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ENTERED
Office of Proceedings
March 18, 2015
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EXPEDITED CONSIDERATION REQUESTED

By E-Filing

March 18, 2015

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

**Re: Docket No. 42143, Sherwin Alumina Company, LLC v.
Union Pacific Railroad Company**

Dear Ms. Brown:

Attached for e-filing is Union Pacific Railroad Company's motion for an extension of time to reply to the petition filed by Sherwin Alumina Company, LLC ("Sherwin"), in the referenced matter on March 10, 2015.

Union Pacific requests *expedited consideration* of its motion because its reply to Sherwin's petition would otherwise be due on March 30, 2015.

Please contact the undersigned with any questions.

Sincerely,



Michael L. Rosenthal

cc: Daniel M. Jaffe, Esq.

employees, security arrangements at Sherwin's plant, conditions on the picket lines outside Sherwin's plant, and Sherwin's alternatives to rail service directly to its plant.

Union Pacific has had no opportunity to conduct discovery or complete an investigation of Sherwin's factual allegations. Union Pacific served its discovery requests on March 18, but Sherwin's responses are not due until April 2. *See Attachment A.*² Union Pacific also provided Sherwin's counsel with a proposed protective order in draft form. Union Pacific plans to file a motion to enter the protective order by the end of the week, hopefully with Sherwin's consent.

Union Pacific should not be required to respond to Sherwin's petition, which Sherwin prepared and filed on its own time-table, within the 20 days the Board's rules allow for generic reply filings. 49 C.F.R. § 1104.13. Allowing Union Pacific an opportunity to conduct discovery and investigate the facts is a matter of fundamental fairness. In addition, the Board needs a full and fair understanding of the factual context to carry out its responsibilities in this proceeding. As the Supreme Court has recognized, in analyzing whether a carrier is acting consistently with its common carrier obligations, the Board "must determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty, and necessarily it makes this determination in the context of the particular situation presented by the case before it." *Local 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB*, 357 U.S. 93, 109 (1958).

Union Pacific's counsel conferred with Sherwin's counsel in an attempt to agree upon a reasonable extension. Union Pacific proposed to file its reply on May 5, which would give Union Pacific 56 days to conduct discovery and prepare its reply. However, Sherwin was unwilling to

² The Board's rules require that the party serving interrogatories allow the person upon whom the interrogatories have been served not less than 15 days to serve answers and objections. 49 C.F.R. § 1114.26(a).

give Union Pacific more than 45 days to file, and then only if Union Pacific agreed not to conduct any discovery. *See* Attachment B (E-mail correspondence between counsel).³

An extension until May 5 is both reasonable and necessary to allow Union Pacific a fair opportunity to reply to Sherwin’s petition. Such a schedule would be consistent with negotiated procedural schedules the Board has adopted in reasonably comparable circumstances. *See, e.g., BNSF Ry.–Terminal Trackage Rights–Kansas City S. Ry. & Union Pac. R.R.*, FD 32760 (Sub-No. 46) (STB served Dec. 1, 2014) (adopting a procedural schedule that allowed 61 days to file replies to opening evidence); *N. Am. Freight Car Ass’n. v. Union Pac. R.R.*, NOR 42119 (STB served Aug. 2, 2011 (adopting a procedural schedule that allowed the defendant 51 days to file reply evidence, *after* discovery had ended). Union Pacific’s proposed filing date is also designed to accommodate obligations of Union Pacific counsel in connection with *United States Rail Service–Performance Data Reporting*, EP 724 (Sub-No. 4), in which reply comments are due on April 29, 2015.

Sherwin may argue that a more expedited schedule is necessary because Union Pacific is not providing service to Sherwin’s plant. But such arguments would not justify depriving Union Pacific of a fair opportunity to respond to the petition. Sherwin controlled the timing of this proceeding and could have filed its petition several months ago. Sherwin alleges that Union Pacific ceased to provide rail service on November 6, 2014,⁴ yet Sherwin waited more than four months to file its petition. Moreover, the situation that Sherwin now faces is not a surprise:

³ Sherwin filed a letter at the Board this morning complaining that Union Pacific had earlier filed its own letter that included a “vague proposal” for an extension of time to respond to Sherwin’s petition. As Union Pacific explained in its letter, Union Pacific refrained from filing a motion for an extension so we could try to negotiate a reasonable extension of time with Sherwin. As shown in Attachment B, those negotiations failed because Sherwin refused to agree to any extension unless Union Pacific waived its right to conduct discovery.

⁴ Petition, p. 1.

documents that Sherwin attaches to its petition reflect that Union Pacific explained the obstacles to service that a lock-out situation would present and communicated its contingency plans to Sherwin in July 2014.⁵ Finally, Sherwin’s alleged concerns about harm to its operations are speculative and involve circumstances that may (or may not) exist several months in the future. Although Sherwin asserts an “urgent need” for rail delivery of lime to its plant,⁶ it later reveals that this is a speculative, distant possibility: a need that might arise “by July 2015” because Sherwin “may” increase production, in which case it “could” experience adverse impacts—if it cannot receive sufficient service by trucks.⁷

A letter that Sherwin filed with the Board earlier today confirms that an extension of time would be appropriate. The letter confirms that Sherwin controlled the timing of this proceeding. The letter also reveals that Sherwin is receiving shipments of lime from transportation providers other than Union Pacific, and thus the balance plainly tilts in favor of allowing Union Pacific a fair opportunity to conduct discovery and prepare its reply, so that the Board has the full understanding of the factual context to carry out its responsibilities in this proceeding.

Union Pacific is moving promptly to respond to Sherwin’s petition. Discovery is underway. For the reasons discussed above, Union Pacific requests that the Board extend the time for Union Pacific to respond to Sherwin’s petition until May 5, 2015.

⁵ *Id.*, Verified Statement of Kent Britton, Attachment B (“Well in advance of the agreement’s expiration, on July 23, 2014, Union Pacific communicated our contingency capabilities to service Sherwin Alumina.”).

⁶ Petition at 12

⁷ *Id.* at 13

Respectfully submitted,

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*Attorneys for Union Pacific
Railroad Company*

March 18, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2015, I caused a copy of the foregoing document to be served by email and first-class mail, postage prepaid, on:

Daniel M. Jaffe
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036



Michael L. Rosenthal

Attachment A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SHERWIN ALUMINA COMPANY, LLC,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

Docket No. 42143

**UNION PACIFIC'S FIRST SET OF DISCOVERY REQUESTS
TO SHERWIN ALUMINA COMPANY, LLC**

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Union Pacific Railroad Company hereby requests that Sherwin Alumina Company, LLC ("Sherwin") produce documents and information responsive to the following requests to Michael L. Rosenthal, Esq., at Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, D.C. 20001, no later than April 2, 2015.

DEFINITIONS

A. "Communication" means any transmission or receipt of information by one or more persons and/or between two or more persons by means including but not limited to telephone conversations, letters, telecopies, electronic mail, text messages, written memoranda, and in-person conversations.

B. "Document" means all types of documents that are subject to discovery under the Board's rules at 49 C.F.R. § 1114.30(a)(1). "Document" includes every copy of a document that is not identical to the original or any other copy.

C. "Petition" refers to Sherwin's "Petition for an Order Compelling Union Pacific Railroad Company to Provide Common Carrier Service," dated March 10, 2015.

INSTRUCTIONS

1. These requests extend to any documents or information in the possession, custody, or control of Sherwin, its present and former directors, officers, employees, attorneys, and any other agents or representatives.

2. Unless a different time period is specified, these requests cover the period from January 1, 2014 to the present.

3. If Sherwin withholds documents on the basis of a claimed privilege or attorney work product, then for each such document, Sherwin should provide the following information: the document's date, type (*e.g.*, letter, memo, notes), author(s), addressee(s)/recipient(s), general subject matter, and the basis for withholding the document.

INTERROGATORIES

Interrogatory No. 1

Identify all of Sherwin's communications with Union Pacific personnel relating to preparations for a possible work stoppage and the work stoppage at Sherwin's plant referenced in the Petition, including all communications relating to the preparation of "contingency plans" described on page 6 of the Petition.

Interrogatory No. 2

Identify all of Sherwin's communications with law enforcement personnel or other public officials relating to preparations for a possible work stoppage and the work stoppage at Sherwin's plant, including all communications relating to the arrangements involving the "sheriff's deputies" described on page 8 of the Petition.

Interrogatory No. 3

Identify all of Sherwin's communications with the "specialized private security company" described on page 6 of the Petition relating to preparations for a possible work stoppage and the work stoppage at Sherwin's plant.

Interrogatory No. 4

Identify all communications between or among Sherwin personnel regarding security of or access to rail lines at Sherwin's plant relating to preparations for a possible work stoppage and the work stoppage at Sherwin's plant.

Interrogatory No. 5

Identify all of Sherwin's communications with the United Steel Workers or union members relating to security of or access to the rail line at Sherwin's plant or to dealings with Union Pacific deliveries and Union Pacific employees.

Interrogatory No. 6

Identify:

- a. The number of tons of lime delivered to Sherwin's plant, by transportation mode, and by supplier, in total from January 1, 2014, through November 6, 2014;
- b. The number of tons of lime Sherwin was storing at or near Sherwin's plant as of November 6, 2014;
- c. The number of tons of lime received at Sherwin's plant, by transportation mode, and by supplier, on each day since November 6, 2014.

Interrogatory No. 7

Identify all of Sherwin's communications with suppliers of lime regarding transportation of lime by truck, including transportation of lime by transloading from rail cars into trucks, or by any other non-rail mode of transportation.

Interrogatory No. 8

Identify the reasons why Sherwin's plant "may increase production" by July 2015, as alleged on page 4 of Mr. Britton's Verified Statement.

Interrogatory No. 9

Identify the reasons why Sherwin received lime by truck, including transloading from rail cars into trucks, or by any other non-rail mode of transportation between January 1, 2013, and November 6, 2014, and the circumstances under which this occurred.

DOCUMENT REQUESTS

Request for Production No. 1

Produce all documents identified in Sherwin's responses to the Interrogatories.

Request for Production No. 2

Produce the "contracts with both suppliers" described on page 6 of the Petition and any contracts with U.S. Lime for the supply of lime described on pages 8-9 of the Verified Statement of George Gleditsch.

Request for Production No. 3

Produce all "contingency plans" described on page 6 of the Petition and drafts of any such plans that relate to transportation of lime to Sherwin's plant.

Request for Production No. 4

Produce all documents relating to communications with Union Pacific regarding preparations for a possible work stoppage and the work stoppage at Sherwin's plant, including documents relating to the preparation of the "contingency plans" described on page 6 of the Petition, the "at least five offers of assistance" described on page 7 of the Petition, and the assertion on page 8 of the Petition that Union Pacific "categorically rejected all offers of assistance from Sherwin."

Request for Production No. 5

Produce all documents relating to communications with law enforcement personnel or other public officials regarding preparations for a possible work stoppage and the work stoppage at Sherwin's plant, including documents relating to the arrangements between Sherwin and the "sheriff's deputies" described on page 8 of the Petition.

Request for Production No. 6

Produce all documents relating to the "specialized private security company" described on page 6 of the Petition, including documents provided to Sherwin by the "specialized private security company."

Request for Production No. 7

Produce all documents relating to activity on the picket line at Sherwin's plant during the work stoppage at Sherwin's plant.

Request for Production No. 8

Produce all documents relating to security of or access to rail lines at Sherwin's plant.

Request for Production No. 9

Produce all documents relating to transportation of lime by truck, including transportation of lime by transloading from rail cars into trucks, or by any other non-rail mode of transportation to Sherwin's plant.

Request for Production No. 10

Produce all documents discussing or describing:

- a. The October 28, 2014, conference call described on page 10 of the Petition.
- b. The December 9, 2014, telephone call described on page 11 of the Petition.

Respectfully submitted,

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*Attorneys for Union Pacific
Railroad Company*

March 18, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2015, I caused a copy of the foregoing document to be served by email and first-class mail, postage prepaid, on:

Daniel M. Jaffe
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036



Michael L. Rosenthal

Attachment B

Rosenthal, Michael

From: Rosenthal, Michael
Sent: Monday, March 16, 2015 10:54 AM
To: Daniel M. Jaffe
Subject: UP extension in Sherwin Alumina case

Dan, .

Following up on our discussion this morning, would Sherwin agree to extend Union Pacific's time to reply to Sherwin's Petition until Tuesday, May 5? That would give us less than the 60 days the Board gave us to reply to BNSF's petition in the CITGO case, but it should be sufficient. I realize this would be more than the 45 days you suggested, but we are also trying to work around the April 29 reply filing in Ex Parte 724(4).

If this would be okay with Sherwin, I can prepare a short motion and indicate Sherwin's consent to the extension.

Regards,

Michael L. Rosenthal

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COVINGTON

Rosenthal, Michael

From: Daniel M. Jaffe <dmj@sloverandloftus.com>
Sent: Tuesday, March 17, 2015 1:49 PM
To: Rosenthal, Michael
Subject: RE: Sherwin case

Mike,

To confirm, Sherwin is willing to extend the time for reply to the petition to 45 days provided UP does not engage in discovery.

Sincerely,
Dan

From: Rosenthal, Michael [<mailto:mrosenthal@cov.com>]
Sent: Tuesday, March 17, 2015 1:43 PM
To: Daniel M. Jaffe
Subject: Sherwin case

Dan,

Just to be sure I have things clear, I understood you to say that Sherwin's position was that Union Pacific could have a total of 45 days to reply to the petition, but only if we agreed not to conduct discovery. Is that correct?

Regards,

Mike

Michael L. Rosenthal

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