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January 15, 2016

By U.S. Mail CMRRR #7014 2120 0001 0438 3695 & Electronic FilingEric Sell, Communications Director
Montana Public Service Commission
PO Box 20260
Helena, MT 59620Re: *Docket No. N2015.11.84: Montana PSC Evaluation of Railroad Safety Program*

Dear Mr. Sell,

Union Pacific Railroad Company (“Union Pacific”),¹ submits the following comments in response to the Montana Public Service Commission’s (“MPSC’s”) request for comments regarding railroad safety programs in Montana. Safety is Union Pacific’s top priority, and Union Pacific supports MPSC’s goals to ensure safe and secure transportation by rail. Union Pacific encourages MPSC to take steps to develop and improve a rail safety plan for Montana and to ensure that emergency responders are trained to respond effectively to rail accidents. However, Union Pacific cautions MPSC against taking actions that would conflict with federal law. In particular, Union Pacific believes that MPSC should not attempt to regulate blocked crossings, which, as Union Pacific will discuss below, is an area of regulation that is within the purview of the federal government.

Union Pacific’s First Priority is Safety

Union Pacific’s goal has always been to ensure that all materials—including hazardous materials—arrive at their destination without incident. Indeed, shipping crude oil and other hazardous materials by rail is extremely safe, with shipments delivered without incident 99.997% of the time. That safety record is a testament to Union Pacific’s deep commitment to safety improvements and innovation, which includes voluntary safety measures, first responder training, and state-of-the-art community outreach programs.

¹ Union Pacific is one of America’s leading transportation companies, linking twenty-three states in the western two-thirds of the country and serving the fastest-growing U.S. population centers. Union Pacific provides competitive routes from all major West Coast and Gulf Coast ports to eastern gateways. Union Pacific also connects with Canada’s rail systems and is the only railroad serving all six major gateways to Mexico. Union Pacific’s diverse business mix includes Agricultural Products, Automotive, Chemicals, Coal, Industrial Products and Intermodal. This business diversity allows Union Pacific to serve customers in new and growing markets.



Voluntary Safety Measures: In 2015, Union Pacific and other major railroads voluntarily committed to and implemented the following actions regarding trains with twenty or more cars of crude oil:

- Using the same routing tools that are used to identify secure routing for toxic-by-inhalation commodities to these crude oil trains;
- Reducing the speed of these trains to 40 mph through High Threat Urban Areas (“HTUAs”);
- Equipping these trains with distributed power (“DP”) or two-way End Of Train (“EOT”) devices that improve train control and braking speed;
- Increasing track inspections and installing wayside detectors on routes used by these trains;
- Reinforcing its Emergency Response Resource Inventory by developing, providing, and funding emergency response training for all interested first responders; and
- Working with affected communities as requested.

First Responder Training: Union Pacific is also committed to assuring that first responders have the information and training needed to respond to any incident, no matter how unlikely. Since 2003, Union Pacific has trained about 38,000 public responders and 7,500 private responders. This year, we are giving 1,500 first-responders specialized crude oil training, and are providing hazardous materials training to thousands of first-responders annually. Our emergency preparedness initiatives extend beyond just training. For example, Union Pacific maintains a 24-hour emergency hotline (1-888-UPRR-COP) so that communities can quickly communicate with us in the event of a derailment or hazardous materials release.

Providing Security Sensitive Commodity Flow Information to Local Authorities: Furthermore, as described in AAR Circular OT-55-N, the industry will assist in implementing TRANSCAER®, a system-wide community outreach program to improve community awareness, emergency planning and incident response for the transportation of hazardous materials. As part of that program, upon written request, Union Pacific provides bona fide emergency response agencies or planning groups with specific commodity flow information covering at a minimum the top twenty-five hazardous commodities transported through the community. To access this commercially and security sensitive information, local authorities must agree to restricted the information only to bona fide emergency response planning and response organizations.

Union Pacific Encourages the MPSC to Take Steps to Improve Rail Safety in Montana

Union Pacific supports the Legislative Auditor’s recommendations that the MPSC conduct rail safety risk assessments and that it actively engage with emergency services across the state to ensure that Montana has an effective rail safety program. In particular, Union Pacific encourages

MPSC to take steps to improve emergency response capabilities and to train first responders to respond effectively to rail incidents.

As described above, Union Pacific is committed to providing first responders with the training necessary to respond effectively to derailments.² Emergency response training benefits the responders themselves and the communities they serve by ensuring that, in the unlikely event of an incident, those who are first on the scene have the tools to assess and address the situation effectively. For example, Union Pacific recently hosted a three-day training at the Association of American Railroad's Transportation Technology Center near Pueblo, Colorado on crude-by-rail emergency response. Emergency response personnel from 17 different states were in attendance. Class members participated in a simulated crude oil fire, which helped students understand how the railroad would work with them in an emergency, and how to work safely while on railroad property. These trainings provide attendees with hands-on experience in assessing tank car damage, making certain on-site repairs, controlling the release of crude oil from damaged rail cars, and crude oil fire suppression techniques. Union Pacific paid for all attendee's expenses, with no cost to communities or organization. Union Pacific would welcome the opportunity to work with MPSC to provide emergency response training to emergency responders in Montana.

Federal Law Preempts Most State Regulation of Blocked Crossings

In its letter to the Legislative Auditor, MPSC notes that two federal statutes, the Federal Railroad Safety Act of 1970 ("FRSA") and the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") prescribe vast federal responsibility for railroad regulation. MPSC is correct. Congress' assertion of federal authority over the railroad industry has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). State regulations that conflict with this comprehensive federal regulatory scheme are preempted by federal law. In particular, states' attempts to regulate blocked crossings have repeatedly been found to be preempted by both FRSA and ICCTA. Union Pacific offers the following background information to assist MPSC to understand the limitations imposed upon state action in the area of blocked crossings.

FRSA: In FRSA, Congress directed that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). To accomplish that objective, Congress provided that a State may no longer "adopt or continue in force a law, regulation, or order related to railroad safety" once the "Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* § 20106(a)(2).³ In practice this

² Union Pacific also offers safety briefings to organizations and communities on various issues upon request. See, e.g., http://www.up.com/aboutup/community/safety/presentation_request/index.htm.

³ The statute provides an exception for requirements "necessary to eliminate or reduce an essentially local safety or security hazard," 49 U.S.C. § 20106(a)(2)(A), but the risk of a spill in Montana "is not one that is fundamentally different from those of other locales" and therefore does not come within the exception. See *Union Pacific R.R. v. Cal. Pub. Util. Comm'n*, 346 F.3d 851, 862 (9th Cir. 2003).

means that once the federal government has enacted railroad safety regulations on a particular topic, states are prohibited from regulating in that area. Courts have found that various state efforts to impose regulations on railroad blocked crossings are preempted by FRSA. *See Village of Mundelein v. Wisc. Cent. R.R.*, 882 N.E.2d 544, 553 (Ill. 2008) (federal regulations “substantially subsume[] the subject matter of movement of trains at grade crossings”); *see also CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002); *CSX Transp., Inc. v. City of Mitchell*, 105 F.Supp.2d 949, 952 (S.D. Ind. 1999); *Krentz v. Consolidated Rail Corp.*, 910 A.2d 20, 35-36 (Pa. 2006); *City of Seattle v. Burlington N. R.R.*, 41 P.3d 1169, 1175 (Wash. 2002).

ICCTA: Congress conferred exclusive jurisdiction over licensing and economic regulation of interstate railroad operations on the Surface Transportation Board (“STB”). The express preemption clause in ICCTA declares that the STB’s jurisdiction over transportation by rail carriers “is exclusive.” 49 U.S.C. § 10501(b). The purpose of this preemption provision is to protect the railroad industry from a patchwork of state regulations that would subject a railroad to a different set of rules every time it crossed a state line. *See 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 over railroad operations.”). ICCTA’s preemptive effect extends to state laws regulating how long trains may block highway/rail grade crossings. *See Friberg v. Kansas City So. Ry.*, 267 F.3d 439, 444 (5th Cir. 2001) (holding that Texas Anti-Blocking Statute was preempted because it affected operating decisions “such as those pertaining to train length, speed, or scheduling”); *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004) (holding that ICCTA preempted nuisance claim that railroad operated side track in a way that unreasonably blocked access to plaintiffs’ property).

The reach of federal regulation in this area is broad and prohibits states and localities from infringing upon the movement of trains through at-grade crossings. MPSC was correct when it cautioned the Legislative Auditor that federal regulation of the rail industry was expansive. Union Pacific urges the MPSC not to exceed the limits of its authority by regulating blocked crossings.

Conclusion

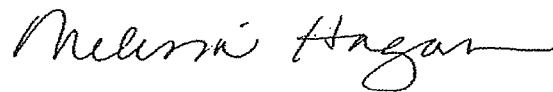
Union Pacific is committed to ensuring the safe transport of all commodities across its network and welcomes the opportunity to work collaboratively with MPSC to assure that Montana first responders and local communities have the information they need to respond to any rail incident.

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We urge MPSC to tread carefully around the issue of blocked crossing regulation, recognizing the strong federal laws that preempt most state efforts to regulate railroad crossings across the country. We appreciate the opportunity to comment on the issues raised by the MPSC in anticipation of its evaluation of Montana's rail safety program.

Regards,

UNION PACIFIC RAILROAD COMPANY

A handwritten signature in cursive script that reads "Melissa B. Hagan". The signature is written in black ink and is positioned above the printed name.

Melissa B. Hagan

cc: Nathan Anderson
