

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 698

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

Docket No. EP 677 (Sub-No. 1)

COMMON CARRIER OBLIGATION OF RAILROADS—TRANSPORTATION OF  
HAZARDOUS MATERIALS

Digest:<sup>1</sup> In an earlier decision, the Board sought public comment on a proposal to create an advisory group to address liability-sharing issues surrounding the transportation by rail of certain toxic by inhalation hazardous commodities. Comments on the proposed advisory group raise a number of antitrust issues and reveal sharply conflicting positions on fundamental legal questions. Not wanting to expose stakeholders to potential antitrust liability by participating in this advisory group, and given the wide difference of opinions between stakeholders on basic liability-sharing issues, the Board has decided not to create this advisory group. It will, instead, continue to address the liability-sharing issues to the degree that they are before this Board on a case-by-case basis.

Decided: April 13, 2011

BACKGROUND

In August 2010, the Board provided notice of its intent to establish a Federal Advisory Committee, known as the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee (TIHCCTAC), pursuant to Section 9(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. app.<sup>2</sup> Its purpose was 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 hazardous commodities (TIH), and specifically, to outline a railroad's reasonable response to a shipper's request that it transport TIH cargo.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plan Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> See Establishment of the Toxic By Inhalation Hazard Common Carrier Transp. Advisory Comm., 75 Fed. Reg. 48,409-10 (Aug. 10, 2010).

The Board sought comments on a proposed TIHCCTAC structure and input from interested parties on the appropriate scope of TIHCCTAC's mandate, how that scope would affect its utility, TIHCCTAC's optimum size, and the composition of its membership. The Board also requested nominations for TIHCCTAC membership.

The Board received comments from 16 entities, including trade associations (both railroad and shipper), firms active in manufacturing and shipping TIH materials, and the trade association for the equipment supplier to the nation's railroads.<sup>3</sup> The Board also received letters from Senator Mitch McConnell (Ky.), Rep. Peter Olson (22nd Dist. Tex.), Rep. Timothy J. Walz (1st Dist. Minn.), and Rep. Edward Whitfield (1st Dist. Ky.), commenting on the composition of TIHCCTAC. No railroad filed individual comments, but both the AAR and the ASLRRA filed comments. Commenters addressed the scope of TIHCCTAC's mandate and its proposed structure, and also discussed the Board's jurisdiction vis-à-vis liability for the transport of TIH cargo. The overwhelming majority of the comments expressed concern about the applicability of antitrust law to TIHCCTAC participants.

With these overarching, threshold concerns voiced in so many of the comments, the Board suspended the nomination process so that we could examine several issues, including the jurisdictional and antitrust concerns, in more depth.<sup>4</sup>

## DISCUSSION & CONCLUSIONS

The safe and efficient shipment of TIH cargo by rail is manifestly in the public interest. TIH commodities are instrumental components of numerous commercial goods and services, such as the manufacture of pharmaceuticals, fertilizers, construction materials, and plastics, as well as the use of chlorine to provide safe drinking water to the public. Railroads are one of the safest ways to transport TIH cargo. No matter how diligent the shippers, equipment manufacturers and railroads, however, or how comprehensive the federal safety transportation rules, segments of the public and industry retain the view that there will always remain a small risk of catastrophic harm from a spill of this cargo during transit.

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<sup>3</sup> The Board received comments from: American Chemistry Council; American Short Line and Regional Railroad Association (ASLRRA); Arkema, Inc.; Association of American Railroads (AAR); Chevron Phillips Chemical Co.; Chlorine Institute, Inc.; Diversified CPC International, Inc.; Dow Chemical Company; E.I. du Pont de Nemours and Company; The Fertilizer Institute (TFI); National Industrial Transportation League; Occidental Chemical Corporation; Olin Corporation; PPG Industries, Inc.; Railway Supply Institute, Inc.; and Tanner Industries, Inc.

<sup>4</sup> Establishment of the Toxic by Inhalation Hazard Common Carrier Transp. Advisory Comm., EP 698 (STB served Oct. 14, 2010).

The Board therefore sought to create a committee of interested stakeholders to advise the agency on reasonable steps the carriers could take to share the risk of catastrophic liability associated with the shipment of TIH cargo. It was our intent with this advisory committee to seek industry consensus on the kinds of factors the Board could consider when parties raise issues of liability before this agency. For example, the AAR had previously proposed a rule in which a TIH shipper would indemnify the railroad against liability arising from a release of such materials in excess of the greater of (1) the maximum amount of insurance that the railroad carries for TIH transport, or (2) \$500 million for Class I railroads.<sup>5</sup> Although shippers of TIH opposed that proposal, some have in the past 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 handle and transport TIH cargo prudently and safely.<sup>6</sup> We were (and still are) of the view that a collaborative resolution of this issue by interested stakeholders might well be superior to one this agency imposed by regulatory fiat.

The comments filed in response to our notice, however, demonstrate a sharp difference of opinion between railroad and shipper interests regarding the very nature of the Board's authority to address liability. For example, TFI took the position that "[a] regulatory recommendation that would condition a railroad's common carrier obligation upon any form of liability limit or indemnification is beyond the Board's authority to implement."<sup>7</sup> While we do not necessarily agree with this view of the limits of our authority, this opinion expressed by a key stakeholder and echoed by other shipper interests, makes it unlikely that the advisory group could form any meaningful consensus on policy recommendations to the agency.

Another concern raised by numerous parties is whether participation in the federal advisory committee would expose a company to antitrust liability. It was our hope that the advisory committee would develop guidelines that would permit it to discuss issues in a manner compliant with the antitrust laws. But we cannot guarantee TIHCCTAC participants that their activities would be immune from antitrust enforcement in this context. The Board does not want

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<sup>5</sup> The AAR asked the Board to 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. EP 677 (Sub-No.1), AAR Testimony 24 (filed July 10, 2008).

<sup>6</sup> TFI Comments 4.

<sup>7</sup> TFI Comments 9.

to place the TIH community in the awkward position of having to risk antitrust exposure by participating in this advisory group, nor do we anticipate that participation from the community would be widespread given this concern.

For these reasons, the Board will terminate the process to create TIHCCTAC and, accordingly, will close Docket No. EP 698. The Board will also close the related proceeding, Common Carrier Obligation of Railroads—Transportation of Hazardous Materials, EP 677 (Sub-No. 1), which we had been holding in abeyance.<sup>8</sup>

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

It is ordered:

1. The proceedings in Docket Nos. EP 698 and 677 (Sub-No. 1) are discontinued.
2. AAR's request that the Board issue a policy statement is denied.
3. This decision is effective on its service date.

By the Board, Chairman Elliott and Commissioner Mulvey.

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<sup>8</sup> As noted above, in that proceeding, the AAR proposed that the Board issue a formal policy statement recognizing and approving the right of a rail carrier to establish, as conditions of transport, reasonable liability-sharing arrangements with shippers and asked the Board to find that such conditions are reasonable service terms for rail common carrier transportation of TIH materials. Supra note 7. The Board will not issue such a policy statement in the abstract. Rather, the Board will proceed according to its usual practice of resolving disputes related to the reasonableness of both requests to transport TIH cargo and the carriers' responses on a case-by-case basis under 49 U.S.C. § 11101. As a result, we will deny AAR's request.