

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 714

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INFORMATION REQUIRED IN NOTICES AND PETITIONS
CONTAINING INTERCHANGE COMMITMENTS

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Pursuant to the Board's Notice of Proposed Rulemaking served November 1, 2012 ("NPRM"), Union Pacific Railroad Company ("UP") hereby submits its comments on the Board's proposal to require parties filing a notice or petition for exemption to disclose additional information about interchange commitments contained in their negotiated lease or line sale transactions.¹ In support of its comments regarding the understated burden estimates, UP is submitting a verified statement from Michael N. Drelicharz, UP's Senior Project Manager of Economic Research and Analysis ("Drelicharz V.S.").

The Board should not adopt the additional disclosure requirements proposed in the NPRM because the additional burdens will have unintended consequences for the short line industry and the shipping community. In Part I of these comments, UP discusses the chilling effect that the additional disclosure requirements will have on future line sale and lease transactions. In Part II, UP addresses the ambiguities in the NPRM that, if not clarified, could

¹ UP also joins in the comments submitted by the Association of American Railroads.

lead to confusion and delays in negotiating line sale and lease transactions. In Part III, UP explains why the NPRM understates the burden estimates.

I. The Additional Burdens Imposed By the Proposed Rules Will Have a Chilling Effect on Line Sale and Lease Transactions.

The Board should not adopt the additional disclosure requirements proposed in the NPRM because the additional burden created by the requirements will have a chilling effect on line sale and lease transactions between Class I railroads and short line railroads. The Board previously refused to establish a rebuttable presumption that interchange commitments are contrary to the public interest because “interchange commitments have facilitated the creation and growth of short line railroads, which in turn has benefited the public by lowering transportation costs, improving service, and in some cases preserving rail transportation.”

Review of Rail Access & Competition Issues – Renewed Petition of the W. Coal Traffic League, Ex Parte No. 575, slip op. at 7 (STB served Oct. 30, 2007) (“Renewed WCTL Petition”). Despite the Board’s previous recognition that interchange commitments serve an important role and despite the existing regulatory requirement to disclose the precise interchange commitment terms in the applicable contract, the NPRM proposes more extensive disclosure requirements, which will have a chilling effect on line sale and lease transactions.

The requirement to submit additional information will chill the formation or continuation of short line operations because either (i) the Board will reject transactions with interchange commitments, or (ii) the rail carriers will not negotiate such transactions due to concern that commercially necessary terms will be rejected or because of the additional burdens associated

with obtaining regulatory authority for the transaction.² If the former, UP can choose to not consummate the transaction. Even if UP were willing to proceed if it were compensated for the market value of the line without an interchange commitment, the transaction cannot proceed if the short line railroad cannot afford both to pay the market price and to supply the working capital to operate and maintain the line. If the latter, fewer agreements to sell or lease a line will be submitted to the Board due to the perceived risk of denial and the associated burden of disclosing commercially sensitive information and defending the terms of the lease or sale. For example, if UP is faced with a situation where the benefits of renewing a lease with a short line railroad do not exceed the compliance burdens and the risk of defending the merits of an interchange commitment, UP will consider resuming its common carrier obligation on the line after the lease expires instead of renewing the lease. Under either scenario, the previously recognized benefits from a short line railroad operating a line, such as specialized service and lower operating costs,³ will no longer be realized by the shipping community and the role of short line railroads will diminish.

II. The Ambiguities in the NPRM Will Increase Compliance Burdens if Not Clarified.

The NPRM proposes eight additional disclosure requirements for parties filing notices or petitions for exemption where the underlying lease or line sale transaction includes an

² UP believes that prior Board findings that interchange commitments were in the public interest – generally or in particular transactions – are correct. *See Renewed WCTL Petition* at 7-8, 13-14; *Adrian & Blissfield R.R. Co. – Continuance in Control Exemption – Jackson & Lansing R.R.*, FD 35410, slip op. at 9-12 (STB served Oct. 6, 2010). The NPRM appears to anticipate that disclosure of detailed information will lead to successful challenges of interchange commitments. If so, then rail carriers will be less likely to sell or lease low density lines. Alternatively, if the Board continues to find that interchange commitments are reasonable, then the additional disclosure requirements for each proposed transaction will increase regulatory barriers to entry contrary to the Rail Transportation Policy. 49 U.S.C. § 10101(7).

³ *See Renewed WCTL Petition* at 3.

interchange commitment. NPRM at 5-6. UP believes that if the Board proceeds with this proposal, many aspects of the NPRM warrant clarification. Without such clarification, uncertainty and confusion will increase compliance burdens and delay transactions if these rules are adopted.

A. The Board should clarify the procedures to ensure the confidentiality of information “submitted under seal.”

The Board appears to intend to protect at least four of the proposed additional items of information to be included with notices or petitions for exemption, but the draft regulations create an ambiguity about whether and how the confidential information would be protected. Draft subsections 49 C.F.R. § 1121.3(d)(1)(iv), (vii), (viii) and (ix) all contain the phrase “(submitted under seal)”, but the draft regulation is silent on whether the rail carriers submitting such information must request a protective order pursuant to 49 C.F.R. § 1104.14 to achieve that protection.⁴ In contrast, 49 C.F.R. § 1121.3(d)(1)(ii) – the existing regulation which requires the submission of the document(s) containing an interchange commitment – specifically provides that such documents “will be kept confidential without the need for the filing of an accompanying motion for a protective order under 49 CFR 1104.14(b).” This difference in language creates an ambiguity that could lead to confusion. The maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) directs that when certain things are specified in a law, an intention to exclude others from its operation should be inferred.

⁴ The same comment applies to the proposed subsections in 49 C.F.R. §§ 1150.33(h)(1), 1150.43(h)(1), and 1180.4(g)(4), but for convenience UP’s comments will focus on 49 C.F.R. § 1121.3(d).

Yet treating the confidential information submitted under seal differently than the confidential document containing the interchange commitment appears contrary to the Board's intent and is inconsistent with 49 C.F.R. § 1121.3(d)(2), which establishes the procedure for shippers or other affected parties to obtain access to confidential information submitted under section 1121.3(d)(1). Confusion about whether parties submitting confidential information under seal can do so without also filing a motion for protective order can be eliminated if the language after "or agreement" in 49 C.F.R. § 1121.3(d)(1)(ii) were moved to 49 C.F.R. § 1121.3(d)(1) and specific reference to all five items requiring confidential information (e.g. subsections 49 C.F.R. § 1121.3(d)(1)(ii), (iv), (vii), (viii) and (ix)) were added.⁵ Therefore, if the Board adopts the proposed rules, it should clarify that a party filing a notice or petition for exemption can file confidential information submitted under seal under 49 C.F.R. § 1104.14(a) without also filing a separate motion for protective order.

B. The Board should clarify how parties should report carload information and confirm that shipper-specific commercial information would not be accessible by other parties.

Under the NPRM, parties filing notices and petitions for exemption would have to disclose the number of carloads originated or terminated by the shippers that currently use or have used the line in question within the last two years. NPRM at 5. However, the NPRM does not specify whether the proposed carload information should be reported in aggregate for all shippers on the line in question or whether it should be reported separately by shipper. The Board, therefore, should clarify the level of specificity for disclosing carload information.

⁵ Similar changes should also be made to proposed subsections 49 C.F.R. §§ 1150.33(h)(1), 1150.43(h)(1), and 1180.4(g)(4).

Regardless of how the Board clarifies this ambiguity, the Board should also clarify that shipper-specific commercial information will be considered highly confidential information that, even under a protective order, would not be disclosed to employees of, or inside counsel for, shippers or other affected parties. On lines with only a few shippers, aggregate carload information may also be considered highly confidential if a shipper could derive another shipper's volume by subtracting its own traffic from the total.⁶ Under 49 U.S.C. § 11904, rail carriers are required to treat their customers' information confidentially, and customers would expect nothing less for the commercially sensitive information proposed in the NPRM.

C. The Board should clarify the meaning of “could physically interchange.”

Under the proposed additional disclosure requirements, parties filing notices and petitions for exemption would have to disclose a list of third party railroads that “could physically interchange” with the line in question. NPRM at 6. The scope of this disclosure requirement is not clear, and the Board should clarify the meaning of “could physically interchange.” Implicit in this disclosure requirement are the assumptions that (a) all interchange facilities are the same and (b) physical proximity necessarily implies legal access. Neither assumption is correct.

Even though two railroads may physically connect to each other and may have interchange facilities, those interchange facilities may not be suitable for the interchange of *all* traffic. For example, two railroads may frequently interchange small blocks of railcars at a particular interchange facility, but that facility might not be suitable for interchanging unit trains or larger blocks of railcars. In addition to capacity constraints, certain interchange facilities may

⁶ Treating aggregate carload information as highly confidential where shipper-specific information could be derived is consistent with the Board's rules regarding the release of waybill sample data, which requires aggregation of data to include at least three shippers and restricts access to non-aggregated shipper data. *See* 49 C.F.R. § 1244.9(b)(4)(iv).

not meet other regulatory requirements, such as the “positive hand-off” requirements for rail security-sensitive materials under 49 C.F.R. § 1580.107. The fact that two railroads physically interchange some rail cars at a particular location does not necessarily mean that the interchange facilities are feasible for interchanging any and all traffic.

Similarly, the fact that a third party railroad physically operates in the proximity of the line in question does not necessarily mean that third party railroad can legally interchange traffic with the short line railroad. Even absent an interchange commitment, a third party railroad may be restricted from interchanging with the short line railroad because of the nature of the third party railroad’s rights. For example, a third party railroad may have overhead trackage rights in the proximity of the line in question (or may even operate over the line in question), and those overhead trackage rights restrict the third party railroad from accessing local industries or otherwise interchanging traffic. Therefore, the third party railroad’s physical proximity to the line in question would be irrelevant since the overhead trackage rights legally restrict the third party railroad from interchanging with the short line railroad. The Board should acknowledge that a third party railroad’s ability to interchange with the line in question can be limited by operational or legal restrictions, and the Board should clarify how parties would address these issues when submitting the proposed information.

III. The NPRM’s Burden Estimates are Seriously Understated.

The NPRM estimated that a total of four respondents will be affected by these additional disclosure requirements annually and that the additional time required by each respondent is no more than eight hours. NPRM at 7. Although the NPRM does not explain the factors used to calculate the estimates, UP believes the number of affected parties and the additional compliance burdens are understated in at least four different ways.

First, under the proposed rules, the short line railroad will be required to develop

substantially more information itself and to coordinate with the Class I carrier selling or leasing the line to obtain the remainder.⁷ The NPRM would require participation by the Class I carrier to supply certain information that the short line railroad will not be able to provide itself.

(Drelicharz V.S. at 2.) For example, a short line railroad will not be able to reasonably estimate “the difference between the sale or lease price with or without the interchange commitment,” NPRM at 6, unless both options were offered during the negotiations. A short line railroad would also not be able to reasonably estimate “the discounted annual value of the interchange commitment to the Class I,” *id.*, with any degree of reliability as UP does not disclose its revenue or cost information during negotiations with a short line railroad. In addition, a short line railroad will have to ensure that the information that it supplies is not inconsistent with the information or the assumptions underlying the estimates that it relies on the Class I rail carrier to provide. Considering the type and scope of the proposed disclosure requirements, the NPRM clearly anticipates joint participation between the short line and Class I railroads, but the NPRM’s low estimate does not seem to reflect multiple carriers supplying data for each filing.

Second, the low estimate understates the number of transactions that would be subject to the proposed disclosure requirements. In addition to applying to new acquisitions and leases, the proposed regulations would also apply to expiring leases that parties agree to renew. *See* 49

⁷ The NPRM addresses only the burden from the perspective of the Regulatory Flexibility Act and ignores the chilling effect of the proposed rules on carriers of all sizes. The proposed changes effectively revoke in part the class exemption for Class I railroads to sell or lease lines to short line railroads despite the lack of evidence that such a revocation is necessary. Discouraging spin-offs of low density lines and increasing the burden on all carriers who still pursue such transactions, is contrary to the statutory directives to exempt transactions to the maximum extent possible and to reduce regulatory barriers to entry. *See* 49 U.S.C. §§ 10502(a) and 10101(7).

C.F.R. § 1180.2(d)(4). Over the next few years, filings related to expiring UP leases could be as many as eight per year (assuming that the chilling effect of the NPRM would not prevent agreement to renew). While UP cannot estimate the total for the railroad industry, this strongly suggests that the NPRM's estimate of only four transactions per year for all rail carriers is seriously understated. Moreover, the Board should also consider the economic impact on short line railroads if fewer line sales and leases take place in the future as a result of these changes.

Third, the NPRM's burden estimate does not consider the limitations of URCS for calculating either the difference between the sale or lease price with or without the interchange commitment or the discounted annual value of the interchange commitment to the Class I. To complete the financial analyses proposed in the NPRM, UP would have to calculate the total contribution derived from the traffic originating or terminating on that line, which will be complicated by the use of regulatory costs. (*Drelicharz V.S.* at 2.) Currently, UP's internal systems can identify all of the movements to and from a line and aggregate the revenues and the variable costs to calculate the total contribution for the line. (*Id.*) On the other hand, URCS – the Board's only approved system for costing purposes⁸ – does not easily lend itself to calculating total variable costs for an aggregation of unique movements of traffic. (*Id.*) Total variable costs for a particular movement based on URCS depends upon compiling seven inputs for each distinct movement: routing, route miles, number of rail cars, equipment type, equipment

⁸ See *Entergy Ark., Inc. v. Union Pac. R.R. Co.*, NOR 42104 (STB served May 7, 2008) (denying complainant's motion to compel discovery of profitability information based on internal management costing systems when complainant challenged the reasonableness of an interchange commitment). See also *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, NOR 42121 (STB served Nov. 24, 2010) (denying complainant's motion to compel discovery of the carrier's internal management costing data in a rate reasonableness proceeding) (internal citations omitted).

ownership, tons per car, and commodity code. (*Id.*) In order to calculate total variable costs for all traffic originating or terminating on a line, URCS inputs for each unique movement would have to be compiled and then processed in URCS, which could be a substantial undertaking depending on the amount and variety of traffic on the line. (*Id.* at 2-3.) Mr. Drelicharz estimates that using URCS to calculate the total contribution could take a number of days – not hours – depending on the amount and variety of traffic involved. (*Id.* at 3.) Without regard to the additional time a short line railroad would need to comply with the other disclosure requirements, UP alone could spend well more than eight hours calculating the total contribution using URCS for a single transaction. (*Id.*)

Fourth, the NPRM fails to recognize that the protective order needed when third parties seek access to the confidential information submitted under seal and the subsequent production of those materials will necessarily be more complicated than what is required under the existing regulations.⁹ As compared to the existing regulations, the NPRM proposes the disclosure of more diverse types of information, some of which is customer information that rail carriers must not disclose under 49 U.S.C. § 11904 without appropriate protections. Therefore, depending on which third party is seeking access to the confidential information submitted under seal, the protective order may need to be more comprehensive to address the access limitations for customer information. Moreover, the subsequent production of customer information may be more burdensome if multiple versions of the information (i.e. a confidential version and a highly confidential version) are required to address the various access limitations. Once again, the

⁹ See 49 C.F.R. §§ 1121.3(d)(2)(ii), 1150.33(h)(2)(ii), 1150.43(h)(2)(ii), 1180.4(g)(4)(ii)(B).

NPRM does not address these additional burdens for complying with the more extensive disclosure requirements.

IV. Conclusion

The NPRM's additional disclosure requirements will have a chilling effect on future line sale and lease transactions to the detriment of the short line industry and the shipping community and will increase regulatory burdens for entry. UP respectfully urges the Board to reject the proposed disclosure requirements.

Respectfully submitted,



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VERIFIED STATEMENT OF MICHAEL N. DRELICHARZ

My name is Michael N. Drelicharz. I am the Senior Project Manager of Economic Research and Analysis for Union Pacific Railroad Company (“UP”), and I have held this position for almost five years. In this capacity, I work very closely with Marketing, Operating, and Law, as well as other UP departments, in conducting various economic analyses, and I have substantial experience with the Board’s Uniform Railroad Costing System (“URCS”). In addition to my current position, I have held various finance related positions, including internal audit, tax, and planning and analysis, and I have been employed at UP for over 25 years.

The purpose of my statement is to provide information regarding the Board’s burden estimate that the proposed rules would result in additional time for each respondent of no more than eight hours. Specifically, I will discuss why the burden estimate of eight additional hours is understated given the amount of time needed for Class I railroads to provide “an estimate of the difference between the sale or lease price with and without the interchange commitment” and “an estimate of the discounted annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line” (“proposed estimates”). Calculating these proposed estimates is a substantial undertaking and could take a number of days.

First of all, UP inevitably would have to participate in filings at the Board for UP transactions because the short line railroad will not have access to most of the information necessary to calculate the proposed estimates. The short line railroad will not know the difference between the sale or lease price with or without the interchange commitment unless both options were part of the negotiations, which has not been common practice in the majority of past transactions. Additionally, the short line railroad will not know UP's revenue and will not have all of the information to use the Board's general purpose costing system to calculate the discounted annual value of the interchange commitment. Consequently, UP will have to calculate the proposed estimates for any future Board filing when an interchange commitment is involved.

Calculating the total contribution for the traffic subject to the interchange commitment would be the largest component of the proposed estimates, and it would also be the most time consuming. By using UP's internal systems, UP can identify and aggregate historical traffic patterns for a particular line and the revenue and operating characteristics for that traffic in order to calculate the total contribution. For regulatory filings with the Board, however, UP would not rely on our internal costing systems but would calculate the total contribution for the line based on URCS variable costs. Unfortunately, URCS does not easily lend itself to calculating total variable costs for an aggregation of unique movements of traffic. In order to calculate the total variable costs for an aggregation of traffic, UP would have to compile the following URCS inputs for each unique movement: routing, route miles, number of cars, equipment type, equipment ownership, tons per car, and commodity code. Compiling the URCS inputs for each unique movement and then processing those movements in URCS could be a substantial undertaking depending on the amount and variety of traffic on the line. Depending on the

amount and variety of traffic, it is possible that hundreds, if not thousands, of URCS cost runs would be necessary. Finally, once the URCS variable costs for the impacted moves are calculated, UP would match the URCS variable costs for each movement with the movement's revenue and number of carloads to calculate the total contribution for the line. Overall, I estimate that developing this estimate using URCS could take a number of days, not hours, depending on the amount and variety of traffic involved.¹

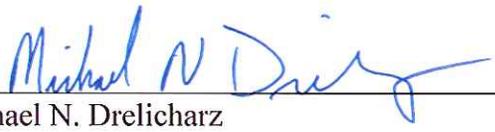
Considering the limitations of URCS for calculating the value of a line, the Board's estimate of only eight additional hours seems overly optimistic. I do not know how much additional time a short line railroad would need to comply with the other disclosure requirements, but UP alone could spend well more than eight hours for each line sale or lease transaction to calculate the difference between the sale or lease price with and without the interchange commitment and the discounted annual value of the interchange commitment.

¹ The exercise I explain above assumes that all traffic subject to the interchange commitment is equally at risk of being lost without an interchange commitment. This may not be the case as UP could retain the line-haul on some portion of the traffic in the absence of an interchange commitment. However, the amount of traffic UP would likely retain could vary with a variety of factors. Analyzing these factors to develop a reasonable assumption about the amount of traffic likely to be retained or lost would be another time consuming exercise.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on December 18, 2012.



Michael N. Drelicharz