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BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35504

PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR A DECLARATORY ORDER

REPLY TO MOTION TO STRIKE

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The Board should deny the Motion to Strike filed by the Chlorine Institute (“CI”) and the American Chemistry Council (“ACC”) on March 14, 2012. In their motion, CI and ACC incorrectly claim that on reply in this proceeding Union Pacific Railroad Company (“UP”) improperly disclosed confidential settlement negotiations that occurred in connection with a federal lawsuit they filed against UP in 2009.

As discussed below, UP’s reply did not disclose settlement negotiations. Even if it had done so, the disclosure would have been permissible because UP was rebutting claims that CI and ACC made about the parties’ communications in an earlier case.

I. BACKGROUND

UP’s petition to institute this proceeding explained that the indemnity provisions at issue were the product of an effort to resolve a federal lawsuit that CI and ACC had filed against UP in 2009. UP described the prior proceeding and its resolution to help explain that the current version of the provisions do not seek indemnification for liabilities arising from UP’s fault or negligence. *See* UP Petition at 3-4. UP’s willingness to address CI’s and ACC’s criticisms of the indemnity provisions in the earlier case also demonstrated that UP has not adopted a “take it or leave it” approach to the tariff provisions, contrary to the claims of the shipper parties in this proceeding.

In their opening evidence, CI/ACC also addressed the 2009 federal lawsuit.¹ They acknowledged that UP had revised the indemnity provisions in a manner that resolved their complaint, but then they went further. To support their assertion that the provisions were unreasonable despite their dismissal of the federal lawsuit, they denied that their discussions with UP addressed the issue of “third party indemnities” – that is, whether the indemnity provisions would require TIH shippers to indemnify UP for liabilities caused by third parties that UP is required to cover. *See Interested Parties Op.* at 1 n.1.

In its reply, UP described and attached several emails that counsel for UP and counsel for CI/ACC had exchanged before CI/ACC dismissed the federal lawsuit. UP provided the emails to rebut CI/ACC’s assertion that the parties had not addressed third party indemnities, and their implication that that issue had not arisen until after CI/ACC dismissed their lawsuit.² The emails establish beyond dispute that the parties had in fact discussed the subject of third party indemnities required under the tariff provisions before CI/ACC dismissed the federal lawsuit. *See UP Reply* at 24-25 & *Reply Exhibits D & E.*

UP’s first email to CI/ACC, dated August 4, 2009, did not contain any indication that the email was a settlement communication. UP explained that it had “decided to make substantial changes to the tariff items subject to the litigation” after “consulting with certain TIH customers and reviewing [CI/ACC’s] complaint.” *UP Reply Exhibit B.* UP told CI/ACC it was issuing a revised version of the provisions and asked CI/ACC to “let [UP] know whether you plan to continue the [federal] litigation.” *Id.* CI/ACC’s response was not marked as confidential

¹ ACC and CI filed joint opening comments along with two other shipper organizations. The four organizations call themselves the “Interested Parties.”

² In addition, Olin Corporation claimed in its opening comments that “at the time of the lawsuit, UP 6607 did not impose broad liability on shippers for acts of third parties.” *Olin Op.* at 4 n.14.

or as subject to any settlement privilege. *See* UP Reply Exhibit C. None of the subsequent communications between UP and CI/ACC contained any statement that they were confidential or constituted settlement communications. UP revised the tariff provisions twice more during this period to address comments from CI/ACC. At no point, however, did UP ever condition its revisions to the indemnity provisions on a commitment by CI/ACC to dismiss the federal lawsuit. *See* UP Reply Exhibits D & F.

II. ARGUMENT

CI/ACC's claim that UP improperly disclosed settlement negotiations in its reply evidence has no basis in fact or law. As an initial matter, UP did not disclose any settlement negotiations. But even assuming the emails UP disclosed were settlement negotiations, Board precedent and the Federal Rules of Evidence permitted UP to use those communications in response to claims CI/ACC made on opening.³

A. The Communications at Issue Were Not Settlement Negotiations.

CI/ACC's arguments rely on Rule 408 of the Federal Rules of Evidence, but Rule 408 "protects only conduct or statements made in compromise negotiations." *MCI Commc'n Servs., Inc. v. Hagan*, 641 F.3d 112, 117 (5th Cir. 2011) (internal quotation omitted). As the emails show, UP and CI/ACC were not engaged in compromise negotiations. Recognizing that the original indemnity provisions in its tariff were not clear, UP voluntarily issued revised indemnity provisions *before* sharing them with counsel for CI/ACC. *See* UP Reply Exhibit B ("The revised tariff will be published today [P]lease let us know whether you plan to

³ As CI/ACC recognize, the Federal Rules of Evidence do not apply in Board proceedings. Because the Board has looked to the rules for guidance, however, we discuss authority relating to the rules below. CI/ACC also reference the Board's alternative dispute resolution rules, but those rules do not apply to this dispute because the communications at issue occurred in connection with a federal lawsuit, not a proceeding governed by the Board's rules.

continue the Utah litigation”). UP remained open to comments from CI/ACC and revised the provisions several times in response to those comments, but there was no exchange of a promise to revise the tariff in return for a promise to dismiss the lawsuit. Thus, the communications involved no settlement agreement or compromise of positions. In fact, UP made clear that it was prepared to defend the revised provisions if CI/ACC decided not to dismiss their complaint. *See* UP Reply Exhibit D (“Here is a copy of the revised tariff, which we plan to publish tomorrow so that we can include it in our court filings on Monday”).⁴

Thus, while the communications between UP and CI/ACC led CI/ACC to agree with UP that the revised tariff responded to the concerns stated in the complaint and ultimately produced a resolution of the federal litigation, they were not settlement communications. *See Sunstar, Inc. v. Alberto-Culver Co.*, No. 01 C 0736, 2004 WL 1899927, at *22-*23 (N.D. Ill. Aug. 23, 2004) (letters containing no suggestion of compromise were not part of settlement negotiations). Moreover, as noted above, the emails were not labeled as confidential or subject to any settlement privilege, which is a further indication the parties did not believe they were engaged in communications subject to Rule 408. *See Nurse Notes, Inc. v. Allstate Ins. Co.*, No. 10-14481, 2011 WL 3862402, at *4 (E.D. Mich. Aug. 31, 2011) (upholding magistrate’s finding that certain letters were not settlement communications “as the letters were not labeled confidential or settlement communications” and “did not indicate that the letters contained settlement negotiations”). Accordingly, there would be no basis under Rule 408 for striking the emails between UP and CI/ACC from the record.

⁴ If UP had considered the August 2009 communications to create a settlement agreement, it would have objected to CI/ACC’s opposition to the tariff provisions in this proceeding. But UP did not require CI or ACC to dismiss their earlier case or refrain from further litigation regarding Items 50 and 60 in exchange for making any of the revisions to those items.

B. Even If UP Had Disclosed Settlement Negotiations, the Disclosure Was Permissible Under Board and Federal Rules.

Even assuming UP disclosed settlement negotiations in its reply evidence, the disclosure was permissible under Board precedent and the Federal Rules as rebuttal to claims CI/ACC made on opening.

First, UP's submission of the emails was consistent with Board precedent, even if it disclosed settlement negotiations. Board precedent allows a party to submit evidence of statements made in settlement negotiations to rebut claims that have been placed on the record by the other party to the negotiations. *See Rail General Exemption Authority – Nonferrous Recyclables*, STB Ex Parte No. 561 (STB served May 5, 1997). In *Nonferrous Recyclables*, Conrail asked the Board to strike a shipper's testimony that certain transportation was not subject to competition, or to admit evidence that the shipper had made inconsistent statements in private negotiations. The Board denied Conrail's motion to strike and allowed Conrail to submit the evidence of inconsistent statements over the shipper's objection that admission of the evidence would violate agency policy regarding introduction of evidence of compromise negotiations. *See id.* at 12-13. In this proceeding, CI/ACC made statements on the record about the issues the parties addressed in discussions in connection with the federal lawsuit. UP was entitled to rebut those inaccurate statements. Thus, UP's submission of the emails was proper rebuttal under Board precedent.

Second, even if UP's submission of the emails disclosed settlement negotiations, Rule 408 would not have precluded the disclosure in this proceeding. Rule 408 allows parties to submit evidence of statements made in settlement negotiations to rebut claims placed in the record by the other party to the negotiations. That exception would apply to this proceeding, since CI/ACC denied that the parties discussed the issue of third party indemnities, and the

emails rebut their assertion. *See Breuer Elec. Mfg. Co. v. Toronodo Sys. of Am.*, 687 F.2d 182, 185 (7th Cir. 1982) (“In this case, the ‘settlement’ evidence was properly presented below to rebut defendants’ assertion that they had not been aware of the issues until the suit was filed.”); *see also CCMS Publ’g Co. v. Dooley-Maloof, Inc.*, 645 F.2d 33, 38 (10th Cir. 1981) (“The defendants opened the subject and CCMS was entitled to rebut. We find no violation of Rule 408.”); *Bankcard Am., Inc. v. Universal Bancard Sys., Inc.*, 203 F.3d 477, 484 (7th Cir. 2000) (evidence admissible to rebut claim that party acted improperly); *Cochenour v. Cameron Sav. & Loan, F.A.*, 160 F.3d 1187, 1190 (8th Cir. 1998) (“Even assuming that the letter was an ‘offer to compromise’ within the meaning of Fed. R. Evid. 408, we believe that its use as rebuttal to Ms. Cochenour’s testimony was permissible under the rule.”); *Freidus v. First Nat’l Bank*, 928 F.2d 793, 795 (8th Cir. 1991) (documents exchanged during negotiations admissible to rebut claim that defendant failed to give a reason for its actions); *Baird v. Boies, Schiller & Flexner LLP*, 219 F. Supp. 2d 510, 516 n.2 (S.D.N.Y. 2002) (plaintiffs “opened the door” by disclosing details of settlement discussions in their moving papers).

In addition, the emails that UP submitted involved the federal litigation, not the current Board proceeding, and Rule 408 allows use of settlement communications in subsequent litigations. *See, e.g., Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 689 (7th Cir. 2005); *Towerridge Inc. v. T.A.O., Inc.*, 111 F.3d 758, 770 (10th Cir. 1997); *Broadcort Capital Corp. v. Summa Med. Corp.*, 972 F.2d 1183, 1194 (10th Cir. 1992); *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 277 (8th Cir. 1983); *Nurse Notes*, 2011 WL 3862402, at *4. The case law reflects recognition that “[w]here the settlement negotiations and terms explain and are a part of another dispute they must often be admitted if the trier is to understand the case.” *Broadcort Capital*, 972 F.2d at 1194 (quoting 2 Jack Weinstein & Margaret Berger, *Weinstein’s Evidence* ¶ 408, at

408-32 to 33 (1991)).⁵ Thus, even if UP had disclosed settlement communications and the disclosure were not permissible rebuttal, UP still would not have violated Rule 408.

Moreover, “Rule 408 does not bar evidence that certain statements were not made during compromise negotiations.” *Donovan v. Quade*, Case No. 05 C 3533, 2011 WL 5588765, at *5 (N.D. Ill. Nov. 16, 2011) (citing Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Evidence* § 5308, at 239 (1980)). Accordingly, UP was entitled to cite the parties’ communications in connection with the federal litigation to show that CI/ACC did not voice an objection to inclusion in the tariff of provisions regarding indemnity for third party liabilities.

⁵ When one party makes an *admission of fact* during settlement discussions in a prior case, Board precedent prohibits use of the admission in a subsequent case. *See Sandusky County-Seneca County-City of Tiffin Port Authority – Feeder Line Application – Consolidated Rail Corp. Carrothers Secondary in Sandusky & Seneca Counties, OH*, 6, I.C.C.2d 568, 582 (1990). However, UP did not use a prior admission by CI/ACC. UP used general communications to provide the Board with a more complete understanding of the context in which the present dispute arose.

III. CONCLUSION

For the reasons discussed above, the Board should deny CI's and ACC's Motion to Strike.

Respectfully submitted,



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March 26, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2012, I caused a copy of the foregoing Reply to Motion to Strike to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in this proceeding.



Michael L. Rosenthal