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SERVICE DATE – AUGUST 5, 2010

SURFACE TRANSPORTATION BOARD

CORRECTED DECISION*

Docket No. EP 698

ESTABLISHMENT OF THE TOXIC BY INHALATION HAZARD COMMON CARRIER
TRANSPORTATION ADVISORY COMMITTEE

AGENCY: Surface Transportation Board.

ACTION: Notice of establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee.

SUMMARY: As required by § 9(a)(2) of the Federal Advisory Committee Act (FACA), 5 U.S.C. app., the Surface Transportation Board hereby gives notice that, following consultation with the General Services Administration, the Board will create the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee (TIHCCTAC), to provide independent advice and policy suggestions to the Board on issues related to the common carrier obligation with respect to the rail transportation of toxic by inhalation hazards (TIH), and specifically, to outline what is a railroad's reasonable response to a shipper's request that it transport TIH cargo. The TIHCCTAC will convene for a two-year period during which the Board anticipates it will produce a report that will include a recommended policy statement for further consideration by the Board. The Board may renew the TIHCCTAC charter if the Board deems it advisable. This notice seeks comments on the proposed TIHCCTAC structure, as outlined below. It also requests nominations for members of the TIHCCTAC.

In the context of its proposed structure, outlined below, the Board seeks input from interested persons on a number of issues, including: (1) What should be the appropriate scope of such a committee's mandate? (2) How would the scope of the committee's mandate affect its utility? (3) What would be the optimum size of such a committee? and (4) How should the committee's membership be allocated among various stakeholder groups to achieve a fairly

* This decision corrects the decision served on August 3, 2010. The August 3 decision incorrectly stated the day of the week that nominations are due as Friday, October 25, 2010 (a Monday). As set forth in this decision, nominations are due Monday, October 25, 2010. Likewise the references to Eastern Standard Time have been changed to Eastern Daylight Time. Finally, in this corrected decision, a reference to a now closed case (EP 677) has been deleted. The August 3 decision remains unchanged in all other respects.

balanced “cross section of those directly affected, interested, and qualified,” as required under FACA, 41 C.F.R. § 102-3.60(b)(3).

DATE: Comments regarding the proposed TIHCCTAC structure and scope must be received by 5:00 p.m. E.D.T., Friday, September 24, 2010. Nominations for members must be received by 5:00 p.m. E.D.T., Monday, October 25, 2010.

ADDRESSES: All comments and nominations should be submitted to the Board, and may be submitted either via the Board’s e-filing format or in the traditional paper format. Any person using e-filing should comply with the instructions at the E-FILING link on the Board’s website, at <http://www.stb.dot.gov>. Any person submitting a nomination in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: STB Ex Parte No. 698, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION, CONTACT: Ronald Molteni, Office of the General Counsel, at 202-245-0267. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The Board, created by Congress in 1996 to take over many of the functions previously performed by the Interstate Commerce Commission, exercises broad authority over transportation by rail carriers, including regulation of railroad rates and service (49 U.S.C. §§ 10701-10747, 11101-11124), as well as the construction, acquisition, operation, and abandonment of rail lines (49 U.S.C. §§ 10901-10907) and railroad line sales, consolidations, mergers, and common control arrangements (49 U.S.C. §§ 10902, 11323-11327). As part of its regulatory function, the Board oversees the common carrier obligation.

The common carrier obligation refers to the statutory duty of railroads to provide “transportation or service on reasonable request.” 49 U.S.C. § 11101(a). A railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable. G.S. Roofing Prods. Co. v. STB, 143 F.3d 387, 391 (8th Cir. 1998). The common carrier obligation, however, is not absolute, and service requests must be reasonable. Id. In recent years, the Board has seen an increasing number of questions arising, both formally and informally, regarding the extent of a railroad’s common carrier obligation. As a result, in its docket styled, Common Carrier Obligation of Railroads, EP 677, the Board held a hearing on April 24-25, 2008, to hear comments from interested parties on the common carrier obligation and to provide a forum for discussion of that obligation.

That hearing raised issues involving the obligation of railroads to haul hazardous materials, including toxic by inhalation hazards. For many hazardous materials, including TIH, rail is the safest and most efficient mode of transportation. But, according to the railroads, the transportation of these materials subjects them to the potential for extremely high liability in the event of an accident.

Consequently, to allow a more detailed discussion, the Board opened another docket styled, Common Carrier Obligation of Railroads—Transportation of Hazardous Materials, EP 677 (Sub-No. 1), and held a hearing on July 22, 2008, to further explore the issues surrounding the transportation of hazardous materials by rail. At that hearing, the Board heard testimony that touched on, among other things, specific potential policy solutions to the liability concern.

In EP 677 (Sub-No. 1), the Board invited parties to comment on what constitutes a reasonable request for service involving the movement of TIH, as well as whether there are unique costs associated with the transportation of hazardous materials, and if so, how railroads recover those costs.

The American Association of Railroads (AAR) suggested that the Board adopt the following policy statement:

It would not be an unreasonable practice for a rail carrier, under the provisions of 49 U.S.C. § 11101(a) and 49 U.S.C. § 10702, to require (if it elected to), as a condition of providing common carrier transportation services, that a TIH materials shipper indemnify and hold harmless the railroad against liability arising from a release of such materials in excess of (1) the maximum amount of insurance that the railroad carries for TIH transport or (2) \$500 million for Class I railroads, whichever is greater; and to provide reasonable assurances in the form of insurance or other means to support such indemnity.¹

Other commentators, particularly those representing TIH shippers' interests, urged the Board to reject this proposed policy statement. But some, while lamenting escalating rates they believe are priced to drive TIH off the railroads, expressed a willingness to explore allocations of excess liability insurance to cover a limited scope of occurrences while not reducing a railroad's incentive to prudently and safely handle and transport TIH.

While the Board views the safe transportation of hazardous materials as crucial to this nation's economic and national security, and the transportation by rail of hazardous materials as vital to our nation's industrial production, the Board is an economic regulator, and, as such, seeks to address the economic component of TIH transport. It hopes to facilitate dialogue regarding and resolution of those economic concerns between and among TIH shippers and the railroads.

The Board believes that an industry-derived solution to the question of what constitutes a reasonable response to a shipper's request that a railroad transport TIH cargo might be a better and potentially more economically sustainable solution than a Board-imposed solution, though the latter remains a lawful alternative in the absence of industry-wide consensus. Accordingly,

¹ AAR Comments, EP 677 (Sub-No. 1) at 24.

the Board will place in abeyance docket EP 677 (Sub-No. 1) and will not rule on the railroad industry's proposed policy statement at this time. Instead, the Board proposes to establish the TIHCCTAC to provide independent advice and policy recommendations to the Board. TIHCCTAC will be directed to provide advice on issues pertaining to the common carrier obligation with respect to the rail transportation of TIH, and specifically, the question of what is a railroad's reasonable response to such a request.

The Board anticipates that the TIHCCTAC will consist of a balanced cross-section of members at the general counsel or vice president level of stakeholders involved in the rail transportation of TIH, including but not limited to railroads, TIH shippers, insurers or underwriters, and tank car owners, lessors, or manufacturers.

The TIHCCTAC will be tasked with producing a report and recommendations on how the Board should balance the common carrier obligation to transport this commodity with the risk of catastrophic liability in setting appropriate rail transportation liability terms for TIH cargo. The TIHCCTAC's focus and its solution to the question presented above should revolve around the amount of economic responsibility for liability that railroads can reasonably ask TIH shippers to assume before the carrier will transport TIH cargo. The TIHCCTAC shall function solely as an advisory body and will comply with the provisions of FACA and its implementing regulations.

For the purpose of soliciting comments, the Board proposes the following structure. The TIHCCTAC shall consist of up to 27 voting members, including its chair. Members of the TIHCCTAC will be chosen by the Chairman of the STB and shall include at a minimum: 7 representatives from the Class I and II railroads; 3 representatives from Class III railroads; 5 representatives from chlorine shippers; 5 representatives from anhydrous ammonia shippers; 4 representatives currently engaged in academia or policy analysis; 2 representatives with an insurance or underwriting background; and 1 representative from tank car owners, car lessors, or car manufacturers. The 3 members of the Board shall serve as *ex officio* (non-voting) members of the Committee. In addition to the members described above, the Chairman of the STB may invite representatives from the U.S. Departments of Homeland Security and Transportation (including their affiliated agencies) to serve the TIHCCTAC in advisory capacities as *ex officio* (non-voting) members. The Chairman of the STB will appoint the TIHCCTAC's chair. The Chairman of the STB may constitute an executive committee and subcommittees as necessary for the TIHCCTAC to discharge its responsibilities. The Board contemplates a voting structure that will provide each voting member with a vote. But, for any proposal to become a recommendation of the TIHCCTAC, a majority vote of the railroad interests and a majority vote of the shipping interests will be required.

The TIHCCTAC will meet monthly with an anticipatory commencement in the final quarter of 2010, after it has been established in compliance with FACA. No honoraria, salaries, travel or per diem are available to members of the TIHCCTAC; however, reimbursement for travel expenses may be sought from the Board in cases of hardship.

Chairman Elliott will appoint Ronald Molteni of the Board's Office of General Counsel to serve as the Designated Federal Official—the agency's liaison to the TIHCCTAC.

Suggestions for members of the TIHCCTAC should be submitted in letter form, identifying the name of the candidate; evidence of the interests the candidate will represent; and a representation that the candidate is willing to serve a two-year term as a member of the TIHCCTAC, with the possible charter renewal leading to a potential second term.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Authority: 49 U.S.C. § 721, 49 U.S.C. § 11101; 49 U.S.C. § 11121.

Decided: July 30, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.