

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
December 14, 2022
Part of
Public Record

STB *Ex Parte* No. 772

OVERSIGHT HEARING PERTAINING TO UNION PACIFIC RAILROAD
COMPANY'S EMBARGOES
December 13-14, 2022

**TESTIMONY OF THE
AMERICAN CHEMISTRY COUNCIL**

Presented by

Jeff Sloan

Senior Director, Regulatory Affairs

Thank you for the opportunity to testify on behalf of the American Chemistry Council. ACC represents more than 190 of America's leading chemical companies. Our members produce a wide variety of chemicals, polymers, and related products that make our lives and our world healthier, safer, more sustainable, and more productive. The business of chemistry supports over 25% of the U.S. Gross Domestic Product and directly touches nearly all manufactured goods.

ACC member companies are some of the largest customers of the U.S. freight rail system, and our transportation needs are growing. U.S. chemical manufacturers ship more than 1.8 million carloads per year. New capital investments in U.S. production will require two million new chemical and plastics shipments per year, including 300 thousand more railcar shipments.

ACC welcomes the Board's attention to UP's use of rail embargoes and their impacts on rail customers and downstream industries. ACC understands that rail embargoes are necessary in some circumstances. We further acknowledge that UP has worked constructively with some ACC members to help mitigate the negative impacts of the embargoes. However, ACC shares the Board's concerns about the increasing use – and misuse – of embargoes to manage network congestion.

ACC members have been subjected to multiple UP embargoes over the past year. They have been impacted by other railroad embargoes as well, including the BNSF embargo on rail shipments into California, which forced companies to reduce production and shift some traffic to trucks. These rail embargoes disrupt operations, impose significant costs on rail customers, and prolong the nation's supply chain problems. And they are yet another manifestation of the chronic service failures that have plagued the U.S. rail network for more than two years.

My testimony will highlight specific issues with the UP embargoes, as well as the need for STB policy reforms to address the systematic conditions that lead to embargoes, including finalizing long-overdue rules for reciprocal switching.

Specific concerns with UP embargoes

UP has offered insufficient information to explain the need for its actions or the specific volume targets imposed. Typically, car limits have been set with no customer input. Furthermore, UP's 14-day baseline is arbitrary and does not account for factors that impact traffic volume, including weather events, seasonal demand shifts, and plant outages.

In an attempt to shift blame, UP leadership has suggested that shippers are at fault for creating congestion by exceeding shipping requirements. But they have offered no details on the market segments or locations where they believe this is happening. ACC members report that shipping volumes are based on customer orders.

ACC members have described varied experience with UP's responses to their concerns.

- Several large UP customers report that they are working through service issues and that UP is effectively meeting their needs.
- Some companies report that, after first threatening an embargo, UP indicated that they had achieved sufficient reductions from other shippers and further embargoes were not needed.
- Other ACC members report that they have received little more than system-generated notices from UP with predetermined volume levels. After contacting their Account Manager, companies have been told to open a case through the UP website and have received no meaningful response or follow-up. As noted by one member representative, this suggests a lack of interest from UP in developing a supply chain solution versus a railroad solution.

I will highlight a few examples how UP embargoes impose significant burdens and harm manufacturing operations.

- One ACC member facility serves a large refinery in TX, providing critical inputs and using sulfur from the refining process to make sulfuric acid. On average, the ACC member site receives four loads of raw material and ships out eight loads of sulfuric acid per week. This volume, however, varies at times depending on refinery operations. Due to its size and geographic restrictions, the facility has no room to store extra cars on site. Recently, UP determined, without any customer input, that it will hold only three cars at its serving yard and embargo the site when that limit is reached. Managing to this limit is not feasible. The embargoes threaten operations at the ACC member facility and production from the refinery.

While BNSF has operations and serving yards in the area, the lack of reciprocal switching forecloses the facility from accessing alternative rail service.

- Where reciprocal switching is available, ACC members have been able to use alternative routes to maintain shipments and prevent shutdowns at some customer locations. However, due to higher tariff rates, ACC members have incurred hundreds of thousands of dollars in additional costs, while UP has faced no penalty for failing to meet its contractual obligations.
- Other ACC members have been asked by customers to either divert cars that were enroute away from specific UP served destinations, or to rebill cars that were already placed – all to prevent embargoes. The rebill and diversion charges represented substantial costs.

The true impact of UP's actions extends far beyond the number of shipments that are directly subjected to embargoes. When UP demands car reductions, customers are effectively forced to comply. These companies face higher costs and lost business without the embargo officially coming into effect.

ACC is also concerned that UP is using embargoes to shore up its service metrics and help achieve its performance improvement targets. Restricting service in this manner runs counter to UP's common carrier obligation and undermines the Board's efforts to improve transparency and accountability for rail service performance.

STB must address the underlying conditions that lead to rail embargoes

Embargoes ration rail service, favoring certain customers and commodities while limiting or denying service to others. Embargoes may be reasonable in some circumstances, particularly in response to weather emergencies or other external factors. However, ACC is concerned that UP and potentially other railroads will increasingly turn to embargoes to manage long-term congestion problems. It is particularly troubling that some of these underlying conditions were created or exasperated by the railroad's own management decisions, including actions to cut jobs, mothball equipment, and delay infrastructure investments. The STB must not allow such embargoes to become normal and accepted practice.

In exercising its oversight role, the Board should establish a clear policy on the factors that it will assess in determining whether an embargo is reasonable, including a statement that it will consider any embargo to be unreasonable if it results from staffing, equipment, and infrastructure decisions designed to increase railroad profitability. This will send a clear signal that conditions caused by a railroad do not relieve that railroad of its common carrier obligation.

In addition, the Board must adopt regulatory reforms aimed at the root causes of chronic rail service problems.

- First, the Board should establish permanent reporting requirements to track how well major railroads are performing for their customers. This should include metrics for on-time performance and first mile/last mile service from the Board's temporary reporting requirements in EP 770. Standardized metrics provide a foundation for STB oversight and enforcement of the common carrier obligation.
- Second, the Board should establish minimum standards for the delivery of efficient, timely, and reliable rail service. The Board has the authority to further define the common carrier obligation and to hold railroads accountable for failing to deliver reasonable levels of service.
- Third, the Board must complete long-overdue rules to improve access to competitive rail service through reciprocal switching. Reciprocal switching can help prevent or mitigate the harm caused by UP's embargoes. More importantly, expanding rail-to-rail competition creates incentives for railroads to improve rail service.

These reforms will increase transparency, strengthen accountability, and promote market competition. Collectively they provide a more balanced regulatory framework – one that incentivizes network resiliency, growth, and customer service.

Thank you again for the opportunity to provide testimony on this important matter. For questions or additional information regarding this submission, please contact Jeff Sloan, Senior Director of Regulatory Affairs, at (202) 249-6710 or jeffrey_sloan@americanchemistry.com.