

232114

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**ENTERED**

**Finance Docket No. 35504**

**Office of Proceedings**

**March 26, 2012**

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

**Part of  
Public Record**

**JOINT REBUTTAL COMMENTS OF  
THE AMERICAN CHEMISTRY COUNCIL; THE CHLORINE INSTITUTE;  
THE FERTILIZER INSTITUTE; AND THE NATIONAL INDUSTRIAL  
TRANSPORTATION LEAGUE**

The American Chemistry Council, The Chlorine Institute, The Fertilizer Institute, and The National Industrial Transportation League (the “Interested Parties”) submit these Joint Rebuttal Comments in accordance with the Board's December 12, 2011 decision in this proceeding. In these Rebuttal Comments, the Interested Parties show that (1) the extensive citation to state law throughout the railroad reply comments illustrates the extent to which the indemnity requirements in Union Pacific Railroad Company (“UP”) Tariff 6607 implicate legal issues outside of the Board’s jurisdiction and expertise; (2) the true objective of UP and the railroad parties is to narrow the common carrier obligation not just for toxic inhalation hazards (“TIHs”), but for a much broader range of commodities; (3) the UP Tariff is so broad that it cannot be justified by any distinction between TIH and non-TIH commodities; and (4) the UP Tariff is a manifestation of railroad market power over the transportation of TIH materials.

At the outset, the Interested Parties urge the Board to use particular caution in addressing UP's request given the discrepancies detailed herein, and in the Interested Parties' previously-

filed comments, between what UP and other railroads have represented UP's tariff to be, and what a careful reading of the tariff shows it to be. For example:

- The UP and other railroads have portrayed the tariff as an effort to address shipments of TIH products, but in fact the language of the tariff encompasses a much broader range of products.
- The UP and other railroads have portrayed the tariff as addressing liability stemming from releases of TIH products, but in fact the language of the tariff would make those shipping under the tariff potentially liable for any harms arising from any cause, including causes and harms having nothing to do with the TIH cars on the train.
- The UP and other railroads have emphasized that the tariff is designed to address catastrophic releases of TIH products, but as the Interested Parties showed in their Joint Reply Comments, a main motivation appears to be to shift environmental cleanup liability for spills of non-TIH products<sup>1</sup> despite Congress' intent that such responsibility be borne by carriers.
- The UP and other railroads have argued that this proceeding permits a narrow focus on specific tariff language, while obscuring the true import of that language, and at the same time requesting that the Board's decision should NOT be focused solely on the specific language of the UP tariff.

For the reasons stated in these Joint Rebuttal Comments, and in the Interested Parties' previous comments, a finding that the UP tariff is not unreasonable would increase uncertainty by leading to a multi-year morass of state-court and federal litigation. That uncertainty is heightened further because we cannot be certain what other surprises may await as railroads implement variants of this tariff covering various products and situations.

One thing we *can* be reasonably certain of is that, given an opening, the railroads will do everything they can to use their market power to drive TIH products (and any other materials they do not wish to carry) off the rails entirely, potentially resulting in what the Department of Transportation ("DOT") in its March 12, 2012 Comments (at 3) calls "far-reaching adverse effects on transportation safety." The Board should not allow itself to be made a party to such a result.

---

<sup>1</sup> Because TIH products are gaseous and tend to disperse relatively quickly, releases of those products are not associated with significant clean-up or remediation activities.

**I. THE INDEMNITY ISSUES ARE COMPLEX AND INVOLVE MATTERS FAR BEYOND THE SUBJECT-MATTER EXPERTISE OF THE BOARD.**

The scope of issues raised in this proceeding demonstrates the substantial complexity of the indemnity tariff, which delves far beyond the Interstate Commerce Act and the Board's core expertise. The submissions in this docket clearly illustrate that approval of UP's indemnity tariff is intertwined with complicated issues of state tort law, environmental liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (42 U.S.C. §§ 9601 *et seq.*), and even antitrust concerns.<sup>2</sup> None of these areas fall within the traditional expertise of the Board and the agency should avoid issuing a declaratory order that may have unintended consequences in matters outside of its well-defined proficiency.

UP admits in its Reply that state tort law would govern the allocation of liability for any TIH incident through application of fundamental tort concepts (UP Reply at 16). While UP states that questions regarding enforcement of the indemnity tariff under state law are separate from a determination of the tariff's reasonableness by the Board, in its next breath, UP admits that the two issues are inextricably related. UP Reply at 16. The Reply comments of Norfolk Southern ("NS") make similar inconsistent statements; but NS admits that potential conflicts between the UP tariff and state principles of tort liability could exist, and "are for the courts to decide." Norfolk Southern Reply at 14.<sup>3</sup>

The Reply of UP makes it clear that the carrier intends to use a favorable ruling from the Board in this proceeding to argue preemption in any state court challenge to the indemnity tariff.

---

<sup>2</sup> See Joint Reply Comments of the Interested Parties, at 4, n. 2.

<sup>3</sup> Norfolk Southern also cites to several cases to support its contention that state courts routinely enforce the use of indemnification agreements. NS Reply at 15-16. However, each of those cases involved a bargained for indemnity clause and, thus, did not deal with the situation here, where an entity with substantial market power over its customer base unilaterally imposes the indemnification in a non-negotiable public tariff. It is highly questionable that enforcement of the UP tariff would be found by a state court judge to be sound public policy as the railroad asserts.

The carrier seeks to use the Board's decision to influence state court determinations on the question of enforceability of the proposed indemnity. UP Reply at 15-16, and 22 ("when state courts are asked to determine whether the tariff provisions are consistent with public policy, they must defer to the Board's determination regarding the reasonableness of the tariff provisions."). UP, thus, seems to recognize that a state court may not agree that it is reasonable to shift liability for third party conduct, and associated litigation and other costs that may result from transportation of TIHs, entirely onto the shipper, especially when the shipper is not at fault and did not have the opportunity to negotiate the indemnity provision.

UP unreasonably asks the Board to declare that the railroad's own self-serving liability allocation contained in a non-negotiable tariff should replace the determinations of experienced state court judges and legislatures *in all cases*, regardless of the multitude of facts that may be involved in a TIH incident, and that might reasonably call for a different result. The Board should not be an accomplice in this attempt to over-simplify liability allocations to the sole benefit of UP (and the railroad industry), and to permit the carrier to "have its cake and eat it too" as to any TIH shipment subject to the UP tariff. Accordingly, the Board should not issue an order that endorses the shifting of liability upon the innocent shipper-party, in all circumstances, which may conflict with state tort law, and which would usurp the role of state judges who are more experienced in allocating liability under negligence principles.

UP and the other participating railroads also do not deny that the indemnity tariff intrudes into the domain of environmental liability under CERCLA, another area beyond the Board's expertise. UP's Reply filing demonstrates the complexity and lack of clarity surrounding CERCLA liability. UP states that "the tariff provisions do not undermine UP's CERCLA obligations to remediate any environmental damages, and UP will continue to be a first

responder in the event of an accident while it is transporting TIH." UP Reply at 17. However, UP contends that indemnity "agreements" are permitted under CERCLA<sup>4</sup> and shifting of CERCLA-related costs to the shipper is an appropriate federal policy. UP Reply at 17-18.

Regardless of whether UP might be able to cite authority permitting *private* indemnity *agreements* to determine who ultimately pays for CERCLA liability, neither UP, nor any other carrier cites legal authority which permits CERCLA liability to be shifted by means of a *unilaterally-established* public railroad tariff. Whether UP's unreasonable liability-shifting in a non-negotiable tariff would be enforceable under CERCLA is far from certain.

As evidenced by this proceeding and UP's opening submission, shippers have strongly opposed the obligation to indemnify the railroad for the actions of third parties. In fact, it is reasonable to infer that strong shipper resistance to the indemnification provisions was an important factor in UP's petition for declaratory order. The railroad seeks to obtain by regulatory fiat an excessive liability-shifting arrangement that it has been unable to achieve through its commercial contract negotiations. Since actual shipper "agreement" to the tariff is lacking, it is not evident that UP's attempt to avoid CERCLA liability can even be accomplished. Accordingly, the Board should avoid taking action that may interfere with determinations of environmental liability under CERCLA.

Additionally, UP argues that a determination that the indemnity tariff is reasonable would promote certainty and predictability in its dealings with TIH shippers. As shown herein and in the Interested Parties' previous comments, a "not unreasonable" determination in this proceeding will not bring certainty. But even if the meaning of the UP tariff could be pinned down, and the Board limited other railroads to the exact language UP offers here, it is plain that any benefits of

---

<sup>4</sup> See 42 U.S.C. § 9607(e)(1).

certainty would flow *only* to the railroad, while increasing the uncertainty faced by a non-negligent TIH shipper. While the TIH shipper may know that it must indemnify the railroad for all scenarios except to the extent that the railroad's negligence caused an incident, the shipper will possess much less ability than the railroad to identify those scenarios or to mitigate the scope and extent of the liability exposure that may be caused by a third party. Moreover, because railroads seldom concede any negligence following accidents, even when settling, it is likely that shippers would have to affirmatively litigate each case to determine whether and to what extent railroad negligence played any role in the accident. For these very reasons, the TIH shipper will find it much more difficult and costly to procure insurance to cover its indemnity obligations. Finally, under UP's liability-shifting arrangement, there will be no incentive for the railroad to control costs and spend wisely if it knows such expenditures will be transferred to the TIH shipper.

**II. UP PRESENTS A SERIES OF SHIFTING JUSTIFICATIONS WITH THE ULTIMATE GOAL OF NARROWING ITS COMMON CARRIER OBLIGATION.**

In reality, the Petition for Declaratory Order<sup>5</sup> pending before the Board is nothing more than the latest attempt of UP, together with the other Class I railroads represented by the Association of American Railroads (“AAR”), to present a shifting set of justifications to limit their common carrier obligation to move various hazardous materials, including TIH materials, and to insulate themselves from liability when performing transportation services. In *Common Carrier Obligation of Railroads-Transportation of Hazardous Materials*, Ex Parte No 677 (Sub-No.1), the Class I railroads, through the AAR, asked the Board to “establish, as a condition of transport, liability-sharing arrangements with shippers and find that such conditions are

---

<sup>5</sup> It is of course axiomatic that as the proponent of the proposed Declaratory Order, the UP has the burden of proof to demonstrate that the Tariff provision is reasonable.

reasonable service terms for rail common carrier transportation of TIH materials....” (Written Testimony of the Association of American Railroads, dated July 10, 2008).

In January 2009, US Magnesium LLC (“USM”) requested that UP establish common carrier rates for the transportation of chlorine from Rowley, Utah, to 35 different destinations. UP published rates to some destinations but refused to publish rates to four destinations stating that it was not a “reasonable request to expect UP to transport chlorine over 1,000 miles through multiple High Threat Urban Areas...when there is an abundant supply of chlorine located closer to the denied destinations.” The Board ruled, in *Union Pacific Railroad Company-Petition for Declaratory Order*, Finance Docket No. 35219 that UP “has an obligation to quote common carrier rates and provide service for the transportation of chlorine for the movements at issue in this case.”<sup>6</sup> As a result of that ruling, neither UP nor any other railroad may lawfully decline to move chlorine or any other hazardous material, or decline to accept some shipments between certain origins and destinations.

While Finance Docket No. 35219 was pending before the Board, UP published a new version of Tariff 6607 entitled “General Rules for Movement of Toxic or Poisonous Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad Company.” Even though the title of this Tariff indicated then as now that it is limited to rules governing TIH transportation, that is far from true. As discussed in the Reply Comments of the Interested Parties filed in this Docket on March 12, 2012, Item 2 of Tariff 6607 clearly states that the Tariff applies not only to TIH materials, but to 75 Environmentally Sensitive Commodities, as defined by 49 C.F.R. Section 173.31(f)(2), and infectious substances subject to regulation as Division 6.2 materials. The mischaracterization of the application of Tariff 6607, and its extension to these

---

<sup>6</sup> See the Board’s Decision of June 11, 2009 at page 1.

other substances, is not inadvertent, nor is it a mere technical matter. While TIH substances dissipate fairly rapidly following releases and thus are not likely to lead to clean-up exposure under CERCLA, the other materials to which the railroads would extend the indemnification provisions can cause contamination that would create CERCLA clean-up liability.

There can be little doubt that a principal benefit seen by the railroads in the proposed indemnification tariff is for the UP and other railroads to absolve themselves from statutorily imposed liability under CERCLA.<sup>7</sup> It should be stressed that CERCLA liability is a matter of Congressionally imposed public policy regarding who is responsible for the release of polluting materials and who is responsible for the clean up of those materials in the event of a release. There is no reason to believe that courts would allow the railroads with superior bargaining power to demand indemnification for CERCLA liability as a condition of meeting their common carrier obligations to any greater degree than those courts would allow the railroads to exculpate themselves from their own negligence. Furthermore, given that the extension of the UP tariff to encompass CERCLA liability for non-TIH products was not among the justifications for its alleged reasonableness presented to the Board, those aspects of the tariff are not properly before the Board for decision.

In addition, Item 85 of the tariff offers a similar indication of the real purpose and intent of the Tariff, which in this case does relate to TIH commodity shipments. Item 85 of the current Tariff 6607 provides:

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

---

<sup>7</sup> In the hundreds of pages of factual assertions and arguments put forth by UP to justify the terms of Tariff 6607, the words “environmentally sensitive commodity” do not appear, and Item 2 is specifically omitted from the Tariff terms noted by UP or its supporters.

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. (Emphasis in original)

When read in historical context and with the omitted Items 2 and 85 supplied, it is abundantly clear that the UP has constructed a public justification for Tariff 6607 that has little to do with its real purpose. Can there be any question that, if UP did not want to move a TIH shipment to some destination, as it plainly did not want to do in the Finance Docket No. 35219 USM proceeding, it would be a simple matter for UP to demand a level of insurance coverage that the shipper could not obtain or afford, thus eliminating that shipper from the marketplace? UP would have accomplished through its Tariff Item 85 precisely the result that the Board held to be unlawful when UP refused to quote a rate for the same movement(s).

Since UP and other railroads have been unsuccessful in seeking to limit the common carrier obligation in recent years, UP now seeks to accomplish indirectly what it could not accomplish directly. Indemnification coupled with the right to demand insurance coverage at any level constitutes the new assault on the common carrier obligation. The extraordinary rate increases on TIH movements that have already been put in place, coupled with the proposed indemnification and insurance provisions -- using TIH "catastrophic risks" as a justification for asking the Board to invade the province of state tort law and the federal CERCLA law -- are plainly designed to make shipment of TIH products by rail financially infeasible.

At the same time, the justification given by the railroads to shift risk and costs to shippers of TIH products -- safety and sound public policy—is at odds with the railroads' own course of conduct when they find movement of sensitive products to be aligned with their economic interests. For example, NS has recently insisted that the Board and subsequently the Court of Appeals for the Fourth Circuit, (*see, Norfolk Southern Railway Co. v. City of Alexandria*, 608 F.

3d 150 (4<sup>th</sup> Cir. 2010)) preempt a local ordinance of the City of Alexandria, Virginia, regarding NS's creation and operation of an ethanol rail-to-truck transloading facility located within the City, within the National Capital High Threat Urban Area, and virtually adjacent to Reagan National Airport. How is it that the risks attendant to the transloading of such a highly flammable material on a 24 hour per day, 7 day a week basis in such a densely-populated urban location is acceptable to NS but moving TIH rail shipments generally in much less vulnerable locations are not? Obviously risks involving ethanol, which is highly lucrative to the rail industry, are acceptable but TIH shipments, which produce less than one-half of one percent of rail revenues, are not. The railroads, including UP, are quite willing to forego the movement of TIH materials, even at the extraordinary rate levels now paid by TIH shippers. The result of such a decision on the part of the railroads, however, is not only to severely limit the shipment by members of the Interested Parties of TIH material that are critical to safe drinking water, affordable crops, and a host of consumer products. An additional result is that alluded to by the Department of Transportation in this proceeding: a shift of TIH shipments to the safe highway mode and away from the safer rail mode, resulting in "far-reaching adverse effects on transportation safety." (DOT March 12, 2012 Comments at 3). That result, and the railroad method to accomplish that result, are contrary to the public interest and are unreasonable.

**III. UP'S TARIFF INDEMNITIES ARE SO BROAD THAT THEY CANNOT BE JUSTIFIED BY ANY DISTINCTION BETWEEN TIH AND NON-TIH COMMODITIES.**

Although this proceeding ostensibly is about indemnities arising from the transportation of TIH materials, there is nothing in the arguments or logic of the railroad parties that would so limit this proceeding. The scope of UP's indemnity tariff provisions encompasses liabilities that are very similar, if not identical, to liabilities that railroads incur for many non-TIH commodities. Yet, UP asks the Board to treat TIH materials differently without offering any justification. If

the Board were to find UP's extremely broad tariff indemnities to be reasonable for TIH materials, it would not require a great leap in logic to extend them to all hazardous materials. Consequently, the Board should declare the UP tariff indemnities to be unreasonably broad and unwarranted.

In both their Opening and Reply Comments, the Interested Parties noted the overly broad scope of the UP Tariff 6607 indemnities. Although the comments of UP and every other railroad participant in this proceeding have attempted to justify the UP tariff on the basis of potentially ruinous liability from a catastrophic release of TIH materials, the UP indemnity provisions encompass far more than catastrophic TIH releases or even any product release at all. By justifying the UP indemnity with examples of major TIH releases caused by railroad negligence, and hypothetical major TIH releases where the railroads would not incur liability at all, the railroads implicitly argue that TIH materials present a much greater risk of loss than other commodities that railroads transport. But the UP indemnities would apply even to situations where the potential damages associated with TIH transportation are no greater than, and in some cases less than, the damages that could arise from the transportation of other, non-TIH, commodities. Indeed, such lesser TIH incidents, which are indistinguishable from incidents involving non-TIH commodities, are more probable than the extremely remote potential for a "catastrophic" TIH release. Neither UP nor the other railroad parties have offered any rationale to explain why indemnification is appropriate for TIH commodities in those circumstances where a railroad's liability exposure is not notably greater than for other commodities.

In its Reply Comments, UP contradicts itself and makes internally inconsistent arguments and factual assertions. For example, the Interested Parties have criticized the breadth of the UP tariff because it applies even in the absence of any TIH release at all. On page 27 of its Reply

Comments, UP at first seems to take issue with that argument in a section titled “The Tariff Provisions Do Not Require TIH Shippers to Indemnify UP for Liability Unrelated to TIH Releases.” However, on the very next page, UP argues, contrary to its section heading, that the tariff indemnity provisions “properly require a TIH shipper to indemnify UP for costs that may be incurred *even in the absence of a release...*” [emphasis added]. This is consistent with a pattern whereby UP attempts to justify its tariff on the basis of a “catastrophic” TIH release, but then adopts tariff language that includes every other conceivable liability no matter how small the potential damages or how remotely associated with the TIH transportation.

For example, in their Opening Evidence at page 7, the Interested Parties demonstrated how UP’s tariff “could make TIH shippers insurers of consequences stemming from the negligence of any other railroads or of any non-TIH shippers and their commodities on the same train.” UP protests that interpretation as unreasonable, because:

As its title indicates, Tariff 6607 establishes rules for the “Movement of Toxic or Poison Inhalation Commodity Shipments,” and Items 50 and 60 are designed to require indemnification only for those liabilities that are causally connected to the transportation of TIH pursuant to Tariff 6607.

UP Reply at 27. But, UP’s reliance upon the title of the tariff is entirely discredited by the fact that, despite only referencing TIH materials in the title, Item 2 of the tariff states that it applies to a host of non-TIH commodities as well. This is a fact that UP has avoided in its comments and that other railroad parties have either ignored or overlooked. The Board, however, should not overlook this important fact.

UP also misleadingly argues that its indemnity language is not as broad as the Interested Parties describe because Item 50.1 requires a causal connection by defining the “‘liabilities’ *for which UP must indemnify TIH shippers*” as those “arising from...the performance of transportation services pursuant to this tariff.” UP Reply at 28 [emphasis added]. According to

UP, based upon two Texas cases, the term “arising” means there is a causal connection between the liabilities and the principal activity of the contract, which would be the transportation of TIH.<sup>8</sup> *Id.*, n. 30. It is important to note that the term “arising” is not part of the definition of “Liabilities” in Item 50.1—it appears *after* “liabilities” already have been defined. Moreover, the issue in this case does not concern the liabilities for which UP must indemnify the TIH shipper, but rather the liabilities for which the TIH shipper must indemnify UP. Those liabilities are defined in Items 50.2 and 60, and neither Item contains the term “arising.” Rather, Item 50.2 requires the TIH shipper to indemnify UP against all “all liabilities except those caused by the sole or concurring negligence or fault of railroad,” and Item 60 states that “Customer shall be liable for all other liabilities” where there is joint liability to the extent that UP is not negligent, even if the TIH shipper is not negligent (*i.e.*, the joint liability is solely between UP and a third party).

Even accepting UP’s narrower interpretation of “liabilities” and the requirement of a “but for” causal connection, UP actually seems to agree with the Interested Parties’ assessment of the tariff’s scope. As an example of the “but for” causal connection that UP alleges is required by its tariff, UP states that, “if an incident occurs that is not UP’s fault and government officials order an evacuation out of concern for a possible TIH release, a TIH shipper could be required to indemnify UP for the associated costs because the evacuation was causally connected to transportation of TIH.” UP Reply at 28. The “but for” connection in this example is merely the presence of the TIH commodity on the train. Nothing more is required. This is precisely the concern raised by the Interested Parties on page 7 of their Opening Comments.

---

<sup>8</sup>That limited sampling of state law provides very little comfort to shippers who ship TIH materials through other states. Moreover, it illustrates how the Board is required to delve into state tort law even to determine the reasonableness of UP’s tariff.

Furthermore, UP has not attempted to distinguish evacuations for TIH releases from releases of other hazardous materials such as recent railroad-caused derailments of flammables such as ethanol. To the extent that UP draws any distinctions, it is to derailments involving non-hazardous materials, such as lumber or grain, where there would not be any evacuations at all. But, evacuations must be ordered when there is a threatened release of many non-TIH and non-environmentally sensitive hazardous materials to which the UP tariff indemnification provisions do not apply. How is the cost of an evacuation due to a potential TIH release notably different from the cost of an evacuation associated with an ethanol train fire or the potential release of another non-TIH hazardous material? Such liabilities clearly are not catastrophic or ruinous. Yet, UP claims that it should be indemnified for evacuations due to the release or potential release of a TIH commodity even though it does not seek indemnification for the same evacuation costs associated with the release or potential release of another non-TIH hazardous material. Moreover, what if both a TIH and a non-TIH hazardous material are in the consist of a derailed train? Will the TIH shipper be required to indemnify UP for the full response cost of a precautionary evacuation?

Although these are complicated questions, the Board need not address them at all, because they merely illustrate the unreasonably broad nature of the UP tariff indemnities due to a lack of any justification for treating TIH materials differently from other hazardous materials in these circumstances. Indeed, given that the UP indemnifications would apply to any causes and any harms, even those that have nothing to do with TIH cars, there is nothing in principle to argue why UP could not extend the indemnification demand to the shipment of any product whatsoever. The point is that once the Board gives a green light to the railroads to start down the

track of demanding indemnification, it is difficult to see what the limits of extending that precedent would be.

UP also defends the fact that its indemnity provisions for third party negligence do not require it to first attempt to recover damages from the responsible third party before invoking the indemnity against the TIH shipper. Specifically, UP claims that this is a standard feature in indemnity provisions. UP Reply at 32. While this may be a feature of some indemnities, it certainly is not universal. But, whether or not this is a standard feature of indemnity clauses misses the point. The indemnity requirements that UP seeks to impose against TIH shippers are exceptional provisions in the realm of common carriage where the TIH shipper has no choice but to use the railroad or not ship its product at all. Preservation of a meaningful common carrier obligation demands that the Board preclude rail carriers from exercising their market power in this manner.

In addition, UP attempts to justify application of its tariff indemnities to lesser TIH incidents that do not pose a threat of ruinous liability because of inadequate insurance. Specifically, because UP self-insures for up to \$25 million, UP complains that it cannot recover damages for small incidents from insurance. UP Reply at 11. UP also expresses concern that a single TIH incident will increase UP's profile for insurance underwriting purposes. *Id.* However, it is what UP does not say that is significant. UP does not provide any examples of actual liability for lesser TIH incidents or compare that liability with other, non-TIH, liabilities. Since UP's insurance concerns are equally true for non-TIH commodities, UP has not drawn any distinction that warrants different indemnity treatment for TIH commodities.

This proceeding has presented a case of "indemnity creep." Having persuaded the Board to initiate this proceeding to address "whether UP can reasonably require a TIH shipper to

indemnify UP for liabilities that would arise if there were a release of TIH and an evacuation of a nearby community (or worse),” UP Petition at 5, UP now asks the Board to approve a much broader application to potential liabilities that are no different than liabilities that UP may incur when transporting non-TIH commodities. If the Board follows UP down this path, it is not difficult to envision UP or some other railroad imposing a similar indemnity upon all hazardous materials based upon the same argument that hazardous materials impose risks upon a railroad that cannot be avoided because of the common carrier obligation.

Indeed, UP has sown the seeds of this future argument in its Reply Comments. In support of its alleged need for indemnification against TIH liabilities, UP points to court decisions that have imposed strict liability upon railroads for damage associated with transporting certain non-TIH commodities, namely, bombs, propane and gasoline. UP Reply at 8-9. Although those decisions date back 40 years and do not encompass TIH commodities, no railroad has ever imposed an indemnification requirement upon the transport of those commodities. Moreover, the reason for imposing strict liability in those cases was because the commodities were combustibles for which the evidence needed to prove negligence was destroyed in the explosions. TIH commodities, in contrast, do not fall into that category and any evidence of negligence typically would be readily discernible, as evidenced by the findings of railroad negligence in each of the significant rail TIH releases to date. If UP can justify its TIH indemnity requirements based upon non-TIH incidents, what justification is there to not also permit indemnities for non-TIH commodities?

This has significant ramifications for the common carrier obligation, to which this Board should be mindful. The common carrier obligation is not a burden imposed on the railroads without corresponding benefits. The common carrier obligation is a two-way street. Railroads

are granted monopolies; they are protected from the application of normal bankruptcy laws; they are protected from normal application of the antitrust laws; and they are allowed to price with an eye toward what they need to make a profit rather than the normal laws of supply and demand. In return for these many and valuable public concessions, railroads are required to provide rail service upon reasonable request. The law has been clear for more than 100 years that the common carrier obligation does not allow the railroads to choose what traffic they will carry and does not allow them to exercise their unequal bargaining power to demand unreasonable conditions of carriage.

In this proceeding, UP would have the Board declare that UP's attempts to limit its common carrier obligation by conditioning the transportation of TIH materials upon indemnification is somehow reasonable because it is dealing with TIH materials. But, the TIH aspect of this matter is largely a red herring since UP's tariff indemnities are so broad that they cannot be justified by any distinction between TIH and non-TIH commodities. Despite contrary implications from UP and the other railroad parties in this proceeding, UP's tariff is not even limited to TIH materials. Indeed, it is highly questionable whether TIH liabilities even are the real concern of UP, in light of the substantial attention given in its comments to strict liability imposed by CERCLA, where UP has much greater exposure to liability for non-TIH commodities. The fact that TIH materials disperse into the atmosphere means that CERCLA liability exposure is actually less for TIH materials than for most other hazardous materials that may cause soil or groundwater contamination when released.

For the above reasons, a sufficient basis for the Board to find that the indemnity requirements in UP Tariff 6607 are unreasonable is that UP has not presented any evidence or

rationale to justify the tariff's broad-based discrimination between TIH and non-TIH liabilities that are similar in nature and magnitude.

**IV. THE INDEMNIFICATION CONDITION REPRESENTS YET ANOTHER EFFORT BY RAILROADS TO EXPLOIT THEIR INCREASED MARKET POWER.**

In its recent proceeding in Ex Parte No. 705, *Competition in the Railroad Industry*, the Board was presented with ample evidence that, following the mega-mergers of the past two decades, rail-to-rail competition has become almost non-existent, and railroads have become increasingly bold in exploiting their monopoly positions by increasing rates, pricing in parallel, refusing to compete for business, and offering shippers "take it or leave it" terms. For example, the April 12, 2011, Joint Comments of the Alliance for Rail Competition and other Interested Parties, including the associations joining in the instant filing, cited a study by the Board's Section of Economics which showed that rail rates, following many years of falling in real terms in line with increased railroad productivity, had begun to rise after 2004. (Joint Comments at 13.) At the same time, railroad profits almost doubled between 2004 and 2008 (Joint Comments at 13, citing Rockefeller Report.<sup>9</sup>) Collective or parallel actions included the imposition of a fuel surcharge on a "take-it-or-leave-it" basis that had the effect of over-recovering railroad fuel costs. (Joint Comments at 14.) Railroad exercise of market power has continued more recently as well. Despite the deep recession of 2008-2010, railroads succeeded in increasing their prices between the first quarter of 2004 and the fourth quarter of 2010 at a rate three to four times the Consumer Price Index, and three to four times the increase in truck rates over the same period. (Reply Comments of The Fertilizer Institute, May 27, 2011 citing a study by Escalation

---

<sup>9</sup> Senate Committee on Commerce, Science and Transportation, Office of Oversight and Investigations, Majority Staff Report, September 15, 2010.

Consultants.) Plainly, only an industry with tremendous market power could impose and maintain such rate increases.

Given the abundant evidence that the highly concentrated rail industry has increasingly sought to exploit its monopoly position, it comes as no surprise that it was only after the last of the mega-mergers that the rail industry began waging its campaign, in which this proceeding is but one chapter, to whittle away the common carrier obligation for products it would prefer not to carry, beginning with TIH and other chemical products. Having failed to convince Congress or the Board to eliminate their common carrier obligation altogether for certain products, the railroads now return to the Board to seek again to impose an indemnification condition on tariff shippers.

The railroads contend that their preoccupation with driving TIH off the rails has something to do with the events of September 11, 2001, or with particular past releases occurring on their systems (*see, e.g.*, NS Reply Comments at 9). This contention is unconvincing. The railroads have long been aware of the risks associated with these commodities, and, for example, have actively participated in efforts to design improved tank cars and otherwise minimize those risks. Instead, the key new railroad insight is not a realization that accidents might happen or that some products entail risks — but rather that, because of the increased market power of the rail industry, they may now have the ability collectively to upend years of industry practice and impose a much greater share of those risks upon shippers. Their preferred route to this goal may be to seek to impose such terms in contracts, but lest shippers seek refuge in tariff rates, the railroads now would impose their wholesale indemnification condition on tariff shipments as well.

The railroads are so accustomed to exercising market power that they somewhat naively believe that shippers must have such market power too. In fact, one of their central contentions in this proceeding is the supposed ability of shippers to dictate to their customers where, when, and at what price the customers will purchase products. For example, NS argues (Reply Comments at 20) that shippers have "unfettered control" over where they ship their products, and hence will respond to greater risk exposure by changing where they ship. While this line of argument is certainly revelatory of the railroads' state of mind, it has nothing to do with reality. Railroads may be used to imposing terms upon their customers, but in the world in which shippers live – *i.e.*, in competitive marketplaces – they do not have the luxury of informing their customers when and where they will take products, or that the customers must purchase their desired products from another source.

The plain fact is that, as much as the railroads would like to portray their indemnification conditions as somehow providing benefits to society, the only true effect will be to transfer more costs onto shippers, to further increase railroad profits, and to reduce railroad incentives to continue to exercise their control over their systems to make them safer from the effects of reckless or intentional wrongdoers or Acts of God.

For all of these reasons, the Board should declare that the indemnification condition requested by Union Pacific, contrary as it is to decades of industry practice, is unreasonable and unlawful.

Respectfully submitted,



---

Jeffrey O. Moreno  
Karyn A. Booth  
Thompson Hine LLP  
1919 M Street, N.W.  
Washington, DC 20036  
(202) 331-8800  
*Counsel for The Fertilizer Institute and The  
National Industrial Transportation League*

Scott N. Stone  
Patton Boggs, LLP  
2550 M Street, NW  
Washington, DC 20037  
*Counsel for the American Chemistry  
Council*

Paul M. Donovan  
LaRoe, Winn, Moerman & Donovan  
1250 Connecticut Avenue, NW, Suite 200  
Washington, DC 20036  
*Counsel for The Chlorine Institute*

March 26, 2012

**Certificate of Service**

I hereby certify that on 26th day of March 2012, a copy of the foregoing Joint Rebuttal Comments of the American Chemistry Council; The Chlorine Institute; The Fertilizer Institute; and The National Industrial Transportation League was served by electronic delivery on all parties of record in these proceedings.

  
\_\_\_\_\_  
Jeffrey O. Moreno