



ASSOCIATION OF
AMERICAN RAILROADS

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Law Department

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March 26, 2012

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: STB Finance Docket No. 35504, Union Pacific Railroad Company—Petition for
Declaratory Order

Dear Ms. Brown:

Pursuant to the Decision served by the Board on December 12, 2011, please find the
Rebuttal Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

REBUTTAL COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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BEFORE THE
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REBUTTAL COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Introduction

In a decision served December 12, 2011 (“December Decision”), the Surface Transportation Board (“Board”), in response to a petition by Union Pacific Railroad Company (“UP”), instituted a declaratory order proceeding to remove uncertainty as to whether UP tariff provisions relating to the transportation of toxic by inhalation hazardous commodities (“TIH”) are reasonable under 49 U.S.C. § 11101 and 49 U.S.C. § 10702. The specific UP tariff provisions at issue “require TIH shippers to indemnify UP against all liabilities except those caused by the sole, contributory, or concurring negligence or fault of UP.” December Decision at 1.

The AAR filed opening comments on January 25, 2012. The AAR’s comments focused on legal and policy issues pertaining to the scope of shippers’ and rail carriers’ obligations regarding TIH transport. The AAR took no position on, and did not address commercial interests or the specific terms of UP’s, or any other railroad’s, tariff provisions for TIH transport. In its comments, the AAR noted that the Board has the authority to find that reasonable liability sharing arrangements in tariffs are consistent with the common carrier obligation and not

unreasonable practices; and the Board should make such findings because railroads face untenable liability exposure solely because of the inherent nature of TIH materials that the railroads are required to transport. Finally, the AAR comments demonstrated that arrangements for sharing with shippers the liability associated with TIH transport further the Rail Transportation Policy under 49 U.S.C. § 10101. The AAR filed reply comments on March 12, 2012 and demonstrated that nothing in the other parties' opening comments refuted the AAR's position.

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, 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").

As shown below, the reply comments of shipper interests do not refute the AAR's position that it is consistent with 49 U.S.C. § 11101 and 49 U.S.C. § 10702 for a rail carrier, if it chooses to do so, to impose reasonable liability sharing arrangements on shippers as a condition of TIH rail transport.

Discussion

I. A Requirement for Reasonable Liability Sharing Arrangements as a Condition for TIH Transport Is Consistent with CERCLA

The Interested Parties cite the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (42 U.S.C. §§ 9601 *et seq.*) and argue that "the *obvious*

Congressional intent of CERCLA is to make the railroad common carrier responsible for clean-up costs because it has control over the hazardous substance when released, and to limit the liability of the shipper to those situations where it can prevent the release by its actions.”

Interested Parties Reply Comments at 3-4 (emphasis added).

Contrary to the Interested Parties’ assertions, nothing in CERCLA prohibits rail carriers from requiring liability sharing as a condition for TIH rail transport. In fact, as described below, CERCLA actually expressly allows indemnification arrangements where there is potential liability exposure.

CERCLA was landmark environmental legislation that, *inter alia*, created a tax on the chemical and petroleum industries; created a trust fund for cleaning up abandoned or uncontrolled hazardous waste sites; and established prohibitions and requirements concerning closed and abandoned hazardous waste sites. CERCLA also imposed liability on a variety of parties who may be associated with releases or threatened releases. While the AAR will not address the extent to which CERCLA may or may not apply to rail shipments, the principal focus of CERCLA is clearly not on TIH releases from rail cars. However, if a railroad were considered a responsible party and subject to liability, CERCLA expressly allows responsible parties to be indemnified for the costs of that liability.

CERCLA provides:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. *Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.*

42 U.S.C. § 9607(e) (emphasis added).

Appellate courts interpreting this provision have consistently given effect to indemnification in CERCLA cases. “The plain meaning of this language is that, although responsible parties may not altogether transfer their CERCLA liability, they have a right to obtain indemnification for that liability.” *United States v. Royal N. Hardage*, 985 F.2d 1427 (10th Cir. 1993). Beyond the statutory construction, courts have also concluded that CERCLA policy would not be frustrated by indemnification because all responsible parties would remain fully liable to the government, although they would be free to enter into private contractual arrangements “essentially tangential to the enforcement of CERCLA’s liability provisions.” *Jones Hamilton Co. v. Beazer Materials & Services, Inc.*, 973 F.2d 688 (9th Cir. 1992) (quoting *Mardan Corp. v. C.G.C Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986)).

In no way does CERCLA suggest that liability sharing provisions are available to all other participants in production, movement and storage of hazardous materials/wastes and that rail carriers only are barred from obtaining insurance or indemnification for CERCLA liability. Accordingly, railroad tariffs that include liability sharing provisions are consistent with CERCLA.

II. No New Arguments Have Been Asserted to Change the Conclusion that Reasonable Liability Sharing Arrangements Are Reasonable Practices that Are Consistent with the Common Carrier Obligation

In its reply comments, the AAR responded to and refuted shipper assertions in their opening comments that, in part, included claims that if liability sharing arrangements were imposed, TIH shippers would go out of business, their rates would be affected, and TIH traffic would be diverted to truck. The AAR noted that the shippers’ assertions were clearly speculative

and could not be the basis for the Board to conclude that reasonable liability sharing arrangements were unlawful.

In their reply comments, certain shippers again asserted that liability sharing arrangements would adversely affect TIH shippers' business. *See* CF Industries Reply Comments at 7 and Dyno Nobel Reply Comments at 6. As the AAR noted in its opening and reply comments, the shippers' arguments are based on their concerns about cost and not concerns about mitigating the risks associated with TIH rail transport or protecting the public. More importantly, the shippers have failed to show why a rail carrier (which has no choice but to move TIH as directed by TIH shippers) should not be able to require reasonable liability sharing arrangements and why TIH shippers (who control how much and how far TIH is transported) should be absolved from liability arising from the inherently dangerous nature of TIH.

It is also not surprising that shippers would resist a rail carrier's decision to require reasonable liability sharing arrangements due to the dangers inherent to the nature of TIH commodities. But shippers' reluctance does not make such a requirement by a rail carrier unreasonable. Again, the common carrier obligation of railroads should not be used to perpetuate old practices and to prevent initiatives seeking a safer and more secure rail network and communities through which railroads operate.

Contrary to certain shippers' implications that the Board does not have the statutory authority to approve railroad practices regarding TIH liability because they somehow might have an impact on the shipper, it is clear that the Board is the agency with the exclusive jurisdiction to rule on economic issues pertaining to the rail transportation of hazardous materials, including insurance and liability issues. *See, e.g., Akron, C. & Y. Ry. v. ICC*, 611 F2d 1162, 1170 (6th Cir. 1979) ("A question of possible liability for damage resulting from carriage of a commodity is

therefore within the Commission's jurisdiction as the regulator of the economics of interstate rail transport").

Also, under 49 U.S.C. § 10702, the Board determines the reasonableness of railroad rules and practices on a case-by-case basis in light of all the relevant facts and circumstances. *See Granite State Concrete Co., v. STB*, 417 F.3d 85, 92 (1st Cir. 2005); *see also National Grain & Feed Ass'n v. United States*, 5 F.3d 306, 310 (8th Cir. 1993). In the instance of TIH transport, the issue from a policy standpoint, as the AAR noted in its reply comments, rests with the Board to provide a regime which allows for a fair allocation of liability among private parties where TIH is transported by rail. Clearly a critical factor is the safety of TIH transport.

USDOT expressed a concern that "tariff requirements imposed by railroads cannot be so onerous as to drive TIH materials traffic off the railroads and onto the highways." USDOT Comments at 12. As the AAR noted in its reply comments, shipper assertions that this would occur are unsupported and speculative. Shippers' reply comments do not provide evidence that such a shift would occur. Indeed, such claims are inconsistent with shippers' previous claims that trucks are more expensive than rail. Less than a year ago, The Fertilizer Institute, whose members ship commodities including the TIH material anhydrous ammonia, claimed:

Trucks are an inherently higher cost alternative than rail and are not very practical for high volume lanes. Moreover, as fuel costs increase, trucks become even less efficient and competitive. New truck driver hours of service rules will only aggravate the situation by creating driver shortages.

STB Docket No. EP 705, Opening Comments of The Fertilizer Institute (filed April 12, 2011) at 5.

If a reasonable liability sharing requirement were made a condition of TIH transport by any mode, shippers would have incentives that do not exist today to consider transportation safety and the public interest regarding TIH transportation in its business decisions. In some

cases, a shipper, or the shipper's customer, may decide to use less dangerous products or source their TIH material to reduce risk where it is in the shipper's/customer's economic interests. In fact, such incentives are consistent with USDOT's call for shippers "to continue exploring ways to reduce TIH ton-miles (such as changing shipping patterns; co-location of plants at the end user; and product substitutions)." USDOT Comments at 12.

Conclusion

Based upon the record in this proceeding, including the general legal and policy principles discussed above, the Board should find that the imposition by a rail carrier, if it chose to do so, of reasonable liability sharing arrangements with a shipper of TIH materials, as a condition of TIH transportation, is consistent with the common carrier obligation under 49 U.S.C. § 11101 and a reasonable practice under 49 U.S.C. § 10702.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Rosita M. N'Dikwe, hereby certify that on this 26th day of March 2012, I served by e-mail a copy of the Rebuttal Comments of the Association of American Railroads to those parties listed as Parties of Record in STB Finance Docket No. 35504.

Respectfully Submitted,


Rosita M. N'Dikwe

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