

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 772

OVERSIGHT HEARING PERTAINING TO UNION PACIFIC RAILROAD COMPANY'S
EMBARGOES

Digest:¹ In this decision, the Board explains its findings from its review of UP's embargoes and closes the proceeding.

Decided: April 16, 2024

In 2022, Union Pacific Railroad Company (UP) issued over 1000 embargoes due to congestion on its network, which was nearly ten times as many embargoes as any other railroad.² Concerned about the impact that these embargoes were having on UP's customers and the national rail network, on November 22, 2022, the Board ordered a public hearing to be convened on December 13 and 14, 2022, to examine the use of embargoes by UP. Oversight Hr'g Pertaining to Union Pac. R.R.'s Embargoes (Hearing Order), EP 772 (STB served Nov. 22, 2022). In ordering the hearing, the Board identified eight specific topics that UP "should be prepared to discuss in detail." Id. at 4. Based on the information provided since then, the Board now details its conclusions on the central issues raised in its November 22 order.

Before doing so, the Board will first discuss UP's repeated failures to comply with Board orders and requests for information during the course of this proceeding. UP's conduct in this regard bordered on the contumacious and cannot be viewed as acceptable conduct by a railroad subject to the Board's statutory authority. At the outset of this proceeding, the Board's November 22, 2022 order setting the hearing directed UP to file, by December 6, 2022, "information and documents in support of the [eight] topics" UP was directed to address at the hearing. Hearing Order, EP 772, slip op. at 4.

In response, on December 6, 2022, UP filed with the Board only a single document: a PowerPoint file presentation prepared for the hearing containing seven slides. The slides addressed some of the topics listed in the Hearing Order in general terms, without providing any substantial detail, while other topics listed in the order were ignored.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² Except where indicated otherwise, the embargo data discussed in this decision were obtained from the AAR Embargo System at <https://embargo.railinc.com/#/home>.

On December 8, 2022, Chairman Oberman wrote to UP stating that UP's submission was not fully responsive to the Board's order. During the hearing, when pressed on whether UP searched for documents requested in the Hearing Order, UP's then president and CEO, Lance Fritz, stated that the single PowerPoint document UP had earlier submitted "explains why we're using embargo[e]s and how embargo[e]s work" and "so I think, in spirit, it's telling you this is exactly what's going on." (Hr'g Tr. 222:16-17, 224:3-6, Dec. 13, 2022.) To the contrary, however, UP's submission of its PowerPoint presentation was clearly an insufficient response to the Board's request for information.

During the hearing, UP's representatives also described various documents in UP's possession that were responsive to the Board's order but had not been submitted. (E.g., Hr'g Tr. 184-86, Dec. 13, 2022 (describing documents setting forth hiring plans based on customer demand).) Following the hearing, on December 22, 2022, UP submitted additional documents that it stated were responsive to inquiries made by the Board during the hearing. (UP Letter 1, Dec. 22, 2022.) While these documents provided some additional information responsive to the Board's requests prior to and during the hearing, UP's production remained incomplete, and the Board concluded that a further response to its requests for information by production of additional documents and information was needed to evaluate the issues raised in the Hearing Order and additional concerns raised at the hearing. Given UP's own attribution of the increased use of embargoes to crew shortages, (see Hr'g Tr. 185:19-187:9, Dec. 13, 2022), one of the glaring omissions was UP's failure to produce any of the "three year hiring plans" its Chief Operating Officer had identified and discussed at the hearing in connection with the Board's inquiries concerning these shortages, (see, e.g., Hr'g Tr. 283-86 (UP, in response to a question about the levels of employment it was trying to achieve in 2020 and 2021, explaining that it sets employment targets based on three-year hiring plans that it produces every year and adjusts monthly)). After numerous failed informal efforts to obtain not only these documents but other information directly relevant to the Board's requests, the Board issued another order on May 15, 2023, directing UP, in detail, to provide information and documents by June 14, 2023. Oversight Hr'g Pertaining to Union Pac. R.R.'s Embargoes (May 2023 Order), EP 772 (STB served May 15, 2023).

UP's initial response to the May 2023 Order was incomplete. For example, UP was directed to provide the three-year hiring plans from 2015 onward that it specifically identified at the hearing. Id. at 6. UP's response, for the first time, and in contradiction to testimony at the hearing, stated that it did not actually create such three-year hiring plans until 2022, (UP, PUBLIC UP-EP 772-0345 1, June 14, 2023). UP made no effort to address or explain the contradiction. Further, the May 2023 Order directed UP to provide certain employment data "for each operating division to the maximum extent practicable in addition to reporting on a system-wide basis," May 2023 Order, EP 772, slip op. at 6-7, but UP provided data only on a system-wide basis, (UP, CONFIDENTIAL UP-EP 772-0379, June 14, 2023).

After several additional informal efforts to obtain compliance with the Board's May 2023 Order and its earlier requests, on November 16 and 27, 2023, nearly a full year after the Hearing Order, and more than five months after its responses to the May 2023 Order were due, UP finally submitted additional requested documents and information. The November 16 filing provided employment data by operating division that was requested in the May 2023 Order. And for the

first time, the November 27 filing purported to explain UP's hearing testimony describing the creation and retention of three-year employment plans every year and its failure to produce any such documents for years prior to 2022 after being expressly directed to do so. If UP's witnesses during the December 2022 hearing had misinformed the Board as to the preparation and existence of employment plans after being questioned about them in detail, UP had an obligation to promptly provide the Board with an explanation and correction of the record rather than ignoring the problem for nearly a year.

While UP ultimately attempted to address its previous failures to fully respond to the Board's information requirements in this proceeding, the Board cannot condone UP's repeated and extended failure to provide the Board with information in a timely and responsive manner when requested. Rarely has a rail carrier engaged in such delay and obfuscation in response to the Board's requests for information.³ In order to carry out its statutory mandates, Congress expressly empowered the Board to request information from rail carriers. See 49 U.S.C. § 1321(b); 49 U.S.C. § 11145(a)(1). Going forward, the Board fully expects UP, like all other members of the industry, to responsibly, timely, and candidly comply with such Board requests for information and will not tolerate the type of conduct exhibited by UP in this docket.

UP's Embargo Activities

The information⁴ provided by UP at the December 2022 hearing and thereafter shows that from 2015 through 2017, UP substantially reduced⁵ its number of train and engine (T&E) employees.⁶ The number of T&E employees rose in 2018, but only by less than one-third the number UP had lost over the previous three years. Moreover, as UP began to implement significant operational changes in late 2018,⁷ it was clear that UP intended to resume reductions in its T&E workforce: on an October 25, 2018 call regarding earnings for the third quarter of

³ See, e.g., Canadian Nat'l Ry.—Control—EJ&E W. Co. (Decision No. 27), FD 35087, slip op. at 1, 5 (STB served Dec. 21, 2010) (finding that Canadian National Railway knowingly violated a Board order requiring monthly and quarterly reporting on certain crossing blockages and imposing a fine of \$250,000).

⁴ The discussion below of UP's employment and embargo data will be limited and general in nature so as to avoid referring to information designated as confidential under the protective order in this case.

⁵ The increases and decreases/reductions in T&E employees discussed in this paragraph refer to the difference between the number of employees entering training in a given year and the number of employees separated in that year.

⁶ The employment data discussed in this paragraph was submitted by UP on November 16, 2023. UP submitted a spreadsheet for each month from January 2015 through September 2023. These spreadsheets are labelled UP_STB_000001_2015_01.xlsx, UP_STB_000002_2015_02.xlsx, etc. through UP_STB_000105_2023_09.xlsx.

⁷ John Kingston, Union Pacific Will Implement Parts of the Precision Railroading Model, FreightWaves (Sept. 18, 2018), <https://www.freightwaves.com/news/union-pacific-precision-railroading>.

2018, UP touted to investors that its “September [T&E] workforce was down 2% versus August on flat volume,” and while “it’s only one month, the numbers are moving in the correct direction.”⁸ From 2019 through 2021, which included a decrease in rail traffic volume during the COVID-19 pandemic, and a return of some of that volume as the economy recovered, UP experienced a further decrease in T&E employees, which far exceeded the decrease that occurred from 2015 through 2017. In 2022, UP increased its T&E workforce, but that increase amounted to only about 10% of the T&E employees it lost from 2019 through 2021.

In recent years, UP has also made a number of changes to its embargo-related practices. Though UP states that it has operated “Customer Inventory Management Systems” (CIMS) program since the early 2000s, (UP Exs. 13, Dec. 9, 2022), in 2018 the carrier made significant changes to its application of CIMS, pertaining to serving areas, and the carrier continued to modify CIMS thereafter. For example, UP changed its calculation of “excess inventory,” its timing of alerts, and its decision-making processes, (*id.* at 11). Most of UP’s embargoes are issued under CIMS for serving areas. (Test. Fritz 6, Dec. 14, 2022.) Separately, in 2022, in response to what it terms excess cars “across the entire [UP] network,” (Tr. 205-07, Dec. 13, 2022), which contributes to congestion, UP implemented its “Private Car Pipeline Management” (PCPM) program, (UP Exs. 9, Dec. 6, 2022), and contacted hundreds of customers to reduce the number of private cars across UP’s network, (Tr. 195-97, Dec. 13, 2022). Simultaneously, UP removed system cars from the network. (*Id.* at 187.)

The changes to CIMS for serving areas in 2018 and beyond, the implementation of the PCPM program in 2022, and UP’s significant reductions in T&E employment coincided with a steep increase in UP’s use of so-called “congestion embargoes.” In 2017, UP instituted only five congestion embargoes. That number rose to 304 in 2019 and soared to 1,081 in 2022. At the December 2022 hearing, UP’s then president and CEO acknowledged the connection between crew shortages and UP’s increased usage of embargoes:

This year has proved challenging. Our network is not operating at the levels our customers expect and deserve. In large part, [this] is because one of our critical resources, employees, was out of alignment. We did not have enough crews and did not have them in the right places at the beginning of the year. . . . As cycle time slowed earlier this year, some customers reacted by adding more cars into the system. That’s a natural reaction, but it contributed to our challenges and delayed our full network recovery. Excess freight car inventory disrupts the alignment of our network resources. It requires us to use more crews and more locomotives to handle the same amount of business. . . . For many years Union Pacific has used embargo[e]s when we see customers accumulating cars in serving yards. In November, Union Pacific implemented a program similarly aimed to address excess cars in our pipeline.

(Hr’g Tr. 185:19-187:9, Dec. 13, 2022.)

⁸ Union Pacific Corp (UNP) Q3 2018 Earnings Conference Call Transcript, Motley Fool (Oct. 25, 2018), <https://www.fool.com/earnings/call-transcripts/2018/10/25/union-pacific-corp-unp-q3-2018-earnings-conference.aspx>.

The common carrier obligation requires carriers to provide service in response to reasonable requests, and carriers shall establish reasonable rules and practices on matters related to that transportation or service. 49 U.S.C. §§ 11101, 10702. The common carrier obligation “reflects the well-established principle that railroads are held to a higher standard of responsibility than most private enterprises.” GS Roofing Prods. Co. v. STB, 143 F.3d 387, 391 (8th Cir. 1998) (internal citations omitted).⁹ An embargo can relieve a carrier of its common carrier obligation; however, an embargo is generally temporary and issued under emergency conditions, and it must be reasonable, both at the time it is issued and while it is maintained. See, e.g., GS Roofing Prods. Co., 143 F.3d at 392; Bar Ale, Inc. v. Cal. N. R.R., FD 32821, slip op. at 6-7 (STB served July 20, 2001). The Board looks at the reasonableness of embargoes on a case-by-case basis, and it is beyond the scope of this proceeding to determine whether particular congestion embargoes imposed by UP were reasonable. However, under the Board’s traditional factors,¹⁰ among other considerations, the excessive use of embargoes over an extended period to address problems on a carrier’s network could weigh in favor of a finding of a statutory violation.

As a general matter, the Board also notes that the UP’s embargo-related practices, at the start of this proceeding, did not appear to fully account for carrier-caused problems and did not factor in relevant conditions of a yard or line, and these practices were exacerbated by UP’s reductions to its T&E workforce and by limitations with the carrier’s prior visibility measures. Without deciding whether these prior practices violated applicable statutes, or prejudging the reasonableness of any future embargo issued following changes made by UP, described below, the Board urges UP and all other carriers not to adopt embargo practices that fail to account for carrier-caused problems and relevant physical conditions, and to maintain T&E workforces—as well as levels of employment of other categories of workers and other resources—necessary to satisfy their common carrier obligation without unreasonable reliance on embargoes.

Encouragingly, following the Board’s institution of this proceeding in late 2022 and the airing of these issues in the December 2022 hearing, UP made changes to its embargo-related practices. Shortly after the hearing, UP’s then president and CEO wrote to Chairman Oberman that the carrier would immediately pause any additional embargoes under the PCPM program. (UP Letter 1-2, Dec. 21, 2022.) In April 2023, UP submitted an update outlining its actions to (1) improve customer visibility; (2) provide customers additional time, under certain

⁹ See also GS Roofing Prods. Co., 143 F.3d at 391-92 (stating “a railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable” and that “if the carrier is financially able to remedy the disability [that prevented the carrier from performing its duty], the embargo becomes unreasonable and will no longer be valid.”); Am. Trucking Ass’n, Inc. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 407 (1967) (stating that the common carrier obligation is “fundamental and exceptions are not to be implied.”).

¹⁰ Cent. Or. & Pac. R.R.—Coos Bay Rail Line, FD 35130, slip op. at 3 (STB served Apr. 11, 2008) (in assessing embargoes, the Board “typically balances the following factors: (1) the cost of repairs necessary to restore service; (2) the amount of traffic on the line; (3) the carrier’s intent; (4) the length of the service cessation; and (5) the financial condition of the carrier.”).

circumstances, to resolve any identified issues; (3) include a clearer, shorter expiration date for embargoes; (4) launch a proactive customer engagement plan to ascertain operational and other adjustments; and (5) increase the carrier's industry spot and pull threshold before it engages a customer. The Board understands that UP has also implemented changes to account for its overall trip plan compliance and to ascertain whether the serving yard was congested based on total inventory, not just customer-specific numbers.

These changes, along with an increase in its workforce and improved service, dropped the use of congestion embargoes precipitously, from 1,081 in 2022 to 181 in 2023. This represents a more than 80% reduction in UP's use of congestion embargoes from the previous year. UP's effort to drastically reduce its use of congestion embargoes is a positive and welcome step. In light of that dramatic reduction, we conclude that this proceeding has served a useful purpose and can be closed. We do note, however, that even after the significant reduction in UP's congestion embargoes from 2022 to 2023, the 181 congestion embargoes issued by UP in 2023 still exceeded the number issued by all the other Class I railroads combined. The Board therefore expects UP, notwithstanding the closure of this proceeding, to continue to work to reduce and minimize its use of congestion embargoes going forward. The Board intends to monitor UP's progress in this regard.¹¹

It is ordered:

1. This proceeding is closed.
2. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

¹¹ The Board notes that during the last half of 2023, UP, which came under new management, began increasing the number of employees furloughed. See STB, Employment Data, <https://www.stb.gov/reports-data/economic-data/employment-data/>. Moreover, UP, at its most recent earnings call with investors, stated publicly that "there is no reason for [UP] not to continue to [reduce headcount during 2024]." Union Pacific Corp Q4 2023 Earnings Call Transcript, Yahoo! Finance (Jan. 26, 2024), <https://finance.yahoo.com/news/q4-2023-union-pacific-corp-090043190.html>. These reductions underscore the need for the Board to continue closely monitoring UP's service reliability in general.