231469

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

DEC 12 2011

Part of
Public Record

Docket No. EP 706

REPORTING REQUIREMENTS FOR
POSITIVE TRAIN CONTROL EXPENSES AND INVESTMENTS

OPENING COMMENTS OF UNION PACIFIC RAILROAD COMPANY

J. MICHAEL HEMMER
LOUISE A. RINN
DANIELLE E. BODE
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

MICHAEL L. ROSENTHAL
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

Attorneys for Union Pacific Railroad Company

December 12, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. EP 706

REPORTING REQUIREMENTS FOR
POSITIVE TRAIN CONTROL EXPENSES AND INVESTMENTS

OPENING COMMENTS OF UNION PACIFIC RAILROAD COMPANY

Pursuant to the Board's Notice of Proposed Rulemaking served October 13, 2011 ("NPRM"), Union Pacific Railroad Company ("UP") hereby submits its opening comments on the Board's proposal to adopt reporting requirements for capital investments and operating expenses associated with positive train control ("PTC").[1]

UP strongly supports the Board's proposal to adopt new reporting requirements for capital investments and operating expenses associated with PTC. The Board's proposal is largely consistent with the reporting requirements UP urged the agency to adopt in its petition to institute this proceeding. Accordingly, UP's comments first review the basic rationale for new reporting requirements and then focus on the few areas in which the Board added to or subtracted from the proposals in UP's Petition. UP's comments also address the timeframe for implementing the new reporting requirements.

With regard to the differences between the Board's proposal and UP's Petition, UP asks the Board to add a PTC version of R-1 annual report schedule 755 to the proposed "PTC

[1] UP also joins in the opening comments submitted by the Association of American Railroads ("AAR").

Supplement" to track information about the amount of materials classified as hazardous toxic-by-inhalation and poisonous-by inhalation materials that move on the lines of the reporting carrier. UP also asks the Board to modify its proposal that railroads disclose the "value of funds from government transfers" to provide that railroads would be required to make that disclosure only if they include the value of those funds in their capital investment schedules. Finally, UP asks the Board to adopt the schedule for implementing the new reporting requirements that is proposed in the opening comments of AAR, but also to make clear that individual railroads can begin reporting earlier on a voluntary basis.

I. ADOPTING NEW REPORTING REQUIREMENTS FOR PTC WOULD SERVE IMPORTANT INTERESTS.

UP believes the rationale for adopting reporting requirements for PTC is straightforward: Class I railroads are spending substantial amounts of money to implement PTC, and unless PTC-related financial and operating data are reported as part of the Board's regulatory reporting process, the Board may be unable to reconstruct the data in a manner that it finds satisfactory, and thus it may be unable or unwilling to use them in future proceedings. Accordingly, the ability of individual railroads to account separately for their own PTC costs or submit voluntarily their own PTC data is no substitute for Board-developed reporting rules.

UP recognizes there will be differences of opinion on how PTC-related data may be used in Board proceedings. However, the Board can and should adopt its proposed reporting rules without deciding whether it will use the data in any specific setting. It is enough for the Board to conclude that the data have significant informational value and therefore should be reported and preserved to ensure their availability now and in the future. This is not a matter of placing the proverbial cart before the horse: if the Board does not take the minimal step of requiring reporting, its inaction will deprive it of information that could be used to guide present policy decisions, and it may well preclude subsequent use of the data in future proceedings.

A. Railroads Will Spend Substantial Amounts Of Money To Implement PTC, And PTC Costs May Have A Significant Impact In Regulatory Proceedings.

Under the Rail Safety and Improvement Act of 2008, UP and other Class I railroads must install PTC by December 31, 2015 on (i) all main line over which intercity rail passenger transportation or commuter rail passenger transportation is provided, and (ii) all main line used to transport materials classified as hazardous toxic-by-inhalation or poisonous-by inhalation materials (collectively, "TIH").[2]

PTC is being developed to be a predictive collision avoidance technology that will stop or slow a train before an accident occurs.[3] It is designed to keep a train under its maximum speed limit and within the limits of its authority to be on a track. It requires sophisticated computer software, reliable communications systems, and other complex technologies to monitor current train conditions, detect upcoming track conditions, and take control of the train when needed. PTC systems are comprised of digital data communications networks; on-board computers, in-cab displays, and throttle-brake interfaces on locomotives; wayside interface units at switches and wayside detectors; and control center computers and displays.

Railroads are incurring substantial costs to install PTC, and they will incur substantial costs to operate and maintain their PTC systems. UP has estimated that it will spend

---

[2] Pub. L. No. 110-432, § 104(a), 122 Stat. 4848, 4856-57 (2008) (codified at 49 U.S.C. § 20157(a)(1)).

[3] The Federal Railroad Administration describes the basic attributes of PTC on its website. *See* http://www.fra.dot.gov/pages/784.shtml.

approximately $1.4 billion to implement PTC by the end of 2015.[4] AAR estimates that total implementation costs for Class I railroads will be approximately $5.8 billion.[5] According to Federal Railroad Administration ("FRA") estimates, railroads will spend between $9.5 billion and $13.2 billion over the next 20 years to install and maintain PTC systems.[6]

To place PTC costs into perspective, AAR estimates that the approximately $5.8 billion that Class I railroads will spend to install PTC is roughly equal to what they have spent over the past four or five years combined on capital expenditures related to infrastructure expansion.[7] FRA succinctly summarized the consequence of the requirement to install PTC: "railroads must immediately engage in a massive reprogramming of capital funds."[8]

The potential impact of PTC costs in regulatory proceedings is demonstrated by a recent case under the Board's Three-Benchmark methodology, *US Magnesium, L.L.C. v. Union Pacific Railroad*. The Board ultimately rejected UP's effort to account for PTC costs in *US Magnesium*,

---

[4] *See* Union Pacific Corp., Annual Report (Form 10-K), at 25 (Feb. 4, 2011).

[5] *See* Association of American Railroads, Positive Train Control (June 2010), *available at* http://www.aar.org/safety/~/media/aar/backgroundpapers/positivetraincontrol.ashx.

[6] *See* Federal Railroad Administration, Docket No. FRA-2008-0132, Notice No. 3, *Final Rule: Positive Train Control Systems, 49 CFR Parts 229, 234, 235, and 236* at 327 (Jan. 15, 2010). The difference in estimates reflects different discount factors applied to the 20-year analysis. The low estimate reflects a 7% discount factor; the high estimate reflects a 3% discount factor.

The Federal Railroad Administration has recently proposed to amend certain of its regulations regarding implementation of PTC, and it estimates that the amendments would reduce the costs over 20-years by between $620 million (using a 7% discount factor) and $818 million (using a 3% discount factor). *See* Federal Railroad Administration, Office of Safety Analysis, Docket No. FRA-2011-0028, Notice No. 1, *Positive Train Control Systems, Regulatory Impact Analysis* at 16 (Aug. 3, 2011).

[7] *See* Association of American Railroads, Positive Train Control (June 2010), *available at* http://www.aar.org/safety/~/media/aar/backgroundpapers/positivetraincontrol.ashx.

[8] Federal Railroad Administration, Docket No. FRA-2008-0132, Notice No. 1, *Notice of Proposed Rulemaking: Positive Train Control Systems, 49 CFR Parts 229, 234, 235, and 236* at 19 (July 21, 2009).

primarily because it concluded that UP's actual PTC costs were uncertain and that the attribution of those costs to the issue traffic was too complex an issue to analyze in the context of a single rate case.[9] However, UP's analysis showed that if a share of UP's approximately $1.4 billion in costs to install PTC were allocated to the issue traffic, the maximum lawful rates would have been approximately $5,500 per car higher than if PTC costs were not considered.[10]

The availability of accurate PTC-related financial and operating data will be critical to the Board as it pursues its regulatory responsibilities. PTC costs will be an issue as the Board pursues its initiative to review and update URCS, particularly in any effort to analyze whether URCS properly allocates costs to TIH.[11] PTC costs will likely be an issue in any proceeding regarding the common carrier obligation to transport TIH.[12] Moreover, PTC costs will continue to be an issue in rate cases, including cases under stand-alone cost methodology.[13]

B. The Board's Reporting Rules Do Not Include Separate Classifications For PTC-Related Financial And Operating Data.

The Board's reporting rules currently do not provide for separate reporting for either capital investment in PTC or costs associated with operating and maintaining PTC. Under the

---

[9] *See US Magnesium, L.L.C., v. Union Pac. R.R.*, STB Docket No. 42114, slip op. at 17 (STB served Jan. 27, 2010).

[10] *See* Opening Evidence of Union Pacific Railroad at 61, *US Magnesium, L.L.C., v. Union Pac. R.R.*, STB Docket No. 42114 (filed Aug. 24, 2009).

[11] *See Class I Railroad Accounting & Financial Reporting – Transportation of Hazardous Materials*, STB Ex Parte No. 681, slip op. at 1-2 (STB served Jan. 5, 2008); Surface Transportation Board, *Surface Transportation Board Report to Congress Regarding the Uniform Rail Costing System* at 19 (May 27, 2010).

[12] *See Establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee*, STB Ex Parte No. 698 (STB served Aug. 5, 2010).

[13] *See, e.g.*, Opening Evidence of Arizona Electric Power Cooperative at III-C-57 to C-60, *Az. Elec. Power Coop. v. BNSF Ry.*, STB Docket No. 42113 (filed Jan. 25, 2010); Joint Reply Evidence of BNSF Railway & Union Pacific Railroad at III.F-95 to F-96, *Az. Elec. Power Coop. v. BNSF Ry.*, STB Docket No. 42113 (filed May 7, 2010).

Board's current reporting rules, those capital investments and operating expenses are being reported, and will be reported, within schedules 330, 332, 335, 352B, and 410 in Annual Report R-1 data that railroads file each year with the Board. However, those schedules do not provide for separate reporting of the PTC-related costs and expenses.

The Board's rules also do not provide for reporting operating statistics associated specifically with lines or locomotives on which carriers have installed PTC equipment. The Board currently collects a variety of operating statistics that can be used to monitor and evaluate many aspects of the railroad industry, and the Board also uses certain operating data, together with cost data, to develop the cost/volume relationships that are then used to cost specific rail movements. However, none of the schedules currently in Form R-1 provides for separate reporting of PTC-related operating statistics. For example: schedules 700 and 720 require reporting of mileage operated for certain categories of tracks, but they do not require separate reporting regarding track equipped with PTC; schedule 710 requires reporting regarding locomotive units, but it does not require identification of the number of units equipped with PTC; schedule 755 requires reporting information about freight traffic, but it does not require separate reporting for TIH traffic.

Unless the Board adopts rules that require more detailed reporting, there can be no assurance that PTC-related financial and operating data will be captured and preserved in a way that will allow the Board to use them to inform its regulatory policymaking or to make more specific use of the data in future proceedings.

C. The Board Should Promptly Establish New Reporting Rules So PTC-Related Financial And Operating Data Will Be Available For Use In The Future.

The Board should act promptly to implement its proposed rules, with the few additions and modifications described below. The Board has already identified the need to better capture the costs of transporting TIH as a reason for updating its accounting and financial reporting for Class I rail carriers, including its Uniform Railroad Costing System.[14] The Board's efforts would be facilitated by rules that ensure railroads are capturing and preserving potentially relevant data. The Board has estimated that updating URCS would take approximately two years.[15] However, UP and other railroads are presently incurring significant PTC-related costs as part of their efforts leading up to implementation of PTC.[16] While the dissent to the NPRM expresses concern that gathering data before deciding precisely how it will be used seems to place the "cart before the horse," in reality, unless the Board promptly adopts new reporting requirements, the data may not be useable in a modified URCS. The Board has previously adopted additional reporting requirements to ensure the continued availability of data used as inputs to URCS.[17]

Moreover, even if the Board decides not to account for PTC-related costs in a modified version of URCS, the availability of consistent information about PTC costs and related operating statistics should prove valuable to the Board. PTC costs have been at issue in rate cases under the Board's Three-Benchmark and stand-alone cost rate methodologies.[18] PTC costs will likely be at issue in any case under the Board's simplified stand-alone cost methodology because the road property investment costs used in those proceedings do not reflect the costs of

[14] *See Class I Railroad Accounting & Financial Reporting – Transportation of Hazardous Materials* at 1-2; Surface Transportation Board, *Report to Congress*, *supra*, at 19.

[15] Surface Transportation Board, *Report to Congress*, *supra*, at i.

[16] *See* Union Pacific Corp. Annual Report (Form 10-K), at 9 (Feb. 5, 2010); *see also Massive Infrastructure Project Under Way to Ready BNSF for PTC*, Railway: The Employee Magazine of BNSF at 14 (Summer 2010) ("Construction work to lay the infrastructure for positive train control (PTC) is under way."), *available at* http://www.bnsf.com/employees/communications/railway-magazine/pdf/201007.pdf.

[17] *See Modification of Class I Reporting Regulations*, STB Ex Parte No. 538 (STB served Jan. 5, 2001).

[18] *See* notes 9 & 13, *supra*.

installing PTC.[19] The Board has previously adopted additional reporting requirements to obtain information for use in rate proceedings.[20]

Finally, as the Board observes in the NPRM, the Board has an interest in compiling information regarding PTC-related costs and operating statistics in exercising its broad economic regulatory oversight of railroads. *See* NPRM at 4. As discussed above, railroads will spend billions of dollars to comply with the congressional mandate to install PTC, and the Board has a responsibility to monitor the financial and service implications for railroads and shippers. Indeed, the Board has asked UP and other Class I railroads to provide information regarding the status of their PTC initiatives.[21] The Board has previously adopted additional reporting requirements to keep apprised of significant issues affecting railroads and shippers.[22]

II. COMMENTS ON SPECIFIC ELEMENTS OF THE BOARD'S PROPOSAL

UP agrees with the Board's proposal to create "PTC versions" of existing schedules in the Form R-1. As UP explained in its Petition, such an approach should ensure the reporting of accurate, useful, and clear information, while minimizing the burdens on carriers. UP has comments on only two specific elements of the Board's proposal: (1) the Board's proposal not to include a PTC version of schedule 755 in the PTC Supplement; and (2) the Board's proposal

---

[19] *See Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), slip op. at 45 (STB served Sept. 5, 2007) (discussing departures from rolling-average signals and communication costs).

[20] *See Annual Submission of Tax Information for Use in the Revenue Shortfall Allocation Method*, STB Ex Parte No. 682 (STB served Feb. 26, 2010) (requiring annual submission of weighted average state tax rate for each Class I railroad for use in Three-Benchmark methodology).

[21] *See, e.g.*, Letter from Daniel R. Elliot III to James R. Young (Aug. 9, 2010), *available at* http://www.stb.dot.gov/PeakLetters1.nsf/84a013f97c88faa18525777c00500f21/221fc9a5da456f698525777e00557504/$FILE/UP.pdf.

to request disclosure in a footnote of "the value of funds from government transfers." UP also believes the final rule should establish timeframes for compliance with the new requirements. These issues are discussed below.[23]

A. PTC Schedule 755

In its Petition, UP asked the Board to create a PTC version of schedule 755, which would report information on the number of TIH carloads, car-miles, train-miles, and gross ton-miles that move over the lines of the reporting carrier. In the NPRM, the Board said it believes a PTC version of schedule 755 would be "unnecessary to monitor the implementation of PTC, because gathering such data would not aid us in tracking expenditures made for PTC." NPRM at 5. However, the Board asked interested parties to address "whether collecting such information would assist the Board in monitoring PTC implementation, and, if so, how it would do so." *Id.*

UP believes that the Board's justifications for collecting information that will be reported in other portions of the PTC Supplement apply equally to the information that carriers would report in a PTC version of schedule 755. As the Board recognized, "PTC costs carry the distinction of representing a relatively specific set of expenditures prompted directly by legislative mandate," and the Board has an interest in gathering information about how these

---

[22] *See Rail Fuel Surcharges*, STB Ex Parte No. 661 (Sub-No. 1) (STB served Aug. 14, 2007) (requiring reporting of data concerning fuel costs and fuel surcharges).

[23] UP notes that the Board did not include a PTC version of schedule 352B among the sample forms in Appendix B to the NPRM. However, UP assumes that was an oversight, because the NPRM clearly contemplates that there will be a PTC version of schedule 352B. *See* NPRM at 5. In addition, UP notes that the Board included a PTC version of schedule 710S among the sample forms in Appendix B, but it is unclear what additional information the Board is seeking that would not be reported in either the PTC version of schedule 710 (which would report the number of locomotives equipped with PTC) or the PTC version of schedule 330 (which would report the capital costs of adding PTC equipment to locomotives). The Board should consider dropping the requirement of a PTC version of schedule 710S altogether. If it decides such a schedule is (continued...)

expenditures might relate to "transportation industry changes that may require attention by the agency" and in "preparing financial and statistical summaries and abstracts to provide the agency itself, Congress, other government agencies, the transportation industry, and the public with transportation data useful in making regulatory policy and business decisions." NPRM at 4.

The "legislative mandate" driving PTC expenditures requires railroads to install PTC on lines with passenger traffic and TIH, so reporting on the volume of TIH traffic and changes in volumes as railroads implement PTC appears plainly relevant to the Board's objective of "identifying transportation industry changes" that may result from that mandate, and preparing "statistical summaries and abstracts" that would be useful in making "regulatory policy and business decisions."[24] UP agrees it is important for the Board to gather information on railroad expenditures associated with PTC. UP believes that information about the volume of traffic associated with those expenditures will give the Board a more complete perspective on the impacts of the PTC mandate on the industry, as well as the potential impacts of any regulatory policy changes it may consider to address the impacts of the PTC mandate. It surely makes a difference from a policy perspective if railroads are spending billions of dollars to transport a few thousand cars or a few million cars.

In addition, UP recognizes that the Board's decision to collect and preserve PTC-related data does not mean that the Board will ever use the data in any particular regulatory application, but if the Board were to update its costing system to better capture the cost transporting TIH, the

---

necessary, then it should clarify what information should be recorded in that schedule that is not captured elsewhere.

[24] Schedule 755 currently requires reporting on passenger train data. UP operates certain commuter trains in Chicago and its metropolitan area under contracts with Metra, but passenger trains statistics have historically been excluded from the reporting in UP's schedule 755.

information provided by a PTC version of schedule 755 could be a critical part of that effort. Again, UP is not asking the Board to put the cart before the horse; it is asking the Board to preserve potentially relevant information by collecting it in a routinized fashion. Indeed, UP believes the Board would need the type of information that would be provided by a PTC version of schedule 755 simply to evaluate whether and how it should update its costing system to allocate the costs of PTC.

UP could provide information about TIH traffic in a PTC version of schedule 755 with little effort at a low cost. The Board would find the information useful in analyzing the impacts of the PTC mandate and in determining whether and how to assign those costs in rate and other proceedings. Thus, there are good reasons for the Board to require reporting of these data, and no real reasons not to require reporting.

B. The Value of Funds From Government Transfers

In the NPRM, the Board proposed a new PTC-related reporting requirement that UP did not address in its Petition; namely, the Board proposed that the reporting railroads "include by footnote disclosure the value of funds from government transfers, including grants, subsidies, and other contributions or reimbursements, used or designated to purchase or create PTC assets or to offset PTC costs." NPRM at 5. The Board said that this information would "help the Board to monitor the financing of PTC installation." *Id.*

UP urges the Board to reconsider this proposal because the requested information is unnecessary and could potentially cause confusion about the level of railroad investment in PTC. The proposed disclosure appears intended to identify the amounts recorded in railroad property accounts that are related to PTC installation and were funded by "government transfers." However, UP believes that railroad property accounts would never include any amount for PTC installation that was funded by government transfers. Rather, if there are PTC installation projects in which both a carrier and a governmental agency participates, the amount includible in the railroad's property accounts would be governed by the principles set forth in Instruction 2-17 of the Board's Uniform System of Accounts.[25] Under Instruction 2-17, the amount includible in the railroad's property accounts would include only the carrier's payments for its share of the project's cost (plus the cost of railroad property relinquished as a direct result of the arrangement and retired from service, less salvage value and less depreciation accrued on depreciable property). Thus, if a governmental agency were to help fund a PTC installation project, the railroad would not include the value of that funding in its property accounts.

In short, if the proposed disclosure is meant to break out PTC investment funded by government transfers from other reported PTC investment, UP believes the disclosure is not needed because railroads would not report PTC expenditures funded by government transfers in the PTC versions of the schedules addressing road and equipment property and depreciation. Moreover, separately reporting the amount of PTC installation costs funded by government transfers would likely prove confusing. Persons reviewing the disclosure might assume incorrectly that the amounts are reported separately because they need to be removed from the schedules to reflect actual railroad investment in PTC.[26]

However, if the Board believes that there may be situations in which a carrier might account differently for government transfers associated with PTC installation costs, UP suggests that the Board modify its proposal to provide that the footnote disclosure is required if a railroad

---

[25] 49 C.F.R. Part 1201, Instruction for Property Account 2-17.

[26] If Board is seeking simply to gather general information about the amount of government funding for PTC installation, the information should be available from public sources. If the Board is seeking information that is not publicly available, then reporting the information in the R-1 would appear to be inappropriate, in light of the Board's determination that the supplemental schedules should not be kept confidential. *See* NPRM at 4.

includes the value of government transfers in its road and equipment property and depreciation schedules.[27]

C. Timeframe for Compliance

The Board's NPRM does not clearly state when the Board would expect railroads to begin filing a PTC Supplement along with their R-1 annual reports. For the reasons described in AAR's Comments, UP agrees that the Board should make the new requirements mandatory for reports regarding calendar year 2012, except for the PTC version of schedule 410, which would become mandatory for reports regarding calendar year 2014. UP believes the Board should also allow and encourage railroads to begin filing the new reports on a voluntary basis even earlier, if their accounting systems and processes can be adapted to provide the reports before the requirements become mandatory.

III. CONCLUSION

UP commends the Board for its work in developing the straightforward approach to collecting information regarding PTC expenses and investments that is described in the NPRM. UP urges the Board to accept the minor modifications to its proposal that are discussed above and to proceed promptly to amend its reporting rules.

---

[27] If the Board decides there is a need for the proposed disclosure, UP asks the Board to modify its proposal by providing the protections and clarifications discussed in AAR's Comments.

Respectfully submitted,

MICHAEL L. ROSENTHAL
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

J. MICHAEL HEMMER
LOUISE A. RINN
DANIELLE E. BODE
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-3309

Attorneys for Union Pacific Railroad Company

December 12, 2011