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December 14, 2022

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: STB Docket No. EP 772, *Oversight Hearing Pertaining to Union
Pacific Railroad Company's Embargoes*

Dear Ms. Brown:

Pursuant to the Decision served in this proceeding on November 22, 2022, this letter submits the written versions of the testimony submitted by Michael J. Seyfert and the undersigned that was presented on behalf of the National Grain and Feed Association in the public hearing held on December 14, 2022.

Please do not hesitate to call me if you have any questions.

Sincerely,

Thomas W. Wilcox
*Attorney for the National Grain and Feed
Association*

WRITTEN TESTIMONY OF MICHAEL J. SEYFERT



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 772

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

TESTIMONY OF MICHAEL J. SEYFERT

Good morning, my name is Mike Seyfert, and I am the President and Chief Executive Officer of the National Grain and Feed Association. I am joined by Mr. Tom Wilcox, NGFA's outside transportation counsel, who will also testify on behalf of NGFA. I want to begin by commending Chairman Oberman and the Board for holding this hearing to examine Union Pacific Railroad Company's use of embargoes.

The NGFA consists of more than 1,000 grain, feed,



processing, exporting and other grain-related companies operating more than 8,000 facilities. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed, and processing industry.

The NGFA's wide-ranging membership is proud to partner with UP, the 2nd largest carrier of agricultural products. It is a partnership critical to agricultural commerce, both domestically and internationally.

NGFA encourages commercial solutions between individual rail customers and their carriers, but we have heard from several NGFA members who believe they have exhausted efforts to curb UP's use of embargoes to meter rail service because of what they call congestion, and they believe it is time for STB intervention.

NGFA believes the underlying cause for UP's use of embargoes is the significant rail service challenges it has experienced in 2022.

While we certainly are rooting for a speedy rail service recovery, we realize the size and complexity of UP's system may delay such a recovery. We have no doubt UP is working hard to improve rail service, but we fear UP's significant use of embargoes for so-called congestion that our members believe is largely the result of UP's actions may be unfairly placing the cost burden of its rail service recovery on their rail shipper customers.

Back in March, NGFA sent a letter urging the Board to address substantial rail service disruptions. We are thankful the Board followed up with a freight rail service hearing on April 26 and 27 that brought to light the wide range of rail customers that were experiencing economic harm due to inadequate rail service. As you know, after the hearing the Board ordered the four largest

rail carriers, including UP, to submit service recovery plans. In June of this year, the Board also ordered UP to provide temporary emergency rail service to an NGFA member due to UP's inability to deliver corn from the Midwest to the West Coast that was to be used for feeding dairy cattle and chickens.

We aim to give credit where it is due, and we have seen some improvements in UP's service since the STB hearing in April. I also want to publicly thank UP for their efforts to communicate with NGFA and our members. UP's marketing team hosted me at their headquarters in Omaha this summer, has been in communication with NGFA staff, and sent a representative who spent three hours on two panels visiting with attendees at NGFA's Country Elevator Conference last week.

As I've said before the relationship between NGFA members and the railroads is a partnership that must work for both sides and that requires communication. Despite the good-faith

efforts on both sides, the year-over-year numbers continue to show challenges for NGFA members. Here is a snapshot of UP's rail system status for grain shippers using the most recent service data reported to STB:

- Unfilled grain car orders that were placed 11 or more days ago stand at 1,088 cars as of December 7. This is down from 1,518 on April 27, but higher than the 471 cars in December 2021. We assume the goal is to have zero car orders that are more than 11 days old.
- As for average dwell time at origin for grain unit train shipments, it is 29.7 hours for December 7, which is down from 40.5 hours on April 27, but higher than the 25.3 hours a year prior.

UP's current rail service data is better than in April, but still very low and almost certainly the reason UP has greatly expanded its use of embargoes. The natural response for shippers when they

receive slower rail service is to buy or lease additional private cars to offset the slower service and still move the amount of product their facilities require. The additional railcars come at a cost for shippers and often are a multi-year investment. If UP were providing the level of rail service that is needed by its customers, the additional private railcars would not be on its system.

In 2022, UP has issued over 1,000 embargoes and as the Board noted almost all of them are due to UP's general claim of "congestion". This compares to 662 embargoes in 2021 and 251 embargoes in 2020, which were themselves high numbers. The general practice for limiting shipper cars utilized by UP has been to notify the customer of too many cars in the servicing yard or corridor. If the customer is unable to put together an acceptable plan with UP as the judge, then an embargo is declared, and service is metered for an indefinite period.

Reported embargoes only capture the occurrences in which

shippers were unable or unwilling to agree to UP's demands. Thus, NGFA believes the embargo list is not a full representation of the quantity of facilities that have had their car volume or shipping plans decided for them.

We certainly appreciate UP providing notice before a decision is made to embargo, however we believe more than 7-days of notice should be provided and that more discussion should be held before the decision is made. We have heard examples of limited to no discussion. Shippers, like railroads, do not want to carry excess cars due to cost. If there are excess cars it is usually because the shipper has concerns about service. Discussions between UP and their customers should be held on car inventories, but not under the threat of embargo.

There are multiple problems for NGFA's membership when they are embargoed or encouraged into changing shipping plans. Processors may not be able to run at full capacity, livestock or

poultry operations run the risk of depopulating, and exporters may pay demurrage on vessels. Plus, NGFA members may have to incur additional transportation costs by using UP's cars instead of their own.

As you may have surmised, in 2022 NGFA members have been forced to make decisions that either lower their productive value or increase their transportation costs. These missed opportunities negatively impact the agricultural value chain, meaning NGFA members and farmers receive lower revenues. Neither is positive for the U.S. economy.

My understanding is that a rail carrier, like other businesses, can improve its service by adding labor and/or capital. Alternatively, a rail carrier can attempt to manage its service deficiencies by making freight rail service more inaccessible to customers through higher rates or other service limiting actions, such as embargoes.

Valid embargoes excuse railroads from their statutory obligation to provide service when weather events or other unforeseen disasters out of the carrier's control temporarily prevent service from being provided. We strongly urge against the use of embargoes as a planned business practice when the system becomes congested because of the actions of the railroad, namely not having sufficient personnel or making necessary capital expenditures.

Not only do embargoes reduce overall productivity for the U.S. economy, but they also put the rail carrier in the position of picking winners and losers because service is arbitrarily metered instead of provided in accordance with the carrier's statutory obligation. We have heard from members that UP has not been open about sharing data or logic behind its rationale for declaring embargoes and that there are also concerns that UP is unknowingly at times relying on data that is skewed for service

reasons. Some NGFA members have been successful in refuting some UP embargo declarations on this basis.

To be clear, we do not intend for this hearing to turn into a debate over the appropriate data needed for UP to continue declaring embargoes based on what it calls congestion. Instead, we desire for UP and the Board to hear our message that embargoes due to congestion should only be permitted when the railroad is not the cause of the congestion it claims is the basis for an embargo. Liberal declarations of embargoes and the metering of service should certainly not be embedded into a rail carrier's business model.

NGFA neither desires to dictate to UP how many employees or equipment it must maintain, nor the business model UP should employ. However, we desire better rail service for our members than has been provided in 2022. We believe STB can help by finishing the reciprocal switching and by developing guidance on



the use of embargoes. My colleague, Tom Wilcox, will now discuss the legal rules for embargoes and expand on NGFA's recommendations to improve the situation. Thank you for holding this important hearing.

WRITTEN TESTIMONY OF THOMAS W. WILCOX

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 772

OVERSIGHT HEARING PERTAINING TO UNION PACIFIC
RAILROAD COMPANY'S EMBARGOES

TESTIMONY OF THOMAS W. WILCOX

Good morning. My name is Tom Wilcox, and I am appearing before you today as transportation counsel for the National Grain and Feed Association in this matter. My testimony consists of a brief discussion of the rules and standards applicable to railroad embargoes, and several recommendations from NGFA to the Board for further action in response to the extensive occurrence, over the past several years, of actions Union Pacific Railroad Company and other Class I railroads are calling embargoes as a means to stop providing service to their customers or to meter the service that they do provide. The written version of this testimony includes citations to applicable cases and authorities and will be submitted into the record for the Board's convenience and reference.

As the Board noted yesterday, the use of embargoes started increasing a few years ago. To me as a practitioner, this is another example of an area of law where there are established rules and precedent but in today's industry the boundaries of those rules get stretched and railroad practices become potentially unlawful, but they become part of the industry because they are not challenged. They then spread as other railroads adopt them. Other areas are demurrage and accessorial charges, billing, rates, etc.

The issue as a lawyer for railroad customers is how to square UP's CIMS practices with the standards and policies governing embargoes, which are well established and go back many years.

The concept of a railroad embargo is fairly straightforward. A railroad has a statutory obligation to provide service on reasonable request pursuant to 49 U.S.C. §11101(a). A railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable.¹ However, that statutory obligation to serve can be temporarily excused by an embargo without liability to the railroad if events happen out of its control that prevent it from temporarily fulfilling its obligations and it takes appropriate steps to eliminate the cause of the disruption and resume service. The concept of an embargo is similar to *force majeure* in contracts, where a party's contractual obligation is temporarily suspended if a cause beyond its control temporarily prevents it from performing. But in both cases the duty is on the party claiming the excuse to remove the condition.

So, the question is not whether UP's congestion embargo practices violate the common carrier obligation, which was asked yesterday. The correct question is whether the action taken meets the criteria of an embargo. If it does, then legally UP has no liability for violating its common carrier obligations for the duration of the embargo. Looking at the bigger picture, allowing the expansion of the definition of "embargo" arguably removes an incentive for UP to improve service, and to also utilize private railcars more efficiently.

Judicial definitions of the term "embargo" have included "an emergency measure placed in effect because of some disability on the part of the carrier which makes the latter unable

¹ *GS Roofing Products Company vs. STB*, 143 F.2d 387, 391 (8th Cir. 1998) ("GS Roofing"), citing *General Foods v. Baker*, 451 F. Supp 873, 875 (D. Md. 1978).

properly to perform its duty as a common carrier.”² Also: as “issued by the carrier alone and which will justify a cessation of service as a temporary emergency measure when for some reason the carrier is unable to perform its duty as a common carrier.”³ Finally, the STB has stated “an embargo is a carrier’s notice to the railroad industry and affected shippers that a disability or interruption in operations exists which temporarily prevents it from providing service or performing its common carrier duties.”⁴ Embargoes are therefore by definition limited to emergency measures, and “an embargo is a temporary measure that is justified only if the condition warranting the embargo cannot reasonably be rectified.”⁵

The measures justifying an embargo have consistently been defined as events that are out of the carrier’s control, including “physical conditions such as weather and flood damage, tunnel deterioration, or lack of equipment.”⁶ More recent STB cases have stated that embargoes are valid if they are justified by such physical conditions out of the carriers’ control but also “operating restrictions such as congestion.”⁷ However, as discussed later there are very few examples of congestion embargoes.

So, significant for purposes of this hearing, a valid embargo is a defense to an action for breach of the carrier’s duty to provide common carrier service under §11101(a), meaning that a carrier cannot be subject to any damages to its customers for the duration of a valid embargo.

² *GS Roofing* at 392, citing *Chicago N.W. Ry. Co. v Union Packing Co.*, 373 F.Supp 734, 736-37(D.Neb. 1974) and other cases.

³ *ICC v. Baltimore & Annapolis R. Co.*, 398 F.Supp. 454, 462 (D. MD. 1975)

⁴ STB Finance Docket No. 33386, *Decatur County Commissioners, et al, v. the Central Railroad Company of Indiana* (served September 29, 2000) citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981).

⁵ *GS Roofing* at 394.

⁶ *Id.* at 392.

⁷ *Bar Ale, Inc. v. BNSF Railway Company*, Docket FD No. 32821 (served July 20, 2001)(mentioning congestion but the case was about a bridge being physically impassable).

The well-established rule is that an embargo must, at all times, be reasonable.⁸ Consequently, the railroad's initial declaration of the embargo must be reasonable, and if it passes this threshold, the embargo must remain reasonable for its duration. If an embargo is unreasonable at the outset or becomes unreasonable because the condition or disability that prevented the carrier from providing service is eliminated or the carrier is financially able to remedy the condition or disability, then the carrier has violated its statutory obligations under 49 U.S.C. §11101(a).⁹ The relief for an affected shipper or other party for such a violation includes damages under 49 U.S.C. §11704(b), and pursuant to 49 U.S.C. §11705(c), a shipper has up to two years to file a complaint with the STB to recover such damages.

Applying these principles to the actions of UP it has labelled embargoes, the railroad has based the vast majority of its declarations on "congestion," which it has not defined in any detail other than to vaguely say is "elevated/excess inventory" of railcars, specifically private railcars. As stated, there have not been many recent examples of decisions entailing embargoes that are declared because of "congestion." However, the cases where an embargo was imposed because of congestion appear to be instances where the condition or disability causing the congestion was outside the control of the carrier declaring the embargo, meaning it did not cause the congestion it claimed rose to the level of preventing it from meeting its obligations under §11101(a). This is consistent with the overall policy of embargoes, which contemplates emergency events occurring that are beyond the carrier's control to prevent, but that it must diligently seek to remedy and resume service.

As for examples, during the widespread service failures that accompanied implementation of the UP/SP merger in Texas, both UP and BNSF temporarily instituted what

⁸ *GS Roofing* at 392.

⁹ *Id.*

they each called embargoes for congestion related to the implementation of the merger but also many other factors. BNSF temporarily embargoed the transportation of cars and trains of Mexico-bound traffic over the international gateway into Laredo Texas due to congestion caused by the merging UP and SP and many other factors out of BNSF's control.¹⁰ Later, "the backup of Mexico-bound traffic destined for Laredo . . . ultimately forced UP to declare an embargo of the Laredo gateway."¹¹

Also of significance for the subject of this hearing, BNSF's so-called embargo did not involve a complete cessation of service. Rather, BNSF "imposed a temporary embargo under which it determines on a daily basis the capacity of lines into Laredo and Brownsville and into other Texas Gulf Coast destinations, and, through a permitting system, authorizes only those train movements that can be completed without delay."¹² This service metering labelled an embargo appears to be similar to what UP has described in its materials and testimony. However, there are at least two material differences:

1. The congestion giving rise to BNSF's action was congestion on main lines that was not caused by BNSF's operating or business decisions or any causes or conditions within its control to prevent. This is a matter of dispute concerning UP's present claims of "congestion."
2. There is a question of whether rationing service through a "permit" system (as opposed to ceasing service for the duration of the disability) is a valid embargo that creates a defense for violations of §11101(a). BNSF's use of the permit system was not rejected by the Board. However, BNSF's actions took place under the unique circumstances of the STB having taken the drastic step of issuing Emergency Service Order SO 1518 to try to address an acute service meltdown in Texas post UP/SP merger, as opposed to ongoing service failures arising largely out of Class I railroad business decisions.

¹⁰ Ex Parte 553, *Rail Service in the Western United States* and Docket SO 1518, *Joint Petition for Service Order* (served November 21, 1997) at 5, note 6.

¹¹ *UP/SP*, FD No. 32760 (Sub No. 26)(Decision No. 10)(served December 21, 1998) at 22.

¹² Note 10, *Supra*. UP apparently did not implement a permit system.

The liberal use of embargoes by UP and other Class I railroads for “congestion” prompt a number of questions that the Board should considering exploring and providing guidance on.

For example:

1. What, exactly, is the condition, disability or event that is allegedly preventing UP from fulfilling its statutory obligations to provide service?
2. Is “elevated/excess inventory” a valid example of “congestion” that supports the emergency action of an embargo and the accompanying defense for breach of the obligation to provide service?
3. If the condition, disability or event is the result in whole or in part of actions and business decisions by UP vs causes that are out of UP’s control, is labelling the action taken an “embargo” legally correct? If not, is UP violating its obligations under §11101(a)?
4. Assuming instituting an embargo for “elevated/excess inventory” is lawful at the outset, at what point is the condition or disability considered eliminated (and continuing the embargo unlawful), and how is that to be determined?
5. If a valid embargo requires a cessation of service, then how can a “congestion embargo with permits” be an embargo that provides UP with an absolute defense from an action for breach of its common carrier obligations because UP is continuing to provide rail service, albeit at a reduced level that harms its customer?

In conclusion, the NGFA makes several suggestions to the STB for further action on this important issue:

1. Don’t concede that UP’s CIMS program actions are valid “embargoes.” The CIMS program - as described by UP - is a service metering or “pipeline management program.” The defense against violations of §11101(a) should not be allowed just because the metering is called an “embargo.”
2. The Board should consider instituting a public comment proceeding concerning embargoes similar to the process in EP No. 757 which culminated in the Board’s *Policy Statement on Demurrage and Accessorial Rules and Charges*. The *Policy Statement* was issued to provide the public with information on principles the Board would consider in evaluating the reasonableness of demurrage and accessorial rules and charges. While the Board has not seen formal complaints subsequent to the issuance of the *Policy Statement*, it has nevertheless positively impacted the commercial relationships of some railroads and shippers by providing guidelines that can be used to negotiate mutually agreeable solutions to disputes over demurrage and accessorial charges outside of formal Board action.
3. Pending any further review of this issue, the Board should not take any action that

would limit or foreclose the ability of shippers to pursue actions for damages against UP or other Class I rail carriers for allegedly unlawful embargoes, subject to the applicable statute of limitations.

4. NGFA echoes the view of others that competition, whether its by reciprocal switching or otherwise, will help resolve the immediate service failures, and provide longer term stability to the economy.

Thank you for holding this hearing and permitting me to testify. I'd be happy to try to answer any questions you might have.

Dated: December 14, 2022