

ENTERED
Office of Proceedings
July 24, 2020
Part of
Public Record

July 24, 2020

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Submitted via e-filing

Re: STB Finance Docket No. 36420, *Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra – Petition for Declaratory Order*

Dear Ms. Brown:

I have attached the reply of the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra to the Union Pacific Railroad Company's Motion to Hold Proceedings in Abeyance in the above-captioned matter.

Thank you very much for your attention to this matter.

Yours very truly,



Charles A. Spitulnik
Counsel for Commuter Rail Division of the
Regional Transportation Authority d/b/a Metra

Enclosure

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 36420

**COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY, d/b/a METRA – PETITION FOR DECLARATORY ORDER**

**REPLY OF THE COMMUTER RAIL DIVISION OF THE REGIONAL
TRANSPORTATION AUTHORITY d/b/a METRA TO UNION PACIFIC RAILROAD
COMPANY'S MOTION TO HOLD PROCEEDING IN ABEYANCE**

Sue-Ann Rosen
General Counsel
Commuter Rail Division of the
Regional Transportation Authority
d/b/a Metra
547 W. Jackson Blvd.
Chicago, IL 60661
(312) 322-6684
srosen@metrarr.com

Thomas J. Litwiler
Bradon J. Smith
Fletcher & Sippel, LLC
29 North Wacker Drive, Suite 800
Chicago, IL 60606-3208
(312) 252-1508
tlitwiler@fletcher-sippel.com
bsmith@fletcher-sippel.com

*Communications with respect to this
document should be directed to:*

Charles A. Spitulnik
Allison I. Fultz
Katherine C. Bourdon
Kaplan Kirsch and Rockwell LLP
1634 I (Eye) Street, NW, Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com
kbourdon@kaplankirsch.com

Paul A. Cunningham
Harkins Cunningham, LLP
1750 K Street, NW, Suite 300
Washington, DC 20006
(202) 973-7601
pac@harkinscunningham.com

*Counsel for the Commuter Rail Division of
the Regional Transportation Authority*

Dated: July 24, 2020

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. 36420

**COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION
AUTHORITY, d/b/a METRA - - PETITION FOR DECLARATORY ORDER**

**REPLY OF THE COMMUTER RAIL DIVISION OF THE REGIONAL
TRANSPORTATION AUTHORITY d/b/a METRA TO UNION PACIFIC RAILROAD
COMPANY'S MOTION TO HOLD PROCEEDING IN ABEYANCE**

The Commuter Rail Division of the Regional Transportation Authority d/b/a Metra ("Metra") asks the Surface Transportation Board ("STB" or "Board") to deny the motion of Union Pacific Railroad Company ("UP") to hold this proceeding in abeyance ("UP's Motion"). UP's Motion ignores UP's June 30, 2020 notice to Metra, that UP would begin dismantling the three services known as the UP North, UP West and UP Northwest lines ("UP lines") on August 31, 2020. UP also obscures the issues, arguing that the existence of its common carrier obligation is a matter of contract law and therefore outside the Board's jurisdiction. UP misstates both the nature of the dispute and the state of the law. The dispute over UP's common carrier obligation presents a question of law that is squarely and properly before this Board; and the nature of that obligation is within the unique, if not exclusive, purview of the Board. UP's assertion that the matter is currently before the District Court belies the uncertainty of when the District Court will resolve the matters pending before it. Moreover, UP ignores the unique expertise of the Board with respect to the common carrier obligation and the Board's authority to interpret and require UP to comply with the scope of that obligation.

I. BACKGROUND¹

On July 21, 2020, Metra filed a Petition for Declaratory Order with the STB seeking resolution of two issues. *Petition of the Commuter Rail Division of the Regional Transportation Authority for Declaratory Order*, STB Finance Docket 36420 (Filed July 21, 2020). Metra asked the Board to declare that UP has a common carrier obligation on the subject UP lines and that the Board has jurisdiction to enforce that obligation. *Id.* at 2. Metra also filed a Petition for Preliminary Injunction asking the Board to enjoin UP from reducing services associated with the subject UP lines. *Petition of the Commuter Rail Division of the Regional Transportation Authority for Preliminary Injunction*, STB Finance Docket 36420 (Filed July 21, 2020). Metra seeks the Preliminary Injunction to prevent UP from implementing its plan to begin termination of services on August 31, 2020. See **Exhibit A**. Metra's Petition for Declaratory Order is consistent with its request in Metra's filings in the District Court, in which Metra explains why the STB is the best forum to address the complex questions presented in this case.

On July 22, UP filed a Motion to Hold the Proceeding in Abeyance pending a resolution of the matters in District Court. *Union Pac. R.R. Corp. Mtn. to Hold Proceedings in Abeyance*, STB Finance Docket No. 36420 (Filed July 22, 2020). Metra demonstrated in its Petition for Declaratory Order and Petition for Preliminary Injunction that the issues Metra has raised should be adjudicated by the Board and circumstances are ripe for the Board to enjoin UP from dismantling the commuter rail passenger service on the subject UP lines during this proceeding. The Board should deny Metra's Motion.

¹ A full recitation of the lengthy factual history of this case, including ownership of the subject UP lines, is set forth on pages 3 through 11 of Metra's Petition for Declaratory Order. In the interest of brevity, Metra will not repeat those facts here.

II. ARGUMENT

Metra has always believed the issues UP brought to the District Court belong before the Board. It asked the Court to dismiss the case or refer it to this Board before UP notified Metra of its plan to terminate services in the June 30 letter. Once Metra learned that UP would begin dismantling its services on the subject UP lines beginning on August 31, 2020, Metra acted swiftly to protect Chicago-area commuters from losing vital arteries to downtown Chicago if UP implements its stated intentions.

Given UP's sudden insistence on terminating the services before the resolution of the issues in this case, Metra had no choice but to seek a Preliminary Injunction to ensure UP did not leave Metra commuters stranded. UP's allegations that Metra is forum shopping or short-circuiting its own Motion to Dismiss in District Court are disingenuous. In fact, in opposing Metra's Motion to Dismiss in the District Court, UP argued that "Metra's motion, if granted, would leave the parties exactly where they stood before Union Pacific sought relief from the Court last year—with no prospect for resolution of the important public interest question presented." *Union Pac. Mem. in Opp'n to Metra's Mtn. to Dismiss or Stay Based on Primary Jurisdiction* at 7, Union Pac. R.R. Co. v. Reg. Transp. Auth. and its Commuter Rail Div., No. 1:19-cv-07957 (N.D. Il. June 11, 2020). Now, however, UP seeks to hold Metra's Petition, which asks the Board to resolve this "important public interest question," in abeyance.

UP also ignores its role in escalating the proceeding by notifying Metra that it intends to cease services on the subject UP lines beginning on August 31, 2020. Metra had no choice but to ask this Board to take expeditious action to stop UP from ceasing providing essential elements of the transportation services it currently provides until the Board can address the issues at hand.

UP suggests that the STB has no jurisdiction to require UP to continue to provide services under the terms of the existing Purchase of Service Agreement (“PSA”) because the PSA is a contract. If this matter presented only a question arising under the PSA, UP might be right. But this matter presents a broader question about the scope and interpretation of the common carrier obligation, and UP is wrong. UP is merely attempting to frame a nuanced legal question as a contract matter to circumvent STB involvement in this dispute. The issue in *this* case has nothing to do with contractual obligations. Rather, the issue—as raised by UP in the District Court and Metra in the Petition for Declaratory Order—is whether UP has a common carrier obligation to provide commuter rail passenger service on the subject UP lines upon expiration of the current PSA on August 31, 2020. UP’s attempt to evade the issues of the case by alleging they are contractual in nature is a red herring. The Board should not allow UP to preemptively terminate a service before the Board can adjudicate the questions at the heart of this matter.

Metra’s Petition for Declaratory Order sets forth the legal history of UP’s common carrier obligation as well as the obligations of the parties to this case. The current PSA between Metra and UP is not at issue here. Rather, the issue is the fundamental common carrier obligation of UP, which the STB is best poised to address.

The STB, like the Interstate Commerce Commission before it, has always been best positioned to adjudicate questions that implicate a railroad’s common carrier obligation. While courts can adjudicate some matters that can also be addressed by the STB, courts often refer complicated matters involving unique railroad obligations to the STB. *See e.g. Ill. Cent. R.R. v. South Tec Dev. Warehouse, Inc.*, No. 97-c-5720, 1999 U.S. Dist. LEXIS 11222 *4-*6 (N.D. Ill. 1999) (referring question of reasonableness of demurrage charges to STB but rejecting request to refer additional question regarding application of demurrage to boxcar traffic). The common

carrier issue raised by UP and Metra is precisely the type of complex matter that the STB should address.

The Board cannot wait to respond to Metra's request for a Preliminary Injunction and to address UP's continuing common carrier obligation until some unknown date in the future when the District Court reaches a decision on the merits of the case that is pending there. Nor does it have any duty to do so. UP acted unilaterally, advising Metra of its intent to terminate services that are part of the transportation services included in UP's fulfilment of its common carrier obligation to provide commuter rail service on the subject UP lines (*see* 49 U.S.C. § 10102(9)). UP cannot now complain that Metra has taken action to protect the commuting public from UP's actions.

III. CONCLUSION

Metra respectfully requests this Board to deny UP's Motion to Hold Proceedings in Abeyance. The public interest requires that the Board issue the requested Preliminary Injunction to preserve the *status quo* while it adjudicates the issues presented by UP's denial of its continuing common carrier obligation to provide commuter rail passenger service on the subject UP lines.

[Signatures on Next Page]

Respectfully Submitted,



Sue-Ann Rosen
General Counsel
Commuter Rail Division of the
Regional Transportation Authority
d/b/a Metra
547 W. Jackson Blvd.
Chicago, IL 60661
(312) 322-6684
srosen@metrarr.com

Thomas J. Litwiler
Bradon J. Smith
Fletcher & Sippel, LLC
29 North Wacker Drive, Suite 800
Chicago, IL 60606-3208
(312) 252-1508
tlitwiler@fletcher-sippel.com
bsmith@fletcher-sippel.com

Charles A. Spitulnik
Allison I. Fultz
Katherine C. Bourdon
Kaplan Kirsch and Rockwell LLP
1634 I (Eye) Street, NW, Suite 300
Washington, DC 20006
(202) 955-5600
cspitulnik@kaplankirsch.com
afultz@kaplankirsch.com
kbourdon@kaplankirsch.com

Paul A. Cunningham
Harkins Cunningham, LLP
1750 K Street, NW, Suite 300
Washington, DC 20006
(202) 973-7601
pac@harkinscunningham.com

*Counsel for the Commuter Rail Division of
the Regional Transportation Authority*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July 2020, I have caused a copy of the foregoing Reply of the Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra to the Union Pacific Railroad Company's Motion to Hold Proceeding in Abeyance to be served upon the following individuals via e-mail:

Craig Richardson
Vice President – Law
Union Pacific Railroad
1400 Douglas Street, Stop 1580
Omaha, Nebraska 68179-1580
cvrichar@up.com

Michael L. Rosenthal
Covington & Burling LLP
One City Center
850 Tenth Street, NW
Washington, DC 20001-4956
mrosenthal@cov.com

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1634 I (Eye) Street, NW
Suite 300
Washington, DC 20036
(202) 955-5600
cspitulnik@kaplankirsch.com

Dated: July 24, 2020

EXHIBIT A



BUILDING AMERICA®

June 30, 2020

Via email to: JDerwinski@METRARR.COM

James M. Derwinski
CEO/Executive Director
Metra
547 W. Jackson Blvd., 13th Floor
Chicago, IL 60661

Re: Union Pacific's Notice to Metra of Its Intent to Transfer Services

Dear Mr. Derwinski,

Nearly one year ago, in August 2019, Union Pacific in conjunction with Purchase Service Agreement ("PSA") renewal negotiations, formally notified Metra of Union Pacific's intent to discontinue providing Union Pacific employees to operate Metra's trains, provide mechanical maintenance and perform other PSA services ("Services To Be Transferred"). As a result, Metra would assume responsibility for directly operating its own commuter trains on Union Pacific's lines. At the onset and throughout our negotiations, Union Pacific has affirmed its commitment to provide uninterrupted track access as well as to retain responsibility for right-of-way maintenance and dispatching ("Services To Be Retained").

Negotiations have continued to the present time. Despite both parties' efforts, little progress has been achieved toward reaching an orderly and defined schedule covering the Services To Be Transferred and providing for reasonable, future compensation to Union Pacific for the Services To Be Retained as well as market-value compensation for Metra's continuing use of Union Pacific's property.

Most recently, on June 15, 2020, Union Pacific provided a comprehensive proposal to Metra that, among other things, laid out a clear schedule for the orderly transition of the Services To Be Transferred. Metra's June 24, 2020 response identified a large number of action items that Metra believes would have to be achieved before the relevant services could be transferred, including "satisfactory financial arrangements" as a repeated precondition. It is evident that Union Pacific and Metra remain very far apart in our respective understandings of reasonable financial terms.

In addition, among the reasons for our lack of progress in the negotiations was, and is, a substantial disagreement between the parties about whether Union Pacific has a common carrier obligation to operate commuter trains on its lines for Metra after expiration of the current PSA. Union Pacific rejects there is any such obligation. Metra disagrees. Therefore, on December 5, 2019 Union Pacific filed a lawsuit to assist the parties in resolving their differences.

The lawsuit remains pending. Union Pacific understands the Court will need time to address the legal questions before it, and nothing in this letter intends to anticipate or prejudge the Court's ultimate ruling. Even so, there can be no dispute that a number of the services included in the Services To Be Transferred do not involve "Public Transportation Services," as that term is defined in the PSA and which describe the core function of transporting or conveying passengers by rail. These services, unrelated to Public Transportation Services, include the provision of legal, claims, accounting, clerical, and mechanical (equipment repair) services and the like.

Therefore, by this letter, Union Pacific is providing advance notice to Metra that the services listed in the attachment will be discontinued on the corresponding listed dates. The sequence of the services being discontinued and the corresponding dates have been carefully selected to minimize impacts on Metra, limit transition complexity, and provide Metra with abundant time to plan, adjust, and execute the assumption of responsibility for the specified services while maintaining seamless commuter rail service for Metra's customers. If Metra has any concerns or feedback about any specific service or date, Union Pacific will of course discuss those concerns and make any reasonable adjustments, while preserving our commitment to move forward at a deliberate pace with a transfer of services that have no relation to Public Transportation Services or the lawsuit.

With respect to the remaining Services To Be Transferred, Union Pacific also is providing Metra with notice by this letter that such services will be discontinued 90 days following any final court ruling in the lawsuit determining that Union Pacific does not have a common carrier obligation to operate commuter trains on its lines for Metra. While the Court may rule otherwise, Union Pacific believes it is reasonable and prudent for the parties to begin planning now for the contingency that the Court will find there is no common carrier obligation. Metra's commuters and customers deserve nothing less than advance, orderly

and diligent planning for that contingency and for the discontinuance of the relevant services by Union Pacific after the Court's ruling.

Throughout the transition, Metra will be expected to carry out its obligations under the PSA, including payment for the gradually reducing services being provided by Union Pacific, as well as the provision of the crucial liability and insurance protections set out in the PSA.

Union Pacific has the deepest respect for our relationships with the numerous communities in our service territory. Those communities have been important stakeholders throughout the years we have operated passenger service in Chicago – and they will continue to be. We also appreciate and respect our longstanding relationship with Metra. While that relationship is now entering a new and exciting chapter, some things will not change: among them, the steadfast commitment of our two organizations to work together to ensure safe and high-quality commuter rail service for Metra's customers.

Union Pacific looks forward to working diligently and collaboratively with Metra to facilitate a seamless, effective, and efficient transition as set out above.

Sincerely,

A handwritten signature in blue ink, appearing to read "Cyn M. Sanborn", with a stylized flourish at the end.

Cynthia M. Sanborn
Vice President
Network Planning & Ops

Attachment
Services Transfer Schedule*

Services Transfer Date (To Occur On or Before)	Services Transfer
July 31, 2020	Revenue Accounting
August 31, 2020	Law and Claims – For Passenger and Collection Claims
September 30, 2020	TCU Passenger Ticket Agents
October 31, 2020	Mechanical Car
October 31, 2020	Mechanical Locomotive
November 30, 2020	Engineering (minimal services only not personnel)
November 30, 2020	Communication and Telecommunications
Reasonable Time (90 Days) Following Court’s Final Ruling**	Train, Engine and Yard Employees
After TE&Y Services Transfer	Timekeeping (services only not personnel)
After TE&Y Services Transfer	Crew Management (services only not personnel)
After TE&Y Services Transfer	Law and Claims – Remaining Claim Types

*For almost a year, Metra and Union Pacific have discussed a phased transition of Contract Services to be transferred from Union Pacific to Metra. The above services transfer schedule is submitted in an effort to assist with ongoing negotiations and commence the services transfer.

** Reasonable time (90 days) following any final court ruling in the lawsuit that Union Pacific does not have a common carrier obligation to provide services to Metra.