

## update: liability for rail shipments of TIH commodities

Some rail carriers have imposed indemnification and liability obligations on shippers for the carriage of Toxic-by-Inhalation Hazardous commodities (TIH). A complaint before the Canadian Transportation Agency (CTA) seeks to address the reasonableness of such efforts in respect of a Canadian Pacific Railway (CP) tariff. Recently, the United States Surface Transportation Board (STB) issued a **decision** in response to a petition from Union Pacific Railroad (UP) in regard to the issue. In the petition, UP requested that the STB review its tariff provisions, which require shippers of TIH commodities to indemnify UP against any and all liabilities except those caused through UP's own negligence or fault.

The STB ultimately declined to declare UP's tariff provisions reasonable and agreed with the shipper arguments that the UP tariff provisions are overly broad and that UP had not provided adequate support for the tariff requirements. In doing so, the STB noted that UP's tariff language could subject TIH shippers to a wide range of liability unrelated to the presence of TIH. The STB gave the example of a derailment of a train carrying TIH that results in a spill of diesel fuel with no TIH-related impact and noted that the tariff provisions may subject TIH shippers to liability to the extent the damage was caused by a third party or act of God. The STB dismissed UP's arguments that its tariff should only apply when the presence of TIH is a 'but for' cause of liabilities as being inconsistent with the actual language of the tariff.

Similar to CP's claim in the CTA complaint, UP has claimed it is unable to adequately insure itself against TIH carriage risks. By way of example, UP noted that a large TIH incident in an urban area could generate liabilities in the tens or hundreds of billions of dollars and asserted that it could only purchase insurance coverage of up to \$1.2 billion. However, upon examining UP's tariff language, the STB found it overly broad and would unreasonably require shippers to protect UP from certain smaller risks against which UP is able to insure.

The STB did not find it necessary to adjudicate UP's argument that its tariff provisions provide incentives to shippers to reduce risk in connection with TIH shipments by rail, but noted that there are other, less onerous options available to provide such incentives.

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#### [a cautionary note](#)

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