



ASSOCIATION OF
AMERICAN RAILROADS

Law Department
Louis P. Warchot
Senior Vice President-Law
and General Counsel

September 24, 2010

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 698, Establishment of the Toxic by Inhalation Hazard Common Carrier
Transportation Advisory Committee

Dear Ms. Brown:

Pursuant to the Board's Notice served August 2, 2010 (as corrected August 5, 2010), attached please find the Comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 698

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

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Of Counsel:

David L. Coleman
Allison M. Fergus
Paul A. Guthrie
J. Michael Hemmer
Paul R. Hitchcock
James A. Hixon
Theodore K. Kalick
Jill K. Mulligan
Roger P. Nober
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shutz
Richard E. Weicher
W. James Wochner

Louis P. Warchot
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

Kenneth P. Kolson
10209 Summit Avenue
Kensington, M.D. 20895

*Counsel for the Association of
American Railroads*

September 24, 2010

SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 698

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

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

I. Introduction

In a Notice served August 3, 2010 (as corrected August 5, 2010), the Board provided notice that it “will create [under the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. § 1 et seq.] 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.” August 5, 2010 Notice (“Notice”) at 1. The Board further noted that 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.” *Id.* The Board sought comment on the proposed TIHCCTAC structure as outlined in the Notice (as well as several related issues

such as the appropriate scope of the committee's mandate) and requested nominations for members of the TIHCCTAC. *Id.*¹

The Association of American Railroads ("AAR") is appreciative of the Board's establishment of TIHCCTAC as a forum to provide Class I, Class II and Class III railroads, affected TIH shippers, insurers and other participants an opportunity to engage in substantive dialogue and additional fact-finding under the auspices of the Board on the TIH liability issue—an issue of overwhelming importance to the rail industry, its employees and the communities it serves. However, in view of the unacceptable ongoing risk the railroads continue to face with respect to the transport of TIH materials, the AAR would urge that the Board not view pendency of the TIHCCTAC's work as precluding the Board from taking other appropriate action to address rail carrier concerns at this time.

It is in this context that the AAR, on behalf of its member railroads, submits these comments in response to the Board's Notice.

II. Background

To provide perspective for the AAR's comments herein, it is necessary to review the legal and regulatory environment for TIH rail transport and the recent Board proceedings which have not addressed issues raised by the railroads.

As noted by the Board, its decision to establish the TIHCCTAC as an advisory committee on issues related to "what is a railroad's reasonable response to a shipper's request that it transport TIH cargo" arises from oral hearings conducted by the Board (and submitted written testimony) in Ex Parte No. 677, *Common Carrier Obligation of Railroads* (hearing conducted on April 24-25, 2008) and the Board's follow-up

¹ Nominations for members of the TIHCCTAC are due October 25, 2010. Notice at 2.

proceeding focusing solely on TIH transportation, Ex Parte No. 677 (Sub- No.1), *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials* (hearing conducted on July 22, 2008). Notice at 2-3. In its written and oral testimony in those proceedings, the AAR (and individual rail carrier witnesses) stressed that the current situation facing the railroads with respect to the transportation of TIH materials was untenable and that Board action to address the situation was urgently required. The AAR's testimony included specific proposals for Board action.

In its testimony, the AAR noted that the transportation of TIH as currently mandated under the railroads' common carrier obligation subjects the railroads to potentially huge, multi-billion dollar liability risks for personal injury and property damage claims should there occur an accident or incident resulting in an inadvertent TIH release.² The AAR's testimony further noted the extremely dangerous nature of TIH materials themselves and the attendant liability risks associated with an inadvertent TIH release, and pointed out that insurance carriers did not issue policies that covered the enormous liability risks of TIH transportation.³ A rail carrier is currently able to obtain

² See July 10, 2008 AAR testimony in Ex Parte No. 677 (Sub-No.1) at 14-21. As noted in the AAR's testimony, TIH is far more dangerous than other hazardous materials the railroads are required to transport under their common carrier obligation. If a TIH release were to occur in or near a highly populated area with unfavorable time and weather conditions, the results in death, personal injury and property damage could be catastrophic.

The AAR further noted that, even where a carrier transporting TIH operates with the utmost care, it is simply unrealistic to expect that *no* accidents or incidents will occur, given the complexity of carrier operations over its 140,000 mile outdoor "factory floor", the exposure of carrier operations to weather extremes (e.g., tornados or flash flooding washing out ballast) and actions of third parties (e.g., cars running into moving trains). Potential terrorist attacks on rail transportation of TIH materials are also of concern and are one of the principal focus points of Department of Transportation/ Department of Homeland Security safety and security regulations. See July 10, 2008 AAR testimony in Ex Parte No. 677 (Sub-No. 1) at 14-15; see also August 21, 2008 AAR Supplemental Testimony at 6-7.

³ The AAR's testimony in Ex Parte No. 677 (Sub-No.1) established that the insurance coverage available to Class I railroads for TIH transport is currently limited to approximately \$1.1 billion (with large self insured retentions (typically \$25 million)) and that in the event of a major TIH incident even that could become unavailable. See August 21, 2008 AAR Supplemental Testimony at 14-15 (and attached August 20, 2008

insurance coverage for only a small fraction of its potential TIH transportation liability risk—raising the specter of “bet the company” exposure each time a rail carrier is required to transport TIH materials. The AAR pointed out that such exposure could jeopardize not only the financial condition of individual carriers but also the financial health of the industry itself with attendant adverse effects on the ability of the railroad network to provide efficient and responsive service to the public in general.⁴

The AAR also noted in its testimony that not only are railroads currently faced with potentially enormous liability for the transportation of TIH for which they cannot obtain adequate insurance coverage, but that carriers also bear the economic burden of a multitude of unique and significant costs associated with TIH transportation that they are currently precluded under STB rules from identifying and recovering in rate proceedings from TIH shippers.⁵

In light of the rail carriers’ currently untenable situation with respect to the transportation of TIH materials, the AAR requested that the Board take three actions to address the extraordinary potential liability, unrecoverable significant costs and public

letter of Gregory W. Larson, Senior Vice President, Lockton Companies, LLC (a large insurance brokerage firm).

⁴ See July 10, 2008 AAR testimony in Ex Parte No. 677 (Sub-No. 1) at 4-5, 13-21. The AAR further noted that the TIH liability issue was clearly within the jurisdiction of the Board because only the Board has jurisdiction to rule on economic issues pertaining to the rail transportation of TIH materials. See July 10, 2008 AAR testimony in Ex Parte No. 677 (Sub-No. 1) at 9-13; see also Notice at 3.

⁵ See, e.g., July 10, 2008 AAR testimony in Ex Parte No. 677 (Sub-No. 1) at 26-28. See also *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) (“*Simplified Standards*”), Slip op. at 84 (declining to permit movement-specific adjustments to URCS variable costs in rate cases under *Simplified Standards*). These unique costs include the costs of maintaining insurance that cover the higher risks of TIH transportation, the multi-billion dollar costs of installing Positive Train Control technology on tracks over which TIH materials are transported and costs of compliance with extensive safety and security operating procedures that each railroad must have in place due to the enhanced risks associated with TIH commodities. July 10, 2008 AAR testimony at 26-28.

safety risks associated with the rail transportation of TIH materials pursuant to the railroads' common carrier obligation.

First, the AAR noted that the common carrier obligation is not absolute, that service requests must be reasonable, and that carriers may adopt reasonable rules governing conditions of service.⁶ The AAR accordingly requested that the Board issue a formal policy statement (based on the record in the Ex Parte No. 677 (Sub-No.1) proceeding) that would recognize and approve the right of a rail carrier (if it chooses to do so) to establish, as conditions of transport, reasonable liability-sharing arrangements with shippers and find that such conditions are reasonable service terms for rail common carrier transportation of TIH materials.⁷

Second, the AAR requested that the Board consider the extraordinary costs of TIH materials transport, including the government imposed costs of implementing positive train control, in Board rate proceedings so that carriers are permitted to recover these significant costs from TIH shippers in such proceedings.⁸

Third, the AAR requested that the Board support long-term policy solutions to address the open-ended liability risk and public safety concerns associated with TIH materials transport (including through legislative approaches such as enactment of Price

⁶ See July 10, 2008 AAR testimony at 6-13; see also Notice at 2. As noted by the AAR, the issue from the railroads' perspective is that if there is a public interest need for the railroads to be compelled to carry TIH materials, there is a corresponding public interest need for the industry to be able to take into account and protect itself against the increased risk and potentially ruinous liability exposure associated with transporting TIH. See July 10, 2008 AAR testimony at 5-6.

⁷ See July 10, 2008 AAR testimony at 4-6, 24-26. The AAR proposed a specific policy statement (including specific liability-sharing provisions and a proposed minimum \$500 million carrier liability limitation) that is referenced by the Board in its Notice (at 3).

⁸ See July 10, 2008 AAR testimony at 26-28; see also February 4, 2009 AAR Comments in Ex Parte No. 681, *Railroad Accounting and Financial Reporting—Transportation of Hazardous Material* (ANPR) at 8-9, 12.

Anderson Act type legislation that would provide for liability limitations and the sharing of liability risk with the public at large, as well as legislative initiatives to minimize unnecessary transport of TIH materials through promotion of product-substitution, co-location or other means).⁹

In response to the AAR's request that the Board take immediate action to address the extraordinary TIH liability risks by issuing a formal policy statement recognizing and approving the right of a carrier to establish liability-sharing arrangements with shippers as reasonable service terms for rail common carrier transportation of TIH, the Board determined—in its decision in the instant proceeding—to refer the issue of development of a policy statement in the first instance to the TIHCCTAC advisory committee for a two-year period for possible recommendations. The Board also concomitantly determined to “place in abeyance docket EP 677 (Sub-No. 1) and ...not rule on the railroad industry's proposed policy statement at this time.” Notice at 4.

With respect to the AAR's request that the Board permit carriers to identify and recover the unique and significant costs of TIH transportation in TIH rate proceedings, the Board on January 5, 2009 issued an Advance Notice of Proposed Rulemaking (“ANPR”) that essentially predicated Board action on the potential need for long-term, extensive studies of (and modifications to) the Uniform System of Accounts (USOA) and the Uniform Railroad Costing System (URCS) to resolve the issue of identifying, reporting and allocating TIH costs.¹⁰ However, the Board has yet to take action on the

⁹ See July 10, 2008 AAR testimony at 29-31; August 21, 2008 AAR supplemental testimony at 2-4.

¹⁰ Ex Parte No. 681, *Railroad Accounting and Financial Reporting—Transportation of Hazardous Materials* (ANPR) (served Jan. 5, 2009).

AAR's proposal in response to the ANPR that interim relief permitting railroads to present specific cost adjustments to URCS in individual TIH rate proceedings be allowed.¹¹

III. Recommendations

As noted above, the AAR supports the establishment of a forum that provides lines of communication between stakeholders regarding TIH rail transport and offers comments below on the mandate of and procedures for TIHCCTAC with the goal of facilitating such communications. However, as the AAR has also noted, the railroads are faced with an untenable situation regarding TIH rail transport at this time and have sought current action from the Board to address the railroads' concerns. Those requests included: (1) the Board's issuance of a formal policy statement recognizing and approving a rail carrier's right (if it chooses to do so) of establishing reasonable liability sharing arrangements with TIH shippers; and (2) the Board's consideration of the extraordinary costs of TIH materials transport in Board rate proceedings, including the government imposed costs of implementing positive train control. The AAR urges at the outset that the Board not delay or defer action on those requests while the TIHCCTAC studies the issue. These issues simply cannot wait for two years to be resolved.

¹¹ See February 4, 2009 AAR comments at 3, 8-9; see also *US Magnesium L.L.C. v. Union Pacific Railroad Company*, STB Docket No. 42114 (served Jan. 28, 2010) ("*US Magnesium*"), appeal docketed, No. 10-1019, *Union Pacific Railroad Company v. Surface Transportation Board* (D.C. Cir. Feb. 2, 2010). (Board declined to allow carrier to quantify PTC costs in TIH rate proceeding).

A. Board Action Pending TIHCCTAC's Deliberations

- 1. The Board should issue an interim policy statement that expressly recognizes a carrier's right to establish reasonable liability-sharing arrangements with shippers as reasonable service terms for the rail common carrier transportation of TIH and the establishment of the TIHCCTAC should not preclude such action.**

The Board's Notice in this proceeding states that that the "TIHCCTAC's focus and its solution to [the question of what is a railroad's reasonable response to a request that it transport TIH] 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 at 4. As reflected in the AAR's "Background" discussion above, the TIHCCTAC is essentially tasked with addressing the same TIH liability-sharing issue that the AAR raised before the Board more than two years ago in the Ex Parte No. 677 (Sub-No. 1) proceeding and with respect to which the AAR proposed a specific Board policy statement addressing the issue.

Accordingly, the AAR urges that the Board issue an *interim* policy statement at this time based on the overwhelming evidence of record in the Ex Parte 677 (Sub-No. 1) proceeding regarding the rail industry's absolute need to be able to establish liability-sharing arrangements with TIH shippers to protect the railroads from the huge potential liability risks they run in transporting TIH materials. Such a statement would recognize the right of a rail carrier to establish reasonable liability-sharing arrangements with shippers as reasonable service terms for the rail common carrier transportation of TIH if a carrier chose to do so. The statement would be an *interim* statement that could be presented to the TIHCCTAC for its consideration and deliberation. It would serve the purpose of addressing the significant potential liability concerns facing the railroads at

this time while leaving the issue open for review and recommendation by TIHCCTAC through a structured deliberative process. It would also provide TIHCCTAC with the results of real world experience regarding the effects of such a policy on all of the stakeholders including providing TIHCCTAC with specific examples of liability-sharing arrangements that rail carriers and shippers have entered into.

Of corresponding importance, Board issuance of an interim general policy statement would also immediately serve an important public safety purpose. By providing incentives to shippers to enter into liability-sharing arrangements with carriers during the pendency of the TIHCCTAC, the Board would provide incentives for TIH shippers to recognize and take into account the financial risks involved in the transportation of TIH such that there would be shipper appreciation of the need to minimize unnecessary TIH movements (e.g., through closer product sourcing, product substitution, co-location, or other means) to the benefit of the public at large.

2. The Board should clarify that the statutory obligation to determine the scope of the common carrier obligation regarding TIH transportation lies with the Board and not the TIHCCTAC.

The Board's statutory authority to determine the scope of the common carrier obligation cannot be delegated to an advisory committee established under FACA. See 5 U.S.C. App. 2 § 9 (b) ("advisory committees shall be utilized solely for advisory functions"). The Board should clarify that it does not intend to delegate its responsibilities and legal obligations to the TIHCCTAC.

3. The Board should clarify that, notwithstanding its establishment of TIHCCTAC, the agency's statutory mandate requires it to take action on the TIH transportation issues on a case-by-case basis during the pendency of the TIHCCTAC process.

The AAR further urges that the Board also make clear that the agency stands ready to take measures on the TIH issues, notwithstanding its establishment of the TIHCCTAC to study the issue over an extended period and make policy recommendations, should specific issues be presented by carriers or shippers to the Board on a case-by-case basis predicated on specific factual circumstances. Those issues include the TIH liability issue, the scope of the common carrier obligation for TIH, and the recovery of PTC costs. The Board's statutory authority (under 49 USC §11101(a) and 49 USC §10702) provides that the agency consider the scope of a carrier's common carrier obligation to transport TIH on a case-by-case basis predicated on all relevant facts and circumstances, and it would be inconsistent with the Board's responsibilities for the agency to defer or avoid making decisions in concrete cases presented to the agency on the grounds that the issue has been referred to the TIHCCTAC for a future report and possible future policy recommendations.¹² The establishment of the TIHCCTAC cannot relieve the Board of its statutory duties in the interim.

¹² Under its statutory mandate the Board is required to determine on a case-by-case basis under the specific facts and circumstances presented: (1) whether a shipper has made a reasonable request for the transportation of TIH materials and (2) whether the carrier's response to such a request to transport TIH materials (including the establishment of terms and conditions of transport) is reasonable. See, e.g., *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92-94 (1st Cir. 2005); *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F. 3d 387, 391 (8th Cir. 1998); see also *Classification Ratings of Chemicals, Conrail*, 3 ICC 2d 331, 336-337 (1986).

4. If the Board does not act on the AAR's recommendations for an interim policy statement and for other action pending TIHCCTAC deliberations, the Board should require the TIHCCTAC to issue its report and recommendations within a one-year period rather than the two-year period proposed in the Notice.

The Board's Notice establishes TIHCCTAC for a two-year period (with possible charter renewals) and tasks it specifically "with producing a report and recommendations on how the Board should balance the common carrier obligation to transport [TIH] with the risk of catastrophic liability in setting appropriate rail transportation liability terms for TIH cargo." Notice at 4. The Notice also clarifies that the "TIHCCTAC's focus and its solution to [the question of what is a railroad's reasonable response to a request that it transport TIH] 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." *Id.* As noted above, the TIHCCTAC is essentially tasked with addressing the same TIH liability-sharing issue that the AAR raised before the Board more than two years ago in Ex Parte No. 677 (Sub-No. 1).

If the Board does not issue the interim policy statement requested by the AAR in section A.1 and take other action pending TIHCCTAC deliberations as requested in section A.3 above, the AAR requests that, in light of the extensive factual background developed by rail carriers, TIH shippers and other interested parties in the course of the Ex Parte No. 677 (Sub-No.1) proceeding, and the urgency of the TIH liability issue to the railroad industry, the Board task the TIHCCTAC to produce its report and policy recommendations within a one-year period, rather than the two-year period provided for in the Notice. The AAR believes that a further two-year hiatus before the Board commits itself to act on the AAR's liability-sharing proposal is simply too long a period for the issue to remain unresolved and the rail industry to remain in its untenable position

regarding the huge, uninsurable liability risks of transporting TIH under its common carrier obligation.

B. Substantive Recommendations Pertaining to the Proposed Scope of the TIHCCTAC's Mandate

1. The Board should broaden the TIHCCTAC's mandate to include an evaluation of the issue of "What constitutes a reasonable request for the transportation of TIH?"

As currently proposed, the focus of the TIHCCTAC's mandate is "specifically, the question of what is a railroad's reasonable response" to a request by a shipper for the transportation of TIH. Notice at 4. As further defined, "[t]he TIHCCTAC'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."

Id.

The AAR believes that the TIHCCTAC's mandate, as defined above, addresses only *one* of the relevant questions pertaining to the scope of a rail carrier's common carrier obligation to transport TIH materials. The other question, and of equal importance, is what constitutes a "reasonable request" to transport TIH in the first instance. See, e.g., *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92-94 (1st Cir. 2005); *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F. ed 387, 391 (8th Cir. 1998); see also *Classification Ratings of Chemicals, Conrail*, 3 ICC 2d 331, 336-337 (1986).

The AAR accordingly submits that the TIHCCTAC's mandate be expanded to also address the "reasonable request" aspect of the problem. As the AAR noted in its testimony in the Ex Parte No. 677 (Sub No.1) proceeding, TIH transportation exposes rail carriers to enormous liability risks and the public to enormous public safety risks in the event of an accident or incident resulting in a significant TIH release. The public interest

would accordingly be served by minimizing the unnecessary transportation of TIH commodities wherever possible. For example, where safer products are developed that are fully substitutable for TIH materials, there is no reasonable basis why rail carriers should be required to transport such TIH materials at all at unnecessary, huge potential risk to themselves and the public safety.¹³

The AAR believes that the TIHCCTAC would serve an important public policy function by examining the issue and explicitly recognizing in a recommended policy statement that there may be factual circumstances, despite a shipper's willingness to share liability, where a carrier would be fully justified in refusing a shipper's request to transport TIH because the request itself is unreasonable under the circumstances. Public policy should strongly discourage unnecessary shipment of TIH materials, and the TIHCCTAC should play an advisory role in formulating that policy as part of its functions.

- 2. The Board should clarify that the TIHCCTAC's mandate in preparing its report and policy recommendations includes the development of relevant facts pertaining not only to the rail transportation of TIH itself but also to current trends regarding the development of substitute products and other means of minimizing unnecessary TIH transportation.**

Pursuant to the Board's Notice, the TIHCCTAC is tasked with producing a report and recommendations to the Board relating to the scope of the rail common carrier obligation to transport TIH materials, specifically focusing on the liability-sharing issue outlined in the Notice. That mandate necessarily requires that the TIHCCTAC engage in fact-finding regarding issues such as the current and potential availability to carriers and

¹³ See AAR July 10, 2008 comments at 21-23. For example, there are far safer substitute products for the treatment of water than chlorine gas (e.g., liquid bleach, ultraviolet light, and sodium hypochlorite), and where these products are readily available to a water treatment plant and fully substitutable, they should be required to be used instead.

shippers of liability insurance for TIH transportation and the various forms of liability-sharing arrangements that may prove potentially useful.

As discussed supra, the AAR believes that the TIHCCTAC's mandate must also necessarily include the related issue of what constitutes a reasonable shipper request to transport TIH in the first instance, and the AAR submits that the TIHCCTAC can—and should—play a highly useful fact-finding role in addressing this issue. Because any inquiry regarding the reasonableness of a shipper's request to transport TIH is necessarily dependent upon such factors as alternative sources of supply, availability of safer and cost-effective substitute products, or other available means of reducing unnecessary transportation of TIH, the Board should clarify that the TIHCCTAC's mandate includes the development of facts relating to these factors.

3. The TIHCCTAC's mandate should be broadened to include recommendations for long-term legislative solutions to the liability and public safety aspects of TIH transportation, such as enactment of Price Anderson type legislation and legislative incentives to eliminate the unnecessary transportation of TIH materials.

As discussed in the AAR's testimony in Ex Parte No. 677 (Sub-No.1), it is also necessary that long-term legislative solutions be adopted to address: (1) the open-ended liability exposure associated with transportation of TIH materials and (2) the public safety issues associated with TIH transportation. Potential legislative approaches could include Price Anderson type legislation that would set liability limitations for TIH transportation and provide for the risk and exposure relating to TIH transportation to be shared by the public at large. The public safety issues could be addressed by legislative

incentives to eliminate the transport of TIH over the long-term through product-substitution, co-location or other means.¹⁴

The AAR submits that the TIHCCTAC's mandate accordingly should be broadened to include analysis and recommendations with respect to long-term legislative solutions to the liability and public safety aspects of TIH transportation. Through its deliberations, the TIHCCTAC will necessarily familiarize itself with all aspects of the TIH transportation liability and public safety issues, and the Board and the stakeholders would benefit from any recommendations that the TIHCCTAC could make to the Board as to long-term legislative approaches to address these issues.

C. Procedural Recommendations Pertaining to the TIHCCTAC's Proposed Mandate

- 1. The Board should expand the proposed TIHCCTAC membership and specifically include separate groups for Class I railroads and for Class II and Class III railroads respectively.**

As currently proposed, the TIHCCTAC is to consist of 27 voting members—chosen by the STB Chairman—that the Board anticipates will be “a balanced cross-section” of stakeholders. The 27 currently proposed voting members include “7 representatives from the Class I and II railroads, 3 representatives from Class III railroads; 5 representatives from chlorine shippers; [and] 5 representatives from anhydrous ammonia shippers....” The proposed TIHCCTAC voting structure further provides that each voting member will have a vote, but that “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.” Notice at 4.

¹⁴ See July 10, 2008 AAR testimony at 29-31; August 21, 2008 AAR supplemental testimony at 2-4.

The AAR submits that, although the Board's proposal provides for 10 voting representatives of "railroad members" and 10 voting representatives of "shipping interests," the TIHCCTAC voting structure is not in fact evenly balanced among the stakeholders. Whether or not each representative of "shipping interests" may potentially share the same overall economic objective from a TIH "shipping interests" standpoint, the economic interests of the "railroad members" representatives will likely differ based on size, i.e., financial ability to pay significant claims and availability of insurance. Also, the interests of Class II carriers are generally more closely aligned with Class III carriers than with Class I carriers. See, e.g., July 10, 2008 Comments of the American Short Line and Regional Railroad Association ("ASLRRRA") (proposing that for interline movements involving a Class I carrier and a Class II or Class III carrier, potential exposure be placed on the Class I carrier even where the Class I carrier was not involved with a TIH incident occurring on the Class II or Class III carrier's line).¹⁵

Because the Class I railroads' interests cannot necessarily in all instances be fully and adequately represented by representatives of Class II or Class III carriers and vice versa, the AAR submits that the railroads should be represented in the TIHCCTAC as two separate groups, i.e. Class I carriers would have seven representatives as one group and Class II and Class III carriers would form the second group and have six representatives. Because there are only seven U.S. Class I carriers and the overwhelming amount of rail transportation of TIH—and concomitant exposure to the huge liability risks of transporting TIH—is conducted over the lines of the seven Class I railroads,¹⁶ the

¹⁵ ASLRRRA's proposal was opposed by the AAR. See August 21, 2008 AAR Supplemental Comments at 13-14.

AAR believes that all Class I railroads be represented and have voting rights on the TIHCCTAC with respect to the TIH liability issue. Membership for the Class II and Class III carrier group would be correspondingly increased from the three members currently proposed by the Board for Class III carriers to six members to reflect the addition of Class II carrier representation in the Class II and Class III carrier group. The AAR would not object to the expansion of the TIHCCTAC to include corresponding increases in the number of groups and the number of representatives of “shipping interests” so that the interests of the railroads and shippers are equally represented.

2. The Board should ensure that there is at least one voting representative on the TIHCCTAC who has expert knowledge regarding the environmental and public safety issues associated with the transportation of TIH.

As currently proposed, the membership of TIHCCTAC is to include “4 representatives currently engaged in academia or policy analysis.” Notice at 4. The AAR submits that to provide the Board with a fuller range of knowledge pertaining to such issues as the scope of need for TIH transportation for specific commercial use purposes, the availability of safer substitute products for such commercial use purposes, and means of minimizing the unnecessary transportation of TIH where no safer substitute products are available, at least one voting member of the TIHCCTAC from this group of representatives should have expert knowledge with respect to the environmental and public safety issues associated with the transportation of TIH, including the use and current state of development of safer substitute products.

TIHCCTAC access to such expert knowledge would not only assist TIHCCTAC in developing a fuller understanding of the TIH transportation liability issue (including

¹⁶ U.S. Class I railroads accounted for 97.3% of TIH ton-miles (U.S. ton-miles) in 2008. U.S. non-Class I railroads accounted for 2.7% of TIH ton-miles. Source: STB 2008 Waybill Sample.

potential means of reducing such liability exposure), but would also assist it in making potential policy recommendations on the additional relevant issue pertaining to the scope of the common carrier obligation to transport TIH that the AAR submits TIHCCTAC should also address as part of its mandate: i.e., what constitutes “a reasonable request to transport TIH” in the first instance. See discussion supra at pages 12-13.

3. The Board should ensure that there is a voting representative on the TIHCCTAC who represents the interests of rail labor.

The AAR submits that the TIHCCTAC should also add a voting member who represents the interests of rail labor. The transportation of TIH not only poses a safety issue for the public at large, it also most directly poses a safety issue for railroad employees involved in the rail transportation of TIH materials. Indeed, should there occur a rail accident or incident resulting in a release of TIH materials, railroad employees are likely to be the most immediately affected and the most at risk from TIH exposure. Rail labor should accordingly have its voice count on the TIHCCTAC with respect to consideration of issues pertaining to the scope of the rail common carrier obligation to transport TIH materials and on proposals aimed at minimizing the unnecessary transportation of TIH materials wherever possible.

4. The Board should provide that for any proposal to become a recommendation of the TIHCCTAC, a majority vote of the Class I railroad representatives group, a majority vote of the Class II and Class III railroad representatives group, and a majority vote of shipping interests representatives be required.

As currently proposed in the Notice, “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.” Notice at 4. As explained in section C.1. above, the AAR believes that the Class I railroads’ interests cannot

necessarily in all instances be fully and adequately represented by representatives of Class II and Class III railroads and vice versa. The AAR has accordingly proposed that Class I railroads and Class II and Class III railroads respectively should be represented on the TIHCCTAC as two separate groups with separate voting representation. Under the AAR's proposal, as discussed in section C.1., Class I railroads would have seven representatives and Class II and Class III railroads would have six representatives.

To conform the TIHCCTAC voting structure to AAR's proposal for "railroad interests" to be represented by Class I railroad representatives and Class II and Class III railroad representatives as separate groups, and to more fairly reflect the respective interests of Class I and Class II and Class III railroads on the TIHCCTAC, the AAR submits that the Board's proposal requiring a majority vote of the respective railroad and shipping interests for a TIHCCTAC recommendation should be modified to provide that "for any proposal to become a recommendation of the TIHCCTAC, a majority vote of the Class I railroad representatives, a majority vote of the Class II and Class III railroad representatives, and a majority vote of the shipping interests representatives will be required."

Should the "shipping interests" also believe for any reason that they would be better served by representation on the TIHCCTAC in two separate groups, the AAR would have no objection to the Board further modifying the proposed TIHCCTAC voting structure to require a majority vote of the two separate groups of shipping interests representatives for any proposal to become a TIHCCTAC recommendation as well.¹⁷

¹⁷ As noted in section C.1., to the extent that the AAR's proposal would provide for two groups of "railroad interests" and expand railroad representation by three members, the AAR would not object to the expansion of the TIHCCTAC to include corresponding increases in the number of groups and the number of

Also, the AAR believes that the TIHCCTAC should not be required to produce a report or recommendations if there is not a majority vote of all of the railroad and shipping interest groups.

5. The AAR agrees that the Board should require members of the TIHCCTAC to be at the level of General Counsel or Vice President.

The AAR supports the Board's proposal to require that railroad and shipper members of the TIHCCTAC are at the level of General Counsel or Vice President. Notice at 4. The AAR believes that railroad and shipper members of the TIHCCTAC should come from within organizations that actually move or ship TIH respectively and have in-house responsibilities and experience at the level that requires and prepares them to take into account a broad range of factors as part of the decision-making process. Members should also be of sufficient rank such that they can speak with authority for the stakeholder interests they represent. The AAR believes that limiting TIHCCTAC railroad and shipper members to the General Counsel or Vice President level within organizations that actually move or ship TIH would serve to accomplish these objectives.

The AAR also proposes that the TIHCCTAC be structured to recognize that representatives of railroads and shipper members may not always be available if the TIHCCTAC is to meet monthly. The TIHCCTAC should accordingly have procedures in place to allow substitution by proxy at a comparable level of General Counsel or Vice President.

representatives of "shipping interests" so that the interests of the railroads and shippers are equally represented.

6. The Board should ensure that it has appropriate procedures in place to preserve the confidentiality of sensitive commercial information that may be provided by member participants to the TIHCCTAC .

The AAR notes that TIHCCTAC's mandate necessarily requires that it engage in fact-finding regarding the TIH liability-sharing issue, including with respect to such relevant issues as the availability (including potential cost, maximum coverage, and required self-insured retentions) of insurance to carrier and shipper representatives for TIH transportation. Some of this data may be commercially sensitive information. The Board must accordingly provide procedures for the issuance of protective orders where necessary to protect the confidentiality of commercially sensitive data submitted by member participants to the TIHCCTAC.

7. The Board should ensure that it has appropriate procedures in place to address any potential antitrust issues that may arise.

The AAR notes that the Board is establishing the TIHCCTAC as an advisory committee to the Board for purposes of preparing a report and policy recommendations for further Board consideration on (among other potential issues) the "amount of economic responsibility for liability that railroads can reasonably ask TIH shippers to assume before the carrier will transport TIH cargo." Notice at 4. The AAR accordingly considers that (1) all TIHCCTAC activities will be conducted under the auspices, and within the scope, of the instant STB Ex Parte No. 698 proceeding establishing the TIHCCTAC and delineating its functions and (2) that railroad and TIH shipper member representatives of the TIHCCTAC (as well as other TIHCCTAC members) enjoy antitrust immunity under the Noerr-Pennington Doctrine [*United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965)] for the preparation of industry submissions to the TIHCCTAC and for any discussions engaged in among or between them (as well

as with other members of the TIHCCTAC) for the purposes of furthering the TIHCCTAC's mandate as delineated by the Board.

To confirm and clarify the antitrust protections and constraints that will apply to the TIHCCTAC, and to the parties providing information to TIHCCTAC, the Board should establish antitrust guidelines at the outset of the TIHCCTAC process, post them publically, and distribute them to the TIHCCTAC members prior to the first TIHCCTAC meeting. In any event, to ensure that antitrust issues are properly considered by the Board in the event they arise, the Board should also provide legal counsel to the TIHCCTAC to monitor such issue and to advise the TIHCCTAC as necessary.

Respectfully Submitted,



Of Counsel:

David L. Coleman
Allison M. Fergus
Paul A. Guthrie
J. Michael Hemmer
Paul R. Hitchcock
James A. Hixon
Theodore K. Kalick
Jill K. Mulligan
Roger P. Nober
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shutz
Richard E. Weicher
W. James Wochner

Louis P. Warchot
Association of American Railroads
425 Third Street, S.W.
Suite 1000
Washington, D.C. 20024
(202) 639-2502

Kenneth P. Kolson
10209 Summit Avenue
Kensington, M.D. 20895

*Counsel for the Association of
American Railroads*

September 24, 2010