

August 6, 2018

The Honorable Elaine Chao, Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Ave. SE
Washington, D.C. 20590

Dear Madam Secretary:

The undersigned associations submit this letter on behalf of our members to express our great concern over the proposed drastic expansion of the scope of the Association of American Railroads' ("AAR") tank car facility certification process in a manner that violates the provisions of 49 U.S.C. 5103(b) and 49 CFR 179.1. The modified certification requirements are driven, in part, by DOT regulatory interpretations and enforcement actions. However, these requirements have been developed outside of the federal rulemaking process and fail to consider the adverse impacts on rail shippers and the tank car maintenance industry. In addition, our members are more broadly concerned about AAR's Tank Car Committee ("TCC"), which due to its charter and composition, allows the railroads to ignore stakeholder input and pursue actions without consideration of impacts for all stakeholders.

The undersigned associations represent rail shippers who lease, own, and maintain tens of thousands of rail tank cars, a multi-billion-dollar investment in what constitutes nearly the entire fleet of rail tank cars in North America. The AAR's TCC, which is comprised of railroads, tank car builders, and tank car owners/shippers, oversees the industry standards for those assets. But the rail shippers who own or lease these transportation assets comprise only a small portion of TCC voting members while railroad members of the TCC constitute a voting majority. This has given the rail industry a disproportionate voice and influence regarding issues impacting all stakeholders. Our concerns are outlined below.

Concerns Related to the Expansion of the Tank Car Facility Certification Process

On May 1, 2018, AAR issued the Casualty Prevention Circular 1332 ("CPC-1332") entitled, "Solicitation of Comment for Appendix B and Associated Chapter 1 Definitions of AAR Manual of Standards and Recommended Practices ("MSRP") Section C Part III, Specifications for Tank Cars ("M-1002")." CPC-1332 is designed to facilitate comments on recommended modifications to AAR tank car facility certification processes via revisions to the MSRP M-1002.

The U.S. Department of Transportation ("DOT"), as the agency responsible for adopting and enforcing rail tank car standards, has a duty to ensure that the TCC's actions do not impose regulatory burdens outside the rulemaking process. Unfortunately, the TCC is imposing new requirements in response to unpublished DOT interpretations and guidance. CPC-1332 includes a re-write of M-1002, Appendix B that, although characterized by AAR as a clarification, in reality would significantly push tank car facility certification requirements deep into the supply chain for a wide range of tank car components with no demonstrated or articulated safety benefit.

We respectfully request that DOT work with AAR and other TCC members to simplify the proposals in CPC-1332. AAR should move forward with only the elements of Appendix B that clarify, streamline and improve the current tank car facility certification processes and withdraw those elements of CPC-1332 that would expand the scope of tank car facilities subject to the tank car certification process. Consistent with the Administration's regulatory reform agenda, DOT should fully review its interpretations and guidance to ensure that it does not impose new regulatory burdens on rail shippers and the tank car maintenance industry without a formal rulemaking process.

CPC-1332 expands the scope of the tank car facility certification program based on an internal DOT policy change that runs counter to historical interpretation and enforcement of the program.

Over the last decade, DOT's enforcement of the Hazardous Materials Regulations and AAR's implementation of the tank car certification program has excluded tank car component facilities and operations. Should AAR and/or DOT wish to expand the scope of the tank car certification process beyond those facilities currently subject to the program, they should do so through a notice and comment rulemaking process (not a policy change) that fully addresses the potential regulatory impacts and considers all stakeholders' comments in an open forum as required by the Administrative Procedures Act. This would also require meaningful consideration of public comments, including on the economic impacts and safety justification for such changes.

CPC-1332 does not adequately consider economic impacts or provide sufficient safety justification for the expanded scope of the tank car facility certification program.

While the AAR's Safety & Operations Department Committee Handbook, which governs the operation of AAR Committees, includes requirements for committees to conduct cost-benefit analysis, the TCC is the only committee explicitly excluded from such requirements. Thus, the TCC has not provided any analysis of economic impacts or safety justification for expanding the scope of tank car facility certification to tank car component suppliers. Indeed, during the Task Force meetings leading up to the publication of CPC-1332, Task Force members were barred from discussing supply chain and economic impacts even in the most broad and generic terms. The resulting CPC-1332 therefore was completely devoid of any consideration of potential economic impacts.

While some types of operations may warrant tank car facility certification, no supporting safety data was presented providing a direct need to expand the scope of tank car facility certification. Expanding the scope of facilities subject to the tank car facility registration (*e.g.*, tank car tank and service equipment component manufacturers), as CPC-1332 does, potentially would limit the availability of equipment in the supply chain and create redundancies in the program that are neither necessary nor justified by any identified safety issue.

CPC-1332 expands a tank car facility certification program that is already resource-constrained and overburdened.

There are acknowledged deficiencies with the existing AAR tank car facility certification process in terms of communication, timely delivery of audit results, and effective integration of the Tank Car and Quality Committee aspects of this work. The original charge of the T91.2.4 Task Force, and the stated purpose of the Appendix B re-write in published dockets and discussed at TCC meetings, was to clarify and streamline the existing Appendix B rules to address these deficiencies. Yet the ultimate product of the TCC went far beyond this charge by expanding the scope of tank car facilities subject to certification. That result, without a corresponding increase in resources and staff, is more likely to hinder the implementation of improvements designed to streamline the current process consistent with the actual charge to the Task Force. Further, this expansion could result in extended delays in delivery of audit results and diluted oversight of higher risk tank car facilities. The railroad members, however, ignored these issues by adopting the expanded version of CPC-1332 without the vote of a single non-railroad TCC member.

Broad Concerns with the Tank Car Committee Process

Approximately two years ago, a group of trade associations representing rail shippers¹ petitioned the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) to initiate a rulemaking to more clearly define the role of TCC in development of tank car standards.² This petition remains pending before DOT. The actions of the TCC related to CPC-1332 are just the most recent in a series of actions³ that demonstrate the need for DOT to take a considered review of the TCC and its processes and we respectfully request DOT to prioritize and grant this pending petition.

DOT’s delegation of authority to AAR (by way of the TCC) to play a central role in the enforcement of rail tank car standards is premised on bringing together expertise from rail carriers, car builders, lessors, and tank car users for a meaningful dialogue to develop/modify industry standards. While the TCC does bring together such expertise, the debates at recent TCC meetings have been of little to no consequence as the railroad members have arbitrarily disregarded the opinions and expertise of other stakeholders when in conflict with the railroad member objectives. Specifically, regardless of the debate and input presented in the public forum, the railroads, with their voting majority, push through their desired outcome. The outcomes of these meetings now seem to be a foregone conclusion, as the railroads’ opinion always prevails, many times to the detriment of the tank car owners and builders who bear the consequences of those outcomes.

¹ The following organizations submitted this petition: the American Chemistry Council, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, The Chlorine Institute, the National Association of Chemical Distributors, the National Industrial Transportation League, the Society of Chemical Manufacturers and Affiliates, The Sulphur Institute, the U.S. Clay Producers Traffic Association, Inc., and The Fertilizer Institute.

² See Docket No. PHMSA-2016-0093, “Petition to Amend Tank Car Standards,” submitted August 12, 2016, <https://www.regulations.gov/document?D=PHMSA-2016-0093-0001>.

³ In 2015, TCC proposed tank car top fitting protection that PHMSA had expressly declined to adopt by rulemaking, as the costs far outweighed the benefits. That same year, TCC proposed to require all single tank car shipments of class 3 materials to meet DOT-117 standards, even though DOT imposed that requirement by rulemaking only on high-hazard flammable trains. In addition, the AAR through TCC has attempted to make unilateral changes to the TIH pressure car fleet. These proposals put the interchange requirements in direct conflict with DOT requirements that were fully considered during the rulemaking process.

The discussion related to the tank car facility certification program at the April 2018 TCC meeting is a particularly illustrative example of such unilateral decision making. In fact, despite considerable discussion at the public session during the meeting, strong vocal opposition, and a formal dissenting opinion from T91.2.4 Task Force (the “Task Force”) members,⁴ the railroad majority approved this proposal through the TCC with no supporting votes from any shipper or tank car builder representatives, resulting in the publication of CPC-1332.

If any one industry ignores the lack of consensus among the other stakeholders and makes a unilateral decision, as was the case with CPC-1332, that usurps the DOT’s authority as the regulator. Further, such actions seriously undermine the ability of the TCC to continue its essential, collaborative work and calls into question the legitimacy of the current TCC. We call on the DOT to respond to the rail shippers’ petition and initiate a rulemaking that would allow for an open and transparent discussion on TCC reform.

Path Forward

The undersigned associations support efforts to revise the tank car certification program that would improve and streamline the process and enhance transparency. While many of the improvements in CPC-1332 do just that, the proposed expanded scope of the tank car facility certification program is not risk-based or data-driven. We therefore ask DOT to proceed as follows:

- DOT should urge AAR to implement only those revisions that clarify and streamline the existing tank car facility certification process through CPC-1332;
- DOT should urge AAR to remove from CPC-1332 all elements that expand the scope of the tank car facility certification process and continue further discussions, along with tank car builders and rail shippers, on how best to address the additional elements;
- DOT should fully review its regulatory interpretations and guidance that are driving Appendix B decisions and make sure that these documents are available publicly;
- DOT should grant the rail shippers’ petition to initiate a rulemaking that would allow for an open and transparent discussion on TCC reform.

We thank DOT for its time and for its consideration of a more flexible and less burdensome approach, as outlined above, to achieve the desired safety benefits we seek as an industry. We share the AAR and DOT’s commitment to tank car safety. We look forward to the opportunity to work together on this, and other rail safety issues.

⁴ See <https://www.aar.org/wp-content/uploads/2018/04/Appendix-B-Task-Force-Dissenting-Report-and-Appeal-3.28.18.pdf>. The T91.2.4 task force is a group of subject matter experts, including representatives from railroads, rail carriers, car builders, lessors, and tank car users, that was charged with reviewing core elements of Appendix B and developing proposals to clarify and streamline the existing Appendix B rules to address deficiencies.

Sincerely,



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CC:

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