

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

238822

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<b>SHERWIN ALUMINA COMPANY, LLC</b>	)	
	)	ENTERED
<b>Petitioner,</b>	)	Office of Proceedings
	)	July 14, 2015
v.	)	Part of
	)	Public Record
	)	<b>Docket No. 42143</b>
	)	
<b>UNION PACIFIC RAILROAD COMPANY</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

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**REPLY OF PETITIONER SHERWIN ALUMINA COMPANY, LLC TO THE  
NOTICES OF INTENT TO PARTICIPATE FILED BY THE BROTHERHOOD  
OF LOCOMOTIVE ENGINEERS AND TRAINMEN AND THE  
TRANSPORTATION DIVISION OF THE INTERNATIONAL ASSOCIATION  
OF SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS**

Petitioner Sherwin Alumina Company, LLC (“Sherwin”) hereby replies to the Notices of Intent to Participate (“Notices”) filed in this proceeding by the Brotherhood of Locomotive Engineers and Trainmen (“BLET”) on July 9, 2015 and by the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART-TD”) on July 10, 2015 (collectively “Unions”). The Unions’ Notices are procedurally defective and untimely, and the Unions have no basis on which to participate in this private dispute between Sherwin and Defendant Union Pacific Railroad Company (“UP”). Sherwin requests that the Board reject the Unions’ Notices and proceed immediately to a decision on the merits in this matter.

## BACKGROUND

Sherwin filed its Petition for an order compelling UP to provide common carrier service on March 10, 2015. UP's Reply was initially due on March 30, but at the request of UP and over the objections of Sherwin, the Board granted UP 56 days to prepare a reply and permitted UP to proceed with discovery, thereby extending the reply date to May 5, 2015.<sup>1</sup> In granting UP's request, the Board specifically noted, however, that Sherwin's need for resolution was urgent and therefore the "Board will endeavor to issue a decision expeditiously after receipt of UP's reply submission."<sup>2</sup>

Now, more than two months after the close of the record and four months after Sherwin filed its Petition, the Unions filed the instant Notices without so much as an acknowledgement that the filings are flagrantly out of time. Moreover, the Unions' Notices are not simply a placeholder request. Counsel for BLET has advised counsel for Sherwin that it intends to file a merits pleading, on an unknown future date, in support of UP.<sup>3</sup> As the Board has already recognized that time is of the essence in this matter, the Unions' late, defective filings should be swiftly dispensed with by the Board.

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<sup>1</sup> *Sherwin Alumina Co., LLC v. Union Pac. R.R.*, NOR 42143 (STB served March 26, 2015).

<sup>2</sup> *Id.*, slip op. at 3.

<sup>3</sup> Counsel for Sherwin has, on this day, inquired with counsel for SMART-TD regarding its intentions, but Sherwin has yet to receive a response. Regardless, Sherwin expects that SMART-TD intends to file a substantive pleading in this case given that there would be little reason simply to be served with pleadings since they are readily available on the Board's website and there are no further pleadings by the actual parties expected at this time.

## ARGUMENT

### I. The Unions' Notices are Defective

A notice of intent to participate is not the proper vehicle for entering into a pending private adjudication before the Board.<sup>4</sup> Notices of intent to participate are used when the Board is considering a matter where public participation is required (*e.g.*, rulemakings) or specifically ordered by the Board (*e.g.*, certain multiparty disputes with broad industry application, such as the recent coal dust tariff proceeding or railroad merger cases).<sup>5</sup> Indeed, such proceedings are generally open to any person that files a notice.<sup>6</sup>

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<sup>4</sup> “Adjudication is purposely limited to those who have a strong, direct interest in the outcome in order to focus the decision on those interests and permit defense of those interests. The scope of this access is expressed by the term ‘party’, and generally speaking only parties may participate in adjudication. In order for other ‘interested persons’ to participate, they must be either admitted as a party or given special permission to participate by being granted intervener status.” 1 Admin. L. & Prac. § 4:33 (3d ed. 2010). Conversely, a “major purpose of rulemaking [and similar broadly applicable proceedings] is to permit the broadest possible participation. Thus access to the rulemaking process is fundamentally different from access to adjudication.” *Id. Compare Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, FD 35557 (STB served Dec. 16, 2011) (notice of intent to participate all that was required to participate in a proceeding of broad applicability) (“*Coal Dust*”) with *Tex. Mun. Power Agency v. The Burlington, N. & Santa Fe Ry*, NOR 42056, slip op. at 2 (STB served Sept. 24, 2004) (motion to intervene utilized in private rate dispute, and only granted in part).

<sup>5</sup> *See, e.g., Coal Dust; Railroad Revenue Adequacy*, EP 722 (STB served May 8, 2015) (notice of intent required to participate in oral hearing); *Canadian Pac. Ry – Control – Dakota, Minn. & Eastern R.R.*, FD 35081, slip op. at 2 (STB served Dec. 27, 2007) (“*DM&E*”) (notice of intent to participate required).

<sup>6</sup> *See DM&E*, slip op. at 2.

Notices of intent to participate are not sufficient when intruding upon a private adjudication, such as the instant matter.<sup>7</sup> Instead, a party wishing to participate must file a petition for leave to intervene, and the requesting party must meet STB-prescribed requirements to be granted such leave.<sup>8</sup> Specifically, the intervention must not (i) interfere with the schedule or (ii) broaden the issues raised.<sup>9</sup> Moreover, the petitioner must have a clear interest in the proceeding.<sup>10</sup> The petition must also state “[w]hether the petitioner supports or opposes the relief sought or the action proposed or is otherwise concerned with the issues presented in the proceeding.”<sup>11</sup> The Unions have not made any such demonstration that their Notices meet the necessary requirements; nor have the Unions even filed the appropriate petition. Thus, the Unions’ Notices are defective and should be rejected.<sup>12</sup>

Preemptively, Sherwin notes that the Unions have no direct interest in this proceeding that would warrant intervention, let alone intervention at this late hour.

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<sup>7</sup> See, e.g., n.4 *supra*.

<sup>8</sup> 49 C.F.R. § 1112.4.

<sup>9</sup> 49 C.F.R. § 1112.4(a). See also *Dakota, Minnesota & E. R.R. Corp. & Cedar Am. Rail Holdings, Inc. – Control – Iowa, Chicago & E. R.R. Corp.*, FD 34178, slip op. at 2 (STB served Nov. 27, 2002) (“Pursuant to 49 CFR 1112.4, intervention may be granted if it will not unduly disrupt the procedural schedule nor unduly broaden the issues raised in the proceeding.”).

<sup>10</sup> 49 C.F.R. § 1112.4(b)(1) states that the petition to intervene must set out the petitioner’s interest in the proceeding. It is therefore axiomatic that the petitioners have a clear interest in order to intervene in the first place.

<sup>11</sup> 49 C.F.R. § 1112.4(b)(2).

<sup>12</sup> 49 C.F.R. § 1104.10(a) (the Board may reject deficient filings that do not comport with the rules).

Sherwin has requested that the Board order UP to provide common carrier service of inbound lime to Sherwin's alumina plant. UP's obligation to provide such service is the only issue the Board must decide. To be sure, UP has raised concerns that its unionized employees will balk at providing such service, but that is a problem between UP and its relevant employees. Sherwin did not request (nor could it request) that any specific UP employees provide such service, and the choice of whether to use unionized employees or management employees to provide service to Sherwin is one that UP must make based on its common carrier obligation to provide service upon reasonable request. Thus, any concerns the Unions have need not be resolved by the Board at this time. Rather, these concerns are best addressed separately between UP and the Unions, and there is no need to further delay this matter that has already been pending for many months.

## **II. The Unions' Notices are Untimely**

Timely filing of pleadings, including replies and motions, is required under the Board's rules and is essential to the orderly prosecution of a case.<sup>13</sup> Even if the Unions had any basis upon which to intervene in this case, such application should have been made long ago. Indeed, the Unions should have filed any responsive pleading and/or requested to intervene within 20 days of the filing of Sherwin's Petition.<sup>14</sup>

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<sup>13</sup> 49 C.F.R. §§ 1104.6 and 1104.13.

<sup>14</sup> 49 C.F.R. § 1104.13.

Alternatively, when the Board modified the standard procedural schedule and granted UP 56 days to reply, the Unions should have acted. But the Unions sat on their hands.<sup>15</sup>

Sherwin is clearly prejudiced by the Unions' 11<sup>th</sup> hour action. Moreover, the Unions' pleadings can serve no purpose at this time, except to disrupt the procedural schedule and further delay the restoration of common carrier service to Sherwin. The Board has rejected such disruptive filings in other proceedings and it should do so here.<sup>16</sup>

### CONCLUSION

Sherwin requests that the Board reject the Unions' Notices as defective and untimely. As described herein, the Unions' Notices clearly interfere with the schedule in this proceeding, are likely to broaden the issues raised, and lack any showing that the Unions have a direct interest in this proceeding. Thus, the Unions have no basis to participate, especially not at this late date. Sherwin further requests that the Board expeditiously decide the underlying matter on the merits.

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<sup>15</sup> See *Dakota, Minnesota & E. R.R. Corp. & Cedar Am. Rail Holdings, Inc. – Control – Iowa, Chicago & E. R.R. Corp.*, FD 34178 (STB served Nov. 15, 2002) (notice of intent to participate in proceeding rejected because it was not timely filed).

<sup>16</sup> See, e.g., *Boston & Me. Corp. – Pet. for Declaratory Order*, FD 35749, slip op. at 1-2 (STB served July 17, 2013) (rejecting two different filings, one styled as a motion to participate as amicus curiae which also included a brief and another styled as notice of intent to participate amicus curiae without a brief, which was to be filed later, because granting the filing of amicus briefs and allowing the other party an opportunity to reply “would prevent the expedited resolution of this proceeding.”).

Respectfully submitted,

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Dated: July 14, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of July, 2015, caused a copy of the foregoing Reply to be served by email upon:

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/s/ Daniel M. Jaffe \_\_\_\_\_  
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