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SERVICE DATE – DECEMBER 12, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35504

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision begins a proceeding to determine the reasonableness of certain tariff provisions that require shippers to indemnify Union Pacific Railroad Company (UP) against future liabilities, other than those liabilities resulting from UP's negligence or fault, when UP carries toxic by inhalation hazardous commodities.

Decided: December 8, 2011

Union Pacific Railroad Company (UP) filed a petition on April 27, 2011, requesting that the Board issue a declaratory order to resolve a controversy regarding the reasonableness of the indemnification provisions in UP's tariff relating to transportation of toxic by inhalation hazardous commodities (TIH). As discussed below, a declaratory order proceeding will be instituted to resolve the uncertainty raised in UP's petition.

BACKGROUND

UP's petition requests a declaratory order regarding Items 50 and 60 of UP Tariff 6607, "General Rules for Movement of Toxic or Poison Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad" (hereafter, the tariff provisions), which are attached as an exhibit to the petition. The tariff provisions require TIH shippers to indemnify UP against all liabilities except those caused by the sole, contributory, or concurring negligence or fault of UP. Thus, shippers are required to indemnify UP against liabilities resulting from the negligence or fault of shippers themselves, the negligence or fault of third parties, or from acts of God. This indemnity includes, for example, any liabilities arising from:

- any failure of, release from, or defect in equipment tendered by customer for the transportation of commodity;
- loading, sealing, and securing commodity in such equipment;

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language in Decisions, EP 696 (STB served Sept. 2, 2010).

- 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.

Pet. for Declaratory Order, Ex. A.²

In Docket No. EP 677 (Sub-No. 1), the Association of American Railroads (AAR) proposed that the Board issue a policy statement establishing that certain TIH-related indemnifications would be reasonable if required by carriers—including indemnification of the carrier against liability arising from the carrier’s own negligence.³ The Board denied AAR’s request, declining to issue such a policy statement in the abstract. Instead, the Board stated that it would proceed according to its usual practice of resolving disputes related to the reasonableness of both requests to transport TIH cargo and the carriers’ responses on a case-by-case basis. Establishment of the Toxic by Inhalation Hazard Common Carrier Transp. Advisory Comm., EP 698 et al., slip op. at 4 n.8 (STB served Apr. 15, 2011). In its petition, UP refers to that decision, asserting that such a dispute has arisen between UP and Olin Corporation (Olin) and SunBelt Chlor Alkali Partnership (SunBelt) (collectively, Olin/Sunbelt). UP states that Olin/SunBelt “have threatened to commence litigation” unless UP eliminates the challenged indemnification language from Tariff 6607.

According to UP, because the disputed language applies generally to TIH shipments moving over UP lines in common carrier service, other persons may wish to comment on the issues in this proceeding. UP contends that its dispute with Olin/SunBelt presents important questions about what constitutes a reasonable request for service involving transportation of TIH under 49 U.S.C. § 11101(a) and what rules and practices a rail carrier can reasonably establish in its response to a request to transport TIH under 49 U.S.C. § 10702.

Norfolk Southern Railway Company (NSR) filed a notice of intent to participate on May 5, 2011. Canadian Pacific Railway Company (CP) filed a statement in support of the petition on May 13, 2011.

² According to UP, the language in these tariff provisions is the product of an agreement that resolved a complaint filed by The Chlorine Institute (CI) and American Chemistry Council (ACC) against UP in a Utah federal court in June 2009.

³ AAR Written Testimony, Docket No. EP 677 (Sub-No. 1), July 10, 2008, at 24. The UP indemnity provisions at issue in this case are not as broad as AAR’s proposed policy statement, as the UP provisions do not insulate the railroad against liability resulting from its own negligence.

On May 17, 2011, replies opposing UP's petition were filed by Olin/SunBelt, Dyno Nobel, Inc. (DNI), and (jointly) The Fertilizer Institute (TFI), CI, and ACC (collectively, shippers).

Shippers argue that UP is seeking approval of generalized indemnity language, which would effectively approve such indemnities for other railroads. They assert that the requested declaratory order would be, in effect, the same type of abstract policy statement that the Board declined to issue in Docket No. EP 677 (Sub-No. 1). According to TFI, CI, and ACC, UP has alleged only a threat by Olin/SunBelt to commence litigation, which does not present a concrete dispute. Without a formal complaint against UP's tariff, these shippers argue, UP's petition seeks only an advisory opinion. Shippers also assert that the threshold issue is whether an indemnification provision is enforceable under state tort law, which is not within the Board's jurisdiction. Thus, shippers argue that a declaratory order would not resolve an actual case or controversy.

DNI further contends that the order requested by UP could have serious consequences, because railroads, and not shippers, have exclusive control over their systems, and obtaining insurance against TIH-related liabilities would be difficult for shippers. In DNI's view, traditional arrangements allocating liability to the carrier or the shipper based on fault have served railroads and their customers well, and they have not resulted in any "staggering liability" on rail carriers.

DISCUSSION AND CONCLUSIONS

Under the Administrative Procedure Act, 5 U.S.C. § 554(e), and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. We have broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). It is appropriate here to institute a declaratory order proceeding to remove the uncertainty raised in UP's petition regarding the reasonableness of its tariff provisions under 49 U.S.C. § 10702 and 49 U.S.C. § 11101(a).

According to shippers, this case lacks a sufficiently active controversy to support the institution of a declaratory order proceeding because shippers have declined thus far to bring a complaint challenging UP's tariff provisions. The declaratory order process, though, is not limited to terminating controversies; it is also available to remove uncertainty. Moreover, this procedure is available to carriers as well as shippers.⁴ Here, UP has raised uncertainty regarding the reasonableness of its tariff provisions, an issue of significance to the railroad and its shippers. Resolving such an uncertainty is an appropriate use of the declaratory order process. See 5 U.S.C. § 554(e).

⁴ See, e.g., Union Pac. R.R.—Pet. for Declaratory Order, FD 35219 (STB served June 11, 2009).

Several shippers also contend that, because enforcement of indemnity provisions would occur on a case-by-case basis in the courts as a matter of state tort law, a Board ruling on the reasonableness of those provisions would amount to merely an advisory opinion. UP, however, does not seek a ruling from the Board regarding enforceability under state tort law, but rather the reasonableness of its tariff provisions under 49 U.S.C. § 11101 and 49 U.S.C. § 10702. Even if UP's tariff provisions were potentially subject to challenge in 2 ways—under the ICA and under state tort law—there is no reason why the Board should not resolve the ICA challenge, a matter committed to the Board's primary jurisdiction. See, e.g., Pejepsco Indus. Park, Inc. v. Maine Cent. R.R., 215 F.3d 195, 205-06 (1st Cir. 2000).

Moreover, TFI, CI, and ACC concede that a declaratory order could find UP's tariff unreasonable—a result that is certainly more than advisory. In this way, TFI, CI, and ACC acknowledge that there is an issue here capable of resolution by the Board.

Accordingly, the Board will institute a declaratory order proceeding here. UP will bear the burden of proof because it is the party seeking the declaratory order. Due to the significance of this matter to TIH shippers, railroads, and other interested parties, we are opening this declaratory order proceeding for public participation. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than December 27, 2011 a notice of intent to participate and must adhere to the procedural schedule established in the Appendix. To ensure each POR receives all filings, the Board will serve, as soon as practicable, a notice containing the official service list (the service-list notice). Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service-list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties).⁵ Each POR also will be required to file with the Board, within 10 days of the service date of the service-list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding under 5 U.S.C. § 554 and 49 U.S.C. § 721 is instituted.
2. The parties to this proceeding must comply with the procedural requirements described in this decision and the procedural schedule shown in the Appendix.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

⁵ Service may be made by e-mail if service by e-mail is acceptable to the recipient.

APPENDIX

Procedural Schedule

December 12, 2011	Declaratory order proceeding instituted
December 27, 2011	Notices of intent to participate due
January 25, 2012	Opening evidence and argument due from all PORs
March 12, 2012	Reply evidence and argument due from all PORs
March 26, 2012	Rebuttal evidence and argument due from all PORs