

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. EP 772

Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes

Comments of Corn Refiners Association

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Union Pacific Railroad Company's extensive use of embargoes to address its congestion challenges is troubling. The congestion on Union Pacific's network arises as Union Pacific is achieving and pursuing record-low operating ratios,¹ which suggests that Union Pacific is prioritizing lean operations over its common-carrier duty to handle traffic upon reasonable request. The Corn Refiners Association thus urges the Board to examine Union Pacific's embargo practice closely and declare that Union Pacific's embargoes are an invalid defense to the common-carrier obligation where they address congestion arising from Union Pacific's general business decisions.

Further, carriers and rail customers lack clear guidance confirming that embargoes addressing congestion arising from a carrier's general business decisions do not excuse carriers from the common-carrier obligation. This lack of guidance discourages rail customers from challenging embargoes that appear closely tied to a carrier's attempts to operate with minimal staffing and equipment and little regard for its common-carrier duty. It also encourages carriers to adopt profit-maximizing measures that jeopardize service. Since many Class I railroads have recently adopted lean operating models, like Precision Scheduled Railroading (PSR), and struggle with congestion, it is imperative that the Board clarify that carriers cannot avoid accountability under the common-carrier obligation by using embargoes to

¹ Operating ratio is operating expenses divided by operating revenues. Union Pacific seeks to achieve an operating ratio of 55%. Union Pac. Corp., Annual Report (Form 10-K), at 6 (Feb. 5, 2021). In 2020 and 2021, Union Pacific achieved record-breaking operating ratios of 59.9% and 57.2%, respectively. Union Pac. Corp., Annual Report (Form 10-K), at 3 (Feb. 4, 2022).

address congestion arising from their own business decisions.

I. CRA's Interest

CRA is the national trade association representing the corn refining industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. CRA is comprised of seven member companies, including Archer Daniels Midland Company, Cargill, Grain Processing Corporation, Ingredion Incorporated, Primient, Roquette America, Inc., and Tate & Lyle Americas. For decades, corn refiners have been perfecting the process of separating corn into its component parts to create a myriad of value-added products. Our member companies accomplish all of this with more than 8,000 hardworking employees and one and a half billion bushels of corn, or about ten percent of America's corn crop. Together, our industry supports an additional quarter-million American jobs and has an annual economic impact of \$54 billion.

CRA members are highly dependent upon reliable and economic rail transportation for their products, both for inbound shipments of raw materials and outbound shipments of finished products. Rail service issues have disrupted the business of CRA members, resulting in additional costs, threatening our members' production, and jeopardizing their customer relationships.

II. Allowing Union Pacific to issue valid embargoes to address congestion arising from its own business decisions would undermine the common-carrier obligation.

CRA is concerned that Union Pacific has been using embargoes in record numbers to address congestion that might arise from its own business decisions regarding staffing and equipment. Used in this manner, embargoes undermine the

common-carrier obligation by giving carriers a free pass to pursue profits at the risk of providing inadequate service to rail customers. The Board thus should examine Union Pacific's embargo practice closely.

A valid embargo is a temporary service restriction that excuses a carrier from the common-carrier obligation under 49 U.S.C. § 11101(a) when the carrier is unable to perform its common-carrier duty.² To be valid, an embargo must at all times be reasonable.³ Embargoes that undermine the policy considerations underlying the common carrier obligation are unreasonable.⁴

The common-carrier obligation reflects a strong public policy that carriers should not be permitted to curtail operations so they can pursue their own profitability goals. "At the very heart of the common carrier obligation is the belief that railroads are in a position of unique public trust and are therefore held to higher standards of responsibility than other private enterprises."⁵ Thus, a railroad is accountable under the common-carrier obligation when it fails to provide services merely because it would be inconvenient or unprofitable.⁶

Embargoes that address congestion arising from the embargoing carrier's adoption of lean staffing and equipment models undermine the common-carrier

² *Bar Ale, Inc. v. Cal. N. R.R.*, FD 32821, slip op. at 6 (STB served July 20, 2001).

³ *Id.* at 6.

⁴ *GS Roofing Prods. Co. v. STB*, 143 F.3d 387, 392 (8th Cir. 1998).

⁵ *State of Montana v. BNSF Ry.*, NOR 42124, slip op. at 5 (STB served Apr. 26, 2013) quoting *GS Roofing Prods. Co. v. STB*, 143 F.3d 387, 393 (8th Cir. 1998).

⁶ *GS Roofing*, 143 F.3d at 391.

obligation by making the carrier unaccountable when it pursues profitability at the expense of service. Lean staffing and equipment models, like PSR, reduce costs and promote profitability. If taken too far, these models leave railroads with insufficient staff and equipment to handle normal traffic demands, leading to congestion.

Failing to deem embargoes addressing this congestion as invalid would excuse a railroad for prioritizing profits over its common-carrier duty. It would mean that railroads could make staffing, equipment, and other business decisions without regard for whether those decisions will prevent them from satisfying their common-carrier duty.

Here, Union Pacific's embargo practice appears to arise from business decisions that conflict with its common-carrier duty. In October 2018, Union Pacific adopted PSR and announced the first of several rounds of job cuts intended to reduce its general and administrative support structure by roughly 30% by 2020.⁷ Since then, Union Pacific's embargoes have skyrocketed from 140 in 2018 to upwards of 900 this year, nearly all of which it attributes to congestion.⁸ All other Class I carriers combined have issued far fewer embargoes during this period, which suggests that Union Pacific's congestion issues arise from its own business decisions.

Further, Union Pacific's embargo practice places a significant burden on rail

⁷ Paul Ziobrio, *Union Pacific to Lay Off Nearly 500 Workers*, Wall St. J. (Oct. 23, 2018), <https://www.wsj.com/amp/articles/union-pacific-to-lay-off-nearly-500-workers-1540319983>.

⁸ *Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes*, EP 772, slip op. at 3 (STB served Nov. 22, 2022).

customers. By subjecting Union Pacific's customers to rolling service cuts with little notice, Union Pacific's embargo practice impairs its customers' ability to plan inbound and outbound traffic to meet their needs and the needs of their customers. This puts rail customers that rely on Union Pacific at a disadvantage to their competitors that have access to other carriers or transportation modes. Additionally, for rail customers with seasonal traffic flows, Union Pacific's embargoes can deprive the customer of access to materials or markets at moments that are crucial to the customer's business.

Despite the high burden that Union Pacific's embargo practice places on rail customers, it does little to solve the chronic congestion that it addresses. The chronic nature of Union Pacific's congestion problems suggests that Union Pacific is not sufficiently investing in staff, equipment, and other resources to handle normal traffic volumes. Using embargoes to address this congestion ignores Union Pacific's role in its congestion. Further, it allows Union Pacific to reap the benefits of its staffing, equipment, and other business decisions that are contributing to the congestion while placing the costs of the congestion on the backs of Union Pacific's customers and the broader public that needs access to the goods that Union Pacific transports. Simply put, the "public trust" requires more of Union Pacific.

The Board thus should send a clear message to Union Pacific that it cannot avoid accountability under the common-carrier obligation by issuing embargoes for congestion that arises from its own business decisions, including its decisions to pursue lean staffing and equipment models to improve its bottom line. Allowing this

embargo practice to relieve Union Pacific from its common-carrier duty would turn the common-carrier obligation on its head by enabling Union Pacific to pursue its own interest without regard for the public's interest in adequate rail service.

III. The Board should issue guidance stating that embargoes addressing congestion arising from a carrier's staffing and equipment decisions do not excuse carriers from the common-carrier obligation.

Rail customers have an urgent need for guidance stating that embargoes do not excuse carriers from the common-carrier obligation where they address congestion arising from a carrier's staffing, equipment, and other business decisions. Union Pacific's embargo practice has grown amidst a lack of guidance about whether embargoes addressing congestion within the issuing carrier's control provide a valid defense to the common-carrier obligation. Further, like Union Pacific, many other Class I carriers have experienced similar congestion issues following their recent adoption of lean staffing models and other measures intended to lower operating ratios and increase profitability. To avoid embargoes getting further out of hand, the Board must be clear that embargoes addressing congestion arising from a carrier's staffing, equipment, and other business decisions do not relieve carriers of their common-carrier duty.

Existing precedent does not directly address embargoes addressing congestion arising from a carrier's business decisions. The factors that the Board has typically considered when evaluating an embargo—the length of service cessation, the intent of the railroad, the cost of repairs, the amount of traffic on the line, and the financial condition of the carrier—generally contemplate embargoes arising from a carrier disability caused by an act of God. Thus, it is unclear to what

extent the Board would consider a carrier's general business decisions about staffing, equipment, and other matters, when evaluating embargoes arising from congestion.

This ambiguity harms rail customers. When faced with an embargo, a rail customer's focus is on existential matters, such as how it will receive necessary inputs that move by rail or how it will move goods to its customers. An STB proceeding to determine the validity of the embargo, which involves a fact-specific, case-by case analysis considering multiple factors, is too time consuming and risky for many customers to pursue, particularly concerning embargoes for which there is a lack of precedent and guidance. Thus, absent direct guidance indicating that an embargo is unlawful, a rail customer probably will accept the carrier's proposed traffic restriction or negotiate a compromise that accommodates more traffic than the carrier's proposal, but still does not meet the customer's reasonable needs.

In contrast, the lack of guidance about the validity of embargoes addressing congestion arising from a carrier's business decisions encourages carriers to give their common-carrier duty little consideration. Carriers likely understand that shippers do not have enough regulatory certainty to make challenging embargoes addressing congestion arising from a carrier's business decisions worthwhile. In fact, Union Pacific has issued hundreds of embargoes this year, and no shipper has challenged the embargoes. Thus, absent guidance indicating whether embargoes addressing congestion arising from a carrier's business decisions are valid, carriers have freedom to pursue cost-saving measures designed to increase profitability even

though those measures may harm their capacity to handle traffic under normal operating pressures.

The Board can provide helpful guidance without prejudging specific cases. It can plainly state that embargoes that are implemented to address congestion or other service problems that are attributable in substantial part to a carrier's business decisions will not excuse the carrier from its common-carrier duty to transport traffic subject to such embargoes. A complainant still would need to present evidence to satisfy this standard.

For broad embargoes of regional or national significance, such as those implemented by Union Pacific and BNSF Railway over the past year, the Board's recently expanded authority to initiate investigations on its own initiative, at 49 U.S.C. § 11701, is tailor-made for mitigating the risk and uncertainty that shippers must overcome to prove that an embargo is caused by a carrier's business decisions that should not vitiate its common-carrier duty. If the Board finds that the carrier has violated its common-carrier duty, a shipper could invoke the results of that investigation in support of any subsequent complaint for damages that it may choose to pursue.

In sum, guidance stating that embargoes addressing congestion arising from a carrier's business decisions do not provide a valid defense to the common-carrier obligation would give rail customers the certainty they need to hold carriers accountable for business decisions that impair their ability to provide reasonable service. Further, conducting Board-initiated investigations pursuant to 49 U.S.C.

§ 11701 can facilitate the ability of shippers to hold rail carriers accountable for damages resulting from embargoes imposed to redress the operating consequences of carriers' business decisions. This accountability would encourage railroads to give serious consideration to their common-carrier duty when making business decisions.

IV. Conclusion

The common-carrier obligation reflects that carriers have a heightened public responsibility that requires them to provide reasonable service even when it is merely unprofitable.⁹ Embargoes that excuse railroads from this responsibility when congestion arises from a carrier's business decisions to pursue profits at the risk of service would undermine the common-carrier obligation. Thus, to the extent that Union Pacific's embargoes address congestion arising from its staffing, equipment, and other business decisions that put service at risk, the Board should hold that these embargoes do not shield Union Pacific from accountability under the common-carrier obligation.

Further, in recent years, many Class I carriers have adopted lean operating models and emphasized reducing their operating ratios. CRA thus urges the Board to issue guidance stating that embargoes arising from a carrier's business decisions that create an unreasonable service risk will not excuse the carrier from accountability under the common-carrier obligation.

⁹ *GS Roofing*, 143 F.3d at 391.

Respectfully submitted,

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