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**Law Department**  
Louis P. Warchot  
Senior Vice President-Law  
and General Counsel

April 30, 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 Reply Comments of the Association of American Railroads ("AAR") for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot  
Counsel for the Association of  
American Railroads

Attachment

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35219

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UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY  
ORDER

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REPLY COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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Of Counsel:

George A. Aspatore  
Paul A. Guthrie  
J. Michael Hemmer  
Paul R. Hitchcock  
Theodore K. Kalick  
Jill K. Mulligan  
Roger P. Nober  
David C. Reeves  
Louise A. Rinn  
John M. Scheib  
Peter J. Shutz  
Richard E. Weicher

Louis P. Warchot  
Association of American Railroads  
50 F Street, N.W.  
Washington, D.C. 20001  
(202) 639-2502

Kenneth P. Kolson  
10209 Summit Avenue  
Kensington, M.D. 20895

*Counsel for the Association of  
American Railroads*

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SURFACE TRANSPORTATION BOARD

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Pursuant to the Surface Transportation Board's ("Board" or "STB") March 10, 2009 decision instituting this declaratory order proceeding, the Association of American Railroads ("AAR") hereby submits the following reply comments in response to various arguments raised by participants in this proceeding. The AAR's reply comments, similar to its initial comments, are directed solely at legal issues pertaining to the scope of the rail common carrier obligation to transport Toxic Inhalation Hazard ("TIH") materials generally under 49 U.S.C. § 11101 and take no position on any specific party's commercial interests or on any disputed factual matters.

As noted in the AAR's initial comments, it must be stressed that that DOT safety regulations govern only safety issues and TSA regulations govern only 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 TIH materials, including with respect to insurance and liability issues. See, e.g., Akron, C. & Y. Ry. v ICC, 611 F.2d 1162, 1170 (6<sup>th</sup> Cir. 1979) (“Akron”); Delta Airlines v. CAB, 543 F.2d 247, 259-260, 267 (D.C. Cir. 1976) (“Delta Airlines”); Radioactive Materials, Missouri-Kansas-Texas R.R., 357 ICC 458, 463-64 (1977) (“MKT”).

**A. The Board’s Assessment of the Applicability of the Common Carrier Obligation is Not Limited to Exemption Proceedings Under 49 U.S.C. § 10502**

Several parties contend that the only means by which a rail carrier may seek relief from its common carrier obligation to transport TIH materials is through filing a petition for exemption with the Board pursuant to the criteria set forth in 49 U.S.C. § 10502.<sup>1</sup> Such an assertion is not supported by prior court, Interstate Commerce Commission (“ICC”) and STB decisions.

As noted in the AAR’s initial comments, the common carrier obligation is not absolute. 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 has long been determined by the Board and its predecessor agency under the governing statute on a

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<sup>1</sup> See, e.g., comments of American Chemistry Council (Joint Comments) at 12-13; CF Industries comments at 4-5. Section 10502 provides that “a person, class of persons, or transaction or service may be exempted from Board regulation whenever the Board finds that the application in whole or in part of a provision [of Subtitle IV of Title 49] (1) is not necessary to carry out the transportation policy of [49 U.S.C. § 10101]; and (2) either (A) the transaction or service is of limited scope, or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.”

case-by-case basis in individual adjudicatory proceedings predicated on all the relevant facts and circumstances. See, e.g., Granite State Concrete Co., v. STB, 417 F.3d 85, 92-94 (1<sup>st</sup> Cir. 2005) (“Granite”); G.S. Roofing Prods. Co. v. STB, 143 F. 3d 387, 391 (8<sup>th</sup> Cir. 1998) (“G.S. Roofing”); National Grain & Feed Ass’n v. United States, 5 F. 3d 306, 310 (8<sup>th</sup> Cir. 1993); Decatur County Comm’rs v. STB, 308 F.3d 710, 716 (7<sup>th</sup> Cir. 2002); see also Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325 (1981).

Indeed, the parties’ “exemption” argument is directly refuted by the only agency case that ever actually considered the scope of the rail common carrier obligation to transport TIH materials. In Classification Ratings of Chemicals, Conrail, 3 ICC 2d 331 (1986) (“Conrail”), the ICC specifically found that it had discretion to determine the reasonableness of a carrier attempt to limit its common carrier obligation to transport TIH materials because of risk and liability issues. As noted by the ICC in Conrail, “[T]he Commission has discretion to determine if there may be limitations on a carrier’s tariff publication/common carrier obligation [regarding transport of ultra-hazardous materials].... This determination will include an analysis of the hazard posed by the involved commodity, the need for stricter safety standards [than Department of Transportation (“DOT”) safety regulations], and financial evidence including insurance costs and the extent of carrier liability.” Conrail at 337. <sup>2</sup>

There can be no doubt as to the propriety of the Board determining, as it did in Conrail, whether a general legal predicate for the common carrier obligation under 49 U.S.C. § 11101(a) has been satisfied by a shipper outside the context of 49 U.S.C. §

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<sup>2</sup> Although the ICC in Conrail ultimately denied Conrail’s “flag out” attempt, it did so because it found that Conrail had failed to meet its evidentiary burden

10502. As the ICC noted in Conrail, it is only *after* it has been determined by the agency that a reasonable request for service has been made and that a common carrier obligation accordingly exists, that the availability of the exemption process even becomes relevant. See Conrail at 338.<sup>3</sup>

**B. The Board Has Clear Authority Under the ICCTA to Determine the Scope of the Common Carrier Obligation to Transport TIH Materials in the Context of Specific Facts and Circumstances**

Several parties contend that only Congress can modify the common carrier obligation to transport TIH materials and that the Board has no jurisdiction to even consider the scope of the common carrier obligation to transport TIH materials in the context of specific facts and circumstances.<sup>4</sup> This contention is without merit.

As noted above, the Board, the ICC and the courts have long construed the agency's authority under the ICC Termination Act ("ICCTA") (and its predecessor statute, the Interstate Commerce Act) as conferring exclusive jurisdiction upon the agency to determine the scope of the common carrier obligation on a case by case basis predicated on all relevant facts and circumstances. See Granite; G.S. Roofing and other cases cited *supra*.<sup>5</sup> As Conrail also makes clear, this authority extends to determining the

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<sup>3</sup> As the ICC explained in Conrail, "[o]nce 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 [the former exemption provision]". Conrail at 338 (emphasis added).

<sup>4</sup> See, e.g., Chlorine Institute comments at 5; Westlake Chemical comments at 6.

<sup>5</sup> As explained by the court in Granite, the obligations of a carrier to "provide service on reasonable request" pursuant to section 11101(a), and to "establish reasonable...rules and practices" pursuant to section 10702, are not statutorily defined. "The two statutory provisions ... do not provide precise definitions for the operative standards: section 11101 does not define what would constitute adequate service on reasonable request, and section 10702 does not define what would be reasonable rules and

scope of a rail carrier's common carrier obligation to transport TIH materials under specific facts and circumstances at issue (including the reasonableness of carrier rules and practices governing the conditions upon which such transportation will be provided to address risk and liability concerns). The Board's broad discretion under the ICCTA to determine the scope of the rail common carrier obligation to transport TIH materials under 49 U.S.C. § 11101(a) is thus clear under the applicable case law.

Despite the Board's clear authority under the ICCTA to determine the scope of the rail common carrier obligation in the context of a specific factual setting (including with respect to TIH materials), it was contended in comments in this proceeding that recent inaction by Congress somehow changed the law.<sup>6</sup> The assertion was that Congress recently enacted legislation governing the safety and security of rail movements of TIH materials and providing for implementing DOT/TSA regulations. In the legislation, Congress did not modify the rail common carrier obligation to transport TIH materials or adopt a liability cap for such movements. Accordingly it is argued that such actions indicated Congressional intent to divest the Board from all jurisdictions to consider the scope of the rail common carrier obligation to transport TIH materials in all circumstances.<sup>7</sup>

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practices." Granite, 417 F.3d at 92-94. The Granite court confirmed that under the statutory scheme of ICCTA the definition and scope of these terms are to be determined by the Board on a case-by-case basis in light of all the relevant facts and circumstance. *Id.* at 92.

<sup>6</sup> DOT Comments at 4.

<sup>7</sup> See DOT comments at 4. The referenced legislation (which deals with regulations governing TIH routing assessments, vulnerability assessments and requirements for the implementation of Positive Train Control ("PTC")) are several sections of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act, Pub. L. 110-53; 121 Stat. 266) and The Rail Safety Improvement Act of 2008 (Pub. L. No. 110-432, Div. A, 122 Stat. 4848-4906) as described in DOT's comments at 4-6. Contrary to DOT's assertion (at 4), neither the AAR, nor its Class I member railroads, has requested Congress to eliminate the rail common carrier obligation to transport TIH materials.

To the contrary, there is absolutely nothing in the recent TIH safety and security legislation that provides any indicia whatsoever of Congressional intent to strip the Board of its longstanding authority under the ICCTA to determine what constitutes a “reasonable request for service” under 49 U.S.C. § 11101(a) or what constitutes a “reasonable carrier rule or practice” under 49 U.S.C. § 10702 in the context of the rail transportation of TIH materials. Congress did not further define or limit these ICCTA provisions in the recent TIH safety and security legislation cited by DOT and left the administration of these provisions where it currently resides, under the authority of the Board. Repeals by implication are not favored in the law, and argument to the contrary should be rejected. See, e.g., National Assn. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007) (“repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest”).

**C. Recent Legislation and DOT/TSA Regulations Governing the Safety and Security of Rail Transportation of TIH Materials Do Not Address Carrier Risk and Liability Issues That Are Within the Exclusive Jurisdiction of the Board**

Several parties contend that the recent Congressional legislation (referenced *supra*) and extensive DOT/TSA safety and security regulations governing the rail movement of TIH materials adequately address safety and security concerns; and that, because the Board has no jurisdiction over safety and security issues, the STB has no role to play with respect to determining the scope of the rail common carrier obligation to transport TIH materials.<sup>8</sup> This contention is also not supportable.

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<sup>8</sup> See, e.g., American Chemical Council (Joint Comments) at 8-12; CF Industries comments at 9-11. The DOT/TSA safety and security regulations referenced govern routing, TIH materials handling, and tank car design (among other subjects) and are described in DOT’s comments at 7-11.

First, although the recent TIH safety and security legislation and DOT/TSA regulations hopefully will serve to enhance the safety and security of rail transportation of TIH materials, the legislation and regulations cannot eliminate all risk in the transportation of TIH materials or guarantee the safety or security of these movements against any accident or incident. Nor can the legislation and DOT/TSA regulations eliminate the huge and largely uninsurable attendant rail carrier risk and liability issues that are important factors for the Board to consider in exercising its economic oversight responsibilities to implement rail transportation policy with respect to the rail transportation of TIH materials.<sup>9</sup> As the AAR and individual carrier testimony demonstrated in the pending Ex Parte No. 677 (Sub-No. 1) proceeding, carriers undertake huge liability risks in transporting these ultra-hazardous materials and effectively “bet the company” each time TIH materials are transported. The risk and liability issues pertaining to the rail transportation of TIH materials are exclusively within the Board’s jurisdiction to address as the economic regulator of the rail industry and remain as relevant for the Board to consider now as before the recent legislation and DOT/TSA regulations. See Akron, 611 F.2d at 1170.

It was further asserted that a carrier can minimize its exposure to tort claims arising out of TIH materials transportation “by ensuring better employee compliance with the DOT and TSA regulations.”<sup>10</sup> As discussed in detail in the AAR’s comments in Ex

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<sup>9</sup> As noted in Akron, 611 F.2d at 1170: “questions of safety ... 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, 543 F.2d at 259-260; MKT, 357 ICC at 463-64.

<sup>10</sup> DOT comments at 6.

Parte No. 677 (Sub-No.1),<sup>11</sup> this assertion does not respond to the risk and liability issue. Even where a carrier complies with a federal standard, there could be other state tort claims that could arise from a TIH materials incident and whose subject matters are not covered by federal regulations. A carrier would have no protection from state tort liability in such situations. Moreover, it is not difficult for a plaintiff's attorney to develop state tort claims in hindsight that are not covered by federal law or that raise *some* factual basis for a jury to find carrier liability based on a "deep pockets" approach. In addition, the railroad "factory floor" is outdoors and more than 140,000 miles long. It is simply unrealistic to expect that no rail accidents will occur, especially when a third party can cause an accident (e.g., automobiles running into sides of trains) and access to rail property by trespassers cannot be readily prevented.

**D. The Duty of a Rail Carrier to Quote a Common Carrier Rate for a Requested Transportation Service is Predicated on Whether a Common Carrier Obligation Exists to Provide the Requested Transportation Service**

Several parties contend that, while the common carrier obligation to provide a specific transportation service is predicated on whether there has been a "reasonable request" for such service under the requirements of 49 U.S.C. § 11101(a), a rail carrier nevertheless has an "absolute obligation" to quote rates and service terms for any common carrier service "on request" under the provisions of 49 U.S.C. § 11101(b).<sup>12</sup>

The parties further note in support of their contention that the Board's regulations

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<sup>11</sup> See AAR's August 21, 2008 comments at 9-12.

<sup>12</sup> See, e.g., American Chemistry Council (Joint Comments) at 14; Dow Chemical comments at 9. Subsection 11101(b) provides that "A rail carrier shall also provide to any person, on request, the carrier's rates and other service terms" and requires that a rail carrier must provide its rates and other service terms "promptly".

implementing the rate quotation requirements of 49 U.S.C. § 11101 (b) recognize such “absolute obligation” by incorporating in the regulations the “on request” language of subsection (b). See 49 C.F.R.1300.1 et seq.<sup>13</sup> However, the parties’ contention conflicts with the statutory scheme.

The attempted distinction underlying the parties’ argument that a common carrier has an unqualified obligation to quote rates and service terms “on request” is that “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 service.”<sup>14</sup> In support of their contention, the parties cite to various Board and ICC cases referencing the distinction between a request for a rate and a request for a specific transportation service. See, e.g., Pejebscot Industrial Park, Inc. d/b/a Grimmel Industries--Petition for Declaratory Order, STB Finance Docket No. 33989, slip op. at 8 (“Pejebscot”) (“Without rates, and any attendant terms setting forth the particulars of a service, a shipper cannot make a specific service request”). The distinction raised by the parties is one without a difference in the context of this proceeding.

The parties’ argument ignores the fact that the obligation of a carrier to quote rates and service terms on request under 49 U.S.C. § 11101(b) does not apply in the abstract. Where a carrier, as here, challenges a *shipper request for service as unreasonable* and declines to provide rates and service terms for the requested service, the governing legal issue is whether the shipper’s request for the service at issue is

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<sup>13</sup> The Board’s regulations at 49 CFR 1300.1 et seq. implement provisions of the ICCTA that eliminated the former tariff filing requirements of the Interstate Commerce Act (at former sections 49 U.S.C. § 10761-62) and substituted a rate quotation requirement.

<sup>14</sup> American Chemistry Council (Joint Comments) at 14.

reasonable, not whether the carrier was remiss in not providing rates and service terms for a service it is not obligated to perform.

Indeed, the Board, the ICC and the courts have explicitly recognized that the common carrier obligations set forth in Section 11101 are linked and that the issue whether a carrier must provide rates and service terms for a specific requested service is predicated on whether the shipper's request for the service is reasonable. See, e.g., Conrail, 3 ICC 2d at 337 (“[T]he Commission has discretion to determine if there may be limitations on a carrier’s tariff publication/common carrier obligation [regarding transport of ultra-hazardous materials]....”); Pejebscot, slip op. at 9 (recognizing that common carrier requirements to establish rate for requested service “and, thereafter, provide service” are linked); Arizona Electric Power Cooperative, Inc. v The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 42058, 2001 WL 489999 at \*1 (May 8, 2001) (recognizing that carrier has no common carrier obligation to quote rate where rate could not possibly be applied to the traffic at issue); Burlington Northern Railroad Company v. STB, 75 F.3d 685 (D.C. Cir. 1996) (carrier has no obligation to provide common carrier rates and service terms for a common carrier service it is not obligated to perform).<sup>15</sup>

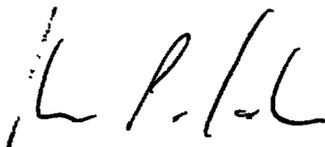
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<sup>15</sup> The Board, in its rulemaking proceeding adopting the regulations at 1300.1 et seq. also explicitly recognized that the common carrier requirements set forth in 49 U.S.C. § 11101 are linked but elected only to adopt implementing regulations for subsections (b)-(d). As noted by the Board: “[I]mplementing regulations are not needed for new 49 U.S.C. § 11101(a) and (e). New section 11101(a) simply reenacts the longstanding common carrier obligation that a carrier provide transportation or service on reasonable request. This obligation has been well developed through case law and is best addressed on a case-by-case basis. New section 11101(e), which requires a rail carrier to provide transportation or service in accordance with the rate and service terms...as published or otherwise made available under new 49 U.S.C. § 11101(b), (c) or (d), is clear on its face.” STB Ex Parte No. 558, Disclosure, Publication, and Notice of Change of Rates and Other Service terms for Rail common Carriage, (May 2, 1996), 1996 WL 224228, FN4 (NPR).

Conclusion

In determining the reasonableness of the request 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,



Louis P. Warchot  
Association of American Railroads  
50 F Street, N.W.  
Washington, D.C. 20001  
(202) 639-2502

Kenneth P. Kolson  
10209 Summit Avenue  
Kensington, MD 20895

*Counsel for the Association of  
American Railroads*

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