

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35504

RESPONSE OF OLIN CORPORATION

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As the party seeking a declaratory order, UP bears the burden of presenting evidence to establish the reasonableness of the indemnity provisions in its 6607 tariff. Because UP has failed to meet its burden, the Board should deny UP's petition by declaring that the indemnity provisions of UP Tariff 6607 are unreasonable.¹

ARGUMENT

I. UP has failed to produce any evidence that railroads need, or are entitled to, unilaterally imposed indemnity terms for shipments of TIH materials; therefore, the indemnity provisions are unreasonable.

No evidence has been produced to support the proposition that a railroad could face staggering liability when it had no fault. UP alleges that certain court decisions “*suggest* that a common carrier *might* be held strictly liable for damage associated with its carriage of TIH”²; however, all of the cases cited by UP involve combustible materials that have the potential to destroy evidence of negligence.³ Further, strict liability is only imposed when the risks of the activity at issue cannot be effectively mitigated.⁴ As courts have held, the risks associated with

¹ Some parties to this proceeding, such as AAR and NS, continue to emphasize that they take no position on the specific terms of UP's tariff and instead are seeking some type of broad policy statement by the Board regarding the reasonableness of indemnity terms or “liability sharing arrangements” in general. *See e.g.* AAR Reply p. 3, NS Reply p. 8. UP, on the other hand, has correctly stated that this proceeding is limited to the reasonableness of the specific terms of its 6607 tariff. *See* UP Reply p. 4. The Board should reject efforts to broaden the scope of this proceeding beyond the terms of the 6607 tariff.

² UP Reply p. 9 (emphasis added).

³ *Id.*

⁴ *See* Olin Reply pp. 5-6 (citing cases).

transporting TIH materials can be effectively mitigated through reasonable cautionary measures.⁵ The DOT has reached the same conclusion in this proceeding: “the comprehensive federal regulatory framework applicable to rail transportation of hazardous materials, including TIH materials, *effectively mitigates safety and security risks.*”⁶ Thus, UP has offered no evidence that a railroad could be held strictly liable for staggering liabilities when it had no fault.

Likewise, UP has failed to present evidence that it does not already receive adequate protection from liability when it is without fault through federal preemption and defenses under environmental statutes. As noted by the DOT, there is a comprehensive federal regulatory framework that is specifically designed to mitigate risks associated with transportation of TIH materials.⁷ The DOT also notes that Congress has not ignored railroads’ concerns regarding liability, but has acted purposefully to enact various rules and regulations that protect the railroads in appropriate circumstances.⁸ Statements by the railroads that they have been unable to meet these defenses in certain circumstances do not provide any evidence that such protections are unavailable or inadequate; rather, these statements only show that the railroads disagree with the decisions made by elected public officials relating to when a railroad should be insulated from liability.

Finally, in addition to the protections included in existing laws, UP can negotiate additional terms by entering private contracts with shippers. Such negotiations, where each party receives value in return for compromise, are part of the ordinary course of business. UP has not contested this option; in fact, it has stated that a significant percentage of its movements are made under such private contracts.

⁵ See Olin Reply pp. 5-6.

⁶ DOT Comments p. 6 (emphasis added).

⁷ DOT Comments pp. 2-3.

⁸ See DOT Comments pp. 6-11 (explaining regulatory framework put into place by Congress).

In sum, UP has failed to produce any evidence that railroads need, or are entitled to, unilaterally imposed indemnity terms. Olin respectfully submits that it is beyond the province of the Board to approve of unilaterally imposed indemnity terms, which could have detrimental and unexpected effects. For these reasons, the Board should deny UP's petition by declaring that the indemnity provisions of the 6607 tariff are unreasonable.

II. The UP indemnity provisions are simply a pathway for the railroads to circumvent the common carrier obligation.

As recognized by the DOT in this proceeding, Congress is aware of the risks involved in shipping TIH and has rejected repeated attempts by the railroads to avoid the common carrier obligation.⁹ It seems clear that the UP 6607 tariff is simply another attempt to achieve what Congress has not permitted. As Olin has noted, the 6607 tariff provides for specific insurance requirements in Item 85-A.¹⁰ By unilaterally imposing increasing insurance requirements or other financial obligations on shippers, railroads could effectively circumvent the common carrier obligation. Further, onerous conditions to rail transportation raise the concern that shipments may be shifted to the highways, an outcome that the DOT strongly warns against.¹¹

In addition to allowing railroads to circumvent the common carrier obligation, Board approval of UP's indemnity terms would take away from carefully crafted laws and policies that balance liability and the public good. The DOT has provided a detailed description of many measures that Congress has taken to protect railroads in appropriate circumstances.¹² Regarding these protective measures, the DOT has stated:

Accordingly, a railroad can minimize its liability exposure by ensuring employee compliance with its own operating rules, as with DOT and DHS safety and security standards. As rail safety and security continues to improve as a result of

⁹ DOT Comments p. 10.

¹⁰ Olin Reply pp. 8-11.

¹¹ DOT Comments pp. 4-6.

¹² DOT Comments pp. 7-12.

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.¹³

These comments by the DOT are consistent with Olin's conclusion that Congress has not ignored the railroads' concerns, but has responded to them in a manner that Congress feels adequately balances liability against the public good. UP has provided no evidence to the contrary and appears only to disagree with the balance that has been struck. As such, UP has failed to meet its burden and its petition should be denied

III. UP has failed to produce any evidence that the indemnity terms are tailored to meet the purported justifications for the 6607 tariff.

As Olin has extensively discussed in this proceeding, the plain language of the tariff states that the shipper is liable for "any and all liabilities" other than those caused by the railroad.¹⁴ In its Reply, UP attempts to backtrack on this overbroad drafting by arguing that an implied causation condition exists when the indemnity provisions are "[c]onstrued in the context of the tariff as a whole."¹⁵ In making this argument, UP does not actually cite to any part of the tariff outside of the indemnity provisions except to the title, "Movement of Toxic or Poison Inhalation Commodity Shipments." As the "Interested Parties" have noted, this title cannot be relied on for guidance as the tariff actually applies to numerous non-TIH substances.¹⁶ Given the controversy that exists over the proposed indemnity terms, and the scope of liabilities they impose, it would be inherently unfair for the Board to approve a vague provision that depends upon implied limitations that may or may not exist. Such vague terms also fail to provide sufficient notice to shippers of the terms of carriage. If there are limitations to the indemnity obligations, the tariff should clearly state what such limitations are. For this reason alone, the

¹³ DOT Comments pp. 11-12.

¹⁴ Olin Opening Argument pp. 13-17; Olin Reply pp. 11-18.

¹⁵ UP Reply p. 28.

¹⁶ Joint Comments of ACC, CI, TFI and NITL pp. 2-4.

Board should deny UP's petition.

IV. UP's arguments relating to the history of the tariff and the enforceability of indemnity provisions are irrelevant because Olin does not agree to the terms that UP is attempting to impose through its unilateral tariff.

There is no agreement between UP and Olin regarding the indemnity terms of the 6607 tariff. To the contrary, Olin vigorously opposes the indemnity terms for the reasons it has discussed in this proceeding. In attempting to legitimize the indemnity provisions, however, UP continues to portray its tariff provisions as stemming from settlement of a lawsuit that *Olin was not involved in*.¹⁷ As non-parties, Olin and the Board are not bound in any way to any alleged agreement. Further, parties may make concessions for a variety of reasons in a settlement that they would not make in other contexts.¹⁸ For these reasons, any purported history provided by UP is irrelevant to the reasonableness of the 6607 indemnity provisions.

Likewise, UP's arguments relating to the enforceability of indemnity provisions is irrelevant because such arguments are predicated on the false assumption that there has been an agreement on indemnity terms. Not a single case cited by UP holds that a unilateral indemnity agreement is enforceable when it imposes unequal terms against the will of the indemnitor. Further, although UP recognizes that CERCLA authorizes indemnification, UP fails to recognize that this exception requires for there to be an *agreement* between the parties. In fact, the CERCLA provision that UP cites uses the word *agreement* three times to qualify when indemnity provisions are permitted.¹⁹ There has been no agreement between UP and Olin regarding the 6607 indemnity terms; therefore, cases and statutes permitting indemnity agreements are irrelevant and provide no evidence in support of UP's petition.

¹⁷ In its Reply, UP has even gone so far as to attach selected excerpts of communications relating to the settlement.

¹⁸ It appears to Olin that the logical course of action for a railroad that settles a dispute relating to a tariff would be to reach a contract agreement with a shipper outside of the Board's review. If either party believed the terms of settlement were being violated, the aggrieved party could bring an action for breach of contract.

¹⁹ UP Reply p. 17 (citing 42 U.S.C. § 9607(e)(1)).

CONCLUSION

UP has failed to submit any evidence to support its purported justification that a railroad can be held liable for staggering or insurmountable liabilities when it had no fault. Likewise, UP has not presented any evidence that the terms of its 6607 tariff are even tailored to meet this purported justification. Given the previous attempts by the railroads to avoid the common carrier obligation, which the DOT has recognized in this proceeding, it is not hard to see the potential effect, if not the intent, of the 6607 tariff is to circumvent the common carrier obligation by imposing sweeping indemnity obligations on shippers and requiring backing by way of insurance for such obligations. Legislative and judicial bodies, including Congress, have purposefully acted in addressing issues of liability and have balanced such issues against the public good. UP should not be permitted to second guess these determinations through imposing a tariff that shippers, such as Olin, strongly oppose. For these reasons, Olin respectfully requests for the Board to deny UP's petition by declaring the 6607 indemnity terms are unreasonable.

Respectfully submitted on behalf of the Olin Corporation by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2012, I caused a copy of the foregoing document to be served on all Parties of Record in this proceeding.

/s/ Gregory M. Leitner
Gregory M. Leitner, Esq.