39995 SERVICE DATE – JUNE 11, 2009
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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35219

UNION PACIFIC RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Decided: June 11, 2009

In this decision, the Board is granting a petition for declaratory order to the extent necessary to clarify that Union Pacific Railroad Company (UP) has an obligation to quote common carrier rates and provide service for the transportation of chlorine for the movements at issue in this case.

BACKGROUND

In January 2009, US Magnesium LLC (USM) requested that UP establish common carrier rates for the transportation of chlorine from Rowley, UT, to 35 different destinations.[1] UP established rates for most of the traffic, but replied that it would not publish rates from Rowley to four destinations[2] in or near Houston and Dallas, TX, and Allemania and Plaquemine, LA (the denied destinations), because: (1) although UP previously published rates for these destinations, USM never shipped to them; and (2) it was not a reasonable request to expect UP to transport chlorine over 1,000 miles through multiple High Threat Urban Areas (HTUAs), as defined by the Transportation Security Administration (TSA) at 49 CFR 1580.3, when there is an abundant supply of chlorine located closer to the denied destinations.[3]

On February 18, 2009, UP filed a petition for declaratory order seeking to have the Board determine the extent of its common carrier obligation with regard to these movements. UP characterizes the traffic as "new, lengthy movements of chlorine, a toxic inhalation hazard (TIH), through HTUAs and other large communities to destinations where an ample supply of chlorine is available from nearby sources."[4] Specifically, UP asserts that the facilities in both Allemania

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[1] See USM Reply, Exh. A.

[2] Initially, UP failed to quote rates to seven destinations but, in a letter sent to USM dated March 20, 2009, UP states that it has provided rates to three additional destinations previously omitted. See USM Reply, Exh. D.

[3] See USM Reply, Exh. B.

[4] UP Pet. at 1.

and Plaquemine have alternate chlorine sources accessible by rail within 70 miles without routing through any HTUAs, and that the facilities in Houston and Dallas have alternative chlorine sources within 300 miles (with potential sources located in the Houston metropolitan area) that would not require transport through other HTUAs or large cities. UP also asserts that other governmental agencies have pressed it to find ways to reduce TIH material shipments to reduce risks. UP suggests that a Board decision requiring it to publish rates for the movements at issue would conflict with policies and regulations of TSA and the Federal Railroad Administration (FRA). UP asks that we find that it has no obligation under 49 U.S.C. 11101 to quote rates for the specific requests at issue.[5]

Many shippers and receivers filed comments in opposition to UP's petition, and railroads and associations of railroads filed comments in support, while other interested parties filed comments noting their various concerns.[6] In its comments in opposition, USM requests that the Board issue an order compelling UP to establish rates and service terms. USM, North America's sole producer of magnesium, explains that chlorine is a co-product of its magnesium production process. The volume of chlorine produced by USM in a given year varies directly with the demand for magnesium.[7] USM asserts that increased demand for magnesium led USM to ship chlorine via UP to Allemania in 2007 and to Houston in 2008. USM points out that, if it is unable to reach a market for its chlorine, then it must release it into the air, which is not cost effective and may cause it to decide to stop producing magnesium in the U.S. Several shippers

[5] See UP Reb. at 1.

[6] Comments were filed by the following interested parties: the American Chemistry Council, the American Forest and Paper Association, the Chlorine Institute, Inc. (Chlorine Institute), the Edison Electric Institute, the Fertilizer Institute, the National Industrial Transportation League, and the Paper and Forest Transportation Committee (collectively, Joint Parties); the American Short Line and Regional Railroad Association; the Association of American Railroads (AAR); the Brotherhood of Railroad Signalmen and Brotherhood of Maintenance of Way Employees Division; Buckeye Technologies, Inc., and Verso Paper Corporation (Buckeye and Verso); CF Industries, Inc.; Chlorine Institute (separate from Joint Parties); Citizens for Rail Safety; CSX Transportation, Inc.; Dow Chemical Company (Dow); E.I. du Pont de Nemours and Company (DuPont); the Healthy Environment Alliance of Utah, League of Women Voters of Utah, Sevier Citizens for Clean Air and Water, Utah Physicians for a Healthy Environment, and the Wasatch Clean Air Coalition (collectively, Utah Parties); the National Association of Chemical Distributors; Nevada Nuclear Waste Task Force, Inc.; Occidental Chemical Corporation; Old World Industries, Inc.; Olin Corporation; PPG Industries, Inc. (PPG); Shell Chemical, LP; Springfield Terminal Railway Company; TSA; United States Department of Transportation (DOT); USM; and Westlake Commercial Corporation. Additionally, several interested parties filed correspondence or comments with the Board after the April 10, 2009 deadline, including: AMVAC Chemical Corporation on May 5, 2009; Georgia Gulf Chemicals and Vinyls, LLC, on May 18, 2009; Hasa, Inc., on May 19, 2009, and ALTIVIA Corporation, on May 26, 2009. As no party is prejudiced, we will accept these late filings.

[7] See USM Comments, Kaplan V.S. at 3.

also dispute UP's claims and assert that the supply of chlorine in the Gulf Coast region is inadequate,[8] requiring customers in the region to have chlorine delivered from over 800 miles away, including from Canadian sources.[9] Shippers also point out that chlorine is not homogenous and that different industrial uses require different specifications.[10]

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e), the Board has broad discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty.[11] We are issuing this declaratory order to provide guidance concerning the extent of the common carrier obligation to transport hazardous materials by rail under the facts presented here.[12] As discussed below, we find that UP has an obligation to establish rates and service terms in response to USM's request, and subsequently to provide service under the rates offered.

Railroads have a statutory common carrier obligation under 49 U.S.C. 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. 10502. This obligation creates two interrelated requirements. Railroads must provide, in writing, common carrier rates to any person requesting them. 49 U.S.C. 11101(b). And, they must provide rail service pursuant to those rates upon reasonable request. 49 U.S.C. 11101(a). These requirements are linked, because a rate is a necessary predicate to providing requested service.[13] What constitutes a reasonable request for service is not statutorily defined but depends

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[8] See e.g., Chlorine Institute Comments at 2-4; PPG Comments at 5; DuPont Comments at 6.

[9] See Chlorine Institute Comments at 3.

[10] See e.g., Dow Comments at 13; DuPont Comments at 5-6.

[11] See Boston & Maine Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989).

[12] We reject the arguments raised by some of the parties that the Board does not have jurisdiction to address this matter. The Board has jurisdiction to determine whether a carrier is complying with its common carrier obligation. 49 U.S.C. 10501; 49 U.S.C. 11101. Moreover, the Board has jurisdiction to determine whether the terms and conditions under which railroads transport TIH materials are reasonable. See generally Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir. 1981) (Conrail) (Interstate Commerce Commission (ICC) jurisdiction over tariff proposal requiring special train service for hauling spent nuclear fuel); Akron, Canton & Youngstown R.R. Co. v. ICC, 611 F.2d 1162, 1169 (6th Cir. 1979) (Akron) (same).

[13] See Arizona Elec. Power Coop. v. The Burlington N. and Santa Fe Ry. Co., STB Finance Docket No. 34041, slip op. at 2 (STB served May 8, 2001) ("railroads have a general duty under 49 U.S.C. 11101(b) to establish common carrier rates upon request"); Western Resources, Inc. v. The Atchison, Topeka and Santa Fe Ry. Co., STB No. 41604, slip op. at 4-5 (STB served May 17, 1996) (a railroad's common carrier obligation requires it to comply with any reasonable request for service as well as shipper requests for rates).

on all the relevant facts and circumstances.[14] Regardless, a rail carrier may not avoid its common carrier obligation to provide service by evading the requirement to establish rates upon request.[15]

In this case, there is no dispute that USM made a request for common carrier rates and that UP did not provide requested rates. The question then is whether UP's explanation for its failure to provide common carrier rates is sufficient to relieve it of its common carrier obligation under 49 U.S.C. 11101.

Court and Board precedent have addressed the extent of the common carrier obligation with regard to transporting hazardous materials. Rejecting the claim that railroads should not have a common carrier obligation to transport radioactive materials because of the extraordinary risks involved, the Board's predecessor, the ICC, explained that "a carrier may not assert before this Commission that, as a general proposition, shipments meeting DOT and [Nuclear Regulatory Commission] requirements are too hazardous to transport."[16] In Akron, 611 F.2d at 1169, the court upheld the ICC's holding that the common carrier obligation included the transportation of radioactive materials, stating that a "carrier may not ask the Commission to take cognizance of a claim that a commodity is absolutely too dangerous to transport if there are DOT … regulations governing such transport." Thus, the common carrier obligation requires a railroad to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations. Although carriers are not precluded from seeking imposition of stricter safety standards, the court in Conrail held that "the burden is upon [the carrier] to show that, for some reason, the presumptively valid … [safety] regulations are unsatisfactory or inadequate in their particular circumstance."[17]

Specifically regarding hazardous chemicals, the ICC found that, where there is no "evidence as to why DOT [safety] regulations are inadequate" and no evidence with regard to insurance, indemnification, or the extent of a carrier's potential liability, a carrier has the obligation to transport the hazardous chemicals.[18] Recently, in the context of a rate complaint proceeding, the Board, citing FRA and Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations, denied a carrier's requests that the movement of chlorine, due to its

[14] See Granite State Concrete Co. v. STB, 417 F.3d 85, 92 (1st Cir. 2005); Nat'l Grain & Feed Ass'n v. United States, 5 F.3d 306, 310 (8th Cir. 1993).

[15] See 49 CFR 1300.2(a); Pejepscot Industrial Park—Pet. For Declaratory Order, 6 S.T.B. 886, 893 (2003).

[16] Radioactive Materials, Missouri-Kansas-Texas R.R. Co., 357 I.C.C. 458, 464 (1977) (MKT) (applying the principles of regulatory responsibility found in Delta Air Lines, Inc. v. CAB, 543 F.2d 247, 260 (D.C. Cir. 1976)).

[17] Conrail, 646 F.2d at 650.

[18] Classification Ratings on Chemicals, Conrail, 3 I.C.C.2d 331, 337-38 (1986).

hazardous nature, be treated differently from the transportation of any other commodity, including other TIH materials.[19]

Here, UP claims that USM's requests for rates and service were unreasonable because they would require the transportation of chlorine for long distances through several HTUAs, when alternative sources of the commodity are available closer to the destinations. But UP fails to support its factual assertions. It does not establish that there are closer ample alternative sources of chlorine at the denied destinations. UP fails to identify where those sources are and who controls them, demonstrate the demand for the particular type of chlorine being offered by USM, and show that there is ample supply of that quality chlorine at the alleged closer sources. Further, shippers, including USM, have shown that the markets for chlorine are varied, dynamic, and complex.[20]

UP alleges safety concerns in arguing that USM's requests are unreasonable, but it fails to establish that the transportation at issue is unsafe.[21] Indeed, the record shows that UP has moved chlorine for USM to two of the denied destinations in the last 2 years. UP claims that other government agencies have pressed it to reduce safety and security risks associated with transporting TIH material, implying that these agencies would support denial of service to USM from USM's Rowley facility to the denied destinations. UP goes so far as to suggest that the common carrier obligation may counteract the efforts of those other agencies and that requiring UP to honor USM's requests may conflict with TSA and FRA policies.

In their comments, DOT and TSA, the agencies charged by Congress to make such determinations, directly contradict UP's interpretation of their safety and security efforts. DOT states that it has developed and enforces a "comprehensive regulatory framework applicable to the rail transportation of hazardous materials," [22] which "effectively mitigate[s] the safety risk

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[19] See E. I. DuPont de Nemours and Company v. CSX Transportation, Inc., STB Docket No. 42099, slip op. at 8-9 (STB served June 30, 2008).

[20] See, e.g., USM Comments at 3-4; Chlorine Institute Comments at 4; DuPont Comments at 5-6; PPG Comments at 3; Buckeye and Verso Comments at 9-10.

[21] AAR argues that the movements at issue would be unreasonable because they would impose an unfair risk of catastrophic liability on the railroads. The Board recognizes that the issue of liability and indemnification exists with regard to the transportation of chlorine and other TIH materials; however, UP has not raised this issue. Indeed, UP conversely claims that, were it "concerned first and foremost with its private economic interests, it would encourage these long shipments." UP Pet. at 2.

[22] The movement of TIH materials is governed by an extensive set of DOT regulations and TSA requirements that are intended to minimize the hazards of transporting TIH materials by rail. See, e.g., 49 CFR Parts 171-180 (PHMSA's hazardous materials regulations); 49 CFR Parts 200-244 (FRA's railroad safety regulations); 49 CFR Part 1580 (TSA's rail transportation security regulations). DOT and TSA have stated that their regulations are not inconsistent with the common carrier obligation. See DOT Comments at 2-3; TSA Comments at 6.

associated with rail transportation of hazardous materials."[23] Similarly, TSA states that, along with DOT, it has "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."[24] Thus, if we were to find that USM's requests for service are unreasonable on safety and security grounds, we would be substituting our safety and security judgments for that of DOT and TSA.[25] We will not do so here.

Even if we were to construe UP's petition as seeking approval to impose additional safety and security measures on USM shipments – namely, eliminating long distance moves – UP carries the burden of proving that the safety and security regulations of DOT and TSA are unsatisfactory or inadequate.[26] UP has not met this burden. Both DOT and TSA have stated that the safety and security risks of shipping chlorine by rail can be appropriately mitigated and that their respective rules are not to be interpreted as inhibiting the transportation of hazardous materials or giving railroads the option to decline transportation of such materials.[27] Moreover, both agencies note, contrary to UP's assertions, that the shortest routes for rail transportation are not necessarily the safest or most secure.[28]

In sum, UP has not shown that USM's requests for rates and service are unreasonable.[29]

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

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[23] DOT Comments at 7.

[24] TSA Comments at 3.

[25] See Akron, 611 F.2d at 1169; MKT, 357 I.C.C. at 464.

[26] See Conrail, 646 F.2d at 650 ("Where DOT and NRC, pursuant to specific statutory authority, have established 'complete and comprehensive' safety standards . . . and have drafted regulations . . . while balancing the cost of safety with the need for economy, a presumption arises that expenditures for safety measures not specified by these agencies are unnecessary and fail to satisfy the criteria of reasonableness.").

[27] See DOT Comments 10; TSA Comments at 4-5.

[28] See id.

[29] Along with its comments filed on March 23, 2009, USM submitted a check covering the filing fee associated with a separate formal filing to compel the establishment of common carrier rates under 49 CFR 1002.2(56)(v) and, in its cover letter, requested that its check be returned if that issue will be decided in this proceeding. Because we are clarifying UP's common carrier obligation under these circumstances and UP has expressed its desire to comply with that obligation, see UP Pet. at 4, we need not institute a complaint proceeding on behalf of USM at this time, and USM's filing fee will be refunded.

It is ordered:

1. The petition for declaratory order is granted to the extent necessary to clarify that UP has an obligation to provide rates to USM for the denied destinations and to provide service for the transportation of chlorine as set forth in this decision.

2. This proceeding is discontinued.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary