

BEFORE THE
SURFACE TRANSPORTATION BOARD

HASA, INC.	248426
v.	STB Docket No. NOR 42165
UNION PACIFIC RAILROAD COMPANY	ENTERED Office of Proceedings September 3, 2019 Part of Public Record

UNION PACIFIC RAILROAD COMPANY'S
REPLY TO HASA, INC.'s *EX PARTE* APPLICATION FOR SECTION
11123(a) SERVICE ORDER AND SECTION 11701 INVESTIGATION AND
PETITION FOR TEMPORARY INJUNCTION

Rhonda S. Ferguson
James B. Boles
Jeremy M. Berman
Danielle E. Bode
UNION PACIFIC RAILROAD CO.
1400 Douglas Street
Omaha, NE 68179

Raymond A. Atkins
Matthew J. Warren
Richard E. Young
Morgan B. Lindsay
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

Counsel for Union Pacific Railroad Company

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I. SUMMARY OF FACTS AND LAW

As the party seeking the most dramatic array of remedies the Board has been asked to impose in recent years—from an emergency service order to a § 11701 investigation to an *ex parte* injunction—one might assume that Hasa, Inc. is motivated by a compelling set of facts that justifies such sweeping agency intervention. And Hasa does its best to paint such a picture. It claims Board action is necessary to avert “a public health crisis of enormous proportions.”¹ But Hasa can only make that claim by materially misstating critical facts and by failing to mention others. A complete and accurate view of the facts shows that Hasa has no basis for invoking the extraordinary Board remedies that it now seeks.

First, Hasa asserts that Union Pacific’s plan to serve it with three-day-per-week service rather than five-day-per-week service will plainly be insufficient for its needs. But Hasa never mentions that over the past three years it has never once received more than 16 cars per week. The idea that such volumes require daily service rather than three-day-a-week service is unreasonable on its face. It is particularly unreasonable when Hasa typically receives far *fewer* than 16 cars per week. These volumes plainly are not commensurate with daily service (particularly since Hasa has 10 storage spots at its Saugus facility).

Indeed, Hasa’s representations about its daily processing needs at Saugus are plainly false. It claims that during its peak summer season “the plant consumes approximately 1.25-1.5 railcars per day of chlorine, and 2.5-3 cars per day of caustic soda.” Pet., V.S. Brink ¶ 15. If those numbers were accurate, then over a 22-business-day month, Hasa would consume 27 to 33 cars of chlorine and 55 to 66 cars of caustic soda. But it has never come close to those volumes: In May 2019 it received [REDACTED] chlorine cars and [REDACTED] caustic soda cars; in June it received [REDACTED] chlorine

¹ *Ex Parte* Application for Section 11123(a) Service Order and Section 11701 Investigation / Petition for Temporary Injunction (“Petition” or “Pet.”), at 16.

cars and [REDACTED] caustic soda cars, and in July it received [REDACTED] chlorine cars and [REDACTED] caustic soda cars (all during Hasa’s season of peak demand).² *See infra* at II.A & Table 1. Hasa’s entire Petition is thus based on a fundamental misrepresentation about its incoming volumes. The misrepresentation about average caustic soda volumes is particularly egregious—Hasa plainly does not receive even close to 3 cars per day of caustic soda.³ To date, Hasa has never explained why Monday-Wednesday-Friday service is not sufficient to deliver these low incoming volumes.

Second, Hasa neglects to mention that **100% of traffic to the Saugus plant is governed by rail transportation contracts**. This fact categorically removes all the traffic at issue from the Board’s jurisdiction and precludes the Board from considering any of the relief Hasa seeks—whether an emergency service order, an injunction, or an order to mediate. Hasa’s assertion that the Board has jurisdiction to issue a § 11123 emergency service order for this contract traffic is predicated on a misleading partial quotation from Ex Parte No. 628, *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 976 (1998). The complete text at issue clearly states that the Board ordinarily cannot “directly regulate transportation that is provided

² Information in single braces (*e.g.*, “{ }”) is designated Confidential pursuant to the proposed protective order that Union Pacific is filing today.

³ These repeated misstatements should be of particular concern to the Board because of Hasa’s extraordinary demand that the Board act on an *ex parte* basis. Parties asking the agency to act without hearing from the other party have a heightened duty of candor to the agency. *See Campbell v. Rice*, 408 F.3d 1166, 1175 (9th Cir. 2005) (Ferguson, J., dissenting) (“[I]n an *ex parte* proceeding, a lawyer shall inform the tribunal of *all material facts known to the lawyer* which will enable the tribunal to make an informed decision, whether or not the facts are adverse.”) (emphasis in original); *In re McAteer*, 183 A.3d 1133 (R.I. 2018) (“The Rules of Professional Conduct do not allow an attorney to take advantage of an absent party by being less than truthful with a court. Section (d) of Rule 3.3 provides: ‘In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.’”).

under such a [§ 10709] contract,” and that it only reserved the right to act in an emergency “where *no* transportation is being provided,” *id.* (emphasis added). Even if that narrow, no-service exception were a permissible interpretation of the agency’s jurisdiction, it plainly does not apply here.

Third, Hasa’s claim that emergency action is needed because Union Pacific “has chosen to abruptly cease its required daily scheduled service, without warning or notice” (Pet. at 2) is belied by its own Petition. Union Pacific has been discussing this service change with Hasa for approximately two months. The record shows that Union Pacific had multiple discussions and communications with Hasa over the past two months, including one with the assistance of OPAGAC. In the course of those communications, Union Pacific shared the data that it used to arrive at the new service plan, and explained why three-times-a-week service was more than sufficient to meet Hasa’s needs. Union Pacific asked Hasa if it could provide any contrary data analysis or explanation for why three-times-a-week service would not be sufficient. Hasa provided nothing, beyond reiterations that it had been switched more than three times per week in the past. Its Petition continues to provide no support for its claim that three-times-a-week service is not acceptable to serve Hasa’s maximum volume of 16 cars per week.

Hasa made a number of other misstatements and misleading claims in its Petition. Hasa claims that daily service is essential to prevent the degradation of its finished sodium hypochlorite product, but fails to mention that all of its outbound shipments are made by truck. (Union Pacific only hauls empty tank cars from Saugus.) Whether Union Pacific provides inbound switches to Saugus on Tuesdays and Thursdays has no impact on Hasa’s ability to ship out product via truck on any day of the week. And while many facilities with a volume and storage capacity similar to Saugus receive service once a week, Union Pacific has made

clear to Hasa for nearly two months that Union Pacific is only planning to move to three switches per week.

In short, Hasa is petitioning the Board to take sweeping regulatory action for traffic that is not within its jurisdiction, on the basis of misrepresentations about the notice Union Pacific provided to Saugus and Hasa’s unsupported need for daily service. The “emergency” of which Hasa complains is its receipt of three regular switches per week at a facility that typically receives less than seven cars per week and that has never received more than 16 cars per week over the past three years.⁴ This claim cannot support the “extraordinary remedy” of an emergency service order⁵ or the “extraordinary and drastic remedy” of a preliminary injunction.⁶

Section II sets forth the background to this dispute and summarizes facts that are set forth in the Verified Statements of Kari Kirchhoefer and Michael Matya. **Section III** explains that, setting all legal theories aside, Union Pacific’s three-day-a-week service plan is eminently reasonable and appropriate for the Saugus facility. **Section IV** describes the Board’s complete lack of jurisdiction over the transportation at issue, which is all governed by rail transportation contracts. **Section V** then discusses Hasa’s failure to establish the required elements for any of the relief it seeks, whether it be an emergency service order, an injunction, or an “investigation.”

⁴ 345 cars over the past 12 months divided by 52 weeks equates to an average of 6.63 cars per week.

⁵ *Canexus Chemicals Canada L.P. v. BNSF Ry.—Emergency Service Order*, NOR 42131, at 5 (Oct. 14, 2011) (“The Board recognizes that a § 11123 emergency service order is an extraordinary remedy and does not issue such an order lightly.”).

⁶ *Muzarek v. Armstrong*, 520 U.S. 968, 972 (1997) (“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.”) (emphasis in original); see *B.P. Amoco v. Norfolk So. Ry. Co.*, STB Docket No. 42093, at 4 (June 6, 2005) (party seeking injunction “carries the burden of persuasion on all of the elements required for [such] extraordinary relief”).

II. BACKGROUND

A. Hasa's Saugus Location Receives Less Than Seven Cars Per Week on Average and 16 Per Week at Peak.

This dispute involves a Hasa facility in Saugus, California, which receives small volumes of chemical deliveries from multiple sources to make water treatment products. *See* Kirchhoefer V.S. at 1-2. Hasa's website emphasizes its recreational water products for pool and spa water treatment. The website provides information about "pool tips and product updates" and tips for "Keeping Your Pool Beautiful."⁷ Indeed, Hasa's website is called "hasapool.com."⁸ Even under its "Industrial Products" tab, three out of the seven products listed are for pools or spas rather than public drinking water supply.⁹

To manufacture its products, Hasa receives deliveries of chlorine, hydrochloric acid, and caustic soda. *See* Kirchhoefer V.S. at 1. Hasa states that it receives caustic soda and hydrochloric acid by both truck and rail, but that it exclusively receives chlorine by rail. *See* Pet., Brink V.S. ¶ 11. The Saugus facility has a ten-car spot on one track, with three spots dedicated for chlorine unloading. *See id.* at ¶ 15. Hasa typically receives more chlorine carloads than hydrochloric acid or caustic soda carloads. For example, from April through August 2019, Hasa received [REDACTED] carloads of chlorine, [REDACTED] carloads of hydrochloric acid, and [REDACTED] carloads of caustic soda. Ex. 2 at Pivot tab.¹⁰ Since January 2019, the *most* of each commodity Hasa received *per month* was [REDACTED] carloads of chlorine, [REDACTED] carloads of hydrochloric acid, and [REDACTED] carloads of caustic soda. *Id.* During that same time

⁷ *See* <https://hasapool.com/>.

⁸ *Id.* (emphasis added).

⁹ *Id.*

¹⁰ Exhibits 1 and 2 to this Reply are Excel spreadsheets detailing information on shipments to the Saugus facility that are being produced to the Board and to Hasa in native format. These files have been designated Confidential under the requested protective order that Union Pacific filed on September 3, 2019.

period, the least Hasa received per month was [REDACTED] carloads of chlorine, [REDACTED] carloads of hydrochloric acid, and [REDACTED] carload of caustic soda. *Id.* On a weekly basis over the past three years, Hasa has never received more than 16 cars per week (which it received in one week during 2018). In 2019, Hasa has not received more than 12 cars in a single week.

No matter the season, the Saugus facility receives a low volume of deliveries per month.¹¹ Over the past 12 months (August 2018 - July 2019), Hasa's facility has received a total of 356 cars, for a monthly average of approximately 30 cars. Ex. 2 at Pivot(2) tab. Since 2017, Hasa's highest monthly volume was 50 cars (in August 2018). *Id.* Hasa's lowest monthly volume was 12 cars (in February 2019). *Id.* During Hasa's busiest months over the last three years, Union Pacific has brought only two cars per switch on average. *Id.* at Pivot(3) tab. Similarly, often two or fewer cars are released per day by Hasa, on average. *Id.*

These historic volumes cannot be reconciled with the representations Hasa makes in its Petition. Hasa's witness claims that: "During the peak summer season, the plant consumes approximately 1.25-1.5 railcars per day of chlorine, and 2.5-3 cars per day of caustic soda." Pet., V.S. Brink ¶ 15. If those numbers were accurate, then over a 22-business-day month, Hasa would consume 27 to 33 cars of chlorine and 55 to 66 cars of caustic soda. In the past three years, Hasa has never come close to those volumes. The table below illustrates the inaccuracy of Hasa's volume claims by comparing them to Hasa's actual volumes in recent summer months:

¹¹ All traffic moving to Hasa's facility in 2019 is transported under rail transportation contracts pursuant to 49 U.S.C. § 10709. Kirchhoefer V.S. at 1.

Table 1
Comparison of Actual Volumes to Hasa's Claimed Volumes¹²

	Chlorine volume claimed by Hasa	Actual Chlorine volume	Caustic soda volume claimed by Hasa	Actual Caustic soda volume
May 2019 (22 business days)	27.5 to 33 cars	■ cars	55 to 66 cars	■ cars
June 2019 (20 business days)	25 to 30 cars	■ cars	50 to 60 cars	■ cars
July 2019 (22 business days)	27.5 to 33 cars	■ cars	55 to 66 cars	■ cars

Despite these consistently small volumes, Hasa has been served five days per week over recent years. *Matya V.S. at 3.* Historically, this daily service was handled by a local train serving multiple other customers, and thus daily switches made operational sense despite the low volumes received at Saugus. But in recent years, other local demand for rail service has decreased, highlighting the inefficiency of daily Saugus service. Indeed, Union Pacific crews have had no Hasa cars to switch on some switching days. *See Ex. 2 at Raw data tab.* For example, during the week of November 6, 2017, Hasa received cars only on Monday, Thursday, and Friday. *Id.* The next week, Hasa received cars only on Monday, Tuesday, and Thursday. *Id.* The following week, cars were switched only on Monday and Friday. *Id.* During some weeks in the summer months of June through August, cars would be delivered five days per week, but not always. *Id.* (see week of June 25, 2018, when cars were delivered Monday, Thursday, Friday). Again, the average switch is only two carloads. *Matya V.S. at 4.*

¹² Claimed volumes extrapolate the daily volumes Hasa alleges in *V.S. Brink* ¶ 15 over the course of a month (not including weekends or holidays). Actual volumes are drawn from Exhibit 2.

B. Union Pacific Carefully Developed a Monday-Wednesday-Friday Service Plan After Data Analysis and Consultation With Hasa.

Union Pacific recently evaluated its five-day-per-week service schedule for Hasa and initially determined it could fully serve Hasa's needs by delivering traffic one day per week. Based on average inbound volumes of less than seven cars per week, Saugus appeared to be a candidate for once-weekly service on a pure per-car basis. This plan, however, was only a preliminary determination and would never have been implemented without input from Union Pacific's marketing contact with Hasa and consultation with Hasa itself. Matya V.S. at 3-4.

Unfortunately, when local Union Pacific operating personnel informed their Hasa contacts that Union Pacific was *considering* a plan for once-weekly service, this gave Hasa the misimpression that Union Pacific was on the verge of actually *imposing* once-weekly service. Hasa first contacted its Union Pacific customer service representative Steven Haywood about its concern on the evening of July 8, 2019, and Mr. Haywood assured Hasa he would look into the matter. Union Pacific informed Hasa on July 10 and 11 that its feedback was under review and that one-day-per-week service would not be implemented in the coming weeks. Kirchhoefer V.S. at 3; Matya V.S. at 3-4. After considering Hasa's input, Union Pacific determined it could provide Hasa with service three days per week (Monday-Wednesday-Friday). Matya V.S. at 3-4.

On the morning of July 17, Union Pacific informed Hasa it would provide three-day-a-week service on a Monday-Wednesday-Friday schedule starting on July 29. Kirchhoefer V.S. at 4. After Hasa told Union Pacific it was not in favor of the three-day-a-week schedule change, Union Pacific sought to schedule a call with Hasa. Due to Hasa's unresponsiveness, that call was eventually scheduled for July 25. *Id.* Union Pacific provided Hasa with detailed data backing up its proposed service plan, including the following key points:

- Hasa's average daily car release rate has not been over 1.8 cars for a full month dating back to 2016.
- Hasa's average for chlorine car placement to release over the last 12 months is 10.8 days.
- Due to the low inbound volume to Saugus in 2019, Union Pacific is actually already spotting cars at the facility approximately 3 times per week on average.
- On average, Union Pacific delivers 2 cars each switch and has been 94% on-time or early in 2019.¹³

These data did not satisfy Hasa. Union Pacific asked Hasa to provide any countervailing data supporting its need for five-day-a-week service, but Hasa failed to produce any factual support for its claims that it would be adversely impacted by the service change. *Kirchhoefer V.S.* at 4-5. Hasa presented some simple data showing that it had historically received more than three switches per week in the past, but failed to produce anything showing that those historic volumes could not have been easily accommodated by less frequent service.

On July 29, Union Pacific learned that Hasa had reached out to the Board's Office of Public Assistance, Governmental Affairs and Compliance ("OPAGAC"), and Union Pacific confirmed with OPAGAC that it would participate in a conference call with Hasa and maintain service at five-days-per-week until the call occurred. *Kirchhoefer V.S.* at 5-6. During the August 6 conference call, Union Pacific committed to a separate discussion with Hasa regarding online tools for scheduling and requesting special switches. That separate discussion occurred on August 7. *Id.* at 6. During the August 7 call, Hasa requested a separate call to again go over Union Pacific's data. *Id.* On August 12, Union Pacific again explained the data supporting the conclusion that three-day-a-week service would meet Hasa's service needs. *Id.* Those data included Hasa's daily release rates, its inbound volume per

¹³ *Matya V.S.* at 4

switch, and its car hold rates. *Id.* In response, Hasa requested that Union Pacific again justify its position with historical data dating as far back as possible. *Id.*

On an August 16 follow-up call, Union Pacific explained that the older data still supported the sufficiency of three-day-a-week service. *Id.* Yet Hasa maintained its unsupported insistence on five-day-a-week service. *Id.* Although Hasa claims to have offered Union Pacific an “interim service proposal” during that August 16 call, no such proposal was actually made. *Id.*

C. Union Pacific’s Service Plan Allows Hasa to Request Additional Switches and to Specify Particular Cars for Delivery.

Effective August 12, Union Pacific informed Hasa that it would move to Monday-Wednesday-Friday service, while allowing Hasa to request additional switches at no charge on an interim basis. Kirchhoefer V.S. at 6. On Tuesday, August 13, Hasa requested a special switch, and Union Pacific delivered cars to capacity for no extra charge. *Id.* Hasa also requested a spot capacity change to 11 cars, but Union Pacific explained that it could not accommodate that change due to safety issues. *Id.* On Thursday, August 15, Hasa requested another special switch, and Union Pacific delivered to capacity at no extra charge. *Id.* Hasa similarly requested special switches on August 20 and 22.¹⁴

On August 13, Hasa asked if it could change the Saugus location from “spot-on-arrival” service to “order-in” service. *Id.* at 7. Union Pacific agreed to review Hasa’s request, and Union Pacific made the service change on August 23. *Id.* The change to order-in service will enable Hasa to specify exactly which cars it wishes delivered to Saugus first and allow Hasa to adjust to any unusual production needs or shipment patterns. Matya V.S. at 5-6.

¹⁴ Assuming the Board withdraws the relief it granted Hasa on an *ex parte* basis, Hasa will retain the ability to request special switches in the future at its own cost, and Union Pacific will accommodate those requests if capacity is available.

D. Hasa’s Claims About Its Importance to Drinking Water Supply Appear Exaggerated.

Union Pacific does not contest that the Saugus facility produces an important commodity for Hasa’s customers. While Union Pacific does not have complete visibility into the details of Hasa’s business, the public record suggests Hasa has overstated the importance of its product for “water treatment and public health.” Pet. at 6. Hasa lists various municipalities as customers, *see* Brink V.S. ¶ 7, but fails to disclose to the Board that many of these customers use Hasa’s products for municipal *swimming pools*, not drinking water supply.

E. Hasa’s Claims of “Retaliation” Are Baseless.

Finally, Hasa’s claims that Union Pacific has degraded service in “retaliation” for its complaints about Union Pacific’s proposed change in service are false. Hasa’s primary support for this claim is an assertion that Union Pacific’s service is “performed at various times of the day, from early morning and into the evening, causing Hasa significant business disruption and harm.” Pet. at 12. But the actual exhibit Hasa provides does not come close to supporting that assertion. Over the 41 days and delivery times tracked in Hasa’s Exhibit 5, Saugus was never served before 9:00 AM, and only twice was it served after 3:00 PM (and those times were 5:34 PM and 6:09 PM). Nor does the mere fact that Union Pacific accidentally delivered Hasa a hydrochloric acid car one day instead of a caustic soda car suggest retaliation (particularly since the email record includes Union Pacific’s immediate apology and describes its action to correct the error).

Moreover, Hasa’s claim that Union Pacific charged demurrage for the erroneous delivery is untrue and belied by the very exhibit that Hasa cites to support its claim.¹⁵ Indeed, three-days-a-week service could reduce Hasa’s potential

¹⁵ *Compare* Pet. at 12 (“[UP] has even sought to assess railcar demurrage charges on its own missed switches.”) *and* V.S. Brink ¶ 51 (“UP has even assessed demurrage charges on cars that Hasa ordered but which UP failed to deliver.

demurrage liability. Union Pacific's policy is to give double demurrage credits for days that it does not switch a customer—including scheduled no-switches.

Therefore, if Hasa were on three-day-a-week service and ordered a car after its scheduled Monday switch that would not be delivered until Wednesday, it would receive two credits for Tuesday—one of which would be applied to that car's Tuesday debit and another credit that could be used to offset other demurrage debits incurred during that month. V.S. Matya at 6.

III. THREE-DAY-A-WEEK SERVICE IS REASONABLE, AND HASA'S CLAIMS OTHERWISE ARE UNSUPPORTED.

Hasa does not satisfy the legal requirements for any of the extraordinary remedies it seeks—indeed, the traffic at issue is not even subject to the Board's jurisdiction. Hasa's claims also fail as a matter of simple common sense. In the past three years, Hasa has never received more than 16 cars in a single week. The idea that it needs to receive those cars in five weekly switches rather than three weekly switches defies logic. Over multiple conversations and communications with Union Pacific over the past two months, Hasa has proclaimed that Monday-Wednesday-Friday service will result in disaster, and its Petition asserts three-day-a-week service will “devastat[e] Hasa commercially” and “endanger[] water safety and public health in Southern California.” Pet. at 2. But Hasa has never explained how that could possibly be true in light of the volumes at issue, and its Petition does nothing to fill this gap.

Exhibit 6 contains communications with UP reflecting some of these problems.”), *with* Pet., Ex. 6 at 5 (8/13/19 UP email stating that “In regards to demurrage, we will provide credits for any unfilled capacity. The balance is showing below \$0 for the month.”). Union Pacific notes that—while as of August 13 Hasa had accumulated \$0 demurrage for August and had received credits for Union Pacific's service mistake—by month's end Hasa had accumulated a small amount of demurrage based on other cars.

Hasa provides the Board with no data for why five-day-a-week-service is essential to its operations. Indeed, the only numbers Hasa provides in an attempt to support its claims are plainly unreliable. As demonstrated above in section II.A, Hasa's assertion that it consumes "1.25-1.5 railcars per day of chlorine, and 2.5-3 cars per day of caustic soda" (Pet., Brink V.S. ¶ 15) during peak periods is completely inconsistent with its actual volumes.

In lieu of data, Hasa makes sweeping, conclusory assertions regarding its production needs, storage capabilities, and potential product degradation. None of these assertions supports the necessity of five-day-a-week service. For example, Hasa claims it "cannot produce sodium hypochlorite in the quantities that its customers require" without "*constant* UP deliveries." Pet. at 7 (emphasis added). But Hasa has never received "constant" deliveries. *See supra* II.A (explaining that Hasa has never received more than 16 cars in a week). Indeed, there is no reason to conclude that Hasa would "run out of" its various raw materials with a Monday-Wednesday-Friday schedule because Hasa has historically received carloads only three days per week in many of the weeks since 2017 (and, in some weeks, only two days per week). *See* Ex. 2 at Raw data tab.

Nor does the fact that Hasa receives three different products at Saugus make Union Pacific's service plan inappropriate. As detailed above, Union Pacific has agreed to Hasa's recent request to move to "order-in" service. This means that, in instances where Union Pacific has multiple Hasa cars ready for delivery, but Hasa wants one product to be delivered first, Hasa will have the ability to pick and choose which cars it wants first. Hasa has not identified any circumstances in which Monday-Wednesday-Friday order-in service would prejudice Hasa's production.

Hasa also asserts it has "limited storage capacity and capabilities." Pet. at 7-8. But Hasa has 10 storage spots, which is ample storage in light of its typical weekly volume of less than 7 cars and maximum historical volume of 16 cars in a

week. Hasa fails to provide any serious explanation for why three-day-a-week service would strain its storage capacity.

Hasa's claim of product degradation appears to be a red herring. Even assuming that sodium hypochlorite "begins degrading immediately after manufacture," V.S. Brink ¶ 18, Union Pacific does not handle any outbound shipments of sodium hypochlorite. Hasa's sodium hypochlorite volumes are shipped by truck. Union Pacific's service schedule has no impact on Hasa's ability to truck product immediately after its manufacture.

Ultimately, there is no support for Hasa's apocalyptic claims that the entire population of the Los Angeles Basin will be without clean drinking water if Union Pacific provides three-day-a-week service. *See* Petition at 16, 25-27. Union Pacific has repeatedly explained the compelling data supporting three-day-a-week service for Hasa.¹⁶ The data indicate that, for the last three years, the Saugus facility has received, *at most*, 50 cars per month and 16 cars per week. Ex. 2 at Pivot(2) tab. For the last three years, during Hasa's *busiest* months, Union Pacific has brought only two cars per switch on average. *Id.* at Pivot(3) tab. Similarly, often fewer than two cars are released by Hasa, on average. *Id.* At over 90% on-time performance, much higher inbound traffic numbers and higher release rates are needed to justify a daily weekday service. *See* Ex. 1 at "Cars spotted per week" tab.

Hasa has not challenged Union Pacific's data or reasoning other than taking issue with a purported "simple, single-factor data approach that averages daily release rates." Pet. at 10. Hasa admits it has done only a "limited review of UP's

¹⁶ Hasa's suggestion that Union Pacific might reduce Hasa's service to "one day" per week has no factual basis. *See* Petition at 3. As discussed *supra*, Union Pacific initially considered one-day-per-week service (a level that is appropriate for many customers with Hasa's volumes and storage capacity). After consultation with Hasa, Union Pacific determined that three-days-per-week was a more appropriate level of service. Matya V.S. at 3-4.

data” but asserts the data are “mathematically defective” because they miscalculate averages, “ignore[] the inherent fluctuations in Hasa’s business,” and are “far too simplistic.” Pet. at 11. All of these assertions are wrong. As Michael Matya explains in his Verified Statement, Union Pacific’s analysis was careful, detailed, and took into account, among other things, the seasonal nature of Hasa’s business. Matya V.S. at 3-5.

Union Pacific has proposed an eminently reasonable, data-supported service change. Hasa has produced no evidence to support its claims of dire outcomes for itself and the State of California. Even if the Board had both unlimited jurisdiction and the inclination to use that unlimited jurisdiction for regulating routine service schedule changes, the Board would have no reason to second-guess this particular Union Pacific service decision. But there is no need even to consider this strawman, because the Board simply lacks the jurisdiction or statutory authority to grant any of the relief Hasa seeks. Nothing in the Interstate Commerce Act allows the Board to regulate contract traffic or to issue emergency service orders or injunctions for any group of traffic in a factual scenario like the present one.

IV. UNION PACIFIC’S SERVICE PLAN FOR THIS TRAFFIC IS CATEGORICALLY BEYOND THE BOARD’S JURISDICTION, BECAUSE ALL THE TRAFFIC IS GOVERNED BY TRANSPORTATION CONTRACTS.

Because all the traffic at issue is outside the Board’s jurisdiction, none of Hasa’s claims can make it past the starting gate. As detailed in the Verified Statement of Kari Kirchhoefer, every carload that Union Pacific has transported to Saugus in 2019 moved under a rail transportation contract, and Union Pacific continues to have active transportation contracts in effect with Hasa’s suppliers. See V.S. Kirchhoefer at 1. The Board does not have statutory jurisdiction to issue an injunction or emergency service order to block a change to the service schedule for traffic moving under Section 10709 transportation contracts.

“Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board’s jurisdiction.”¹⁷ The Board’s lack of jurisdiction over contract traffic is “well established”¹⁸ and “well settled.”¹⁹ The statute makes clear that it is not merely contract *rates* that are beyond the Board’s jurisdiction, but also any *service* governed by contract.²⁰ And the Board has held on multiple occasions that it has no jurisdiction to regulate the service of contract traffic.²¹ Simply put, when transportation is conducted pursuant to a rail transportation contract, the reasonableness of service provided by a carrier for that transportation is governed by the applicable contract, and not by the background statutory duties that the Board might enforce for movements in common carriage.²²

¹⁷ *Rail Transp. Contracts Under 49 U.S.C. 10709*, STB Ex Parte No. 676, at 2 (served Jan. 6, 2009).

¹⁸ *Omaha Pub. Power Dist. v. Union Pac. R.R. Co.*, STB Docket No. 42006, at 2 (served Oct. 17, 1997) (“*Omaha Power*”).

¹⁹ *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, STB Docket No. 42144, at 4 (served Dec. 21, 2015).

²⁰ See § 10709(b) (“A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.”); § 10709(c)(1) (“A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part . . .”).

²¹ See, e.g., *United States Rail Service Issues*, STB Ex Parte No. 724, at 7 (served Dec. 30, 2014) (“Section 10709 states that transportation provided under private contract is not subject to the Board’s governing statute; parties are not subject to statutory duties with respect to contract service; and the ‘exclusive remedy’ for breach of contract is in a court of competent jurisdiction.”); *Union Pac. R.R. Co.—Petition for Declaratory Order*, STB Docket No. 35021, at 2 (served May 16, 2007) (“However, that holding does not apply to any traffic handled under rail transportation contracts, because under 49 U.S.C. § 10709 we have no authority to regulate rail rates and *services* that are governed by a contract.”) (emphasis added); *Rail Fuel Surcharges*, STB Ex Parte No. 661, at 13 (served Jan. 26, 2007) (“Under 49 U.S.C. 10709, we have no authority to regulate rates and *services* that are governed by a contract.”) (emphasis added).

²² See *H.B. Fuller Co. v. S. Pac. Transp. Co.*, STB Docket No. 41510, at 3 (served Aug. 22, 1997) (“*H.B. Fuller*”) (complainant brought an unreasonable practice claim

Hasa alleges that the Board has authority to issue emergency service orders for contract traffic, selectively quoting from the 1998 decision adopting the Part 1146 rules for emergency service orders.²³ But the text surrounding that partial quotation shows that Hasa has clearly misstated the Board’s holding:

As for transportation that is provided under a rail transportation contract, AAR is correct that we cannot enforce, interpret, or disturb the contracts themselves, nor can we directly regulate transportation that is provided under such a contract. 49 U.S.C. 10709(b), (c). *However, where no transportation is being provided, we do not believe that the mere existence of a contract precludes us from providing for temporary emergency service, upon a proper showing, so that traffic can move while any contract-related issues are being litigated in the courts.*

Ex Parte No. 628, *Expedited Relief from Service Inadequacies*, 3 S.T.B. at 976 (emphasis added). The emphasized sections Hasa omitted from its quotation make clear that the Board was addressing a narrow hypothetical situation “where *no* transportation is being provided” and that only “upon a proper showing,” could the Board act to ensure “that traffic can move.” *Id.* (emphasis added). And when the Board recognized that exception, it specifically reaffirmed that it could not “directly regulate transportation that is provided under . . . a contract.” *Id.* Hasa has not shown that “no transportation is being provided” or that the Board needs to act “so that traffic can move.” Rather, Hasa is asking the Board directly to regulate the

and the Board dismissed it for lack of jurisdiction “because the record indicates that all shipments in issue moved under the contract or its predecessors”).

²³ See Pet. at 15 (“[E]ven service provided under a § 10709 contract is subject to a directed service order: ‘[W]e do not believe that the mere existence of a contract precludes us from providing for temporary emergency service.’ *Expedited Relief from Service Inadequacies*, 3 S.T.B. 968, 976 (1998).”).

contract traffic Hasa is receiving by mandating daily weekday service over thrice-weekly service. Such regulation is plainly barred by Section 10709(b).²⁴

V. EVEN ASSUMING BOARD JURISDICTION, HASA HAS ASSERTED NO GROUNDS THAT WOULD WARRANT RELIEF.

A. An Emergency Service Order Is Plainly Inappropriate.

Even if the Board had jurisdiction over the contract traffic moving to Hasa’s facility, Hasa has provided no evidence that Union Pacific’s service plan change for Hasa will “create[] an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States.”

49 U.S.C. § 11123. The Board has held that “a § 11123 emergency service order is an extraordinary remedy and does not issue such an order lightly.” *Canexus Chemicals Canada L.P. v. BNSF Ry.—Emergency Service Order*, STB Docket No. 42131, at 5 (served Oct. 14, 2011). Hasa cannot satisfy the exacting standards required for an emergency service order under Section 11123.

1. Hasa’s Desire for Daily Service Despite Its Minimal Volumes Is Not an “Emergency.”

Hasa has failed to meet the threshold requirement of Section 11123 – an actual emergency. The statute authorizes the Board to issue such service orders only when it finds “an emergency situation of such magnitude to have substantial adverse effects on shippers, or on rail service in a region of the United States.” 49 U.S.C. § 11123(a). “To meet the threshold jurisdictional test under Section 11123, [the Board] must find that ‘a shortage of equipment, congestion of traffic, or

²⁴ Indeed, the Board’s authority in *Expedited Relief from Service Inadequacies* to recognize even this limited exception from § 10709’s jurisdictional bar is dubious. Congress plainly provided that transportation under a transportation contract “shall not be subject to this part,” § 10709(c)(1), and the Board has no ability to claim jurisdiction that Congress cannot provide. The remedy for a railroad’s failure to provide adequate service under a contract is for the other party to that contract (or a third party beneficiary) to seek to enforce that contract in court. *Id.* § 10709(c)(2). The Board has no role in regulating contract traffic.

other emergency requiring immediate action exists in a section of the United States.” *St. Louis, S. W. Ry. Co.—Temporary Authority—Chicago, R.I. & Pac. R.R. Co.*, 360 I.C.C. 539, 544 (1979) (“*Temporary Authority Decision*”).

As detailed in section II, Hasa has no supportable claim to perpetual daily service at a facility with volumes that cannot justify that level of service. While Hasa makes broad claims about the importance of rail service to its business, Hasa fails to explain why it must have rail service five days a week when its average weekly volume is less than seven cars and its maximum weekly volume is 16 cars, or why any harm (let alone harm rising to the level of an emergency) would arise if it received cars on Monday, Wednesday, and Friday. The justification Hasa does provide is based on apparent exaggerations of its daily volume needs that are unsupported by the last three years of historical data. Delivering Hasa’s cars over three weekly switches rather than five weekly switches is not a “serious ongoing service disruption[]” justifying emergency action. *Expedited Relief from Service Inadequacies*, 3 S.T.B. at 974.

2. Emergency Service Orders May Not Be Issued to Resolve a Single Shipper’s Complaint.

Moreover, the language of Section 11123 shows that it does not empower the Board to issue emergency service orders catering to the specific service preferences of a single shipper or receiver. Rather, the statute authorizes the Board to issue such service orders only in emergency situations that “have substantial adverse effects on *shippers*, or on rail service *in a region of the United States*.” 49 U.S.C. § 11123(a) (emphases added). The statute “does not give [the Board] *carte blanche* to direct service simply because a party would prefer to be served one way rather than another; rather, Congress intended that the power be used sparingly and in a focused way.” *Joint Petition For a Further Service Order*, 3 S.T.B. 612, 616 (1998). Similarly, the courts have defined “emergencies” for purposes of Section 11123 as

“those situations where the common good or public interest is legislatively declared to be paramount to individual interests.” *United States v. S. Ry. Co.*, 364 F.2d 86, 94 n.21 (5th Cir. 1966); see *Daugherty Lumber Co. v. United States*, 141 F. Supp. 576, 581 (D. Or. 1956).²⁵ Hasa’s request for a service order, however, is based only on its individual preference for one type of service. That “shipper-by-shipper” approach has been flatly rejected by the Board as a basis for an emergency service order. See *Joint Petition For a Further Service Order*, 3 S.T.B at 619.²⁶

3. Hasa’s Request For Indefinite Relief Violates the Strict Time Limits of § 11123.

Moreover, Hasa appears to seek an order of indefinite duration. Rather than specify a particular time period for its “emergency service order,” Hasa vaguely describes the need for the parties to consult “over a reasonable period of time.” Pet. at 9. Indeed, Hasa states that it would take “at least months, if not years” to make modifications needed to adjust to thrice-weekly service – during which time, presumably, Hasa would desire the service order to remain in effect. *Id.* at 12. Section 11123, however, provides only for *temporary* relief – as reflected by the 30-day period it allows for a service order and a limitation of extensions to 240 days. 49 U.S.C. § 11123(a), (c)(1). Section 11123 is therefore “limited to addressing short-term emergencies on a temporary basis.” *Keokuk Junction Ry. Co.—Feeder Line*

²⁵ *Accord, Pend Oreille Valley R.R., Authority To Operate Over Tracks of C., M., & St. P. & Pac. R.R.*, 360 I.C.C. 636, 641 (1980).

²⁶ The Board is not powerless to address an individual shipper’s complaint about rail service that is within its jurisdiction. But the avenue for such individualized grievances is for the shipper to file a complaint alleging a particular violation of the Interstate Commerce Act. Emergency service orders are limited by statute to true emergencies with “substantial adverse effects” on multiple shippers or on regional rail service.

Acquisition—Line of Toledo Peoria and Western Ry. Corp. Between La Harpe and Hollis, IL, STB Finance Docket No. 34335, at 6 (served Oct. 28, 2004).²⁷

4. Hasa Does Not Meet the Threshold Regulatory Requirement of a Documented Service Deterioration “Over an Identified Period of Time.”

Nor can Hasa satisfy the threshold 49 C.F.R. § 1146.1(a) requirement that it demonstrate a “substantial, measurable deterioration or other demonstrated inadequacy in rail service” that occurs “*over an identified period of time.*” 49 C.F.R. §1146.1(a) (emphasis added). Hasa does not even attempt to explain how it meets that standard. Indeed, since Union Pacific’s service has been held to five days a week, Hasa cannot make that threshold showing.

Hasa claims that some service deterioration might happen if it were served thrice-weekly (although it does not say how or why). But mere speculation is not sufficient for the exceptional relief Hasa seeks. The Board has made clear that emergency service orders are not to be used “to anticipate problems that have not yet occurred (and might not occur).” *Expedited Relief from Service Inadequacies*, 3 S.T.B. at 974. In other words, emergency service orders are appropriate to address ongoing and serious service problems—not to forestall speculative future problems. Here, Hasa’s claim is directed entirely “to anticipate problems that have not yet occurred (and might not occur)” with thrice-weekly service. Even if it were reasonable to think that thrice-weekly service might not be sufficient for a facility whose weekly volume has never exceeded 16 cars over the past three years, emergency service orders are not intended to address speculation about future problems.

²⁷ See also, e.g., *Entergy Arkansas, Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42104, Finance Docket No. 32187, at 14 (served June 26, 2009); *Petition For Emergency Service Order*, 4 S.T.B. 434, 436 (1999); *Joint Petition For Service Order*, 3 S.T.B. 28, 29, 35 (1998).

5. Hasa Cites No STB or ICC Authority Supporting an Emergency Service Order Here.

Tellingly, Hasa does not point to a single instance where the Board has entered an emergency service order in a situation like this one. Hasa’s reliance on *Canexus Chemicals Canada L.P. v. BNSF Ry.—Emergency Service Order*, STB Docket No. 42131 (served Oct. 14, 2011), is misplaced. *See* Pet. at 20-22. Hasa ignores the critical distinction that *Canexus* involved the potential for a complete cessation of service for the traffic at issue. The Board found that, due to underlying disagreements among carriers about their common carrier obligations, there would soon be no rate authority under which Canexus could ship its traffic. Under that extreme situation, the Board found it had “no choice” but to enter an emergency service order “to ensure that traffic will continue to move.” *Canexus, supra*, STB Docket No. 42131, at 5. By contrast, there is no question that Hasa’s traffic will continue to move. Hasa’s suggestion that Union Pacific’s plan to provide three-days-a-week service is somehow akin to the complete “failure of movement” that the Board confronted in *Canexus* (*see* Pet. at 21-22) is nonsense.

In short, there is simply no support for the “extraordinary remedy” of an emergency service order.

B. Hasa Falls Far Short of the Standards for a Preliminary Injunction.

Like an emergency service order, a preliminary injunction is an “extraordinary and drastic remedy.”²⁸ And, as in the case of an emergency service order, Hasa cannot satisfy the requirements for issuance of the “temporary injunction” it seeks.

²⁸ *Muzarek v. Armstrong*, 520 U.S. 968, 972 (1997) (“A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.”) (emphasis in original); *see B.P. Amoco Chem. Co. v. Norfolk So. Ry. Co.*, STB Docket No. 42093, at 4 (served June 6, 2005) (party seeking injunction “carries the burden of persuasion on all of the elements required for [such] extraordinary relief”).

As discussed above, the Board should not reach the merits of Hasa’s temporary injunction request, because the Board plainly has no authority to issue injunctions with respect to contract traffic. Indeed, it is not clear that the Board has the jurisdiction to consider a “temporary injunction” request that was not filed in conjunction with a complaint. Hasa paired a request for a “temporary injunction” with its application for an emergency service order, but it did not file a complaint alleging any violation of the Interstate Commerce Act.²⁹ This failure to institute an underlying complaint action dooms Hasa’s request for a temporary injunction.³⁰

Regardless, Hasa has fallen far short of meeting the standards for the “extraordinary relief” of an injunction. As the movant, Hasa has the burden of showing that: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other interested parties; and (4) granting the injunction is in the public interest.³¹ Hasa has not met its burden.

Hasa has not shown a substantial likelihood of success on the merits. Instead, Hasa’s petition is clearly without merit. *See supra* Part III. Hasa’s

²⁹ Hasa also asked the Board to “consider” initiating an investigation under 49 U.S.C. § 11701. Petition at 6, 29-31.

³⁰ *See P.K. Family Restaurant v. IRS*, 535 F. Supp. 1223, 1224 (N.D. Ohio 1982) (“Absent a complaint, this Court lacks jurisdiction to entertain plaintiff’s petition for injunctive relief.”); *see also Gardner v. McQueen*, Case No. 2:16-cv-13790, 2017 WL 131553, at *2 (E.D. Mich. Jan. 13, 2017) (court lacked jurisdiction to grant request for injunctive relief because plaintiff failed to file an actual complaint).

³¹ *See Schneider Transport, Inc., et al.—Petition For Exemption*, ICC Docket No. 40784, Fed. Carr. Cas. P. 38198, 1995 ICC LEXIS 141, at *4 (ICC served June 14, 1995) (“the party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief”); *see also, e.g., Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, at 2-3 (served Dec. 22, 2008); *accord, Richard Best Transfer, Inc. v. Union Pacific Railroad Co.*, STB Docket No. NOR 42149, at 4-5 (served Dec. 22, 2016); *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, at 4 (served May 4, 2012); *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

assertion that “UP has a common carrier obligation to provide regular daily service to Hasa” (Pet. at 23) has no basis in the law and incorrectly assumes that the traffic at issue is moving in common carriage. Nor could Hasa justify an extension of existing law regarding the common carrier obligation with volumes entirely consistent with less frequent service. The Interstate Commerce Act requires only that Union Pacific “provide the transportation or service on *reasonable* request.” 49 U.S.C. § 11101(a) (emphasis added).

Hasa asserts two legal theories for its alleged likelihood of success on the merits. First, Hasa claims that there is a “longstanding standard that such deliveries are to be provided at least once a day, on a five days per week basis.” Pet. at 24 (citing *id.* at 17 n.7). But daily switches are not an industry standard, particularly for small-volume facilities. On the contrary, “[t]here is no set rule establishing the number of switches a rail carrier is required to provide. Rather, the Board looks to what is reasonable under the circumstances.”³² Hasa cites *Savannah Port Terminal* and another case where the Board rejected arguments that railroads were required to provide more than one daily switch as purported evidence that railroads are legally required to provide one switch per day. Pet. at 17 n.7. But that is neither the law nor the industry standard—railroads are required to provide service that is “reasonable under the circumstances,” and many rail customers do not reasonably require daily service.³³ Indeed, one of the cases Hasa cites for the proposition that daily service is “standard” actually was a case

³² *Savannah Port Terminal Railroad, Inc.—Petition for Declaratory Order—Certain Rates and Practices as Applied to Capital Cargo, Inc.*, STB Fin. Docket No. 34920, at 8 (served May 30, 2008).

³³ See *Consolidated Freightways Corp. of Del. Extension-United States (Menlo Park, CA)*, 132 M.C.C. 458, 463 (Jan. 15, 1981) (the “common carrier obligation to provide reasonably adequate and continuous service ... is tempered by a rule of reason relative to the amount of service which [a railroad] can be expected to provide”).

where “switching was not performed daily” prior to the complained-of service problems.³⁴ And Hasa fails to cite other recent Board precedent rejecting claims that daily service was a violation of the common carrier obligation and recognizing that such claims must be assessed in light of the particular volumes at issue.³⁵

Second, Hasa claims that daily service is necessary to comply with Federal Railroad Administration (“FRA”) regulations requiring hazardous materials to be forwarded within 48 hours of receipt. Pet. at 17; *see* 49 C.F.R. § 174.14. By definition, § 174.14 will never be violated by Monday-Wednesday-Friday service, because trains will be scheduled to switch every other day. For example, if a chlorine car arrives at Union Pacific’s serving yard Monday evening (and thus too late for the Monday switch to Hasa), the 48-hour rule is not violated if the car is delivered on the Wednesday switch. The fact that the regulation specifically includes exceptions for weekends, for holidays, and for facilities receiving weekly or twice-weekly service shows that FRA regulations explicitly contemplate that hazardous materials do not need to be immediately forwarded in all situations.

³⁴ *See Louisiana Grocers Co-operative, Inc. v. Illinois Cent. Gulf R.R. Co.*, 353 I.C.C. 606, 609 (1977) (railroad violated common carrier obligation by not ordering employees to cross picket line to provide prompt service, even though “prior to the strike switching was not performed daily”).

³⁵ *Roseburg Forest Products Co., et al.—Alternative Rail Service—Central Oregon & Pac. R.R., Inc.*, STB Fin. Docket No. 35715, at 7 (served Mar. 4, 2009) (“The evidence suggests that the 2-day a-week schedule CORP implemented in January 2008 was adequate for the number of cars RFP and TPC tendered for movement to their Oregon mills. As far as we can tell from petitioners’ submissions, RFP and TPC together tendered approximately 68 carloads of logs and raw veneer a week (50 carloads from RFP and 18 carloads from TPC”). While *Roseburg* did not reach a definitive conclusion as to the reasonableness of the service provided, it rejected claims that five-day-a-week service was necessary and ordered the parties to address “feasibility of addressing these problems through means other than a return to a 5-day-a-week service schedule.” *Id.* Notably, the weekly volumes at issue in *Roseburg* were approximately twice the highest monthly volumes inbound to Hasa’s Saugus facility.

In short, Hasa has not alleged a legal theory on which it has any likelihood of success on the merits (let alone an overwhelming likelihood).

Hasa also has not shown that the denial of its request will cause it to sustain irreparable harm. As the Board's predecessor, the ICC, stated, "a claim of speculative harm is not enough to support relief. A party seeking a stay is required to demonstrate that the injury claimed is imminent, 'certain and great.'" *Schneider Transport, supra*, at *14. As discussed above, Hasa's irreparable harm allegations are based on unsupported speculation that three-days-a-week service will cause product flow interruptions that could impact Hasa's business or cause plant shutdowns.³⁶ Hasa also does not demonstrate that three-days-a-week service will mean "the Los Angeles Basin would be deprived of a safe water supply." Pet. at 25; *see, e.g., Brink V.S.* ¶ 21 (stating that "any change in the specifications of Hasa's outgoing product ... *could* cause cascading after-effects" and suggesting "*potential* consequences of any delay in product distribution") (emphasis added). Hasa's speculative, unsupported claims are insufficient to show irreparable harm.³⁷

In any event, Hasa will suffer no harm at all if Union Pacific provides service three days a week. Union Pacific also has offered to allow Hasa to request additional switches if it needs to accommodate any unusual shipment patterns. Union Pacific has changed the Saugus location from "spot-on-arrival" service to

³⁶ *See Am. Chemistry Council*, STB Docket No. 42129, at 4 (served May 4, 2012) (additional costs and disruption of business operations caused by carrier's newly imposed requirements were not irreparable harms because they constituted "[i]njuries in terms of money, time, and energy," which are "economic in nature").

³⁷ *See, e.g., R. J. Corman R.R. Co./Pennsylvania Lines, Inc.—Abandonment Exemption—in Clearfield, Jefferson, and Indiana Counties, PA*, STB Docket No. AB-491 (Sub-No. 2X), at 4 (served Dec. 11, 2008); *New York Cent. Lines, LLC Abandonment in Berkshire Cty., Ma.*, STB Dockets No. AB-565 (Sub-No. 3X), AB-55 (Sub-No. 595X), at 2 (served Sept. 5, 2001); *Missouri Pac. R.R. Co. – Abandonment Exemption—in Marion Cty., Ill.*, ICC Docket No. AB-3 (Sub-No. 77X), 1988 ICC LEXIS 337, at *9 (ICC decided Nov. 9, 1988).

“order-in” service, enabling Hasa to specify the particular cars it wishes to be delivered to Saugus first.

The absence of any likelihood of success on the merits and the lack of irreparable harm are each sufficient to require rejection of Hasa’s preliminary injunction, and the Board does not need to consider the remaining two factors.³⁸

C. No Other Action Is Warranted.

Hasa argues that the Board should take “broader measures ..., such as a show cause order or the initiation of an investigation,” and it makes a variety of allegations about Unified Plan 2020, a “possible strategy to ‘double-dip’ and/or collect additional charges for special switching and demurrage,” and a “new scheme by UP” to “relieve itself of its common carrier obligation” to transport chlorine. Petition at 5-6. This hodgepodge of allegations lacks any merit. As described above, Union Pacific has proposed a service schedule change that is well-calibrated to meet Hasa’s needs. There is nothing unusual, suspicious, or unreasonable about a proposal to serve a facility that averages less than 7 cars per week with Monday-Wednesday-Friday service, and absolutely no cause for a § 11701 investigation into a potential violation of the Interstate Commerce Act.

In the first place, this dispute has nothing to do with Unified Plan 2020 or precision scheduled railroading. There is no operating plan under which it would make sense to continue providing five weekly switches to a facility with Hasa’s volume, despite flagging local demand and limited crew and locomotive resources. Hasa’s attempt to frame its claims as a Unified Plan 2020 dispute is yet another red herring.

³⁸ See *Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, at 1, 3 (Dec. 22, 2008) (holding that because movant had failed to show irreparable harm, Board could deny preliminary injunction without considering any other factor).

Hasa's claim that this dispute is tied in with accessorial charge issues is similarly false. As noted above, Hasa's assertion that UP "has even sought to assess railcar demurrage charges on its own missed switches" is not true, and disproven by the very exhibit that Hasa cites to support that false claim. *See supra* at II.E & n.14 (citing Pet., Ex. 6 at 5 (noting that UP would provide credits to make up for service issue and observing that as of August 13 Hasa had a demurrage balance of \$0)). And as discussed above, three-day-a-week service could actually reduce Hasa's aggregate demurrage liability, due to the additional credits it would receive on non-service days.

VI. CONCLUSION

For the reasons stated above, Hasa's request for issuance of an emergency order, a temporary injunction, or any broader relief should be denied. The Board further should immediately lift the temporary stay it put in place on August 22, 2019, and permit Union Pacific to implement the three-days-per-week service change it has proposed for Hasa's Saugus facility.

Respectfully submitted,

/s/ Raymond Atkins

Raymond A. Atkins

Matthew J. Warren

Richard E. Young

Morgan B. Lindsay

SIDLEY AUSTIN LLP

1501 K Street, N.W.

Washington, D.C. 20005

(202) 736-8000

Rhonda S. Ferguson
James B. Boles
Jeremy M. Berman
Danielle E. Bode
UNION PACIFIC RAILROAD COMPANY
1400 Douglas Street
Omaha, NE 68179

Counsel for Union Pacific Railroad Company

Dated September 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September 2019, I served a copy of Union Pacific Railroad Company's Reply to *Ex Parte* Application for Section 11123(a) Service Order and Section 11701 Investigation / Petition for Temporary Injunction on the following counsel for Hasa, Inc., by first class mail and email.

Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, DC 20036

/s/ Morgan B. Lindsay
Morgan B. Lindsay

VERIFIED STATEMENT

OF

KARI KIRCHHOEFER

My name is Kari Kirchhoefer. I am Vice President of Industrial for Union Pacific Railroad Company. I have held this position for one year. Prior to assuming my current role, I served as Vice President – Customer Care and Support and Vice President – Chemicals for Union Pacific, and as president of Union Pacific’s Streamline subsidiary. In my current role, I am responsible for managing Union Pacific’s Industrial business unit which includes the team that handles marketing and sales interactions with Hasa Inc. (“Hasa”). I am submitting this statement in support of Union Pacific’s reply to the petition Hasa filed in this proceeding.

I. UNION PACIFIC’S SERVICE TO HASA

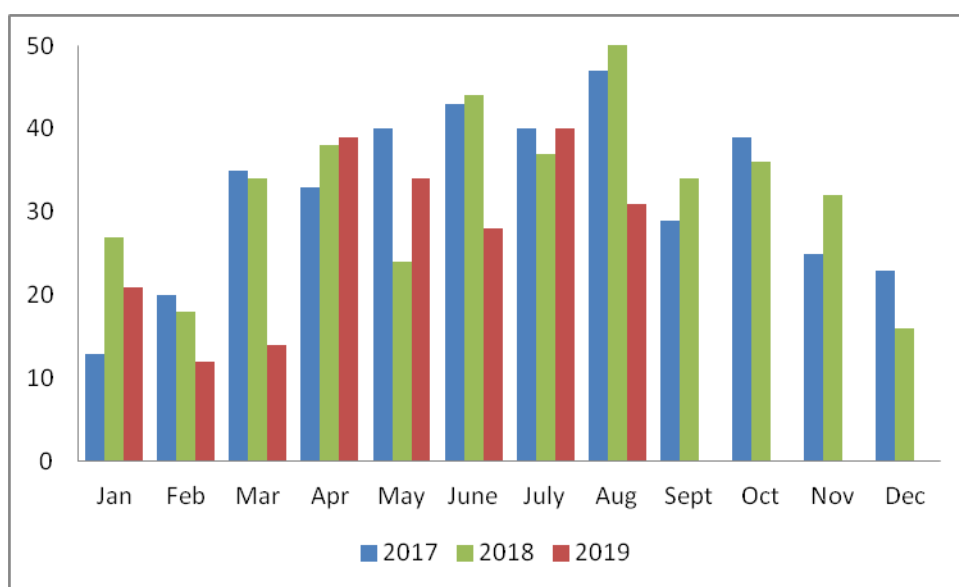
Union Pacific transports three commodities to Hasa’s Saugus, California facility: caustic soda, chlorine, and hydrochloric acid. Union Pacific delivers loaded cars of these commodities to Hasa. Union Pacific retrieves empty cars from Hasa but does not move any loaded outbound product. It is my understanding that Hasa ships outbound product using trucks, not rail. Hasa is a receiver of shipments and is typically listed as the consignee on waybills but does not pay the freight charges. While Union Pacific has a relationship with Hasa as the receiver of these commodities, our primary relationship is with the shipper of these commodities. All traffic that has moved to the Saugus facility in 2019 was transported under confidential rail transportation contracts that were entered into between a shipper and Union Pacific pursuant to 49 U.S.C. § 10709.

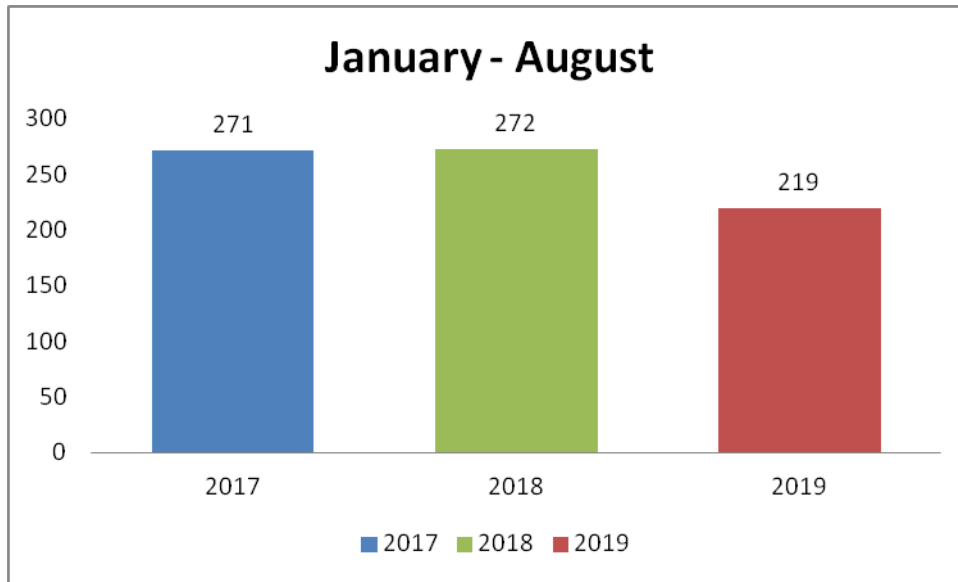
Between January 1, 2019 and August 31, 2019, Hasa received a total of 219 cars at its Saugus facility. Union Pacific Ex. 2. In Hasa’s highest-volume month (July 2019), Hasa received

a total of 40 cars. *Id.* In its lowest-volume month (February 2019), Hasa received a total of 12 cars. *Id.* The table below provides details on the commodity mix that Hasa received during this time.

	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Aug-19	Total
Caustic Soda	{								}
Chlorine	{								}
Hydrochloric Acid	{								}
Total	21	12	14	39	34	28	40	31	219

Hasa's monthly volume at Saugus is seasonal, with its highest volume usually occurring in June, July, and August.





(2019 volume shown through August 31, 2019)

II. UNION PACIFIC WAS IN CONSTANT COMMUNICATION WITH HASA REGARDING A CHANGE IN SERVICE

Union Pacific employees began having discussions with Hasa personnel about a potential change to Hasa service schedule during the week of July 8, 2019. Contrary to the assertions made by Hasa (Brink V.S. at ¶ 26), my team was in communication with Hasa prior to July 16. My team became involved in these discussions on July 10, when Jackson Bogatz called Rob Bzdil, a Hasa employee, to inform Mr. Bzdil that Union Pacific would review a proposed change to one day a week (“DOW”) service as a result of Hasa’s concerns about this service change. On July 11, Mr. Bogatz again called Mr. Bzdil to inform Mr. Bzdil that Union Pacific had started reviewing the proposed change to one DOW service.

On July 15, Union Pacific internally canceled the change to one DOW service before it was ever implemented. That same day, I received a letter from Christopher Brink explaining that Hasa believed it needed five DOW service. Brink V.S., Ex. 2 and 3. This letter arrived via email at 4:48 p.m., Central Time. I responded to Mr. Brink the next day, on July 16 at 12:02 p.m., Central Time. Brink V.S., Ex. 3. I informed Mr. Brink that Union Pacific’s Operating

Department was evaluating other options, besides one DOW service, and that Union Pacific would retain five DOW during this evaluation. I also told Mr. Brink that Mr. Bogatz would be in touch with his counterpart at Hasa to discuss the other options being evaluated.

The following day, on July 17, Mr. Bogatz informed Hasa that, based on Hasa's traffic volume and its input, Union Pacific now proposed a change to three DOW service beginning on July 29. Brink V.S., Ex. 3. Union Pacific informed Hasa that service would take place on Monday, Wednesday, and Friday and that Union Pacific's analysis showed that three DOW service would be sufficient to meet Hasa's rail service needs. Hasa requested a call to discuss the proposed change and indicated it could not accommodate a service change by July 29. Brink V.S., Ex. 3.

Within one hour of receiving the email requesting a call, Union Pacific agreed to a call and requested dates from Hasa for the call. Union Pacific Ex. 3. Union Pacific did not receive a response to this email. On July 22, Union Pacific again emailed Hasa, this time asking to have a call on July 23. *Id.* Union Pacific did not receive a response to this email. On July 23, Union Pacific once again emailed Hasa requesting Hasa's availability for a call. *Id.* This email also reminded Hasa that Union Pacific planned to implement three DOW service based on Hasa's inbound and outbound volumes. Following this email, Mr. Bzdil called Mr. Bogatz to request a call on July 25.

On this call, Union Pacific stated that its data, shown on Union Pacific Exhibit 1, demonstrated that three DOW service would be sufficient to meet Hasa's commodity needs and that we still planned to implement this change on July 29, as we had communicated on July 17. Hasa stated it would pursue legal action if Union Pacific implemented the service change as planned on July 29. Union Pacific again told Hasa that the move to three DOW service was

based on Hasa's traffic levels and that we were willing to review data showing that three DOW service would be inadequate, if Hasa had such data. Hasa did not provide data to refute Union Pacific's position that three DOW service would be sufficient, and Union Pacific again told Hasa that we planned to change to three DOW service on July 29.

A second call was held on July 25, during which Union Pacific asked Hasa to consider trying three DOW service with the option to request special switches on non-service days if necessary. Union Pacific shared additional daily traffic data demonstrating that three DOW service would be sufficient to meet Hasa's rail commodity needs. Hasa again threatened legal action if any service changes were made. Union Pacific agreed to escalate Hasa's concerns within Union Pacific but did not agree to delay the service change planned for July 29.

On July 26, Union Pacific once again informed Hasa that it would move forward with the change to three DOW service on July 29. Brink V.S., Ex. 4. Over the next two days, Union Pacific and Hasa exchanged emails that demonstrate a disagreement regarding Hasa's need for five DOW service. In an email on July 27, Union Pacific again presented data indicating that three DOW service would meet Hasa's needs. Brink V.S., Ex. 4. Hasa did not respond to these data but stated that it had not analyzed its business needs. Brink V.S., Ex. 4. Because Hasa could not provide evidence for its continued need for five DOW service, Union Pacific decided not to alter its planned change to three DOW service. The change in service on July 29 should not have been a surprise to Hasa. We informed Hasa of the change on July 17 and had reiterated our plan to change service several times between July 17 and July 29.

On July 29, Union Pacific learned that Hasa had contacted the Surface Transportation Board's Office of Public Assistance, Governmental Affairs and Compliance ("OPAGAC"). Also on this date, we agreed to have a conference call with Hasa and OPAGAC and agreed that we

would maintain five DOW service until that call took place. This call took place on August 6. During the call, Union Pacific agreed to show Hasa how it could use Union Pacific's shipment management tool to request special switches. Union Pacific and Hasa held another call on August 7 to review the shipment management tool. On the August 7 call, Hasa requested another call to review UP's data. The next call was held on August 12. During this call, Union Pacific again showed Hasa that all of the data, including daily release rates, volume, and hold rates, indicates three DOW would be sufficient to meet Hasa's needs. Hasa did not provide its own data but requested that Union Pacific provide Hasa with data going as far back as possible. Union Pacific reviewed the older data with Hasa during a call on August 16. The older data going back to 2017 supported Union Pacific's position that three DOW service would be sufficient. Hasa argued that the data showed they needed to stay at five DOW service but did not present an alternative to Union Pacific's service plan. Also on August 16, Hasa requested a spot capacity change to 11 cars, but UP explained that it could not accommodate that change due to safety issues with spotting an eleventh car outside Hasa's facility.

On August 12, Union Pacific transitioned Hasa to three DOW service on Monday, Wednesday, and Friday. On Tuesday, August 13, Hasa requested a special switch. Union Pacific provided this switch and did not charge Hasa for the special switch. Hasa also again requested to change its spot capacity from 10 to 11 cars. Union Pacific Ex. 4. Based on feedback from Union Pacific Operating, we explained that Hasa's facility could not accommodate that change due to safety issues. *Id.* Hasa requested another special switch on Thursday, August 15, which Union Pacific provided at no charge. Hasa claims that on August 16, 2019, it offered Union Pacific an "interim service proposal," but Union Pacific is unaware of any service proposal put forth by Hasa, besides Hasa's insistence on five DOW service.

On August 13, Hasa requested that service to the Saugus location change from “spot-on-arrival” service to “order-in” service so Hasa could control what commodities Union Pacific delivers. Union Pacific Ex. 4. Union Pacific agreed to this change in service effective August 23, 2019.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on September 3, 2019.

A handwritten signature in cursive script, reading "Kari Kirchhoefer", written over a horizontal line. The signature is fluid and includes a long, sweeping flourish at the end.

Kari Kirchhoefer

VERIFIED STATEMENT

OF

MICHAEL V. MATYA

My name is Michael V. Matya. I am Assistant Vice President – Customer Care and Support for Union Pacific Railroad Company, a position I have held for a year. I have worked at Union Pacific for 16 years. For 14 of those 16 years, I have focused on rail-based logistics. I have served in other roles in Union Pacific’s Customer Care and logistics groups and have also acted as Director – Shipment Management for Union Pacific’s Marketing and Sales Department and as Director – Logistics for LOUP Logistics (Union Pacific’s wholly-owned transportation logistics subsidiary). I am submitting this Verified Statement in support of Union Pacific’s reply to the application and petition Hasa filed in STB Docket No. NOR 42165.

Customer Care and Support is Union Pacific’s customer service department, acting as a liaison between customers, the Marketing and Sales Department, and our operations teams in the field. Among other things, our team manages Union Pacific’s evaluation of service changes that are projected to meet the service demands of our premium, manifest, and bulk traffic customers. Customer Care and Support also coordinates communication regarding those changes to ensure the Operating and Marketing and Sales Departments have cooperatively analyzed potential changes, discussed those changes with the affected customers, and fully incorporated customer feedback regarding those changes into decision-making.

I. REVIEWING AND RECOMMENDING CHANGES TO A CUSTOMER’S SERVICE LEVELS

Over the course of my 16 years at Union Pacific, we have used the same process for continuously evaluating customer service levels and implementing solutions to improve service

levels as needed. Reviews of local service changes start at the local management level. Our local management team is closest to the first mile and last mile of customers' freight transit, and that team has the most insight into customer volumes and demands for their respective service areas. These same local managers have ownership of the service in their area – they are directly responsible for how well Union Pacific serves its customers in that first mile or last segment of the trip plan. That same ownership is why local managers have the authority to seek service changes they believe are needed to ensure reliable and efficient service for all of our customers.

Local managers are expected to review continuously the service demands of the customers located within their territories. Because no single customer's service is provided in a vacuum, the local manager reviews the local service demands as a whole. This may mean reviewing customer service levels because of volume changes by one or many customers in their area. The local manager's goal is to provide reliable service for all the customers while taking into account individual customer demands and balancing the finite crew and locomotive resources with which Union Pacific provides that local service.

When changes are needed, the local manager submits a proposal to change service levels. Both the Network Planning and Operations (NPO) team and the Marketing and Sales Department Manager analyze the proposal for impacts on particular customers. These teams use Union Pacific data and feedback from the customer to make a recommendation regarding the service level change. The Customer Care and Support team, Operating managers, a NPO Scheduling Manager, and a Homeland Security Specialist (if the customer ships Rail Security Sensitive Material) work together to complete the change and implement the newly defined service schedule. In some cases, our analysis of data and customer feedback shows that a service level change is not warranted, and in those instances we do not alter service levels. In my

experience, in most instances our analysis and the proposed changes match up with the customer's understanding of its service needs, and we then calibrate the service to match the customer's volumes and supply chain needs. Customers accept these changes because they understand that Union Pacific will continue to evaluate service levels and will support customers if and as their needs change.

II. REVIEWING AND RECOMMENDING CHANGES TO HASA'S SERVICE LEVELS

I was a part of the Union Pacific team that reviewed Hasa, Inc.'s ("Hasa") service level at its Saugus facility. When this particular review process started, Hasa had five day a week ("DOW") local service at Saugus that occurred Monday through Friday. Union Pacific's initial review of Hasa's volumes showed that their facility required one DOW service. Once this localized review was complete, our standard process began with a change of service request. The local manager's initial request took into account Hasa's volumes and those of other customers in the local service area.

The initial review of that data, using straight line math, showed a monthly peak of 40 cars. Based on a single weekly switch on a four-week-a-month average, the analysis showed a single spot of 10 cars would meet Hasa's demand. [Union Pacific Ex. 2 (Spot and Pull data)]

NPO evaluated the proposed service change and discussed the proposed change with the Sales Manager and Hasa. Hasa told the Sales Manager that one DOW would not work due to their supply needs. Operating (including my team) and Marketing and Sales performed an analysis that incorporated Hasa's feedback. That secondary analysis, including the Hasa feedback, showed that three DOW service or roughly 12 switches per month was sufficient to serve Hasa's needs.

Before making our final recommendation, my team looked at several measures related to Hasa's service that went beyond the straightforward, initially-presented numbers (*e.g.*, total weekly cars versus the customer's car capacity). We specifically verified asset throughput at Hasa's facility, including commodity dwell at the location and the facility's capacity history. For instance, we studied the average time that a chlorine, caustic soda, or hydrochloric acid car tended to sit at the Hasa facility. We also examined how many times the Hasa facility, then as a spot-on-arrival location, was full and Hasa ended up releasing no cars for pickup (meaning that Hasa received no cars for service based on our capacity scheduling logic). [Union Pacific Ex. 1, (Hasa Shipment Data Spreadsheet)] Among other things, this data showed that:

- Hasa's average daily car release rate has not been over 1.8 cars for a full month dating back to 2016.
- Hasa's average for chlorine car placement to release over the last 12 months is 10.8 days.
- Due to the low inbound volume to Saugus in 2019, Union Pacific is actually already spotting cars at the facility approximately 3 times per week on average.
- On average, Union Pacific delivers 2 cars each switch and has been either on-time or early 94% of the time in 2019.

Hasa claims that "UP's single factor approach to service ... engineered far away in Omaha by PSR managers unreasonably ignores [our] joint experiences, circumstances, and factors related to ... unique local service requirements that have led [to] ... scheduled daily service for over five decades, without interruption." [Petition at 12.] This claim is mistaken in several respects: (1) while the initial service recommendation relied on a "single factor" approach, Union Pacific's ultimate conclusions regarding service were supported by a deeper study of the data that was guided by Hasa's feedback; (2) the initial recommendation of one DOW service was made by the local manager, who is very familiar with Hasa's service history as well as these "joint experiences, circumstances, and factors ..." (*id.*); and (3) Union Pacific

serves customers other than Hasa and cannot continue to provide unnecessarily frequent service without regard to Hasa's actual service needs and at the expense of our other customers.

In its verified statement [Brink VS ¶¶ 51-52], Hasa claims to have proposed Union Pacific provide Hasa with four DOW service between April and September and three DOW service for the rest of the year. To my knowledge, Hasa has never proposed such a service schedule. Nor has my team rejected that scheduling proposal. Regardless of whether it was ever communicated, the proposal in Hasa's verified statement is consistent with our conclusion that three DOW service is the appropriate service level. Our analysis of Hasa's through-put enables us to conclude that Hasa does not need more than three DOW service even during peak periods of demand. I am comfortable with this decision because my team and I examined every single day of Hasa service for the last 2 years and focused on exactly how Hasa utilized that service – during its peak season – before reaching the conclusion that three DOW service is the appropriate level of service. In preparation for this statement, I also reviewed Hasa's volumes for the month of August 2019. Hasa's August volumes did not change our conclusion that Hasa does not need more than three DOW service.

Neither the straightforward volume to capacity numbers, nor the deeper numbers based on past years of Hasa's asset utilization (both non-peak and peak), support Hasa's continued receipt of five DOW service.

III. THE HASA CHANGE TO ORDER-IN SERVICE

Hasa recently requested that we change the Saugus facility from spot-on-arrival service to order-in service. Rail cars for an order-in customer are not placed for loading or unloading at the customer's facility until the customer has given us placement instructions. With its shift to

order-in, Hasa is now able to order specific commodities to specific track positions based on its production needs.

If Hasa is transitioned to three DOW service then Hasa would also receive additional demurrage credits if it orders a car or releases a car on a non-service day. For example, if Hasa ordered a car to be delivered on a Tuesday (a non-service day) Hasa would receive two demurrage credits for that car under Union Pacific's chargeable events system. However, this car would only incur one additional demurrage debit due to Hasa not being served on Tuesday. Over the course of a month I would expect these additional demurrage credits would lower Hasa's demurrage liability.

IV. HOW HASA'S CONTINUED RECEIPT OF FIVE DOW SERVICE WOULD IMPACT THE NETWORK

Hasa's continued receipt of five DOW service would require that crew and locomotive resources be underutilized. This underutilization of resources can adversely impact our local operations where the resources are needed to meet service levels requested by other customers, driven by their true demand. Hasa's statistically unsupportable service demand introduces inefficiency into the network, constraining Union Pacific's ability to provide, and other customers' ability to receive, responsive and accurate service.

V. UNSUPPORTED HASA CLAIMS

Hasa claims that Union Pacific's review and decision to decrease Hasa's service level is an attempt to "de-market" certain hazardous commodities like chlorine. [Petition at 5.] That claim could not be farther from the truth. This service request change is designed to promote efficient use of Union Pacific assets while providing service levels appropriate for customer demand. Our local managers are focused on these efforts and have very challenging and

complicated jobs as a result. Those challenges and complications do not include conspiracies to “de-market” hazardous substances.

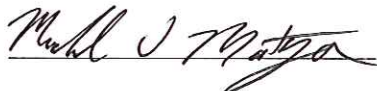
VI. CONCLUSION

Hasa has approached the Board with unsupported claims that five DOW service is its minimum service level. However, Union Pacific’s analysis of the volume and capacity information, its examination of Hasa’s equipment utilization and switching data, and its review of Hasa’s feedback all combine to establish that three DOW service is likely to exceed Hasa’s necessary service level.

VERIFICATION

I, Michael V. Matya, declare under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on September 3, 2019.

A handwritten signature in black ink, appearing to read "Michael V. Matya", written over a horizontal line.

Michael V. Matya

EXHIBIT 1

Hasa Shipment Data.xlsx

(Attached in native Excel format)

(Designated Confidential)

EXHIBIT 2

HASA Spot & Pull Data 2017-2019 9-3.xlsx

(Attached in native Excel format)

(Designated Confidential)

EXHIBIT 3

UP-Hasa Email Correspondence (7/15/19-7/23/19)

From: Jackson L. Bogatz/UPC
To: Rob Bzdil <RobBzdil@hasapool.com>
Date: 07/23/2019 08:43 AM
Subject: RE: Hasa's Letter to Union Pacific Regarding Deliveries

Rob,

Reaching out to confirm if we can discuss with the local operations. Need to stress the urgency as the local operations team plans to move forward with a 3 DOW service plan to support Hasa based on the inbound and empty release volume seen at this facility.

Please let me know available times and I will coordinate with operations to make sure they are represented on the call.

Regards,

Jackson Bogatz

Marketing & Sales | Manager- Sales | Industrial
Union Pacific Railroad | 24125 Aldine Westfield Road | Spring, TX 77373
Cell: (281) 898-2637 • Office: (281) 350-7180 • Email: jlbogatz@up.com



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From: Jackson L. Bogatz/UPC
To: Rob Bzdil <RobBzdil@hasapool.com>
Date: 07/22/2019 11:08 AM
Subject: RE: Hasa's Letter to Union Pacific Regarding Deliveries

Rob,

Following up to see if we can try and set up a call Tuesday if that works for Hasa.

Regards,

Jackson Bogatz

Marketing & Sales | Manager- Sales | Industrial
Union Pacific Railroad | 24125 Aldine Westfield Road | Spring, TX 77373
Cell: (281) 898-2637 • Office: (281) 350-7180 • Email: jlbogatz@up.com

From: Jackson L. Bogatz/UPC
To: Rob Bzdil <RobBzdil@hasapool.com>
Date: 07/17/2019 11:31 AM
Subject: RE: Hasa's Letter to Union Pacific Regarding Deliveries

Rob,

I can work to schedule a call next week to include our local operations as well. We want to make sure we are taking into account the largest possibly volume output when putting together our plan. We feel that we can support this with the revised schedule.

Which date next week works best for you to discuss?

Regards,

Jackson Bogatz

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Union Pacific Railroad | 24125 Aldine Westfield Road | Spring, TX 77373
Cell: (281) 898-2637 • Office: (281) 350-7180 • Email: jlbogatz@up.com



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From: Rob Bzdil <RobBzdil@hasapool.com>
To: "Jackson L. Bogatz" <jlbogatz@up.com>
Date: 07/17/2019 10:40 AM
Subject: RE: Hasa's Letter to Union Pacific Regarding Deliveries

***** STOP. EXTERNAL EMAIL. USE CAUTION *****

Jackson,

This will not work. We cannot make any changes right now especially this time of year. There is no way we can accommodate this kind of change so quickly. Taking the average cars per week does not work with the extreme seasonality of our business. It is very important that we schedule a call to make sure we are aligned as it seemed very clear from Kari's email this would be a process vs. a simple redirection.

I am tied up in a board meeting this week however, would be available early next week to discuss.

Thank you,

Rob Bzdil

From: Jackson L. Bogatz <jlbogatz@up.com>
Sent: Wednesday, July 17, 2019 7:38 AM
To: Rob Bzdil <RobBzdil@hasapool.com>
Subject: Re: Hasa's Letter to Union Pacific Regarding Deliveries

Rob,

Our operating team sent me an update on their re-evaluated plan which they hope to implement by July 29. The proposal is 3 days/week service which will occur on Monday, Wednesday and Friday. Year to date, this facility is averaging about 15 cars/week. Our operating team states that they will have no issue supporting this volume with the proposed schedule. I expect to get the formal schedule change request in the coming day or so.

Please let me know any questions/concerns.

Regards,

Jackson Bogatz

Marketing & Sales | Manager- Sales | Industrial
Union Pacific Railroad | 24125 Aldine Westfield Road | Spring, TX 77373
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From: Rob Bzdil <RobBzdil@hasapool.com>
To: "Jackson L. Bogatz" <jlbogatz@up.com>
Date: 07/16/2019 12:18 PM
Subject: Re: Hasa's Letter to Union Pacific Regarding Deliveries

***** STOP. EXTERNAL EMAIL. USE CAUTION *****

Thanks Jackson. I appreciate the follow up and maintains our current service level. I will look for further details from your Operating Team.

Thank you,
Rob Bzdil
Hasa, Inc.
661-259-5848

On Jul 16, 2019, at 10:08 AM, Jackson L. Bogatz <jlbogatz@up.com> wrote:

Rob,

As of now, we have cancelled the request for the change to 1 day/week service. Our operations team is re-evaluating and will bring to my attention when they have a re-arranged plan of action and I will work collaboratively with you and discuss once I have this.

Regards,

Jackson Bogatz

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Union Pacific Railroad | 24125 Aldine Westfield Road | Spring, TX 77373
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----- Forwarded by Jackson L. Bogatz/UPC on 07/16/2019 12:07 PM -----

From: Kari A. Kirchhoefer/UPC
To: Chris Brink <cbrink@hasapool.com>
Cc: Frankie Paice <frankiep@hasapool.com>, Rob Bzdil <RobBzdil@hasapool.com>, Jackson L. Bogatz/UPC@UP
Date: 07/16/2019 12:02 PM
Subject: Re: Hasa's Letter to Union Pacific Regarding Deliveries

Mr. Brink,

Thank you for your letter regarding your service schedule for your facility in Saugus, California. I was glad to hear that you have been receiving reliable service for many years. As you stated, Union Pacific is working on our Union Plan 2020 operating model to provide safe, reliable, and consistent service. As we evaluate our train schedules, at times we may find the need to adjust days-of-week service schedules. Jackson Bogatz on my team handles your account and has been working directly with Rob Bzdil from your team. We understand that one day a week service will not work for you and believe we can find a solution that will work for both of us. Our Operating department is evaluating options and Jackson will

reach out to Rob directly to discuss further.

Again, thank you for bringing this to my attention. While we are working with you on options we will continue to service your facility five days per week.

Sincerely,

Kari Kirchhoefer

Kari Kirchhoefer

Vice President | Industrial

Union Pacific Center | 1400 Douglas St. STOP 1210 | Omaha, NE 68179

Ph 402.544.3463

Email kakirchh@up.com | www.uprr.com

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From: Frankie Paice <frankiep@hasapool.com>
To: "kakirchh@up.com" <kakirchh@up.com>, "krocker@up.com" <krocker@up.com>
Cc: Chris Brink <cbrink@hasapool.com>, Rob Bzdil <RobBzdil@hasapool.com>
Date: 07/15/2019 04:48 PM
Subject: Hasa's Letter to Union Pacific Regarding Deliveries

***** STOP. EXTERNAL EMAIL. USE CAUTION *****

Good Afternoon,
Attached please find the letter from Chris Brink.
A letter will be FedExed to you as well.
Thank you,

Frankie Paice
Executive Assistant
Hasa Inc. Saugus CA 91350
661-259-5848 EXT. 5406

<mime-attachment.jpg>

[attachment "Hasa's Union Pacific Railroad Letter Dated July 15, 2019.pdf" deleted by Kari A. Kirchhoefer/UPC]

**

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**

EXHIBIT 4

Email Confirmation of Status Change to Order-In Facility

From: "Jackson L. Bogatz" <jlbogatz@up.com>,
To: Donna Leonhardt <donna@hasapool.com>
Cc: Felix Sandoval <felix@hasapool.com>, John C. Carlucci/UPC , Rob Bzdil
<RobBzdil@hasapool.com>, "Steven J. Haywood" <SJHAYWOO@up.com>, Vinny Sharma
<VinnySharma@hasapool.com>, Wendy A. Goodwin/UPC@UP, Joseph G. Martell/UPC@UP,
Trevor M. Wiley/UPC@UP, William P. Enos/UPC@UP
Date: 08/21/2019 04:22 PM
Subject: Re: Saugus Status Change Request

Donna,

We are able to accommodate HASA's request for its Saugus, CA facility to become an Order-In facility so that HASA can determine which products are spotted based on manufacturing needs, up to the available capacity. We are able to implement this requested change effective immediately. Starting with your next scheduled switch on Friday 8/23, you will need to manually order-in cars via the UP website. I understand you are familiar with UP's order-in process since you manage the inbound car flow for HASA's Order-In facility in Eloy, AZ. However, if you need any assistance or have any questions on the process, please contact our Shipment Management team at 800-872-1045.

Regards,

Jackson Bogatz

Marketing & Sales | Manager- Sales | Industrial
Union Pacific Railroad | 24125 Aldine Westfield Road | Spring, TX 77373
Cell: (281) 898-2637 • Office: (281) 350-7180 • Email: jlbogatz@up.com

From: John C. Carlucci/UPC
To: Donna Leonhardt <donna@hasapool.com>
Cc: Felix Sandoval <felix@hasapool.com>, "Jackson L. Bogatz" <jlbogatz@up.com>, Rob Bzdil
<RobBzdil@hasapool.com>, "Steven J. Haywood" <SJHAYWOO@up.com>, Vinny Sharma
<VinnySharma@hasapool.com>, Wendy A. Goodwin/UPC@UP, Joseph G. Martell/UPC@UP,
Trevor M. Wiley/UPC@UP, William P. Enos/UPC@UP
Date: 08/14/2019 12:23 PM
Subject: Re: Saugus Status Change Request

Sorry, my answer is the same for the 11 car spot due to the location. It has always been a 10 car limit in the system since before I was here. The crews have placed the 11th car as a favor when requested by your facility in the past. I am trying to set standards for customers as I identify possible risks during audits. The 11th car has to be left outside the inner fence, partially in a crossing, and less than a foot from a derail. I am working with our crews to educate them on the 10 car standard. Wendy is trying to initiate the process to change over to order in versus spot on arrival. We will do our best to accommodate specific cars until then.

John C. Carlucci

Assistant Manager of Terminal Operations

Cell 626-494-2619

Fax 402-997-4248

E-mail jccarluc@up.com

"We make a living by what we get, but we make
a life by what we give." Winston Churchill

From: Donna Leonhardt <donnaL@hasapool.com>
To: "John C. Carlucci" <jccarluc@up.com>, "Jackson L. Bogatz" <jlbogatz@up.com>, "Steven J. Haywood" <SJHAYWOO@up.com>
Cc: Rob Bzdil <RobBzdil@hasapool.com>, Vinny Sharma <VinnySharma@hasapool.com>, Felix Sandoval <felix@hasapool.com>
Date: 08/13/2019 10:54 AM
Subject: Saugus Status Change Request

***** STOP. EXTERNAL EMAIL. USE CAUTION *****

John,

As I have requested before.....we need spot 11 to be available to us for railcars. You have a new crew that just spotted a car on 11 and didn't have any issues with doing it. This spot on our rail track has been used safely for years! It just needs to be added to our profile.

We also need to be changed from a "spot on arrival" customer to an "order in" customer. We need to have more control of which products are being brought in to our facility and not depend on the U.P. to correctly bring us in the products needed.

Please consider having these changes made soon as you have forced us to deal with a 3 day a week delivery schedule... in the middle of our busy season... and are forcing us to pay higher prices by bringing in caustic trucks to accommodate our daily needs.

Thank you for your immediate consideration,

Donna Leonhardt

Purchasing Manager

HASA, Inc. – Saugus

DonnaL@hasapool.com

661-259-5848 ext. 5428