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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 772

**OVERSIGHT HEARING PERTAINING TO
UNION PACIFIC RAILROAD COMPANY'S EMBARGOES**

**COMMENTS OF
DIVERSIFIED CPC INTERNATIONAL, INC.**

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On Behalf of:

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1.0 Background

The Surface Transportation Board (STB or Board) is holding a public hearing to hear firsthand from senior officials of Union Pacific Railroad (UP) about the substantial increase in the use of embargoes in recent years. In addition to inviting UP's participation, the Board invited shippers and other stakeholders who can contribute to the Board's understanding of the cause and/or impact of UP's embargoes to testify. Interested stakeholders may also file written comments into the proceeding.

My name is Sandra Dearden; I am President of Highroad Consulting, Ltd. Highroad has managed rail transportation for Diversified CPC International, Inc. (Diversified CPC) for more than 24 years. I am filing these comments on behalf of Diversified CPC.

Diversified CPC is a global leader in the design, production, and distribution of the highest quality specialty products for a variety of industries and applications. They produce products for aerosol propellants, high purity hydrocarbon refrigerants, and specialty applications, including biomass solvent extraction products.

Diversified CPC provides unique purity specifications that assist their customers in increasing plant productivity, improving product performance, decreasing environmental footprints, and attaining favorable financial results. Their high purity products are engineered to meet the stringent standards of research laboratories and demanding requirements of top manufacturing facilities. Diversified CPC ensures quality by following the ISO9001 certified business process with dedicated production and logistics services.

Diversified CPC and their customers are heavily dependent on rail transportation. They currently have five manufacturing plants in the United States at Channahon (Lorenzo, IL); Sparta, NJ; Sebring, FL; Petal (Dragon, MS); and Anaheim, CA which is local on Union Pacific Railroad (UP), and a distribution terminal in Ajax, On. All of these plants and the Ajax terminal are rail-served. A new manufacturing plant that is currently under construction at Beaumont, TX will be jointly served by UP and BNSF.

2.0 Embargoes Vs. Common Carrier Obligation

In recent years, there has been a significant increase in UP's use of embargoes, and congestion is the stated cause for almost of all of the embargoes. This pattern shows no signs of abating. Between November 1, 2022, and November 17, 2022, UP issued an additional 126 embargoes with congestion as the stated cause. Of those 126 embargoes, 89 were issued on November 16, 2022; as of November 17, 2022, UP had 128 active embargoes in place and, for all, congestion was the stated cause. The STB stated that embargoes may vary in scope and that

all carriers do not report and use embargoes in the same way. Nevertheless, the use of embargoes by all other Class I carriers, combined, pales in comparison to the number of embargoes issued by UP.

Rail capacity and related service issues have been a major concern of shippers for more than a year. The Class I's, in their communications to customers, state they are "*working on it*" but we have not seen any significant improvement. The common excuse is the labor shortage, but the reports of new hires do not take into consideration attrition. It is difficult at times to empathize knowing the labor shortage was self - induced by the railroads when Precision Scheduled Railroading plans were implemented, but it is what it is. The question today is what are UP and the other railroads doing not only to handle current freight volumes, but also to manage the growth forecasted by US DOT?¹

It seems UP is taking the easy route; instead of addressing congestion issues, it's much easier to simply issue embargoes. Of course, a significant side benefit of the embargoes to UP is the railroad is relieved of its common carrier obligation. Also, consider some other possibilities. In October 2021, UP employed 13,554 transportation (train and engine) employees and 31,921 total employees. In October 2022, UP employed 13,862 transportation (train and engine) employees and 32,807 total employees, increases of 308 and 886 employees, respectively. Thus, UP can be using these recent embargoes to slow the need to hire by reducing traffic. As a result, UP can keep its job numbers down, thereby making Wall Street happy, while justifying its actions to its customers and regulator through the use of the embargo process which does not require STB authorization.

Moreover, UP can potentially be utilizing embargoes to pick winners and losers. If so, it could be allowing its preferred customers relief from the embargoes while enforcing the embargoes against smaller, less lucrative customers. It can even go so far as to use the embargoes to de-market traffic by limiting service, causing plant shutdowns and other economic burdens that force the shipper to find other means to transport its goods. We are not saying this is UP's strategy but whatever the reasons or strategy, UP's embargoes are totally out of control. We submit these as possibilities, and the reason the Board is justified in launching this investigation.

¹ US DOT Bureau of Statistics and Federal Highway Administration, Freight Analysis Framework Version 4.1, 2016, freight tons moving on the nation's transportation network will grow 40 percent in the next three decades while the value of the freight will almost double, increasing by 92 percent.

An embargo is a notification to the railroad industry and affected shippers that, in the carrier's opinion, a disability exists that temporarily prevents it from providing service. An embargo, which is issued through the Association of American Railroads pursuant to Circular TD-1, does not require prior Board approval. See, e.g., *id.* at 5. If justified, the embargo will temporarily relieve the carrier of its common carrier obligation.²

As background, the common carrier obligation refers to the statutory duty of railroads to provide "transportation or service on reasonable request."³ A railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable.⁴

Moreover, under 49 U.S.C. § 10702, rail carriers are required to "establish reasonable... rules and practices on matters related to... transportation." As the Interstate Commerce Commission (ICC) explained: "[t]his statutory requirement derives from the common law common carrier obligation" and is "intended to protect against unreasonable carrier actions that impede interstate commerce."⁵ (Underscore for emphasis). In this 1994 regulatory responsibilities study, the ICC expressed the scope of its unreasonable practices jurisdiction:

*Not only must a carrier's rates be reasonable, but so must its practices. This statutory requirement derives from the common law common carrier obligation. It is intended to protect against unreasonable carrier actions that impede interstate commerce. In evaluating carrier practices, '[t]he question is not whether the [questioned practice] can be described as 'rational from the railroads' perspective, but instead whether the practice... is reasonable when viewed from the public perspective of the Commission, which must reconcile a multitude of factors in exercising its expert judgment on tariff issues, including economy, efficiency, fair wages and working conditions, and safety, in addition to the financial conditions of the carriers.' ... Rail practices that the Commission has been asked to evaluate in recent years include collection of storage charges on empty rail cars awaiting loading,[] limiting the use of private cars,[] attempting to limit carrier liability and place responsibility on a shipper to make a "reasonable" inspection of grain cars,[] refusal to compensate a shipper for the use of its cars,[] and adoption of minimum weight rates where rail cars were incapable of being loaded to the minimum weight.. .. The Commission has also barred carriers from refusing to carry hazardous materials that have been certified as safe for transport[] Unreasonable practices can result in abusive treatment of shippers. Federal oversight of railroad practices is therefore necessary and should be retained in order to protect the public interest. Id. at *20-*21 (footnotes omitted).*

² *Groome*, slip op. at 11.

³ 49 U.S.C. § 11101(a).

⁴ *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998).

⁵ *ICC Regulatory Study*, 1994 WL 639996 at *20 (ICC issued Oct. 25, 1994).

With respect to failure to serve in violation of the common carrier obligation due to an embargo, a rail carrier is not given a free pass to choose not to serve just because of circumstances that make it difficult or expensive to provide service. In order for a cessation of service to be lawful, an embargo must be reasonable at the time it is issued, and the carrier's ongoing choice to maintain the embargo must continue to be reasonable as well.⁶ An embargo that extends beyond a reasonable time can be construed as an unlawful abandonment.⁷

The reasonableness of an embargo is a fact-specific inquiry to be determined on a case-by-case basis. Whether an embargo is reasonable, as well as how long an embargo may reasonably continue, is typically determined by considering various factors, such as: the cost of repairs necessary to restore service, the amount of traffic on the line, the carrier's intent, the length of the service cessation, and the financial condition of the carrier. These factors are not applied in a formulaic way, however. Rather, its objective is to determine whether the carrier's actions are reasonable under the circumstances. (Underscore for emphasis).

Cases involving the extent to which a party has an obligation to provide rail service and whether it has met that obligation can be difficult because often the required factual determinations are inherently subjective. However, we submit that UP has violated its common carrier obligation and committed an unreasonable practice by imposing these embargoes capriciously.

As noted, UP issued over 100 embargoes in November alone based on congestion. While the STB has stated these types of embargoes can be permissible, the use of this mechanism in this manner is unreasonable. First, the issuance of the embargoes does not stem from a weather event, a railroading accident, or lack of maintenance on a line that creates a safety hazard. Instead, this is a self-inflicted service crisis caused by massive job cuts under the guise of Precision Scheduled Railroading. Unbelievably, the UP has not remedied this employment dilemma which has disrupted its service to its customers over the last year. While difficult to demonstrate, it is almost as if UP had slowed down hiring because the economic pundits have

⁶ *Decatur County Commissioners, et al. v. The Central Railroad Company of Indiana*, FD 33386, slip op. at 19 (STB served Sept. 29, 2000), *aff'd sub nom. Decatur County Comm'rs v. STB*, 308 F.3d 710 (7th Cir. 2002) (Decatur); *GS Roofing Prods. Co.*, 143 F.3d at 392.

⁷ *Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation*, Docket No. 42087, slip op. at 11 (STB served July 27, 2005) (Groome).

been predicting a slowdown of the US economy. In other words, these embargoes may be related to UP profitability and its image on Wall Street, and not circumstances beyond its control.

Embargoes are meant to be temporary solutions to emergency situations and not as a crutch to remedy poor management decisions by a railroad. Therefore, the Board would be correct in a decision to employ its investigatory powers to determine whether UP has violated its common carrier obligation, which it obviously has done.

3.0 Diversified CPC and Its Customers' Dependence on Rail Service

Diversified CPC's plant at Anaheim is a tight operation with limited track capacity and storage. We have made some minor infrastructure changes to manage growth, including converting a storage tank to hold a new product, but the plant is land locked by neighboring industries, making it impossible to add track capacity or storage tanks. Diversified CPC's Plant Manager at Anaheim has done a remarkable job managing production which is reliant on rail shipments of inbound raw materials, but it is not an easy task due to inconsistent transit times. For example, since February, transit times in one lane ranged from 13 days to 28 days.

We feel fortunate that Diversified CPC's plant at Anaheim has not been impacted by the embargoes. However, rail service has worsened in recent months and as a result, our customers have felt the impact. A total shutdown of rail service to the Anaheim plant due to an embargo would put the plant out of business, and employees would be furloughed. Furthermore, a plant shutdown will also impact on Diversified CPC's customers' plant operations and employees.

While the Anaheim plant also purchases some raw materials from other origins, Diversified CPC's headquarter plant in Illinois is a primary source of the Anaheim plant's inbound products. UP basically has total control of those shipments which they receive at interchange in Chicago. Normal routing is through UP's Colton Yard, which is only 44 miles from Anaheim. However, for whatever reason, instead of moving through Colton, recent shipments have been staged at Roseville, CA, more than 400 miles from the plant, seemingly adverse to streamlining operations, due to utilization of additional resources, including crews and train capacity (to and from Roseville). The problems escalated from there.

Diversified CPC's customer placed an order from the Anaheim plant, for delivery on November 22; however, Diversified CPC's plant was nearly out of product and could not fill the order. The car, which was scheduled to leave Roseville on November 22, actually departed on November 26. Subsequently, the car was scheduled to arrive at Anaheim on November 27. On November 29, a week after the requested delivery date, Diversified CPC's Plant Manager received

an email from his customer that they had shut down and were sending ten (10) employees home with no pay. The car was finally actually placed on December 1.

Of course, this is only one car and one customer order, but it is an example of the impact service disruptions, and a potential embargo, will have on our plant at Anaheim, and the collateral impact on Diversified CPC's customers.

4.0 Summary

Even though the Class I's labor shortage was self-induced, we somewhat empathize with the challenges they face when trying to hire and train personnel as quickly as possible. The labor shortage is a common issue with industries in the U.S. However, that does not excuse UP's undisciplined use of the embargo process, their disregard as a responsible carrier to fulfill their common carrier obligation, and the apparent lack of caring about the impact their decisions have and will make on their customers and their customers' employees is startling.

We commend the Board for taking this proactive approach by initiating this proceeding. We believe that The Board may, in fact, find that UP has violated its common carrier obligation and committed an unreasonable practice by imposing embargoes in an undisciplined manner. If so, then what next?

Ideally, UP will view the Board's inquiry as an opportunity to review its internal decision-making process regarding embargoes, and to revise its strategy to decrease the need for embargoes going forward. However, UP's embargo issue is not a problem in itself, but part of a much bigger problem which includes a general lack of customer focus. How the Board uses the information presented by UP and other stakeholders is for the Board to decide. Still, UP also has a decision to make, and that is whether or not they will review their approach to serving their customers.

Respectfully Submitted,



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