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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**Union Pacific Railroad Company** )  
**Petition for Declaratory Order** )  
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ENTERED  
Office of Proceedings

**Docket No. FD 35504**

JAN 25 2012

Part of  
Public Record

**CF INDUSTRIES, INC.'S OPENING EVIDENCE AND ARGUMENT**

The Surface Transportation Board ("STB") should reject Union Pacific Railroad Company's ("UP") attempt to subvert state tort law by including liability-shifting indemnification language in its tariff. UP's proposed indemnification language makes an end-run around state tort law and contravenes Congressional intent to prevent railroads from escaping liability. It places an undue burden on shippers, the party least able to control the safety of the railroad shipment. It ignores recent history, which demonstrates that railroad accidents involving TIH are the fault of the railroad. And it is bad policy.

***I. Railroads Have A Common Carrier Obligation To Transport TIH And Should Not Be Able To Undermine That Obligation By Raising Hurdles To Transportation.***

UP is a common carrier. It is obligated to provide transportation service on request and on reasonable terms.<sup>1</sup> The STB has held that this includes the obligation to transport hazardous materials such as TIH.<sup>2</sup>

Shippers such as CF Industries, Inc. ("CF") rely on railroads fulfilling their common carrier obligations. CF, like others in the fertilizer industry, relies on rail service to transport its

<sup>1</sup> See 49 U.S.C. §§ 10701 and 11101 (2007).

<sup>2</sup> See, e.g., *Akron, Canton & Youngstown R.R. Co., et al. v. ICC*, 611 F.2d 1162 (1979); see also *Union Pac. R.R. Co. - Petition for Declaratory Order*, 2009 WL 1630587 (June 11, 2009) ("UP Order").

fertilizer products safely and cost-effectively to farmers, other customers, and storage facilities throughout the United States and Canada. Railroads are essential to the safe, cost-effective, and energy efficient transportation of TIH materials, and any policy change that results in a shift of TIH material off rail is inefficient, risky, and inconsistent with the public interest.

The STB has recognized this in the past. Previously, UP attempted to escape its common carrier obligations with regard to transporting TIH, but the STB denied UP's request.<sup>3</sup> Now, with the proposed addition of new indemnification provisions to its tariff, UP is attempting to raise hurdles to the transportation of TIH in the hopes of driving TIH shippers off the system. The STB should remain resolute in requiring common carriers to fulfill their obligations.

## ***II. Congress Never Intended To Allow Railroads To Escape Liability.***

On January 18, 2002, a Canadian Pacific Railway train derailed near Minot, North Dakota. Over 220,000 gallons of anhydrous ammonia were released, causing one death and over 300 injuries. The National Transportation Safety Board ("NTSB") found that the accident was caused primarily by the railroad's ineffective inspection and maintenance program.<sup>4</sup> The U.S. District Court for the District of North Dakota dismissed state law claims brought by the plaintiffs, determining that such claims were preempted by federal regulations.<sup>5</sup> The U.S. Court of Appeals for the Eighth Circuit reached a similar result in another case stemming from the Minot accident.<sup>6</sup> In response, Congress amended 49 U.S.C. § 20106 to include the following language:

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<sup>3</sup> See *UP Order*.

<sup>4</sup> See <http://www.nts.gov/investigations/summary/RAR0401.html>.

<sup>5</sup> See *Mehl v. Can. Pac. Ry., Ltd.*, 417 F. Supp. 2d 1104 (2006).

<sup>6</sup> See *Lundeen v. Can. Pac. Ry. Co.*, 447 F.3d 606 (8<sup>th</sup> Cir. 2006).

**(b) Clarification regarding State law causes of action. –**

**(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party –**

**(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;**

**(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or**

**(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).**

**(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.<sup>7</sup>**

Congress amended the law to make clear that railroads cannot escape liability for their actions and explicitly provided for recourse to state courts. Congress could have set a national standard regarding liability, but left tort-related claims to the states so that the states could apply their own laws with respect to a cause of action.<sup>8</sup>

In addition, Congress created subsection (c) which states that “[n]othing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.”<sup>9</sup> Once again, by stating that there was no federal question jurisdiction (*i.e.*, a federal court having subject matter jurisdiction over civil matters), Congress passed on the opportunity to grant federal jurisdiction over such matters,

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<sup>7</sup> 49 U.S.C. § 20106(b).

<sup>8</sup> Interestingly, Congress’ drafting of subsection (b) so as to allow states to impose their own individual tort laws stands in contrast to subsection (a), which creates “national uniformity” with regard to railroad safety and security measures. This further suggests that Congress specifically intended to allow individual state laws to govern tort issues.

<sup>9</sup> 49 U.S.C. § 20106(c).

opting to have state courts, not federal courts (and, presumably, not federal administrative agencies, either), handle such matters.

Since Congress amended 49 U.S.C. § 20106, railroads have lobbied Congress for limitations on their liability. Congress has yet to pass such legislation, suggesting that it is comfortable with retaining the current system of having state courts adjudicate matters of liability.

UP's proposed liability language is an attempt to circumvent state tort law, and its request for the STB to approve tariff language is an attempt to step on state courts. As such, it appears to contravene the intent of Congress as expressed in the amendments to 49 U.S.C. § 20106.

### ***III. Courts Applying State Tort Laws Are Best Equipped To Determine Liability Issues Arising From TIH Accidents.***

As noted above, Congress has expressly stated that railroads can be held liable for their negligence under state tort law. Tort law is concerned with the rights of parties to obtain compensation from those who have injured them.<sup>10</sup> Generally, there are four elements to a tort claim: (1) a duty to act with some standard of care; (2) a breach of that duty; (3) causation; and (4) damages.<sup>11</sup> While scholars disagree on what should be the primary purpose of tort law, there are generally three accepted purposes: (1) shifting losses to the person at fault; (2) deterring unsafe behavior by placing costs on the party best able to prevent injury; and (3) distributing losses.<sup>12</sup>

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<sup>10</sup> See Kenneth Abraham, *The Forms and Functions of Tort Law* at 1 (2002).

<sup>11</sup> See *id.* at 2-3.

<sup>12</sup> See J.D. Lee and Barry Lindahl, *Modern Tort Law, Liabilities and Litigation, Second Edition* § 2.1 (2001). See also Dan Dobbs, *The Law of Torts* at 13-21 (2000).

Because tort law reflects local values<sup>13</sup> and because it developed more through common law than statute, each state tends to have its own body of precedent and tort law.<sup>14</sup> These laws and precedents reflect the experience and values of the local community. The state courts have extensive experience in applying the relevant standards and legal norms to a specific fact pattern.

UP's proposal ignores all of this. As discussed below, UP's proposal is merely an attempt to shift liabilities away from itself and put them on shippers, even when shippers are not at fault. This contravenes the principles of justice, deterrence, and causation underlying tort law. Moreover, by imposing the indemnification language on shippers through its tariff, rather than using state law or mutually-agreed-to contractual provisions to establish the proper allocation of liabilities, UP is attempting to make an end-run around state courts and state law.

But there are reasons that those state laws exist. And there are reasons that parties contractually agree to various provisions, including indemnification provisions. By ignoring these reasons and unilaterally applying a policy designed solely for its own benefit, UP is improperly shifting risk and establishing a bad policy.

The STB should recognize that state courts have the expertise and ability to allocate to each party the appropriate level of liability arising from an accident. There is no compelling reason to permit UP to unilaterally establish indemnification provisions designed to circumvent state tort law or state courts.

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<sup>13</sup> See *Modern Tort Law* at § 1.1.

<sup>14</sup> See *The Forms and Functions of Tort Law* at 1.

***IV. Railroads, Not Shippers, Control The Transportation Of TIH Materials On The Tracks.***

In its Request for a Declaratory Order, UP states that the TIH shipper is “the party that controls whether, when, and where it ships TIH.”<sup>15</sup> This is a misleading statement that is intended to hide the most relevant fact – once TIH shippers deliver their goods to the railroads, the TIH shippers lose all control over the goods. It is the railroad, and the railroad alone, that controls the safe transportation and delivery of the TIH.

There are two major implications associated with this fact. First, it raises a question of which party, as a matter of justice, should be held more responsible for events surrounding accidents. As noted above, there is a debate in tort law about whether tort law should be established on the basis of “justice” or “incentivizing” certain behavior. UP fails to explain how it is just for shippers to pay for damages that may result from accidents that occur while the railroad is in control of the product. It is inappropriate to require draconian indemnification provisions that shift costs and liabilities to shippers who are unable to prevent the accidents from occurring.

Second, it raises the question of what type of indemnification provisions create the best set of incentives so as to encourage the safest possible transportation of TIH. As noted above, one of the principles of tort law is to incentivize safe behavior. For example, suppose a shipper delivers TIH product to a railroad, and then a hurricane forms and heads for the rail yard. This might be considered an act of God, but which party is in a better position to prevent something from happening to the TIH? The shipper no longer has any control over the TIH. The railroad can move the TIH cars out of the path of the hurricane or secure the TIH rail cars in a facility to protect them from damage. Tort laws are designed to encourage the party that can do something

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<sup>15</sup> Petition of Union Pacific Railroad Company for a Declaratory Order at 5.

to take responsible action, especially in cases like this. Sometimes accidents happen. Which party is better able to take steps to limit the occurrence of accidents – the shipper, which does not control the movement of the train or the maintenance of the rail system, or the railroad, which does? The answer is obvious: the party that has actual control over the product and the means by which it is transported. And despite UP's claims to the contrary, it is the railroad that has such control.

Thus, regardless of which side of the debate the STB supports – that tort law should be designed to promote justice or good incentives – the result is the same. The fact that the railroad is the party that controls the transportation of TIH and the conditions on the rail system argues in favor of rejecting UP's indemnification language.

***V. In Fact, All Recent TIH-Related Accidents On Railroads Have Been The Railroad's Fault.***

Hazardous material-related railroad accidents are rare. Nevertheless, when examining the NTSB's website listing of all railroad accidents over the past ten years, it is clear that the NTSB's investigations show the accidents are caused by the railroads' negligence.

For example, the NTSB has published reports on the following incidents:

- *Minot, North Dakota. January 18, 2002. "Executive Summary. [O]n January 18, 2002, eastbound Canadian Pacific Railway freight train . . . derailed . . . about 1/2 mile west of the city limits of Minot, North Dakota. Five tank cars carrying anhydrous ammonia, a liquefied compressed gas, catastrophically ruptured, and a vapor plume covered the derailment site and surrounding area. . . . Damages exceeded \$2 million, and more than \$8 million has been spent for environmental remediation. Probable Cause. The National Transportation Safety Board determines that the probable cause of the derailment of Canadian Pacific Railway train 292-16 was an ineffective Canadian Pacific Railway inspection and maintenance program that did not identify and replace cracked joint bars before they completely fractured and led to the breaking of the rail at the joint.*

Contributing to the severity of the accident was the catastrophic failure of five tank cars and the instantaneous release of about 146,700 gallons of anhydrous ammonia.”<sup>16</sup>

- *Tamaroa, Illinois. February 9, 2003.* “Executive Summary. [O]n February 9, 2003, northbound Canadian National freight train . . . derailed . . . in Tamaroa, Illinois. Four of the derailed cars released methanol, and the methanol from two of these four cars fueled a fire. . . . Damages to track, signals, and equipment, and clearing costs associated with the accident totaled about \$1.9 million. Probable Cause. The National Transportation Safety Board determines that the probable cause of the February 9, 2003, derailment of Canadian National train M33371 in Tamaroa, Illinois, was Canadian National’s placement of bond wire welds on the head of the rail just outside the joint bars, where untempered martensite associated with the welds led to fatigue and subsequent cracking that, because of increased stresses associated with known soft ballast conditions, rapidly progressed to rail failure.”<sup>17</sup>
- *Macdona, Texas. June 28, 2004.* “Executive Summary. [O]n Monday, June 28, 2004, a westbound Union Pacific Railroad (UP) freight train traveling on the same main line track as an eastbound BNSF Railway Company (BNSF) freight train struck the midpoint of the 123-car BNSF train as the eastbound train was leaving the main line to enter a parallel siding. . . . As a result of the derailment and pileup of railcars, the 16th car of the UP train, a pressure tank car loaded with liquefied chlorine, was punctured. Chlorine escaping from the punctured car immediately vaporized into a cloud of chlorine gas. . . . Damages to rolling stock, track, and signal equipment were estimated at \$5.7 million, with environmental cleanup costs estimated at \$150,000. Probable Cause. The National Transportation Safety Board determines that the probable cause of the June 28, 2004, collision of Union Pacific Railroad train MHOTU-23 with BNSF Railway Company train MEAP-TUL-126-D at Macdona, Texas, was Union Pacific Railroad train crew fatigue that resulted in the failure of the engineer and conductor to appropriately respond to wayside signals governing the movement of their train. Contributing to the crewmembers’ fatigue was their failure to obtain sufficient restorative rest prior to reporting for duty because of their ineffective use of off-duty time and Union Pacific Railroad train crew scheduling practices, which inverted the crewmembers work/rest periods. Contributing to the accident was the lack of a positive train control system in the accident location. Contributing to the severity of the accident was the puncture of a tank car and the subsequent release of poisonous liquefied chlorine gas.”<sup>18</sup>
- *East St. Louis, Illinois. September 21, 2004.* “Executive Summary. On September 21, 2004, . . . the Alton and Southern Railway Company [train] derailed during switching operations. . . . The remote control operator was unable to control the speed of the train as it crested the hump . . . it collided at 9.6 mph with a tank car containing vinyl acetate. During the collision and subsequent derailment, vinyl acetate began to leak from two tank

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<sup>16</sup> <http://www.nts.gov/investigations/summary/RAR0401.html>. The executive summaries have been edited so as to reduce their length. The summaries here attempt to briefly describe the accidents, the amount of damages, and NTSB’s description of probable cause. Complete reports can be found on the NTSB’s website.

<sup>17</sup> <http://www.nts.gov/investigations/summary/RAR0501.html>.

<sup>18</sup> <http://www.nts.gov/investigations/summary/RAR0603.html>.

cars and the cargo from both cars caught on fire. . . . Probable Cause. The National Transportation Safety Board determines that the probable cause of the September 21, 2004, accident at the Alton and Southern Railway Company's Gateway Hump Yard in East St. Louis, Illinois, was the inability of the remote control operator to control the speed of the cars being switched as they crested the hump because the weight of the cars exceeded the braking capability of the remote control locomotives. Contributing to the accident was the failure of the Alton and Southern Railway Company to have weight limits and adequate hump operation procedures in place for maneuvering heavy strings of cars over the hump."<sup>19</sup>

- *Graniteville, South Carolina. January 6, 2005.* "Executive Summary. [O]n January 6, 2005, northbound Norfolk Southern Railway Company (NS) freight train 192, while traveling about 47 mph through Graniteville, South Carolina, encountered an improperly lined switch that diverted the train from the main line onto an industry track, where it struck an unoccupied, parked train (NS train P22). The collision derailed both locomotives and [ ] freight cars of train 192, as well as the locomotive and 1 of the 2 cars of train P22. Among the derailed cars from train 192 were three tank cars containing chlorine, one of which was breached, releasing chlorine gas. . . . Total damages exceeded \$6.9 million. Probable Cause. The National Transportation Safety Board determines that the probable cause of the January 6, 2005, collision and derailment of Norfolk Southern train 192 in Graniteville, South Carolina, was the failure of the crew of Norfolk Southern train P22 to return a main line switch to the normal position after the crew completed work at an industry track. Contributing to the failure was the absence of any feature or mechanism that would have reminded crewmembers of the switch position and thus would have prompted them to complete this final critical task before departing the work site. Contributing to the severity of the accident was the puncture of the ninth car in the train, a tank car containing chlorine, which resulted in the release of poisonous chlorine gas."<sup>20</sup>
- *New Brighton, Pennsylvania. October 20, 2006.* "Executive Summary. [O]n Friday, October 20, 2006, Norfolk Southern Railway Company train . . . derailed while crossing the Beaver River railroad bridge in New Brighton, Pennsylvania. . . . Of the 23 derailed tank cars, about 20 released ethanol, which subsequently ignited and burned for about 48 hours. Some of the unburned ethanol liquid was released into the river and the surrounding soil. . . . The Norfolk Southern Railway Company estimated total damages to be \$5.8 million. Probable Cause. The National Transportation Safety Board determines that the probable cause of the derailment of Norfolk Southern Railway Company train 68QB119 was the Norfolk Southern Railway Company's inadequate rail inspection and maintenance program that resulted in a rail fracture from an undetected internal defect. Contributing to the accident were the Federal Railroad Administration's inadequate oversight of the internal rail inspection process and its insufficient requirements for internal rail inspection."<sup>21</sup>

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<sup>19</sup> <http://www.nts.gov/investigations/fulltext/RAB0504.html> (footnotes omitted).

<sup>20</sup> <http://www.nts.gov/investigations/summary/RAR0504.html>.

<sup>21</sup> <http://www.nts.gov/investigations/summary/RAR0802.html>.

- *Oneida, New York. March 12, 2007. “Synopsis.* On Monday, March 12, 2007 . . . CSX Transportation (CSX) train . . . derailed near Oneida, New York. . . . Twenty-nine cars derailed. Six tank cars were breached, including four carrying liquefied petroleum gas, one carrying toluene, and one carrying ferric chloride. . . . Estimated damages and environmental cleanup costs were \$6.73 million. Probable Cause. The National Transportation Safety Board determines that the probable cause of the March 12, 2007, derailment of CSX train No. Q39010 and subsequent release of hazardous material near Oneida, New York, was the failure of the rail from an undetected detail fracture that initiated from an area of shelling on the rail.”<sup>22</sup>

In all of these incidents, the railroad was the party at fault. In light of the history of TIH-related accidents, it makes little sense to reduce railroads’ liabilities. Instead, railroads should be incentivized to be even more careful than they have been in the past.

#### ***VI. The Proposed Indemnification Language Is Inappropriate.***

Item 50, Section 1 begins with UP indemnifying the shipper from liabilities associated with the UP’s “sole negligence”:

Railroad shall [indemnify] Customer . . . against any and all [Liabilities<sup>23</sup>] arising from Railroad’s sole negligence or fault in the performance of transportation services pursuant to this tariff...

But Item 50 then begins to limit the extent of the indemnification:

Such [indemnification] shall not apply to any Liabilities caused by the sole negligence or fault of Customer or the concurring negligence or fault of Railroad and Customer.

It is appropriate that UP not be forced to indemnify shippers for liabilities arising from the sole negligence of the shipper. In cases of concurring fault or negligence, however, the tariff language in Item 60 governs and has several problems, as discussed below.

Item 50, Section 2 provides UP with additional protections that are not reciprocal:

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<sup>22</sup> <http://www.nts.gov/investigations/fulltext/RAB0805.html>.

<sup>23</sup> Note that Liabilities are “any and all Liabilities,” not just those associated with TIH.

**Customer shall [indemnify] Railroad . . . against any and all Liabilities except those caused by the sole or concurring negligence or fault of Railroad.**

Understand what this sentence means. The shipper is forced to indemnify the railroad for liabilities associated with third-party actions or acts of God, even if the shipper itself is not at fault. Note also that “liabilities” are not limited to TIH-related liabilities. This is an extremely broad and overreaching indemnification.

Item 50, Section 2 then includes a list of examples of when shippers must indemnify UP:

**Customer’s indemnity shall include, but not be limited to, any Liabilities arising from:**

- any failure of, release from, or defect in equipment tendered by Customer . . .;
- loading, sealing, and securing commodity in such equipment;
- release, unloading, transfer, delivery, treatment, dumping, storage, or disposal of commodity not caused by the sole or concurring negligence or fault of Railroad;
- any fines, penalties, or suits resulting from alleged or actual violation of federal, state or local environmental or other law, statute, ordinance, code, or regulation that was not attributable to Railroad; and
- any loss caused by the sole negligence or fault of Customer.

**Provided, however, that Customer shall have no responsibility to indemnify Railroad for Liabilities arising from the negligence or fault of another rail carrier that participated in the movement.**

There are several noteworthy things about this list. First, it requires the shipper to automatically indemnify UP if there is a “release” from the shipper’s equipment. Presumably, this would apply even to cases where UP is negligent (note that in the third bullet point, there is a specific carve out for when the railroad is negligent, but there is no such carve out in the first two bullet points).

And it applies when the shipper is neither solely negligent nor concurringly negligent. With regard to the bullet point about indemnifying UP for fines or penalties, it is hard to understand how the railroad could be penalized if it had no negligence or fault. Perhaps that is why it discards such language and uses the phrase “not attributable to railroad.” This is unclear, and possibly intended to stick the shipper with penalties and fines even when, as discussed above, the shipper has no control over transportation. And, once again, this list sticks the shipper with liabilities that it does not cause (for example, those caused by third-parties). The sole protection for the shipper is when the liabilities arise from the fault of another railroad that “participated in the movement.”

Finally, Item 50, Section 2 states:

Customer is solely responsible for and will [indemnify] Railroad [] against any Liabilities due to the presence of chemicals or contaminants in the commodity which are not properly described in the commodity shipping document.

While it is appropriate to properly describe contents in a shipping document, it is not clear why a minor mistake in filling out a shipping document should result in such a broad indemnification provision (this appears to even include cases where the railroad is negligent). A mistake in filling out a form is unlikely to be the proximate cause of any accident. To the extent that it is, the state courts are in the best position to allocate the appropriate share of liability to the shipper.

In Item 60, which deals with joint liability, UP states:

When Liabilities are caused, in whole or in part, by the joint, contributory, or concurrent negligence or fault of the Railroad, Customer, or any other Party, responsibility for Liabilities shall be adjudicated under principles of comparative fault in which the trier of fact shall determine the percentages of responsibility for Railroad, Customer, and any other Party. Railroad shall be liable only for the amount of such Liabilities allocated to the Railroad in proportion to Railroad percentage of responsibility. Customer shall be liable for all other Liabilities.

Neither Railroad nor Customer may reduce its pro rata share of negligence or Liabilities under this tariff by agreement or settlement with any other party or claimant.

Note that, once again, this language makes the shipper responsible for liabilities associated with third-parties' fault, as well as its own. For example, in a situation where the railroad is 50% liable, a third-party is 49% liable, and the shipper is 1% liable, the railroad would only be held liable for "such Liabilities . . . in proportion to Railroad percentage of responsibility," *i.e.*, 50%, and the shipper would be held "liable for all other Liabilities," *i.e.*, 50%, even though the shipper is only 1% at fault. This makes the shipper responsible for pursuing claims against third-parties despite having only a miniscule responsibility for liabilities.<sup>24</sup>

Moreover, the language in the second paragraph appears to prevent the shipper from reaching a settlement with an injured party, even if both the shipper and the injured party come to a mutually agreeable settlement.

When viewed as a whole, the problems with the proposed tariff provisions become clear. The provisions are overly broad, requiring indemnification not only for TIH-related liabilities but for "any and all" liabilities. They require shippers to indemnify UP for the negligence of third-parties. The provisions require shippers to indemnify UP for events that the shipper has no control over. The provisions are not reciprocal, but are one-sided in favor of the railroad. And, at points, the language is unclear and appears to contradict itself.<sup>25</sup>

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<sup>24</sup> It also puts the shipper in the position of having to insure against third-party negligence.

<sup>25</sup> For example, the language generally says that UP is liable when the accident is due to the sole negligence of the railroad. Yet language in the tariff also seems to give UP a blanket indemnification if the shipping label is even slightly wrong or if there is any release of product from shipper's equipment. Perhaps this is not UP's intent, but it is a bit unclear.

Even if it was appropriate for the STB to decide what the appropriate indemnification provisions are regarding the transportation of TIH, UP's proposal is too broad, too one-sided, and too unfair.

***VII. UP's Proposal Is Bad Public Policy.***

After having reviewed the purposes of tort law, the history of TIH-related accidents, and the indemnification language proposed by UP, it becomes clear that sanctioning UP's proposed language would be bad public policy.

TIH materials are vital inputs to many sectors of the US economy. And rail transportation is the most efficient and safest way to transport TIH. Yet UP's proposal is designed to shift the risk of transporting TIH materials on rail systems, presumably to drive TIH shippers off the system. This impacts not just the railroads and shippers, but also farmers, industrial users, and other important segments of the economy. UP's proposal gives little consideration to the wider economic damage it causes.

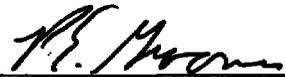
Railroads are common carriers. Common carriers receive certain benefits from society, such as eminent domain rights, subsidies, access to land, *etc.* In return, society expects that the common carrier will allow non-discriminatory access to its system at reasonable prices. Society makes that trade-off for a simple reason, because the benefits to society outweigh the costs. Society does not make these concessions to such companies to generate a greater return to the individual company's shareholders. In this case, one of the benefits to society is that railroads are often the cheapest, safest, and most efficient way to move certain products, including TIH. Forcing the shipment of TIH from railroads to other modes of transportation will not improve public safety and is not the solution that is needed. Using railroads allows parties to transport

TIH to farmers in a timely manner and in large volumes, who in turn use TIH to increase substantially their crop yields, or to industrial users, who in turn use TIH as vital inputs to important industrial products. These are the direct (safer transportation) and indirect (increased economic output) benefits to society that are threatened by UP's proposal and the railroads' attempt to drive TIH off the rail system.

UP's proposal is bad policy not only for the economic harm it does to other entities, but also because it reduces incentives to maintain the rail system in good order and therefore undermines the overall safety of the rail system. UP's decoupling of liability and responsibility undermines safety by reducing incentives for railroads to improve and maintain their systems. Improving the safety of the rail system would have a beneficial impact beyond just the transportation of TIH because most railroad accidents do not involve TIH. It could save lives, reduce damages to property, and ultimately save the railroads money. The STB should not reduce the incentives on railroads to properly maintain their systems.

For all of these reasons, the STB should reject UP's proposed indemnification language.

Respectfully submitted,



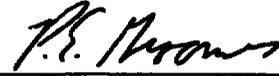
Patrick E. Groomes  
Jeffrey J. Williamson  
Rabeha S. Kamaluddin  
Fulbright & Jaworski, L.L.P.  
801 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2623  
Telephone: (202) 662-4556

Attorneys for CF Industries, Inc.

Dated: January 25, 2012

**CERTIFICATE OF SERVICE**

I certify that, on January 25, 2012, I have sent copies of CF Industries, Inc.'s Opening Evidence and Argument to all parties of record on the service list for Docket No. FD 35504.



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Patrick E. Groomes