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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35504

UNION PACIFIC RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER

REBUTTAL COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY

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Dated: March 26, 2012

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Pursuant to the Decision served in the above-captioned proceeding on December 12, 2011, Canadian Pacific Railway Company and its U.S. subsidiaries, Soo Line Railroad Company, Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively "CP"), submit these Rebuttal Comments in support of Union Pacific's ("UP's") request that the Board "declare that UP may require, as a condition of providing common carrier transportation services, that a TIH shipper indemnify and hold harmless UP against liabilities arising out of the performance of the transportation services, except those liabilities caused by the sole, contributory, or concurring negligence or fault of UP." Petition of Union Pacific Railroad Company for a Declaratory Order (filed April 27, 2011) ("Petition").

CP submitted opening comments in this proceeding. TIH shippers and associations representing TIH shippers filed reply comments opposing UP's Petition.¹ TIH shipper

¹ Joint reply comments were filed by American Chemistry Council, The Chlorine Institute, The Fertilizer Institute, and The National Industrial Transportation League (collectively, "Interested Parties"). Reply comments were also filed by Union Pacific Railroad Company, Norfolk Southern Railway Company, Dyno Nobel Inc. ("Dyno Nobel"), US Magnesium LLC ("US Magnesium"), CF Industries, Inc. ("CF Industries"), Olin Corporation ("Olin"), and Canexus Chemicals Canada, L.P. ("Canexus"). Comments were also filed by the United States Department of Transportation ("USDOT").

comments contain arguments that are not supported by evidence, are largely irrelevant to the reasonableness of UP's tariff provisions, and/or are inconsistent with other arguments made by TIH shippers as well as with CP's experience. CP files these Rebuttal Comments to address these issues.²

CP explained in its Opening Comments that it is more than fair and reasonable to require TIH shippers to bear the risk that its product will cause catastrophic harm through no fault of the rail carrier. As is evident below and in the comments filed by the AAR and other rail carriers, no comments and evidence submitted in this proceeding support a different conclusion.

Discussion

No shipper has genuinely disputed the reasonableness of requiring a TIH shipper to indemnify UP for the shipper's own negligence. Nor could they. Rather shippers have primarily focused on whether it is reasonable to require a TIH shipper to bear the risk stemming from acts or omissions of a third party and/or acts of God. While shippers have made a variety of arguments as to why it would be unreasonable to require a TIH shipper to bear some of the risk posed by the uniquely dangerous nature of the commodity that it forces UP to transport, many of these arguments are fundamentally flawed and largely irrelevant to the question at hand.

A. The Likelihood that a Catastrophic Accident Will Occur is Irrelevant to Whether it Is Reasonable For A Carrier's Tariff to Require Indemnity Against Such a Risk

For example, shippers argue that the risk of a catastrophic accident is negligible.³ This argument, while comforting, says nothing about whether it is reasonable for a shipper to share the risk that its product, through no fault of the carrier, will cause harm, harm that may be catastrophic. Typically, indemnity provisions address a variety of foreseeable and unforeseeable

² CP endorses all Comments filed by the Association of American Railroads ("AAR") in this proceeding.

³ See Olin Reply Comments at 7; CF Industries Reply Comments at 6-7, 9-10.

risks and in most cases the likelihood of any of the risks occurring is small. This does not mean that the liability will not arise, or that it is unreasonable to plan in advance which party will be responsible in the event it does, particularly when that liability may be catastrophic. CP is unaware of any case in which a court has refused to enforce an indemnity agreement because the indemnified risk was too unlikely. The likelihood that catastrophic harm will occur is simply not relevant to whether UP's indemnity provisions are reasonable.

B. CP Is Committed to Fulfilling Its Common Carrier Obligation, Indemnity Notwithstanding

Shippers would have the Board believe that the indemnity provision at issue is really part of a scheme to demarket TIH traffic.⁴ CF Industries goes so far as to warn of dire consequences for corn production if corn belt farmers cannot get anhydrous ammonia.⁵ For CP, shippers' demarketing claims could not be further from the truth. CP remains fully committed to honoring its common carrier obligation to all, including TIH shippers, and to doing so in the safest and securest manner possible.

Nor does CP believe that UP's or similar tariff indemnity provisions legitimately can be construed as an effort to demarket TIH. In CP's case, it issued its tariff indemnity provision in an effort to fairly allocate the risk associated with TIH rail movements in a manner that ensures that risk is properly accounted for by relevant decision-makers, and to protect CP and its shareholders against liability that arises from the uniquely dangerous nature of TIH and not from the negligence or fault of CP. There is no evidence that would support, and no reason to believe, that the indemnity would in any way preclude TIH shippers from using rail, or force TIH shippers to shift TIH to trucks.

⁴ See Olin Rely Comments at 7-11; US Magnesium Reply Comments at 3; CF Industries Reply Comments at 2, 7-8.

⁵ See CF Industries Reply Comments at 2-4.

Indeed, no shipper has presented evidence that UP's indemnity provision or CP's similar provision which is currently in place, has resulted in a shift of any TIH traffic from rail to truck. Farmers served by CP continue to get their anhydrous ammonia. Although its tariff also requires a similar indemnity, as CP indicated in its opening, it continues to move significant volumes of TIH.

Moreover, the fact that such indemnity provisions are frequently included in rail contracts belies shippers' alarmist claims.

Additionally, shippers' argument that the risk of a catastrophic incident is so small that it cannot justify the indemnity provision⁶ undermines shippers' suggestion that shifting any part of this risk to the shipper could force TIH shippers off the rails and onto trucks, or to stop shipping TIH altogether.⁷ But, if the risk associated with rail transportation of TIH is indeed so small, then there should be no legitimate concern that the indemnity provisions would influence a shipper's decision as to which mode to ship, or that it would result in a cessation of TIH shipments.

C. The STB's Policies Already Affect the TIH Commodity Market

Shippers make the self-serving argument that the STB should not interfere in the TIH commodity market. Yet, TIH shippers have repeatedly urged the Board to intervene when such intervention is to the shippers' advantage. For example, in *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1) and in *Union Pac. R.R. Co. – Petition for Declaratory Order*, STB Finance Docket No. 35219, shippers argued that the Board should interpret the rail common carrier obligation as requiring

⁶ See CF Industries Reply Comments at 6, 9-10 ("movement of TIH is relatively safe when conducted pursuant to existing safety regulations"); Olin Reply Comments at 7.

⁷ In its Reply Comments, the U.S. Department of Transportation generally cautions the STB to avoid taking action that would drive TIH shippers to ship by truck. Significantly, the DOT does not indicate that there is any reason to expect that UP's tariff indemnity provision would do so.

rail carriers to move TIH under virtually any circumstance. TIH shippers have brought challenges before the Board seeking to constrain rail rates.⁸ And TIH shippers have waged a battle against efforts to accurately reflect in URCS, the costs associated with the transportation of hazardous materials.⁹ The fact is that the STB's decisions, regulations and policies already have a substantial impact on the TIH commodity market.

Ironically, the relief that UP seeks here would result in a more efficient commodity market, *i.e.*, one where the risks are properly allocated. Moreover, shippers remain free to enter into contracts and to negotiate with rail carriers over indemnity provisions.

D. Under Shippers' Argument A Tariff Indemnity Should have No Impact on Rail Carrier's Commitment to Safety

According to shippers, because rail carriers are in the best position to avoid an accident, carriers should bear all risk of liability, including risks arising from the negligence or fault of third parties and acts of God.¹⁰ This argument assumes that the carrier already bears the risk of liability for such acts. However, shippers also argue that the indemnity is unnecessary because rail carriers face no risk of liability so long as they comply with federal rail safety regulations.¹¹ These two arguments are in clear conflict. If a rail carrier is fully insulated from liability so long as it complies with federal rail safety regulations, then an indemnification that does not protect the rail carrier against liability arising from its own negligence or fault, should have no bearing on the carrier's incentives to avoid an accident. Take shippers' grade crossing scenario for example. According to shippers, the carrier should bear the risk of an incident caused by a third

⁸ See, e.g., *U.S. Magnesium LLC v. Union Pac. R.R. Co.*, STB Docket Nos. 42114, 42115, 42116; *E. I. DuPont de Nemours and Co. v. CSX Transp., Inc.*, STB Docket Nos. 42099, 42100, 42101.

⁹ See *Class I Railroad Accounting and Financial Reporting Transportation of Hazardous Materials*, STB Ex Parte No. 681, Comments of American Chemistry Council, the Chlorine Institute, The Fertilizer Institute, and the Edison Electric Institute (filed February 4, 2009).

¹⁰ See CF Industries Reply Comments at 8.

¹¹ See Olin Reply Comments at 2, 4 ("a railroad can only be exposed to state tort claims when the railroad violates regulations applicable to such shipping"); Interested Parties' Reply Comments at 2-4.

party driver because the carrier could have “put up better signs.”¹² But, if the carrier could be held liable only if it failed to put up signs that comply with federal safety regulations, then liability concerns should not be a factor in the railroad’s decision whether to “put up better signs” than those required by federal regulation.¹³ Accordingly, under shippers’ own arguments, whether or not the railroad is in the best position to avoid an accident would not be relevant to the Board’s consideration of whether the tariff at issue is reasonable.

Moreover, while shippers imply that the indemnity provision at issue might cause a carrier to compromise its commitment to safety, shippers have presented no evidence that this would occur, or has occurred, nor is there any rational basis to believe that it would. The stark reality is that even with an indemnity, the carrier still faces an inordinate amount of risk when transporting TIH. The indemnity only shields the carrier from the negligence or fault of others or acts of God; it does not shield the rail carrier from its own negligence or fault. Moreover, liabilities associated with a TIH incident may outstrip the shipper’s financial ability to satisfy the indemnity. And, even if a shipper is able to satisfy its indemnity obligations, there would undoubtedly be costs to the carrier. Accordingly, it would be imprudent for a carrier to factor in the indemnity in making decisions regarding operations, safety, and security.

Importantly, although CP currently has a similar tariff indemnity provision similar to UP’s tariff, safety and security remain CP’s priority. As described in its Opening Comments, CP goes to considerable lengths to ensure the safety of all movements generally, and specifically with regard to TIH. These efforts are reflected in CP’s industry leading safety record.

¹² See CF Industries Reply Comments at 8, n.18.

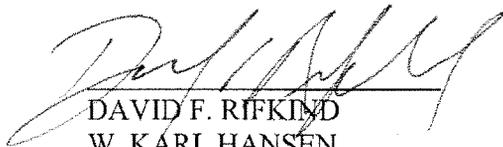
¹³ Shippers’ argument that railroads cannot be held liable if it is not at fault runs headfirst into shippers’ flawed argument that the indemnity somehow circumvents CERCLA. Under CERCLA, a railroad can be held liable regardless of fault. As the AAR explains in Rebuttal, CERCLA expressly allows a potentially responsible party to enter into indemnification agreements regarding CERCLA liability. See AAR Rebuttal Comments.

Conclusion

As explained in CP's Opening Comments, in these Rebuttal Comments, and in the comments filed by the AAR and other rail carriers in this proceeding, requiring TIH shippers to indemnify the rail carrier for liability that arises through no fault of the rail carrier helps ensure that the risk to public safety is factored into decisions that affect that risk, fairly allocates risk, and is consistent with the STB's authority and other laws relating to liability. It is fair, reasonable and in the public interest that a TIH shipper share in the risks created by its choices. Accordingly, the Board should grant UP's Petition.

Respectfully submitted,

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Dated: March 26, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2012, a copy of the forgoing Rebuttal Comments of Canadian Pacific Railway was served via e-mail and/or U.S. 1st Class Regular Mail to those parties listed as Parties of Record in Docket No. FD – 35504.


David F. Rifkind