

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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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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**JOINT REPLY 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**

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 these reply comments pursuant to the decision of the Surface Transportation Board ("Board"), served in this docket on March 24, 2009.

The Joint Shippers filed opening comments in this proceeding, on April 10, 2009, in opposition to the Petition for Declaratory Order filed by Union Pacific Railroad Company ("UP") on February 18, 2009 ("UP Petition"), in which UP asks whether the common carrier obligation requires it to quote rates for the transportation of toxic inhalation hazards ("TIH" or "PIH"), when in UP's opinion there is a TIH source closer to the destination. The Joint Shippers

have opposed UP's Petition as an unlawful and procedurally defective attempt to narrow the common carrier obligation because it would require the Board to impermissibly intrude upon the safety and security jurisdiction of other federal agencies, it fails to address the standards for granting exemptions from the statute, and it raises significant public policy consequences far beyond the Board's jurisdiction and expertise.

Several individual shippers, the Transportation Security Administration ("TSA"), and the Department of Transportation ("DOT") also filed comments stating that there is no need to narrow the common carrier obligation as UP has requested and raising significant jurisdictional and public policy objections. Although several railroad interests filed comments in support of UP's Petition, they focused primarily upon issues well beyond the scope of the Petition and that they previously presented to the Board in Ex Parte No. 677 (Sub-No. 1).<sup>1</sup>

#### **I. DOT AND TSA OPPOSE UP'S PETITION.**

UP's Petition is predicated upon an assumption that the common carrier obligation "counteracts" and "conflicts" with the efforts of DOT and TSA to promote the safety and security of TIH shipments. However, in this very proceeding, both DOT and TSA have stated unequivocally that there is no need to narrow the common carrier obligation to comply with their regulations.

TSA reminds us that its activities are designed to enhance rail transportation security, not to inhibit transportation. TSA Comments at 4. According to TSA, "[w]hen rail shipments conform to the TSA and DOT regulations, the risks of transporting [TIH] by rail are appropriately mitigated and such movements can take place without posing unnecessary safety

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<sup>1</sup> Notably, UP itself did not file opening comments with the Board, apparently choosing to rely upon its Petition. However, as pointed out by several commenters, UP's five page Petition is short on facts, long on unsupported assertions, and completely devoid of legal argument. Any attempt by UP to present such facts or arguments in this reply round of comments should be rejected by the Board, because UP obviously could have presented such facts or arguments in its Petition.

and security risks.” *Id.* at 3. There is no need to take the additional step advocated by UP of refusing to transport TIH commodities whenever there may be a TIH source closer to the destination. Indeed, TSA explicitly declares that it “has not urged, and its rules provide no basis for, freight railroad carriers to discontinue the transportation of such shipments.” *Id.* at 6. TSA further emphasizes that granting UP’s Petition “may have adverse unintended consequences” and that “[f]uture rail security and safety enhancements should be accomplished through DHS and DOT rulemakings.” *Id.*

DOT’s comments echo those of TSA by also concluding that “[c]ompliance with existing regulatory safeguards would appropriately mitigate the relevant risks” and that “there is no reason to change the common carrier obligation of railroads with respect to shipment of PIH materials such as chlorine.” DOT Comments at 2. DOT describes the likely unintended consequences for the economy if railroads are permitted to determine what destinations to serve from which origins. *Id.* at 3. Notably, DOT’s concerns arise from the very same Section 333 conferences that the Federal Railroad Administration (“FRA”) facilitated in order to reduce TIH rail ton-miles, *id.* at 3 & 11-12, and that UP claims is counteracted by the common carrier obligation. UP Petition at 3-4. DOT’s comments corroborate similar concerns raised by the Joint Shippers at pages 18-21 of their opening comments. DOT notes that Congress has rejected railroad requests to eliminate the common carrier obligation to transport TIH commodities, and instead has directed DOT and DHS to ensure the safe and secure transportation of such commodities. DOT Comments at 4. Moreover, DOT asserts that the declaratory order that UP has requested would conflict with DOT’s routing regulations because, among the 27 factors that are relevant to route assessments, UP’s Petition would elevate distance above all others. *Id.* at 9-

11. Finally, DOT explains that its rules do not provide railroads with the option of declining to transport TIH materials that comply with DOT regulations. *Id.* at 10.

As the Joint Shippers argued at pages 8-12 of their opening comments, the Board fulfills its responsibilities with respect to safety and security matters when it determines that all DOT and TSA 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”)). Furthermore, the Board should defer to its sister agencies’ positions on safety and security as establishing both an inner and outer limit on its own jurisdiction. *CAB* at 260. Where as here DOT and TSA have established comprehensive safety and security standards for TIH transportation, there is a heavy presumption against the reasonableness of additional measures.<sup>2</sup> *See Consolidated Rail Corp. v. ICC*, 646 F. 2d 642, 650 (D.C. Cir. 1981).

## **II. RAIL INDUSTRY COMMENTS ADDRESS MATTERS BEYOND THE SCOPE OF UP’S PETITION AND THE BOARD’S JURISDICTION.**

Four railroad interests commented upon UP’s Petition. The Association of American Railroads (“AAR”) and CSX Transportation, Inc. (“CSXT”) presented a Class I perspective. The American Shortline and Regional Railroad Association (“ASLRRRA”) and the Springfield Terminal Railway Company (“STRC”) presented a shortline perspective. For the most part, however, those comments address matters beyond the scope of the UP Petition and the Board’s jurisdiction.

Whereas the UP Petition is predicated upon safety and security arguments, the AAR’s comments focus upon the liability of railroads for accidental releases of TIH commodities while in their possession. This is largely repetitive of the AAR’s testimony in Ex Parte No. 677 (Sub-

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<sup>2</sup> DOT describes its regulations as “comprehensive” repeatedly throughout its comments. DOT at 7, 8, 13, 15.

No. 1), in which the AAR asked for a policy statement that would allow railroads to condition their common carrier obligation upon obtaining shipper indemnification for railroad liability. AAR Comments at 2-3, 6-7. That issue has been thoroughly debated in the other proceeding and is not within the scope of UP's Petition.

AAR also argues that, in determining whether a request for service is reasonable, the Board must take into account the hazard posed by the involved commodity and a need for stricter safety standards than those adopted by DOT. *Id.* at 4. But as noted in the preceding section, stricter standards are presumptively unreasonable when DOT has adopted a comprehensive regulatory safety regime, as it has for all hazardous materials. Moreover, in this proceeding, both DOT and TSA have declared that TIH commodities can be transported in accordance with existing DOT and TSA requirements without posing unnecessary safety and security risks.

CSXT argues that new and future government requirements challenge the traditional common carriage business model that "any shipper anywhere may ship to any other shipper anywhere on reasonable request." CSXT Comments at 5. Although CSXT claims that new and proposed safety and security rules "present the railroads with unreasonable demands," *id.*, that argument has been considered and rejected by DOT and TSA, and it is not for the Board to second-guess its sister agencies on such issues that Congress has entrusted to their jurisdiction. Furthermore, as demonstrated in the comments of DOT and TSA in this proceeding, and contrary to CSXT's contentions, *id.* at 6-7, the common carrier obligation does not frustrate DOT and TSA regulatory initiatives. Ultimately, CSXT's claim that federal policy cannot impose additional special handling requirements for TIH commodities and simultaneously preserve the traditional common carrier obligation, *id.* at 6, presents a question that only Congress may address because Congress imposed the traditional common carrier obligation by statute.

The ASLRRRA and the STRC seek special treatment for Class II and III railroads that extends far beyond anything that UP has requested in its Petition. Indeed, the ASLRRRA asks the Board to clarify that the common carrier obligation does not require Class II and III railroads to quote a rate for TTH transportation within a high threat urban area if the railroad determines that it cannot provide service without unreasonable risk to itself or the community. ASLRRRA Comments at 4-5. In essence, ASLRRRA asks this Board to authorize shortline railroads to usurp the role of DOT and TSA, which surely it cannot do.

### **III. CONCLUSION.**

On the whole, the rail industry is using the UP Petition as a stalking horse to further advance its position on liability. The UP Petition itself, however, is predicated upon safety and security, not liability, arguments. DOT and TSA have debunked the safety and security arguments, and the liability issues already are the subject of Ex Parte No. 677 (Sub-No. 1).

Moreover, as DOT, TSA and multiple shipper interests have demonstrated, granting UP's Petition could have significant negative consequences for safety, security and our economy. Thus, there is no basis for granting the UP Petition as a matter of law or policy.

Respectfully submitted,



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April 30, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that I have served on this 30th day of April, 2009, a copy of the foregoing "Joint Reply Comments" by first-class mail on all parties of record in this proceeding.



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Jeffrey O. Moreno