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Mr. Steven V. King
Executive Director and Secretary
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Docket TR-151079, Rulemaking to Consider Adoption of Rules Relating to Rail Safety

Dear Mr. King:

The Union Pacific Railroad Company ("Union Pacific") appreciates the opportunity to offer comments to the Washington Utilities and Transportation Commission ("Commission") on its proposed rules in Docket TR-151079, Rulemaking to Consider Adoption of Rules Relating to Rail Safety. The Commission has issued these proposed rules in light of Washington State House Bill 1449, which Governor Jay Inslee signed into law on May 14, 2015.

That legislation authorized the Commission to promulgate rules on various topics affecting rail operations in the State, including the requirement that railroads provide the State with financial fitness reports, as well as rules to enforce safety standards for private crossings. Prior to issuing the proposed rule, the Commission sought comments from interested parties on three topics: (1) updates to annual reporting requirements on financial responsibility for railroads hauling crude oil; (2) introduction of safety standards for private crossings, and (3) enablement of first-class cities to opt in to the Commission's rail crossing safety program.

Union Pacific participated in the initial round of comments. As Union Pacific indicated in its June 22 comments, Union Pacific does not object to first-class cities opting into the Commission's rail crossing safety program to the extent the program is not preempted by federal law. In the initial round of comments, both Union Pacific and BNSF Railway Company identified certain concerns about the other two issues raised by the Commission. The railroads cautioned that the imposition of financial reporting requirements on the railroads would conflict with federal law. The railroads also expressed concern that the private crossings regulation could interfere with private contracts entered into between the railroads and private landowners to establish private crossings. The railroads made various suggestions for the Commission to consider when it drafted the proposed rules, including adopting the R-1 as a sufficient annual

reporting mechanism, and including a provision expressly stating that the regulations would not interfere with private contracts entered into by the railroads with regards to private crossings. See Union Pacific Comments on Preproposal Statement of Inquiry (CR-101), Docket TR-151079 (filed June 22, 2015); BNSF Ry. Co. Comments on Docket TR-151079 (filed June 22, 2015).

Union Pacific appreciates that the Commission adopted some of the railroads' suggestions. In particular, the Commission has taken the railroads' recommendation to adopt the R-1 as an acceptable form of financial reporting for Class I railroads. This decision will harmonize the State rules with the federal reporting standards required of the Class I railroads by its federal regulator. In addition, the Commission has taken the railroads' suggestion to include in its proposed rules language that makes clear that the private railroad crossing rules are not intended to interfere with the private contracts entered into between the railroad and the landowner. This will facilitate the continued use of private crossings, will encourage rail safety, and will benefit private businesses and properties within the State.

While Union Pacific appreciates that the Commission has taken these positive steps, there remain aspects of the annual reporting provisions in the proposed rule that remain under the exclusive jurisdiction of the Federal Government for the preservation of common carrier service obligations for public convenience and necessity. Union Pacific's comments will address those issues. In addition, Union Pacific offers a few technical comments with regards to the private rail provisions proposed by the Commission.

A. The Financial Reporting Requirements Are Preempted by Federal Law.

Union Pacific is particularly concerned about the financial fitness and insurance requirements that the Commission is proposing. The Commission's proposed rules include requirements that railroads provide annual reporting statements that identify all insurance carried by the railroad, including "Coverage amounts, limitations, and other conditions of the insurance" as well as "information sufficient to demonstrate the railroad company's ability to pay the costs to clean up a reasonable worst case spill of oil as defined in WAC 480-62-125." WAC 480-62-300(2). These requirements are preempted by federal law, compromise the integrity of Union Pacific's confidential business records and are blatantly discriminatory on their face.

Congress' assertion of federal authority over the railroad industry has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). As relevant here, the ICC Termination Act ("ICCTA") confers exclusive jurisdiction over licensing and economic regulation of interstate railroad operations on the Surface Transportation Board ("STB"). Under 49 U.S.C. § 10901, the "Board has exclusive licensing authority for . . . operation of new railroad lines" and may certify rail line operation unless the STB finds the project to be "inconsistent with the public convenience and necessity." N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1073 (9th Cir. 2011). To determine public convenience and necessity, the STB looks at a variety of circumstances surrounding the proposed action, "which can include consideration

of the applicant's financial fitness, the public demand or need for the service, and the potential harm to competitors." Alaska Survival v. STB, 705 F.3d 1073, 1078 (9th Cir. 2013) (emphasis added).

The express preemption clause in ICCTA declares that the STB's jurisdiction over transportation by rail carriers "is exclusive." Specifically, Section 10501(b), provides:

> (b) The jurisdiction of the Board over—
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), . . . and facilities of such carriers; and
>
> (2) the . . . operation . . . of spur, industrial, team, switching, or side tracks, or facilities . . .
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

The purpose of this preemption provision is to protect the railroad industry from a patchwork of state regulations that would balkanize the network. The STB has explained that § 10501(b) "is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce." *CSX Transp., Inc.—Pet. for Declaratory Order*, 2005 WL 584026, at *9 (STB served Mar. 14, 2005).

The federal courts have repeatedly recognized that these provisions broadly preempt state laws regulating transportation operations. *See, e.g.*, *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (describing language of § 10521(b)(2) as "broad" and giving Board "exclusive jurisdiction over . . . operation . . . of rail lines"); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority."). The STB observed that "[e]very court that has examined the statutory language has concluded that the preemptive effect of Section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on . . . a railroad's ability to conduct its rail operations." *CSX Transp., Inc.—Pet. for Declaratory Order*, 2005 WL 584026, at *6 (STB served Mar. 14, 2005).

Over the years, federal courts and the STB have found two types of state regulations of railroads to be so pernicious as to be "categorically" preempted, without any inquiry into the State's reason for the regulation or burden on the railroad industry. First, States are categorically prevented from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, and licensing). *See 14500 Limited LLC—Pet. For Declaratory Order*, FD 35788, slip op. at 4 (served June 5, 2014) (citing *City of Auburn*, 154 F.3d at 1029-31). Thus, ICCTA

categorically precludes any form of state regulation in traditional areas of economic regulation, such as the parameters of the common carrier obligation or licensing of carriers (which may include a financial fitness inquiry).

Second, States cannot impose permitting or preclearance requirements. The STB has reasoned that these kinds of regulation, by their nature, can be used to deny a railroad's ability to conduct rail operations that the STB has authorized. *Id.* Thus, state permitting or preclearance requirements—including environmental and land use permitting requirements—are categorically preempted. *City of Auburn*, 154 F.3d at 1029-31. Otherwise, state authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the STB's authorization of those facilities and operations. *14500 Limited* at 4 n.5 (*citing City of Auburn*, 154 F.3d at 1031; *CSX Transp., Inc.—Pet. For Declaratory Order*, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005)).

Here, federal law requires Union Pacific to transport all commodities, including crude oil, upon reasonable request. The railroads cannot simply stop transporting crude oil through Washington State. They have a federal common carrier obligation under 49 U.S.C. § 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. § 10502. Crude oil has not been exempted from this obligation. "The common carrier obligation," the Board thus explained, "requires a railroad to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations." *See Union Pacific R.R. Co.—Pet. For Decl. Order*, FD 35219 (STB served June 11, 2009).

As such, Washington State cannot regulate the amount of insurance to be held by a federally licensed rail carrier. Doing so plainly intrudes into an area where federal control is exclusive. Regulating financial fitness of rail carriers is quintessential economic regulation that is categorically preempted by ICCTA. The STB is the only regulator (at a state or federal level) with the exclusive authority to review the financial fitness of a railroad or require a minimum level of insurance before transporting hazardous materials. *N. Plains Res. Council*, 668 F.3d at 1073; *Alaska Survival v. STB*, 705 F.3d at 1078; *Tongue River R.R.—Rail Construction & Operation—Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2) (STB service date Nov. 8, 1996) (explaining the purpose of the STB's financial fitness test). Once the STB has granted a federal license to carriers to operate in interstate commerce, Washington State cannot superimpose another layer of economic regulation by forcing carriers to demonstrate they have obtained a minimum level of insurance. The United States Supreme Court has made this point plain. *See R.R. Transfer Serv., Inc. v. City of Chicago*, 386 U.S. 351, 358-59 (1967) (city could not regulate the "financial ability" of a party to render safe service where the regulated service was an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act). And the Senate has more recently reiterated the importance of a nationally uniform system of economic regulation:

> The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation.

> Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the 'seamless' service that is essential to its shippers and would weaken the industry's efficiency and competitive viability.

See S. Rep. No. 104–176, at 6 (1995), U.S. Code Cong. & Admin. News 1995, p. 793.

Union Pacific acknowledges that a determination of whether the reporting provisions are preempted by federal law may be a matter outside of the agency's purview and that the Commission is required to adhere to the laws passed by the State Legislature. However, Union Pacific recommends that the Commission seek advice and counsel from its attorney general and seriously consider these well-established federal principles in making a final decision on the insurance requirements imposed in the rule.

The Class I rail carriers' R-1 reports will illustrate that these common carriers by railroad have more than enough financial security to cover the cost of even a worst-case scenario crude oil spill. *See, e.g.,* Union Pac. R.R. Co. R-1 Annual Report Statement for 2014 (reporting net revenue from railway operations of $8.5 billion). The legislation requires no disclosure beyond that already made publicly available in the R-1.

Section WAC 480-62-300(2)'s requirements that the railroads produce "coverage amounts, limitations, and other conditions of the insurance" would require Union Pacific to divulge the terms of insurance coverage that Union Pacific has negotiated with its insurance providers. It is not in the public interest to force Union Pacific to divulging the confidentially-negotiated insurance terms it has obtained to a competitor railroad or a competing mode of transportation.

Requiring Class I carriers to divulge this commercially sensitive confidential insurance information is unnecessary to meet the goals of the legislation, given the information is readily available from the public R1 reports to satisfy the requirement of ESHB 1449 Sec. 10. We therefore urge the Commission not require this additional disclosure of confidential information by Class I carriers.

B. Union Pacific Offers Certain Technical Comments on Specific Provisions in the Proposed Rules.

Union Pacific offers the following three technical comments on the provisions regarding safety standards at private crossings:

1. In WAC 480-62-(2), the Commission would provide the railroads only 90 days following the adoption of the rule to install appropriate signage at each private crossing in the State through which any amount of crude oil is transported. This requirement imposes a significant burden on Union Pacific. Union Pacific respectfully requests that the Commission allow the railroads 180 days to comply with the rule.

2. Union Pacific suggests that the Commission consider including an exception to its signage requirements for private crossings where only a *de minimis* amount of crude oil is transported. A *de minimis* exception would take into account the realities of railroad operations. Railroads occasionally have to alter the normal routing of traffic for various reasons, such as weather, congestion, construction and repair of track, among others. Union Pacific would not want to find itself in violation of the regulations as a result of a routing change that required the movement of crude oil over a route not commonly used to transport such commodities. The inclusion of a *de minimis* exception, perhaps expressed as a monthly volume requirement, would enable the railroads to avoid inadvertent violations of the regulations, or being forced to choose between not rerouting the traffic onto an alternative route or being fined for operating a train through a crossing that had no signs because, until then, no train carrying crude oil had used that route.

3. Finally, Union Pacific recommends a technical change to the language in WAC 480-62(4). In this section, the proposed rule contemplates that the State may conclude that the sight restriction for a particular private crossing are insufficient, and then notify the railroad of the concern. The proposed rule would then require an additional crossbuck to be installed "within 90 days of the adoption of this rule." Union Pacific believes this may have been a clerical mistake, as it would be impossible for Union Pacific to predict in advance what (and where) the State might find to be an insufficient sight restriction. Union Pacific suggests that the proposed rule read instead "within 90 days of notification of the insufficient sight restriction."

Union Pacific's first priority is safety. Union Pacific is committed to following—and in many cases exceeding—the requirements of federal law in the transport of crude oil and other commodities through Washington state and across the UP system. UP appreciates that the proposed rules incorporated some of the suggestions that it put forward in the prior round of comments. We look forward to working collaboratively with the Commission as this rulemaking moves ahead.

Regards,

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