

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 528 (Sub-No. 1)

PUBLICATION REQUIREMENTS FOR AGRICULTURAL PRODUCTS

Docket No. EP 665 (Sub-No. 1)

RAIL TRANSPORTATION OF GRAIN RATE REGULATION REVIEW

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Union Pacific Railroad Company (“UP”) submits these comments in response to the Board’s Notice of Proposed Rulemaking and Policy Statement decided on December 28, 2016 (the “Notice”). In general, UP supports the proposals and statements in the Notice. The proposed addition to 49 C.F.R. § 1300.5 is consistent with existing law, and the Notice provides some clarification on the issues of claim aggregation and standing. Three areas require additional clarification, however. The Board should: (1) provide guidance on the definition of “any person” under § 1300.5; (2) address how claim aggregation will affect the limit on relief in rate cases brought under the Three-Benchmark methodology; and, (3) confirm that third-party discovery will be available to defendants if the complainants who experience no direct damage in any given case do not possess relevant information to issues in the proceeding.

I. Does “Any Person” Mean Certain Persons or Any Person?

The proposed text of §1300.5 appears to be unambiguous in requiring Class I rail carriers to make certain information available online to literally any person. However, the text of the Notice potentially introduces an ambiguity in requiring this information to be made available, “to

anyone, regardless of whether a person is a current or potential customer or receiver of a railroad.” Notice at 5. The proposed rule and comment in the Notice are silent on whether “anyone” includes brokers, trade associations, law firms, or other carriers.

UP requests that the Board clarify whether “any person” as used in § 1300.5 is limited to current or potential rail customers or rail receivers. If “any person” is not limited in this way, then UP requests clarification and confirmation that the information in § 1300.5 must be made available to anyone.

UP does not take a position on the appropriate definition of “any person.” Specifically, we are not asking the Board to include or exclude other carriers from the proposed rule. We raise this issue only because a clear definition is required to ensure that all Class I railroads are placed on a level playing field and make the information available to the persons that the rule is intended to cover. Without a clear definition, railroads are likely to draw varying lines about who gets access causing confusion and frustration among stakeholders.

II. The Limit on Relief Must Apply to Total Relief Sought Among All Claims

In light of the clarifications on standing and claim aggregation provided in the Notice, the Board must also address how these clarifications will affect rate complaints brought under Three-Benchmark methodology. The issue is that complainants can invoke the Three-Benchmark methodology only when the relief is limited to \$4 million or less (indexed for inflation) over a five-year period. *Rate Regulation Reforms*, EP 715 (STB served July 18, 2013) at 21-22. The limit on relief applies to reparations, rate prescriptions, or a combination of the two, and any rate prescription terminates once the \$4 million limit is reached. *Id.*

By clarifying that a complainant that did not suffer direct damage, *i.e.*, a complainant that did not pay the rail rate, may bring a rate complaint, the Notice introduces uncertainty into how the limit on relief will apply. If a grain producer, trade association, or attorney general who

claims to represent the interests of grain shippers but does not pay transportation charges brings a complaint and obtains a rate prescription, that rate prescription should reduce any reparations or prescription sought by other complainants for the subject rate over the five-year time period regardless of whether the reparation claim is aggregated or brought as a separate claim.¹

Otherwise, a complainant without direct damage can bring a Three-Benchmark complaint to obtain a rate prescription while the actual reduction in revenue as a result of the prescription exceeds the limit, as others who actually pay the freight take advantage of the rate prescription. Confirmation would assist complainants and railroads in future cases by removing any uncertainty. While the Notice did not address what parties are entitled to reparations, if a grain producer in this example shipped under prescribed rates that should count towards the relief available to a non-complainant who later seeks reparations under the challenged rates.²

By avoiding the issue of reparations, the Notice introduced another uncertainty as to how long rate relief granted in a rate complaint brought by a party who does not suffer direct damages will apply. Accordingly, the final decision should clarify this point about duration so that potential complainants and carriers have the same understanding of how the rules apply.

III. Third-Party Discovery is Necessary in Complaints by Parties Who Do Not Experience Direct Damage

When complainants who do not sustain direct damages have standing to file complaint, third-party discovery may be crucial to the defendants' ability to defend and to the Board having

¹ "The limit on relief will apply to the difference between the challenged rate and the maximum lawful rate, whether in the form of reparations, a rate prescription, or a combination of the two," *Simplified Standards*, EP 646 (Sub-No. 1) (STB served Sep. 4, 2007) at 28. *See also Rate Regulation Reforms*, EP 715 (STB served July 18, 2013) at 11-12.

² Three-Benchmark complaints are not limited to challenging a single rate. US Magnesium won rate prescription of two different rates in *US Magnesium, L.L.C. v. Union Pacific Railroad Company*, NOR 42114 (STB served Jan. 28, 2010). Likewise, a complainant without direct damage could complain about several rates in a region.

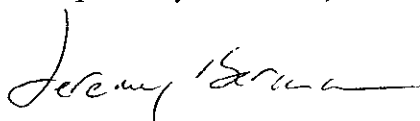
a complete record on which to base its findings. The Board should clarify that third-party discovery will be readily available if the complainant does not have possession, custody or control of information relevant to issues in the proceeding. In a rate case, this could include information about competition. In an unreasonable practice complaint, this could include information about the impact of the challenged rule or the practices of other railroads. Such a clarification is necessary because it is very likely that complainants with no direct damages will not possess information about the rail transportation at issue. Federal and state courts routinely allow third-party discovery even though their standing to bring a lawsuit is generally higher than what is permitted under 49 U.S.C. § 11701(b). Yet under the Board's rules, obtaining discovery from trade association members, who are technically third parties but are the real parties in interest, is cumbersome and costly. As UP experienced recently in *North America Freight Car Association, et al. v. Union Pacific*, NOR 42144, the issue of whether and to what extent third-party discovery is available has required protracted motions practice and multiple hearings and much of the material from third parties has yet to be produced.³ A statement from the Board in this proceeding that third-party discovery is allowed would expedite rate cases because the parties would not be forced to consume the Board's time and resources arguing the issue.

³ Likewise, utilities, whose trade association challenged coal dust loading rules on their behalf, objected strenuously to the very concept that they could be required to produce relevant information even though it was clear the association parties lacked relevant information. *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, FD 35557 (STB served Feb. 27, 2012).

CONCLUSION

The Board should: (1) provide clear guidance on the definition of “any person” under § 1300.5; (2) address how claim aggregation will affect the limit on relief in rate cases brought under the Three-Benchmark methodology; and (3) confirm that third-party discovery is available when the complainants do not possess information relevant to issues in the proceeding.

Respectfully submitted,



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