

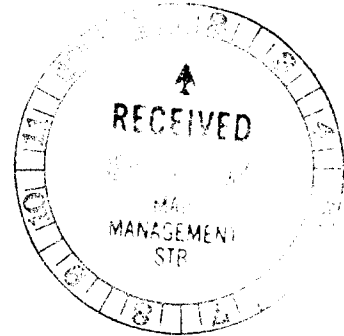
UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
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OMAHA, NEBRASKA 68179-0001
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199640

August 31, 2000



VIA UPS OVERNIGHT

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RE: Docket NOR 42052; Union Pacific Railroad Company --
Declaratory Order -- Unilaterally Imposed Interchange Charges

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding is an original and 10 copies of Reply Comments of Union Pacific Railroad Company.

Please acknowledge receipt of the enclosed materials by returning a stamped copy of this letter in the self-addressed, stamped envelope enclosed for this purpose.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Robert T. Opal".

Robert T. Opal
General Commerce Counsel
Phone: (402) 271-3072
Fax: (402) 271-5610

cc: Parties of Record

ORIGINAL

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

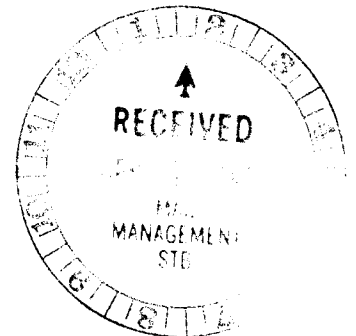
DOCKET NOR 42052

**UNION PACIFIC RAILROAD COMPANY
- DECLARATORY ORDER -**

199640
OFFICE OF THE SECRETARY
SEP 1 1999
PUBLIC NOTICE

UNILATERALLY IMPOSED INTERCHANGE CHARGES

**REPLY COMMENTS
OF
UNION PACIFIC RAILROAD COMPANY**



UNION PACIFIC RAILROAD COMPANY

Robert T. Opal
General Commerce Counsel
1416 Dodge Street
Room 830
Omaha, Nebraska 68179
(402) 271-3072

Dated: August 31, 2000
Due: September 1, 2000

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ATTACHMENTS

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NOR 42052

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

REPLY COMMENTS
OF
UNION PACIFIC RAILROAD COMPANY

I.

INTRODUCTION

It is evident from the comments filed in this proceeding that many of the commenters misunderstand the relief that UP is seeking. UP is seeking a declaration that, under 49 U.S.C. § 11121, a railroad may not unilaterally impose charges on another railroad for interchange events, either by "tariff" or otherwise. Rather, interchange related charges imposed by one railroad on another must either be permitted by agreement of the railroads involved or specifically authorized by the Board. UP is not, in any way, opposed to interchange related charges that result from agreements by the parties to the interchange.

Many of the commenters, on the other hand, seem to think that UP is seeking to have the Board broadly prohibit charges for "delayed interchange."¹ In particular, these commenters believe that UP is trying to prohibit the Indiana Harbor Belt Railroad (IHB), a Chicago area terminal road, from charging connecting lines for delayed interchange, a development which, they claim, will lead to increased congestion on that railroad and adversely affect fluidity of operation in the Chicago terminal.

As explained in the accompanying declaration of J. H. Koch, UP is not trying to prohibit interchange delay charges. Maintaining fluidity in the terminals UP serves is as important to UP as it is to the other commenters. UP clearly understands that timely interchange of traffic helps reduce congestion and is not opposed, in principle, to penalty charges where interchange is unduly delayed by the receiving road. But penalty charges for delayed interchange, or other interchange related charges, should be established by agreement of the railroads involved, so that charges and the standards for applying them fairly accommodate the concerns of all parties to the interchange (Koch Dec., pp. 2-3).

There is no reason to believe that railroads will be unable to reach agreements on interchange delay charges where such charges are appropriate. UP has already agreed to delayed interchange charges with the Belt Railway of Chicago ("BRC"), another Chicago area terminal railroad. As discussed in Mr. Koch's declaration, UP would be willing to agree to similar penalty charges by IHB, if IHB agrees to bring its interchange practices more in line with those of BRC (Koch Dec., p. 9). Further, since the filing of UP's Petition, UP has reached agreement with Tacoma Rail (TML), one of the original

¹ These charges may be called "storage" charges, "train delay" charges or various other names. For convenience, we will refer to them generally as "delayed interchange charges."

respondents in this proceeding, covering penalty charges and other interchange related issues (Id., pp. 10-11). Agreements will be reached where the parties to the interchange are willing to accommodate each others' legitimate concerns.

The problem with unilateral interchange charges, on the other hand, is that they are frequently attempts by one railroad to dictate the terms of interchange to connecting roads, and to enforce these dictated terms with penalty charges. The conduct they seek to enforce, while seemingly beneficial to the charging road, may not be consistent with efficient operations of the connecting roads or the network as a whole. As discussed below and in the attached declarations, that is the case with the IHB delayed interchange charge (which, contrary to IHB's characterization, is not "substantially identical" to the negotiated BRC charge) and the unilateral charges of the other respondents.² Further, the unilateral establishment of interchange charges by one carrier may lead to imposition of counter-charges by other carriers, with each carrier trying to compel conduct which is most advantageous to it. The growth of a "system" of uncoordinated and inconsistent interchange charges will do nothing to improve interchange operations, and will undermine cooperative efforts to improve interchange (Koch Dec., pp. 2-3).

The reply comments which follow are focussed primarily on the comments submitted by the American Short Line & Regional Railroad Association ("ASLRRRA"), Indiana Harbor Belt Railroad ("IHB"), Iowa Interstate Railroad ("IAIS"), Ispat Inland, Inc. ("Ispat"), Norfolk Southern Railway ("NS") and Wabash Central Railroad, et al. ("Wabash").

² For example, the TMBL charge could be avoided only by adding an unnecessary third "pull," or by rearranging the existing "pulls" in a manner which would add up to a day of transit time to some shipments. The IHB and IAIS charges, as administered, penalize receiving roads for the forwarding roads' own delays (Koch Dec., pp. 5-8, 10-11; Schultz Dec., pp. 2-3).

While there were some other comments filed in the proceeding, their arguments are similar to arguments raised by one or more of the above-named commenters, so they need not be separately addressed. In Section II below, we discuss arguments by some of the commenters that it is lawful for a railroad to unilaterally impose an interchange charge on another railroad. In Section III, we discuss requests that respondents charges be specifically authorized, or that the Board grant a blanket authorization for unilateral interchange charges. Finally, in Section IV, we discuss Norfolk Southern's suggestion that the Board institute a rulemaking proceeding.

II.

LEGAL ANALYSIS

UP's Petition for Declaratory Order ("UP Petition") thoroughly analyzes the legal issues applicable to this proceeding. Briefly, the law on interchange arrangements is as follows:

- First - Interchange arrangements must be established by agreement or (if agreement cannot be achieved) by the Board. Unilateral interchange charges such as those involved in this proceeding are impermissible because they are an attempt by one railroad to dictate the terms of interchange to a connecting road, and to enforce those terms by imposition of penalty charges (UP Petition, pp. 6-8).
- Second - A railroad may not circumvent the requirement to obtain agreement on interchange arrangements by publishing unilaterally established interchange terms and penalty charges in pricing documents styled as

"tariffs." The I.C.C. Termination Act eliminated the special legal status that filed tariffs once had (such as the principle that filed tariffs had the "force of law"). Further, tariffs imposing charges on other railroads in connection with interchange of cars were improper even under pre-ICCTA law (UP Petition, pp. 8-10).

- Third - A railroad may not unilaterally impose charges on a connecting railroad for interchange events which are covered by AAR rules (for example, "delayed interchange," which is the subject of many of the comments, is governed by AAR Car Service Rule 7 and Car Service Rule 15). Railroads are, of course, free to make agreements that are in addition to, or even contrary to, AAR rules, but one railroad may not unilaterally dictate such terms (UP Petition, pp. 10-12).

Norfolk Southern agrees that UP's Petition properly states the law as to interchange arrangements.³ On the other hand, three of the commenters (IHB, IAIS and Ispat Inland) argue that the former I.C.C. and the courts have recognized that railroads can unilaterally establish terms of interchange and penalty charges to enforce those terms. We will address each of their arguments below:

A. The Requirement for Agreement

Ispat argues, first, that New York C & St L R. Co. v. New York Central, 314 I.C.C. 344(1961) and other cases discussed by UP (UP Petition, p. 6) actually recognize that interchange arrangements may be unilaterally imposed. In particular, Ispat points to

³ While agreeing with UP's legal analysis, NS goes on to argue that the Board should specifically approve the IHB charges. This request is discussed at pp. 15-18, infra.

language in Kansas City S. Ry Co. v. Louisiana & A. R. Co., 213 I.C.C. 351 (1937), a decision made 24 years prior to NYC&St L suggesting that a receiving railroad could unilaterally designate interchange points. designation of interchange points by the receiving railroad.

UP has properly stated what these decisions stand for. In fact, the I.C.C. specifically discussed the Kansas City decision in NYC&St L decision, and explained that Kansas City did not permit a receiving railroad to unilaterally dictate the point of interchange. After quoting the language from the Kansas City decision that ISPAT is relying upon, the I.C.C. explained:

"Thus, the right of the receiving carrier to designate the point where it will receive cars in interchange is not an absolute right, but by its limitations, becomes a matter of proposal, subject to discussion and negotiation. A carrier cannot arbitrarily provide points of interchange which ignore the basic rights of others. This is a matter to be arranged between the parties. Interchange agreements should be reached by consultation, exploration of mutual benefits, and negotiation." NYC & St L, 314 I.C.C. at 345.

And, lest there be any remaining question that the I.C.C. meant what it said, the decision specifically found as follows:

"We also find that determination of a point or points of interchange is a matter of mutual consultation and agreement, and that the unilateral action of the Central in naming its own point for receiving cars without consideration of or consultation with the interchanging carrier is unjust and unreasonable." Id, 314 I.C.C. at 346.

The decision then went on to state that, if the parties were unable to reach agreement, the matter could be brought back to the I.C.C. for further action. There is absolutely no room for any doubt as to the holding of this decision -- it is unlawful for a

railroad to unilaterally impose interchange arrangements on a connecting road.⁴ That is precisely what the respondents in this proceeding have done -- they have unilaterally established the terms of interchange and published penalty charges to enforce those terms.

Ispat next argues that the I.C.C. decisions in Exemption from Regulation - Boxcar Traffic, 367 I.C.C. 425 (1983) and Box Car Hire and Car Service, 3 I.C.C.2d 1 (1986) (discussed at UP Petition, pp. 6-7) have "nothing to do" with the issues now before the Board.⁵

The Boxcar decisions cannot be so cavalierly dismissed. These decisions involved, among other things, an attempt by one carrier (Con Rail) to unilaterally impose storage and return charges on cars it received in interchange. That is precisely what the respondents in this proceeding are trying to do -- they even characterize their charges as "storage" charges (see, for example, IHB Comments at pp. 8-9). As discussed in UP's Petition, the I.C.C. first attempted to permit the charges by "exempting" them from regulation, but this was struck down as an improper use of exemption authority, Brae Corp. v. United States, 740 F.2d 1023, 1053-1060 (D.C. Cir., 1984). The I.C.C. then adopted a modified form of the storage and return charge as a substantive rule under 49 U.S.C. § 11122, Boxcar Car Hire and Car Service, *supra*. These cases show that a railroad cannot unilaterally impose storage charges against another railroad on interchange

⁴ As pointed out by Norfolk Southern in its comments, the Board's more recent Bottleneck decisions expressly recognize that interchange points are established by agreement in the first instance (NS Comments, p. 3).

⁵ IHB and IAIS do not address the Boxcar decisions or CNW Declaratory Order.

traffic without Board authorization. That is precisely what respondents' tariffs purport to do. The Boxcar cases are obviously relevant to the instant proceeding.

Ispat's final argument is that Docket No. 41201, Chicago and North Western Transportation Company - Petition for Declaratory Order - Right of Independent Action a to Car Hire Rates and Rules (not printed) ("CNW Declaratory Order") served September 13, 1994 (discussed at UP Petition, pp. 7-8) is not relevant to this case. This is so, according to ISPAT, because a receiving carrier cannot "choose" to avoid car hire (by refusing cars), but it can "choose" whether to be subject to a forwarding carrier's delayed interchange charges by "timely" accepting the interchange (Ispat, p 5).

There is no real difference between the car hire and interchange scenarios. As recognized in CNW Declaratory Order, a railroad cannot "choose" to avoid another railroad's unilaterally established car hire rates because it cannot "choose" to refuse to accept the cars in interchange. Similarly, a receiving railroad in an interchange scenario cannot "choose" to avoid the interchange arrangements unilaterally dictated by the forwarding road for the same reason it cannot avoid car hire -- it cannot refuse the cars being offered in interchange by the forwarding road. The only "choice" the receiving road has in the interchange scenario is between two options which have been unilaterally imposed by the forwarding road. Either the receiving carrier complies with whatever interchange standards for "timely" acceptance that have been dictated by the forwarding road, or pays the unilaterally established penalty charge. In either case, the receiving road cannot "choose" to avoid the forwarding road's unilateral action on cars it receives in interchange from the forwarding road, any more than it can "choose" to avoid car hire on

those cars. The CNW Declaratory Order decision is directly relevant to the instant proceeding.

B. The Effect of Tariff Publication

IHB and IAIS argue that Cincinnati, N. O. & T. P. Ry. v. Chesapeake & O. R. Co., 441 F.2d 483 (4th Cir., 1971) (CNO) permits a railroad to publish tariff charges against connecting railroads on interchange traffic. Since IHB, in particular, depends so heavily on this case, it is worth reviewing it in detail.

CNO involved a railroad which published and filed a tariff imposing a "return charge" against other railroads at Cincinnati for cars delivered to it in error. Several of the other roads petitioned the I.C.C. to suspend the tariff, but the I.C.C. refused to do so, 441 F.2d at 485. The opposing roads took no further action against the tariff with the I.C.C. Instead, they waited until CNO brought a lawsuit to collect its tariff charges, and then defended against the suit claiming the tariff violated various industry and private agreements, and could not be enforced (Id., 489).

Contrary to IHB's comments, the court did not hold that the CNO's charges had properly been published in a tariff, or that they could only be published in a tariff (IHB, p. 7). The court's discussion of this issue is clearly dicta, since the decision goes on to recognize that the I.C.C. might later determine that tariff filing was not required, 441 F.2d at 488. In other words, the court itself recognized that it was not authoritatively deciding this issue.

The actual holding of the court in CNO is that the tariff had to be treated as though it had the force of law so long as it was in effect, regardless of any private agreements. In other words, it is a classic "filed rate" case, similar to the later Supreme

Court decision in Maislin Industries v. Primary Steel, 497 U.S. 116 (1990). However, the "filed rate" doctrine died in 1996, with the enactment of the ICCTA. Unlike the tariff in CNO, the tariffs in this proceeding do not have the "force of law." They have no special regulatory status at all, and certainly do not trump industry or private agreements. As Norfolk Southern recognizes in its comments, the CNO decision is simply irrelevant under the current regulatory regime. Curiously, while IHB and IAIS focus on CNO, they simply ignore the fact that the regulatory regime under which CNO was decided no longer exists, and do not discuss the effect of tariff publication under the current regime.

Beyond this, the CNO court's dicta on the tariff filing requirements that were in effect in 1971 is clearly wrong. The court believed that, since handling of misrouted cars was a "transportation service," any charges for that service had to be published in filed tariffs under former 49 U.S.C. § 6(7), even if the charges were only assessed against other railroads, 441 F.2d at 447. Under that view, any charges paid by one railroad to another in connection with interchange traffic would have had to be in filed tariffs, including car hire charges, reclaims and penalty charges provided by AAR rules and any other arrangements that governed exchanges of money between railroads in connection with the movement of freight or passengers. What the court failed to recognize was that there were other provisions in the Interstate Commerce Act that specifically dealt with inter-carrier arrangements, which did not require tariff filing. Former 49 U.S.C. § 1(13) authorized the I.C.C., in its discretion, to require railroads to publish their car service rules in their tariffs.

⁶ In addition, former 49 USC § 6(5) required the filing, in non tariff form, of all inter-carrier

⁶ Under 49 U.S.C. § 10102(2), "car service" includes the "exchange" and "interchange" of locomotives and cars.

arrangements, subject to I.C.C. authorized exceptions (the I.C.C. excepted railroads from this requirement in 1952, see UP Petition, Tab 5).⁷ These sections of the Act would have been completely superfluous if former § 6(7) required tariff filing for all inter-carrier charges relating to "transportation service."

The other cases cited by IHB similarly do not support the notion that inter-carrier charges could be published in tariffs under pre-ICCTA law. In Wooden Grain Doors, Burlington Northern, Inc. 350 I.C.C. 768, 774 (1975)(IHB comments, p. 5), the I.C.C. rejected a tariff filed by BN imposing charges on other carriers for failure to return grain doors that BN had fitted to boxcars, a significant fact which IHB fails to mention. The portion of the decision IHB does mention, 350 I.C.C. at 774, is only partially quoted. The parts IHB leaves out are the I.C.C.'s statement that "we normally do not endorse tariffs assessing charges on other carriers", the I.C.C.'s discussion of the so-called "Office Car Cases" as the exception to this rule,⁸ and its characterization of the CNO decision as based on the Office Car Cases, Id. The Office Car Cases are clearly inapposite, as they involve a situation where a railroad is acting as a shipper of property (the office car), not as a connecting carrier on an interline move. The other two cases cited by IHB have nothing to do with the issues in this proceeding, Wilson Produce Co. v. Pennsylvania R. Co., 14 I.C.C. 170 (1908) and 16 I.C.C. 119 (1909) involves a track storage assessed against a

⁷ Former §§ 1(13) and 6(5) became §§ 11121(a)(2) and 10764, respectively, in the 1978 recodification of the Interstate Commerce Act. The ICCTA removed the former ICC authority to require tariff filing of car service rules by repealing §11121(a)(2)(B), and repealed §10764 in its entirety.

⁸ Louisville & N. R. Co. V. U.S., 282 U.S. 740 (1931) and Kansas City Sou. Ry. V. U.S., 282 U.S. 760 (1931). These cases upheld an I.C.C. decision requiring railroads to publish tariff charges for moving office cars of other railroads.

consignee, not another railroad. Illinois Terminal R. Co. - Abandonment, 328 I.C.C. 49, 61 (1965) and 328 I.C.C. 66 (1966) simply notes that a railroad (TP&W) had to file tariffs to cover the transportation services it had agreed to provide in a trackage rights contract with Illinois Terminal, which was unquestionably correct under the law as it existed in the 1960's. It does not have anything to say about the propriety of publishing inter-carrier charges in tariffs.

Finally, IHB tries to downplay the significance of the January 18, 1994 letter decision of the I.C.C. Office of Tariffs in Suspension Case No. 71632 (attached at Tab 5 to UP's Petition) by characterizing it as nothing more than a "letter from an ICC employee". In fact, this was a decision by the Office of Tariffs under delegated authority (49 C.F.R. § 1011.8 (1994)) rejecting an inter-carrier tariff naming car hire rates which had been filed by CNW (note the statement at the end of the letter decision that it was subject to appeal under 49 C.F.R. 1011.7(b)). The case was hotly litigated, with two major exchanges of pleadings.⁹ A review of these pleadings will reveal that CNW sought to justify the tariff based on, inter alia, the CNO and Wooden Grain Door cases that IHB is relying upon in this case. The decision flatly rejected CNW's position. The portion of the decision quoted by IHB at p.9 of its comments conveniently omits the part that is most damaging to its current arguments. Here is what IHB leaves out:

⁹ Con Rail Petition for Rejection of Tariff or, in the Alternative, For Investigation and Suspension Pending Investigation, December 22, 1993; Verified Reply of Chicago and North Western Transportation Co., December 27, 1993; Supplement to Con Rail Petition for Rejection (etc.), January 5, 1994; Union Pacific Railroad Co. Verified Protest, and Petition for Rejection and Investigation, January, 1994; Verified Reply of Chicago and North Western Transportation Co., January 11, 1994. Copies of these submissions were attached to CNW's February 11, 1994 Petition for Declaratory Order in Docket No. 41201, Chicago and North Western Transportation Co -- Petition for Declaratory Order -- Right of Independent Action as to Car Hire Rates and Rules.

“Section 10762, which sets forth the requirement that common carriers generally publish their rates in tariffs, applies to the services a carrier offers to its potential shippers. **Interchange of cars, although it obviously benefits shippers, involves purely intercarrier matters and hence does not come within the section 10762 tariff requirements.** Rather, interchange of cars is governed by section 10764 of the Act, which directs carriers to file, in non-tariff form, copies of ‘each arrangement related to transportation.’ We note that, pursuant to section 10764(a)(2) of the Act, carriers have been exempted from filing their transportation-related arrangements since 1952.” (Emphasis supplied)

However, when all is said and done, this case is not governed by pre-ICCTA law on tariff requirements, because that law has been repealed. The fact that a railroad may choose to publish interchange charges in a “tariff” is legally irrelevant under the present regulatory regime, since tariffs no longer have any special regulatory status. As such, tariff publication does not circumvent the requirement that interchange arrangements be established by agreement or by the Board.

C. The Effect of AAR Rules

As discussed at pp. 10-12 of UP's Petition, AAR rules (Car Service Rule 7 and Car Hire Rule 15) specifically address the issue of delayed interchange by a receiving road and provide the consequences of that event. The respondents in this proceeding are all contractually bound to the AAR Car Service and Car Hire rules, either by being party to the underlying AAR agreement, or by agreeing to abide by the AAR agreement in a separate agreement. Under the AAR rules, railroads may make agreements that are in addition to, or contrary to, the AAR rules, but a railroad that is party to the rules may not unilaterally depart from them. The former I.C.C. discussed the legal effect of the AAR Car Service and Car Hire Agreement in its Car Hire depreservation decision and in CNW

Declaratory Order. These decisions squarely hold that a carrier which is party to the AAR rules must abide by them. The only way a carrier can unilaterally depart from the rules is to withdraw entirely from the rules, Railroad Car Hire Compensation - Rulemaking, 9 I.C.C.2d 80, 87 (1992); 9 I.C.C.2d 1090, 1093 (1993); CNW Declaratory Order, *supra*, pp. 103.

IHB does not discuss any of the above authorities in its comments. Instead, it just ignores the decisions and argues that it should have the right to unilaterally establish interchange charges because the AAR rules, in IHB's view, may not fully compensate the forwarding road for all of the costs of a delayed interchange (IHB, pp. 11-12). The trouble is that, under IHB's argument, a railroad which believes that the AAR "deprescription" rules do not result in adequate compensation for cars (like CNW) could also unilaterally establish their own car hire rates, a result which is directly contrary to the Car Hire and CNW Declaratory Order decisions. If IHB truly believes that the AAR rules do not provide adequate compensation, it is free to pursue bi-lateral or multi-lateral agreements with other roads for greater compensation or, if agreements cannot be achieved, seek Board action.¹⁰ What IHB cannot do is to unilaterally dictate the terms of interchange to connecting roads, and attempt to enforce those terms with penalty charges.

¹⁰ As discussed in the accompanying statement of J. H. Koch, IHB never sought the agreement of UP or CNW when it established its charges, nor has it obtained UP's agreement since (Koch Reply Dec., p. 3).

III.

THE BOARD SHOULD NOT AUTHORIZE ANY UNILATERAL INTERCHANGE CHARGES IN THIS PROCEEDING

The Board, of course, has the power to authorize interchange charges which have been unilaterally imposed by one railroad on another, even in the absence of agreement by other railroads, see Boxcar Car Hire, *supra*. Norfolk Southern, which agrees with UP's position that railroads cannot unilaterally impose interchange charges on each other, requests that the Board specifically authorize the IHB delayed interchange charges (NS Comments, pp. 6-8). Presumably, IHB and IAIS would themselves support such relief as to their respective charges if the Board determines that the charges cannot be unilaterally imposed.¹¹ Wabash Central, in contrast, requests that the Board generally authorize railroads to unilaterally impose interchange delay or "service disruption" charges on other railroads, and ASLRRA appears to generally support the same relief.

The Board should not authorize any unilateral interchange charges in this proceeding, for the following reasons:

A. There Has Been No Failure Of The Agreement Process

There has been absolutely no showing by anyone in this proceeding that, where interchange charges are warranted, they cannot be established by agreement. None of the respondents, for example, contend that they were rebuffed in efforts to obtain agreements with connecting lines on interchange standards, or on penalties for interchange failures. In fact, none of them contend they even attempted to obtain such

¹¹ As previously noted, since the interchange charges that now apply between UP and TMBL are covered by a bi-lateral agreement, no STB authorization is needed.

agreements before establishing their own charges -- they simply published them. As discussed in the attached declaration of J. H. Koch, UP is willing to agree with connecting roads on interchange standards and/or penalty charges where those agreements fairly accommodate the concerns of all parties to the interchange. UP has reached such agreements with BRC and TMBL, and is willing to enter into an agreement with IHB on terms similar to those applicable with BRC.¹² As the I.C.C. recognized in the NYC & St L decision, interchange arrangements should be established, where possible, by agreement of the parties to the interchange themselves. Unless there has been a breakdown in that process, the Board should not intervene in it, either by prescribing interchange terms and charges, or by authorizing one of the parties to the interchange to do so. There has been no breakdown in the process here, merely a failure by the respondents to utilize it.

B. The Board Should Not Authorize Any Of Respondents' Charges

The attached declarations of J. H. Koch and D. P. Schultz discuss how the unilateral interchange charges published by IHB, TMBL and IAIS actually work. All of these charges, as applied, are fundamentally one-sided, favoring the interests of the publishing road over the interests of its connections. None of them should be authorized by the Board. Instead, the parties should be left to resolve the matter by agreement, which is the way the charges should have been established in the first place.

IHB - Mr. Koch's accompanying declaration describes in detail the many problems UP has experienced with IHB's delayed interchange charges and the way IHB

¹² IHB contends the UP agreed to its charges in 1999. As discussed by Mr. Koch in his attached declaration, the "agreement" never occurred. IHB merely reported at a meeting of the Chicago Rail Planning Committee that it was adopting "free time" provisions similar to BRC's (Koch Dec., p. 9).

applied these charges (Koch Dec., pp. 3-10), so a brief summary is all that is required here. Contrary to IHB's attempts to characterize its charges as "substantially identical" to those established by BRC (which were the result of an agreement with the major Chicago line haul roads), the charges of the two roads are very different, as is the way they are administered. The BRC charge is based on the receiving road's failure to comply with a schedule which the receiving road has agreed to. The IHB charge, in contrast, is triggered by a receiving road's failure to comply with unilateral IHB notifications, which are solely controlled by IHB. IHB, in fact, did not tender traffic to UP in a consistent or predictable manner during the periods when most of the disputed bills arose. This is confirmed by the lack of consistency in the "offering" times shown on the bills (i.e., the times IHB claims it offered the cars in interchange to UP), which occurred randomly throughout the day. The way IHB calculated "delays" resulted in penalizing UP for IHB's own operating decisions. BRC provided UP with updates every four hours showing the cars it was holding for UP and their age, which permitted UP to manage the interchange and prevent the delays that would result in application of BRC penalty charges. UP requested IHB in 1997 to supply similar information on a daily basis (rather than every four hours), but IHB did not comply until 1999. The differences between the agreed-upon BRC charges and the unilaterally imposed IHB charges are a good example of why charges like this should be negotiated. Had IHB negotiated its charges with UP prior to implementing them, these issues would have been resolved and the disputes we would have had with this railroad would likely not have occurred. UP would have no difficulty agreeing with IHB on an arrangement that really was "substantially identical" to BRC's.

TMBL - While this railroad's unilateral charges have been replaced by a negotiated arrangement, it is still useful to examine how the unilateral charges operated. As discussed by Mr. Koch (Koch Dec., pp. 10-11), this road was assessing "penalties" against UP because UP's normal service pattern (two pulls a day in the afternoon) did not match the service standard imposed by the TMBL tariff (pull cars within 12 hours). To comply with TMBL's service standard, UP would have either had to add a third pull, which was unwarranted, or rescheduled the existing pull, which would have added up to a day of transit time to some shipments. Had the charge been negotiated at the outset, these differences would likely have been worked out, and the dispute avoided. Now that UP and TMBL have reached a negotiated arrangement, future disputes of this nature are far less likely to arise.

IAIS - This is, by far, the most one-sided of the respondents' tariffs. It allows IAIS to offer cars to a receiving railroad without any advance notification, and provides for a penalty if the receiving road does not immediately accept them. Unlike the IHB and TMBL tariffs, the IAIS tariff does not provide for any "free time" within which the receiving railroad may accept cars without penalty.¹³

The way IAIS has applied this charge, as demonstrated by the circumstances surrounding the disputed IAIS-UP bills, is even worse. According to IAIS, UP supposedly refused to accept a 75 car unit train at Council Bluffs for 10 days, from October 16 to October 26, 1998, resulting in a penalty of \$37,500.00 (IAIS Comments, pp. 2-3). The

¹³ Wisconsin Central, one of the parties supporting unilateral interchange charges and tariffs, recognizes that "such tariffs must have a reasonable period of 'free time' in which the receiving road can accept traffic tendered in interchange" (Wisconsin Central Comments, p. 2)

accompanying statement of Daniel P. Shultz, UP's Director of Terminal Operations for the Council Bluffs Service Unit at the time, explains what really happened. UP only refused the train once -- on October 16, when a UP yardmaster was unable to take immediate delivery of the train. The remaining delay was due entirely to IAIS' own inaction. IAIS does not claim that it ever attempted to re-offer the train to UP after the 16th (which would have been the normal thing to do), or that it contacted anyone at UP about it. In fact, IAIS never did contact any of the UP officials at Council Bluffs that were available to resolve IAIS interchange issues. The UP officials did not learn about the train until October 26, and then arranged for its immediate acceptance. Apparently, the IAIS officials involved in the matter believed that, once UP indicated it could not take the train on the 16th, IAIS did not have to do anything else to accomplish interchange, and was entitled to assess penalty charges until UP came looking for the train. Clearly, in this situation, IAIS is attempting to penalize UP for its own management problems.

C. The Board Should Not Grant A Blanket Authorization of Unilateral Interchange Charges

Wabash Central requests that the Board authorize all railroads to impose unilateral charges on their connections to address interchange delay or service disruptions (Wabash Central, et al. Comments, Wendelin VS, p. 10). The American Short Line and Regional Railroad Association (ASLRRA) appears to be making a similar request, although in more general terms. Both commenters justify these requests based on the supposed need for short line and regional railroads to impose charges on their connections.

The Board should not give any kind of blanket authorization for unilateral interchange charges for the following reasons:

First - As discussed in the accompanying reply declaration of Warren C. Wilson, allowing railroads to unilaterally impose interchange charges on each other would not assist short lines or regional railroads, and could be a serious threat to them. Wabash and ASLRRA ignore the fact that, if unilateral interchange charges are permitted, connecting roads would be able to impose such charges on them. Small roads do not operate the service frequencies that would permit them to avoid penalty charges such as those contained in respondents' tariffs. Wabash Central which, according to its witness, pulls interchange from connecting roads roughly three times a week, is a good example of this. Some small roads operate only once per week, which would expose them to catastrophic penalty charges under tariffs similar to respondents'. Further, both Wabash and ASLRRA seem to assume that a small road could impose a unilateral interchange charge on a connecting road without any response by the latter. This is completely unrealistic. The connecting road would obviously respond with a reciprocal charge and would likely come out way ahead in the exchange.

As stated in Mr. Wilson's declaration, the only way to successfully resolve small railroad interchange issues is by cooperation, not by the connecting carriers throwing charges at each other. This is the approach UP has been following with its small railroad connections. Since 1999, UP has negotiated over 160 Interline Service Agreements with connecting short lines and regional railroads, which cover, among other things, interchange frequencies, times and windows for both parties to the interchange (Wilson Dec., p. 5).

Second - A blanket authorization of unilateral interchange charges raises issues that go far beyond small railroad issues. A "system" of unilateral interchange and counter-charges would be a very dangerous development in the rail industry. While most

of the comments in this proceeding have focussed on delayed interchange charges, there is no principled limit as to the types of charges connecting carriers could impose on each other.

The record in this proceeding shows that this is not just speculation. Wabash Central, for example, argues that railroads should have the right "to unilaterally impose intercarrier charges as economic incentives to force capacity constrained carriers to make the necessary capital investments in infrastructure, equipment and personnel ..." (Wabash Central, Wendelin VS, p. 7). In other words, Wabash Central would determine how much capacity a connecting road should be making, and then impose penalty charges on the connecting road if it does not measure up to Wabash Central's standards.¹⁴ Wabash Central then says that it wants the ability to unilaterally impose charges on connecting roads, not only for interchange delays, but for "service failures" (Id., p. 10). While Wabash Central does not explain its reference to "service failures," the term would presumably include delays to interline traffic somewhere on the connecting road other than at the interchange. Perhaps what Wabash Central has in mind is that it would unilaterally establish transit time requirements for the connecting road's service, and impose penalty charges on the connecting road if it fails to comply with them. After all, if railroads can freely impose charges on each other, why not this kind of charge?

Another example in the record is a \$110.00 per car charge by the Peoria & Pekin Union (PPU) against connecting carriers for cars it receives in interchange with AAR defects, which supposedly covers the costs of "extra handling" (IAIS Comments, Exhibit

¹⁴ The possibility that the connecting road would respond with similar charges on Wabash Central does not seem to have occurred to Wabash's witness.

6, PPU Tariff 8041-F, Item 670). As explained by Mr. Koch, PPU is already compensated for "extra handling" of bad order cars by AAR car repair rates, which include this handling as part of the indirect overheads used in the calculation of the rates. Thus, PPU is trying to get compensated twice for the costs it incurs in switching defective cars. If it can do this, why can't it publish surcharges to the AAR car repair rates and bill them against connecting roads (which is functionally what PPU is doing with its defective car charge)?

If the Board were to authorize unilateral interchange charges in this proceeding, the result would be a lot more of these kinds of charges, as particular railroads attempt to dictate interchange procedures and facilities of connecting roads by imposition of various penalties, and the railroads subject to these charges respond with their own counter-charges. All that would be accomplished by this mutually destructive exchange of charges is to make it more difficult to achieve the cooperation that is necessary to successfully resolve interchange problems.

IV.

NORFOLK SOUTHERN'S SUGGESTION FOR A RULEMAKING PROCEEDING

NS agrees with UP that working out interchange arrangements by agreement is "by far" the preferable way to establish them. It then goes on, however, to indicate that, where agreement is not possible, there should be a procedure by which railroads can implement "reasonable" interchange charges promptly, without advance STB authorization, and suggests that the Board institute a rulemaking proceeding to develop one. As a possible approach, it suggests that the charges be paid into an escrow account pending a Board determination of the propriety of the charge (NS Comments, pp. 8-9).

UP questions the need for such a proceeding. As previously discussed, no one in this proceeding has shown that there has been any breakdown in the process of addressing interchange problems by negotiation and agreement. None of the respondents, for example, claims that they approached their connections to negotiate delayed interchange charges and were rebuffed by the connecting lines. They simply published their charges without seeking these agreements. There is no reason to believe that agreements cannot be achieved to address legitimate interchange issues -- UP's agreements with BRC and TMBL show that they can.

Further, we question NS's belief that the ability of a railroad to quickly impose charges to remedy a perceived interchange problem would be a good thing. The likely result of such an action would be the imposition of reciprocal or counter-charges by the connecting roads. The resulting disputes would simply undermine cooperative efforts to resolve the underlying problem, and could well exacerbate it. Further, in the event there were a serious interchange problem that could not be resolved by negotiation, Board intervention would not require "the equivalent of a rate case" as NS seems to believe. The Board has ample emergency authority to act quickly where warranted.

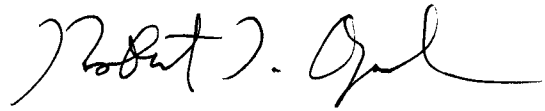
V.

CONCLUSION

For the foregoing reasons, UP respectfully requests that the Board issue an order declaring that, under 49 U.S.C. § 11121, a railroad may not unilaterally impose charges on another railroad for interchange events, by tariff or otherwise. Rather

interchange related charges imposed by one railroad on another must either be permitted by agreement of the railroads involved or specifically authorized by the Board.

Respectfully Submitted,

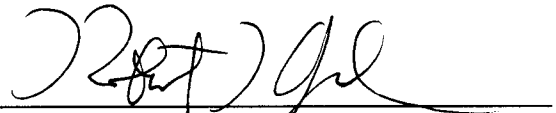
A handwritten signature in black ink, appearing to read "Robert T. Opal", with a long horizontal flourish extending to the right.

Robert T. Opal
Union Pacific Railroad Company
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(402) 271-3072

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing Reply Comments of Union Pacific Railroad Company on each of the persons shown on the attached Service List by First Class U.S. mail with postage prepaid.

Dated this 31st day of August, 2000.


Robert T. Opal

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**REPLY DECLARATION
OF
JEFFERY H. KOCH**

My name is Jeffery H. Koch. I am Vice President-Field Operations for Union Pacific Railroad Company. My business address is 1416 Dodge Street, Omaha, Nebraska 68179.

I have had management positions in the railroad industry since 1968, when I joined Penn Central Transportation Company. In 1971, I joined the Chicago and North Western, holding a variety of operating management positions including AVP-Division Manager of CNW's Illinois and Eastern Divisions. In 1990, I became Vice President-Transportation for CNW, a position I held until the UP-CNW merger in 1995. For most of my career at CNW, I was heavily involved with Chicago terminal operations. That has continued on UP. In my current position, I am responsible for overseeing terminal operations throughout the UP system including Chicago. In this capacity, I have represented UP on the Chicago Rail Planning Committee, comprised of officials from both the line haul and terminal railroads serving the Chicago, which was established to discuss and resolve Chicago interchange and terminal issues.

I. Preliminary Comments

Before addressing the individual comments, it would be useful to briefly summarize UP's position on unilateral interchange charges, particularly the "parking" or "train delay" charges that are the focus of most of the comments. The parties submitting these comments seem to believe that we are trying to broadly eliminate

these sorts of charges and are concerned that this could adversely affect fluidity at major rail terminals, particularly Chicago.

Nothing could be further from the truth. UP is a very active participant in joint railroad efforts to address capacity and congestion issues in the Chicago terminal and elsewhere. Maintaining fluidity in the terminals we serve is as important to UP as it is to other commenters. We clearly understand that timely interchange of traffic may help reduce congestion, and we are not opposed, in principle, to penalty charges where interchange is unduly delayed by the receiving road. All that we are saying is that penalty charges for delayed interchange, or other interchange related charges, should be established by agreement between the railroads involved, so that the charges and the standards for applying them fairly accommodate the concerns of all parties to the interchange.

The problem UP sees with a "system" of uncoordinated, unilateral penalty charges is that the conduct they seek to compel may seem to benefit the charging carrier, but may not be consistent with the efficient operation of the connecting railroads or of the network as a whole. As I will show below, that is the case with the unilaterally imposed IHB delayed interchange charge (which, contrary to IHB's characterization, is very different from the negotiated BRC delayed interchange charge). A related concern is that unilateral imposition of charges by one railroad may lead to imposition of counter-charges by other railroads, with each railroad trying to compel conduct that is individually advantageous to it. That is particularly likely if the charges imposed by the first carrier are one-sided (like the IHB charges). A major reason we have brought this proceeding rather than to establish counter-charges applicable to IHB and other

railroads that have unilaterally imposed "parking" charges on us because we are concerned about the deterioration in interchange services that could result from such a development.¹ However, we will certainly re-examine our position on counter-charges if the Board determines that interchange charges can be unilaterally imposed. In particular, I expect that we would consider imposing charges on IHB to encourage them to make deliveries on a scheduled basis, which would bring its interchange practices more in line with those of BRC.

II. The Indiana Harbor Belt "Delayed Interchange" Charges

Most of the comments filed in this proceeding are concerned with the IHB "delayed interchange" charges, which were initially established in 1994. I note that IHB, in its comments, says that it needs the ability to unilaterally impose these charges as a "back up", in the event it is unable to achieve agreements with its connecting railroads (V.S. Allen at 13). However, IHB did not seek or obtain the agreement of either CNW or UP when it established the charges.² As such, IHB's characterization of the charges as a "back up" is simply a position it has taken for purposes of this proceeding.

¹ IHB and several of the parties claim that UP has itself established unilateral interchange charges, pointing to a charge for "Interchange Error Movements" in Item 900 of Tariff UP 6007 (copy attached at IHB Comments, Appendix E). This item is a good example of a counter-charge. On its face, it is "applicable only in connection with carriers that publish interchange error movements in connection with UP." We view unilateral imposition of charges followed by unilateral imposition of counter-charges as a very poor and potentially disruptive way of establishing workable interchange arrangements. That is one reason we brought this proceeding rather than establishing counter-charges against IHB, IAIS, TMBL and other railroads which have unilaterally imposed charges on us.

² IHB also claims that UP effectively agreed to its charges in 1999, at meetings of the Chicago Rail Planning Committee. As discussed at p. 9 of this statement, there was no such agreement.

The IHB charges are contained in two items of the IHB switching tariff, Items 250 and 255, a copy of which is attached as Exhibit C to IHB's comments. The current version of Item 250 imposes a "train delay charge" of \$130.00 for each car which a receiving carrier does not pull from an IHB receiving track within 9 hours after the car is placed on the outbound track. An additional charge of \$130.00 per car is then assessed for each successive 12-hour period (in other words, a delay of 24 hours would generate a charge of \$260.00 per car, \$130.00 for exceeding the 9 hours "free time", and an additional \$130.00 for exceeding a period of 12 hours after expiration of the "free time"). Although labeled a "train delay charge", Item 250 does not actually require that the cars be tendered to the receiving road as a train.

Item 255 is a similar charge that applies where IHB is to itself make delivery of outbound cars to the receiving carrier. Since IHB normally makes the delivery of cars to UP (as opposed to UP pulling the cars from IHB), most of the disputed bills we have with IHB involve the Item 255 charge. In this case, the \$130.00 per car "train delay charge" is supposed to apply if the receiving carrier does not allow IHB to make deliveries to the receiving railroad for a period in excess of 9 hours. However, as I will discuss below, IHB actually imposes this charge for delays resulting from its own operating decisions. An additional \$130.00 per car charge is assessed for successive 12-hour periods.

IHB claims in its comments that the above charges are "substantially similar" to a delay charge established by the Belt Railway of Chicago ("BRC"), another Chicago area terminal railroad, which UP is not challenging. In fact, IHB's charges are not "substantially similar" to BRC's, nor are the two railroads practices similar. The

differences are very significant and demonstrate why these kind of charges should be established by agreement rather than by unilateral action.

The current version of the BRC charge is contained in Item 125, BRC Tariff 8002 Series, a copy of which appears at Exhibit J to the IHB Comments. Unlike the IHB charges, the BRC charge was established by agreement of BRC and the principal Chicago area line haul roads, including UP. BRC Item 125 establishes a delay charge for "cars that remain on departure tracks in excess of 9 hours **from scheduled departure time** due to failure of the outbound carrier to handle from the BRC..." The departure schedule is published in a BRC Superintendents notice called the "Clearing Train Departure Schedule." This schedule is agreed upon by BRC and its connecting roads. In other words, the arrangement is collaborative. The connecting roads have a say in what the schedule will be, and they know well in advance when they are expected to pull trains. The "clock" for assessment of penalty charges begins to run if the outbound road fails to comply with the schedule it has agreed to.

The IHB tariff is different, and the difference is a crucial one. The IHB penalty charge is not based on failure of the receiving road to comply with an agreed schedule. Under Item 250, the clock for the penalty charge begins to run when IHB places cars on outbound track, and inspects and air tests them. The timing of this event is solely controlled by IHB. Similarly, under Item 255, the clock begins to run when IHB notifies a connecting road that IHB desires to make a delivery -- another event that is solely under IHB's control. During the period in which the disputed bills arose, it was common for IHB to give UP these notifications without any advance

communication or line-up.³ Further, IHB would often make arrangements with other line haul roads to deliver cars to UP, in lieu of the line haul railroad making direct interchange to UP. We usually did not know of these arrangements until IHB notified us that they desired to deliver the cars. The unpredictable nature of IHB's interchange practices at the time is confirmed by the disputed penalty bills they have assessed against us. There is a lack of consistency in the "offering" times contained in the bills (ie., the time that IHB claims to have offered the cars to UP) -- they occur at random times throughout the day. Even the offering times on the auto trains that were supposed to be delivered on a schedule are inconsistent from day to day. Under these circumstances, it should not be surprising that there were times that UP was not in a position to accept immediate delivery of cars.

Under the IHB tariff, we were supposed to get 12 hours (now 9 hours) "free time" to accept delivery. In practice, however, IHB would assess us for relatively short delays, because of the way they administered their charges. IHB computes the "delay" from the time the receiving carrier cannot accept the car until the time IHB puts the cars in a train and the train departs from the IHB yard. In other words, once the penalty clock started to run, it continued to run until IHB train departed from its yard, regardless of whether the receiving road was responsible for the entire delay.

³ Prior to this year, the only IHB deliveries that were reasonably predictable were one or two auto trains a day from IHB's Gibson Yard to UP's Proviso yard, and even these trains were not consistently delivered on schedule. In May of this year, IHB agreed to scheduled delivery of additional interchange traffic. However, the IHB "train delay" penalties are still not based on based on the schedule, and there is no penalty applicable to IHB for its failure to comply with the schedule.

Here's an example of a pattern we often saw with IHB

- (1) 2:00 p.m., Day 1 -- IHB notifies UP that it desires to deliver cars at UP's Proviso Yard. UP responds that it cannot accept the cars until 5:00 p.m., a delay of 3 hours.⁴
- (2) 5:00 p.m., Day 1 -- IHB does not move the cars. Rather, it decides, for its own operating convenience, that it will move them to UP at 6:00 a.m. on Day 2.
- (3) 2:00 a.m., Day 2 -- 12 hours "free time" under IHB tariff expires.
- (4) 6:00 a.m., Day 2 -- IHB train departs with cars for UP.

In this example, the IHB "penalty clock" would run from 2:00 p.m. on Day 1 to 6:00 a.m. on Day 2 - a total of 16 hours -- even though the UP portion of the delay was only 3 hours. IHB would thus assess us a penalty charge of \$130.00 per car under their tariff for a 3 hour UP delay. This was a very common pattern we saw with the IHB penalty charges. The IHB portion of the delay could be due to a variety of reasons such as congestion in and around IHB facilities (for example, congestion in Gibson yard or trains waiting to get into the yard), lack of rested crews, IHB's desire to "fill out" a train with additional traffic before operating it or simply IHB decisions on how to make most efficient use of their crews. These were, of course, perfectly valid reasons for IHB to decide to delay a UP interchange, and I do not question their judgement in doing so.

⁴ All Chicago roads -- including IHB -- regularly hold out trains for periods like this. For example, UP operates over IHB from its Proviso Yard to reach BRC at Argo, IL. It is very common for IHB to require UP to hold trains these trains at Proviso for hours at a time.

But UP should not be responsible for any delays which occur after releasing IHB to deliver the cars.

Most of the disputed charges we have with IHB appear to involve this pattern, but it is impossible to determine which cars because of the lack of information in the IHB bills. The IHB bills and supporting documentation simply show the time a car was supposedly refused and the time the car departed from Gibson. IHB does not show the "release" time (ie., the time the UP indicated it could accept delivery). By the time we get the bills (30 or more days from the alleged delays), it is nearly impossible to go back and try to reconstruct what happened.

We have previously raised these issues with IHB. In April, 1997, UP requested IHB to provide UP's Proviso Service Unit with a fax on a daily basis showing what cars they had on hand for UP and what cars had been offered and refused, if any. This would have allowed us to address any problems before they escalated, and to determine if alleged delays to particular cars, were, in fact, our responsibility at the time the delays were occurring. IHB did not comply with this request until 1999, long after most of the disputed bills arose. In contrast, BRC has provided us with an update every four hours showing cars they are had for us and how old they were, which allowed us to manage the BRC interchange and avoid the BRC penalties.

In summary, these differences between the BRC and the IHB charges are a good illustration of why negotiated charges are preferable to unilaterally imposed charges. The negotiated BRC charge addresses the concerns of all parties to the interchange. BRC obtains a penalty charge to prevent cars from remaining on its facilities for inordinate amounts of time, while the receiving roads obtain an advance

schedule of deliveries, which facilitates their own operations and helps them avoid the delays that would cause the penalty to be assessed. The IHB charge, on the other hand, is one-sided, since it allows IHB to unilaterally determine when interchange events occur, and to penalize connecting carriers if they do not adjust their operations to meet IHB's requirements. It is also perverse in that, as administered, it penalizes a receiving road for IHB's own delays.

Had IHB sought UP's agreement, these issues would have been resolved. I expect that an agreement would have contained the same penalty charges and time periods which the IHB tariff now provides. However, there would have also been requirements for IHB to tender interchange to UP on a reasonably scheduled basis, like BRC does, and any train delay penalties imposed on UP would be based on departures from the schedule, like the BRC tariff. There would also have been formal notification requirements so that, when IHB claims to be holding cars for us, the appropriate UP officials know about it soon enough to be able to do something about it. UP would have no difficulty in agreeing with IHB on this kind of arrangement.

Finally, I want to address IHB's contention that UP agreed to the IHB charges at two meetings of the Chicago Rail Planning Committee in 1999.⁵ I was the senior UP official at these meetings, and this is not what occurred. The discussion at the meetings was focussed on BRC, which was having some serious congestion problems at the time, not on IHB. The excerpt of the minutes of the March 22-23 meeting quoted at p. 17 of IHB's comments shows this. The recommendation the

⁵ Most of the disputed charges we have with IHB arose before 1999.

group endorsed was for BRC to reduce its penalty time to 6 or 8 hours. The group did not "endorse" a similar action by IHB. IHB simply reported that it would look into the merits of a similar tariff at Blue Island and Gibson. At the next meeting (April 21), BRC reported that it had reduced free time to 9 hours, and IHB reported it had made a "similar change at Gibson". There was no action taken on these reports (in fact, the minutes state "Action: None required"). As I have already discussed, UP does not have any particular objection with the amount of "free time" provided in the IHB tariff or the level of the penalty charge. Rather, our objection is to other features of the tariff and IHB's practices under it, as discussed above.

III. The Tacoma Rail Storage Charges

I am pleased to advise that we have fully settled our dispute with Tacoma Rail (TMBL), one of the original respondents to this proceeding, over the "storage" charges imposed by that railroad. Nevertheless, a brief discussion of that railroad's storage charges is in order because it is another illustration of why interchange charges should be established by agreement.

TMBL's tariff imposed a "storage" charge for cars not pulled by the receiving road within 12 hours of being offered by TMBL in a fax list. The charge escalated from \$25.00 per car (for a car pulled between 13 - 24 hours) to a maximum of \$1,000 per car (for a car pulled after 72 hours). Most of the charges that TMBL had assessed against us was for cars pulled within 13 -24 hours.

What we found when we investigated these charges is that there really were no systematic "delays" by UP -- UP's normal service patterns simply did not match

the service standard imposed by the TMBL tariff. UP pulled interchange from TMBL twice a day on weekdays, and once a day on weekends. The reason most of these charges were being incurred was because the two weekday pulls were both scheduled in the afternoon. In other words, more than 12 hours would elapse between the last pull of Day 1 and the first pull of Day 2. On weekends, of course, there would be nearly 24 hours between pulls. In our view, the number and times of pulls we were providing were consistent with operational and commercial requirements. To avoid the TMBL charges, we would have either had to add another pull, which we felt was unwarranted, or more evenly space the existing pulls, which would have added up to a day of transit time to some shipments.

The terms of the settlement we have reached with TMBL address a wide range of interchange issues between the two carriers. The agreement provides for revisions in interchange procedures by both carriers, capacity enhancements, scheduled interchange deliveries and completely revised penalty charges. Thus, rather than having a unilaterally imposed penalty charge which provokes disputes between the two carriers, we now have agreed upon interchange standards and penalties that fairly accommodate the concerns of both parties to the interchange. This is the way that interchange issues should be addressed.

IV. Other Interchange Charges

The above discussion has primarily been confined to "interchange delay" charges, because those are the kinds of charges addressed by most of the comments. However, these are not the only kinds of charges that a railroad might choose to

unilaterally impose. For example, at least one railroad -- the Peoria and Pekin Union -- has published a charge of \$110.00 per car against connecting roads when it receives cars in interchange with FRA or AAR defects, supposedly to cover the costs of "extra handling" (IAIS Comments, Exhibit 6, PPU Tariff 8041-F, Item 670). But, when P&PU repairs the defective cars, P&PU receives applicable AAR car repair rates. The costs for "extra handling" of defective cars (ie., switching of defective cars from yard to repair tracks, and then back to the yard tracks) is already built into the AAR rates, as part of the indirect overheads used in the calculation of the repair rates. In other words, by publishing its Item 670 charge, P&PU is getting compensated twice for its cost to switch defective cars. If they can properly do this, or course, they could properly publish surcharges to the AAR car repair rates in their own tariffs (which is functionally what they have already done with the Item 670 charge), and assess them against connecting roads.

I would expect that, if the Board were to say in this proceeding that carriers are free to impose interchange charges on connecting roads, we would see a lot more of these charges, as particular carriers attempt to dictate interchange procedures and facilities to other railroads by imposition of various penalties. We would also see more counter-charges, as railroads respond to charges which have been imposed on them. ⁶

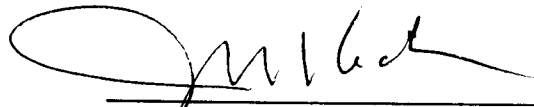
⁶ Wisconsin Central, in its comments, says that it would be unreasonable for a railroad to impose penalty charges that have the effect of requiring a connecting road to pull interchange four times a day (WCL Comments, p. 2). But what is there to stop a railroad from doing so if unilateral charges are permissible?

This is not just speculation. To understand what could potentially occur, one need look no further than the comments of Wabash Central, one of the parties to this proceeding, Wabash Central argues that railroads should have the right "to unilaterally impose intercarrier charges as economic incentives to force capacity constrained carriers to make the necessary capital investments in infrastructure, equipment and personnel..." As I understand Wabash Central's proposal, Wabash Central would determine how much capacity a connecting road should have, and how much capital investment the connecting road should be making, and then impose penalty charges on the connecting road if it does not measure up to Wabash Central's standards. Of course, were a railroad like Wabash Central ever to try to control a connecting carrier's capital investment by imposing such charges, the connecting road would almost certainly respond with counter-charges against Wabash Central (a possibility that appears not to have occurred to Wabash Central's witness). The expansion of these kinds of charges and counter-charges, in my view, would be a very dangerous development in the industry, and would lead to a degradation of interchange service.

DECLARATION

I declare under penalty of perjury that I have read the foregoing document,
know the facts asserted therein, and that the same are true and correct as stated.

Executed on August 29, 2000.

A handwritten signature in black ink, appearing to read 'JH Koch', written over a horizontal line.

Jeffery H. Koch

**REPLY DECLARATION
OF
DANIEL P. SCHULTZ**

My name is Daniel P. Schultz. I am Director-Road Operations for Union Pacific Railroad's Council Bluffs Service Unit, which includes Council Bluffs, IA.

My rail management career goes back to 1973, when I joined the Chicago and North Western Railway. At the time of the UP-CNW merger, I was CNW's Transportation Superintendent at Boone. Following the merger, I was Manager Terminal Operations (MTO) at Council Bluffs, Iowa, Senior MTO at the same location, and then Director Terminal Operations for UP's Council Bluffs Service Unit, which includes the Council Bluffs Terminal. I assumed my present position in July of this year.

I have read the verified statement of Dennis H. Miller on behalf of Iowa Interstate Railroad (IAIS) concerning the 75-car unit train that UP supposedly refused to accept from IAIS for ten days between October 16 and October 26, 1998. I am personally familiar with this incident as, at the time, I was Director of Terminal Operations for the Council Bluffs Service Unit. There is much more to the story than is related by Mr. Miller.

Mr. Miller is correct that UP initially refused to accept the train on October 16, 1998, an operational decision made by a UP yardmaster. But UP certainly did not refuse to accept it for ten days. In fact, Mr. Miller does not claim that IAIS ever re-offered the train to UP during this period (which would have been the normal thing to do

in this situation) or that anyone at IAIS ever talked to anyone at UP about the train after the initial contact with the UP yardmaster on October 16.

We had a procedure in place at Council Bluffs in 1998 to deal with problems like this. If IAIS local management had an interchange problem that they could not resolve with the UP yardmaster, IAIS officials would contact either me or Dan Lehan (then UP's Manager Terminal Operations at Council Bluffs). If the problem could not be resolved at our levels, they would contact Byron Schroeder (then UP's Director of Transportation Services for the Council Bluffs Service Unit). These contacts would normally come from Gilbert Peters or Lee Horst, both of whom were IAIS officials. No one from IAIS ever contacted me, Mr. Lehan or Mr. Schroeder about this train during the 10-day period Mr. Miller is now complaining about. When I learned on October 26 that IAIS had been holding a train for us, I immediately arranged for it to be accepted. Had IAIS told me, Mr. Lehan or Mr. Schroeder about the train on October 17, it would have been accepted then. In fact, it would probably have been accepted without any intervention by the three of us had IAIS simply re-offered the train to UP subsequent to the 16th, which they did not.

I later asked Mr. Peters why IAIS had allowed the train to sit for so long without re-offering it or mentioning it to me or anyone else at UP. He had no explanation. Rather, his response was that the initial contact with the yardmaster on the 16th was all that was required. Needless to say, I was very surprised at this remark. Had our positions been reversed, and UP had been the one holding a train for IAIS at Council Bluffs for days on end, I would have been on the phone several times a day until it was accepted. IAIS' silence is particularly puzzling in view of Mr. Miller's

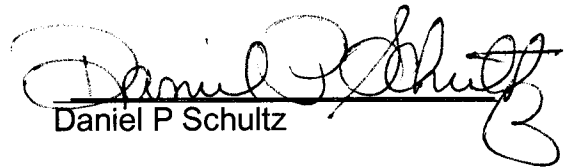
testimony about the additional work IAIS supposedly had to do to hold the train. If this was such a problem, why didn't IAIS simply re-offer the train to us? Why didn't someone from IAIS call me, Mr. Lehan, or Mr. Schroeder? The only explanation I can think of is that IAIS may have been more interested in running up the delay charges than in interchanging the train.

Notwithstanding this incident, I regard our overall relationship with IAIS at Council Bluffs as cordial and cooperative. In fact, UP and IAIS recently implemented new, cooperative arrangements at Council Bluffs where IAIS will serve some UP industries on the south end of town as UP's agent. With respect to Mr. Miller's statement that "UP requires IAIS to interchange traffic in its [UP's] yard", I should point out that all Council Bluffs railroads, including the giant BNSF, pull and deliver UP interchange traffic at the UP yard. Prior to the UP-CNW merger, CNW did as well. These are longstanding interchange arrangements that go back many years.

DECLARATION

I declare under penalty of perjury that I have read the foregoing document, know the facts asserted therein, and that the same are true and correct as stated.

Executed on August 23, 2000.


Daniel P Schultz

**REPLY DECLARATION
OF
WARREN C. WILSON**

My name is Warren C. Wilson. I am Senior Manager - Rail Line Planning for Union Pacific Railroad Company at 1416 Dodge Street, Omaha, NE, a position which I have held since 1991. My duties include responsibility for all aspects of Union Pacific's relations with the short lines and regional railroads with which we connect (over 160 in UP's service territory), including interchange matters. Prior to assuming my present position, I held various Marketing & Sales and Operating with the UP and Missouri Pacific railroads and, prior to that with the Pennsylvania Railroad since 1967.

I have read with considerable interest the comments submitted in this proceeding by the American Short Line and Regional Railroad Association (ASLRRA) and the joint comments of Wabash Central Railroad/C&NC Railroad Corporation/Maumee & Western Railroad Company, three affiliated eastern short lines. Both comments take the position that a railroad should have the right to unilaterally impose charges on a connecting railroad, when the connecting road fails to pull cars from the interchange in a "reasonably timely fashion." Wabash Central goes further and argues that it should be able to unilaterally impose charges on connecting lines "to force capacity constrained carriers to make the necessary capital investment in infrastructure, equipment and personnel (Wendelin VS at 7). As I understand these positions of these parties, they are proposing that a railroad would unilaterally determine what constitutes "interchange in a reasonably timely fashion" or "necessary

capital investment in infrastructure equipment and personnel", and then assess a charge on the connecting carrier if the first carrier's unilateral standards were not met.

There is a proverb that says "Be careful what you wish for -- your wish may come true," or words to that effect. That proverb is an apt response to these comments. To my mind, permitting railroads to unilaterally impose charges on connections for "delayed interchange" or other supposed interchange failings is potentially far more damaging to regional and short line railroads than to their connections.

ASLRRA and Wabash Central seem to believe that a system of unilateral charges would be one-way street; that is, the short lines would be able to impose charges on their connections, but the connections would not be able to impose charges on the short lines. Obviously, that is not the way such a system would work. Both carriers would be able to impose charges on each other. Based on the way things usually happen in the rail industry, a railroad that unilaterally imposes charges on another road can expect that the other road will probably respond with its own charges.

The reason this should be of concern to short lines and regional railroads is that most of these roads operate at frequencies that would routinely subject them to the kinds of interchange delay / storage charges that have been published by the respondents in this proceeding. Let's take a look at these charges:

IAIS - \$50 per car per day. Charge begins to apply immediately upon connecting carrier's refusal to accept cars when offered (i.e., no "free time").

IHB - 9 hours "free time," then \$130 per car for each succeeding 12-hour period.

TMBL - 12 hours "free time," then escalating per car charge ranging from \$25 per car (if pulled within 24 hours) to \$1,000 per car, if pulled after 72 hours.

The trouble is that most short lines and regional roads do not operate more than once a day. Many do not even operate this frequently. Some only operate on weekdays, some operate two or three times a week, some operate only once per week. Even a short line that operates once a day would be in no position to comply with an interchange delay tariff requiring immediate acceptance (IAIS). Further, unless a once-per-day railroad is able to closely coordinate interchange with its connections, it may not be able to pull interchange within the 9 hour "free time" provided in the IHB tariff or the 12 hour "free time" in the TMBL tariff.

The potential exposure would be much worse for a short line which does not operate every day. I am not personally familiar with the Wabash Central Railroad (it is in the east). However, it appears from the statement of its witness, Spencer Wendelin, that this road makes only "three plus interchanges a week with its major connecting carrier" (Wendelin, p. 2). At three interchanges a week, Wabash Central would be pulling interchange only once every 2-3 days. A car not pulled for 48 hours would, under the IHB tariff, be subject to a charge of \$520.00 per car (four 12-hour periods after expiration of 9 hours free time), \$100.00 per car under the TMBL tariff (charge for 37-48 hours) and \$100.00 under the IAIS tariff (2 days). The exposure escalates significantly for cars not pulled for 72 hours; \$780.00 per car under the IHB tariff (six 12-hour periods after expiration of 9 hours free time), \$400.00 per car under the TMBL tariff (charges for 61-72 hours) and \$300.00 per car under the IAIS tariff (3

In my view, the only way to successfully resolve interchange issues is by cooperation, not by the connecting carriers throwing charges at each other. This is the approach UP has been following with its short line and regional connections.

Consistent with our obligations under the AAR-ASLRRRA Railroad Industry Agreement, UP has negotiated over 160 Interline Service Agreements with connecting short line and regional railroads since 1999. Among other things, these agreements address interchange frequencies, times and windows for both parties to the interchange. We are further instituting a program to automatically monitor compliance with these agreements.

In summary, the ability to impose unilateral penalty charges on connecting roads would not be of any assistance to short line railroads, and is potentially a serious threat to them. Further, throwing penalty charges at a connecting railroad is not a way of fostering the partnerships and cooperation that allow both short lines and their connections to preserve and grow their businesses. It is also not necessary, when other, less onerous, solutions to interchange failures already exist.

DECLARATION

I declare under penalty of perjury that I have read the foregoing document,
know the facts asserted therein, and that the same are true and correct as stated.

Executed on August 28, 2000.


Warren C. Wilson