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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings**

MAR 14 2012

**Part of
Public Record**

Docket No. 35504

**UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY
ORDER**

**MOTION TO STRIKE IMPROPERLY DISCLOSED
CONFIDENTIAL COMPROMISE SETTLEMENT NEGOTIATIONS**

The American Chemistry Council; The Chlorine Institute; hereby submit this Motion to Strike the confidential compromise settlement negotiations and discussions improperly disclosed by the Union Pacific Railroad Company ("UP") in its filing of March 12, 2012 in this proceeding.

Background

On June 29, 2009, the Chlorine Institute, Inc. ("CI") and the American Chemistry Council ("ACC") brought suit against the UP in connection with its then Tariff 6607. (A copy of the Complaint filed in the United States District Court for the District of Utah, Central Division is attached hereto as Exhibit I). The Complaint dealt solely with the legality of Items in the UP Tariff 6607 that would exculpate the UP from its own negligence in the event of a TIH release. Further, the suit was brought under the laws of the State of Utah and under the Federal Public Policy considerations regarding attempted railroad self exculpation. The suit did not deal with the reasonableness of the Tariff 6607 under the terms of the Interstate Commerce Commission Termination Act. ("ICCTA")

After service of the Complaint, but before UP had answered, the parties engaged in settlement discussions in hopes of resolving the matter. Those discussions bore fruit and the UP modified its Tariff 6607 so as to remove the indemnification and exculpation provisions that were the subject of the Complaint.¹ With the removal of these offending provisions, Plaintiffs dismissed their suit as moot.

The dismissal of the suit brought under the laws of Utah and Federal Public Policy said nothing about the lawfulness of the new Tariff 6607 under the ICCTA, but UP began a program of telling its contract shippers that CI and ACC had agreed to the new third party provisions of the Tariff. Apparently, according to the testimony of Diane Duren of the UP, shippers either believed that story or had no choice but to accept the provisions if they wanted to move their TIH shipments. Now the UP has gone a step further telling the Board that CI and ACC had agreed to the terms of the Tariff. Without disclosing attorney-client communications it should be quite obvious that the legal judgment as to whether the new Tariff provisions could be successfully challenged under the indemnification laws in Utah does not imply that the Tariff provisions are reasonable under the ICCTA or that the Plaintiffs thought they were. UP now seeks to support its arguments by revealing selected communications between counsel during the confidential compromise settlement discussions, and that is wholly inappropriate.²

¹ See paragraphs 37 and 38 of the Complaint. It must also be noted that the provisions of the now Tariff 6607 dealing with the indemnification for third party liability when the UP was not negligent or strictly liable do not appear in the paragraphs of the Complaint or in the prayer for relief. Plainly, the Complaint did not deal with any of the issues involved in the matter now before the Board.

² By filing this Motion along with the reasons and justifications for it, the undersigned counsel does not intend to cast any personal aspersions on UP counsel that have signed the Reply Evidence and Argument. While we do not believe that the disclosures referenced herein are proper, we do not suggest that they are in any way unethical.

Discussion

The Board, like other administrative agencies, is not generally bound by the highly technical Federal Rules of Evidence (“FRE”) designed largely to protect fact finders from the confusion of unreliable evidence in jury trials. However, certain of the FRE are designed not to protect jurors but to prevent the harm from disclosure of privileged information that is identical whether the disclosure takes place in an administrative or a judicial proceeding. The law of privilege applies to both. See, e.g. *Wearly v. FTC*, 462 F. Supp. 589 (D.N.J. 1978 (trade secret privilege); *CAB v. Air Transport Ass’n*, 201 F. Supp. 318 D.D.C. 1961) (attorney-client privilege).

Rule 408 of the FRE provides for just such a privilege:

(a) **Prohibited uses.** Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

In *Fiberglass Insulators v. Dupuy*, 856 F.2d 652 (4th Cir. 1988), the Court explained the reasons for the Rule 408 exclusion:

The public policy of favoring and encouraging settlement makes necessary the inadmissibility of settlement negotiations in order to foster frank discussions. *Wright & Graham, Federal Practice and Procedure: Evidence* § 5302 (1980); *Weinstein & Berger, Weinstein’s Evidence* § 408[1] (1986). “By preventing settlement negotiations from being admitted as evidence, full and open

disclosure is encouraged thereby furthering the policy toward settlement.” *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) (which held inadmissible a settlement by the plaintiff with another defendant of a closely related but separate claim, much, but not the same as here.) Moreover, we agree with the statement of the Fifth Circuit, in a case under a fact situation similar to that of *Contra Costa*, that the “spectre of a subsequent use to prejudice a separate and discrete claim is a disincentive which Rule 408 seeks to prevent.” *Branch v. Fidelity & Cas. Co. of New York*, 783 F.2d 1289, 1294 (5th Cir. 1986) Attorneys must be afforded wide latitude in the conduct of settlement negotiations if the rule is to have an effect.

Similarly, in *Ciulli v. Iranani* the Court stated:

Because it is “generally believed that settlement negotiations will be inhibited if the parties are aware their statements may later be used as admissions of liability FRE 408 acts to protect freedom of discussion during negotiations and thereby encourage settlements among the parties. *Agnew v. Aydin Corp.* No. 88-3436, 1988 U.S. Dist. LEXIS, 1988 WL 92872 at *3 (E.D. Pa. Sept 6, 1988); see also *Affiliated Mfrs. v. Aluminum Co. of Am.*, 56 F.3d 521 (3d Cir. 1995).

See also, *Citibank, N.A. v. Citytrust*, No. CV-84-3786, 1988 US Dist. LEXIS 9273 (E.D. N.Y. August 16, 1988. “Nothing in Rule 408 limits its scope to direct communications between the negotiating parties. To the contrary, Rule 408 applies to any evidence direct or circumstantial, of settlement of, or offer to settle, a disputed claim.”

The provisions of Rule 408 of the FRE do not by their terms apply to Board proceedings. But the intent and purposes of Rule 408 are contained in 49 C.F.R. § 1109.3. In Finance Docket No. 35524, served November 1, 2011, the Board noted that:

In its petition, BNSF reveals the substance of confidential information between BNSF and Canexus discussed during Board sponsored mediation. Disclosure of this information is a clear violation of Board regulations and will not be tolerated. Our regulations at 49 C.F.R. §

1109.3, which govern all mediation proceedings conducted under Board auspices provides:

In all ADR matters involving the Board...the confidentiality provisions of that Act (5U.S.C. 574) shall bind the Board and all parties and neutrals in those ADR matters.

The applicable confidentiality provisions of the statute recite that “[a] party to a dispute resolution proceeding shall not voluntarily disclose...any dispute resolution communication...” Accordingly, we will grant the motion of Canexus to strike BNSF’s statement regarding mediation discussions from the record in this proceeding. Any future breach of our mediation rules by BNSF, or any other party, may result in sanctions. We remind all parties to mediation that the Board’s rule on confidentiality must be observed. (Footnote omitted)

Admittedly, FRE 408 and the Board’s ADR policies are not the same. But they are grounded in the same recognition that settlement and/or mediation cannot hope to go forward if every word or thought is subject to being revealed and interpreted by the other party in ways that may suit its later interests. It would serve no purpose to go into detail as to the reasons for CI and ACC accepting the UP offer to resolve the Utah case. To do so would also cause the undersigned to go through the same process that UP counsel has, in our opinion, unwisely and inappropriately gone through. And in the final analysis no amount of back and forth could possibly address the issue in this matter, the reasonableness of the UP Tariff 6607 under the ICCTA.

Conclusion

In view of the foregoing, CI and ACC respectfully submit that the Board should strike UP’s argument point II from pages 23 through 27 of its Reply Argument and Evidence and the emails attached as Exhibits C,D,E, and F to the document.

Respectfully submitted,

/s/ Paul M. Donovan

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*Counsel for the Chlorine Institute,
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Council*

Certificate of Service

I hereby certify that on this 14th day of March, 2012, a copy of the foregoing Motion to Strike Improperly Disclosed Confidential Compromise Settlement Negotiations was served by electronic delivery on all parties of record in these proceedings.

/s/ Paul M. Donovan

EXHIBIT I

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FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

JUN 29 2009

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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

THE CHLORINE INSTITUTE, INC., a
Connecticut not for profit corporation, and
AMERICAN CHEMISTRY COUNCIL, a New
York not for profit corporation,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, a
Utah corporation,

Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Civil No. _____

Honorable _____

The Chlorine Institute, Inc. and the American Chemistry Council, plaintiffs in the above-entitled civil action, complain of and for their causes of action against defendant, Union Pacific Railroad Company, allege as follows:

THE PARTIES

1. Plaintiff, The Chlorine Institute, Inc. ("Chlorine Institute"), is a Connecticut not-for-profit corporation with its headquarters at 1300 Wilson Blvd., Arlington, VA 22209.
2. The Chlorine Institute is a 220 member, not-for-profit trade association of chlor-alkali producers, packagers, distributors, users and suppliers.
3. The Chlorine Institute's mission is the promotion of safety and 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.
4. The Chlorine Institute's North American producer members account for more than 95 percent of the total chlorine production capacity of the United States, Canada and Mexico.
5. Plaintiff, American Chemistry Council ("ACC"), is a New York not-for-profit corporation with its headquarters at 1300 Wilson Blvd., Arlington, VA 22209.
6. ACC is an industry association that represents America's leading chemical producers. ACC's 130 members account for approximately eight-five percent (85%) of US capacity for the production of basic industrial chemicals and manufacture a wide array of products, including products designated PIH/TIH, including chlorine. These products, including those designated PIH/TIH, are offered for shipment by railroads including the Union Pacific Railroad Company.
7. ACC and its members have a long-standing commitment to the safe and secure transportation of hazardous materials including PIH/TIH shipments.

8. Defendant, Union Pacific Railroad Company ("UPRR"), is a Utah corporation with its principal place of business located at 1400 Douglas Street, Omaha, Nebraska 68179.

9. UPRR is the largest freight railroad in the United States. UPRR serves primarily the western two-thirds of the United States, and maintains coordinated schedules with other rail carriers to handle freight to and from other parts of the country.

JURISDICTION AND VENUE

10. Plaintiffs bring this action pursuant to 28 U.S.C. § 2201 seeking a declaratory judgment, and pursuant to 28 U.S.C. § 2202 seeking injunctive relief.

11. There is a present and actual controversy among and between the parties, as further set forth herein.

12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1), inasmuch as the amount in controversy (including the value of the declaratory and/or injunctive relief sought by plaintiffs and/or the cost of compliance by defendant UPRR) is in excess of \$75,000, exclusive of interest and costs, and all plaintiffs are diverse from all defendants.

13. In addition, this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, inasmuch as defendant UPRR's actions, as further explained herein, violate federal public policy and therefore raise a substantial federal question.

14. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(a) inasmuch as Defendant UPRR has substantial rail operations within this judicial district

and a substantial part of the events giving rise to the claim are occurring within this judicial district.

NATURE OF THE ACTION/UP TARIFF 6607

15. UPRR has published UP Tariff 6607 containing “General Rules for Movement of Toxic or Poison Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad Company” (hereinafter, the “UP Tariff”).

16. The UP Tariff became effective on March 4, 2009, over the objections of the Chlorine Institute and ACC. A true and correct copy of UP Tariff 6607 is attached hereto as Exhibit “A” and incorporated herein by this reference.

17. The rules contained in the UP Tariff 6607 apply to shipments of Poison Inhalation Hazard (“PIH”) or Toxic Inhalation Hazard (“TIH”) products identified in the Tariff, including chlorine, as these commodities are shipped under the provisions of a public or private Price Document that references the UP Tariff 6607 for its governing rules.

18. The UP Tariff 6607 defines “Price Document” to include either a confidential contract for rail transportation between UPRR and any specific customer, or a public tariff under the jurisdiction of the Surface Transportation Board.

19. Rail rates contained in private confidential contracts may not be challenged as unreasonably high under the terms of the Interstate Commerce Commission Termination Act of 1995. Rail shippers seeking to challenge the level of railroad rates must first demand that the railroad in question issue a “public tariff” rate that is subject to Surface Transportation Board rate level jurisdiction, and then proceed before that Board to challenge the rate level.

20. US Magnesium L.L.C. ("US Magnesium") is a Delaware limited liability company with magnesium mining operations in Rowley, Tooele County, Utah. US Magnesium, which is a member of The Chlorine Institute, produces certain by-products, including chlorine, as part of its magnesium mining operations.

21. US Magnesium then ships its chlorine in rail tank cars from its Rowley, Utah facility to destinations throughout the United States.

22. US Magnesium's chlorine production facility is served exclusively by the UPRR, and UPRR handles one-hundred percent (100%) of the chlorine produced at and moving from the Rowley, Utah location.

23. UPRR is the largest common carrier railroad in North America providing rail transportation service to the general public pursuant to publicly awarded franchises under the Interstate Commerce Act and its successor the Interstate Commerce Commission Termination Act of 1995 (49 U.S.C. § 10101 et seq.).

24. The railroad industry generally, and the UPRR in particular, is subject to government regulation because of the federally granted franchises awarded to it, and the federally imposed entry barriers protecting it from competition from potential rivals. These franchises and entry barriers have given railroads, including UPRR, an uncommon amount of market power, far greater than the bargaining power of any customer of the UPRR.

25. The railroad industry generally, and the UPRR in particular, is providing services that are essential to the economy and to the public interest. In this regard, UPRR is transporting chlorine that is essential to the health and welfare of the nation and to its economic welfare.

26. For a substantial part of the year 2008, US Magnesium sought to negotiate contract rail rates with Defendant UPRR for the shipment of chlorine from its facility in Rowley, Utah to destinations throughout the country. These negotiations did not bear fruit and as a consequence US Magnesium, by letter of January 16, 2009, requested that UPRR publish public tariff rates for those movements.

27. On January 26, 2009, UPRR responded by publishing public tariff rates to some of the requested destinations but refused to publish rates to other destinations claiming that the request for rates to several destinations was not reasonable because there was a supply of chlorine from origins closer to those destinations than Rowley, Utah.

28. The purpose of the US Magnesium request for public tariff rates was to allow it to challenge the reasonableness of those rates before the Surface Transportation Board, a challenge that could not by law be accomplished as long as the rates were contract rates and not public tariff rates.

29. Along with the publication of some tariff rates and the refusal to publish rates to other destinations, UPRR issued UP Tariff 6607 that prescribed general rules for the movement of all PIH/TIH commodities including chlorine.

30. By its terms, this new Tariff is applicable to any confidential contract or any public tariff that references the Tariff, and is applicable to the tariff rates quoted to US Magnesium.

31. US Magnesium has no choice but to accept the provisions of the new Tariff if it is to ship its chlorine from Rowley, Utah inasmuch as UPRR is the only rail

carrier serving the US Magnesium facility and the movement of chlorine over long distances by motor carrier is not feasible for economic and safety reasons.

32. US Magnesium requested that the UPRR publish public tariff rates for the movement of US Magnesium chlorine to various destinations to permit it to challenge the level of the rates demanded by UPRR in contract negotiations.

33. In response to US Magnesium's request, UPRR took four actions: (a) UPRR published tariff rates to some destinations as requested by US Magnesium; (b) UPRR declined to publish rates to other destinations; (c) UPRR filed a petition before the Surface Transportation Board for a declaratory order seeking a determination that its statutorily imposed common carrier obligation does not require that it publish rates for chlorine movements when there are sources of chlorine closer to the proposed destination; and (d) UPRR published UP Tariff 6607.

34. With respect to the tariff rates published by UPRR, US Magnesium has filed a complaint before the Surface Transportation Board alleging that two of the rates are unreasonably high. That matter is pending.

35. With respect to the refusal of UPRR to publish rates on chlorine and with respect to UPRR's petition for a declaratory order that it is not required by law to publish those rates, the Surface Transportation Board issued a decision served June 11, 2009, holding that "[t]he petition for declaratory order is granted to the extent necessary to clarify that UP has an obligation to provide rates to USM for the denied destinations and to provide service for the transportation of chlorine as set forth in this decision."

THE UNLAWFUL INDEMNIFICATION PROVISIONS

36. UP Tariff 6607 contains several provisions dealing with indemnification between the UPRR and the customer seeking to have chlorine or any other PIH/TIH commodity moved by UPRR. Several of these provisions are phrased in a very confusing and difficult to interpret fashion, apparently deliberately so.

37. Foremost among these indemnification provisions is Item 50, paragraph 4. When stripped of its obscuring language, the paragraph provides: "...CUSTOMER SHALL INDEMNIFY AND HOLD RAILROAD HARMLESS FROM ANY AND ALL COST, FINE, PENALTY, CLAIM OR OTHER EXPENSE INCURRED BY RAILROAD (INCLUDING ATTORNEY'S FEES AND OTHER LEGAL OR INVESTIGATIVE EXPENSES, CONSULTING FEES OR REMEDIATION CONTRACTOR EXPENSES) RESULTING FROM ANY ORDER OR DIRECTIVE OR ANY GOVERNMENTAL BODY OR AGENCY... REQUIRING MOVEMENT OF A LOADED CAR SUBJECT TO THIS TARIFF...."

38. The UP Tariff also provides in Item 62: "...THE INDEMNIFICATION PROVISIONS SET FORTH IN ITEM 50...SHALL APPLY EVEN IF THE LOSS, DAMAGE, SUIT, LIABILITY AND EXPENSE IS ALLEGED TO HAVE BEEN CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE, NEGLIGENCE PER SE, OR STRICT LIABILITY OF...RAILROAD."

39. Defendant UPRR is well aware that the "governmental directive" referred to by it in Item 60, paragraph 4 is already in place.

40. On July 10, 2008, UPRR filed testimony with the Surface Transportation Board concerning its obligation to accept and transport chlorine and other PIH/TIH

commodities stating: "The government requires UP and other railroads to transport TIH chemicals. Even though we prefer not to carry TIH commodities, this government policy makes sense, in the absence of safer alternatives."

41. There is no viable alternative to the rail transportation of chlorine and other PIH/TIH commodities in the volumes and over the distances required to meet the health, safety and economic requirements of the Nation. Thus, railroads in general, and UPRR in particular, possess dominant market power over the shippers and receivers of these commodities.

42. Recognizing the governmental policy requiring it to transport these commodities, UPRR seeks to exercise its market power by exculpating itself from its own negligence and to require shippers and receivers without transportation alternatives to indemnify it for that same negligence.

43. The UP Tariff currently directly affects US Magnesium in that it ships chlorine subject to its terms. It also affects other members of the Chlorine Institute and ACC, however, in that it effectively requires those members that ship chlorine and other PIH/TIH to make the Hobson's choice of either accepting the rates offered by UPRR for transportation without resort to the Surface Transportation Board for an adjudication as to the reasonableness of those rates, or, in the alternative, request tariff rates that can be challenged but in so doing subject themselves to the indemnification and exculpation provisions of UP Tariff 6607.

44. In light of the unequal bargaining power of UPRR when compared to that of shippers that must use its services to stay in business, the indemnification and

exculpation provisions of UP Tariff 6607 are against the public policy of both the State of Utah and the United States of America.

OTHER INFORMATION RELEVANT TO PLAINTIFFS' CLAIMS

45. US Magnesium has filed a complaint before the Surface Transportation Board alleging that the tariff rates published by UPRR under UP Tariff 6607 are unreasonably high in violation of 49 U.S.C. §§ 10701(d) and 10702.

46. Should any other member of the Chlorine Institute or ACC seek to challenge any other rate for the movement of PIH/TIH commodities it would be required to request the publication of tariff rates and by doing so subject itself to the provisions of the new UP Tariff 6607.

47. Following its refusal to quote rates to certain destinations requested by US Magnesium, and following its issuance of the new UP Tariff 6607, UPRR filed a petition for a declaratory order with the Surface Transportation Board seeking a ruling from that Board that it had no legal obligation to quote rates for movement of US Magnesium's chlorine to certain destinations when there were other sources of chlorine allegedly closer to those destinations. As mentioned above, the Surface Transportation Board, in its decision of June 11, 2009, has reaffirmed that UPRR is indeed legally obligated to move chlorine to the destinations at issue in that petition.

48. Plaintiffs allege on information and belief that UPRR's reason for filing the petition for declaratory order was and is to obtain an order from the Surface Transportation Board restating that UPRR is indeed legally required to quote rates to any and all destinations. Such an order would then trigger the provisions of Item 50, paragraph 4 of UP Tariff 6607, and result in the indemnification of UPRR for its own negligence pursuant to the provisions of Item 62 of that Tariff.

49. Defendant UPRR has the market power to insist that any confidential contract between it and any chlorine or other PIH/TIH commodity shipper agree to the referencing of the terms and conditions of the new UP Tariff 6607, including the indemnification provisions quoted above, and the application provisions of Item 2 of the new Tariff reflect UPRR's intention to so insist in the future.

50. The result of the unilateral imposition of the UPRR Tariff indemnification provisions is to reduce the incentive of UPRR to operate in a safe manner by eliminating the financial penalty that it would otherwise face for its negligent conduct.

COUNT I
(Declaratory Relief—Violation of Utah Public Policy)

51. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 50 of this Complaint, as if they were fully set forth herein.

52. Defendant UPRR has unilaterally imposed a prospective indemnification and exculpation provision on US Magnesium insofar as US Magnesium ships chlorine by rail on UPRR's lines from its Rowley, Utah facility.

53. Since US Magnesium has no power to agree or disagree with the terms of this prospective indemnification and exculpation provision, the provision is against public policy within the State of Utah, and this Court should grant Plaintiffs declaratory relief so holding.

54. Defendant UPRR has unilaterally imposed a prospective indemnification and exculpation provision on any shipper that ships, or would ship in the future, any PIH/TIH commodity over the lines of the UPRR under public tariff rates.

55. Since shippers of PIH/TIH commodities are subject to the indemnification and exculpation provisions of UP Tariff 6607 to the extent that they seek to exercise their

legal right to request a public tariff rate subject to the regulatory jurisdiction of the Surface Transportation Board, and since such shippers do not have the ability to agree or disagree with the indemnification and exculpation provision, the provision is against public policy within the State of Utah (and other states), and this Court should grant Plaintiffs declaratory relief so holding.

COUNT II
(Declaratory Relief—Violation of Federal Public Policy)

56. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 55 of this Complaint, as if they were fully set forth herein.

57. UPRR is a common carrier railroad.

58. Federal public policy prohibits common carrier railroads from demanding indemnification or exculpation for their own negligence since such provisions eliminate the normal financial incentive for common carriers to operate safely, and this Court should grant Plaintiffs declaratory relief so holding.

59. Federal public policy prohibits common carrier railroads from demanding indemnification or exculpation for their own negligence since such prohibitions protect those such as US Magnesium and other shipper members of the Chlorine Institute and ACC from being overreached by those railroads that have the power unilaterally to impose their economic will, and this Court should grant Plaintiffs declaratory relief so holding.

COUNT III
(Temporary Restraining Order/Preliminary Injunction)

60. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 59 of this Complaint, as if they were fully set forth herein.

61. The actions of Defendant UPRR in imposing the indemnification and exculpation provisions of UP Tariff 6607 on US Magnesium or any other shipper member of the Chlorine Institute or ACC seeking to ship PIH/TIH commodities over the lines of the UPRR causes US Magnesium and/or such other shippers to suffer irreparable injury and harm that can only be redressed by injunctive action of this Court.

62. The current and future injury and harm being suffered and to be suffered by US Magnesium and other shippers of PIH/TIH commodities by allowing UPRR to impose the indemnification and exculpation provisions of UP Tariff 6607 outweighs any injury or harm that could be suffered by UPRR by an injunction prohibiting UPRR from imposing such unlawful provisions of US Magnesium and other shippers.

63. An injunction prohibiting UPRR from imposing the indemnification and exculpation provisions of UP Tariff 6607 on US Magnesium and other shippers of PIT/TIH commodities would not be adverse to the public interest. Rather, such an injunction would serve the public interest by furthering the public policy of both the State of Utah and the United States, as set forth above.

64. Plaintiffs have a substantial likelihood of succeeding on the merits of this action. Alternatively, there are questions going to the merits of this litigation that are so serious, substantial, difficult and doubtful as to make them fair grounds for litigation.

65. The injunctive relief requested by Plaintiffs would not alter the status quo. Rather, such relief, if granted, would place all effected parties back in the position they were in prior to UPRR's issuance of UP Tariff 6607, and prior to the development of this dispute.

66. Pursuant to Federal Rule of Civil Procedure 65, this Court should issue a Temporary Restraining Order and/or Preliminary Injunction enjoining UPRR, and all persons and entities in concert with UPRR, during the pendency of this lawsuit and the entry of a final judgment, from enforcing or attempting to enforce any of the indemnification or exculpation provisions of UP Tariff 6607 upon US Magnesium and/or any other shipper of PIH/TIH commodities over UPRR's lines, or requesting or demanding that US Magnesium or any other shipper of PIH/TIH commodities over UPRR's lines agree to such provisions as a condition of UPRR's agreement to carry such commodities over its lines.

COUNT IV
(Permanent Injunctive Relief)

67. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 66 of this Complaint, as if they were fully set forth herein.

68. Regardless of whether or not this Court grants Plaintiffs a Temporary Restraining Order and/or Preliminary Injunction as requested in Count III of this Complaint, this Court should issue, as part of any final judgment in this litigation, a permanent injunction enjoining UPRR, and all persons and entities in concert with UPRR, during the pendency of this lawsuit and the entry of a final judgment, from enforcing or attempting to enforce any of the indemnification or exculpation provisions of UP Tariff 6607 upon US Magnesium and/or any other shipper of PIH/TIH commodities over UPRR's lines, or requesting or demanding that US Magnesium or any other shipper of PIH/TIH commodities over UPRR's lines agree to such provisions as a condition of UPRR's agreement to carry such commodities over its lines.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, Plaintiffs, the Chlorine Institute, Inc. and the American Chemistry Council, pray for judgment in their favor and against defendant Union Pacific Railroad Company as follows:

A. On their *First Cause of Action*, for a Declaratory Judgment from this Court finding and declaring that the indemnification and exculpation provisions in UP Tariff 6607 is unlawful as against Utah public policy, and that such provisions are unenforceable against US Magnesium and all other shippers of PIH/TIH commodities on UPRR's rail lines;

B. On their *Second Cause of Action*, for a Declaratory Judgment from this Court finding and declaring that the indemnification and exculpation provisions in UP Tariff 6607 is unlawful as against the public policy of the United States, and that such provisions are unenforceable against US Magnesium and all other shippers of PIH/TIH commodities on UPRR's rail lines;

C. On their *Third Cause of Action*, for issuance of a Temporary Restraining Order and/or a Preliminary Injunction enjoining UPRR, and all persons and entities in concert with UPRR, during the pendency of this lawsuit and the entry of a final judgment, from enforcing or attempting to enforce any of the indemnification or exculpation provisions of UP Tariff 6607 upon US Magnesium and/or any other shipper of PIH/TIH commodities over UPRR's lines, or requesting or demanding that US Magnesium or any other shipper of PIH/TIH commodities over UPRR's lines agree to such provisions as a condition of UPRR's agreement to carry such commodities over its lines;

D. On their *Fourth Cause of Action*, for issuance, as part of any final judgment in this litigation, of a permanent injunction enjoining UPRR, and all persons and entities in concert with UPRR, during the pendency of this lawsuit and the entry of a final judgment, from enforcing or attempting to enforce any of the indemnification or exculpation provisions of UP Tariff 6607 upon US Magnesium and/or any other shipper of PIH/TIH commodities over UPRR's lines, or requesting or demanding that US Magnesium or any other shipper of PIH/TIH commodities over UPRR's lines agree to such provisions as a condition of UPRR's agreement to carry such commodities over its lines;

E. For Plaintiffs' costs of suit and attorneys' fees and costs to the extent allowed by law; and

F. For such other and further relief as the Court may deem just and proper.

DATED this 29th day of June, 2009.


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EXHIBIT A
(UP Tariff 6607)



UP TARIFF 6607

CONTAINING

**General Rules for Movement of Toxic or Poison Inhalation
Commodity Shipments over the Lines of the Union Pacific
Railroad Company.**

**Issued By:
G. H. OSLER - MANAGER PRICING SERVICES
K. A. EYMANN - MANAGER PRICING SERVICES**

**Union Pacific Railroad Company
1400 Douglas Street Omaha, NE 68179**

**Issued January 26, 2009
Effective: March 4, 2009**

UP 6607



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TARIFF ITEM CHECKLIST

Item Number	Item/Rate Description	Version	Effective Date	Expiration Date
2	APPLICATION		03/04/2009	12/31/2100
5	REVISIONS		03/04/2009	12/31/2100
10	TRANSPORTATION UNDER THIS TARIFF		03/04/2009	12/31/2100
15	RESTRICTIONS - EXPENSE RECOVERY		03/04/2009	12/31/2100
20	OTHER RULES		03/04/2009	12/31/2100
25	EQUIPMENT		03/04/2009	12/31/2100
30	PRIVATE EQUIPMENT MILEAGE ALLOWANCE/CAR HIRE		03/04/2009	12/31/2100
35	COMMODITY LOSS OR DAMAGE		03/04/2009	12/31/2100
40	LADING		03/04/2009	12/31/2100
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50	INDEMNITY		03/04/2009	12/31/2100
55	INDEMNIFICATION - EQUIPMENT LOADING AND UNLOADING	A	03/04/2009	12/31/2100
60	JOINT LIABILITY	A	03/04/2009	12/31/2100
62	ENFORCEABILITY		03/04/2009	12/31/2100
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85	INSURANCE PROVISIONS		03/04/2009	12/31/2100
90	WAIVER		03/04/2009	12/31/2100
100	ATTACHMENT I - TOXIC INHALATION HAZARD OR POISONOUS BY INHALATION HAZARD COMMODITIES		03/04/2009	12/31/2100

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Item: 2
APPLICATION

Item 2. Application:

The rules contained in this Tariff apply to shipments of Poison (PIH) or Toxic Inhalation (TIH) manufactured products as identified in Attachment 1 hereto. These products are being shipped under the provisions of a public or private price document that references this Union Pacific Railroad Company Rules Tariff 6607 (Tariff) for its governing rules.

For purposes of this Tariff, the term "Price Document" shall be construed to mean either a confidential contract for rail transportation services between the Union Pacific Railroad Company and a specific Customer, or it may mean a public rate tariff, under the jurisdiction of the Surface Transportation Board (STB), that references this Tariff for some or all of its governing terms and conditions.

For purposes of this Tariff, the capitalized term "Customer" shall mean the shipper moving under this Tariff, or the party to a private Price Document, that tenders a shipment of commodity under a Price Document that references this Tariff.

The terms and conditions of this Tariff will apply to all shipments of PIH or TIH commodities that are listed in Attachment 1 or that are classified by the Department of transportation (DOT) as being within one or more of the categories described below (Commodity). Attachment 1 or the Commodities classified within the categories below, may be amended from time to time to include or exclude specific PIH or TIH Commodities.

- Material poisonous by inhalation (PIH) as defined by DOT Hazardous Materials Regulations (HMR), 49 C.F.R. Section 171.8.
- Material listed as a hazardous substance in DOT HMR 49, C.F.R. Section 173.31(f)(2) due to the environmentally sensitive nature of the Commodity.
- Infectious substances (etiologic agents) subject to DOT HMR as a Division 6.2 material.

The following hazardous Commodities may not be tendered for transportation under this Tariff or any Pricing Documents subject to this Tariff.

- Radioactive material subject to DOT HMR as a Class 7 material.
- Asbestos.
- Building construction debris.

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- Waste regulated by EPA (e.g., PCB's, used oil).
- Medical waste.



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Item: 5
REVISIONS

Item 5. Revisions:

Revisions to this Tariff will be made from time to time by revising a specific item/page or reissuing the Tariff in its entirety.

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Item: 10
TRANSPORTATION UNDER THIS TARIFF

Item 10. Transportation Under This Tariff:

Railroad Tariff shall provide line-haul transportation and, as required, switching services over Railroads' lines, of Customer's Commodity in Customer supplied equipment (Private Equipment) from Origin(s) to Destination(s) via routing outlined in the Price Document.

In the event of conflict between the terms and conditions of this Tariff and those set forth in the Price Document referencing this Tariff, the terms and conditions of the Price Document shall govern.

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Item: 15
RESTRICTIONS - EXPENSE RECOVERY

Item 15 Routing Restriction Expense Recovery

If actions by federal, state, or local governments ban, restrict or otherwise prohibit the transportation through their jurisdictions of any Commodity(ies) moving pursuant to the terms or routing of a Price Document referencing this Tariff, and Railroad is thereby required to re-route its trains carrying such Commodities in a way that causes Railroad to incur additional costs, Customer shall be responsible for such additional costs.

The additional costs may include, but are not limited to: costs associated with labor, equipment, fuel, additional switching operations, or increased Railroad terminal dwell time.

Railroad will use its best efforts to advise the Customer of the anticipation and/or occurrence of additional costs. Such costs will be added to the freight rates set forth in the Price Document and included in the calculation of total charges due from the Customer.

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Item: 20
OTHER RULES

Item 20 Other Rules

This Tariff adopts by this reference the following publications:

<u>Uniform Freight Classification</u>	<u>Tariff UFC 6000 series</u>
<u>Official Railroad Station List</u>	<u>Tariff OPSL 6000 series</u>
<u>Directory of Hazardous Materials Shipping Description</u>	<u>Issued by Railinc.</u>
<u>Bureau of Explosives</u>	<u>Tariff BOE 6000 series</u>
<u>Official Railway Equipment Register</u>	<u>RER series</u>
<u>Union Pacific Railroad Company Accessorial Tariff</u>	<u>Tariff UP 6004 series</u>
<u>Union Pacific Railroad Company Tariff</u>	<u>Tariff UP 6007 series</u>
<u>Standard Transportation Commodity Code</u>	<u>STCC 6001-series</u>

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Item: 25
EQUIPMENT

Item 25. Equipment:

Private equipment used for transport pursuant to any Price Document referencing this Tariff shall comply with applicable rules and regulations for private railcars established by the Association of American Railroads, Federal Department of Transportation, and Federal Railroad Administration. Said Private Equipment shall also comply with all applicable Hazardous Materials Regulations of the U.S. Department of Transportation (DOT), as published in Title 49 of the Code of Federal Regulations, as amended, supplemented, and revised. Compliance therewith shall in no way relieve any party from any liabilities otherwise assumed under the Price Document and it shall be the responsibility of the party providing the Private Equipment in any case to assure such compliance.

Acceptance of Private Equipment in interchange by Railroad(s) will not relieve Customer of its obligation herein and shall not constitute waiver by Railroad(s) of Customer's obligations hereunder. Customer shall indemnify and hold harmless Railroad from and against any and all liability for loss or damage (including but not limited to loss or damage to personal property, personal injury and/or death, attorney's fees arising therefrom, or any special, consequential, or environmental damages) resulting from future use of Private Equipment to the extent such loss, damage, personal injury or death resulted from Customer's failure or negligence in inspecting, securing and/or decontaminating the Private Equipment prior to release to Railroad.



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Item: 30
PRIVATE EQUIPMENT MILEAGE ALLOWANCE/CAR HIRE

Item 30. Private Equipment Mileage Allowance/Car Hire

Customer waives payment of all mileage allowances applicable under Tariff RIC 6007 - series, as amended, supplemented, and/or reissued, which would have been due from Railroad for the use of Private Equipment in the absence of this Tariff.

Customer warrants that its interest in the Private Equipment furnished under any Price Document referencing this Tariff is sufficient to permit it to waive payments of any mileage allowances. Customer and Railroad agree that Railroad shall not be liable for any mileage allowance that may accrue or have been paid in error by Railroad on Private Equipment used under this Tariff. In the event that the owner of the Private Equipment or the person whose reporting marks appear on the Private Equipment other than Customer (hereinafter "Car Owner") makes a claim against Railroad for payment of mileage allowances which may have been paid in error by Railroad that have not been provided for in any Price Document referencing this Tariff (hereinafter Mileage Allowance), Customer shall, upon notification thereof by Railroad, either (1) defend Railroad against and relieve Railroad from said claim or (2) reimburse Railroad for payment of the Mileage Allowance to the Car Owner.

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Item: 35
COMMODITY LOSS OR DAMAGE

Item 35. Commodity Loss or Damage:

Each bill of lading shall contain all information required by all applicable state and federal laws and regulations governing the transportation of PIH or TIH.

Customer agrees not to file any claim for freight loss or damage when the amount of proven loss or damage is less than \$200.00 per carload (Minimum Claim Amount). If Customer's proven loss or damage is determined to be in excess of the Minimum Claim Amount, the Minimum Claim Amount shall be deducted from any claim against Railroad for loss or damage to Commodity.

WITH RESPECT TO THE LIABILITY OF RAILROAD(S) TO CUSTOMER FOR LOSS OR DAMAGE TO THE COMMODITY ITSELF, RAILROAD(S) SHALL NOT BE LIABLE FOR SPECIAL, CONSEQUENTIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES ARISING FROM LOSS OR DAMAGE TO COMMODITY OR FOR ANY AMOUNT IN EXCESS OF THE ACTUAL DAMAGE TO THE COMMODITY TRANSPORTED HEREUNDER.

In all other respects, claims shall be processed in accordance with 49 U.S.C. Section 11706 and 49 C.F.R. Part 1005.

All lawsuits must be filed within twelve (12) months from the actual date of delivery by Railroad, or in the event of loss of shipment, from the expected date of delivery by Railroad.

Railroad shall have no obligation with regard to disposition of Commodity tendered to it for transportation other than to deliver it to Customer or party designated or deemed to have been designated by Customer, at a Destination location named in this Tariff, or an alternate destination location designated or deemed to have been designated by Customer.



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Item: 40
LADING

Item 40. Lading:

Customer or its designated agent is solely responsible for the securement of lading in accordance with the rules of the Association of American Railroads (AAR) or as modified to meet the needs of Customer, subject to approval of UP's Freight Loss & Damage Prevention Department. Loading and handling of any PIH or TIH shall be performed in accordance with all applicable federal and state requirements.

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Item: 45
LEGAL PROCEEDING

Item 45. Legal Proceeding:

Unless otherwise specifically provided in any individual Price Document referencing this Tariff, the interpretation, construction, and performances of this Tariff and the rights and remedies of the parties hereunder shall be governed by the laws of the State of Nebraska.

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Item: 50
INDEMNITY

Item 50. Indemnity:

- 1. RAILROAD SHALL SAVE, INDEMNIFY, DEFEND AND HOLD HARMLESS CUSTOMER AND ITS DIRECTORS, OFFICERS AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIM, LOSS, DAMAGES (INCLUDING SPECIAL AND CONSEQUENTIAL DAMAGE OR DAMAGES CAUSED BY SUDDEN ACCIDENTAL POLLUTION) SUIT, LIABILITY, AND EXPENSE ARISING FROM RAILROAD'S NEGLIGENCE IN THE PERFORMANCE OF TRANSPORTATION SERVICE PURSUANT TO THIS TARIFF, PROVIDED HOWEVER, THAT SUCH INDEMNIFICATION AND HOLD HARMLESS OBLIGATIONS SHALL NOT APPLY TO ANY CLAIM, LOSS, DAMAGES, SUIT, LIABILITY OR EXPENSE CAUSED BY THE SOLE OR CONCURRING NEGLIGENCE OF CUSTOMER.**
- 2. CUSTOMER SHALL SAVE, INDEMNIFY, DEFEND AND HOLD HARMLESS RAILROAD AND ITS DIRECTORS, OFFICERS, AGENTS AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIM, LOSS, DAMAGES (INCLUDING SPECIAL AND CONSEQUENTIAL DAMAGES), SUIT, LIABILITY, AND EXPENSE ARISING FROM OR IN ANY WAY CONNECTED WITH THE TRANSPORTATION, TRANSFER, DELIVERY, TREATMENT, DUMPING, STORAGE OR DISPOSAL OF COMMODITY BY CUSTOMER, OR ANY OTHER ACT OR OMISSION OF CUSTOMER, OR A PARTY DESIGNATED BY CUSTOMER TO RECEIVE, TRANSFER, DELIVER, TREAT, DUMP, STORE OR DISPOSE OF COMMODITY, INCLUDING, BUT NOT LIMITED TO, DAMAGES CAUSED BY SUDDEN ACCIDENTAL POLLUTION OR THE CONTAMINATION OF COMMODITY, AND ANY FINES, PENALTIES OR SUITS RESULTING FROM ALLEGED OR ACTUAL VIOLATION OF FEDERAL, STATE OR LOCAL ENVIRONMENTAL OR OTHER LAW, STATUTE, ORDINANCE, CODE, OR REGULATION.**
- 3. IN PARTICULAR, BUT WITHOUT LIMITING THE FOREGOING, IF CUSTOMER, KNOWINGLY OR UNKNOWINGLY, TENDERS OR SHIPS ANY HAZARDOUS ORTIH/PIH COMMODITY(IES) NOT AUTHORIZED UNDER TERMS OF THIS TARIFF, CUSTOMER SHALL SAVE, INDEMNIFY, DEFEND AND HOLD HARMLESS RAILROAD AND ITS DIRECTORS, OFFICERS AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIM, LOSS, DAMAGES (INCLUDING SPECIAL AND CONSEQUENTIAL DAMAGES), SUIT, LIABILITY AND EXPENSE ARISING OUT OF THE TRANSPORTATION, TRANSFER, DELIVERY, TREATMENT, DUMPING, STORAGE OR DISPOSAL OF COMMODITY, INCLUDING BUT NOT LIMITED TO ANY AND ALL CLEANUP OR DECONTAMINATION COSTS, ANY ENVIRONMENTAL FINES OR PENALTIES, AND ANY LIABILITY PURSUANT TO FEDERAL, STATE OR LOCAL LAWS WHICH MAY HOLD A TRANSPORTER OF COMMODITY OR MATERIALS**

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LIABLE FOR ANY RELEASE OF HAZARDOUS COMMODITY OR MATERIALS.

- 4. FURTHER, AND WITHOUT LIMITING THE FOREGOING, CUSTOMER SHALL INDEMNIFY AND HOLD RAILROAD HARMLESS FROM ANY AND ALL COST, FINE, PENALTY, CLAIM OR OTHER EXPENSE INCURRED BY RAILROAD (INCLUDING ATTORNEY'S FEES AND OTHER LEGAL OR INVESTIGATIVE EXPENSES, CONSULTING FEES, OR REMEDIATION CONTRACTOR EXPENSES) RESULTING FROM ANY ORDER OR DIRECTIVE OF ANY GOVERNMENTAL BODY OR AGENCY OR ANY COURT PROHIBITING, REGULATING, RESTRICTING OR REQUIRING MOVEMENT OF A LOADED CAR SUBJECT TO THIS TARIFF, OR PROHIBITING, REGULATING OR RESTRICTING DELIVERY OF THE COMMODITY AT DESTINATION OR AT ANY ALTERNATIVE DESTINATION OR AT ORIGIN IF THE COMMODITY IS RETURNED TO ORIGIN PURSUANT TO THE RETURNED SHIPMENTS SECTION HEREOF. SUCH COSTS SHALL INCLUDE TRANSPORTATION COSTS (INCLUDING APPLICABLE CHARGES FOR ANY TRANSPORTATION SERVICE PERFORMED BY RAILROAD), DUMPING, STORAGE, TRANSFER, DELIVERY, TREATMENT OR OTHER COSTS DIRECT AND INDIRECT, INCURRED BY RAILROAD IN DISPOSING OF THE COMMODITY OR INCURRED AS A RESULT OF ANY SUCH ORDER OR DIRECTIVE.**



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Item: 55-A
INDEMNIFICATION - EQUIPMENT LOADING AND
UNLOADING

Item 55 - Indemnification - Equipment Loading And Unloading:

UPON DELIVERY TO AND ACCEPTANCE BY CUSTOMER OF THE COMMODITY TRANSPORTED UNDER THE PRICE DOCUMENT REFERENCING THIS TARIFF, RAILROAD SHALL BE RELIEVED FROM ANY FURTHER OBLIGATION WITH REGARD TO ITS DISPOSITION. CUSTOMER HEREBY AGREES TO INDEMNIFY AND HOLD RAILROAD HARMLESS FROM AND AGAINST ANY AND ALL LOSS, DAMAGE (INCLUDING SPECIAL AND CONSEQUENTIAL DAMAGES), SUITS, LIABILITY AND EXPENSES (INCLUDING, BUT NOT LIMITED TO, ENVIRONMENTAL COSTS, INVESTIGATION COSTS AND REASONABLE LEGAL EXPENSES) ARISING OUT OF ANY CLAIM FOR LOSS OR DAMAGE TO PROPERTY, INCLUDING WITHOUT LIMITATION CUSTOMER'S, RAILROAD'S OR THIRD PARTY'S PROPERTY, INCLUDING NATURAL RESOURCES AND INJURIES TO OR DEATH OF PERSONS, INCLUDING WITHOUT LIMITATION CUSTOMER'S, RAILROAD'S EMPLOYEES, CAUSED BY, RESULTING FROM, OR GROWING OUT OF THE WORK PERFORMED BY CUSTOMER, INCLUDING, BUT NOT LIMITED TO, DAMAGE CAUSED BY SUDDEN RELEASE OR DISCHARGE AND SHALL, AT THE OPTION OF RAILROAD, DEFEND RAILROAD AT CUSTOMER'S SOLE EXPENSE IN ANY LITIGATION INVOLVING THE SAME

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Item: 60-A
JOINT LIABILITY

Item 60. Joint Liability:

(The provisions of this item 60 will apply to joint, contributory, or concurrent liability).

TO THE EXTENT THAT THE LOSS, DAMAGE, SUITS, LIABILITY AND EXPENSE (INCLUDING, BUT NOT LIMITED TO, REASONABLE INVESTIGATION AND LEGAL EXPENSES) ARISING OUT OF ANY CLAIM FOR LOSS OF OR DAMAGE TO PROPERTY (INCLUDING WITHOUT LIMITATION RAILROAD'S OR CUSTOMER'S PROPERTY) OR INJURY TO OR DEATH OF PERSONS (INCLUDING WITHOUT LIMITATION RAILROAD'S OR CUSTOMER'S EMPLOYEES), ARISING OUT OF AND/OR CONNECTED WITH THE TRANSPORTATION OF COMMODITY UNDER ANY RATE SET IN ANY PRICE DOCUMENT MAKING REFERENCE TO THIS TARIFF, IS CAUSED BY THE JOINT, CONTRIBUTORY OR CONCURRENT NEGLIGENCE, NEGLIGENCE PER SE OR STRICT LIABILITY OF THE RAILROAD AND CUSTOMER, IT SHALL BE APPORTIONED BETWEEN RAILROAD AND CUSTOMER AS DETERMINED UNDER THE PRINCIPLES OF COMPARATIVE FAULT IN PROPORTION OF THEIR COMPARATIVE FAULT AS DETERMINED BY A COURT ACCORDING TO THE APPLICABLE LAW OF THE STATE WHERE THE LOSS OCCURRED.

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Item: 62
ENFORCEABILITY

Item 62. Enforceability:

TO MEET THE REQUIREMENTS OF THE EXPRESS NEGLIGENCE TEST UNDER VARIOUS STATE LAWS, THE INDEMNIFICATION PROVISION(S) SET FORTH IN ITEMS 50, 55 AND 60 IN THIS TARIFF SHALL APPLY EVEN IF THE LOSS, DAMAGE, SUIT, LIABILITY AND EXPENSE IS ALLEGED TO HAVE BEEN CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE, NEGLIGENCE PER SE, OR STRICT LIABILITY OF CUSTOMER OR RAILROAD.

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Item: 65
RETURNED OR REJECTED SHIPMENTS

Item 65. Returned Or Rejected Shipments

If a shipment of Commodity has reached its Destination, but is returned to the original shipping point with Railroad's permission and consent, (in addition to necessary shipping documentation, which shall include but not be limited to Bill of Lading) the following provisions will apply:

1. Reverse routing will be observed in all cases, except in the case of emergency routing orders.
2. On shipments not partially unloaded, the return movement will be subject to the Price Document Rates minimum weights applicable in the reverse direction in effect on the date the shipment is tendered for return.
3. Mileage payments for Private Equipment compensation will NOT be made on shipments not partially unloaded and then returned to the original shipping point.
4. On shipments that are partially unloaded, the return movement will be subject to the rates set forth in the Price Document referencing this Tariff that was observed in the reverse direction, such rate shall be applied to the actual weight of the Commodity remaining in the Private Equipment on the date the shipment is tendered for return.
5. Mileage payments for Private Equipment compensation will NOT be made on partially unloaded Private Equipment returned to the original shipping point.
6. No freight charges will be assessed on Private Equipment returned to the original shipping point if the remaining weight is less than seven percent (7%) of the original outbound lading weight, or if no commercial consideration (See note) is given to the substance remaining in the Private Equipment.

NOTE: No commercial consideration shall be deemed to be given to the remaining substance if the purchaser or consignee in connection with the last loaded movement is not credited with it, or if it is discharged as waste before the Private Equipment is again loaded, or if such remaining material is accumulated substance which is wasted when the Private Equipment is cleaned.



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Item: 70
DEFAULT

Item 70. Default:

Any of the following events shall constitute a Default hereunder:

1. Failure of Customer to pay when due and payable any payment of charges during the term of a Price Document making reference to this Tariff; or
2. Failure by any party to perform, keep or observe any material term, provision, warranty or condition contained in this Tariff, unless otherwise excused by the terms of this Tariff.

If any party to a Price Document referencing this Tariff fails to correct a default hereunder within thirty (30) days after written notice to do so, the party serving such notice may unilaterally terminate its participation in the Price Document forthwith. Waiver of any default shall not be construed as a waiver of either a subsequent or continuing default. Termination of the Price Document shall not affect a party's liability by reason of any act, default, or occurrence prior to such termination.



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Item: 75
WARRANTIES

Item 75. Warranties:

Each party hereto acknowledges and understands that the Commodity to be transported under a Price Document referencing this Tariff is a TIH or PIH commodity that contains toxic or hazardous substances or hazardous substance-containing materials and that are hazardous to life, health, property, and the environment.

Railroad shall be relieved from any responsibility to switch or pick up railcars from Customer's facility, if, in the opinion of Railroad's employees, the facility is contaminated with a toxic substances in the area of Railroad's operation. Railroad reserves the right to inspect Customer's loading or unloading facility upon five (5) days' advance written notification. If Railroad determines the area of Railroad's operation is contaminated, Railroad shall be relieved of its obligation to transport any additional railcars to or from the facility until the area has been remediated to Railroad's satisfaction.

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Item: 80
SAVINGS CLAUSE

Item 80. Savings Clause:

If any one or more of the provisions contained in this Tariff shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Tariff but this Tariff shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

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**Item: 85
INSURANCE PROVISIONS**

Item 85. Insurance Provisions:

For purposes of transporting Commodity under terms of a Price Document referencing this Tariff, Customer agrees to keep in force General Liability Insurance (containing Broad Form Contractual Liability) and Pollution Legal Liability Insurance that provides protections against pollution from any occurrence involving Customer's Commodity with minimum policy limits of not less than \$10 million per occurrence and name Railroad as additional insured to the extent of liabilities and indemnities assumed by Customer under this Tariff

Customer will also maintain statutory Workers' Compensation and Employers Liability which shall include a waiver of subrogation in favor of Railroad to the extent of liabilities and indemnities assumed by Customer under this Tariff.

Customer is not allowed to self-insure without the prior written consent of Railroad If granted, any deductible, self-insured retention or other financial responsibility for claims must be covered directly by Customer in lieu of insurance. Any and all Railroad liabilities that would otherwise, in accordance with the provisions of this Circular, be covered by Customer's insurance will be covered as if Customer elected not to include deductible, self-insured retention or other financial responsibility for claims.

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Item: 90
WAIVER

Item 90. Waiver:

The failure of any party to enforce any provision of this Tariff or to prosecute any default shall not be considered a waiver of that provision nor bar prosecution of that default unless such party so indicates in writing.

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Item: 100
ATTACHMENT 1 - TOXIC INHALATION HAZARD OR
POISONOUS BY INHALATION HAZARD COMMODITIES

ATTACHMENT 1

**Toxic by Inhalation Hazard
Or
Poisonous by Inhalation Hazard
Commodities**

**HAZARDOUS
MATERIAL
STCC**

DESCRIPTION

4821019	WASTE ALLYL ALCOHOL
4821261	WASTE TOXIC LIQUID, CORROSIVE, INORGANIC, N.O.S.
4821722	WASTE HEXACHLOROPENTADIENE
4830030	WASTE FUMING SULFURIC ACID
4904209	AMMONIA, ANHYDROUS
4904210	AMMONIA, ANHYDROUS
4904211	AMMONIA, SOLUTION
4904878	AMMONIA, ANHYDROUS
4907409	ISOBUTYL ISOCYANATE
4907434	ETHYL ISOCYANATE
4909306	ISOPROPYL ISOCYANATE
4909307	METHOXYMETHYL ISOCYANATE
4910370	METHACRYLONITRILE, STABILIZED
4916138	PENTABORANE
4918180	TETRANITROMETHANE
4918505	BROMINE PENTAFLUORIDE
4918507	BROMINE TRIFLUORIDE
4920101	COMPRESSED GAS, TOXIC, CORROSIVE, N.O.S.
4920102	COMPRESSED GAS, TOXIC, FLAMMABLE, CORROSIVE, N.O.
4920103	COMPRESSED GAS, TOXIC, OXIDIZING, CORROSIVE, N.O.
4920104	COMPRESSED GAS, TOXIC, OXIDIZING, N.O.S.
4920105	LIQUEFIED GAS, TOXIC, CORROSIVE, N.O.S.
4920106	SELENIUM HEXAFLUORIDE
4920107	DIBORANE, COMPRESSED
4920108	LIQUEFIED GAS, TOXIC, FLAMMABLE, CORROSIVE, N.O.S
4920110	LIQUEFIED GAS, TOXIC, OXIDIZING, CORROSIVE, N.O.S
4920111	LIQUEFIED GAS, TOXIC, OXIDIZING, N.O.S.
4920112	NITRIC OXIDE, COMPRESSED
4920113	NITRIC OXIDE AND DINITROGEN MIXTURES
4920113	NITRIC OXIDE AND DITNITROGEN TETROXIDE MIXTURES
4920114	NITRIC OXIDE AND NITROGEN DIOXIDE MIXTURES

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4920115	INSECTICIDE GASES, TOXIC, FLAMMABLE, N.O.S.
4920116	INSECTICIDE GASES, TOXIC, FLAMMABLE, N.O.S.
4920122	HYDROGEN SELENIDE, ANHYDROUS
4920135	ARSINE
4920160	PHOSPHINE
4920164	LIQUEFIED GAS, TOXIC, FLAMMABLE, N.O.S.
4920165	COMPRESSED GAS, TOXIC, FLAMMABLE, N.O.S.
4920167	STIBINE
4920173	OXYGEN DIFLUORIDE, COMPRESSED
4920174	DINITROGEN TETROXIDE
4920175	NITROGEN TRIOXIDE
4920178	CYANOGEN CHLORIDE, STABILIZED
4920180	FLUORINE, COMPRESSED
4920181	COMPRESSED GAS, TOXIC, N.O.S.
4920183	PHOSPHORUS PENTAFLUORIDE, COMPRESSED
4920184	PHOSGENE
4920187	SULPHUR TETRAFLUORIDE
4920188	TELLURIUM HEXAFLUORIDE
4920189	CHLORINE PENTAFLUORIDE
4920195	LIQUEFIED GAS, TOXIC, N.O.S.
4920196	ETHYLENE OXIDE AND CARBON DIOXIDE MIXTURE
4920300	COMPRESSED GAS, TOXIC, N.O.S.
4920301	COMPRESSED GAS, TOXIC, N.O.S.
4920302	INSECTICIDE GASES, TOXIC, FLAMMABLE, N.O.S.
4920303	COMPRESSED GAS, TOXIC, FLAMMABLE, CORROSIVE, N.O.
4920304	COMPRESSED GAS, TOXIC, FLAMMABLE, CORROSIVE, N.O.
4920305	COMPRESSED GAS, TOXIC, FLAMMABLE, CORROSIVE, N.O.
4920306	COMPRESSED GAS, TOXIC, OXIDIZING, CORROSIVE, N.O.
4920307	COMPRESSED GAS, TOXIC, OXIDIZING, CORROSIVE, N.O.
4920308	COMPRESSED GAS, TOXIC, OXIDIZING, CORROSIVE, N.O.
4920309	COMPRESSED GAS, TOXIC, OXIDIZING, N.O.S.
4920310	COMPRESSED GAS, TOXIC, OXIDIZING, N.O.S.
4920311	LIQUEFIED GAS, TOXIC, CORROSIVE, N.O.S
4920312	LIQUEFIED GAS, TOXIC, OXIDIZING, CORROSIVE, N.O.S
4920313	LIQUEFIED GAS, TOXIC, CORROSIVE, N.O.S
4920314	LIQUEFIED GAS, TOXIC, FLAMMABLE, CORROSIVE, N.O.S
4920315	LIQUEFIED GAS, TOXIC, FLAMMABLE, CORROSIVE, N.O.S
4920316	LIQUEFIED GAS, TOXIC, CORROSIVE, N.O.S
4920317	LIQUEFIED GAS, TOXIC, OXIDIZING, N.O.S
4920318	LIQUEFIED GAS, TOXIC, FLAMMABLE, CORROSIVE, N.O.S
4920319	LIQUEFIED GAS, TOXIC, OXIDIZING, N.O.S
4920320	LIQUEFIED GAS, TOXIC, OXIDIZING, CORROSIVE, N.O.S.
4920321	LIQUEFIED GAS, TOXIC, OXIDIZING, N.O.S.
4920322	INSECTICIDE GASES, TOXIC, FLAMMABLE, N.O.S.
4920323	INSECTICIDE GASES, TOXIC, FLAMMABLE, N.O.S.
4920324	COMPRESSED GAS, TOXIC, CORROSIVE, N.O.S.
4920325	COMPRESSED GAS, TOXIC, OXIDIZING, CORROSIVE, N.O.S.
4920331	COMPRESSED GAS, TOXIC, CORROSIVE, N.O.S.
4920337	COMPRESSED GAS, TOXIC, OXIDIZING, N.O.S.
4920342	ETHYLENE OXIDE AND CARBON DIOXIDE MIXTURE
4920343	CARBON MONOXIDE AND HYDROGEN MIXTURE, COMPRESSED

4920344	OIL GAS, COMPRESSED
4920346	TRIFLUOROCHLOROETHYLENE, STABILIZED
4920347	TRIFLUOROACETYLCHLORIDE
4920348	TRICHLOROACETYL CHLORIDE
4920349	HYDROGEN IODIDE, ANHYDROUS
4920351	CARBONYL SULFIDE
4920352	CHLORINE TRIFLUORIDE
4920353	ETHYLENE OXIDE
4920354	GERMANE
4920355	METHYL MERCAPTAN
4920356	PERCHLORYL FLUORIDE
4920357	SILICON TETRAFLUORIDE, COMPRESSED
4920359	AMMONIA ANHYDROUS
4920360	AMMONIA SOLUTIONS
4920368	LIQUEFIED GAS, TOXIC, N.O.S.
4920369	LIQUEFIED GAS, TOXIC, N.O.S.
4920371	TUNGSTEN HEXAFLUORIDE
4920373	COMPRESSED GAS, TOXIC, N.O.S.
4920375	COMPRESSED GAS, TOXIC, N.O.S.
4920378	COMPRESSED GAS, TOXIC, FLAMMABLE, N.O.S.
4920379	COMPRESSED GAS, TOXIC, FLAMMABLE, N.O.S.
4920380	LIQUEFIED GAS, TOXIC, FLAMMABLE, N.O.S.
4920381	LIQUEFIED GAS, TOXIC, FLAMMABLE, N.O.S.
4920382	LIQUEFIED GAS, TOXIC, FLAMMABLE, N.O.S.
4920392	CHLOROPICRIN AND METHYL CHLORIDE MIXTURES
4920394	METHYLCHLOROSILANE
4920395	CYANOGEN
4920396	COMPRESSED GAS, TOXIC, FLAMMABLE, N.O.S.
4920398	DICHLOROSILANE
4920399	CARBON MONOXIDE, COMPRESSED
4920502	HYDROGEN BROMIDE, ANHYDROUS
4920503	HYDROGEN CHLORIDE, ANHYDROUS
4920504	HYDROGEN CHLORIDE, REFRIGERATED LIQUID
4920505	LIQUEFIED GASES, TOXIC, N.O.S.
4920508	SULFUR DIOXIDE
4920509	NITROSYL CHLORIDE
4920510	GAS IDENTIFICATION SET
4920511	CARBON MONOXIDE, REFRIGERATED LIQUID
4920513	HYDROGEN SULFIDE
4920315	HEXAETHYL TETRAPHOSPHATE & COMPRESSED GAS MIX.
4920516	CHLOROPICRIN AND METHYL BROMIDE MIXTURES
4920517	COMPRESSED GAS, TOXIC, N.O.S.
4920518	METHYL BROMIDE
4920522	BORON FLUORIDE, COMPRESSED
4920523	CHLORINE
4920525	COMPRESSED GAS, TOXIC, N.O.S.
4920526	SUFURYL FLUORIDE
4920527	COAL GAS COMPRESSED
4920528	HEXAFLUOROACETONE
4920530	ORGANIC PHOSPHATE, MIXED WITH COMPRESSED GAS
4920531	LIQUEFIED GAS TOXIC, N.O.S.

4920534	GAS SAMPLE, NONPRESSURIZED TOXIC FLAMMABLE
4920535	PARATHION AND COMPRESSED GAS MIXTURE
4920536	GAS SAMPLE, NONPRESSURIZED TOXIC
4920547	CHLOROPICRIN AND METHYL BROMIDE MIXTURES
4920550	INSECTICIDE GASES, TOXIC, N.O.S.
4920556	LIQUIFIED GAS, TOXIC, N.O.S.
4920559	CARBONYL FLUORIDE, COMPRESSED
4920570	COMPRESSED GAS, TOXIC, N.O.S.
4920571	LIQUEFIED GAS, TOXIC, N.O.S.
4920715	BROMINE CHLORIDE
4921000	TOXIC BY INHALATION LIQUID, N.O.S.
4921003	TOXIC BY INHALATION LIQUID, N.O.S.
4921004	ALLYLAMINE
4921006	TOXIC BY INHALATION LIQUID, WATER-REACTIVE, N.O.S.
4921008	METHYL PHOSPHONOUS DICHLORIDE
4921009	CHLOROACETONITRILE
4921010	CYCLOHEXYL ISOCYANATE
4921016	PHOSPHORUS TRICHLORIDE
4921019	ALLYL ALCOHOL
4921020	ETHYL CHLOROFORMATE
4921023	TOXIC BY INHALATION LIQUID, OXIDIZING, N.O.S.
4921024	TOXIC BY INHALATION LIQUID, OXIDIZING, N.O.S.
4921028	HYDROCYANIC ACID, AQUEOUS SOLUTIONS
4921063	TRIMETHYLACETYL CHLORIDE
4921064	TOXIC LIQUIDS, FLAMMABLE, ORGANIC, N.O.S.
4921202	DIMETHYLHYDRAZINE, UNSYMMETRICAL
4921207	SEC-BUTYL CHLOROFORMATE
4921211	ISOBUTYL CHLOROFORMATE
4921213	TRIMETHOXY SILANE
4921216	PHENYL ISOCYANATE
4921239	HYDROGEN CYANIDE, SOLUTION IN ALCOHOL
4921245	METHANESULFONYL CHLORIDE
4921248	CROTONALDEHYDE, STABILIZED
4921251	MDIMETHYLHYDRAZINE, SYMETRICAL
4921252	ISOPROPYL CHLOROFORMATE
4921254	DIKETENE, STABILIZED
4921255	METHYL ORTHOSILICATE
4921275	METHYLDICHLOROARSINE
4921287	TOXIC BY INHALATION LIQUID, CORROSIVE, N.O.S.
4921288	TOXIC BY INHALATION LIQUID, CORROSIVE, N.O.S.
4921304	METHYL IODIDE
4921401	ACETONE CYANOHYDRIN, STABILIZED
4921402	2-CHLOROETHANAL
4921404	METHYLDICHLOROARSINE
4921405	DIMETHYL SULFATE
4921413	PHENYL MERCAPTAN
4921414	CHLOROPICRIN
4921420	ETHYLENE CHLOROHYDRIN
4921438	MMETHYL BROMIDE AND ETHYLENE DIBROMIDE MIXTURES
4921473	PERCHLOROMETHYLMERCAPTAN
4921487	METHYL ISOTHIOCYANATE

4921495	2-METHYL-2-HEPTANETHIOL
4921497	ETHYLENE DIBROMIDE
4921558	CHLOROACETONE, STABILIZED
4921587	PHENYLCARBYLAMINE CHLORIDE
4921695	METHYL PHOSPHONIC DICHLORIDE
4921722	HEXACHLOROCYCLOPENTADIENE
4921727	BROMOACETONE
4921730	N-BUTYL CHLOROFORMATE
4921741	TRIFLUOROPYRIDINE
4921742	ETHYL PHOSPHONOUS DICHLORIDE, ANHYDROUS
4921744	ETHYL PHOSPHORODICHLORIDATE
4921745	ETHYL PHOSPHONOTHIOIC DICHLORIDE, ANHYDROUS
4921746	CHLOROPIVALOYL CHLORIDE
4921756	N-PROPYL CHLOROFORMATE
4923113	ALLYL CHLOROFORMATE
4923117	CHLOROACETYL CHLORIDE
4923209	ARSENIC TRICHLORIDE
4923298	THIOPHOSGENE
4927004	IRON PENTACARBONYL
4927006	ETHYLENEIMINE,STABILIZED
4927007	ACROLEIN, INHIBITED
4927008	METHYL CHLOROFORMATE
4927009	METHYL ISOCYANATE
4927010	NICKEL CARBONYL
4927011	METHYLHYDRAZINE
4927012	METHYL CHLOROMETHYL ETHER
4927014	HYDROGEN CYANIDE, ANHYDROUS, STABILIZED
4927018	TOXIC BY INHALATION LIQUID, N.O.S.
4927019	TOXIC BY INHALATION LIQUID, FLAMMABLE, N.O.S.
4927022	METHYL VINYL KETONE, STABILIZED
4927023	TOXIC BY INHALATION LIQUID, WATER-REACTIVE, N.O.S.
4927024	TOXIC BY INHALATION LIQUID, OXIDIZING, N.O.S.
4927025	N-PROPYL ISOCYANATE
4927026	TERT-BUTYL ISOCYANATE
4927027	N-BUTYL ISOCYANATE
4927028	TOXIC BY INHALATION LIQUID, CORROSIVE, N.O.S.
4927099	TOXIC BY INHALATION LIQUID, CORROSIVE, N.O.S.
4930024	HYDROGEN FLOURIDE, ANHYDROUS
4930030	SULFURIC ACID, FUMING
4930050	SULPHUR TRIOXIDE, STABILIZED
4930204	CHLOROSULPHONIC ACID
4930260	SULFURYL CHLORIDE
4931201	NITRIC ACID, RED FUMING
4932010	BORON TRIBROMIDE
4932352	PHOSPHORUS OXYCHLORIDE
4932385	TITANIUM TETRACHLORIDE
4933327	METHYL CHLOROTHIOFORMATE
4935231	TRICHLOROACETYL CHLORIDE
4936106	BROMIDE SOLUTIONS
4936110	BROMINE
4936565	SULFUR TRIOXIDE, STABILIZED