



Freight Rail
Customer Alliance



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Office of Proceedings
January 4, 2023
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Public Record

January 4, 2023

The Honorable Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: EP 772, *Oversight Hearing Pertaining
to Union Pacific Railroad Company's Embargoes,*

Dear Ms. Brown:

The Freight Rail Customer Alliance ("FRCA") and National Coal Transportation Association ("NCTA") respectfully oppose the request that Union Pacific Railroad Company ("UP") filed for a protective order in the above-captioned proceeding on December 22, 2022.

UP's request is highly problematic on multiple levels. First, the core conceptual issues presented by UP's embargoes and other restrictions on and failure/refusal to provide service relate to accountability and transparency, *e.g.*, whether UP's service restrictions are justified and result from the actions of shippers or from UP's flawed implementation of Precision-Scheduled Railroading ("PSR") and overly zealous pursuit of lower operating ratios, how UP decides which shippers do and do not receive service, *etc.* UP's efforts to conceal its actions, data, and ostensible rationales from public review impedes resolution of those issues. "Sunlight is said to be the best of disinfectants," in the words of Justice Brandeis. Having chosen to limit and deny service in the first place, UP now seeks to prevent shippers, customers, receivers, and the public from being able to scrutinize UP's actions and rationales for that denial of service. The Board should not facilitate such efforts.

Second, UP's effort to seek protection from Freedom of Information Act (FOIA) disclosure under exemption four in advance is particularly problematic. FRCA and NCTA appreciate that some of the information that UP might submit may pose a risk of "substantial competitive harm." The risk of actual harm is easily overstated as UP's prime competitor is experiencing its own service issues, in some respects more severe than those of UP, and is hardly in a position to divert embargoed volumes from UP. Any determination of such harm should be made only after the fact, based on a weighing of competing considerations, not before the information is even submitted.

In that regard, Attorney General has underscored the commitment to openness, transparency, and accountability in FOIA. *See* <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-issues-new-foia-guidelines-favor-disclosure-and>. The Attorney General has further directed that disclosure be withheld only after a determination of a foreseeable harm, not based on the mere possibility of same, openness should prevail, discretionary disclosures should be made in cases of doubt, and nonexempt information be made available to the extent possible. *See* <https://www.justice.gov/ag/page/file/1483516/download>. To that end, UP should at least be required to prepare a proposed public and confidential version of any submission, much as if a protective order applied in a contested proceeding.

Third, in no sense should UP be allowed to precondition its submission of relevant information on a grant of protection. The Board plainly has the power to compel submission of the information. *E.g.*, 49 U.S.C. §§ 11145, 11903. Indeed, one might have thought that the Board already utilized that authority in its notice serviced November 22, 2022. The fact that UP construed that its obligations under that notice excessively narrowly hardly provides a basis for the treatment UP now seeks.

UP's failure to provide adequate service is costing NCTA and FRCA members, and the economy as a whole, millions, even billions of dollars and related jobs losses, let alone additional economic and social hardships. The notion that UP can assert that it will provide the actual information and data, but only in a way that requires it to be concealed from public review, is offensive and should not be allowed.

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Respectfully submitted,



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