

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 698

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

COMMENTS

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
and
THE AMERICAN FOREST & PAPER ASSOCIATION

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The National Industrial Transportation League (“League”) and the American Forest & Paper Association (“AF&PA”) (collectively, “Interested Associations”) submit these Comments in response to the invitation of the Board set forth in its Notice served on August 5, 2010,¹ in which the Board announced that is seeking comments regarding the formation, scope, and structure of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee (“Committee” or “TIHCCTAC”).

I. BACKGROUND

In its Notice in this proceeding, the Board described its prior history and consideration of the issue of the transportation of TIH materials in Ex Parte 677, *Common Carrier Obligation of Railroads*, and Ex Parte 677 (Sub-No. 1), *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*. The Board noted the rail industry's concerns regarding the transportation of TIH commodities and the suggestion of the Association of American

¹ The August 5 Notice corrected a decision served on August 3, 2010.

Railroads ("AAR") for a policy statement that would have permitted a rail carrier to require a shipper of TIH materials to indemnify the carrier against liability arising from the release of the commodity, as well as the response of the shipper community to the AAR's request.

Additionally, the Board indicated that it hopes to "facilitate dialogue" regarding the resolution of the economic concerns between TIH shippers and the railroads, and 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 better than a Board-imposed solution. Notice, p. 3.

In its July 2008 filing in Ex Parte 677 (Sub-No. 1), the League commented that the STB itself has favored private sector solutions to transportation problems, since the parties are often in the best position to have a full knowledge of the problem and are in the best position to assess their interests and reach a sound solution. The League also noted that the issue of liability for the transportation of TIH materials was a matter that should be discussed in the first instance by the involved private interests. Ex Parte 677 (Sub-No. 1), Comments of The National Industrial Transportation League, July 10, 2008, p. 10. The Board recognized in the Notice of this proceeding that some shippers had expressed a willingness to discuss the matter of TIH liability, and the Interested Associations are aware that some shippers were involved previously in discussions with the railroads on this issue, based on the hearing testimony in Ex Parte 677 (Sub No. 1).

II. THE INTERESTED ASSOCIATIONS STATEMENTS OF INTEREST

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and currently has over 600 company members. These company members range from some of the largest users of the nation's and the world's transportation

system, to smaller companies engaged in the shipment and receipt of goods. The League's members include shippers and receivers of goods as well as carriers, third party intermediaries, logistics companies, and similar entities. Members of the League are engaged in all forms of transportation, including rail, motor, ocean and air carriage. The League's members that ship their goods by rail have a vital interest in the railroads' common carrier obligation.

AF&PA is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. The forest products industry relies on the railroads for the transportation of raw materials to its mills and for bringing finished products to the marketplace. This includes the transport of materials such as chlorine, ammonia, and potentially other TIH commodities that are used in the manufacturing processes of the forest products industry.

III. COMMENTS OF THE INTERESTED ASSOCIATIONS

The Board's Notice indicates that the agency is an "economic regulator" and thus "seeks to address the economic component of TIH transport" through the deliberations of this Committee. *Id.* Specifically, the Committee will be directed to provide advice on "the question of what is a railroad's reasonable response to . . . a request to transport TIH materials." *Id.*, p. 4. The Board intends to task the Committee 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 transportation liability terms for TIH cargo." *Id.* The Board asks for comments on (a) the scope of the Committee's mandate; (b) how would the scope of the Committee's mandate affect its utility; (c) the optimum size of such a Committee; and, (d) the allocation of the Committee's membership. *Id.*

The Interested Associations commend the Board on its effort to develop a private-sector solution to these issues. However, they believe that the Board needs to consider more carefully the proposed mandate and structure of the Committee in light of certain legal constraints. These constraints are in three areas: (a) the potential for antitrust exposure; (b) the scope of the Committee's mandate in light of federal statutes external to the Board's jurisdiction; and (c) the scope of the Committee's mandate in light of the Board's underlying statute and precedent.

A. THE BOARD NEEDS TO CONSIDER POTENTIAL ANTITRUST EXPOSURE IN THE DELIBERATIONS OF THE PROPOSED COMMITTEE AND SHOULD DEVELOP GUIDELINES AND PROCEDURES TO ELIMINATE THAT EXPOSURE

In its Notice, the Board never adverts to any possible antitrust issues, and appears to presume either that there are no such concerns, or that they may be handled during the deliberations of the Committee. The Interested Associations believe that such an approach underestimates the potential problems, and that it is better for the Board to confront such matters up front rather than enmesh the Committee in matters that it may be difficult or impossible for it to resolve.

The Board has proposed that the Committee include various suppliers of transportation services (i.e. a total of 10 representatives of Class I, II, and III rail carriers) that are competitors in certain markets. The Committee will also be composed of rail customers that ship and receive TIH materials (i.e. 5 representatives from chlorine shippers and 5 representatives from anhydrous ammonia shippers) who also are competitors of each other in various markets. Furthermore, the cost of rail transportation is not an insubstantial percentage of the final cost of TIH materials. The mandate of the Committee is to seek to establish an agreement (by majority vote) among the railroad members, among the shipper members, and then between the shipper group and the rail carrier group, on the "economic component of TIH transport." Notice, p. 3.

On its face, any discussion among competitors on economic terms of transport may be problematic under the antitrust laws, even if this discussion will result in a recommendation to the Board. More importantly, any collective discussion of "setting appropriate rail transportation liability terms for TIH cargo" and "the amount of economic responsibility for liability" of railroads is also very likely to involve a discussion of the price (rates) which rail carriers could charge their customers in exchange for the customers' agreement on such appropriate liability terms and economic responsibility. Indeed, the Board's Notice itself indicated that shippers had complained about "escalating rates" that they believe were priced to drive TIH off the railroads. Notice, p. 3. But collective discussion and agreement on price, either among the rail carriers themselves, or among their customers, or collectively between both, could be very problematic under the antitrust laws.²

The Interested Associations believe that the Board needs to explicitly consider whether the establishment of the Committee creates potential antitrust risks for the participants, and further, that the Board should consult with the Department of Justice in order to evaluate the extent of such risks and how such risks may be mitigated. In light of such consideration and consultation, the Board should develop guidelines and procedures to protect the Committee members from engaging in any potential antitrust violations, before convening the Committee.

B. THE BOARD SHOULD IDENTIFY THE SCOPE OF THE COMMITTEE'S MANDATE IN LIGHT OF FEDERAL STATUTES EXTERNAL TO THE BOARD'S JURISDICTION

The Board's Notice indicates that the Committee's focus 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." Notice, p. 4. This mandate seems to assume that the Committee will consider a policy statement that will require a shipper to indemnify a

² The Federal Advisory Committee Act, under which the Committee will operate, provides no antitrust immunity.

railroad above that amount, *i.e.*, an amount that will limit railroad liability even for a railroad's own negligence as a condition to its common carrier obligation to transport TIH materials.

Prior to 2007, courts had held that state law negligence claims were preempted by federal law, specifically the Federal Rail Safety Act ("FRSA").³ However, in 2008, Congress amended the FRSA to clarify that state law negligence claims based on a railroad's failure to comply either with federal regulations, with state regulations not otherwise preempted by federal law, or with a railroad's own operating procedures, are not preempted by federal law. See, 49 U.S.C. 20106(b)(2).⁴ Thus, under current law external to the Board's governing statute, rail carriers cannot be exempted from liability for their own negligence. The Board should clarify the permissible scope of the Committee's recommendations in light of the provisions of the 2008 amendments to the FRSA and relevant precedent.

Moreover, the transportation of hazardous materials by rail is, as the Board well knows, extensively regulated by DOT and TSA, including numerous recent rulemakings to insure that hazardous materials are transported safely. Issues of safety have been at the forefront of many cases involving the common carrier obligation.⁵ Indeed, case precedent has rejected safety arguments as grounds to narrow the common carrier obligation, since "no other mode of transportation is more suited to the economical carriage of these materials than train

³ See, *e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *Lundeen v. Can. Pac. Ry. Co.*, 447 F.3d 606 (8th Cir. 2006); *Mehl v. Can. Pac. Ry., Ltd.*, 417 F. Supp.2d 1104 (2006); see also, *CSX Transportation v. Anthony Williams*, Civil Action No. 05-0338, Motion to Dismiss and Memorandum in Support of Motion to Dismiss, p. 2 (June 23, 2010) (federal statute preempts state law).

⁴ Moreover, federal and state law uniformly holds that common carriers cannot by agreement secure immunity from liability. See, *Union Pacific RR. Co. v. U.S.* 292 F.2d 521 (Ct. Cl. 1961) (a common carrier cannot relieve itself of its own negligence); *Tunkl v. The Regents of the University of California*, 383 P.2d 441, 443 (Cal. 1963) (an exculpatory provision may stand only if it does not involve the public interest)

⁵ The ICC and courts have confirmed that a railroad may not ask the Board "to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT...regulations governing such transport, and these regulations have been met." *U.S. Energy Research and Development Administration v. Akron, C. & Y. R. Co.*, 359 I.C.C. 639, 640-41 (1978), *aff'd Akron, Canton and Youngstown Railroad Company v. Interstate Commerce Commission*, 611 F.2d 1162, 1169 (6th Cir. 1979), *cert denied*, 449 U.S. 830 (1980) ("*Akron*"); see also, *U.S. Dept. of Energy v. The B. & O. R.R. Co.*, 364 I.C.C. 951, 959 (1981).

carriage...."⁶ Most importantly, at the Board's hearing in Ex Parte 377 (Sub-No. 1), DOT indicated that it had a "keen interest" in issues related to the common carrier obligation of railroads with respect to hazardous materials.⁷

Given this extensive web of regulations that directly address safety and security issues in the transportation of hazardous materials, as well as DOT's strong current interest in the specific issue being considered by the Board and by the proposed Committee, the Board should be careful that the deliberations of the Committee not undermine the important safety and security jurisdiction of these federal agencies. Thus, the Interested Associations recommend that the DOT and the DHS should be sponsoring agencies for the proposed Committee, and the Board should clarify that the recommendations of the Committee should take into account the safety and security jurisdiction of DOT and DHS in the transportation of hazardous materials.

C. THE BOARD SHOULD CLARIFY THE COMMITTEE'S MANDATE IN LIGHT OF THE BOARD'S RESPONSIBILITY TO CONSIDER THE COMMON CARRIER OBLIGATION IN LIGHT OF SPECIFIC FACTS

In its Notice, the Board stated that the Committee will be tasked with producing recommendations revolving around "the amount of economic responsibility for liability that railroads can reasonably ask TIH shippers to assume before the carrier will transport TIH cargo." Notice, p. 4. The Board's formulation clearly suggests that the Committee should be prepared to consider some type of broad rule delineating the amount of responsibility and liability that should be levied on TIH shippers and railroads.

The Interested Associations are concerned with this approach. Longstanding agency and court precedent holds that the common carrier obligation must be construed in light of specific facts. For example, in *Akron*, the court held that a railroad cannot refuse to haul materials that

⁶ *Akron* at 1168.

⁷ Testimony of the United States Department of Transportation Presented by Clifford Eby, Deputy Federal Railroad Administrator, Ex Parte 677 (Sub-No. 1), July 22, 2008.

meet DOT safety standards, but that it may seek approval of a stricter practice that is shown to be just and reasonable.⁸ However, the Court noted that, in making that determination, the agency was required to review multiple factors specific to the transportation at issue.⁹ Similarly, in *Consolidated Rail Corp. v. ICC*, 646 F2d 642 (D.C. Cir. 1981) ("*Conrail*"), the Court ruled that the agency must "reconcile a multitude of factors in exercising its expert judgment . . ."

The common carrier obligation has always been interpreted on a case-by-case basis, taking into account the particular facts and circumstances. The adoption of a broad policy statement would potentially result in all TIH shipments being treated exactly the same, and would not take into account such factors as the involved commodities, volumes, distances, market situations, etc. which could have a bearing on the involved risks of an incident and any resulting liability. Thus, in light of the well-established law of the common carrier obligation, the Board should re-consider whether it is appropriate to develop a broad policy statement applicable to all TIH shipments.

⁸ *Akron*, at 1169.

⁹ *Id.* at 1168-70.

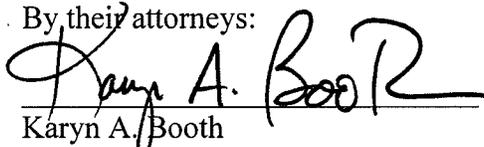
The Interested Associations appreciate the opportunity to make their views known on this matter.

Respectfully submitted,

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By their attorneys:

A handwritten signature in black ink, appearing to read "Karyn A. Booth". The signature is written in a cursive style and is positioned above a horizontal line.

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Dated: September 24, 2010