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Surface Transportation Board
395 E Street, SW
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Re: STB Finance Docket No 35219 — STB-2009-0035
Union Pacific Railroad petition for relief from their common carrier
obligation

**Comments of the
Brotherhood of Railroad Signalmen (BRS) and
Brotherhood of Maintenance of Way Employees Division
(BMWED/IBT)
In Resistance to the Petition.**

The BRS and BMWED/IBT (the Labor Organizations) are the recognized collective bargaining representatives of a significant majority of railroad industry workers engaged in railroad track and signal installation, inspection, and repair. Our membership has a vested interest in railroad safety in the transportation of hazardous chemicals on our nation's railroad infrastructure.

The Labor Organizations are filing these joint comments in response to the above-referenced petition, published in the Federal Register (page 10991) on March 13, 2009. In its petition, Union Pacific Railroad (UP) requests that the Surface Transportation Board (Board) determine the extent of the common carrier obligation to quote rates for new, lengthy movements of chlorine where the transportation would require movement through High Threat Urban Areas and other large communities to destinations where, according to UP, an ample supply of chlorine is available from nearby sources.

UP asserts that "... the risk of potential exposure from long distance shipments of chlorine is unnecessary where all four of these destinations are located less than 300 miles from ample alternate chlorine supplies."

In essence, UP's Petition argues that the cost/benefit to it as a common carrier does not justify it taking the economic risks of an accident hauling a cargo of chlorine and notes it is consistent with national security

interests as well. The UP's Petition impliedly asserts that it should have the power to decide:

- what constitutes "risk",
- what constitutes an unacceptable level of risk (i.e., "too" risky),
- that no pricing will compensate it for the risk of an accident,
- what constitutes an allegedly safer "alternative" to UPRR carrying the cargo, and
- which alternatives constitute "less risky" options to it carrying the cargo.

The Board should decline granting the UP the relief it seeks for four reasons:

First, the Board lacks jurisdiction to make decisions about these key elements of UP's request. The power to make these decisions is within the exclusive jurisdiction of the Federal Railroad Administration (FRA) and Department of Transportation (DOT), not the Surface Transportation Board. See, *In Re Classification Ratings On Chemicals, Conrail*, 3 I.C.C. 2d 331 (Dec. 19, 1986)

Second, the Board should follow the holding of that Interstate Commerce Commission (ICC) decision where the ICC found that the carrier failed to exhaust its administrative remedies by asking the DOT (FRA) for a rulemaking to protect it. UP's failure to pursue its remedies with the FRA and DOT bars it from Board relief since UP failed to exhaust its remedies.

Third, the UP's Petition masks the real questions whose answers hold the key to public safety

- what level of risk exists for carrying hazmat?
- who is being subjected to the risk?
- what are the parameters of the risk?
- who decides what risks are acceptable?
- on what basis do these risk/reward decisions get made?
- what transparency applies to the process of risk acceptability?

- what participation is permitted to the process of risk acceptability?
- who are the stakeholders in the process of risk acceptability?

The solution to many of the questions above need statistical analysis. In the real world of self-reporting by carriers and the lack of reliable data from the FRA, these decisions cannot be made at this time. The need for a verifiable statistical basis for these answers is consistent with the goals of II R. 2095, the Rail Safety Improvements Act of 2008 (RSIA), and with the current Six Sigma problem-solving approach universally used in modern management. These questions are best answered in FRA rulemaking proceedings, which are required as part of the RSIA. One of the fundamental objections to the UP's Petition is that its method of protecting public safety allows it to avoid any disclosure of its knowledge of the possible answers to the questions raised above. A holding by this Board that the jurisdiction in this matter should be with the FRA first to evaluate the risk factors raised by UP will compel disclosure of facts concerning safety, accidents, and economics, instead of hiding behind a proceeding which requires no disclosure.

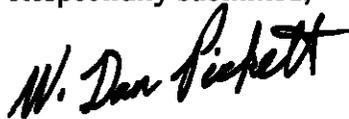
Fourth, the Board must deny the requested relief or face a series of serious unintended consequences dramatically affecting public safety.

- Relief to UP could result in forcing our nation's small businesses to purchase necessary poison-inhalation hazardous materials (PIII) or toxic-inhalation hazardous materials (TIHI) only from certain suppliers based upon proximity rather than market forces. Denial of Class I rail services will likely result in these commodities being shipped by shortline railroads with multiple interchanges or by long-haul trucking over our nation's highways. Such a scenario does not eliminate potential risk; it simply shifts the risk from one common carrier to another. It seems from the Labor Organizations' point of view that UP should not be allowed to make such determinations simply because it is inconvenient for the railroad's business model.
- However, the bigger problem relates to exposure. If Class I railroads are provided a mechanism to deny service to shippers of hazardous materials, then the risk will simply shift away from our nation's Class I railroads to shortline railroads and/or on to our nation's highways in the form of long-haul trucks. From a safety perspective, this is an undesirable consequence. It is a well-established fact that Class I railroads are well suited to transporting hazardous materials and are substantially safer than moving the same materials by truck.

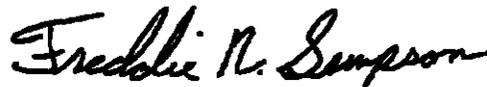
- This issue reaches well beyond one railroad carrier. Providing UP relief from their federally mandated obligation would certainly open the door for similar requests from additional Class I and perhaps other railroad carriers. What would the economic effect be to businesses dependent upon common carrier railroads for transportation of these materials?
- Last year, when Congress passed H. R. 2095, it required each Class I railroad to install a Positive Train Control (PTC) system governing operations on main line over which poison-inhalation hazardous materials (PIH) or toxic-inhalation hazardous materials (TIH) are transported. The Labor Organizations view UP's petition as a means for the railroad to circumvent that legislative mandate. By shifting their common carrier obligations to our nation's shortline railroads, which are not mandated to install PTC for the transport of TIH or PIH materials, or onto highways in the form of trucks moving TIH and PIH, Union Pacific can and will forego installing PTC on lines where such a safety system would otherwise be required. The movement of TIH or PIH on a Class I main line is one trigger that compels the railroad to install a PTC system, which reduces the risk associated with the transportation of such material, however, such a system also reduces risk and provides additional safety benefits for all PTC-equipped trains traversing that line.

For the reasons stated above, and in the interest of safety for the railroad, its employees, and the public, the Labor Organizations oppose granting Union Pacific relief from their common carrier obligation.

Respectfully submitted,



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cc Tonya W Conley, Union Pacific Railroad Company
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