

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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EX PARTE No. 770 (Sub. No. 1)

URGENT ISSUES IN FREIGHT RAIL SERVICE

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**UNIONS' REPLY TO  
UNION PACIFIC RAILROAD MOTION FOR PROTECTIVE ORDER**

The Brotherhood of Locomotive Engineers and Trainmen, Brotherhood of Maintenance of Way Employees Division/IBT; Brotherhood of Railroad Signalmen; International Association Of Boilermakers; International Association Of Machinists And Aerospace Workers District #19; International Association of Sheet Metal, Air, Rail and Transportation Workers Mechanical Division; and National Conference of Firemen and Oilers, 32BJ/SEIU (“Unions”) urge the Board to deny the motion of the Union Pacific Railroad Co. (“UP”) for a protective order regarding employment data that UP is required to file with the Board in accordance with the Board’s order in this proceeding issued on January 31, 2024.

UP baldly states that a protective order is required to permit UP to submit information that supposedly contains confidential, highly confidential, and/or “confidential commercial information”. The Carrier then notes that the Board’s order requires that UP submit detailed employment data, future labor force targets, and detailed information regarding plans to incentivize hiring and retention including policies and incentives to maintain an adequate labor supply and how those measures will work. No further explanation, justification or argument is offered in support of the motion.

Initially, the Unions note that UP has not explained why the reporting requirements in the

January 31 Order create concerns about disclosure of supposedly confidential information that were not present under the Board's earlier requirements in this Docket for disclosure of information related to employment levels, hiring and retention efforts-requirements that did not cause UP to seek a protective order regarding those disclosures. Furthermore, disclosure of the sort of information requested by the Board is hardly unprecedented when similar information is disclosed by the carriers in R-1 reports and other monthly reports that have been filed and publicly accessible for decades, or can be derived from those reports.

Additionally, UP has not explained how or why the Board's Order would require disclosure of confidential, highly confidential, and/or "confidential commercial information" generally, or why the specific types of information UP anticipates submitting constitutes confidential, highly confidential, and/or "confidential commercial information". In particular, UP did not explain how the employment related information constitutes "confidential commercial information" that no one should be able to see other than the Board and its staff. Nor did UP identify which type of information would fall into which category of supposed confidentiality or the standards that would be applied in classifying information as confidential, highly confidential, "confidential commercial information". It may be that UP will take the position that all of the information to be disclosed is subject to some form of confidential treatment. And if the proposed order is granted, it appears that UP will have unfettered discretion to categorize information however it chooses.

Someone who has signed an undertaking could move to have it de-classified; but industry stakeholders should not be required to act to obtain public disclosure of information that the Board has deemed important for its assessment of whether the Class I railroads are taking steps

necessary for them to perform their common carrier obligations, and to fulfill their functions as essential parts of American transportation infrastructure. Nor should industry stakeholders have the burden of showing that information is not confidential; rather, UP should have the burden of showing that information is indeed confidential and on balance should not be available except under a confidentiality undertaking. Additionally, with highly confidential information restricted to counsel and consultants, they may not be able to determine whether certain information is properly classified without assistance of their principals. And, of course, no industry stakeholder would even be able to seek disclosure of the supposed “confidential commercial information” because none of their counsel or consultants would ever see that information. The Unions further submit that the public has a right to information enabling the public to determine whether the Class I’s are fulfilling the commitments they made and the representations they offered in seeking and gaining authorization to merge into mega-carriers, which were key to the Board’s conclusions that the mergers were consistent with the public interest.

UP may believe that as a private corporation it is entitled to refuse to disclose information about its operations to the public. But UP and other carriers often conveniently fail to acknowledge that: 1) they operate under government issued certificates; 2) have common carrier obligations; 3) are government permitted duopolies (with each of the Big 4 spanning half the United States), that would never have been allowed to form in other industries, but were allowed to form because this agency determined that their combinations were consistent with the public interest, and that the public transportation benefits of the combinations outweighed the potential negative effects of extreme industry concentration; and 4) have immunity from anti-trust law and other laws with respect to post-merger actions, with the scope of that immunity broadly

construed (and wielded liberally against Rail Labor). (And in the case of UP in particular, it was given large swaths of land by the Federal government, and it was substantially built with funds provided by the Federal government- making it especially inappropriate for UP to object to public scrutiny when it has been falling short in providing adequate transportation to large parts of the Country). It must also be recognized that UP would not be in the position of having to report its employment, hiring and employee retention information and hiring plans if it and the other Big 4 Class I's hadn't failed abysmally in their basic transportation function causing the Board to open the instant proceeding.

UP is particularly ill-suited to object to disclosure of employment and hiring information when its service failures and denials of service caused the Board to open the UP embargoes proceeding (Ex Parte 772) in which UP attributed its service problems in large part to a (self-inflicted) shortage of train and engine service workers; and when its inability to adequately maintain its Winnemucca line and properly service Foster Poultry Farms after UP reduced its maintenance of way and signal forces resulted in two directed service orders from this agency to prevent Foster Farms from having to euthanize millions of chickens. It should also be recalled that UP's Eric Gehringer had to submit a heavily lawyered "clarifying statement" in the UP embargoes case, explaining that statements he made in testimony to the Board that seemed to describe a multi-year planning process for hiring and retention of train and engine service employees were not in reality describing an actual multi-year planning process for hiring and retention of train and engine service employees.

The need for public disclosure of the employment related information that UP is to provide to the Board is further emphasized when one considers the following recent actions of

UP:

- 1) one of the first actions of UP under the leadership of James Vena was to furlough scores of shopcraft workers;
- 2) UP then pointlessly cut-off maintenance of way production gangs comprised of over 1300 maintenance of way employees, and responded to BMWED's protests by letter of October 30, 2023 that was copied to this Board, asserting that the furloughs were typical for the season, the duration would be only a month, and UP did not "anticipate significant furloughs if any resulting from this action". But, in fact, the cut-offs were not seasonal, other carriers did not take similar actions at the time, the gangs were not re-started until two months had passed, and UP's own reporting to this agency reveals that over 550 employees were furloughed and without earnings for two months;
- 3) UP started the new year by furloughing dozens of shopcraft workers in the Los Angeles area (and took an additional 500 locomotives out of service), raising significant questions about UP's commitment to handle increased volume out of the ports of Los Angeles and Long Beach.

These and other actions indicate that UP engaged in the furloughs not because they were necessary (according to data reported to the Board, UP's reductions in its workforce of 26% since 2016 and 17% since 2019 far exceed its negligible reductions in volume of 3% since 2016 and 1% since 2019), but rather in order to artificially lower its Operating Ratio for the fourth quarter of 2023, so the new leadership could appease financial interests with its results for the first quarter of that leadership. These and other actions also reveal that UP is not staffing to meet current needs and is definitely not staffing to increase capacity, a strategy that justifies Board scrutiny of UP's employment, hiring and retention data and plans, as well as public access to that information. And UP's misrepresentations to the Board concerning employment matters further underscore the need for public access to the employment related reports filed by UP, without the fetters of confidentiality undertakings so the Carrier's assertions can be fact-checked by industry stakeholders.

In summary, UP has failed to support its contention that the information it wants to shield

from the public is properly considered confidential at any level so as to justify a protective order; and it has failed to explain how it would classify the different types of information it would produce and the standards or criteria it would apply in categorizing information. Furthermore, UP has ignored its own problematic conduct with respect to employment reports and hiring and retention plans that militates strongly against issuance of a protective order. UP's motion should therefore be denied.

Respectfully submitted,

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