

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 772

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

COMMENTS OF CN

The U.S. rail operating subsidiaries of Canadian National Railway Company (hereafter "CN") respectfully submit these comments in response to the Board's Notice of Public Hearing served on November 22, 2022, in the above-captioned proceeding.¹ In its Notice, the Board announced that it would hold a hearing pertaining to Union Pacific Railroad Company's ("UP") use of embargoes, with a goal of understanding "how UP plans to reduce, if not eliminate, the use of embargoes to control congestion." The Board invited stakeholders to file testimony or comment about the topics described in its Notice.

CN takes no position on UP or any other carrier's use of embargoes or on any specific factual issues that may be developed at the public hearing. CN submits these comments simply to emphasize that "the use of embargoes to control congestion" has been recognized by this agency, federal courts, and Congress for well over a century. As common carriers responsible for balancing the needs of all

¹ Notice of Public Hearing, *Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes*, Docket No. EP 772, slip op. at 4 (STB served Nov. 22, 2022) ("Notice").

customers on the interconnected rail network, railroads occasionally need to deploy a congestion-related embargo or permit system to avoid situations that could impair network fluidity and service to other customers who depend on the network. To be sure, the use of such embargoes must be reasonable and justified under the circumstances, and the Board may consider the reasonableness of embargoes on a case-by-case basis. But the Board should not do anything to undermine the historic ability of railroads to use embargoes when appropriate, including as a mechanism to manage congestion and ensure consistent service for the network.

I. EMBARGOES ARE AN ESSENTIAL TOOL FOR PROTECTING THE RAIL SYSTEM.

For rail common carriers, embargoes are a critical and valuable tool for protecting the rail system generally. An embargo has been defined as an emergency measure placed in effect when a carrier is unable properly to perform its duty as a common carrier.² An embargo is not just a recognition of the carrier's temporary inability to provide service, however. It can also be a means of resolving the temporary disability so that service can resume. For this reason, an embargo "is not promulgated for [the] protection of the shipper or the consignee but to *protect transportation generally*."³

² *Chicago & N. W. Ry. v. Union Packing Co.*, 373 F. Supp. 734, 736–37 (D. Neb. 1974) ("CNWR"), *aff'd sub nom. Chicago & N. W. R. Co. v. Union Packing Co.*, 514 F.2d 30 (8th Cir. 1975) (citing *Froehling Supply Co. v. United States*, 194 F.2d 637, 641 (7th Cir. 1952)); *see also Am. Mfg. Co. v. Director Gen.* 77 I.C.C. 52 (1922) (stating that agency has defined an embargo as an emergency measure adopted where it is physical impossible for carriers to transport freight or where there is an unusual accumulation of traffic).

³ *CNWR*, 373 F. Supp. at 737 (emphasis added).

Importantly, the decision to impose an embargo rests with the railroad. “[I]t is the right of a carrier to establish an embargo if circumstances warrant it, and the right of the carrier to determine in the first instance the need of an embargo and the right to place that embargo for the proper conduct of its business are well settled.”⁴

For this reason, it is also well established that the Board does not have authority to interfere with a carrier’s decision to impose an embargo unless and until the Board finds that an individual embargo has been imposed either for an unreasonable amount of time or for an unreasonable purpose, such as avoiding inconvenient or unprofitable business.⁵ As the Board has explained:

What constitutes a valid embargo is a fact-specific inquiry to be determined on a case-by-case basis. Embargoes are typically valid if justified by physical conditions affecting safety such as weather and flood damage, and tunnel deterioration, or operating restrictions such as congestion. But to be valid, an embargo must at all times be reasonable.⁶

⁴ *Id.* at 737 (emphasis added) (citing *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *Asbury v. Chesapeake & Ohio Ry.*, 314 F. Supp. 310 (D.D.C. 1970); *New York Central R.R. v. United States*, 201 F. Supp. 958 (S.D.N.Y. 1962); *United States v. Metro. Lumber Co.*, 254 F. 335 (D.N.J. 1918); *Balt. Chamber of Com. v. Balt. & Ohio R.R. Co.*, 45 I.C.C. 40 (1917)); *see also Metro. Lumber*, 254 F. at 348 (“The right of a carrier to lay embargoes for the proper conduct of its business is not, and I do not think could be successfully, contested.”).

⁵ *See, e.g., GS Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387 (8th Cir. 1998) (in the context of an embargo utilized to address physical damage to the rail network, discussing when embargoes become unreasonable due to time or unlawful purpose); *New York Central R.R.*, 201 F. Supp. at 960 (holding that “the ... imposition of an embargo on a particular service because the continuation of that service would result in a financial loss is an unlawful practice”).

⁶ Decision, *Bar Ale, Inc. v. Cal. N. R.R. & S. Pac. Transp. Co.*, Docket No. FD 32821, slip op. at 6 (STB served July 20, 2001).

II. EMBARGOES ARE JUST AS VALID AND IMPORTANT WHEN ADDRESSING CONGESTION.

Embargoes have been used in a variety of contexts to temporarily cease or limit service. The Notice, however, focuses on the use of embargoes to address congestion. It is well-established that embargoes are an appropriate tool for addressing congestion or accumulation. As noted above, the Board has already explained that “[e]mbargoes are typically valid if justified by physical conditions affecting safety ... *or operating restrictions such as congestion.*”⁷ This understanding that a common carrier’s obligations can be limited by congestion is well rooted in common law, which recognized that, “‘if [its] coach be full,’ [the carrier] was not liable for failing to transport more than [it] could carry.”⁸

In addition to having a strong historic foundation, embargoes are an important practical tool that can be deployed by a railroad faced with congestion. An embargo can aid recovery from a congested situation by preventing the addition

⁷ *Id.* at 6; *see also New York Central R.R.*, 201 F. Supp at 959 (“In almost all cases in which the laying of an embargo has been approved, the embargoes were issued because weather conditions, traffic congestion or other physical or operation conditions made it impossible for the carrier to provide transportation to a particular area.”); *Milne Lumber Co. v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 146 I.C.C. 514, 520-21 (1928) (“[T]he record is conclusive that the embargo was justified because of an accumulation of cars on defendant’s [carrier’s] tracks at Detroit, including a number of complainant’s [shipper’s] shipments.”); *Wickard v. Filburn*, 317 U.S. 111, 125, (1942) (acknowledging that, where a “decline in the export trade” for “wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains,” “railroads ... institute[d] embargoes to prevent further congestion”).

⁸ *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S 121, 133 (1915) (citations omitted).

of more cars than an already congested customer facility or portion of the network can handle. Allowing permits is often an effective way to temporarily provide for the controlled movement of traffic until the disability leading to the embargo is resolved. The use of permits, which is also well-established,⁹ is an effective way to ensure the continued but controlled movement of traffic while the congestion is being resolved.

The agency has recognized this on multiple occasions. For example, in *Compagnie Auxiliare*, the Interstate Commerce Commission (“ICC”) reasoned that during a period of time when there was “great congestion in and around New York Harbor” due to “[s]hipments ... arriving more rapidly than they could be handled and the congestion extend[ing] far back into the interior,” “it was a physical impossibility for the carriers to lighter all traffic offered and resort was had to embargoes,” including the use of “[p]ermits” for controlling and prioritizing the flow of traffic.¹⁰ And in *North Packing & Provision*, the ICC emphasized that “[c]ommon carriers have the right, in order to prevent complete paralysis of their operating

⁹ See generally *Balt. Chamber of Com. v. Balt. & Ohio R.R.*, 45 I.C.C. 40 (1917) (holding that a permit system would be permissible, so long as permits are necessary and properly policed and safeguarded); see also *Am. Mfg Co. v. Director Gen.*, 77 I.C.C. 52, 56 (1922) (discussing *Balt. Chamber of Com.*, where “we indicated our approval of the permit system ... provided the permits were necessary and properly policed,” with “no substantial evidence [of] ... any undue preference or prejudice or any unjust discrimination result[ing] from the use of the permits”).

¹⁰ *Compagnie Auxiliare de Chemins de fer au Bresil v. Delaware, Lackawanna & W. R.R.*, 87 I.C.C., 443, 444 (1924).

facilities, to protect themselves by embargo against acceptance of freight over a certain route or routes which may be congested.”¹¹

Congress has also recognized embargoes as an essential tool for preserving or restoring network fluidity. The legislative history of the Esch Car Service Act, which is the origin of the agency’s emergency authority, includes the following remarks made on the floor of the House of Representatives in 1919 by Congressman Esch:

You know how the ports in New York, Boston, and Philadelphia were cluttered up with a vast congestion of freight during the summer of 1918 before the armistice was signed, and you remember how embargoes had to be issued way back to the interior where the commerce originated. This bill gives the Commission the right of levying embargoes to prevent the goods moving to the port terminals and thus congest not only the port terminals but the sidings of tracks for a hundred miles from the harbor city. We give the commission the right to issue permits for shipments for similar reasons.¹²

Although no carrier wants to experience congestion or other temporary operating constraints, these can periodically occur on the rail network and can arise due to a myriad of reasons—from weather events, to inability of another carrier to pull interchange cars, to labor strikes, to issues at a shipper’s facility, to unexpected shifts or surges in demand. In the event such a constraint does occur, congestion-related embargoes are a means to address and resolve it.

* * *

¹¹ *North Packing & Provision Co. v. Director General*, 73 ICC 749, 752 (1922); *see also Milne Lumber Co. v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 146 I.C.C. 514, 520–21 (1928); *Armstrong Cork Co. v. Pennsylvania R.R.*, 279 I.C.C. 357, 362 (1950).

¹² 58 Cong. Rec. 8316 (1919).

In closing, CN appreciates the Board's continued focus on service and its desire to improve the rail network for all stakeholders. In exercising its oversight, the Board should take care to not weaken effective, legally sound tools that railroads can use to address network fluidity problems, including congestion-related embargoes.

Respectfully submitted,

/s/ Kathryn J. Gainey
Olivier Chouc
CN
935 de La Gauchetière Street West,
16th Floor
Montreal, QC H3B 2M9
CANADA

Kathryn J. Gainey
CN
601 Pennsylvania Ave, NW
Suite 500, North Building
Washington, DC 20004
Kathryn.gainey@cn.ca

Dated: December 14, 2022