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June 26, 2025

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Office of Proceedings

June 26, 2025

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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: FD 36844, *Commuter Rail Division of the Regional
Transportation Authority d/b/a Metra – Terminal Trackage
Rights – Union Pacific Railroad Company*

Dear Ms. Brown:

Metra replies, pursuant to 49 C.F.R. § 1104.13(a) (permitting replies to a motion), to oppose the Motion to Strike (“Motion”) UP filed on June 25, 2025.

UP objects to Metra’s evidence and argument showing that UP’s proposed trackage rights rates are not only irrelevant and premature at this stage of the proceeding, but also, even if considered as bearing on the public interest criteria, unwarranted and unsupported. UP acknowledges Metra’s right to respond to UP’s new reply arguments addressing its alleged “market rates,” which UP grudgingly recognizes as “permissible (albeit unpersuasive) rebuttal evidence” (Mot. at 5). Yet UP still seeks to strike Metra’s evidence showing that UP’s proposed rates deviate from the Board’s established SSW trackage rights compensation framework.

UP asserts “[s]uch argument and evidence should have been submitted on opening” (Mot. at 6). On the contrary, Metra addressed on opening the five statutory elements for obtaining terminal trackage rights specified at § 11102(a). Metra cannot be expected to have anticipated that UP would seek to insert the putative reasonableness of its own compensation demand into the public interest analysis, when the express statutory language properly defers determination of the conditions and compensation to apply between the parties until *after* the Board’s determines whether to grant trackage rights in the first place. § 11102(a).

Metra was entitled to rebut UP's theory that relief should be denied because the alleged "market rates" that UP is seeking to charge are fair in UP's own estimation by showing the range of alternative outcomes produced under the Board's preferred approach. UP may disagree that Metra's evidence is persuasive, but UP is correct that it is permissible rebuttal evidence. Rebuttal evidence is proper where addressed "to issues raised in the reply statements to which they are directed." 49 C.F.R. § 1112.6. Even in stand-alone cost ("SAC") rate cases, with their strict evidentiary rules,¹ a shipper is entitled to "show[] that the railroad's reply evidence is itself unsupported, infeasible or unrealistic." *Western Fuels Ass'n, Inc. & Basin Electric Power Coop., v BNSF Ry. Co.*, NOR 42088 (STB served Sept. 10, 2007) at 6; *Consumers Energy Co. v. CSX Trans., Inc.*, NOR 42142 (STB served Dec. 9, 2016) at 16-17 (a party is "entitled to offer corrective evidence to demonstrate that . . . reply evidence was unsupported, infeasible, or unrealistic").

UP also incorrectly claims that Metra "modifie[d] its opening position" by responding to UP's new proffer that UP would "assent" to interim terms and conditions for Metra's use of the UP Lines, if the Board granted trackage rights, but only and exclusively on its own terms and conditions. (UP Reply Statement at 34-38, Exhibit B). Metra could not have anticipated that UP, in favor of an interim resolution, would alter its prior position that final compensation had to be decided and paid *before* usage could commence, which Metra had pointed out in its Opening Statement and Evidence allowed no room for Metra's service to continue without disruption after June 30, 2025, and nullified the statutory language providing for conditions and compensation to be established *after* the Board grants trackage rights.

UP specifically seeks to strike Metra's rebuttal evidence proposing that the reasonable alternative to UP's non-negotiated terms and conditions, in the event the Board granted trackage rights, would be to maintain the status quo between the parties, until final conditions and compensation are established, subject to a retroactive adjustment either way to July 1, 2025. Metra's proposed Interim Conditions and Compensation (Metra Rebuttal Statement and Evidence, Exhibit A) are a proper rebuttal response to UP's change in position and, contrary to UP's argument, are not inconsistent with any argument or evidence Metra

¹ UP's Motion relies solely on the evidentiary rules applicable in SAC rate cases and adopted in *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 445-46 (2001). Metra does not agree with UP that the evidentiary rules for SAC cases control the scope of rebuttal evidence here, but even if they do, the outcome does not change.

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previously offered. Metra's response to UP's newly proposed interim terms and conditions properly addressed issues that UP chose to raise for the first time on reply. *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, NOR 42121 (STB served July 24, 2015 at 4 (replies to new arguments and evidence that a party "[could] not have anticipated on opening" are acceptable).

UP also argues that Metra's attempt to consign the status quo to paper in its proposed Interim Conditions and Compensation "would need to be addressed through the adversarial process." (Mot. at 7). Metra disagrees that additional rounds of "[l]egal and evidentiary briefing by both sides" (*id.*) would be appropriate or needed to articulate the terms and conditions that currently exist and are applied by and between the parties on a daily basis to the operation of Metra's service. To the extent UP disagrees that Metra's has accurately captured the status quo on its rebuttal filing, however, the Board, if it granted trackage rights and ordered interim relief, consistent with the approach outlined in UP's Reply Statement, could reject both parties' interim proposals and simply order the parties to maintain the "status quo" until final conditions and compensation were established between the parties or by the Board in accordance with § 11102(a). Such an order would be unambiguous and executable between UP and Metra during the interim time period required to establish final conditions and compensation.

The Board should deny UP's Motion for these reasons. The Motion also goes well beyond seeking to strike and includes substantial and improper surrebuttal arguments and evidence, without seeking leave to do so, in contradiction of the Board's procedures and the schedule in place for this proceeding, 49 C.F.R. § 1104.12(c).

Respectfully submitted,



Peter A. Pfohl

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Regional Transportation Authority d/b/a Metra*

CERTIFICATE OF SERVICE

I hereby certify this 26th day of June, 2025, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by more expeditious means to all parties of record.

/s/ Peter A. Pfohl