



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

**FILED**  
07-08-09  
04:59 PM

Application of Peninsula Corridor	)	<b>Application No. A0906009</b>
Joint Powers Board (Caltrain)	)	
Requesting Authority for	)	<b>PROTEST BY UNION</b>
Variances from Portions of	)	<b>PACIFIC RAILROAD</b>
General Order 95	)	<b>COMPANY</b>
	)	
	)	
	)	
	)	

Pursuant to Public Utilities Code § 1701 *et seq* and Rule 2.6 of the Commission’s Rules of Practice and Procedure, Union Pacific Railroad Company (“Union Pacific”) hereby protests the Application of Peninsula Corridor Joint Powers Board (Caltrain) Requesting Authority for Variances from Portions of General Order 95.<sup>1</sup>

**I. RESERVATION OF LEGAL RIGHTS**

By filing this Protest and participating in the Commission’s proceeding, Union Pacific does not waive, and expressly reserves, the right to challenge the proceeding and any rule or decision adopted through it, in general or in any particular aspect, in any appropriate forum, on such grounds as may exist under state or federal law. Nothing in or regarding this Protest constitutes a waiver of these rights, including Union Pacific’s right to seek relief in federal court for violations of federal

<sup>1</sup> Union Pacific notes that the JPB has recently filed a motion to dismiss its application without prejudice. Although Union Pacific anticipates that the Commission will grant the motion, the railroad has filed this protest in order to meet the time requirements of Rule 2.6. Union Pacific is also hopeful that its protest will help inform the JPB of issues that must be resolved through informal discussions or workshops.

law or the United States Constitution. Subject to this reservation of rights, Union Pacific intends to participate fully and in good faith in this proceeding.

## **II. GROUND FOR PROTEST**

Union Pacific is a Class 1 freight railroad with obligations to provide freight transportation services as a common carrier. On the tracks in question here, it operates by right under agreement with the Peninsula Corridor Joint Powers Board (“JPB”), which owns the tracks and right of way. Union Pacific currently serves customers on this corridor and has the prospect of serving additional customers and increasing service to its current customers in the future.

The JPB’s application raises significant issues with respect to Union Pacific’s rights and obligations on the JPB’s tracks. The complexity and scope of these issues do not lend themselves to an exhaustive examination in an initial filing such as this. For purposes of framing the issues and informing the Commission, however, the railroad provides the following summary of grounds for protesting the JPB’s application. At the same time, Union Pacific believes that this is a matter that is well suited for direct settlement discussions and recommends referring it to the Commission’s non-binding alternative dispute resolution program.

**1. The JPB's Proposed Variances Do Not Meet Industry Engineering Standards.**

Notwithstanding the JPB's assertions, the horizontal and vertical clearances between the tracks and the components of the system that the JPB proposes to build do not meet industry standards. They also do not meet Union Pacific's company standards and may conflict with the Commission's own requirements for clearances around railroad tracks as set forth in General Order 26-D. Any conflicts with General Order 26-D must be resolved through further formal application to the Commission.

Union Pacific objects to the JPB's use of calculations rather than specific distances to describe the clearances that it proposes. The JPB's methodology creates ambiguity and uncertainty for purposes of design and enforcement. It also prejudices Union Pacific's ability to confidently protect its rail franchise.

The issue of clearances is critical. Clearances determine, in part, the types of railcars that can be operated on a track and the types of loads that a car may carry. Clearances also directly relate to the safety of railroad operations for employees and the public. For these reasons, Union Pacific requests a thorough examination of the engineering issues raised by the JPB's application.

The JPB states that it has received and incorporated comments from Union Pacific in its current proposal. Union Pacific agrees that the

parties have communicated at length about these issues, but it denies that the JPB's proposal addresses all of the railroad's engineering concerns.

A resolution of this issue will require a clear statement of minimum clearances that comply with Union Pacific engineering standards in light of the current and prospective use of the tracks. As stated above, Union Pacific believes that such engineering questions are well suited for discussion through the Commission's alternative dispute resolution program.

**2. The JPB's Proposed Variances Conflict With Union Pacific's Legal Rights and Obligations as a Common Carrier Freight Railroad.**

The variances that the JPB proposes conflict with Union Pacific's rights and obligations to provide common carrier transportation services. The limited clearances would prevent Union Pacific from using certain cars and carrying certain loads on this line. These facts could result in a constructive forced abandonment or partial abandonment of Union Pacific's operations.

This outcome would directly conflict with federal law. Under the Interstate Commerce Commission Termination Act, 49 U.S.C. §10101 *et seq*, the federal Surface Transportation Board ("STB") has exclusive jurisdiction over transportation by rail carriers and the "construction, acquisition, operation, abandonment, or discontinuance of spur,

industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state.” 49 U.S.C. §10501(b). The Commission is not authorized to issue orders that would interfere with the STB’s jurisdiction over these subjects. *Id.*

The JPB’s application and how the Commission may respond also present possible conflicts with other federal laws, including but not limited to the Federal Railroad Safety Act, 49 U.S.C. 20101 *et seq.*, and the Commerce Clause of the United States Constitution. For these reasons, Union Pacific objects to any order or outcome of this proceeding that would directly or indirectly conflict with the railroad’s current or prospective operations on this line.

**3. The JPB’s Proposed Variances Conflict with the Terms of Agreements Between the Parties.**

Union Pacific’s predecessor-in-interest, Southern Pacific Transportation Company (“Southern Pacific”), sold this right of way to the JPB by way of a purchase and sale agreement dated November 22, 1991.<sup>2</sup> As part of this transaction, Southern Pacific reserved a perpetual, exclusive easement and trackage rights over the right of way for Southern Pacific’s present and future rail freight operations and intercity passenger operations. The parties further memorialized the terms and

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<sup>2</sup> Union Pacific describes the purchase and sale agreement and trackage rights agreement for purpose of reference in support of its positions in this proceeding. By doing so, Union Pacific does not concede, and specifically denies, that the Commission has jurisdiction over the terms of the agreements or their enforceability.

conditions of Southern Pacific's operations by executing a Trackage Rights Agreement dated December 20, 1991.

Union Pacific protests the JPB's application on the grounds that the variances that the JPB seeks would conflict with Union Pacific's rights as successor-in-interest to Southern Pacific's easement and the Trackage Rights Agreement. Union Pacific will provide further briefing as necessary to detail the conflicts that exist between its contractual rights and the JPB's proposals.

### **III. CATEGORIZATION**

The characteristics of this proceeding do not clearly fit into any of the customary categories of Commission proceedings as defined in Rule 1.3. Under these circumstances, the matter initially should be conducted under the rules applicable to a ratesetting proceeding pursuant to Rule 7.2(a). Union Pacific notes that in substance, however, this matter is more akin to a rulemaking and asks the Commission to determine at the Prehearing Conference which procedural rules, including the possibility of hybrid rules, are most appropriate to apply.

### **IV. HEARING SCHEDULE**

Union Pacific objects to the JPB's efforts to rush this matter to a hasty conclusion with or without the benefit of a hearing. As set forth above, the JPB's application raises complex and important issues related to safety, the preservation of a rail freight corridor, and Union Pacific's rights and obligations under contract and law.

A proper resolution of these questions will require a robust investigation and briefing of issues. At the same time, Union Pacific acknowledges the JPB's interest in avoiding undue delay. With these issues in mind, Union Pacific requests an evidentiary hearing and recommends the following schedule:

Prehearing Conference:	September 1, 2009
Workshop re Engineering Issues:	October 14, 2009
Further Prehearing Conference:	December 9, 2009
Hearing:	May 4, 2010
Final Decision:	July 15, 2010

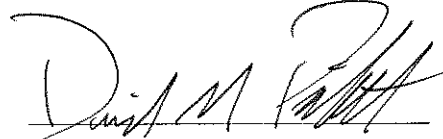
Union Pacific recommends a workshop regarding engineering issues as an early opportunity for the parties to refine issues and consider solutions. A further prehearing conference will permit the Commission to receive a report on the workshop and discuss any necessary refinements to the schedule, including the possibility of a further workshop, based on the posture of the proceeding at that point. Union Pacific also recommends a referral to the Commission's alternative dispute resolution program.

Union Pacific objects to the JPB's request to limit participation in the proceeding only to those parties who file timely responses to the application. There are parties, such as Union Pacific's current and prospective customers, who may have significant interest in the outcome of the proceeding but who are not on the service list and may not receive notice of the application within a reasonable time to file a timely response under the Commission's normal procedural rules. The Commission

should protect the possible interest of such parties to participate in the proceeding should they elect to do so.

Dated: July 8, 2009

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David M. Pickett", written over a horizontal line.

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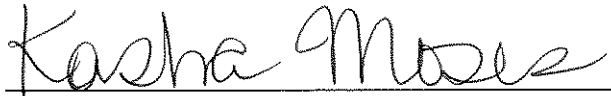
**CERTIFICATE OF SERVICE**

**Application No. A0906009**

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedures, I have this day served a true copy of the following in proceeding Application No. A0906009:

**PROTEST BY UNION PACIFIC RAILROAD COMPANY**

on the persons as shown on the attached service list. Service was effected by transmitting copies via regular mail or as indicated. Executed on July 8, 2009, at Roseville, California.



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