

EXPEDITED CONSIDERATION REQUESTED

238013

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
March 19, 2015

SHERWIN ALUMINA COMPANY, LLC)		Part of
)		Public Record
Petitioner,)		
)		
v.)	Docket No. 42143	
)		
UNION PACIFIC RAILROAD)		
COMPANY)		
)		
Respondent.)		
)		

**SHERWIN'S ALUMINA COMPANY, LLC'S REPLY TO UNION PACIFIC
RAILROAD COMPANY'S MOTION FOR EXTENSION OF TIME**

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Dated: March 19, 2015

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Sherwin Alumina Company, LLC (“Sherwin”) hereby submits its Reply in opposition to Union Pacific Railroad Company’s (“UP”) Motion for Extension of Time filed on March 18, 2015 (“Motion”). Sherwin’s Petition for an order compelling UP to provide common carrier service was filed on March 10, 2015, and UP’s Reply to that Petition is due March 30, 2015.¹

UP’s Motion provides no valid basis for an extension of time. Contrary to UP’s claim, twenty (20) days is ample time for UP to provide a substantive response to

¹ Sherwin requests that the Board resolve this timing issue quickly, but on no account should the Board entertain UP’s suggestion to hold this case in abeyance if such a decision requires additional time. Motion at 1.

Sherwin's Petition since the only substantive issue in dispute is whether UP's own decision to terminate service to Sherwin is permissible. Accordingly, there is no reason to afford UP more than the standard twenty-day reply period and there certainly is no legitimate need for UP to engage in discovery before filing its Reply.² UP's Motion should, therefore, be rejected.

ARGUMENT

Significantly, UP made the decision that it would cease providing service to Sherwin long before the work stoppage at the Sherwin plant began in October 2014.³ In fact, UP already had settled upon a course of action to ignore its common carrier obligation in the event of a work stoppage many months before Sherwin filed its Petition.⁴ UP therefore should not require 56 days to prepare a Reply attempting to justify that course of action.

In that regard, if one combines UP's Motion with the discovery requests that it served yesterday on Sherwin,⁵ UP's intentions become clear: seek more time to

² The Board's regulations state that discovery can be denied in order to "prevent the raising of issues untimely or inappropriate to the proceeding." 49 C.F.R. § 1114.21(c).

³ Verified Statement of Kent Britton ("Britton V.S.") at 7-8; Verified Statement of George Gleditsch ("Gleditsch V.S.") at 3-5.

⁴ UP cited two reasons for its cessation of service: (i) its philosophical objection to asking its unionized employees to cross a picket line; and (ii) its lack of available management employees to provide such service in the absence of its normal workforce. Britton V.S. at 1-2; 7-9.

⁵ See Attachment A to UP's Motion.

reply so that UP first can engage in a discovery fishing expedition whose only purpose is to further delay reinstatement of service and to aid UP's attempts to present a post-hoc explanation of its decision to cease serving Sherwin. The Board should not countenance UP's approach.

As Sherwin explained in its Petition, UP served the Sherwin plant for 3 ½ weeks with management employees following the commencement of the work stoppage – all without incident,⁶ and UP has never previously raised safety concerns as a basis for refusing Sherwin service during the work stoppage.⁷ If UP has a valid safety concern, it should already know it. Consequently, UP's new-found interest in the security arrangements at the plant, as expressed in its discovery requests and its Motion,⁸ constitutes yet another attempt to develop a post-hoc rationale for its unlawful service refusal.

UP also opines that Sherwin controlled the timing of its filing in such a manner that a prompt response from UP is not necessary.⁹ UP's self-serving suggestion is incorrect and it fails to justify an extended period for UP's reply.

⁶ Britton V.S. at 6 (explaining that UP's management employees were never harassed or threatened by any of the picketers).

⁷ Britton V.S. at 8.

⁸ See Motion, Attachment A, Interrogatory Nos. 2, 3, 4, 5, 6, and 7; Request for Production Nos. 5, 6, 7, and 8.

⁹ Motion at 3.

After UP stopped serving the Sherwin facility in November 2014, Sherwin attempted to go without UP service for only a few weeks, but it quickly realized that trucking all of the lime it needed was not feasible in the long-term and that the additional costs were substantial.¹⁰ Thus, in December 2014, Sherwin sought to restart UP common carrier service of lime. However, Sherwin's restart attempt required considerable effort and time before the shipments could be attempted, including: (i) requesting common carrier rates and service terms from UP for the shipment – recognizing that UP might outright refuse to provide such rates and service terms; (ii) receiving the reply from UP regarding the applicable rates; (iii) retrieving the rail cars from storage; (iv) ordering the shipment; (v) waiting for the cars to be moved to the quarries and loaded; (vi) waiting for UP to move the shipments, which it did, but only to the nearby yard in Gregory, TX; and (vii) requesting that UP spot the cars at Sherwin's facility, which UP refused to do.¹¹

UP's definitive refusal to spot cars at the Sherwin plant occurred on February 11, 2015 – only a few weeks ago.¹² Thus, UP is incorrect when it claims that Sherwin sat on its Petition. Moreover, UP plainly was on notice that Sherwin sought to

¹⁰ Gleditsch V.S. at 7-8 (listing the specific problems associated with trucking at the plant); Britton V.S. at 4 (noting that trucking “is unreliable in many respects, difficult to handle at the plant, and extremely expensive”).

¹¹ Britton V.S. at 9; Verified Statement of Sarah Waldhelm (“Waldhelm V.S.”) at 3-4. *See also* Verified Statement of Cindy Jette (“Jette V.S.”) at 1.

¹² Waldhelm V.S. at 4.

reestablish common carrier line service,¹³ and UP was well aware that Sherwin was dissatisfied with UP's refusal to serve.¹⁴ It therefore should have come as no surprise to UP that Sherwin would file this Petition. But even assuming, *arguendo*, that Sherwin took longer than UP expected to file such a motion, that delay makes no difference to the question of whether UP is entitled to any extension in its Reply deadline, much less the substantial extension UP seeks. Again, UP made its determination to refrain from serving Sherwin months ago, and UP should have been prepared to defend its decision at any time.

UP's additional attempt to justify its 56 day reply period request by comparing this matter to other schedules that the Board has established is likewise without merit.¹⁵ The cases that UP cites were not service-related cases, and both had been pending for well over a year before the procedural schedules were set.¹⁶ Conversely, when the need for service is at issue, the Board has been quick to require prompt responses from carriers. *See, e.g., Canexus v. BNSF Ry.*, FD 35524, slip op. at 1

¹³ Britton V.S. at 9.

¹⁴ Britton V.S. at 9; Gleditsch V.S. at 7-9.

¹⁵ Motion at 4, citing *BNSF Ry—Terminal Trackage Rights—Kansas City S. Ry. & Union Pac. R.R.*, FD 32760 (Sub-No. 46) (STB served Dec. 1, 2014) and *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42119 (STB served Aug. 2, 2011).

¹⁶ UP's counsel also expresses concerns about having to juggle the reply in this matter and a reply filing in *United States Rail Service Issues—Performance Data Reporting*, EP 724 (Sub-No. 4). Motion at 4. UP's expressed concerns are not well-founded. UP counsel have 58 days in which to prepare a reply to a small number of short filings submitted in EP 724 (Sub-No. 4). Moreover, if UP simply files its Reply in this case by March 30, it still will have 30 days to prepare its reply in EP 724 (Sub-No. 4).

(June 8, 2011) (ordering BNSF and UP to provide a substantive reply within 20 days of the filing of a service-related complaint even where service continued throughout the pendency of the case);¹⁷ *United States Rail Service Issues*, EP 724, slip op. at 1 (Oct. 24, 2014) (ordering BNSF to reply within 12 days to a petition requesting a service recovery plan).

CONCLUSION

UP is required to provide service upon reasonable request. 49 U.S.C. § 11101(a). Sherwin has made such reasonable requests for lime service, and UP has refused to restore service. UP has failed to provide any justification for extending the due date for its Reply under those circumstances. Sherwin, therefore, requests that the Board deny UP's request for an extension of time.

¹⁷ In a letter to the Board dated March 18, 2014, UP attempts to draw distinctions between the timing in the *Canexus* matter and Sherwin's Petition, but UP ignores the fact that BNSF had continued providing the subject service in *Canexus*, and the fact that the Board eventually ordered BNSF to continue providing that service when the term of the applicable tariff was near expiration. *Canexus*, (STB served Oct. 14, 2011).

Respectfully submitted,

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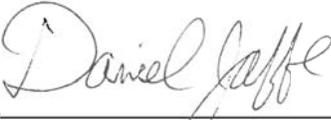
Dated: March 19, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of March, 2015, caused a copy of the foregoing Reply to Union Pacific Railroad Company's Motion for Extension of Time to be served by email upon counsel for Union Pacific Railroad Company, as follows:

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