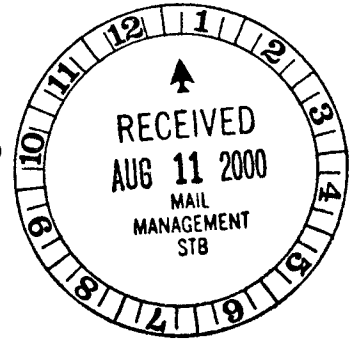


199485

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Docket No. 42052

UNION PACIFIC RAILROAD COMPANY
--PETITION FOR DECLARATORY ORDER--
UNILATERALLY IMPOSED INTERCHANGE CHARGES

COMMENTS

submitted on behalf of

ISPAT INLAND INC.

Nicholas J. DiMichael
Thompson Hine & Flory LLP
1920 L St. N.W.
Suite 800
Washington, D.C. 20036
(202) 263-4103

Attorney for Ispat Inland Inc.

Due and Dated: August 11, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

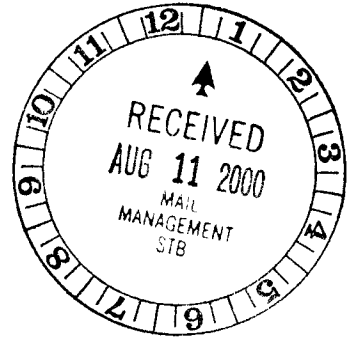
STB Docket No. 42052

UNION PACIFIC RAILROAD COMPANY
--PETITION FOR DECLARATORY ORDER—
UNILATERALLY IMPOSED INTERCHANGE CHARGES

COMMENTS

submitted on behalf of

ISPAT INLAND INC.



Comes now Ispat Inland Inc. ("Ispat Inland") and submits these Comments to the Surface Transportation Board ("Board" or "STB") in response to the Board's order served June 13, 2000, as modified by the Board's order served July 7, 2000, which extended the due date for these Comments to August 11, 2000. In the Petition for Declaratory Order that gave rise to this proceeding, the Union Pacific Railroad Company ("UP") has asked the Board to declare that a rail carrier may not unilaterally impose any charges on another rail carrier for the interchange of cars, either by tariff or otherwise. Ispat Inland believes that the statutory provision at issue here, 49 U.S.C. §11121, which requires rail carriers to "establish, observe and enforce reasonable rules and practice on car service," does not prohibit the type of charges at issue here, as long as such charges are "reasonable." Accordingly, Ispat Inland believes that the Board should not issue the order requested by the UP.

Identification and Interest of
Ispat Inland Inc.

Ispat Inland Inc., formerly Inland Steel Company, is the sixth largest steel company in the United States and accounts for about 5 percent of the nation's steel production. The company, founded in 1893, specializes in high-value-added flat-rolled and bar products. It is a wholly owned subsidiary of Ispat International, a multinational company with operations around the world.

Inland Steel Flat Products produces carbon and high-strength low-alloy flat-rolled steels for virtually all auto makers in the United States, as well as for leading manufacturers of appliances, office furniture, electrical motors and other products. Inland Steel Bar Products makes special-quality and alloy bar products for the automotive, cold-finishing, fastener, forging, industrial machinery, off-highway and agricultural-equipment industries. Both production facilities are based at Ispat Inland's only steelmaking plant, the 1,900 acre Indiana Harbor Works in East Chicago, Ind.

Given the location of its production facility near the critically-important Chicago rail terminal and its dependence on rail service, Ispat Inland has a major interest in insuring that the interchange of cars between railroads is accomplished smoothly and in the least amount of time. Accordingly, Ispat Inland has a major interest in this proceeding, which concerns the charges that one rail carrier can impose upon another to encourage interchange between carriers within a specific time period.

A. The Type of Charges At Issue in this Proceedings Are Not Prohibited By Statute Or Precedent

As UP's Petition concedes, the statutory provision at issue here is 49 U.S.C. §11121, which states in pertinent part:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall furnish safe and adequate car service and establish, observe and enforce reasonable rules and practices on car service. [emphasis added]

Under 49 U.S.C. §10102(2), “car service” is defined to include the “use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars . . . used in the transportation of property by a rail carrier.”

Thus, the plain wording of the statute does not by its terms flatly prohibit a rule or practice that would impose a charge by one rail carrier on another related to the interchange of cars: it merely requires that all rules and practices on car service be “reasonable.” Thus, UP’s petition amounts to a request that the Board rule (either on the basis of the agency’s past precedent and/or on the basis of future policy) that any charge imposed by one carrier on another related to the interchange of cars is per se “unreasonable.” But neither past precedent nor future policy compels or even supports such a rule.

At pages 6 through 8 of its Petition, the UP offers a legal argument to the effect that past precedent by the Board’s predecessor, the Interstate Commerce Commission (“ICC”), recognizes that interchange arrangements are matters of agreement and cannot be “unilaterally” charged by a carrier. However, the ICC precedents cited by UP either have nothing to do with the question now before Board, or in fact support the proposition that charges for interchange are permissible, as long as they are “reasonable.”

For example, the ICC’s decision in *New York, Chicago & St. Louis Railroad Company v. New York Central Railroad Company*, 314 I.C.C.344 (1961), the case cited by UP as “particularly instructive,” does not support the proposition advanced by UP. In that case, one rail carrier unilaterally terminated an agreed-to point of interchange with a

rail carrier, and then arbitrarily established a new point of interchange. The agency ruled that the terminating rail carrier had the unilateral right to terminate the existing interchange point (i.e., without the agreement of the other carrier), but simply ruled that the carrier's arbitrary choice of a new interchange was not "reasonable." In making its decision, the ICC quoted its prior decision in *Kansas City S. Ry. Co. V. Louisiana & A. Ry. Co.*, 213 I.C.C. 351, 359, to the effect that a receiving carrier "has the right to designate where it will accept cars in interchange from its connections, provided, in making such designation, the receiving carrier does not impose unusual, unreasonable, or impossible operating hazards . . ." 314 I.C.C. at 345. In *New York, Chicago & St. Louis*, the agency did require the two carriers to confer regarding the new interchange, but made it clear that mutual agreement was not an absolute requirement, because it specifically indicated that if such an agreement was not negotiated, it would take further action on its own. 314 I.C.C. at 346.

Similarly, UP completely "over-reads" the holding of *Birmingham Southern R.R. Co. v. Director General*, 61 I.C.C. 551 (1921), which did not set forth any absolute rule that interchange arrangements must be matters of agreement. In that case, the agency examined in detail the specific facts of the matter and concluded that the actions of a carrier in that case were not shown to have been unreasonable. The decision noted only that car interchange is "primarily" (a word conveniently ignored by UP in summarizing the decision) a matter of agreement -- a formulation that makes it clear that interchange rules may be unilaterally established in the proper circumstances. See, 61 I.C.C. at 555.

UP's reliance on the ICC's series of decisions in *Exemption from Regulation -- Boxcar Traffic*, 367 I.C.C. 425 (1983), is completely misplaced: the decisions simply had

nothing to do with the issue now before the Board. Indeed, UP admits as much. It weakly argues only that the *Boxcar Exemption* decisions did not “even suggest” that railroads had the right to impose equipment charges, implying that the agency’s failure to mention a right somehow must mean that the right does not exist. But the agency was under no obligation, legal or otherwise, in a decision dealing with exemption from regulation, to fully explicate the car service rights and obligations of a rail carrier.

Finally, the ICC’s decision in Docket No. 41201, *Chicago and North Western Transportation Company – Petition for Declaratory Order –Right of Independent Action As To Car Hire Rates and Rules* (not printed), served September 13, 1994, also lends no support to the UP’s position. In that case, the agency ruled that it would be unfair for a carrier to unilaterally set car hire rates, because carriers were required to accept cars in interchange. But the charges at issue in this proceeding are not car hire charges. Rather, they are charges imposed by one carrier for another carrier’s failure to timely accept a train in interchange. In such a situation, it is perfectly fair for the carrier who has been unreasonably burdened by that failure, to impose some charge on the offending carrier in order to obtain reimbursement for the costs that it has incurred, and to create an incentive for the offending carrier to perform its interchange obligations. Unlike the case of car hire, the offending carrier in this case can avoid the charge simply by performing its obligations. Thus, such a charge would be akin to demurrage charges imposed by carriers on shippers, for a shipper’s failure to return equipment within a reasonable period of time. As in the case of demurrage, as long as the carrier’s charge is reasonable, the charge would clearly be lawful.¹

¹ Ispat Inland takes no position on UP’s assertion that AAR car hire rules prohibit the imposition of the subject charges, since it is not a party to and is not familiar with the complexities of those rules.

B. A Charge for Unreasonable Delay in Accepting Interchange Would Appear to be An Efficient and Market-Sensitive Arrangement to Insure Fluid Interchange

Ispat Inland would note here that it is taking no position as to whether the level of the specific charges set forth in the various tariffs at issue in this proceeding are in fact “reasonable”; it would note that UP is also apparently not, at least at this time, challenging the level of the charges being imposed. However, Ispat Inland believes that a charge for unreasonable delay in accepting interchange would appear to be an efficient and market-sensitive arrangement to insure fluid interchange, as long as that charge is “reasonable.”

If one rail carrier refuses to perform its interchange obligations in a timely manner, such action can have dire consequences for the rest of the industry in a particular area, especially when that area involves such a complex and sensitive operation as the Chicago terminal. Ideally, of course, carriers in a terminal would mutually agree to the consequences of a failure to perform their obligations. But there must be some solution in the event that a carrier will not agree to penalties for failure to perform, and yet fails to perform. In theory, it might be possible to require the burdened carrier to apply to the Board for an order, but such a requirement would be impractical given the requirements of modern rail service; would be expensive and unfair; and would unnecessarily involve the Board in the day-to-day operations of the nation’s rail system. A charge for failure to perform interchange obligations, on the other hand, as long as the charge is reasonable, is self-executing and market-sensitive. It imposes the burden of solving the problem on the entity that created the problem, and makes it possible for the offending carrier to come to a rational economic judgment about the consequences of its own actions.

At pages 12-14 of its Petition, UP presents a parade of horrors, and argues that if the charges at issue are approved, "there is no principled limit to the types of charges that may be imposed." UP Petition, p. 12. UP is clearly wrong. Several of the examples of the charges that UP asserts could be imposed are different in kind from the charges at issue here, and all of the charges suggested by UP would be subject to the statutory requirement of "reasonableness," both in the type and amount of the charge. Ispat Inland is confident that the Board, in carrying out its regulatory responsibility, can distinguish between reasonable and unreasonable charges in a principled and rational manner.

C. Conclusion

Ispat Inland respectfully asks the Board not to issue the requested declaratory order.

Respectfully submitted,



Nicholas J. DiMichael
Thompson Hine & Flory LLP
1920 L St. N.W., Suite 800
Washington, D.C. 20036
(202) 263-4103

Attorney for Ispat Inland Mining Company

Due and Dated: August 11, 2000

Certificate of Service

I hereby certify that I have on this 11th day of August 2000 served a copy of the foregoing Comments on the following persons, in accordance with the Board's order served June 13, 2000:

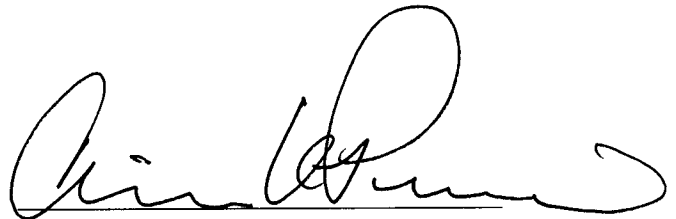
Robert T. Opal
General Commerce Counsel
Union Pacific Railroad Company
1416 Dodge St, Room 830
Omaha, NE 68179

Edward J. Krug
Krug, Krug & Beckelman, P.L.C
401 First St S.E.
Suite 330
P.O. Box 186
Cedar Rapids, IA 52406-0186

City of Tacoma Public Utilities
D/b/a Tacoma Rail
Mark Bubenik
Chief Assistant City Attorney, P.O. 11007,
Tacoma, WA 98411-0007

Roger A. Serpe
General Counsel
Indiana Harbor Belt Railroad Company
111 West Jackson Boulevard,
Suite 1128
Chicago, IL 60604-3502

William C. Sippel
Thomas J. Litwiler
Fletcher and Sippel LLC
Two Prudential Plaza
Suite 3125
180 North Stetson Ave
Chicago, IL 60601-6710

A handwritten signature in black ink, appearing to read "A. J. Krug", is written over a horizontal line.