

## Surface Transportation Board Denies Shipper Request for Injunction Against UP

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has denied a request by a shipper, DeBruce Grain, Inc. (DeBruce), for an emergency order directing the Union Pacific Railroad Company (UP) to provide it with specific levels of service. The Board concluded that granting DeBruce's request would be inconsistent with the Board's overall efforts to relieve the transportation emergency in the West.

The transportation emergency in the West has been addressed in some detail in Board decisions in Joint Petition For Service Order, STB Service Order No. 1518. In a decision served Oct. 31, 1997 (see "Surface Transportation News" release No. 97-92, issued October 31, 1997), after finding a transportation emergency in the West, the Board directed a variety of remedies designed to help free up traffic on the UP system. More recently, in its December 4, 1997, decision, the Board expressly found that rail service by UP and its affiliates and by the Burlington Northern and Santa Fe Railway Company has not been sufficient, and it 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." See "Surface Transportation News" release No. 97-102, issued December 5, 1997. In both orders, however, the Board was careful to avoid directly favoring any particular shipper over any other. And consistent with the Board's approach throughout the proceeding, the Board did not itself attempt to prioritize agricultural service; rather, it directed the carriers to meet with shippers so that they could, through cooperation, devise an appropriate prioritization program.

DeBruce ships grain under UP's Guaranteed Freight Pool (GFP) program. Under that program, shippers sublease their private cars to UP; UP guarantees placement of a certain number of private cars; and if UP fails to meet the placement guarantee, it is liable for a penalty of \$250 a car if the order is canceled. DeBruce complains that UP has been favoring its "voucher" or auction program over its GFP program, assertedly because UP's penalties for nonperformance are more severe under the voucher program. DeBruce filed papers seeking monetary damages, and injunctive relief (1) essentially asking the Board to require specifically that DeBruce's shipments be given priority over other shipments, and (2) generally asking the Board, rather than the railroads and the shippers, to prioritize among grain shipments by directing that GFP program cars be given the same priority as voucher cars.

The Board, in denying the request for injunctive relief, found that 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. In deciding not to issue an injunction, the Board quoted from a recent court decision [DeBruce Grain, Inc. v. Union Pacific RR, No. 97-1413-CV-W-3 (W.D. Mo. Oct. 30, 1997)], in which the court, in refusing to grant the relief that DeBruce has now sought before the Board, stated:

G]ranteeing 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 Board allowed DeBruce to continue its complaint seeking damages, but in light of its denial of DeBruce's request for injunctive relief, the Board asked DeBruce to inform it as to whether it wants to proceed with its complaint now, or whether it wants to wait until more normal levels of service are restored.

The Board's decision was issued today in DeBruce Grain, Inc. v. Union Pacific Railroad Company, STB Docket No. 42023.

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