

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
April 18, 2025
Part of
Public Record

DOCKET NO. FD 36844

**COMMUTER RAIL DIVISION OF THE REGIONAL
TRANSPORTATION AUTHORITY D/B/A METRA
—TERMINAL TRACKAGE RIGHTS—
UNION PACIFIC RAILROAD COMPANY**

**REPLY OF UNION PACIFIC RAILROAD COMPANY TO
APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

Union Pacific Railroad Company (“Union Pacific”) hereby replies to the application for terminal trackage rights filed by the Commuter Rail Division of the Regional Transportation Authority (“Metra”) in the above-captioned matter. In this reply, Union Pacific is generally not addressing the application’s merits and will do so as provided for in the procedural schedule. At the outset, the Board should give no credit to Metra’s repeated doomsday scenarios implying commuter rail service for Chicago-area residents is in jeopardy. Recent history between Metra and Union Pacific reveals the truth and raises serious questions about the appropriateness of the relief sought by Metra.

Union Pacific has been working with Metra for over five years, since August 2019, to negotiate a transfer of commuter operations from Union Pacific to Metra and substantial progress has been made towards implementing a new arrangement, including the transfer of responsibility for maintaining the locomotive and car fleet

(June 2024), station agent services (September 2024), and ticketing services onboard trains (February 2025).

All negotiations, amendments, and progress over the past several years contemplate Metra's continued access to Union Pacific lines for its commuter service and the parties have agreed to all material terms related to Metra's continued use of Union Pacific's lines with one notable exception: compensation. The parties have engaged in good faith in these negotiations over many years, exchanging multiple offers and engaging in multiple in-person discussions. Unable to reach agreement, Union Pacific asked the Board to conduct mediation. Despite Metra's opposition, the Board ordered non-binding mediation, which concluded unsuccessfully in January 2025. In February 2025, Union Pacific offered to arbitrate compensation, but Metra declined. Union Pacific is thus not refusing Metra access to its lines but is simply seeking fair market compensation for that access, the central issue on which Metra refuses to engage. In filing this action, Metra appears to want the Board to provide it with financial relief by obtaining government-ordered access and delaying the issue of compensation.

Metra's application is an attempt to circumvent necessary private commercial negotiations and will force the Board to unnecessarily expend resources addressing complex and novel issues regarding access that Union Pacific is willing to provide. Beyond compensation, at issue will be the Board's jurisdiction over Metra, the eligibility of the lines, and whether it is in the public interest to issue an order forcing

access that Union Pacific is otherwise willing to provide, all so that Metra can further delay paying fair market value.

The critical role compensation will play in this proceeding cannot be ignored for two reasons. First, Metra's refusal to pay fair market value for access to Union Pacific's lines strikes at the heart of the public interest analysis. Second, compensation is required under statute to be paid or adequately secured prior to access.

Section 11102(a) is one of the Board's more extraordinary authorities insofar as it allows the Board to order the use of one railroad's property by another entity. As the ICC explained soon after this provision was adopted,

[W]hen it provided that in the public interest we could require a carrier to give up a use of its terminal facilities to another carrier, Congress was faced with the necessity of not only satisfying the constitutional prohibition that private property shall not be taken for public use without just compensation, but in addition had to provide for a judicial review of the question of compensation at the option of the owning carrier. However, Congress did impose on us the duty in the first instance, to fix the just and reasonable terms and compensation, for any use that we may require, "on the principle controlling compensation in condemnation proceedings."

Hastings Com. Club et al. v. Chi., Milwaukee & St. Paul Ry., et al., 107 I.C.C. 208, 212 (1926). The public interest standard therefore must consider the totality of the circumstances, and the costs, compensation, and financial consequences of an agency order forcing access are factors to be considered. In *Hastings*, 107 I.C.C. at 215–16, the ICC reversed its prior determination that forced access was in the public interest after having a more complete record that included consideration of "the compensation on the principles controlling in condemnation proceedings." The level of

compensation under condemnation principles that would be owed to the Milwaukee “would be substantial,” in fact far outweighing the earnings ability of the Burlington based on carloads. *Id.* at 215. “Fairness demands that the whole question of ‘public interest’” be considered, and the compensation and finances involved dictated in that case that the public interest was not met. *Id.* at 216.

The facts of this case elevate the central importance of fair market value and Metra’s willingness to pay in the public interest inquiry. While the facts of this case still need to be adduced, it has been publicly reported that “Metra . . . will see large budget gaps in 2026 without additional funding relief.”¹ “Large” is an understatement: those agencies are collectively facing a “\$770 million fiscal cliff,” the possibility of which is being described as a “doomsday scenario.”² And if that additional funding does not come, Metra knows it cannot “cut [its] way out of such a large budget gap, . . . [or] solve it with higher fares.”³ It is not in the public interest to force Union Pacific, its investors, or its freight customers to cross-subsidize Metra’s operations.⁴ That principle cannot be challenged. Nor can Metra demand that the Board declare it is in the public interest to exercise this extraordinary remedy without

¹ Metra, 2025 Operating Budget & Capital Program 4, <https://bit.ly/42ag4o0> (message from CEO James M. Derwinski).

² Press Release, Reg’l Transp. Auth., Transit Agencies Sound the Alarm on Looming Transit Cuts (Mar. 21, 2025), <https://bit.ly/3FTp1dP>.

³ Metra, 2025 Operating Budget & Capital Program 4.

⁴ Metra simultaneously filed an action in federal court, in which it alleged that the parties are at an impasse over the appropriate level of compensation and claiming that the compensation sought by Union Pacific is “economically unfeasible to Metra.” Compl. ¶ 105, *Commuter Rail Div. of the Reg’l Transp. Auth. v. Union Pac. R.R.*, No. 25-cv-2439 (N.D. Ill. filed Mar. 7, 2025).

knowing that Metra can pay Union Pacific what it is entitled to under statute and the Constitution. When property is appropriated for public use, the property owner is not supposed to bear the risk of not being paid.

Metra is incorrect when it claims that there is no requirement that compensation be decided before trackage rights usage may commence. The text of the statute is plain: “The compensation shall be paid or adequately secured **before** a rail carrier may begin to use the facilities of another rail carrier under this section.” 49 U.S.C. § 11102(a) (emphasis added). Metra nonetheless argues that “Section 11102 contemplates a sequence where access is first sought and granted” before any Board-ordered compensation and that “[t]here is no requirement that compensation be decided before trackage rights usage may commence.” Appl. 25. Metra does not explain how this supposed sequence of events squares with the plain meaning of the statutory text.

Long-standing ICC precedent confirms payment or security of compensation therefore must come **prior** to any use. For example, in the *Hastings Commercial* case, the ICC considered a request for terminal access under what was then section 3(4) of the Interstate Commerce Act. The ICC concluded that the requested use of terminal facilities was in the public interest and practicable, but specifically held that “[n]o order will be entered at this time” while the carriers attempted to agree upon the terms and compensation for use. 69 I.C.C. at 496. The carriers were unable to agree and the case was set for further hearing to determine just and reasonable compensation, where the ICC ultimately reversed its public interest finding. No

order was ever entered allowing access during the pendency of the proceeding while the ICC considered the issue of compensation. *See* 107 I.C.C. 208 (1926).

The ICC continued to adhere to this understanding of compensation being condition precedent to use in the years following. For example, in *Use by Erie of Niagara Junction Ry. Terminals*, 269 I.C.C. 493 (1947), the ICC entered an order under what was then section 3(5) of the Interstate Commerce Act. But that order was not an unqualified right to use the facilities. Rather, it was “conditioned ... that the enjoyment of the use of said facilities therein prescribed shall be subject to the right of the Niagara Junction to require that the compensation for such use shall be paid or shall be adequately secured before the use under that order shall be commenced.” *Id.* at 502–03; *see also CSX—Control—Chessie*, 363 I.C.C. 518, 604 (1980) (“[T]he enjoyment of the use of the involved terminal facilities shall be subject to the right of Consolidated Rail Corporation to require that the compensation paid for the use shall be adequately secured to it *before the use shall be commenced.*” (emphasis added)).

The statute provides an alternative: “adequate[] secur[ity]” of compensation. Once just compensation is adequately secured by means of a bond, deposit, or pledge of other property, then and only then may an applicant enjoy use of terminal facilities prior to payment of said compensation. This statutory language, originally added to the U.S. Code as part of the Transportation Act of 1920, § 405, Pub. L. No. 66-152, 66 Stat. 456, 480, was not arbitrary. Rather, “adequately secured” is a term of art referencing a fundamental tenet of Takings Clause jurisprudence. *See, e.g., Chi.,*

Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 235, 241 (1897) (“[T]he fourteenth amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.”); see also *Ex parte Reynolds*, 12 S.W. 570, 572 (Ark. 1889) (“Security in such cases has but its common meaning, of something given or deposited to make certain the fulfillment of an obligation, and it necessarily precedes the ripening of the obligation.”).

Metra has not indicated that it is willing or able to secure a litigation bond to fully compensate Union Pacific for the requested fair market value of access, with interest, for the long duration of any compensation litigation. What is decidedly not adequate security, however, is an agency’s promise to do what it is required by statute to do. The agency’s more recent precedent to this effect⁵ is entitled to no weight in a *Loper Bright* era, and appears to derive from some ill-advised language in a 1984 D.C. Circuit opinion. See *Southern Pacific Transport Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984). In *Southern Pacific*, the D.C. Circuit reviewed an ICC decision approving major consolidations after extensive hearings. One of several issues on appeal was the ICC’s grant, as part of the overall consolidation proceeding, of trackage rights over rail lines owned by the Atchison, Topeka & Santa Fe Railway Company (“ATSF”). In its decision approving the merger, the ICC made the trackage rights

⁵ See, e.g., *Union Pac. Corp., et al.—Control & Merger—S. Pac. Rail Corp., et al.*, 1 S.T.B. 233, 449 & n.215 (1996) (“We therefore pledge that, if BNSF and KCS cannot reach agreement respecting compensation terms, we will set appropriate terms under condemnation principles.”)

effective immediately and said in footnote that if the parties failed to agree on terms of compensation, it would “apply the principles for compensation in condemnation proceedings.” *Union Pac. Corp., Pac. Rail Sys. & Union Pac. R.R.—Control—Mo. Pac. Corp. & Mo. Pac. R.R.*, 366 I.C.C. 459, 576 n.114 (1982) (citing *Missouri-Kansas-Texas*, 198 I.C.C. 4 (1933)).

On appeal, the D.C. Circuit stated that the aforementioned footnote “fulfills the requirement of the term ‘adequately secured’ under 49 U.S.C. § 11103(a).” *S. Pac.*, 736 F.2d at 723. The court did not analyze the statutory language, nor did it address the fact that that was a major departure from prior agency practice. More baffling is the fact that the ICC itself did not even endorse that view of the statute. In its brief to the court, the ICC argued what any common sense reading of “adequate security” would imply: that the statute had in fact been met because “the new UP system offered to post a bond to secure the use of the track,” which “fulfills the requirement of the term ‘adequately secured’ under Section 11103(a).” ICC Br. 61, *S. Pac. Transp. Co. v. ICC*, No. 82-2253 (D.C. Cir. Mar. 28, 1983) (emphasis added).

It is simply not sufficient that the Board promise to order compensation at a later date. This conclusion is evident from the face of the statute. If the two carriers cannot agree on terms, the Board is required by statute to “establish conditions and compensation for use of the facilities under the principle controlling compensation in condemnation proceedings” and that compensation “shall be paid or adequately secured before” such use. 49 U.S.C. § 11102(a) (emphasis added). No other interpretation is reasonable and would survive review in a *Loper Bright* era.

In the end, the Board's authority to issue the extraordinary relief of a forced terminal access order over Union Pacific's property is discretionary. Congress stated that the agency "may" issue such an order, not "shall." The discretionary nature of this extraordinary remedy permits the agency to consider all the facts and circumstances. In this case, there is simply no reason for the agency to wade through complicated factual and legal issues of first impression. That daunting undertaking on an unnecessarily accelerated schedule is a waste of limited Board resources because Union Pacific has been clear that Metra can continue to provide commuter rail services if it agrees to pay the fair market value for that access, and has offered to arbitrate that issue.

Union Pacific is confident that at the end of an inquiry into its jurisdiction, the scope of relief available, and the public interest standard, the Board will conclude it is not appropriate to order access to Union Pacific lines in this case, which would then obligate Metra to compensate Union Pacific under condemnation principles. But in any event, Metra cannot access Union Pacific's lines pursuant to such order without compensating Union Pacific beforehand. The Congressional mandate is crystal clear: "The compensation shall be paid or adequately secured ***before*** a rail carrier may begin to use the facilities of another rail carrier under this section." 49 U.S.C. § 11102(a) (emphasis added).

/s/ Raymond A. Atkins
Raymond A. Atkins
Allison C. Davis
Stephen S. Laudone
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
ratkins@sidley.com
allison.davis@sidley.com

*Attorneys for Union Pacific
Railroad Company*

Dated: April 18, 2025

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of April 2025, the foregoing Reply of Union Pacific Railroad Company to Application for Terminal Trackage Rights was served by first-class mail or more expeditious means on all parties of record in this proceeding.

/s/ Stephen S. Laudone

Stephen S. Laudone