

Sherwin's locked-out employees, thereby becoming targets for the anger of those employees. As set forth in more detail below, it is BLET's position that, as Sherwin has created the situation in which it now finds itself, it is not reasonable for Sherwin to demand that UP provide direct service to its locked-out facility.

ARGUMENT

The Board has long recognized that the common carrier obligation "is not an absolute one, but is subject to reasonable limitations and conditions. [A carrier] may refuse to receive property for shipment if transportation on its line or the line of a connecting carrier has become impossible or impracticable because of circumstances beyond its control, as, for example, a strike, the strike not being induced or caused by the carrier." *Montgomery Ward & Co., Inc. v. Consolidated Freightways, Inc.*, 42 M.C.C. 225, 231 (1943) ("*Consolidated Freightways*"); *State of Montana v. BNSF Railway Co.*, NOR 42124, slip op. at 7 (STB served Apr. 26, 2013 ("What constitutes a reasonable request for service is not statutorily defined but depends upon all the relevant facts and circumstances.")). See also *Meier & Pohlmann Furniture Co. v. Gibbons*, 233 F.2d 296, 303-04 (8th Cir.1956) (the carrier has the right to "responsibly evaluate" the existence of a strike against a shipper in deciding whether the shipper has made "reasonable request [for service] under the statute.").

In *Consolidated Freightways*, the Board found it was not reasonable for the complainant to expect the defendant carriers to service its facility when

[t]he primary cause of the [carriers'] failure to serve the complainant was a strike at the latter's plant. The defendants in no way contributed to the calling or maintenance of that strike. It was caused by a dispute to which the complainant was a party, so that it was within its power, and not within the power of the defendants, to resolve the dispute and have the strike called off, thereby providing unrestricted access to its plant.

Consolidated Freightways, 42 M.C.C. at 230 (emphasis added). This reasoning is even more applicable here since it was Sherwin's own decision to lock-out its employees that caused UP's inability to provide the requested service to Sherwin's facility. Thus, even more than in *Consolidated Freightways*, it was – and remains – within Sherwin's power to resolve the dispute and provide UP unrestricted access to its facility.

Sherwin is not an unwitting “victim” of an unexpected work stoppage. Rather, Sherwin made a calculated decision to engage in a lock-out of its entire workforce. Indeed, it is plain from the filings of both Sherwin and UP that Sherwin had planned for this eventuality well in advance of making its final bargaining offer to USW. In April or May 2014, Sherwin contacted UP to discuss contingency plans in case of a work stoppage at its facility. Gleditsch Verified Statement at 3-4 (“VS”) (att'd to Sherwin Petition); Gatson-Dunham Reply Verified Statement (“RVS”) at 2 (att'd to UP Reply). Based on these conversations, Sherwin knew by early July 2014 that UP would only provide service for a limited period should there be a lockout or strike. Sherwin knew that UP's union-represented train crews would not cross a USW picket line. Gatson-Dunham RVS at 3-4; Olin RVS at 3-4 (att'd to UP Reply). Thus, Sherwin knew that it would have to rely upon other means of obtaining raw product and shipping its finished product if it chose to lock-out its employees.

It is equally clear that Sherwin knew what the impact on its production would be if the USW did not give in after Sherwin locked out all of its USW-represented workers. Now Sherwin finds itself in a position that it miscalculated because the USW has not accepted Sherwin's contract proposal before Sherwin needed more lime to manufacture at the rate it deems desirable. But Sherwin still has the ability to receive the necessary lime and ship its own product

via other means, specifically trucks and trans-load shippers. Gatson-Dunham RVS at 2.¹ It simply wants to force UP to provide shipments by rail because it apparently believes that might lead to a break in its negotiations with USW.

However, ICCTA Sections 11101(a) and 11701 were not intended to serve as a blunt instrument to require carriers to ignore the realities of their own needs and to enable carrier customers to put carriers in the position of becoming economic weapons to break labor impasses for their customers. Rather, the statute says that “[a] rail carrier...shall provide the transportation or service *on reasonable request*.” 49 U.S.C. § 11101(a) (emphasis added). Prior to October 2014, Sherwin was provided with rail service because its request for such service was reasonable. But that changed in October 2014 when Sherwin, of its own volition, determined it to be in its best interests to engage in economic self-help in its labor dispute with USW by locking the USW-represented workers out of the plant. Not surprisingly, those employees set up a picket line to air their grievances with the company. Sherwin created the conditions that caused UP to suspend direct service to its facility; Sherwin alone holds the key for returning the conditions to what they were. *Consolidated Freightways*, supra

A customer who creates conditions that are not reasonable is rightly subject to a denial of its request for service. It is BLET’s position that in the circumstances presented here, Sherwin’s request does not fall within the statutory service mandate.

¹ As Ms. Gatson-Dunham attested in her Reply Verified Statement: “Both lime and alumina can move via transload and truck. In fact, when I worked at UPDS [Union Pacific Distribution Services] Sherwin transloaded alumina under a UPDS program, under which alumina was transloaded from railcars and trucked to various destinations. I understand that Sherwin continues to use that UPDS program to reach various destinations by truck. Union Pacific also moves lime in transload service for other customers.” Gatson-Dunham RVS at 2.

Respectfully submitted,

/s/ Michael S. Wolly

Michael S. Wolly

Margo Pave

ZWERDLING, PAUL, KAHN & WOLLY P.C.

1025 Connecticut Avenue, NW, Suite 712

Washington, D.C. 20036

(202) 857-5000

Attorneys for BLET

CERTIFICATE OF SERVICE

This is to certify that a copy of the attached Comments was served by first class mail, postage prepaid, this 21st day of July, 2015 on the following:

Gayla L. Thal
Louise A. Rinn
Patricia O. Kiscoan
Daniellee E. Bode
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

Michael L. Rosenthal
Carolyn F. Corwyn
COVINGTON & BURLING LLP
One City Center
850 Tenth Street NW
Washington, DC 20001

Daniel M. Jaffe
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street NW
Washington, DC 20036

Erika A. Diehl-Gibbons
Associate General Counsel
SMART - UTU Transportation Division
24950 Country Club Blvd., Ste. 340
North Olmsted, Ohio 44070

/s/ Margo Pave
Margo Pave