



**SUPPLEMENTAL WRITTEN COMMENTS
OF
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**Before The
Federal Railroad Administration
And
Pipelines & Hazardous Materials Safety Administration
August 28, 2013 Public Meeting**

These written comments supplement my August 28, 2013 oral remarks presented at the FRA/PHMSA Public Meeting on rail safety in the wake of the catastrophic derailment of a crude oil unit train in Lac-Megantic, Quebec on July 6. While my oral remarks primarily focus on the necessity to retrofit existing DOT-111 tank cars to make them more crashworthy in a derailment, these written comments focus on elements in the FRA's August 2, 2013 Emergency Order No. 28, the Joint FRA/PHMSA Notice of Safety Advisory and Announcement of Emergency Meeting of the Railroad Safety Advisory Committee, and on the early media reports of issues that are being red-flagged during Transport Canada's investigation into that accident.

Preliminary to my comments, I will summarize what we know at this point about the Lac-Megantic derailment and its aftermath.

- In the middle of the night on July 6, an unattended runaway unit train operated by Montreal, Maine & Atlantic Railway (MMA) transporting 72 tank cars or nearly 2.2 million barrels of crude oil from the Bakken shale fields of North Dakota destined for the Irving refinery in Saint John, New Brunswick derailed in the middle of Lac-Megantic at a speed of over 60 mph. Numerous tank cars exploded.

- MMA and The Transportation Safety Board of Canada say the liquid that was supposed to be in the rail cars is not considered flammable enough to create such large blasts and that the crude oil reacted in an "abnormal" way. Edward Burkhardt, chairman of MMA, said the hazards posed by shipping Bakken crude by rail should be reassessed. "It looks like it was much more dangerous than we were predisposed to believe."
- The death toll is 47 although only 42 bodies had been recovered while five people remain missing. The coroner's office has identified 38 of the bodies and is trying to identify the remaining victims.
- The event leveled more than 40 buildings in the town's core of six blocks and caused the immediate evacuation of 1500 people from their homes. Another 160 property owners have been put on alert that their homes and businesses could be razed. 200 families and businesses evacuated due to the derailment and its aftermath will not be allowed to return for at least a year, as the impacted area will be closed and cordoned off until at least June 2014 for environmental remediation.
- The environmental consequences have been staggering. It has been estimated that 66,000 to 80,000 gallons of crude spilled into the lake and a nearby river. Sewers filled with the oil and exploded. While many of the homes and businesses look untouched on the surface, the ground beneath them is hazardous and many buildings will require demolition. "The ground is like coffee grinds and the oil is percolating through the soil," the head of the cleanup effort said. According to an environmental group's July testing, the rate of one carcinogen is 394,444 times the standard acceptable for surface waters mandated by the provincial government. The concentration of arsenic detected on the water's surface exceeds the government's acceptable standard by 28 times.
- It is unclear as to who will ultimately be held responsible for paying all the clean-up costs and civil suits. MMA has filed for bankruptcy and stopped paying the bills for clean-up. Its liability insurance caps at \$25 million, while MMA has stated that clean-up costs alone could exceed \$200 million. Other companies are being sued by various parties that consider them at least partially liable for the scope of the accident's damage: World Fuel Services and its subsidiary Western Petroleum Company, MMA parent company Rail World, and Canadian Pacific, the Class I that subcontracted the transport of the crude shipment to MMA.

In response to the Lac-Mégantic derailment, both Transport Canada and the Federal Railroad Administration issued emergency directives /orders to increase safety-related measures when railroads (and other vehicles) are transporting packing groups I and II hazardous materials. Some of the provisions of these new directives would seem so common sense it's difficult for an outsider to understand why they were not already normal operating procedures for freight trains transporting packing groups I and II hazmat. Such common sense provisions would include: not leaving loaded hazmat trains on main lines and sidings unattended; application of all possible braking mechanisms; securing locomotives against unauthorized entry; a two-man crew to provide a proactive defense against human error; and, a requirement that train personnel inspect the equipment after incidents of emergency management team involvement to insure that the train is properly secured.

RED FLAG ISSUES:

There are a number of red flag issues that local governments would like to see addressed by the FRA and/or PHMSA as you review long-term operational changes that could better insure the safe transport of hazmat materials by rail.

The Composition of RSAC

Tomorrow, August 29, 2013, the FRA's Railroad Safety Advisory Committee (RSAC) will be holding an emergency meeting to address the safety requirements that were issued in the August 2 FRA Emergency Order and the joint FRA/PHMSA safety advisory. We laud FRA for that action, however, we cannot help but note that RSAC's membership is industry-centric. While employee unions are involved in the 39-member Committee, entities that represent the perspective of local emergency responders and/or local governments are not. That should be corrected to give RSAC the ongoing benefit of a perspective on safety matters that is currently unavailable to it as a result of this omission.

Consist Accuracy And Dissemination.

In our 2012 Petition for Rulemaking, Barrington and TRAC requested PHMSA to require railroads to provide emergency responders accurate, real-time information regarding the identity and location of all hazardous materials on a train when emergency responders are called into action. The lack of real-time information needlessly places the public, trains crews, and first responders at serious risk of harm, and adversely impacts the ability of local governments to respond to serious incidents in a timely fashion. Our concerns were related to the 2009 Cherry Valley, IL derailment of a CN ethanol train and the fact that the train crew arrived at the command post established by emergency responders to present the consist almost two hours after the derailment had occurred. In the interim, emergency responders had been initially advised that only one tanker contained ethanol, which advice was corrected at 9:15 p.m. when CN advised the involved fire department that the train contained 75 cars of ethanol.

Four years have passed since the Cherry Valley derailment, and while we acknowledge that HM-ACCESS has been launched, we fear that the goal of developing a multi-modal solution is simply delaying the mandate requiring real-time electronic dissemination of train consists to emergency responders. Given the potential for major hazmat events related to unit trains, the possibility that train crews may be severely injured or worse (or sound asleep in a motel room as seems to have been the case in Lac-Megantic), and may be fearful of approaching rail tank cars that are burning a mile or more behind the engine, it is clear that the status quo regulations, which are dependent on the crew handing over the paper consist to emergency responders, are wholly insufficient to meet the needs of local governments charged with managing a hazmat spill response.

FRA should act expeditiously to mandate the adoption of real-time electronic dissemination of train consists so that no emergency response team is faced with the incoherent and preventable chain of events that characterized the Cherry Valley incident. With all the advances in technology that have been efficiency-drivers in all facets of the American economy, it is time for the rail industry to put in place a scalable electronic consist program that enables it to provide real-time electronic dissemination of consists when an accident occurs. A large majority of 911 dispatch centers have internet-based, computer-aided communications systems in emergency vehicles that allow first responders to receive real-time dispatch updates while en route or at the scene of an emergency event.

While terrorist threats may justify the decision not to provide rail consists for all trains, that justification does not apply when a train has been derailed and cars and their contents are already compromised. Simply stated, it would not be a major technological hurdle for the railroad industry to email consist information and provide real time guidance on how best to manage the response to any hazmat materials released in an accident. With most 911 departments having the capability to instigate a reverse 911 alert to the public in the vicinity of an accident that instructs the public on any protective actions they should take, the rapid sharing with EM dispatchers of an accurate consist could literally save lives.

Industry Practices and Data on Current Safety-Related Regulations

The agency documents issued earlier this month paint a chilling picture of a pervasive industry practice of not abiding by current operating rules and falsifying reports to regulators. According to these August 2, 2013 documents:

“(E)ven with its limited resources, FRA has found there is significant non-compliance among the railroads with respect to FRA’s securement regulations. FRA has recorded nearly 4,950 securement defects in the course of its inspections since January 2010, an average of approximately 1,483 defects per year.”

“(A) failure to comply with railroads’ securement procedures account for approximately 8.5% of human factor caused accidents.”

“While train accidents involving hazardous materials are caused by a variety of factors, nearly one-half of all accidents are related to human factors or equipment defects.”

“...(T)here are significant discrepancies between the number of operating rules compliance failures that railroads record when compared with the ratio of operating rules failures that FRA inspectors observe during compliance inspections.”

The above raises our alarm in the context of the new FRA order directing railroads to “develop, adopt, and comply” with a plan “that identifies specific locations and circumstances when such trains or vehicles may be left unattended.” These safety plans will then be made available to the FRA “upon its request” and the FRA goes on to state that it “does not intend to grant approval to any plan, per se.”

Given the railroads’ (and their employees) current known failure to fully abide by existing operating rules and then under-reporting on those failures, one cannot help but think that Order 28 is empowering the fox to guard the hen house when it comes to monitoring whether anything meaningful will result on the ground in the aftermath of the Emergency Order.

We strongly suggest that the FRA review and approve these plans and proactively undertake random and unscheduled compliance inspections. If funding for sufficient inspection staff is a problem (as we expect it is), the FRA should consider a reverse incentive approach to securing inspection funds by levying a transport fee on each tank car of hazmat being transported by rail. Once (and if) the railroad reaches an acceptable rate of compliance with operating and reporting requirements per these plans, the tank car transport fee could be reduced or even eliminated (subject to reinstatement if later random inspections demonstrate non-compliance with the safety plan.)

Penalties/Fines for Non-Compliance:

The emergency order states: “FRA also plans to discuss the safety implications and potential costs and benefits of the requirements in Transport Canada’s emergency directives... and safety-related initiatives going forward, including possible new RSAC tasks to implement” them. Given the existing laxity of industry practices when it comes to following operating rules, under-reporting of infractions, and inadequate FRA staffing to monitor compliance, it hardly seems like the fine structure that accompanies a violation would do much to prod compliance with the safety plans the railroads are charged with devising. From the railroad’s cost-benefit perspective, it would seem an acceptable cost of doing business to pay the maximum \$150,000 violation penalty (if it were even to be levied), especially since the risk that the FRA will actually discover an instance of noncompliance seems statistically low. We suggest the FRA increase penalties to an extent that the cost-benefit analysis does not further suggest non-compliance by the railroads is the most cost-effective approach to dealing with the new safety rules.

Uncharacteristic Reaction of Crude in the Accident and Hazmat Designations

The FRA admits it “has seen a number of serious accidents during rail transportation of flammable liquids since 2009, and there has been significant growth in these types of rail shipments since 2011” and that “an increasing proportion of the hazardous materials being transported by rail is classified as flammable.” MMA and Canadian government officials have also indicated that the crude involved in the Lac-Megantic incident reacted abnormally. While inspectors were sent out to the source of the crude involved in this accident to analyze it for any additives that might result from its extraction and/or processing, it seems that a broader and more encompassing industry review of the crude derived from fracking may be in order to determine whether it has properties that would require changes in how industry generally transports it and how it is classified on tank car placards.

Crew Staffing Levels

Rather than taking an aggressive approach to preventing human error by mandating a second set of eyes and hands be involved in the rail transport of packing groups I and II hazmat, the FRA waffles in its EO by having the RSAC determine the best approach.. These unit trains of crude and ethanol are rolling pipelines and the potential for catastrophe when something goes seriously awry as it did in Lac-Megantic, Cherry Valley, IL, Arcadia, OH, Columbus, OH, Plevna, MT, etc., makes a two-person crew requirement a sensible approach to preventing human error. We laud Canadian regulators for their forceful leadership on crew staffing levels.

Covering Liability Costs in a Catastrophic Derailment

While AAR can provide positive statistics that demonstrate that 99.9977 percent of all rail hazmat shipments reach their destination without a release caused by train accident, the horrific event in Lac-Magentic provides a shocking illustration of the potential stratospheric costs of responding to the catastrophic release of hazardous materials. As noted above, MMA has filed for protection under the bankruptcy laws. Furthermore, its insurance is wholly inadequate to cover the total cost of the damages caused by the derailment. Given these undeniable facts, where can the victims of this tragedy look to restore what remains of their lives, their homes, their businesses and the environment? Because financial recovery from the rail industry and the shippers is highly questionable, the task of covering the liability costs will eventually fall on the victims themselves, the government, and the taxpayers.

We believe that this result is fundamentally unfair and unjust. The victims, local governments and taxpayers lack any control over the rail industry. Not only are they preempted by existing laws governing the movement of hazardous commodities through their communities, but, as reflected by the twenty-year hiatus between the NTSB investigation that raised issues about the DOT-111 tank car, they lack the ability to compel the regulators to take actions that are required to address the basic underlying issues. As a result, the rail industry and its allies have deftly perpetuated a system that allows them to reap the profits associated with the continuing use of unsafe equipment.

It must be acknowledged that it is highly unlikely that adequate liability insurance, especially for smaller Class 2 and 3 railroads, could be obtained that would cover incidents similar to Lac-Magentic. That being the case, the cure must include all steps necessary to eliminate the continued use of cars that are known to be defective. Indeed, it may well be anticipated that insurance companies may ultimately control the issue by declining to cover the transportation of crude oil and ethanol in out-dated rail tank cars or raising the cost of such insurance.