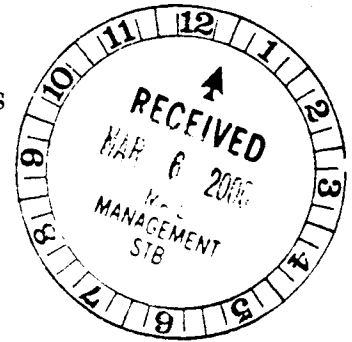




City of Tacoma
Office of the City Attorney - Department of Public Utilities



March 3, 2000

Secretary
Surface Transportation Board
1925 K Street NW
Washington, D.C. 20423-0001

ENTERED
Office of the Secretary

MAR - 8 2000

Part of
Public Record

Re: Docket NOR 42052

Dear Secretary:

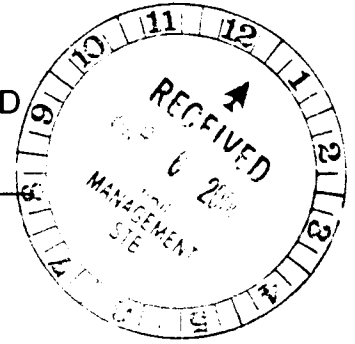
Attached hereto is Reply to Petition for Declaratory Order from City of Tacoma, Tacoma Public Utilities, d.b.a. Tacoma Rail relating to the above-entitled matter.

Very truly yours,

Paul A. Brachvogel
Assistant City Attorney

attachment

BEFORE THE SURFACE TRANSPORTATION BOARD



DOCKET NO. 42052

CITY OF TACOMA, TACOMA PUBLIC UTILITIES,
d.b.a. TACOMA RAIL, and, TACOMA BELTLINE RAILROAD

REPLY TO PETITION FOR DECLARATORY ORDER
AND REQUEST FOR DECLARATORY ORDER IN ITS FAVOR

CITY OF TACOMA, TACOMA PUBLIC
UTILITIES, d.b.a. TACOMA RAIL

Mark Bubenik, Chief Assistant City Attorney
Paul A. Brachvogel, Assistant City Attorney
P.O. 11007
Tacoma, WA 98411-0007

Dated: March 3, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

REPLY TO PETITION FOR DECLARATORY ORDER
AND REQUEST FOR DECLARATORY ORDER IN ITS FAVOR

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I. INTRODUCTION AND BACKGROUND

The City of Tacoma, Tacoma Public Utilities, d.b.a. Tacoma Rail and Tacoma Beltline ("Tacoma Rail") hereby responds to the petition for Declaratory Order, filed by Union Pacific Railroad company ("UP") on February 11, 2000.

Tacoma Rail was a Car Switching Rail Road until September 1998. It has has operated as a Car Hire Rail Road since that time. It is a short line regional railroad switching in and around the Port of Tacoma region. It has at all times been owned and operated by the City of Tacoma. UP is a Class I carrier, which interchanges with Tacoma Rail in Tacoma, Washington.

On January 19, 2000 Tacoma Rail filed a lawsuit against UP in Pierce County Superior Court. See attachment "A" copy of the complaint. Tacoma Rail alleges that UP owes it past due debt based on the purely state claims of unjust enrichment, breach of implied contract, and breach of contract. See "A" at 2-4.

Since 1994 UP has made it their business practice of storing its rail cars on the property owned by the City of Tacoma causing a shortage of storage and rail capacity to the detriment of Tacoma Rail. As a result of the business interference caused by UP, Tacoma Rail issued Freight Tariff TMBL 6000 in May 1995 which imposed storage fees. (A copy of the tariff is attached to UP's petition).

From September 1995 through December 1997, UP made payments pursuant to this tariff. Since April 1997 UP failed to pay any of the debt owed. As a consequence, Tacoma Rail seeks to recover unpaid debt of over \$300,000. UP

has not answered this lawsuit and instead filed a motion to dismiss for lack of subject matter jurisdiction. See attachment "B" motion from UP.

Belt Line agrees and adopts the Iowa Interstate Rail Road LTD analysis contained in its response to UP's petition. Tacoma Rail urges the STB to institute a Declaratory Order in its favor and deny UP's requests. Tacoma Rail concurs with IAIS and UP in that the matter described in UP's petition is a "major ongoing controversy with important transportation policy ramifications which go far beyond the specific charges at issue". (UP's Petition for Declaratory Order at 12) Tacoma Rail adopts IAIS's position that the issues raised in UP's petition have a profound impact on competition between various carriers including the shortline regional railroad such as Tacoma Rail. Tacoma Rail adamantly asserts UP's position lacks merit and instead believes a Declaratory Order should be issued ruling that Tacoma Rail and the other respondents in this proceeding are entitled to file and collect the tariff charges in dispute.

II. ARGUMENT

Tacoma Rail is owed in excess of \$300,000, as a result of UP's blatant disregard for Tacoma Rail's property rights. The storage of UP's cars on Tacoma Rail property necessitated Tariff TMBL 5000 which was lawfully published in May, 1995. UP had clear notice of Tacoma Rail's tariff. Instead, it settled much of the amount owing under this Tariff under separate agreement. However, as indicated in the lawsuit, since **December 1997** UP has failed to pay anything under the recognized tariff causing its unjust enrichment.

Like IAIS, Tacoma Rail adopts the authority set forth in *Cincinnati, N.Q. and T.P. Ry. Co. v. Chesapeake and Q. Ry. Co.*, 441 F.2d 483 (4th Cir. 1971), the Fourth Circuit Court of Appeals upheld a tariff charge by the Cincinnati New Orleans and Texas Pacific Railway Co. ("CNO") against the Chesapeake and Ohio Railway Co. and other carrier for costs relating to cars switched in error in the Cincinnati, Ohio terminal district. The case stands for the proposition that the AAR Rules do not prevent the carrier from acting individually and establishing a tariff to avoid the great inconvenience and cost associated with another carrier's malfeasance. Like all the Respondents here, Tacoma Rail was forced to take action in the form of a tariff in order to prevent continued track congestion caused by UP.

Tacoma Rail shares the outrage expressed in IAIS's response to UP's petition. It has become apparent that not only does UP have complete disregard for business operations of Tacoma Rail, it engages in similar anti-competitive conduct nationwide. Tacoma Rail as does IAIS, stands on firm ground implementing the tariff and in demanding that it be its storage fees

UP's request is as unreasonable as their business practices. UP requests STB outlaw otherwise valid tariffs essentially granting them carte blanche rights nationwide to engage in unreasonable storage of cars on other carriers' lines. The Respondents urge the STB to view such a request with great caution. Such an order would be, on its face, unreasonable in that it would grant monopolistic power over small rail companies.

III. RELIEF REQUESTED

Tacoma Rail joins in IAIS's request that the Board publish a schedule for further proceedings, including the development of facts and law through discovery. Tacoma Rail further requests a briefing schedule be established with an opportunity to cite further facts and law in support of its position. Tacoma Rail also requests the STB delay in its ruling until the lawsuit for collection is resolved in U.S. District Court under Cause No. C 00-5054 FDB.

IV. CONCLUSION

For the foregoing reasons, Tacoma Rail urges the STB take no action until the lawsuit referenced above is concluded. In the event the STB does continue with this proceeding, it requests Declaratory Order in its favor for the foregoing reasons. Tacoma Rail joins IAIS and adamantly asserts the ultimate disposition of this matter should be in favor of Tacoma Rail and the other smaller railroads named in the Petition. Tacoma Rail joins the other respondents respectfully requesting the Board deny UP's petition for an Order in its favor.



Paul A. Brachvogel WSBA 21849
Assistant City Attorney
City of Tacoma
Tacoma Public Utilities
P.O. Box 11007
Tacoma, WA 984011-0007

Attorney for Tacoma Rail

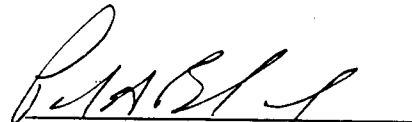
CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing Response to Petition for Declaratory Order on each of the persons listed below by First Class Mail with postage prepaid, on the 3rd day of March, 2000.

Robert T. Opal
Union Pacific Railroad Company
1416 Dodge Street, room 830
Omaha, NE 68179

William Sippel, Esq.
Oppenheimer, Wolff & Donnelly
Two Prudential Plaza
45th Floor
180 North Stetson Avenue
Chicago, IL 60601

Edward J. Krug
Krug & Beckelman, P.L.C.
401 First Street S.E., Suite 330
P.O. Box 186
Cedar Rapids, IA 52406-0186


Paul A. Brachvogel

ATTACHMENT "A"

FILED
IN COUNTY CLERK'S OFFICE
A.M. JAN 19 2000 P.M.
PIERCE COUNTY, WASHINGTON
BY TED RUTT, COUNTY CLERK
DEPUTY

IN THE PIERCE COUNTY SUPERIOR COURT IN AND FOR
THE STATE OF WASHINGTON

CITY OF TACOMA, TACOMA PUBLIC
UTILITIES, a municipal corporation

Plaintiffs,

vs.

UNION PACIFIC RAILROAD, a
Nebraska corporation

Defendants.

NO. 00 2 04445 9

COMPLAINT FOR DAMAGES

COMES NOW Plaintiff, by and through its attorney of record PAUL A.
BRACHVOGEL, Assistant City Attorney, MARK BUBENIK, Chief Assistant City
Attorney, and ROBIN JENKISON, Tacoma City Attorney, and for its cause of
action against the defendant and alleges and states as follows:

I.

THE PARTIES

1.1. Plaintiff, City of Tacoma, Tacoma Public Utilities is a municipal corporation
within the confines of Pierce County, Washington. It owns and operates Tacoma
Rail, a car switching railroad located in Tacoma, Washington.

1 1.2 The Defendant, Union Pacific Railroad is, by information and belief, a
2 corporation based in Omaha, Nebraska, owning land and conducting business in
3 Tacoma, Pierce County, Washington.

4
5 **II.**

6 **JURISDICTION AND VENUE**

7 2.1 Jurisdiction is proper in the Pierce County Superior Court, as all allegations
8 contained herein are based on principles of equity and the laws of the State of
9 Washington. The Defendant is a railroad and Nebraska corporation owning real
10 property and doing business in Washington State and nationwide. Plaintiff is a
11 municipal corporation located in Pierce County, Washington. Venue is proper in
12 Pierce County as the cause of action arose within the confines of Pierce County,
13 Washington and both parties are located and doing business in Pierce County,
14 Washington.
15

16 **III.**

17 **FACTUAL ALLEGATIONS**

18 3.1 Tacoma Rail was a car-switching service railroad in the City of Tacoma,
19 Pierce County, Washington. Its primary function at all times relevant to this action
20 was to act as a switching service ensuring its customers, such as Port of Tacoma,
21 the ability to link rail cars with Union Pacific Railroad and Burlington Northern
22 Railroad.
23

24 3.2 Since 1994 Defendant has made a business practice of storing its rail cars
25 on the property of the Plaintiff without authority or permission. Contrary to both the
26
27

1 plaintiffs' express wishes and authorization, Defendant stored its rail cars on
2 Plaintiff's property for extended periods causing a shortage of storage and rail
3 capacity on Plaintiff's property, inconvenience for Plaintiff and its customers, delay,
4 and congestion.

5
6 3.3 As a result of the business interference caused by Defendant, Plaintiff issued
7 a rail Tariff which was properly published in May, 1995. See attachment "A," Tariff,
8 issued May 1, 1995.

9 3.4 Defendant acknowledged legitimacy of the Tariff and undertook a business
10 practice of settling claimed amounts under the Tariff for a portion of the amount
11 claimed.

12
13 3.5 From September 1995 through April 1997 Defendant paid under the Tariff
14 pursuant to negotiated amounts.

15 3.6 Since April 1997, Defendant has failed to pay under the Tariff. As a result,
16 Defendant owes in excess of \$308,200 to Plaintiff for storage fees from April 1997
17 to present.

18 **IV.**

19 **CAUSES OF ACTION**

20 **Unjust Enrichment**

21
22 4.1 Defendant has retained benefit or advantage of storing its cars at no
23 expense to it, causing an injustice to the Plaintiff. The Defendant has been unjustly
24 enriched by storing its cars on Plaintiff's property and failing to pay under the tariff,
25

1 or any other amount, since 1997. Plaintiff seeks recovery of unjust enrichment in
2 an amount set by the Tariff of May 1995.

3 **Breach of Implied Contract in Fact and in Law**

4 4.2 Defendant breached its implied contract to pay storage fees based on the
5 acknowledgement of the Tariff and past business practice of negotiating settled
6 amounts under the Tariff. The contract is implied in fact and in law and imposed a
7 duty to pay under the terms of the tariff. Defendant breached these terms and
8 caused damages to Plaintiff in the form of congested rail yard, slower service to its
9 customers, and in a monetary amount defined under the tariff.
10

11 **Breach of Express Contract**

12 4.3 Defendant breached an express contract which is evidenced by the parties
13 conduct of business, written documents, the recognition of the Tariff, and other
14 evidence to be presented at trial establishing mutual assent and the terms of the
15 contract. Defendant has breached this contract and as a result, Plaintiffs are
16 entitled to the stated damages under the Tariff. These damages include full
17 payment of past-due storage charges from April 1997 pursuant to the Tariff of May
18 1, 1995 which are the proximate cause of the breach.
19
20

21 **V.**

22 **PRAYER FOR RELIEF**

23 5.1 Plaintiff requests restitution for unjust enrichment of using Plaintiff's property
24 for storage of Defendant's cars, in an amount to be determined under the May 1995
25 Tariff at trial, or other reasonable and just amount to be determined by the Court.
26
27

1 5.2 Plaintiffs request costs, terms, attorney's fees and any other relief the court
2 deems just and equitable.

3 DATED this 14th day of January 2000.
4

5 ROBIN JENKINSON
6 MARK L. BUBENIK
7 G. S. KARAVITIS
8 PAUL BRACHVOGEL

9 By P.B.V.
10 Paul Brachvogel WSBA#21849
11 Assistant City Attorney
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TACOMA MUNICIPAL BELT LINE RAILWAY

FREIGHT TARIFF TMBL 6000

STORAGE RULES AND CHARGES

APPLYING
AT
STATIONS ON THE
TACOMA MUNICIPAL BELT LINE RAILWAY

This tariff is also applicable on intrastate traffic, except where expressly provided to the contrary in connection with particular items.

ISSUED: April 7, 1995

EFFECTIVE: May 1, 1995

ISSUED BY
Dennis Dean, Superintendent
3628 South 35th Street
P.O. Box 11007
Tacoma, WA 98411-0007

(The provisions published herein, if effective, will not result in an effect on the quality of the human environment.)

A

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**
ITEM 10**SUPPLEMENTS AND REISSUES**

When reference is made in this tariff, or supplements, to other publications for rates or other information, it includes "Supplements thereto or successive issues thereof."

Where reference is made in this tariff to items, it includes "reissues" of such items.

ITEM 15**REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.**

Where reference is made in this tariff to another tariff by ICC number, such reference applies also to such tariff as it may be applicable on intrastate traffic, or traffic within Canada.

When the words tariff, tariffs or contracts are used in this tariff, they refer to tariffs or contracts lawfully on file with the Interstate Commerce Commission as to interstate traffic and State Commissions as to intrastate traffic.

ITEM 20**METHOD OF CANCELLING ITEMS**

As this tariff is supplemented, numbered items with letter suffixes cancel correspondingly numbered items in the original tariff, or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with A. Example: Item 100-A cancels Item 100 and Item 300-B cancels Item 300-A in a prior supplement which, in turn, cancelled Item 300.

**SECTION I
STORAGE RULES AND CHARGES**
ITEM 100**STORAGE CHARGES FOR FAILURE
TO PULL INTERCHANGE**

Connecting carriers, BN or UP, shall be billed storage charges monthly, accrued daily, for failure to pull interchange offered by fax list as follows:

- A. Pulled within 12 hours of fax time..... No Charge
- B. Pulled between 13 - 24 hours of fax
time on list.....\$ 25.00 Per Car
- C. Pulled between 25 - 36 hours of fax
time on list.....\$ 50.00 Per Car
- D. Pulled between 37 - 48 hours of fax
time on list.....\$ 100.00 Per Car
- E. Pulled between 49 - 60 hours of fax
time on list.....\$ 200.00 Per Car
- F. Pulled between 61 - 72 hours of fax
time on list.....\$ 400.00 Per Car
- G. Pulled after 72 hours of fax time on list.....\$1000.00 Per Car

ATTACHMENT "B"

CERTIFICATE OF SERVICE
On this day, the undersigned, Paul Brachvogel, has caused this document to be filed by U.S. Mail, postage prepaid, by messenger service following.

THE HONORABLE FRANKLIN D. BURGESS

The undersigned certifies under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed in Seattle, Washington on Feb. 18,

2000.

Lynn A. Lebring
Signature

RECEIVED
FEB 18 2000
LEGAL DIV.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CITY OF TACOMA, TACOMA PUBLIC
UTILITIES, a municipal corporation,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a
Delaware corporation,,

Defendant.

No. C00-5054 FDB

**DEFENDANT'S 12(B) MOTION TO
DISMISS**

ORAL ARGUMENT REQUESTED

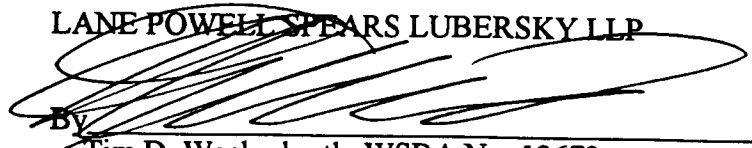
**NOTE ON MOTION CALENDAR:
FRIDAY, MARCH 17, 2000**

COMES NOW defendant Union Pacific Railroad Company, by and through its attorneys, Lane Powell Spears Lubersky, and hereby moves to dismiss plaintiff's complaint on file herein. Plaintiff claims damages resulting from the alleged failure of defendant to promptly accept cars in interchange. This motion is brought pursuant to FRCP 12(b) and is based on the exclusive jurisdiction of the Surface Transportation Board over disputes of this nature under 49 U.S.C. § 10501(b)(1), the authorities contained in the memorandum of law submitted in support of this

1 Motion, the Affidavit of Tim D. Wackerbarth and the exhibits attached thereto and the pleadings and
2 other documents on file herein.

3 DATED this 18 day of February, 2000.

4 LANE POWELL SPEARS LUBERSKY LLP

5 
6 By

7 Tim D. Wackerbarth, WSBA No. 13673
8 Attorneys for Defendant
9 Union Pacific Railroad Company
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