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*The safety and security association of the commercial explosives industry • Founded 1913*

June 10, 2006

Docket Management Facility  
US Department of Transportation  
400 Seventh St., SW  
Room PL-401  
400 Seventh St., SW  
Washington, DC 20590

RE: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials  
Docket No. FRA-2006-25169<sup>1</sup>

Dear Sir or Madam:

On behalf of the Institute of Makers of Explosives (IME), I am submitting comments on the joint Federal Railroad Administration/Pipeline and Hazardous Materials Safety Administration (FRA/PHMSA) notice concerning the review of design and operational factors affecting the transportation of hazardous materials in tank cars.

#### Interest of IME

The IME is the safety and security association of the commercial explosives industry. Our mission is to promote safety, security and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations. Commercial explosives are transported by all modes and used in every state. Additionally, our products are distributed worldwide, while some explosives, like TNT, must be imported because they are not manufactured in the United States.

Over 2.5 million metric tons of explosives are consumed annually in the United States. Ammonia, for which there is essentially no alternative, is basic to the manufacture of about 95 percent of all commercial explosive products. The transportation of this key feedstock is accomplished almost exclusively by rail.

#### Points for Consideration

IME attended public meetings FRA/PHMSA held earlier this year to gather information on improving the safety of tank car transportation of hazardous materials. We appreciate and respect the expert

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<sup>1</sup> 71 FR 37974 (July 3, 2006).

opinions presented. However, there are a few issues that we would like to weigh in on, hopefully adding constructively to the discussion.

- **Probability of an Accident:** While a zero-accident transportation system is a laudable goal, the only way to ensure that tank cars are accident-free is not to transport them. The reality is that accidents will happen, including accidents involving tank cars. Yet, the reality is still that the safest mode of transportation is rail and that the economy would suffer unacceptable disruption if this mode of transportation were allowed to refuse to carry hazardous materials, even if only the subset of TIH materials, in rail cars.
- **Product Embargos:** The threat of product embargos is real. FRA/PHMSA will remember the ill-fated 2003 effort by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to regulate persons who transport explosives under Federal Explosives Law (FEL) which prompted a self-imposed embargo of explosives shipments by all North American railroads, vessel operators serving U.S. ports, and some motor carriers. The embargo was disastrous for explosives industries left without means to effectively transport products. However, Class 1 materials make up less than one percent of all hazmat freight and it was simply not in the economic interest of commercial carriers to revamp their personnel screening requirements to the extent necessary to comply with FEL for the incremental business provided by explosives shippers. ATF's effort was blocked when DOT and the Transportation Security Administration (TSA) issued rules addressing security qualifications of hazardous materials transportation workers and effecting the FEL transportation exception at 18 U.S.C. 845(a)(1). While DOT/TSA's action prompted a lifting of the voluntary embargo, we understand that Canadian railroads still embargo explosives shipments in the United States.

While government action can prompt voluntary embargos by carriers, carriers can also achieve a similar result by adopting "best practices" or operating rules that cause shippers to look for alternative means of transportation. Examples might include the recent institution by a Class 1 railroad of a private background investigation and credentialing program for contractor employees, or, as a point of discussion in this proceeding, equipment limitations that would create an arbitrary capacity shortage. Another type of product ban would result from the suggestion of the railroads that they be relieved of their common carrier obligation to transport certain hazardous materials in tank cars. The ramifications for the economy and society make this option unacceptable. Not even the railroads would be immune as these materials are indispensable precursors to rail infrastructure and equipment as well as the well-being of rail employees. It is a paramount concern of shippers that the response to current perceptions of tank car safety and liability not be requirements or standards so severe or unique that railroads are relieved of their common carrier obligation to transport or that shippers find themselves unable to offer to railroads essential materials.

- **Comprehensive Review:** To determine how best to improve the railroads already exceptional safety record, many are advocating for a "comprehensive" or "holistic" review of safety considerations surrounding the tank car movement of hazardous materials. Since catastrophic failures of tank cars are the consequence of derailments, collisions and human error, any improvements to tank car specifications will likely be eroded without corresponding improvements to rail track, operating procedures, and personnel training. IME also believes that an assessment involving all these factors is essential. In addition, as a shipper who uses all modes of transportation and multiple modes to move some shipments, any "comprehensive" review must

look beyond the immediate rail environment and embrace an intermodal approach and is system-wide in scope. Otherwise, the result is likely to simply be a shift of risk to other modes.

Several years ago, the US Coast Guard (USCG) enforced policies that made it virtually impossible to bring shipload quantities of explosives into U.S. ports. The premise for the policies was to keep port facilities “safe.” However, the “closure” of U.S. ports did not lessen the need for explosive products. The market demand resulted in ships being routed to Canada or Mexico where product was transferred to trucks and brought to customers in the United States. PHMSA lead a multi-agency working group to assess the system-wide risks of the USCG’s policy. In its final report, the working group “found that system-wide risks from such a course could be orders of magnitude higher than from allowing unloading in a port closer to the intended destination of the explosive cargo. This occurs because highway risk (crash and explosives transportation) more than offsets port risk if significant distances are involved.”<sup>2</sup> It would be folly to advance policies that make rail transportation “safer” at the expense of system-wide safety.

- **Impact to the Rail Industry:** The railroad industry has made it crystal clear in testimony before Congress that railroad viability is threatened by seemingly limitless liability when accidents, for whatever cause, result in catastrophic releases of hazardous materials.<sup>3</sup> Since many hazardous products are dependent on rail transportation, shippers cannot dismiss railroad concerns. All affected parties should be open to solutions outside traditional remedies which, be best, promise marginal improvements in safety. A suggested solution worthy of consideration includes working with Congress to create a statutory liability cap with government revenue and/or private-pooled funds covering damages above the cap.<sup>4</sup> Such coverage is a way to limit risk and establish a level of certainty necessary to sustain a market for insurance.

### Conclusion

IME is pleased that FRA/PHMSA has engaged on this important issue. All parties to the discussion of railroad and tank car safety should share common goals to foster safe, secure, reliable, and economically-feasible rail transportation. FRA/PHMSA leadership toward these objectives is welcome.

Respectfully,



Cynthia Hilton  
Executive Vice President

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<sup>2</sup> [http://hazmat.dot.gov/riskmgmt/analyses/explo\\_transp\\_wp.pdf](http://hazmat.dot.gov/riskmgmt/analyses/explo_transp_wp.pdf).

<sup>3</sup> Statement of Edward Hamberger, President & CEO, AAR, before the US House of Representatives Subcommittee on Railroads, June 13, 2006.

<sup>4</sup> Precedents include PL 107-297, the Terrorism Risk Insurance Act of 2002; PL 105-134, the AMTRAK Reform and Accountability Act of 1997; and PL 85-256, Price-Anderson Nuclear Industries Indemnity Act of 1957.