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March 26, 2012
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Public Record

Re: Union Pacific R.R. – Petition for Declaratory Order –
Finance Docket No. 35504

Dear Ms. Brown:

Enclosed for electronic filing in the above-referenced docket is the Rebuttal Evidence and Argument of Norfolk Southern Railway Company.

Thank you for your assistance.

Sincerely,


David L. Meyer

Attachment

cc (with attachment): David L. Coleman, Esq.
John M. Scheib, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35504

UNION PACIFIC R.R. – PETITION FOR DECLARATORY ORDER

**REBUTTAL EVIDENCE AND ARGUMENT
OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: March 26, 2012

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**REBUTTAL EVIDENCE AND ARGUMENT
OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company (“NS”) submits this Rebuttal Evidence and Argument in support of a declaration that the UP tariff provisions at issue in this proceeding are reasonable.

INTRODUCTION

This case is about indemnification in the unique context of TIH transportation, nothing else. Indemnification does not impose on shippers any risks other than those that flow directly from the inherent chemical composition of their commodities and their own shipping decisions. Indemnification also does not result in overcompensation to railroads because shippers retain their ability to challenge the transportation rate. These facts alone establish the reasonableness of indemnification provisions that, like UP’s, exclude liabilities caused by railroad negligence.

But there is a further reason why indemnification is not merely reasonable but quite important. The reply comments of shippers and shipper groups reveal that the TIH shippers who make the decision to send TIH shipments onto the Nation’s rail network do not believe that the catastrophic risks posed by such shipments are anything to worry about, and if they are they can easily be avoided if only railroads would just be careful. The record is to the

contrary. As the Department of Transportation confirms, the risks of a deadly TIH release cannot be reduced to zero no matter how much care is taken when TIH commodities are transported. The risk of a disaster remains, and as a result, manufacturers and consumers of those chemicals should have incentives to take socially-optimal steps uniquely within their control “to reduce TIH ton-miles (such as changing shipping patterns; co-location of plants at end user; and product substitutions).”¹ UP’s indemnification provisions establish precisely such incentives, making them not merely reasonable but socially desirable.

I. MOST OF THE ESSENTIAL FACTS ESTABLISHING THE REASONABLENESS OF UP’S INDEMNITY PROVISIONS ARE NOT SERIOUSLY DISPUTED

The opening and reply comments in this proceeding have generated a record establishing many facts that are not seriously disputed, and that together show the reasonableness of UP’s indemnification approach.

A. TIH Commodities Pose Unique and Serious Risks

First, notwithstanding some quibbling, there is no question that TIH commodities are inherently dangerous because of their chemical composition. Those commodities have been used as weapons of war by releasing them in proximity to humans in much the same way that a ruptured railroad tank car would release them following an accident or terror attack.

Although CF Industries regards this as “incredible,”² it is nothing short of established fact.³

¹ Comments of the U.S. Department of Transportation, Finance Docket No. 35504 (filed Mar. 12, 2012) (“DOT Comments”) at 12.

² CF Industries, Inc.’s Reply Brief, Finance Docket No. 33504 (filed Mar. 12, 2012) (“CF Reply”) at 2.

³ See Reply Evidence and Argument of Norfolk Southern Ry., Finance Docket No. 35504 (filed Mar. 12, 2012) (“NS Reply”) at 8-10; Reply Comments of the Association of American Railroads, Finance Docket No. 35504 (filed Mar. 12, 2012) (“AAR Reply”) at 5-7; Reply Evidence and Argument of Union Pacific R.R., Finance Docket No. 35504 (filed Mar. 12, 2012) (“UP Reply”) at 5-6; Opening Evidence and Argument of Norfolk Southern Ry., Finance Docket No. 35504 (filed

(footnote continued on next page...)

As the Department of Transportation explains, “shipments of hazardous material by rail frequently move through densely populated or environmentally sensitive areas where consequences of an incident could be considerable loss of life.” DOT Comments at 6-7. Safety regulation, and railroads’ own care in transporting TIH materials, at most can “reduce railroad liability exposure,” not erase it. DOT Comments at 12.

Railroads are not making this up. The dangers of TIH commodities are unique, and warrant action by railroads not merely to exercise care when transporting them, but also to address the residual non-zero risks they pose for society and the railroads’ own existence whenever shippers demand that TIH commodities move by rail. *See* DOT Comments at 12.⁴

B. Railroads May Not Decline to Provide TIH Transportation When Demanded

Second, there is no dispute in this proceeding that railroads may not refuse to transport TIH commodities based on the argument that “TIH is too dangerous to transport.” CF Industries Reply at 4. Instead, as the Board ruled in *Union Pacific R.R. — Petition for Declaratory Order*, Finance Docket No. 35219 (served June 11, 2009), railroads have a common carrier obligation to transport TIH chemicals on demand regardless of the availability of lower-risk transportation or supply-chain alternatives. The Board’s

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Jan. 25, 2012) (“NS Opening”) at 13-14 & n.5; Comments of Canadian Pacific Ry., Finance Docket No. 35504 (filed Jan. 25, 2012) (“CP Opening”) at 3; Opening Argument and Evidence of Union Pacific R.R., Finance Docket No. 35504 (filed Jan. 25, 2012) (“UP Opening”), Duren V.S. at 3-5.

⁴ Olin’s contention that there is nothing about TIH chemicals that makes them “more likely than other materials to be released in the event of a derailment or other rail incident” is both irrelevant and obviously incorrect. *See* Reply of Olin Corp., Finance Docket No. 33504 (filed Mar. 12, 2012) (“Olin Reply”) at 14. First, it is the consequence of a release that makes TIH chemicals uniquely lethal. Second, it is also certain that TIH chemicals pose special risks of being released; nobody fears that a terrorist will target a flatcar carrying lumber, a gondola carrying scrap steel, or a hopper carrying coal. Tank cars carrying TIH chemicals, however, are attractive targets of terrorist attention because of the lethal consequences of a release. *See* NS Reply at 9 & n.9.

interpretation of that obligation empowers shippers to create risks through their shipping decisions that the railroads may not decline to accept. Under these circumstances, indemnification is imminently reasonable as a way of allocating a portion of those same risks to the party whose decisions create them,⁵ and in the process also providing incentives for shippers to take those risks into account so that they make socially-optimal shipping decisions.

Perhaps because they recognize the absence of any good arguments against indemnification, the opponents of UP's tariff repeatedly seek to mischaracterize indemnification as entailing a refusal to transport, in breach of the railroads' common carrier obligation. CF Industries, for example, argues at length about the virtues of TIH commodities, and mischaracterizes the railroads as seeking to have those commodities declared "too dangerous to transport." CF Industries Reply at 2-4.

But there are no such arguments here. No railroad has contended that it should be free to decline TIH transportation. No shipper or shipper group has even attempted to show that it is incapable of providing the indemnity UP seeks. And no railroad is seeking to "dictate" (*see* CF Industries Reply at 11), or have this Board dictate, when the risks associated with particular TIH transportation outweigh the benefits to the shipper and its customer base; those decisions will remain with the shippers, who as a result of the indemnification they provide will have incentives to internalize the risks created by their decisions. *See* NS Reply at 12-13; *see also* pages 9-11 below.

⁵ Because UP's indemnity provisions exclude liabilities caused by railroad negligence, they will never fully shift back to shippers all of the risks that would not have existed but for the shipper's decision to demand TIH transportation.

C. Railroads Take Extraordinary Precautions to Handle TIH Safely, and Will Continue to Do So, But Risks Remain Non-Zero

Despite heated rhetoric about railroads' role in past accidents involving TIH transportation, there is in fact no dispute that railroads take extraordinary precautions when they are asked to transport TIH chemicals. Shippers rely on DOT's previous conclusion that TIH-related accidents are "rare" (*e.g.*, CF Industries Reply at 10), and DOT for its part emphasizes in this proceeding that "railroads have an outstanding safety record." DOT Comments at 12; *see also id.* at 4-5.

No shipper has refuted the railroads' evidence that they will continue to take (and be required to take) extensive precautions regardless of whether a shipper has provided an indemnity.⁶ Not a single opponent of UP's tariff questioned that showing on reply. And DOT confirms that the extensive federal regulatory framework will effectively "mitigate the safety and security risks associated with the transportation of these materials." DOT Comments at 3; *see also* CF Industries Reply at 10. But DOT also confirms that safety regulations cannot eliminate the risks. DOT Comments at 6.

D. Shippers Lack Incentives to Consider the Risks of Their Shipping Decisions

Shippers and shipper groups in this proceeding implicitly acknowledge the risks associated with a TIH release when they tout the safeguards they employ when those materials are loaded into tank cars and shipped by rail.⁷ They would not take those precautions unless the risks were real.

⁶ *E.g.*, NS Opening at 14-17; NS Reply at 20-21; UP Opening at 22-23, O'Brien V.S.; UP Reply at 41-44.

⁷ *E.g.*, Reply Comments of U.S. Magnesium, L.L.C., Finance Docket No 35504 (filed Mar. 12, 2012) ("USM Reply"), Kaplan V.S. at 2-3; Opening Comments of Canexus Chemicals Canada, L.P.,
(footnote continued on next page...)

But those same shippers and shipper groups have made no effort to refute the railroads' showing that shippers today do not have adequate incentives to consider ways to "reduce TIH ton-miles" (DOT Comments at 12).⁸ As NS and other railroads have demonstrated, shippers lack these incentives in part because the common carrier obligation empowers them to demand that railroads provide such transportation regardless of the risks. NS Opening at 22-23; UP Opening at 16-20. Indemnification provides appropriate incentives for them to begin to consider less-risky alternatives, an objective DOT supports. *Id.*; DOT Comments at 12.

Remarkably, instead of seeking to demonstrate that they *do consider* the risks of their TIH transportation decisions, shippers in this proceeding argue that any requirement that they do so – indeed any “financial disincentives” at all placed on TIH shipments (Olin Reply at 8) – would be impermissible. “Factor[ing] the associated risks” (*id.*) is treated as virtually a dirty word, apparently because – once the risks are internalized by shippers – the result will be, in at least some cases, that shippers will “limit TIH shipments” (*id.* at 7) or “declin[e] to ship TIH products at all.”⁹

NS submits that this position strongly supports the reasonableness of UP's indemnification approach. By arguing that internalizing the risk will reduce the volume of TIH shipments, these shippers necessarily acknowledge that in some cases their present

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Finance Docket No. 35504 (filed Jan. 25, 2012) (“Canexus Opening”) at 3-4; Opening Comments of Occidental Chemical Corp., Finance Docket No. 35504 (filed Jan. 25, 2012) (“OxyChem Opening”) at 3.

⁸ CF Industries claims (Reply at 11), for example, that its decisions are “market driven,” but those decisions are nonetheless made based on market signals that in today's environment do not fully reflect the transportation-related risks.

⁹ Joint Reply Comments of the American Chemical Council, *et al.*, Finance Docket No 35504) (filed Mar 12, 2012) (“ACC Reply”) at 11.

shipping patterns are creating external risks that outweigh the benefits to society from manufacturing and selling TIH commodities. But these shippers nonetheless appear to believe that they should be absolutely free to shift those risks to railroads that have no control over the decisions of whether, how much, and how far to ship TIH materials. There is nothing unreasonable about railroad tariff provisions that require that a portion of those risks be internalized by the party whose decisions create them, allowing them to make efficient decisions about whether to bear those risks or seek to avoid them. UP Opening at 18-20, Shavell V.S.; NS Opening at 19-25.

E. The TIH-Related Risks Railroads Must Face Are Not Already Borne by Others

Despite a great deal of rhetoric about insurance in this proceeding, one central fact is beyond dispute: the railroads are not fully insured for the TIH-related risks they must bear. See UP Reply at 10-13, Beach V.S.; NS Reply at 24-26. Shippers make no effort to demonstrate otherwise.¹⁰

Nor should it matter even if railroads were insured. Shippers might prefer that railroads bear these risks – and obtain insurance for them – so shippers do not have to, but there is nothing unreasonable about requiring the party demanding transportation of TIH commodities to internalize the incremental risks its shipping demands impose on the carrier. The Board’s decision in *Amtrak-Springfield Terminal*,¹¹ a case not once mentioned by UP’s opponents in this case, makes absolutely clear that those risks are an incremental cost of the transportation shippers demand from the railroad. See NS Opening at 17-19.

¹⁰ Indeed, Olin appears to agree that railroads are not fully insured for TIH-related risks. Olin Reply at 9.

¹¹ *Application of the National Railroad Passenger Corp. under 49 U.S.C. 24309(a) – Springfield Terminal Ry., Boston & Maine Corp. & Portland Terminal Co.*, 3 S.T.B. 157 (1998).

It is also beyond dispute that there is no possibility of “double recovery” as a result of indemnification. Leaving aside the likelihood that railroad rates do not – and cannot readily – incorporate the full risks of TIH transportation, there would remain the shipper’s entitlement, in *a rate case*, to demonstrate that the level of a railroad’s revenues for a particular TIH movement is unreasonable. *See* UP Reply at 13-14, 39. Of course, even in that context, when determining whether particular rate levels are reasonable the Board would need to take account of the extraordinary risks of TIH transportation, where an accident would have far more serious consequences than one involving other commodities, like coal, that are not deadly when released.

F. Absent Regulation, TIH Shippers Would Be Required to Indemnify Transportation Providers

Finally, the undisputed record shows that in a competitive and unregulated marketplace, shippers are routinely required to indemnify their transportation providers. NS’s Opening Evidence provided numerous, unrefuted examples of standard indemnity provisions imposed by other transportation providers with respect to transportation of TIH and other hazardous commodities. NS Opening at 25-27. NS’s evidence demonstrates what the transportation terms for TIH shipments would be if the market were free to function without regulation. Trucking companies, which compete in the transportation marketplace and are subject to safety regulation,¹² but are free from regulation of price and service terms, demand indemnification. An efficient outcome routinely arrived at in the marketplace for

¹² For example, the Federal Motor Carrier Safety Administration develops, maintains, and enforces regulations “designed to ensure the safe and secure transportation of hazardous materials.” *See* FMCSA website, at <http://www.fmcsa.dot.gov/about/what-we-do/keyprograms/keyprograms.htm>.

unregulated transportation is demonstrably reasonable, and surely does not become unreasonable simply because it is incorporated into a tariff for common carrier transportation.

II. DOT'S COMMENTS PROVIDE SUPPORT FOR THE REASONABLENESS OF UP'S TARIFF PROVISIONS

As already noted above, the Department of Transportation's comments in this proceeding provide substantial support for UP's tariff provisions.

A. DOT Does Not Oppose UP's Tariff Provisions

First, DOT expressly does not take the position that UP's tariff provisions are unreasonable. DOT Comments at 3 (DOT "takes no position regarding the reasonableness of the tariff in question"). DOT merely expresses concern about tariff requirements "so onerous as to drive TIH materials traffic off the railroads and onto the highways" and urges the Board to "monitor any trends" towards the shifting of TIH materials shipments from the railroads to the highways. DOT Reply at 3; *see also id.* at 12-13. DOT has thus left to the Board the determination whether, in light of the effect of indemnification, UP's tariff constitutes an appropriate and reasonable exercise of railroad discretion. As explained below, UP's tariff provisions will not cause a diversion of TIH materials to the highways.

B. DOT Endorses the Need for Shippers to Have Incentives to Consider the Risks Posed by their Shipping Decisions

Second, DOT's factual conclusions support the key underpinnings of UP's indemnification provisions:

- (a) TIH transportation is inherently risky, creating "safety and security risks" that will "never be zero" no matter how much care railroads and shippers exercise when TIH moves by rail; and

- (b) in light of these non-zero risks, shippers should have incentives to explore ways to reduce TIH ton-miles by changing their shipping patterns and modifying their supply chains.

DOT Comments at 12. UP's indemnification provisions provide a measured set of incentives for shippers to consider these important and real safety and security risks when they make shipping decisions.

C. UP's Indemnity Provisions Will Not Shift TIH Shipments to the Highways

Third, DOT takes pride in the fact that the comprehensive federal regulatory framework makes rail the "safest and most efficient mode of transportation" for moving TIH commodities between any two points. DOT Comments at 6 (quoting *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, Ex Parte No. 677 (Sub-No. 1) (served June 4, 2008)). And DOT therefore is rightfully concerned about the potential that TIH shipments would be diverted from railroads to the Nation's highways, notwithstanding that DOT also regulates safety for truck transportation of TIH materials. *See* note 12, above.

However, UP's tariff provisions raise no such concern. No shipper has suggested that it would divert shipments of TIH materials to truck; shippers claim instead that they are dependent on rail.¹³ Moreover, raw economics will determine any diversion as a result of

¹³ *E.g.*, CF Industries Reply at 4 (trucking "unable to fill the void"); *see also* Opening Comments of The Fertilizer Institute, Ex Parte No. 705 (filed April 12, 2011) at 5 ("Trucks are an inherently higher cost alternative than rail and are not very practical for high volume lanes. Moreover, as fuel costs increase, trucks become even less efficient and competitive. New truck driver hours of service rules will only aggravate the situation by creating driver shortages."). In addition, DOT observes that it has seen no evidence of diversions to truck even though shippers have claimed that rail rates have increased substantially in recent years. *See* DOT Comments at 3; Canexus Opening at (footnote continued on next page...)

indemnification. There is every reason to expect that the cost of transporting TIH materials via truck and other modes will reflect the full measure of risk associated with that transportation. Indeed, as noted above, these other transportation providers routinely demand that TIH shippers indemnify them for those risks. *See* pages 12-13, above. Accordingly, whenever other modes are *less safe* – or *less efficient* – than rail, shippers will choose to ship by rail even if they must indemnify the railroads for TIH-related risks. NS Reply at 12-13; UP Reply at 47.

III. THE ARGUMENTS AGAINST UP’S TARIFF LACK SUBSTANCE

Most of the arguments against UP’s tariff in the reply comments rehash arguments that already have been extensively addressed. A few points bear emphasis.

A. Many of the Arguments Against UP’s Tariff Rest on Distortions of UP’s Tariff

NS will continue to refrain from commenting on the specific language used in UP’s tariff,¹⁴ but NS cannot overlook the fact that UP’s opponents have blatantly distorted the meaning of that tariff in an effort to defeat it.

First, UP’s opponents continue to assert that UP’s tariff will immunize railroads from liabilities that Congress (and perhaps state systems of tort law) believe that railroads should bear. Olin Reply at 16-17; Dyno Nobel Reply at 7-8. That is incorrect. Indemnification does not affect the rights of any injured third party to pursue a claim against the railroad.

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4 (asserting that rail rates have increased). NS is aware that trucks compete for TIH traffic and that some competition will always exist between rail and other modes.

¹⁴ NS’ reluctance to comment on and interpret the specific language offered by UP does not mean that it is seeking an “abstract policy statement” from the Board. *See* ACC Reply at 5-6. Rather, NS is supporting the relief UP is seeking – a declaration that a tariff having the effect of UP’s tariff to indemnify the railroad except with respect to railroad negligence is reasonable in the circumstances of TIH transportation.

The only effect of indemnification is to allocate that liability – if it arises – between the railroad and the shipper. *See* NS Reply at 15; UP Reply at 38.

Second, UP’s opponents continue to repeat assertions about how UP’s tariff provisions force shippers to bear risks unrelated to TIH transportation or that arise from UP’s negligence. *E.g.*, Olin Reply at 12-14; ACC Reply at 6-9. UP’s Reply, which states in plain language that its indemnity applies only to liability having a “causal connection to transportation of the shipper’s TIH” (UP Reply at 28) and that UP will be “responsible for liabilities arising from its own negligence” (*id.* at 7) should put those concerns to rest once and for all.

B. The Board Should Not Allow Shippers to Convert the Common Carrier Obligation into an All-Purpose Immunity from Railroad Tariff Rules

A recurring theme in the comments opposing UP’s tariff is that indemnification is one part of a multiple-step strategy to erode the railroads’ common carrier obligation. Stated simply, from these shippers’ perspective it is unacceptable for UP to seek to “forc[e] shippers to ‘factor the associated risks’” (Olin Reply at 8) or “impose costs on shippers and consumers that should be borne by UP and its shareholders” (CF Industries Reply at 7). Olin goes so far as to contend that any “financial disincentives on TIH shipments” would flout the common carrier obligation. Olin Reply at 8.

The Board should quickly and squarely reject such arguments, which seek to convert the railroads’ limited obligation to respond to reasonable requests for service into an all-purpose entitlement to terms of the shippers’ liking.¹⁵ The common carrier obligation is not a

¹⁵ Railroads’ only obligation is to respond to reasonable requests for service with reasonable rates and shipping terms. The mere fact that it may be reasonable for a shipper to *request* transportation of TIH chemicals in compliant tank cars (*see* DOT Comments at 10) does not render

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bona fide issue in this proceeding. UP has acknowledged that it has such an obligation. UP Opening at 17. And when the Board decided to close Ex Parte No. 698 in favor of “resolving disputes related to the reasonableness of both requests to transport TIH cargo and the carriers’ responses on a case-by-case basis,”¹⁶ it necessarily concluded that the common carrier obligation did not give shippers an impenetrable shield against liability-sharing provisions or other practices or charges related to TIH transportation by rail.

If the Board accepts these shippers’ arguments about the reach of the common carrier obligation in this case, the Board can expect in every future proceeding to hear shippers seek to block any commercial steps railroads might take as “attempts to circumvent their common carrier obligations.” (CF Industries Reply at 8).¹⁷ Indeed, there appears to be nothing to distinguish Olin’s distaste for the “financial disincentives” created by an indemnity from similar “disincentives” that are created by railroads’ expectation that the shipper *will pay a rate* in exchange for the transportation services they provide.

C. Shippers Misstate UP’s Burden

A third theme in the reply comments opposing UP’s tariff is an effort to impose upon UP an inappropriately heavy burden to justify its tariff provisions. As the party seeking a

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unreasonable any railroad *response* that does amount to an offer to transport for free. The question remains for adjudication on a case-by-case basis, what railroad practices related to transporting TIH chemicals are reasonable.

¹⁶ *Establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee*, Ex Parte No. 698 (served Apr. 15, 2011) at 4 n.8.

¹⁷ The Board has already seen such claims in Finance Docket No. 35517, where several commenters characterize Rail America’s operating protocols designed to ensure the safe handling of TIH commodities as interfering with the common carrier obligation. *See* Opening Evidence of the Dow Chemical Co., Finance Docket No. 35517 (filed Jan. 13, 2012) at 5-7; Rebuttal Evidence and Argument on behalf of American Chemistry Counsel, *et al.*, Finance Docket No. 35517 (filed Mar 13, 2012) at 7-8.

declaration, UP does bear the burden of persuasion, but that burden is not nearly so high as UP's opponents suggest.

First, it is important to bear in mind that the only reason UP has any burden at all is because it is seeking an *affirmative declaration* that its tariff provisions are *reasonable*. In NS's view, UP has amply carried that burden. But in all events, opponents have not proven that the provision is an unreasonable practice, which is what would be necessary for the Board to declare the practice unreasonable.¹⁸

Second, CF Industries' suggestion (Reply at 5) that UP's burden in this proceeding is elevated because TIH transportation is involved has it backwards. CF Industries cites Finance Docket No. 35219 for this proposition, but the Board's decision there did not address any burden applicable in this proceeding. UP is here seeking to require shippers to internalize a portion of the risks created by the inherent nature of the TIH commodity they produce and by their own shipping decisions. Far from posing an obstacle to UP's indemnification approach, the unique risks associated with TIH transportation provide a key justification for UP's tariff.

Third, the nature of UP's burden in this proceeding must be evaluated in light of the governing statutory standard – UP need only show that indemnity provisions *are reasonable* to obtain the affirmative declaration it seeks. Reasonableness does not require perfection, and it does not require scientific or other quantitative proof of the precise degree of risk that UP is seeking to address. Establishing that indemnification is reasonable thus does not

¹⁸ *North America Freight Car Association, v. BNSF Ry.*, Docket No. 42060 (Sub-No. 1) (served Jan. 26, 2007) at 4-5 (burden on complainants to establish unreasonableness of practice); *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, Finance Docket No. 35305 (served Mar. 3, 2011) (“*Arkansas Electric*”) at 4 (burden on party seeking declaration that practice is unreasonable).

demand the introduction of evidence quantifying with precision the “level of risk” (CF Industries Reply at 10) or recounting the history of calamities that have yet to take place (Olin Reply at 7). The indemnification approach avoids that issue by allocating certain risks *directly* to the shippers who create them. It is more than enough that the record developed here has amply demonstrated the existence of unique risks posed by TIH transportation, which no party (including DOT) disputes, in order to justify the measured approach to those issues reflected in UP’s tariff. That conclusion is confirmed by DOT’s agreement that shippers should be encouraged to take steps to reduce the risks of a TIH-related catastrophe by reducing TIH ton-miles. DOT Comments at 12.

Likewise, UP has no obligation to prove that it is not somehow charging, or able to charge, rate levels sufficient to cover the TIH-related risks, as CF Industries suggests (Reply at 11). As NS has explained, shippers may bring a rate case. But they may not bootstrap a challenge to UP’s rates here by merely asserting – and not attempting to prove – anything about UP’s rates today or in the future.¹⁹

Indeed, imposing such a burden here would sweep away much of the Board’s reasonable practice jurisprudence. In most cases where the Board has upheld the reasonableness of carrier rules, railroads conceivably were charging – or could have charged – rates sufficiently high to cover the costs of associated with the activity they were seeking to address. The Board has nonetheless consistently approved railroad tariff rules aimed at *reducing costs* by encouraging efficient behavior on the part of shippers. *See Arkansas Electric* at 9 (whether rates might cover costs of cleaning up coal dust deposits not a relevant

¹⁹ Importantly, this objection to UP’s tariff does not address at all the legitimate (and thus reasonable) goal of the tariff to give shippers incentives to make efficient shipping decisions. *See NS Opening* at 21-25; *UP Opening* at 16-20, *Shavell V.S.*

issue in assessing reasonableness of tariff mandating shipper steps to reduce formation of such deposits; “argument that increased revenues have covered the increased costs of maintenance, even if true, does not mean that containment is not a reasonable practice”). Here, there is an even more compelling justification for indemnification; it will not merely reduce costs, it will reduce the risks of a catastrophic TIH-related release that could injure or kill large numbers of third parties. *Cf. id.* (“containment is the only way to protect the environment and communities along the right of way”).

D. Shippers’ Continued Refusal to Acknowledge Their Role in Creating TIH-Related Risks Underscores the Reasonableness of UP’s Tariff

The reply comments opposing UP’s tariff continue to reflect an unwillingness on the part of TIH shippers to forthrightly acknowledge that TIH transportation entails unique risks for railroads and the communities they traverse. We have already shown that the existence of these risks is beyond dispute. *See* pages 6-7, above. Shippers’ denial of these risks only reaffirms the reasonableness of UP’s effort to use indemnification as a means of giving shippers incentives to take TIH-related risks into account when they demand that railroads transport these deadly chemicals.²⁰

There is no better illustration of this frame of mind than Olin’s Reply, which asks the Board to ignore risks that actually exist because a “claim that ‘staggering,’ ‘catastrophic’ or ‘lose the company’ liability on a railroad could arise without the fault of the railroad . . . patently disregards over a century of actual experience” – by which it means the fact that the

²⁰ If shippers truly believed that the risk of harm – and ultimately railroad liability – arising from a TIH-related accident or attack are not meaningful, then indemnification should not be an issue that concerns them. The extensive debate about whether railroads in fact face such liability (*see, e.g.,* Olin Reply at 3-7) is thus entirely beside the point. If they do, indemnity is reasonable. If they do not, no shipper will be required by an indemnity to bear any such liability.

catastrophic event has not yet occurred. Olin at 7. On the merits, Olin's backwards-looking perspective amounts to wishful thinking at best, dangerous myopia at worst. *See* NS Reply at 9-10. Olin's observation is akin to advising Union Carbide's plant manager in Bhopal that there was no risk of a major release because one had not happened before. Clearly there was risk, even though the manager could not have proven the risk existed by pointing to a prior event. The Board has the chance now to enable rail carriers to take reasonable and measured steps to address an equally real and dangerous set of risks.

E. Shippers' So-Called "Policy" Arguments Are a Thinly-Veiled Plea for Commercial Advantage

UP's opponents make a variety of "policy" arguments that boil down to the proposition that railroads and not shippers should bear all of the risks associated with shippers' decisions to demand TIH transportation.

UP's opponents are quite blatant about this. CF Industries, for example, asserts quite plainly that "UP is seeking to impose costs on shippers and consumers that should be borne by UP and its shareholders." CF Industries Reply at 7. Why is that? Because, in CF Industries' world view, every possible accident – even those caused by "acts of God" – are UP's responsibility. *See id.* at 8 (illogically asserting that UP is in a better position to prevent an act of God). This shipper's self-interested sense of entitlement is strikingly inconsistent with any sense of the *public's interest* in having shippers "reduce TIH car-miles" (DOT Comments at 12).

To the same effect are arguments about the Board's lack of authority to implement "any policy intended to reduce or eliminate the use of TIH." CF Industries Reply at 13; *see also* USM Reply, Kaplan V.S. at 4 (asserting need for "maximum flexibility" to ship TIH materials whenever and wherever it wishes); Olin Reply at 11 (objecting to "cram-down"

because there should not be any “obstacles for TIH shippers in getting their products to the many industries that depend on them”). No one is asking the Board to regulate in this way. *See* pages 7-8, above. UP merely asks the Board to exercise its jurisdiction to affirmatively determine that its indemnity provision is a reasonable practice. It is UP’s opponents who are seeking to prevent railroads from adopting reasonable tariff provisions that are designed to encourage *shippers themselves* to make sensible decisions about how much TIH to ship and where to ship it.

CF Industries and others also argue that UP’s tariff will distort contract negotiations. This is just another way of saying that any requirement that shippers internalize risks they themselves create must come *at a price* – shippers should get lower rates “or something in return.” CF Industries at 14. This proceeding, however, deals with common carrier transportation. The governing statute does not allow the reasonableness of the rates and service terms railroads offer to be judged based on what the shippers might prefer, but rather on reasonableness. The reasonableness of UP’s indemnification provisions is well established on this record.

Finally, Dyno Nobel’s reliance (Reply at 6-7) on a 101-year-old ICC decision reveals the shippers’ true motivation here to free-ride on the railroad network. The case Dyno Nobel cites²¹ was an investigation of proposed railroad rate increases more than six decades before the regulatory reforms of the 4R and Staggers Acts. The specific discussion from which Dyno Nobel quotes categorically rejects carrier efforts to differentiate among shippers based on demand-side factors – and thereby eschews the whole thrust of this agency’s

²¹ *In re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri and Illinois Freight Committee Territories*, 20 I.C.C. 307 (1911).

implementation of Congress' deregulatory mandates. 49 U.S.C. § 10101(1-2); *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). As of 1911, the agency was no more open to these concepts than to the notion of rail transportation contracts, which were then illegal. Dyno Nobel may want to return to the 1911-era of railroad regulation, but those days are over. The suggestion that concepts of demand-based pricing should be regarded as "extortion excepting the fair-mindedness of the railroad traffic manager" (20 I.C.C. at 351) has no proper place in the Board's adjudication under the modern regime of railroad regulation.

CONCLUSION

The evidence and argument in this proceeding strongly support the reasonableness of indemnification in the TIH context. The Board should reject opponents' preference not to internalize risks that are associated with their shipping decisions and inherent in the chemical composition of their commodities. The Board should clarify that railroads may reasonably insist upon such an indemnity as one means of addressing the extraordinary risks associated with transporting TIH chemicals.

Respectfully Submitted,

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Dated: March 26, 2012

CERTIFICATE OF SERVICE

I, Anand Viswanathan, certify that on this date a copy of the Rebuttal Evidence and Argument of Norfolk Southern Railway Company, filed on March 26, 2012, was served by email or first-class mail, postage prepaid, on all parties of record in accord with the service list set forth in the Board's decision served January 23, 2012.



Anand Viswanathan

Dated: March 26, 2012