

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35219

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

**JOINT COMMENTS OF
THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN FOREST AND PAPER
ASSOCIATION, THE CHLORINE INSTITUTE, INC., EDISON ELECTRIC
INSTITUTE, THE FERTILIZER INSTITUTE, THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE, AND THE PAPER AND FOREST INDUSTRY
TRANSPORTATION COMMITTEE**

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The American Chemistry Council ("ACC"), the American Forest and Paper Association ("AFPA"), the Chlorine Institute, Inc. ("CI"), the Edison Electric Institute ("EEI"), The Fertilizer Institute ("TFI"), the National Industrial Transportation League ("NITL"), and the Paper and Forest Industry Transportation Committee ("PFITC") (collectively "Joint Shippers") hereby submit comments pursuant to the decision of the Surface Transportation Board ("Board"), served in this docket on March 24, 2009. CI separately submitted comments to the Board on March 12, 2009 and reaffirms those comments. The Joint Shippers oppose the Petition for Declaratory Order filed by Union Pacific Railroad Company ("UP") on February 18, 2009 ("UP Petition") both as a matter of law and public policy. They ask the Board to deny UP's Petition and to discontinue this proceeding.

UP's Petition is an improper attempt, both substantively and procedurally, to narrow the common carrier obligation and to revisit an issue that already has been raised before the Board in STB Ex Parte No. 677 (Sub-No 1), *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials*. The Joint Shippers take seriously their role in the safe and secure transportation of TIH commodities. But UP's Petition attempts to over-simplify a complex issue by elevating distance above all other safety and security factors and disregarding important economic factors that must be part of a balanced determination of the public interest. Moreover, UP's Petition would require the Board to impermissibly intrude upon the safety and security jurisdiction of other federal agencies; is procedurally defective because it fails to address the standards for granting exemptions from the statute, and has significant public policy consequences that extend far beyond the Board's expertise.

I. STATEMENT OF INTEREST.

The Joint Shippers are trade associations whose members include producers, purchasers and/or shippers of commodities that are designated as toxic inhalation hazards ("TIH"). TIH commodities are essential to their businesses and to the American economy as a whole. Because TIH commodities cannot always be produced in the same locations where they are used, safe and reliable transportation is essential. Rail transportation is the safest mode by which to transport TIH commodities over land. Therefore, any action taken by this Board that affects the transportation of TIH by rail potentially has significant downstream ramifications for the entire economy.

ACC's 130 members account for approximately 85 percent of U.S. capacity for the production of basic industrial chemicals and manufacture a wide array of products that are offered for shipment by railroads and other carriers. ACC and its members have a long-standing

commitment to the safe and secure transportation of hazardous materials. The business of chemistry depends upon the railroads for the safe, efficient and secure transportation of 176 million tons of chemical products each year, including TIH commodities. The movement of TIH commodities by rail is critical to the well being of our country and our way of life

AFPA is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers, and forest landowners. Its members make products essential for everyday life from renewable and recyclable resources that sustain the environment. The forest products industry accounts for approximately 6 percent of the total U.S. manufacturing GDP, putting it on par with the automotive and plastics industries. Industry companies produce \$200 billion in products annually and employ more than 1 million people earning \$54 billion in annual payroll. The industry is among the top 10 manufacturing sector employers in 48 states.

PFITC is comprised of companies in the forest products industry serving in logistics and transportation capacities. The forest products industry relies on the railroads for the transportation of raw materials to its mills and for finished product to the marketplace. This includes the transport of chlorine, a TIH commodity that is used in the manufacturing processes of the forest products industry.

The Chlorine Institute, Inc., founded in 1924, is a 210-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. The Institute's mission is the promotion of safety and the protection of human health and the environment in the manufacture, distribution and use of chlorine, sodium hydroxide, potassium hydroxide and sodium hypochlorite, plus the distribution and use of hydrogen chloride. The Institute's Producer members account for more than 95 percent of the total

chlorine production capacity of the United States. Virtually all the chlorine shipped by rail in the United States is by a Chlorine Institute member.

EEI is the association of U.S. shareholder-owned electric companies. Its members serve 95% of the ultimate customers in the shareholder-owned segment of the industry, and represent approximately 70% of the U.S. electric power industry. It also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members. The investor-owned electric utility industry relies on the Nation's railroads to transport hazardous commodities, such as anhydrous ammonia, chlorine, and radioactive materials, needed for the safe, reliable and environmentally acceptable operation of coal-fired or nuclear power plants. Anhydrous ammonia is used to provide legally required pollution control at coal-fired power plants, chlorine is used, among other purposes, to keep intake pipes clear at nuclear power plants; and nuclear plants generate spent nuclear fuel and radioactive waste as byproducts of their operations. Coal-fired and nuclear power plants are absolutely essential to this Nation's economy and well-being.

The NITL is the nation's oldest and largest association of companies interested in transportation. Its 600-plus members range from some of the largest companies in the nation to much smaller enterprises. Many members of the League ship via rail, and are vitally interested in the capacity, service, and competitiveness of the nation's rail industry. In addition, many League members are purchasers, suppliers, and shippers of TIH commodities.

TFI is the national trade association of the fertilizer industry. TFI, which traces its roots back to 1883, represents virtually every primary plant food producer, as well as secondary and micronutrient manufacturers, fertilizer distributors and retail dealerships, equipment suppliers and engineering construction firms, brokers and traders, and a wide variety of other companies

and individuals involved in agriculture. Many members produce and/or consume anhydrous ammonia, which is a TIH commodity that provides essential nutrients to grow our nation's food supply. Rail transportation is essential to the safe and reliable movement of anhydrous ammonia. Thus, TFI's members have a strong interest in the common carrier obligation of the rail industry.

II. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT.

On February 18, 2009, UP filed its Petition asking the Board to institute a declaratory order proceeding to "clarify" the extent of the common carrier obligation to transport TIH commodities when the requested transportation would displace a TIH source that is closer to the destination.¹ Ostensibly, UP's Petition is based upon a single set of facts involving a request for common carrier rates made by US Magnesium ("USM") to UP for transportation of chlorine from Rowley, UT to Houston, TX; Dallas, TX; Allemania, LA; and Plaquemine, LA. According to UP, each of these destinations has "ample" sources of chlorine available from closer origins within 300 miles that would reduce the distance traveled and number of High Threat Urban Areas ("HTUAs") traversed. UP, however, did not present any evidence to support its factual assertion that there is an ample supply of chlorine closer to the destinations; nor did UP address any other factors surrounding USM's request for rates. Based upon these narrow and unsupported assertions, UP refused to quote rates, despite clear and unqualified statutes and regulations that require UP to provide a common carrier rate upon request. *See* 49 U.S.C. 11101(b) (a carrier shall provide rates "on request") and 49 C.F.R. 1300.3 ("the carrier must promptly establish and provide...a rate") From this single set of narrow assertions, UP asks for

¹ The Board's rules permitted interested parties to reply to UP's Petition within twenty days. 49 C.F.R. § 1104.13(a). However, because UP filed its Petition under seal, several parties jointly asked the Board to extend the reply period until twenty days after the Board issued a protective order that would have permitted all interested parties to review and respond to UP's full, unredacted, Petition. Instead of addressing the request for an extended reply period and then considering the content of those replies, the Board *sua sponte* granted UP's Petition and established a procedural schedule

a broad-based declaration of a right to abrogate its common carrier obligation to haul all TIH commodities whenever it unilaterally determines that there is an alternate TIH source closer to the destination.

As it turns out, UP's statement of the facts is neither complete nor accurate. After the Board issued its decision initiating this proceeding, the Chlorine Institute filed a reply ("CI Reply") which notes that there is not in fact an "ample supply" of chlorine in the Gulf Region to meet local demand and that UP routinely delivers chlorine to the Region from distances far greater than 300 miles. CI Reply at 3-4. In addition, CI notes that Gulf Region users must have access to alternate sources of chlorine to meet unforeseen contingencies such as weather disruptions and plant outages *Id* at 4

On March 23, 2009, the shipper that requested rates from UP, USM, filed its reply to UP's Petition ("USM Reply"). USM is the only producer of magnesium in all of North America. USM Reply at 2. Chlorine is a necessary co-product of USM's magnesium production that USM sells into markets where there is a demand for chlorine. *Id* at 2-3. This is in lieu of an environmentally unfriendly alternative that vents the chlorine into the air pursuant to permits that restrict USM to 3000 tons per year. *Id.* at 3 UP has been transporting USM chlorine for more than thirty years. *Id* at 4. USM asked UP for common carrier rates only when it was unable to renegotiate an acceptable contract with UP. *Id.* at 4-5. USM needs rates from UP so that USM is assured of buyers for its chlorine co-product. *Id* at 10. If USM cannot move its chlorine co-product, it cannot produce magnesium. *Id.* at 3 Furthermore, USM depends on the revenue from chlorine sales to remain competitive in the global market for magnesium. *Id.* at 4. UP's Petition ignores all of these key facts.

UP professes to be acting contrary to its own self-interest in order to further the greater public interest:

Obviously, if UP were concerned first and foremost with its private economic interests, it would encourage these long shipments. Other governmental agencies, however, have pressed us to find ways to reduce TIH transportation risks. As a responsible public citizen, we concluded that those considerations should prevail.

UP Petition at 2.² This claim, however, is directly contradicted by the testimony of Diane Duren, UP's Vice President & General Manager-Chemicals, before the Board in Ex Parte No. 677 (Sub-No. 1) just last Summer, in which she expressly declared that "we prefer not to carry TIH commodities." Written Testimony of UP at 6 (filed July 15, 2008). Furthermore, no governmental agency has advocated that railroads reduce TIH transportation risks at the expense of their common carrier obligation.

As the Board itself noted in the March 10, 2009, decision initiating this proceeding, the issues raised by UP's Petition overlap with those addressed in Ex Parte No. 677 (Sub-No. 1) In that proceeding, the Association of American Railroads ("AAR") asked the Board to condition the common carrier obligation to transport TIH commodities upon the shipper's agreement to indemnify the railroad even for damages caused by the railroad's own negligence. In addition, the AAR raised the very same issue posed by UP's Petition, arguing that TIH commodities "should not be moving long distances across the country to further the commercial interests of producers or receivers when closer sources of supply are available." AAR Br. at 26 (filed April 17, 2008). But UP's Petition goes even further by asking the Board to abolish the common carrier obligation altogether when a railroad contends that closer sources of supply are available. The broad scope of UP's Petition could and should have been raised in Ex Parte No. 677 (Sub-

² Because UP did not number the pages in its Petition, all citations in this pleading assume that page 1 is the first page of narrative.

No. 1), not in a declaratory order proceeding based upon a single set of facts for a single TIH shipper. This Petition is an attempt by UP to get a second bite at the apple, after the record has closed in Ex Parte No 677 (Sub-No. 1).

UP's Petition is a frontal attack upon the common carrier obligation itself. Because UP's Petition is predicated solely on safety and security claims that do not implicate any matter within the Board's economic jurisdiction over rail carriers, the Board may not grant the relief that UP requests. Finally, as a matter of public policy, the Board cannot and should not grant UP's Petition because that could require the Board to evaluate every potential TIH movement on a case-by-case basis and entangle the Board in complex non-transportation issues over which it has no expertise or jurisdiction

III. THE BOARD LACKS JURISDICTION TO GRANT UP'S PETITION.

Congress has vested the Federal Railroad Administration ("FRA") and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") (collectively "DOT") with jurisdiction over the safe transportation of TIH commodities by rail and has vested the Transportation Security Administration ("TSA") with jurisdiction over rail security matters. In contrast, the Board's role in safety and security matters is extremely limited. "[A] carrier may not ask the [Board] to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT regulations governing such transport, and these regulations have been met." *Akron, Canton & Youngstown R.R. Co. v. ICC*, 611 F. 2d 1162, 1169 (6th Cir. 1979) ("*Akron*"). Furthermore, because DOT and TSA have established comprehensive safety and security standards for TIH transportation that balance the cost of safety and security with the need for economy, there is a heavy presumption that additional safety and security measures are

unreasonable *See Consolidated Rail Corp v. ICC*, 646 F. 2d 642, 650 (D.C. Cir. 1981) (“*Conrail*”).

UP’s Petition is predicated *solely* upon an assertion that UP needs to find ways to reduce TIH transportation risks in response to pressure from FRA and TSA. UP Petition at 2. According to UP, the common carrier obligation “counteracts” the safety and security efforts of FRA and TSA. *Id.* at 4. UP, however, does not point to a single FRA or TSA regulation that is incompatible with the common carrier obligation. Nor have FRA or TSA raised any concerns that the common carrier obligation counteracts their objectives.

In fact, both FRA and PHMSA have expressly disavowed any intent to alter the common carrier obligation. PHMSA’s final rule on routing and risk assessment, which it developed in coordination with FRA and TSA, clearly states that “We do not intend for the provisions of this rule to impede the everyday commerce of hazardous materials, or to change the common carrier obligation of the railroads to handle security-sensitive materials that shippers tender to them for shipment.” “Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments,” Docket No. PHMSA-RSPA-2004-18370, 73 Fed. Reg. 72182, 72190 (Nov. 26, 2008). In addition, in testimony to this Board in Ex Parte No. 677 (Sub-No. 1), FRA explicitly disavowed any need to diminish the common carrier obligation:

DOT believes that there is no reason to change this common carrier obligation. Rail transportation of hazardous materials is currently very safe and DOT has been working with railroads, shippers, and tank car builders to make rail transportation of PIH and other hazardous materials even safer and more secure.

Testimony of Clifford Eby, Deputy Federal Railroad Administrator, pp. 1-2. Finally, TSA has expressly deferred to DOT on routing issues. “Rail Transportation Security,” Docket No. TSA-2006-26514, 73 Fed. Reg. 72130, 72151-52 (Nov 26, 2008).

The Board fulfills its responsibility with respect to safety questions when it determines that all DOT requirements have been satisfied. *See Radioactive Materials, Missouri-Kansas-Texas R.R. Co.*, 357 I.C.C. 458, 463-44 (1977) (adopting by analogy this principle of regulatory responsibility expressed in *Delta Air Lines, Inc v C A B*, 543 F. 2d 247, 260 (D.C. Cir 1976) (“CAB”)) (“MKT”). In general, the Board should defer to its sister agencies’ positions on safety and security as establishing both an inner and outer limit on its jurisdiction over the same matters. *CAB* at 260. These principles are particularly strong when there is a need for extensive technical expertise in determining safety standards and a need for uniform standards. *MKT* at 464. Because UP’s Petition is not necessary to satisfy any DOT or TSA safety or security requirement, there is no basis for the Board to act.

UP’s Petition would abolish the common carrier obligation to transport a TIH commodity from a more distant origin when there is an alternate TIH source closer to the destination. Essentially, UP’s argument is that TIH movements in those circumstances are too dangerous to haul.³ But as noted above, “a carrier may not ask the [Board] to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT...regulations governing such transport, and these regulations have been met.” *Akron* at 1169. *See also, U.S. Dept of Energy v The B&O R R Co.*, 364 I.C.C. 951, 959 (1981) (“DOE”) (a railroad may not “renege on its common carrier commitment” by claiming a commodity is too dangerous to handle when DOT safety requirements are satisfied); *Radioactive Materials, Special Train Service, Nationwide*, 359 I.C.C. 70, 73 (1978). Indeed, any such claim is an impermissible collateral attack on the DOT and TSA regulations that must be made to the agencies entrusted with safety and security regulations *Akron* at 1169; *see also MKT* at 464

³ *See e.g. Classification Ratings of Chemicals, Conrail*, 3 I.C.C. 2d 331, 337 (1986) (characterizing Conrail’s insistence upon special train service for radioactive materials as a contention that the commodity is too dangerous to haul under any other circumstances)

Both FRA and PHMSA have comprehensively addressed routing and risk assessment issues for rail transportation of TIH commodities. See “Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments,” Docket No. PHMSA-RSPA-2004-18370, 73 Fed. Reg. 72182 (Nov. 26, 2008); “Railroad Safety Enforcement Procedures; Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions,” Docket No. FRA-2007-28573, 73 Fed. Reg. 72194 (Nov. 26, 2008). Neither agency, however, has adopted any regulation that would prohibit transportation of TIH commodities from a more distant origin when there is a closer origin, and as noted above, both have explicitly disavowed any intent or need to modify the common carrier obligation to accommodate their safety regulations. Therefore, the Board may not declare such transportation too dangerous.

The Board may impose additional safety standards *only* if the railroad requesting those standards carries a heavy burden to show that the DOT regulations are unsatisfactory or inadequate in a particular circumstance. *Conrail*, 646 F. 2d at 650. Otherwise, there is a strong presumption that additional standards are unreasonable. UP's attempt to abolish its common carrier obligation to transport a TIH from a more distant origin when there is an alternate TIH source closer to the destination is not an additional safety standard. But, even if somehow the Board were to treat UP's Petition as a safety standard, UP has not even attempted to carry its heavy burden.

UP has not argued that the DOT and TSA regulations are anything less than a comprehensive attempt to fully satisfy their statutory duties to assure the safe and secure transportation of TIH commodities. Nor does UP contend that DOT and TSA drafted their regulations without considering routing and distance issues or that UP lacked any opportunity to bring these issues to the attention of DOT and TSA. Indeed, UP's Petition acknowledges that

both agencies considered ways to reduce unnecessary TIH shipments in meetings with railroads and TIH shippers only a year ago. UP Petition at 3-4. Absent any of the above types of evidence to demonstrate that existing DOT and TSA regulations are unsatisfactory or inadequate, and in view of express denials by FRA and PHMSA of any need or intent to modify the common carrier obligation in order to comply with their regulations, the Board must consider those regulations to embody the appropriate balance between safety and security considerations and the public need for the transportation of TIH commodities. *Conrail* at 651-52. Any additional standards are presumptively unreasonable. *Id.* at 650.

IV. UP'S PETITION IS PROCEDURALLY DEFECTIVE.

Although self-described as a request for "clarification" of the common carrier obligation, UP's Petition really asks the Board to abolish the common carrier obligation altogether, whenever there may be a TIH source closer to the destination. There is no room to argue that the common carrier obligation is unclear or ambiguous on this subject. A common carrier railroad must transport all goods delivered to it for transportation upon reasonable request. *Akron* at 1166; 49 U.S.C. § 11101(a). The only means provided by Congress for a blanket elimination of the common carrier obligation, as requested by UP, is to obtain an exemption pursuant to 49 U.S.C. § 10502(a). UP's failure to pursue this remedy is fatal to its Petition.

A. UP Must Obtain an Exemption to Be Relieved of Its Common Carrier Obligation.

Congress provided only one means for the Board to relieve a railroad of its common carrier obligation. That is to grant an exemption if the standards at 49 U.S.C. § 10502(a) have been satisfied. UP has not even requested an exemption in this proceeding, much less attempted to satisfy the statutory requirements

Moreover, UP could not satisfy the statutory requirements for an exemption because its request is inconsistent with the national rail transportation policy, is not limited in scope, and would grant railroads *carte blanche* to abuse their market power over TIH shippers. Moreover, a petition for exemption would confront the same jurisdictional issues addressed in Part III, *supra*. Presumably, UP has filed this declaratory order petition, which seeks a determination that railroads need not even quote common carrier rates on request for certain TIH shipments, in order to avoid these uncomfortable facts by circumventing the exemption statute altogether.

But, the ICC has held that similar action by railroads to flag out of tariffs is an impermissible end-run around the exemption statute. In *Classification Ratings on Chemicals, Conrail*, 3 I.C.C. 2d 331 (1986), shippers challenged Conrail's attempt to flag out of published tariff rates for certain hazardous materials, including TIH commodities. Shippers argued, among other things, that Conrail's flag out was contrary to the exemption statute, which at the time was codified at 49 U.S.C. § 10505. The ICC agreed, declaring that:

Once a reasonable request for transportation of these chemicals is made, Conrail has a common carrier obligation to transport them. It necessarily follows that Conrail's attempt to unilaterally excuse itself from this requirement circumvents section 10505.

Classification Ratings at 338.

UP's Petition attempts to use this declaratory order proceeding to avoid its common carrier obligation, without satisfying the exemption statute. Although Congress gave the Board authority to consider UP's request, it did so only within the narrow confines of the exemption standards. The Board, therefore, cannot grant UP's Petition for Declaratory Order.

B. UP's Petition Does Not Demonstrate That Common Carrier Rail Service is Unreasonable.

A railroad may not refuse a reasonable request for common carrier service. UP's Petition does not argue the reasonableness of USM's request for service; nor does it ever invoke the "reasonableness" standard at 49 U.S.C. § 11101(a). Nevertheless, UP's request for overall guidance as to whether it must provide a rate for transportation of a TIH commodity when there is an alternative source closer to the destination implicitly raises the "reasonableness" question. UP's Petition, however, misconstrues both a railroad's duty to provide a common carrier rate "on request" and the duty to provide common carrier service "on reasonable request."

1. The duty to quote common carrier rates is absolute and unqualified.

The very premise of UP's Petition confuses the common carrier duty to provide service "on reasonable request," 49 U.S.C. 11101(a), with the duty to provide rates and service terms "on request," 49 U.S.C. 11101(b). The former duty is qualified by the term "reasonable," while the latter duty is not. This is a significant distinction that both the Board and the courts have recognized.

The Board recognizes this distinction in its regulations governing requests to establish a new rate. At 49 C.F.R. 1300.3, the Board states:

Where a shipper...requests that the carrier establish a rate in the absence of an existing rate for particular transportation, the carrier *must promptly* establish and provide to the requester a rate and applicable service terms. [emphasis added]

The Board defines "promptly" to mean "as soon as reasonably possible, but no later than 10 business days...." *Id.* There is no qualification that limits a railroad's duty to provide a common carrier rate. Indeed, no qualification is necessary, because a rate request, although an essential predicate to obtaining common carrier service, is not the same as a request for transportation service "Without rates, and any attendant terms setting forth the particulars of service, a shipper

cannot make a specific service request.” *Pejepscot Industrial Park, Inc d/b/a Grimmel Industries—Petition for Declaratory Order*, STB Finance Docket No. 33989, slip op. at 8 (served May 15, 2003). Without a specific service request, the Board cannot determine whether the request is reasonable. Thus, according to the Board, “[i]t is axiomatic that a rail carrier may not indirectly avoid its common carrier obligation to provide service by evading its obligation to establish rates upon request.” *Id*

Less than a year ago, in a public hearing on the common carrier obligation, then Chairman Nottingham declared “that the Board takes very seriously any refusal by a railroad to quote a tariff under any circumstances other than if it’s involving an exempt commodity.” *Common Carrier Obligation of Railroads*, Ex Parte No. 677, Hearing Tr. at 527 (April 24, 2008). This statement is consistent with both the absolute and unqualified duty imposed by 49 U.S.C. § 11101(b) to provide a rate and the fact that this Board may not address the subject matter of UP’s Petition except through an exemption request that satisfies the requirements of 49 U.S.C. § 10502. *See* Part IV.A., *supra*.

In *Akron*, the Sixth Circuit also recognized the importance of the distinction between a request for common carrier rates and a request for service. In affirming an ICC order to publish common carrier rates for the transportation of radioactive materials, the Court first distinguished an order to publish rates from an order to carry goods. *Akron*, 611 F. 2d at 1164 & 1166. Second, the Court affirmed the ICC’s determination that, because the Department of Transportation and the Nuclear Regulatory Commission had published safety regulations governing the transportation of radioactive materials, such commodities are not too dangerous to transport, but that a railroad may seek approval of stricter safety standards shown to be just and reasonable. *Id* at 1169. However, according to the Court, whether or not a stricter safety

standard is reasonable is a matter “properly to be explored *after* the publication of tariffs for the carriage of nuclear materials, not in deciding whether such publication should be ordered.” *Id* at 1170 [emphasis added].

UP’s refusal to provide rates to USM violates this fundamental tenet, by ignoring the distinction between a request for rates and a request for service. UP has an absolute and unqualified duty, under 49 U.S.C. § 11101(b), to quote a common carrier rate. UP may not invoke the “reasonableness” qualification applicable to a request for service, under 49 U.S.C. § 11101(a), to avoid quoting a common carrier rate.

2. UP has not raised a cognizable claim of an unreasonable request for service.

Implicit in UP’s Petition is the argument that any request for transportation of TIH commodities is unreasonable when there is a source of TIH closer to the destination, and therefore, it need not quote a rate for such transportation. Such a blanket assertion, however, does not comport with the meaning of “reasonable” in 49 U.S.C. § 11101(a).

The common carrier obligation to provide service “on reasonable request” codifies the common law “duty to the public to carry for *all* to the extent of its capacity at a reasonable charge and *with substantial impartiality* according to its holding out.” *B J Alan Co., Inc. v. United Parcel Service, Inc.*, 5 I.C.C. 2d 700, 710-11 (1989), *citing Michigan Pub Util Comm’n v. Duke*, 266 U.S. 570, 577 (1925) [emphasis added]. This description of the common carrier obligation does not empower a railroad to refuse service to one shipper because it believes that another movement is more reasonable under the circumstances. The reasonableness of a request for service is not, and never has been, dependent on the availability or unavailability of alternate service. Each request for service must be evaluated on its individual facts at the time the request

is made. Therefore, UP's Petition, which would evaluate reasonableness based on the availability of a shorter alternate movement, is anathema to the common carrier obligation.

Furthermore, a rail carrier cannot be in violation of its duty to provide service until there is a specific request for service. "A reasonable request is one that is specific as to the volume, commodity, and time of shipment." *CSX Transp. Inc.—Abandonment—Between Bloomington and Montezuma, in Parke County, IN*, STB Finance Dkt. No. 34019, 2002 STB LEXIS 535, *21 (served Sept. 13, 2002). This movement-specific focus upon the reasonableness of a request for service is inconsistent with UP's attempt to impose a blanket standard of reasonableness

UP's only rationale for finding USM's rate requests unreasonable is that there may be closer sources of TIH that would not require transportation over as great a distance as the requested service. Consequently, UP contends that the shorter distance option is safer and more secure. As demonstrated in Part III, above, however, a railroad may not argue that transportation is too dangerous when there are complete and comprehensive safety standards and those standards have been satisfied. *Akron* at 1169; *DOE*, 364 I.C.C. at 959; *Radioactive Materials*, 359 I.C.C. at 73. UP does not claim it is unable to provide service to USM in compliance with all applicable safety and security regulations. Moreover, USM states that it has not had any incidents or spills in the last 10 years and that it has received UP's Pinnacle safety award several times—most recently in 2008—for safe loading practices and zero non-accident releases.⁴ USM Reply at 4. Furthermore, the rail industry, as a whole, has a long and excellent history of safely transporting large quantities of TIH commodities all distances across all parts of the country. As DOT noted in its testimony to the Board in Ex Parte No. 677 (Sub-No. 1), page 2, "[r]ail transportation of hazardous materials is currently very safe and DOT has been working with

⁴ After USM filed its reply to UP's Petition, UP published its 2009 Pinnacle Award winners, and once again USM was a recipient. See <http://www.uprr.com/she/cts/pinnacle.shtml>

railroads, shippers, and tank car builders to make the rail transportation of PIH and other hazardous materials even safer and more secure.” Thus, there is no evidence that service to USM would be unreasonable because it is unsafe.

V. Granting UP’s Petition Would Have Dangerous Public Policy Implications.

A. UP’s Proposal Would Entail Arbitrary and Anti-Competitive Allocations of Resources.

Granting UP’s Petition would entrust to the UP (and other railroads), and impose upon the Board, economic resource allocation decisions of the sort that would have been typical in the days of the commissars of the Soviet Union, but which have no place in the modern American economy. Not since World War II has the government been involved in deciding such questions – e.g., how much rubber and tin to devote to the war effort, and how much to permit private industry to allocate; how much gasoline and sugar were adequate for a family each month, and so on.

The dangers of such an approach are evident on the face of the UP’s Petition. Basic economic principles hold that a market is not “well supplied” when there is, as attested by USM in this proceeding, an additional supplier who believes it may be commercially advantageous to enter and compete in that market, and would do so if only the UP would honor its common carrier obligation. The UP is now suggesting that it, another private entity, be empowered to decide who can and cannot compete in particular markets, and to erect barriers to entry and to the free flow of commerce, whenever in its subjective judgment a shipper or consignee of TIH commodities theoretically could obtain the material from another source.

The allocation decisions that the UP asks for permission to make are, of course, precisely the type of market-constraining behavior that is condemned under this nation’s antitrust laws. Whether termed monopolization, refusal to deal, territorial market allocation, or denial of the use

of an essential facility on reasonable terms, the activity that UP is proposing, in the absence of the Board's sanction, would be subject to criminal, civil, and private treble damages sanctions. The fact the UP refused to quote rates to "only" seven of 35 requested destinations is of no comfort, because the UP does not offer, and cannot offer, any clear lines of demarcation that would limit when it could and could not deny service and refuse to quote rates. Refusal to quote rates even to a single destination would be inconsistent with the antitrust laws and contrary to sound economic policy.

B. UP's Petition Would Impose Unworkable Administrative Burdens That Effectively Would Deny Service.

When the Board abandoned the use of product and geographic competition in market dominance determinations, it did so principally because the discovery and evidence submitted on these subjects, including the analysis of alternative sources of products around the world and consideration of the technical feasibility of substituting one product for another, had overwhelmed the resources of litigants and the Board, and involved matters beyond the expertise of the Board:

Based on our experience in rail rate cases (including the experience of our predecessor, the ICC), we found that inclusion of this evidence [on alleged product and geographic competition] had "impose[d] substantial burdens on both the parties and this agency." *1998 Decision*, [3 S.T.B.] at 946. We observed that discovery in individual cases had often included hundreds of questions directed to the existence or effectiveness of product and geographic competition and had frequently triggered discovery disputes that we had to resolve. *Id.* at 946. Furthermore, the evidence that had been introduced relating to alleged product and geographic competition had placed a substantial burden on us to address matters outside of our areas of expertise, requiring us to grapple with such complex non-transportation issues as: the feasibility of switching the generation of electricity from one plant to another; the utility industry's ability to "wheel" power over the electric power grid; the ability of a paper manufacturer to substitute different types of wood in its paper production process;

and the feasibility of manufacturers' switching from aluminum to glass or plastic containers. *Id.* at 947. Consideration of these matters had extended the time needed to resolve rail rate cases *Id.* We concluded, *id.* at 948 (footnotes omitted), that:

the time and resources required for the parties to develop, and for us to analyze, whether it would be feasible for a shipper to change its business operations (by changing its suppliers, customers, or industrial processes) so as to avoid paying the challenged rail rate can be inordinate.

Market Dominance Determinations – Product and Geographic Competition, 5 S.T.B. 492, 493 (2001), *aff'd by Association of American Railroads v. STB*, 306 F. 2d 1108 (D.C. Cir. 2002).

If consideration of product and geographic competition resulted in inordinate complexity and expense in the context of rate reasonableness proceedings – which shippers would seldom undertake unless millions of dollars were at stake – then *a fortiori* the expense of such proceedings analyzing alternative sources would impose an even more inordinate and disproportionate burden on the shipper simply seeking a rate quote.

If UP's Petition were granted, the Board and shippers would be forced to deal with innumerable questions every time a railroad decided that there was some justification for declining to quote a rate. Such questions would include : (1) Is there a closer TIH source to the destination? (2) Does the alternative source supply product with the correct specifications for the end-user's needs? (3) What is the price of the product from the alternative source? (4) Do the price and business terms from the alternative source make it competitive? (5) Is there an ample supply at the alternate source? (6) How would shipping from the alternate source affect other supply chains to other users? (7) What are the various alternative routings that might be used for products from the original and any alternative sources? (8) What is the relative safety of the various possible routings? (9) Will the TIH shipper go out of business if it is unable to transport the TIH? And so on, potentially *ad infinitum*. The questions posed above, of course, do not even

begin to deal with potential railroad arguments that substitute products should be considered, which would magnify the complexity exponentially.

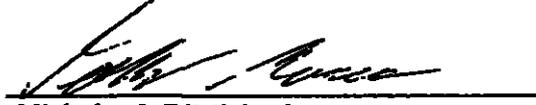
The need to deal with such complex non-transportation questions is evident in just the few facts that already have been placed into the record by UP, the Chlorine Institute, and USM. For example: If the Board grants UP's Petition, would USM be able to find a market for all of its chlorine co-product that does not have a closer source? Is it better policy for USM to vent unsold chlorine into the atmosphere than to transport it by rail over longer distances? Can USM, which is North America's only magnesium producer, profitably produce magnesium without revenue from its chlorine co-product? Can and should the Board force USM to curtail its magnesium production, if it cannot transport the chlorine to market? Is there truly an ample supply of chlorine in the Gulf Region? Although there may be closer sources, are their routes necessarily safer? These questions are just the tip of the iceberg, since extensive discovery almost certainly would be necessary to sort through the conflicting allegations. This is a road that the Board is not qualified to travel, does not have the jurisdiction to go down, and does not possess the resources to do so.

Furthermore, how many shippers, faced with the necessity of having to fight such a complex battle just to be quoted a tariff rate, would persist in their quest? Shifting the burden of proof to the railroads would not solve this problem, because the shipper still would have to participate in the proceedings before the Board.⁵ In the face of such obstacles, the common carrier obligation would become a dead letter.

⁵ It bears noting that the Board's initial response to the complexity of product and geographic competition determinations was to shift the burden of proof to the railroad parties. The Board quickly realized that, notwithstanding the nominal shift in the burden of proof, a heavy burden of discovery responses and analysis continued to fall on shippers. See, e.g., *FMC Wyoming Corp v Union Pacific RR Co*, 3 S.T.B. 88, 90 (1998).

In sum, the petition filed by the UP should be seen for what it clearly is, part of the railroad industry's continuing campaign to be relieved of its common carrier obligation whenever they view it as being in their economic interest to do so

Respectfully submitted,



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April 10, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have served on this 10th day of April, 2009, a copy of the foregoing "Joint Comments" by first-class mail on all parties of record in this proceeding.



Jeffrey O. Moreno