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August 11, 2000

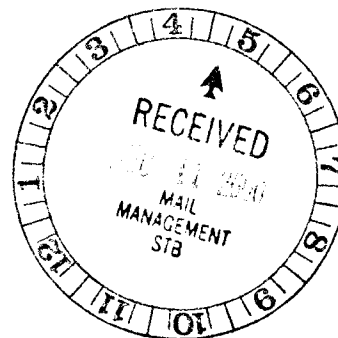
**BY HAND**

Surface Transportation Board  
Office of the Secretary  
Case Control Unit  
1925 K Street  
Washington, D.C. 20423  
ATTN: Docket No. 42052

**ENTERED  
Office of the Secretary**

**AUG 15 2000**

**Part of  
Public Record**



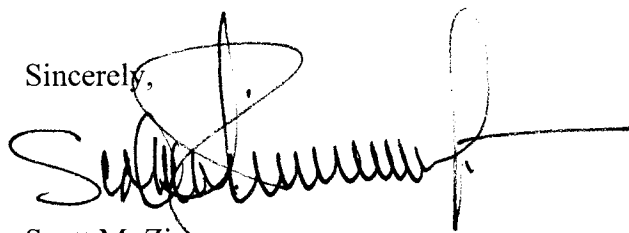
Re: *Union Pacific Railroad Company – Declaratory Order – Unilaterally Imposed  
Interchange Charges, Docket No. 42052*

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and ten copies of the "Comments of Norfolk Southern Railway Company." Also enclosed is a computer disk containing the text of this pleading in WordPerfect 5.0.

Please date-stamp and return with our messenger the additional two enclosed copies of the petition.

Many thanks for your assistance. Please feel free to contact me if you have any questions.

Sincerely,  
  
Scott M. Zimmerman

Enclosures

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ORIGINAL

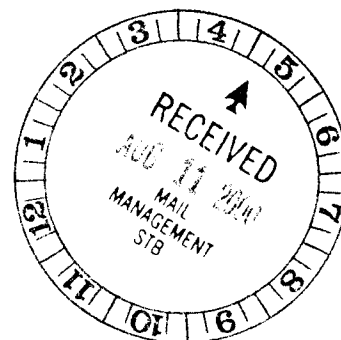
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BEFORE THE  
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42052



**UNION PACIFIC RAILROAD COMPANY  
— DECLARATORY ORDER —  
UNILATERALLY IMPOSED INTERCHANGE CHARGES**

**COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY**

**Introduction and Summary**

Pursuant to the Board's orders served June 13, 2000 and July 7, 2000, Norfolk Southern Railway Company ("NS") submits these comments on the Petition For Declaratory Order (the "Petition") filed by Union Pacific Railroad Company ("UP") on February 11, 2000. UP's petition seeks a declaratory order that certain charges unilaterally imposed by three railroads – Tacoma Municipal Belt Line Railway ("TMBL"), Indiana Harbor Belt Railroad Company ("IHB") and Iowa Interstate Railroad ("IAIS") – on connecting railroads that fail to accept cars tendered to them for interchange within specified times are unlawful.

NS agrees with UP that railroads may not unilaterally impose charges on other railroads for matters relating to their interchanging of cars. Because railroads are required by law to interchange traffic with each other and because the Board has exclusive jurisdiction to

prescribe interchange arrangements among railroads, railroads may not impose charges on other railroads relating to interchange unless and until such charges have been authorized by the Board. Were it otherwise, each railroad would be at the mercy of its connections.

NS also believes, however, that situations may arise in which such charges are warranted. NS believes that the charges imposed by IHB that are referenced in UP's petition are a reasonable means of responding to serious congestion in Chicago, that they contribute to relieving that congestion and that they should be approved by the Board.

Generally, interchange arrangements, including charges related to interchange activities, have been worked out among connecting railroads by agreement, and that is certainly the best way to resolve such matters. Where agreements cannot be reached, however, NS believes that the Board can and should establish a practical procedure by which railroads can institute reasonable charges relating to interchange of traffic with reasonable dispatch. These procedures should both allow a railroad to act quickly to maintain efficient operations and protect connecting railroads from unreasonable charges. NS suggests that the Board institute a rulemaking to consider such procedures.

## **I. THE LEGAL FRAMEWORK**

It has long been established that connecting railroads have an obligation to interchange cars with each other on reasonable terms and that the Board, like the Interstate Commerce Commission ("ICC") before it, has the authority to enforce that obligation. See, e.g., United States v. Pennsylvania R.R. Co., 323 U.S. 612, 615 (1945); Boxcar Car Hire and Car Service, 3 I.C.C.2d 1, 2 (1986). This obligation derives from 49 U.S.C. § 10703, requiring connecting railroads to "establish through routes (including physical connection) with each other;" 49 U.S.C. § 10742, requiring railroads to "provide reasonable, proper, and equal

facilities that are within its power to provide for the interchange of traffic;" and 49 U.S.C. § 11121, requiring railroads to "furnish safe and adequate car service and establish, observe and enforce reasonable rules and practices on car service."

Traditionally, through routes, interchange points and the terms and conditions on which cars are interchanged have been established in the first instance through bilateral or multilateral agreements among railroads. See, e.g., Central Power & Light Co. v. Southern Pacific Transp. Co., STB Nos. 41242, 41295, 41626, 1996 STB LEXIS 358 (served December 31, 1996) ("Bottleneck I") and 1997 STB LEXIS 91 (served April 28, 1997) ("Bottleneck II"), aff'd sub nom Mid-American Energy Co. v. Surface Transportation Board, 169 F.3d 1099 (8<sup>th</sup> Cir. 1999; New York, C. and St. L. R. Co. v. New York Central Railroad R. Co., 314 I.C.C. 344 (1961). In the rare instances in which carriers cannot agree to reasonable interchange terms, the Board has the authority to establish and impose them. 49 U.S.C. § 10705, 11121, 11701.

As UP points out in its petition, almost all railroads have subscribed to an agreement, the AAR Car Service and Car Hire Agreement, which has provisions pertaining to the rights and obligations of railroads in connection with the interchange of cars. Rule 7.A of the Code of Car Service Rules provides:

Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, preceded by (or "accompanied or preceded by" in the case of non-EDI road) the necessary data for forwarding and to insure delivery, and accepted by the designated representative of the receiving road.

Rule 7.C provides: “When interchange required by Section (B.2,3. or 4.) cannot be accomplished, the provision of Car Hire Rule 15 apply.” Rule 15.B.1 of the Code of Car Hire Rules provides:

Unless otherwise agreed to by the roads involved, when interchange cannot be accomplished due to a road’s failure to receive promptly from a connection cars on which it has laid no embargo, the receiving carrier shall be responsible to the car owner for the car hire on cars so held for delivery, including cars owned by either the delivering or receiving line.

Rule 15.C of the Code of Car Hire Rules requires the delivering carrier to notify the delinquent line and RAILINC “when interchange cannot be accomplished,” and provides that “[c]ar hire liability transfers from connection holding cars to the delinquent line effective with the date and time the transmission is received.”

The AAR agreement and rules permit signatories to make separate agreements governing interchange. If a railroad signatory to the AAR agreement and rules had not concluded a separate agreement with connecting railroads, it would be bound to those AAR agreements and rules. NS agrees with UP that those rules specify in detail the consequences to a delinquent railroad for failing to accomplish an interchange promptly and how and when those consequences are triggered. Accordingly, the agreement and rules would not permit a signatory unilaterally to impose additional charges on connecting railroads for failure to accomplish interchanges promptly.

Even if TMBL, IHB and IAIS withdrew from the AAR agreement, NS agrees with UP that the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) would not permit them unilaterally to impose charges on connecting railroads related to the manner in which they perform interchanges. When carriers cannot agree among themselves on the terms

for interchange, the terms cannot be dictated unilaterally by either of the connecting railroads but must be determined by the Board. For example, the Board ruled in its Bottleneck decisions that one connecting carrier may not unilaterally dictate the point of interchange with its connections,<sup>1</sup> and the same principle would apply to any other terms related to the manner of effecting interchanges. Because all carriers are legally compelled to interchange cars with connections, neither connection should be able to dictate the terms to the other without prior Board authorization.

NS disagrees with TMBL's contention that Cincinnati, N.O. & T.P. Ry. v. Chesapeake & Ohio Ry., 441 F.2d 483 (4<sup>th</sup> Cir. 1971) establishes that its charges are lawful because TMBL (like IHB and IAIS) set out its charges in a "tariff." In that case, a railroad had filed a somewhat similar charge in a tariff filed with the ICC which the ICC, rejecting the protests of connecting carriers, declined to suspend. In those circumstances, the court held that the charges were lawful and enforceable. In that case, however, the ICC's decision refusing to suspend the tariff amounted to the agency's authorization of the charge.<sup>2</sup> There has been no similar authorization of the charges at issue here. In any event, the court's ruling rested firmly on the principle then in effect that filed tariffs had the force and effect of law. That principle was eliminated when the ICCTA abolished the railroad tariff filing provisions of the Interstate Commerce Act. Accordingly, NS submits that the Cincinnati case does not establish the right

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<sup>1</sup> Bottleneck II, 1997 STB LEXIS 91 at \*17; see also New York, C. and St. L. R. Co. v. New York Central R. Co., 314 I.C.C. at 346.

<sup>2</sup> Indeed, under the tariff system then in effect, railroads could not implement new tariff charges without first giving 30 days' notice and giving affected parties an opportunity to protest and the ICC the opportunity to review and suspend the tariff before it went into effect. That (continued...)

of railroads unilaterally to impose charges on other railroads related to the interchange of cars, whether by tariff or otherwise, after January 1, 1996, whether or not it could be read to do so before that date.<sup>3</sup>

## II. PRACTICAL CONSIDERATIONS

While NS agrees with UP that railroads may not, without prior Board authorization, unilaterally impose charges related to interchange on connecting carriers, NS believes there are circumstances in which such charges may be reasonable and an appropriate means of reducing congestion or otherwise providing necessary incentives to effect interchanges promptly. In some circumstances, the AAR agreement and rules – which are necessarily broad – may not be sufficiently effective for those purposes.

Under the agreement and rules, when interchange of a car has been effected, liability for car hire payments to the owner of the car transfers from the delivering to the receiving railroad. Under AAR Car Service Rule 7, however, an interchange is not effected until cars delivered to an interchange point are “accepted by the designated representative of the receiving road.” If the receiving road does not promptly accept a car, the delivering road must, under Rule 15 of the Car Hire Rules, send a notice to the delinquent road and to RAILINC that “interchange cannot be accomplished,” and only when such notice is received by RAILINC does liability for car hire

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(...continued)

system, and the principles of public notice and equal applicability to all on which it was based, was very different from today’s deregulated environment.

<sup>3</sup> As UP has noted, the ICC staff in 1994, even before the ICCTA, rejected a tariff proposing unilaterally to establish car hire charges to be assessed against other railroads. The Chief of the ICC’s Section of Tariff Maintenance and Compliance stated that railroad-to-railroad charges could not be set forth in tariffs, and he rejected the filing carrier’s reliance on the Cincinnati case. January 18, 1994 letter from Charles Langyher, attached to UP’s petition at Tab 5.

pass to the receiving road. This puts the burden on the delivering road to take some action in order to effect the shifting of car hire liability to the receiving road, after waiting some period of time to determine that interchange has not been promptly effected. Also, even after notice has been given and received by RAILINC, the only sanction to a delinquent receiving road is car hire. That sanction may not always be a sufficient inducement to a receiving road to prevent cars from stacking up on the delivering road's tracks for considerable periods of time, particularly if the cars are empty and the receiving road is itself the owner of the cars. Moreover, in the case of a switch carrier in a busy terminal area, if the switch carrier cannot deliver cars to one of its connections, it may find itself unable to avoid accruing large car hire liabilities by reason of its own inability to accept cars for interchange from one or more of its other connections.

In some circumstances, therefore, an additional charge imposed on the delinquent road may be a reasonable and appropriate means of providing the necessary incentives. NS believes that was the case with regard to the charge that IHB put in effect in 1994 referenced in UP's petition. IHB put the charge into effect in 1994 because it believed that the failure of other railroads to effect interchanges with IHB promptly were contributing to serious congestion in and around Chicago at that time, and because it believed that the charge would help to provide the necessary incentive to interchange more promptly and thereby reduce congestion.

NS also believes that the charge imposed by IHB was reasonable. IHB Tariff Item 255 states:

When IHB notifies a connecting line it desires to make a delivery of cars, and the connecting line refuses to accept, or otherwise fails to allow IHB to physically deliver cars at its receiving yard or other designated interchange location for a period in excess of 12 hours, thus requiring cars to remain on tracks of IHB, cars will be subject to a Train Delay charge of [\$]130 per car. Thereafter, for every 12 additional hours that a connecting line refuses to accept delivery and cars remain on tracks of IHB, cars will be subject to an additional Train Delay charge of [\$]130 per car.

Tariff Item 250 imposes a similar charge for cars not picked up when ready at IHB's Blue Island Yard. IHB modeled its tariff on the terms under which the owners of the Belt Railway of Chicago ("BRC") – i.e., most of the railroads serving Chicago – govern themselves. The switching carriers in Chicago should remain as fluid as possible. Before IHB issued its "tariff" but after BRC began imposing its interchange charges, IHB had a congestion problem as carriers which wanted to delay interchange began shoving increased amounts of traffic onto IHB rather than BRC. Once IHB issued its "tariff," the congestion cleared. Accordingly, while NS expresses no opinion about the other interchange charges referenced in UP's petition, we believe IHB's charge is reasonable and should be found so and authorized by the Board.

**III. THE BOARD SHOULD ESTABLISH PROCEDURES TO PERMIT THE PROMPT IMPLEMENTATION OF REASONABLE INTERCHANGE CHARGES.**

Interchange arrangements have almost invariably been matters for railroads to work out among themselves by agreement, and certainly that is by far the preferable way to establish them. When agreement is not possible, however, there should be a procedure by which railroads can implement reasonable interchange charges promptly and without having to file a petition with the Board and prosecute the equivalent of a rate case to its conclusion before such charges can be put into effect. Given the speed with which operating problems can develop and spread throughout the entire rail system, and the very serious consequences that can result, putting such a burden on the party wishing to implement such a charge would effectively negate its purpose and potential benefits.

NS therefore suggests that the Board institute a rulemaking to establish such a procedure. NS believes that the Board has ample authority under the cited statutory provisions to promulgate such a rule. There are many procedures that could be effective. For example, the

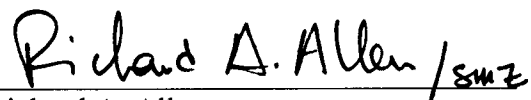
Board could by rule allow a railroad to impose such a charge, but if a connection challenged the charge, all payments beginning 90 days prior to the challenge would be paid into an interest-bearing escrow account until the STB makes the determination. This is merely one possible approach. There may be better ones. In any event, the imposed charges giving rise to UP's petition indicate that there is a need for effective procedures, and a rulemaking is warranted to consider them.

### CONCLUSION

NS agrees with UP that railroads may not unilaterally impose charges on connecting railroads related to the performance of interchanges, but must first obtain Board authorization. NS believes that there are circumstances which can justify such charge and, specifically, that the charges imposed by IHB in 1994 were reasonable and should be so found by the Board. NS also suggests that the Board institute a rulemaking to adopt procedures by which railroads can implement reasonable charges relating to interchange promptly when the circumstances justify them.

Respectfully submitted,

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*Attorneys for Norfolk Southern Corporation and  
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August 11, 2000

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of August, 2000, a true and correct copy of the Comments of Norfolk Southern Railway Company was served by first-class U.S. mail, postage prepaid, or by more expeditious means, upon:

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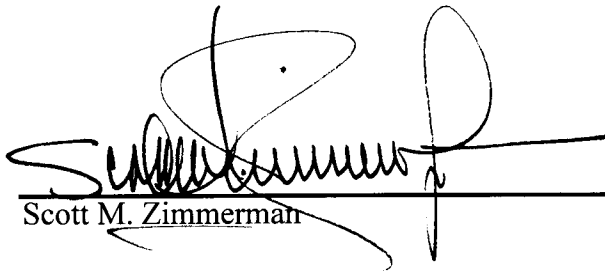
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