BEFORE THE
CANADIAN TRANSPORTATION AGENCY

REVIEW OF RAILWAY THIRD-PARTY
LIABILITY INSURANCE COVERAGE REGULATIONS

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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The Canadian Transportation Agency ("Agency") announced on August 13, 2013 that it would undertake a public consultation and review of the adequacy of insurance coverage for the issuance of certificates of fitness required by Canadian law for federal railway companies. The stated purpose of this review is to solicit input or possible improvements to the current regulatory framework. To this end, the Agency issued a Discussion Paper on November 19, 2013 that provides background information on the Agency's role in regulating federal railway companies, railway third party liability insurance and the Agency's current regulatory requirements for determining the adequacy of third party liability insurance coverage and appropriate accountability for liabilities.

The Association of American Railroads ("AAR") is a trade association whose membership includes freight railroads that operate throughout the North American (Canada, United States, and Mexico) rail network. The AAR's members operate approximately 83 percent of the line-haul mileage, employ approximately 92 percent of the workers, and account

for approximately 96 percent of the freight revenues of all railroads in North America. Accordingly, the AAR has an interest in matters that affect rail operations in all three countries. In that regard, the AAR and its freight railroad members have a strong interest in the respective obligations and liabilities of all stakeholders involved in the rail transportation in North America and in ensuring that the Agency has the benefit of the relevant legal principles and policy considerations when considering its regulations. The AAR provides these comments to enhance and clarify the Discussion Paper's review of the regulatory framework related to third party liability in the United States and to provide the AAR's views on issues of shared liability.

DISCUSSION

I. There Is No Regulatory Requirement in the United States That Rail Carriers Demonstrate Adequate Insurance Coverage

The economic regulator of the railroad industry in the United States, the Surface Transportation Board ("STB"), has jurisdiction over transportation by rail carrier.[1] In order to construct or operate a line of railroad, a rail carrier must first obtain from the STB a certificate of public convenience and necessity ("PC&N") or an exemption.[2] The STB must approve a proposal to construct or operate a rail line unless it finds that the proposal would be inconsistent with the PC&N,[3] reflecting a Congressional intent that new rail lines and new rail operations should be presumed to be in the public interest. Although the statute does not define "public convenience and necessity," the agency has traditionally looked at whether: (1) the applicant is financially able to undertake the project and provide rail service; (2) there is a public demand or

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[1] 49 U.S.C. § 10501.

[2] 49 U.S.C. §§ 10901, 10502. Similarly, a non-carrier must obtain a PC&N certificate or an exemption to acquire and operate a line of railroad.

[3] *See* 49 U.S.C. § 10901(c).

need for the proposed service; and (3) the proposal is in the public interest and would not unduly harm existing services.[4]

There is no requirement in the United States that the railroad demonstrate adequate insurance coverage as part of the PC&N showing. Instead, insurance coverage is a commercial consideration that railroads evaluate in the same way that other businesses do, including rail customers who produce or work with hazardous materials. Freight railroads must evaluate their third party liability coverage in light of availability of insurance capacity in the marketplace, price and the risks the railroads face, including evaluation of those entities that can access their properties, such as passenger providers who utilize freight tracks, the nature and risk of the commodities they are obligated to haul, including hazardous materials, and the many ways third-parties come in contact with railroad infrastructure and operations.

II. Providers Of Passenger Rail Transportation In The United States Are Authorized To Enter Into Contracts That Allocate Financial Responsibilities For Claims.

One area where the U.S. government has some regulatory involvement in the relative allocation of third party liability risk is the allocation between freight railroads and providers of passenger rail service that operate on freight railroads' track. Most passenger rail service in the United States is provided over tracks owned by an entity other than the provider of passenger service. The National Railroad Passenger Corporation ("Amtrak") operates 95 percent of its 22,000-mile network on tracks owned by freight railroads through a statutory right to access those tracks. In the first instance, that right is governed by the operating agreement that Amtrak

[4] *See, e.g., Tongue River R.R.—Construction & Operation—Western Alignment*, FD 30186 (Sub-No. 3) (STB served Oct. 9, 2007), slip op. at 13.

negotiates with its freight carrier host.[5] If Amtrak and the freight carrier cannot agree to terms, the STB has the authority to set terms and conditions with compensation set at a minimum of the incremental cost of Amtrak's use of the freight carrier's facilities.[6] In contrast, commuter railroads do not have a statutory right to access tracks that are owned by Amtrak or the freight railroads. A commuter operator's use of those tracks and facilities is governed solely by contract.

The operating agreements between passenger rail service providers and host freight railroads address myriad issues, including third-party liability. Congress enacted the Amtrak Reform and Accountability Act ("ARAA") in 1997, in part, due to challenges faced by parties in developing those agreements.[7] A significant challenge was how passenger rail service providers could indemnify host railroads for the risk created by the presence of the passenger operations. In that context, Congress acted to limit damages, including punitive damages, from claims arising from a single passenger rail accident to $200 million.[8] The ARAA also specifically authorized providers of passenger rail transportation to enter into contracts allocating financial responsibility for claims. In enacting this legislation, Congress intended to facilitate agreements governing passenger service providers' access to freight railroads' property.

In 2009, the United States Government Accountability Office ("GAO") issued a report, *Commuter Rail: Many Factors Influence Liability and Indemnity Provisions, and Options Exist to Facilitate Negotiations*. GAO reviewed agreements between commuter rail agencies and freight railroads, between commuter rail agencies and Amtrak, and between Amtrak and Class I

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[5] 49 U.S.C. § 24308(a)(1).

[6] 49 U.S.C. § 24308(a)(2).

[7] Pub. L. No. 105-134 (1997).

[8] 49 U.S.C. § 28103.

freight carriers. Most agreements that GAO reviewed allocated liability on a "no fault" basis. That is, liability is assigned to one party or the other regardless of who was at fault in the accident. GAO found that liability and indemnity provisions in agreements between commuter rail agencies and freight railroads differ, but commuter rail agencies generally assume most of the liability risk for commuter operations.[9]

The Discussion Paper in this review suggested that the STB had recently concluded that "a rail carrier cannot be indemnified for its own negligence, recklessness, or willful misconduct, as that would be contrary to public policy in encouraging safe rail operations."[10] Though similar language was included in a 2010 letter report from the STB to Congress, the context of that statement reveals that the STB was discussing cases under its authority to set terms and conditions between Amtrak and a freight railroad when those parties cannot reach an agreement.[11] In such cases, the STB has determined that it would not impose a provision that allowed a rail carrier to be indemnified for its own *gross* negligence, recklessness, or willful or wanton misconduct.[12]

III. The Sharing Of Liability With The Economic Beneficiaries Of The Transportation Of Hazardous Materials Is Consistent With The Common Carrier Obligation

It is uncontroversial that a sound North American rail system is in the public interest and delivers economic benefits for all shippers and receivers of rail freight, including those who ship

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[9] GAO Report at 14-15.

[10] Discussion Paper at 7.

[11] 49 U.S.C. § 24308.

[12] *Application of the Nat'l R.R. Passenger Corp. under 49 U.S.C. 24308(a) – Springfield Terminal Ry.*, 3 S.T.B. 157, 162 (1998).

hazardous materials that rail carriers are required by law to transport. Public policy should be mindful that the liability associated with a catastrophic hazardous materials accident could devastate that system.

Despite the concerted effort by the rail industry to ensure the safe transport of hazardous materials and the railroads' overall favorable safety record, a railroad moving hazardous shipments faces exposure to potentially ruinous liability. Importantly, some releases may happen even if the railroad's employees do nothing wrong. The fact that the commodities move in accordance with applicable government-approved safety regulations does not eliminate the problem or the concern. Even when the railroads do everything right, an outside event can cause an incident. For example, automobiles running into sides of moving trains and natural causes such as unexpected flooding could cause hazardous materials incidents where the railroad is not at fault.

A carrier can be exposed to, and be found responsible for, enormous damage claims even where it has done nothing wrong. While incidents involving highly-hazardous materials on railroads are exceedingly rare, railroads could be subjected to multi-billion dollar claims solely because of the unusual characteristics of the commodities themselves. Should an incident occur within or near a densely populated area, or should there be a popular public attraction within a few miles of the incident site, an incident, for example, resulting in a TIH release under unfavorable meteorological conditions has the potential to be truly catastrophic and result in billions of dollars in personal injury and property damage claims.

The damages potentially resulting from an exposure could risk the financial soundness and viability of the rail transportation network in North America. Insurance does not provide a viable means to fully mitigate this risk. In connection with the review at the STB in 2008 of the

common carrier obligation as it relates to the transportation of hazardous materials, the AAR undertook a review of third party liability coverage for Class I freight railroads. The AAR presented testimony of Gregory W. Larson, Senior Vice President of Lockton Companies, LLC.[13] Mr. Larson testified that the maximum excess liability capacity available to any individual railroad had declined by approximately 30% in the previous 5 years and was about $1.1 billion in 2008. There is simply not enough available coverage in the commercial marketplace anywhere in the world to insure against a catastrophic hazardous materials incident.[14] Mr. Larson noted in his testimony that a truly catastrophic hazardous materials incident could give rise to claims that easily exceeded a billion dollars. If this were to occur, Mr. Larson stated "there could be a complete collapse of available risk transfer capacity available to Class I railroads."[15] In other words, insurance may be unavailable to the entire railroad industry if such an event occurred.

In this regard, the AAR has advocated that a long-term legislative policy solution should be based on overall limitations on liability for the transport of hazardous materials. Such an approach could be based on the U.S. Price-Anderson Act that limits the liability of a company from an incident involving the release of nuclear material, including in transportation, and provides for a fund to which all nuclear power plant licensees contribute to cover any damages in excess of required insurance levels. Under a similar type of proposal for hazardous materials, railroads, shippers, and tank car owners, lessors, and manufacturers would be required to

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[13] Lockton is the world's largest privately owned, independent insurance brokerage firm.

[14] *See* "Fiery Oil-Train Accidents Raise Railroad Insurance Worries," *Wall Street Journal* (Jan. 9, 2014) (quoting James Beardley, global rail practice leader for Marsh & McLennan Cos Marsh Inc. insurance brokerage unit).

[15] AAR Supplemental Comments, *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials*, EP 677 (Sub-No. 1) (filed Aug. 21, 2008). *See also* "Fiery Oil-Train Accidents Raise Railroad Insurance Worries," *Wall Street Journal* (Jan. 9, 2014).

maintain insurance and be liable for a defined amount of damages arising from an accident involving hazardous materials. Any damages above that defined amount would be paid from a fund to which shippers of these materials would contribute on a pre- and post-incident basis up to a statutory maximum payment per incident. In this context, following the Price-Anderson Act approach, the entire supply chain would be part of the solution. Railroads would be treated as "contractors" with more limited liability than the shippers who have the option whether to make and use of hazardous materials and who benefit economically from doing so.

The AAR submits that, absent a comprehensive legislative solution, it is not inconsistent with the common carrier obligation in the United States for a rail carrier to require, if it chooses to do so, reasonable liability sharing arrangements with shippers as a condition of common carrier transportation.[16] Much the same way that passenger service has been recognized as a public good, the common carrier obligation places a requirement on railroads to haul dangerous commodities upon reasonable request because the safe transportation of those materials is in the public interest. Yet the liability for passenger operations is limited and those who arrange for passenger operations on freight railroads accept some responsibility for the risk associated with those operations as described in Part II. That is not yet the case for dangerous commodities.

The AAR's position is that where the government mandates railroads to move dangerous commodities for the public interest it is not unreasonable for the risk of transporting such commodities to be shared by shippers and receivers who control the decision to ship. If a rail

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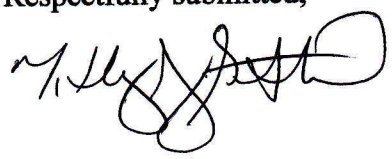
[16] The AAR has articulated this position in administrative proceedings before the STB in testimony exploring the common carrier obligation and the reasonableness of liability sharing provisions in railroad tariffs. *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, EP 677 (Sub-No. 1), *Union Pacific Railroad Company – Petition for Declaratory Order*, FD 35219, and *Union Pacific Railroad Company – Petition for Declaratory Order*, FD 35504.

carrier chooses to do so, a tariff requiring reasonable liability sharing as a condition of rail common carrier transportation would be consistent with the public interest.

Respectfully submitted,



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