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

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

NGFA urges the Board to bear clearly in mind that it is, in simple terms,
impossible for agriculture to obtain an adequate supply of anhydrous ammonia by truck, and that rail service remains an essential conduit for that type of HAZMAT.

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

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

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

Established legal precedents dealing with far more hazardous commodities
than ethanol hold that railroads may not refused reasonable requests to transport such commodities, so long as they are tendered in compliance with applicable government regulations.

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

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

Ethanol in that form bears almost no risk of explosion, merely by trauma, such as a train collision. It is of course flammable, but ethanol fires can be contained by firefighters using foams that are highly
Few fatalities or serious injuries result from ethanol fires, and we are aware - not aware of any derailment of ethanol cars that has ever resulted in or posed the risk of, quote, ruinous liability, end quote, for a railroad.

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

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

The June 4th decision by the STB solicits comments on what constitutes a
reasonable request for service involving the
movement of TIH as well as whether there are
unique costs associated with the transport of
HAZMAT materials, and if so, how railroads can
recover those costs.

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

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

DOT records will show a great many
incidents involving ethanol, but a thorough
inspection of DOT's records will disclose that
the overwhelming majority of these incidents
are nothing but a leaky outlet valve on a tank car.

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

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

The problem with that approach is that the railroads would be doing indirectly what the act forbids them to do directly, thus making common carrier service not an obligation but an option.

We appreciate the opportunity to present our views today, and we look forward to questions.
CHAIRMAN NOTTINGHAM: Thank you.

Mr. Goldstein, do you have remarks as well?

MR. GOLDSTEIN: Yes, thank you, Mr. Chairman.

I just wanted to add one small comment. After reading the AAR's filing which of course we didn't have when we prepared our own comments. And that is, we notice that they are claiming you have the authority to act as they propose you act under Section 1110.3 of your rules, which is a provision that basically says you can adopt informal rules.

We think they have stretched that way beyond its intended purpose, and that Section 1110.3 is really a housekeeping section, and if you read it in the context of all your rules, we don't believe that what it's intended to do is to permit the Board to adopt a - as in the railroads' own words - a formal statement that makes clear that a
railroad can impose liability on a shipper. And we would urge that you take a hard look at that section to see whether you agree that in fact it does comprise the authority they suggest it does.

We disagree with that.

Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Goldstein.

We will now hear from the Agricultural Retailers Association, Mr. Dan Weber.

MR. WEBER: Chairman Nottingham and members of the Board, thank you for inviting me to testify today on behalf of the Ag Retailers Association concerning railroads' common carrier obligation to transport hazardous materials.

I'm Dan Weber, vice president of Agronomy with Serious Solutions. We are an LLP farmer-owned cooperative selling crop inputs and application services to farmers in
the state of Indiana.

I am also chairman of the board of directors of the Ag Retailers Association which represents a significant majority of the nation's retailers and dealers here in Washington, D.C. offices.

Serious Solutions is an agricultural cooperative with 26 full-time agronomy retail locations and about 34 locations receiving and storing anhydrous ammonia, serving about 5,000 cooperative members, and other customers of agricultural producers in western Indiana.

My background includes 34 years in agricultural retail sales and management.

In our retail organization, as with many ag retailers, rail services have played and continue to play a critical role in distributing necessary crop inputs at a reasonable cost effective transport alternative to trucking.

In my job I oversee the
procurement of about 125,000 tons of fertilizer, approximately 30,000 tons of that of which is anhydrous ammonia, which is about one-third delivered by rail.

How are the railroads doing? As I look at it from an ag retailer's perspective, and doing business with the railroads over the past three decades, I have encountered a deterioration in timely service of the agricultural industry.

As a background for my comments I would say that in the 1960s the industry moved away from animal manure and bag fertilizer to bulk rail shipments and manufactured fertilizer. This was a change in the genetics moving from open pollinated corn to the hybrid selections of corn we have that responded better to the fertilizer.

This is a new business for the railroads, and they embrace the ag industry and new fertilizer retail facilities were built next to the railroads, with the idea the
rail system would provide ag retailers with
the best economics in getting product in
house.

This service continued to be
acceptable through the `70s, but beginning in
the `80s and `90s it began to change.
Railroads began to abandon the rail lines
through smaller communities, and ag business
operations that were located there deemed to
be too costly were left without service.

This discontinued or reduced rail
service resulted in ag retailers dependence on
more products distributed at a higher cost by
trucks. Please remember, for every rail car
product not delivered by rail, we added four
trucks to our already crowded highways
carrying this same volume of fertilizer.

This increases the distribution
costs, and increases the general public's
exposure to potentially more danger when
anhydrous ammonia is involved.

These increased costs are
ultimately passed on to the farmer by us, the retailers, and then also eventually to the American consumer.

As consumers of food we all pay for the loss of this efficiency in transportation.

Currently the railroads are asking to be relieved of their responsibility to transport hazardous material like anhydrous ammonia used by many of our farmers through the ag retailers outlet.

It is our belief you should not and cannot let them out of their responsibility under the Staggers Act. Since the 1960s anhydrous ammonia has been recognized as the most cost-efficient of the nitrogen products on a per unit basis, for most of our farmer operations use when growing corn.

More than four decades ago a whole infrastructure was developed by the ag retailers in cooperation with the railroads
and the manufacturers to facilitate the production, distribution, storage and application of this lower cost fertilizer for the farmers who were using anhydrous ammonia.

It has taken a tremendous amount of investment by everybody involved over the years. As an example of the investment; ag retailers might have Serious Solutions, as a farmer-owned cooperative, has investments in over 40 large storage tanks with a market value of about $2 per gallon, and we average probably 12,000-30,000 gallons for each of those tanks, which would make about an $880,000 investment just in the storage of anhydrous ammonia at our retail operations.

Along with this investment in storage, we have about $900,000 in some 1,500 nurse tanks and wagons that farmers use in their fields.

We need to continue timely rail distribution of anhydrous ammonia to supply the needed volumes in the tight windows of
season application a farmer has in injecting
the anhydrous ammonia in the soil.

If the railroads were allowed
relief from their responsibilities as a common
carrier, it would be devastating for many of
the ag retailers who provide anhydrous ammonia
to the farmers. This huge investment in
infrastructure that we have to carry out that
mission.

Most ag retailers would suffer
financial hardship if their capital
investments in storage and distribution of
anhydrous ammonia were suddenly devalued.

There is a shortage of truck
transportation already in our industry. Since
we have the new CBL with the HAZMAT
endorsement that has taken place. The need
for ag retailers to receive all their
anhydrous tonnage by truck would cause longer
lines in terminals and increase the already
severe shortage of qualified CBL drivers.

Why is anhydrous so important to
the farmers? Anhydrous ammonia is the lowest
cost per of nitrogen a farmer can buy for this
crop. For every ton of NIT3 it would take
1.78 tons of urea to provide the same units of
actual nitrogen, and if you were using the
liquid nitrogen solution, it would take 2.93
tons to provide that same amount of nitrogen
for that corn crop.

The farmers' cost savings using
anhydrous ammonia over the other two available
nitrogen products of urea and UAN, there is
about $40 per acre at current costs. If a
farmer uses 200 units of nitrogen as anhydrous
ammonia on his 1,000 acres of corn, it saves
him roughly $40,000 versus using a urea or UAN
solution.

The railroads need to provide
timely dependable service for ag industries to
meet the ever increasing global food and fiber
demand. Without the continued delivery of
anhydrous ammonia food costs will go up and
America will suffer.
There are other issues that I've submitted in my written comments that I have regarding the rail responsibilities and the STB Board in their oversight responsibility but I will not review all of those.

In conclusion ARA recommends first the railroad common carrier obligation should be maintained by hazardous chemicals like anhydrous ammonia.

Second, the STB board should provide stronger oversight of the railroads in fulfilling this important obligation.

Thank you for considering the ARA's views. We appreciate the Board's interests concerning a very important and critical responsibility the railroad has in serving the ag retailer industry.

Mr. Chairman, I welcome the opportunity to provide further input to the Board.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Weber.
We will now hear from the Fertilizer Institute represented by Ford West and Nicholas J. DiMichael.

Please proceed.

MR. WEST: Thank you, Mr. Chairman.

Today you just heard from Dan. You are going to hear from Gene. We got another fertilizer panel coming later. You are going to hear all you want about anhydrous ammonia and its role in agriculture and in the role of these businesses that have built their system around rail delivery of ammonia. So I won't go into that.

In late 2006, following the testimony before Congress, the Association of American Railroads where they stated that they either wanted out from under their common carrier obligation or they wanted to be provided some liability protection.

We became aware of an AAR proposal, legislation that would put a liability on - put a cap on railroad
liability.

TFI as well as other hazardous material shippers objected to the AAR proposal. We thought it was one sided, unfair, reduced incentives for the safe transportation of anhydrous ammonia.

Now we are - this is a business. We are businessmen. We prefer business solutions to problems. And rather than get into a legislative fight with the AAR, we decided to see if we could do something on the liability side of the equation.

And we sat down and began to develop kind of a business solution we thought to the problem. And we didn't take it to the Board, and we didn't take it to the media or DOT; we took it to, and sat down with, the AAR, and sat down with my good friend, Ed Hamburger, and told him that given the two options that he laid on the table, we would fight to maintain our common carrier obligation because we felt like it - in the
broadest sense because we felt like it was a safety issue for us, hauling ammonia on the railroads was a safety issue. But maybe there was something we could do together on dealing with their concern over liability.

We began developing this, and worked with the AAR, and kept Ed informed all the way through the process, and gave them a formal proposal in writing in November of 2007.

Our proposal basically outlined a process where TFI members would be willing to enter into an agreement with a Class I railroad under which shippers would assume a part of the cost of liability insurance for the transportation of anhydrous ammonia in exchange for rate caps on anhydrous ammonia at a level to be negotiated.

We saw this as, they didn't like their liability, we didn't like the rate caps - the rates we were getting. Maybe there was something here we could negotiate.
We made it clear from the beginning that anhydrous ammonia shippers would not accept any liability, but would simply arrange and maintain certain excess liability insurance coverage above the primary insurance level agreed to by the railroads.

And this would relieve rail carriers of part of the cost of their liability insurance.

Now we sat down with two insurance providers, Marsh and Willis. They told us that they thought that there was insurance available in the marketplace, and they were excited about taking on this project with us to see how much insurance we could find.

Under the plan TFI would act as an agent for ammonia shippers by forming the ammonia shippers captive insurance group, including members and non-members of TFI, and the group would purchase an amount of insurance in excess of the primary amount of insurance that the railroad would agree to.
maintain. And this insurance would compensate for third party bodily injury and property damage, liability cost, arising out of the release of anhydrous ammonia associated with a rail accident.

In exchange for providing this excess insurance, TFI acting as an agent for the shippers who have joined the group would negotiate an overall kind of rate cap with the railroads. And to be more specific our initiative proposed would ask the railroads to carry 500 million in primary insurance. In return our group would purchase $1 billion in excess insurance, or more depending if we could find it in the insurance market.

The railroads then would agree to kind of a rate cap, and if agreement was reached with all parties, then TFI would be willing to work with the AAR, go back to Capitol Hill, explain that we have gone into the marketplace, purchased all the insurance available, and therefore work together on a
legislative proposal to cap the overall
liability for the railroad.

AAR's response, once they finally
got the written proposal, they expressed some
concerns over antitrust. I don't want to put
words in their mouth, but they kind of felt
like any discussions between carriers and
shippers should be done between carriers and
shippers, and they didn't necessarily want to
be involved in that.

So they asked for us not to pursue
our proposal through them. They asked that
we begin meeting with the individual
railroads, and we have done that. TFI sent
letters to the CFOs of all seven Class I
railroads on March 18th of 2008, and over the
next month we received a response from all
seven Class I railroads expressing interest in
further development of the concept.

We have now completed face-to-face
meetings with the CSX and the Canadian
Pacific, the Burlington Northern Santa Fe, the
Norfolk Southern and the Canadian National.

I'm meeting with the Union Pacific and Kansas City Southern is scheduled for this week, Thursday and Friday.

Participants in the meetings have included usually one ammonia shipper that is shipping on the railroad. The company's risk management professional. Several representatives from the railroad including their risk management folks. Counsel, and normally a TFI representative.

These meetings we think, thought, were productive, and there seems to have been willingness by each railroad to continue the discussions.

I think the next step after we have our meetings would be to go back to our insurance provider, perfect our insurance vehicle a little bit, and then come back and show the railroad.

The railroads have asked, and we've agreed, that any discussion on rates be
between the customers and the railroads as it should be.

We have advised each railroad in our meeting that once TFI is advised that there is agreement between the carrier and the shippers, or the railroads and the ammonia shipper, that once they have worked out a rate reconstruction, then we would provide the insurance and cover that.

And then we've also had discussions on kind of the best approach to go to the Hill, and what would be the offer we would put in place to seek some legislative cap.

Now that's where we are at on our discussions, and now comes the proposal that the AAR put before the Board that is kind of acting like we haven't even had any discussions with them.

And I can tell you that what the AAR has put before the Board is about 180 degrees from the content of the discussion we
have had with the individual railroads.  

Now we've got to decide whether we were getting lip service from the railroads, or do they really want to proceed as expressed in our individual discussion.

And it would appear that maybe the railroads do not want to negotiate liability issues; what they really want is with your help they want to dictate indemnification to the shippers.

And so instead of sincere discussions with us, the railroads have come to you, as I see it, the board, and asked that you weigh in on our discussions on their behalf to form this policy statement which gives them all the power in our negotiations in order that they can dictate indemnification to us.

The railroad has testified on the Hill that they want liability protection. We were trying to offer them some liability protection. And I'm not sure exactly right
now what they want. Because they have come to
you to require the shipper of TIH to indemnify
them. They want the shipper to attain
insurance to assure that indemnification, and
then to add insult to injury, they have
indicated that with this shared liability and
indemnification, maybe you can do us some
good, because with that you can direct us to
make some what they call product changes or
changes in our use of ammonia kind of like we
are too stupid to understand the risk there is
of ammonia, and maybe we need to do some
product substitutions.

When I saw the proposal from the
railroads, given our work with the railroads,
my immediate reaction was, this is very
simple, what the railroads want. They want
the cake, they want to eat it too, and they
want to eat it in our presence as we sit at
the table negotiating with them.

We are very serious about our
proposal. We spent $100,000 with the
insurance companies to put our proposal together, and prepared to spend more to perfect our policy.

Thank you very much.

CHAIRMAN NOTTINGHAM: Thank you, Mr. West.

We will now hear from Jean Payne from the Illinois Fertilizer & Chemical Association.

Welcome.

MS. PAYNE: Thank you.

I really appreciate the opportunity to be here today. I am not an attorney. Happen to be out in Washington, D.C. with seven of my board members who are here today, five of which are ag retailers from Illinois, so guys who are not real comfortable in suits, but this happened to fall during our congressional visit. So I think it's really neat that they can hear all this testimony today. Because they deal with ammonia everyday. In fact three of them are
probably some of our largest ag retailers who handle ammonia in Illinois everyday.

So my purpose here is really just to explain to you the impact of this issue on a particular state like Illinois. Our farmers in Illinois use 1.6 million tons of nitrogen every year. That's what they used last year to grow the 2007 corn and wheat product.

Of that 1.6 million tons which is an impressive amount, almost half is in the form of anhydrous ammonia, because we have great soils for growing corn in Illinois.

We also have been blessed with a wonderful distribution system to get that ammonia to our retailers and to our farmers. We have 11 ammonia terminals, and they are fortunate enough to be able to be fed by barge on the Mississippi and Illinois Rivers, and also by pipeline, which is wonderful, and also by rail.

But our ammonia distribution system, which is probably the best in the
country in Illinois, is also incredibly fragile. It is susceptible to any disruption in the supply chain, and weather also can wreak havoc on it. But I'm not talking about storms or tornadoes. I'm really talking about good weather.

And it happened to us in the fall of 2007. We had an excellent fall season for anhydrous ammonia. Congress passed the renewable fuel standard which increased the demand for corn, and our farmers jumped right to the starting date to get that corn in the ground which built up our demand for ammonia.

When the good weather didn't break, and we actually ran out of ammonia in our 11 terminals. And in order to finish up the season for the fall, our dealers had to drive as far as Mississippi, Arkansas, Oklahoma, and even Minsk, Minnesota, to find a product to bring it back to Illinois to finish getting the corn season taken care of.

So while we had an excellent fall
season, it really ended on a somber note, because we recognized, even with the impressive system we have, really how fragile it is.

But now I want to talk about where rail fits into this in Illinois. Like I said we are using 753,000 tons of ammonia every year in Illinois. About 75,000 tons are transported by rail. It's not a big percentage, as you can easily figure out, but it's a huge amount; in fact, 75,000 tons by rail is probably more than most agricultural states do all year is what we do by rail.

If we had to replace those rail tons with cargo tanks, it would take another 3,700 truck loads to meet the needs of our Illinois farmers.

And even if we had the trucks, which we don't, we don't have the drivers. The biggest drivers our retail members face is finding qualified HAZMAT and CBL-endorsed drivers that meet the TFA regulations who want
to work in the ag industry which is not the most glamorous of industries. You put in a lot of hours, it's dirty, you know, we work with farmers who can be a little testy at times. So it's very hard to get people to work in our industry, even harder to find qualified drivers.

So we don't have really any options for coming up with those 3,700 cargo tanks we would need.

And when our ag retailers, when I called them and told them that I had this opportunity to represent them today, and a lot of them carry ammonia. Some of the guys in the room here get ammonia by rail.

What I heard from them was a concern about this issue with the indemnification. But mostly what I heard from them was their appreciation for the rail industry's role in our industry. I mean we are all aware of the hazards of handling anhydrous ammonia. These guys could tell you
stories back here that would be quite entertaining, I guarantee you, because I've heard them, because a lot of them have been handling it since they were kids.

We have 23,000 nurse tanks in Illinois. These are the 1,000 or 1,500 gallon white tanks that we fill up at the retail site and take to the farm field; 23,000 we have in Illinois. We are very aware of all the maintenance issues and the driver issues and the pre- and post-trip inspections, and everything it takes to get those products to the farm safely everyday.

We really - I mean I sympathize with the railroads on that, because we live with it. And even when you do everything right we still have accidents, just from the sheer amount of ammonia that we move every year.

That's why we do the best to handle the product carefully on our end. We bring our farmers in for training so they can handle it properly on their end once they get
it to the field. And the railroads have also
done a fabulous job with it, and we really
commend them for that, and want to work more
with them, because as we continue to grow corn
in Illinois, and we will because we have the
best soils for it - no offense to my Indiana
friends, but we do - and we are going to need
that rail. Because it gives us another
opportunity, when everybody else is lined up
at the terminals and the trucks, we can get
rail cars in a less frenzied period of time
where we can offload them in a more manageable
level. They can then get them to other sites
where it's needed, where it is not that three
and four-week crazy season where everybody is
trying to get the product at once. Rail gives
us some important breathing room to fill those
gaps in Illinois.

And I know that a lot of our guys
would invest in more rails first for ammonia
if they felt that rail was going to be their
reliable shipper well into the future. They
are interested in looking at these opportunities, and there are obviously excellent opportunities to grow this industry in Illinois, and we really hope to have that opportunity.

So on behalf of my ag retail members in the fertilizer industry, we just ask you to please consider everything that has been talked about here today. We are affiliated with The Fertilizer Institute back at the state level, and I really give them credit for thinking outside the box in dealing with this because, as I indicated, when we pass the ammonia on to the farmers, when I heard about the indemnification issue, which is kind of new to me, I can tell you that there wouldn't be one of the guys in the room behind me who would ever conceive of asking the farmer to cover the liability for our members.

We consider ammonia to be our responsibility. We have a healthy respect and
fear for that product, as everyone needs to handle it safely. It just isn't even a concept that would cross these guys minds, because they feel they have to handle it responsibly to keep this product around.

So it's an interesting concept, we look at trying to pass that on. And I know there are a lot of farmers here in the room today, and I'd like to speak for them a little bit. Because they have a lot of things going on, and they have a lot of challenges, the ethanol gate everyone knows about. And I know that they are concerned about the availability of this product, because they wouldn't be using 1.6 million tons of nitrogen, 750,000 tons of ammonia, if there was a better alternative in Illinois. Farmers like it, and farmers demand it. We do the best we can to meet the needs for them. And the rail industry is a very important part of that equation.

I really appreciate your time. We
have a small association with three people. We do our best to bring forth the perspectives of the people that are out there everyday with the farmers working with this product.

Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Ms. Payne.

Mr. Buttrey, do you want to start with questions for this panel?

MR. BUTTREY: I don't have any questions per se of the panel, but I would like to just say that in listening to Mr. West's testimony, I think you and your association should certainly be commended for taking the bull by the horns so to speak in trying to address this issue.

We've heard a lot about market based solutions and private sector solutions and so forth, and I think your example today of what you had tried to do is a perfect example of how that can be done.

I'm going to be interested to hear
what the American Association of Railroads has
to say about your views about how this is
turned around, or turned out basically.
Because I had gotten the impression from what
I had read and what I had heard that there had
sort of been a really strong effort on both
sides to reach some kind of accommodation
here.

And your association is basically
the only evidence that I can see, really, of
a concerted effort to do that. I know a lot
of people say a lot about it, but I'm not too
sure too many people are doing anything about
it.

And so I'm really interested to
hear what they are going to have to say, and
we are going to hear from them in a few
minutes here, and they are in the room right
now. And I'd like to hear their explanation
about how they view what's happened with this
issue.

I think it's clear that the board
is very concerned about the issue, and it doesn't seem that anybody else is. And I hope we get the test, the hypothesis that has been proffered here today, that the board has no jurisdiction to do anything about this, I hope we get that chance - I don't know whether we will or not - but I'd like to see that case argued before the Court of Appeals further on down the road, but I don't know whether we'll ever get that chance or not, because we don't have a complete record yet, and we'll have to look at that when we do.

But I just wanted to commend your organization, and maybe I can commend the other groups as well when the day is over. But I think what you have done is a perfect example of trying to bring a private sector solution to the table, and I'm just anxious to hear what the other side has to say later on.

Thank you, Mr. Chairman.

MR. WEST: Can I respond?

CHAIRMAN NOTTINGHAM: Sure.
MR. WEST: We have talked to AAR, and they tell us that they don't see that their statement is inconsistent with our efforts.

They say that as railroads reach agreement with customers, it addresses the liability issue and the AAR position is no longer relevant.

However, they think if our effort fails they need a backup plan.

Well if you come down with what they call the backup plan, then our negotiation with the railroad is probably over, because instead of us negotiating, they are going to tell us, the shippers and receivers, how and when and how much liability we've got to have to move ammonia.

We still want this to move forward, but we'll have to wait and see you all act, coming down.

CHAIRMAN NOTTINGHAM: Thank you.

Ms. Payne, you mentioned that in
your job occasionally your members had to work
with farmers, and on some occasions they can
be testy?

MS. PAYNE: Yes.

CHAIRMAN NOTTINGHAM: It brought a
smile to my face. I saw Mr. Keith was smiling
a little bit too. If you like working with
testy farmers, you should consider working
with the STB. Because we can make them testy
with the best of them despite our best
efforts.

But on a more serious note, let me
ask Mr. West, I do commend you for showing
some real initiative. I would say I've been
a little bit underwhelmed by some of the other
associations and companies who one would think
would have a lot at stake in this issue but
haven't really been producing much in the way
of meaningful discussions and proposals.

But you have, and I think you
deserve tremendous credit, and it really
heightens your credibility in my eyes.
Let me ask, how did you kind of arrive at the $500 million-$1 billion insurance levels? Did you ever think about it from another perspective, just above a certain level of liability there would be a share, a percentage basis, 50-50 above a certain level? Is that hard to implement?

MR. WEST: Well, the first question we had to deal with is, is insurance available. And we brought the two firms in, and they gave us some assurance, they thought it was.

So how much can we get in the marketplace? A billion? A billion and a half? Go offshore? What's available?

And then we tried to deal with a catastrophic event, you know. So we just picked $500 million, and named that level, then we'll go a billion on top of that. I understand most railroads carry about a billion dollars worth of insurance. We're trying to raise that level as high as we
could.

And we thought then if we got as much insurance as we could together then that would pass the giggle test if we went to Congress and said, look, this is all there is in the marketplace.

CHAIRMAN NOTTINGHAM: Vice Chairman Mulvey, any questions?

MR. MULVEY: Just a couple.

Mr. Keith, in your testimony on page eight with respect to Price Anderson, you compare the railroads to the nuclear industry, and you say that the railroads are loosely regulated.

I mean, I guess compared to what? The FRA, the PSA, PHMSA, the railroads' own committees, we're not talking about economic regulation, and I don't think you are either here. We are talking about safety regulation. Do you really think that the railroads are loosely regulated given all the agencies that they have to deal with?
Mr. Goldstein, if you want to take
that also.

MR. GOLDSTEIN: Yes, thank you. I
think as you heard mentioned earlier today
there are Nuclear Regulatory Agency inspectors
on site in every nuclear facility.

And what we were simply pointing
out is that to a great extent implementation
of federal regulations involving railroads is
left to the railroads.

The car men for example, who used
to inspect trains to make sure that they were
in compliance with the safety regulations have
largely been retired or gone by attrition.

There is just a lower level of day-to-day
inspection of railroad trains than there used
to be, and a lower level of day-to-day
supervision of railroad operations compared to
a nuclear facility.

MR. MULVEY: Yet their safety
record continues to improve over time. As
pointed out the one area where the record has
not improved has been in trespassing, and that

is pretty difficult to control. But there has
been an improvement in the safety record.

I was going to ask you about the
cost of getting insurance, and passing those
costs on. We have a – there's this process
called URCS as you know, Uniform Rail Cost
System. It's based on pretty old data, and in
my view probably needs to be updated. But do
you think URCS could be adjusted in order to
take into account the incremental costs to the
railroad to carry TIH or PIH?

MR. GOLDSTEIN: Well, I think that
the URCS system - I'm not clear first of all
whether you are talking about just adjusting
URCS in general, or whether you are suggesting
it in a rate case.

MR. MULVEY: I'm thinking here
about adjusting URCS in general in the sense
that it really has, despite the legislation to
the contrary which says it's supposed to be
updated every five years, this thing has not
been updated very much, and in fact it's really based on some relationships that go back decades.

So it'd probably be better in general to update the entire thing, which would include perhaps taking into account any incremental costs or costs that are directly assignable to the carriage of materials like TIH and PIH.

MR. GOLDSTEIN: Unfortunately, I am not an expert on URCS. I think some of the cost people, one of whom has already testified today, probably would have been better qualified to answer that.

My understanding is that the railroads' costs, whatever they may be, are currently in URCS, and that is about as much as I know about it.

MR. MULVEY: Anhydrous ammonia is carried by railroads, and it's an important and a safe way to carry it. But it's also carried by barge or by pipeline.
And it's been asserted that rail is the safest way to move TIHs like anhydrous ammonia, and it's generally compared to truck transport. We all know that we've had some numbers quoted here about rail being 14 or 16 times safer than truck.

But is it safer than pipelines or safer than barge transport? And in terms of incidents or accidents in however you want to - millions of ton miles or whatever? Or are pipeline and barge equally unsafe?

Mr. Weber?

MR. WEBER: Pipeline, which is, goes across, comes up through Donaldsonville up the Mississippi River and then splits going across Illinois and Indiana into the eastern part of Indiana where we pull the service, it is maximized as far as the capacity of it.

It obviously is the safest, probably distribution form of anhydrous ammonia versus any other, but the problem is we are allocated a number of tons we can get
off the pipeline, so we have to rely again on rail cars and then truck transportation from other terminals to pull those products, because we pull all the allocated tons available to us on pipe.

MR. MULVEY: My understanding is that most of the anhydrous ammonia comes out of Louisiana and Texas, and that it's basically two major pipeline companies that transport most of this.

Is there any opportunity for building another line and increasing the capacity of pipelines? Or are the profits not great enough to justify making that investment?

MR. WEST: Let me try to take that. No, I don't think that — I'm not aware of any project underway to build a new pipeline. Our pipeline is at capacity. But we do import quite a bit of ammonia, and it comes into Tampa. So we do import and we can also import to inject into the pipeline down in
Donaldsonville.

From the barge side, I think there are only about 30 barges in service, and we haven't built a new ammonia barge in a long time. So as these barges go out of service, they are probably not coming back.

MR. MULVEY: I understand one of the alternative fertilizers, so I guess it's also related to anhydrous, is UAN, and according to one testimony UAN is no longer being manufactured in the United States, and it's all being imported. Is that your understanding, or are we still manufacturing UAN here?

MR. WEST: No, I don't think that is correct.

MR. MULVEY: Okay, that was in written testimony.

MR. WEST: We are probably producing more UAN solution, because UAN solution is 28 or 32 percent nitrogen. Ammonia is 82 percent nitrogen. That's why if
you haul nitrogen, your cost per
transportation pound end basis is lower.

And when you import UAN solution
you've got to pay for all that weight that's
in that product.

MR. MULVEY: Ms. Payne, would your
members have objections to paying a portion of
an insurance premium for railroads
transporting anhydrous ammonia, providing
indemnification in cases involving
catastrophic accidents, involving TIH products
where the railroad was not held negligent?
Would there be a willingness to do that?

MS. PAYNE: All I can tell you is
that one of the biggest challenges we have is
getting property, casualty and liability
insurance for ag retail pipes, particularly
since, because we handle ammonia we now fall
under the Department of Homeland Security
purview, and it's becoming more and more
difficult.

I would say that, yes, on the
surface that they would have a lot of
questions about that, because already what we
pay to carry this to the farm.

MR. MULVEY: The concern today is
about a catastrophic spill and the railroads'
liability for that. But as you say the final
movements are by truck. Have there been any
serious incidents and spills involving
fatalities from accidents involving trucks or
other modes of transportation including
pipelines? Or has anhydrous ammonia here in
this country pretty much moved almost like
nuclear materials without really an accident
that has involved the loss of life and serious
injuries?

MR. WEST: We had a serious
accident involving trucked ammonia probably 25
years ago in Houston. That was a huge
accident where it went off the top layer of a
highway exchange, and that was a serious
accident.

I'm not aware of a serious truck
accident.

MR. WEBER: I'm not either.

MR. MULVEY: I mean considering all the HAZMATs that are moved around the country every year, it really is quite amazing that virtually all modes of transportation have performed so well, and it obviously speaks well for our transportation systems.

MR. WEST: Yes, I would agree. Because we do transport hazardous materials, and do it in a very safe way. And we spend a lot of time and energy in training the individuals to do that very thing.

MR. MULVEY: Thank you, that's all I have.

CHAIRMAN NOTTINGHAM: Mr. West, we heard some testimony from one of the previous panels about arguably the point was raised that it's just not right - I'll paraphrase, it's just not fair, it's not consistent with many people's understanding of tort law and the way it should work in our country for a
party to ever bear responsibility for the insurance costs or liability costs of handling materials that that party can't control over a period of time.

Your proposal seems to break through that barrier a little bit and recognize that it may just make good common sense, and business sense, to work something out in this regard, where it would be possible and reasonable for a party to bear some of that responsibility in a shared way, but obviously you are asking for some benefits to be conferred back to your members to justify that cost.

MR. WEST: Well, I think the issue there is responsibility. We told the railroads, we'll try to get some liability protection for them, but we were not accepting responsibility for a movement that we had no control over.

CHAIRMAN NOTTINGHAM: Okay.

Mr. Buttrey, any other questions?
Mr. Mulvey?

Thank you panel. You are dismissed.

(Panel dismissed.)

We will now recess for 45 minutes. We will come back at 1:40 p.m. promptly and pick up with the next panel.

Thank you.

(Whereupon at 12:56 p.m. the proceeding in the above-entitled matter went off the record and resumed at 1:43 p.m.)

CHAIRMAN NOTTINGHAM: Good afternoon. I would like to call our hearing back to order, and invite the next panel, panel #3, consisting of the Association of American Railroads represented by Edward R. Hamberger, and the American Short Line and Regional Railroad Association represented by Richard F. Timmons.

Welcome, and we will start with remarks from Mr. Hamberger.
MR. HAMBERGER: Thank you, Mr. Chairman. Good morning or good afternoon, as the case may be, Mr. Vice Chairman, Commissioner Buttrey.

On behalf of our members thank you for this opportunity to testify on the railroad industry's common carrier obligation to carry hazardous materials, most specifically those that are labeled toxic by inhalation hazards, TIH.

Now I want to emphasize up front that we are talking about toxic by inhalation standards only; we are not talking about any other commodity that the railroad carries.

And to put that into perspective, last year we had about 100,000 carloads of TIH material out of 32 million carloads. So we are talking about 0.3 percent of all of our traffic.

There's been a lot of talk this morning, a lot of writing, about not lettering
the railroads out of their common carrier obligation. So let me put that to rest right now by saying that the railroad industry, the AAR members, are not seeking to eliminate our common carrier obligation to carry these materials at this time.

And as much as I appreciate Mr. McBride interpreting my testimony, let me state for the record that I do not concede his point that we are conceding the right of a railroad to come and challenge that common carrier obligation at further proceedings depending on how things materialize.

We recognize that many TIHs play an important role in the economy, and that rail is the safest and most secure mode of transporting these highly dangerous substances.

Nothing in fact is more important than the safety of our employees and the communities through which we operate. The freight rail industry is doing its part to
ensure that highly hazardous chemicals are
being delivered safely.

Railroads spend billions of
dollars each year to ensure the safety of our
rail network. We train thousands of local
emergency responders, and have implemented
costly yet necessary special operating
procedures on trains carrying TIH.

Just recently we implemented new
AAR standards for tank cars carrying TIH,
standards designed to sharply reduce the risk
of toxic releases should an accident occur.

Our concentrated efforts to
enhance the safe transport of TIH have
produced superior results. In 2006, the most
recent year for which we have final data,
99.996 percent of all hazardous materials
shipped by rail arrived safely at their final
destination.

In fact I have to say it was
gratifying to hear this morning and listen to
so many of our customers and customer
representatives laud the industry for our safety record. And I want to say that it is not something that is done in a vacuum; we work closely with our customers, with the shippers and with the receivers, both on the safety and security side, to make sure we can continue to maintain that record.

Notwithstanding the record, notwithstanding the cooperative efforts that we have in that regard, the current risk profile for transporting TIH by rail is untenable.

To repeat we are not seeking to eliminate the common carrier obligation at this point, but what we are seeking, as I put in our written statement, we are asking that you issue a policy statement based on the record in this proceeding that a railroad if it chooses to do so may establish common carrier service terms that, one, require the shipper of TIH materials to indemnify the carrier for the full amount of any liability
or exposure resulting from the release of TIH materials above a threshold level that would be set at the higher of $500 million or the amount of insurance if the amount of insurance is greater than that, that the railroad is carrying.

Now some have questioned your power to make such a determination. I note that they have offered no citations to support their assertion that you lack power, but let me address that quickly.

The Interstate Commerce Act requires that a request for service be reasonable. It also requires that the carrier response is reasonable.

Reason, of course, is in the eye of the beholder, and there is therefore the need in some cases for an arbiter to decide: is the request reasonable? Is the response reasonable?

And in the seminal case of Granite State Concrete the 1st Circuit Court of
Appeals made it clear and explicitly found that you are that arbiter.

In fact this court said, quote, the two statutory provisions do not provide precise definitions for the operative standards. Section 111.01 does not define what is adequate service, unreasonable request, and Section 107.02 does not define what would be reasonable rules and practices.

The court went on to say further that under the statutory scheme of ICCTA, quote, the definition and scope of these terms are to be determined by the Board on a case-by-case basis in light of all the relevant facts and circumstances.

I think it is clear that you have the authority, and Mr. Chairman, you mentioned it this morning in your opening remarks, and I think that you have the authority to make a policy decision as we are asking.

So why is the request to transport TIH not reasonable? We believe that as you
take a look at risk in general, there are two impacts of risk. One is that you do everything you can to reduce the risk. You do everything you can to reduce the impact of the event should it occur. You do everything you can to make sure that you can recover, and that the damage is short, and not terminal.

You will hear later from the railroad panel about the security steps we take, the safety steps we take, the operating steps we take, to make sure that we are mitigating the risk, trying to reduce its impact, and making sure that we can recover from an event.

But the second impact of risk is, once you go through step one, and you make everything you can, you then make a determination: do I want to undertake this action? Do I want to undertake this risk? And if you don't want to, you exit the activity.

We are not asking to exit the
activity at this point, but we also understand
the common carrier obligation therefore do not
have that opportunity to walk away if we
determine that it is an unreasonable risk.

Each one of the class I members,
and one of the panelists mentioned it this
morning in their 10Ks where they are required
by Sarbanes-Oxley to rate their highest risk,
each one has transportation of TIH as the
number one risk.

Norfolk Southern in a previous
proceeding, CSX in this proceeding, have
indicated that but for the common carrier
obligation they would exit that activity.

It is the threat to the network,
not just the individual railroad, to the
employees, to the citizens of the communities
in which we operate, that is being endangered
each day when we are forced to carry TIH
materials.

We think that asking us to do so
without recognizing and sharing in the
liability for doing so is unreasonable.

The second branch of your determination - you don't need to find both, but the other one is - is our response reasonable? Would a requirement to share in the liability be reasonable?

Again, we believe that it is. The industry is not walking away from its responsibility. It is suggesting right now a $500 million minimum insurance requirement. Some railroads will carry more.

But it is the nature of the product itself that is requiring higher insurance, and that is raising the liability level.

Someone this morning quoted the Bisso, in our Supreme Court Case, and talked about wrongdoers getting away without any responsibility. I bridle at the aspect that our railroads are wrongdoers. But in any case, the Bisso case was a case where the company was trying to shift all of its
liability. It was not taking any responsibility. That is not the case here.

We believe that the companies that produce, market and profit from these materials should share in the substantial liability.

If you issued the policy statement we propose, I believe it would be a spur for the private sector to evolve solutions.

In April I was pleased to commend the Fertilizer Institute for their assertive action proposing a partnership in buying liability insurance.

I repeat that praise today. I think Ford West and his members have done an outstanding job in trying to address the concerns that we have addressed.

I disagree that a policy statement from you would undermine those negotiations. We see them as complementary.

In fact the discussions between the Fertilizer Institute and the individual
railroads would address the issue of liability, and it would be up to the railroad to make a determination at that point that that satisfies the need for liability sharing, and therefore a further tariff requirement would be unnecessary.

I would also just like to mention very quickly if I can, Mr. Chairman, a lot of discussion about market-based solutions. Right now it is not a market-based solution. The industry is under an obligation to carry this material and to bear all of the costs.

I believe that it would be spur to private sector discussions if you were to issue this statement.

Let me just close, therefore, by saying that there has been a lot of talk about a lot of important issues – tank car standards, and the Bisso case, Federal Rail Safety Act amendments – but at its heart what we are asking is really very straightforward and a very simple proposition.
One, the policy we are asking for is driven by real world events.

Two, you have the authority to issue that policy.

Three, the policy is consistent with the common carrier obligation and definition of what is reasonable.

Four, the record is complete enough for you to make the determination.

And five, the policy would achieve a further public goal of driving private sector discussions.

Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Hamberger.

We will now hear from General Timmons from the American Short Line and Regional Railroad Association.

Welcome.

MR. TIMMONS: Good afternoon, Mr. Chairman, and thank you very much.

Mr. Vice Chairman, Mr. Buttrey,
it's a pleasure to be here this afternoon, and
I thank you for the opportunity to testify on
this important subject of common carrier
obligations as they affect the short line
railroads.

This is an important opportunity
to influence and correct what I perceive as a
longstanding public policy shortcoming, that
threatens our citizens, our communities, rail
freight transportation, and obviously the
employees that work in the short line railroad
industry.

The unreasonableness of the
current situation has brought together
numerous stakeholders, all of whom will speak
forcefully on this subject of TIH movements.

You possess the authority to forge
a practical and equitable solution to this
serious dilemma short line railroads, and
indeed, the railroad industry, faces every day
of the year, that being of course the tragic
consequences of a TIH spill and its extreme
I am proud of the consistent and safe performance of the short line and regional railroads and of their contributions to freight movement across the country. They are the first mile/last mile of our system, and tie the network together for both shipper and user with an unprecedented safety record for the transportation of TIH materials.

The Short Line Association is pleased to have the opportunity to participate in these proceedings, and to specifically address the application of common carrier obligations to hazardous materials.

Our comments focus on the transportation of TIH and propose a framework under which the stakeholders in TIH transportation share in the liability risks presented by TIH.

All those small railroads are generally well equipped to handle the risks related to common carrier freight obligations.
These railroads despite an unprecedented safety record of TIH handling, simply cannot manage the extraordinary potential risk presented by a TIH mishap.

Small railroads do not have the financial resources and cannot reliably obtain insurance coverage to address claims in the hundreds of millions of dollars, let alone claims in the billions of dollars.

A TIH incident on a Class III or Class II railroad likely would bankrupt the carrier and leave vast numbers of people without remedy for losses resulting from injury, death or destruction of property.

In light of the disproportionate risks to the public presented by TIH, and the limited financial resources of small railroads, an unconditional requirement that small railroads carry those commodities does not serve the public interest.

On the other hand, the Short Line Association recognizes that it is in the
public interest that rail transportation be available for TIH movement. Therefore balance must be reached between the obligation of small railroads to handle the traffic tendered by TIH shippers, and the inherent limitations on those carriers to manage the risks.

The Short Line Association believes that it is not reasonable to force a small railroad to bear 100 percent of the risk associated with TIH movements when it is beyond dispute that a small railroad does not have the financial resources to manage such a risk.

Both court and agency decisions indicate that the Board has the discretion to determine the scope of the common carrier obligation. The Short Line Association respectfully urges the Board to use its discretion to determine that it is reasonable for a small railroad to condition its willingness to handle a TIH shipment on the existence of a liability sharing arrangement.
that protects the public from TIH risks.

The ASLRR thereby proposes that if the smaller railroad satisfies certain minimum insurance requirements, they be permitted to publish a tariff that conditions their obligation to carry TIH on the other stakeholders similarly assuming certain insurance and liability obligations.

In other words if the other stakeholders in a TIH move agree to the conditions in the tariff, their request for service is reasonable, and the small railroad is bound by its common carrier obligation. However if the other stakeholders choose not to comply with the conditions, then the small railroad is not required to serve the TIH shipper.

In order to implement this proposal, the Short Line Association urges the STB to promptly issue a policy statement that interprets the term, reasonable request, as applied to TIH shipments in a manner
consistent with this proposal.

So in order for a small railroad to be able to publish a tariff that conditions its handling of TIH on the criteria below, a class III railroad must have liability insurance coverage with a minimum limit that meets or exceeds the lesser of 200 percent of its freight revenue, or $25 million. And a Class II railroad must have a liability insurance coverage with a minimum limit of $25 million.

A Class I railroad must have liability coverage in the amount the Board determines. The policy must name the Class III or Class II railroad as an additional insured for inter-line moves of TIH. In the event of a loss-producing incident, or one caused by the Class III or Class II railroad, the insurance of the Class III or Class II railroad, would be the primary coverage.

To the extent that the Class I railroad's insurance policy has an attachment
point that is greater than the limit on the
Class III or the Class II railroad's insurance
policy, the Class I railroad would indemnify
the Class III or Class II railroad for the
TIH-related losses that fall within the
coverage gap.

The TIH shipper must have excess
insurance in an amount the Board determines,
which coverage attaches at the limit of the
Class I railroad's insurance policy. The
excess policy must name the Class III or the
Class II railroad as an additional insured,
unless the Board determines that it is
commercially unreasonable to do so based on
insurance industry capacity limitations for
TIH hazards.

The TIH shipper must indemnify the
Class III or the Class II railroad for the TIH
losses above the limit of the shipper's excess
insurance policy.

Now in order for a Class III or a
Class II railroad to qualify to issue a tariff
that requires Inter-line Class I carriers and TIH shippers to share in the liability for a TIH move, the Class III or the Class II carrier would be required to obtain a sizeable amount of insurance of at least $25 million. This requirement would increase the insurance coverage maintained by many small railroads today which is in the public interest.

In addition the small railroad's insurance under the proposal is primary. The Class I interline carrier, and/or the TIH shipper, would become responsible for a portion of the small railroad's liability only if the TIH incident products liability in excess of the small railroad's required insurance limit, a condition that has rarely if ever occurred for short line HAZMAT carriers.

The $25 million amount of primary insurance this proposal requires a small railroad to maintain is intended to reflect the small railroad's responsibility and
commitment to protect the public interest, but is also meant to recognize the inherent financial limitations of a small business, and the many benefits that many small railroads derive from the carriage of TIH.

In conclusion the ASLRRA has attempted to craft a liability sharing framework that is workable and equitable, given the financial limitations of small railroads and the immense liability risks that arise from the handling of TIH.

The Short Line Association acknowledges that although its proposal will provide adequate coverage for the vast majority of TIH incidents, it likely would not be sufficient to address all losses arising from a significant TIH spill, particularly in a metropolitan area. In order to address that situation, the ASLRRA urges the Board to support a legislative solution similar to the Price-Anderson approach developed by the AAR and the Short Line Association two years ago.
I respectfully request that you seriously considered this tiered option that draws together those responsible for TIH production and movement.

Now there will be other approaches to this problem that merit serious review, and my expectation is that from these proposals a much overdue remedy may be crafted that serves the best interests of shippers, railroads, and the businesses and communities they serve.

I thank you very much for your attention this afternoon, and I will be happy to address any questions you may have at the appropriate time.

Thank you.

CHAIRMAN NOTTINGHAM: Thank you, General Timmons.

Mr. Hamberger, we've heard a lot about tort law today. We have heard a little bit about bankruptcy law in a worst case situation which of course is that we are here today unfortunately having to talk about,
because it is we hope we never see that situation, but we have to at least think about it and plan.

It occurs to me that if you assume a massive liability imposed on a Class I railroad that would require that Class I railroad to go out of business, you are basically looking at situation where you are going to presumably have some injured parties not getting compensated according to my understanding, my very basic understanding of tort law and bankruptcy law.

So any notion that the current system is actually a healthy one from the perspective of protecting people who might need and deserve compensation in the event of a worst case scenario, I call it into question I guess.

I just want to know if you have thought through that at all. I know it's not a super positive thing for you to be thinking through everyday. But railroads in the past
I have had to go into bankruptcy. Not any real big ones real recently that I'm aware of, but I've certainly heard a little about the Rock Island and the Penn Central.

Any reaction to any of those comments?

MR. HAMBERGER: Yes, sir, thank you, Mr. Chairman.

The thinking that we have done about it is based more on what would be the impact on the network rather than whether or not victims would be totally compensated.

You are I believe exactly correct in that the - if there was indeed a catastrophic event that the damages would exceed the amount of insurance; they would exceed the amount of available cash that the railroad could put against those damages; and the railroad would be forced into bankruptcy.

Now as Mr. Vice Chairman Mulvey has indicated airlines have gone into bankruptcy. But our concern is that in this
case if a railroad were to be forced into bankruptcy absent an intervening event by Congress or the federal government that the natural course of events would be that the trustee in bankruptcy would certainly cut any — any spending that he or she determined was, quote, unnecessary.

And I would anticipate that any expansion capital would be dried up very quickly; that something called deferred maintenance might become the order of the day on that railroad; and that an analysis would have to be done of what assets can be sold, and I listened to the city councilwoman from Alexandria talking about the real estate that is currently a rail yard. I suppose a trustee in bankruptcy might decide that that rail yard should become condos looking out over the Potomac, and that the railroad in question would certainly be in a much different configuration. And that then would have a ripple effect with the rest of the network
even if it wasn't chopped up and sold. The fact that the investment was not keeping pace with what was needed to expand and maintain it at a ready state would have a ripple effect throughout the entire network, as we are as you know a North American network.

So I think it would have an effect on all shippers, and it's something that sometimes I think the other shippers don't recognize, that they are at risk should something like this occur.

CHAIRMAN NOTTINGHAM: You referenced the airline industry. In the airline industry, the U.S. passenger rail industry, particularly Amtrak, the nuclear power industry we heard about earlier today, there are probably others, all seem to have some protections. There is some recognition in statute that they are being asked to take on some significant risks, and that there ought to be some limit on those risks.

How did we get to this point where
arguably the freight rail industry is sort of
the only one out there that is left hanging
with all its fully exposure for being
obligated by statute to handle the most
dangerous materials? Is this something you
guys asked for?

MR. HAMBERGER: Well, we certainly
did not ask for it. But we have, as General
Timmons indicated, been trying to interest
members of the House and Senate in some sort
of liability cap legislation. We have our own
proposal out there. We have shared that with
our customers in the chemical industry.

We have not reached consensus with
them, to say the least, nor have we been
encouraged by the reaction on Capitol Hill.

CHAIRMAN NOTTINGHAM: Thinking
through a worst case scenario, if one of your
members had to go into bankruptcy because of
a significant release of TIH and massive
lawsuits, injured people aren't getting
compensated presumably, and what do you then -
how does that ripple out in two directions I
want to pursue, attracting capital and
investors to your industry, and what if any
consideration should we give to that kind of
scenario when we look at something as
important as revenue adequacy?

MR. HAMBERGER: Well, I think the
question of what is the impact, and I won't
pretend to be a bankruptcy lawyer, but as I
recall from my legal days back in Georgetown
there is a Chapter 7 and a Chapter 11, and I
believe the aviation industry went into
voluntary bankruptcy with a goal of
reorganizing, changing some of their operating
practices and coming back out as an operating
entity.

They were not forced into
bankruptcy by a catastrophe like this. I am
not sure that a trustee in bankruptcy would
even have the ability, depending on the size
of the liens against it, to even consider
trying to come back out, or whether it would
be a liquidation bankruptcy in which case all employees would be out of a job; all customers on that particular railroad would be out of that railroad's service; the connecting carriers would no longer have anyone to connect with.

So I think it would have an incredibly deleterious impact on the entire rail network.

I think that obviously at that point the ability to attract capital would be questioned. I know that Mr. Dave Burr of BNSF is on two panels next, and he is the insurance expert for BNSF, and I'd like to reserve his - ask him about what that would do about the ability to get insurance.

I have heard others opine that the next major TIH accident means that there will be no TIH insurance available.

CHAIRMAN NOTTINGHAM: And with - history tells us that when we have had large railroad failures or bankruptcies, the Board
or in the past the ICC has had to come in and
direct service in many cases, and Congress has
felt obligated I'm told on occasion to
actually appropriate funds to make sure that
the serving railroad that is standing in as an
emergency provider actually gets compensated.

I think if we got into that level
of worst case scenario, and you used to work
in the Congress I know, do you think it would
be reasonable for the Congress at that future
point to stop and ask, how did we get to this
point? Who is the regulator here? We are
having to fork over money to keep a rail line
because there wasn't adequate insurance, and
there actually were multiple hearings before
the regulatory agency and nothing was done.

In your experience as a former
congressional staff person, do you expect this
Board or future members of this Board should
look forward to that kind of scrutiny from the
Congress?

MR. HAMBERGER: I would expect that
the investigations, subcommittees, any number of committees would want to know what happened, how was it allowed to devolve into this situation. Why is the federal government being called in to prop up what should be an ongoing and profitable railroad?

And so I would not be at all surprised that that would be Congress' reaction. I don't know that they would step forward with the money. It's hard to know what their view would be at that point.

But I think that there would be an awful lot of questions asked as to why it was allowed to get to this point.

CHAIRMAN NOTTINGHAM: Let me turn it over to Vice Chairman Mulvey for questions.

MR. MULVEY: A couple of things.

I think realistically of course it's the railroads carry the coal to power our utilities and the food from our farms, et cetera. The likelihood of a railroad being shut down and sold off, and the shippers not
being served, is probably zero. All members of this panel including yourself have all worked for the Congress, and Congress I would think would almost be forced to do something, whether it would be something as radical as nationalization or creating some kind of Conrail alternative, et cetera. But I think it's clear that you could not just simply abandon one-third or one-fourth of the Class I railroads if one of the major ones -

MR. HAMBERGER: I'm not sure I'd disagree. I was just trying to play out the hypothetical scenario of the chairman.

But I will, I think, hopefully agree with you that even under that scenario the railroad would be under much different management with much different goals than expansion in -

MR. MULVEY: And I agree, it might not have the expansion capital that both you and I think is necessary for this railroad to meet -
MR. HAMBERGER: Right, exactly.

MR. MULVEY: - the future demands.

In your testimony you talk about what constitutes a reasonable request on the railroads, and doesn't adherence to the FRA and PHMSA and TSA regulations, doesn't that imply or doesn't that confer reasonableness on a request for carriage, if you are complying with all those rules and regulations, and if the shipper is complying with the rules and regulations in terms of how the tank and the tank car - the quality of the tank car, et cetera, and how it's filled, and complies with all the rules and regulations, and asks the carrier, isn't that a reasonable request per se?

MR. HAMBERGER: Not per se. It is reasonable with respect to complying with all the rules and regulations. But it is unreasonable because it puts that railroad in an untenable position, in an uninsurable position, where it is, notwithstanding what
some may believe, where it is a bet-the-
company process.

We are fortunate that that has not
occurred; that every accident to date has been
within the coverage limits of insurance. But
that is not a guaranteed outcome in the
future. So from that standpoint, because of
the very nature of the product that is being
tendered to be carried, is what makes it
unreasonable.

MR. MULVEY: Previous witnesses,
Mr. McBride in particular, tried to draw the
distinction between the railroad industry and
the nuclear industry in terms of the
applicability of a Price Anderson kind of a
model to the railroad industry. And he listed
off several characteristics of the nuclear
industry under Price Anderson and what they've
had to agree to.

I raise the issue as to whether or
not carrying - if you have an accident
carrying nuclear materials, you have no
liability for that. You are completely covered by Price Anderson.

Do you think that that should be extended to the railroads for carrying TIHs or PIHs?

MR. HAMBERGER: That was our legislative effort, which as I indicated in the earlier questioning has not gotten a lot of traction in the House and Senate. And I will defer to Mr. McBride in his knowledge of the nuclear industry. We are open to discussions of how that would be structured, how it would be funded. I think that that might be a longer term goal.

What we believe right now is that you have the authority to issue the policy that we are asking; that that would drive certain behavior including, which I did not mention in my opening statement because I was dinged down, including driving private sector activity on behalf of the chemical manufacturers and their customers to figure
out, is there another way to do this?

And I was impressed with the previous panel, Ms. Payne and Mr. Weber, talking about the importance of anhydrous ammonia to the farmers in their states.

I also was struck by the fact that they make that decision to use anhydrous ammonia rather than urea because it is a little bit more effective and it is cheaper. That is their decision, and we are saddled with uninsurable liability because it is their decision, economic decision, to use urea rather - to use anhydrous ammonia rather than urea. I'm not sure that that is a reasonable request.

MR. MULVEY: And none of us here are chemists or agricultural specialists or for that matter even waste water treatment specialists. Chlorine is another example. Chlorine, again, you have suggested many many times that it would be a good idea for waste water treatment plants around the country to
switch from chlorine to bleaches and other
less toxic materials. But the industry comes
back and says, well, maybe that can be done in
some places, but it takes a long time for that
to happen, and chlorine for one has many many
more uses than simply waste water treatment,
and so many movements, it really has no
effective substitute. It sort of has to move.

Are you willing to move back a
little bit from your previous statement that-

MR. HAMBERGER: No, I don't want to
move back, but I will concede to Mr. Donovan
that I am not a chemist. But I believe that
if the manufacturers of this material were
forced to have a share of the responsibility
of not only the manufacture but also the
transport of this material, that there would
be in this business model a new openness to
looking at additional technologies or new ways
to accomplish the same thing.

You have some witnesses at the end
of the day who are much more informed on this
issue than I am, but from what I've read there are some applications where chlorine bleach can be used. Out here at Blue Plains Water Treatment Plant, it is not today a total substitutability factor.

However I would draw your attention to when the Montreal protocols were enacted on chlorofluorocarbons, they were given 10 years to make the transition from CFCs to no CFCs. I can give you for the record comments by chemical company CEOs at the time believing that it would drive their company out of business; it would drive thousands of jobs overseas; and it could not be done. It was accomplished in five years.

MR. MULVEY: We have a lot of experience along those lines. It's funny when you said Montreal protocols, of course with my background I thought of the Montreal Protocols of the Warsaw Convention limiting airlines' liability in international trip making.

You cited some cases where the
railroads have experienced recently where they had fairly significant costs. But I was noticing that, and some of these actually took place in urban areas or near urban areas. One occurred near San Antonio for example. Another one occurred - Minot, that's not a larger city, but it's still a fairly significant urban area for that part of the country.

I was just wondering if there were any more breakdowns of how much monies have actually been paid out rather than what the claims were. Because as you know, it's been argued before that, while, yes, sometimes there are outrageous jury awards or runaway juries or whatever you want to call them, those are very often overturned by the courts on appeal, especially when the carrier or the party only partly at fault or even fully at fault, the amounts are considered to be excessive.

Do you want to comment on that?
Is there any more documentation or data on some of these that you presented here?

MR. HAMBERGER: That would have to be from the individual carriers. I do know in the Graniteville situation that the cost data that I have been made aware of, and I don't know whether it is public or not, so I'll just defer to the NS representative. But it is very compelling in the amount of damages paid out in that particular case, in a relatively rural setting at 2:00 o'clock in the morning, with a terrible tragic end result of nine deaths, but it could have been a lot worse, much more tragic, if it had occurred at 10:00 o'clock in the morning instead of 2:00 o'clock in the morning when the textile mill would have been at full employment and the grade school that was within half a mile.

So I don't know what is public and what is not, but let me check on that for the record.

MR. MULVEY: Thank you.
General Timmons, you claim that small railroads cannot afford and, quote, are often contractually prohibited from having a significant amount of self insurance.

By whom are the short lines prohibited? Is it the Class Is?

MR. TIMMONS: No, basically it's a financial matter. The costs of insurance to insure the movement of those TIHs is prohibitive for the small railroads.

MR. MULVEY: But you say contractually prohibited. That assumes that there is somebody who has signed the contract and says you can't self insure. Is that a Class I-Class III relationship? Or is that with shippers?

MR. TIMMONS: It is basically with shippers.

MR. MULVEY: Thank you.

CHAIRMAN NOTTINGHAM: Mr. Buttrey, questions.

MR. BUTTREY: I was just thinking,
Mr. Chairman, as you were saying something about being called up to Congress to explain why the agency had not addressed this issue, I just want to say, and I have no questions for these witnesses, I just want to say that I hope you enjoy being up there, because I am probably going to be doing something else that day.

I had that unpleasant experience once, and I remember it well. So I just say that I hope we never have to do that.

CHAIRMAN NOTTINGHAM: Mr. Hamberger, you mentioned uninsurable liability. I need to ask this: why shouldn't Class Is just buy a lot more insurance and raise their rates to pay for the costs?

MR. HAMBERGER: Two interrelated questions if I might. One is the amount of insurance, and I think we heard - again, notwithstanding what we heard this morning, Mr. West indicated that his involvement and his investigation is that together the
railroad industry and the fertilizer industry could perhaps eke out $1.5 billion.

Mr. Burr can talk to you more about what an individual company can get as opposed to a company in the secondary market supported by the Fertilizer Institute.

So the amount of insurance is finite in both the insurance and reinsurance markets, so that limits what could be purchased.

The issue of rates is of course the secondary issue that we raised in our comments, and it was talked about I believe by you, Mr. Vice Chairman, earlier today, and that is whether or not your SSAC and three benchmark case approach would allow for the costs to be allocated to the shipper who forces those costs to be borne.

It is our belief that you have made a mistake in that regard by saying that you will not allow URCSs to be adjusted to allow that.
And yes, many of those costs are being collected. They are part of the URCS system. But in a rate case they are not allocated specifically against that shipment. So number one from the rate standpoint you would therefore not be able to get those costs reimbursed. And number two, in addition to the costs, what we are really talking about here is the liability which you can't charge enough. The liability is just so large that it's not monetizable, if that is a word.

CHAIRMAN NOTTINGHAM: We are going to keep the record open for 30 days, which is often our custom, after today. It would be very helpful to the Board, I believe, helpful to me, to get some more concrete information from the insurance industry.

If you could be of any help in that regard.

MR. HAMBERGER: Okay.

CHAIRMAN NOTTINGHAM: Work with
your members who are in touch with their insurance providers. Because we are talking about entertaining and looking at some very significant possible potential policy initiatives here, and we have to have more than just your good word that there is—that the insurance just isn't available. 

MR. HAMBERGER: I know there was testimony on the record a couple of years ago in the House T&I Committee, a representative of Aon testified there. So I know we can at least dig that out of the records and send that up.

CHAIRMAN NOTTINGHAM: And to follow up on your point about our pre-benchmark, simplified small rate case dispute resolution process, wouldn't the natural result of that then be, you have got to recover your—you are entitled to recover your costs of being in the railroad business through your rate structure. If you can't assign it to the 0.3 percent of your traffic that you think is
causing the bulk of your insurance proceeds, you will have to presumably assign it across the board to all your customers on the theory that society generally benefits by having agricultural products grown efficiently with fertilizer, and utilities producing energy with the help of some chemicals, et cetera, that we all benefit by the flow of chemicals into the economy, and so we all pay for the cost.

Have you guys thought through that at all? In that way if rates got really high people could either bring a rate case or look at their options for transportation.

MR. HAMBERGER: Well, as I say, because those costs have to be allocated across 32-, 33 million carloads, it does not have them apply to the traffic which is causing that cost to be incurred, and in - I want to be careful here because I think if I'm not mistaken we have an appeal on that matter pending. So I'm not sure - I mean if it's
okay to talk about it we can talk about it. But we believe that it should be- that URCS at least in those cases should be adjustable so that the customers who are forcing those costs to be incurred pay those costs and are not cross-subsidized by the rest of our customer base.

CHAIRMAN NOTTINGHAM: If I could just follow up on Vice Chairman Mulvey's point earlier about the rail transportation of nuclear material, am I correct in saying that if you have an accident today, at one of your member companies, where spent nuclear fuel is released and people are hurt, and let's say it's because of the negligence of a railroad employee, Price-Anderson would actually cover the liability?

MR. HAMBERGER: It is my belief, and correct me if I am wrong, General Counsel Warchot, that we are responsible for $300 million.

(Off-mic comment.)
CHAIRMAN NOTTINGHAM: Okay, so it's limited responsibility.

MR. HAMBERGER: Right.

CHAIRMAN NOTTINGHAM: So the notion that we have never crossed the threshold of ever asking parties who make something to actually step up and bear some of the responsibility for the accidental or negligent release of it, at least part of the responsibility, we've sort of crossed that threshold?

MR. HAMBERGER: Well I think not only in that case, but just a short time ago Mr. West indicated, and I want to be very careful, because in our private conversations he made it very clear that he is not assuming the liability, but that he is, and his members, stepping in to help assume the economic cost of buying that insurance.

So it seems to me the Fertilizer Institute has crossed that line as well.

CHAIRMAN NOTTINGHAM: General
Timmons, in looking at this puzzle I want to make sure that we don't do anything that harms the short line industry. That is certainly not our intent, not my intent.

You came up with a couple of thresholds, $25 million if I follow your testimony of insurance. How did you sort of arrive at your threshold? Did you kind of look at short line industry averages for insurance? As you know better than anyone there is enormous diversity within your membership.

MR. TIMMONS: There is.

CHAIRMAN NOTTINGHAM: You have extremely small railroads, maybe a couple of employees, mom and pop, maybe a couple of miles of track, and then you've got the pretty sophisticated multi-state significant players.

MR. TIMMONS: We do.

CHAIRMAN NOTTINGHAM: And nothing that - looking at a change of rules or policies that impact all of them, how to hit
that correctly is going to be a challenge if we go down that road.

MR. TIMMONS: It certainly requires an awful lot of in depth study. But roughly half of our members, if you moved that threshold to $25 million, it would require about half our members that move TIHs or more, to bump up to $25 million.

And that number is an estimate of what we think that - that is the appropriate threshold for Class IIs, and clearly for Class IIIs. The adjustment for the Class III of course is 200 percent of their annual revenue, which would be something on the average, something less than $25 million.

So in a rough sense without getting into the math of it, $25 million is the rough threshold that we were looking at for Class II and Class III railroads.

In terms of the implications for the small railroad industry at large, when you say you want to make sure there are no adverse
implications for them based on policy change, the difficulty they have to be honest about it is that they do not have the option of rejecting this.

And so they are driven to accept it, to move it, and traditionally have done a very very good job in this regard, simply because it's generally a daylight move in low volumes at low speeds. So their traffic - their history of moving this stuff is extremely good.

Last year the insurance industry picked apart the small rail industry TIH movement profile, and was very very impressed to include Lloyds of London and Berkshire Hathaway offering to be reinsurers for the small railroad industry for private insurance.

So the issue is, if you have the option, many of these small railroads would choose not to move it. But if we can't get away from the common carrier obligation, and we are not suggesting that we should, at least
set a range of conditions that permit them to reasonably haul it without being compelled to go out of business if a mishap should occur.

CHAIRMAN NOTTINGHAM: Thank you.

Vice Chairman Mulvey.

MR. MULVEY: Just to follow up on one thing with you, Ed. And that is, with regard to the cost of insurance, are the railroads to your knowledge able to separate out the incremental costs that they have for carrying HAZMATs as opposed to their overall liability? That's the first part of the question.

MR. TIMMONS: I assume the answer to that is yes, but please, if I could defer to Mr. Burr.

MR. MULVEY: The second part of that is, you mentioned about adjusting - of course the reason for going for the simplified standards is that we don't want to have the parties fighting over everything all the time, and just take it as it is.
But it is also clear that this is something that has been around for a long time and probably needs updating. Is the Association of American Railroads and the American Short Line Association, are both of you amenable to seeing URCS updated?

MR. HAMBERGER: The only formal position we have taken is in this particular proceeding as far as the general approach, let me check with our members in the back.

MR. MULVEY: Thank you.

MR. TIMMONS: We would certainly be open to looking at that.

MR. MULVEY: Thank you very much.

CHAIRMAN NOTTINGHAM: Thank you.

Any further questions? Mr. Buttrey?

MR. BUTTREY: I'd just like to clarify. I know you didn't mean to give an incomplete answer, but maybe I missed it when we were talking about Price Anderson and the liability of the railroads and the cap on the
liability - not the cap on the liability, but the insurance provisions.

Did I hear you say that if there were an incident, catastrophic incident, which you would assume nuclear radioactive would be, under Price Anderson the railroad's liability would be limited or capped at $300 million?

MR. HAMBERGER: Three hundred million, yes.

MR. BUTTREY: And then it would go to the pool, is that correct?

MR. HAMBERGER: I believe that's the way it works, yes.

MR. BUTTREY: So the rest of it goes to the pool up to -

MR. HAMBERGER: Five billion.

MR. BUTTREY: Is it $5 billion?

MR. HAMBERGER: Closer to $10 billion.

MR. BUTTREY: Ten billion? Okay. I know it goes - but my question is, then it goes to the pool.
And that pool is spread over what I believe to be a fairly large number of participants shall we say in the industry?

MR. HAMBERGER: It is my understanding all the nuclear utilities, right?

MR. BUTTREY: But in your case the pool would be a handful, less than a handful of participants; is that correct? If there were a pool?

MR. HAMBERGER: You mean in the draft legislation, is that what you are talking about?

MR. BUTTREY: Yes. I'm talking, if there were a similar Price-Anderson type mechanism. Your pool would not be a broad pool of many participants; it would be a very limited number of participants in that pool.

MR. HAMBERGER: That's correct.

MR. BUTTREY: Which would tend to limit the ability of the pool to meet the demand that is being made on the pool if there
were a catastrophic incident; is that correct?

MR. HAMBERGER: The way that was designed in that draft legislation was, it was a contribution based on per carload by the shipper up to a threshold of $10 billion.

MR. BUTTREY: Per incident?

MR. HAMBERGER: Per incident. And then you would go - both Class I, II, III railroads, shippers, and tank car manufacturers, all had insurance thresholds.

And in theory I suppose you would work through that entire - all of those thresholds before you go to the pool. Then the pool would contribute whatever was necessary to meet the liability losses that were incurred as a result of the incident.

MR. BUTTREY: And the tank car producers, the manufacturers of the tank cars -

MR. HAMBERGER: That's correct.

MR. BUTTREY: - which are presumably the safest in the world.
MR. HAMBERGER: Right.

MR. BUTTREY: Anybody who knows anything about it, they would participate in the pool.

MR. HAMBERGER: Not the pool; they would carry an insurance level.

MR. BUTTREY: They would carry an insurance level.

MR. HAMBERGER: The shippers are the pool contributors by carload. And so it was – the discrimination was based on how many carloads you moved each year, and you contributed.

Once you reached the pool threshold you didn't contribute any more; you stopped. And the pool sat there until there was some pressure on the pool, and then they contribute to meet the needs of the mishap. And the Secretary of Transportation was the manager, monitor, overseer and judge of when the incident fund - that's the name of it, the incident fund - was to be tapped.
MR. BUTTREY: So you would work through all the - you work through potentially the railroad's insurance, the shipper's insurance, the tank car insurance, before you got to the incident pool? Thank you.

MR. MULVEY: But to clarify on that point, Mr. Butz, you were saying that the pool for the Price Anderson consists of 103 utilities. Your pool would actually have many many more shippers than - many many more contributors than 103, right? Because there are that many more shippers of TIH?

MR. TIMMONS: Well, yes, that's right, there are many.

MR. HAMBERGER: There are many receivers. I don't know how many shippers there are.

MR. MULVEY: Well, that's the question. He said that there were fewer or - and I want to be clear - would it only be the producers? Or would it also be the receivers as well that would contribute to the pool?
Okay, so then that is a relatively few number of chemical companies.

Thank you.

CHAIRMAN NOTTINGHAM: Any further questions?

This panel is dismissed. Thank you.

We will now call up the next panel, panel IV, a group of representatives of the chemical industry.

From Dow Chemical Company Cindy Elliott and Jeffrey Moreno; from PPG Industries, Inc., Sharon Piciacchio and Karyn Booth; from Occidental Chemical Corporation Robin A. Burns; from E.I. du Pont de Nemours and Company, Gary W Spitzer; and from Olin Corporation, John McIntosh.

Welcome, and we will invite you forward and get you going. Our first speaker will be Cindy Elliott and Jeff Moreno.

Whenever you are ready you can proceed. Thank you.
PANEL IV: CHEMICAL SHIPPERS

MS. ELLIOT: Chairman Nottingham, Vice Chairman Mulvey, Commissioner Buttrey, I am pleased to present testimony again today on an issue that is so important to Dow, the common carrier obligation of railroads to transport hazardous materials.

The common carrier obligation ensures that all chemicals continue to move by rail when that is the safest mode available. Currently 20 percent of Dow's 2.2 million product shipments annually are regulated as hazardous materials, and our culture of safety and responsibility pervades all activities in their production, use and transportation. Because the topics listed in the Board's hearing notice touched on both commercial and legal matters, I am joined by Jeff Moreno who will comment on legal aspects of this hearing.

I am proud of the fact that transportation for hazardous materials has never been safer with extensive private and
regulatory initiatives underway to further reduce risks.

Consistent with the principles of responsible care, Dow is working with our railroad partners and other industry stakeholders on a number of projects that focus on prevention and risk reduction.

First our overall objective is to reduce the number of shipments and container miles traveled by TIH materials by 50 percent by 2015 from our 2005 baseline.

Second, DOW, UP and Union Tank Car are in the process of implementing a next generation tank car for TIH materials to increase the survivability of a tank car involved in accidents.

Third, for more than two decades DOW and UP have provided emergency preparedness and response training through TRANSCAER to the communities along rail routes.

And finally to improve shipment
visibility Dow has installed GPS and sensor
technologies on all of our TIH tank cars.

These programs illustrate the
financial commitment, cooperation and progress
toward a common goal of reducing the risks of
hazardous materials transportation to both
railroads and the public at large

In addition to private industry
initiatives, FRA, PHMSA and TSA either
recently have adopted or are considering new
rules to resist the risk of transporting
hazardous materials by rail. These include
rules for routing, and operating practices, as
well as standards for tank cars, routing and
track safety standards.

These new programs deserve a
chance to demonstrate results. A rush by the
Board to impose liability limits for railroads
could undermine these efforts.

Dow is asking the Board to defend
the common carrier obligation against erosion.
The Board must not take any action that
unintentionally undermines the safety of transporting hazardous materials by rail.

This means ensuring that liability remains with the responsible party, specifically the party in control of the material.

I will now turn the microphone over to Dow's counsel to discuss the limits of the Board's authority to address liability limits, and the issues to be considered in any change to the liability regime.

Jeff.

MR. MORENO: Thank you, Cindy. Good afternoon. I wish to begin by noting the common ground between the rail industry and hazardous material shippers.

The current fault-based liability regime has generated substantial cooperation between railroads, shippers and regulators to greatly reduce the risk of accident TIH releases, and to mitigate the impact of any release that may occur.
Now several members of the board this morning expressed some doubt or skepticism as to what other shipper, TIH shippers other than perhaps TFI, is doing to address the liability issue.

I submit that the Board's question seems to suggest that indemnification or railroad liability caps through legislation are the only solutions to the liability question. But risk reduction efforts are an equally valid activity that is deserving of recognition by this Board including the efforts that Cindy has just discussed.

Any tinkering with the current fault-based system that fosters this type of cooperation must not be done lightly. Any action that would permit railroads to impose indemnification requirements in their tariffs is precisely the type of tinkering that this Board cannot and should not undertake.

As a threshold matter, the Board may not exercise its economic jurisdiction in
a manner that adversely affects safety. Now Chairman Nottingham, this morning you asked a question of the association's panel as to whether the STB can ever make a decision that adversely affects safety.

While I think it's important to distinguish between those decisions that have a direct impact on safety, and those that have incidentally impacts, the - as the Akron court has noted, questions of risk liability are also questions of safety.

Therefore, any action that this Board takes with respect to liability has direct impacts on safety, and when we are talking about such direct impacts on safety, this board must be very careful on how it exercises its jurisdiction to ensure that it does not do so in a way to adversely affect safety.

A major function of our fault-based liability system is to prevent future harm through admonition of the wrongdoer. An
indemnification provision undermines that function by reducing the financial incentives to operate safely.

Moreover, indemnification also distorts the cost-benefit analysis that occurs when deciding whether to make safety-related investments such as signaling dark territory or investing in positive train control.

Moreover, a fatal safety related flaw in any indemnification proposal is that it can only apply to railroads since this Board's jurisdiction only extends to that mode. This will create undesirable incentives for shippers to use trucks which provide service without an indemnification requirement.

All of these results are contrary to the broader public needs that shape the boundaries of the common carrier obligation.

A tariff indemnification provision may also not be enforceable in many, perhaps most states, because indemnification is a
matter of state tort law, and in most states a railroad acting as a common carrier may not exculpate itself from its own negligence; and therefore such provisions are void as a matter of public policy.

But when a state is acting within its police powers to protect the public health and safety, such as when it voids indemnification laws on its public policy, the board's jurisdiction does not preempt those laws unless those laws unreasonably interfere with railroad transportation.

I would submit the fact that the railroad industry has hauled TIHs for nearly 100 years without indemnification provisions would strongly suggest that this Board cannot reach that conclusion.

To the extent that Congress has in fact preempted state tort laws it has done so through the Federal Rail Safety Act, and until just last year, that act granted railroads broad liability protection by preempting all
state law claims related to any matter covered by federal safety regulations, even when a railroad was in violation of the federal safety standard that caused the damages.

But just last year in 2007 Congress amended the act to revoke that protection, and it did so in response to preemption rulings arising from TIH releases in the Minot incident. With Congress having so recently expressed its intent to subject the railroads to full liability for their negligence for TIH releases, I do not see how the board can reasonably assert discretion to approve a contrary result.

At its essence this hearing is about the risk of transporting TIH materials by rail and who should bear those risks. But what the rail industry has requested is special treatment, which is an unprecedented quid pro quo for the common carrier obligation.

Dow submits that the risks faced
by a railroad when it transports TIH materials
are not so different than those risks that
other businesses confront on a daily basis, so
as to merit this form of special treatment.

Other businesses, including other
TIH transporters, manage similar risk at a
cost of doing business - as a cost of doing
business, yet they continue to engage in those
businesses profitably.

What makes railroads unique is the
market power they possess to demand special
treatment. The common carrier obligation
ensures that despite this market power TIH
materials continue to move by rail when that
is the safest mode available.

The rail industry has tried to
distinguish itself from these other businesses
on the grounds that TIH materials account for
only a small fraction of the railroad
business. But this claim ignores all the
other traffic that railroads handle for which
TIH materials are essential.
For example chlorine is essential in the production of all plastics that railroads transport. Anhydrous ammonia is essential for growing the corn that railroads transport, and that corn is essential to producing the ethanol that railroads transport.

Anhydrous ammonia is also essential to enabling coal-fired power plants to meet their clean air act requirements, which enables railroads to haul more coal.

Furthermore the rail industry already has a quid pro quo for the common carrier obligation: they are and have been the recipients of substantial government largesse in the form of public land grants, loans and subsidies, antitrust exemption, widescale preemption of state and local laws; eminent domain powers; and bottleneck franchise protections.

There simply is not a reasonable basis for special treatment of railroad
liability risk. Any change in the existing liability regime for TIH transportation cannot and should not be made by this Board, because it cannot make a holistic determination that require tradeoffs between safety and economic matters. Only Congress can do so.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Moreno.

We will now turn to Sharon Piciacchio. I hope I didn't mangle too badly. And Karen Booth. Welcome.

MS. PICIACCHIO: Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey, I am Sharon Piciacchio, Vice President of Marketing Services and Cal-Hypo for the Chlor-Alkali business unit of PPG Industries.

I appreciate the opportunity to appear before you today to explain why PPG strongly believes that the railroad's common carrier obligation must continue to apply to the transportation of chlorine, a commodity
that is critical to the U.S. economy and our way of life.

Appearing with me is our legal counsel, Karen Booth.

PPG is a diversified manufacturer of chemicals, protective coatings, glass and fiber glass, with over 22,000 employees in the United States, and more than 50 shipping facilities; and we are one of the largest manufacturers of chlorine, a commodity classified as a TIH.

At the hearing in April the Board heard compelling arguments as to why the common carrier obligation is critical to companies like PPG that depend on the railroads to safely transport chlorine, and why chlorine is essential to the nation's economy and to human life despite its hazardous characteristic.

It is undisputed that rail transportation is the safest overland method of transporting this commodity, as we've heard
many times today. This has made the railroads critical to our chlorine network. Although PPG can ship to a limited extent by barge, and to certain customers by pipeline, the vast majority of our chlorine consumers cannot physically receive chlorine by barge or pipeline, and due to safety considerations, PPG does not ship chlorine by truck in North America.

Safety in the production and shipment of chlorine is the highest priority of our business, and we are proud of our safety record. In 2007 PPG was recognized by all five Class I railroad carriers for completing the year without a single shipper caused hazardous materials release.

This hearing was initiated in response to the claims of the railroads that shipments of hazardous materials, and in particular, TIH commodities, create extraordinary liability risks that make requests for transportation of these materials
unreasonable in the absence of liability limits.

I would like to summarize why PPG believes that the railroads' concerns do not warrant any action by the Board to change the common carrier obligation.

First we believe that railroad transportation of chlorine is reasonable under the common carrier obligation based on the longstanding history of the carriage of this commodity by the railroads, and the importance of chlorine to the public health and welfare.

The courts have previously decided that railroads cannot refuse to transport a commodity simply because it is dangerous, as long as it is shipped in accordance with federal safety regulations.

We believe that this logic and legal precedent still holds true today.

Second, the railroad industry contends that absent the common carrier obligation they would not choose to transport
chlorine and other TIH materials, and that this public duty justifies a limitation of their liability by the government.

The railroads are asking for special treatment. Companies that manufacture and use TIH materials and other transporters everyday face and manage similar risks. Yet these companies continue to engage in their businesses without protection from the government.

Furthermore the railroads have a long history of safely transporting chlorine, and only recently have attempted to discourage the transportation of this commodity through extraordinary double digit price increases. The rail industry claims that times have changed, and that the risk of liability and the cost of transporting chlorine has increased.

The real change is that the railroads are now choosing to exert their market leverage over shippers to achieve their
goals. The lack of bargaining power, especially of captive shippers, is allowing the railroads to implement unreasonable pricing for instance that manufacturers and consumers cannot fully absorb and remain competitive in the global economy.

Furthermore we have customers that are distressed over the rising rail transportation costs and have requested PPG to consider truck alternatives. However such requests have not been accommodated by PPG for safety reasons.

Our company is concerned that the continuing rise of rail transportation costs may add to the factors that are causing some of our customers to shift their production operations outside of the continental United States, or simply curtail operations causing a loss of business for PPG, and a loss of American jobs.

Third, the railroads claim that rates for the transportation of chlorine have
increased to cover rising costs for insurance and to comply with special handling and operational requirements have never been sufficiently justified.

To PPG's knowledge the railroads have not adequately quantified the rising costs that are claimed to apply to TIH shipment.

PPG questions whether the substantial rate increases that it has experienced are solely intended to cover TIH shipment costs. No detailed evidence has been presented that insurance and shipment handling costs for TIH justify the adoption of liability limits.

Fourth, PPG is concerned that applying liability limits to the transportation of chlorine could reduce the incentives for carriers to make safety-related investments. The most widely cited of rail incidents involving the releases of TIHs have been determined by the National Transportation...
Safety Board to have resulted from railroad error. PPG believes that the railroad should continue to be held accountable for their actions, and that the federal government should address the railroads' liability concerns by continuing to focus on improvements to rail transportation safety and security in order to prevent hazardous materials accidents from ever occurring.

Recent rail safety and security initiatives related to the transport of hazardous materials undertaken by the FRA, PHMSA and TSA are excellent examples of how the government can enhance the safe transport of TIH shipments. These important safety-security matters are within the jurisdiction of other federal agencies.

We are concerned that the limitations on the Board's jurisdiction over safety restricts the Board from reviewing and acting on the liability issue in a complete and comprehensive manner.
Fifth, PPG is aware and heard today that the Association of American Railroads is asking the Board to issue a policy statement at the conclusion of this hearing that would endorse tariff provisions that would require TIH shippers to indemnify the railroads for liability in excess of $500 million.

PPG strongly believes that it would be inappropriate for the Board to take such action. The policy requested by the railroads improperly assumes that TIH shippers do not share liability risks with the railroads, when in fact shippers today may be held liable for release of their product if due to the shipper's fault.

Also no evidence has been presented by the railroads that would support adoption of this specific liability cap proposed by the ARR, including whether shipper indemnifies for railroad negligence is sound public policy; what impact the proposal would
have on safety; and whether railroads' insurance obligations should be limited to an amount lower than what the market may in fact allow.

Finally, although PPG does not agree that the liability concerns of the railroad justify changes to the common carrier obligation to the shipper, if any initiative were undertaken for this purpose, it should be undertaken by Congress. And it must involve a thorough evaluation of the safety, liability and public interest considerations.

Any congressional initiative regarding liability limitations for TIH shipments to be successful must include the following:

Railroads should be required to disclose the Congress the details of extra costs associated with handling TIHs. Any liability cap or limitation applicable to rail transportation of TIHs must include railroad funding.
If adopted liability caps should be extended to shippers and not just the railroads with conditions or exceptions included to address intentional or grossly negligent acts.

Improved safety requirements for the railroads and mandatory audits to assess compliance with requirements.

And finally, rate relief must be considered in conjunction with any liability limitation including long term rate relief for both tariff and contract shipments, and other potential reforms to the rate relief procedures administered by the Board.

If Congress were to initiate a review of the common carrier obligation, PPG is willing to work with other industry stakeholders to address key concerns related to chlorine shipment.

I would like to thank the Board for allowing PPG to provide its testimony on this important subject, and I would be happy
to answer any questions.

CHAIRMAN NOTTINGHAM: Thank you.

Now we will hear from Robin A. Burns from the Occidental Chemical Corporation.

Welcome.

MS. BURNS: Thank you.

My name is Robin Burns, vice president, supply chain for Occidental Chemical Corporation, otherwise known as Occi Chem.

I am here today to Occi Chem's position on the common carrier obligation for transportation of hazardous materials including TIH such as chlorine.

As noted during the earlier hearing on common carrier obligations, it is extremely important that Occi Chem have access to an adequate rail transportation network throughout the United States.

Railroads must continue to be required as common carriers to carry hazardous
materials that are necessary for many of the industrial applications essential to our economy.

The common carrier doctrine is a bedrock of remaining rail legislation, and mitigates public discomfort with rail industry consolidation.

Occi Chem is a leading North American manufacturer of basic chemicals and vinyl resins including chlorine, caustic soda and PVC, the building blocks for a range of products.

Occi Chem employs, 3,100 people at 23 domestic locations spread throughout the central to eastern United States. Our products, which are used in water purification, medical supplies, pharmaceuticals, construction materials and agricultural chemicals are vital to the economy of the United States.

Our various business units make over 70,000 rail shipments per year of these
48,000 hazardous materials. Of these 48,000 shipments, about 20 percent are chlorine.

Due to the locations and needs of our many customers and users across the United States, rail transportation is essential for this critical building block. Pipeline transportation is not feasible for small or geographically distant customers.

Generally trucks are not cost effective, and are inherently riskier considering the number and distance required to handle the volume.

Before getting into details regarding a possible solution I want to remind the board that as a shipper we have absolutely no control over a rail car once tendered to the railroad. We have no say in the routing of the safe or unsafe movement of that car, while in the hands of the railroad.

Over the past four years we experienced exorbitant rail rate increases ranging from as high as 70 percent for non-TIH
to 238 percent for TIH commodities.

We believe these rates are directly related to the market dominance of the railroads. Over 70 percent of our origin and destination carriers are served by only one railroad.

This effectively provides the railroad with market power in pricing their service. One of the reasons given for these extreme rate increases is the liability for the transportation of TIH materials.

We understand that the railroads have suggested that we look to the Price Anderson Act as a possible model for a risk-shifting mechanism. Although a complete discussion of all the public policy and other considerations underlying the Price Anderson Act is beyond the scope of this testimony, we think the railroads have misrepresented the substance of the Act.

With respect to the Act and how it works, Occi Chem here adopts the testimony of
the Edison Electric Institute.

Moreover, the Act explicitly stands for unified limits that would also apply to shippers, and thus in this instance would limit the liability of the chemical industry as well as that of the railroads.

Occi is opposed to any shift in the liability allocation to shippers, unless that model continues to make railroads responsible for any incidents due to their gross negligence or willful misconduct.

In that regard, in all three accidents involving TIH releases which have been referred to it was concluded by government finding that the railroads were at fault.

Occi is opposed to supporting a program which provides multiple layers of coverage provided by both the carriers and shippers unless the discussions take place with all major shippers and railroads, and involve profit limits and material price
concessions to offset any agreed shift in liability.

Occi would be opposed to a new risk allocation model unless the railroads accept the preceding conditions; agree to negotiate long term multi-year contracts that permit shippers to plan their business; and promote meaningful reform of the current STB rate review mechanism.

In our proposed model the railroads including the short lines would jointly secure insurance up to a predetermined amount. Shippers would also jointly purchase insurance for the next layer of coverage.

Effective immediately shippers would begin paying a surcharge on a per shipment basis for all TIH moves. Surcharges are to be accumulated into a fund managed by a third party to be used in the event both levels of insurance coverage are exhausted.

Congress would be required to limit the liability of the total amount
covered by the three levels. In return we
would ask that the STB limit the rates on TIH
moves to an RVCR of 250 percent. In addition
railroads must negotiate in good faith long
term multi-year contracts as stated earlier;
make capital investments to promote safety
infrastructure; and continue to work with us,
the shippers, to implement safety and security
improvements.

I'm sure that you will hear
objection from the railroads on regulating
rates for these moves, but as reported by the
AAR, the TIH moves represent 0.3 percent of
rail carloads.

I would hope that the railroads
would be willing to do a fair and equitable
trade of regulation of 0.3 percent of their
business in return for a fair liability
mitigation in the event of an accident.

As mentioned in earlier testimony,
Occi Chem is actively engaged in the new tank
car design for chlorine. We have made a
public commitment to replace our entire chlorine rail fleet by – the new design by 2017. We estimate this will cost us, Occi, $250-300 million.

Based on our own commitment and attention to safety in our manufacturing facilities, our commitment to strengthen the car used to transport the material, our partnership with the railroads in emergency response and safe handling, and the importance of this product to the safety and health of the United States, we believe that the request to move chlorine is a reasonable request for service, and that railroads should continue to be obliged with the common carrier obligation.

We understand that there are limited costs associated with the transportation of hazardous materials. These may include resources for positive handoff; time required to constructively place the car in a specific spot within the train; and the cost of running the train at a slower speed.
However each of these actions is done for a specific reason to ensure the safe and secure movement of that car. We believe that these costs are already being recouped by the exorbitant rates being charged TIH shippers.

If the STB believes that a fair and equitable revenue-to-variable cost ratio is 180, then an RVCR of 250 should cover any unique costs associated with TIH moves.

However, Occi Chem and its customers are currently paying rates for chlorine shipments that have an RVCR in excess of 1,000.

If the railroad industry believes that changes to statutory common carrier obligation are appropriate, it must seek these changes from Congress not the STB. Courts have held that the Board has no authority to regulate the railroads on the grounds of safety. DOT, FRA, PHMSA and TSA are the only agencies with authority to issue safety and
security regulations governing the movement of these materials, and are actively engaged in looking for ways to continue to improve on the safe and secure movements of these materials. However, Occi Chem is willing as described above to discuss liability issues with the railroad industry.

We are grateful for the opportunity to speak today on the need to maintain the common carrier obligation. Chlorine and its derivative products are vital to the way we live. It is imperative that the STB continue to enforce the railroads' current common carrier obligation in order to ensure the continued safe transport of TIH materials including chlorine.

Thank you for your consideration.

CHAIRMAN NOTTINGHAM: Thank you, Ms. Burns.

We will now hear from Gary W. Spitzer from the du Pont Company.

MR. SPITZER: Chairman Nottingham,
Vice Chairman Mulvey, Commissioner Buttrey,
good afternoon.

I am Gary Spitzer, vice president and general management for a segment of the du Pont Company, a global science corporation, with revenues over $30 billion a year.

We operate in more than 70 countries, employ 36,000 people in the U.S., and over 70,000 products and services for a variety of markets.

I am here today to testify in support of the retention of the common carrier obligation as it currently exists. It is clearly in our nation's best interests to require our freight railroads to transport hazardous materials including TIHs.

Du Pont believes that neither relieving the railroads of their duty to carry TIH materials nor absolving them of their responsibility when their negligence causes accidents would be an appropriate undertaking for this board.
Either of these approaches would have negative consequences for the safe transport of these commodities, and for the manufacturing of everyday products which drive the U.S. economy and are essential to the American public and quality of life.

Before continuing I would like to note that I appear before you as a witness qualified to speak to the commercial aspects of the issues at hand. Since I am not a lawyer I will not address legal questions. Instead I refer you to the written statement du Pont submitted which fully outlines our legal position.

For more than 150 years du Pont has had a strong and vested interest in the success of the railroads. Like others in our industry du Pont has worked with railroads to develop rail cars, systems, and processes to safely transport materials, including hazardous materials and TIH.

This has benefitted the railroads,
our nation's economy, and the American
standard of living. Jointly we have achieved
an outstanding safety record. Despite our
long history of safe and mutually beneficial
collaboration, the railroads would now prefer
not to carry our hazardous freight.

Du Pont and others use and make
these products because the American people
need clean water, they need abundant food,
medicines, clean burning fuels, and numerous
other products that make our lives better,
safer, and healthier.

They also need jobs. Du Pont
alone employs 36,000 people in the United
States, and chemical companies employ over
860,000.

Where viable substitutes for
hazardous and TIH materials exist, we use
them. Industry has every incentive to reduce
risk where possible. However, because in most
cases there are no viable substitutes for TIH
commodities, there is an undeniable public
need for their safe transport.

Relieving the railroads of liability when they cause accidents would not address that need, nor would gutting the common carrier obligation by permitting the railroads to pick and choose which commodities they haul.

Either approach, while arguably beneficial to the railroads, would harm thousands of other American businesses and the American people.

I'd like to share a few examples to illustrate this potential negative impact.

Du Pont produces a variety of sulfuric acid products, a class of hazardous materials the railroads might refuse to transport absent the common carrier obligation.

Sulfuric acid is so widely used, its production volume is viewed as an indicator of general economic activity. It is used in a vast array of central products and
services including electricity generation, additives for clean burning fuels, car batteries, mining, papermaking, fertilizers, pharmaceuticals, electronics, many chemicals, and others.

It is also produced as a co-product from pollution abatement facilities, converting what had previously been emitted as sulfur dioxide.

Clearly in light of sulfuric acid's importance to such a wide range of industries, giving railroads the right to refuse to carry it would have a significant and adverse impact on America.

Another example involves anhydrous hydrogen fluoride, or HF. The TIH material which must be used to manufacture some refrigerants including the Du Pont Suva line. Du Pont pioneered much of the science and technology that makes today's air conditioning and refrigeration possible.

Much of the food the American
public consumes, medicines, and systems that maintain tolerable temperatures in our homes, cars, and even passenger trains depend upon these refrigeration products. On a day like today we are sure glad we have them, and they all begin with HF.

There are currently no substitutes for HF in these areas. Were we unable to viably ship this material the likely consequence would be increased imports of finished refrigerants, causing the loss of yet more U.S. manufacturing jobs, and negatively contributing to our nation's trade deficit.

Moving more regulated products via our nation's highways it would be neither realistic nor good for our American people.

Moving these products by rail is 16 times safer than moving the same materials by truck. In this period of skyrocketing fuel costs, the AAR is justifiably proud of the railroad's energy efficiency, since railroads can move one ton of freight 436 miles per
gallon of diesel.

Shifting transportation of materials from rail to truck would increase emissions of greenhouse gases, exacerbate highway congestion, and decrease our collective security.

Undoubtedly it is in the national interest to keep and move regulated materials on the railroads. The railroads have made it clear that they seek to be relieved of their obligation to haul TIH materials because they reportedly fear the risk of economic liability.

Du Pont believes that liability should fall on the individual or company that causes the event which results in the loss. If the shipper causes the loss or damage, the shipper should be responsible. If the carrier causes the loss or damage, the carrier should be responsible.

If a third party or force, such as a terrorist act, causes the loss or damage,
neither the shipper nor the carrier should be responsible. No party should be permitted to shift the responsibility or liability for its own negligence, or misconduct, to another.

The basic principle that seems to have been lost in the last panel discussion is that people and companies should be responsible and accountable for their own actions.

In the 19th century the railroads received vast land grants to develop rail service for the public use, convenience and necessity. Along with the land came the enormous wealth associated with the accompanying mineral, oil, gas, and timber rights.

The common carrier obligation was thus bought and paid for by the American people to ensure the growth and prosperity of the United States. Allowing the railroads to reduce or eliminate the common carrier obligation for TIH and other hazardous
materials would put companies like du Pont in
grave risk of no longer being able to produce
products important for the health, safety and
security of the American people.

This would also put at risk jobs
that support local economies and help balance
our nation's trade deficit.

In closing, Chairman Nottingham,
Vice Chairman Mulvey, and Mr. Buttrey, the
railroads must continue to fulfill the crucial
role they play in our nation's economy. This
role includes moving TIH and other hazardous
materials.

Thank you for allowing me to share
my company's views today. Du Pont stands
prepared to continue to work with the
railroads, with government, and with others in
industry to enhance the safety and efficiency
of the rail transportation system on which our
nation's safety and economic well-being so
depend.

Thank you.
CHAIRMAN NOTTINGHAM: Thank you, Mr. Spitzer.

We will now hear from John McIntosh from the Olin Corporation.

Welcome.

MR. McINTOSH: Chairman and members of the Board, I'm pleased to be here this afternoon.

I represent Olin Corporation, a company headquartered in Missouri. And I function as president of Olin's Chlor Alkali division.

We are headquartered in Tennessee, Cleveland, Tennessee, and we have manufacturing locations across the United States, from New York to the California coast, as well as facilities in Canada.

My testimony today will focus on the importance of common carrier obligation as it relates to the transportation of chlorine, a chemical of paramount concern and importance to our business.
The metrics for chlorine shipments by Olin are relatively simple and I think compelling. One hundred percent of our manufacturing locations are served by only one railroad; no competition, only one railroad.

Eighty percent of the customers we serve and the chlorine that we transport by rail is transported to customers who have no other option than to receive the products important to their business by rail.

So the metrics of the importance of the common carrier obligation to ship chlorine and service our customers is paramount to us.

For a captive shipper like Olin, regardless of the size of the location in which we are talking, the efficient movement of chlorine is a franchise issue for us. It is the very survival of our business. And it depends we believe on common carrier obligation.
As a preface to my testimony, and as we stated in April, Olin unequivocally believes that the railroad carriers, if not required to do so by law, would not carry TIH chemicals.

This is based on public and private pronouncements as well as any affirmative response to the contrary by the railroads during the April hearings.

I know that in a previous panel there has been testimony that their current objective, the railroads' current objective, is only to ask the STB to establish a policy, a policy we think in appropriate, related to liability. But I believe the long term objective they have is still to not have the obligation, the legal obligation, to move TIH chemicals.

Olin believes that as has been testified by many that liability should rest with the party that has caused the damage, or the incident, and that that should be -
continue to be applied to TIH shipments as well.

We believe that shifting this liability away from the carriers, in whole or in part, to the shippers, is not a good public policy for reasons mentioned by many others, but most notably because it transfers the obligations and the financial responsibility away from those who are most directly in control of those events and issues that create the liability in the first place.

We don't believe that when the common carrier obligation was crafted by Congress that their intent was that the obligation be dependent upon cost or risk versus benefit or whether the railroads could operate without derailments or liability claims associated with the transportation of TIHs.

So we believe that these excuses, or these reasons which have been used by some
in testimony, should not be and cannot be a reason to deny service to shippers like Olin under the common carrier obligation.

Olin is aware of various proposals that have been testified about in both written and oral testimony to create a liability cap that is modeled on or similar to the Price Anderson Act. Olin believes that there is merit to indemnification on a model that could in effect be based on a concept similar to the Price-Anderson Act.

But we establish conditions that we believe must go along with that. And the conditions have been spoken to previously. We believe that there needs to be something in it for the shipper. We believe that support of some concept for indemnification or liability sharing or liability cap should include an agreement by the railroads to provide a significant reduction in current rates, both private rates and tariff rates; it should obligate the parties to enter into
long-term written contracts, to provide stability and predictability that are needed by both American producers and consumers of TIH.

The benefits of any liability cap should be extended to the shippers who are an integral part of the process, and that the rate process going forward should be simplified and more equitable than it currently is.

If these standards were met, Olin would be supportive of a liability cap model as one type of solution.

I testified back in April that at the time Olin was willing to, and had engaged in conversations with certain railroads about its willingness to share incremental liability costs that railroads were incurring in their insurance premiums associated with moving TIH materials.

At the time, and still to this time, we have been unable to make any headway
in establishing a model for sharing based on that kind of a concept, because nobody has been willing to share with us incremental premiums or incremental liability insurance costs, or the unique costs associated with the transaction.

We are currently in discussion with railroads looking for other commercial approaches to resolve liability, structured more about liability cap provisions that are not inconsistent with some of the models that have been spoken to in earlier testimony.

We believe it is vital that whatever liability arrangement ultimately comes to fruition, if one does, that everyone involved in it needs to be a part of the process.

We believe it's important to recognize that there are other liability models besides Price Anderson that are out there that have come in to play since 9/11, and form the backdrop of some other you know
entities today that have had to resort to unique arrangements to provide the insurance backstop they need for property and/or casualty insurance protection.

Common carrier obligation is a result of a federal statute, and we believe that that statute requires action by Congress to change, and would support testimony that has been given that the STB's oversight in this case would be to advise on and provide input to Congress who ultimately would have the responsibility for so changing any part of the common carrier obligation.

Much has been talked about in terms of what would be classified as a reasonable request for service involving the movement of TIH. We believe that the obligation as set in the exact words of the U.S. code are very specific in that it doesn't provide conditions or obligations that might otherwise have been referenced by others who have testified.
We as I mentioned earlier have been pursuing commercial arrangements, commercial resolutions to this issue focused on liability caps. We were unsuccessful in doing that based on incremental liability cost sharing.

We are not, as I mentioned earlier, adverse to or unsympathetic to the issues the railroad raises about liability. We are not unsympathetic to the issues they raise about unique costs, either. We have several of those very same unique costs that we are incurring in our operation, and quite honestly, we operate in an environment in which we can't just ask a regulatory agency to issue a policy and allow us to recover those costs. And we operate in a competitive environment in which we can't just pass those costs along.

We believe that there are important issues at hand here. We commend the STB for their willingness to understand
and take testimony on this issue.

We believe it's important, and it's key to the survival of all the parties that are involved in this.

And we look forward to being a part of any constructive conversations, constructive resolutions of a liability model that will meet equitably the needs of all the interested parties.

Thank you for the opportunity, and I'm prepared to answer any questions.

CHAIRMAN NOTTINGHAM: Thank you, Mr. McIntosh, and other panelists.

I'd like to start with Vice Chairman Mulvey with questions if you would like.

MR. MULVEY: I'll start off with Dow Chemical. You talked about risk reduction, and one of the things the AAR has suggested is that there may be some substantial risk reduction with co-location of the production HAZMATS and their
How feasible is it to increase the co-location of TIH and PIH materials with their final use, their final uses?

MS. ELLIOT: We have looked at those types of opportunities, and it is feasible when there is either a new production facility that needs to be built that it could perhaps be put on a current site.

So there are a couple of examples of that. However, in most instances, the customers are where they are located, and coming from a commercial background that I do, in many instances our customers cannot use one chemical from one of our plants that, even though we use the same process, is made in a different location. You have so many variables when you make a product such as the raw materials, the reactors, the piping, the types of - you end up then with what you would think would be a homogeneous type consumption.
product when in fact they are much different.
And our customers design their plants around those products.

So I've had many instances where the customers couldn't even use a product from one of our plants versus another one of our locations due to their design of their product and their end use specification.

So it's very difficult to do.

MR. MULVEY: Thank you. It's interesting, you might have the same observation when it comes to coal. You would think coal is a fairly homogeneous product, but in fact coal utilities have specifications for their boilers for coals from certain areas, and they can't just readily switch from one type to another.

PPG, you say that the railroad accountability makes the railroad safe. The railroads were here before saying that placing more of this burden on the shippers for indemnification will make the shippers
safer.

It seems that people are saying that unless you are subject to a massive lawsuit you are not going to operate safely, or there is going to be a tendency to operate without due regard for the public health and well-being.

Do you have a comment on that?

MS. PICIACCHIO: I would say with respect to the railroads and the industry, we are all very conscious of safety, and we all move forward everyday with continuous improvement to make things safer.

But I think what we said is, it could impact a decision, because every decision is an economic decision at times, and you are evaluating the cost for a safety improvement versus you know what benefit you will get from it and what the outcome will be, and what risks you may mitigate.

So our statement was that it could impact, but not necessarily would. And again
we respect both the railroads and the industry for their safe efforts.

MR. MULVEY: The railroads have something of a unique problem facing them in the sense that while your plants are located in a fixed geographic area, where you can monitor activities, the railroads operate over a 140,000 mile linear factory if you like, and is virtually impossible to constantly police it. You could always have vandalism. You could have rogue employees once in awhile who doesn't take care of themselves. We've just heard recently about people driving trucks around the country who have commercial drivers licenses despite the fact that they should not have them because they have heart conditions and the like. And this happens with the railroads as well.

There are also weather factors on these 140,000 mile systems that also causes rail - so they have much less control over their destiny than do shippers.
Does that give them some credibility in making their argument that it really can't underwrite these losses and be subject to them, and that they should really be the responsibility of those firms that can control or can better control their facilities?

MS. PICIA CCHIO: I think producers and the railroads face things that they can't always control. For example when the Gulf Coast was hit by severe hurricanes recently those were things we couldn't control. We had to do everything we could to mitigate any risks or safety.

I will also say that I'm not an expert on all the controls and safety mechanisms that the railroads put into place and have the opportunity to put into place to make their networks safer.

So I would say it's just a matter of looking at each unique situation and saying, can they improve what they have. And
that is what we are looking for, improvement.

MR. MULVEY: With regard to Occi
Chem and the revenue to variable cost ratio
of 180, I don't think it's fair to say that
the Board feels that 180 is a fair and
equitable rate. It's the rate at which we
presume that the railroad has market
domiance.

If it's that or higher, our
presumption is that it's likely to have
market dominance. It's not really much to do
about whether that rate is fair or equitable
or not. The rate could be 180, or it could
be higher and would still be the fair rate.

But that's all I have right now.

CHAIRMAN NOTTINGHAM: Mr. Buttrey,
any questions?

MR. BUTTREY: I just wanted to
explore something if I could with Mr.
McIntosh. Since you mentioned my home state
of Tennessee, I thought I just might ask him
a question.
I'm envisioning a situation where - let me just ask you this first. Your production capability, is it - say for instance you decided you didn't want to make chlorine any more, you wanted to make some other chemical for commercial use. How quickly could you change your technology from chemistry, from the chemistry producing chlorine to the chemistry of producing some other commercially viable and feasible product?

MR. McINTOSH: I couldn't. The fact of the matter is that if I couldn't move chlorine effectively and economically to my customers, what's left of my business that isn't supported by chlorine and its co-product caustic is of such magnitude that my $1.2 billion business would not be viable, and there would be no more Olin for alkalyde products.

MR. BUTTREY: There would be an Olin Corporation, but it wouldn't be
producing chlorine?

MR. McINTOSH: It wouldn't be producing chlorine. The assets are specialized and useable only for the most part for the chemicals that are produced, and are not readily transferrable or convertible to other chemicals of commerce, even if, outside of the matter of whether it is economically feasible or not, it's not technically feasible.

MR. BUTTREY: So it wouldn't be like an oil refinery, for instance, which involves a distillation process where you produce, depending on how long you keep the product in the distillation process, you can pull off different kinds of products off of that crude product until you get to the point where you want to be in terms of what you are producing, your diesel or gasoline or kerosene or some other product. It's not like that?

MR. McINTOSH: No, sir, it's not.
MR. BUTTREY: Okay, is that true for Occidental? Is that true for everybody? Okay, so you really couldn't - so those production facilities would basically be obsolete.

MR. McINTOSH: That's correct.

MR. BUTTREY: If you no longer produce chlorine. So you'd have to write off what would be a huge - presumably a huge asset on your books because it would be no longer useful to produce anything because it's set up to produce chlorine and nothing else; is that correct?

MR. McINTOSH: Correct. And I would also add that out of the hundreds of customers we have, I would think a fairly high percentage of them would be faced with the same technical reality that absent the ability to source chlorine, their processes which would use that as a raw material to make another product, are not readily transferrable to something else, another
product; and in most cases, in the majority of cases, there is not a substitute for chlorine as the raw material precursor for what our customers are producing.

MR. BUTTREY: Is that true for sulfuric acid as well?

MR. SPITZER: In many cases that is the case; in some cases there are substitutes. But in a large number of cases it is the product that is needed.

If I could just add to what Mr. McIntosh said, in the case of chlorine we use it to produce kevlar fiber which is used in bulletproof body and vehicle armor, protects troops as well as law enforcement at home. Talk about life saving, it's credited with saving the lives of over 3,000 people.

We need chlorine ultimately in the process to make NOMEX, a fire retardant fabric used in aerospace applications.

The fact is for this chemistry as it exists today we do not have a substitute
for chlorine.

MR. BUTTREY: Just curious, does PPG make the heat shield for the space vehicles? You do not. Too bad.

I'm thinking about a situation where a large TIH facility, heaven forbid, would suffer some type of catastrophic release. I went through a chlorine plant one day, and they loaded me down with a lot of gear. And including hard hat and goggles and everything else that goes along with that. And I just casually asked, are we expecting a problem? And they said, no, but if there is one you are going to be prepared to deal with it, because we are going to give you a respirator and a breathing device that will allow you to continue to move and get out of here in case something goes wrong.

If that were to happen I presume that there is a plume, as they call it, a plume of troubling gas which would go into the atmosphere, and potentially anyway affect
some community of human beings or animals as
the case may be, and that there would be a
pretty serious problem ensuing from that.

And so if that were to happen our
comp.ay may decide, well, you know, we are
not going to do this anymore. We have
essentially been wiped out here, and so we
are not going to continue this. And the
government comes and says, oh, but this is
required and necessary, and you really have
to do this.

And I'm wondering under what
circumstances you would agree to continue to
be involved in that business when the
government says, you are going to do this,
you are going to produce this stuff because
it is required for our national security or
our public health, whatever.

Could it be that you might be
interested in being protected against
liability in a situation where the government
tells you you are going to have to produce
this stuff whether you want to or not.

Anybody like to take a crack at that?

MR. SPITZER: I'd like to if I can. Because I think when this question comes up, I think a point that needs to be made is, a railroad is a very different type of business. We were not given vast land grants. We do not have what I would call a federally protected monopoly like the railroads have. We function in a free and fair competitive environment.

There are certain responsibilities that the railroads therefore took on in return for that, and that was the common carrier obligation, and to act in our nation's interests.

So I think that is the first point, that they are in a different type of business.

The second is, there's been a lot of discussion relative to insurance and
liability and caps, but I think it's extremely important to look at what's done to reduce risk.

Because when I hear the proposals from the railroads, and I quote, it is require indemnification for any liability or exposure greater than $500 million. But what I heard from the last panel is that even if it was the case where the railroad was at fault, or the railroad had misconduct or negligence, they are expecting shippers to go ahead and take on that liability.

I suggest that what we do in our industry is, we have a scientific approach to identifying the risk; to identifying the failure mechanisms; and to taking the actions in terms of equipment, people and processes to reduce those risks and mitigate those potential actions.

That scientific-based approach I am assuming that the railroad takes that in what they do.
I'll just finish up that given the long history that we have with the railroads, greater than 99.997 percent safety record, and getting safer based on what PHMSA and what FRA and the new tank car ruling I believe that we have an opportunity to continue the shipment.

And I believe it is a bit of an exaggeration in the prior panels when we hear about the so-called ruinous liability.

MR. BUTTREY: Thank you.

CHAIRMAN NOTTINGHAM: Several witnesses today on different panels have mentioned that this Board is not authorized to make any decisions that could either directly or inadvertently or indirectly result in lessening safety conditions. I know I'm paraphrasing. I'm sure no witness actually said it exactly that way.

But it does cause some concern to me. Because as I look back, I was just thinking about our docket on any day of the
week, the types of garden variety of things this Board does, licensing, line discontinuance, abandonments, rates, review of rates, rate cases, costs of capital and setting the appropriate cost of capital termination, the revenue adequacy review, looking at preemption and what rail transportation operations are preempted from state and local regulation, perhaps even merger review, when we decide to approve or disapprove a merger.

Under a certain set of circumstances, in all those proceedings we could actually follow the law, statute and regulation and precedent, survive appeal, but despite our best intentions it could cause somebody to decide it's a better business option to revert to truck traffic and thereby we see a deterioration in safety.

So I guess I'm having trouble accepting the premise that we can't do our work because there might be a chance that
someone out there might decide to opt for a truck route.

Can somehow help me, am I misunderstanding the position? Help me on this.

MR. MORENO: I think I can address that issue, because that was what I was trying to get at at the beginning of my verbal testimony.

The examples that you have provided, Chairman Nottingham, are, those where the safety effects are largely incidental.

I think maybe one exception is the merger scenario, and in that case I believe you are required to consult with the Federal Railroad Administration, DOT, on various safety matters, and the merging carriers are supposed to submit safety plans.

But when you are talking about rates or something like that, you are talking about very incidental issues. When we are
talking about indemnification the Akron court said specifically liability issues are safety issues. They are two sides of the same coin. So when you are addressing liability directly you are also directly addressing safety, and therefore you have to be much more careful about what you do and the impacts you have on safety, when you were talking about liability and indemnification provisions.

CHAIRMAN NOTTINGHAM: So your position is that liability has nothing to do with economics?

MR. MORENO: I didn't say nothing to do with economics. Because clearly there is a part that has to do with economics. But it is also equally safety, and therefore you have to walk a fine line between what is your jurisdiction and what is DOT's jurisdiction for example.

CHAIRMAN NOTTINGHAM: So just to pick an example - and again you mentioned
merger review. Yes, absolutely, we could dutifully and studiously and very consciously go through all the right checks and groups and do our best and still find out that a couple of years later, boy, we just didn't—we met the legal test, but we didn't anticipate that those 12 people were going to feel obliged to go retain truck services, and then unfortunately one of them has an accident.

So we make the best decisions we can on all these issues based on the record before us, but I've never heard anyone before today, before this proceeding, suggest that if there is any possibility of somebody moving to a truck option that we have crossed and line and entered an area where we should not wander.

So I'm going to be struggling with that. And we are not setting, or proposing to set safety standards, or tread on anyone else's terrain, even if we were to entertain
any proposal or hybrid proposal that might be
before us.

But I just wanted to call that
into question.

Any other questions from my
colleagues?

MR. MULVEY: Just a comment, one
question and a comment.

The issue of the land grants, most
of the studies that I'm aware of conclude
that the railroads paid back the value of the
land grants by 1947. That's the first time
that came up. When I hear this land grant
argument made, I'm always a little taken back
by it, because I'm not sure that's a good
basis for looking at whether or not the
railroad should be treated differently
because they received the land grants.

And secondly this common carrier
obligation that was mentioned as being in
law, it is enshrined in law, but the common
carrier obligation as a matter of common law,
goes back to the Middle Ages. So it is not something that was created by ICCTA or by the Interstate Commerce Act of 1887. It's a longstanding obligation for those who offer themselves out to transport people or goods.

I did have one question. For a Price Anderson type scenario, in Dow's testimony they indicate that a second pool funded by a small number of TIH shippers would not significantly expand the size of this pool to cover a TIH accident.

However, Dow and Dupont and some other TIH shippers really dwarf the size of the Class I railroads with regard to their revenues or even their assets. So would it be possible for these large producers of TIHs to contribute more meaningful to these pools, or to create something that would perhaps not be as large as the nuclear pool but the Price Anderson pool would be something that would be able to accommodate a serious TIH accident.
Anybody? Dow is the one I was calling for, so -

MR. MORENO: Theoretically, yes, it might be possible to contribute more. But that still begs the question of whether they should be required to contribute more, and whether that really is the Price Anderson model.

I believe, Vice Chairman Mulvey, that this morning you asked a question on Price Anderson, quoting the railroads getting off - without making any contribution to the pool in the nuclear context.

In the nuclear context the railroads are third party contractors. Yes, they get a free ride, but it's the entire nuclear industry that is covered by Price Anderson.

If you were to superimpose that model and treat the railroads as third party contractors in the TIH context and require TIH shippers to fund that pool, you would
need to create a liability cap and an insurance scheme that protects the entire industry, all TIH producers and everyone downstream from them.

And that's why we think the railroads haven't really proposed a true Price Anderson model.

MR. MULVEY: So in other words it's more complicated than the Price Anderson, because with Price Anderson there are 103 countable utilities, where you may only have 30 TIH shippers, but you have many thousands of recipients, right?

MR. MORENO: That certainly is the factor that makes creating the pool of a proper size an issue. Now there is the question in Price Anderson as to whether we need a Price Anderson type solution.

And what we are submitting is that what the railroads are calling for doesn't call for Price Anderson. Dow isn't saying that Price Anderson, there might not be
objectives, or legitimate objectives, for Price Anderson, such as assuring compensation of the public. But that is a determination that has to be made by Congress for the various tradeoffs. And what we are talking about here is what everyone calls the worst case scenario.

Well, we don't necessarily plan everything we do around the worst case scenario, and we need to also be asking the question, how probable is that scenario.

And what we hear most often from the rail industry is, what would happen if instead of Graniteville it was Washington, D.C. Well, you can't simply take all the circumstances surrounding the Graniteville accident and simply replace Graniteville with Washington. Because I doubt in Washington that the railroads would have been traveling at 50 miles an hour through a major metropolitan area on unsignaled track. So the accident probably wouldn't have occurred
if this was a Washington scenario, because all the other variables would have changed as well.

And we need to really ask ourselves, what is the probability of this incident, and do we need to legislator to address what is the worst case but probably least probable scenario.

MR. MULVEY: Thank you very much.

CHAIRMAN NOTTINGHAM: Just following up, I think that is a fair point. And there might be - I say might - be some way to come up with some sharing of risk between the TIH producers and railroad companies where TIH producers don't actually have to part with any money. They could self insure, set aside a reserve, chances are you will never need to spend it, and we can have a little better sense of security that we are not going to wake up tomorrow and have a Class I railroad, or god forbid, two, two in an accident, going out of business, leaving
shippers and rail customers a very serious problem.

So I just offer that up. It's good to know that you think it's a remote risk. That means that properly structured there might be very little chance that it could actually ever inconvenience TIH producers if in fact a wise and balanced policy were to be found.

MR. MORENO: Well, Price Anderson is in fact structured much that way, because the secondary insurance pool that the nuclear reactor licensees pay into is actually paid into after the fact.

I think you do have to address some of the concerns though of trying to collect from a much larger pool of potential contributors after the fact than has occurred in Price Anderson.

CHAIRMAN NOTTINGHAM: Any other questions for this panel?

MR. BUTTREY: I'm just curious
about - we spent a lot of time talking about today and hearing about inspection rules and inspectors and who regulates who.

Who else other than OSHA would be on your property at any given time in terms of federal regulation? Who other than OSHA? I know OSHA is.

MR. McINTOSH: EPA, Department of Homeland Security, the FBI, the Coast Guard. TSA, immigration, or ICE as it's now called.

MR. BUTTREY: Does that pretty much complete the list? Can anybody think of anybody else?

MS. BOOTH: FRA.

MR. BUTTREY: Thank you.

CHAIRMAN NOTTINGHAM: Any other questions for this panel?

MR. BUTTREY: No.

CHAIRMAN NOTTINGHAM: This panel is dismissed.

(Panel dismissed.)

CHAIRMAN NOTTINGHAM: We will call
for the next panel, which is comprised of representatives of the freight railroad industry.

From the Union Pacific Railroad Company, Diane Duren. From the Norfolk Southern Railway Company, Fred M. Ehlers. From the CSX Transportation Company, Howard R. Elliott. And from the BNSF Railway Company, David T. Burr and Richard E. Weicher.

Good afternoon and welcome panelists. We will start today by hearing from Diane Duren of the Union Pacific Railway Company.

Thank you, welcome.

PANEL V: FREIGHT RAILROADS

MS. DUREN: Thank you.

Good afternoon, and thank you for the opportunity to speak with you today about Union Pacific's perspective on the railroad's common carrier obligation to handle TIH commodities.
I would like to start out by saying that Union Pacific agrees with and fully supports the testimony submitted by the AAR. My testimony will focus on TIH supply chain economics.

We do have some slides I think that we are going to be showing.

As I said in my written comments, the safe and efficient handling of TIH throughout the supply chain is one of our highest priorities, because it is our biggest single risk.

The fair allocation of the burdens of risk and liability across the supply chain is also a high priority.

Union Pacific accepts our obligation as a common carrier to transport TIH in the absence of safer and more logical alternatives, but we should not be forced to accept the full burden of risk and liability associated with the transportation of these products.
The way current supply chain economics work for TIH is ill conceived. It's broken, and it needs to be fixed. Currently faulty economics actually encourage the transportation of TIH, exposing railroads and the public to unnecessary risk. The reasons for this, the customers are not required to bear all the cost or share the liability for their distribution decisions. These exclusions are in effect an economic subsidy for TIH production and transport. Let me give you an example. This is a simplified depiction of the supply economics for a tank of corn syrup. When the producers of corn syrup decide where to distribute their products, and how much to charge their customers for the product, they include the costs you see up there - procurement, raw materials, production, inventory storage costs, transportation
costs.

In this example the railroad is providing the transportation of the product and charging the shipper a price that covers all of its cost.

The supply chain participants will then determine the margin they need, or are able to secure from their customers for the corn syrup. But TIH products are not the same as corn syrup.

The risks and liabilities for TIH are significantly different. Take for instance the 2004 incident at McDonough, Texas, near San Antonio. There was one car of hazardous material on the train in McDonough that day, and it was chlorine.

Had the car been corn syrup or even sulfuric acid, and not TIH, there would have been no loss of life. Certainly we would have experienced property damage and the liability that comes with that damage, but three people wouldn't have died, and the
liability equation would have been very
different.

Whether it was corn syrup or
chlorine doesn't change the facts of the
actual incident, but does change the
economics and the transportation choices that
were influenced by those economics.

Properly allocated risk would
change transportation decisions. It is less
likely that TIH would move where it doesn't
have to move.

Now let's look at a depiction of
the supply chain economics of a carload of
TIH, say for instance chlorine. Once again
you see all the same type of costs that the
producer of corn syrup takes into
consideration. You see transportation costs
as the rail rate we charge for moving the
product.

But there are some things that are
missing as depicted by the items noted in
red. First of all there are some quantified
capital costs and operating expenses, including insurance costs. Our insurance costs are up four to five times from the level they were since 9/11, and have remained at that level.

We also have less coverage because deductibles have risen steeply at the same time.

The cost that Union Pacific incurs are not under current STB rules allocated specifically to these movements, even though the only reason we incur these costs is because of TIH.

Actually in rate cases, and as a result of them, these costs are allocated across all the business we transport. So the costs we incur specifically for the 31,000 carloads of TIH that we handle are borne, and we would say subsidized, by all shippers.

The Board can and should address this issue by allowing railroads to reflect these incremental costs in their rates for
TIH, as well as in rate cases for these products.

More importantly a significant element of risk to the transporters of TIH that is not shared by the rest of the supply chain participants is its potentially huge, unpredictable and therefore unknown liability for a catastrophic incident that could occur in the transportation of the product. An incident that could occur through no fault of the railroad, one which according to the experts could cost billions of dollars.

Consider for instance the incident in January of this year in which a train in a developed area outside of Chicago was struck by a tornado derailing 12 cars. One of these cars was loaded with ethylene oxide, a TIH product. This car landed on its side, was badly damaged, and had its steel jacket and body bolsters torn off. It did not leak, but a 1.5 mile area was evacuated.

Union Pacific handled this car
safely and according to all the rules yet
came close to a catastrophic event.

Another example also in January of
this year, is that of a coal train that
derailed, 33 cars in Iowa. This occurred on
a double main line, high speed, signal lights
track, and it was last inspected the day
before the incident. New track of the
highest grade had been laid the year before
in 2007. The train derailed due to a
catastrophic track failure that no one could
have predicted or prevented. This track was
as good as it gets.

As it was the cost of the incident
was over $2 million. If TIH had been
involved, the cost and liability picture
could have been totally different.

Finally everyday on our railroad
cars and trucks drive around gates and pull
in front of moving cars. So far in 2008 235
of these vehicles have run into or been hit
by a train. If the trains hit were carrying
chlorine or other TIH the consequences could have been disastrous.

Incorporating elements of risk management, related transportation liability, would result in a redesign of the TIH supply chain. The costs, risk and liability exposure associated with TIH are not allocated proportionately within the current regulatory model. If these TIH commodities were a bet-the-company proposition for the shippers of the product like it is for the railroads, shippers would change their distribution decisions and practices.

The fact that all of the liability risk for transportation is borne by the railroad actually encourages the chemical producers to develop new long distance TIH movements in spite of governmental and public concerns.

One site is being developed on Union Pacific which will require the movement of between 500 and 1,000 new TIH shipments.
These movements are over 1,900 miles in length and travel through many states and communities.

The site was selected because of supply proximity and costs of other raw materials needed in the production process. There was no economic incentive for the producer to factor in the transportation liability risk, because the railroad and the public are expected to bear this risk.

If even a portion of this liability were borne by the producers or users of this product as it should be, their cost-profit margin calculations would change considerably. This would economically incent different behavior that would significantly reduce the rail and truck transport of TIH.

We believe that adding a transportation risk element to TIH distribution decision models would result in a redesign of at least some portions of that supply chain. Producers and users of TIH
would make different distribution decisions.

You would see more co-location of TIH production near the consumption of these products, rather than an economic decision to ship TIH products thousands of miles because of an abundant low cost supply of other raw materials.

You would see an increase in product substitution as we are seeing in the use of urea, ammonia nitrate, and other nitrogen products, other than anhydrous ammonia, for direct field application.

And as we are seeing in the use of new water cleansing products and processes in the place of chlorine. You would see more product swaps as producers would seek to ship these products fewer miles.

The Board can fix this broken system. If you leave the current system in place, you are negatively impacting safety.

First, as I stated earlier, the Board should allow railroads to reflect
properly the incremental costs for handling TIH in their rates and in rate cases involving these products.

In the near term the Board should issue a general policy statement which allows the railroads to impose conditions that properly assign liability exposure above reasonable railroad liability to those who ship these TIH products.

Those who produce and use these products should share the risk and economic responsibility for their distribution decisions.

In addition the Board should encourage the exploration of legislative and policy solutions to create economic incentives for measures such as product substitution and onsite manufacture of these commodities, with the goal of eliminating the transportation of TIH over the longer term.

Thank you again for the opportunity to speak with you.
CHAIRMAN NOTTINGHAM: Thank you.

Now we will hear from Fred Ehlers from Norfolk Southern Corporation.

Welcome.

MR. EHLERS: Thank you, and I too have some slides.

Good afternoon. My name is Fred Ehlers, vice president of customer service at Norfolk Southern.

Within the customer service organization I also have responsibility for the network management function including our control center, transportation planning, service design, terminal operations, locomotive distribution and crew management.

I would like to talk to you for a few minutes about the network cost of handling TIH cars under the three proposed and final PHMSA and TSA rules.

But before discussing the impacts let me quickly review the relevant portion of the rules that I will cover in my testimony.
First, the PHMSA proposed rules which cover speed limits and tank car standards.

Second, the PHMSA interim final rules which cover safety security analysis, and routing using the 27 factors.

And finally the TSA-proposed rules which speak to chain of custody, secured handoffs, and attended cars.

This map represents Norfolk Southern traffic density for TIH cars traversing the Norfolk Southern system for the year 2007.

The thickness of the red line corresponds to the number of rail cars, TIH rail cars, traversing that particular segment of the network.

The thicker the red line the more cars traverse the line segment.

As you can see TIH cars move throughout our network. Shipments are not confined to a few lines, or a geographic
region, but traverse our primary trunk lines as well as many of our secondary lines.

Now let me talk to you a little bit about how those cars move through the network. In 2007 we handled just under 49,000 TIH loads and residuals on Norfolk Southern. While it seems like a large number, it only represents, and you have heard this before, 0.3, or three-tenths of a percent, of our total shipments.

Those 49,000 cars traverse just over 23 million miles for an average of 473 miles per trip, and were switched 117,990 times for an average of 2.42 times a trip.

Of particular significance is the fact that these cars do not move in any great volumes together. For instance the largest block, and by block I mean a group of cars moving together on a train, to an intermediate or final destination as defined by the operating plan, the largest block of TIH cars that move on the NS network is from
McIntosh, Alabama to Birmingham, Alabama, with a volume on average of 11.7 cars a day. In fact only four blocks on our system carry more than 10 cars a day.

What this means is that there are virtually no unit train opportunities on the network, and I'm not sure we would want them anyway if they were available. But more often than not when a train is carrying TIH traffic, we will have just one, two or three TIH cars in the consist, and as you can see in the next two slides, these cars will determine the handling of the entire train, and every car riding on that train.

This is the same traffic density map that we saw a couple of slides ago. However I overlaid the areas on the Norfolk Southern system that are non-signaled and operated under track one authority.

And this leads into a discussion of the cost that TIH cars will generate under the PHMSA proposed rules.
Of particular concern is the proposed rule that would limit trains with TIH cars to 30 miles per hour in nonsignaled territory. Since as we discussed no real unit train opportunities exist to minimize the network impact, TIH cars will continue to move in general merchandise service.

Additional costs will be incurred including overtime, hiring, training, and locomotives on all line segments subject to this restriction.

Based on RTC studies, at current volumes two lines, Macon to Augusta and Macon to Savannah, could not support a 30 mile per hour, or even a 35 mile per hour operation. The model just won’t even run.

Just to support the current operation at slower speeds, additional infrastructure, two passing sidings will be required. Even with additional infrastructure, under the proposed rule every merchandised train will need to be re-crewed.
in mid-route.

The majority non-TIH traffic will be impacted as well due to longer transit times over the road, and the resulting missed connections at terminals. As a result there will be direct costs related to car hire and the customer supply chain and shipment pipeline requirements.

And as overall traffic volumes increase on the network, more lines will become capacity constrained, requiring additional infrastructure improvements.

With regard to PHMSA's interim final rule that addresses the safety and security risk analysis, and route selection using the 27 factors, first, understand the definitions, significance and interplay of the 27 routing factors is extremely complex and anything but clear.

In just trying to understand the routing factors, all the railroads have invested and will continue to invest
significant manpower in developing a routing
model to guide us through route selection.

To illustrate the issue our
existing car routing algorithms are designed
to minimize distance and handling, for all
shipments taking into account network
capabilities and constraints, and as a
consequence, our operating plan is designed
around this precept, with the resulting yard
blocking and train service plans in place.

The problem lies that in the
extent that current routings are no longer
preferred, additional switching, blocking and
train service requirements will need to be
incorporated into the operating plan.

At the least this will cause us to
increase the complexity, and will likely -
and the likely outcome of displacing the most
productive uses of our capacity.

Let me give you an example. Each
yard on Norfolk Southern has the capability
of creating a finite number of blocks to be
carried by outgoing trains. We refer to this as our blocking plan.

We spend a lot of time working, refining and ensuring our blocking plan is the most efficient we can make it, because an efficient blocking plan allows us to bypass downstream yards and get the traffic to destination with fewer handlings and in a shorter amount of time.

If TIH routings require special blocking, then we will have to displace some general block requirements to accommodate a TIH specialty block.

And now for a few comments about the impact of the TSA's proposed rule, specifically the chain of custody and control rules for TIH shipments.

This rule could have devastating consequences on railroad operations with the required person-to-person handoffs and maintaining line of sight on all TIH shipments.
Let me give you a couple of examples of how this rule will impact us. Consider the situation where NS has a TIH receiver located in a high threat urban area, and even though we thought we had coordinated delivery, the customer did not have a secured area, or was unable to receive the car in person when we arrived with the TIH car.

We would have two options: have the crew wait while we contacted the receiver, possibly outlawing under the hours of service act, or we return the car to the attendant serving area.

Whatever the solution, the result is less than efficient operations impacting all customers and consuming capacity.

The rule also states that cars may not be left unattended at any time during the physical transfer of custody, and the receiving railroad must perform security inspections.

What defines unattended? Where we
execute run through interchanges, where one railroad crew gets off the train and the next railroad crew gets on, is an inspection required?

What would be the impact if this inspection had to be made on line of road on crew safety, block crossings and the movement of trains.

And finally what does unattended mean?

Here is a view of our main tower from our Macon, Georgia facility. The best vantage point in the yard, looking south towards the receiving yard.

This is a medium sized yard. It is six miles long, and processes approximately 1,600 cars a day. It has eight receiving tracks, 50 classification tracks, nine departure tracks, and the longest track in the yard is over 12,000 feet.

Do you think a single individual is going to be able to keep a line of sight
view on a car positioned just half the
distance in this photograph?

Furthermore this photograph was
taken on a bright sunny summer day, and you
still can't see every car.

Now consider time and weather,
imagine if it's night, foggy or rainy, you
won't know what ultimately is required by
this rule, but it is not difficult to imagine
having to hire more people, 24 by seven, and
make infrastructure improvements to maintain
a line of sight requirement.

Here is a view looking north into
the classification yard with the departure
yard on the right. Remember cars are
processed through a classification yard.
They just don't arrive in one place, and sit
in that same place for the departure. They
arrive in the receiving hard, are processed
in the classification yard, are made into
blocks of cars, and finally get made into
outbound trains in the forwarding yard.
So the idea of holding cars in a specially monitored area runs contrary to the basic operation of the yard.

And getting down to the ground level doesn't help much. From our parallel access road an individual can only see the cars on the near track, and not the half dozen tracks sitting behind the train.

Norfolk Southern alone has 13 of these classification yards. Dozens of smaller but still large regional yards. And still dozens more for our industrial support yard, not to mention the 21,000 route miles that link these yards.

In conclusion, the cumulative impact of these rules will have a significant and direct impact on costs, just to name a few, infrastructure, locomotive, crews, car hire, training, information technology, administration and a significant ripple effect on the NS network that affects all customers.
And finally these rules are the ones we know about today. We don't know what is yet to hit us, and quite frankly, I don't think we fully comprehend the extent of what has already been communicated.

Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Ehlers.

We will now hear from Howard Elliott from the CSX Company.

MR. ELLIOTT: Chairman Nottingham, Vice Chairman Mulvey, Commissioner Buttrey, thank you for allowing me this opportunity to speak with you today.

I'd like to start with Commissioner Buttrey by offering my apology for our part in your lateness to this meeting this morning. I understand that the cause of the delay of the area trains has been fully researched, and we understand.

MR. BUTTREY: Let me just respond if I may and tell you that the BRE people
responded in stellar fashion as far as I'm concerned. They apprised us of the situation. They kept us informed all the way along the line with verbal information.

I did not really arrive all that late. In fact I didn't even qualify for a free ride certificate, and I didn't take a free ride certificate.

But I think the BRE people did a stellar job this morning responding to the situation, and I'm sorry that it happened, but I think that's about the only time it's ever happened in over a year.

So I'm a happy camper with respect to that, anyway.

MR. ELLIOTT: And I would also be remiss as we focus our attention to the current Atlantic storm season and earlier talk about mother nature's effect on rail operations, our journey a few years ago as we walked through the 9th Ward of New Orleans and you saw our Gentilly yard, and you saw
firsthand the kind of impact that mother
nature can have on rail operations, pretty
significant.

I too have a few slides that I'd
like to share with you this afternoon.

Given a choice, CSX Transportation
would decline to handle toxic inhalation
hazard materials. Because there is in fact a
new paradigm. There is a very real risk of
ruinous liability.

Chairman Nottingham, you mentioned
this morning that there is more than just an
academic concern about moving these products.

Mr. Hamberger from the Association
of American Railroads also referred to it as
real world events that have changed the
perception, the real perception, about how we
move, and the concerns we have in moving
toxic inhalation hazards.

And of course there is
reputational damage. Being the railroad that
operated hazardous materials through the
heart of Washington, D.C., during the D.C. council re-routing regulation, we know firsthand what kind of damage can be done to reputation through moving TIHs.

And of course the growing regulatory demands that are inconsistent with common carriage. Deputy Secretary Eby noted that the DOT had been very active in recent years in HAZMAT and security regulations, and that's okay as long as there is consistency in those regulations, and they are achievable for the railroads.

CSX Transportation does not solicit new TIH business, nor do we encourage - but we do encourage alternative products and shorter hauls.

As a matter of fact in the last three years our average haul length has been reduced by about 12 percent for TIH materials.

Like some of the other carriers you have heard from today, TIHs account for
about one-half of one percent of all CSX traffic.

Perhaps spend a second on a different perspective, on the TIH transportation topic. The rail industry is one that is hugely proud of our security efforts to ensure the safe transportation of toxic inhalation hazards.

The rail industry acted immediately after the tragic events of September 11th, 2001, and developed a comprehensive risk analysis and security plan.

We established four escalating alert levels; implemented countermeasures for baseline and escalating threat conditions for our critical assets, our most critical bridges, tunnels, railyards, fuel storage sites, data centers and dispatch centers. Our security plan is aligned with security federal plans. For example, the national infrastructure protection plan and the
transportation sector specific plan as well.

It's a dynamic security plan that is continually updated, and as viable today as it was in 2001. As a matter of fact we just completed a line by line, page by page, section by section, complete review of the industry security plan to make sure that it is in fact as viable today as it was when it was created after September 11th.

But much has been done since the initial rail efforts after September 11th. We saw the implementation of DHS security alert levels in 2002, followed by the United States Coast Guard port security laws that affect a number of rail carriers today, followed by border security, Customs and trade partners against terrorism, regulations that came about in 2006.

And in 2006 we also saw the TSA voluntary security action items, 24 action items mutually developed by the rail industry. And then a few months later four
supplemental action items, special
requirements that were inconsistent with
common carriage business models, especially
when we talk about dwell time reductions.

There is a growing regulatory
burden. But TSA voluntary action items are
being supplanted by formal regulations that
impose specialized handling of TIH materials.

The DOT route analysis rules that
we're working with today involving 27
mandatory factors. Unfortunately we cannot
adequately consider some of the factors that
we need to do good sound route assessments.
Information such as venues, high consequence
targets and known threats, information that
needs to be provided to us by other federal
agencies, those agencies at this point in
time are not appearing to be willing to give
us that information to factor into our route
assessments.

TSA's chain of custody that was
talked about by my colleague from the Norfolk
Southern earlier, requirements for attendant
interchange compliance, and may in fact
override DOT's mandated 27 factor route
analysis.

And of course the tank car safety
proposed rulemaking that sets certain speed
limits that will in fact have some impacts on
our operation.

And of course too we can't rule
out the fact that states and municipalities
will remain interested in wanting to
regulate, even though they may not be able
to, the movement of toxic inhalation
standards.

These compounded effects of
specialized requirements will begin to
present some unreasonable demands on rail
carriers.

At CSX Transportation safety each
and everyday is a way of life. We take the
transportation of these hazardous materials
very seriously, and we take our obligation
seriously, and our record speaks for itself.

I'm pleased that I can sit here today and say that we too can offer up a better than 99.99 percent safety record in moving all hazardous materials from origin to destination safely.

We certainly understand our obligations under the current state of law. We take our responsibility to transport these commodities very seriously.

We are dedicated to the safe and secure movement of these products whenever we are required to transport them.

At CSX noncompliance is not an option. CSX is committed to maintaining high ethical and legal standards in every aspect of our business. But growing regulatory burdens may make transportation of toxic inhalation hazard commodities unreasonable.

Again, TIH dwell time reductions, line of sight security, attended interchanges, circuitous routes, conflict and
compliance where TSA's regulations may override DOT's mandated 27 factor route analysis; speed restrictions that could severely affect networks; and some things that aren't mentioned here, transportation worker identification credentials that affect all railroad employees that operate in certain port areas.

The combination of regulations may be mutually exclusive, making some service impossible. And CSX will not design any operation that we are not confident that we can comply with, or that does not comply with, governing regulations.

We must at all times be able to maintain sustained compliance, and we simply will not violate the law.

Chairman Nottingham, Vice Chairman Mulvey, Commissioner Buttrey, thank you for your time.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Elliott.
We will now hear from David Burr and Richard Weicher from the BNSF Railway Company.

Please proceed.

MR. BURR: Good afternoon, Chairman Nottingham, Vice Chairman Mulvey and Commissioner Buttrey.

I am assistant vice president, fuel and risk management, for BNSF Railway Company.

CHAIRMAN NOTTINGHAM: I'm sorry, we are not hearing you too well. I mean I can hear it; I'm worried people in the back might not. Make sure the red light is on by pushing that button.

MR. BURR: Sorry.

I am assistant vice president, fuel and risk management, with BNSF Railway with 30 years experience in insurance and risk management.

BNSF is willing to maintain its common carrier obligation. However the risk
associated with transportation of high hazard commodities must be addressed.

Specifically BNSF is concerned that a small percentage of shipments creates an enormous risk to the public and to rail carriers, potentially threatening the viability of the rail network, and hence transport of other commodities.

The shipment of high hazard commodities is not one that is accepted by choice, but one that is forced upon rail carriers as a result of our common carrier obligation.

The risks associated with the release of these commodities is one that is unquantifiable, and the potential for an accident cannot be fully eliminated.

Further, available insurance can only satisfy a small portion of the total risk we are forced to accept.

Therefore it is our position that BNSF should be able to condition the
transport of these materials on reasonable terms.

To put it in perspective, we are talking about a small volume of traffic that is considered high hazard: less than one-half of one percent of the shipments handled by BNSF.

Of the total high hazard traffic handled, the majority is made up of anhydrous ammonia and chlorine gas.

Numerous regulations have been implemented or promulgated to reduce the risk associated with the transportation of hazardous materials.

BNSF has implemented operating practices recommended by the AAR and developed multiple changes to operations to minimize the potential for accidents.

BNSF has also developed a list of at-risk commodities based on environmental, safety and health hazards, as well as historic liabilities associated with such
Despite these efforts it is not possible to fully eliminate the potential for release of these commodities.

This slide just lists some of the operating practices that have been implemented by BNSF.

Although the probability of an accident is small, if one of the commodities that we are required to transport is released, it is impossible to control the commodity once released, and the resulting loss is unquantifiable.

Even with legislative and private initiatives, the risk of an accident cannot be fully eliminated.

Prior comments indicate the rail industry has not presented any evidence regarding the availability of insurance, and I'm here to address those issues to the extent I can.

Further insurance is not
commercially available to sufficiently protect us against catastrophic losses. Limited insurance that we can purchase has increased substantially. Subsequent to 9/11 insurance costs for BNSF has increased by 250 percent.

This slide shows the insurance that we are able to purchase. Currently we are able to purchase $1 billion in liability insurance, which is the total amount that is available to the freight railroad industry.

Of this the first $25 million is covered by our self-insured retention. Even though $1 billion seems large, it is not sufficient to cover the catastrophic exposure that high hazard chemicals present.

While this slide may appear to be an eye chart, what it shows is that purchasing insurance for a railroad is not like calling up your local State Farm agent. The chart on the left shows how we have to piece together coverage with every known
insurer who will write liability insurance
for a railroad.

   Approximately 20 companies are
currently willing to write such coverage.

   Even to find this limited amount
of insurance coverage, railroads must
approach the global market as depicted on the
right side. As you can see we are very
dependent on foreign insurance for coverage.

   Over the last five years the
number of companies willing to write
insurance coverage for freight railroads has
decreased. As a result the total amount of
insurance available to BNSF has shrunk by
about $500 million.

   Further the self insurance
required to purchase this coverage has more
than doubled.

   Despite these reductions the costs
have increased substantially as I previously
mentioned.

   For the past several years
insurance companies have increased their focus on BNSF's handling of hazardous materials, due to the fact that these commodities have been the proximate cause of most of the largest losses in the rail industry.

Had Graniteville, South Carolina occurred at a different time of day or in a different location it is likely the loss could have exceeded available insurance coverage.

In my opinion if the rail industry experiences another large loss involving hazardous materials, insurance coverage will be significantly reduced, and the cost for any remaining coverage will spike.

Such a loss could result in the collapse of the insurance market for the rail industry.

The limitless exposure created by these high hazard commodities which we are required to handle jeopardizes our obligation
to all shippers and our ability to invest in infrastructure.

If the rail transport of these commodities is in the public interest, then the shareholders of BNSF should not be the ultimate insurers.

BNSF believes that the Board should support efforts to formulate private sector solutions to share these risks. BNSF is developing alternative approaches to address these risks which we anticipate publishing as part of our common carrier obligation to handle these commodities.

MR. WEICHER: Chairman, Vice Chairman and Commissioner, I'm Rick Weicher, Richard Weicher from BNSF Railway.

I'll make a couple of comments on these last slides with respect to the nature of the common carrier obligation.

One thing that was on the last slide that Dave Burr mentioned, I'll just briefly comment on. We have been active
participants in discussions with the TFI and
customer representatives about that program.
We are encouraged by that. It is by no means
necessarily an overall solution to things,
but it is a promising step. We are exploring
it in good faith. We don't view it as
inconsistent with the kind of policy the AAR
is seeking. It is an alternative; it is
another possible way to go. And it only
addresses one commodity and one subset of
shippers, not the entire picture.

With respect to the nature of the
common carrier obligation, there have been
many comments this morning, including in the
Chairman, Vice Chairman and Commissioner's
opening statements and other statements that
safety general boilerplate law that the
common carrier obligation is to provide
transportation on reasonable demand on
reasonable terms and conditions.

That does not mean, and we are not
suggesting, because we respect enormously the
common carrier obligation, that doesn't mean any requirement a carrier might seek if it were for example unachievable was necessarily reasonable.

Certain requirements, if they were under the circumstances of a given shipment or shipper, unachievable, impossible, whatever, could be an unreasonable term or condition.

By the same token that doesn't mean that any or every term or condition of common carriage including on these type of commodities should be considered unreasonable.

Ultimately it would be a case by case issue of what a carrier was proposing, and it's holding out for movement of these commodities.

And indeed as the world has evolved and conditions of transportation and risk have evolved, some risk sharing in the terms offered by a carrier could very well be
and should be considered reasonable, and
could encourage and incentivize safer and the
safest most economical handling of these
commodities which present unique and growing
risks as they evolve in the transportation
world.

We ask the Board to consider those
factors, and adopt the kind of policy that is
open to private carrier initiatives and terms
and conditions for these that would be
reasonable, and that would condition in ways
that enhance those incentives and have
elements of risk share.

And we think that flexibility is
not inconsistent with the Board's authority,
or the common carrier obligation.

Thank you.

CHAIRMAN NOTTINGHAM: Thank you,
Mr. Burr and Mr. Weicher, and all the
witnesses.

I'd like to give Commissioner
Buttrey the opportunity to start questions.
MR. BUTTREY: Mr. Ehlers, you referred to a segment of business in and around Birmingham, Alabama, where you said a huge amount of TIH moves over a very short distance.

MR. EHLERS: What I was addressing was the largest block, a block being the blocks that we move on trains of cars going to an intermediate or final destination, moves from McIntosh, Alabama to Birmingham, Alabama.

MR. BUTTREY: And how far is that?

MR. EHLERS: One hundred and fifty miles, 200 miles. And once again -

MR. BUTTREY: How many cars a day would that be?

MR. EHLERS: On average, it's 11.7 cars a day.

MR. BUTTREY: And that translates into how many trucks?

MR. EHLERS: You will have to ask somebody else for that translation.
MR. BUTTREY: That sounds like a perfect truck market to me.

MR. EHLERS: Well, to be very clear, it goes to Birmingham, and then it gets reclassified and it gets moved throughout the network. My point was that as far as unit train operations, or the ability to minimize the 30 mile an hour restriction on the network, I mean if you could you would want to grab all the TIHs, put them on a train, and one could argue that may not be the best thing because you have just created a super target.

But from a network impact standpoint you would want to group all those cars together. The 11.7 speaks to the fact that that is the largest block of cars that move together on regular train service. Now when those cars get to Birmingham, I'm sure 99.9 percent of them get forwarded onto other destinations, other trains. They do not terminate at Birmingham.
MR. BUTTREY: So they go through a hump yard at Birmingham and get on some other train.

MR. EHLERS: Birmingham is one of our largest classification -

MR. BUTTREY: Onesies and twosies if you will on -

MR. EHLERS: Exactly, and it gets to the point later on in my presentation -

MR. BUTTREY: But they move from the production facility to Birmingham in a little mini unit train; is that what they do?

MR. EHLERS: They move on a merchandise train, and on average 11.7 cars a day in a block that move from McIntosh to Birmingham for furtherance into the network either on NS destination or offline.

MR. BUTTREY: Altogether?

MR. EHLERS: No, once they get to Birmingham, they get broken up.

MR. BUTTREY: No, when they go to Birmingham, they are moving altogether on the
same train, they go on a merchandise train that is headed for a classification yard.

MR. EHLERS: Right, they are all moving together, correct.

MR. BUTTREY: Okay. Interesting.

MR. EHLERS: And again, my discussion about the blocking, most of the TIH cars that move in our network move in one, two or three cars on the entire train.

Ten, 11.7 is at the very far end of the spectrum. You get down to onesies and twosies every other day in much of the rest of the network.

MR. BUTTREY: You make an effort, then to keep these cars grouped together when they go on the big merchandise train out of Birmingham. If there are three cars going on a train, and they are all going on the same train, you are going to bunch those cars up together, you are going to try to or not?

MR. EHLERS: No, we don't try to, no. They will get switched out as they get
processed through the yards, they will get switched out. If they are traveling together for the most part they will stay together from the same origin to the destination if they are going to a common destination.

MR. BUTTREY: Mr. Burr, I think maybe you are the only insurance expert we have had here today, which is unfortunate, really. Is that correct? I think that is correct. You are the closest thing we have all day long to an insurance expert, and we are glad you are here.

Are you familiar with this Price Anderson pooling idea? Are you familiar with that process?

MR. BURR: I'm generally familiar with it, yes.

MR. BUTTREY: Okay.

Is there any way to create, in your view, a pooling arrangement like that for the railroads? In other words there would be a ground level insurable on a per
occurrence basis there would be a cap if you will or a liability limit, and then above that it would go to a pool of some kind, and that pool would be contributed to by whomever.

Is there – have you thought about that? Have you given that any thought about how that might work?

MR. BURR: Well, we have considered different options. That is one that we would consider. One of the problems we would have is, without the ability to talk freely amongst the shippers and the rail industry, it is difficult to establish the appropriate rate for that.

However it is a concept that if we can get past that issue could hold merit.

Other issues that we are considering is essentially establishing our own internal loss funding mechanism whereby through an assessment mechanism we would charge the shippers to build up a fund held
by a third party to pay for losses over and above the insurance we have.

MR. BUTTREY: So Mr. Weicher, how do we get past that roadblock?

MR. WEICHER: The first roadblock, if you're trying to do a parallel with Price Anderson, is, it would take legislation to have a cap, because the other essence of Price Anderson in its broadest terms is a cap on damages and/or federal public responsibility at certain levels administering this whole thing, and administering the form of pool.

It is not clear without some form of legislation how - at least to me - how you could have a similar pool structure with liability limitations and contribution required by parties.

MR. BUTTREY: When you say legislation, do you mean that word in the purest sense, or do you mean legislation or regulation?
MR. WEICHER: I meant that in the pure sense I believe.

MR. BUTTREY: Something passed by the people down the street.

MR. WEICHER: Yes, something passed by the people down the street. Now there could be elements of pooling in the traditional STB Interstate Commerce Act sense among carriers and/or people in the transportation element that could conceivably deal with some elements of these issues, but not with the tort limitation or mandatory elements that are in the federal statute, if I understand the question.

MR. BUTTREY: Now do you quarrel with the idea that the Board is powerless to do anything in this area?

MR. WEICHER: I don't believe - the Board is the ultimate arbiter of the nature of the common carrier obligation. And the Board I believe has jurisdiction to determine how that obligation should be applied and
interpreted in the circumstances of all
shipments that are regulated, and have been
exempt from regulation, and none of this is,
in carload scenario, and then rule upon and
determine the reasonableness of proposals
carriers might bring to them, and also set
policies or guidelines that would encourage
private sector solutions to this.

MR. BUTTREY: In your view that is
perfectly consistent with the Akron case?

MR. WEICHER: Yes, the Akron case -
we are not discussing from our standpoint,
from BNSF's standpoint, a refusal to handle
these commodities. The Akron case, that was
a far more Draconian - at least where we are
now in this, in this evolution of dealing
with these commodities, I don't believe we
are talking about the same thing.

MR. BUTTREY: Well, we've been
citing the Akron case all day long saying we
don't have any jurisdiction here. I don't
read the Akron case to say that, but what do
you think?

MR. WEICHER: If I may, sir, the Akron case I think stands for the proposition that if a carrier, or the predecessor, Conrail - if a carrier at that time said, we will not handle this at all, or only under terms that are patently unachievable, unreasonable, can't do it, then the Board properly had the jurisdiction to say, no, you can't take that position. That is against the law, we - excuse me, you, the Board, administer, and find that unlawful, and that is an enforceable order. That is an exercise of the Board's jurisdiction and the predecessor's jurisdiction in those circumstances under the law, and that's what it did.

MR. BUTTREY: And do you see any movement whatsoever in the Congress to take on this issue? Or do you subscribe to the theory that the reason the Surface Transportation Board is here is to grapple
with these thorny issues instead of the Congress?

MR. WEICHER: I'm an - I consider myself experienced in transportation law. I'm out of my league when I talk about Congressional thrust. But having said that, from a governmental relations standpoint, it's hard to picture the appetite to take this issue on in the current climate, that being the issue of creating a Price Anderson for the railroads, absent the unity which doesn't appear to be here between all aspects of the rail transportation sector with the customers and the shippers.

And I think that leaves the Board to exercise the jurisdiction it has within its areas to interpret common carrier obligations.

MR. BUTTREY: And then we'll see what the court of appeals has to say about that.

MR. WEICHER: Yes, sir, and I think
what happens is, if you do a policy, and you
do a policy saying there are things that
could be done, or whether or not you do a
policy, if at some point a carrier publishes
something, does something, takes a position,
you are the arbiter in the first instance,
subject to review by the court of appeals, of
whether that is a proper interpretation of
common carrier obligation.

MR. BUTTREY: Thank you.

CHAIRMAN NOTTINGHAM: Mr. Weicher,
why the suggestion that we adopt or issue a
policy statement as opposed to going through
a rulemaking proceeding? Obviously a
rulemaking would take a little longer, but it
would typically get more comment. You build
a bigger record.

MR. WEICHER: Chairman, I'm not
sure where the direction of these proceedings
started, when the Board had the first hearing
which some of us testified at, and it was
clear that this was an important issue that
required a great deal of focus.

This proceeding as it stands now, and I would certainly defer to the Board and its staff on how best to think of this, it is not at this point a rulemaking which would suggest that it could become one if there were concrete rules proposed, but in the absence of that it is a proper vehicle as the Board has done in some other areas in past years to promulgate a policy statement. That is where we are in this.

That would not preclude the Board establishing formal rules through an ANPR and an NPR and so forth, which is a longer process, and has greater in the panoply of things a greater legal effect. But that doesn't mean it's inappropriate I think to establish or set out certain policies.

CHAIRMAN NOTTINGHAM: I'd like to ask each of the witnesses on this panel to help us better understand the availability of insurance question. It has been
characterized differently by different
witnesses, different panels today.

Some shipper witnesses have
basically said they are not aware of any
shortage or difficulty whatsoever in
railroads getting insurance, and that you
have basically just contrived this issue for
some other devious purposes.

So we need - Mr. Burr's testimony
was quite helpful, it actually was the first
very specific information we'd gotten on
that, and that is helpful.

I think each of you would be
helping yourselves if you helped us develop
that record more thoroughly over the next 30
days with, perhaps with correspondence from
insurance carriers about - sort of what types
of efforts have you done.

And maybe I will ask Mr. Burr,
since it sounds like you labor in this area
on a regular basis, you call your 20
insurance providers that are out there, you
say you need more, you'd like to have $5 billion in coverage. What are those conversations like? What do they say, what are you kidding? How does that work? You are able to get to a billion through a checkerboard approach which you showed us which was interesting, tiered and everything.

Can you elaborate on what the market is like?

MR. BURR: Sure, I think there are actually two issues you have to take into consideration. First, the insurers that we do business with are only willing to offer a finite amount of coverage, so they will only put out $100 million on any one railroad for example. So we are limited in the amount I can buy from the 20 companies that are willing to write the coverage.

The second issue though is, there are vastly more than 20 insurers in this world. The problem we face, the vast majority of them are precluded from writing
railroad liability insurance, because when an insurance company issues a policy they typically buy reinsurance as well either on a specific risk basis or to cover the entire portfolio, and that is called treaty reinsurance, or reinsurance.

The reinsurance market does not allow the primary carrier to write railroad liability coverage. So then the primary carrier is faced with the dilemma of, if I put out $50 million in coverage, and normally I'm expecting my reinsurer to pick up 90 percent of that, I no longer have that luxury.

So most of the companies will say, no, we will not write insurance on railroad companies.

CHAIRMAN NOTTINGHAM: Now what about self insurance? Another approach would be that a large successful company like BNSF could have a very significant reserve fund or contingency fund. Do you do any of that, or
MR. BURR: Well, currently our self-insured retention is $25 million as the chart showed, which has increased by 150 percent actually over the last several years.

So yes, we do use self insurance as a vehicle. Going forward what we are looking at is using an assessment mechanism to charge our shippers to build up a fund to pay for those losses only under certain circumstances.

CHAIRMAN NOTTINGHAM: Also I think a couple of witnesses have mentioned significant insurance cost increases since 2001. I heard 400-500 percent and 200-300 percent, if I recall.

If each of the railroads could for the record get back to us with that information of what your experience has been in the last, since 2001, the last seven years in the area of insurance costs.

Vice Chairman Mulvey?
MR. MULVEY: Thank you, I have a couple of questions.

The recommendation for a policy statement, as opposed to say giving advice to the Congress, what is the legal import of a policy statement from this Board with regard to this issue? I mean would that be binding if we had a policy statement saying that we thought agreements between railroads and TIH shippers ought to include an indemnity feature, would that be dispositive, or would that just be a suggestion and have no legal import?

MR. MULVEY: Vice Chairman Mulvey, I'll be happy to try to address that. A couple of things.

On your first comment in terms of approaching Congress, of course the Board has a voice, but how that process would work and how long it would take and what it is directed to, more like the Price Anderson, something else entirely.
From the standpoint of a policy statement, a policy statement could facilitate the parties, the carriers working with their shippers, or offering to their shippers, and give some guidelines.

But I again defer, but I would believe that it is not binding on the Board in terms of when it had a specific proposal before it and examined it in the light of the policy and the law, it would make the de novo determination or adjudication or whatever would be the proper term for what came before it; but as the Board has done in other areas, it could help give guidance and suggestions and promote trying to find solutions by suggesting the criteria or the directions the Board thought were important in those areas.

MR. MULVEY: Of course the shippers have said it would frustrate the development of cooperation and agreement. But the railroads feel that it would actually spur that cooperation and agreement.
BNSF, you were talking about unreasonable requests. Do you have any real world examples of unreasonable requests where shippers have made requests that you have turned down because they were unreasonable, especially as they relate to TIH or PIH movements?

MR. WEICHER: Not on our company. I am not aware we have ever done anything like that.

I suppose the extreme - although I didn't go back and read the record - whatever happened in the Akron nuclear case, as the Board implicitly if not explicitly found there, there was something unreasonable going on there by the carrier in that case.

MR. MULVEY: You mentioned in your testimony on page eight about let's see about number of incidents where UP did however experience six shipper caused releases of TIH two of which occurred in HDPAs.

MS. DUREN: Yes.
MR. MULVEY: But none that were railroad caused. This seems to run counter to what the shippers have testified that virtually all the incidents that have occurred out there were the fault of the railroad as opposed to the shippers.

MS. DUREN: Well, the safe securement of the tank cars is the responsibility of the customers. And we do find, particularly on residue cars, where all of the tank cars are not completely secured, and will have some residual release. But that is the responsibility of the shipper.

MR. MULVEY: One last question.

What other industries or events are not subject to the availability of reinsurance?

MR. BURR: If that question is directed at me, I'm not sure I can answer that, because obviously I focus on the rail liability insurance market, and not the rest. So I don't know the answer to that.
MR. MULVEY: It seems to me, virtually this could come up in other industries as well.

CHAIRMAN NOTTINGHAM: Mr. Mulvey,
something tells me that the largest shareholder of BNSF stock probably knows the answer, but he is not here with us today.

MR. MULVEY: Can you see if he can come next time? Thank you.

(Laughter.)

MR. MULVEY: That's all I have. Thank you.

CHAIRMAN NOTTINGHAM: Mr. Buttrey, any other questions for this panel?

MR. BUTTREY: I'm just curious, Mr. Elliott - sorry to interrupt your note taking there - after the catastrophic events of Katrina, did you have a hard time getting insurance? Did companies cancel policies down there on your company after - because you - the best I could tell when I was down there was that there was nothing where it was
supposed to be. I mean it was just the most bizarre thing I have ever seen. Everything was in the wrong place. Eight barges were laying right on top of your mainline track for instance. You and I both have pictures of that, I think.

What effect did that have? In other words after a catastrophic event, what is the aftermath of all of that? Are you at liberty to discuss that at all?

MR. ELLIOTT: Well, Mr. Buttrey, obviously insurance and the availability -

CHAIRMAN NOTTINGHAM: I'm sorry, can you pull that mike over. I can hear you fine, but the people in the back probably can't.

MR. ELLIOTT: I'm sorry.

The risk management side of CSX is not my specialty, so the best answer I can give you is that we have taken note of that, and will include that in our comments about insurability.
I will tell you that I am not aware of any, but again, you and the Vice Chairman saw firsthand some of what you never thought you could see before as far as the damage that could be imposed on rail infrastructure by Mother Nature, and by other infrastructure that came to rest on railroad. I suspect there were some real significant impacts, but we will have to - I will have to make sure that we do our research and get back to you with an adequate answer to that.

MR. BUTTREY: I don't know whether you can answer this or not, Mr. Ehlers, but you may not be able to for proprietary reasons, are the claims emanating from the accident at Graniteville, is that all over, or are there some things still pending with respect to that incident, unfortunate incident?

MR. EHLERS: The word falls in the other category, which I just don't know. And
I have to tell you, I am just not into that. That is not an area that I have communication with the folks that are dealing with that. So I just can't tell you.

MR. BUTTREY: Okay.

Thank you, Mr. Chairman.

CHAIRMAN NOTTINGHAM: Mr. Ehlers, you can respond on the record if you prefer, on this, because I know when we announced this hearing it was not to get into details on any one particular dispute or controversy. But we did have witnesses this morning from Alexandria about the ethanol transloading facility there. There is an active proceeding before us in the form of a request for declaratory judgment. And we will be working our way through that soon.

But if you could give it to us now or for the record some background - the city seemed to indicate that there wasn't adequate communication from the railroad, that they were surprised to learn about this facility,
and we also heard a little bit this morning that there was some extensive land use planning that has gone on in the past period of years since the area around your facility there, which formerly was primarily a military facility, has now become a vibrant community of some 4,000 people; an elementary school right there.

I would also appreciate knowing for the record just what kind of communication you got at the time during the land use process from the city as to whether or not, hey, is this a good idea, we are putting a school next to your property. And you have been there for a long time operating facilities. And it just kind of - communication is a two-way street, and I just wanted to give you an opportunity or your colleagues a chance to respond, either today or for the record on that.

MR. EHLERS: I know very little about the Alexandria issue. I do know we
I can tell you, we have been talking, or the appropriate people have been talking to Alexandria for about two years now. Beyond that, as far as details, we are just going to have to include it in the record.

CHAIRMAN NOTTINGHAM: Okay, and we see this I think it's a natural outgrowth of the resurgence in rail traffic, and the attractiveness of the rail industry to shippers who are faced with severe highway congestion. We are seeing more track getting busier, and occasionally homeowners and neighbors and communities claim to be surprised that they are living near a rail line that could get busier.

So I am always interested in ways to figure out how to get better information out, because in this environment that we live in now, and the economy we live in with traffic and forecasts, nobody who lives
within earshot or eyesight of a railroad should assume, unless they have really checked it out and confirmed it's been abandoned or something, should assume that there is not going to be any kind of increase in rail activity.

MR. EHLERS: You are certainly right.

CHAIRMAN NOTTINGHAM: But unfortunately we don't see a lot of that information coming out. Don't have the answer to that today, and it's not the purpose for today, but welcome any thoughts on that for the record.

Any other questions for this panel?

MR. MULVEY: No, thank you.

CHAIRMAN NOTTINGHAM: Thank you, this panel will be dismissed, and we will call up the next panel, Panel VI, Terra Industries, Inc., represented by Joseph Geisler; CF Industries, Inc., represented by
Patrick E. Groomes; and The McGregor Company, represented by Alex McGregor.

I think we can begin. You can begin, Mr. Geisler.

PANEL VI: AGRICULTURAL (FERTILIZER) SHIPPERS

MR. GEISLER: Geisler. I've been called a lot worse. It's fine.

Good afternoon, Chairman, Vice Chairman, and Commissioner.

Terra Industries is the leading nitrogen producer in the United States. We are also a leading international importer of nitrogen products also, and Vice Chairman Mulvey, you asked a question about UAN solutions earlier today. Terra Industries is the largest producer of UAN in the world, and it's all produced in North America.

Our nitrogen products are sold into the agricultural markets as fertilizers, and into industrial markets as feedstocks for other processes; and as reagents to scrub emissions from power plants, diesel engines.
and other sources.

Approximately 70 percent of our business is agricultural. Nitrogen fertilizers are essential to nourishing the crops that are used to produce biofuels, and more importantly, to feed a growing global population.

Thank you for recognizing the importance of the railroads' common carrier obligation. Terra is particularly concerned with this issue as it applies to ammonia transportation by railroad. If not properly resolved it will have devastating effects on our food and energy supplies; certain industrial production; air quality; and the overall economy.

My written testimony provides a good description on ammonia uses, so I won't repeat it here. What I'd like to discuss is substitutability of ammonia, which has been brought up today during the meetings, and I would like to do it by our customer segments.
In 2007 Terra serviced more than 125 agricultural customers, dealers who sell direct to thousands of farmers, with ammonia served by rail. We served a lot more customers than that with ammonia, but those were the only ones serviced by rail.

We supplied approximately 200,000 tons or 2,500 shipments to these customers.

The rail industry has suggested that farmers replace ammonia with non-hazardous fertilizer such as UAN and urea, but because those products contain less nitrogen per ton, it would take nearly three times as many tons of UAN and approximately twice as many tons of urea to deliver the same amount of nitrogen.

Not only are the railroads today incapable of handling these quantities, these quantities are not available to be purchased, and I think that is even more important.

Due to the demand to feed our growing world population, nitrogen is in a
tight balance today and forecasted to continue. The International Fertilizer Association forecasts show that the new world fertilizer capacity will barely keep up with consumption needed through 2015.

The railroads suggest this ammonia be substituted with other forms of nitrogen. However in today's environment with the railroads near capacity and demand for nitrogen extremely high, it is not possible.

All producers in North America are upgrading ammonia at maximum rates. Several producers have announced upgrade projects for the future, however those are several years away.

Terra's industrial customers are similarly dependent on ammonia rail transportation. In 2007 Terra serviced over 60 industrial customers with ammonia that was shipped directly to their sites to be used as chemical intermediates or as reagents to clean nitrous oxide emissions.
Most of these customers fall into three categories. The first is the mining services. There is no alternative for ammonia as a raw material to produce explosives, and what we in many cases, we have talked about moving or putting facilities closer to the production of the ammonia. In 2005 Terra partnered with Orica, and we did - we revamped a plant that Terra owned so we could produce the upgraded materials.

However that was the last plant in North America that had the capability to modify existing equipment to do so. Any change at this point would require hundreds of millions of dollars to move a facility and provide the upgrading capacity. It would be very similar to doing a UAN upgrade; it's going to take several hundreds of millions to build the upgrading capability to move forward on that.

The second category is power
generation, specifically coal and natural gas
fired generating facilities. Other products
can be substituted for ammonia in these
applications if they are available. But the
cost associated with converting facility feed
systems would be in the tens of millions of
dollars per location; plus the rail track
infrastructure improvements and freight costs
associated with handling up to four times the
shipments of products to these facilities.

Terra has attempted to work with
carriers to change this business. However it
has always come back that the carriers want
to - even after the increase in rates that
have taken place, and several of these are
well over 200 and some odd percent of the
ammonia increases, the carriers still want to
receive the same revenue generation for the
different products.

Now you are going to be taking in
four times as much product, and the customers
don't see an incentive, and no guarantee that
the rates are going to be stable, it makes it very difficult to change their mind to expend the money to upgrade it.

Finally there is a category of customers in refinery, nylon production, resins and pharmaceuticals, who have no alternatives to ammonia as a raw material.

I'd like to turn your attention now to safety, security and costs associated with ammonia transportation. For Terra to convert its ammonia shipments from rail to truck would be a staggering undertaking both logistically and economically. It would take over 27,000 truck shipments averaging a round-trip distance of over 1,300 miles. We estimate the additional costs associated with truck freight over current costs would exceed $70 million annually.

Also there simply are not enough trucks, equipment and personnel to make this possible.

Terra takes safety and the
environment very seriously. We have a dedicated EH&S manager at each facility who's role is to document policies and procedures; provide training for inspection, handling and loading hazardous materials; ensure that each person is provided with specialized protective equipment.

We at Terra have been judiciously involved in assuring we were adhering to provide the safest environment for our employees, carriers and customers throughout our existence.

I will admit the amount of dollars the railroads have put forward to assure safer transit is substantial. I applaud them for doing this.

However it appears it just recently started. It hasn't been a long term practice. If the efforts had taken place over time, as it should have been, we may not be here today, and the costs would have been gradual versus extreme one-year payments.
Terra itself spends well over $1,000 per shipment per year for TIH shipments. Car costs are almost $1,000 themselves. Terra has worked closely with the other TFI ammonia members to craft liability program for consideration by Class I railroads. As TFI’s president spoke earlier, Terra is also very concerned with the position taken in written testimony by the Association of American Railroads that calls for TIH shippers to indemnify and hold harmless the railroad.

We have spent endless hours and committed substantial funds to work with the railroads on a business solution to their concern over liability.

With the position that their trade association has taken, and if the Board acts to accommodate them, we are concerned that there is no incentive for the railroads to continue to work with us. They will get exactly what they want, with a workable
liability program, and a continuation of the common carrier obligation as is, Terra believes costability and ammonia supply chain predictability would be restored in enabling business to make sound future decisions.

Terra understands the concerns of the railroads pertaining to the potential risk associated with transporting TIH by rail, and has attempted to work with them to make our industry safer. We also believe however that the STB should not take any action that would allow the railroads to continue to impede the movement of TIH by rail. Any proposal that shifts liability from carriers to shippers when an accident and a release occurs due solely to the fault of the railroad is unacceptable.

I believe that the economic incentives of our current fault-based tort system encourages greater safety measures, and that tinkering with that system by imposing liability limits jeopardizes overall
Every business in this nitrogen supply chain including transporters has risks, but as a result they do not have insurance for a total catastrophic event, and that is why the focus on safety and appropriate maintenance is of utmost importance, not indemnification responsibility.

Although the STB must not take any action to narrow or eliminate the common carrier obligation to all hazardous materials, Terra believes that the STB can facilitate and negotiate a business or political solution to railroad liability concerns that will not jeopardize the public safety.

Thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. Geisler.

We will now hear from Patrick E. Groomes from the CF Industries Company.
MR. GROOMES: Chairman Nottingham,
Vice Chairman Mulvey, Commissioner Buttrey,
of course I prepared comments coming into
this, but so much has been said today, I'd
like to revisit a couple of the comments that
have been made, and maybe draw a little bit
of a finer point on some of them.

First of all, I think the Board's
role here is really not what the railroads
have requested. There is a very important
role for you to play; it's just not what they
are asking.

Everyone has talked about the
business solutions proposed by, for example,
TFI, and we certainly think that the Board
could facilitate those proposals. I know
that in at least one instance the Board has
filed comments with one of the other agencies
in one of the rulemakings to make sure that
they are made aware of what's going on in
that proceeding. I would submit that your
continued participation in those proceedings
will allow those agencies to take your economic expertise into consideration.

A lot of the economic issues were just discussed with you by the railroads about what was going on in the FRA proceeding, and I think it's important that you continue to follow up with that.

What I would also suggest is very important is that you require the railroads to submit evidence of everything they are asserting in this proceeding. I know at least one witness today has referenced the woeful inadequacy of just about every assertion they have made.

I would think that any decision that comes out of this proceeding should be based on facts and not just suppositions.

I know that each of you have had a question about the authority of the Board to act in this proceeding, and particularly Commissioner Buttrey has had some questions about exactly where is the Board's authority
I don't want to focus on the broader authority of the Board to address what the railroads have requested, but specifically the Board's authority to act specifically as the railroads requested in this proceeding. They have requested that you grant them a right to impose indemnification upon shippers. That constitutes legislative rulemaking, and we have not gone through a rulemaking proceeding.

Now if you were to issue a policy statement that was not binding, did not give them the right to impose that obligation, perhaps we are somewhat short of that. But what they have requested is not that; what they have requested is that you adopt a rule.

And as I said before, I think that whatever decision you may come to, I don't think the record as it currently stands is sufficient to come to any conclusion.
Another thing that I think we can draw a finer point on is the scope of liability. Everyone has talked about it; I understand that, and I hope I'm not beating a dead horse at 5:00 o'clock in the afternoon, a long day. But what we are talking about is a much smaller category of liability that what the railroads would have you believe.

As I believe you heard from the FRA, if the railroads comply with federal regulations, they have the protection of preemption. That means that state law negligence claims cannot be brought against them, preempted by the federal regulatory scheme.

So what does that leave you with? That leaves you with instances where they are not complying with law. So now they have come to you and asked you to take the position that it is reasonable for them to impose indemnification requirements on shippers in cases where they haven't complied
with federal law.

I have a hard time coming to the conclusion that that is a reasonable request, but that seems to be what they are asking.

I know there has also been some debate about, particularly from you, Chairman Nottingham, about the question of the intermingling of safety and economic regulation. And one thing I would note is that the liability that the railroads are concerned with here arises specifically under the FRSA. It comes about because of an amendment to the FRSA last year.

If you go back and look at the Minot decision prior to that amendment, the 8th Circuit held that all - all claims - based on state law of negligence were preempted. And based on Congress' amendment just a few weeks ago, we now have a decision from the 8th Circuit that says, in cases where they don't comply with law, they are not preempted.

So that liability arises under the
FRSA, a statute that the FRA is charged with administering, and it is part of the safety scheme, so I think that is a little bit finer point, much along the lines of what Mr. Moreno was discussing with you.

So I think it's a little bit clearer that it's a safety issue and not an economic issue.

You had a few questions also, Mr. Chairman, about the issue of bankruptcy and what the implications might be for a railroad after a release.

I've been through a few very large bankruptcies, and what I will tell you is that it's not the normal course of business for whatever reason that an entity stops business overnight, especially if it's got going concern value. It will operate, most likely, as a debtor in possession. It will continue to operate; it will serve its customers; and it will continue to make money.
The claims that came about will be settled through bankruptcy most likely. So there is a mechanism in place to ensure that the railroads continue to operate in such a situation.

One thing that I was a little disappointed when the railroads were up here speaking, there was a lot of hope that they would talk about the proposal by TFI, and I think but for one, we didn't hear anything from them about it.

So I question whether or not there should be some additional follow up with them on that.

And then just one clarification on the modes of transportation that have been discussed as the safest manner for transporting TIH materials. For shipments from Canada, specifically for CF, there is no alternative to rail. No barge, no pipeline. So while certainly with certain customers and shippers they may have that alternative; we
do not.

That concludes my remarks, and thank you very much.

CHAIRMAN NOTTINGHAM: Thank you.

We will now hear from Alex McGregor of the McGregor Company.

MR. Mc Gregor: Good afternoon.

Thanks for the opportunity to discuss anhydrous ammonia and its importance for farm families.

I'm president of a 126-year-old family wheat and livestock ranch, and a family business that supplies and other agricultural inputs in over 40 rural communities in the inland Pacific Northwest.

Since my dad brought the first rail car of anhydrous ammonia to our region over half a century ago, has become a cornerstone to grain production. Farmers, scientists, local businesses like ours have helped increase yields 2-1/2 fold, reduced tillage and decreased soil erosion more than
80 percent.

Gone are the chin-high ditches and dust storms of my youth. We've come a long way, and anhydrous ammonia has been a big part of a striking environmental success story.

It was but two years ago that farm families for the first time since the Great Depression paid more for a gallon of fuel than they received for a bushel of grain they produced.

Grain prices have since risen, but increases in energy costs, diesel and nitrogen in particular, have advanced at a breathtaking pace. AAR's plan to avoid potential demands of trial lawyers should its members have accidents would worsen the picture.

The AAR has taken an interesting approach, seeking your okay to discourage shipments of the product upon which we depend while maintaining steadfastly that they have
got a strong safety record at delivering it.

They tell us they have plenty of business; that intermodal shipments are booming; that we are small fry shippers to them; and that they would rather not take risks with us, exceedingly rare though they might be.

Let's look at the consequences for agriculture and for consumers of this frenzied risk avoidance tactic. Anhydrous ammonia is the feedstock from which other nitrogen materials are made. Take away rail access and you will put under siege a domestic fertilizer industry that at the manufacturing level has had to shutter permanently many plants in the past 10 years.

NH3 has long been our most efficient and cost effective nitrogen product for direct field application. We have handled over 1,100,000 tons of anhydrous ammonia ourselves as an organization, and we've done so safely over the years. More
than 12,000 rail cars.

The keystone is remarkable dedicated people, intensively trained, and forever diligent in maintenance and stewardship. Allow AAR participants to renege on serving us and we'd have to get ammonia from ocean ports. The nearest ammonia barges that serve rivers, and the nearest ammonia pipelines are half a continent away for us in the Pacific Northwest.

We'd average 660 round trip highway miles to move each truckload of NH₃, not our current 128. Our cost of bringing NH₃ to our branches would increase from $300,000 to more than $1.5 million with reduced safety, driver fatigue, squandered fuel and delayed shipments as part of the equation.

Does it make sense to be handicapping American agriculture in this fashion?
If we tried to avoid this forced march toward financial lunacy by switching to more dilute products made from anhydrous ammonia, those AAR misleadingly regards as inherently safer technology, the consequences would be different but severe nonetheless.

Urea, a less concentrated dry fertilizer, would require twice as many truck trips to the nearest rail siding for the same amount of nutrients; twice as many rail cars or more, too. This is no small feat in itself. We can't get cars delivered on time right now.

We don't have the tools or the expertise to ensure uniform placement of the product in the root zone on steep hillsides.

But there would be more very bad news for farm families. Costs vary by the day, but here is a sampler from spring work. The farmers we serve would have had to pay a premium of 17 percent more for dry urea, and 29 percent more for UAN. On average the cost
of nitrogen to farmers would have increased more than 25 percent to switch from NH3.

This on top of production costs already up more than 67 percent in the last decade, from $3.97 per bushel to $6.64, with 233 percent increases in fuel, and 91 percent increases in fertilizer leading the way.

Energy prices have moved up further since those early `08 estimates, too.

The idea of sidetracking a rail distribution system its representatives and those who regulate it describe as having a safety record that is exceedingly favorable and remarkable is hard to understand from a public policy perspective.

Ammonia shippers are already treated as unwanted customers. They have been hit with exponential shipping rate increases of as much as 300 - 400 percent since 2005. Policy statements enabling rail lines to further burden shipping of this vital nutrient will put more traffic on
beleagured highways, increase congestion and
decrease safety, and put our food production
system at risk.

This when all rail shipments to
and from agricultural heartlands have already
grown less reliable and more expensive. The
AAR risk avoidance strategy would increase
costs for food stuffs and energy just as
Congress examines way to lower them.

Let's be realistic. One of us can
plausibly make a case for changing a system
that works to a costly cumbersome and
wasteful one that doesn't. We in agriculture
cannot maintain railroads and do the
maintenance for them. We cannot prevent two
trains from running into each other, causes
of some recent serious accidents.

Only carriers can do that. One
can create doomsday worst case scenarios,
about gasoline, propane, diesel, ammonia, and
many other products. My family's record of
56 years of safe product use and similar
experiences of many across our land are evidence that the real world of NH3 has been one of responsible transportation and responsible use.

We have limited liability the best way we can, by an all out commitment to central maintenance, and by training good people, and we have done it well.

We urge you to be unwavering in maintaining common carrier responsibilities. Please consider carefully before writing policies that allow a system that has provided safe and affordable plant nutrients to be derailed.

We should consider the issue that underlies all of this, railroad concerns about potential liability. Kudos to the Fertilizer Institute for offering on behalf of shippers to purchase a billion dollars in excess umbrella insurance, and to propose legislative action to cap overall liabilities in exchange for putting a governor on rapidly
surging rail shipping charges.

We hope you will encourage good faith efforts to pursue the initiative now on the table.

Anhydrous ammonia provides the proteins today for a billion humans at least, and a meat supply for half a billion more via livestock feed. Ammonia is an engine of productivity directly, and as a feedstock that makes possible much of our agricultural plenty.

Firms like ours help stoke the coals of local economies in the farm towns we serve. Following the advice of pioneer settlers, measuring twice and cutting once, would seem appropriate, when our firm and thousands like it across our heartland have shown that we can handle ammonia safely and responsibly year after year, decade after decade.

We urge you to consider America's farm families, stewards of 97 percent of the
farms across our heartland, before allowing railroads to scuttle a system that works, please be wary of the consequences of handicapping people just now emerging from a prolonged economic crisis.

We lost way too many farm families in the last few years, four or five in each of the dozens of farm communities we serve. Growers are facing unprecedented high costs for fuel, fertilizer and other inputs. Let's put aside an Alice in Wonderland board room scheme where it becomes logical somehow to dump or impede a safe transportation system, while opening the floodgates to higher priced energy on the farm, and higher priced foodstuffs in the supermarket.

I'm reminded of Nobel Prize winning plant breeder Norman Borlag's warning that if we as Americans let misconceptions, not science and good judgment, dictate the future of agriculture, we will be guilty of displaying a diminished gene frequency for
commonsense.

Please don't let our efficient production system get overburdened with tariffs, with policy statements that allow backdoor ways of scuttling a safe and efficient system, or by taking at face value impractical notions of supposedly safer technologies.

Out in the real world of production agriculture, it is so much more complicated than that. As former President Dwight Eisenhower once put it, farming looks mighty simple when your plow is a pencil and you are a thousand miles from the field.

We are all for safety, and we have demonstrated our excellent record in our stores and on the road and on the farm.

Please help us avoid a destructive blind alley. The consequences are too severe, for the remarkable people who are American agriculture, and for American consumers, too.
I thank you.

CHAIRMAN NOTTINGHAM: Thank you, Mr. McGregor, and other witnesses.

I have a question for Mr. Groomes.

I noticed in your statement on the first page it says that the Board has no authority to impose rail safety standards, and I don't think we have ever proposed to impose rail safety standards, and then you go on to say, or to regulate the transportation of hazardous materials.

That second statement might be news to companies like Dupont for example, who just won four rate cases before us involving the movement of hazardous materials, TIH, and we have all kinds of movements of hazardous materials that we have regulatory oversight over.

MR. GROOMES: I would submit that that is the regulation, not the rate, the regulation, the actual transportation, the safety transportation.
CHAIRMAN NOTTINGHAM: Okay, so -
and our authority to exempt commodities from
regulation, if we applied that to exempting
hazardous materials, hypothetically, that
would be an example of deregulating something
we never had regulatory oversight over under
your -

MR. GROOMES: Well, again, your
regulatory authority is over the rates for
the most part, and then what we are talking
about here. And so what you would be doing is
exempting that from rate regulation.

CHAIRMAN NOTTINGHAM: I would just
submit that the thousands of producers of
hazardous materials who come to the Board and
tell us they are relying on our stewardship
of our regulatory oversight so they can stay
in business might beg to disagree with the
way you phrase that statement.

MR. GROOMES: I certainly didn't
mean to diminish the Board's role. But I do
mean to imply that with regard to safety
issues, that is within the Federal Railroad Administration's jurisdiction.

CHAIRMAN NOTTINGHAM: Okay, and that first part of the statement certainly is perfectly sound. I was worried when you got into saying we can't regulate the transportation of hazardous materials in any respect.

You mentioned your experience with bankruptcy. I don't have deep experience with bankruptcy law, I'll say that. But I will just point you to the history of the Rock Island Railroad, and the Penn Central. If you were to be advising a client who was looking for freight rail transportation you would probably have trouble finding those two companies in the Yellow Pages as providers. It is more than just a paperwork issue, when a railroad goes bankrupt, bills get settled, and then they go merrily on providing good service in a seamless way.

We've seen railroads, especially
in the '70s, completely going under, disappearing, very severe hardships imposed on rail customers out of that. It's not something we should be cavalier about. And I was just worried that your statement sounded a little bit cavalier, that it's not something we should be too worried about.

MR. GROOMES: And again, I didn't mean to be cavalier about it, but again, given what a number of the other witnesses have said, that government would likely step in, and the pools afforded a debtor in possession, I think the assumption, I think what we were fearful of is that the assumption here was if any railroad were to become financially troubled it would automatically go into Chapter 7. And what I wanted to make clear was that there is the option of Chapter 11, and in fact a lot of companies do it and they are very successful at it.

CHAIRMAN NOTTINGHAM: In the real
world thankfully I haven't had to personally experience managing through a directed service situation on a large scale that would be required arguably under a large bankruptcy scenario, or Chapter 7 even.

But we've got about 142 employees, and the notion that we would be able to seamlessly with no impact or inconvenience to rail shippers be able to start operating a railroad and then seamlessly convince Congress with no objections and no concerns to write the checks to reimburse the new railroad that stands in, which is the way that works, and that all that would be kind of a pleasant experience with - and not to mention the impact on reduced competition, which is already a big concern of shippers.

I just think, we don't want to understate the importance of trying to stay as clear as we can of major shutdowns of railroads out there.

MR. GROOMES: I couldn't agree with
you more, Mr. Chairman. If someone is
calling me about a bankruptcy issue, it's a
bad day, and nobody wants to be there.

I just didn't want the record to
sort of keep gravitating toward this idea
that the only option if something goes bad is
to liquidate a company, because it's not.
And I understand the burdens imposed on this
Board in such a situation, and I don't mean
to diminish that at all.

But I think part of the problem
is, again, that the railroads have talked
about nothing but ruinous liability, and not
distilled the issue to what we are really
talking about. And that is troublesome to
shippers in this case. If we really distill
it down to what we are talking about,
liability in instances where they failed to
comply with law, and the fact that they are
afforded essentially a safe harbor if they
comply with law, it's a little bit of a
different issue.
CHAIRMAN NOTTINGHAM: Vice Chairman Mulvey.

MR. MULVEY: I have no questions for these witnesses, thank you.

CHAIRMAN NOTTINGHAM: Commissioner Buttrey?

That will complete the questions for this panel. You are dismissed. Thank you for being with us today.

We will call forward our final panel today, Mr. Paul Orum from the Center for American Progress; Mr. Eric S. Strohmeyer from CNJ Rail Corporation; and Mr. Rick Hind from Greenpeace.

As soon as you are ready, Mr. Orum, you can start. Do we have everyone here?

Mr. Hind? Is Mr. Hind here?

MR. ORUM: I don't see him here.

CHAIRMAN NOTTINGHAM: Well, go ahead, and if he has anything to put in the record in the next 30 days, he can.
Mr. Orum, if you would go ahead and start with your statement. Welcome.

PANEL VII: OTHER INTERESTED PERSONS

MR. ORUM: Thank you for this opportunity to comment on rail transportation of hazardous materials.

I am here to comment on one specific aspect, namely, opportunities to get these hazardous materials, toxic inhalation hazardous materials, off the rails through safer and more secure chemicals.

I wrote a report in 2007, Toxic Trains and the Terrorist Threat, as a consultant to the Center for American Progress. The report documented the opportunity to eliminate chlorine gas shipments by rail to water utilities, and I'm submitting that report into the record.

Basically we found it's quite affordable. Very few water utilities still use the railcar amount of chlorine gas, and really don't need to.
But water is just one industry.  
I'd like to just give some other examples of  
changes that can eliminate these TIH  
shipments.  

Bleach manufacturers can produce  
bleach by generating the chlorine gas onsite,  
from salt and electricity, the same way the  
major manufacturer would produce it. And  
then without bulk storage, that eliminates  
the need to send a railcar of chlorine gas  
around.  

By some estimates possibly up to a  
third of all chlorine rail shipments would be  
off the rails if bleach manufacturers  
uniformly were to make that change.  

There are many types of food  
processors that use sulfur dioxide gas for  
various things, wet corn milling, cherry  
brining, sugar processing; it's not that  
uncommon to have a sulfur burner onsite to  
generate the sulfur dioxide that's needed for  
that sort of process. Something like half
the sulfur that is used around the world is generated at the site where it is used.

Wastewater utilities that replace chlorine gas can also replace sulfur dioxide gas with sodium bisulfite. It's a different form to do the same thing.

Soap and detergent manufacturers can also use the sulfur burner to create their sulfur trioxide on site as opposed to bringing it in by rail.

Secondary aluminum smelters, some of them are gone from rail cars of chlorine gas, which isn't real common but does happen, over two alternatives, nitrogen gas.

Paper mills, going off chlorine shipped by rail to chlorine dioxide generated onsite. Or chlorine free alternatives.

And various manufacturers do collate near the producers of toxic inhalation hazard chemicals, and receive by pipeline. And the bulk of chlorine is used up at or near where it is produced.
That is by no means a complete review. It's just a few examples, and basically I'm here to urge you not to neglect this aspect.

There are many changes that can be made, and that I think will happen for a variety of reasons. We need to be encouraged with the right incentives.

All these examples by the way are based on things that people are already doing somewhere.

I'm not a chemical engineer, neither are you from what I gather. And I urge you, maybe that is not where you should go, into chemical engineering. Rather it would be to try to associate the economic incentives to use a chemical with all the hazards of using that chemical.

That's the goal that I think you all can play very well, because requiring facilities to produce or receive these toxic inhalation hazard materials by rail to cover
liability insurance commensurate with the hazard would add a very important incentive to use and develop feasible alternatives.

Right now we have the wrong incentive structure. I know of one water utility spending $120 million to put up containment structures for their rail cars of chlorine gas, which helps them out as long as nobody destroys that building. It doesn't do anything to protect that rail car on the way in.

It's sort of a mutually reinforcing inertia in which the user doesn't pay the full cost and doesn't have the real incentives to switch off to something else that might be readily available, and yet the rail car has to carry it.

With that I can conclude.

CHAIRMAN NOTTINGHAM: Thank you.

We will now hear from Eric Strohmeyer.

MR. STROHMeyer: Good afternoon,
Mr. Chairman. My name is Eric Strohmeyer, of CMJ Rail Corporation. It has been a very informative hearing today. I will end very briefly with some comments and some observations which I thought the Board should take into consideration.

We'll let the shippers and the Class Is put into the record most of the stuff they have already done. But I do want to bring to the Board's attention the concept the chemical shippers are very reluctant to embrace is the concept that eventually we may need to get to a liability cap, a straight liability cap.

One of the things that 20 years ago Congress realized there was great reluctance to allow passenger service back under the nation's rail network. And in order to do that, they had to produce an incentive for the railroads to allow passengers to physically get on the nation's
rail networks again.

And they did so by providing a mechanism with a liability cap to Amtrak, originally to the VRE, which both Commissioner Buttrey and Chairman Nottingham actually take everyday.

These liability caps also had indemnifications for the railroads.

This has been going on since the 1990s, so the idea of a liability cap for the railroad industry has been around for some time, and has actually been endorsed and supported and continued and actually been codified in our statute today, 49 USC 28.103 and 28.102.

So we do actually have a form of liability cap. And it was a straight cap. And an indemnification agreement already precedent which exists today.

Today we hear that the shippers are concerned over the fact that railroads would have this liability shifted to third
parties when they are negligent has already been done.

And to that extent we just wanted to bring that to the Board's attention, and the Amtrak statutes that we cited, that this issue has actually, been there done that.

And to that extent, that is the only real issue that we have to bring to this table. I know it took a lot of people a lot of time to actually make that happen. I know a gentleman in our organization actually started that process in 1983, through legislative action initiated in New Jersey.

Eventually the first liability cap was the BRE, approximately 1988, `89, I forget when the BRE actually started.

We actually saw that come to fruition. Today if there were to be an accident on the VRE, and a trainload of passengers were to succumb to an unpleasant fate, the liability cap is only $200 million, I believe. To that extent if it was 500
people on board, each person is worth $400,000. It sounds a little gory, but that is the reality. And the railroads are indemnified.

So to that extent it has already been done once, so that is the only issue we would like to bring to the Board's attention today.

It's already out there, and the TIH issue is just something, nothing more than an extension of yet another possibility, whether it's catastrophic, potential for loss of life. And I can certainly see why the railroads are pushing for it, and I don't envy your decisions with regards to what you have to do.

So to that extent I will conclude my testimony, and if you should have any questions I'll be more than happy to answer them.

CHAIRMAN NOTTINGHAM: Thank you.

Mr. Orum, your affiliation with
the Center for American Progress, did you say
you are a past consultant, current, just for
the record, are you a full-time employee
there?

MR. ORUM: I'm not a full-time
employee; a consultant. I have written two
reports. I mentioned one. The other was
called, Preventing Toxic Terrorism, and am
currently doing additional work as a
consultant on this issue to the Center for
American Progress.

CHAIRMAN NOTTINGHAM: And Mr.
Strohmeyer, CNJ Rail, what does that business
actually do? Do you operate trains? Or what
-

MR. STROHMeyer: CNJ Rail
Corporation provides I would call it
management consulting services to the rail
industry. We've got a couple of entities
we've worked with around the country.

We work with Mr. Raymond English
in foam packaging down in Vicksburg,
Mississippi in a case recently before you. We have also worked with other individuals around the country.

We currently have our greatest work in progress up the road in Cockeyesville, Maryland, that we have been trying to turn into a railroad. It has been difficult at best, but we are doing the best we can. We have actually been working with folks out in Oklahoma City on another case that I spoke about, the last time we had a get-together here, with regards to some of their issues.

And I believe there is already now another pending case before the Board, and I can inform the Board there is going to be a second case in regards to that sometime shortly thereafter as well.

So we get around the country from time to time where management is necessary. I myself have been involved in the operation of short lines, Somerset Terminal Railroad
Corporation. I'm from New Jersey. I've held every position from the car knocker to the president of the organization.

So we know a little bit about the short line and railroad industry, and I've been doing this since I first hired on with the railroad in 1988.

CHAIRMAN NOTTINGHAM: And which railroad was that? What was the name of that railroad?

MR. STROHMEYER: Which railroad?

CHAIRMAN NOTTINGHAM: Yes, the railroad you were employed by?

MR. STROHMEYER: Oh, Somerset Terminal Railroad Corporation, Finance Docket 33999.

CHAIRMAN NOTTINGHAM: Commissioner Buttrey, any questions for these witnesses?

Vice Chairman Mulvey?

MR. MULVEY: I don't have a question. An observation. I'm familiar of course with the commuter railroads and how
there are agreements on liability.

But what we are talking about here with regard to the freight railroads and carriage of TIHs is catastrophic losses, which go far beyond $400 million, and even with the current administration's reductions lately in the value of human life, it still comes out to be an awful lot of money if you kill 10,000 or 100,000 people. And I think that there is something to be said for the idea of working out agreements with commuter railroads, and Amtrak, and that has been successful.

But I do think it's going to be a little more difficult to find a solution to situations where the potential is catastrophic loss.

MR. STROHMeyer: One of the issues, if I might just respond to that for just a second, we have heard a lot about the relationship between, if you take away the liability, that the safety aspect will
decrease. We have heard about it. I've heard numerous testimony today with regard to the Akron case, the holding that there is some sort of relationship between the two. But I would like to point out the safety record, that when you took the liability away from the freight carriers, do you feel any less safe getting on a commuter rail network knowing that the liability? No, you actually feel safer. You actually see a degree of safety, because that has actually led to investments in infrastructure, has actually brought the infrastructure up to a higher standard, and actually brought the FRA to the property.

And so while I hear we relieve the freight carriers of their obligation, the net result has actually been an improvement in the issue of safety, which if you go by what everybody is telling you, at least the shippers are arguing, there's going to be no incentive.
Well, we've taken away the stick with regards to the passenger service, but there has been no down side. And if you listen to the ratio, you should be seeing commuter trains falling off the track. And you are not doing that.

MR. MULVEY: Well, the railroads have plenty of other incentives, including FELA, for example, to encourage them to operate safely.

So Mr. Hamberger is chuckling away at that. But no, I have always thought that the liability incentive is always one which I suppose is there, but I do think responsible people try to behave responsibly.

With that I have no further questions.

CHAIRMAN NOTTINGHAM: Thank you, witnesses. You are dismissed.

(Panel dismissed.)

CHAIRMAN NOTTINGHAM: This concludes the hearing. We will adjourn. We
will keep the record open for 30 days, and I 
appreciate everyone's patience in getting 
through a long day. Also appreciate the hard 
work of the many staff who it took to make 
this hearing happen.

    Thank you, everybody.

    (Whereupon at 5:48 p.m. the 
    proceeding in the above-entitled 
    matter was adjourned.)