

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Finance Docket No. 35861**

**CALIFORNIA HIGH-SPEED RAIL AUTHORITY
—PETITION FOR DECLARATORY ORDER**

**UNION PACIFIC RAILROAD COMPANY'S
REPLY COMMENTS TO
CALIFORNIA HIGH-SPEED RAIL AUTHORITY
PETITION FOR DECLARATORY ORDER**

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Union Pacific Railroad Company (“UP”) hereby submits these Reply Comments to the Petition for Declaratory Order filed on October 9, 2014 (“Petition”) by the California High-Speed Rail Authority (“CHSRA”).

I. INTRODUCTION

UP operates an interstate railroad that is an integral part of the nation’s freight transportation network. UP operates in California and twenty-two other states. To ensure national uniformity in the regulation of freight railroad tracks, rail yards and other rail transportation facilities and rail operations, UP has a strong interest in the issue of preemption under ICCTA.

UP also has a strong interest in protecting its freight operations from any impacts caused by California’s high-speed rail project (“HSR”). CHSRA’s currently proposed route for the approximately 800-mile HSR project runs in close proximity to, and in some locations threatens to encroach on, UP’s freight rights-of-way. Between San Francisco and San Jose, for example, CHSRA proposes to share tracks currently used by UP freight trains and conventional passenger trains (so-called “blended service”). At various stages in the development and review of the HSR project, UP has participated and commented on blended service and other issues in order to protect its freight rail network and avoid interference with its operations. UP has raised significant operational, safety, and other

concerns arising from the proposed construction and/or operation of the HSR project on or adjacent to railroad tracks, rail yards and other transportation facilities on which UP provides freight rail transport services.

The purpose of these comments is two-fold: *First*, to inform the Board of UP's substantial interests and unique perspective, as a nationally operating freight railroad, on the California HSR project and federal preemption. *Second*, to urge the Board to avoid any ruling that would compromise UP's ability to protect its freight rail network, operations and service to shippers. We begin with some brief background facts relating to UP's substantial interests in the California HSR project.

II. FACTS RELATING TO UP'S INTERESTS

A. UP's Freight Rail Network.

UP's interstate freight rail network forms a vital link in the nation's interstate and international commerce. UP's freight tracks, rail yards and other rail transportation facilities are located throughout the State of California, including in the Central Valley, in the Los Angeles Basin, and on the San Francisco Peninsula. UP serves all of the state's major ports, including the Port of Los Angeles, Port of Long Beach, and Port of Oakland. UP connects its California customers to twenty-two other states and beyond to North America, Asia and Australia.

B. Notice to CHSRA of Need to Avoid Interference with Freight.

In 2008, California voters approved Proposition 1A, which authorized issuance of \$9.95 billion in state bonds to fund the beginning of construction of a high-speed passenger rail system connecting the major population centers of Northern and Southern California. From the outset, UP communicated with CHSRA regarding the need to construct and operate the HSR in a manner that would not interfere with UP's freight system and operations. UP informed CHSRA that UP opposed building any part of the project on Union Pacific's property; that UP opposed building or operating any part of the Project in a manner that would limit UP's ability to serve current and future freight

rail customers; and that UP opposed any project component that could increase the safety and liability risks to UP's employees and freight operations. In particular, UP always has required that CHSRA design the HSR project to maintain a safe, and operationally functional, distance between UP's freight lines and the HSR project.

C. CHSRA's Proposal for "Blended Service."

Since the 1990s when the HSR project was proposed in California—and continuing until 2012—the announced plan was to construct and operate high-speed rail on entirely new tracks dedicated to HSR service over its entire length. But CHSRA changed that plan in April 2012, when CHSRA adopted a "Revised Business Plan."

Under the 2012 Revised Business Plan, CHSRA proposed for the first time to operate part of its network through "blended"¹ operations with existing, lower speed commuter services. In some places, these commuter lines operate on freight tracks that UP owns or on which it has rights to operate freight service. In some locations, most notably the San Francisco Peninsula, CHSRA contemplates operating high-speed trains on the same tracks as freight and conventional passenger trains. Blended service would interfere with UP's existing and future freight operations, including access to existing and future customers.

D. The MOU Between UP and CHSRA.

When the Revised Business Plan was adopted in 2012, UP raised concerns with CHSRA about how blended service would interfere with existing and future freight

¹ CHSRA proposes having high-speed trains transfer from dedicated tracks to existing tracks used for commuter service to complete their travel into urban areas such as Los Angeles, Sacramento, and San Francisco. CHSRA refers to these proposals as "blended service" or "blended operations." The 2012 Revised Business Plan refers to *blended systems* and *blended operations*, "which are the integration of high-speed trains with existing intercity and regional/commuter rail systems via coordinated infrastructure (the system) and scheduling, ticketing, and other means (operations)." See http://www.hsr.ca.gov/About/Business_Plans/2012_Business_Plan.html, p. 2-1, last visited October 30, 2014.

operations, and directly conflict with UP's legal rights. UP subsequently engaged in negotiations with CHSRA and some of the commuter railroads whose operations would be affected by blended service under the 2012 Revised Business Plan. On July 11, 2012, UP, CHSRA, the Capitol Corridor Joint Powers Authority, the San Joaquin Regional Rail Commission and the State of California Department of Transportation executed a binding Memorandum of Understanding ("MOU") to ensure the HSR project does not interfere with Union Pacific freight operations or conflict with its other legal rights.

The purpose and effect of the MOU is to secure UP's rights and ability to continue meeting its common carrier obligations, including access to new and existing customers. The MOU specifically reserves UP's rights to participate in future proceedings, including claims or litigation concerning any aspect or portion of the HSR project.

E. Ongoing Negotiations Between UP and CHSRA

Since executing the MOU, UP and CHSRA have participated in negotiations to enter into definitive agreements that will be necessary for construction of the HSR project to begin—including an engineering, construction and maintenance agreement, an engineering reimbursement agreement, and real estate purchase and sale agreements. So far, the only additional agreements that have been executed are an insurance and indemnity agreement (as required by the MOU) and a reimbursement agreement related to UP's review of CHSRA's engineering plans.

UP and CHSRA are continuing to negotiate an engineering, construction and maintenance agreement for the portion of the HSR project from Merced to Bakersfield, California. Other necessary agreements, which are still subject to negotiation between UP and CHSRA, include an environmental indemnity agreement; grade separation and grade crossing closure agreements; and easement acquisition agreements. Additional agreements will be necessary as the HSR project proceeds, including agreements regarding rights of entry, construction of utility crossings, construction of grade-separated

structures and removal of existing at-grade crossings; real estate purchase and sale and easement agreements; and agreements regarding communication protocols and mitigation of electromagnetic interference impacts.

F. Surface Transportation Board Decision Authorizing Construction of Fresno-Bakersfield Segment.

On August 12, 2014, the Board issued a decision (Docket No. FD 35724 (Sub. No. 1)) (the “Decision”) authorizing construction of the portion of the HSR project from Fresno to Bakersfield. In the Decision, the Board, acting in part as a cooperating agency pursuant to the National Environmental Policy Act (“NEPA”), adopted the Final Environmental Impact Report/Environmental Impact Statement (“EIR/EIS”) jointly prepared by CHSRA, pursuant to the California Environmental Quality Act (“CEQA”), and the Federal Railroad Administration (“FRA”), pursuant to NEPA. In doing so, the Board added several important environmental conditions to supplement those in the EIR/EIS, including in particular new Mitigation Condition (d): “Prior to initiating construction, the Authority shall ensure that the Construction Management Plan required by FRA’s Mitigation Measures LU-AM#2 and SOAM#1 is expanded to address potential project-related construction impacts to freight railroad operations.” Decision at 21. The Board also noted that it expected that CHSRA “will work out mutually satisfactory agreements with other railroads, if any, that might be affected by construction of the Line, including Union Pacific Railroad Company. . . . See also Mitigation Condition (d), below (requiring the Authority to ensure that the construction management plan required by FRA’s mitigation measures be expanded to address potential project-related construction impacts to freight railroad operations).” Decision at 16, n.60.

G. CHSRA Petition for Declaratory Judgment from the Board.

On October 9, 2014, CHSRA filed the Petition for Declaratory Order (“CHSRA CEQA Petition”) advising the Board of certain pending CEQA lawsuits in state court, challenging the EIR/EIS and seeking to enjoin construction of the Fresno-Bakersfield

HSR segment. UP is not a party to any of those lawsuits. In the Petition, CHSRA requests a declaration as to whether such a state law remedy is available or whether 49 U.S.C. § 10501(b) of the ICC Termination Act ("ICCTA") preempts such a remedy. Given the time constraints and extensive comment the Board will receive on the applicability of ICCTA preemption, UP will not burden the record by addressing that issue. Instead, we request that the Board take care that its decision in response to the CHSRA CEQA Petition does not compromise its ability to protect freight rail transportation.

III. THE BOARD SHOULD NOT MAKE ANY RULING THAT WOULD COMPROMISE UP'S ABILITY TO PROTECT ITS FREIGHT RAIL NETWORK

UP has a strong interest in protecting its freight rail network, and its ability to serve shippers from potential operational, safety and other impacts of the HSR project. The Board has broad authority under 49 U.S.C. § 10901(c) and (d) to protect UP's freight operations from potential interference by construction and operation of the proposed HSR. UP also has a strong interest in federal preemption to ensure uniformity in the regulation of its railroad tracks, rail yards and other rail transportation facilities and rail operations apart from the California HSR. The Board should not rule on the CHSRA CEQA Petition in any way that undermines these interests.

Given that CHSRA requested an expedited ruling in the CHSRA CEQA Petition, UP is focusing its comments on a specific point: that the Board's ruling should not compromise its ability to protect the rail freight system, operations or service from interference by the proposed passenger service in the event that CHSRA and UP are unable to reach agreement in the future.

We note that UP has utilized the joint environmental review process, as made available to date by CHSRA and FRA under CEQA and NEPA, to protect its interests in important ways. As noted above, UP has raised significant operational, safety, and other

concerns arising from the proposed construction and operation of the HSR project in the forum that CHSRA/FRA have provided. Among other issues, UP commented on the need to ensure coordination with freight railroads during construction, which the EIR/EIS had failed to require as part of the construction mitigation plan. The Board itself remedied this omission later in its August 2014 Decision.

IV. CONCLUSION

Like any other rail project subject to this Board's approval authority, the HSR project is subject to the Board's ability to impose conditions in the public interest and to prevent unreasonable or material interference with existing rail carriers by its construction or operation. 49 USC § 10901(c) and (d). The concerns raised by UP with regard to the HSR project—including potential impacts to rail safety and efficient freight operation—are important issues for this Board to bear in mind as it addresses the proper role of federal approval of the HSR project.

Respectfully submitted,



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November 6, 2014

VERIFICATION

I verify under penalty of perjury that the factual statements made in the foregoing Union Pacific Railroad Company's Reply Comments to the California High-Speed Rail Authority Petition for Declaratory Order are true and correct, to the best of my knowledge, information and belief.

Further, I certify that I am qualified and authorized to file this document.

Executed on November 6, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Union Pacific Railroad Company's Reply Comments to California High-Speed Rail Authority Petition for Declaratory Order was served on the 6th day of November 2014, by first class mail, postage prepaid on the following parties:

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