

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Public Record
Docket No. FD 35504

Union Pacific Railroad Company)
Petition for Declaratory Order)
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CF INDUSTRIES, INC.’S REBUTTAL ARGUMENT

On April 27, 2011, Union Pacific Railroad Company (“UP”) filed the Petition of Union Pacific Railroad Company for a Declaratory Order (“Petition”) in the above-referenced docket. In its Petition, UP stated that its request for declaratory relief stemmed from a dispute between UP and Olin Corporation (“Olin”) and SunBelt Chlor Alkali Partnership (“SunBelt”) regarding indemnification. As UP noted in its Petition, the Surface Transportation Board (“Board”) previously has refused to grant the railroads’ request to issue a policy statement addressing the inclusion of indemnification provisions in tariffs:

However, the Board ultimately concluded that it would not issue “a policy statement in the abstract,” but would instead “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 under 49 U.S.C. § 11101.” UP’s dispute with Olin/SunBelt presents precisely the type of concrete dispute over the reasonableness of a request for common carrier rates to transport TIH, and the reasonableness of a railroad’s response, that the Board has said it would address.¹

Yet, the overwhelming majority of the so-called evidence offered by UP and the other railroads in this proceeding has absolutely nothing to do with a dispute that UP asserts exists between it and Olin and SunBelt. While that is the pre-text under which UP filed its Petition, UP and the

¹ Petition at 6 (citation omitted).

railroads from the beginning have consistently attempted to broaden the nature of this proceeding to include an attack on the *use* of TIH.

In requesting that the Board issue a declaratory order in this proceeding, UP and the other railroads are simply following a different path to the same end they previously sought. They are seeking an order from the Board that will serve as precedent allowing them to include liability-shifting provisions in their tariffs. Whether by policy statement or an overly broad declaratory order proceeding, the end game is the same – obtain the Board’s imprimatur of the railroads’ efforts to move TIH off the rail.

As the Board acknowledged in its order commencing this proceeding, UP bears the burden of proof. While UP and the other railroads have engaged in scare tactics, distortions, and other questionable behavior in this proceeding, what they have not done is proffer evidence that addresses with specificity the indemnity provisions at issue in this proceeding. Moreover, UP has not shown that its proposal is either necessary or appropriate. And the language of the tariff is overbroad and unclear. For these reasons, the Board should deny UP’s request for declaratory relief and reject UP’s liability-shifting indemnification language.

I. UP Has Failed To Meet Its Burden.

UP has the burden of proof in this proceeding.² In order to meet that burden, UP must define the risks and costs it is trying to address and then demonstrate that the unilaterally imposed indemnification provision it proposes to address such risks and costs is reasonable. As a threshold matter, UP has failed to meet its burden of proving the risks and costs it claims are the basis of its proposed indemnity provision. UP claims that it “presented substantial evidence showing that the provisions respond to a real problem, *i.e.*, the significant risks that UP faces in

² See *Union Pacific RR Co. – Petition for Declaratory Order*, Doc. No. 35504, at 4 (Dec. 8, 2011).

connection with its carriage of TIH materials.”³ But, in fact, it never did. Nothing in the record in this proceeding substantiates the “bet-the-company” level of risk continually claimed by UP and the other railroads.⁴ And it is this risk upon which UP relies to meet its burden in this proceeding. Rather than providing evidence to support its assertion, UP implies that shippers have the burden to prove that such risk does not exist⁵ and, further, asks the Board to ignore the need to meet any burden of proof altogether and place liability with shippers “[b]ecause the risk and costs associated with UP’s transportation of a shipper’s TIH cannot be easily quantified.”⁶ But UP has the burden of proof in this proceeding and it cannot claim that it provided substantial evidence that it faces significant risk when it overtly refused to substantiate or quantify such risk.

The reason UP did not attempt to make a showing with regard to its “bet-the-company” risk assertions is simple. The historical data demonstrates that all material risk (and the corresponding costs) arises from railroad negligence. The railroads cannot refute the data. UP never cited to a single occurrence to which its indemnity provision would have applied in the past. It never pointed to a single TIH accident caused by a third-party or an Act of God to support its assertions. In contrast, CF provided substantial evidence showing that all recent major TIH accidents were due to railroad negligence.⁷ Based on actual, historical data, the risks associated with TIH result from railroad negligence, not TIH shippers’ decision to ship TIH or Acts of God or third parties. The underlying premise of UP’s argument does not withstand scrutiny. Based on the record in this proceeding, UP’s proposal is a solution in search of a problem.

³ Reply Argument and Evidence of Union Pacific Railroad Company at 48 (“UP’s Reply Brief”).

⁴ CF Industries, Inc.’s Reply Brief at 8-10 (“CF’s Reply Brief”).

⁵ See UP’s Reply Brief at 48.

⁶ *Id.* at 12.

⁷ See CF Industries, Inc.’s Opening Evidence and Argument at 7-10 (“CF’s Opening Argument”).

Even were the Board to accept UP's underlying premise for its tariff provisions, the evidence in this proceeding proves that UP does not need a tariff provision to meet its goals. UP admits that a majority of its TIH traffic already moves under contracts with indemnification provisions similar to that proposed in this proceeding. This indicates that UP does not need the Board to mandate such language in a tariff, but that negotiations are sufficient for UP to obtain the requested indemnification language provided that UP is willing to negotiate in good faith with TIH shippers. In other words, UP's own data shows that it can obtain indemnification without a unilaterally imposed tariff provision.

Moreover, as the Department of Transportation ("DOT") explained in its Reply Argument, there is already a comprehensive regulatory framework specifically designed for the transportation of hazardous materials, including TIH. This framework was developed over years of study, with participation from all aspects of the transportation industry, and after detailed scientific analysis. As the DOT stated "[t]his comprehensive regulatory program serves to effectively mitigate the safety risk associated with the rail transportation of hazardous materials, including TIH materials."⁸ And courts have noted that in areas where responsible government agencies have crafted "'complete and comprehensive' safety standards," "a presumption arises that expenditures for safety measures not specified by these agencies are unnecessary and fail to satisfy the criteria of reasonableness."⁹ That is particularly the case in this proceeding, where UP is trying to circumvent the existing regulatory framework in an attempt to not only raise costs on TIH shippers, but drive them off the system. UP has failed to meet its burden in this proceeding because it has failed to show that the existing regulatory framework does not sufficiently mitigate its liability risks.

⁸ Comments of the United States Department of Transportation at 7 ("DOT's Reply Brief").
⁹ *Consolidated Rail Corp. v. ICC*, 646 F.2d 642 at 650 (D.C. Cir. 1981).

Finally, as explained in CF's Opening Argument, state tort law already exists to determine and allocate liability.¹⁰ UP has not shown why relying on state tort law is inappropriate, aside from the fact that UP may not like the result, and as such, the Board should deny UP's Petition.

In summary, UP has not proven its underlying premise regarding the dangers of transporting TIH, it has not shown the need for forcing the indemnity-shifting provision into its tariff, it has failed to detail why the existing regulatory framework is insufficient to transport TIH safely, and it has not explained why existing state tort law is unable to appropriately determine and allocate liability in the event of an accident. As such, UP has failed to meet its burden of proof in this proceeding.

II. Shippers Oppose UP's Proposal Because It Is Unreasonable And Burdensome To TIH Shippers.

In prior filings, numerous TIH shippers provided evidence from the National Transportation Safety Board that all major recent TIH accidents on the rail system have been the result of railroad negligence.¹¹ Certain shippers noted that the railroads are insulated from many state tort claims when they are acting in accordance with appropriate federal rules and regulations. UP argues that to the extent that TIH shippers believe that either most TIH-related accidents on the railroad system are the result of the railroads' negligence or that railroads are often insulated from liability when they are not at fault, then TIH shippers should "not be concerned by the tariff provisions."¹² That is not true. There are several reasons why TIH shippers oppose UP's liability provisions, including: UP is attempting to erode its common

¹⁰ See CF's Opening Argument at 4-5.

¹¹ See, e.g., *id.* at 7-10.

¹² See UP's Reply Brief at 6-7.

carrier obligations; TIH shippers are already paying a premium to use the rail system; and UP's proposal is an attempt to strengthen its bargaining position at the expense of shippers.

1. *UP's proposal is another attempt to push TIH off the rail system and erode railroads' common carrier obligations.*

As the Board has noted in previous decisions, railroads have a common carrier obligation to transport hazardous materials such as TIH.¹³ As CF explained in its Opening Argument, society has deemed that railroads should have these obligations in exchange for the benefits that railroads receive, benefits such as eminent domain rights, subsidies, access to land, *etc.*¹⁴ But railroads are engaged in a long-running attempt to erode, or even eliminate, their common carrier obligation.

UP, for example, previously filed a petition for a declaratory order seeking the right to deny TIH shippers access to its system.¹⁵ In another proceeding currently before the Board, railroad employees talked about one railroad "trying to price itself out of [the TIH] market" and also exchanged internal emails saying "[a]re we talking about taking up prices on all hazardous material shipments where we can in an effort to dissuade this type of traffic. . . . It appears that maybe we are talking about doing [that]" and "[j]ust so I am clear on this new policy: the recommendation was for a 'controlled retreat from the [TIH] market place by increasing prices. . . .' 'to levels that encourage customers to engage in other transportation alternatives.'"¹⁶ In this proceeding, railroads filed comments admitting that they would not transport TIH absent the

¹³ See *Union Pacific RR Co. – Petition for Declaratory Order*, 2009 WL 1630587 at *2 (2009) (“*UP Common Carrier Obligation Order*”).

¹⁴ See CF's Opening Argument at 14.

¹⁵ See *UP Common Carrier Obligation Order*.

¹⁶ See Docket No. 35517, CF Industries, Inc.'s Opening Evidence and Argument (Public Version) at n.20.

common carrier obligation.¹⁷ UP's liability shifting provision is one more step in the attempt to erode the railroads' common carrier obligation.

First, shifting the liability for certain accidents to TIH shippers could result in an increase in costs, leading to pricing shippers out of the market, as referred to in the railroads' emails. The easiest way to accomplish this would be to require a minimum amount of insurance for TIH-related accidents. For example, UP claims that TIH-related accidents could result in up to \$778 billion in liabilities.¹⁸ If the Board grants UP's petition in this proceeding, then nothing is precluding UP from increasing the insurance requirement to cover the unsupported, worst-case scenario costs.¹⁹ In fact, some railroads have already suggested that the liability-shifting provisions should be "backed up" with increased insurance requirements.²⁰ And since UP's Tariff 6607 does not allow TIH shippers to self-insure, the result is an increase in transportation-related costs resulting from the requirement to procure insurance to cover a potential liability that is unsupported by the record. As noted in CF's Reply Argument, this is one reason why it is unreasonable for the Board to examine the liability-shifting provisions of UP's tariff in isolation.²¹ TIH shippers oppose UP's proposal because it is a hidden means of increasing costs and driving them off the rail system, in contravention of the common carrier obligation.

Second, as the railroads' filings in this proceeding make clear, the railroads are not content with simply shifting the risks for losses associated with third-party or Acts of God-related accidents. They hope to use this proceeding to establish the precedent that shifting liability is an acceptable means for dealing with the "risk" of TIH transportation, and to further

¹⁷ See, e.g., Comments of Canadian Pacific Railway Company at 3 ("CP would not participate in the movement of TIH if given the choice.").

¹⁸ See UP's Reply Brief at 6.

¹⁹ This is particularly the case because, as CF noted in its Reply Brief, UP never actually quantifies its true risk from third-party or Acts of God related TIH risk. See CF's Reply Brief at 9-10. Without verified data showing the true risk, UP could "justify" requiring any amount of insurance.

²⁰ See, e.g., Opening Evidence and Argument of Norfolk Southern Railway Company at 19.

²¹ See CF's Reply Brief at 14-15.

argue that railroads should be able to shift all liabilities associated with transporting TIH, including those arising from the railroads' own negligence.²² Unless the Board draws a line in this proceeding, there will be further attempts to shift liabilities associated with the railroads' own negligence in the future.

Third, the railroads' argument that TIH shippers are creating risk by putting the TIH into the stream of commerce, and that this somehow justifies eroding the common carrier obligation, ignores the long-standing doctrine that the common carrier obligation does not depend on the dangerousness of the product transported. Rather, the common carrier obligation depends on the nature of the carrier itself and reflects the fact that the carrier is granted certain privileges by the state that other enterprises do not have.²³ Using alarmist and inflammatory language, UP seeks to undermine its common carrier obligation by filling the record in this proceeding with tomes discussing the nature, deployment, and use of chemical weapons by war criminals. This proceeding is not about weaponized chemical munitions or war criminals. It is about the nature of the railroads' common carrier obligation to transport materials that are critical to the health and welfare of the U.S.

TIH materials such as anhydrous ammonia play a critical role in modern agriculture. Any disruption in the distribution system for anhydrous ammonia could have a significant adverse effect on the country and its food supply. The U.S. produces more than 40% of the world's corn production.²⁴ Approximately 85% of U.S. corn production is grown in the Midwest.²⁵ Approximately 80% of the total anhydrous ammonia fertilizer used in the U.S. is

²² See, e.g., Comments of Canadian Pacific Railway Company at 4.

²³ UP compares itself to non-regulated carriers such as UPS, but UPS and other non-regulated carriers never received the benefits from society that railroads do. Thus, they do not have the same common carrier obligations.

²⁴ See, e.g., Written Testimony of Robert G. Hoeft filed in Ex Parte No. 677 (Sub No. 1), attached to CF's Reply Brief as Exhibit 2.

²⁵ See *id.*

consumed in the Midwest, including in U.S. corn production.²⁶ Thus, far from being the weaponized chemical munitions discussed by the railroads in this proceeding, TIH materials are important products vital to the health of the U.S. economy and food supply. The Board should look past the rhetoric and see the railroads' arguments in this case for what they are – an attempt to appeal to fear in a continuing assault on the common carrier obligation.

2. *TIH shippers already pay a premium to use the rail system.*

UP argues that it cannot be assured of covering the costs of TIH liability through the rates it charges TIH shippers.²⁷ At one point, it makes the claim the “rates are constrained by regulation” and “the Board’s regulatory regime does not ensure that rates will be allowed to cover the costs associated with transporting TIH.”²⁸ At another point, however, UP states that its “rail rates are not cost-based; rather, they are determined by the market.”²⁹ UP does not explain how their market-determined rates are “constrained by regulation.”

In any event, the vast majority of TIH transported on rail is transported under market rates. And TIH shippers are already paying a premium to use the rail system. Presumably, this premium includes the costs associated with any TIH liability. Leaving aside the fact that UP fails to quantify its actual risks and costs associated with transporting TIH (thus making it impossible for the Board to determine whether UP is actually already covering costs associated with TIH transportation),³⁰ for UP to ask TIH shippers to accept liability for certain TIH-related incidents where the TIH shippers is not negligent is adding an additional burden on TIH transportation above and beyond the already-existing premium that shippers are paying. UP may argue that shippers are always free to initiate a rate case, but that misses the point. The point is

²⁶ *See id.*

²⁷ *See* UP’s Reply Brief at 13-14.

²⁸ *Id.* at 13.

²⁹ *See id.* at 39.

³⁰ *See* CF’s Reply Brief at 9-10.

that, fairly or not, TIH shippers are already paying a premium to use the rail system, and UP's proposal shifts *additional* burdens to TIH shippers that other users of the system do not bear. The proposal is yet another way in which TIH shippers are penalized when using the rail system.

3. *UP's proposal tips the scales even more in favor of the railroads.*

Despite UP's claims that TIH shippers hold all the "bargaining power,"³¹ the truth is that railroads have extensive leverage when negotiating contracts with most shippers, particularly TIH shippers. Railroads have a strong advantage when it comes to negotiating contracts and rates.³² One of the terms that TIH shippers can negotiate in exchange for better terms elsewhere in the contract is indemnification. UP states that nearly half of the TIH traffic on its system moves under indemnification provisions similar to the ones in this proceeding.³³ UP apparently believes that this demonstrates the inherent reasonableness of its indemnification provision. In fact, it is more likely that those shippers traded the indemnification for something else in return. The fact that half the TIH traffic moves under indemnification provisions similar to those in this proceeding shows the reasonableness of letting private negotiations resolve these types of disputes and the reasonableness of viewing contracts in the whole, and not a piecemeal fashion.

UP's proposal, however, eviscerates one of the TIH shippers' primary negotiating tools. To the extent that the Board grants UP's petition, it will further erode TIH shippers' ability to negotiate and further tilt the playing field in the railroads' favor.

UP's proposal places a number of burdens on TIH shippers, some of which are not obvious at first glance. But when the Board examines the tariff more closely, it becomes clear

³¹ See UP's Reply Brief at 40.

³² Rates are effective until relief is granted by the Board. Rate cases are time consuming and expensive, and TIH shippers need to move product to market quickly in response to market demand. Often they cannot take the time or money to file a rate case, even if they believe that they would be successful.

³³ See Opening Argument and Evidence of Union Pacific Railroad Company at 4 ("UP's Opening Brief").

why shippers oppose the indemnification provisions and why the provisions are unreasonable and burdensome.

III. UP's Proposal Violates Congressional Intent.

In its Opening Argument, CF explained that Congress never intended to allow railroads to escape liability.³⁴ More specifically, in response to the 2002 Minot, North Dakota accident, Congress amended 49 U.S.C. § 20106 to make clear that railroads were not exempt from state tort laws in certain circumstances. It is this amendment to the statute that is prompting UP's Petition (previously, railroads could escape liability for their negligence in many circumstances).

Congress amended the law to make clear that railroads could not escape liability for their actions and explicitly provided for recourse to state courts. What is most notable for this proceeding, however, is that Congress *did not* set a national standard regarding liability (or a national standard for allocating liability). Instead, Congress left tort-related claims to the states so that states could apply their own laws with respect to a cause of action. In addition, by explicitly adding subsection (c) that states that there is no federal question jurisdiction (*i.e.*, a federal court having subject matter jurisdiction over civil matters), Congress further signaled its intent to leave these tort-related matters to the states, and to not have federal courts (and, presumably, federal agencies either) get involved in such matters.

As the DOT noted in its Reply Brief, railroads have since repeatedly lobbied Congress to enact legislation that would limit railroads' liability for TIH-related accidents, but Congress has rejected the railroads' pleas: "Congress is well aware of the safety and security risks posed by the rail movement of TIH materials. However, Congress has rejected railroads' repeated requests for the enactment of legislation that would either eliminate the railroads' common carrier

³⁴ See CF's Opening Argument at 2-4.

obligation to transport TIH materials or cap the railroads' liability for transportation incidents involving the movement of TIH material.”³⁵

In its Reply Brief, UP claims that CF argues that the indemnification provision “violate[s] federal law.”³⁶ But UP is twisting CF’s point. Nothing in Section 20106 prohibits indemnification provisions such as the one UP proposes, especially in the context of a negotiated agreement. Nevertheless, Congress’s revoking of railroads’ immunity, the explicit recourse to state courts, and its continued rejection of railroads’ attempts to limit their liability all point to a specific Congressional intent to hold railroads accountable and address TIH safety matters through FRA and PHMSA regulations, not a national policy that shifts liability away from railroads. UP’s proposal is counter to that intent: it seeks to shift liability through a tariff provision rather than avoiding liability by complying with safety standards;³⁷ it seeks to impose a national liability standard through a federal agency rather than allow state courts to determine who should be liable; and it seeks to establish a new national policy designed to “incentivize” using less TIH rather than promoting the safe transportation of TIH. UP’s proposal contravenes Congress’s intent. Therefore, the Board should deny UP declaratory relief. If UP and the railroads believe a national liability scheme and the elimination of TIH from the market are appropriate, the proper forum is Congress, not the Board.

IV. UP’s Argument That Its Tariff Provisions Are “Fair” Are Not True.

In its Reply Brief, UP argues that “[s]hippers insist that requiring them to pay for a loss when they are not at fault is unfair. But [the shippers] never explain why it is any more fair for

³⁵ DOT’s Reply Brief at 10.

³⁶ See UP’s Reply Brief at 47-48.

³⁷ See, e.g., DOT’s Reply Brief at 10 (discussing how Congress “provides protection to railroads against tort suits when they comply with the Federal standards”).

UP to suffer such a loss when UP is not at fault and it is the shipper that decides whether to ship TIH, making a request for carriage that UP cannot refuse.”³⁸ UP misstates shippers’ arguments. Shippers are not stating that UP should automatically bear the loss when it is not at fault. Rather, the shippers are stating that tort law and state courts are the appropriate forum for determining and allocating liability in such circumstances. UP seeks to usurp the authority of state courts and impose a liability provision on shippers through regulatory fiat rather than based on the facts of a specific case. Shippers seek to preserve the authority of state courts, applying the appropriate law, to make a determination regarding the allocation of liability based on a careful examination of the facts in a particular case. The contrast between the shippers and UP could not be greater.

UP’s proposal also raises other issues of fairness. It can result in a situation where a shipper pays for liabilities even though the shipper had no fault and the railroad was the major party at fault. For example, in its Reply Argument, CF gave the following example. Assume that the allocation of liability is 60% for the railroad, 40% for a third party, and 0% for the TIH shipper. Under UP’s proposal, the TIH shipper must indemnify the railroad for the third party’s 40% share of the liabilities.³⁹ This would be true even though the railroad was the party with the most liability and the shipper had absolutely no fault. By predetermining the allocation of liability, UP’s proposal may result in patently unfair outcomes.

Moreover, the method by which UP is trying to impose the indemnification provisions is troubling. Railroads have a unique advantage among regulated entities. While it is true that they have a common carrier obligation to transport TIH, they have significant negotiating advantages. The railroads can use their bargaining power and monopoly position when entering into a market-based contract. Then, if the shipper balks at the terms or rates in the railroad’s preferred

³⁸ UP’s Reply Brief at 36.

³⁹ The shipper may be able to recover that 40% from the third party, it may not. But UP gets a pass because it can call on the indemnity provision at any time, and then force the shipper to have to go after the third party.

contract, the railroad can force the shipper to a tariff. If the shipper does not like the terms or rates in the tariff, it is then forced into a lengthy and expensive proceeding before the Board. The railroad is able to take advantage of both the regulated and market-based worlds to get the deal that it wants, whereas shippers have few options absent expensive and time-consuming regulatory proceedings. In this proceeding, UP is simply trying to prejudge the outcome of any future regulatory challenge to its tariff provisions, while simultaneously establishing those provisions as the baseline in their market contracts.

V. Debates Over The Tariff Language Illustrate Why The Board Should Not Approve The Language.

UP's discussion of the tariff language in its Reply Brief illustrates another reason why the Board should reject UP's Petition. In defense of the overly broad and ambiguous tariff language it has proposed, UP was forced to put forth interpretations of its proposed tariff that not only are not supported by the plain language of the tariff, but often appear to be in direct contradiction to it. The Board should see this debate over UP's proposed language as a preview of the absolute morass that will be created by allowing UP to implement these provisions. Shippers' argument that UP's tariff provisions are going to lead to significant litigation is not a debating tactic, but rather a concrete conclusion based on the specific language proposed by UP and the inability of shippers and UP to agree on what the language means.

For example, several shippers noted that the tariff provisions are drafted so broadly that they could be interpreted to require a TIH shipper to indemnify UP for any accident that occurs while UP is transporting TIH. UP claims that such an interpretation is unreasonable given the title of the tariff.⁴⁰ Thus, UP is suggesting that the title of the tariff somehow overrides the

⁴⁰ See UP's Reply Brief at 27.

specific language in the body of the tariff. And, as discussed below, a closer examination of the actual language further highlights the flaws in UP's argument.

UP claims that "Item 50.1 makes clear in defining 'liabilities' for which UP must indemnify TIH shippers that the tariff provisions address only liabilities 'arising from . . . the performance of transportation services pursuant to this tariff.' Construed in the context of the tariff as a whole . . . Items 50.2 and 60 plainly involve only those liabilities with a causal connection to transportation of the shipper's TIH."⁴¹ But the plain language of Items 50.1 and 50.2 shows that the language "in the performance of transportation services pursuant to this tariff" appears in Item 50.1 (UP's indemnification obligations), but *not* in Item 50.2 (shippers' indemnification obligations).⁴² There is nothing in the language of Item 50.1 that explicitly limits the scope of shippers' indemnification obligation under Item 50.2 to TIH-related liabilities. The plain language of the tariff defines liabilities as any liabilities, not only TIH-related liabilities. UP is simply wrong in suggesting otherwise.

Next, as various parties have argued, the tariff provisions are overly broad because they require a TIH shipper to indemnify UP even in the absence of a release of TIH. UP counters by, again, reading limiting language into the tariff that is not there. UP states that the "provisions properly require a TIH shipper to indemnify UP for costs that may be incurred even in the absence of a release – if there is a 'but for' causal connection to the transportation of the shipper's TIH."⁴³ However, there is no language in the tariff that provides such a "but for" causal limitation.

⁴¹ *Id.* at 28.

⁴² Even if one were to read such purported limiting language into Item 50.2, such language might not limit shippers' indemnification obligations to the extent suggested by UP. For example, if a train carrying TIH and non-TIH shipments derails, one could question whether such derailment occurred "in the performance of transportation services pursuant to [UP 6607]."

⁴³ *Id.*

UP also takes issue with CF's argument that Item 50.2 would require a TIH shipper to indemnify UP if there is a release of TIH from the shipper's equipment, even if UP is at fault. UP claims "Item 50.2 makes absolutely clear, just before listing the examples [of when the indemnity applies], that the item applies to all liabilities 'except those caused by the sole or concurring negligence or fault of the railroad.'"⁴⁴ Once again, however, UP misstates the plain language of its own provision. It is true that the sentence prior to the defined occurrences when the indemnity applies states that the customer does not have to indemnify UP for liabilities caused by the sole or concurring negligence or fault of the railroad. However, the plain language of Item 50.2 defines liabilities arising from the occurrences specified in Item 50.2 as *automatically* within the scope of shippers' indemnification obligations. If UP did not intend for shippers to be strictly liable for all liabilities arising from such enumerated occurrences regardless of UP's fault or negligence, UP could have explicitly stated this, as it did elsewhere in the proposed tariff.

When drafting contractual or tariff provisions, precise language matters. It is important that an objective review, without the benefit of UP's somewhat tortured explanations, result in a determination that UP's proposed tariff language is clear and unambiguous. As demonstrated by the comments of numerous parties in this proceeding, such a result is not possible. As such, not only is there no basis to determine that UP's proposed tariff provisions are reasonable, there is ample evidence in the record to determine that they are unreasonable.

VI. CF Objects To Railroads' Insinuations That It Is Not A Responsible Shipper.

Throughout these proceedings, railroads have suggested that shippers, such as CF, that do not agree with their indemnification provisions are somehow irresponsible or are not sufficiently

⁴⁴ *Id.* at 29 (emphasis in original).

concerned with safety when transporting TIH. That is not true. CF has been an industry leader when it comes to shipping TIH safely. It has been involved in developing some of the latest and safest tank cars for TIH, and been one of the first market participants to use such cars on the rail system. It has been willing to work with railroads to ensure the safe transportation of TIH, and it has even been willing to enter into commercial arrangements with railroads to address indemnification concerns. The fact that TIH shippers do not agree with the railroads' attempts to drive them off the system or to unilaterally shift liabilities to shippers when the shippers are not at fault for any accidents in no way indicates that the TIH shippers take lightly their obligation to transport TIH safely. The Board should ignore such rhetoric.

VII. Conclusion.

For the reasons set forth herein, the Board should deny UP's request for declaratory relief.

Respectfully submitted,



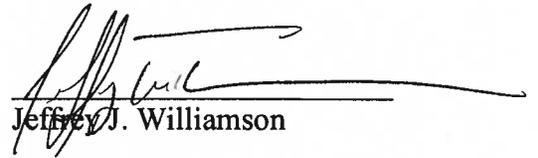
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Dated: March 26, 2012

CERTIFICATE OF SERVICE

I certify that, on March 26, 2012, I have sent copies of CF Industries, Inc.'s Rebuttal Argument to all parties of record on the service list for Docket No. FD 35504.


Jeffrey J. Williamson