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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35504

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PETITION OF UNION PACIFIC RAILROAD COMPANY  
FOR A DECLARATORY ORDER

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**REBUTTAL ARGUMENT AND EVIDENCE OF  
UNION PACIFIC RAILROAD COMPANY**

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Rebuttal Exhibit A: Video of Incident Near Lawrence, Illinois.

Verification of Dianne K. Duren

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Union Pacific Railroad Company (“UP”) petitioned the Board to institute this proceeding to address the reasonableness of the liability-sharing arrangement contained in Items 50 and 60 of UP Tariff 6607. Together, these two items establish a straightforward framework for allocating liabilities that may arise from UP’s transportation of toxic by inhalation hazardous commodities (“TIH”): UP is responsible for all liabilities arising from its own negligence or fault, and the TIH shipper is required to indemnify UP against all other liabilities arising from transportation of the shipper’s TIH.

UP demonstrated in its opening and reply argument and evidence that the tariff provisions are reasonable. Ultimately, the shipper parties object to only one substantive element of the tariff provisions: they insist it is unreasonable to require shippers to indemnify UP against TIH-related liabilities that are not attributable to any fault of UP or the shipper. These liabilities include any losses UP may face due to acts of judgment-proof third parties or acts of God. But, in explaining their objections, shippers take wildly conflicting positions, often within the same set of comments. At some points, they claim UP needs no indemnification because it will never face liabilities for incidents not arising from its own negligence or fault, or because it does not face a real risk of a catastrophic loss. At other points, they claim that they will be forced to stop

shipping TIH by rail if they have to indemnify UP for those supposedly non-existent liabilities. Both claims cannot be correct.

In fact, shippers are wrong on both extremes of their conflicting claims. UP faces a real risk that it will be held responsible for TIH-related liabilities when it is not negligent, or for TIH-related liabilities that exceed its percentage of fault. At the same time, requiring TIH shippers to indemnify UP for such liabilities will not put an end to rail shipments of TIH: the indemnity provision create no new liabilities, and they transfer to shippers no greater burden than UP currently bears. The provisions allocate to TIH shippers the liabilities that are not due to UP's fault, because such liabilities are more appropriately borne by the shipper – the party that controls the overall level of TIH-related risk in a fundamental way, through its decisions about whether, where, and in what equipment to move TIH.

Shippers offer no evidence that the tariff provisions are unreasonable. They simply resist a change that will require them, rather than UP, to bear certain risks and costs that arise from the particularly dangerous nature of their TIH. The shippers ask, “What has changed that renders such requirements necessary or reasonable today when railroads have transported such commodities for as long as 100 years without those requirements?” (Interested Parties Reply at 10-11.) But rail carriers have always been allowed to include liability-sharing arrangements in their tariffs, including their tariffs governing transportation of highly toxic chemicals, so nothing has changed in that regard. *See Classification Ratings of Chemicals, Conrail*, 3 I.C.C.2d 331 (1986). As for why UP recently changed its indemnity requirements for TIH, UP has explained that the attack of September 11, 2001, and the three serious TIH-related rail accidents in the last decade focused its attention on the particularly high risks of transporting TIH. (UP Op., *Duren V.S.* at 4-5.) UP is not alone in recognizing a need to change the status

quo. As the Department of Transportation (“DOT”) describes in its comments, federal regulators responded to the same series of events by promulgating extensive new rail safety and security rules to address TIH-related risks, and Congress mandated that railroads spend billions of dollars to install Positive Train Control. (DOT Reply at 7-11.) These developments could not have escaped the notice of the shipper parties, and the Board has made clear that railroads may “change their rules in response to changing circumstances.” *Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011) at 11.

Shippers also offer no evidence to support their other arguments against the tariff provisions, though their arguments are full of sound and fury. Shippers repeatedly proclaim that the tariff provisions are an attempt to circumvent the common carrier obligation. But the Board has made clear that shippers are free to decide whether and where to ship TIH by rail, and railroads must comply. Shippers also speculate that the tariff provisions are just one step in a scheme in which UP will next adopt unreasonable insurance requirements. But if UP were to adopt an unreasonable insurance requirement (or any other unreasonable term), shippers could obtain relief from the Board. Shippers also continue to insist that the provisions conflict with federal and state laws, but indemnities are commonplace business tools that Congress and state legislatures have authorized and that courts routinely uphold.

Shippers go so far as to deny that their shipping decisions have any impact on UP’s exposure to TIH-related liability. But many critical factors that affect TIH transportation safety are within their control, including the basic decisions of whether and where to move TIH. The indemnity provisions not only protect UP from liabilities in the event of an accident, they also reduce UP’s overall exposure to liability by encouraging TIH shippers and end users to consider more fully the TIH-related risks that they create through their decisions. The shipper

parties provide no coherent reply to UP's showing that it is reasonable to place responsibility for TIH-related liabilities not caused by UP's negligence on the TIH shipper, rather than on UP.

Part I of the argument below rebuts arguments that the Board should refrain from ruling on the reasonableness of the tariff provisions. Part II addresses arguments that the tariff provisions are unreasonable or contrary to public policy.

**I. THE BOARD SHOULD EXERCISE ITS JURISDICTION TO DETERMINE THE REASONABLENESS OF THE TARIFF PROVISIONS.**

UP's reply addressed various arguments in shippers' opening comments that the Board should refrain from deciding whether UP's indemnity provisions are reasonable. In their replies, the shippers recycle their prior arguments that UP is seeking an abstract decision, or a decision that is beyond the Board's authority, or a decision that would conflict with other law. The Board should reject those arguments and rule on the reasonableness of Items 50 and 60.

**A. UP Does Not Seek a Broad Policy Statement or an Abstract Decision.**

Contrary to the claims of the Interested Parties and others, UP has not asked the Board to issue a broad policy statement or an abstract decision that reaches beyond the scope of the indemnity language in Items 50 and 60 of Tariff 6607. (Interested Parties Reply at 6; Olin Reply at 1; Dyno Nobel Reply at 1.) UP asked the Board to institute this proceeding because two TIH shippers threatened to commence litigation over the indemnity provisions and a ruling from the Board would remove uncertainty over the reasonableness of the provisions.<sup>1</sup> UP is presently moving TIH traffic subject to Items 50 and 60, and those provisions will apply to customers that elect to move TIH traffic under tariff rates in the future. The Board instituted this

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<sup>1</sup> Dyno Nobel implies that UP manufactured the existence of a dispute, asserting that UP "fail[s] ... to even name the involved shipper." (Dyno Nobel Reply at 2.) Dyno Nobel apparently failed to note that, in its petition for a declaratory order, UP identified the involved shippers as Olin Corporation and SunBelt Chlor Alkali Partnership.

proceeding to determine “the reasonableness of [Items 50 and 60] under 49 U.S.C. § 11101 and 49 U.S.C. § 10702.” December 12 Decision at 4. UP asks for nothing more.

The Interested Parties are also wrong when they contend that UP is trying to “broaden” this proceeding because the provisions apply to “all liabilities arising from the transportation of TIH materials, regardless whether there is a catastrophic release of TIH materials, or even any release at all.” (Interested Parties Reply at 6-7.) UP never claimed the provisions apply only to catastrophic releases of TIH. In fact, as UP explained on opening and reply, carriage of TIH presents a risk of significant liability from accidents that might not be considered catastrophic. Environmental cleanup is a good example. (UP Op. at 9 & Duren V.S. at 5 n.5 & O’Brien V.S. at 4-5; UP Reply at 4-6 & Beach R.V.S. at 2-3.) The Interested Parties are thus incorrect yet again when they claim that UP’s evidence “focuses exclusively upon the consequences of a catastrophic TIH release” and that “no railroad party has offered any justification” for applying the provisions to TIH-related incidents that might not be characterized as “catastrophic.” (Interested Parties Reply at 7.)

UP also never claimed the tariff provisions apply only when TIH is released. In fact, after the Interested Parties observed on opening that the provisions could be read to require indemnification in the absence of a TIH release, UP explained why that was the correct reading: when the presence of TIH is a “but for” cause of liabilities, such as evacuation costs due to the potential for a TIH release following a derailment, the provisions require the TIH shipper to indemnify UP for those liabilities even if there was no actual release. (UP Reply at 28.) The potential release of grain or lumber creates no such costs.

The Interested Parties are wrong again when they contend that UP is trying to broaden this proceeding by requiring TIH shippers to indemnify UP even if an accident does not

involve a TIH shipper's cars or product. (Interested Parties Reply at 7-8; *see also* Olin Reply at 12-13.) As UP explained in its reply, the tariff provisions do *not* require a TIH shipper to indemnify UP for liabilities that have no causal connection to UP's transportation of the shipper's TIH. (UP Reply at 27-28.)

Finally, the Interested Parties are wrong when they assert that UP is trying to obtain indemnification for losses relating to *all* hazardous materials because the tariff provisions apply to transportation of certain non-TIH materials. (Interested Parties Reply at 10; *see also* Olin Reply at 14.) As discussed below on page 9, the provisions apply to only certain non-TIH materials that are transported in tank cars subject to safety rules similar to the rules for tank cars used to transport TIH because these non-TIH materials (which accounted for just 0.4% of UP carloads of hazardous materials in 2011) pose special risks to the environment. *See* 49 C.F.R. § 173.31(f)(2).<sup>2</sup> However, UP is not asking the Board to address the application of the tariff provisions to these small volumes of non-TIH materials. UP's petition was confined to the application of the provisions to movements of TIH.<sup>3</sup>

**B. The Tariff Provisions Address Issues Within the Board's Jurisdiction.**

CF Industries and others incorrectly argue in their replies that the Board would be exceeding its authority if it determined that the tariff provisions are reasonable because it would be "shaping markets outside the rail industry." (CF Industries Reply at 12; *see also* Dyno Nobel Reply at 6-7; U.S. Magnesium Reply at 3.) The Board acts well within its authority when it

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<sup>2</sup> As the Interested Parties recognize, this subset of hazardous materials includes substances that can cause especially significant harm to the environment but that do not present the same immediate threat to human health as a release of TIH. (Interested Parties Reply at 2 n.1.)

<sup>3</sup> Although the scope of UP's petition and this proceeding does not encompass non-TIH material subject to the same tariff items, UP believes the provisions are also reasonable as applied to those materials.

addresses the reasonableness of a railroad rule or practice, even if the rule or practice indirectly affects commerce in one or more commodities. *E.g., Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Nov. 22, 2011) (addressing rules relating to transportation of Powder River Basin coal). Indeed, virtually every railroad rule or practice will affect another industry.<sup>4</sup> The Board plainly “has jurisdiction to determine whether the terms and conditions under which railroads transport TIH material are reasonable.” *Union Pacific R.R. – Petition for Declaratory Order*, STB Finance Docket No. 35219 (STB served June 11, 2009) at 3 n.12.

Olin also questions the Board’s authority when it asserts that the tariff provisions are inconsistent with the regulatory programs that the DOT has developed to address “the safety and security risks of transporting chlorine by rail.” (Olin Reply at 6.) However, DOT filed comments in this proceeding, and it does not contend that the provisions are inconsistent with, or unnecessary in light of, existing regulations. To the contrary, DOT recognizes that “the safety and security risks associated with the transportation of TIH materials will never be zero” and that railroads have a legitimate interest in “eas[ing] the liability exposure associated with the rail movement of [TIH] materials.” (DOT Reply at 12.) DOT also expressly encourages solutions that would “reduce TIH ton-miles” by “changing shipping patterns; co-location of plants at the end-user; and product substitution.” (*Id.*) Far from being inconsistent with DOT’s regulatory programs, the tariff provisions complement and advance the same goals as those programs.

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<sup>4</sup> In addition, the Board’s many decisions exempting certain commodities from regulation plainly have an effect on commerce in those commodities, but those effects stem from the Board’s exercise of its jurisdiction to regulate railroads.

**C. The Tariff Provisions Do Not Conflict with Other Laws.**

In their replies, the Interested Parties and others repeat and elaborate upon certain claims they made on opening that the tariff provisions conflict with federal or state law. In particular, they assert that the provisions conflict with CERCLA and state laws regarding allocation of damages for torts. These arguments remain incorrect.

**1. The Tariff Provisions Do Not Conflict with CERCLA.**

The Interested Parties argue at some length that the tariff provisions are an attempt by UP to avoid liability under CERCLA. (Interested Parties Reply at 2-4.) However, as UP explained in response to similar assertions made in Olin's opening comments, such claims confuse the determination of a party's liability with its ability to obtain indemnification for that liability. Under CERCLA, a party always remains liable to the government and others for harms covered by the statute. UP cannot, and does not even attempt to, change that basic liability through indemnity provisions. However, CERCLA leaves potential responsible parties such as UP free to establish who ultimately pays for that liability through private indemnity provisions. (UP Reply at 16-17.) The Interested Parties are thus incorrect when they assert that UP is attempting to circumvent congressional intent that railroads ultimately pay for certain harms in all cases. (Interested Parties Reply at 3-4.) Congress had no such intent.

In fact, Congress intended that potentially responsible parties, including railroads, *should* be allowed to obtain indemnification for CERCLA-related liabilities. CERCLA expressly preserves potentially responsible parties' right to seek indemnification. *See* 42 U.S.C. § 9607(e)(1) ("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."). Indeed, allowing a railroad to obtain indemnification from a shipper makes particular sense for CERCLA-related liabilities: it allows the railroad to recover clean-up costs from the shipper that put the hazardous

product into the flow of commerce, rather than forcing the railroad to attempt to spread the costs among all customers, including those that do not create similar risks. In addition, to the extent indemnification encourages shippers to reduce the ton-miles of TIH shipments, the tariff terms advance CERCLA's purpose by reducing the potential for environmental harm.

In addition to misstating Congress's intent in CERCLA, the Interested Parties misleadingly imply that *all* hazardous materials that UP transports are subject to the indemnity provisions of Tariff 6607. (Interested Parties Reply at 3; *see also* Olin Reply at 14.) In fact, the vast majority of hazardous materials that UP transports are subject to UP Tariff 6601, which has different liability-allocation terms.<sup>5</sup> As discussed above on page 6, UP included certain non-TIH materials in Tariff 6607 only because they must be transported in tank cars that comply with safety rules similar to those that apply to tank cars used to move TIH and because the materials pose special risks to the environment. Those non-TIH materials accounted for only 2,297 of the 628,522 carloads of hazardous materials (about 0.4%) that UP transported in 2011.<sup>6</sup> Thus, contrary to the claims of the Interested Parties, Tariff 6607 does not reflect a broad change in UP's approach to liability for transportation of hazardous materials under CERCLA.

## **2. The Tariff Provisions Do Not Conflict with State Law.**

The Interested Parties and others also assert that the tariff provisions conflict with state tort law. (Interested Parties Reply at 8-9; Olin Reply at 15; Dyno Nobel Reply at 7-8.) As UP explained in response to similar arguments in shippers' opening comments, such assertions are incorrect: a party injured by an accident involving TIH transportation will have the same

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<sup>5</sup> UP Tariff 6601 is available at <http://c02.my.uprr.com/wtp/pricedocs/UP6601BOOK.pdf>.

<sup>6</sup> Diane K. Duren, UP's Vice President & General Manager - Chemicals, confirms these figures in the verification attached hereto.

recourse against UP, the TIH shipper, or a third party that the injured party would have had in the absence of the tariff provisions. The provisions affect only the rights and remedies of UP and a TIH shipper with respect to each other. (UP Reply at 16.) The provisions do not in any way alter fundamental state tort law concepts such as duty, foreseeability, and proximate cause that govern determinations of liability for TIH accidents. (*Id.*)

Moreover, contrary to assertions by the Interested Parties and others, use of indemnity provisions is fully consistent with state law. (Interested Parties Reply at 8-9; Olin Reply at 15.) As UP explained on reply, state legislatures and courts have devised rules for allocating tort liability, but state legislatures and courts – as Congress did with CERCLA – routinely preserve and enforce indemnity clauses that provide additional remedies as between the parties involved in a transaction. (UP Reply at 15-16.)<sup>7</sup> Indeed, as UP explained on opening, a major benefit of indemnity provisions, particularly for businesses (like railroads) that routinely operate across state lines, is that parties can reduce the costs and uncertainties created by inconsistent state laws regarding allocation of liability. (UP Op. at 14.)<sup>8</sup>

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<sup>7</sup> After Olin claimed on opening that the tariff provisions conflict with state rules for allocating liability, UP provided citations to decisions upholding the use of indemnity provisions in each state Olin cited. (UP Reply at 16 n.12.) On reply, Olin argues further that the provisions conflict with “liability mechanisms” in Texas and Illinois. (Olin Reply at 15; *see also* Interested Parties Reply at 8-9.) In both states, however, courts allow the use of indemnity provisions to allocate tort liability because indemnity (like insurance) does not interfere or conflict with their tort liability schemes. *See, e.g., Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 831 (5th Cir. 1992) (Texas); *Allison v. Shell Oil Co.*, 495 N.E.2d 496, 497 (Ill. 1986) (Illinois).

<sup>8</sup> As Norfolk Southern showed in its opening evidence, indemnity provisions are commonplace in unregulated transportation settings when carriers transport hazardous commodities. (NS Op. at 25-27; *see also* UP Reply at 20.) Indeed, indemnity provisions are commonly used to manage risk where the activities of one party expose another party to an increased risk of liability, which is precisely the situation UP faces when TIH is tendered to it for shipment.

Finally, the Interested Parties and others do not appear to believe their own claims of inconsistency between the use of indemnity provisions and state law. They are happy to override state law outcomes when contracts require mutual indemnification. Indeed, they embrace that result. (Interested Parties Reply at 11 (discussing “the mutual indemnification provisions that heretofore have been the industry standard”); Dyno Nobel Reply at 3-4 (noting that “the traditional, bi-lateral liability sharing arrangements have never created a major dispute ....”).) On opening and reply, the shippers point to nothing in state law that bars UP’s inclusion in a tariff of an indemnity provision that places greater responsibility on the parties that control whether, where, and in what equipment to move TIH.

## **II. THE TARIFF PROVISIONS ARE REASONABLE.**

In its opening, UP showed that its use of the tariff provisions constitutes a reasonable practice. A practice is reasonable if it is a reasonable response to a real problem and is consistent with the national rail policy. (UP Op. at 12-13 (citing numerous STB precedents).) The shippers have failed to find any persuasive argument or evidence to counter UP’s showing on these points.

### **A. The Tariff Provisions Address Real Concerns.**

#### **1. UP Faces the Potential for Significant Losses Arising from TIH Transportation Even When It Is Not at Fault.**

There can be no serious doubt that the tariff provisions respond to real concerns. UP’s evidence demonstrates that it faces the potential for catastrophic losses in connection with TIH transportation, and that other serious but lesser incidents involving TIH collectively can

impose a substantial burden on the railroad.<sup>9</sup> An earlier statement of Warren Beach, UP's Assistant Vice President for Finance and Insurance, reported estimates of potential losses from terrorist incidents involving the release of TIH or other hazardous materials, developed by the American Academy of Actuaries, and Mr. Beach's reply verified statement in this proceeding shows how smaller (but still very significant) losses from TIH accidents can impose a substantial burden on UP because commercial insurance will not cover all of these losses. (UP Reply, Beach R.V.S. at 2-3 & Attachment A at 5-6.) UP also demonstrated that it can face liability in connection with TIH transportation even when it is not at fault, and that it can incur liabilities beyond its share of fault through the operation of state law regarding joint and several liability. UP's opening and reply describe a number of scenarios in which UP could be held liable for losses not due to its own fault or damages beyond the level attributable to its fault. (UP Op. at 6-7; UP Reply Exhibit A.)

**a) The Risk of Significant Losses Arising from TIH-Related Accidents Is a Real Concern.**

Shippers argue that the probability of a catastrophic accident is small and that the potential liability scenarios UP describes are not realistic. (CF Industries Reply at 6-7, 9-10; Olin Reply at 6-7; Interested Parties Reply at 8-9.) UP exercises great care when transporting TIH, and thankfully, there have been relatively few serious rail accidents involving TIH. But a good safety record and low probability of an accident do not mean that a catastrophe will never

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<sup>9</sup> In its reply, Olin argues again that UP's Form 10-K annual report fails to identify the risk of catastrophic loss not covered by insurance. (Olin Reply at 9.) As explained in UP's reply, the UP Form 10-K does refer to such risks in appropriately cautionary language. (UP Reply at 5 n.4.) Plainly, UP would not report that losses in the event of a TIH-related accident "could have a material adverse effect on [its] results of operations, financial condition, and liquidity," or that terrorist attacks targeted at rail cars carrying hazardous materials "may adversely affect [its] results of operations, financial condition, and liquidity," if all of the losses were covered by insurance. (Union Pacific Corporation, 2011 Annual Report, Form 10-K, at 10, 13 (2012).)

occur, and shippers cannot deny that the losses from a serious accident in a highly populated area could be staggering. As DOT observes, “the safety and security risks associated with ... transportation of [TIH] materials will never be zero” (DOT Reply at 3), and “shipments of hazardous materials by rail frequently move through densely populated or environmentally-sensitive areas where consequences of an incident could be considerable loss of life, serious injury, or significant environmental damage” (*id.* at 6-7).

Several shippers comment that the examples UP provided of situations that would be covered by the tariff provisions do not necessarily involve catastrophic liability. (Olin Reply at 15; Interested Parties Reply at 8-9.) As UP has explained, however, it is not concerned only with the worst accidents. Less serious TIH accidents also expose UP to significant losses, and UP is entitled to protection from liabilities that exceed the percentage of its own negligence in those circumstances. (UP Op. at 9; UP Reply at 4-5.)

The Interested Parties and others incorrectly assert that UP’s examples are not realistic. In particular, the Interested Parties argue that the example involving a settlement under Texas law cited in UP’s opening (at page 6) is unlikely to occur because a plaintiff would not settle with a shipper for a minimal amount. (Interested Parties Reply at 8.) The example, however, is based on UP’s actual experience in a Texas state court case. This scenario is likely to recur, because UP is always the most visible party when a TIH accident occurs, and local communities will focus on the railroad’s presence, while a shipper is likely to be remote and far less visible to the plaintiff.

Dyno Nobel also complains that railroads have not presented realistic examples of “accidents occurring outside of a railroad’s control.” (Dyno Nobel Reply at 5.) However, the tornado scenario described in UP’s opening is based on an incident that occurred on January 7,

2008, near Lawrence, Illinois, involving a tank car carrying ethylene oxide. In that episode, there was no release, but the incident still required an evacuation in the town of Lawrence. UP has enclosed a video of the incident, labeled as UP Rebuttal Exhibit A.<sup>10</sup>

CF Industries and Olin argue that UP failed to carry its burden of proof that the provisions are reasonable because it has not mathematically quantified the risk associated with TIH transportation. (CF Industries Reply at 9-10, 11, 13; Olin Reply at 10).<sup>11</sup> However, there is no requirement that UP quantify such risk with precision to demonstrate that the tariff provisions are reasonable. *See, e.g., Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 2, 2011) at 7, 8. UP is entitled to protect itself against losses from a devastating accident to the extent such losses are not attributable to railroad negligence, even if the likelihood of such an accident is remote and the magnitude of loss is uncertain. And no shipper argues that UP can escape a significant burden from a series of less serious TIH incidents in view of the limits on UP’s ability to obtain commercial insurance and its necessary reliance on self-insurance to cover many losses.

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<sup>10</sup> Ms. Duren’s verification confirms these facts and the authenticity of the video.

<sup>11</sup> Olin misses the point when it asserts that UP has failed to show that the hazardous nature of TIH makes a release more likely. (Olin Reply at 14.) The point is that any release of TIH will cause greater harm than a release of almost all other commodities the railroad carries due to the toxic nature of the substance and the manner in which it will spread. Olin also ignores the risk that terrorists will target tank cars carrying TIH – the risk of terrorist attack is certainly much lower for autoracks or hopper cars carrying coal.

The Interested Parties make the remarkable and entirely unsupported assertion that, “except for catastrophic releases, the non-TIH materials pose equal or greater liability risks than the TIH materials.” (Interested Parties Reply at 9.) DOT certainly does not share that view. (DOT Reply at 6-7.) Indeed, as UP has shown, the release of even a small amount of TIH presents an immediate risk to human life – particularly to UP employees; indeed, even the possibility that TIH has been released often requires an evacuation of the surrounding area. (*See, e.g., UP Op., O’Brien V.S.* at 3-5.) Faced with such an extreme risk, the responders to a TIH accident cannot be expected to gamble the health and safety of their community.

**b) UP Is Exposed to Liability for TIH-Related Accidents Even When It Is Not at Fault.**

CF Industries and others repeat arguments made on opening that the tariff provisions are unnecessary because all TIH accidents result from railroad negligence. (CF Industries Reply at 11-12; *see also* Interested Parties Reply at 12-13.) The premise is wrong, as shown by the incident reports listed in UP's reply. (UP Reply at 43 n.43.) But even if railroad negligence has been a factor in most major accidents to date, shippers have failed to show that UP will never be charged with losses that exceed the percentage of its own fault or that UP should be barred from seeking protection from such liability. And, if there are in fact no situations in which UP will be charged with losses that are not due to its own negligence, shippers will never be required to indemnify UP. If shippers believe what they claim, they have nothing to fear from the tariff provisions.

Other shippers repeat assertions made on opening that UP would never be held liable for losses when it is not at fault. However, UP has described many situations and legal authorities under which it could be held liable for acts of third parties or acts of God, as well as other situations in which it would be held responsible for liabilities that exceed its percentage of fault. (UP Op. at 6-7; UP Reply Exhibit A.)

In response to some of UP's examples, the Interested Parties argue that CERCLA provides a complete defense for third-party acts, that TIH materials are unlikely to cause ground contamination that would be subject to CERCLA, and that the Clean Water Act includes an act of God defense. (Interested Parties Reply at 9.) In fact, CERCLA and Clean Water Act defenses are rarely successful. (UP Reply at 9-10 (citing case law and commentary); *see also* Laurencia Fasoyiro, *Invoking the Act of God Defense*, 4 *Env't'l & Energy L. & Policy J.* 1, 3-4 (2009) (discussing act of God defense under Clean Water Act).) And both CERCLA and the Clean

Water Act have been applied to railroads in connection with TIH releases. *See* News Release, U.S. Environmental Protection Agency, Region 4, Railroad Company to Pay \$4 Million Penalty for 2005 Chlorine Spill in Graniteville, SC (Mar. 8, 2010) (describing Clean Water Act and CERCLA penalties imposed on Norfolk Southern Railway).

In addition, some shippers assert (again) that federal preemption will protect UP from liabilities not attributable to any fault of its own. (Dyno Nobel Reply at 4; Olin Reply at 2, 4-5.) Of course, if these shippers were correct, they would have no reason at all to claim that the tariff provisions matter to them, since shippers would have no indemnity obligation if federal preemption provided a complete defense to UP. In reality, as UP explained in its reply, federal preemption has a limited scope and would not always protect a railroad from liability associated with acts of third parties or acts of God. (UP Reply at 8.)

Shippers also insist that UP would not be held liable under state law absent negligence, due to the requirement of proximate causation and because TIH transportation has not been categorized as an ultrahazardous activity. (Dyno Nobel Reply at 4; Olin Reply at 2, 5.) These arguments disregard the existence of no-fault liability under state environmental laws, and they disregard state law under which UP might be allocated liability that exceeds the percentage of its fault. Moreover, in its reply, UP cited several state court cases that suggest that, in some jurisdictions, railroads could incur liability without fault for TIH releases. (UP Reply at 8-9.)

Again, shippers fail to confront the contradiction in their positions. If shippers are convinced that UP faces no liability for losses that are not caused by railroad negligence, they should have no concern about the indemnity requirement. Where UP incurs no liability, there is nothing to indemnify. In these circumstances, the tariff provisions can hardly be characterized as a “sledgehammer.” (Interested Parties Reply at 12.) Rather, the provisions would have no

impact at all. UP has a different perspective on its potential liability, based on its experience with no-fault environmental statutes and its inevitable status as the most visible and attractive target in the aftermath of a rail accident involving TIH. While perspectives on the likelihood of liability will differ, UP's concern about potential liability is real and rational, and it provides ample justification for UP's effort to allocate liability through the tariff provisions.

**2. UP Lacks Alternative Means to Protect Itself.**

UP introduced the tariff provisions (and similar indemnification requirements in its contracts with shippers) because it lacks alternative ways to protect itself against losses when it is not at fault. Of course, UP will invoke available legal defenses when it is not at fault, and it will be able to avoid liability in many such cases (or to confine its liability to losses attributable to its own fault). But should courts hold UP liable beyond its degree of fault, UP has no means of protecting itself other than through indemnity. The Board has made clear (at the behest of shippers) that UP may not refuse to carry TIH or limit the distance it transports TIH, even where a TIH customer has alternative sources closer to the destination.<sup>12</sup> Thus, UP may not choose to avoid the TIH transportation risk by declining to provide service.

There is also no assurance that UP will be able to recover the losses arising from TIH transportation through the rates it charges TIH shippers. CF Industries asserts that railroads charge a "premium" to transport TIH. (CF Industries Reply at 14.) But it offers no proof that rail rates for TIH include any premium, much less that the rates are sufficient to cover all losses

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<sup>12</sup> See *Union Pacific R.R. – Petition for Declaratory Order*, STB Finance Docket No 35219 (STB served June 11, 2009).

that may arise from TIH transportation.<sup>13</sup> In any event, as UP explained on reply, allegations regarding the reasonableness of rail rates must be pursued in a rate proceeding and cannot bar a finding of reasonableness for an otherwise appropriate tariff term. (UP Reply at 39.)<sup>14</sup>

Finally, as UP has explained, it cannot obtain full protection from TIH-related losses through insurance. There are limits to the amount of commercial insurance available to railroads, and even if UP could double or triple its coverage, it would still fall far short of the amount needed to cover losses from a catastrophic accident. (UP Reply, Beach R.V.S. at 1-3.) And, because the market requires that UP maintain a high level of self-insurance, UP may have to absorb many millions of dollars in losses if it experiences even a non-catastrophic TIH incident. (*Id.*)<sup>15</sup>

**B. The Tariff Provisions Allocate Risks in a Socially Desirable Manner.**

All agree that it is reasonable for UP and the shipper each to bear the liability that results from its own negligence, which is the primary allocation of liability under the tariff terms.

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<sup>13</sup> CF Industries argues that UP was required to provide quantitative data showing that its current rates do not reflect the risks and costs associated with transporting TIH. (CF Industries Reply at 13.) As the Board recognizes, however, rates reflect many factors, “such as general market conditions, carrier-specific financial condition, product demand and the competitive options available to particular shippers,” so it is impossible “to attribute values to each component of rail pricing actions ... on a component-by-component basis.” *Cargill, Inc. v. BNSF Ry.*, STB Docket No. 42120 (STB served Jan. 4, 2011) at 6.

<sup>14</sup> See also *N. Am. Freight Car Ass’n v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (STB served Jan. 24, 2007) at 7 (explaining that, even if line-haul rates compensated a railroad for storing empty private cars, it could institute a new demurrage charge because a railroad “may raise the price for its services, as long as the total amount paid is reasonable”).

<sup>15</sup> Moreover, even if UP could obtain insurance that covered the full scope of its potential TIH-related liabilities, it could appropriately require TIH shippers to pay the portion of its insurance premiums that corresponds to the liabilities covered by the tariff provisions. UP’s decision to address those liabilities through indemnification is a practical alternative in light of the difficulty in quantifying insurance costs. (UP Reply at 12-13.) The choice of indemnification should not make a legal difference.

However, the shippers argue vigorously that it is unreasonable to require them to indemnify UP for losses that are not caused by a shipper's fault. (Olin Reply at 12-13; CF Industries Reply at 7-8.) Yet, their arguments lack substance; shippers never explain why UP should bear liability for those losses that are not due to UP's fault and that arise from the dangers inherent in TIH products.

Significantly, none of the shippers confronts the fact that shippers are the ones that choose to put TIH on the rails, as well as the origins and destinations of their shipments, while UP cannot refuse to accept TIH. As DOT recognizes, UP "is obligated to transport hazardous materials and must provide this service on reasonable request by shippers." (DOT Reply at 10.) This fact alone justifies making the shipper responsible for losses that are not due to negligence of either party. There is no reason UP should be liable for these losses when it is the shipper that creates the hazard on UP's lines and UP has no choice but to accept the hazard.

CF Industries asserts that UP shareholders should bear any losses UP incurs from TIH transportation beyond UP's level of fault, but it does not explain why this should be. (CF Industries Reply at 7-8.) In its example, CF Industries posits that UP is 60% at fault and the shipper is 0% at fault. It takes the position that UP shareholders should pick up the 40% of losses resulting from the negligence of a judgment-proof third party. But the shipper was responsible for putting TIH on the rails, for choosing the origin and destination of the move, and

for choosing the tank car.<sup>16</sup> There is simply no basis for saying that UP stockholders, rather than the shipper stockholders, must bear the loss attributable to the third party.<sup>17</sup>

Olin protests that shippers should not be required to “factor the associated risks” of transporting TIH by rail into their decisions. (Olin Reply at 8.) But Olin never explains why not. Indeed, Olin’s implicit admission that it would not otherwise factor into its decisions the TIH-related risks associated with losses resulting from acts of third parties or acts of God is all the more reason for the Board to find the tariff provisions reasonable and in the public interest.

As Dr. Shavell explained, “If shippers do not bear the liability risks in question, the risks of shipping will not be properly incorporated into the prices of TIH materials and levels of shipping activity will tend to be socially excessive, exposing the public to greater risks of TIH losses than is desirable. (UP Op., Shavell V.S. at 3.) The tariff provisions are reasonable because they help ensure that risks are incorporated in prices and that shipping activity is at socially desirable levels.

**C. The Tariff Provisions Do Not Erode UP’s Common Carrier Obligation.**

Shippers continue to insist that a Board finding that the tariff provisions are reasonable will allow UP to avoid its common carrier obligation. (Olin Reply at 7-11; U.S.

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<sup>16</sup> Indeed, as Norfolk Southern showed in its opening comments, if the TIH shipper in the CF Industries example had found a motor carrier willing to move the material, the shipper would have paid for 100% of the loss, and the motor carrier would have paid 0%, under typical motor carrier indemnity provisions. (NS Op. at 25-26.)

<sup>17</sup> CF Industries also complains that the tariff provisions are unfair because they lack terms typically found in indemnities, such as terms addressing notice and participation rights. (CF Industries Reply at 15.) It argues that, as a result, parties will not be afforded various protections in implementation of the indemnity. (*Id.*) UP addressed these concerns in its reply, explaining that such protections are provided by state law and by other parts of the tariff, including Item 50.3. (UP Reply at 33-35.) As UP also noted, it has no interest in denying such protections, since the tariff provisions are a two-way street; they require UP to indemnify TIH shippers when a loss is caused by UP’s negligence. (*Id.* at 33-34.)

Magnesium Reply at 3.) This is incorrect. The Board has made clear that railroads have a common carrier obligation to transport TIH and that they may not limit that obligation by refusing to carry TIH from the origin designated by the shipper, even when there are sources closer to the destination. UP is simply attempting to address the liability risks it encounters because it must accept TIH shipments. Under the tariff, shippers are free to ship TIH from anywhere to anywhere, so long as they indemnify UP for losses it incurs that arise from the presence of TIH and that do not arise from UP's own negligence. UP has taken a measured approach, not a "sledgehammer approach." (Interested Parties Reply at 12.) And, contrary to shippers' claims, the tariff provisions do not threaten the survival of TIH producers. (U.S. Magnesium Reply at 3.)

UP plainly is not taking the position that TIH is "too dangerous to transport," as claimed by CF Industries. (CF Industries Reply at 4-7.) UP recognizes that TIH nearly always moves without incident, to the credit of UP, other railroads, shippers, and federal regulators. But there is no denying that TIH is inherently dangerous and that "the safety and security risks associated with the transportation of these materials will never be zero." (DOT Reply at 3.) Nor can it be denied that there is a substantial risk of serious injury if any TIH is released while a TIH tank car is on UP lines. (*Id.* at 6-7.) UP is entitled to take into account the special risks presented by the nature of TIH and to present them to the Board as a reason why UP needs to deal with potential liability in connection with TIH transportation.

Shippers also continue to complain that the tariff provisions are the beginning of a "slippery slope" that will erode UP's common carrier obligation to transport TIH. CF Industries and Olin predict that UP will use the tariff provisions as the basis for requiring shippers to carry

high amounts of insurance coverage, thereby raising the costs to transport TIH. (CF Industries Reply at 14; Olin Reply at 9-10.)

There is no slippery slope here. UP and other railroads will remain subject to the common carrier obligation. The Board will continue to enforce the common carrier obligation and will be available to consider any practices that allegedly interfere with that obligation. If TIH shippers believe that UP's rates are too high, they are free to file rate complaints with the Board, now or in the future.<sup>18</sup> And if TIH shippers believe that UP is attempting to impose an onerous insurance provision, they may file an unreasonable practice complaint.

In any event, UP has not imposed any unreasonable insurance requirement in its current TIH tariff. Although the tariff's insurance provision is not at issue in this proceeding, it is worth noting that none of the shippers here claims it cannot satisfy the tariff's terms or that the provision has imposed any serious burden.<sup>19</sup> Olin and CF Industries complain that the tariff's insurance provision prohibits shippers from self-insuring. (Olin Reply at 9; CF Industries Reply at 14.) But the provision expressly allows shippers to self-insure; the provision merely requires the shipper to obtain UP's prior written consent if it intends to self-insure. (Olin Reply, Ex. A (UP Tariff 6607, Item 85).) UP requires prior written consent so that it can assure itself that the shipper has sufficient financial resources to support its commitment. No shipper alleges that UP has unreasonably withheld consent when shippers wish to self-insure.

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<sup>18</sup> TIH shippers are plainly capable of filing rate complaints. *E.g.*, *U.S. Magnesium L.L.C. v. Union Pacific R.R.*, STB Docket No. 42114; *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry.*, STB Docket No. 42130; *Canexus Chemicals Canada, L.P. v. BNSF Ry.*, STB Docket No. 42132.

<sup>19</sup> Nothing prevents shippers from filing a complaint about the insurance provision in Tariff 6607 if they really object to its terms. UP filed its petition in response to a specific threat of litigation involving Items 50 and 60, not the insurance provision. Thus, UP's petition addressed only Items 50 and 60.

Some shippers predict that a Board finding that the tariff provisions are reasonable will lead UP to a “take it or leave it” stance regarding indemnity provisions in contract negotiations, depriving shippers of a “bargaining point.” (CF Industries Reply at 14-15; Olin Reply at 11; *see also* Interested Parties Reply at 4 n.3.) This is unfounded speculation. Since UP included the indemnity requirement in its TIH tariff, it has continued to negotiate indemnity terms in contracts with TIH shippers, and it has been willing to modify the language in some cases. (*See* UP Op., Duren V.S. at 8.)<sup>20</sup> There is no reason to surmise that UP will refuse to bargain on this issue if the Board finds that the tariff provisions are reasonable, particularly if the shipper proposes an alternative that will provide similar protection for UP or offers a concession that presents an attractive trade-off for UP. (*See* UP Op., Shavell V.S. at 18-19.) On the other hand, if the Board declares the tariff provisions unreasonable, there is little or no chance that UP will be able to obtain any protection through a contract. UP will lose both a “bargaining point” and its only real protection from TIH liability that does not result from any UP fault, and shippers’ incentives to factor TIH-related risks into their shipping decisions will diminish.

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<sup>20</sup> The Interested Parties and Olin assert that UP described its experience with contractual indemnity provisions for an improper purpose, but there is no basis for this assertion. (Interested Parties Reply at 4 n.2; Olin Reply at 10-12.) UP’s evidence regarding shippers’ agreement to contractual indemnity provisions similar to the challenged provisions demonstrates that such provisions are regarded as reasonable terms in the industry. *See, e.g., Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges*, STB Docket No. 42102 (STB served July 20, 2010) at 13 (discussing interest rates challenged as an unreasonable practice in the context of “industry practice”). This evidence also demonstrated that UP is willing to negotiate over variations on the indemnity provisions. This directly rebuts the claims of Olin and other shippers that UP has adopted a “take it or leave it” stance with regard to indemnification. Finally, UP’s evidence regarding the amount of traffic that is not covered by contracts helps demonstrate that this case involves a concrete issue, contrary to the claims of shipper parties.

Olin complains that the indemnity requirement is unreasonable because there is no “commensurate exchange of value.” (Olin Reply at 11.) By that logic, no tariff term could ever be reasonable, and that cannot be right. A common carrier rate published in a tariff must be supplemented with terms to make it meaningful. *See* 49 U.S.C. § 10702(2). Board precedent is clear that a railroad must include in a tariff its terms and conditions of the service, and may include terms such as annual volume requirements or a fuel surcharge.<sup>21</sup> If necessary, the Board will review such tariff terms to determine whether they are reasonable, as it is doing here. Thus, UP’s inclusion of an indemnification requirement in its TIH tariffs is in no way inconsistent with its common carrier obligation to transport TIH. *See, e.g., Classification Ratings of Chemicals, Conrail*, 3 I.C.C.2d at 337 (indicating that Conrail could “use [a] tariff (through publication of various governing rules) to limit liability”).

**D. The Tariff Provisions Do Not Interfere with Markets.**

Shippers are wrong when they assert that UP is improperly attempting to influence markets for TIH and that the Board would be doing the same if it were to find the tariff provisions reasonable. (CF Industries Reply at 7, 11, 12, 13; *see also* Dyno Nobel Reply at 6-7.) Of course, every term of a commercial relationship influences the market in some sense. But the tariff provisions do not interfere with transactions between TIH shippers and their customers, or limit where and when TIH may move. Shippers may move TIH wherever and whenever they wish, so long as they agree to indemnify UP for a narrow and limited category of losses. Through the indemnification requirement, UP is attempting to protect itself and to make certain

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<sup>21</sup> If Olin’s point is that UP should have to prove mathematically that its rates do not already cover these TIH-related liability costs, Olin is clearly incorrect. *See* notes 13 & 14, *supra*.

that TIH shippers and end users factor the costs of TIH transportation into their commercial decisions. This is normal economic behavior.

In addition, the shippers' "market interference" argument fails to take account of the fact that, wholly apart from the tariff provisions, TIH transportation does not occur in a free-market setting. The common carrier obligation prevents UP from adopting the obvious market solution to potential TIH losses – refusal to carry TIH. Moreover, rail transportation of TIH is not a free market because it is subject to rate regulation by the Board. In a free market, UP could raise its rates for TIH transportation to ensure that it would have adequate resources to cover the potential losses from TIH accidents. As UP has explained, the Board's rate methodology does not assure recovery of these costs. (UP Reply at 13-14.) Regulation dominates the TIH transportation market.

As Norfolk Southern has pointed out, carriers that are not subject to the common carrier obligation freely choose not to carry TIH, or they require shippers to indemnify them for all losses. (NS Op. at 25-27.) Thus, UP's tariff provisions correspond to the market-driven responses that occur in non-regulated markets. Indeed, rather than interfering with markets, the tariff provisions actually reflect an effort to bring TIH transportation closer to a market-based outcome, one in which costs are internalized and considered by TIH producers and end users when they make commercial decisions. Shippers criticize Professor Shavell's conclusion that the tariff provisions will help to produce a "socially desirable" level of TIH transportation, characterizing it as an "essentially academic" concept. (Interested Parties Reply at 11.) But Professor Shavell's point is fundamental to the operation of markets, *i.e.*, that the price paid by end users should reflect the costs of an activity. This is the point of UP's tariff provisions. By placing on shippers the responsibility for TIH liability that does not result from UP's negligence,

the provisions help to ensure that such costs are reflected in the price paid by end users of TIH.<sup>22</sup> No shipper has rebutted UP's showing that this is an appropriate outcome and that it constitutes evidence that the tariff provisions are reasonable.

As UP explained in its prior filings, including liability costs in prices charged to TIH end users should cause the end users voluntarily to reduce ton-miles of TIH transportation as the cost-benefit equation shifts. (UP Op. at 16-20 & Shavell V.S. at 11-15; UP Reply at 42-45.) This is the result one would expect to see in a properly operating market: it is an entirely appropriate outcome, consistent with good public policy. Indeed, "DOT encourages TIH materials 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)." (DOT Reply at 12).

CF Industries complains that it would be uneconomic to replace anhydrous ammonia with other fertilizers, predicting a series of calamities in the corn market if anhydrous ammonia were unavailable to farmers. (CF Industries Reply at 3-4.) But UP never suggested that no TIH should move by rail. Rather, UP wants shippers and receivers to take account of all the costs of using TIH, including potential losses arising from TIH rail transportation accidents. The cost-benefit equation will still lead TIH shippers to use rail transportation, but where the equation reflects all the relevant costs, shippers have a greater incentive to consider possible methods of reducing the overall ton-miles of rail transportation. The result is fully consistent

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<sup>22</sup> Dyno Nobel cites to archaic precedent from the early 20th century suggesting that rail rates should not be based on shipper demand. (Dyno Nobel Reply at 6-7.) This authority has no relevance today. Since 1980, when Congress enacted the Staggers Act, it has been accepted that rail rates should be a function of competition and demand. *See* 49 U.S.C. § 10101(1) (national rail policy is "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail").

with DOT's call to TIH materials shippers "to continue exploring ways to reduce TIH ton-miles." (DOT Reply at 12.)<sup>23</sup> By contrast, if TIH shippers continue to be insulated from the risks they create through their decisions to ship TIH when there are alternatives, then there will be socially excessive shipments of TIH. (UP Op., *Shavell V.S.* at 11-15.)

As discussed above, there is no basis for the suggestion that the Board lacks authority to find the tariff provisions reasonable because this would somehow control the market for TIH commodities. The Board clearly has authority to determine the reasonableness of tariff terms, and that is all UP is asking here. In any event, the tariff provisions do not "control" or interfere with TIH markets in any meaningful sense.

**E. The Tariff Provisions Create Appropriate Safety Incentives.**

UP explained that the tariff provisions will enhance the safety of TIH transportation by giving shippers an increased incentive to focus on liability costs associated with TIH movements in their decision-making processes. (UP Op. at 16-23; UP Reply at 41-45.) Shippers merely reinforce UP's point when they repeat the argument that UP should bear losses not caused by its own fault because it "controls" TIH shipments while they are on its lines. (CF

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<sup>23</sup> Dyno Nobel rejects as a "ruse" UP's suggestion that shippers could reduce risk by engaging in "product swaps," arguing that there are no practical alternatives to explosives and fertilizer made from anhydrous ammonia. (Dyno Nobel Reply at 5.) In fact, in using the term "product swap," UP was referring to a commercial transaction in which one TIH producer arranges for another producer located closer to supply the same product, thereby reducing the distance the TIH would be transported on UP. While such transactions may not be practical in every case, they will provide an alternative for some TIH movements. DOT plainly believes there are opportunities for shippers to reduce TIH ton-miles through "changing shipping patterns; co-location of plants at the end-user; and product substitutions." (DOT Reply at 12.) And, at least some TIH shippers share that view. *See, e.g.,* Written Statement of Dow Chemical at 2, *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1) (July 10, 2008) ("Dow recognizes the risks inherent in transporting hazardous materials and is continually designing and re-designing its supply chain to minimize those risks. This includes efforts to reduce or eliminate the shipment of highly hazardous materials.").

Industries Reply at 10, 12.) Of course, UP takes many steps to reduce the risks that are within its control and to foresee and minimize potential harm from acts of others or acts of God. But shippers, too, can take important steps that go beyond minimal compliance with federal safety regulations. Their insistence that UP controls everything about TIH transportation, and the Interested Parties' insistence that there are "no shipper actions that would reduce risks, other than declining to ship TIH products at all" (Interested Parties Reply at 11), support UP's judgment that many shippers need stronger incentives to contribute to risk reduction efforts.

Even putting aside shippers' basic decisions about how much TIH to ship and where to ship it, which they clearly control, a shipper can enhance the safety of TIH shipments in other important ways. An obvious example is upgrading its tank car fleet. (DOT Reply at 7-8 (describing rule governing newly constructed tank cars).) The potential for harm from a TIH accident depends in large part on whether there is a release of TIH from a tank car. All TIH shippers must comply with federal specifications for tank cars, but federal regulations establish only minimum requirements, and they provide transition periods for shippers to upgrade their tank car fleets. (UP Op., O'Brien V.S. at 6.) A shipper can choose to upgrade its fleet more quickly than federal regulations require, or to acquire tank cars that are stronger than required by federal specifications and thus less likely to rupture in the event of an accident.<sup>24</sup> It is disturbing, but very revealing, to see that shippers object to the tariff provisions on the grounds that the

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<sup>24</sup> U.S. Magnesium is one of the few shippers that provided evidence about safety measures it is taking in connection with TIH transportation. (U.S. Magnesium Reply, Kaplan R.V.S. at 2-3.) UP applauds all of the efforts U.S. Magnesium lists, as well as the priority the company places on the safety of its chlorine shipments more generally. However, U.S. Magnesium's list of safety measures reveals that the company is still in the process of upgrading its tank car fleet. (*Id.* at 3.) The additional incentive provided by the tariff provisions could lead U.S. Magnesium and other shippers to accelerate their schedules for upgrade of their tank car fleets, and it could also lead other TIH shippers to undertake some or more of the other safety-related activities U.S. Magnesium describes.

provisions would “forc[e] shippers to ‘factor the associated risks’” into their decisions to ship TIH. (Olin Reply at 8.)

Shippers complain that even if they “optimally sourced” TIH products, they would still be subject to the indemnity requirement. (Interested Parties Reply at 12; Dyno Nobel Reply at 6.) But they never explain why this is inappropriate. TIH materials are inherently dangerous commodities, presenting much greater potential for liability than any other shipments. Because shippers put these inherently dangerous materials on the rails, it is reasonable to require them to bear the risk of liability that UP may incur as a result of third party acts and acts of God. Absent the tariff provisions, UP would bear this risk, even when the railroad has done all it can to reduce risk and is not at fault. There is no good reason why UP should be the party that suffers the loss in these circumstances, or should pay more than its share of the losses based on its percentage of fault. Even where the shipper has taken some steps to reduce risk, the fact that the shipper is responsible for putting dangerous TIH on UP’s lines makes it reasonable for the risk to fall on the shipper to the extent UP is not negligent.

Contrary to the assertions of shippers, the tariff provisions will not reduce UP’s incentive to take safety measures. (Interested Parties Reply at 13.) As UP has explained, it has the strongest possible incentives to reduce risk for TIH shipments, and its incentives will not be affected by the indemnity requirement. (UP Op. at 22 & O’Brien V.S. at 10-11.) The disputed portion of the provisions relate to acts of third parties and acts of God; UP remains subject to liability for its own negligence. UP’s liability for its own negligence is an overwhelming incentive to take safety measures because UP faces potentially catastrophic liability for its own actions. UP also has strong incentives to avoid injuries to and death of its employees, the

disruption to its system operations that results from any TIH accident, and the destruction of good relations with the communities through which it operates.

These incentives have led UP to invest hundreds of millions of dollars in maintaining and upgrading its lines and equipment and in improving both its general safety practices and TIH-specific safety measures. (UP Op., Duren V.S. at 5.) UP will continue to have strong incentives to take these steps. UP is currently operating at record-high levels of safety.<sup>25</sup> UP's hope is that the tariff provisions will give shippers a greater incentive to work jointly with UP to undertake more effective initiatives to increase safety for TIH transportation.

**F. The Tariff Provisions Will Not Cause TIH Traffic to Shift to Truck.**

In its reply comments, DOT takes no position on the reasonableness of the tariff provisions – it recognizes the Board's authority to decide the issue – but it asks the Board to monitor any trends toward the shifting of TIH movements from rail to the highways. (DOT Reply at 3.) Significantly, DOT reports that it has “not seen evidence suggesting that TIH materials are moving from the railroads to the highways.” (*Id.*)<sup>26</sup> DOT is correct to prefer movement of TIH by rail to movement of TIH by truck. Rail is plainly a safer mode for transporting TIH. However, UP's tariff provisions will not cause TIH to divert from rail to truck.

Some of the strongest evidence that TIH shippers will not divert rail traffic to truck comes from their own statements in this proceeding: shippers claim they have no choice

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<sup>25</sup> See Comments of Union Pacific Railroad Company, Verified Statement of Lance M. Fritz at 7-9, *Competition in the Railroad Industry*, STB Ex Parte No. 705 (Apr. 12, 2011).

<sup>26</sup> The absence of any evidence of diversion from rail to truck is particularly significant in light the fact that UP introduced the indemnity provisions in 2009. The absence of such evidence is also telling in light of shipper claims of significant increases in rail rates for TIH in recent years. (*E.g.*, Canexus Op. at 4.)

but to ship by rail. CF Industries explains that trucking and highway infrastructure cannot replace rail, and “even if it could, moving fertilizer traffic from rail to highway is inefficient, risky, and inconsistent with the public interest.” (CF Industries Reply at 4.)<sup>27</sup> Moreover, as CF Industries notes, and DOT confirms, simple economics explains why truck cannot serve as an alternative to rail transportation of TIH: it “takes about four tank trucks to haul the amount of product that can be moved in a single rail tank car.” (DOT Reply at 6.)<sup>28</sup>

Moreover, even if shippers wanted to shift TIH movements to truck, they could not necessarily do so. Trucking companies have been wary of shipping TIH long distances.<sup>29</sup> Some trucking companies refuse to carry TIH.<sup>30</sup> In addition, as discussed above and elsewhere, the trucking companies that are willing to handle TIH require indemnifications similar to those in UP’s tariff provisions or terms even more favorable to the carrier. (UP Reply at 20, 47; NS Op. at 26-27.) Accordingly, TIH shippers could not avoid indemnification for TIH-related risks by

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<sup>27</sup> See also, e.g., *CF Indus., Inc. v. Koch Pipeline Co., L.P.*, 4 S.T.B. 637, 644 (2000) (“Because [anhydrous ammonia] may be transported only in specialized refrigeration or pressurization equipment by highly trained drivers, truck transportation of [anhydrous ammonia] is typically limited to short-haul movements from storage terminals to nearby retailers, and these short-haul movements cost as much, and at times more, than Koch’s long-haul pipeline movements.”). As UP pointed out on reply, UP transportation of TIH can be followed by truck movements when the ultimate receiver is not served by rail or receives quantities too small to move by rail.

<sup>28</sup> See also Lewis M. Branscomb et al., *Rail Transportation of Toxic Inhalation Hazards: Policy Responses to the Safety and Security Externality*, Belfer Center for Science and International Affairs, Harvard Kennedy School, Discussion Paper 2010-01, p. 5 (2010).

<sup>29</sup> See *id.* at 11.

<sup>30</sup> See NS Op. at 27. A number of other trucking companies decline to transport Class 2.3 poison gases, a category that includes chlorine and anhydrous ammonia. This includes US Xpress, Inc. (see [www.usxpress.com/en/Press-Room/~media/Files/Featured%20Documents/USX%202011%20Tariff.ashx](http://www.usxpress.com/en/Press-Room/~media/Files/Featured%20Documents/USX%202011%20Tariff.ashx) at p. 23); Averitt Express, Inc. (see [www.averittexpress.com/documents/avrt100.pdf](http://www.averittexpress.com/documents/avrt100.pdf) at p. 55); Central Freight Lines (see [www.centralfreight.com/portal/static/pdf/CENF100RulesTariff.pdf](http://www.centralfreight.com/portal/static/pdf/CENF100RulesTariff.pdf) at p. 32); and Celadon Trucking Services (see [www.celadontrucking.com/forms/tariffrules.pdf](http://www.celadontrucking.com/forms/tariffrules.pdf) at p. 14).

diverting their shipments to trucks – they would just be diverting traffic to a more costly, less efficient, less safe alternative. That would make no sense.

To the extent UP’s tariff provisions affect the overall level of TIH shipments, the likely effect will be that shippers will be encouraged to reduce TIH ton-miles through such DOT-recommended means as “changing shipping patterns; co-location of plants at the end-user; and product substitutions.” (DOT Reply at 12.) As UP has noted previously, such reductions in turn should reduce truck shipments of TIH, as well as rail shipments. (UP Reply at 47 & n.47.)

**G. The Tariff Provisions Are Consistent with the National Rail Policy.**

UP’s opening and reply argument and evidence demonstrated that the tariff provisions are consistent with the national rail policy. UP showed that the provisions promote safety by ensuring that all costs of TIH transportation are reflected in the price paid by end users, thereby giving shippers and end users incentives to request a socially desirable amount of TIH transportation. *See* 49 U.S.C. §§ 10101(8), 10101(11). Some shippers deny that they could do anything to make TIH transportation safer, but DOT appears to agree that safety benefits can be achieved by ensuring that the market reflects the true costs of transporting TIH when it urges the use of “market-based solutions to ease the liability exposure associated with rail movement of these materials.” (DOT Reply at 3.) DOT also appears to agree that safety and security risks will be reduced by encouraging “TIH materials 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 substitution).” (*Id.* at 12.)

UP has also explained that the tariff provisions are consistent with the national rail policy because they help to avoid cross-subsidy of TIH transportation by the rest of UP’s customers. *See* 49 U.S.C. §§ 10101(1), 10101(5), 10101(10). Through two rounds of evidence, no shipper has tried to explain why UP must attempt to spread the costs of TIH-related liabilities

associated with judgment-proof third parties and acts of God over all of its rail customers, rather than recover the costs directly from the shipper whose product was involved in an incident.

On this record, the Board should conclude that Items 50 and 60 are reasonable and fully consistent with the national rail policy.

### III. CONCLUSION

For the reasons discussed above and in UP's opening and reply argument and evidence, the Board should declare that UP may reasonably require, as a condition of providing common carrier service for TIH, that the TIH shipper accept responsibility for liabilities as set forth in Items 50 and 60 of Tariff 6607.

Respectfully submitted,



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March 26, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of March 2012, I caused a copy of the foregoing Rebuttal Argument and Evidence of Union Pacific Railroad Company to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in this proceeding.



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Michael L. Rosenthal



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3. Open "Playback Software"
4. Double click "RunPlayer.exe" (this may take a few moments)
5. Click "File" and then "Open Clip"
6. Select either video file to play



## VERIFICATION OF DIANE K. DUREN

I, Diane Duren, Vice President & General Manager - Chemicals for Union Pacific Railroad Company, declare under penalty of perjury that I have read Union Pacific's Rebuttal Argument and Evidence and that the statement regarding the volume of non-TIH materials listed in Tariff 6607 and the volume of hazardous materials transported by Union Pacific in 2011 is true and correct. I also declare under penalty of perjury that the statement regarding the tornado incident in Lawrence, Illinois is true and correct. Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed on March 23, 2012.

A handwritten signature in cursive script that reads "Diane K. Duren".

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Diane K. Duren