

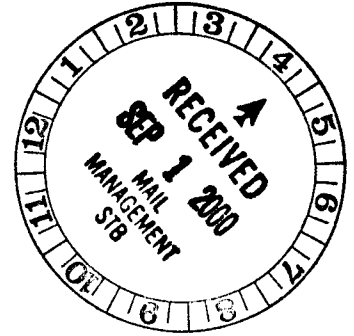
ORIGINAL

199643

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42052

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



REPLY COMMENTS

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Nicholas J. DiMichael
Frederic L. Wood
Thompson Hine & Flory LLP
1920 L St. N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

*Attorneys for The National Industrial
Transportation League*

Due and Dated: September 1, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. 42052

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

REPLY COMMENTS

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Comes now The National Industrial Transportation League. (“the League”) and submits these Reply Comments to the Surface Transportation Board (“Board” or “STB”) in response to the Board’s notice served June 13, 2000, as modified by the Board’s decisions served July 7 and August 16, 2000, which extended the due date for these Reply 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 related to the interchange of rail cars, either by tariff or otherwise.

The League urges the Board to find that the statutory provision at issue here, 49 U.S.C. §11121, does not prohibit the type of charges at issue here, as long as such charges are “reasonable.” Moreover, the record shows that such charges clearly contribute to the efficient operation of the rail network, by establishing appropriate economic incentives for rail carriers to operate interchanges efficiently.

The League urges the Board to deny the relief requested by UP. The Board should also make a strong statement encouraging the establishment of charges such as those at issue here where appropriate and necessary to ensure the efficient and effective operation of the nation's entire rail system.

I. Identity and Interest of the League

The National Industrial Transportation League is an organization of shippers that conduct industrial and/or commercial enterprises throughout the United States and internationally. The League is the oldest and largest nationwide organization representing shippers of all sizes and commodities. The League has over 600 separate company members, ranging from smaller shippers to some of the largest shippers in the country. The members of the League utilize all modes of transportation to move their goods in interstate, intrastate, and international commerce. Substantial volumes of commodities are shipped by League members via rail. Accordingly, the League's membership will be directly affected by the resolution of the issues raised in this proceeding.

II. Charges for Delays at Interchanges Are Permitted by the Law.

As the Petition for Declaratory Order submitted by Union Pacific Railroad Co. ("UP") states, the principal statutory provision at issue here is 49 U.S.C. §11121. The plain wording of the statute by its terms does not require, as UP claims, an agreement between carriers before an interchange delay charge may be imposed by an affected rail carrier. The statute only requires that such a charge by one rail carrier on another related to the interchange of cars be "reasonable." Thus, UP's position seems to be that *any*

charge imposed by one carrier on another, related to the interchange of cars, is *per se* “unreasonable.”¹

Moreover, the decision of the court in *Cincinnati, N. O. & T. P. Ry. Co. v. Chesapeake & O. Ry. Co.*, 441 F.2d 483 (4th Cir. 1971) makes it clear that, even when there is an agreement between rail carriers relating to interchanges, carriers may establish tariff provisions that both govern the interchange and override the agreements. Even though (unlike the situation prevailing in the above case) rail carriers are no longer required to file tariffs with the agency, they are still required to adhere to their published terms. 49 U.S.C.A. § 11101(e).

The Board should also find that UP’s publication of a tariff item attempting to exempt itself from the application of interchange delay charges is unlawful. In *Wooden Grain Doors, Burlington Northern Inc.*, 350 I.C.C. 768, 774 (1973), it was held, in reliance on the *CNO&TP* case, that a BN tariff publishing a charge for grain doors installed in cars interchanged with connecting carriers was not a proper subject for a tariff publication because it was not for a transportation service. UP’s effort to disclaim liability for interchange delay charges is likewise not a proper tariff publication.

III. Interchange Delay Charges Are An Effective Means of Ensuring Efficient Interchange Services

All rail carriers have a statutory duty to provide interchange service. 49 U.S.C.A. § 10742. All carriers should also make all efforts to ensure that interchanges operate in an efficient manner, so that the transportation being provided to League members and other shippers can meet their needs. The comments by IHB, Wisconsin Central,

¹ It is hypocritical for UP to be challenging the lawfulness of an interchange delay charge by Indiana Harbor Belt R. Co., (“IHB”) while benefiting from a similar charge established by its affiliate, the Belt Railway of Chicago (“BRC”).

American Short Line and Regional Railroad Association and others clearly establish that interchange delay charges are an effective incentive for creating and maintaining efficient interchange operations. Such charges place the economic burden on the party causing the delay, and encourage the necessary operational improvements and investments to remove the causes of the delay. As the experience in Chicago and other congested terminals demonstrates, the League believes that the Board should be taking every possible step to encourage efficient interchange operations at a time when the rail network is straining at capacity.

IV Conclusion

The League respectfully urges the Board to deny the petition of Union Pacific for a declaratory order.

Respectfully submitted,

Nicholas J. DiMichael
Frederic L. Wood
Thompson Hine & Flory LLP
1920 L St. N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

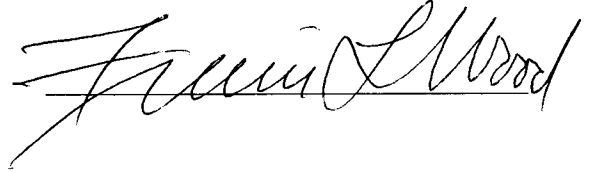


*Attorneys for The National Industrial
Transportation League*

Due and Dated: September 1, 2000

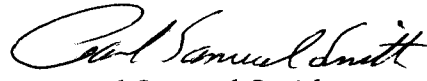
Certificate of Service

I hereby certify that I have on this 1st day of September 2000 served a copy of the foregoing Reply Comments on all parties of record, via first-class mail, in accordance with the Board's order served June 13, 2000, and the Rules of Practice:

A handwritten signature in black ink, reading "Francis L. Wood". The signature is written in a cursive style with a horizontal line underneath the name.

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused a copy of the foregoing Reply Comments of the United States Department of Transportation in STB Docket No. 42052 to be served upon all Parties of Record by first class mail, postage prepaid.


Paul Samuel Smith

September 1, 2000