ASSOCIATION OF
AMERICAN RAILROADS

Corrected Version

Law Department
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April 9, 2009

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: STB Finance Docket No. 35219, Union Pacific Railroad Company—Petition for Declaratory Order

Dear Secretary Quinlan:

Pursuant to the Board's decisions served March 10, 2009 and March 25, 2009, attached please find the comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35219

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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INTRODUCTION

In a decision served March 10, 2009, the Board, in response to a petition by the Union Pacific Railroad Company ("UP"), instituted a declaratory order proceeding "to terminate a controversy or remove uncertainty." Decision at 1. The Board solicited "broad public comment" on the issue of UP's common carrier obligation to transport chlorine, a toxic inhalation hazard ("TIH") material, under the circumstances set forth in UP's petition.

The Board noted in its decision that many of the comments filed in STB Ex Parte No. 677 (Sub-No.1), Common Carrier Obligation of Railroads—Transportation of Hazardous Materials, "touched on the issues that are likely to arise in this proceeding," and that the parties that participated in the pending STB Ex Parte No. 677 (Sub-No.1) proceeding "may have an interest in the issues raised in this proceeding." *Id.* at 2. The Association of American Railroads ("AAR"), on behalf of its member carriers, is a participant in that pending proceeding. Although the AAR will not be commenting on any specific party's commercial interests and will leave the factual record to the parties to develop, the AAR has a strong interest, as reflected in the AAR's

comments in Ex Parte No. 677 (Sub-No.1), in ensuring that the Board apply sound legal principles and public policy considerations in determining the scope of the common carrier obligation to transport TIH materials generally.

The AAR also notes that its request in Ex Parte No. 677 (Sub- No.1) for a Board policy statement allowing a carrier to impose reasonable liability-sharing arrangements on shippers as a condition of common carrier TIH materials transportation is still pending and respectfully requests that Board act on the AAR's proposal.

DISCUSSION

The relevant legal principles and public policy concerns that the AAR believes should govern the outcome of this proceeding are set forth below and have also been extensively set forth in the AAR's comments in Ex Parte No. 677, Common Carrier Obligation of Railroads and Ex Parte No. 677 (Sub No.-1).[1]

1. The Common Carrier Obligation is Not Absolute and Is Predicated on a Case-by-Case Board Determination of Whether the Shipper's Request for Transportation Services is Reasonable Under the Specific Facts and Circumstances Presented

The common carrier obligation derives from 49 U.S.C § 11101(a), which requires that a carrier provide "transportation or service upon reasonable request." What constitutes a "reasonable request" is not statutorily defined but instead is determined by the Board on a case-by-case basis predicated on all the relevant facts and circumstances. Granite State Concrete Co., v. STB, 417 F.3d 85, 92-94 (1st Cir. 2005) ("Granite"); *see also* Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325 (1981)).

[1] *See* April 17, 2008 AAR comments in Ex Parte No. 677; July 10, 2008 AAR comments in Ex Parte No. 677 (Sub-No.1); and August 21, 2008 AAR supplemental testimony in Ex Parte No. 677(Sub-No.1). The AAR incorporates the above comments in this proceeding by reference.

In assessing what constitutes a reasonable request, there are two lines of inquiry. The first is whether the "request" for service is reasonable. In addressing this inquiry, the common carrier obligation is infused with the public interest which shapes the scope of the obligation. Akron, C. & Y. Ry. v ICC, 611 F2d 1162, 1168 (6th Cir. 1979) ("Akron") ("A carrier's duties run not to shippers alone, but to the public....Therefore, public needs must shape the boundaries of these duties."). Moreover, as noted in Consolidated Rail Corp. v. ICC, 646 F.2d 642, 647 (D.C. Cir. 1981), "[l]ong ago the Supreme Court made it clear that '[no] party has the right to insist upon a wasteful or excessive service for which the consumer must ultimately pay.'"

The second line of inquiry is whether the carrier's response to a request for service is reasonable. In assessing the reasonableness of the carrier's response to a request for rail transportation of ultra-hazardous materials such as TIH, the hazards to the public and employees and the economic risks to the carrier are major factors. The Commission must take into account not only the public needs for the service, but also "an analysis of the hazard posed by the involved commodity, the need for stricter safety standards [than DOT's safety regulations], and financial evidence including insurance costs and the extent of carrier liability." Classification Ratings of Chemicals, Conrail, 3 ICC 2d 331, 337 (1986) ("Conrail").[2]

2. The Board Is the Only Federal Regulatory Agency with Jurisdiction Under the ICCTA to Determine the Scope of the Common Carrier Obligation to Transport TIH Materials

The Board's jurisdiction to determine the scope of the rail common carrier obligation under 49 U.S.C. § 11101(a) is neither nullified nor circumscribed by the safety regulations issued by the Department of Transportation ("DOT") or by the security regulations issued by the

[2] Conrail is the only case of which AAR is aware involving agency consideration of the rail common carrier obligation to transport TIH materials. Conrail's effort in that case to "flag out" from its common carrier obligation was ultimately denied by the agency because Conrail failed to meet its evidentiary burden of demonstrating that it "could not use the tariff (through publication of various rules) to limit liability or to gain greater control over when commodities are tendered or how they are handled." Conrail at 337.

Transportation Security Administration ("TSA") pertaining to TIH materials. DOT or TSA regulations may set standards for the way a specific hazardous material may be packaged or transported by rail, but they do not modify or define the common carrier obligation of rail carriers to transport the materials.

As specifically recognized by the courts and the Board's predecessor agency (the Interstate Commerce Commission or "ICC"), DOT safety regulations govern only safety issues (and similarly security regulations govern security issues). Only the Board has jurisdiction under the ICCTA to determine the scope of the common carrier obligation (*i.e.*, what constitutes a "reasonable request" for service under 49 U.S.C. § 11101(a) or a "reasonable rule or practice" under 49 U.S.C. § 10702), and only the Board has jurisdiction to rule on economic issues pertaining to the rail transportation of hazardous materials, including insurance and liability issues. *See, e.g.*, Akron, 611 F.2d at 1170 ("questions of safety [regarding rail transport of nuclear materials] are also questions of risk and liability. A question of possible liability for damage resulting from carriage of a commodity is therefore within the Commission's jurisdiction as the regulator of the economics of interstate rail transport"); *see also* Delta Airlines v. CAB, 543 F.2d 247, 259-260, 267 (D.C. Cir. 1976); Radioactive Materials, Missouri-Kansas-Texas R.R., 357 ICC 458, 463-64 (1977).

3. The Board Is Entrusted Under the National Rail Transportation Policy With Promoting the Safety and Financial Soundness of the Rail Transportation System and These Policy Directives Must Be Recognized When Determining the Scope of the Common Carrier Obligation to Transport TIH Materials

Several provisions of National Rail Transportation Policy, 49 U.S.C. § 10101, apply to a Board determination of a rail carrier's common carrier obligation to transport TIH materials. These policy provisions include: "to promote a safe and efficient rail transportation system...

"(49 U.S.C. § 10101(3); "to ensure the development and continuation of a sound rail transportation system...to meet the needs of the public and the national defense" (49 U.S.C. § 10101(4); "to foster sound economic conditions in transportation...." (49 U.S.C. § 10101(5); "to operate transportation facilities and equipment without detriment to the public health and safety" (49 U.S.C. § 10101(8); and "to encourage...safe and suitable working conditions in the rail industry" (49 U.S.C. § 10101(11).

These policy guidelines entrust the Board with promoting not only the safety and efficiency of the rail transportation system to the public, shippers and rail employees, but also the financial soundness of the rail industry. When these guidelines are applied to determine whether a specific request for the rail transportation of TIH materials is reasonable, the Board should consider that a rail carrier faces potential "bet the company" exposure each time it transports these TIH materials. The "financial soundness" of the rail industry, as well as the "public health and safety," are put at risk each time these materials are transported by rail.

A release of TIH materials has a potentially far greater impact than other spillages or releases of lading, and the difference arises solely from the nature of TIH itself.[3] A TIH materials release may spread over a considerable distance and cause extensive injury and property damage.

As the AAR and individual carrier testimony in Ex Parte No. 677 (Sub-No.1) also demonstrate, the litigation environment has changed, creating extraordinary liability risks that are nowhere near fully insurable. Currently, available insurance for Class I railroads is limited to approximately $1.1 billion with large self-insured retentions.[4] Should an incident involving the rail transportation of TIH materials result in a release of TIH materials in or near a large

[3] *See* July 10, 2008 AAR comments at 14-20.
[4] *See* August 21, 2008 AAR supplemental testimony at 14-15.

populated area, the affected rail carrier could face billions of dollars in claims and potential financial ruin, jeopardizing the "financial soundness" of the rail industry as well as the "public health and safety."

CONCLUSION

In determining the scope of the common carrier obligation to transport TIH materials, the Board should apply the relevant legal principles and address the public policy concerns set forth above and as more fully discussed in Ex Parte No. 677 (Sub- No.1). The AAR also respectfully requests that the Board act as expeditiously as possible to issue the policy statement urged by the AAR in Ex Parte No. 677 (Sub- No.1) which would allow a carrier to impose reasonable liability-sharing arrangements on shippers as a condition of moving TIH materials.

Respectfully submitted,

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