

Testimony of:

The American Chemistry Council
The American Fuel & Petrochemical Manufacturers
The American Petroleum Institute
The Chlorine Institute
The Fertilizer Institute
The National Industrial Transportation League

Before the
United States Senate
Committee on Small Business & Entrepreneurship

Field Hearing on
“How Small Businesses Benefit from Smart Shipping Regulation”

Port of New Orleans
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The American Chemistry Council (ACC), the American Fuel & Petrochemical Manufacturers (AFPM), the American Petroleum Institute (API), the Chlorine Institute (CI), The Fertilizer Institute (TFI), and the National Industrial Transportation League (NITL) are pleased to provide testimony for the Senate Small Business Committee’s Field Hearing on “How Small Businesses Benefit from Smart Shipping Regulation.” We thank Senator Kennedy and members of the Committee for holding this hearing and for your consideration of written testimony from impacted stakeholders.

ACC, AFPM, API, CI, TFI, and NITL are national trade associations representing chemical and energy producers and agricultural input and production industries.¹ Our industries are among the largest freight rail shippers. Thousands of small businesses and farmers rely on the timely and economic delivery of essential goods such as fertilizer, petroleum products, chlorine and other chemicals produced by our member companies. We need smart policies to help ensure a strong, safe, and competitive rail network.

The following testimony addresses a number of key challenges faced by our member companies and other freight rail shippers. The Committee has an important oversight role in looking at the impact of freight rail policies on small business. We look forward to working with you to address these challenges.

Tank Car Standards Must Be Established through DOT Rulemaking

We are committed to the safe transportation of hazardous materials by rail. Our member companies lease, own, and maintain tens of thousands of rail tank cars in what constitutes the vast majority of rail tank cars in North America. We look to the Department of Transportation (DOT) to establish uniform national standards for hazmat transportation safety, including tank car requirements.

➤ *DOT should clarify its sole authority to impose tank car requirements.*

While Congress has given rulemaking authority to the DOT to establish tank car standards, we are concerned that DOT has allowed the Association of American Railroads (AAR) to usurp this role. Railroads have acted unilaterally through the AAR's Tank Car Committee (TCC) to impose requirements on other stakeholders, even moving to prohibit the use of tank cars that meet all applicable DOT safety standards. These *de facto* regulatory requirements are adopted without cost-benefit analysis and without the due process assurances of a Federal rulemaking process.

AAR's delegation of authority from DOT is premised on bringing together expertise from rail carriers, tank car builders, tank car lessors and tank car shippers. The appropriate role for the TCC is to review proposed changes to specifications and then make recommendations to DOT for consideration. Instead, AAR acts without a consensus of TCC members to impose requirements on other industries. Such actions seriously undermine the ability of the TCC to continue its essential, collaborative work and call into question the legitimacy of the current TCC.

The TCC is dominated by railroad interests. In fact, 13 of the 23 voting seats are held by individual railroads and their trade associations. According to the Committee's charter, no vote can even occur unless a railroad majority is present. This lack of balance has given the rail industry the ability to unilaterally impose tank car requirements over the objections of other affected stakeholders. This situation is even more troubling given the fact that railroads do not own a significant number of tank cars and therefore do not bear the costs associated with modifying the fleet.

In August of 2016, a broad coalition of shipper organizations petitioned DOT to adopt clear rules protecting the Department's exclusive authority to set uniform national standards for the transportation of hazardous materials. The petition asks DOT to adopt new rules that explicitly prohibit any party from imposing tank car requirements that are different from DOT rules. The proposed changes would clarify what is already inherent in the law, that DOT has the sole authority to establish tank car standards.

We urge DOT to respond to the rail shippers' petition and initiate a rulemaking that would allow for an open and transparent discussion on TCC reform. Rules for hazmat transportation, including uniform national tank car standards, should be developed through DOT rulemaking. The federal rulemaking process allows for a full consideration of relevant data and stakeholder perspectives to help ensure that new requirements are achievable, will provide meaningful safety improvements, and are in the public interest.

- *DOT should ensure that its requirements for tank car facility certification minimize unwarranted regulatory burdens.*

Under DOT's Hazardous Materials Regulations, maintenance, repair, and qualification of a DOT-specification tank car must be performed by a tank car facility with a quality assurance program approved by the AAR. To comply with this requirement, tank car facilities maintain AAR certification for specific tank car activities.

DOT previously clarified that the definition of a "tank car facility" does not include a shipper facility where pre-trip inspections are performed. Specifically, a 1995 rulemaking states:

*Several commenters asked RSPA to clarify whether or not a tank car facility includes a shipper's loading facility **where items such as gaskets and manway bolts are normally inspected and replaced as part of a "pre-trip" inspection. It is not the intention of RSPA to include within the definition of a tank car facility a shipper's facility where pre-trip inspections are performed.** Generally, a tank car facility evaluates the tank structure to ensure that, if serious fatigue, corrosion, or accidental damage occurs within the inspection and test interval, the remaining structure can withstand reasonable loads without failure or excessive structural deformation. A shipper, on the other hand, ensures by inspection that the tank is in proper condition for transportation from point of origin to destination. . . . A shipper that inspects a tank car solely to ensure that the tank car is safe for transportation is not performing a periodic qualification function. On the other hand, a shipper who continues the qualification of a tank car, by performing a function described in Parts 179 or 180, meets the definition of a tank car facility. [60 Fed. Reg. 49064]*

This language appropriately distinguishes between maintenance activities that must be performed by tank car facilities, and activities performed at a shipper facility as part of a pre-trip inspection. It clearly recognizes that pre-trip inspections can include the *replacement* of certain items, including, but not limited to, gaskets and manway bolts.

The Federal Railroad Administration has recently stated its position that the replacement of any tank car component covered by the DOT's hazardous materials regulations, including a manway bolt, is a maintenance function and therefore must be performed by a certified tank car facility. This interpretation conflicts with the regulatory language on pre-trip inspections cited above. If adopted, it will impose significant new regulatory burdens on tank car shippers without providing any additional safety benefit. Shippers would need to send their tank cars to a certified repair shop more frequently, which could hold the tank cars for several months and result in service delays. These service delays have significant implications for our members and their customers.

DOT should ensure that its regulatory interpretations remain consistent regarding pre-trip inspections. Clearly, pre-trip inspections can include the replacement of manway bolts. Similarly, other fasteners as well as secondary closures (e.g., plugs and caps) are also inspected and replaced as part of pre-trip inspections. These activities should not be considered tank car

maintenance and should not require facility certification. DOT should ensure that its regulatory interpretations on tank car maintenance minimize regulatory burdens without compromising the Department's highest priority of safety.

➤ *DOT should complete work on key rules for TIH tank cars.*

Critically important products, including anhydrous ammonia fertilizer and chlorine, are classified as toxic inhalation hazard (TIH) materials and shipped in specially designed rail cars. In March of 2009, DOT issued updated design requirements for all newly built TIH cars. These design specifications, known as HM-246, were designated as an "interim" standard in light of a wide range of ongoing tank car research projects sponsored both by DOT and industry. Since then, the results of that research have supported the HM-246 standard as the most feasible means to achieve increased safety and accident survivability for TIH tank cars.

We are pleased that DOT recently issued a Final Rule (HM-219A) that extends the allowable service life of the "interim" TIH tank cars to the full service-life of all other tank cars. DOT previously limited the service life of these cars to 20 years. Extending the service life provides an economic incentive for further investment in tank cars with improved crashworthiness.

DOT must now address other pending rulemakings on TIH tank cars. On December 16, 2016, ACC, CI and TFI joined with AAR and the Railway Supply Institute on a petition asking DOT to make the HM-246 tank car specifications a "final" standard. In addition, ACC, TFI, and CI joined with AAR to file comments asking DOT to establish a phase-out date of **December 31, 2027**, for legacy TIH tank cars built prior to the HM-246 standards. Unlike an earlier deadline imposed unilaterally by the AAR's Tank Car Committee, the proposed December 31, 2027, deadline is supported by all stakeholders.

To provide greater certainty to all stakeholders, we strongly urge DOT to move forward as quickly as possible to complete these rules.

We Need Smart Policies to Promote Freight Rail Competition and to Resolve Disputes between Railroads and Shippers

Congress created the Surface Transportation Board (STB) to help foster a healthy and competitive freight rail system. Critical STB responsibilities include ensuring efficient rail service, reasonable rates, and when necessary, a timely and equitable way to resolve disputes between freight rail companies and shippers. Unfortunately, many of the Board's procedures are too slow, too burdensome and too unworkable to meet these responsibilities.

More recently, Congress passed the STB Reauthorization Act of 2015 with broad bipartisan support. This legislation provides the Board with additional tools and authority to address challenges of the modern freight rail system. Additional action is needed now by both Congress and the STB to achieve this vision.

- *The Senate should confirm pending STB nominations.*

The STB currently has three of its five seats vacant. Until these vacancies are filled, meaningful policy reforms remain on-hold. President Trump has nominated three well-qualified candidates to fill these critical positions. The nominees passed through their confirmation hearings with unanimous, bipartisan support. We urge the full Senate to move quickly to confirm these nominees and give us a fully staffed STB.

- *The STB should adopt long-awaited reforms that reduce bureaucratic red tape and increase the efficiency and effectiveness of Board procedures.*

Once new Board members are confirmed, the STB should move forward as quickly as possible to address critically needed reforms. Existing Board procedures are overly-burdensome and fail to provide a meaningful path for a shipper that lacks transportation options to challenge an unreasonable rail rate or to request access to competitive rail service.

Reciprocal Switching: Reciprocal switching, also known as competitive switching, would allow, under certain circumstances, a shipper that is served by a single major railroad to request to have its freight “switched” to another major railroad at a nearby interchange. Access to switching empowers rail customers to choose a freight rail carrier that provides the most competitive rates and best service. Such market-based competition can lead to innovation and increased efficiencies—just as it does throughout all sectors of the U.S. economy. Moreover, reciprocal switching has been utilized in Canada since 1904 to the benefit of Canadian shippers and carriers.

While Congress expressly authorized reciprocal switching as a tool to advance competitive rail markets, the STB’s existing rules are so burdensome and unworkable, that no shipper has ever successfully gained access to switching. As stated by the Board itself, these rules have “effectively operated as a bar” rather than as “a standard under which [switching] could be granted.”

We urge STB to complete work on its 2016 proposal that provides a practical blueprint for shippers to request reciprocal switching. Adopting this policy will provide businesses with more shipping options and will support a strong and competitive freight rail system.

Rate Review Procedures: STB Chairman Ann Begeman perfectly encapsulated shipper concerns when she stated that the Board’s rate review process “is too costly, too time consuming, and too unpredictable.” The heart of the problem is the Board’s arcane Stand-Alone-Cost (SAC) rate standard. To successfully challenge a rate, a shipper must design, on paper, an entire railroad business, and prove that this make-believe railroad could serve the same traffic at a lower cost than the rates charged by the existing railroad.

Because of the incredible complexity involved, SAC has been characterized as ‘a full employment bill for economists.’ Recent SAC cases for chemical shippers have taken an

average of 5 years to complete and cost each shipper well over \$5 million. No chemical shipper has won a SAC case, even when challenged rates were nearly nine times as high as the railroad's cost for those shipments.

We support the STB's ongoing efforts to streamline and improve its existing rate case procedures. However, the STB should prioritize efforts to develop alternatives to SAC that are more economically sound and not so inherently complex, costly and time consuming. We strongly urge the Board to consider an alternative rate review standard that would employ Competitive Rate Benchmarking. Under this approach, the STB would judge the reasonableness of rates using real world data on rates charged in competitive markets.

Emergency Service Orders: Rail service is an ongoing challenge. Shippers need effective remedies, especially when a serious disruption in service threatens a facility's operations. Railroad service problems during the winter of 2014-2015 and the more recent problems on CSX and other railroads highlight what is at stake. Numerous rail customer facilities were forced to cut production and even shut down operations. As a result, large and small businesses suffered millions of dollars in economic harm.

The STB has the power to grant a shipper access to an alternative rail carrier during a service emergency. Unfortunately, despite these dire situations, no shipper has asked STB for relief. Many have simply concluded that the Board's regulations are unworkable. A months-long process is too long when a facility faces a production cut or an immediate shutdown.

We urge the Board to establish a significantly expedited process to address immediate service emergencies. The primary focus would be to prioritize delivery of railcars needed to prevent a plant shutdown. The STB should also signal its willingness to award damages to shippers harmed by service failures that are within the railroad's reasonable control. This would provide greater weight to customer needs for railroads that face few, if any, consequences for their service failures.

Again, we thank Senator Kennedy and members of the Committee for holding this important hearing. We look forward to continuing to work with you to find solutions that will improve the situation for rail shippers and their large and small business customers.

¹ ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, and pursues safety enhancements through a risk-based framework for every aspect of hazmat transportation. The business of chemistry is a \$526 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for fifteen percent of all U.S. exports.

AFPM is a national trade association representing approximately 400 companies that comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses. They rely on a secure, uninterrupted, and plentiful supply of raw materials to produce products that are consumed both here and abroad.

API is the only national trade association representing all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 47 million Americans.

CI is a 190-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. The Institute's North American Producer members account for more than 93 percent of the total chlorine production capacity of the U.S., Canada, and Mexico. Chlorine and related chlor-alkali chemicals are used throughout the U.S. economy and are key to the protection of public health. CI's long term transportation goal is to maintain the ability to transport chlorine and other mission chemicals in a safe and secure manner while seeking areas for cost justified risk-based safety enhancements.

TFI represents the nation's fertilizer industry, which includes companies that are engaged in all aspects of the fertilizer supply chain. Fertilizer is a key ingredient in feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all food grown around the world today is made possible through the use of fertilizer. The U.S. fertilizer industry generates more than \$154 billion in economic benefit each year and provides approximately 89,000 direct jobs and 406,000 indirect jobs for a total of 495,000 U.S. jobs. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic information and public communication programs.

NITL is the nation's oldest association of shippers using all modes of transportation in both domestic and international commerce. Founded in 1907, the League is known as The Shipper's Voice. As an advocacy organization its mission is to advance the views of shippers on freight transportation issues and enhance their professional development.