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SERVICE DATE - DECEMBER 30, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36609

FOSTER POULTRY FARMS—
EX PARTE PETITION FOR EMERGENCY SERVICE ORDER

Digest:¹ Union Pacific Railroad Company is directed to deliver certain trains of corn to Foster Poultry Farms’ facilities in Traver, Turlock, and Delhi, Cal., on the schedule provided by UP in its pleading and to provide the Board a status update on January 3, 2023. Foster Farms is directed to reply to UP’s status update no later than January 4, 2023.

Decided: December 30, 2022

On December 29, 2022, Foster Poultry Farms (Foster Farms) filed an ex parte petition for a second emergency service order under 49 U.S.C. § 11123. The petition requests that the Board immediately direct Union Pacific Railroad Company (UP) to give preference and priority to the movement of unit trains of corn tendered to UP by or on behalf of Foster Farms from origins in the midwestern United States to Foster Farms’ facilities in Traver, Turlock, and Delhi, Cal.

In its petition, Foster Farms asserts that an emergency service order is necessary because of the “substantial, measurable deterioration of rail service” by UP to Foster Farms’ Traver, Turlock, and Delhi facilities beginning October 2022. (Pet. 2, Dec. 29, 2022.) Foster Farms states that the corn delivered by UP is used exclusively to feed hundreds of thousands of cattle and millions of chickens, which are raised for the purpose of providing food supplies. (*Id.* at 5.) According to Foster Farms, “[t]he lack of sufficient deliveries of unit trains in October and November resulted in feed stocks dwindling to critically low levels,” and inventory levels have continued to dwindle in December. (*Id.* at 3.)² Foster Farms states that it has supplemented UP deliveries with corn shipped on BNSF Railway Company (BNSF), which was transloaded onto trucks at locations within driving distance to Foster Farms’ facilities, and purchased extra unit

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² According to Foster Farms, the minimum weekly consumption levels of the livestock supplied by Foster Farms mandates the delivery of a minimum of nine loaded unit trains per month, which is typically 2.25 trains per week. (Pet. 3 n.5, Dec. 29, 2022.) Foster Farms states that it received from UP “[seven] complete cycles on Foster Farms’ four trainsets” in November and has received four loaded trains from UP in December. (*Id.* at 3-4.)

trains on the secondary market. (Id.) Foster Farms further states that it has cut off feed to the dairy cattle to preserve corn for feeding the chickens, which are more susceptible to starvation; however, it believes that those efforts will be exhausted by January 7, 2023. (Foster Farms Ltr. 1-2, Dec. 29, 2022.)

In its petition, Foster Farms requests that, for a period of at least 30 days, the Board direct UP to (1) prioritize the assignment of crews to Foster Farms' unit trains at loading origins; (2) prioritize the transportation of Foster Farms' unit trains on UP's system with the goal of minimizing the extent to which the crews on such trains "time out" under the Hours of Service rules, thereby enabling the train to complete its movement from origin to destination without stopping, the crew departing, and then waiting for a new crew; (3) assign and retain sufficient locomotives to Foster Farms' trains at loading origins to ensure that once a Foster Farms train is loaded there is sufficient locomotive power for the unit train to immediately begin its trip to Foster Farms' Traver, Turlock, and Delhi facilities; (4) provide the Board with daily status reports over the 30-day period regarding the delivery of Foster Farms' trains, to include the number of trains and cars billed to Foster Farms' Traver, Turlock, and Delhi facilities, and actual performance versus trip plan data for these shipments. (Id. at 5-6.)

On December 30, 2022, UP filed a reply, arguing that the Board should deny or hold in abeyance Foster Farms' petition. (UP Reply 2, Dec. 30, 2022.) According to UP, Foster Farms' current crisis is largely the result of extreme winter weather that has affected many rail shippers. (Id. at 5.) UP asserts that there are currently five loaded trains destined to Foster Farms' facilities in Traver, Turlock, and Delhi that will arrive between December 31, 2022, and January 3, 2023.³ (Id. at 2.) UP argues that delivery of these trains will resolve Foster Farms' immediate issue, and the Board, therefore, should monitor UP's efforts to deliver the trains before deciding whether to impose a service order. (Id.)

By letter filed December 30, 2022, Foster Farms informed the Board that delivery of these five trains on the schedule listed in UP's reply would "alleviate the immediate feed crisis."⁴ (Foster Farms Ltr. 1, Dec. 30, 2022.)

In order to alleviate Foster Farms' immediate service issues while the Board further considers its petition for a second emergency service order, UP will be directed to deliver the five loaded trains currently destined for Foster Farms' Traver, Turlock, and Delhi facilities on the schedule provided by UP in its pleading, to the greatest extent possible.⁵ UP will be directed to file daily updates regarding the location of these trains with the Board starting December 31, 2022 through January 3, 2023. UP shall file such reports in this docket and send a courtesy copy

³ UP further states that Foster Farms recently acquired use of a sixth trainset, which will move from Louisiana to Nebraska for loading. (UP Reply 4-5, Dec. 30, 2022.)

⁴ Also on December 30, 2022, Foster Farms filed a letter response to UP's reply.

⁵ UP states that the estimated time of arrival for the five trains enroute are as follows: (1) HS74 – December 31, 2022; (2) FR11 – January 1, 2023; (3) AG04 – January 2, 2023; (4) BR04 – January 2, 2023; and (5) FR12 – January 3, 2023. (UP Reply, V.S. Moore at 3-4, Dec. 30, 2022.)

to Janie Sheng, the Board's Director of the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC). Should UP need to deviate from its proposed schedule for those trains, UP must immediately advise the Board and Foster Farms in writing. On January 3, 2023, UP shall update the Board on the status of the five deliveries and inform the Board of its plans to continue to provide service to Foster Farms over the next 30 days. UP must also state its position on whether it is willing to grant or consider granting BNSF access for any period of time to serve Foster Farms directly via switch or trackage rights to avoid continued or future service disruptions. Foster Farms will be directed to reply to UP's status update no later than January 4, 2023.⁶

It is ordered:

1. UP is directed to deliver the five loaded trains currently destined for Foster Farms' Traver, Turlock, and Delhi facilities on the schedule provided by UP in its pleading to the greatest extent possible, as described above.

2. Should UP need to deviate from its proposed schedule for those five trains, UP is directed to immediately advise the Board and Foster Farms in writing.

3. UP is directed to file daily updates regarding the location of these trains with the Board starting December 31, 2022 through January 3, 2023. UP shall file such reports in this docket and send a courtesy copy to Janie Sheng, Director of OPAGAC.

4. UP is directed to file a status update as discussed in this decision on January 3, 2023.

5. Foster Farms is directed to reply to UP's status update no later than January 4, 2023.

6. This decision is effective on its date of service.

By the Board, Board Members, Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Member Fuchs concurred with a separate expression and Board Member Schultz dissented in part with a separate expression.

BOARD MEMBER FUCHS, concurring:

While I concur in the outcome, I disagree with the decisions to omit any citation to the Board's legal authority and to include only part of UP's representation to the Board.

⁶ Nothing in this order relieves UP of its common carrier obligation with respect to the rest of its network. The Board will closely monitor UP's rail service and OPAGAC, although it is also advising the Board, is available to the parties should they need additional assistance. The Board encourages the parties to utilize OPAGAC staff to reach an informal resolution of these issues.

To assist the Board's further consideration of this matter, I encourage Foster Farms to submit readily available information regarding its specific, updated inventory levels. Further, should UP fail to meet its estimated times of arrival for the five trains en route, I encourage the carrier to summarize—in its immediate report to the Board—its efforts to meet those times.

BOARD MEMBER SCHULTZ, dissenting in part:

Foster Farms has requested that the Board issue an emergency service order directing service by UP to Foster Farms in order to prevent the starvation and possible death of hundreds of thousands of dairy cattle and millions of chickens. UP's response details five trainsets of corn currently en route to Foster Farms that UP expects to arrive in the next four days (December 31, 2022, to January 3, 2023). Three of those trains' arrival may be impacted by weather, but if all trains arrive, Foster Farms has stated that its immediate crisis would be alleviated. (See Foster Farms Letter 1, Dec. 30, 2022.)

Despite UP's public commitment to the Board that it would provide the service detailed in its reply, the Board unnecessarily orders UP to provide the service without citation to any statutory or regulatory authority to issue such an order.

I cannot agree with the Board's decision to order service in a situation where such an order is not necessary at this time and appears to be without legal authority. Accordingly, I respectfully dissent from that portion of the Board's decision.