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BEFORE THE
SURFACE TRANSPORTATION BOARD

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REPLY OF OLIN CORPORATION

In opposition to the declaratory order sought by Union Pacific Railroad Company ("UP") in this proceeding, Olin Corporation ("Olin") hereby submits its Reply to the opening arguments of UP, Norfolk Southern Railway Company ("NS"), BNSF Railway Company ("BNSF"), Canadian Pacific Railway Company ("CP"), and the Association of American Railroads (the "AAR").

It is clear from the opening arguments of the railroads that they are seeking a broad policy statement from the Board that would justify the current UP tariff provisions as well as future measures by the railroads to deter TIH shipments.¹ The Board, however, has already stated that this proceeding is intended to resolve uncertainty regarding the reasonableness of the specific provisions in UP's 6607 tariff.² Thus, the issue in this proceeding is the reasonableness of the provisions in UP's 6607 tariff, not the reasonableness of other hypothetical actions for which the railroads may seek approval.

The Board has already established that the burden of proof in this matter lies with UP, the

¹ See e.g. BNSF Opening Argument pp. 1-2 ("the Board should declare in this proceeding that it would be permissible for a railroad, if it chooses to do so, to require that the shipper of TIH commodities indemnify the railroad against liability . . . resulting from causes other than the negligence of the railroad . . . [and] [t]he Board should make it clear that other rules regarding liability due to the release of TIH commodities may be reasonable and that the Board is not limiting the approaches a railroad might take in allocating liability." See also Opening Argument of NS p. 7 (" . . . NS does not take the position that UP's tariff is the only acceptable approach . . .").

² See Decision. ID 41915 (Dec. 12, 2011) (UP "filed a petition . . . requesting that the Board issue a declaratory order to resolve a controversy regarding the reasonableness of the indemnification provisions in UP's tariff. . ."; "It is appropriate here to institute a declaratory order proceeding to remove uncertainty raised in UP's petition regarding the reasonableness of its tariff provisions . . ."; and "Here, UP has raised uncertainty regarding the reasonableness of its tariff provisions . . .") (emphasis added).

party seeking the declaratory order.³ UP has failed to carry its burden of proving that the indemnity provisions are reasonable. In fact, the evidence submitted in this proceeding establishes that the indemnity provisions are unreasonable and that the purported justification behind the 6607 tariff—i.e. staggering or insurmountable liabilities *absent* fault of the railroad—is totally unfounded.⁴ Given that railroads are protected by federal and state laws from liability when they are not at fault, it appears that the railroads are attempting to obtain indemnity in situations where they are at fault, and to implement a mechanism whereby the common carrier obligation could be circumvented through the unilateral imposition of onerous financial obligations and insurance requirements on shippers.

As discussed below in Section I, federal law preempts state tort law claims against railroads for TIH releases when the railroads comply with the federal regulations intended to prevent such incidents, i.e., when they are not at fault. Thus, a railroad can only be exposed to state tort law claims when the railroad violates regulations applicable to such shipping. Likewise, a railroad can only be held liable under state tort laws when the railroad is at fault in causing an incident. Similar efforts by the railroads to obtain indemnity in situations where they are at fault have been rejected by the Board, and the Board should reject this latest effort as well. Indeed, in the litigation proceeding mentioned by UP in its initial petition, UP apparently settled a lawsuit regarding an indemnity term that would have forced shippers to indemnify UP against UP's own negligence.⁵

UP's request for a declaratory order should be denied because UP and the railroads have failed to meet their burden. Specifically, UP's petition should be denied because (I) there has

³ Decision p. 4, ID 41915 (Dec. 12, 2011).

⁴ See discussion of federal and state limitations on liability and citations in Section I, *infra*.

⁵ Pls.' Compl., *The Chlorine Institute, Inc. v. Union Pacific R.R. Co.*, Case 2:09-cv-00574-CW (D. Utah).

been no evidence submitted to support the allegation that railroads face “catastrophic” or “bet the company” financial risks solely by shipping TIH products or that federal and state laws would not shield railroads from liability when they had no fault; (II) UP Tariff 6607 would allow the railroads to circumvent the common carrier obligation by forcing shippers, especially captive shippers that have no alternative due to lack of bargaining power, to become insurers against acts of God and third parties, and by giving railroads unlimited power to raise insurance levels required from shippers or to impose other onerous requirements; (III) there has been no evidence submitted that the UP tariff provisions are tailored to address the alleged justifications for the provisions; and (IV) arguments regarding the “fairness” of the UP indemnity provisions and “socially desirable” levels of TIH shipping are nothing more than subjective second-guessing of established laws and precedent. For these reasons, Olin respectfully requests that the Board deny UP’s petition and declare that the UP indemnity provisions are unreasonable under 49 U.S.C. Sections 11101 and 10702.

- I. **There has been no evidence submitted to support the allegation that railroads face “catastrophic” or “bet the company” financial risks solely by shipping TIH products or that federal and state laws would not shield railroads from liability when they had no fault.**

The railroads have presented no evidence to support their assertion that they are subject to enormous liabilities and claims for damages in situations where they are not at fault. For example, the AAR states that “. . . [u]nder our legal system, it is a fact of life that a carrier can be exposed to, and be found responsible for, enormous damage claims even where it was not at fault.”⁶ The AAR provides no evidence for this conclusory statement; there is not even a citation to support it. This bald assertion by a large trade organization of the railroads is directly at odds

⁶ AAR Opening Argument p. 9.

with federal legislation governing preemption of state tort laws and fundamental principles of American tort law that impose liability based on a defendant's fault or wrongdoing.

Congress has enacted legislation that protects railroads from liability when they are not at fault. For example, the Federal Railway Safety Act ("FRSA")⁷—which is intended to promote "safety in every area of railroad operations and reduce railroad-related accidents and incidents"⁸—contains an express preemption provision in Section 20106 that displaces state law claims when there is a federal regulation or order covering the subject matter of the relevant state law.⁹ Railroads have taken advantage of this legislation in many instances to defend against state tort claims.¹⁰ Further, this legislation reflects careful attention by Congress to the issues of how and when a railroad should be subject to state law claims for damages.¹¹

Before the FRSA preemption provision was amended in 2007, there were cases that held that state law claims against a railroad were preempted regardless of whether the railroad had been at fault in causing an incident through its failure to comply with federal safety standards.¹² In 2007, Congress added new subsections that make preemption contingent on the railroad having operated in accordance with governing federal safety standards and its own internal safety standards.¹³ By hinging a railroad's ability to assert a preemption defense on its compliance with safety standards, Congress has provided an incentive that protects a railroad when the railroad is without fault while allowing a plaintiff to seek redress when a railroad has

⁷ Another example is the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq.

⁸ 49 U.S.C. § 20101 et seq.

⁹ 49 U.S.C. § 20106(a)(2)

¹⁰ See e.g. *Henning v. Union Pacific R. Co.*, 530 F.3d 1206 (10th Cir. 2008); *BNSF Ry. Co. v. Swanson*, 533 F.3d 618 (8th Cir. 2008).

¹¹ For a thorough analysis of the preemptive effect of FRSA and other federal legislation see *Rail Road Tort Liability after the "Clarifying Amendment: Are Railroads Still Protected By Preemption?*, 77 Defense Counsel Journal 92 (Jan. 2010).

¹² See e.g. *Mehl v. Canadian Pac. Ry.*, 417 F.Supp.2d 1104 (D.N.D.2006); *Lundeen v. Canadian Pac. Ry.*, 507 F.Supp.2d 1006 (D.Minn.2007).

¹³ See subsections (b) and (c) of 49 U.S.C. § 20106.

failed to meet federal safety standards. Railroads have submitted no evidence that this legislation would not apply when the railroads were not at fault in causing an incident.

In addition to federal laws that protect a railroad from liability when the railroad has no fault, state tort laws also protect a railroad when the railroad has no fault. Fault or wrongdoing has always been an essential element of tort law.¹⁴ The only tort exception to the requirement of fault is in cases of ultrahazardous activities where a defendant can exercise reasonable care and still be subject to strict liability for the ensuing harms; however, no court has ever held transportation of TIH products to be an ultrahazardous activity. To the contrary, multiple courts have held that activities relating to TIH products, including transportation, are not ultrahazardous activities and, therefore, liability cannot be imposed on a party that is not at fault.¹⁵ Strict liability is most frequently associated with situations involving explosives or highly flammable materials.¹⁶ One of the reasons that strict liability is more likely to apply to situations involving explosives is that an explosion is likely to destroy any evidence of negligence; therefore, there could be no liability established if not for strict liability.¹⁷ Such a justification does not exist for transportation of TIH products because TIH products do not have the potential to destroy evidence of negligence as do explosives or highly flammable materials.

¹⁴ See e.g. Restatement (Second) of Torts § 281 (liability attaches where one has a duty to another and breaches that duty, causing injury to the other); *Scott v. Rizzo*, 96 N.M. 682, 689 (1981) (“Liability based on fault is the cornerstone of tort law . . .”); *Berlangieri v. Running Elk Corp.*, 134 N.M. 341 (“The law of torts, with the exception of strict products liability, is a fault-based system of recovery; without fault, there is no liability for injury”); *Abecassis v. Wyatt*, 785 F.Supp.2d 614, 646 (S.D. Tex. 2011) (“[f]oreseeability is the cornerstone of proximate cause, and in tort law, a defendant will be held liable only for those injuries that might have reasonably been anticipated as a natural consequence of the defendant's actions” (internal citations omitted)).

¹⁵ See Olin Opening Argument p. 9 n. 30 (citing to numerous cases that specifically hold that activities related to TIH are *not* ultrahazardous activities).

¹⁶ Restatement (Second) of Torts § 519, comment d (1977).

¹⁷ See e.g. *Siegler v. Kuhlman*, 81 Wash.2d 448, 502 P.2d 1181 (1972) (noting that “the evidence in a very high percentage of instances will be destroyed, and the reasons for and causes contributing to its escape will quite likely be lost in the searing flames and explosions” in applying strict liability in a case involving transportation of a gasoline trailer).

As Olin has already stated in this proceeding, another one of the principal reasons that courts do not impose strict liability on transportation of TIH products is because the associated risks can be effectively mitigated through reasonable cautionary measures.¹⁸ This rationale is consistent with statements made in FD 35219 by the Department of Transportation (“DOT”) and the Transportation Security Administration (“TSA”). In that proceeding, DOT stated that

DOT has developed and enforces a comprehensive regulatory framework applicable to the rail transportation of hazardous materials. This comprehensive regulatory program serves to effectively mitigate the safety risk associated with the rail transportation of hazardous materials, including PIH materials.¹⁹

TSA also stated that, along with DOT, it had “established comprehensive regulatory programs to address” the safety and security risks of transporting chlorine by rail, and that “[w]hen rail shipments conform to the TSA and DOT regulations, the risks of transporting chlorine by rail are appropriately mitigated and such movements can take place without posing unnecessary safety and security risks.”²⁰ Thus, in prior Board proceedings, DOT and TSA have agreed with the courts that the risks associated with TIH shipping can be appropriately mitigated. The railroads have submitted no evidence to the contrary and, therefore, have failed to carry their burden of proof.

In noting that a railroad would not be liable under tort law in situations where it had no fault, the fact of the matter is that regardless of how extensive the damages may be in any given situation, liability for any such damages would not be imposed on a railroad where the railroad was not at fault. Although UP has correctly stated that “. . . in the event of an accident, UP and its employees are more likely to be found *negligent* and held liable for damages than any other

¹⁸ Olin Opening Argument p. 8.

¹⁹ DOT Comments p. 8, FD 35219, ID 224871 (April 10, 2009).

²⁰ TSA Comments p. 3, FD 35219, ID 224862 (April 10, 2009).

party,”²¹ it has failed to state that the reason for this is because UP and its employees are more likely to have been negligent than any other party. UP and its employees are more likely to have been negligent than any other party because they exercise control over the locomotives and tracks.

As Olin stated in its Opening Argument, TIH products have been shipped for over a century without a single incident resulting in “staggering,” “catastrophic” or “lose the company” liability for a railroad or chemical shipper.²² This is especially notable considering that tragic, fatal incidents have occurred in recent history where railroads were at fault in causing the incidents.²³ To claim that “staggering,” “catastrophic” or “lose the company” liability on a railroad could arise without any fault of the railroad—when no such liability has ever arisen even when the railroads have been at fault—patently disregards over a century of actual experience. No evidence to the contrary has been presented; therefore, UP should be denied the declaratory order it seeks, and the Board should determine that the indemnity provisions are unreasonable.

II. The UP indemnity provisions appear to be little more than an attempt to circumvent the common carrier obligation and to force shippers to become insurers for the railroads.

As can be seen from the Opening Arguments of the railroads, one of the principal goals of the UP tariff is to deter TIH shipments. By imposing such broad liability on shippers, the railroads intend to increase the cost of shipping and thereby limit TIH shipments. For example, CP has stated that the most important purpose of the UP tariff is that “it forces TIH shippers to

²¹ UP Opening Argument p. 9 (emphasis added).

²² Olin Opening Argument p. 8.

²³ Not only have recent TIH incidents been attributed to the fault of railroads, recent serious derailments involving non-TIH products have also been attributed to the fault of the railroad. See e.g. NTSB Accident Report RAR-12-01 (finding fault in CN’s failure to notify its train crew of a known washout in time to stop the train); NTSB Accident Report RAR-08-02/PB2008-916302 (finding fault in NS’ inadequate rail inspection and maintenance program that resulted in a rail fracture from an undetected internal defect).

factor the associated risks into their decisions to ship TIH by rail.”²⁴ By forcing shippers to “factor the associated risks,” the railroads hope to reduce the amount of TIH that is shipped, minimize the length of rail movements of TIH and replace TIH with other commodities.²⁵ Although UP characterizes its intent as “Managing Risk, Not De-Marketing TIH”, it is clear that the position of the railroads is to impose financial disincentives on TIH shipments. This position is consistent with statements of the railroads that they would not ship TIH products if not for the common carrier obligation. It is also consistent with the railroads’ attempts, including current special hauling rules such as those at issue in NOR 42129, to avoid the common carrier obligation.²⁶ As Olin stated in its Opening Argument, the Board should strictly scrutinize the UP indemnity provision in light of the railroads’ admitted goal of limiting TIH shipments.²⁷ Although the railroads cite the common carrier obligation as justification for the UP indemnity terms, the common carrier obligation cannot be seen in isolation, but must be considered in light of the franchise monopoly that is given to the railroads by Congress.

Two of the principal ways in which the UP tariff provisions operate to limit the shipment of TIH products are (1) by forcing the shippers to become insurers for the railroads against acts of third parties and acts of God and (2) by dictating the amount and type of insurance that shippers must carry and by requiring shippers to name the railroad as an additional insured. As stated by CP, the indemnity provision “provides some measure of financial protection to CP and its shareholders from liability arising from a catastrophic TIH incident where CP was not at

²⁴ CP Opening Argument p. 4.

²⁵ BNSF Opening Argument p. 3; NS Opening Argument pp. 20-24; UP Opening Argument pp. 8, 18.

²⁶ See e.g. STB Decision, FD 35219, ID 39995 (June 11, 2009); *Akron, Canton & Youngstown RR Co. v. ICC*, 611 F.2d 1162 (6th Cir. 1979), cert. denied, 449 U.S. 830 (1980); *Consolidated Rail Corp. v. I. C. C.*, 646 F.2d 642 (D.C. Cir. 1981).

²⁷ Olin Opening Argument pp. 8-9.

fault.”²⁸ Further, Item 85-A of Tariff 6607 requires shippers to obtain certain minimum levels of insurance and to name the railroad as an additional insured on its policies. A copy of Item 85-A is attached hereto as Exhibit A. Thus, it is clear that the railroads see the UP indemnity provision as an insurance mechanism, as demonstrated by Item 85-A. Further, UP claims, without any supporting evidence, that it “has not yet been able to obtain insurance coverage at any reasonable price in amounts that would be necessary to cover the type of losses that could arise from an accident in a major population center.”²⁹ As noted by Olin in its Opening Argument, UP’s latest 10-K SEC filing does not disclose to investors any risk of exposure to liabilities from lack of insurance coverage for a TIH release.³⁰ Assuming *arguendo* that UP was unable to obtain insurance that it believed was necessary, it is difficult to see how shippers could ever obtain sufficient insurance to satisfy UP’s subjective requirements.

By imposing financial assurances and insurance obligations on shippers to ensure that they can meet their indemnity duties under the tariff, the railroads could force TIH shippers out of the chemical market. As an example, Item 85-A of the UP tariff at issue already contains a mandatory insurance provision that requires the shipper to obtain insurance with a minimum policy limit, and prohibits the shipper from using self-insurance without the prior written consent of UP. Thus, if approved by the Board, UP Tariff 6607 not only allows UP to dictate how much insurance the shipper must obtain, it also dictates what type of insurance is required. Prohibiting self-insurance is unfair considering that UP and NS have stated in this proceeding that each is

²⁸ CP Opening Argument p. 4.

²⁹ UP Opening Argument p. 9.

³⁰ Olin Opening Argument p. 10; also for authority of the Board to consider SEC filings as evidence. *see* 49 C.F.R. 1114.1 and *Blackstone Capital Partners L.P. v. Union Pacific Corporation*, 1989 WL 239342 (references Union Pacific’s SEC filings as evidence that had been made part of the record).

self-insured to a significant extent.³¹

If the Board were to allow UP Tariff 6607, it is likely that the insurance requirements of Item 85-A would be dramatically increased to account for the alleged “catastrophic” risks that railroads claim they face merely by shipping TIH products. In addition to failing to submit any evidence on how they could be subjected to “catastrophic” liabilities simply by shipping TIH products, as discussed in Section I above, the railroads have failed to submit any evidence of what amount of insurance they believe would be necessary to protect against such alleged liabilities. Nowhere in the record of this proceeding have the railroads attempted to quantify the “catastrophic” liabilities allegedly arising from shipping TIH products. Likewise, there has been no attempt to quantify how much insurance would be necessary to satisfy the railroads’ subjective claims of the alleged risks they face. The fact that the railroads have not quantified the amount of insurance they subjectively deem necessary is alarming considering that the effect of the UP indemnity provision is to push insurance onto the shipper. This is especially true as Item 85-A requires shippers to name the railroad as an additional insured. Because the amount of insurance that is purported to be necessary remains undefined, it is unreasonable to impose such an undefined obligation on shippers. Moreover, Olin respectfully submits that it is beyond the authority of the Board to act as an underwriter of risks by approving such terms.

Further evidence against the need for UP’s indemnity provisions is provided by UP’s statement that a majority of its TIH private contracts already include indemnity terms similar to those in Tariff 6607. UP has stated in this proceeding that “[a]pproximately 56% of UP’s TIH carloads currently move under contracts with indemnification terms that are the same as, or reflect negotiated tailored terms based on, the indemnification terms in Tariff 6607.” UP’s

³¹ NS Opening Argument p. 19; Duren Verified Statement p. 5 UP Opening Argument.

broadcast to the public, and to the other Class I railroads, of this material term of its contracts is troubling considering the disparate bargaining power between shippers and railroads. It is especially troubling considering that the only alternative a captive shipper like Olin has to a tariff rate is to negotiate a contract with the same carrier that offers the tariff rate.

Approval of UP's indemnity provisions in public tariffs would take away one of the few bargaining points that shippers have for negotiating private contracts with the railroads. The fact that some shippers have agreed to such terms in contracts does not establish their reasonableness in a unilaterally imposed tariff. Presumably, the shippers that have agreed to such terms in private contracts have done so in return for commercial value that they deem as sufficient consideration for the increased obligations they assume. Allowing a railroad to impose such terms through a public tariff without any commensurate exchange of value would turn the contracting process on its head by forcing a captive shipper to show up at the negotiating table with one arm tied behind its back with respect to indemnity. The result of this cram-down provision would be greater obstacles for TIH shippers in getting their products to the many industries that depend on them and, ultimately, harm to consumers. Such an outcome would be especially unreasonable considering, as described above, that the railroads cannot justify this indemnity in light of the protections they already receive under state and federal laws.

III. The railroads have failed to submit any evidence that the UP indemnity provisions are tailored to address the alleged justifications. In fact, the UP indemnity provisions are overbroad as they would essentially force the shipper to become an insurer of the railroad for liabilities unrelated to the risks associated with TIH products.

Not only have the railroads failed to provide any evidence to support their alleged justification—i.e. being subject to astronomical damages absent any fault on their part—for the indemnity provisions at issue, they also grossly overstep this purported justification. The

sweeping scope of the indemnity provision is discussed at length in Olin's Opening Argument.³² As discussed therein, the indemnity provisions at issue would not only require the shipper to indemnify the railroad for personal injury claims of potential plaintiffs exposed to TIH products, but also for any conceivable cost or expense incurred by the railroad other than those arising directly from the railroad's fault. Thus, a shipper would be required to pay for the railroad's private investigators, public relations firms, first responders, attorneys and any other potential "liabilities" even when there was no TIH released and even when the shipper had absolutely nothing to do with causing an incident. This overbroad indemnity obligation would even apply to non-TIH shippers, as provided in Item 2 of the 6607 tariff.

Further, even if a railroad was shielded from liability to a potential plaintiff by federal or state laws, as discussed above in Section I, a shipper would still be required to pay for the railroads' defense attorneys and other costs in establishing the railroad's defense. Under federal and state laws, a shipper would never be required to pay for these costs when the shipper had no fault in causing an incident. Imposing them unilaterally on a shipper through a tariff is unreasonable, especially considering that the duty to indemnify the railroad would arise regardless of any causal relationship between any release of TIH and the liabilities claimed.

The railroads have failed to produce any evidence to prove that the scope of the indemnity provision has been tailored to address the alleged justification of being exposed to catastrophic liabilities absent any fault on their part. For example, BNSF has stated that the indemnity provisions "allocate responsibility for liabilities based on the cause of the liability exposure," without referencing any part of the tariff that would limit the shipper's obligation

³² Olin Opening Argument pp. 12-17.

based on the “cause of the liability exposure.”³³ Nowhere in the tariff does it provide that the shipper’s duty to indemnify is limited to liabilities that are actually caused by a release of TIH products. To the contrary, Item 50[c]2 of Tariff 6607 provides that the shipper will indemnify the railroad for “*any and all liabilities* except those caused by the sole or concurring negligence or fault of railroad” and Item 60[c] states that where the shipper and railroad both have fault, the railroad’s liabilities are limited to the extent of its negligence and the shipper is “liable *for all other liabilities.*” Thus, any and all liabilities other than those caused by the railroad—including liabilities caused by third parties or acts of God, and liabilities unrelated to a release of TIH products—are imposed on the TIH shipper.

For example, assume that a driver rushing across a rail crossing collided with a train carrying a TIH shipment causing the train to derail. Further, assume that no TIH products were released, but that diesel fuel was released. Even though the TIH shipper had absolutely nothing to do with causing the incident, and even though no TIH products were released, the TIH shipper would be required under Item 50[c]2 of Tariff 6607 to pay for all of the railroad’s costs including, but not limited to, responding to the incident, defending against any potential lawsuit and satisfying any potential judgment against the railroad. Even if the railroad were partially at fault in causing the incident (e.g. assume it was traveling at an excessive speed when it went through the intersection), Item 60[c] would require the shipper to indemnify the railroad to the extent of the fault of the driver that tried to rush through the rail crossing. In this situation, the shipper would be forced to indemnify the railroad *even though the railroad was at fault* and the shipper was not. The overbroad scope of the tariff provisions is evidence of their unreasonableness; therefore, UP’s petition should not be granted and the tariff provisions should

³³ BNSF Opening Argument p. 2.

be declared unreasonable.

The tariff provisions are also overbroad in that they are intended to apply to a number of non-TIH products.³⁴ Even though the tariff provisions apply to numerous non-TIH products, the railroads' arguments have focused exclusively on the hazards of TIH products, which are categorized by their toxicity to humans upon inhalation. NS has even emphasized the difference between TIH and non-TIH products as justification for the tariff provisions by stating that "TIH commodities are not like other commodities, spillage of which may be messy and costly, but not deadly."³⁵ Although Olin disputes that the tariff provisions are justifiable for TIH products only, the fact that the tariff is intended to include numerous non-TIH products is simply further evidence of the railroads' overreaching and that the real function of the indemnity provisions is to force shippers into acting as insurers for the railroads.

In their Opening Arguments, the railroads have further attempted to justify the UP indemnity provisions by claiming that the "inherently" hazardous characteristics of TIH products are responsible for the alleged risks associated with TIH shipments.³⁶ However, the railroads have not shown how the "inherently" hazardous characteristic of any given TIH material makes the release of such material more likely than other commodities. There is nothing "inherent" in the characteristics of TIH products that make them more likely than other materials to be released in the event of a derailment or other rail incident.³⁷ Thus, any potential release of TIH products would not be attributable to the TIH material, but would be attributable to an act or omission by a person or by an act of God. Practically, as experience has shown, a release of TIH

³⁴ See Joint Reply Comments of ACC, CI, TFI and NITL.

³⁵ NS Opening Argument p. 13.

³⁶ See e.g. NS Opening Argument p. 19, AAR Opening Argument p. 7.

³⁷ In fact, given the stringent guidelines for tank cars that transport TIH products (see DOT and TSA comments in FD 35219 cited *supra*), TIH products may be less likely to be released in an incident than other commodities that are transported.

is most likely to be attributable to the fault of the railroad.³⁸ Consequently, it does not make sense for the railroads to be permitted to shift liabilities to shippers through unilaterally imposed indemnity terms.

The hypothetical situations presented by UP on pages 6-7 of its Opening Argument provide no evidence to support imposing sweeping liability on shippers. None of these hypothetical examples involve a situation where UP would face catastrophic or insurmountable liabilities when it had no fault in causing an incident. In fact, the only hypothetical situations provided by UP where it could be liable without fault are for violations of CERCLA or the Clean Water Act. As noted in Olin's Opening Argument, Congress has already provided defenses under environmental strict liability statutes to account for acts of God and third parties.³⁹

With respect to tort law, UP selects two examples of state law (one from Texas and one from Illinois) as hypothetical situations for its tariff provision. These hypothetical situations provide no evidence to support the indemnity provisions at issue. Instead, they simply demonstrate that UP disagrees with the liability mechanisms that have been developed by the elected legislative officials of Texas and Illinois. In essence, UP is trying to carve out an exception for itself from the liability mechanisms of these states by unilaterally forcing an indemnity provision on shippers that UP subjectively feels is fair, when shippers have no alternative. Olin respectfully submits that if UP feels that the liability mechanisms of these states are unfair, it should seek changes through the legislative process or through contract, just as any other company must do.

³⁸ See Olin Opening Argument p. 9 n. 32.

³⁹ Olin Opening Argument p. 10.

IV. The railroads' arguments regarding the "fairness" of the UP indemnity provisions are nothing more than subjective second-guessing of established laws and precedent.

Significant parts of the railroads' Opening Arguments revolve around their subjective determinations of how liability should be fairly allocated and what levels of TIH shipment are "socially desirable."⁴⁰ Some railroads go so far to argue (as they have unsuccessfully argued before the Board in the past) that a shipper should be required to indemnify a railroad *for the railroads' own negligence*. For example, BNSF has stated that ". . . there may be circumstances in which it would be reasonable for a railroad to shift some risk *associated with the railroad's negligence* to the shipper."⁴¹ Likewise, ". . . CP believes that there are good reasons that the shipper and/or the public should assume at least some of the extraordinary liability associated with this risk *regardless of the carrier's fault . . .*"⁴² The position that shippers should indemnify railroads from liabilities caused by the railroads' negligence is alarming and contradicts established law prohibiting a common carrier from escaping liability for its own negligence. Further, it is indicative of the tendency of the railroads to place their subjective assessment of what is "fair" or "socially desirable" above that of the legislative and judicial bodies that have fashioned the common carrier obligation, tort and statutory laws governing fault, allocation of liability and limitations of damages.

As Olin has discussed in its Opening Argument, state and federal judges and legislators have carefully crafted liability schemes through years of experience, along with the common carrier obligation, and have given the railroads the ability to negotiate different protections in

⁴⁰ AAR Opening Argument pp. 11-12; BNSF Opening Argument p. 3; NS Opening Argument pp. 12-16; UP Opening Argument pp. 8-12.

⁴¹ BNSF Opening Argument pp. 2-3 (emphasis added).

⁴² CP Opening Argument p. 4 (emphasis added).

private contracts.⁴³ State and federal laws operate in a variety of ways to shield a railroad from liability when it has no fault. Decisions about how to protect the public interest and what incentives should exist are best left to the governmental bodies that are charged with crafting the laws that all businesses must operate under. The railroads' attempts to justify the UP indemnity provisions based on outcomes under state or federal law that they feel are "unfair" do not provide any evidence that the underlying state or federal laws should not apply, only that the railroads disagree with how they apply. For these reasons, the Board should rebut UP's attempt to modify the established liability schemes currently existing under state and federal laws by declaring that the unilaterally imposed indemnity terms are unreasonable.

V. Conclusion

In conclusion, UP has failed to submit any evidence to support its petition for a declaratory order. There has been no evidence presented of how a railroad could be subjected to catastrophic liabilities when it was not at fault. To the contrary, both state and federal laws operate to shield a railroad from liability when it is not at fault. In addition to failing to submit evidence regarding how liability could be imposed absent fault on the part of the railroad, UP has failed to submit evidence of how the sweeping indemnity provisions are tailored to address any of their alleged justifications. The sweeping scope of the indemnity provisions and the fact that a railroad cannot be held liable when it is not at fault suggest that the railroads are seeking to obtain indemnity in situations where they are at fault, and to force shippers into becoming insurers against acts of God and third parties, and actually insuring the railroads as additional insured. If the tariff is allowed, the insurance requirements of Item 85-A—which provide backing for the sweeping indemnity provisions—are only likely to increase to account for the

⁴³ Olin Opening Argument pp. 17-18.

railroads' subjective assessment of what is necessary to cover the alleged extraordinary risks that they face. The common carrier obligation could be circumvented by using these insurance requirements, or other financial obligations, as mechanisms to limit or stop TIH shipments. For these reasons, Olin respectfully requests that the Board deny UP's petition by determining the indemnity provisions are unreasonable.

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Attorneys for Olin Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2012, I caused a copy of the foregoing document to be served by e-mail on all Parties of Record in this proceeding.

/s/ Gregory M. Leitner
Gregory M. Leitner, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35504

REPLY OF OLIN CORPORATION

EXHIBIT A



UP 6607

Item: 85-A
INSURANCE PROVISIONS

Item 85. Insurance Provisions:

[i]

For purposes of transporting Commodity under terms of a Price Document referencing this Tariff, Customer agrees to keep in force General Liability Insurance (containing Broad Form Contractual Liability) **and** Pollution Legal Liability Insurance that provides protections against pollution from any occurrence involving Customer's Commodity with **minimum** policy limits of not less than \$25 million per occurrence **and name Railroad as additional insured to the extent of liabilities and indemnities assumed by Customer under this Tariff**

Customer will also maintain statutory Workers' Compensation and Employers Liability which shall include a waiver of subrogation in favor of Railroad to the extent of liabilities and indemnities assumed by Customer under this Tariff.

Customer is not allowed to self-insure without the prior written consent of Railroad If granted, any deductible, self-insured retention or other financial responsibility for claims must be covered directly by Customer in lieu of insurance. Any and all Railroad liabilities that would otherwise, in accordance with the provisions of this Circular, be covered by Customer's insurance will be covered as if Customer elected not to include deductible, self-insured retention or other financial responsibility for claims.