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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

*PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR A DECLARATORY ORDER*

**REPLY OF
THE FERTILIZER INSTITUTE,
THE CHLORINE INSTITUTE AND
AMERICAN CHEMISTRY COUNCIL**

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Dated: May 17, 2011

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The Fertilizer Institute (“TFI”), the Chlorine Institute (“CI”), and the American Chemistry Council (“ACC”) hereby reply to the “Petition of Union Pacific Railroad Company for a Declaratory Order,” filed with the Surface Transportation Board (“STB” or “Board”) on April 27, 2011. Union Pacific (“UP”) asks the Board “to declare that UP may require, as a condition of providing common carrier transportation services, that a TIH shipper indemnify and hold harmless UP against liabilities arising out of the performance of the transportation services, *except* those liabilities caused by the sole, contributory, or concurring negligence or fault of UP.” Pet. at 2. UP alleges that a declaratory order is necessary to resolve a dispute between UP, on the one hand, and Olin Corporation (“Olin”) and SunBelt Chlor Alkali Partnership (“SunBelt”) (collectively, “Olin/SunBelt”), on the other hand, over 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 Company.”

TFI, CI, and ACC do not believe that this is an appropriate issue for the Board to establish a proceeding that can result in little more than an advisory opinion on an issue that is beyond this Board's jurisdiction to resolve.

I. STATEMENT OF INTEREST

TFI is the national trade association of the fertilizer industry. TFI, which traces its roots back to 1883, represents virtually every primary plant food producer, as well as secondary and micronutrient manufacturers, fertilizer distributors and retail dealerships, equipment suppliers and engineering construction firms, brokers and traders, and a wide variety of other companies and individuals involved in agriculture. Many TFI members produce and/or consume anhydrous ammonia, which is a commodity classified as poisonous by inhalation, that provides essential nutrients to grow our nation's food supply. Rail transportation is essential to the safe and reliable movement of anhydrous ammonia. Because UP Tariff 6607 applies to common carrier rail transportation of anhydrous ammonia by UP, TFI's members are directly affected by the provisions within Tariff 6607 that would require them to indemnify UP against liability for the negligent acts or omissions of third parties.

CI is a 200-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. CI's mission is the promotion of safety and the protection of human health and the environment in the manufacture, distribution and use of chlorine, sodium hydroxide, potassium hydroxide, and sodium hypochlorite, plus the distribution and use of hydrogen chloride. CI's North American Producer members account for more than 95 percent of the total chlorine production capacity of the U.S. and offer for transportation approximately 40 percent of the TIH materials moved by rail each year. Chlorine is an essential commodity upon which the Nation's health, safety and economy depend.

Chlorine is essential in the production of a staggering list of products used each day in modern life. Everyone knows about chlorine's use in water disinfection and sewage treatment, but chlorine is essential to the manufacture of automobiles, computers, telephones, fuel cells, pharmaceuticals, rocket propellants, surgical sutures, paint removers, photographic supplies, virtually every plastic material made and literally thousands of other products. Chlorine and chlorine chemistry is indeed essential in our modern lives.

ACC represents the leading companies in the business of chemistry. ACC's 145 member companies apply the science of chemistry to provide innovative products and services that make people's lives better, healthier, and safer. ACC is committed to improved environmental, health, and safety performance through Responsible Care®, to common sense advocacy designed to address major public policy issues, and to health and environmental research and product testing. The business of chemistry is a \$674 billion per year enterprise, a key element of the nation's economy, and the nation's largest exporting sector (chemicals account for 10 cents out of every dollar of U.S. exports). ACC members manufacture a wide array of products and depend on the railroads for the safe, efficient, and secure transportation of more than 160 million tons of chemical products each year.

II. UP's PETITION DOES NOT PRESENT A CONCRETE DISPUTE THAT REQUIRES BOARD RESOLUTION.

UP's Petition is based upon a supposed dispute that is little more than a request for an advisory opinion. The entire predicate for UP's Petition is an alleged dispute between itself and Olin/SunBelt. According to UP, Olin/SunBelt have "threatened to commence litigation" unless UP eliminates the third-party indemnification language in Items 50 and 60 of Tariff 6607. Pet. at 3. At this time, the Board has only UP's characterization of this dispute to determine whether a

declaratory order proceeding is either proper or warranted. This does not arise to the level of a dispute that requires resolution by the Board.

Notably, the Board recently declined to issue a similar declaratory order in docket Ex Parte No. 677 (Sub-No. 1), *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials* (served April 15, 2011). In that proceeding, the Association of American Railroads (“AAR”) had asked the Board to adopt a policy statement that would permit railroads to require shippers of TIH materials to indemnify the railroads against liability arising from the release of such materials in all instances, including a railroad’s own negligence. The Board declined to issue the requested policy statement in the abstract, opting instead to “proceed according to its usual practice of resolving disputes related to the reasonableness of both requests to transport TIH cargo and the carriers’ responses on a case-by-case basis under 49 U.S.C. § 11101.” *Id.* at 4, n. 8.

Despite its contrary assertions, UP’s Petition does not present any more concrete a dispute than the AAR’s policy statement. *See* Pet. at 6. Accepting UP’s characterizations at face value, Olin/SunBelt “threatened” litigation, but have not in fact initiated any proceeding. If UP or any other railroad requested a declaratory order every time there was a disagreement over a tariff provision, this Board’s docket would be overflowing. If Olin/SunBelt so choose, they may file a formal complaint against the UP Tariff at any time. They have not done so. UP’s Petition is little more than a preemptive attempt to obtain the same sort of advisory opinion that the Board declined to issue in Ex Parte No. 677 (Sub No. 1).

III. A DECLARATORY ORDER WOULD NOT RESOLVE THE ALLEGED DISPUTE.

UP’s Petition is predicated upon the fundamentally incorrect assumption that a declaratory order would resolve the alleged dispute. Specifically, UP relies upon the Board’s

jurisdiction “to determine whether the terms and conditions under which railroads transport TIH material are reasonable.” Pet. at 6, *citing Union Pac. R.R. – Pet. for Declaratory Order*, STB Finance Docket No. 35219, at 3, n. 12 (served June 11, 2009). But that is not the threshold issue presented by disputes over tariff indemnity provisions.

The fundamental predicate issue is whether an indemnity is enforceable under state tort laws. This issue is not within the Board’s jurisdiction to determine. If UP sought to collect upon its Tariff 6607 indemnity provisions through an enforcement action, it would not file that claim at the STB; it would do so in a state or federal court based upon applicable contract and tort laws. This would be true for any indemnity, regardless whether it implicated UP’s own negligence, third-party negligence, or the shipper’s negligence. Thus, whether or not UP could enforce its Tariff 6607 indemnity requirement is a matter for a state or federal court to decide.

There is a very clear example of this in modern case law involving transportation of a TIH commodity and a UP tariff indemnity requirement. In *Union Pac. R.R. Co. v. U.S.*, 292 F. 2d 521 (Ct. Cl. 1961), the U.S. Court of Claims denied a claim by UP against the United States to enforce a tariff indemnity provision. UP sought indemnification for damages arising out of a TIH shipment of anhydrous ammonia, which the government had failed to disclose on the shipping documents as required by law. Another shipment on the train caught fire en route and the fire spread to the anhydrous ammonia shipment, which subsequently exploded and injured a third party. The third party prevailed in a personal injury suit that found both UP and the government to be negligent. UP sought indemnification from the government for UP’s payment to the third party in satisfaction of this judgment, based on a tariff provision that required shippers to indemnify UP for all loss or damage caused by dangerous goods that had not been fully disclosed to the carrier. The Court refused to permit UP to recover under this tariff

provision because “[i]t is a well-settled principle of the law relating to common carriers that a carrier cannot by agreement relieve itself of liability for its own negligence.” *Id.* at 243.

The controlling issue in the *Union Pacific* case was not the reasonableness of UP’s tariff indemnity under the Interstate Commerce Act, but the enforceability of the indemnity under tort law. Consequently, even if the Board were to issue a declaratory order that UP’s Tariff 6607, Items 50 and 60, are reasonable, such an order would not bind any subsequent court that must determine whether those indemnities are enforceable. Unless and until a court determines that question, any order issued by the Board in response to UP’s Petition would not resolve the fundamental issue of enforceability.¹ The Board should refrain from exercising its discretion to issue declaratory orders when doing so cannot resolve the actual case or controversy.

IV. CONCLUSION

For the foregoing reasons, TFI, CI and ACC urge the Board to deny UP’s Petition.

Respectfully submitted,



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¹ There is one scenario in which a declaratory order could resolve the alleged dispute surrounding UP’s tariff indemnity provisions. If the STB found that UP’s indemnity was NOT reasonable, then there would be no indemnity to enforce. However, the opposite determination of reasonableness will not resolve the question of enforceability. Clearly, UP’s Petition seeks the latter determination and thus would not resolve the alleged dispute. Because no other party has asked the Board to declare UP’s indemnity provision to be unreasonable, the Board should not wade into this arena.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing "Reply Of The Fertilizer Institute, The Chlorine Institute, and American Chemistry Council" to be served this 17th day of May 2011, by e-mail and first-class mail, postage prepaid, on:

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