

STB DOCKET NO. 42023

DEBRUCE GRAIN, INC.

v.

UNION PACIFIC RAILROAD COMPANY

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*Decided December 18, 1997*

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The Board denies DeBruce Grain, Inc.'s motion for an emergency order, and dismisses a complaint, to the extent that it requests an emergency order. The remainder of the complaint will proceed.

**BY THE BOARD:**

This decision addresses a request by DeBruce Grain, Inc. (DeBruce), seeking injunctive relief against Union Pacific Railroad Company (UP). The request for injunctive relief was sought in a complaint and a motion for emergency order filed by DeBruce against UP on November 3, 1997. DeBruce initiated this proceeding before the Board after its action in Federal district court was dismissed. *DeBruce Grain, Inc. v. Union Pacific RR*, No. 97-1413-CV-W-3 (W.D. Mo. October 30, 1997) (*DGI*).

The complaint seeks the award of damages and the issuance of an emergency order. The motion seeks an emergency order only. UP filed a reply to the motion for an emergency order on November 14, 1997. On November 20, 1997, DeBruce responded to UP's reply, and on November 24, 1997, UP filed its answer to the complaint, and what it described as its reply to "Unauthorized Reply of DeBruce Grain, Inc." For the reasons stated below, we will deny the motion for an emergency order and dismiss the portion of the complaint that seeks an emergency order. We will not, however, dismiss the remainder of the complaint; rather, we will provide DeBruce with an opportunity to inform us as to whether it wishes to proceed with the complaint now, or to await the resumption of more typical service patterns on UP.

## BACKGROUND

DeBruce merchandises grain and operates grain elevators in Nebraska City, Lexington, and Fremont, NE. All three of these elevators are served by UP. DeBruce ships grain from these elevators for domestic and export orders. According to DeBruce, outbound shipments from these elevators often consist of 25 to 100 cars, with each car containing 3,500 or more bushels of grain. DeBruce states that, because of its dependence on rail transportation, it maintains a private fleet of 852 covered hopper cars.

UP provides grain cars under three programs delineated in UP Tariff ICC UP 4051. The first program provides that participating shippers are given between 7 and 14 days' notice that cars will become available. Shippers participating in this program are under no obligation to order particular cars as they become available, and UP is not penalized under the tariff for failing to provide rail cars within any particular time period.

Second, UP has a Guaranteed Freight Pool (GFP) program under which shippers sublease their private cars to UP and UP guarantees placement of 1.4 times the number of private cars. If UP fails to meet the placement guarantee, it is liable for a penalty of \$250 a car if the order is canceled. DeBruce states that it has subleased 450 cars to UP under this program, and it has purchased more than 1000 additional pool cars in the secondary market.

Third, UP has a voucher program under which it sells vouchers guaranteeing placement of cars in either the first or second half of each month. The voucher cost varies with market conditions. Failure to meet the placement guarantee under the voucher program results in a maximum penalty of \$400 per car, and it is not necessary to cancel the underlying order to collect the penalty.

DeBruce argues that only a small percentage of its October car orders under the GFP program have been filled, because UP is giving priority to cars ordered under its voucher program.<sup>1</sup> DeBruce contends that UP has violated its service obligations under 49 U.S.C. 11101(a) to "provide \* \* \* transportation or service on reasonable request" and under 49 U.S.C. 11121(a)(1) to "furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service." It also submits that UP has violated 49 U.S.C. 11101(e) by not adhering to the terms of tariff UP-4051. Finally, it argues that

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<sup>1</sup> DeBruce states that, while it is also buying vouchers, they are in short supply, and it cannot purchase enough to meet its car needs.

by failing to give the same priority to GFP cars as to voucher cars, UP violated 49 U.S.C. 10741(a)(1), which prohibits discrimination.

DeBruce seeks an emergency order under 49 U.S.C. 721(b)(4) enjoining UP from its alleged violations of 49 U.S.C. 11101(a), 11101(e), 11121(a)(1), and 10741(a)(1). It requests that the Board direct UP to (1) give covered hoppers in UP's GFP program the same priority enjoyed by covered hoppers in the voucher program; (2) place cars ordered by DeBruce for its Nebraska elevators as responsively as it places cars at other elevators in the same vicinity; and (3) move loaded cars from DeBruce's Nebraska elevators as responsively as loaded cars are moved from other elevators in the same area. In addition to seeking emergency relief, DeBruce, in its complaint, seeks damages.

#### PARTIES' POSITIONS ON EMERGENCY ORDER

DeBruce argues that 49 U.S.C. 721(b)(4) allows the Board to exercise extraordinary authority unimpeded by the procedural requirements of the Administrative Procedure Act.<sup>2</sup> It contends that the Board's authority is broader than that of federal courts in issuing temporary restraining orders. Exercise of that authority by courts requires application of a four-part test,<sup>3</sup> but DeBruce contends that issuing an emergency order under section 721(b)(4) requires consideration of only one factor: whether issuing the order is needed to prevent irreparable harm.

UP disputes DeBruce's interpretation of section 721(b)(4), arguing that a four-part test is required and that DeBruce has not met the applicable criteria. UP notes that the statute refers to the purpose of the order ("to prevent irreparable harm"), but it contends that the statute itself does not adopt the irreparable harm test as the only governing statutory standard. Rather, UP submits that the new statute was intended to replace the Interstate Commerce Commission's suspension and investigation power under former 49 U.S.C. 10707, which, it states, was essentially governed by the judicial standard for

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<sup>2</sup> Under section 721(b)(4), "The Board may \* \* \* when necessary to prevent irreparable harm, issue an appropriate order without regard to [the APA]."

<sup>3</sup> The generally accepted criteria for an injunction are (1) substantial likelihood of success on the merits; (2) irreparable harmed in the absence of the requested relief; (3) issuance of the order will not substantially harm other parties; and (4) granting the relief is in the public interest. See *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977).

determining requests for injunctive relief. UP also contends that under DeBruce's theory, the Board could issue an injunction even in the absence of any indication that UP violated the law.

#### DISCUSSION AND CONCLUSIONS

We will deny the request for an emergency order in DeBruce's motion and complaint. At the outset, we note that we do not share DeBruce's narrow view that irreparable harm to it is the only relevant consideration in addressing its requests for injunctive relief. But even if it were, the district court in *DGI* already found that denial of injunctive relief would not irreparably harm DeBruce, as DeBruce has other means of obtaining cars, and, ultimately, will be entitled to damages under the tariff, if it cancels its car orders. Moreover, viewed more broadly, we share the concerns expressed by the court (at 10) in denying relief,<sup>4</sup> which we quote at some length:

[G]ranted an injunction will potentially subject [UP] to a flood of similar suits from others whose rights are governed by the Tariff. This is not meant to imply that the Court is motivated to protect [UP] from liability for its past actions; however, the Court should not order relief that requires [UP] to take actions that will expose it to further liability. Along these same lines, there is no way to insure that the public interest will be served by any order that requires [UP] to prefer [DeBruce] over other shippers. In fact, the Court is concerned \* \* \* that it does not know what it should order [UP] to do or not do. The Court cannot order [UP] to honor all orders; this is a physical impossibility. There is no rational basis for ordering [UP] to honor [DeBruce's] orders over all other orders, or even to honor GFP orders over voucher orders. Similarly, there is no contractual requirement that all orders placed be treated on a pro rata basis \* \* \*.

The Court's cogently expressed concerns mirror those with which we have struggled throughout our review of the crisis in the West. Through written submissions and oral presentations at our two oral hearings, we have heard from hundreds of shippers. Each has had service problems, and each wants relief. We have done our best to facilitate resolution of the crisis so that all shippers can obtain relief, but we have always tried to act in a manner that will not unfairly favor one shipper or group of shippers over another.

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<sup>4</sup> The court's decision was premised principally on jurisdictional grounds, but it also addressed the merits of the injunction request.

Thus, in *Joint Petition For Service Order*, 2 S.T.B. 725 (1997), after finding a transportation emergency in the West, we directed a variety of remedies designed to help free up traffic on the UP system. As to each, however, we were careful to avoid directly favoring any particular shipper over any other. More recently, in *Joint Petition For Service Order*, 2 S.T.B. 744 (1997), we expressly found that rail service by UP and its affiliates and by the Burlington Northern and Santa Fe Railway Company has not been at acceptable levels, and we directed the two carriers to prioritize "among grain shipments to ensure that those grain stocks that need to move first in fact receive priority service." Consistent with our approach throughout the proceeding, however, we did not ourselves attempt to prioritize agricultural service; rather, we directed the carriers to meet with shippers so that they could, through cooperation, devise an appropriate prioritization program.

DeBruce's request for injunctive relief would have us require specifically that DeBruce's shipments be given priority over other shipments, and would generally have us, rather than the railroads and the shippers, prioritize among grain shipments by directing that GFP program cars be given the same priority as voucher cars. DeBruce's approach is not in the public interest, because it conflicts with the efforts of the Board and railroads to solve the serious rail service problems that exist in the western United States. Therefore, we will not grant the emergency relief that DeBruce seeks.

We will, of course, hear DeBruce's individual complaint, through which it is seeking damages. In that regard, however, it is not clear to us whether, inasmuch as we are denying its request for injunctive relief, DeBruce wants to proceed with its complaint now, or whether it wants to wait until more normal levels of service are restored. We request that, by January 12, 1997, DeBruce propose a procedural schedule for handling its complaint, or that it request that its complaint be held in abeyance.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

*It is ordered:*

1. The motion for an emergency order is denied, and the complaint, to the extent that it requests an emergency order, is dismissed.

2. The remainder of the complaint proceeding will proceed. By January 12, 1998, DeBruce shall either propose a procedural schedule, or shall request that its complaint be held in abeyance.

3. This decision is effective on December 22, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.