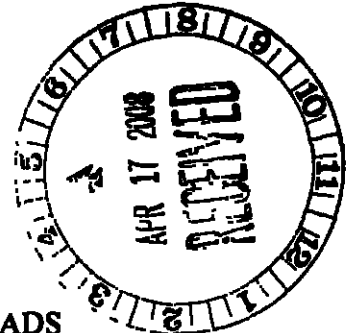


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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 677



COMMON CARRIER OBLIGATION OF RAILROADS

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Public Record

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INTRODUCTION

Union Pacific Railroad Company ("Union Pacific" or "UP") respectfully submits the following comments on the topics identified by the Board in its notice dated February 22, 2008. Union Pacific endorses the Comments of the Association of American Railroads, which should be read first as background. In addition, before discussing the Board's topics, we wish to frame our comments within a broader perspective on the common carrier obligation.

I. PERSPECTIVES ON THE COMMON CARRIER OBLIGATION

The common carrier obligation requires railroads to provide regulated transportation or service "on reasonable request." 49 U.S.C. § 11101(a). Ultimately, this proceeding asks when the Board should intervene in markets to decide what is "reasonable," particularly in the context of the constrained transportation network that exists today. The honest answer is, not often, and then not until the Board understands all the facts and considers all the potential consequences. Almost every time the Board orders a railroad to provide service that it would not otherwise provide, the Board would be undermining the railroad's efforts to operate its rail network

efficiently and respond to market forces.¹ The consequences could range from adverse impacts on other shippers to misallocation of scarce capital and reduced overall capacity.

Common Carriage Regulation Can Have Far-Reaching And Harmful Consequences.

Railroad operations are highly complex and interdependent, and this becomes even more apparent when capacity is constrained. An order directing a carrier to provide more service to a shipper in Tucson can lead to local service disruptions that spread until they cause containers to pile up in Los Angeles or delay chemical shipments in Houston. An order directing a carrier to provide switching on a main line track for a shipper that is not willing to invest in sufficient private spur track to prevent main track blockages can back up traffic for literally thousands of other shippers. Union Pacific has learned hard lessons about how even small changes can have consequences that are far-reaching and difficult to predict.

Moreover, the Board cannot assume that railroads will represent the interests of shippers who are not before the Board. When regulation would impose unreasonable costs or operating conditions on us, the Board can count on us to speak up. But in some situations, we may not be the party that is harmed. A Board order may, for example, cause a new service or an investment to be too expensive, and that might be acceptable to us, even though it might prevent many shippers from enjoying service improvements they would have received. Similarly, there is often no one to speak for opportunities that never materialize – for example, a business that would have been established where a carrier would have improved service if its resources had not been ordered elsewhere. Finally, we – like the Board – may simply fail to anticipate what the effects of an order will be.

¹ We do not claim to be perfect in responding to the market, and the Board's Consumer Assistance Office has occasionally identified perspectives that we missed.

Common Carriage Regulation Changes Market Outcomes For Railroads And Shippers.

The economic markets in which railroads operate are as complex and interdependent as railroad networks. Most businesses are free to decide what products and services to offer, and they respond to market conditions by investing their resources where they are most highly valued by the market. This process is the core of economic efficiency. When regulation constrains a railroad's responses to market forces – for example, by forcing a railroad to invest where it otherwise would not have invested, or to provide service in a manner that it otherwise would not have provided – it diverts resources to less efficient activities and reduces the overall amount of output the railroad can produce. Common carriage regulation thus has economic consequences not only for railroads, but also for our customers and potential customers.

Moreover, the Board must be mindful of the economic signals it sends in common carriage cases. Union Pacific actively participates in financial markets, where we must compete against other investment opportunities. Investors know, however, that regulation could reduce our earnings, and they would then perceive us as a riskier investment, increasing our cost of capital. As capital costs grow, we have less money to invest in infrastructure projects, whether in new track, terminal facilities, or maintenance. Prior to 1980, federal regulation created a downward spiral by curtailing railroad revenues, increasing capital costs, and making it impossible for railroads to maintain their networks, thereby curtailing revenues even further. This is a dangerous dynamic.

As Henry Posner of Iowa Interstate Railroad often says, "Capital is always smarter than we are." In other words, every time regulation interferes with efficient market outcomes, there will be some loss of efficiency and therefore some harm – at least to those that were not the direct beneficiary of the government's action. In deciding when intervention is appropriate, the

Board must recognize that, in a constrained environment, almost every intervention will have negative consequences for someone. In short, someone's ox will be gored; the question is, "Whose and how?" When answering that question, it is important to remember that capital is always smarter than we are.

Common Carriage Regulation Requires Fact Intensive Analysis.

Deciding what is "reasonable" invariably requires a thorough study of the facts and circumstances in each situation. It matters a great deal whether a situation involves a lightly-used branch line or Union Pacific's quadruple mainline, which carries more freight trains than any other rail line in the world. Before the Board overrides a railroad's response to operational needs and market forces, it must investigate the specifics of the situation and estimate the potential consequences of its action so it can be certain that regulatory intervention will not produce more harm than good.

For example, Union Pacific serves an ethanol receiving facility in a major terminal in Texas. Public officials complained vociferously when we imposed an embargo on the facility. The receiver, however, had no ability to restrict the number of cars shipped to it, and it could not unload cars at the pace required to prevent a growing backlog. This situation created severe congestion in UP's terminal facilities, with hundreds of cars of ethanol backed up in our yards, delaying trains and degrading service to other shippers. UP imposed an embargo on inbound shipments to that customer and issued permits for the number of cars the receiver could unload, resolving the problem. Had the Board ordered UP to accept all inbound ethanol shipments for that one customer, it would have, in effect, ordered UP to allow growing and crippling congestion in that terminal. That congestion would have directly affected service to the other

shippers in and around the terminal area, and the ripple effects from the backup would have spread throughout the UP system.

Another recent situation illustrates that initial appearances can be misleading. A shipper complained to the Board that we had refused its request for service on a spur that was owned by a third party and was used by a competitor. The shipper believed that it had a right to use this spur. In fact, when we investigated, we discovered a highly complex web of agreements that did not give the shipper a right to use the spur.

These examples, and others like them that we discuss below, underscore a basic theme of our comments. The Board might prefer to establish bright-line rules, but bright-line rules cannot account for all the relevant considerations in any real-world situation. The Board's Office of Compliance and Consumer Assistance (now the Office of Public Assistance), which intervenes in these situations on request, has the flexibility to explore the facts and evaluate the potential risks and benefits of intervention. Careful evaluation is key to sensible common carrier regulation.

II. COMMENTS ON THE SPECIFIC ISSUES RAISED BY THE BOARD

Issue No 1: Service Limitations Resulting from a Capacity Constrained Environment

Every recent study of future demand for rail transportation predicts that demand will outstrip capacity from investments railroads will be able to make on their own, and that this capacity-constrained environment will persist for decades. For example, the "National Rail Freight Infrastructure Capacity and Investment Study" (Sept. 2007) predicts an investment shortfall between now and 2035 of \$39 billion, even assuming little modal shift. We can hope that public-private partnerships, investment tax credits, or other sources will help address this shortfall, but the Board must anticipate the likelihood that rail capacity will be constrained, at least in many parts of the national rail network, for the foreseeable future.

This is a major change in the railroad environment. In an environment of more capacity constraints – and especially after Union Pacific was caught short-handed by a sudden traffic surge in 2003 – we have learned to be much more careful and analytical in our approach to business opportunities. Each year, and on a multi-year basis, we attempt to estimate expected traffic levels for the upcoming year and several years beyond and match them to the resources – track, people, cars, locomotives – needed to handle that traffic. We must be very careful to avoid overstressing the network and inefficient operations that would consume resources. Both would hurt service.

In today's slowed economy, we have excess capacity in some areas, but the future promises more capacity challenges, not fewer.² On several major corridors, we remain near the edge of our capacity limits. We therefore continue to invest at a record pace – \$3.1 billion annually – where we anticipate earning a reasonable return. Our investments include new capacity on constrained corridors, such as our east-west lines between central Nebraska and both Chicago and St. Louis that carry most of our customers' coal shipments. Our expansion of the "Sunset Route" between El Paso and Southern California has drawn substantial attention. We also are expanding capacity in the Houston area, on the Joint Line with BNSF Railway that serves the Powder River Basin, on our own Wyoming coal line, in the Los Angeles Basin, and in other locations. In addition to these and other "iron-on-the-ground" investments, we continually improve operating processes and technology to create additional capacity.

We demonstrated to ourselves and to the nation in 2003-2004 what happens when traffic outstrips capacity. When Union Pacific did not have enough crews to operate our trains in the

² For example, we had more than 16,000 cars in storage on our lines as of April 15, 2008, including more than six thousand lumber center beam flatcars and boxcars.

Far West in 2003, we lost the ability, for example, to move loaded trains outbound from busy West Coast ports and move inbound trains to the ports for unloading. That temporarily stranded locomotives on the trains, worsening the congestion at the ports. With significant numbers of locomotives stranded in the West, the normal flow of locomotives for intermodal and manifest traffic dried up, and we quickly ran short on locomotives in Chicago and other locations. The resource shortage and congestion in the West spread until it affected our entire network. UP's velocity declined and service deteriorated for thousands of our manifest and intermodal customers.

Union Pacific's experience illustrates two important points that are particularly relevant in this proceeding. First, when railroads take on traffic that they are not resourced to handle, it can reduce rather than expand the overall provision of rail service. Second, the harms from such traffic will not be confined to particular localities. Railroads are networks, and events that overload one part of a rail network can swallow up resources, disrupt service, and cause dislocations for customers 1,500 miles away.

In this capacity constrained environment, the Board also must take special care not to overload the rail network, either on a broad scale or in particular localities. The Board must always question whether it can allocate resources better than the market. When market forces are allowed to operate, scarce capacity will be allocated as efficiently as possible. Suppliers naturally avoid taking on volume that they cannot handle, and they commit available capacity where it creates the greatest value. Especially when railroads are capacity constrained, regulators should be extremely careful before ordering a rail carrier to handle additional traffic. They also must recognize that an apparently benign decision to aide one shipper – even a decision that superficially appears to be “reasonable” – might in fact unleash forces that have

broad disruptive effects and ultimately reduce a railroad's ability to meet obligations to other shippers, and ultimately reduce the aggregate amount of transportation service the carrier can provide.

Issue No. 2: Cost and Safety Issues Related to the Transportation of Hazardous Materials, Especially Toxic Inhalation Hazards

On this issue, Union Pacific adopts the comments of the Association of American Railroads.

Issue No. 3: Carrier-Imposed Requirements for Infrastructure Investments by Shippers

Shipper investments in rail infrastructure have a long history, and requiring shippers to take financial responsibility for infrastructure needed to serve them cannot, in principle, be considered unreasonable. For decades, and throughout the country, shippers have provided in-plant switching using their own locomotives on their own trackage. Today, for example, grain elevators and ethanol producers often use their own locomotives or small "track mobiles" to shuttle freight cars as needed for loading and unloading. Railroads routinely enter into a variety of arrangements that allocate financial responsibility for infrastructure needed to serve particular shippers. Sometimes carriers use "take-or-pay" arrangements in which the customer receives a credit for shipping cars, but remains financially responsible for the infrastructure investment, so that the railroad does not waste money on infrastructure that the shipper then does not use. These arrangements are even more important on a capacity-constrained network.

Market forces, not government regulation, should presumptively determine whether and where rail carriers invest their scarce resources and how responsibility for mutually beneficial investments is allocated between rail carriers and shippers. Any government regulation that forced carriers to make investments not justified by market conditions, even assuming it could meet constitutional standards, ultimately would reduce the total amount of transportation service

a railroad could provide by diverting investment dollars to less efficient uses. Regulation also should not require rail carriers to spend their investment dollars to offset the costs created when shippers site new facilities on their lines. Rail carriers should be allowed to insist that shippers bear the reasonable costs of ensuring that new facilities do not impair rail service to other shippers.

The same principle applies both to investments needed to serve new markets and to investments needed to serve new facilities: the common carrier obligation should not be invoked to force carriers to invest in ways that help one shipper at the expense of others.

Shipper investment in rail infrastructure to serve new markets. Union Pacific sometimes enters into infrastructure investment agreements with customers that give UP the assurance we need to justify investing in a new line of business. For example, UP's Powder River Basin ("PRB") coal network, in which we have invested over \$7.5 billion in the past 10 years, is oriented to handle shipments from Wyoming to the Midwest or beyond and to the South Central states. Recently, however, a few customers approached us about shipping PRB coal to western destinations. The capacity investments needed to make such shipments feasible – specifically, upgrading an unsignalled branch line in eastern Wyoming – did not provide as attractive a return as other investments. In agreements that worked for both parties, a customer provided up-front funding in exchange for a multi-year service commitment on terms the customer found acceptable.

Setting aside questions of Board jurisdiction over private contracts, we believe railroads and their customers should be allowed as a matter of policy to enter into such arrangements to develop new transportation services. Such arrangements rely on market principles and mutual commitments to produce investments in new transportation capacity that otherwise might not

occur. If carriers were prohibited from entering into infrastructure agreements, they might not make certain investments, and a shipper's only recourse would be to turn to the Board. In such situations, the Board would be forced to substitute its decisions for those that could have been obtained from the market. Presuming it has the constitutional authority to do so, the Board would be confronted with the possibility of forcing carriers to make uneconomic investments – investments where the railroad is left on the hook if the shipper fails to carry through.³ And such government-directed investments would mean that other market-driven investments of benefit to other shippers would not be made.

With rail transportation capacity needed throughout the nation, there is no public-policy justification for prohibiting mutual infrastructure investment commitments. There also is no public policy justification for requiring railroads to make capital investments that may not be fully utilized or provide adequate returns. By contrast, there is a public-policy justification for mutual infrastructure investment commitments that are market driven. Such market-driven, mutually agreed-upon infrastructure investment commitments ensure that shippers' capital, and ours, will be used effectively and for the greatest value.

Shipper investment in rail infrastructure to serve new facilities. A shipper's desire to locate a new facility on a capacity-constrained rail line presents a somewhat different situation. Traditional switching access, where a local train stops on the mainline and switches cars from the mainline into the plant and brings others out, creates intolerable disruption if the mainline is at or

³ Even apart from constitutional issues, Union Pacific does not believe that the Board has the authority to require railroad investments, except with regard to the provision of car service, and then only when "providing the facilities or equipment will not materially and adversely affect the ability of the rail carrier to provide safe and adequate transportation," and "the amount spent on facilities or equipment, including a return equal to the rail carrier's current cost of capital, will be recovered," and "providing the facilities or equipment will not impair the ability of the rail carrier to attract adequate capital." 49 U.S.C. § 11121(a).

near capacity. Such switching would cause major delays to other shipments, such as unit trains of grain and coal. Highways provide an often-used analogy. A lightly-used rural highway can accept more new access driveways without causing unreasonable delays. No one, however, would consider it reasonable to force the New Jersey Turnpike Authority to allow developers to connect new roads directly onto the Turnpike at stoplights.

Union Pacific has developed “Guidelines for Rail Service to New Industry Locations,” which are posted on our website.⁴ Union Pacific’s guidelines classify various track segments depending on how likely it would be for new local service to interfere with service for other shippers and cause “collateral delay.” On branch lines and some secondary lines, we establish more modest requirements for new service. On the majority of our mainlines, however, we have established “controlled access,” which requires new facilities to have industrial trackage sufficient to handle their business and to permit switching to take place with minimal interference to main track operations. Union Pacific’s approach is essential to maintain fluid network operations. On mainlines such those in Arkansas and eastern Oklahoma, we typically handle 20 to 45 trains per day, so traditional switching from the main track, which can consume hours, would delay hundreds of shipments and cause delays that would ripple into our terminals and consume locomotives by forcing them to sit idle.

On our busiest mainlines, such as between the middle of Nebraska and North Platte, we regularly operate a train as frequently as every six minutes. and we also must devote many hours each day to maintaining our tracks. The delays associated with switching a new facility from

⁴ See www.uprr.com/customers/attachments/industry_guidelines.pdf. Apart from whatever contractual arrangements they may have with shippers, railroads have no unrestricted obligation to connect a shipper’s spur to its main line, or to operate over such a spur. They can be obligated to install and operate a switch connection only if the specific requirements of 49 U.S.C. § 11103 are met.

this mainline would be intolerable, backing up trains across the state and making it impossible for us to meet our commitments to utilities and other shippers across the country. A request for traditional switching service on these and other intensely used main tracks would not be a reasonable request for service. If the shipper is willing, however, to invest in support tracks and related infrastructure that allow trains to enter and exit these lines without major delays, we will welcome the new customer.

Union Pacific's recent experiences in connection ethanol plants illustrate these issues. During the initial surge of enthusiasm for ethanol plant construction (which has since subsided), Union Pacific received numerous requests for new plant locations on our lines throughout the Midwest. Several of those plants have been constructed, others are being constructed, and still others have been deferred due to changes in the energy, grain, and credit markets.

In a few instances, Union Pacific could not approve a proposal, at least as made, because of adverse impacts on network operations and other shippers. For example, Union Pacific had purchased a line from a shortline railroad and converted it into a conveyor belt for empty coal trains returning from the St. Louis and Kansas City gateways to PRB mines. We were (and are) running westbound empty coal trains at the maximum capacity of the line. A potential shipper asked to locate on that line and receive local service when there were no other local shippers to serve. To make matters worse, the shipper wanted most of its shipments to go eastward, against the flow of coal trains. We could not accommodate that request as made, because we could not accept the delays to our customers' coal trains while we switched the plant and could not run trains against the flow of westbound coal trains. We suggested infrastructure investments that would allow it to load unit trains and avoid unreasonable delays to coal trains, and we also suggested other locations.

It is essential that capacity-constrained railroads be allowed to meet their common carrier obligations in a way that preserves network efficiency and service to other customers. For example, a customer wanted to expand an ethanol facility on the south side of our quadruple main track just west of North Platte, Nebraska. This is the most heavily used freight line in the world. Providing the customer with switching off the main line for the proposed volumes would have been severely disruptive. We reached agreement with the shipper on its funding of a siding and a loop track, which would enable UP to access the plant from both directions without disrupting mainline operations. If the Board had determined that Union Pacific had a common carrier obligation to serve this shipper or others in similar circumstances without the shipper's investing in the requisite infrastructure, it would have forced UP to make the investment. That investment might have been wasted because the expansion has not gone forward.

If government regulation could require railroads to spend their scarce capital dollars on projects that they would not otherwise fund, whether those projects involve serving new markets or new shippers, financial markets would quickly withdraw investment dollars from the industry, increase capital costs for railroads, and, accordingly, reduce overall railroad investment. Ultimately, railroads would provide less capacity than if they had been allowed to make market-driven investments in the first place. This would hold true even if the government regulated railroad investment indirectly by holding that a railroad's failure to make particular investments constituted a violation of its common carrier obligation. Whether the regulation is direct or indirect, railroads would be unable to provide the services demanded by the market because of reduced investment and less capacity brought about by government action, and their earnings would be reduced, which would further reduce their ability to meet market demand and the needs of shippers.

Issue No 4: The Impact of Volume Requirements or Incentives

As we noted earlier, in the former era of excess capacity, railroads had strong incentives to capture as much remunerative traffic as they could to help defray the costs of their expensive infrastructure. Union Pacific still has a number of “legacy” contracts that reflect that economic environment and provide volume incentive arrangements. In the current capacity-constrained world, however, we are more likely to impose a volume cap than to create a volume incentive.

Even in a constrained environment, however, volume requirements and incentives play important roles. Volume commitments allow us to establish plans to maximize the efficient use of our transportation resources. We attempt to make reasonable estimates of future volumes, which can be difficult in a dynamic marketplace, and volume commitments ensure that we do not waste millions of dollars by allocating capacity to handle shipments that suddenly evaporate. Volume commitments also help justify investments in new capacity. In connection with our automotive contracts, for example, Union Pacific has invested hundreds of millions of dollars in autoracks and unloading facilities. We would not make those investments without customer commitments to use them.

Moreover, even in a capacity-constrained world, we must compete for business, and many shippers want multi-year arrangements with us. If we stopped competing in that way, we would find ourselves losing traffic. The several recent, publicized shifts of business between UP and its competitors are only the most visible signs of competition that roils continuously, as railroads attempt to balance the need to carry a volume of traffic they can service with the need to earn adequate revenues. The judicious use of volume requirements and incentives is part of competing and achieving that balance.

Issue No. 5: "Economically Motivated" Service Reductions and Metering of the Demand for Service

Union Pacific is aware of claims that we and other railroads adjust our rail operations to disadvantage shippers that pay low rates. These claims do not accurately characterize UP's conduct. It is important for the Board to analyze the facts in each such situation to understand what is happening in the marketplace.

With regard to service changes, Union Pacific does not target individual shippers for more or less train or switching service based on how much they pay. That would lead to inefficient operations. When we reduce service, we do so for legitimate operating reasons. Like any railroad, we may sometimes reduce service when demand does not justify the current level of service (such as reducing switching service from daily to five days per week), but all similarly situated shippers are treated similarly, regardless of the rates they pay.⁵

On the issue of "metering" demand, it is essential to recognize that the freight rates we charge invariably affect demand. That is how markets work. Our rates may sometimes cause a shipper to make a choice to use a carrier other than Union Pacific. In 2007, we received through our web-based rate request system 1,513 requests for rates involving over 1,000 commodities in which the shipper noted a trucking option. In almost 1,000 of those instances, involving over 900 commodities, the shipper elected to ship by truck. In those instances, we were not "metering" demand. We wanted the business. But at the same time, we also wanted a reasonable return on our investment, and truckers – desperate for business in a slowing economy – were willing to quote rates too low to meet our targets for reasonable rates (usually below the

⁵ An exception is in our intermodal business, where we offer a premium service ("Blue Streak" service) to shippers willing to pay-a-rate premium.

level over which the Board would have jurisdiction). That is what happens in a competitive market. We respectfully suggest that the Board cannot rationally distinguish “metering” demand from normal competitive behavior and railroad efforts to achieve adequate returns on the investments we are making to serve shippers.

Issue No. 6: The Proper Use of Rail Embargoes

Embargoes are an essential tool for preserving service quality and preventing widespread harm to the rail network. Union Pacific has developed and successfully deployed a sophisticated demand-management program that also helps us identify problems and implement temporary embargoes before the problems can spread. At the same time, we recognize that embargoes must be used reasonably and only as long as the conditions that prompt them exist.

Union Pacific probably has imposed more embargoes during the last few years than any other carrier.⁶ In the 2003-2004 period, we faced significant congestion problems that required temporary embargoes. As a result of those congestion problems, we developed a sophisticated, web-based program that we call CIMS (Customer Inventory Management System).

We initially developed CIMS to address congestion in the Phoenix terminal. In early 2004, Phoenix was gridlocked with freight cars. We sometimes could not switch incoming cars for shippers because we had no empty tracks in our yard. Terminal dwell time averaged 5.75 days, and our yard capacity dropped to 62,000 cars annually. Demand, however, totaled 88,000 cars in 2004. In studying the situation, we found that we were holding in our Phoenix yard up to

⁶ Nearly half of UP’s outstanding embargoes are what we call “mirror embargoes.” These embargoes are issued, not because of disabilities on UP, but because of embargoes issued by other railroads. These typically involve short lines or switching roads where we have traffic arrangements treating their stations as “UP” stations for billing purposes (often called “handling carrier” arrangements). In these situations, if the serving road issues an embargo for one or more of its stations, industry billing systems will not recognize that the embargo also affects the “UP” stations on the serving road, and will continue to allow traffic to be billed to the “UP” stations.

29 days' worth of inbound cars for one shipper, and dozens more for many other shippers. We initially attempted to address this situation by increasing our switching frequency to ensure that our service was adequate, but it quickly became apparent there was nothing we could do with service adjustments that would address the real problem – the huge amount of excess inventory we were holding in the terminal for shippers who were unable to accept inbound traffic. Clearly, something had to be done.

We began CIMS by creating a highly detailed, computer model of the capacity of every UP track and every shipper facility in the Phoenix area and by creating an inventory of all cars in the terminal and en route to the terminal, even on other railroads. We quickly discovered that a number of customers had far more cars in the terminal than they could unload in any reasonable time frame. We imposed embargoes on those customers, but we worked with them, customer-by-customer, to whittle down the backlogs. Sometimes we changed our operating patterns so that shippers could unload more cars. We also established a policy that allowed up to three days' worth of cars in our yards at any time, but no more. We used a permit system, with the active involvement of our customers in issuing permits, to keep the inventory within this guideline.

Within weeks, Phoenix was cleaned out, and our service had improved enormously. We had reduced terminal dwell time to 3.5 days and added effective capacity for 38,000 more carloads per year. This gave us ample room to switch cars on arrival and receive and depart trains on time. The lesson: UP used embargoes, with permitting mechanisms, to increase capacity more than 50 percent.

We then took CIMS on the road, gradually deploying it throughout the West and then throughout the rest of our system. CIMS has not only improved terminal fluidity but also

improved car cycle time. Car cycle times on Union Pacific have dropped from 11.3 days in early 2004 to only 9.9 days today.

CIMS and the embargoes we sometimes used with it played a major role in ending the service difficulties we experienced in 2003-2004. It continues to play an important role in enhancing service quality by allowing us to identify shippers that cannot accommodate the volume of cars they are receiving on their infrastructure. This ability allows us to react to shipper-specific situations, as well as situations resulting from rapidly changing market conditions. For example, if brokers suddenly redirect carloads of lumber to a particular terminal to take advantage of market conditions, the receivers may not be able to handle the flood of traffic, but UP can see the problem coming and stem the flow before it inundates an entire terminal area. We then work with affected shippers to clear the congestion and restore normal operations. UP consults with the customer throughout this process to make the customer aware of the issues and explore solutions to eliminate backlogs and congestion. An embargo is a tool of last resort that is used after explaining that alternative to the customer.

Union Pacific believes that targeted use of embargoes is a best practice that the Board should encourage, and that it is fully consistent with the common carrier obligation. It allows us to provide more and better service to more shippers. We receive very few complaints, and they disappear once shippers understand the advantages.

The Board must allow railroads to make appropriate use of embargoes, such as we do in the CIMS program. Unless capacity-constrained railroads can control traffic flows when shippers receive more cars than they can accommodate on their facilities and the situation threatens to interfere with service to other shippers, railroads will face repeated rounds of congestion and wide-spread declines in service.

Issue No. 7: When It Becomes Necessary to Obtain Abandonment Authorization

Union Pacific believes that a railroad should not be allowed to discontinue service indefinitely over a rail line subject to Board jurisdiction without seeking Board authority. Abandonment or discontinuance authorization under 49 U.S.C. § 10903 (or an exemption from this section) is necessary for a rail carrier to permanently or indefinitely cease service over any part of its railroad lines. An embargo can lawfully be used as a temporary measure for situations where a rail carrier is unable to provide service, but not for a permanent or indefinite service cessation.

The question of when an embargo becomes an unlawful abandonment or discontinuance is fact specific and revolves largely around the length of the service cessation and the intent of the rail carrier. Other relevant considerations are the costs of any repairs needed to restore a railroad line to service and the financial condition of the carrier. *See Overbrook Farmers Union – Petition for Declaratory Order*, 5 I.C.C. 2d 316, 322-23 (1989); *see also Central Oregon & Pacific R.R. v Coos Bay Rail Line*, STB Fin. Docket No. 35130 (STB served Apr. 11, 2008).⁷

Issue No. 8: To Whom Does the Common Carrier Obligation Apply?

Although Union Pacific is uncertain about the meaning of this question, the Board may be asking whether one railroad can be held to its common carrier obligations when another carrier also serves the same customer. In our view, any common carrier obligation should apply in equal measure to both carriers. We do not believe that one carrier is free to decline to provide service in response to a reasonable request merely because another carrier could provide the

⁷ We note that the requirement to obtain Board authorization or exemption for abandonment or discontinuance applies only to trackage considered a “railroad line,” not to spur, industrial, team, switching, or side tracks or facilities (“auxiliary tracks”). *See* 49 U.S.C. §§ 10501(b)(2) & 10906; *Auburn & Kent, WA – Petition for Declaratory Order*, 2 S.T.B. 330, 341-42 (1997); *Port Cities Properties v Union-Pacific R.R.*, 518 F.3d 1186, 1188 (10th Cir. 2008).

service. That rule could create a “race” to be the first to refuse a service request. The test should be whether the request is reasonable *for that carrier* under all the circumstances affecting that carrier, not which carrier reacts first.

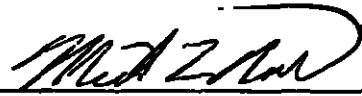
The Board may be asking instead whether an owning railroad has a common carrier obligation to preserve reciprocal switching or other access arrangements as circumstances change. Union Pacific does not believe that this type of situation implicates the common carrier obligation at all. Instead, this situation is a matter of interline rail service and is governed by the Board’s Intramodal Competition Rules. 49 C.F.R. part 1144.⁸

CONCLUSION

This proceeding raises important questions about when railroads can be required by government to act contrary to the dictates of the market and their best judgments about how to operate constrained rail networks. These questions take on additional importance in the current capacity-constrained environment, where regulatory decisions can have particularly harmful effects on railroad operations and detrimental consequences for railroads and their customers. We believe regulation should rarely be used to restrict or countermand market-driven behavior, and then only after developing a full and complete understanding of all the facts and potential consequences and seriously questioning whether regulation will truly produce a better overall outcome for railroads and their customers.

⁸ We put aside any trackage rights and terminal access arrangements that arise out of merger proceedings. In those cases, agency decisions and resulting implementing agreements govern the parties’ duties.

Respectfully submitted,



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April 17, 2008