

# **APPORTIONING POTENTIAL LIABILITY FOR THE RAIL TRANSPORTATION OF HAZARDOUS COMMODITIES\***

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## **Introduction**

Certain of the Class I railways have gone to increasing lengths in recent years to insulate themselves from potential liability arising out of the rail transportation of material classified as Toxic Inhalation Hazard (“TIH”) substances.

The issue has yet to become publicly contentious in Canada. In the United States, however, the Union Pacific Railroad (“UP”) has initiated a proceeding before the Surface Transportation Board (“STB”) whereby it has requested, and the STB has now agreed, to initiate a declaratory order proceeding (the “UP Proceeding”) to resolve the alleged uncertainty surrounding the ability of UP to limit its potential liability with respect to the transportation of TIH materials by way of UP Tariff 6607 (the “UP Tariff”).<sup>1</sup> Because any decision in the UP Proceeding will likely be instructive to Canadian regulators, and because many Canadian shippers ship TIH products to destinations in the United States, the UP Proceeding raises important implications for Canadian TIH shippers, railways, and other stakeholders.

At the outset, it should be noted that there is some controversy as to whether or not the STB even has the jurisdiction to issue the requested declaratory order that the liability and indemnity language contained in the UP Tariff is reasonable. Shippers argue that the issue of liability for damages arising from a TIH release is within the

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jurisdiction of state courts as a matter of tort law and should therefore be adjudicated by state courts.<sup>2</sup> For the purposes of this paper we will assume that the STB has jurisdiction to make the requested determination and will focus on the arguments for and against any such determination.

### **Background**

Notably, the transportation of TIH materials comprises a very small subset of all rail traffic, although the issue is important because release of TIH materials is said to impose extraordinarily high risk involuntarily on rail carriers.<sup>3</sup> Only approximately 0.3% of all rail carloads are comprised of TIH materials, of which anhydrous ammonia and chlorine together account for approximately 80%.<sup>4,5</sup> Notably, the Association of American Railroads (“AAR”) claims that, as of 2007, this small percentage of the rail carriers’ overall carload traffic attributable to TIH materials accounted for approximately 50% of the overall cost of rail carrier insurance.<sup>6</sup>

Further adding to the perceived costs of TIH rail shipments is the US *Rail Safety Improvement Act of 2008*, which mandates that by the end of 2015, “positive train control” (“PTC”) technology must be installed on rail main lines used to transport TIH materials or passengers.<sup>7</sup> The AAR states that rail carriers will incur PTC-related costs of up to \$13.2 billion to install PTC on approximately 17,000 locomotives and 73,000 miles of track and further claims that roughly 75% of those miles must be upgraded to PTC because they are used to transport TIH material.<sup>8</sup>

Despite all of the foregoing, rail transportation is generally recognized by both shippers and rail carriers as the safest and most secure mode of transporting TIH materials.<sup>9</sup>

### **Compelling carriers to transport TIH materials**

In the United States, the proposition that rail carriers, upon reasonable request, have a common carrier obligation to carry TIH materials, is generally conceded by the AAR and is consistent with various other submissions in the UP Proceeding.<sup>10</sup> According to one shipper submission, “tendering TIH materials to a rail carrier in tank cars meeting federally approved standards has never been held to be an unreasonable request for service under the rail carriers’ common carrier obligation”.<sup>11</sup> So, since rail carriers cannot outright refuse to transport TIH materials, they have sought to impose conditions associated with such movements to protect themselves from potential liability.

Whether Canadian rail carriers have a common carrier obligation to carry TIH materials is somewhat less clear. There is some authority that they do not.

#### **Division of Liability Arguments**

It is relatively clear that railways and shippers are free to voluntarily use contracts to apportion liability as between themselves with respect to responsibility for damages arising from the potential release of TIH materials. However, this is not necessarily true with respect to the transportation of TIH materials under railway tariff, where a rail carrier may, upon notice, impose or omit terms unilaterally.

Some U.S. cases have centered on the ability of a railway to require, via tariff, a shipper to indemnify the railway against the railway’s own negligence.<sup>12</sup> For example, UP had previously been challenged in a Utah federal district court with respect to a predecessor of the UP Tariff which allegedly had the effect of forcing the shipper to indemnify UP against its own negligence. The shipper’s lawsuit was ultimately withdrawn and the issue appears to be more or less resolved against UP, as the current incarnation of the UP Tariff does not indemnify UP against its own negligence and UP’s submission to the STB concedes this to be the case.<sup>13</sup>

There is also rarely controversy that each of the shipper and the rail carrier are willing to accept liability arising from damages caused by each party's own negligence in proportion to the allocation of fault in respect of such negligence. In the case of shippers, indemnity might be provided for items such as improper loading or failure to properly seal a tank car.

However, the central point of contention in the UP Proceeding appears to be whether or not the UP Tariff should be permitted, as stated by UP, to make "the TIH shipper responsible for all liabilities arising out of the transportation of its TIH materials that are *not* caused, either in whole or in part, by UP".<sup>14</sup> Such an allocation of liability would cause the shipper to assume responsibility for all costs arising out of TIH incidents caused by the negligence of third parties, force majeure events such as terrorism or natural disasters, to name but two of the myriad of possibilities, as well as other TIH incidents in which no party is at fault, or where fault cannot be determined.

Unsurprisingly, the various shippers and shipper groups object vehemently to such an allocation of potential liability. Consider, for example, a TIH spill in which the shipper and railway were ultimately each found to be 10% at fault with some judgment proof or impecunious third party being at fault for the remaining 80%. The effect would be that the shipper would be liable for 90% of the damages, despite only being 10% negligent. This would remain the case even if the shipper was not negligent at all, in the situation where the railway was 10% responsible and the third party was 90% responsible.

The various shipper submissions examine variations of the foregoing, with the overall theme being that, as a matter of justice, UP has not explained how it is just for a shipper to pay for damages that result from incidents that occur while the rail carrier is in control of the product, at which point the shipper has no ability to prevent such accidents. Shippers argue that the rail carrier is clearly in the better position to prevent, limit or mitigate damage arising from acts of third parties or acts of nature. Similarly, the rail carrier is the only party

that can construct its network in such a way as to withstand poor weather or natural disasters.<sup>15</sup>

Some shippers go so far as to say that this creates a moral hazard for the railways on the theory that the rail carriers would be less concerned about reducing risks or offering certain legal defences.<sup>16</sup> The railways counter that they already have sufficient incentive to maintain their networks.<sup>17</sup>

UP's primary justification for such a shift of liability is that the shipper controls whether to ship TIH on UP, the amount of TIH that UP must carry, and where the TIH materials are shipped.<sup>18</sup> UP argues that such an incentivizing of certain behaviours will force shippers "to ensure that the costs associated with TIH shipments are more fully reflected in the prices end users pay".<sup>19</sup>

UP claims to face potentially staggering liability or 'bet the company' exposure each time it is required to transport a TIH tank car.<sup>20</sup> While there is no dispute that potentially sizable liability can arise from rail transportation of TIH materials, the various shipper groups indicate that UP is attempting to shift the STB's focus to accidents caused by third parties and force majeure events, when in fact all TIH related incidents over the last ten years that are described on the National Transportation Safety Board website have arisen from instances in which a rail carrier was at least partially negligent.<sup>21</sup> UP does not contest the point that all serious recent TIH releases have involved some degree of rail carrier negligence.<sup>22</sup>

UP also indicates that, aside from shipping a smaller quantum of TIH material and over decreased distances, TIH shippers should also be incented to develop safer substitutes for the TIH materials transported. In response, TIH shippers state that most TIH materials are necessary in the products in which they are used, and there are few, if any, adequate substitutes for the TIH materials currently transported.<sup>23</sup> TIH shippers also point out that many segments of the economy rely on TIH materials as basic inputs into other products that are widely available and that any decrease in the amount of TIH materials shipped will have a correspondingly negative effect on the

economy and employment.<sup>24</sup> For instance, the Chlorine Institute notes that chlorine is used in the production of clean water and safe foods, pharmaceuticals, medical equipment, construction materials and other products and asserts that chlorine products and their derivatives contribute in excess of \$46 billion to the US economy each year.<sup>25</sup>

Shippers also point out that, relative to the status quo, a shifting of liabilities for TIH transportation towards shippers, whether potential liabilities or actual insurance costs, without a commensurate reduction in rail rates, would amount to double dipping by rail carriers, a practice that was relatively recently banned by the STB with respect to railway fuel surcharges.<sup>26</sup>

There are some other, slightly more subtle, issues that are in dispute in the UP Proceeding. For instance, Item 60 of the UP Tariff does not require UP to attempt to achieve recovery for incidents caused by negligent third parties at all, even from parties that would be able to pay, such as another Class I railway, before resorting to the shipper's indemnity. In such an instance, the shipper would be worse off than even a typical insurer, as the shipper would not have the usual right of subrogation that would be available to an insurer to defend itself and UP and pursue compensation from such a negligent third party.

The UP Tariff is also criticized for being too broadly worded and confusing. Upon a close examination of the language of the UP Tariff, one potential interpretation of the indemnity of the rail carrier by the shipper, as pointed out by shippers, is that the indemnity is a catch-all provision that simply states the shipper is liable for "any and all liabilities" other than those caused by the rail carrier.<sup>27</sup> This arguably could include liabilities arising in the transportation service provided by the rail carrier though not necessarily caused by a TIH release. It is also arguably the case that shipper indemnity of the railway extends to all "releases from" equipment provided by the customer even in cases of railway negligence, as this particular provision contains no carve out for railway negligence.<sup>28</sup>

## **Insurance**

One might query why either the shipper or the railway does not simply seek insurance for incidents of TIH release. UP indicates that adequate insurance coverage is not available “at any reasonable cost” to cover the potential liability associated with transportation of TIH materials.<sup>29</sup> UP further asserts that its general commercial liability insurance does not cover losses of \$25 million or less, so even a smaller scale incident could have significant impact on UP in the absence of the liability sharing in the UP Tariff.<sup>30</sup>

Shippers submit in response that the onus should be placed on UP to provide actual evidence that such insurance is unavailable. Shippers note that the public record does not confirm UP’s position regarding the unavailability of adequate insurance, as neither the potential liability arising from a TIH spill or the unavailability of insurance is noted in UP’s most recent SEC filings.<sup>31</sup> Furthermore, if insurance is not available to the Class I rail carriers, it is also not likely to be available to TIH shippers. So, it appears insurance is not the answer, or at least not a complete answer, to the controversy.

## **Ability to Bear Costs**

Assuming adequate insurance is unavailable, and aside from the issue of fault in connection with an incident, the question of which party is best able to bear the cost of compensating third parties harmed by a TIH spillage incident is also a live issue. If one starts with the proposition that all innocent but harmed third parties should be compensated for losses incurred as a result of a TIH release, the question of which of the railway, the shipper, or some other culpable third party is most able to bear the loss is at issue.

It would be difficult for rail carriers to dispute the point that in many instances the Class I rail carrier, as a multi-billion dollar entity, would be in the best financial position to withstand such liability. Even in cases in which a shipper has the ability to bear the cost, or perhaps a receiver or end-user, control of the TIH materials bears greatly upon the risk and the assessment of damage.

### **Other Proceedings**

The UP proceeding before the STB is not the only front on which the battle over TIH transportation under railway tariffs is being waged. In another case currently before the STB, CF Industries, Inc. has sought a declaration that the practices adopted by various American rail carriers in AGR Tariff 0900-1 are unreasonable.<sup>32</sup> The protocols in this tariff are significantly different than practices required by the FRA and apply not just under particular operating conditions but apply system-wide. The protocols go so far as to require the use of a dedicated train to move TIH products with no more than three cars per train, and with a maximum speed of 10 mph.<sup>33</sup> A special five day notice period before the railway is required to accept the TIH tank cars is also applicable.

Shippers have alleged that these restrictive protocols render TIH transportation more difficult and costly and are effectively designed to force TIH shippers off the rail system.<sup>34</sup> The outcome of this proceeding also may be instructive to Canadian rail regulators and stakeholders.

### **Applicability in Canada**

In Canada, the starting point for a discussion of the issues raised in the UP Proceeding is subsection 137(1) of the *Canada Transportation Act* (the “Act”), which sets out that a rail carrier “shall not limit or restrict its liability to a shipper for the movement of traffic” except by way of agreement with the shipper or shipper group.<sup>35</sup> Note that only rail carrier liability to a shipper is restricted; a broad indemnity by the shipper of the rail carrier is not expressly considered. This language appears to be mostly directed at governing liability for loss or damage to goods or damage resulting from delay of delivery of goods, and the cases decided pursuant to it support such a view. One might reasonably anticipate that shippers would take the position that such language should be interpreted to prevent a rail carrier from imposing liability upon the shipper for TIH releases caused by third parties,

though the outcome of such an argument cannot be known, and to our knowledge has not been the subject of a published decision.

Assuming there is no agreement with the shipper, subsection 137(2) of the Act sets out that the rail carrier's liability can only be limited (1) to the extent specified by the Canadian Transportation Agency (the "Agency") upon the application of the rail carrier, thus implying that the Agency has jurisdiction to determine such limitation of liability issues, or (2) as set out in the regulations, most notably the Railway Traffic Liability Regulations.<sup>36</sup> The Railway Traffic Liability Regulations primarily address liability for lost or damaged goods, or delay in the transportation of goods, including provisions relating to force majeure events, notice periods and valuation of lost or damaged goods, but does not go further to address matters such as those at issue in the UP Proceeding.

However, if a rail carrier were to implement a tariff with terms similar to the UP Tariff, and if the provisions of such a tariff were determined to fall outside of the purview of section 137 of the Act and associated regulations, the shipper would not necessarily be without protection. Other avenues of redress would potentially include a level of service complaint to the Agency pursuant to the level of service provisions of the Act, which are often referred to as the codified "common carrier obligations" and, possibly, the an application to the Agency pursuant to the relatively new section 120.1 of the Act.<sup>37</sup>

So, even though the Canadian public record to date contains little consideration of the matters at issue in the UP Proceeding, there are potentially avenues of redress which shippers might seek should the issue become more active in Canada. Furthermore, any STB determination in the UP Proceeding almost certainly would be instructive to involved Canadian regulators, rail carriers, shippers, and other supply chain participants.

## Endnotes

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- <sup>1</sup> *Union Pacific Railroad Company – Petition for Declaratory Order*, FD 35504, online: S.T.B. <<http://www.stb.dot.gov>>
- <sup>2</sup> *Union Pacific Railroad Company – Petition for Declaratory Order*, (25 January 2012), FD 35504, online: S.T.B. <<http://www.stb.dot.gov>> (Opening argument and evidence of CF Industries Inc.), 4-5
- <sup>3</sup> *Common Carrier Obligations of Railroads – Transportation of Hazardous Materials* (10 July 2008), STB Ex Parte No. 677 (Sub-No. 1), online: S.T.B. <<http://www.stb.dot.gov>> (Written Testimony of the Association of American Railroads), 4
- <sup>4</sup> Association of American Railroads, (2007), Statement for the Record of the Association of American Railroads to the U.S. House of Representatives Committee on Homeland Security Subcommittee on Transportation Security and Infrastructure Protection: Chemical Security: The Implementation of the Chemical Facility Anti-Terrorism Standard and the Road Ahead, online: Association of American Railroads <<http://www.aar.org/Safety/~media/aar/Testimony/2007/2007-12-12-ChemSec-written.ashx>>, 3
- <sup>5</sup> Association of American Railroads, (2011), Railroads and Chemicals, online: Association of American Railroads <<http://www.aar.org/~media/aar/Background-Papers/Railroads-and-Chemicals.ashx>>, 4
- <sup>6</sup> *Supra* note 4 at 3
- <sup>7</sup> *Rail Safety Improvement Act of 2008*, Pub L No 110-432, 122 Stat 4848
- <sup>8</sup> Association of American Railroads, (2011), Hazmat Transportation by Rail: An Unfair Liability, online: Association of American Railroads <<http://www.aar.org/~media/aar/Background-Papers/Hazmat-by-Rail.ashx>>
- <sup>9</sup> *Common Carrier Obligations of Railroads – Transportation of Hazardous Materials* (10 July 2008), STB Ex Parte No. 677 (Sub-No. 1), online: S.T.B. <<http://www.stb.dot.gov>> (Written Testimony of the Association of American Railroads), 5
- <sup>10</sup> *Supra* note 8
- <sup>11</sup> *Union Pacific Railroad Company – Petition for Declaratory Order* (25 January 2012), FD 35504, online: S.T.B. <<http://www.stb.dot.gov>> (Joint Opening Comments of The American Chemistry Council; The Chlorine Institute; The Fertilizer Institute; and the National Industrial Transportation League), 13
- <sup>12</sup> Pls.’ Compl., *The Chlorine Institute, Inc. v. Union Pacific R.R. Co.*, Case 2:09-cv-00574-CW (D. Utah), as referenced in *Union Pacific Railroad Company – Petition for Declaratory Order* (25 January 2012), FD 35504, online: S.T.B. <<http://www.stb.dot.gov>> (Opening argument and evidence of Olin Corporation), 4
- <sup>13</sup> *Union Pacific Railroad Company – Petition for Declaratory Order* (25 January 2012), FD 35504, online: S.T.B. <<http://www.stb.dot.gov>> (Opening argument and evidence of Union Pacific Railroad Company), 3-4
- <sup>14</sup> *Ibid* at 6
- <sup>15</sup> *Supra* note 11 at 13
- <sup>16</sup> *Ibid* at 13
- <sup>17</sup> *Supra* note 13, at 15, 22
- <sup>18</sup> *Supra* note 13, at 8

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- <sup>19</sup> *Supra* note 13, at 9
- <sup>20</sup> *Supra* note 13 at 2, 22
- <sup>21</sup> *Supra* note 2 at 7-10
- <sup>22</sup> *Union Pacific Railroad Company – Petition for Declaratory Order* (25 January 2012), FD 35504, online: S.T.B. <<http://www.stb.dot.gov>> (Opening argument and evidence of Union Pacific Railroad Company, verified statement of Diane K. Duren), 12
- <sup>23</sup> *Union Pacific Railroad Company – Petition for Declaratory Order* (25 January 2012), FD 35504, online: S.T.B. <<http://www.stb.dot.gov>> (Opening argument and evidence of Olin Corporation), 5
- <sup>24</sup> *Supra* note 11 at 11
- <sup>25</sup> *Supra* note 23 at 5
- <sup>26</sup> *Supra* note 23 at 20, citing STB Decision, EP 661, ID 37341 (26 January 2007)
- <sup>27</sup> *Supra* note 23 at 14, referring to Item 50(1) and (2) of the UP Tariff
- <sup>28</sup> *Supra* note 2 at 11, referring to Item 50(2) of the UP Tariff
- <sup>29</sup> *Supra* note 13 at 9
- <sup>30</sup> *Supra* note 13 at 9
- <sup>31</sup> *Supra* note 23 at 10
- <sup>32</sup> *CF Industries, Inc. v. Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Michigan Shore Railroad, Inc.*, FD 35517, online: S.T.B. <<http://www.stb.dot.gov>>
- <sup>33</sup> *CF Industries, Inc. v. Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Michigan Shore Railroad, Inc.* (13 January 2012), FD 35517, online: S.T.B. <<http://www.stb.dot.gov>> (CF Industries, Inc.’s Opening Evidence and Argument (Public Version)), 6
- <sup>34</sup> *Ibid* at 7
- <sup>35</sup> *Canada Transportation Act*, S.C. 1996, c. 10, subsection 137(1). The full text of subsection 137(1) states “A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.”
- <sup>36</sup> SOR/91-488
- <sup>37</sup> *Canada Transportation Act*, SC 1996, c 10, s 113-116, 120.1