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SERVICE DATE – FEBRUARY 14, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36609

FOSTER POULTRY FARMS—
EX PARTE PETITION FOR EMERGENCY SERVICE ORDER

Digest:¹ This decision denies as moot Foster Poultry Farms’ petition for emergency service order and directs Union Pacific Railroad Company to file weekly status reports with the Board. The docket will remain open for 180 days in the event that further action is necessary.

Decided: February 14, 2023

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. By decision served on December 30, 2022, the Board directed Union Pacific Railroad Company (UP) to deliver five unit trains of corn to Foster Farms’ facilities in Traver, Turlock, and Delhi, Cal., on the schedule provided by UP, to the greatest extent possible, and to update the Board on the status of the trains. The Board stated that it was issuing the December 30 decision to alleviate Foster Farms’ immediate service issues while it further considered Foster Farms’ petition for a second emergency service order.²

Pursuant to the Board’s December 30 decision, UP filed daily status reports, and, on January 3, 2023, updated the Board on the status of the five deliveries and its plans to continue to provide service to Foster Farms over the next 30 days. In its January 3 status update, UP states that two of the five trains had been delivered (HS74 and FR11), two were expected to arrive by

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 Foster Farms filed a petition for an emergency service order in this docket on June 15, 2022. The Board issued the requested emergency service order by decision served July 1, 2022. By decision served July 20, 2022, the Board declined to extend the emergency service order beyond the initial 30-day period but left the docket open, stating that, “[i]n the absence of any further Board order, the docket will automatically close six months from the service date of this decision.” The Board issued its December 30 decision prior to the six-month deadline, and the docket therefore remained open.

January 3 (BR04 and AG04), and the fifth was expected to arrive by January 4 (FR12).³ (UP Status Update 2, Jan. 3, 2023 (Filing ID 305902).) According to UP, the deliveries to Foster Farms, as estimated by UP in its December 30 filing, were delayed due to weather events, as well as incidents on one of the routes.⁴ (Id.) UP states that, barring further weather events, it anticipates delivering five additional trains in January. (Id. at 2-3.)

In its December 30 decision the Board directed UP to state whether it is willing to grant or consider granting BNSF Railway Company (BNSF) access to serve Foster Farms directly via switch or trackage rights. In response, UP states that it is “always willing to consider granting other railroads temporary access to customers” to mitigate the impacts of service disruptions, but it argues that it “does not believe granting BNSF access to Foster Farms would resolve any issues Foster Farms might face over the next 30 days” since BNSF service would be subject to the same weather delays that would affect UP service. (Id. at 3.) As noted by Foster Farms, however, UP failed to address the Board’s request that it indicate whether it would consent to granting BNSF access to its tracks via reciprocal switching. (Foster Farms Reply 6-7, Jan. 4, 2023.)

Foster Farms replied to UP’s status update on January 4, 2023. In its reply, Foster Farms states that the emergency situation has been alleviated for at least a week, but Foster Farms remains concerned that the service problems will recur.⁵ (Foster Farms Reply 8, Jan. 4, 2023.) Foster Farms explains that the four trains that UP delivered by January 4, 2023, have allowed it to restart cattle feeding, stop trucking corn to the Delhi facility, and begin building up inventory at the Traver facility. (Id. at 3.) Foster Farms further details the additional costs it has incurred as well as the logistical difficulties it has encountered because of UP’s failure to timely deliver trains. (Id. at 2.) Further, Foster Farms points out that UP’s proposal to deliver five more trains in January is insufficient, claiming that eight to nine more loaded trains are needed in January for Foster Farms to feed its animals and rebuild its typical minimum inventory levels since the trains which arrived in early January had actually been due in December and therefore do not fulfill Foster Farms’ continuing regular need for eight to nine trains per month. (Id. at 3.) Foster Farms argues that UP should be able to complete five or six deliveries using Foster Farms’ two reserved trainsets, and three deliveries using unit trains that Foster Farms has acquired for one-time use. (Id. at 4.) Foster Farms further argues that, although severe weather played a role in the December service issues, UP could have mitigated the impact of the weather by using

³ UP previously estimated that these trains would arrive between December 31, 2022, and January 3, 2023. (See UP Reply 2, Dec. 30, 2022.)

⁴ UP also notes that Foster Farms asked it to divert one train (HS74) from Turlock to Traver, which lengthened the haul, but that UP nevertheless delivered the train to the new destination as scheduled on December 31, 2022. (UP Status Update 2, Jan. 3, 2023.)

⁵ According to Foster Farms, two trains (AG04 and BR04) arrived January 4, 2023, and the last of the five trains (FR12) was scheduled to arrive January 5, 2023. (Foster Farms Reply 2, Jan. 4, 2023.) UP’s daily status reports, filed pursuant to a protective order, indicate further that all five trains have been delivered, although later than anticipated in UP’s initial plan. (See UP Status Report 2, Jan. 5, 2023; UP Status Report 2, Jan. 6, 2023.)

alternate routings proposed by Foster Farms “on several occasions.” (*Id.* at 5.) According to Foster Farms, granting BNSF temporary direct access to Foster Farms’ facilities in circumstances like the one at hand could provide relief to Foster Farms. (*Id.* at 8.) Foster Farms requests that the Board (1) continue to retain jurisdiction over this matter for six months, (2) direct UP to deliver eight to nine additional trains in January, (3) direct UP to continue to submit daily or weekly reports on its service to Foster Farms, and (4) direct UP to provide more information to the Board and Foster Farms on whether UP will allow BNSF to switch unit trains into Foster Farms’ facilities on an emergency basis, and if so, under what circumstances. (*Id.*)

The Board may issue an order under 49 U.S.C. § 11123 when it “determines that shortage of equipment, congestion of traffic, unauthorized cessation of operations, . . . or other failure of traffic movement . . . creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier providing transportation subject to the jurisdiction of the Board . . . cannot transport the traffic offered to it in a manner that properly serves the public.” Based on the current record, the Board declines to issue another directed service order at this time. According to Foster Farms, upon delivery of the five trains, all three facilities would be fully operational. (See Foster Farms Reply 3, Jan. 4, 2023.) Therefore, Foster Farms’ petition for a second emergency service order will, at this time, be denied as moot.

Both parties’ submissions suggest that the general service issues Foster Farms is experiencing are recurrent. For example, Foster Farms alleges unpredictable service since February of 2022. (Foster Farms Resp. to UP Reply 4, June 22, 2022 (Filing ID 304814) (“[T]he issue since February of this year has been, and will continue to be for the indefinite future, whether UP can sustain service over a sufficient amount of time for Foster Farms to build up its storage and to alleviate the necessity of Foster Farms to expend its resources and incur the additional costs of scrambling to find corn from alternative sources and transportation modes to meet its contractual obligations to customers and otherwise mitigate the harm caused by UP’s service failures.”).) These issues and Foster Farms’ alarm about potential future service shortcomings by UP and future relief it may seek, including potential access by BNSF through switching or trackage rights, may be more appropriately addressed, if at all, under other regulatory and statutory provisions, such as the Board’s regulations at 49 C.F.R. § 1147.1 or the common carrier provisions of 49 U.S.C. § 11101 and related regulations. Should Foster Farms wish to pursue such other relief in lieu of or in addition to relief available under 49 U.S.C. § 11123, it may supplement and/or amend its pleadings in this docket to the extent necessary to conform with the applicable requirements. See *e.g.*, 49 C.F.R. §§ 1147.1; 1111.2.

Because the Board remains sensitive to Foster Farms’ ongoing concerns, this docket will remain open for 180 days, and to ensure that the Board has adequate information regarding this situation, pursuant to the Board’s authority under 49 U.S.C. § 1321(b), UP is directed to file with the Board weekly status reports on its service to Foster Farms.

In the absence of any further Board order, the docket will close 180 days from the service date of this decision. In the meantime, the Board encourages Foster Farms and UP to work together, and with the Board’s Office of Public Assistance, Governmental Affairs, and Compliance, as appropriate, to ensure adequate rail service to Foster Farms’ facilities. In

addition, the parties are reminded that the Board favors resolution of disputes through mediation, in lieu of formal Board proceedings, whenever possible, and that the Board's mediation program is open to all parties eligible to bring or defend matters before the Board. 49 C.F.R. § 1109.1.

It is ordered:

1. Foster Farms' petition for a second emergency service order is denied as moot.
2. UP is directed to file weekly status reports, as described above, until May 15, 2023.
3. Foster Farms is granted leave to amend or supplement its pleadings in this docket consistent with the discussion in the Board's decision, above.
4. Absent any further Board order, this docket will close on August 14, 2023.
5. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.