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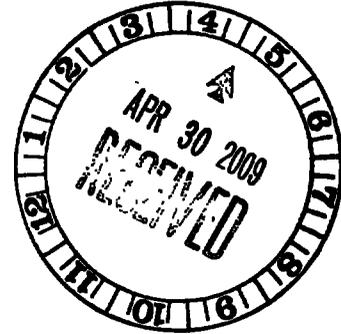
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April 30, 2009

BY HAND

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

225024



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

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced docket, please find the original and ten copies of Union Pacific Railroad Company's Rebuttal and Reply to Comments.

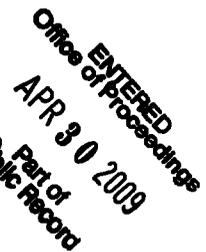
An additional copy of this filing is enclosed. Please return a date-stamped copy to our messenger.

Thank you for your attention to this matter.

Sincerely,

Handwritten signature of Michael L. Rosenthal in black ink.

Michael L. Rosenthal



Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35219

225024



UNION PACIFIC RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER

UNION PACIFIC RAILROAD COMPANY'S
REBUTTAL AND REPLY TO COMMENTS

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April 30, 2009

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35219

UNION PACIFIC RAILROAD COMPANY –
PETITION FOR DECLARATORY ORDER

UNION PACIFIC RAILROAD COMPANY’S
REBUTTAL AND REPLY TO COMMENTS

When US Magnesium LLC (“USM”) asked Union Pacific Railroad Company (“UP”) to establish common carrier rates for chlorine shipments from USM’s facility in Rowley, Utah, to thirty-five UP-served destinations, UP established rates to each of the destinations except four. The four exceptions involved destinations in Texas and Louisiana. UP told USM that, in UP’s view, it was “not a reasonable request for service to expect Union Pacific to transport this deadly chemical over 1000 miles through several High Threat Urban Areas when there is an abundant supply of chlorine located at sources much closer to the destination.”¹ UP then asked the Board to institute this proceeding and to rule that USM’s request was not a “reasonable request.” *See* 5 U.S.C. § 554(e) (agency has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty”).

The attacks on UP’s Petition fall into two general categories. First, some parties claim that the Board lacks jurisdiction to address the issues UP raised in its Petition. Second, some parties claim that UP is trying to manipulate chemical markets. Both claims are false.

¹ Letter from Bob Worrell, UP’s Senior Assistant Vice President - Chemicals, to Dr. Howard Kaplan, USM’s Vice President - Chemicals & By-Products, dated Jan. 26, 2009 (attached to USM’s Comments as Exhibit B.)

I. The Board Has Jurisdiction To Address The Issues Presented In UP's Petition.

The Board plainly has jurisdiction to determine whether USM's request that UP establish common carrier rates for chlorine shipments to Texas and Louisiana was a "reasonable request." The common carrier obligation is not absolute. A rail carrier must provide transportation subject to the Board's jurisdiction only in response to a "reasonable request." 49 U.S.C. § 11101(a). If there is a dispute – such as the dispute between UP and USM – the Board must determine, based on all of the relevant facts and circumstances, whether the shipper's request was a "reasonable request." See *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005) ("The STB has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning" to the term "reasonable request," "which [is] not self-defining, in the wide variety of factual circumstances encountered."); *Nat'l Grain & Feed Ass'n v. United States*, 5 F.3d 306, 310 (8th Cir. 1993) ("Congress did not further elucidate the requisites of the common carrier obligations, leaving to the [STB] and the courts the task of clarifying, on a case-by-case basis, a more precise definition of 'reasonable request,' . . .").

USM does not question the Board's jurisdiction. In its Comments, USM has asked the Board to resolve the issues raised in UP's Petition and compel UP to establish common carrier rates. USM Comments at 11-12. Indeed, USM would have instituted its own proceeding if UP had not already filed its Petition.²

² See Letter from Thomas W. Wilcox, Esq., Counsel for USM, to Hon. Anne K. Quinlan, Acting Secretary for STB, dated Mar. 23, 2009 (noting that, along with USM's Comments in opposition to UP's Petition, USM was submitting a check for the filing fee associated with a formal filing to compel establishment of common carrier rates, in case the fee payment was required).

If USM had filed a complaint before UP filed its Petition, no party would be claiming that the Board lacks jurisdiction, or that the Board would have to institute a rulemaking, or that addressing USM's complaint would conflict with issues raised in Ex Parte No. 677 (Sub-No. 1).

UP understands that the Association of American Railroads is filing reply comments that address the jurisdictional arguments that have been raised by parties opposing UP's Petition. UP thus will not address those arguments in detail; instead, we have boiled down our response to the following two points:

First, UP was not required to petition for an exemption or a rulemaking before the Board can decide whether USM made a "reasonable request." UP is not seeking an exemption from its general common carrier obligations with respect to transportation of chlorine. UP is not seeking a broad rule that a rail carrier is not required to transport chlorine when alternative sources are closer to the destination. Nor is UP attempting to short-circuit the Board's consideration of the issues raised in Ex Parte No. 677 (Sub-No. 1).³ UP asked the Board to resolve a specific dispute, and the Board has consistently addressed disputes of this type in adjudicatory proceedings. *See, e.g., Granite State*, 417 F.3d at 95-96. Indeed, as we observed above, if UP had not filed its Petition, the Board would be addressing the same dispute in an adjudicatory proceeding instituted by USM.

Second, UP is not asking the Board to interfere with other agencies' jurisdiction over rail safety and security matters. Just because one of the Board's sister agencies has the authority, for example, to set forth factors that rail carriers must consider to select the safest route, that does

³ The Board's proceeding in Ex Parte No. 677 (Sub-No. 1) has focused primarily on whether liability associated with transporting hazardous materials can be shared with shippers, which is an entirely different issue. *See Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1) (STB served June 4, 2008) at 2 ("The Board is interested in specific potential policy solutions to the liability issue . . .").

not displace the role of the Board, which is the agency charged with considering whether there may be circumstances in which using even the safest route would create unreasonable economic risks for carriers.⁴ “Questions of safety are also questions of risk of liability. A question of possible liability for damage resulting from carriage of a commodity is therefore within the [Board’s] jurisdiction as the regulator of the economics of interstate rail transport.” *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162, 1170 (6th Cir. 1979). UP is asking the Board to interpret the statute that Congress entrusted it to administer, in light of a specific set of facts and circumstances, under its jurisdiction “as the regulator of the economics of interstate rail transport.” *Id.*⁵ Only the Board has jurisdiction to determine whether a request for transportation is a “reasonable request.” 49 U.S.C. § 11101(a).

UP’s Petition was a proper method of raising an issue involving that falls squarely within the Board’s jurisdiction. If UP had not filed its Petition, the Board would have been confronted with the same issue in a proceeding instituted by USM.

II. Granting UP’s Petition Would Not Allow UP To Manipulate Chemical Markets.

The Board should reject the hyperbolic and hypocritical claims of some parties that UP is seeking the power to interfere with the market-based resource allocation decisions of participants

⁴ We recognize that the Department of Transportation and the Department of Homeland Security may believe that their regulations “provide adequate measures for the safety and security of the transportation of chlorine by rail.” Comments of the Transportation Security Administration, United States Department of Homeland Security at 3. Congress plainly disagrees, however, or it would not have imposed a billion-dollar unfunded mandate that Class I rail carriers implement a positive train control system by the end of 2015. *See* Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, Div. A, § 104, 122 Stat. 4856-4858.

⁵ Contrary to the suggestion of some commenting parties, UP is *not* asking the Board to intrude on the judgment of its sister agencies by “tak[ing] cognizance of a claim that a commodity is absolutely too dangerous to transport.” *Id.* at 1169. In fact, UP established common carrier rates to 31 of the 35 destinations in response to USM’s request.

in the chemicals industry.⁶ Those parties never acknowledge that they are the ones seeking to interfere with the market: they want the Board to prevent UP from making a unilateral business decision to decline to establish rates for certain movements of chlorine. Indeed, those parties benefit from continued government interference in the market: the statutory common carrier obligation and Board regulations allow them to impose on railroads many of the risks and costs associated with their products. *See also* Comments of Union Pacific Railroad at 3, STB Ex Parte No. 681, *Class I Railroad Accounting and Financial Reporting – Transportation of Hazardous Materials* (Feb. 4, 2009); Comments of Union Pacific Railroad at 3-4, STB Ex Parte No 677, *Common Carrier Obligation of Railroads* (Apr. 17, 2008).

Moreover, UP would not gain any power over the chemicals industry if the Board grants UP's Petition. UP has no nefarious interest here. Despite ominous-sounding claims that UP is seeking to engage in "behavior that is condemned under this nation's antitrust laws,"⁷ and that "[c]ompetition between sellers of TIH commodities would be virtually eliminated,"⁸ no party ever explains how UP would benefit financially by prevailing in this or a similar proceeding.⁹

⁶ *See, e.g.,* Joint Comments of the American Chemistry Council, *et al.* ("ACC Comments") at 18 (claiming that UP is seeking power to make "economic resource allocation decisions of the sort that would have been typical in the days of the commissars of the Soviet Union"); Comments of E.I. du Pont de Nemours & Co. ("DuPont Comments") at 4 (claiming that UP is advocating "an extreme form of resource and market allocation [that] is absolutely contrary to the principles of free enterprise and unfettered competition that are the foundation of our economic system"); Comments of The Dow Chemical Company ("Dow Comments") at 10 (claiming that UP is asking the Board to make "market allocation decisions that are contrary to the free-market foundations of our nation's economy and the antitrust laws"); Reply of Westlake Chemical Corporation at 9 (claiming that UP is seeking "to make industrial policy for the country").

⁷ ACC Comments at 18.

⁸ DuPont Comments at 5.

⁹ Occidental Chemical Corporation suggests that UP might be pursuing a strategy to force allocation of production to shippers that are "captive" to UP. *See* Comments of Occidental (continued...)

Furthermore, contrary to what some parties appear to believe, UP has not asked the Board to create a special rule that would give UP and other rail carriers the right to refuse service to chlorine shippers. UP has asked the Board to rule that a specific request in a specific set of circumstances was not a reasonable request. The Board would be the arbiter in any similar dispute in the future.

Finally, some parties claim that the Board is not qualified to address the issues raised by UP's Petition and has no authority to make decisions that would affect non-railroad industries.¹⁰ However, Board decisions in disputes between railroads and shippers will almost invariably have economic consequences for non-rail industries. If the Board could never make rulings that might have an economic impact on other industries, it could never rule that a request for transportation was not a "reasonable request," which would effectively write the reasonableness requirement out of the statute. But the statutory requirement exists, and the agency has recognized that it sometimes must weigh the interests of carriers under its jurisdiction against the marketplace impacts on affected shippers to determine whether certain requests for transportation are "reasonable." See *B.J. Alan Co. v. United States Parcel Serv., Inc.*, 5 I.C.C. 700, 716 (1989) (concluding that UPS's interest in not handling fireworks shipments outweighed concerns that "complainants may suffer some economic hardship with the loss of UPS service"), *aff'd sub nom. B.J. Alan Co. v. ICC*, 897 F.2d 561 (D.C. Cir. 1990).¹¹

Chemical Corporation ("OxyChem Comments") at 4. But UP is plainly not pursuing such a strategy: USM's Rowley, Utah, facility is served exclusively by UP.

¹⁰ See, e.g., ACC Comments at 19-21; DuPont Comments at 4; Dow Comments at 11.

¹¹ The Board's inescapable need to weigh railroad and shipper interests as part of its obligation to resolve disputes about the reasonableness of requests for common carrier transportation makes this proceeding different from the proceedings addressed in *Market Dominance Determinations – Product and Geographic Competition*, 5 S.T.B. 492 (2001), *aff'd sub nom. Ass'n of Am R.R.s* (continued...)

UP did not institute this proceeding to gain control of the product sourcing or distribution decisions of the chemicals industry. UP instituted this proceeding to resolve a specific dispute with USM. The Board is not only qualified, but it also has a responsibility to resolve disputes between railroads and shippers when they cannot agree whether a request for transportation subject to the Board's jurisdiction is a "reasonable request." 49 U.S.C. § 11101(a).

III. The Board Should Grant UP's Petition And Declare That USM's Request Was Not A "Reasonable Request."

UP's Petition set forth facts establishing that USM was seeking to transport chlorine, an extremely hazardous chemical, over great distances and through several High Threat Urban Areas, even though abundant sources of chlorine were much close to the destinations. UP's Petition also showed that UP's refusal to transport USM's chlorine under such circumstances was unlikely to have a substantial economic impact on USM or receivers of chlorine, because USM had not previously shipped significant amounts of chlorine to those destinations.

In its Comments, USM essentially confirmed that UP's decision would not have a meaningful impact on USM or other participants in chlorine marketplace. USM acknowledged that UP had established common carrier rates and service terms for rail transportation from USM's facility in Rowley, Utah, to thirty-one of the thirty-five UP-served destinations to which USM had requested rates. USM Comments at 4-5. USM observed that it had previously shipped small amounts of chlorine to two of the four other destinations, but it never claimed that UP's decision would have a substantial impact on its business. *See id.* at 5-6. USM did not dispute

v. STB, 306 F.2d 1108 (D.C. Cir. 2002). In *Product and Geographic Competition*, the Board determined that it would distract from the central issue in rate cases and impose undue burdens on the parties and the agency for the Board to entertain peripheral arguments about product and geographic alternatives. However, the availability of geographic alternatives is not a peripheral issue in this proceeding: it is central to the issues that the Board must address to determine whether USM's request was a "reasonable request."

that there were alternative sources of chlorine located much closer to the four destinations than USM's facility in Rowley. Nor did USM claim that UP's decision would affect the chlorine marketplace. To the contrary, USM's Vice President, Chemicals and By-Products expressly stated USM's production and transportation decisions were *not* based on the market for chlorine: "the volumes of chlorine USM requires to be transported are determined by the Rowley facility's magnesium production, not necessarily by the market for chlorine or the demands of USM's chlorine customers." USM Comments, Verified Statement of Dr. Howard Kaplan ("Kaplan VS") at 7.¹²

Several other parties that opposed UP's Petition made general claims about the potential impact of UP's actions on the broader chlorine marketplace and the need for alternative sources of chlorine, but they never addressed the facts that are relevant to this proceeding.¹³ No party claimed that it lacks a reasonable alternative source of chlorine at any of the four destinations at issue.¹⁴ Moreover, no party explained how the chlorine marketplace could be affected by the loss of USM's small number of shipments to just four destinations, particularly when USM concedes that it makes chlorine production and transportation decisions based on "magnesium

¹² As Dr. Kaplan explained, chlorine production is a byproduct of USM's primary business of producing magnesium. Until 2001, USM vented most of its chlorine into the atmosphere. When the government tightened restrictions on chlorine emissions, USM decided that transporting the chlorine by rail was cheaper than the alternative of scrubbing the chlorine. *See* Kaplan VS at 3-4. In other words, rail transportation of chlorine is just one of USM's options for eliminating an unwanted byproduct of its primary activities.

¹³ *See, e.g.*, DuPont Comments at 5; Dow Comments at 13.

¹⁴ Several parties observed that UP moves chlorine to the Gulf Coast region from producers outside that region. *See, e.g.*, Reply of The Chlorine Institute at 3; OxyChem Comments at 3. UP does not deny that such movements occur. Questions could certainly be raised about whether the requests for transportation that led to those movements were reasonable. But, in any event, no party contends that it needs chlorine at the four destinations at issue from USM.

production, not necessarily by the market for chlorine or the demands of USM's chlorine customers." Kaplan VS at 7.

UP's Petition establishes that USM's request for rates to transport chlorine from its facility in Rowley to four destinations in Texas and Louisiana was not a "reasonable request" under 49 U.S.C. § 11101(a). Neither USM nor any other party has shown that UP's decision not to transport USM shipments to the four destinations will have a significant impact on its business or the broader chlorine marketplace. Accordingly, the Board should grant UP's Petition.

IV. Conclusion

The Board plainly has jurisdiction to address the issues presented in UP's Petition, just as it would if USM had filed a complaint challenging UP's decision not to establish common carrier rates. The Board should not be swayed by false claims that UP is seeking to interfere with the market for chlorine or other chemicals or that the Board has no place making decisions that might affect non-rail industries. UP has simply asked the Board to resolve a dispute about its obligation to establish common carrier rates in response to a request by USM. The Board should resolve the dispute by granting UP's Petition.

Respectfully submitted,



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April 30, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April 2009, I caused a copy of the foregoing
“Union Pacific Railroad Company’s Rebuttal and Reply to Comments” to be served by first-
class mail, postage prepaid, on all parties of record.



Michael L. Rosenthal