

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

UNION PACIFIC RAILROAD)	
COMPANY – PETITION FOR)	
DECLARATORY ORDER)	Finance Docket No. 35504
)	

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**REBUTTAL COMMENTS OF
DYNO NOBEL INC.**

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Dated: March 26, 2012

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Dyno Nobel Inc. (“DNI”) hereby submits the following Rebuttal Comments concerning the request of Union Pacific Railroad Company (“UP”) for a declaratory order regarding Items 50 and 60 of UP Tariff 6607, “General Rules for Movement of Toxic or Poison Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad” (“Indemnity Tariff”). For the reasons set forth in DNI’s Opening Comments and Reply Comments, and the further reasons set forth herein,¹ DNI respectfully submits that the Board should reject the dramatic, one-sided changes that UP seeks through its Indemnity Tariff, which involves a significant shift in carrier and shipper relations that would have substantial and far-reaching adverse consequences, involves matters beyond the Board’s area of responsibility and expertise, and would unreasonably interfere with remedies available under other applicable federal or state law.

¹ DNI also supports the Joint Rebuttal Comments of the American Chemistry Council, The Chlorine Institute, the Fertilizer Institute, and the National Industrial Transportation League being filed in this docket on this date.

A. The Need for the Imposition of UP's One-Sided Indemnification Terms Has Not Been Demonstrated

Despite the railroads' continuing claims that liability sharing does not occur and that TIH shippers "bear none of the consequences" of accident liability, that simply is not true. None of the railroads dispute that traditional indemnity arrangements existing under bilateral arrangements between railroads and shippers already create liability sharing.² Under, such arrangements, "generally each party has agreed to indemnify one another from and against liability resulting from acts or omissions of each party (*i.e.*, from each other's negligence), with liability in the event of any third party fault, joint negligence, etc. determined under governing negligence/tort law principles." *Id.* at 4.

As the U.S. Department of Transportation ("USDOT") notes, "the safety and security risks associated with the transportation of TIH materials will never be zero,"³ but safety has improved and accidents "have fallen dramatically," with the Department haven taken a number of actions in recent years to further reduce accident risks.⁴ In the few instances where there have been major accidents, in each instance the

² For example, the railroads have contended that an accident might occur as a result of a negligently sealed tankcar valve by a shipper. UP Opening Comments ("UP Op."), Verified Statement ("V.S.") Diane K. Duren at 3. However, the railroads are already fully covered against any associated liabilities under traditional, bilateral indemnification rules. *See* DNI Opening Comments ("DNI Op."), V.S. Sandy Rudolph ("V.S. Rudolph") at 4 (under the traditional arrangements "if a shipper has responsibility for and negligently seals a tankcar, which negligence leads to a cargo accident/spill en route, and liability is imposed on the involved railroad provider, then the shipper could be subject to an indemnity claim by the involved railroad").

³ Comments of U.S. Department of Transportation (filed Mar. 12, 2012) at 11-12 ("USDOT Comments").

⁴ *Id.* at 4.

cause of the accident was railroad fault, not shipper fault or other fault. *See* DNI Op. at 7-9. UP has not been able to cite any specific example demonstrating the need for its onerous Indemnity Tariff, and in the end is left merely asserting that “no shipper provides evidence showing the absence of a potential for such an accident.” UP Reply Comments (“UP Reply”) at 5. However, as DNI has explained, DNI has been in existence for 150 years, and has been moving TIH products by rail for 50 years or more, and the traditional, bi-lateral liability sharing arrangements that have been in effect between DNI and its rail transportation service providers have never created any major disputes or commercial service disruptions. *See* DNI Op., V.S. Rudolph at 5.

In the extremely rare instance where there has been an accident involving a TIH railcar, the railroads are already largely protected from such state common law tort liability (including discharge of hazardous materials) under the preemption provisions of the Federal Railroad Safety Act (at 49 U.S.C. § 20106) (“FRSA Preemption Provisions”), and also because of the need for any potential plaintiff bringing a common law tort claim to establish proximate causation in a negligence action. *See* DNI Op. at 4-5, DNI Reply Comments (“DNI Reply”) at 4. The U.S. Department of Transportation agrees:

In section 1528 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act; Pub. L. 110-53; 121 Stat. 266) Congress amended the preemption provision of 49 U.S.C. § 20106 to make clear that actions under State tort law seeking damages for personal injury, death, or property damages are permitted only in limited circumstances. Specifically, pursuant to amended section 20106, a railroad may be liable if it has violated (1) the Federal standard of care created by a safety regulation or order issued by the Secretary of Transportation or a security regulation or order issued by the Secretary of

DHS; (2) the terms of its own plan required to be created by a DOT or DHS regulation or order; or (3) a State law, regulation or order that is not incompatible with section 20106(a). *Accordingly, a railroad can minimize its liability exposure by ensuring better employee compliance with its own operating rules, as well as with DOT and DHS safety and security standards. As rail safety and security continues to improve as a result of Federal safety and security initiatives and the initiatives of the railroads themselves, the railroads' liability exposure associated with the movement of TIH materials will continue to decrease.*

USDOT Comments at 11-12 (emphasis added).

Additionally, UP and the other railroads' "product substitution" and similar assertions are baseless. Neither UP nor any other railroad has contested DNI's evidence that it moves TIH commodities (anhydrous ammonia) as a basic and essential raw material in the manufacture of industrial explosives and nitrogen fertilizers, which products have no practical alternatives; that DNI's manufacturing facilities are already strategically located (*e.g.*, DNI's largest manufacturing plant of mine explosives, in Cheyenne, Wyoming, is situated adjacent to the nearby Powder River Basin coal fields); and that DNI often must obtain its commodities from distant locations (*e.g.*, the Gulf Coast where most of the production of anhydrous ammonia is sourced). *See* DNI Op., V.S. Rudolph at 1-2.⁵

Shippers are not hoisting on the railroads any new or unfair demands to transport TIH products. TIH shippers already have ample incentives to minimize

⁵ *See also* USDOT Comments at 2, 5 ("TIH materials are essential to the economy and national health, rail movement of these materials is extremely safe, and diversion of TIH materials traffic from rail to other modes is not practicable," including because Gulf Coast ammonia pipelines "are already capacity constrained").

shipments (and shipment lengths) of TIH where feasible, reasonably site plants, and engage in product substitution of TIH products, where possible. See DNI Reply at 5-7. In fact, FRA and other industry experts have confirmed that TIH shipments, in terms of tons, ton miles, and average length of haul have all significantly decreased in the 10 most recent years of data available to DOT:



TIH Shipments (Source US Census Bureau)

Year	Tons (Thousands)	Ton Miles (Millions)	Average Length of haul (Miles)
2007	4005	2551	580
2002	6090	3226	549
1997	8868	6736	764

Mark Hartong, Rajni Goel and Duminda Wijesekera, Federal Railroad Administration, Howard University and George Mason University, *US Federal Regulatory Oversight of Rail Transportation of Toxic by Inhalation (TIH) Material* (2010) (citing USDOT/U.S. Department of Commerce Joint Commodity Flow Survey, Hazardous Materials, 2007, 2002, and 1997) (presentation *available at* <http://www.thei3p.org/docs/events/ifip2010/usfederalregulatoryoversightofrailtransportation-markhartong.pdf>).

USDOT has encouraged “shippers and railroads to work together to find market-based solutions to ease the liability exposure” associated with TIH movements by rail, which clearly they already have, rather than, in the railroads’ “quest to relieve

themselves of liability exposure . . . create a situation whereby more TIH materials traffic is moved via the highways.” USDOT Comments at 12, 3.⁶ UP’s Indemnity Tariff is unreasonable because it subjects shippers to unreasonable liability risk even where they undertake efforts to minimize TIH shipments or lengths of haul, shippers cannot obtain insurance to cover UP’s Indemnity Tariff, it “puts in serious jeopardy DNI’s ability to move an essential business commodity by rail,” and it thus “simply goes too far.” DNI Op., V.S. Rudolph at 7, 5.

B. UP’s Liability Contentions Are Without Foundation and Its Indemnity Tariff Otherwise Contravenes Controlling Federal and State Law

1. UP’s Federal Railroad Safety Act Contentions

UP contends that it is subject to significant liability where it is not at fault. UP Reply at 5-10. For example, UP states that under the FRSA Preemption Provisions, UP is liable in three instances where it (i) has “*failed to comply*” with federally imposed standards of care, (ii) has “*failed to comply*” with its own safety rules created pursuant to a federal regulation or order, or (iii) has “*failed to comply*” with limited state law where the federal safety rules do not cover the subject matter. UP Reply at 8 (emphasis added).

⁶ BNSF Railway Company (“BNSF”) has already asserted that the associated increased costs of Congressional mandates on Positive Train Control can be expected to be passed on to shippers, and “shippers could reasonably be expected to adapt to increases in the relative cost of rail by shifting freight to other less-safe and less-green modes of transportation” that are “contrary to stated government policies” encouraging “more freight and people off of the nation’s highways and onto rail.” Statement of Mark Schulze, Vice President – Safety, Training and Operations Support, BNSF Railway Company, Docket No. FRA-2008-0132, Positive Train Control Systems (hearing testimony dated Aug. 13, 2009). UP’s Indemnification Tariff presents the prospect of substantial additional costs being imposed on TIH shippers (*e.g.*, massive new insurance costs) (See DNI Op., V.S. Rudolph at 6), and these increased costs have not been disputed by UP or any other railroad.

UP's incredible suggestion that it wants the Board, through the issuance of a declaratory order, to assist UP in its attempts to overcome what it considers to be onerous standards imposed by Congress under FRSA and impose on shippers liability, even in instances where UP has "failed to comply" with established standards, are illuminating and absurd. As USDOT has correctly stated:

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 obligation to transport TIH materials or cap the railroads' liability for transportation incidents involving the movement of TIH materials.* Instead, Congress has chosen to pass legislation that directs DOT and the Department of Homeland Security ("DHS") to safeguard the public from the safety and security risks posed by the rail movement of TIH materials shipments, and that provides protection to railroads against tort suits when they comply with the Federal standards.

USDOT Comments at 10 (emphasis added).⁷

2. UP's Strict Liability Contentions
 - a. State Law Strict Liability

UP asserts that it is subject to strict liability for the carriage of TIH commodities under the "decisions of several states." However, the courts have rejected the doctrine of absolute liability for the movement of TIH or other chemicals. And even

⁷ USDOT has further verified that "FRA promulgates and enforces a comprehensive regulatory program in accordance with the Federal railroad safety laws" and that "FRA's rail safety regulations target the causes of train accidents which can potentially lead to the breach of a rail car transporting hazardous materials." *Id.* at 9. If UP is found in violation of these standards, it is not the place of the UP, or the Board, through approval of the Indemnity Tariff, to attempt to dictate liability on railroad customers.

if such a case could be brought, a shipper is just as likely as a railroad to be subject to a suit for strict liability. This matter was considered in the decision of the United States Court of Appeals for the Seventh Circuit (authored by Judge Posner) in *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990) (“*Indiana Harbor*”).

In *Indiana Harbor*, the court considered *shipper* liability for the consequences of a railcar spill of the chemical acrylonitrile, which occurred near Chicago when a tankcar spilled en route to the defendant’s manufacturing plant in New Jersey, after the bottom outlet of the railcar was broken. Applying the *Restatement (Second) of Torts* § 520 governing the general legal standards employed when assessing strict liability, the Seventh Circuit explained that the relevant inquiry is whether the chemical is so dangerous that its transportation constituted an abnormally dangerous activity warranting the imposition of strict liability. *Indiana Harbor*, 916 F.2d at 1181. The court determined that the danger of a chemical spill is negligible if the tankcar is properly maintained, and thus, “there is no compelling reason to move to a regime of strict liability, especially one that might embrace all other hazardous materials shipped by rail as well.” *Id.* at 1179. The court concluded that “[a]ccidents that are due to a lack of care can be prevented by taking care; and when a lack of care can . . . be shown in court, such accidents are adequately deterred by the threat of liability for negligence.” *Id.*

UP conveniently ignores the prominent *Indiana Harbor* decision and the decisions since then that have followed Judge Posner’s reasoning.⁸

⁸ See, e.g., *Toledo v. Van Waters & Rogers, Inc.*, 92 F. Supp. 2d 44, 56 (D.R.I. 2000) (transportation of highly hazardous materials “is common with companies . . .

b. CERCLA Strict Liability

UP asserts that it is sometimes subject to liability under CERCLA⁹ and its Indemnity Tariff is necessary to help it overcome possible massive CERCLA liability costs in the event there is a TIH spill where UP is not at fault (*e.g.*, in the event of a terrorist attack) but where UP is still subject to liability. UP Reply at 8.

However, under CERCLA, while responsible parties are potentially liable for discharge cleanup and restoration activities¹⁰ and those costs could be substantial, responsible parties are not subject to personal injury claims, private property damage claims, or other consequential damages, which are the predominant types of damages cited by UP and other railroads that would comprise a multibillion dollar loss resulting from a major terrorist incident in a major city.¹¹ Even if UP could establish that liabilities

[and] performed daily across this country” and therefore “cannot be considered an ultra-hazardous activity”); *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F.Supp. 1476, 1489 (N.D. Ala. 1995) (same); *Amcast Indus. Corp. v. Detrex Corp.*, 779 F.Supp. 1519, 1544 (N.D. Ind. 1991) *aff’d in part, rev’d on other grounds*, 2 F.3d 746 (7th Cir. 1993) (same).

⁹ Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*

¹⁰ *See* 42 U.S.C. § 9607(a).

¹¹ For example, in the 2004 Macdona, TX TIH railroad accident involving UP, the National Transportation Safety Board found UP at fault for failing to stop at a stop signal (*see* DNI Op. at 7-9). That incident involved a major tankcar breach of chlorine, but ultimately produced only \$150,000 in environmental cleanup costs according to UP-provided estimates. National Transportation Safety Board, Railroad Accident Report, *Collision of Union Pacific Railroad Train MHOTU-23 with BNSF Railway Company Train MEAP-TUL-126-D with Subsequent Derailment and Hazardous Materials Release, Macdona, Texas* (June 28, 2004) at 11. Nowhere on the record has UP or any other railroad attempted to quantify possible CERCLA liability costs imposed by the Federal Government in the event of a TIH railcar discharge incident, or a railroad’s ability to insure against such costs.

established by Congress under CERCLA subject UP to unfair, onerous, or “bet the business” clean-up liability costs, which it has not, that is a matter for Congress and not the UP or the Board to consider changing.

In any event, the UP Indemnification Tariff is still unreasonable because it unreasonably intrudes on Congressionally-imposed CERCLA mandates. UP asserts that no statutory conflict occurs because UP’s Indemnity Tariff “will affect only the rights or remedies of UP and a TIH shipper with respect to each other” after liability is imposed by the government. UP Reply at 15-16. UP’s statutory conflict assertions are wrong.

CERCLA expressly and comprehensively governs contribution between potentially responsible parties. CERCLA, under Section 107, authorizes certain indemnification between private parties to occur, but this authority is granted *only* where the parties have voluntarily entered into “*agreement[s]* to insure, hold harmless or indemnify a party to such *agreement* for any liability under this section.”¹² There is no such private agreement here¹³ under UP’s Indemnification Tariff, which Tariff is the antithesis of a private agreement.¹⁴

¹² 42 U.S.C. § 9607(e)(1) (emphasis added).

¹³ UP does not appear to dispute this fact. *See* UP Reply at 17 (stating that contribution or indemnity agreements are available under the statute where the parties enter into “private indemnity agreements”).

¹⁴ The context the courts look to in deciding whether there is an adequate indemnification agreement is state principles of release and contract law, including whether the parties knowingly, evenhandedly, and for valid consideration entered into an indemnification arrangement. *See, e.g., Beazer East Inc. v. Mead Corp.*, 34 F.3d 206 (3d Cir. 1994). By definition, UP’s Indemnity Tariff is not an agreement involving the mutual intent of the parties, UP does not dispute that there is a lack mutuality under the indemnification terms of the Tariff, and any Board decision upholding the UP Indemnity

Also, in the lack of an explicit private agreement between parties on contribution/indemnification, CERCLA still fully governs, and establishes the contribution standards to apply. As part of the 1986 Superfund Amendments and Reauthorization Act, Congress added an express contribution provision under Section 113, specifically labeled “Contribution” – clarifying the parameters under which a responsible party may seek contribution from another.¹⁵

Under CERCLA Section 113(f), any jointly and severally liable responsible party may seek contribution from others.¹⁶ In resolving contribution claims, Section 113(f)(1) instructs courts to “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”¹⁷ Also, this Section provides that any person who has resolved its liability to the government in an approved settlement “shall not be liable for claims for contribution regarding matters addressed in the settlement.”¹⁸ Thus, Congress has unambiguously provided for a comparative fault responsibility model under CERCLA, with equitable factors governing responsibility, and declaring that claims for contribution regarding matters addressed in a settlement shall not be recoverable. By creating a contribution provision that dramatically departs

Tariff would not conflate the Tariff into a private agreement between parties that could satisfy governing state release and contract law that might be deemed acceptable under Section 107 of CERCLA.

¹⁵ 42 U.S.C. § 9613

¹⁶ *Id.*

¹⁷ *Id.* at § 9613(f)(1).

¹⁸ *Id.* at § 9613(f)(2). UP states on Reply that it seeks, through its Indemnification Tariff, to override laws extinguishing the right to contribution where there is a settlement. UP Reply at 7 n.8; *see also* UP Indemnification Tariff, Item 60-D.

from and directly contravenes CERCLA's explicit contribution provisions, UP's Indemnity Tariff must fail.¹⁹

C. The Board Has No Authority to End Run State Statutory and Common Law Affecting Liability Allocations

UP confirms on Reply that a principal purpose of its Indemnity Tariff (and its efforts to obtain a Board Decision upholding that Tariff) is to provide UP with a vehicle to attempt to override liability and contribution assignments established under state statutes. *See* UP Reply at 8 and Reply Exh. A. UP cites the laws of 13 states (consisting of one-half of the states in which UP operates) which UP contends could subject it to losses beyond its level of fault or on a strict liability basis. *Id.* UP asserts that, if the Board grants its declaratory order petition, then any state court "must defer to the Board's determination regarding the reasonableness of the tariff provisions" and that the determination by the Board "should be sufficient to preempt any state law that might otherwise be asserted as a basis for voiding the indemnity requirement on public policy grounds." UP Reply at 23; *see also id.* at 21 ("[t]he prediction that such a ruling would preempt state law is likely correct").

UP's assertion on the one hand that "[t]here is no basis for the shippers' suggestion that a determination that the provisions are reasonable would create a conflict with other laws" (UP Reply at 23) and on the other hand that the Board should by

¹⁹ UP also states that the "Act of God" defense under CERCLA is not sufficient to protect UP, because the provision, according to UP, has not generally been successfully asserted against a CERCLA claim. UP Reply at 9. However, even if UP's assertions were correct, which DNI is not conceding, it is still not the proper place of UP through its Indemnification Tariff, or the Board through a decision upholding that Tariff, to attempt to override Congressionally established CERCLA defenses.

administrative decision, assist UP in attempting to override the competent governing statutes of 13 states in an area where the Board has no authority or administrative expertise, is illogical. As DNI set forth in its Reply, The Board has no authority to end run state common law and competent governing statutes and assign liability to shippers where the law and legislators have already assigned responsibility to carriers. DNI Reply at 7-8.

The sole authority UP cites for its dramatic and sweeping state law preemption proposition is case law authority addressing inapposite federal law authorizing Amtrak to enter into liability-shifting agreements with other railroads for the movement of passenger rail service. *See* UP Reply at 23 (citing case law addressing the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, section 161(a) (currently codified at 49 U.S.C. § 28103) (“Amtrak Reform Act”). However, the Amtrak Reform Act does not apply to freight railroad service, the ICC Termination Act (“ICCTA”) does, and ICCTA clearly does not authorize such liability shifting arrangements.²⁰ Moreover, even in the case of Amtrak, the law provides only that “a provider of rail passenger transportation may enter into contracts that allocate financial

²⁰ The only provision in ICCTA addressing such liability arrangements is the Carmack Amendment (49 U.S.C. § 11706), which addresses liability for loss and damage to goods in transit, and which expressly assigns primary liability for the full value of such loss or damage on the railroads. Congress’ passage of the Carmack Amendment, first implemented in 1906, and reauthorized numerous times since then, and its passage of the Amtrak Reform Act, evidences that Congress knows full-well how to enact liability-sharing arrangements if it so chooses, but in this instance with respect to freight rail service of TIH shipments, Congress has declined to do so.

responsibility for claims.” 49 U.S.C. § 28103(b).²¹ Thus, even under the Amtrak Reform Act, a bilateral agreement between Amtrak and another carrier on indemnification is required.²²

UP further contends that its Indemnity Tariff does not violate state law “because the provisions were written to be enforceable under state laws, which allow such indemnification terms.” UP Reply at 21. But all the examples UP cites are to state laws authorizing bilateral, private agreements. UP’s Indemnity Tariff clearly is not the product of such an agreement as has been clearly demonstrated in this proceeding.

Indemnity provisions are the product of release and contract law governed by the states, whereby one party agrees to protect the other party against loss or damages it may sustain in connection with the agreement. A fundamental principal of contract law

²¹ The Second Circuit has held that 49 U.S.C. § 28103(b) may preempt a state statute prohibiting agreements that indemnify a party for its own negligence. *See O&G Indus., Inc. v. Nat’l R.R. Passenger Corp.*, 537 F.3d 153, 163 (2nd Cir. 2008). However, that decision has no applicability here, and the court in that case clearly did not seek to address the ability of a federal agency, through an administrative decision devoid of explicit statutory authority, and absent a negotiated bilateral agreement between private parties, to override state law addressing indemnification.

²² Under the Amtrak Reform Act, the Board does have the authority to prescribe reasonable terms and compensation for use of facilities and provision of service by Amtrak in prescribed circumstances where the parties cannot reach agreement on use of facilities (49 U.S.C. § 24308(a)(2)), however, the Board has never adopted any standard indemnification agreement to apply broadly to all railroads and Amtrak. In fact, under this provision (formerly 45 U.S.C. §562(a)), the agency has rejected attempts to require Amtrak to fully indemnify the host railroad over which Amtrak operates “for all casualty losses except casualties sustained by . . . employees and property where [the host railroad] is solely negligent,” holding that “Amtrak will have to purchase insurance to protect against this type of loss,” and that “[t]his is not a just allocation.” *Minn. Transfer Ry. Co. Ordered to Provide Services, Tracks, and Facilities for the Operations of Trains of the Nat’l R.R. Passenger Corp. and the Establishment of Just and Reasonable Compensation for Such Services, Tracks and Facilities*, 354 I.C.C. 769, 771 (1978).

is that a contract is based on the manifestation of the mutual assent of the parties. *See* 1 Arthur L. Corbin, *Corbin on Contracts* § 12 at 27 (1963). UP’s Indemnification Tariff is not the result of the mutual assent of the involved parties, and any Board decision addressing the Tariff would not somehow conflate UP’s Indemnity Tariff into a bilateral, mutual agreement.²³

Additionally, even if a contract were involved here, which is not the case, the courts have consistently rejected efforts by the STB to attempt to assert jurisdiction over freight rail contracts. *See, e.g., Kansas Power & Light Co. v. Burlington N. R.R.*, 740 F.2d 780 (10th Cir. 1984) (“the courts, not the ICC, . . . [are] the appropriate forum for determining the existence of an enforceable contract”). As the Board has clarified, “a dispute over liability for a derailment [is] an area as to which we have very little expertise and limited authority” and that a “dispute founded primarily on claims of breach of contract and tortious actions [are matters where] the courts are the appropriate forum to resolve [such a] dispute.” *See Boston & Maine Corp. v. New England Cent. R.R.*, STB Finance Docket No. 34612 (STB served Feb. 24, 2005).²⁴

²³ As UP itself has strongly asserted in previous filings to the Board, “it is the parties’ intent, not the elements contained in a pricing document, that determines whether the document establishes common carrier rates or contract rates.” Comments of UP, STB Ex Parte No. 669, *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, (filed June 4, 2007) at 5.

²⁴ Moreover, a predicate for a claim of contribution is that two or more persons are liable to the same plaintiff for the same harm, and “[n]o tortfeasor can be required to make contribution beyond its own equitable share.” *See* Restatement (Second) of Torts § 886A(1), (3) (1979). Here, the UP Indemnification Tariff seeks to hold a large class of non-tortfeasor TIH shippers to make contributions well beyond their own equitable share.

D. UP's Attempted Recoupment of Litigation Expenses
Contravenes the American Rule and Federal Law

UP contends that it is not unfair to require a TIH shipper to pay UP's litigation costs under its Indemnification Tariff, asserting that "the responsibility to pay litigation costs and fees can be shifted by statute or contract." UP Reply at 30. However, as described above, there is no such bilaterally agreed upon private agreement involved here, and any such attempted transfer of costs stands against the universally recognized "American Rule" regularly invoked by courts in declining to award legal costs.

As the Supreme Court has instructed, attorney fees generally are not a recoverable cost of litigation "absent explicit congressional authorization." *Runyon v. McCrary*, 427 U.S. 160, 185 (1976). For example, the Court has specifically held that CERCLA does not authorize private plaintiffs to recover their attorney fees or other litigation costs. *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). In the same respect, ICCTA contains no attorney fee/litigation cost recovery provision, and UP cites no instance where the STB (or the Interstate Commerce Commission) has sought to provide for the recoupment of litigation costs as a general rule to be applied across the board to any group of agency stakeholders. UP's Indemnity Tariff contravenes this controlling authority and its declaratory order petition attempts to entice the Board, by administrative decision, to assist UP in its efforts to override CERCLA and ICCTA, which statutes do not authorize the award of litigation expenses.

CONCLUSION

For the reasons set forth in DNI's Opening Comments, Reply Comments, and Rebuttal Comments, UP's Indemnity Tariff is clearly unreasonable and contrary to the public interest, and should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this 26th day of March, 2012, I have caused copies of the forgoing to be served via first-class mail, postage prepaid, or by more expeditious means, upon all parties of record to this proceeding.



Peter A. Pfohl