

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42143

SHERWIN ALUMINA COMPANY, LLC

v.

UNION PACIFIC RAILROAD COMPANY

Decided: March 26, 2015

On March 10, 2015, Sherwin Alumina Company, LLC (Sherwin) filed a petition for an order compelling Union Pacific Railroad Company (UP), pursuant to 49 U.S.C. §§ 11101(a) and 11701, to provide common carrier rail service for the shipment of lime to Sherwin's alumina production facility in Gregory, Tex.

According to Sherwin, UP stopped providing rail service to Sherwin's plant on November 6, 2014, because of a unionized labor work stoppage at the facility. Sherwin argues that its request for restoration of service to the plant is reasonable, asserting among other things that it has arranged for the presence of sheriff's deputies and private security, no illegal activities have been reported on the picket line, many contractors and suppliers regularly enter and exit the property without incident, and UP encountered no difficulties when its management personnel operated trains into the property between October 11, 2014 (the date the work stoppage began), and November 6, 2014.

Sherwin requests expedited action on its petition, stating that it has had to shift the delivery of lime from rail to trucks, which are more costly and less reliable, and that Sherwin's plant was not designed to handle such a large number of trucks per day. Sherwin states that it has not run out of lime, due in part to an unrelated change in the production level at the facility. But Sherwin adds that it may increase its production by July 2015, and without rail service, it could experience serious adverse impacts.

On March 18, 2015, UP filed a motion requesting an extension until May 5, 2015, to file its reply to Sherwin's petition.¹ UP describes Sherwin's petition as a "substantial filing" and

¹ On March 16, 2015, UP submitted a letter stating that it intended to seek an extension of time to file its reply to Sherwin's petition and would attempt to negotiate an extension with Sherwin before seeking relief from the Board. On March 18, 2015, Sherwin submitted a letter in reply, disagreeing with UP's description of the facts and stating that when UP seeks an extension of time, Sherwin would respond accordingly. Also on March 18, 2015, UP submitted a letter responding to Sherwin's letter.

notes that Sherwin refers to its petition as its case in chief in support of the relief requested. According to UP, it has had no opportunity to conduct discovery or complete an investigation of Sherwin's factual allegations. UP states that it served discovery requests on Sherwin on March 18, 2015, but Sherwin's responses are not due until April 2, 2015. Also, UP states that it plans to file a motion for a protective order by March 20, 2015.² UP argues that it should not be required to respond to Sherwin's petition within the 20 days provided under 49 C.F.R. § 1104.13, because UP must have an opportunity to conduct discovery and investigate facts.

UP asserts that its requested extension would be consistent with negotiated procedural schedules the Board has adopted in reasonably comparable circumstances.³ UP also states that its proposed filing date is designed to accommodate the obligations of UP's counsel in United States Rail Service Issues—Performance Data Reporting, EP 724 (Sub-No. 4), in which reply comments are due by April 29, 2015. UP asks that, if the Board cannot resolve the extension request expeditiously, the Board hold this proceeding in abeyance pending resolution of the scheduling issue.

Sherwin filed a reply in opposition to UP's motion on March 19, 2015. Sherwin argues that 20 days is sufficient time for UP to respond to Sherwin's petition, because the only substantive issue in dispute is whether UP's own decision to terminate service to Sherwin is permissible. According to Sherwin, UP decided to cease providing service to Sherwin long before the work stoppage at the Sherwin plant began in October 2014. Sherwin characterizes UP's motion and discovery requests as an effort to further delay reinstatement of service.

Sherwin also disagrees with UP's reliance on Lake Charles and NAFCA. Sherwin contends that those cases were not service-related and that both had been pending for well over a year before the procedural schedules were set. Sherwin instead compares this proceeding to Canexus Chemicals Canada L.P. v. BNSF Railway (Canexus), FD 35524 (STB served June 8, 2011), in which the Board ordered two railroads to provide substantive replies in 20 days even though rail service continued throughout the pendency of the case.

The issues as framed by Sherwin's petition are fact-intensive. To support its claim that its request for restoration of service is reasonable, Sherwin submits extensive factual allegations regarding the circumstances surrounding the work stoppage, safety around the picket line, Sherwin's interactions with UP, and the practical and financial implications of Sherwin's losing rail delivery of lime. In addition to its arguments, Sherwin provides four verified statements from its employees addressing these and other issues. Given the number and variety of factual questions presented in Sherwin's petition, it is necessary to balance Sherwin's interest in an

² UP submitted its motion for a protective order on March 20, 2015, and the Board granted it by decision served on March 25, 2015.

³ UP cites BNSF Railway—Terminal Trackage Rights—Kansas City Southern Railway (Lake Charles), FD 32760 (Sub-No. 46) (STB served Dec. 1, 2014) (providing 61 days for replies to opening evidence) and North American Freight Car Association v. Union Pacific Railroad (NAFCA), NOR 42119 (STB served Aug. 2, 2011) (providing 51 days to file reply evidence after discovery had ended).

expeditious decision with the need for an adequate factual record. Compared to the time allowed for development of a record in other cases, including those cited by UP, the extension requested by UP would provide a relatively short time frame for both discovery and submission of evidence and argument.

Sherwin argues that Lake Charles and NAFCA were not service-related and are inapposite here. However, even if those cases did not involve service-related issues (and arguably, both cases did), they are relevant in demonstrating the time the Board has allowed for development of a record when presented with fact-intensive issues. Moreover, as UP points out, even in Canexus the Board required additional briefing and oral argument, so that the complaint and the initial, 20-day replies did not constitute the entire record. Sherwin argues that in Canexus, the defendant railroad continued providing service while the proceeding was pending, unlike this case. But the Board's decisions in Canexus recognized the urgency of the situation, and the Board recognized the need for an adequate record nonetheless. Allowing UP 56 days for its reply would be a modest extension in comparison to these other proceedings. Therefore, UP's request for an extension will be granted.

This decision does not set any further procedural schedule beyond UP's reply, because UP indicates its intention that the pleading it would file on May 5, 2015, would be its substantive reply to Sherwin's case in chief. As noted, Sherwin states that it has not run out of lime, due in part to an unrelated change in the production level at the facility. But Sherwin also states that it may increase its production by July 2015, and without rail service, it could experience serious adverse impacts. Therefore, the Board will endeavor to issue a decision expeditiously after receipt of UP's reply submission.

The parties are reminded that arbitration and mediation are also options to consider in pursuing resolution of their dispute. See 49 C.F.R. pts. 1108 & 1109.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UP's motion for an extension of time is granted. UP's reply to Sherwin's petition is due by May 5, 2015.
2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.