

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

224875

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**STB Finance Docket No. 35219**

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

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**COMMENTS OF  
E.I. DU PONT DE NEMOURS AND COMPANY**

**I. INTRODUCTION.**

E.I. du Pont de Nemours and Company ("DuPont" or "the Company") asks the Surface Transportation Board ("Board") to deny the Petition for Declaratory Order filed by Union Pacific Railroad Company ("UP") on February 18, 2009 ("Petition") because it is an impermissible effort to avoid the common carrier obligation to transport toxic inhalation hazards ("TIH"). DuPont, as a member of the American Chemistry Council, the Chlorine Institute, and the National Industrial Transportation League, also supports their Joint Comments submitted in opposition to the Petition ("Joint Association Comments")

In its Petition, UP has asked the Board to institute this declaratory order proceeding to "clarify" the extent of the common carrier obligation to transport TIH commodities whenever the railroad concludes that there is an alternative source of that TIH commodity available closer to the point of consumption. But UP is not requesting a clarification properly addressed via a declaratory order. Rather, it is inviting the Board to establish an unprecedented exception to the

common carrier obligation with broad and far reaching consequences for our Country's already challenged economy and the American people. Both as a matter of law and sound public policy, this Board should decline UP's invitation because it is not the appropriate forum for addressing the issues that the Petition raises.

## **II. STATEMENT OF INTEREST.**

DuPont is a global company founded 207 years ago in Wilmington, Delaware. In the Company's third century, the people of DuPont are bringing together biology and chemistry to meet societal needs for safe and abundant food, alternative fuels, and other sustainable solutions to enable a better, safer and healthier life for people everywhere. DuPont has annual revenues of about \$30 billion, operates 135 manufacturing and processing sites in 70 countries, and employs nearly 60,000 people. In the United States alone, DuPont has approximately 33,000 employees in 33 states.

One thing has remained unchanged throughout the history of DuPont - its uncompromising commitment to safety. The Company's founder, E. I. du Pont, built safety into the very fabric of DuPont culture by living, and requiring managers to live, on the Company's first manufacturing sites. That culture and clear personal accountability remain just as strong today. They account for the Company's extraordinary history of safe performance despite its routine handling of many regulated chemicals, including fourteen TIH commodities. The Company's safety expertise and reputation are so strong that DuPont has a business unit that provides safety consulting services to other companies. Indeed, even some of the Class I railroads have availed themselves of our consulting services and all have recognized the Company's safety commitment and performance through numerous "safe shipper" awards

The DuPont commitment to safety is also reflected in many of our products, which are designed to protect human life. DuPont Kevlar<sup>®</sup> high-performance fiber, for example, is credited with the survival of over 3,000 law enforcement officers in the United States over the last thirty years. It is

also used for military helmets, vehicle armor, aircraft parts, bridge construction and numerous other functions. Another DuPont fiber, Nomex<sup>®</sup>, is used for personal protection by first responders, including firefighters. Our SentryGlas<sup>®</sup> technology helps to protect both private citizens in skyscrapers and other structures around the world and government employees at critical government installations such as federal courthouses and embassies.

America's freight rail carriers have been vital to DuPont operations since 1858 when the Pennsylvania Railroad first transported our products. They remain essential to our business today. To produce Kevlar<sup>®</sup>, Nomex<sup>®</sup> and many of our other products, DuPont requires many chemicals, including some hazardous and TIH commodities. DuPont also produces chemicals used by other industries for indispensable products such as tires and electronics. In most cases, because of their volume and composition, these chemicals are best transported by rail -- the safest, most energy efficient and environmentally sound method of land transport. Therefore, a safe, efficient, cost-effective, and responsive rail transportation system is critical to practically all DuPont businesses and to the workers who depend on those businesses for their livelihoods.

DuPont presented written and oral testimony to the Board in two proceedings on the common carrier obligation of railroads initiated within the past year, including a proceeding focused exclusively upon the transportation of hazardous materials. *Ex Parte No. 677, Common Carrier Obligation of Railroads* and *Ex Parte no. 677 (Sub No. 1), Common Carrier Obligation of Railroads—Transportation of Hazardous Materials*. UP's Petition raises many of the same issues addressed in those proceedings. Thus, while framed in safety terms, the Petition should be recognized for what it is -- part of a continuing effort by a railroad industry committed to avoiding its legal obligation to transport TIH commodities because of perceived economic risk, not safety concerns.

Aside from the many jurisdictional and policy reasons that militate against granting the UP Petition, the Board cannot empower the railroads to decide when and where they would transport TIH commodities because of the detrimental impact of such a decision on the American people and our Nation's economy. Permitting the railroads to substitute their judgment concerning appropriate sources of supply for that of business managers in the chemical industry would put employers like DuPont at grave risk of no longer being able to produce products in the United States. Driving domestic manufacturers like DuPont to operate offshore prevents them from providing jobs to support local economies and from contributing to exports to help balance our s trade deficit.

**III. NEITHER THE BOARD NOR ANY RAILROAD HAS THE AUTHORITY TO IMPOSE ON THE CHEMICAL INDUSTRY THE ECONOMIC JUDGMENTS THAT THE PETITION REQUIRES**

The Board must deny UP's Petition because neither the Board nor the railroad industry has the authority, expertise, or resources to make the economic decisions that granting UP's request would require. By asking the Board to permit the railroads to decide when a TIH commodity is available from a source that is closer to the destination, and in such circumstances, to refuse to transport that commodity from a more distant source, UP is essentially asking the Board to remove from the management of companies such as DuPont their ability to make *operational decisions fundamental to the success of their businesses.*

Congress has empowered the Board to regulate economic matters for railroads, but not for other industries. UP's Petition must be denied because it would involve the Board in making economic decisions for non-railroad industries that are far beyond the Board's knowledge and expertise, not to mention its jurisdiction. This is an extreme form of resource and market

allocation and is absolutely contrary to the principles of free enterprise and unfettered competition that are the foundation of our economic system.

Were the Board to adopt UP's proposal, it would divide the buyers and sellers of TIH commodities by geographic areas, dictating that buyers must purchase their essential TIH commodities from those producers closest to them, regardless of price, service, quality, technical or operational requirements, or other terms. Competition between sellers of TIH commodities would be virtually eliminated. TIH producers in more remote locations could be frozen out of many markets and unable to sell their product at any price because the UP scheme would foreclose them from transporting their product to the markets where there is demand. In many instances, the Board would be called upon to make individualized decisions as to when a closer TIH source lacks sufficient capacity to satisfy local demand, justifying a longer haul from a more distant supplier. But, of course, the Board lacks the information and the authority required to make these kinds of resource allocations, even if it were desirable for the Board to do so. Furthermore, trying to force these allocations indirectly through the common carrier obligation is a recipe for economic disaster.

The resource allocations required by UP's Petition are complicated by the fact that different suppliers' production of a given chemical are not necessarily fungible and thus the *closest supplier is not always the appropriate supplier for a given industrial use*. Sulfuric acid, for example, is manufactured in different grades of purity and only specific grades are appropriate for certain uses. Chlorine, the chemical on which the UP Petition rests, is produced with different moisture content. Differences in moisture content can be significant for certain industrial uses. In those situations, the industrial user must qualify its chlorine source to ensure it receives a steady and adequate supply with the correct moisture specification. Similar

observations can be made for a broad range of chemicals, TIH and non-TIH. In short, while businesses like DuPont endeavor to limit the transport of the TIH chemicals they produce or use, the fact remains that geographic proximity alone cannot dictate supply chain decisions for a variety of reasons, including technical requirements and specifications.

Moreover, many TIH purchasers require more than one supplier. In many instances, a single supplier does not have sufficient uncommitted capacity to meet a given user's needs. Additionally, a sole source does not provide companies with appropriate protection against shutdowns due to the unavailability of supply and the consequent productivity and economic losses.

There is a potential even for disagreements between railroads as to whether one TIH producer is closer to a destination than another. Indeed, this is very likely if neither railroad desires to haul the TIH. All Class I railroads have indicated through numerous public statements, including statements made to the Board in Ex Parte No. 677 (Sub-No. 1), that they would not carry TIH commodities if given the choice. Thus, where the potentially closer source is on another railroad, there could be a dispute between the railroads themselves over which is the more "reasonable" TIH movement.

Lastly, the UP Petition rests on the assumption that shorter distance TIH movements are always safer than longer distance movements. Even the Federal Railroad Administration and the Transportation Security Administration ("TSA") do not accept this assumption as true. See "Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments," Docket No. PHMSA-RSPA-2004-18370, 73 Fed. Reg. 72182, 72186 (Nov. 26, 2008) (rail carriers must assess available routes using 27 factors). Yet, UP would require the Board to substitute its judgment for that of its sister agencies in order to determine if

the common carrier obligation requires UP to transport TIH commodities from a more distant source. This the Board may not do. *See Akron, Canton & Youngstown R.R. Co. v. ICC*, 611 F. 2d 1162, 1169 (6th Cir. 1979) (“[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.”).

If railroads are granted any leeway to decide for themselves when the common carrier obligation applies to a TIH movement and when it does not, the Board will find itself enmeshed in the review of innumerable cases where common carrier rail service has been denied. The Board would labor under administrative burdens that exceed those that it sought to avoid when it eliminated product and geographic competition from its market dominance determinations in rail rate cases. In *Market Dominance Determinations—Product and Geographic Competition*, 3 S.T.B. 937, 947 (1998), the Board expressed concern that product and geographic competition arguments “have required us to address complex non-transportation issues...requir[ing] us to ‘second-guess’ shipper management. .[and]...delve deeply into industrial operations that are far removed from the transportation industries that we regulate.” *See also, 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). These concerns apply to an even greater extent to UP’s Petition, because the management decisions of TIH producers and purchasers will be second-guessed first by railroads, and then by the Board, to an extent that is unsound, unfair and inconceivable.

The time required for the Board to make these determinations also will have economic consequences. A TIH shipper’s request for common carrier transportation typically will be based upon its immediate needs. If a railroad is permitted to refuse that request because it

believes that there is a TIH source closer to the destination, the Board's resolution of any dispute over that determination is likely to require many months, especially given the potential discovery burdens. Because in most cases the effort associated with challenging a railroad's determination will preclude Board action within a timeframe that accommodates the commercial requirements of the transaction, shippers, in essence, will be left without any practical means of challenging the railroad's decision. Railroads, on the other hand, would be enabled to refuse common carrier service for TIH shipments comfortable in the knowledge that a regulatory challenge is unlikely. Such a result would not only worsen the "imbalance" of power between the railroads and captive shippers such as DuPont, but is also contrary to the fundamental principles of fair play underlying the United States' market-based economy.

Neither the railroads nor the Board can or should be making the kinds of decisions required by the Petition. Both lack the resources and expertise to make the regulatory and market resource allocations that granting the petition would require.

#### **IV. THE BOARD LACKS JURISDICTION TO GRANT UP'S PETITION.**

The entire basis for UP's Petition is its contention that the common carrier obligation counteracts the safety and security efforts of FRA and TSA. UP Petition at 4. This argument is legally insufficient as a basis for the Board to narrow the common carrier obligation.

The Board's role in safety and security matters is extremely limited. The Board fulfills its responsibility with respect to safety questions when it determines that all Department of Transportation ("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"). Despite UP's claim that the common carrier obligation

counteracts the efforts of FRA and TSA, UP does not cite to any regulation that is in conflict with the common carrier obligation. Nor has UP alleged that it cannot transport TIH commodities in compliance with DOT or TSA regulations when there may be an alternative TIH source closer to the destination. Moreover, neither FRA nor TSA has advocated for narrowing the common carrier obligation as it applies to TIH movements. In short, UP has not raised any matter that is within the Board's jurisdiction to address.

Indeed, because DOT and TSA have established complete and comprehensive safety and security standards for TIH transportation, 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*") Even if the Board construed UP's Petition to impose a new or additional safety standard, UP has not even begun to carry its heavy burden of showing that existing DOT and TSA regulations are unsatisfactory or inadequate. Furthermore, 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. The Board, therefore, must consider the DOT and TSA 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.

**V. UP'S PETITION SEEKS RELIEF THAT THE BOARD MAY GRANT ONLY THROUGH AN EXEMPTION DETERMINATION UNDER 49 U.S.C. § 10502.**

Although styled as a Petition for Declaratory Order, UP's Petition really seeks an exemption from the common carrier obligation to haul TIH commodities, pursuant to 49 U.S.C. § 10502. As noted in the Joint Association Comments, an exemption is the only avenue that Congress provided for narrowing the common carrier obligation, and UP's failure to file a Petition for Exemption and to address the statutory standards for obtaining an exemption requires

the Board to deny UP's Petition. Even if the Board were to construe the Petition as a proper exemption request, it would not be appropriate for the Board to grant it because the railroads could exercise their market leverage to refuse to haul TIH commodities, just as they currently do under existing exemptions.

The Board may grant an exemption only when it determines that sufficient competition exists in the marketplace to regulate the transport services and rates and that the public interest will be protected. The rail industry has demonstrated an improper propensity to take advantage of certain existing broad-based exemptions to refuse to carry TIH commodities. Their actions demonstrate how the rail industry uses exemptions to erode the common carrier obligation in ways that Congress never intended and the Board never envisioned.

To cite just one example, under the intermodal exemption granted by this Board's predecessor (the ICC), railroads currently are refusing to transport certain regulated materials contained in portable ISO containers. DuPont has experienced, first hand, the detrimental impact of the railroads' exercise of their power under this exemption. In October 2005, DuPont was notified that within two weeks its rail carrier no longer would transport TIH materials in intermodal service. At that time, DuPont used the pertinent carrier's intermodal service to supply a customer in Mexico with a TIH contained in ISO tanks approved by the Federal Railroad Administration and the Department of Transportation. The carrier not only refused to carry the loaded ISO tanks that were already in the supply chain *en route* to the customer, but also declined to transport the empty tanks from the customer's facility back to the DuPont site. Because the customer could not accept rail tank cars, DuPont was forced to ship by truck to meet its contractual obligations. Ultimately, DuPont lost the customer to a producer in India because of the higher transportation costs associated with trucking.

Less than a year ago, another Class I railroad issued a tariff circular prohibiting the movement of certain commodities and flammable and non-flammable gases in ISO tanks in intermodal service. Because DuPont was given only one month notice of this change, it faced considerable supply chain disruption that forced it to move the ISO tanks by truck to a West Coast port for export.

As the above examples illustrate, the exemption that enables railroads to decline to transport ISO tanks of TIH materials has imposed, and continues to have the potential to impose, harm on the companies affected, the environment, and the general public. First, it forces companies to transport these non-bulk quantities of TIH commodities by truck over the public highways, a less efficient and less safe method of transport, or to transload in populated areas near the port of export. Second, it may force the manufacture of these necessary products overseas. In the first case, the environment and the public are exposed to greater risk than would be the case if the materials were safely transported by rail in government-approved packaging. In the second case, U.S. manufacturing is curtailed and jobs are put at risk, the trade deficit is exacerbated and local economies suffer.

If the railroads are permitted to behave in the same way relative to TIH commodities shipped in bulk, as UP's Petition envisions, the consequences would be even greater. Plants that manufacture or use such products would be forced to close. Production would shift overseas and U.S. jobs would be lost. Exports would decline and imports would increase, exacerbating the United States' already significant trade imbalance. Local economies and small towns dependent on the jobs and tax revenues generated by the affected manufacturing facilities would experience serious downturns. The national economy would suffer a similar, but much larger, impact. The availability of goods that require hazardous raw materials or intermediaries—including safety

and security products, food, basic commodities such as gasoline and many medicines—would be reduced. Alternatively, their cost would escalate or, worse yet, the Country would endure both scarcity and high costs. To put it differently, the elimination or significant curtailment of the railroads' common carrier obligation in the manner UP requests would create far more problems than it would solve by reducing competition in industries outside transportation.

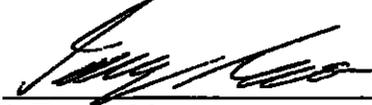
#### **VI. SUMMARY AND CONCLUSIONS.**

In summary, this Board should not entertain UP's Petition, for the following reasons.

- Neither the Board nor the rail industry possesses the knowledge, expertise, or jurisdictional authority to make economic resource allocations for non-rail industries.
- UP's Petition seeks the equivalent of an exemption from the common carrier obligation, which the Board cannot and should not grant because of the rail industry's history of exploiting exemptions to exercise their market power to refuse to transport TIH shipments.
- UP has not identified any safety or security regulations that are inconsistent with the common carrier obligation to transport TIH commodities, and neither DOT nor TSA has advocated for narrowing the common carrier obligation.
- UP's Petition has economic implications far beyond the rail transportation arena.

- The government, shippers, rail carriers, and other stakeholders continue to collaborate on ways to mitigate risk in the rail transport of TIH and other hazardous materials, including routing and sourcing when both economical and practical.

Respectfully submitted,



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Jeffrey O. Moreno  
Thompson Hine LLP  
1920 N Street, NW  
Washington, DC 20036  
202-263-4107

*Counsel for E.I. du Pont de Nemours and  
Company*

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  
Comments by first-class mail on all parties of record in this proceeding.

  
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Jeffrey O. Moreno