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By E-Filing

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Chief of the Section of Administration
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395 E Street, SW
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May 14, 2015

ENTERED
Office of Proceedings
May 14, 2015
Part of
Public Record

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

Dear Ms. Brown:

I am writing on behalf of Union Pacific Railroad Company ("Union Pacific"). On May 8, Sherwin Alumina Company LLC ("Sherwin") filed an unauthorized reply to our Reply in this proceeding. See 49 C.F.R. § 1104.13(c) ("A reply to a reply is not permitted."). If the Board considers Sherwin's reply, we ask that it also consider this response. Union Pacific's Reply accurately sets forth the law and facts establishing that the railroad acted reasonably in suspending direct rail service to Sherwin after providing four weeks of service using management personnel during the shipper's lockout of its employees.

The Board must perform a fact-specific inquiry when it is asked to determine whether a carrier acted reasonably in suspending service due to a labor disruption at a customer's facility. Reply at 31-39. In our Reply, we discussed several cases that identify factors the Board should consider, including *Montgomery Ward & Co., Inc. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 258 I.C.C. 257 (1947) ("*Chicago, Milwaukee*"), and *Montgomery Ward & Co., Inc. v. Consolidated Freightways*, 42 M.C.C. 244 (1943) ("*Consolidated Freightways*").

Sherwin says *Consolidated Freightways* is irrelevant because the case involved the application a tariff provision to carriers' suspension of service during a labor disruption and the Commission later rejected the basis for the decision when it determined that such provisions were impermissible. However, the Commission discussed the common carrier obligation in its decision and relied on precedent regarding that obligation to determine whether the carriers had violated their tariff obligations. See 42 M.C.C. at 231-36. The Commission's reasoning thus continues to be relevant to the scope of the common carrier obligation in the context of a labor disruption. Indeed, in *Chicago, Milwaukee*, the Commission relied on factors it identified in *Consolidated Freightways* when directly addressing a carrier's compliance with the common carrier obligation during a labor disruption. See *Chicago, Milwaukee*, 268 I.C.C. at 259-60 (discussing *Consolidated Freightways*). In other words, the Commission itself recognized that

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the factors identified in *Consolidated Freightways* were applicable to the common carrier obligation.

Sherwin places great weight on *Pickup and Delivery Restrictions, California, Rail*, 303 I.C.C. 579 (1958), which it contends overruled the rationale in *Consolidated Freightways* and *Chicago, Milwaukee*. However, the Commission's concern in *Pickup* was about ambiguity and vagueness of certain tariff language, not the analysis of carriers' obligations in *Consolidated Freightways* or *Chicago, Milwaukee*. See *id.* at 594 ("It appears to us that the opponents of the rules are on much sounder ground in contending that the rules are ambiguous, vague, and indefinite rather than wholly unnecessary."). Indeed, the Commission in *Pickup* reiterated that a carrier's liability for failure to provide service to a picketed shipper is not absolute but rather "depends upon the facts in the case." *Id.* at 593. In short, *Pickup* did not overrule or limit the factors the Board must address in analyzing a carrier's compliance with the common carrier obligation in the context of a labor disruption, and Union Pacific properly submitted evidence addressing those factors in our Reply.

Sherwin also errs in trying to distinguish *Chicago, Milwaukee*.¹ In that case, the most important factor in the Commission's analysis appeared to be that the railroad's suspension of service "was proximately caused by a strike of complainant's employees, for which the defendant and its agents were not responsible." *Chicago, Milwaukee*, 268 I.C.C. at 260. In that regard, the case is squarely on point: Sherwin locked out its employees, so Sherwin's action is the proximate cause of our suspension of direct rail service. In addition, both here and in *Chicago, Milwaukee*, the presence of picketers at the facility's entrance "physically prevent[ed]" service by unionized employees. *Id.* at 260. Contrary to Sherwin's apparent position, *Chicago, Milwaukee* does not require us to order our union-represented employees to test the picketers' propensity to engage in violence. The Commission stated in *Consolidated Freightways* that it is "not incumbent upon [a carrier] to force the issue to the point of resorting to force and violence." *Consolidated Freightways*, 42 M.C.C. at 233. Other cases cited in our Reply make the same point. See, e.g., *Minneapolis & St. Louis Ry. v. Pacific Gamble Robinson Co.*, 215 F.2d 126, 132 (8th Cir. 1954) ("It would hardly be a reasonable request for carrier service, for a shipper to demand in effect, by virtue of that result necessarily being inherent in any attempted compliance, that a railroad require its employees to spill their blood in [the shipper's] existing strike situation . . ."). And, as we showed, our concerns for the safety of our union-represented employees were and are reasonable. See Reply at 20-23.

Finally, Sherwin errs in arguing that the Federal Railroad Safety Act ("FRSA") is irrelevant to whether the common carrier obligation requires us to force our union-represented employees to try crossing a picket line at a customer facility. The FRSA was amended in 1980 to

¹ Although it has no bearing on the legal or factual analysis in this case, Sherwin is correct with regard to one immaterial point: only *Consolidated Freightways*, not *Chicago, Milwaukee*, arose out of the same series of labor disruptions as was addressed in *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475 (D. Ore. 1953), though all three cases involved strikes against the same shipper in the 1940s.

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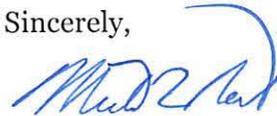
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expressly protect the right of railroad employees to refuse to work under hazardous conditions. *See* Reply at 34 (citing Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423 § 212, 94 Stat. 1815) (codified at 49 U.S.C. § 20109(b)). In light of that amendment, there is no basis for relying, as Sherwin does in its Petition, on *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475 (D. Ore. 1953), where the district court asserted that railroads must require their employees to cross picket lines, even in the face of “acts of violence and threats of violence.” *Id.* at 513. Sherwin cites no interpretation by a court or agency responsible for administering and enforcing the FRSA to support its contention that the statute does not extend to personal safety concerns that employees raise in connection with labor disputes.

The FRSA’s protections of railroad employees were strengthened in 2007 when Congress created a cause of action for retaliatory discharge, which imposes significant costs if we were to discipline our employees for refusing to work in hazardous situations. *See* Reply at 34 (citing Pub. L. No. 110-53, § 1521, 121 Stat. 447). Whatever specific circumstances members of Congress may have considered when enacting and amending the FRSA, we cannot ignore the protections the statute creates for our employees when we evaluate the reasonableness of a shipper’s request for service in a situation raising employee safety concerns, as is plainly the situation here. *See* Reply at 18-23.

Union Pacific reasonably responded to Sherwin’s request for additional direct rail service during the lockout. We carefully evaluated the many relevant factors, including the location of picketing at the plant, the consequences of ordering union-represented employees to cross the picket line, Sherwin’s control over the timing and duration of the labor dispute, our inability to continue service indefinitely using management personnel without impairing our ability to provide safe, reliable service to our other customers, and Sherwin’s alternatives to direct rail service. We gain nothing by suspending service to Sherwin (indeed, we lose significant revenue), but we concluded that the potential harm to our employees, our employee relations, and our other customers from providing additional service would be substantial.

Sincerely,



Michael L. Rosenthal

cc: Daniel M. Jaffe, Esq.