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SERVICE DATE – SEPTEMBER 29, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42143

SHERWIN ALUMINA COMPANY, LLC

v.

UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board finds that Union Pacific Railroad Company's denial of service to Sherwin Alumina Company does not violate the common carrier obligation with respect to this traffic at this time.

Decided: September 28, 2015

Petitioner Sherwin Alumina Company, LLC (Sherwin) seeks an order compelling Union Pacific Railroad Company (UP) to provide common carrier rail service for the shipment of lime to Sherwin's alumina production facility in Gregory, Tex., pursuant to 49 U.S.C. §§ 11101(a) and 11701. Sherwin states that UP stopped providing rail service to Sherwin's plant on November 6, 2014, due to a labor dispute at the facility, during which Sherwin locked out its unionized employees. For the reasons discussed below, this decision denies Sherwin's petition.

BACKGROUND

In its petition, filed on March 10, 2015, Sherwin argues that its request for restoration of rail service to the plant is reasonable.² According to Sherwin, lime is an essential raw material in its aluminum production process, and the plant requires 300 tons of lime a day when running at its normal production rate. Sherwin states that UP's delivery of lime to Sherwin involved the movement of a local train from UP's yard in Gregory, across Highway 361, and then onto an approximately half-mile segment of track on Sherwin's property (but owned by UP). On a typical day, Sherwin states, it received between two and 20 rail cars of lime (between 18 and 28

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The parties designated certain information in this decision as confidential or highly confidential. While we attempt to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, we determined that we could not present our findings with respect to issues in this case without disclosing certain information.

rail cars per week), with each car carrying approximately 100 tons of lime.³ Sherwin notes that, historically, Sherwin's lime suppliers arranged for this transportation, but Sherwin has made the recent requests for service.

Sherwin states that, as it planned for negotiations on a new contract with its 450 unionized employees (United Steelworkers) in early 2014, it contacted UP to discuss ways of ensuring continued rail service in the event of a work stoppage. According to Sherwin, UP indicated that if a work stoppage occurred, UP's regular crews would refuse to cross a picket line and UP would not force them to do so. Sherwin states, moreover, that UP indicated that because it was short on management employees in the area, UP's management crews would only provide reduced service for a limited period of time. Sherwin states that, in response, it made at least five offers of assistance to UP to ensure uninterrupted service, including: offers of financial support for UP to bring in additional management employees to serve the plant; offers to engage a UP-approved rail contractor that would move rail cars on and off the Sherwin property; and offers to use Sherwin-owned locomotive equipment to reach UP. However, according to Sherwin, UP rejected all of these offers.

Sherwin states that after its unionized employees rejected a contract offer, Sherwin locked out those employees on October 11, 2014. According to the most recent information in the record, the work stoppage is ongoing. To prepare for the resulting picket line, Sherwin states that it arranged for sheriff's deputies to be present outside the plant and enlisted a specialized private security company to operate checkpoints near the plant.

Sherwin states that from October 11, 2014 to November 6, 2014, UP management crews provided twice-weekly service and never experienced harassment or threats by picketers. Sherwin also states that it has offered to increase security around the rail line if that would help facilitate UP's restoration of service, but that UP has not expressed an interest in Sherwin's offer. Sherwin further states that the picket line is now limited to a handful of employees on most days, and on some days there is no picket line at all.

According to Sherwin, since UP service ceased on November 6, 2014, Sherwin has had to shift the delivery of lime from rail to trucks. Sherwin states that trucking lime is more expensive and less reliable than rail because neither lime quarries nor Sherwin maintain dedicated fleets of trucks, and demand for truck service in East Texas is very high because of oil and gas work in the area. Moreover, Sherwin states, its plant is not designed to handle regular trucking of lime, but rather is equipped to offload rail cars of lime moving in regular service.⁴ The record indicates that Sherwin has not run out of lime due to an unrelated change in the

³ Sherwin states that the lime is classified as STCC 3274110, Bulk Crushed Quicklime, a commodity that is not exempt from regulation under 49 C.F.R. § 1039.11(a).

⁴ In particular, according to Sherwin, its facility has very little lime storage capacity, as its silo can hold only a couple days' supply of lime. Therefore, Sherwin states, lime is regularly stored in rail cars on site and offloaded as needed, but if trucks are used, Sherwin must shift the lime from trucks to rail cars and then to the silo or the production line. Sherwin Pet., Gleditsch V.S. 7.

production level at the facility,⁵ but Sherwin states that it may decide to increase its production, and if it does, it could experience serious adverse impacts without restoration of rail service from UP.

UP filed its reply on May 5, 2015. UP asserts that Sherwin's request for resumption of service is not reasonable under the circumstances. UP states that, months in advance of the lockout, it warned Sherwin that rail service using union-represented employees would not be practicable if there was picketing at the plant. According to UP, it told Sherwin that UP's union-represented employees consistently refuse to cross picket lines in these situations out of concern for personal safety, and that UP would not require its employees to work under conditions they believe are unsafe.

UP states that United Steelworkers members at Sherwin's plant have made heated accusations against Sherwin, and that other nearby labor disputes involving the United Steelworkers have led to charges of violence, threats, and intimidation. According to UP, picketers at Sherwin's plant have confronted Sherwin's replacement workers and non-locked out employees in a hostile manner. UP also states that a member of its management crew has been questioned by Sherwin's locked out employees.⁶

UP also states that, in deciding to suspend service to Sherwin, it determined that requiring its union-represented employees to cross a picket line would undermine its own employee relations. Based on past experience, UP states, it had reason to believe that the unions would tell their employees not to cross the picket line, and that they themselves might even strike. UP believes that it might be forced to sue its employees in order to compel them to cross the picket line. UP expresses concern that engaging in a dispute of this type would damage its own employee relations over the longer term and could disrupt service to other customers.

UP states that it was able to divert management employees to serve Sherwin's plant for only a limited period of time after the onset of a labor disruption because the managers who were qualified and available had primary responsibilities for ensuring safe operations over a large territory and for supporting reliable service to many other customers. The limited service provided by management employees in October-November 2014, UP states, was intended to give Sherwin time to increase its stockpile of lime and implement alternatives to direct rail service, or to resolve the labor dispute.

In UP's view, Sherwin's offers of alternatives for continuing direct rail service were impracticable. With respect to Sherwin's offer to supply crews and locomotives to move cars between the plant and UP's property, UP states that it concluded the proposal was infeasible

⁵ See UP Reply, Ex. D (news release from Sherwin's parent company indicating that this "reduction was due to a conscious decision to temporarily curtail" one of Sherwin's production units because of "weak market conditions for Atlantic alumina, coupled with various power supply issues during the year caused by outages at the third party energy supplier.").

⁶ See UP Reply, V.S. Robert M. Johnson 4-5 (describing an instance where he was approached by a locked out employee who questioned whether Johnson was a union member).

because these engineers and conductors would need to be certified by the Federal Railroad Administration; having inexperienced operators in UP's yard would increase safety risks; and if Sherwin employees entered UP's yard, picketing employees might follow them and picket on UP's property. Regarding Sherwin's proposal to pay additional fees for UP management crews, UP asserts that the underlying problem is the limited availability of management personnel and the inability of managers to perform their normal duties when they are diverted to operating trains. Although Sherwin proposed to offset UP's costs of temporarily transferring additional management personnel to this area, UP contends that such transfers would shift the problem, leaving other parts of UP's network shorthanded. And as for Sherwin's proposal to use a third party contractor, UP also contends that the arrangements needed for a third party contractor would take a considerable amount of time and effort to put in place, particularly for what UP viewed as a temporary problem that Sherwin could end by terminating the lockout.

UP also states that it determined that Sherwin had truck and transload options that would allow it to continue to obtain lime during the lockout. Specifically, UP states that it analyzed six potential transload options, recommended one of them to Sherwin as the most suitable, provided Sherwin with rate information for this transload, and offered assistance in pursuing transload options. But according to UP, Sherwin never responded to the transload rate information or UP's offers of assistance.

UP states that since it suspended rail service, Sherwin has received on average as much lime by truck as it previously received by rail.⁷ UP also states that Sherwin had an opportunity to stockpile lime before the labor action, particularly since Sherwin controlled when the lockout began. Regarding the impact lack of rail service has had on Sherwin, UP notes that the reduced production Sherwin has experienced was due to reasons unrelated to the lockout.⁸

On May 8, 2015, Sherwin submitted a letter responding to UP's reply. UP responded in a letter submitted on May 14, 2015, arguing that Sherwin's letter is an unauthorized reply to a reply and requesting that, if the Board accepts Sherwin's letter, it also accept UP's letter in response. In the interest of the development of a complete record by the parties to this dispute, the Board will accept the surreplies.

On July 9, 2015 and July 10, 2015, the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART-TD) (collectively, the Unions), who represent UP employees, filed Notices of Intent to Participate in this proceeding. The Notices were without comment except to assert an interest in the proceeding. On July 14, 2015, Sherwin filed in opposition to the Unions' filings, asserting that they were untimely and procedurally

⁷ See UP Reply, Ex. E (Sherwin data produced in discovery regarding quantities of lime received).

⁸ See UP Reply, Ex. D (news release describing reduced production for reasons unrelated to the lockout).

defective.⁹ On July 21, 2015 and August 4, 2015, BLET and SMART-TD, respectively, submitted substantive comments regarding the issues in this proceeding. On July 28, 2015 and August 18, 2015, Sherwin filed replies to the Unions' substantive comments.

PRELIMINARY ISSUE

Under 49 C.F.R. § 1112.4, a petition to intervene must not unduly disrupt the schedule or broaden the issues in the proceeding, and must set out the petitioner's interest in this proceeding, among other requirements. Because we find that the Unions' Notices were submitted at an extremely late hour without explanation for why they were not submitted earlier, we will reject the Unions' Notices and Comments, and Sherwin's replies.

DISCUSSION AND CONCLUSIONS

Sherwin requests that the Board order restoration of regular rail service pursuant to 49 U.S.C. §§ 11101(a) and 11701. Under § 11101, railroads have a statutory common carrier obligation to provide transportation for commodities or traffic that have not been exempted from regulation pursuant to 49 U.S.C. § 10502. This obligation creates two interrelated requirements. First, railroads must provide, in writing, common carrier rates to any person requesting them. 49 U.S.C. § 11101(b). Second, as is relevant in this case, they must provide rail service pursuant to those rates upon reasonable request for service. 49 U.S.C. § 11101(a). What constitutes a reasonable request for service is not statutorily defined but depends on all the relevant facts and circumstances.¹⁰ When a request for service is made by a shipper but then denied by the rail carrier, it is incumbent on the carrier to provide a reasonable explanation for denying that request.¹¹ In the case of labor-management controversies, a carrier owes the public reasonable efforts to maintain service at all times. See Bhd. of Ry. & S.S. Clerks v. Fla. E. Coast Ry., 384 U.S. 238, 245 (1966). However, a carrier may responsibly evaluate the existence of a shipper labor dispute as it would any other obstacle to service, that is, "on all its elements, as a question of whether the situation . . . fairly constitutes the shipper's demand for service . . . as one of 'reasonable request' under the statute." Minneapolis & St. Louis Ry. v. Pac. Gamble Robinson Co., 215 F.2d 126, 132 (8th Cir. 1954).

⁹ On July 17, 2015, BLET filed a reply to Sherwin's reply. On July 21, 2015, Sherwin filed a reply urging the Board to reject BLET's July 17 reply. On July 28, 2015, Sherwin filed a reply to BLET's comments. Consistent with the discussion here, we reject these filings.

¹⁰ See Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325 (1981) ("The duty to provide [rail service] is not absolute, and the law exacts only what is reasonable of the railroads under the existing circumstances."); Granite State Concrete Co. v. STB, 417 F.3d 85, 92 (1st Cir. 2005); Nat'l Grain & Feed Ass'n v. United States, 5 F.3d 306, 310 (8th Cir. 1993). Courts and the Board have made clear when evaluating railroad rules and practices that a railroad may not refuse to provide service simply because it may be inconvenient or unprofitable. See Pejepsco Indus. Park, Inc.—Pet. for Declaratory Order, FD 33989, slip op at 13 (STB served May 15, 2003) (citing Decatur Cty. Comm'rs v. STB, 308 F.3d 710, 715 (7th Cir. 2002)).

¹¹ Mont. v. BNSF Ry., NOR 42124, slip op. at 4 (STB served Apr. 26, 2013).

In this case, there is no dispute that Sherwin made a request for common carrier rates and UP provided those rates but did not provide the requested service. The question then is whether UP's explanation is sufficient to demonstrate that the request for service was not a reasonable request under the circumstances. When evaluating a carrier's explanation for denying service, the Board has broad discretion to conduct case-by-case fact-specific inquiries. See Mont. v. BNSF Ry., NOR 42124, slip op. at 7 ("What constitutes a reasonable request for service is not statutorily defined but depends upon all the relevant facts and circumstances."); see also Local 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB, 357 U.S. 93, 109 (1958) (ICC determines whether a rail carrier has complied with its common carrier obligation "in the context of the particular situation presented by the case before it").

The Board and our predecessor agency, the Interstate Commerce Commission (ICC or Commission), have held that the mere appearance of a picket line or peaceful picketing does not, standing alone, justify a carrier's denial of service. See Pickup & Delivery Restrictions, Cal. Rail, 303 I.C.C. 579, 593, 595 (1958) (citing Minneapolis & St. Louis Ry. v. Pac. Gamble Robinson Co., 215 F.2d 126 (8th Cir. 1954) and Meier & Pohlmann Furniture Co. v. Gibbons, 233 F.2d 296 (8th Cir. 1956)). Rather, the carrier must consider factors such as the nature of the labor dispute, whether there is a contractual tie between the shipper and carrier, whether violence was present or threatened on the picket line, the potential impact on service to the general public, the accessibility of the pickup or delivery location, the carrier's own labor relations concerns, whether the carrier acted with due diligence to provide service, and whether the shipper has other reasonable service options. See, e.g., Meier & Pohlmann, 233 F.2d at 303-04; Montgomery Ward & Co. v. Chi. Milwaukee, St. Paul & Pac. R.R., 268 I.C.C. 257, 259-60 (1947); Montgomery Ward & Co. v. Consol. Freightways, Inc., 42 M.C.C. 225, 229-30 (1943); see also Bhd. of Ry. & S.S. Clerks, 384 U.S. at 245.¹²

¹² We reject Sherwin's argument in its May 8 letter that Pickup & Delivery overruled the agency's use of these factors to evaluate whether a carrier's denial of service was improper in an individual case. In Pickup & Delivery, the issue before the ICC was whether tariff rules that essentially absolved carriers of their common carrier obligation whenever a labor dispute arose were permissible. 303 I.C.C. at 592 ("The issue here, however, is not whether the carriers are liable in instances where they attempt to excuse their failure of service on the ground of strikes, but whether the [tariff] rules are just, reasonable, and otherwise lawful."). The agency recognized that "whether or not a carrier is liable for its failure to furnish pickup or delivery service to a picketed shipper depends upon the facts in the case." Id. at 593; Local 1976, 357 U.S. at 109-10 (noting that ICC may prefer to avoid bright line rules regarding common carrier obligation in favor of "a more cautious and pragmatic" approach developed "through case-by-case adjudication"). Accordingly, the ICC rejected the carriers' one-size-fits-all tariff-based approach to determining when a service request could be denied in the context of a labor dispute. Here, in contrast, no such tariff provision exists and UP has provided evidence and argument on the factors considered in prior cases. To the extent that UP's Reply contains any suggestion that it has a general policy of not providing service whenever a labor dispute at a customer's plant arises, we specifically reject that approach as unreasonable.

Some of the older ICC and court decisions examining whether a carrier's determination to not provide service during labor strikes at a shipper's facility was reasonable focus on two issues: whether the carrier actually conducted an evaluation of whether it could continue to serve the shipper and the presence (or threat) of violence should the carrier do so. See, e.g., Pac. Gamble Robinson, 215 F.2d at 133 (finding that there was "an absence of any bona fide attempt [by the railroad] to comply with the carrier's duty" to serve the shipper and that the railroad's failure to serve was due to a policy decision rather than an evaluation of the then-current circumstances where there was no violence); La. Grocers Coop. v. Ill. Cent. Gulf R.R. (Louisiana Grocers), 353 I.C.C. 606, 609-10 (1977) (finding no evidence that the railroad responsibly evaluated whether the shipper's demand for service was a reasonable request or used due diligence to attempt to provide service).

While these cases were decided decades ago under very different circumstances than here,¹³ the general requirement that a carrier must carefully consider the totality of the circumstances in determining whether it will deny service still applies. To the extent that prior cases may suggest otherwise, we clarify that neither actual violence nor a threat of violence is a prerequisite to establishing that a request for service is unreasonable, although they can certainly be factors in relevant cases. Contrary to Sherwin's suggestion, functionally limiting the Board's analysis to a single issue—e.g., the likelihood of violence—would be inappropriate.

Here, UP has established that it responsibly evaluated the reasonableness of Sherwin's request for service and that it acted with due diligence under the circumstances by providing limited management crew service and offers to assist Sherwin with alternative service. Based on an analysis of all the relevant factors, we find that UP's explanation is sufficient to show that it has not violated the common carrier obligation with respect to the traffic at issue at this time.

Potential impact on UP employee relations and service. During the period leading to the stoppage, UP evaluated the potential effects of service during the lockout on its relationship with its employees and the residual impact on other customers and the general public. UP concluded that if it were to require its unionized employees to cross the picket line to provide regular service, the Unions would likely take the position that UP had no contractual right to compel their service,¹⁴ and then UP would have to sue its own employees to force performance under their collective bargaining agreements.¹⁵ UP states that it has occasionally had to sue its

¹³ See generally, News Release, Bureau of Labor Statistics, U.S. Dept. of Labor, Major Work Stoppages in 2014 (Feb. 11, 2015), <http://www.bls.gov/news.release/pdf/wkstp.pdf>; Ahmed A. White, Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights, 49 Harv. C.R.-C.L. L. Rev. 59 (2014).

¹⁴ No party has argued that there has been actual violence related to the picket line or that any UP employee has been threatened with violence. However, it is not unreasonable for UP to consider its employees' perception of the potential for violence and the associated impact on employee relations.

¹⁵ UP Reply, V.S. A. Terry Olin 5-7 (also noting that the General Chairmen of the Unions informed UP that they would instruct their members to refuse to cross the picket line).

(continued . . .)

employees to ensure that they performed their work under a collective bargaining agreement, but it has not done so to obtain service for a customer whose employees were on strike or locked out.¹⁶ UP states that even in a situation that did not involve a labor action at the customer's facility, the last time it sued its employees to enjoin them to return to work, relations between management and labor were strained for months.¹⁷ The result, according to UP, was difficulty in negotiating agreements on any issue, and issues that had been easily settled before the lawsuit required far more time and energy to resolve—a situation that disrupted operations and adversely affected customer service.¹⁸

We agree that UP has a significant basis for concern that suing its employees to require them to cross the picket line could lead to a considerable strain on its relations with employees, with associated negative impacts on service. It is not unreasonable for UP to have concluded that the likely outcome, should it attempt to force its employees to cross the picket line, would be a lawsuit against the Unions—a result that could cause severe disruption well beyond the Sherwin plant.¹⁹ We find UP's analysis of these issues to be reasonable, including its detailed consideration of the relative risks.

Nature of the dispute. The work stoppage at Sherwin is a Sherwin management-imposed lockout of union employees. Sherwin's management presumably has control over whether and when the locked out employees may return to work, and, thus, has some ability itself to reverse the conditions that caused UP to cease service. As noted, complying with Sherwin's request for service would likely require UP to sue its employees to compel them to cross the picket line—with significant potential consequences for UP's labor relations and service to the public—as a result of Sherwin's lockout decision.

(. . . continued)

Alternatively, UP could use management crews, but for reasons discussed below, we find that that is not a feasible option.

¹⁶ Id. at 7.

¹⁷ Id.

¹⁸ Id.

¹⁹ Accordingly, this case is distinguishable from both Louisiana Grocers and Pacific Gamble Robinson, cases in which a rail carrier was directed to provide service despite a labor dispute. In Louisiana Grocers, the ICC stated that “no reason appeared on the record as to why [the railroad] failed to direct its [union] employees” to provide service during a shipper's labor dispute. 353 I.C.C. at 609. In Pacific Gamble Robinson, the trial court found that the sole reason given by the railroad for not providing the requested service—concern over the safety of its employees—was not the real reason. 215 F.2d at 133. Here, in contrast, UP explained—among other things—that ordering its unionized employees to provide service to Sherwin would likely lead to UP having to sue its employees, which could cause labor unrest on UP's own system that could lead to disruptions and customer service issues elsewhere. We find on this record that this was indeed UP's reason for declining to provide the requested service and that its concern was reasonable.

Due diligence. UP states that, before the work stoppage began, its marketing personnel corresponded with the Port of Corpus Christi regarding a rate for transportation of lime to Sherwin by transload, provided that rate to Sherwin, and suggested that Sherwin consider using the same transload facility for its outbound alumina shipments.²⁰ UP also states that, after the work stoppage began, it worked with Union Pacific Distribution Services to review potential transload options for Sherwin, leading to the identification and analysis of six potential options that could have accommodated both inbound lime and outbound alumina.²¹ UP adds that it reported to Sherwin regarding this analysis and recommended what UP considered to be the best option for Sherwin.²² According to UP, Sherwin indicated on multiple occasions that it was considering transload options, and UP responded by offering assistance.²³

Also, once the stoppage began, UP used management personnel to provide four weeks of service to Sherwin at a reduced level. According to UP, this was meant to permit Sherwin time to potentially resolve the labor dispute and/or to stockpile lime and other resources for continued alumina production. In response to Sherwin's requests for additional service by management during the lockout, UP reasonably concluded that long-term management service would negatively impact its other customers, potentially creating broader service and safety consequences. Sherwin proposed to pay for UP's use of management crews, but as UP states, the constraint on long-term use of management crews is not financial, and instead relates to the limited availability of qualified management employees.²⁴ We recognize that UP's supply of management employees qualified to provide service to Sherwin is not infinite and that using such employees over a long period would necessarily cause disruptions. In this particular case, it appears that of the seven UP managers who work in the area near Sherwin's plant (Brownsville, Corpus Christi, and Bloomington), only two are certified locomotive engineers and only one of those managers is available for work on a full-time basis.²⁵ Sherwin's offer included compensating UP for temporarily shifting additional management employees to the Corpus Christi/Gregory area, but as UP points out, transferring management personnel would leave other parts of its network shorthanded.²⁶ Service issues on one part of UP's network could lead to issues in other places, particularly given the recent service problems on the national rail network.²⁷ It was reasonable for UP to conclude that use of either local or transferred

²⁰ UP Reply, V.S. LaKeisha Gatson-Dunham 4-5.

²¹ UP Reply 15-16 & V.S. Gatson-Dunham 6.

²² Id.

²³ UP Reply, V.S. Brad A. Thrasher 4-5.

²⁴ Sherwin Pet., V.S. George Gleditsch 4-5; UP Reply, V.S. Gregory D. Workman 10-11.

²⁵ UP Reply, V.S. Workman 11.

²⁶ Sherwin Pet., V.S. Gleditsch 5; UP Reply, V.S. Workman 11.

²⁷ See generally, U.S. Rail Serv. Issues—Data Collection, EP 724 (Sub-No. 3) (STB served Oct. 8, 2014). See also UP Reply, V.S. Workman 8, 11-12.

management employees (beyond the initial period to help Sherwin stockpile lime) would have a negative impact on UP's other customers.²⁸

Other transportation options. As noted, UP also responsibly evaluated Sherwin's other options for receiving lime. While Sherwin indicates that these options are more expensive and less convenient than rail, Sherwin concedes that it has been receiving sufficient amounts of lime via truck²⁹ (and provides no evidence to suggest that it has pursued the transloading option). Data produced by Sherwin show that Sherwin has received on average as much lime by truck as it previously received by rail.³⁰ And despite UP's failure to serve, Sherwin has produced alumina at levels consistent with its production prior to the lockout.³¹ Although Sherwin suggests that it may need to increase its lime deliveries in the near future because it "may" ramp up production,³² this potential need is speculative at this time.

In light of all of the relevant factors, UP has provided a well reasoned and compelling explanation for why its denial of service did not violate the common carrier obligation at this time.³³ UP has shown that it evaluated the potential effects of providing service, acted with due diligence to provide service, and proposed to mitigate its inability to serve. UP has fairly concluded that Sherwin's demand for service is not a reasonable request under the present circumstances.

The Board is also available to assist the parties with informal dispute resolution if the parties choose, including mediation and the Rail Customer and Public Assistance Program. See 49 C.F.R. pt. 1109.

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

It is ordered:

1. Sherwin's petition to compel UP to provide common carrier rail service is denied.

²⁸ UP considered and rejected Sherwin's other offers of assistance to maintain regular service levels but Sherwin does not appear to be challenging UP's analysis of these offers. In any event, we agree with UP that these proposals would be impracticable for the reasons UP states. See UP Reply, V.S. Workman 12-13.

²⁹ Sherwin Pet. 13.

³⁰ See UP Reply, Ex. A (Sherwin news release stating that its production "remains on target with our expectations").

³¹ See UP Reply 30 & Ex. E.

³² Sherwin Pet. 13.

³³ See *Local 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB*, 357 U.S. 93, 109 (1958).

2. Sherwin's May 8, 2015 filing and UP's May 14, 2015 filing are accepted into the record.

3. The Unions' July 9, 2015, July 10, 2015, July 21, 2015, and August 4, 2015 filings are rejected and Sherwin's July 14, 2015, July 21, 2015, July 28, 2015, and August 18, 2015 filings are likewise rejected.

4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.