

308526

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
August 8, 2024
Part of
Public Record

Docket No. FD 36800

APPLICATION OF UNION PACIFIC RAILROAD COMPANY
FOR MEDIATION UNDER 49 U.S.C. § 28502

**RESPONSE IN OPPOSITION
TO UNION PACIFIC APPLICATION FOR MEDIATION**

Thomas Andreoli
William W. Benz
Blair Theuerkauf
Metra
547 W. Jackson Boulevard., Floor 15
Chicago, IL 60661

Peter A. Pfohl
Robert D. Rosenberg
Slover & Loftus LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 347-7170

Attorneys for Metra

Dated: August 8, 2024

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36800

APPLICATION OF UNION PACIFIC RAILROAD COMPANY
FOR MEDIATION UNDER 49 U.S.C. § 28502

**RESPONSE IN OPPOSITION
TO UNION PACIFIC APPLICATION FOR MEDIATION**

Introduction

The Commuter Rail Division of the Regional Transportation Authority, d/b/a Metra (“Metra”), did not join in and opposes the Application for Mediation filed by Union Pacific Railroad Company (“UP” or “Union Pacific”) pursuant to 49 U.S.C. § 28502, because the application is premature.

Metra provides regional passenger rail service in Northeast Illinois and Southeast Wisconsin. Its service is an integral part of the regional economy, including approximately 32 million passenger trips each year. In providing its service, Metra is responsible to taxpayers and other public-sector stakeholders.

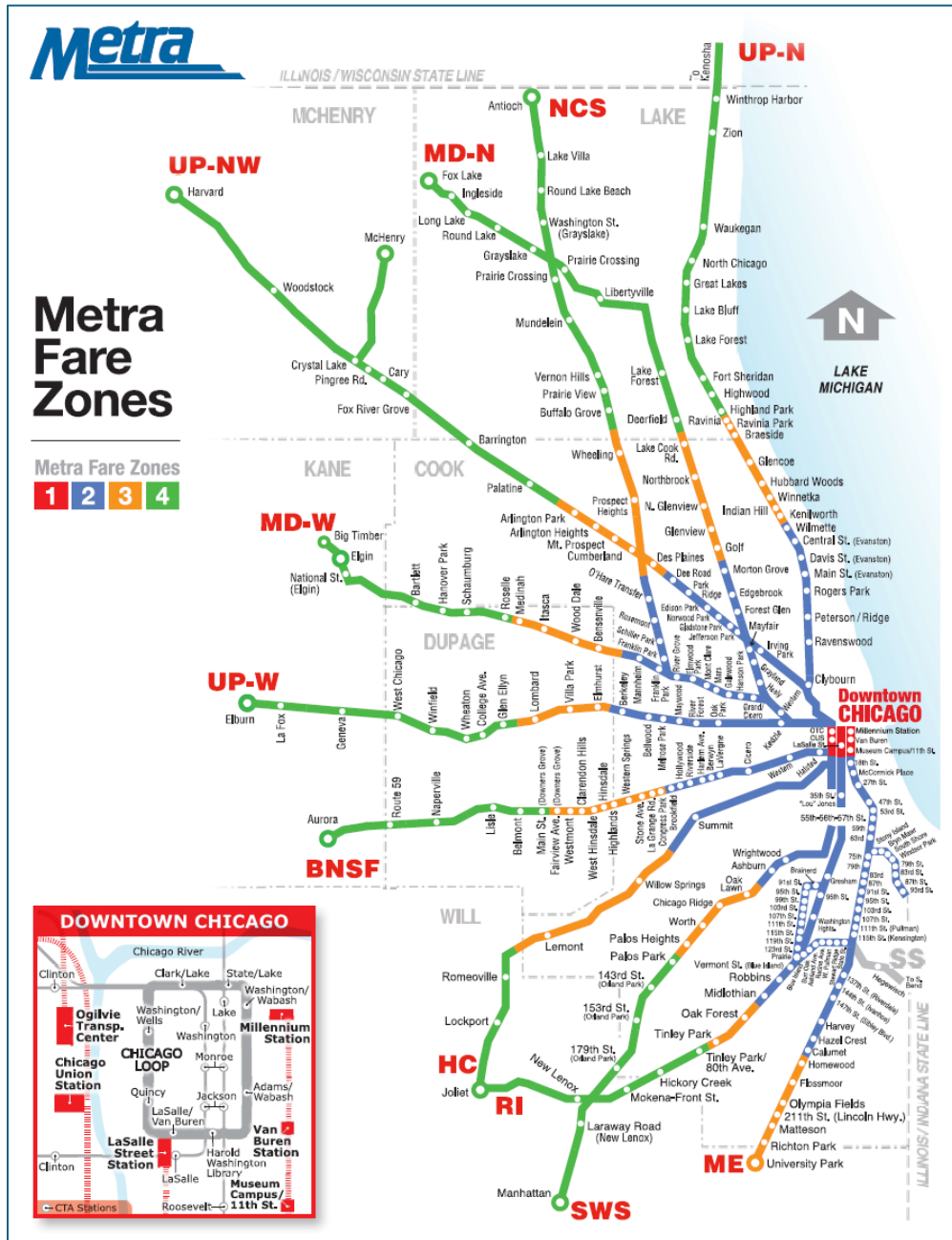
Metra and UP have been engaged in negotiations for several years over the terms and conditions under which UP will continue to provide access to three of its interstate rail lines and related services to Metra for the agency’s passenger operations. Progress in the negotiations has stalled because UP has not provided Metra with complete and sufficiently detailed financial information to support the substantially increased fees and costs that UP seeks to have Metra pay and assume under a new agreement. Metra

repeatedly has requested but has not yet received the basic financial information necessary to evaluate the reasonableness of UP's proposal. As a public-sector agency, Metra cannot meaningfully assess, and ultimately request or obtain approval for UP's proposal without transparent and complete contract information. In lieu of and certainly prior to formal mediation, Metra has proposed and recommends that the parties initially proceed to work through the information sharing and financial aspects of their proposed agreement with assistance from the Board's Office of Public Affairs, Government Assistance and Compliance ("OPAGAC").

Background

As shown below in Map 1, Metra's regional passenger service occurs over three lines owned, used, and dispatched by UP (UP-N; UP-NW; and UP-W). Approximately 38 percent of Metra's total yearly ridership is associated with these lines alone.

MAP 1 _ METRA SYSTEM MAP



Metra and UP have engaged in good faith negotiations over several years for the transfer of regional passenger rail service operations on the three lines from UP to Metra. UP historically has provided the rail service under a Purchase of Service Agreement (“PSA”) with Metra, which the parties have extended several times while negotiating a

new agreement. In the future, Metra will provide the passenger service directly – as it does on most of its lines – while purchasing access rights and certain rail-related services from UP. UP will continue to own, have access to, and use these lines for its freight rail service.

Under its proposed new agreement, UP would continue to own, use, and dispatch the rail lines, but Metra would absorb certain operational functions, associated employees, and acquire or lease UP properties exclusively used in passenger rail service. Throughout the negotiations, Metra’s priorities have been, and will remain, maintaining a safe, quality service for its passengers and being a good steward of taxpayer dollars. To date, the parties have made some progress in their discussions, including the transfer of various former-PSA services and employees from UP to Metra and the lease and/or sale of certain UP properties to Metra. The parties, however, have not been able to reach agreement on other critical issues.

Response to UP’s Application

UP identifies two issues on which it seeks to mediate: “the fee Metra will pay for access to Union Pacific’s tracks and other property used for commuter rail service, and the fees and costs Metra will pay for engineering maintenance services that Union Pacific will continue to provide – primarily maintaining main lines used by Metra’s commuter trains.” Application at 3. These issues and the related costs and fees to be imposed on Metra’s public-sector stakeholders are not easily unpacked and understood. The UP proposal encompasses a complicated combination of “below-the-wheel” engineering cost allocations and reimbursements, a “franchise” access fee, dispatching costs, and lease

fees/purchase options for certain mechanical sites, platforms, stations, and other properties to be used by Metra to provide passenger service. In its current summary form, Metra has no way to understand how UP has calculated its proposed costs and fees and whether UP's proposed pricing is reasonable for Metra's stakeholders.

Metra acknowledges that UP has provided some proposed costing and pricing information in support of its proposal, but the information provided to date largely has been piecemeal and/or summary in form.¹ Metra repeatedly has asked UP to provide a further breakdown and support for its current offer, including all of the individualized components of the proposed costing and pricing for Metra's operations on the UP lines and UP's calculation of the reimbursable costs and expenses associated with the operation of Metra's passenger service. UP has exclusive control over this information, and Metra cannot properly evaluate and respond to UP's proposal – much less request approval from its public-sector stakeholders for the ultimate agreement – until it has complete and transparent supporting information.

The issue is not so much “the fees and costs Metra will pay” (*Id.*) as UP suggests, but more the total of fees and costs that UP is demanding Metra pay in the future, which

¹ As an example, after several years of discussion, UP only delivered its first proposed draft of the parties' new agreement on July 8, 2024 (UP filed for mediation three weeks later). Metra responded that it believed the draft agreement was incomplete and Metra needed support for the economic terms. Metra also advised UP that the form of the agreement was incorrect because it was essentially a cut-and-paste version of the parties' pre-existing PSA, under which UP – not Metra – operated the passenger service. Metra offered to prepare a new contract template for discussion that more accurately reflects the parties' new relationship and responsibilities going forward. UP did not respond and there has been no progress on a new draft document since.

would represent a substantial increase from Metra's historical payments for the same services under the PSA. For Metra to properly evaluate and obtain approval for a multi-year agreement of this magnitude, UP's offer should be presented in one transparent package for all-in services, with complete supporting information, so Metra and its stakeholders, who will bear the cost, can understand and evaluate what is on the table. The agreement also should contain appropriate service level protections for Metra's passenger service and responsibly credit Metra for the billions of dollars of prior and expected future capital contributions made by Metra using public funds that sustain and enhance the value of UP's railroad, which UP has excluded from its proposal.

Metra appreciates that UP would like to finalize an agreement between the parties by December 31, 2024, and that UP believes Board-sponsored mediation will help facilitate that objective. Metra agrees that finalizing the parties' post-PSA agreement in a timely manner is an appropriate objective. Metra further agrees that Board involvement at this time would be helpful. However, it is difficult, if not impossible, to mediate complex issues in a vacuum. Metra believes that initiating mediation prematurely may prove counterproductive to the efficient and timely resolution of issues, particularly given the limited timeframe established for Board-sponsored mediation. As discussed above, Metra has requested but still has not received appropriate and complete supporting information for UP's proposal. Unless and until that information is provided and the issues to be resolved can be identified with greater specificity, Metra is concerned that mediation would become stalled at the outset. Accordingly, Metra believes that the Board's immediate involvement should take a different form.

Metra's Alternative Proposal

Metra has proposed to UP and believes it would be more efficient and effective for the parties to proceed initially with the more informal assistance of OPAGAC. The involvement of OPAGAC (potentially supplemented by Board staff, particularly the Office of Economics), would be more productive than formal mediation in facilitating the exchange of essential information. Formal mediation, if necessary, could then proceed more effectively and efficiently, as a second step, if needed, after foundational information has been provided and discussed by the parties, by focusing the mediation on any specific substantive issues that may remain unresolved.

Metra remains optimistic that more complete information and increased transparency in UP's proposal can help facilitate convergence in the parties' positions. Once Metra has backup support for UP's proposal, and with an informed understanding of all the involved costs and expenses based on existing service levels and potential future service level changes, the parties working in good faith should be able to expeditiously progress and finalize negotiations. However, Metra cannot properly evaluate UP's proposal or fulfill its own stakeholder obligations until it first understands what is included and not included in UP's offer and, by extension, the holistic, total costs and expenses that Metra will experience in directly operating its regional passenger service over the three UP Lines.

Conclusion

For these reasons, Metra recommends that the Board proceed initially by providing the more informal assistance of OPAGAC to help the parties close the gap and

resolve the informational issues presented by UP's summary proposal. OPAGAC's involvement also may help to focus and narrow the issues for which follow-up mediation could be productive under 49 U.S.C. § 18502.

That said, if the Board determines to initiate mediation under 49 U.S.C. § 18502 at this time, Metra will participate fully and constructively. Whether the Board decides to proceed informally through OPAGAC or through formal mediation, Metra encourages the Board to ensure that staff members with knowledge of operating and costing/financial issues in freight and public transportation service are integrally involved to help ensure the best prospects for a successful outcome.

Respectfully submitted,

Thomas Andreoli
William W. Benz
Blair Theuerkauf
Metra
547 W. Jackson Boulevard., Floor 15
Chicago, IL 60661

/s/ Peter A. Pfohl
Robert D. Rosenberg
Slover & Loftus LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 347-7170

Attorneys for Metra

Dated: August 8, 2024

CERTIFICATE OF SERVICE

I hereby certify this 8th day of August, 2024, 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