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Via E-Filing

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
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ENTERED
Office of Proceedings
May 8, 2015
Part of
Public Record

Re: *Sherwin Alumina Company, LLC v. Union Pacific Railroad, Co., Docket No. 42143*

Dear Ms. Brown:

Sherwin Alumina Company LLC (“Sherwin”) submits this letter to bring to the Board’s attention several material misstatements of law and fact presented in Union Pacific Railroad Company’s (“UP”) Reply filed on May 5, 2015.

UP places considerable reliance on two cases: *Montgomery Ward & Co., Inc. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 268 I.C.C. 257 (1947) (“*Chicago, Milwaukee*”) and *Montgomery Ward & Co., Inc. v. Consolidated Freightways*, 42 M.C.C. 255 (1943) (“*Consolidated Freightways*”). However, UP ignores that the basis for the decision in *Consolidated Freightways* – which was also the partial basis for the decision in *Chicago, Milwaukee* – was overruled by the ICC. UP also mischaracterizes the critical facts of *Chicago, Milwaukee*.

The ICC’s decision in *Consolidated Freightways* relied on a tariff provision that explicitly provided that the carrier had the option not to serve if it was “impracticable to operate trucks” due to a strike. *Id.*, 42 M.C.C. at 227. The complainant did not challenge the legality of the tariff, but instead argued that the carriers made no effort to serve. The Commission determined that the carriers were physically unable to serve because the “comprehensive unionization of available labor,” all of whom were unwilling to serve the shipper, prevented the carriers from providing service, and, given the tariff language, the carriers were therefore excused from their common carrier obligation. *Id.*, 42 M.C.C. at 234, 236-37; *Chicago, Milwaukee* (carriers’ employees refused to serve after first day of strike). However, after a series of ICC and court cases involving such issues were decided (including most of the cases cited by both parties that occurred between 1943 and 1958), the Commission revisited the question of the legality of such tariff provisions and it determined that they were impermissible. *See Pickup and*

Delivery Restrictions, California, Rail, 303 I.C.C. 579 (1958) (“*Pickup*”) (a case that Sherwin cited and described in detail in its Petition, but of which UP ignores the central holding).

In *Pickup*, the Commission considered a record “replete with evidence” that demonstrated that the carriers, including UP, were regularly using tariff provisions similar to the one relied upon in *Consolidated Freightways* to “evade living up to their common law duty to render service . . . upon reasonable request.” *Id.*, 303 I.C.C. at 596 (Murphy, concurring). The carriers fought to retain the tariff provisions citing, *inter alia*, *Consolidated Freightways* and *Chicago, Milwaukee*, but the Commission ruled against the carriers holding that the “rules under investigation in these proceedings are unjust and unreasonable.” *Id.*, 303 I.C.C. at 595.

The Commission further noted that the carriers’ unwillingness to cross peaceful picket lines coupled with their acquiescence to restrictive “union contractual provisions” created a situation that did not meet the historical standard for physical obstruction necessary to excuse performance, and that the labor provisions created a situation “diametrically contrary to the accepted legal doctrine that parties may not by entering into a contract alter the rights of third parties.” *Id.*, 303 I.C.C. at 594. Thus, the rationales from *Consolidated Freightways* and *Chicago, Milwaukee* that UP relies repeatedly upon in its Reply arguments to suggest that its refusal to serve Sherwin is reasonable have been overruled by the Commission. In addition, when the *Consolidated Freightways* carriers defended their actions in *Montgomery Ward & Co. v. N. Pac. Terminal Co. of Or.*, 128 F. Supp. 475 (D. Or. 1953) (“*Montgomery Ward*”), the court severely admonished the carriers for their failure to serve and held them liable for same.

UP also relies extensively on *Chicago, Milwaukee*. Indeed, it cites *Chicago, Milwaukee* and *Consolidated Freightways* together multiple times. However, UP misstates the facts of *Chicago, Milwaukee*. First, UP suggests that the case arose from the same facts and circumstances as *Montgomery Ward*. UP Reply at 36. This is incorrect. The circumstances in *Chicago, Milwaukee* occurred some five years after the circumstances in *Montgomery Ward*, and the issues in *Montgomery Ward* occurred in Portland not Chicago, as in *Chicago, Milwaukee*. In addition, the strike in *Chicago, Milwaukee* lasted only a week whereas the *Montgomery Ward* strike went on for many months.

UP also omits the most important fact of *Chicago, Milwaukee*: the carriers attempted to serve the shipper’s facility but were impeded by the striking workers. Indeed, the Commission noted that “the trucking companies dispatched trucks to complainant’s plant and attempted to enter; but in each instance they were unable to effect entrance because of the presence of pickets, the admonition by the latter for the drivers to turn back, and the generally threatening attitude of the pickets.” *Id.*, 268 I.C.C. at 258. In contrast, UP management employees successfully served Sherwin’s plant without incident during the current work stoppage, and UP has never tried to serve the plant since November 6, 2014, let alone been impeded from doing so.

For the first time, UP has suggested that Section 20109 of the Federal Railroad Safety Act (“FRSA”) has somehow changed the relevant law applicable to such situations. UP

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misstates the purpose of the FRSA. It is simply a whistleblower statute. Similar to other whistleblower statutes, it protects a railroad employee from retaliatory action for a refusal to work under hazardous conditions or for reporting such conditions on the railroad, after the employee has apprised the employer, where possible, of those conditions and informed the employer that he or she will not perform further work unless the conditions are made safe. 49 U.S.C. § 20109(b). However, an employee cannot make just any complaint and satisfy the statute. Instead, Section 20109(b) specifically states that a refusal must involve a “hazardous condition [that] presents an imminent danger of death or serious injury.” Here, UP has not identified any circumstances that even remotely trigger FRSA protections, even assuming *arguendo* the statute applies to this situation. Indeed, none of the handful of minor picket line threats cited by UP in its Reply would have triggered the high standard of potential threat required by the statute nor were they directed toward UP or any of the vendors who have passed through the gates of Sherwin’s plant hundreds of times since the work stoppage began.

UP also fails to advise the Board that Section 20109 was never intended to relieve railroads of their common carrier obligations. The legislative history of the FRSA shows that the relevant provision was the result of complaints of “harassment in situations where a worker notifies authorities of violations, testifies in safety proceedings or institutes an action against a railroad” and was not driven by issues about crossing a simple picket line. H.R. Rep. No. 96-1025, at 8 (1980), reprinted in 1980 U.S.C.C.A.N. 3830, 3832. Instead, the legislation was in response to employer harassment, which included “firing[s], verbal abuse, disproportionate[ly] dangerous assignments, and constant and unrelenting supervision.” *Id.* UP is also incorrect that the 2007 amendments to the FRSA somehow fortifies UP’s position that the FRSA serves as a shield in this matter. The 2007 amendments were designed to further protect employees when triggering the statute where the carrier refuses to “authorize the use of safety-related equipment” or requires an employee to operate over “track or structures that are in a hazardous condition.” H.R. Conf. Rep. No. 110-259, at 348 (2007), reprinted in 2007 U.S.C.C.A.N. 119, 181. There is no legislative history that suggests the statute was enacted, or later amended, to excuse the common carrier obligation based on an employee’s desire to not cross a picket line.

Respectfully submitted,



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An Attorney for Sherwin Alumina Company, LLC

cc: Michael L. Rosenthal, Esq.
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