

NO. 36589

## EXPERIMENTAL PIGGYBACK TRAIN SERVICE— DECLARATORY ORDER

Upon petition for a declaratory order, petitioner's status clarified and proceeding discontinued.

*Jacob Bloom* for petitioner.

*Richard J. Boyd, Ronald N. Cobert, Robert L. Cope, S. S. Eisen, Frederick G. Pfrommer, Alan R. Post, and James E. Sykes* for replicants.

*Robert A. Hirsch, John H. Moseman, Daniel M. O'Donoghue, and Peter M. Shannon, Jr.*, for the Bureau of Investigations and Enforcement, Interstate Commerce Commission, in support of replicants.

### REPORT AND ORDER OF THE COMMISSION

#### DIVISION 1, COMMISSIONERS BROWN, GRESHAM, AND CHRISTIAN

##### BY THE DIVISION:

The modified procedure was followed. Pursuant to section 17(9)(b) of the Interstate Commerce Act, the proceeding has been assigned to this division for initial disposition. Requested findings not discussed in this report nor reflected in our finding or conclusions have been considered and found not justified or their resolution not necessary for the proper disposition of the proceeding.

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) and Unit-Trainship, Inc. (UTI) filed a joint petition seeking an order declaring the lawfulness of a proposed service described as rail broker service<sup>1</sup> or, in the alternative, a finding that exemption from regulation is warranted under section 12(1)(b) of the Interstate Commerce Act. Replies were filed by the Burlington Northern, Inc. (Burlington) and the Union Pacific Railroad Co. (Union Pacific).

By order served August 2, 1977, the Commission granted the petition for a declaratory order to determine the lawfulness of the proposed arrangement. Petitioners, Burlington and Union Pacific

<sup>1</sup>Milwaukee Road and UTI proposed to establish an experimental nonstop dedicated piggyback train on a round trip basis from Chicago to specified West Coast points, operating under mutually agreed upon schedules three times each week. UTI proposed to furnish so called "brokerage" services for the carrier, guaranteeing a minimum number of trailers. Each shipment was to move under already existing Freight All Kinds (FAK) rates.

were made parties to the proceeding. On September 2, 1977, Milwaukee Road filed a motion to dismiss the proceeding or, in the alternative, to dismiss itself as a party. UTI filed an objection to this motion, to which Milwaukee Road replied. Milwaukee Road stated that it no longer intended to engage in the proposed experimental piggyback train service and no longer desired to obtain the declaratory order or the exemption. The Commission, in an order served September 30, 1977, without prejudice to a later dismissal if cause should arise, denied the motion to dismiss the proceeding, stating that the issue of the fundamental legality of this type of service needed to be resolved to remove uncertainty as to future publications. The Commission also stated that there was no need to dismiss the Milwaukee Road as a party since the Milwaukee Road alone controlled the extent to which it would actively present its views in this proceeding. Moreover, it was pointed out that a finding that the proposed service was lawful would not obligate the Milwaukee Road to actually render such service.

By notice published in the *Federal Register*, August 16, 1977 (42 F.R. 41342), the Commission requested comments from interested parties concerning the issues raised in the petition. The Western Railroad Association (Western Railroads) filed a petition for leave to intervene in this action on behalf of 19 railroads.<sup>2</sup> This petition was granted in an order, served November 9, 1977.

UTI filed a statement of facts in support of the proposal. The Western Railroads, the American Institute for Shippers' Associations, Inc., and the National Association of Shippers, Agents, Inc. (Shippers' Associations) in a joint statement,<sup>3</sup> the

<sup>2</sup>Chicago and North Western Transportation Company, The Atchison, Topeka and Santa Fe Railway Company, Burlington Northern, Inc., Chicago, Rock Island and Pacific Railroad Company (William M. Gibbons, trustee), The Denver and Rio Grande Western Railroad Company, Elgin, Joliet and Eastern Railway Company, Green Bay and Western Railroad Company, Illinois Central Gulf Railroad Company, Illinois Terminal Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, Norfolk and Western Railway Company, St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Soo Line Railroad Company, Southern Pacific Transportation Company, Toledo, Peoria & Western Railroad Company, Union Pacific Railroad Company, and The Western Pacific Railroad Company.

<sup>3</sup>The former is a trade association representing 37 shippers' associations doing business throughout the United States. Shippers' associations consolidate small LTL shipments and physically operate in a manner similar to freight forwarders. In conducting their operations, however, shippers' associations conduct themselves under the regulatory exclusion found in section 402(c)(1) of the act. The members of the shippers' associations are treated as shippers in their dealings with railroads.

The latter is a trade association, representing 28 shippers' agents throughout the United States. These agents, like freight forwarders, consolidate the shipments of their customers. Generally, their operations consist of the tendering of two or more trailers or containers to railroads for movements under volume rates. Shippers' agents provide services under the regulatory exclusion found in section 402(c)(2). Their members are treated as shippers in their dealings with railroads.

Commission's Bureau of Investigations and Enforcement (Bureau), and the Freight Forwarders Institute filed statements in opposition. The Milwaukee Road did not file a statement.

Under the proposed agreement<sup>4</sup> UTI will secure the Milwaukee Road sufficient traffic, moving under the railroad's FAK rates, to load at least 30 flatcars, each with two loaded or empty trailers or containers, three times a week in each direction between the Milwaukee Road's Bensenville, Ill., and Black River, Wash., yards, pursuant to mutually agreed upon schedules. For its part, the railroad will provide such trains, motive power, cars and crews as are necessary to handle the traffic generated by UTI and maintain the agreed terminal-to-terminal schedules. The railroad will agree to accept for loading in these special trains only such traffic as identified and designated by UTI for transportation. UTI will guarantee to the railroad a minimum fixed amount of revenue for each 60 unit shipment. As the sole compensation for its services, UTI will receive a commission from the railroad equal to 10 percent of the tariff rate applying to the revenue traffic actually transported pursuant to the agreement, and 20 percent of the tariff rate for revenue traffic offered to the railroad by UTI which the railroad is unable to accommodate for transportation. UTI, however, is not entitled to any compensation based on empty trailers or containers tendered by UTI to satisfy UTI's minimum guarantees. If the railroad on any occasion is unable to perform fully, except for causes beyond its control, credits will be allowed to UTI according to a schedule to be specified in the agreement and these credits may be deducted by UTI in payment of the railroad's invoices.

As a measure of protection for the railroad's incurrence of startup costs in connection with providing this service, UTI will post with the railroad its performance bond at an amount to be determined which represents the amount of the railroad's funds that are committed and expended for the exclusive purpose of initiating this service. It is contemplated that this service will be available by contract with UTI to the full spectrum of the shipping public, including manufacturers, consolidators, freight forwarders, shippers' agents, over-the-road truckers, steamship lines, individual customers, et cetera. UTI will provide the railroad with a list of all such shippers which (through contract with UTI) are to use these special trains.

Prior to the scheduled departure time, the railroad will assemble the required number of empty flatcars along with sufficient motive

<sup>4</sup>See appendix A.

power and crews. The shipper or his designated cartage company will deliver the trailer or container and present the bills of lading or waybills prepared by the shipper or his agent to the railroad at the piggyback checkpoint. The railroad's weights and inspection crew will instruct the driver to drop the trailer or container at a location which the railroad designates. Thereafter, any movement within the railroad yard and the actual loading onto the flatcars will be performed by railroad directed personnel. At or before the time each train is dispatched, UTI will submit to the railroad a comprehensive manifest which will include: (1) the name and address of the beneficial owner of each trailer or container on the train, (2) the total loading weight of each trailer or container on the train, (3) the tariff reference including the applicable rates and charges for each shipment on the train, and (4) the name of the entity to which each trailer or container on the train may be released upon the arrival of the train at the opposite terminal.

At the scheduled time, the train will proceed to its destination nonstop except for necessary servicing and crew and equipment changes and in accordance with the agreed operating schedule. Upon arrival at destination, all handling and movement of the trailers or containers is accomplished by railroad personnel. As at origin, the shipper makes his own arrangements for pickup and delivery service.

The agreement states that the railroad will provide and control all rail services to accommodate traffic generated by UTI in accordance with the terms of the agreement. The railroad also will agree to retain sole liability for traffic tendered to it through the agreement that is lost, damaged, stolen, or delayed.

UTI will solicit customers or shippers to a sign contract with it (draft contract attached as appendix B). The contract states that the purpose of the UTI unit train service is to provide for shippers a more efficient freight service operating on a "stipulated and rigidly maintained schedule" with, as near as possible, no stops for drop-off or pick-up, so that a true through train may be operated "exclusively for the benefit of shippers who have entered into agreements with UTI." UTI undertakes to guarantee the shipper a minimum number of cars on each such train. There is a statement that the railroad "also agrees not to accept, for shipment on UTI's train, traffic not identified as \*\*\* (that which UTI has contracted for with the shipper)." UTI disclaims all liability for loss, damage, or delay, and provides that all claims must be handled by the shipper directly with the railroad.

The shipper, on the other hand, guarantees to tender to the railroad a minimum number of containers or trailers on each of the days upon which UTI's unit trains shall operate. If more than the guaranteed number of trailers is tendered and cannot be accommodated on the train, UTI agrees to use its best efforts to have the excess trailers move on the "earliest available other regularly scheduled trains." The shipper is required to prepare its own railroad bill of lading. Regular railroad tariff rates on FAK, will apply. According to the contract, the tariff freight charges are to be paid to UTI within 3 days after the trailer or container is tendered to the railroad, or within 3 days after train departure if the minimum tender is not met.<sup>5</sup>

In sum, UTI submits that the potential additional revenue generated by the proposed service will assist the railroads in their continuing efforts to strengthen their financial and competitive position. UTI believes that its service will provide a practical means of offering a consistent service to the shipping public. Moreover, UTI avers that its proposed collection plan relieves the railroad from collecting individually from the shippers and improves the railroad's cash flow. Each time a train moves under this service, it will carry 100-percent load, thereby maximizing the railroad's utilization of its equipment and optimizing productivity. These factors, it is argued, permit the railroad to guarantee availability of sufficient equipment and operation according to agreed schedules, thus providing the consistency of service contemplated.

#### DISCUSSION AND CONCLUSIONS

##### *(a) Is this proceeding now moot?*

All the replicants believe the Commission should dismiss this proceeding as moot. The Bureau argues that since the Milwaukee Road has withdrawn from this proceeding and no shippers have been shown to have entered into an agreement with UTI, the matter before the Commission is academic. It submits that the Commission must assume facts not in existence in order to render some determination on this matter.

In addition, the Western Railroads point out that no other railroad has been suggested as a prospective participant with UTI in

<sup>5</sup>In its opening statement, UTI declares that it will bill its customers within 48 hours after the trailer or container is released at destination. UTI will collect from its customers. Under the agreement, the railroad will submit a statement of its charges to UTI each Monday. Within a specified number of days, UTI will remit the amount shown on the railroad's statement less its commission and any credits for units not accommodated by the railroad.

implementing the proposal. Furthermore, it is argued that, considering the breadth of the railroad opposition to the proposal, it would be difficult to visualize any potential relationship that would be available to UTI. Moreover, it is asserted that substantive responses to certain interrogatories concerning the proposed operation, served by railroad replicants, were not supplied, apparently due to the need for further negotiations between UTI and the participating railroad.

The Shippers' Associations argue that no compelling reasons require the Commission to entertain the instant petition. The Freight Forwarders' Institute, recognizes that UTI seeks a declaratory order so that it may solicit business and make arrangements with other railroads for its services. However, it states that declaratory orders are proper only if an actual controversy, ripe for decision, exists, and that since no valid contract or agreement between UTI and a railroad exists, no actual controversy is present. It suggests that the Commission should not establish a precedent for offering advisory opinions on such speculative situations.

UTI argues that the September 30, 1977, order determined that a real controversy is present. It adds that it has reason to believe, based on conversations with representatives of the Milwaukee Road, that the railroad would participate in these agreements.

Six days after UTI filed its reply, on December 19, 1977, the Milwaukee Road filed a petition for bankruptcy. A trustee in bankruptcy has been appointed. In light of this development, we think it unlikely that the Milwaukee Road will participate in these agreements. Nevertheless, since the uncertainty surrounding UTI's status may have a chilling effect on its potential for success, we believe that the broad issues presented here should be resolved to the extent possible. While we cannot determine the lawfulness of any particular agreement in the absence of a concrete, executed contract, we will endeavor to point out the difficulties which any such agreement must resolve. In this way, any interested railroad, exercising its own honest and efficient business judgment, may determine if the merits of UTI's services warrant its own involvement.

*(b) What is UTI's status: broker, agent, freight forwarder, or carrier?*

UTI submits that it is a broker of rail transportation service. It points out that brokers, as defined in part II of the act, require authority to conduct their operations in connection with motor carrier transportation, but that part I of the act imposes no such

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requirement with respect to rail transportation. Therefore, petitioner believes that no authority is in fact required from this Commission to initiate its service and that it is not subject to regulation under part I.<sup>6</sup>

As a basis for its conclusion, UTI asserts that under the proposed service arrangement the usual responsibilities between railroad and shipper remain virtually unaffected. For example, it is pointed out that under the proposal shippers perform their own loading, counting and sealing at their own locations and make their own arrangements with the railroad or with a local cartage company of their own choosing for pickup and delivery service at origin and destination. Shippers or their agents have the responsibility of preparing their own bills of lading and submitting them directly to the railroad. All movements of trailers or containers within the railroad yard and all loading and unloading of railroad owned or leased flatcars is performed by railroad personnel. The proposed agreement provides that UTI has no liability to the shipper of the traffic tendered to the railroad for lost, stolen, damaged, or delayed shipments or for damage to the trailer or containers. Any claims that may arise are to be settled between the railroad and the shipper directly. The movement of the train itself throughout the entire length of the trip between terminals is at all times solely under the control, management, and operation of the railroad by its own employees.

Finally, involvement of UTI does not affect or alter any rules or regulations now in effect between shipper and railroad under piggyback plans II 1/2, III, and IV. Most significantly, movement of all traffic encompassed by this service is according to applicable rates and charges on FAK between Chicago, and Seattle/Tacoma, Wash. and Portland, Oreg., currently published in tariffs on file with the Commission. Once a shipper has entered a contract with UTI, the only significant difference from the usual shipper/carrier relationship is that such shipper will pay UTI for the service rather than paying the railroad directly.

UTI characterizes itself as a "supersalesman" for the railroad. It avers that it neither holds itself out as a common carrier nor assumes the status of a shipper, since it does not ship goods under its own name nor prepare the necessary freight bills of lading. It argues that the absence of responsibility for the transportation of property

<sup>6</sup>In its reply, UTI admits that the provisions of the Elkins Act, 49 U.S.C. 41, *et seq.*, would apply to its operations.

means that it is not a freight forwarder within the meaning of section 402(a)(5) of the act.

In addition, UTI presents a letter to its counsel, dated July 24, 1975, from the then General Counsel of the Commission. UTI apparently requested an advisory opinion on the issue. The letter expresses the opinion that the proposed service would appear to be that of a broker operation, and that the term "common carrier" subject to regulation under part I of the act is not defined to include brokers. It was concluded that no authority would be required from the Commission for the proposed operation.

The Bureau, in opposition, points out that the General Counsel's letter is an informal opinion and does not bind the Commission. Moreover, it states, even assuming that UTI would not be required to obtain operating authority from the Commission, this proceeding concerns itself with the lawfulness of the proposed service. It emphasizes that the informal opinion focused on whether prior Commission authority in the form of a license is a prerequisite to the initiation of UTI's proposed service. It is argued that regardless of UTI's status as a broker or agent, the Commission still holds the requisite jurisdiction to inquire into the underlying mechanics or lawfulness of the proposal. In any event, the Bureau asserts that UTI is not a broker. It points out that while UTI claims that it holds itself out to shippers in general, the same cannot be said with respect to carriers, as UTI would contract with the Milwaukee Road exclusively. Moreover, all services performed by UTI presumably comprise functions which the Milwaukee Road would have performed.

The Western Railroads appear to suggest that the relationship sought by UTI with the shipping public would transform it into a common carrier as defined by section 1(3) of the act. They emphasize that the service provided by the railroad pursuant to its contract with UTI is dedicated exclusively to traffic generated by UTI, and that access to the service is through UTI alone, with the railroad's role limited to performance. They argue that UTI is holding itself out to furnish the transportation. UTI is said to be the source of the transportation, even though it does not furnish the equipment. They contend that the listing of traffic prepared by UTI rather than bills of lading prepared by the shippers will control the movements. They conclude that Commission authority is a necessary prerequisite to commencement of operations by UTI.

The Shippers' Associations characterize UTI's proposal as an arrangement to purchase rail transportation at less than the

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otherwise published tariff rate. They condemn this as an attempt to circumvent congressional policy against negotiated arrangements for the purchase of rail transportation. They submit that UTI's guarantee of freight to the railroad places it in the position of a shipper, and, therefore, any service offered UTI by the railroad must also be offered to the general shipping public. Alternatively, they call UTI an agent of the railroad and reason that since the railroad cannot enter into a negotiated special arrangement with shippers, UTI cannot indirectly do what the railroad cannot do directly. They believe that the Commission should require filing of all such "agency" agreements as is done with household goods carriers.

The Freight Forwarders Institute contends that UTI is either an employee or an agent of the Milwaukee Road. It suggests that the ability to allocate traffic among competing carriers is the controlling factor distinguishing a broker from a bona fide agent,<sup>7</sup> emphasizing that an agent will only solicit shipment for a single principal carrier. Thus, the basic distinction between a broker and a bona fide agent is postulated upon whether the individual has the ability to exercise discretion in the performance of its agency function, here the allocation of traffic solicited or handled by it. It argues that the volume guaranteed by UTI to the railroad is so great as to clearly require UTI to tender all traffic to the railroad, and as a practical matter prohibits UTI from tendering traffic to any competing carrier. The Freight Forwarders Institute contends that the railroad may not use an agent to do indirectly what it cannot do directly: namely, to prefer unduly certain shippers with premiums and to avoid publishing these premiums in its tariff.

In the alternative, it is argued that UTI is a freight forwarder and must secure the necessary permit required by section 410 of the act prior to commencement of operations. Section 402(a)(5) defines a freight forwarder as:

\*\*\* any person which \*\*\* holds itself out to the general public as a common carrier \*\*\* and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes

<sup>7</sup>The Freight Forwarders Institute draws an analogy between the instant situation and the Commission's definition of a bona fide motor carrier agent 49 CFR 1045.2(f), which states that a bona fide agent is "a person who is part of the normal organization of a \*\*\* carrier and performs his duties under the direction \*\*\* pursuant to a preexisting agreement with the carrier providing for a continuing relationship between them and precluding the exercise of discretion on the part of the agent in allocating traffic as between the principal and others."

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responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes \*\*\* the services of a carrier(s) subject to part I, II, or III of this act.

The Freight Forwarders Institute contends that UTI holds out its services to the public, receives compensation, and utilizes the services of a railroad for part of the transportation. It argues that UTI consolidates the shipments and that by providing a list of the consignees to whom individual trailers are to be delivered by the railroad it effectively provides for distribution. Finally, it states that a person which otherwise engages in the functions of a freight forwarder cannot elude regulation by disclaiming responsibility for the safe transportation of property, citing *Universal Transcontinental Corp., F. F. Application*, 260 I.C.C. 521 (1945), as a case in point.

UTI's structure does not fit neatly into any particular category. It is a hybrid form, and it is necessary to analyze the substance behind that form. UTI does not appear to be a freight forwarder. Nothing in the record indicates that it performs or provides for either consolidation prior to tender to the railroad or for distribution after the railroad reaches its destination. Given this circumstance, the disclaimer of liability is not a mere attempt to avoid regulation. UTI is not a shipper. It will not ship goods under its own name. All traffic tendered to the railroad will be owned by others. UTI will not give shipping instructions, nor sign bills of lading, nor prepare any of the essential paperwork necessary to transport the goods. The mere providing of a list of shippers to the railroad serves the purpose of confirming that only UTI shippers are utilizing its special trains.

We cannot agree with the contention of the Western Railroads that UTI is a common carrier whose operations require Commission authority. UTI would only be a common carrier if it provided the *sole* access to this transportation. Yet, as discussed below, to permit UTI to monopolize all expedited service would clearly constitute unjust discrimination against others shippers, shipper associations, freight forwarders, and persons similarly situated. Since any carrier which contracts with UTI must offer like service and rates for traffic moving under the same transportation conditions, UTI is not the sole source of transportation and is therefore not a common carrier.

Thus, the issue is whether UTI is a broker or an agent of the Milwaukee Road. The only evidence of record relates to negotiations and agreements between UTI and the Milwaukee Road: there is no indication that UTI has attempted to solicit business

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from any other railroad. Yet this fact does not necessarily mean that UTI is acting solely as the Milwaukee Road's agent. It may be that other railroads were hesitant to deal with UTI because of its uncertain status or because they believe its services would not benefit them. It is also possible that UTI was only acting as the railroad's agent. Since UTI is only in the startup phase of operations, its status cannot easily be determined. If it is in fact a broker, the mere fact that no competing railroad accepted its good faith solicitations of business would not affect that status.

On balance, we must conclude that UTI presently is more akin to an agent than a broker. The guarantee of traffic to the Milwaukee Road is substantial, and it is difficult to imagine how a similar arrangement with any competing carrier would be possible. The record offers no evidence of attempted dealings between UTI and any other carrier. Finally, as discussed below, the proposal is rife with potentially discriminatory and unduly preferential aspects. UTI may offer a worthwhile service to some railroads, but the potential for abuse is great.

However, we must note that there is little practical difference whether UTI is considered a broker or agent. In neither situation is it necessary for UTI to obtain operating authority or any license from the Commission. While brokers of motor carrier transportation services, as defined by section 203(a)(18) of the act, require Commission authority to conduct their operations,<sup>8</sup> no such statutory obligation is imposed on brokers of rail service. Bona fide agents of motor carriers do not need to obtain separate Commission authority to perform their functions. We cannot see any persuasive reason why the same should not be true for agents of rail carriers. UTI agrees that it is subject to the provisions of the Elkins Act which outlaw every device by any person or entity to give rebates, concessions, advantages, or discriminations to shippers in respect to interstate transportation by carriers. In addition, we note that UTI's status has no effect on the Commission's regulatory authority and responsibility over railroads which participate in agreements with UTI. Such railroads continue to be subject to the provisions of part I and the Elkins Act.

<sup>8</sup>Simplified regulations governing the filing of applications for a broker license under part II of the act were adopted April 8, 1977 in Ex Parte No. MC-96, *Entry Control of Brokers*, 126 M.C.C. 476 (1977). The effective date of the regulations has been stayed. An appeal is pending before the United States Court of Appeals for the District of Columbia, No. 77-1501.

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*(c) May the proposed service be initiated without additional tariff publication?*

UTI believes that section 6(7) of the act is inapplicable and no special tariff publication and filing covering the proposed operation is necessary. It emphasizes that the service aspects of the proposal are strictly a matter of contract between it and the railroad. Assuming that it is a broker, UTI argues that its relationship with the railroad is not regulated by the Commission and concludes that the service aspects of the proposal are not subject to the tariff filing requirements of section 6(7). In any event, UTI asserts that under the proposed service arrangement, shippers will be protected, that shipments will be made at the applicable rate contained in rail tariffs published and on file with the Commission, and that the railroad will not be granting any special service to any individual shipper or any organized industry group of shippers.

The Bureau, in opposition, argues that tariff publication of the proposed operation is required. It submits that the proposed service is of a specialized nature not provided for in the current tariffs, pointing out that shippers contracting for the service are guaranteed the "availability of sufficient equipment and operation according to agreed schedules." The Bureau notes that a shipper contracting with UTI will receive the guaranteed service, complete with its nonstop feature, but that another shipper, who does not contract with UTI, would be required to ship on the railroad without the benefit of the particularized service. Each shipper, however, would be expected to pay the same tariff rate. It is thus agreed that the railroad would be assuming greater responsibility than under the present tariffs, that the proposal increases the carrier's statutory responsibility to provide equipment, that it creates a system of credits which work solely to the benefit of UTI, and that these factors evidence an alteration in existing service and reflect a necessity for some differential in the existing tariff rate.

The Western Railroads emphasize that the contract between UTI and the railroad contains certain provisions, which extend beyond the regular common carrier obligation. From this perspective it is argued that such extension of the common carrier obligation must be duly provided for in the tariffs. More specifically, it is pointed out that assurance of a special train and special schedules would be in violation of the standard bill of lading provision. Under the standard bill of lading provisions, the railroad need only transport a shipment with reasonable dispatch and not on any particular schedule or train. Thus, expedited schedules and the guarantees and

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assurances of equipment by the railroad must be set forth in its tariffs.

The Shippers' Associations argue that additional tariff publication is necessary and that tariff rules providing for the publication of charges for leasing trailers and for other special TOFC services will eliminate many of the present opportunities for abuse.

The Freight Forwarders Institute emphasizes that the act requires tariff publications to cover all transportation services and to show all the rates, fares, and charges for transportation, and any rules or regulations which in any way change, affect, or determine any part or the aggregate of such rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. It points out the agreements between UTI and its customers materially and directly affect the level of amount of freight charges that the shipper pays for its transportation.

We believe additional tariff publication by a participating railroad is necessary to permit it to initiate services such as proposed here. Section 6(1) of the act states:

That every common carrier subject to the provisions of this part shall file with the Commission \*\*\* schedules showing all the rates, fares, and charges for transportation \*\*\*

\* \* \* \* \*

The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, *all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.* [Emphasis added.]

Moreover, section 6(7) of the act provides that no carrier may transport property unless all lawful charges relating to that transportation are filed and published with the Commission and that no carrier may rebate any portion of those charges by any device or extend any transportation privilege to any person unless the tariff provides for it (and it is otherwise lawful).

The service UTI's customers would receive purports to be an expedited, nonstop operation under stipulated and rigidly maintained schedules. Insofar as this service differs from that rendered by a participating railroad under present tariffs, that

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railroad would have to publish the details in its tariff. The railroad tariff would also have to include full details of all contractual provisions which would constitute a special transportation privilege or would affect the amount the railroad would receive for the transportation services. The provisions of all agreements such as those in appendixes A and B must be published in the rail tariff. The railroad must publish both its agreement with UTI and UTI's agreements with participating shippers. Inasmuch as the latter may not otherwise be readily available to the railroads, UTI should furnish participating railroads with copies of all agreements between it and participating shippers. The railroad may not accept traffic tendered by any shipper for inclusion on UTI's special trains unless the agreement between UTI and that shipper is published in its tariff. This information will enable the Commission to safeguard against possible Elkins Act violations.<sup>9</sup>

*(d) Is the proposed service unduly preferential or unjustly discriminatory?*

The Bureau and the Western Railroads, in opposition to the proposal, contend that the proposed services is unduly preferential to shippers contracting with UTI, since the service is not available to shippers who do not contract with UTI. Apparently, this is based on the assumption that a shipper contracting with UTI will receive the guaranteed service, complete with its nonstop or expedited feature whereas a shipper not contracting with UTI would not receive such service.

The Shippers' Associations argue that the proposal is both discriminatory, preferential, and prejudicial. They submit that shippers not consolidating through UTI would be prohibited from directly tendering their consolidated shipment to the rail carrier and from taking advantage of the same arrangement under which UTI would operate. They emphasize that UTI's proposal seeks to monopolize all consolidation arrangements. They argue that the Commission must require all rail carriers to treat all tenders of a similar nature in a nondiscriminatory nature. They also contend that the proposal violates 49 CFR 1090.2 of the Code of Federal Regulations, which provides:

<sup>9</sup>While the extent to which the Commission may regulate the relationship between UTI and the shippers is questionable, the only purpose of this information is to safeguard against unlawfully discriminatory rail rates and rules. Since UTI and a shipper may not agree to a relationship which violates the Elkins Act, the Commission is in no way interfering with the contractual relationships of the parties.

TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

It is also argued that the proposal guarantees UTI priority in trailer selection, that during a trailer shortage UTI would have priority regarding distribution of trailers, and that such a practice would be clearly discriminatory.

The Freight Forwarders Institute also submits that the railroad, as a common carrier, is bound to serve all reasonably and without undue prejudice, and that a common carrier's offer to provide selected shippers with special trains or special schedules, in return for their traffic, constitutes a preferential contract or agreement proscribed by law. It contends, that to provide, directly, the special train service and schedules, the railroad would have to provide them to all, equally and without discrimination.

UTI defends such as exclusive dealing arrangement on the basis that no other customer of the railroad guarantees that it will fill the railroad's train on a round trip basis on a definite schedule. It further states that the act only prohibits undue or unreasonable discrimination, preference, or prejudice. UTI also submits that the railroad common carrier replicants in this proceeding have no standing to raise objections relating to any prohibition under section 3(1) of the act, since that section does not apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier. We do not agree with this contention, since this is a declaratory order proceeding and does not involve any issue of reparations.

Under the proposed agreement, UTI would guarantee sufficient traffic to load at least 90 flatcars a week (or 180 on a round trip basis). Expedited service would be provided as an inducement to shippers. Part of the agreement would prohibit the railroad from accepting traffic from shippers which have not contracted with UTI for inclusion on UTI's special trains.

Several aspects of this service appear unjustly discriminatory. UTI seemingly contemplates that only shippers which use its services would receive expedited transportation. Others using rail transportation for a like kind of traffic under substantially similar circumstances and conditions are entitled to obtain the same service under the same rates whether or not they use UTI. Other shippers, shipper associations, or freight forwarders may be able to provide sufficient traffic to guarantee the tender of 60 trailers on 30 flatcars,

three times a week for 90 days.<sup>10</sup> Any rail carrier wishing to provide for special train service to UTI customers must also provide for similar service at the same rates to all others who are prepared to make similar arrangements.

There is no inherent unlawfulness in the provision that only UTI customers may use the UTI special trains, assuming that other special trains are made available to similarly situated rail service users. However, there are other potentially discriminatory aspects of the proposal. Initiation of the proposed service would require 90 flatcars each way per week. Given the projected tonnage, at least 12 diesel units would appear to be needed each week. The Milwaukee Road does not appear to have sufficient cars or locomotives in reserve to provide these extra cars, and given its current financial situation it seems doubtful that they could be leased or purchased without great difficulty. Moreover, the railroad would have to be able to provide sufficient cars and locomotives to provide the same service to all others similarly situated, thus undertaking an even larger car service obligation. If more traffic were tendered than could be accommodated, how would the railroad divide the cars between UTI and non-UTI customers? How would the railroad or UTI determine which UTI customers' shipments would be transported first if the railroad is able to accommodate only part of the UTI traffic?

These problems must be resolved in any tariff which seeks to provide special service for UTI customers. Section 1(11) of the act places an affirmative duty on the railroads to establish and enforce just and reasonable rules, regulations, and practices with respect to car service. The railroad must maintain active control over its car distribution function to assure that all shippers are treated equitably. The mere fact that it would assign cars to unit-train type special service does not relieve the railroad of its duty to oversee the overall impact of its car distribution practices. See *Milmine Grain Co. v. Norfolk and W. Ry. Co.*, 352 I.C.C. 575, 584 (1976). Thus, the railroad would have to ascertain that other shippers would not be unduly prejudiced in the event that it attempted to meet the car demand for the special trains by pulling them from other movements.

We believe that these problems can be solved by the good faith efforts of any railroad wishing to use UTI's services. However, we would call the attention of all concerned to the statement of the

<sup>10</sup>The agreement is for 90 days, and UTI has the option to renew at 90-day intervals for a period up to 5 years.

court in *United States v. Union Pacific R.R. Co.*, 173 F. Supp. 397, 412 (S.D. Iowa, 1959), affirmed 362 U.S. 327 (1960):

The purpose of the Interstate Commerce Act and the Elkins Act was to outlaw every subterfuge, plan, scheme, or device formulated by or participated in by any person or corporation to give rebates, concessions, advantages, and discriminations to shippers in respect to interstate transportation by carriers subject to the Elkins Act and the statutes were designed to strike down every device without exception no matter how ingenious or labyrinthian, by which these objectives are sought to be accomplished. These statutes are intended to strike through all forms, pretenses, and subterfuges to reach and eradicate the forbidden evil.

(e) *Does the payment of a commission to UTI violate the Interstate Commerce Act or the Elkins Act?*

Both the Interstate Commerce Act and the Elkins Act prohibit the rendering, receiving, or soliciting of rebates for the transportation of property in interstate or foreign commerce.

UTI points out that all shippers who wish to use the proposed service will be subject to the full charges for the transportation service provided by the railroad tariff. It contends that no reduction in lawful tariff charges will occur, that there is no advantage or concession given to one shipper over another, and that UTI's commission is its compensation for the performance of a valid, tangible service for the railroad.

UTI emphasizes that at no time under the proposed arrangement will the railroad refund or remit any of the rates, fares, and charges to anyone. Since UTI itself does not pay any tariff charges and acts only as a middleman, there can purportedly be no "refund" of any of the charges to UTI. In effect, UTI argues that it forwards the full tariff charges to the railroad and thereafter the railroad pays UTI its commission for services rendered according to the formula contained in the proposed agreement. As a practical matter, the forwarding of the collected tariff charges to the railroad and the payment of the appropriate commission to UTI would be handled as a single transaction to expedite handling and avoid unnecessary, excessive paperwork and transfer of funds.

The Bureau takes the position that UTI's retention of its commission results in a failure by the railroad to collect the full tariff rate. It points out that the proposed agreement between the railroad and UTI calls for UTI to remit the full existing tariff rate to the railroad less commission and any credits. As a result, the Bureau submits that the rail carrier never in fact would collect the full tariff charges.

In addition, the Bureau questions whether or not the 10-percent commission rate is just and reasonable. It submits that UTI will perform only three functions at most: (1) solicitation of business; (2) preparation of a manifest; and (3) billing of the shippers. Under these circumstances, it is argued that the 10-percent commission rate is unjustly and unreasonably high. UTI, however, submits that the level of the commission is not within the scope of this proceeding. In any event, the Bureau finds it difficult to understand why any major rail carrier would need the services of an outside solicitor. With regard to the preparation of manifests, the Bureau points out that UTI's customers have the full responsibility for preparing and delivering their own bills of lading, and, therefore, the need for a manifest is obviated by the fact that all the necessary information will have already been transmitted to the carrier by the shipper. Furthermore, it is emphasized that the carrier is already required to issue a bill of lading, prepare the "necessary waybill(s) to accompany the transportation of the traffic from origin ramp facility to destination ramp facility," obtain the names of the beneficial owners, and prepare the freight bill. UTI admits that its shipper list is more for its own convenience than that of the carrier.

The Shippers' Associations consider the commission to be an allowance. From this perspective, it cites the Code of Federal Regulations, 49 CFR 1090.7(b), which provides that:

No allowance shall be payable by a rail carrier to any shipper, freight forwarder, or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless (1) such service or instrumentality is one that the rail carrier is obligated to perform or provide under the applicable rate and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

It is submitted that UTI's proposal does not provide that it shall perform any service for the railroad which the railroad is obligated to perform. Rather, the rail carrier will, in fact, be providing the complete scope of TOFC service. Accordingly, it is argued that the rail carrier may not pay any allowance to UTI.

We believe the compensation to UTI is correctly characterized as a commission rather than an allowance. On its face, the arrangement appears to compensate for advertising and billing services. Whether the amount of the commission is too high for the services rendered should ordinarily be a matter for honest and efficient rail management to determine. No rail is under any compulsion to use UTI's services: only if it would benefit financially would it have

reason to do so.<sup>11</sup> Vigorous enforcement of the Elkins Act and sections 2 and 3 of the Interstate Commerce Act will safeguard against any possibility that a commission structure might be used to facilitate illegal rebates.

We agree that the present rail tariffs would not permit retention of a commission by UTI. However, there is no reason why a railroad wishing to utilize UTI's services cannot publish an appropriate tariff provision, setting forth the commission arrangement as well as all other contractual provisions, to permit UTI to retain its commission and forward the balance of the charges to the railroad.

*(f) Do the penalty aspects of the agreement violate the Interstate Commerce Act or the Elkins Act?*

UTI would receive a commission equal to 10 percent of the applicable tariff rate applying to the revenue traffic carried by the railroad pursuant to the agreement. However, UTI would receive 20 percent of the tariff rate for revenue traffic offered but not accommodated by the railroad, excluding empty units tendered by UTI to satisfy minimum guarantees: this constitutes the penalty aspect of the agreement.

In justifying this proposed penalty aspect, UTI emphasizes that it has assumed several allegedly significant and unusual obligations, including guaranteed coverage of the railroad's startup costs in initiating the service and guaranteed round trip use of the railroad's facilities. It is thus argued that, in consideration of these significant guarantees, the railroad assumes added responsibility for performance unless its failure to perform is for reasons beyond its control.

The arguments against this provision stress that the penalty will exact funds from the carrier to its obvious detriment.

On the basis of this record, we cannot determine whether this penalty is lawful or not.<sup>12</sup> We can make some general observations. First, the provision appears to be essentially a liquidated damages provision, which is not per se contrary to any provisions of the law administered by the Commission. However, a valid liquidated

<sup>11</sup>It would appear that UTI's services might be used by a railroad in an effort to reduce overall expenses. We believe UTI's services may possibly be beneficial, if UTI's commissions are not unreasonably high. We are cognizant, however, of the danger that unreasonably high commissions and/or penalty provisions exacted from such railroads may have a counterproductive effect. Accordingly, the Commission will carefully monitor UTI's activities and will take appropriate action where necessary.

<sup>12</sup>Similarly, we cannot determine the lawfulness of penalties imposed on shippers by UTI for failure to deliver agreed-to volumes of traffic.

damages clause must at least constitute an attempt to reasonably forecast the amount of damages which will result from the breach bringing the clause in effect. See *Guaranteed Service, Pacific Intermountain Exp.*, 351 I.C.C. 90, 98 (1975). A valid penalty provision should reflect: (1) the revenue UTI would have received had the service been rendered, and (2) any additional damages proximately caused by the breach. Secondly, we recognize the need for some penalty provision as an inducement to service. While we cannot determine the lawfulness of this particular provision, failure to provide a penalty for nonperformance might well result in discrimination against UTI in favor of other shippers, associations, or freight forwarders to whom the service must be extended. Similarly, a penalty that was too high could effectively result in UTI being unduly preferred in the event of car shortage, since the railroad could be expected to favor that traffic which would benefit it most to move. These factors must be taken into account by a railroad using UTI's services when it files the applicable tariff provisions.

*(g) Do the proposed provisions violate the Commission's credit regulations?*

Several of the parties argue that UTI's billing procedures would violate the Commission's credit regulations (49 CFR 1320). The record is unclear as to when UTI's shippers will be billed. The proposed contract set forth in appendix B provides that the shipper must pay UTI within 3 days of tender to the railroad, while UTI's opening statement declares that it will bill its customers within 48 hours after the trailer or container is released at destination. The precise time at which payment will be made from UTI to the railroad is not specified. Given these uncertainties, we cannot say whether the Commission's credit regulations would be violated. UTI emphasizes that an important feature of its services would be the elimination of billing delays. We would note that the extension of credit by a rail carrier is permissive, not mandatory, under our rules, and that these rules represent the *maximum* period of allowable credit. Billing and collection of charges by any participating railroad must comply with these credit regulations.

*(h) Is an exemption from regulation pursuant to section 12(1)(b) of the act warranted under the circumstances shown here?*

As an alternative to the declaratory order sought, UTI requests that the proposed service arrangement be exempted from the

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provisions of part I of the act, pursuant to this Commission's authority in section 12(1)(b) of the act. Section 12(1)(b) states, in relevant part:

Whenever the Commission determines, upon petition \*\*\* or upon its own initiative, in matters relating to a common carrier by railroad subject to this part, after notice and reasonable opportunity for a hearing, that the application of the provisions of this part (i) to any person or class of persons, or (ii) to any services or transactions by reason of the limited scope of such services or transactions, is not necessary to effectuate the national transportation policy declared in this Act, would be an undue burden on such person or class of persons or on interstate and foreign commerce, and would serve little or no useful public purpose, it shall, by order, exempt such persons, class of persons, services, or transactions from such provisions to the extent and for such period of time as may be specified in such order.

UTI believes that application of the provisions of part I of the act is not necessary to effectuate the national transportation policy declared in the act, since the scope of the proposed service is limited. It is argued that the implementation of the proposed service will, of itself, effectuate the national transportation policy. UTI further believes that application of the provisions of part I would place an undue burden at the critical stage of initiation of this innovative transportation service and would serve little or no useful public purpose since both the shipping public which uses the transportation service and purportedly benefits from it, and the railroad which provides the service to the public are protected.

The Bureau argues that the proposed operation is in derogation of the Elkins Act and the credit regulations. Thus, it is submitted that the exemption under section 12(1)(b) of the act should not be granted. The Western Railroads support the conclusion that the proposed operation does not warrant an exemption to the act, emphasizing the uncertainties engendered by the proposed service. They further argue that the potential for abuse in manipulating this proposed service is too readily apparent for the Commission to waive its regulatory responsibility.

To a large extent, the request for exemption appears to have been based on the apprehension that operating authority might technically be required for UTI. Since we have found that no such authority need be obtained prior to commencement of operations, the request is largely moot. To the extent that further exemption is sought, we would note that it is speculative at this point what railroads, if any, will make use of UTI's services. However, these services could easily be expanded and likely would be if UTI's arguments are correct. In view of this we cannot say that UTI's

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services are of such limited scope to warrant exemption from the ratemaking provisions of part I. Because of the possibilities for abuse and unlawful discrimination, continued Commission scrutiny is necessary to effectuate the national transportation policy. In addition, UTI has not shown that continued regulation would serve little or no useful public purpose or be an undue burden on it or on interstate or foreign commerce. Accordingly, the request for exemption is denied.

#### FINDINGS

*We find:* 1. Prior Commission approval is not necessary for UTI to commence solicitations of business.

2. UTI is subject to all provisions of part I of the Interstate Commerce Act and the Elkins Act.

3. Any railroad wishing to use UTI's services must publish full details of its arrangements with UTI, as set forth in this report, and provide the same service at the same rates to other users of rail transportation of a like kind of traffic under substantially similar circumstances and conditions.

4. The instances of potential discrimination pointed out in the report must be remedied in any such tariff publication.

5. The requested exemption from regulation pursuant to section 12(1)(b) of the act has not been shown to be warranted.

6. This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER CHRISTIAN did not participate.

*It is ordered:*

This proceeding is discontinued.

Decided April 11, 1978.

#### APPENDIX A

##### *DRAFT AGREEMENT*

THIS AGREEMENT, Made this    day of   , 1977, by and between CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation of Wisconsin, hereinafter referred to as "Railroad," and UNIT-TRAINSHIP, INC., a corporation of Illinois, hereinafter "Broker";

WITNESSETH,

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That Broker as an independent contractor, on the terms hereinafter set forth, offers its services to Railroad, for the purpose of securing to Railroad additional freight traffic to its lines; and

That Railroad is desirous of accepting the services of Broker for said purpose; WHEREFORE, for and in the consideration of the sum of TEN DOLLARS (\$10.00), and other good and valuable consideration. Railroad and Broker agree, the one with the other, as follows:

#### I BROKER'S UNDERTAKING

1.1. Broker agrees to use its best efforts to secure and provide to Railroad freight traffic moving on Railroad's FAK rates east and westbound in an amount sufficient to load thirty (30) flatcars each with two loaded or empty trailers or containers, thrice weekly commencing with the week following the execution and delivery of this Agreement by Broker, and continuing for 90 days thereafter, to be transported by Railroad westbound between Railroad's Bensenville Yard, Illinois, and Railroad's Black River Yard, Washington, and eastbound between Black River Yard, Washington, and Bensenville Yard, Illinois, on such schedules as shall be mutually agreed upon between Railroad and Broker.

1.2. Broker agrees to guarantee its performance under Paragraph 1.1 hereof by first posting with Railroad its performance bond (or other chose in action assigned to Railroad) in the amount of \$    as a condition precedent to the effectiveness of this Agreement. The amount of the above-stated performance bond required by Railroad above is represented by Railroad to Broker and accepted by Broker as Railroad's conclusive statement of the amount of Railroad's funds that are committed and expended for the exclusive purpose of initiating the service for Broker as contemplated by this Agreement, and said performance bond shall expire with the net revenues (tariff charges less Broker's commission as specified in Section 2.2 of this Agreement) received by Railroad pursuant to this Agreement equal to said amount. Thereafter, Broker agrees to submit to Railroad such evidence of its assurance of payment to Railroad of Railroad's invoices to Broker as shall be acceptable to Railroad.

1.3. In compliance with Sections 1.1 and 1.2 of the agreement broker guarantees to cause to be tendered to Railroad not less than 60 (but not more than   ) loaded or empty trailers/containers for transportation by Railroad three times per week in a westerly direction from Bensenville Yard, Illinois to Black River Junction (Yard), Washington and like volume tendered three times per week for easterly handling by Railroad from Black River Junction (Yard), Washington to Bensenville Yard, Illinois.

1.4. For each such volume shipment Broker guarantees Railroad a minimum fixed amount of revenue as shown in Section 1.6(A) below. For each pair of loaded or empty trailers or containers offered Railroad over 60 units, Railroad will receive, and Broker guarantees, a fixed amount as indicated in Section 1.6(B) below.

1.5. In the event Railroad is unable to furnish Broker an adequate number of freight cars to accommodate 60 loaded or empty trailers or containers tendered by Broker on a given daily departure, the guaranteed minimum specified in Section 1.6(A) below will be reduced by amounts as indicated in Section 1.6(C) and 1.6(D) below. For the purposes of Sections 1.3 and 1.5 of this Agreement, the words "tender" and "tendered" are agreed to mean Broker's stated willingness to perform its obligations under this Agreement, which Railroad agrees as assumed to be the case during the term of this Agreement except in the event of inability to perform under this Agreement by reason

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of the existence of a labor dispute (strike), fire, flood, adverse weather conditions, civil unrest, or other *force majeure* effectively preventing the parties hereto, or either of them, from performing their obligations under this Agreement.

1.6. Broker agrees to accept Railroad's statement of its charges to Broker during the term of this Agreement on each Monday following the effectiveness of this Agreement as specified in Section 1.1 above in the following manner: (NOTE)

(A) Minimum charge for each volume shipment, based upon 60 units (i.e. trailers or containers gross 40,000 pounds per unit, or less)-----	\$ _____
(B) Plus additional charge for each pair (2) of units tendered-----	\$ _____
(C) Less credit for each pair of units not accommodated-----	\$ _____
(D) Less credit for failure to accommodate-----	\$ _____
<b>NET CHARGE TO BROKER-----</b>	

NOTE Charges (A) and (B) are subject to any future increases or decreases in Railroad's published tariff rates or charges and will be reflected therein concurrently with the effective date of such tariff change(s). Credits under (C) and (D) above, will be adjusted proportionately.

## II RAILROAD'S UNDERTAKING

2.1. Railroad agrees to provide, for the use of Broker, its trains, power, crews, and cars sufficient at all times to load, unload and accommodate the traffic generated by Broker, and to adhere to the terminal-to-terminal schedules agreed upon. Railroad agrees not to accept traffic not identified by Broker as generated by Broker for transportation in such trains as are provided for Broker's use. It is further agreed, however, that the concept of Broker's use does not embrace or include any form of control by Broker over the operation of such of Railroad's trains as are provided for the traffic generated by Broker pursuant to this Agreement, and all control over Railroad's operations is specifically reserved exclusively to Railroad. In consideration of the guaranty of performance herein required of Broker, Railroad agrees that failure of full performance on its part, except for cause beyond its control (as outlined in Section 1.5 hereof), shall result in credits to be allowed to Broker upon the following schedule: Such credits may be deducted by Broker in the payment of Railroad's invoices.

2.2. Railroad agrees to pay Broker, as its sole compensation for its services, sums of money equal to **TEN PER CENTUM (10%)** of the applicable tariff rate(s) applying to the revenue traffic carried by Railroad pursuant to this Agreement, and **TWENTY PER CENTUM (20%)** of the tariff rate for revenue traffic offered Railroad by Broker which Railroad is unable to accommodate for transportation, provided however, that Broker shall not be entitled to any compensation based on empty trailers or containers tendered by Broker to satisfy Broker's minimum guarantees hereunder.

## III MUTUAL COVENANTS AND AGREEMENT

3.1. While shipments are in the possession of Railroad, Broker shall have no liability to the shippers of the traffic tendered Railroad pursuant to Section 1.1 above for lost, damaged, stolen or delayed shipment, and Railroad agrees that it will not look to Broker for subrogation of any claim by a shipper or Railroad for lost, damaged, stolen or delayed shipment.

3.2. Railroad will accept individual bills of lading by persons not parties to this Agreement, and Broker agrees to identify its customers to Railroad and to submit to Railroad one comprehensive listing or manifest for each train of Broker-generated traffic dispatched by Railroad at or before the time each train is dispatched. Such comprehensive listing or manifest shall include at least the following information:

- (A) Name and address of beneficial owner of each trailer or container on the train.
- (B) Total lading weight of each trailer or container on the train.
- (C) Tariff reference including applicable rates and charges for each shipment on the train.
- (D) Name of the entity to which each trailer or container on the train may be released upon the arrival of the train at the terminal.

Railroad will then prepare necessary waybill(s) to accompany the transportation of the traffic from origin ramp facility to destination ramp facility.

3.3. Broker agrees to remit to Railroad sums in the amount specified in Section 1.6 above within \_\_\_\_\_ days of receipt of the Section 1.6 statement, less its compensation as specified in Section 2.2 and less any applicable credits accruing pursuant to Section 2.1.

3.4. This Agreement shall extend for an initial term of **NINETY (90) days** from the date of its effectiveness as specified in Sections 1.1 and 1.2 above, and may thereafter be renewed at the option of Broker for additional 90-day periods by written notice to Railroad given not less than twenty days prior to the end of each such 90-day period, until the fifth anniversary of the applicable effective date of this Agreement, whereupon this Agreement shall cease, determine, and expire unless further extended by mutual agreement of the parties hereto. This Agreement may be terminated or renegotiated at the instance of Railroad whether or not extended in the event that the tariff rates and charges, under which traffic contemplated by this Agreement moves, are reduced **FIFTEEN PER CENTUM (15%)** or more from the level existing on the effective date of this Agreement; Railroad shall notify Broker upon the effectiveness of such tariff reduction, and Broker agrees promptly to meet with Railroad to attempt to renegotiate the terms of this Agreement, and the parties agree in such event to bargain in good faith towards a renewal of this Agreement. If the parties hereto cannot agree on mutually satisfactory terms further to extend the term of this Agreement, this Agreement shall cease, determine, and expire with the effective date of the tariff reduction.

3.5. This Agreement spells out the entirety of the understandings and agreements made between the parties hereto and these parties agree that no other agreements or understandings written or oral, survive the execution of this Agreement. It is agreed by the parties hereto that this Agreement is not intended to be a third-party beneficiary Agreement.

3.6. Broker and Railroad each warrant, the one to the other, that the signatures appearing below attesting to the execution of this Agreement are those of their duly authorized officers and each waives any objection to the effectiveness of this Agreement as *ultra vires* the corporate authority of Broker and Railroad or as improperly executed.

3.7. If Broker fails to arrange for transportation by Railroad of the full amount of traffic specified in Sections 1.1 and 1.3 above, and if within any consecutive 15 day period, the traffic tendered shall aggregate less than 50% of the minimum amount, unless such tender shall be excused pursuant to Section 1.5 hereof, Railroad may in its

discretion declare this Agreement terminated. In such event, Railroad shall have no further obligation to furnish the service contemplated herein. Should Railroad waive any breach, such waiver shall not act as a waiver of any other provision of this Agreement and shall not be considered precedent for any later breach.

3.8. In the event that Railroad shall fail to provide the services required by Broker to accommodate the traffic tendered by Broker hereunder, and if within any consecutive fifteen day period such failures shall affect an aggregate of % or more of the traffic so tendered unless such failure shall be excused pursuant to Section 1.5 hereof, Broker shall have the right, by notice in writing, to declare this Agreement terminated. In such event, Broker shall have no further obligation to tender traffic as contemplated herein.

#### IV CONSTRUCTION AND APPLICATION

4.1. The parties hereto agree that this Agreement contemplates and is to be construed as intending volume trailer/container movements of 60 or more units but in no case more than units, to be transported by Railroad subject to existing Railroad rates and charges applicable on Freight, All Kinds, between Chicago and Seattle/Tacoma, Washington/Portland, Oregon, currently published in tariffs lawfully on file with the Interstate Commerce Commission and shippers/receivers of such freight will be governed by all such publications, and nothing in this Agreement shall be construed as abrogating, altering, or changing any existing rate lawfully on file with said Commission, except as may be provided for in this Agreement.

4.2. In the event that on any date scheduled for the departure of a train on any route provided for herein, Broker shall tender more than the maximum number of trailers or containers specified in the preceding Section 4.1 and if Railroad shall be unable to accommodate such excess on the unit train dedicated to Broker hereunder, Railroad agrees that it will use its best efforts to transport such excess trailers or containers, on Railroad's earliest available other regularly scheduled trains to the same destination point, if such other trains shall be scheduled, and do in fact depart, prior to the next scheduled train pursuant to the schedules arranged for Broker under Section 1.3 hereof. Railroad shall compensate Broker for such excess trailers or containers so accommodated, in the same manner provided in Sections 1.6 and 2.2 hereof, provided however, that neither the penalties specified in Sections 2.1 and 2.2 nor the default provisions of Section 3.8 shall be applicable to the handling of such excess trailers or containers.

4.3. This Agreement shall be construed in case of dispute in accordance with Section 4.1 above and the laws of the United States and the State of Illinois.

4.4. In the event this Agreement is found to be unlawful in any respect by the Interstate Commerce Commission or any court of competent jurisdiction, this Agreement shall be considered as terminated and of no further force and effect between the parties hereto and neither party shall have any right against the other hereunder.

4.5. All notices to Railroad required herein shall be addressed to:

Vice President-Traffic  
Chicago, Milwaukee, St. Paul  
and Pacific Railroad Company  
516 West Jackson Boulevard  
Chicago, Illinois 60606

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All notices to Broker required herein shall be addressed to:

President  
Unit-Trainship, Inc.  
500 North Mannheim Road  
Hillside, Illinois 60161

DONE AT CHICAGO, ILLINOIS THIS DAY OF 1977.

For the Broker:

For Railroad:

#### APPENDIX B

##### *Agreement*

THIS AGREEMENT, made this day of , 1977, by and between UNIT-TRAINSHIP, INC., an Illinois corporation, hereinafter sometimes referred to as UTI and hereinafter sometimes referred to as SHIPPER.

##### WITNESSETH:

WHEREAS, UTI has entered into agreements with the Railroad, hereinafter referred to as Railroad, and other railroads, pursuant to which such railroad or railroads, have agreed to make available TOFC or COFC train service to UTI, for freight train or trains operating on one or more routes as outlined in the Appendix hereto.

WHEREAS, it is the purpose of the UTI unit train service to be able to provide for shippers a more efficient freight service operating on a stipulated and rigidly maintained schedule with as near as possible, no stops for drop-off or pick-up, so that a true through train may be operated exclusively for the benefit of SHIPPER and other shippers who have likewise entered into agreements with UTI for such service; and

WHEREAS, SHIPPER is engaged in the business of forwarding or consolidating and shipping trailers or containers over one or more of the routes along which UTI may be operating its unit trains, and SHIPPER is desirous of using UTI's freight trains on one or more of said routes, upon the terms and conditions hereinafter set forth,

NOW, THEREFORE, for and in consideration of the sum of Ten Dollars (\$10.00) and the mutual promises and undertakings herein provided for, and other good and valuable considerations, UTI and SHIPPER, agree as follows:

##### I. UTI'S UNDERTAKING

1.1 Inasmuch as the program for the unit train service is a relatively new one, it is understood and agreed that the initial schedule outlined in the Appendix hereto is on a "trial" nature. After a reasonable test period, appropriate adjustments may be required to reflect actual performance records.

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1.2 When UTI is prepared to inaugurate unit train freight service to one or more other routes, appropriate details of schedules will be added to this Agreement by written Appendix executed by UTI and delivered to SHIPPER.

1.3 UTI represents that its agreements with the railroad or railroads to provide the service contemplated in this Agreement, stipulate that the respective railroads shall provide its trains, power, crews and cars sufficient to load, unload and accommodate the traffic generated by UTI within the limits therein set forth, and to adhere to the terminal-to-terminal schedules agreed upon. The Railroad also agrees not to accept, for shipment on UTI's train, traffic not identified as being traffic concerning which UTI has contracted for with SHIPPER. However, the furnishing of such unit train for UTI's use as herein contemplated, does not include any form of control by UTI over the operation of the train. All such control over the operation of the train is specifically reserved exclusively to the Railroad. Accordingly, UTI shall have no liability to the SHIPPER for any traffic tendered to the railroad pursuant hereto, for lost, damaged, stolen or delayed shipments. These claims are handled by SHIPPER directly with Railroad.

1.4 The undertaking on the part of UTI hereunder to SHIPPER is limited to a guarantee of a minimum of      flat cars on each unit train reserved for UTI. In the event that on any date schedule for the departure of a train on any route provided for herein, SHIPPER shall tender more than the number of trailers contracted for between SHIPPER and UTI hereunder, or shall tender more than the maximum number of trailers or containers than can be accommodated on such train, UTI agrees that it will use its best efforts to cause the Railroad to transport such excess trailers or containers, on the Railroad's earliest available other regularly scheduled trains to the same destination point, if such other trains shall be scheduled, and do in fact depart, prior to the next scheduled train pursuant to the schedules arranged for UTI's trains.

1.5 The undertaking on the part of UTI relates to the transportation of trailers or containers, by the applicable Railroad, subject to the Railroad's existing rates and charges applicable on Freight all kinds, published in tariffs lawfully on file from time to time, with the Interstate Commerce Commission. SHIPPER will be governed by all such publications and nothing in this Agreement shall be construed as abrogating, altering or changing any existing or future rate lawfully on file with said Commission, nor in any way abrogating, altering, or violating any provision of law or any regulation applicable to the transactions contemplated in this Agreement.

## II. FORWARDER'S UNDERTAKING

2.1 SHIPPER hereby guarantees to tender to Railroad not less than      containers or trailers on each of the days upon which UTI's unit trains shall operate during the term of this Agreement on the route or routes designated in the Appendix hereto, and pursuant to the provisions of paragraphs 1.3, 1.4, and 1.5 hereof.

2.2 SHIPPER will prepare its own bills of lading for all shipments tendered to Railroad, as aforesaid, and will further identify each such shipment, in a suitable manner, as being attributed to the UTI unit train.

2.3 SHIPPER agrees to pay to UTI, an amount equal to Railroad's published tariff for each such trailer or container times the number of trailers or containers tendered, but in no event shall SHIPPER pay for less than      trailers or containers for each UTI unit train which shall operate as provided for in paragraph 1.4 hereof. Such minimum payment shall be paid whether or not SHIPPER shall tender such minimum number of trailers or containers for each such unit train.

2.4 The payments required pursuant to paragraph 2.3 shall be made by SHIPPER within three (3) days of the date upon which SHIPPER shall tender trailers or containers to Railroad; and in the case of the failure to tender the guaranteed number of trailers, within three (3) days from the date that each such unit train shall depart. In the event that UTI shall establish a program at a bank for the purpose of receiving payments from SHIPPER, as may become payable hereunder, SHIPPER agrees to establish an appropriate account at such bank and to direct such bank to honor drafts thereon drawn by UTI supported by copies of SHIPPER's bills of lading evidencing trailers or containers tendered to Railroad for shipment for UTI's account.

2.5 In the event that UTI shall notify SHIPPER of the inauguration of any additional routes other than as described in this Agreement, and if SHIPPER shall have trailer or containers for shipment on such route or routes, then SHIPPER shall tender such shipments to the appropriate Railroad for transportation on UTI's unit trains and all of the provisions of this Agreement shall become applicable to such shipments and such route or routes.

## III. MUTUAL COVENANTS AND AGREEMENTS

3.1 This Agreement shall extend for an initial term of      from the effective date of the aforesaid agreement between UTI and Railroad. UTI has the right thereunder to renew its agreement with the Railroad at its sole option for successive periods until the fifth anniversary of the effective date thereof. Each such renewal shall automatically renew this Agreement between UTI and SHIPPER. In the event of the termination of UTI's agreement with the Railroad as therein provided, this Agreement shall automatically terminate.

3.2 In the event that SHIPPER shall fail:

- a. to tender the minimum guaranteed number of trailers or containers as specified in paragraphs 2.1 and 2.3, as may be applicable; and even though SHIPPER shall make payment for the minimum guaranteed number of units, nevertheless if within any consecutive fifteen day period, SHIPPER shall fail to tender the minimum number of units; or
- b. to extend its guaranteed minimum performance to an increased number of unit trains on the route or routes specified in any appendix hereto, or to use the additional routes as provided in paragraphs 1.2 and 2.5; or
- c. to make payment for either the minimum guaranteed units or the actual units shipped over and above the minimum, as provided in paragraphs 1.4, 1.5, 2.3 and 2.4 hereof; or

d. to abide by each of the undertakings herein made by SHIPPER, then, in each such event, UTI shall have the right in its sole discretion to declare this Agreement terminated by notice to SHIPPER, in writing, specifying the date of such termination.

3.3 The words "tender" and "tendered" as used herein, are agreed to mean SHIPPER's performance of its obligations hereunder, except in the event of SHIPPER's inability to perform by reason of the existence of a strike affecting either Railroad or SHIPPER, fire, flood, adverse weather conditions rendering performance impossible, civil unrest, or other *force majeure* effectively preventing either SHIPPER or Railroad from performing their respective obligations under this Agreement.

IV.  
CONSTRUCTION AND APPLICATION

4.1 This Agreement spells out the entirety of the understandings and agreements made between the parties hereto and these parties agree that no other agreement or understandings, written or oral, survive the execution of the Agreement.

4.2 UTI and SHIPPER each warrant that the signatures appearing below attesting the execution of this Agreement are those of their respective fully authorized officers and each waives any objection to the effectiveness of this Agreement as *ultra vires* the corporate authority of UTI or SHIPPER, or as improperly executed.

4.3 This Agreement shall be construed in case of dispute in accordance with the laws of the United States and the State of Illinois.

4.4 In the event that this Agreement or any integral provision thereof is found to be unlawful by the Interstate Commerce Commission or by any Court of competent jurisdiction, this Agreement shall be considered as terminated and of no further force and effect between the parties hereto, and neither party shall have any right against the other hereunder.

Dated at Chicago, Illinois, this \_\_\_\_\_ day of \_\_\_\_\_ 1977.

UNIT TRAINSHIP, INC. (UTI)

SHIPPER

By \_\_\_\_\_  
President

\_\_\_\_\_  
President  
356 I.C.C.