

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

JAN 25 2012

Part of
Public Record

Docket No. 35504

**UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY
ORDER**

**JOINT OPENING COMMENTS OF
THE AMERICAN CHEMISTRY COUNCIL; THE CHLORINE INSTITUTE; THE
FERTILIZER INSTITUTE; AND THE NATIONAL INDUSTRIAL TRANSPORTATION
LEAGUE**

The American Chemistry Council; The Chlorine Institute; The Fertilizer Institute; and The National Industrial Transportation League (collectively the “Interested Parties”) hereby submit these Joint Opening Comments in accordance with the December 12, 2011, decision of the Surface Transportation Board (“STB” or “Board”) in the above-captioned proceeding. The Board initiated this proceeding in response to a Petition filed by Union Pacific Railroad Company (“UP”) seeking a declaration that Items 50 and 60 of UP Tariff 6607 are not unreasonable.¹ While the language of UP Tariff 6607 is convoluted, not particularly well crafted, and much broader than represented by UP, both UP and the Interested Parties conclude that, at a minimum, those tariff items require shippers of Toxic Inhalation Hazard (“TIH”) materials to indemnify UP against all liabilities, except to the extent those liabilities are caused

¹ UP’s Petition, at 3-4, claimed that Items 50 and 60 are the product of an agreement that resolved a lawsuit filed by CI and ACC in federal court in 2009. That is a gross and inaccurate distortion. As UP’s Petition concedes, the Complaint challenged UP’s attempt to be indemnified for its own negligence. In settlement of that dispute, UP revised its tariff language to eliminate indemnification for its own negligence. Because that dispute did not extend to third party indemnities, the parties did not negotiate that issue as part of their settlement. UP’s attempt to paint that settlement as providing the blessing of ACC and CI to the provisions of UP’s tariff that are at issue in this proceeding is absolutely wrong.

by the negligence of UP. In other words, the UP tariff would make TIH shippers responsible not just for the shippers' own negligence, but for any cause whatsoever that is not otherwise attributable to UP, even if the shippers are not at fault and even if a third party is at fault.

I. BOARD APPROVAL OF THE UP TARIFF WOULD CONFLICT WITH EXISTING LAW AND CREATE GREATER UNCERTAINTY.

In its December 12 Decision, the Board initiated this proceeding over the objections of these Interested Parties. The Interested Parties remain of the opinion that UP failed to demonstrate a clear case or controversy. In response to arguments that the enforceability of the UP indemnity provisions is a matter of state law, the Board concluded at that time: "Even if UP's tariff provisions were potentially subject to challenge in 2 ways—under the ICA [Interstate Commerce Act] and under state tort law—there is no reason why the Board should not resolve the ICA challenge, a matter committed to the Board's primary jurisdiction." Dec. 12 Decision, at 4 (citation omitted). These Interested Parties contend that such a conclusion misapprehends the ability of this proceeding to remove uncertainty and therefore the interests of the public would be well served if the Board were to reconsider the conclusion.

The Board's conclusion that "there is no reason why the Board should not resolve the ICA challenge" is necessarily based on the premise that UP's indemnity tariff has been challenged under the ICA. But there has been no challenge to UP's indemnity tariff under the ICA. Rather, UP has alleged that Olin corporation "threatened litigation." Notably, UP did not represent that the alleged threat was based upon the ICA. UP, for its part, most assuredly is not challenging its own tariff. Thus, there is no "primary jurisdiction" for the Board to exercise, or any dispute for the Board to resolve, in this proceeding.

This leaves the removal of uncertainty as the only basis for the Board to address the reasonableness of UP's indemnity tariff. But in this case, a finding of reasonableness will not

remove any uncertainty and in fact would create more uncertainty and spawn more litigation. It would seem then that the public interest would be better served for the Board to decline to enter this arena.

As noted previously by these Interested Parties, the fundamental predicate issue is whether UP's indemnity tariff is enforceable under state tort laws, which is a matter beyond the Board's jurisdiction. Although one might separate conceptually the validity of UP's indemnity tariff under the ICA and state tort law, these two issues are not severable as a practical matter because Board approval of UP's indemnity tariff under the ICA would set the stage for a conflict with existing federal and state laws, thereby creating even greater uncertainty.

The level of uncertainty surrounding UP's indemnity tariff is not much different from the uncertainty that existed when the Board recently declined to issue a similar declaratory order in docket Ex Parte No. 677 (Sub-No. 1), Common Carrier Obligation of Railroads—Transportation of Hazardous Materials (served April 15, 2011). In that proceeding, the Association of American Railroads ("AAR") had asked the Board to adopt a policy statement that would permit railroads to require shippers of TIH materials to indemnify the railroads against liability arising from the release of such materials in all instances, including a railroad's own negligence. The Board declined to issue the requested policy statement in the abstract, opting instead to "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." *Id.* at 4, n. 8. The only difference is that UP has thrown up a "strawman" provision.

While one might argue that the specific UP tariff language is more concrete than the AAR policy statement, the real issue in this proceeding is the concept underlying the UP indemnity, just as the issue in Ex Parte No. 677 (Sub-No. 1) was the concept of indemnification

against one's own negligence. In other words, is it reasonable for UP to require shippers to indemnify it for liabilities not attributable to any fault of the shipper? If the Board approves UP's indemnity tariff, other railroads will implement the same concept with their own unique tariff language and claim that they may do so as a result of the Board's conclusion that UP's tariff was reasonable. Thus, the Board is dealing with abstract concepts in this proceeding after refusing to do so in Ex Parte No. 677 (Sub-No. 1).

There is good reason why the Board should not venture into the realm of abstract indemnity concepts. Courts are the best arbiters, and have jurisdiction, in the realm of tort law, and any decision from the perspective of the Board's narrower jurisdiction over rail transportation might skew that process. State courts and legislatures have extensive and broad experience addressing the broad public policy consequences of indemnities. Thus, a determination that UP's tariff is reasonable under the ICA would set the stage for a conflict with these state laws, including inevitable railroad claims that a Board decision that UP's indemnity tariff is not unreasonable should preempt state court decisions that this very same indemnity is unenforceable as against public policy. Consequently, the Board's stated objective to reduce uncertainty cannot be accomplished by a decision finding UP's indemnity tariff not to be unreasonable.

The Board's determination of the lawfulness of the UP tariff provisions here at issue is limited solely to the lawfulness under the ICC Termination Act ("ICCTA") and has no bearing on the lawfulness or enforceability of such provisions under the laws of the various states where such provisions would necessarily have to be enforced. It follows therefore that the Board can determine that the tariff provisions are unlawful insofar as they violate the ICCTA provisions cited by the Board in its Decision, but the Board cannot determine that the same provisions are

lawful under state tort laws inasmuch as the Board cannot speak for the courts of the various states. Accordingly, if the Board finds the tariff provisions in violation of the ICCTA, uncertainty will be removed. On the other hand, if the Board finds that the tariff provisions do not violate the ICCTA, such a finding will have no effect on the lawfulness or enforceability of those provisions under state tort law.

Thus, there is only one Board decision in this proceeding that can remove uncertainty regarding UP's indemnity tariff. That decision would be to find the tariff unreasonable, because then there would not be any tariff indemnity to enforce under state tort law. If the Board is unwilling to reach that conclusion in this proceeding, then it should decline to issue any decision at all, lest it actually increase uncertainty.

II. THE OVERLY BROAD SCOPE OF THE UP INDEMNITY IS *PRIMA FACIE* UNREASONABLE.

The Board should declare UP's indemnity tariff to be *prima facie* unreasonable because it is overly broad. The UP tariff summarily declares that TIH shippers shall be responsible for all liabilities, except those attributable to UP's own negligence. Tariff Item 60(c). This is far broader than UP itself has represented in its assertions that its tariff indemnities are designed to address the "potentially staggering liabilities" of a TIH release. UP. Pet. at 5.

The excessive breadth of UP's tariff is reflected in its attempt to cover the waterfront of all potential liabilities through a "laundry list" of specific instances. As noted in the Petition for Declaratory Order, Exhibit A, there are 5 categories of losses where customer (shipper) must indemnify the railroad. These include "release ... of commodity not caused by the sole or concurring negligence or fault of railroad" and "any ... release from ... equipment tendered by customer...." However, one is left to wonder how these differ. The latter instance is not qualified with the exception for sole or concurring negligence or fault of the railroad. Of course,

once the railcar is tendered to the railroad, this begs the question of where else the commodity could possibly be released from *other than* the equipment. To be indemnified first for a release, then for a release from equipment tendered by the shipper, it would seem to be two bites at the same apple, with the latter being unbounded by an exception for railroad negligence or fault. The requirement for indemnity for “securing... the commodity” again begs the question of how this plays itself out other than through a release from the equipment. Finally, the requirement for indemnity for the “sole negligence or fault of customer” is curious. If the customer has already committed to indemnify for any release other than the sole or concurring negligence or fault of railroad, there is no point to this other than perhaps to lull one into a false sense of security about the breadth of the obligation. There are so many parts to UP’s indemnity tariff, which is difficult even to read much less understand, that this fact alone would warrant a determination that the tariff indemnities are unreasonable.

However, the Board also should reject UP’s indemnity requirements as overbroad because UP would have no obligation to pursue the actual responsible party prior to invoking its indemnity. Even if a third party’s negligence caused a liability, UP would be free to ignore the logical step of seeking recompense for its own losses from that third party. Instead, UP may immediately invoke its indemnity rights against the TIH shipper, even if the third party had the means to pay for that liability. This would be economically inefficient, multiplying claims, and thus would work to the detriment of society at large.

Furthermore, UP’s indemnity clauses would extend to all liabilities not caused by UP even if such liabilities are not caused by the release of a TIH material.² Despite the fact that UP’s Petition is predicated upon the “potentially staggering liabilities” of a TIH release (UP Pet.

² For example, the tariffs purport to require indemnity for any “suits from...violation of...law... that was not attributable to railroad.”

at 5), the UP tariff could require TIH shippers to indemnify UP for any and all liabilities even if there was no release of TIH materials at all.

The UP tariff, through a combination of the consequences described in the preceding paragraphs, could make TIH shippers insurers of consequences stemming from the negligence of any other railroads or of any non-TIH shippers and their commodities on the same train. For example, if a UP train carrying TIH materials is side-swiped by a passing train belonging to another railroad causing a non-TIH hazardous material to leak and the other railroad and/or the non-TIH shipper are deemed to be at fault, the TIH shipper still could have to indemnify UP even if the TIH car did not leak. There is not even a requirement that UP first pursue restitution from the other railroad and/or shipper. Rather, it could immediately demand indemnification from the TIH shipper whose product did not leak and who had no role in causing the accident. Even if there was a release of TIH material in the above scenario, it is not reasonable to permit UP to require the TIH shipper to indemnify UP when the parties at fault are known and can pay.

Such results are not unintended consequences of the UP tariff. They are precisely what UP intended. In the "Conclusion" of UP's Petition, UP states that it "simply seeks a declaration that it can reasonably require, as a condition of providing common carriage for TIH, that the TIH shipper accept responsibility for liabilities that are not caused by UP's negligence." This extremely broad scope of the UP indemnify is adequate in and of itself for the Board to declare it unreasonable.

III. UP'S INDEMNITY TARIFF IS AN ATTEMPT TO ERODE THE COMMON CARRIER OBLIGATION TO TRANSPORT TIH MATERIALS.

UP's professed concern over its liability for TIH releases caused by third parties or Acts of God is really a pretext for a much broader agenda to chip away at the common carrier obligation to transport TIH materials. To the knowledge of the Interested Parties, there has never

been a catastrophic release of TIH materials where the transporting railroad was not the sole or principal party at fault and no railroad has ever pointed to such an incident. Furthermore, no railroad has pointed to a single situation where tort law would impose liability upon a railroad for a TIH release caused by the negligence of a third party or an Act of God. Indeed, for UP to be liable in such circumstances, the law would have to impose strict liability upon UP as the transporter of a TIH material regardless of actual negligence.³ This failure of the railroads to identify a significant exposure to liability caused by third parties or Acts of God indicates that this dispute is really a proxy in the on-going fight over the common carrier obligation of railroads to transport TIH materials.

An STB decision that railroads can demand indemnification from TIH shippers, through their tariffs, for liabilities not caused by any negligence of the shipper, places those shippers at the mercy of the railroads that have long stated that they do not want to handle those TIH commodities regardless of their common carrier obligation to do so. If tariff provisions requiring shippers to indemnify railroads against third party conduct and Acts of God can be placed in tariffs, they could be insisted upon as a condition of carriage and any shipper refusal to accede to those indemnification demands could be the basis of railroad refusals to move the commodity.

In addition, if railroads can demand such indemnification from shippers, they likewise could demand that shippers provide insurance to back up those indemnification obligations. How much insurance would be reasonable under those circumstances? Would the Board become the arbiter not only of the tariff indemnification language but also the level of insurance required

³ Indiana Harbor Belt Railroad Co. v. American Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990) (holding that the transportation of hazardous materials does not give rise to strict liability). The Interested Parties are aware of just one statute, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), that might impose strict liability when a railroad is not negligent, but even CERCLA provides a complete defense for Acts of God. 42 U.S.C. 9607(b)

to support those indemnity obligations? Since the railroads would not be paying for the insurance, there would be no incentive to set levels at economically efficient levels. If shippers are unable to obtain the requisite insurance to cover their indemnity obligations, may the railroad refuse to haul their TIH materials? With smaller chemical operations less likely to be able to alternatively self-insure, this could spawn the same kind of contraction of competition that the public has seen with Class I railroads. Since there is no evidence that railcars tendered by smaller operations carry more risk, these requirements are decidedly unreasonable. These questions and more lie inside the Pandora's box that UP has opened.

The public interest is not served by the Board proceeding down this path which necessarily intrudes into the domain of state tort law and commercial contract negotiations. These are not areas well-suited for the Board's mission and expertise. However, the Board's knowledge of the relative unequal bargaining power of railroads on the one hand and TIH shippers and receivers on the other can be instructive in this matter. There is no balance in those relative bargaining positions, particularly when railroads are openly hostile to transporting TIH materials. The railroads can and do set the terms for dealing with their customers with virtually no real check on their respective power. The Board is, therefore, fully able to recognize that this unequal bargaining power can and does create situations where railroads can insist upon provisions such as indemnification terms and insurance coverage requirements that shippers or receivers are unable to resist. The Board should not further tip this balance in favor of the railroads by endorsing the inclusion of indemnity provisions in non-negotiable tariffs that shift liability onto shippers over which the shipper has no control whatsoever. Such an endorsement would open the gates for railroads to avoid their common carrier obligation by refusing to

transport TIH materials unless a shipper complies with the onerous indemnity and insurance requirements dictated by the railroads.

Moreover, this level of unequal bargaining power equates tariff indemnification requirements to contracts of adhesion. State courts have concluded that indemnity provisions in contracts of such unequal bargaining power are unenforceable as a matter of public policy. Speedway Superamerica, LLC v. Erwin, 250 S.W. 3rd 339 (Ky. App., 2008). The courts have more particularly held that a railroad cannot relieve itself from liability for negligent breach of duty imposed upon it as a common carrier. Pennsylvania R. Co. v. Kent, 136 Ind. App. 551, 198 N.E. 2d 615 (1964); Robertson v. New Orleans & G.N.R. Co., 158 Miss. 24, 129 So. 100 (1930); Luedeke v. Chicago & N.W. Ry. Co., 120 Neb. 124, 231 N.W. 695 (1030); Sommerville v. Pennsylvania R. Co., 151 W.Va. 709, 155 S.E.2d 865 (1967). A Board decision that UP's tariff is not unreasonable would set the stage for a clash with state tort laws. Precisely because the Board does not have jurisdiction to address matters of state tort law, and because state tort law will not enforce indemnity clauses in contracts where there is unequal bargaining power, the Board should find that UP's indemnity tariff is unreasonable, or decline to make any determination at all. The former will create the certainty that the Board claims to seek, while the latter will at least avoid the creation of even greater uncertainty by observing the boundaries between ICCTA and state tort law. Any other result risks tumbling head-first down the slippery slope towards erosion of the common carrier obligation.

IV. GRANTING THE UP PETITION WOULD BE BAD PUBLIC POLICY.

A. The UP Tariff Indemnities Are Contrary To The Public Interest In The Safe Transportation of TIH Materials.

When one considers the fundamental and basic underpinnings of responsibility and liability in society, UP's tariff runs counter to how we are organized for safety and public

welfare. This fact also makes the UP tariff an unreasonable restraint on commerce. As a common carrier tariff, not a private contract between consenting parties, the UP tariff is how the companies represented by the Interested Parties must move their goods if UP will not agree to contract with them on reasonable terms. The indemnity that UP seeks will become a “take it, or leave it” proposition imposed by law rather than by negotiations designed to produce an efficient outcome, if the Board finds the indemnity not to be unreasonable. UP seeks to achieve by legal fiat what tort law otherwise requires parties to negotiate through arms-length bargaining.

It can be generally stated that the companies represented by the Interested Parties require rail service and the public requires these products. The economy and livelihoods depend on it. Society places a high value on the availability at a reasonable price of the products these companies produce.⁴ The railroads have asserted many times that there are fewer accidents per mile traveled by rail than, for example, by truck. Societal goals are thus advanced by the goods moving by rail. However, these companies cannot just hire someone else if UP will not ship the goods. Large manufacturing operations are frequently captive to Class I railroads, which have shrunk in number and are increasingly segmented in terms of areas in which they compete with each other. The facility cannot up and move. For example, where “take it or leave it” is not viable coming from trucking or barge vendors, it certainly is with the railroads, which they well know.

⁴ For example, a number of the companies the Interested Parties represent manufacture a variety of bulk products such as olefins, aromatics, solvents, ethylene oxide/glycols, to name several. Manufacturing facilities are operated in virtually every state in the US. Because chemical products manufactured by these companies are also “base” or “intermediate” chemicals, their customers are most often *other* manufacturers that supply products that are present in virtually every aspect of our daily lives. Countless products that we all use every day in our homes, our cars, at work, or while we relax owe their beginnings to the raw materials that these companies produce. Ethylene oxide, for example, is widely used in the production of a number of products such as anti-freeze, polyester fibers, cosmetics, pharmaceuticals, paints, detergents, soaps, and brake fluid to name a few.

In the transportation of TIH materials, railroads are akin to any monopoly serving the public. They must do so in the public interest. It would never be appropriate for the sole provider of electricity to withhold electric service because the consumer would not agree to put up new electric lines if destroyed by an airplane or an ice storm. No regulatory authority would support a condition of service for natural gas that required a consumer to pay for new gas lines and the claims for all of those injured or killed if street repairs in the public roadway in front of one's house causes a leak and explosion. The happenstance that it occurs in front of one's house is not a reasonable basis to allocate fault in that manner. Nor should it be a basis to allocate fault to TIH shippers when the shipper has no negligence.

B. Railroads are in a Superior Position to Prevent or Mitigate the Harm Caused by Third Parties or Acts of God.

As previously noted, consideration of UP's petition requires the Board to venture into a substantive area -- tort law -- in which it does not have special expertise, in contrast to the state courts (and federal courts applying state law in diversity cases) which have daily experience dealing with such matters. This mismatch of expertise alone argues against the Board's granting this petition.

In addition, the specific relief requested -- to assign tort liability to shipper parties that are in no position to prevent or mitigate harm from acts of God or third parties -- would be inconsistent with the clear trend in tort law over the past 50 years to place the burden of tort liability on parties who are in a position, by virtue of their control over their properties and operations, to prevent harm.

Because a shipper loses all control over both its rail car and its product once the rail car is placed in the railroad's custody, the shipper has absolutely no ability to mitigate the transportation risks, including those that might be posed by third parties or natural forces. The

Interested Parties are unaware of any instances in which the railroad, rather than the shipper, is not in a better position to prevent, limit or mitigate damage from acts of third parties, or acts of nature. Only the railroad, not the shipper, can anticipate and guard against the actions of careless drivers at intersections. Only the railroad, not the shipper, can detect and limit unlawful intrusions onto property. Only the railroad, not the shipper, can optimize the design of tracks, bridges and other structures to withstand the ravages of bad weather and natural disasters. Shifting liability to shipper would impose an unfair financial burden on shippers and eliminate financial incentives for railroads to make their system better able to withstand such events. In fact, a tariff that would shift liability to shippers, notwithstanding the shipper's inability to control the facilities over which the shipment was made, would create a substantial "moral hazard" -- i.e., the railroads would be less concerned about reducing risks or even offering certain legal defenses because they would know that someone else would pay the claim.

Of course, tendering TIH materials to a rail carrier in tank cars meeting federally approved standards has never been held to be an unreasonable request for service under the railroads' common carrier obligation. Indeed, railroad common carrier and contract carriage of hazardous material has been deemed an essential element of interstate commerce, and railroads (with the support of the Board and the U.S. Department of Justice) have defended railroad transportation of hazardous materials against local efforts to impose restrictions. In fact, the Department of Justice in the recent case involving the District of Columbia's efforts to ban the rail transportation of hazardous substances stated that such bans would "wreak havoc with the national system of hazardous materials shipment." Memorandum of the U.S. Dept. of Justice submitted in CSX Transportation v. Williams, 406 F.3d 667, 673 (D.C. Cir. 2005).

In sum, the rail shipment of hazardous materials is decidedly not unreasonably dangerous, and efforts to restrict such shipments, whether attempted by localities seeking to ban hazardous freight, or by railroads seeking to impose prohibitive tariff conditions, cannot be countenanced. Were the Board to open the gates to the sort of indemnity tariff proffered by UP, it would be only a matter of months before railroads arrogated to themselves the effective power to decide which products they wanted to transport and which they did not. The common carrier obligation would be reduced to a dead letter, contrary to the consistent policies of the Board and Congress that it not be abridged.

Respectfully submitted,



Jeffrey O. Moreno
Karyn A. Booth
Thompson Hine LLP
1020 N Street, N.W.
Washington, DC 20036
(202) 331-8800
*Counsel for The Fertilizer Institute and The
National Industrial Transportation League*

Paul Donovan
LaRoe, Winn, Moerman & Donovan
1250 Connecticut Avenue, NW, Suite 200
Washington, DC 20036
Counsel for The Chlorine Institute

Scott Stone
c/o Patton Boggs, LLP
2550 M Street, NW
Washington, DC 20037
*Counsel for the American Chemistry
Council*

Certificate of Service

I hereby certify that on 25th day of January 2012, a copy of the foregoing Joint Comments of the American Chemistry Council; The Chlorine Institute; The Fertilizer Institute; and The National Industrial Transportation League was served by electronic delivery on all parties of record in these proceedings.



Jeffrey O. Moreno