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SERVICE DATE - LATE RELEASE JULY 31, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB EX PARTE NO. 573

RAIL SERVICE IN THE WESTERN UNITED STATES

STB SERVICE ORDER NO. 1518

JOINT PETITION FOR SERVICE ORDER

Decided: July 30, 1998

To help ease a major rail service crisis in the western United States in late 1997, resulting from, among other things, congestion on Union Pacific (UP) track and facilities in the Houston, Texas area in the aftermath of UP's merger with the Southern Pacific (SP), we issued a series of decisions under our emergency service order authority of 49 U.S.C. 11123, effective until August 2, 1998, that made changes to the way in which rail service was provided in and around Houston.¹ Among other steps, we directed that UP release from their contracts Houston area shippers switched by the Houston Belt & Terminal Railway Company (HBT) or the Port Terminal Railroad Association (PTRA), so that shippers desiring to do so could immediately route traffic over the Texas Mexican Railway Company (Tex Mex) or the Burlington Northern and Santa Fe Railway Company (BNSF), in lieu of UP. We also granted Tex Mex and BNSF additional rights, directed UP to cooperate with other carriers to minimize congestion in the Houston area, and imposed on UP extensive reporting requirements to help us assess the effectiveness of its service recovery. Finally, in light of our determination that the service emergency was in large part caused by inadequate infrastructure, we also directed UP to describe its plans to invest in new infrastructure to meet the region's increased demand for rail service. These remedies were designed to help free up traffic in and around the Houston area without adversely affecting other shippers, and to support — not impede — UP's own efforts to end the emergency.

The process of restoring adequate rail service to the Houston area, however, and to shippers beyond Houston that have suffered from the ripple effects of the service crisis, has been neither simple nor even, and it has prompted requests from individual shippers that the Board provide discrete emergency service relief. Here, a shipper outside of the Houston area, Cemex USA Management, Inc. (Cemex), a cement and aggregates shipper with facilities in Dittlinger, Texas near New Braunfels, states that it is receiving inadequate rail service from UP. It asks for emergency service relief that would temporarily remove the local service restriction from BNSF's trackage rights over UP, thereby allowing BNSF to serve Cemex and make up the difference between service

¹ STB Service Order No. 1518, Joint Petition for Service Order (STB served Oct. 31 and Dec. 4, 1997, and Feb. 17 and 25, 1998).

that UP currently provides and what the shipper states it currently needs.² For the reasons stated below, we deny Cemex's requested relief.

BACKGROUND

Cemex is located near San Antonio in the middle of the cement and aggregates shipping district of central Texas. It is served by UP's Austin Subdivision, a heavily used mainline that carries most of UP's traffic to and from Mexico, and that also carries Amtrak trains. For some time now, Texas has experienced a construction boom that has caused a surge in the demand for construction aggregates, and Cemex complains that UP has been unable to move all of the product that it could ship to meet that demand. Cemex submits that UP has committed to move nine trains per week totaling approximately 662 cars (six aggregates trains and three cement trains), but that the carrier has fallen well short of that commitment because it lacks adequate locomotive power and has not timely returned empty cars for reloading.³ As a result, Cemex requests that the Board use its emergency authority to grant BNSF, which has overhead trackage rights over the Austin Subdivision that it does not currently use, the right to provide local services in order to interchange with the Cemex-owned Western Rail Road (WRR) that operates inside Cemex's Dittlinger facility, so that BNSF can make up the service shortfall. Cemex submitted, under seal, a copy of its agreement with BNSF to provide that service, and, based on an on-site study, contends that BNSF could operate trains from Dittlinger between 2:00 and 6:30 AM daily that would not interfere with UP trains or add any congestion over the mainline.

UP concedes that it has not yet been able to fully accommodate the number of cement or aggregates trains that Cemex and other producers in this area want to move. The carrier explains, however, that the Austin Subdivision, already one of the busiest and most congested lines on its system, became even more so this past winter and early spring because its Mexico-bound cars could not get across the Tex Mex-controlled bridge at the Laredo gateway, resulting in delays and traffic

² Over the past several months, Cemex has pursued relief informally through numerous letters and faxes, to which UP has responded, to the Board's Secretary, Vernon A. Williams, and to Melvin F. Clemens, Jr., Director of the Board's Office of Compliance and Enforcement. Cemex has also appeared before the Board at our oral hearings concerning the rail service emergency and the review of rail access and competition issues. We have decided to consider Cemex's requests for action as a petition for emergency relief.

³ Letter of Gary P. Burns, Cemex Director of Logistics, May 15, 1998, at 1-2. Cemex submits that between March 30 and May 2, 1998, UP fell short of the shipper's 645-car weekly requirement in that period by as many as 279 to 410 cars per week, and that, cumulatively for the period, the carrier satisfied less than 50 percent of the shipper's needs. *Id.* at 1. Cemex indicates (*id.*) that, given the demand, it could likely use up to 720 railcars per week — 525 aggregate cars (2,100 cars per month) and 195 cement cars (780 cars per month) — and it claims that UP has pledged to provide them if it needs them. Burns Letter, June 4, 1998, at 2-3.

backups that eventually forced UP to declare an embargo of Mexico-bound traffic on the Austin Subdivision and other lines as well. When the Laredo congestion was at its worst, UP agreed on a plan with its cement and aggregates shippers in central Texas, including Cemex, to provide the maximum service possible, and the carrier asserts that, as the congestion has cleared, the plan has been increasingly successful. UP points out that, since its implementation in early March, the cycle time for the return of empty aggregates cars to Cemex for re-loading has improved by more than 50%, and that, while service is not yet at the shipper's desired level, the carrier is now carrying more carloads of aggregates for Cemex per month than it has in over three years.⁴

Further, UP submits that running additional trains of another carrier over the already congested Austin Subdivision would risk increasing congestion that would jeopardize Cemex's service, not improve it,⁵ and it disagrees that BNSF may freely operate additional trains over the line during a "middle-of-the-night" window, indicating that a significant part of this time is required to clear the line for Amtrak passenger trains — trains that, under 49 U.S.C. 24308(c), have preference over freight trains — and for local traffic over the line.⁶ UP states that fully satisfying the increased

⁴ Letters of Dennis J. Duffy, UP Senior Vice-President, Safety Assurance & Compliance Process, May 21 and June 8, 1998. UP submits that it pledged to move for Cemex six aggregates trains per week of 69 cars per train (1,656 carloads of aggregates every four weeks) — not 2,100 carloads as Cemex claims — and three cement trains per week of not less than 40 cars per train (480 carloads of cement every four weeks). Duffy Letter, May 21, at 2. Service for Cemex, according to UP, has significantly improved. In May, the carrier states, it hauled 1,348 carloads of aggregates for Cemex, more than twice the number of loadings for January of this year (661 carloads), more than 50 percent higher than April's carloadings (888 carloads), and more than any month since March 1995 (1,388 carloads). Duffy Letter, June 8, at 1 and Attachment 1. In contrast, Cemex concedes it has been unable to satisfy its commitment to supply 480 monthly carloads of cement to UP, and will now offer 90-95 cars per week, not 120 cars. Burns Letter, June 4, at 2.

⁵ Serving Cemex, UP claims, already poses certain operational concerns. The carrier notes that the switch leading into Cemex is manually operated, and that trains serving Cemex must block the single-track mainline for a substantial period of time because of the need to walk to and from the switch. Duffy Letter, April 9, 1998, at 1. UP also submits that, unlike some of the other producers in the area, Cemex does not have enough track space within its facility at Dittlinger to store the number of cars presently in its service or to assemble the 90-car trains it desires to move — a fact, it notes, that Cemex concedes — and that, periodically, the carrier has been unable to operate trains from Cemex because empties on WRR blocked its access to loaded cars. Duffy Letter, May 21, at 2. These operational issues would impede services by BNSF just as they have impeded services by UP.

⁶ Duffy Letter, June 8, at 2-3. Cemex does not dispute its inadequate storage space, but observes that it has moved 2,100 aggregate cars per month in the past with the same plant track space, and asserts that any concerns in this regard would be alleviated if UP returned empties more timely and predictably. Burns Letter, June 4, at 3. Cemex also submits that its on-site study

service demands of Cemex and the other central Texas aggregates shippers will require an increase in rail capacity, and, to that end, UP is presently rehabilitating, with Cemex's support, a 16.7-mile segment of parallel track near New Braunfels that was previously abandoned, but not removed. Reopening this track, which the carrier plans to reactivate in October, will eliminate the only single-track segment over the relevant portion of the Austin Subdivision between San Marcos and San Antonio.⁷

DISCUSSION AND CONCLUSIONS

The provisions of 49 U.S.C. 11123 authorize us to issue emergency service orders, but only when we determine that a "failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States." The statute, on its face, does not give us *carte blanche* to direct service simply because a party would prefer to be served one way rather than another; rather, Congress intended that the power be used sparingly and in a focused way. Late last year, we issued our unprecedented emergency service order, but only because we found that there was a transportation emergency affecting service throughout the West, and that we could help mitigate the emergency by adding service options in and around Houston, which we found was the source of the crisis. Additionally, we found that any remedies we impose should facilitate the restoration of service without significantly impeding UP's own service recovery plan, and that any remedies we impose not inadvertently make the situation worse for shippers elsewhere, or favor one shipper over another.⁸ Based on those principles, we provided relief meant to quickly free up traffic in and around the Houston area, while at the same time affording UP broad managerial latitude, in cooperation with its shippers and other carriers, to work through the emergency and restore adequate service. This

disclosed that Amtrak trains do not operate over the line between 2:00 and 6:30. Burns Letter, June 19, 1998, at 2.

⁷ UP has filed an emergency petition seeking a declaratory order that its rehabilitation and reactivation of this line is outside of the Board's jurisdiction under 49 U.S.C. 10901, and thus does not require associated environmental review. See Union Pac. R.R.--Rehabilitation of Missouri Kan. Tex. R.R.--Between Jude and Ogden Jct., TX, Finance Docket No. 33611, Petition at 1-3. The City of New Braunfels has opposed the petition, and the matter is presently before the Board. In describing in its petition the need to increase capacity, UP indicates that the single-track mainline presently available for Cemex and other cement-and-aggregates producers in the area is used approximately 10 hours a day for switching operations of the shippers located adjacent to it, often severely impeding other operations on the line. Id. at 3, V.S. Handley at 3.

⁸ Service Order No. 1518, Oct. 31 Decision, at 5-6; Dec. 4 Decision, at 3, Feb. 17 Decision, at 2; DeBruce Grain, Inc. v. Union Pac. R.R., STB No. 42023, at 3-4 (STB served Dec. 22, 1997), at 3-5 (STB served Apr. 27, 1998) (DeBruce); see also, DeBruce Grain, Inc. v. Union Pac. R.R., 983 F. Supp. 1280, 1286 (W.D. Mo. 1997), aff'd, No. 98-1062, 1998 U.S. App. LEXIS 15136 (8th Cir. July 8, 1998).

approach has largely worked: the weekly reporting data that we have received, as confirmed by site visits by Board staff, disclose significant service improvement in the region, and particularly in Houston.

This, of course, does not mean that we will not again intervene, where warranted, to provide emergency service relief. We are sensitive to the real harms that shippers have suffered as a result of the service problems in the West. However, in this case, we find that Cemex has not presented sufficient cause to warrant the discrete emergency service relief that it seeks. Although Cemex is still not receiving service at the level it desires to satisfy the increased demand for aggregates, UP's service for Cemex has improved markedly. As Cemex acknowledges, UP is adequately transporting all of the cement loads that the shipper is offering, and, at 1,348 carloads of aggregates for May, UP is now transporting more than 80 percent of the carrier's originally stated goal of 1,656 carloads per month, far above that moved earlier in the year when UP's service problems were most severe, and more carloads of aggregates than in any month since March of 1995.⁹ In addition, the cycle time for returning empty cars for reloading has substantially improved and appears likely to improve further — allowing more carloadings — as newly commenced service between Dittlinger and Houston becomes routine.¹⁰ And UP is attempting to provide additional rail capacity by rehabilitating and reactivating a second track in the New Braunfels area, which would put it in better position to satisfy Cemex's desire to move 2,100 carloads of aggregates per month, as well as the increased service needs of the area's other cement-and-aggregates shippers. In all, through private-sector initiative, significant service improvement has already occurred, with more likely to be realized.

Moreover, it is not at all clear to us that BNSF could provide additional service to make up any current UP service shortfall, with 2-3 trains per week that Cemex states are needed, without jeopardizing other operations over the line. As UP has outlined, and as Cemex concedes, the Austin Subdivision is a heavily used line. At the relevant points, the single mainline is used for a large portion of each day to switch traffic for adjacent shippers. Moreover, Cemex must be reached by a further time-consuming and operation-delaying manual switch, and Cemex appears to lack enough track space to store the number of empty cars needed to sustain its present level of service, let alone

⁹ Cemex indicates that, at a meeting with UP on June 12, 1998, the carrier restated its commitment to the shipper as 1,775 carloads of aggregates per month. Burns Letter, June 19, at 1. UP's service has recovered to reach more than 75 percent of even this higher goal.

¹⁰ Duffy Letter, July 2, 1998, at 2. UP states that it has begun 90-car, three-day per week service for Cemex between its plant at Dittlinger and its Turkey Bend Island (TBI) aggregates yard in Houston, where they will receive a second switch that will ensure that all cars are unloaded at TBI within 24 hours and that will enable them to more quickly cycle back to Dittlinger. UP also outlines that its industrial development personnel have met with Cemex at both Dittlinger and TBI to explore the feasibility of extending trackage at both sites so that the 90-car trains could be accommodated on one switch. *Id.*

that necessary for the additional carloadings that it seeks. Finally, beyond originating cement and aggregates shipments and transporting local traffic, the Austin Subdivision is also used to carry most of UP's through traffic to and from Mexico, and it must be cleared several times each week to accommodate Amtrak passenger trains.

Given its characteristics, types of operations, and substantial use, even if we were to conclude that the line could possibly accommodate the requested BNSF trains between 2:00 and 6:30 A.M., we find that, based on these significant variables, there is too small a margin for error — and too great a risk of harm — to require it. This conclusion is also appropriate when considering that UP is seeking to make available soon additional rail capacity that will provide the surest, and operationally least disruptive, way to satisfy the increased demand for the aggregates of Cemex and the other central Texas producers.

Finally, under the principles guiding our consideration of emergency relief in the UP service crisis, separate relief for Cemex in the circumstances here would be inappropriate in any event. As UP points out, there are several cement and aggregates producers near Cemex; some, like Cemex, are currently served only by UP.¹¹ But although BNSF purportedly has sufficient excess capacity to serve Cemex, there is no indication that it has sufficient capacity to serve the other UP-served facilities that compete with Cemex. Since the demand for central Texas aggregates is currently very strong, BNSF access for Cemex is likely to produce for Cemex an immediate competitive advantage over similarly situated shippers nearby. In dealing with the UP crisis, the Board has refused to afford emergency relief that would favor a “particular shipper over any other.” DeBruce, supra n.8, Dec. 22, 1997 Decision, at 4.

For all of these reasons, we deny Cemex' request for emergency service relief. This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request by Cemex USA Management, Inc. for emergency service relief is denied.
2. This decision is effective upon its service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹¹ Duffy Letter, July 2, at 3; see also Burns Letter, July 9, 1998, at 1.