

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36609**FOSTER POULTRY FARMS – *EX PARTE* PETITION
FOR EMERGENCY SERVICE ORDER**

**REPLY TO UNION PACIFIC RAILROAD COMPANY'S
STATUS UPDATE**

Pursuant to the Decision issued in this proceeding on December 30, 2022, Foster Poultry Farms (“Foster Farms”) hereby files its reply to the Status Update submitted by Union Pacific Railroad Company. The Decision directed UP to (1) update the Board on the status of the five trains UP represented it would deliver to Foster Farms between December 31, 2022 and January 3, 2023; (2) inform the Board of UP’s plans to provide service to Foster Farms “over the next 30 days” and (3) “state its position on whether it is willing to grant or consider BNSF access for any period of time to serve Foster Farms via switch or trackage rights to avoid continued or future service disruptions.”¹ The factual assertions in this Reply are again verified by Mr. Phil Greene, Vice President of Foster Poultry Farms.

A. Status of the Five Trains

With the exception of one train, UP did not deliver the five trains on the schedule it represented to the Board and to Foster Farms. Train HS74, which was loaded on December 21,

¹ Decision at 3.

2022, purportedly arrived at the Traver² facility per UP's tracking program at around 9:00 PM Pacific Time on December 31, 2022.³ However, UP did not provide notice of its arrival until 4:00 AM Pacific Time on January 1, 2023. Train FR11 was loaded on December 21, 2022. UP represented in its Reply that this train would be delivered on January 1, 2023, but it did not arrive at the Turlock facility until January 3, 2023 at 11:26 AM Pacific Time. Trains AG04 and BR04, which UP represented would arrive on January 2, 2023, did not arrive on that date, but rather on January 4, 2023. Train FR12, which UP represented would arrive on January 3, 2023, did not arrive on that date and UP now says it expects to deliver it on January 5, 2023.

Prior to the filing date of Foster Farms' second *ex parte* Petition, the last train UP delivered to Foster Farms arrived at its Traver facility on December 22, 2022. The Petition explains the impact this had on Foster Farms and its customers, namely that on December 16 Foster Farms shut down feed processing at its Turlock facility and on December 29, 2022 Foster Farms shut down rolling corn at its Traver facility. Foster Farms also stopped selling feed to dairy cows and incurred significant costs to try to obtain and truck corn for feed from other sources to supply to chickens. The delivery of HS74 at the end of the day on December 31, 2022 (or early morning January 1, 2023) enabled Foster Farms to unload the train on January 1, 2023, restart rolling corn feed that night, and to deliver 79 truckloads of feed to some customers on January 2, 2023.

In anticipation of train FR11 arriving at Turlock on January 1, Foster Farms' crews began

² In its filings UP tries to blame its delays on the fact that Foster Farms has from time to time asked UP to divert trains originally destined for one facility to another of its facilities. This complaint is baseless. In the first place, the three facilities are within 100 miles of one another and UP receives ample notice from Foster Farms of any requested diversions. Secondly, the diversions are not because Foster Farms is fickle or indecisive. Rather, UP's inconsistent and sometimes non-existent service is extremely disruptive to Foster Farms' operations, and the diversions are necessary to try to ensure that the corn that UP does deliver goes to the facility that needs it the most until more regular service is restored.

³ This 10-day trip was twice the normal transit time.

prepping for the train's arrival. However, the failure of this train to arrive on January 1 meant that the Turlock mill was down to one weeks' worth of corn safety stock for all three facilities (1900 tons). The failure of AG04 and BR04 to arrive on January 2 meant that Foster Farms had to try to replace the 24,000 tons of corn in those trains with corn from other sources that was trucked primarily to Foster Farms' facility in Delhi. This effort resulted in only 2,000 tons of corn being on hand (one and a half days' supply at Delhi), which was reserved exclusively to feed chickens.

The lack of deliveries on January 1 and January 2 meant that 46 potential feed truckloads to dairy cattle – approximately 1100 tons - were not available and that the millions of chickens owned and supplied by Foster Farms were only fed because Foster Farms was able to obtain corn from alternative sources that was trucked to its facilities. The arrival of train FR11 on January 3, 2023 at the Turlock facility allowed Foster Farms to restart cattle feeding immediately. The arrival of trains AG04 and BR04 on January 4, 2023 meant that Foster Farms could cease locating and trucking corn to Delhi, and begin building back inventory at Traver.

B. UP's Plans to Serve Foster Farms the Next 30 Days

If UP completes the delivery of the five trains discussed above by its new deadline of January 5, 2023, then this will mean that the Traver facility will be fully operational; the Turlock facility will be fully operational, and the Delhi facility will be fully operational. However, these deliveries will only cover Foster Farms' needs for a week. In the rest of the month of January Foster Farms will require UP to deliver eight to nine additional trains to enable Foster Farms to continue to supply the ongoing demand of its customers and livestock, and to rebuild its stocks to typical minimum inventory levels. On this point, there is a significant error in UP's discussion of the number of trains it intends to deliver to Foster Farms in January. Specifically, UP says it intends to deliver nine total trains in January, but it is erroneously counting as January trains four

trains that should have been delivered in December, when in that month only five trains were actually delivered out of the nine that were supposed to be. The “four January deliveries” referenced in UP’s Reply at page 2 - trains FR11, FR12, BR04, and AG04 – were all trains that were loaded and scheduled for delivery in December but arrived or will arrive in January.⁴ As stated above, the belated arrival of these trains in January (and Train HS74 at the very end of the day on December 31, 2022) only gets Foster Farms back to normal operations for week with no reserve stockpiles or excess inventory. Foster Farms requires a minimum of nine trains each month, every month. Consequently, delivery by UP of only five trains in January in addition to the four December trains would not be nearly sufficient. Foster Farms maintains that UP, in order to meet Foster Farms minimal requirements, should be able to meet its contractual commitment of making 2.5 cycles - and its goal of three cycles per month - with trainsets FR11 and FR12. This would result in five to six unit train deliveries in January using these trainsets. Foster Farms has also acquired two additional unit trains and will acquire a third unit train in 2023 to replace trains HS74, BR04, and AG04. The delivery of the three additional trains will result in a total of eight to nine delivered trains for the month of January (in addition to the four December trains that were delivered the first week of January). Foster Farms submits that this is the schedule that the Board should oversee for the next 30 days and/or direct UP to meet via an emergency service order. Failure of UP to meet this schedule will result in Foster Farms again reverting to finding and shipping corn by truck, buying additional trains on the secondary market, and taking other

⁴ HS74, FR11, and BR04 were all loaded on December 21 or 22, 2022. With a five-day transit time under normal operations, these trains should have arrived at Foster Farms for unloading around Christmas. FR12 was unloaded on December 12 but was held up by UP prior to returning to a loading origin. It too, should have been loaded and returned to Foster Farms in December. Train AG04 was another train Foster Farms acquired from a third party in mid-December with the intention of it also being delivered in December, but UP was unable to move the train to a loading origin until the end of the month.

measures unless it is able to obtain unit train deliveries from BNSF, as discussed below.

Moreover, in its daily reports and its Status Update UP has placed great emphasis on the occurrence of weather events as the reason it did not timely deliver trains to Foster Farms in December and so far in January. UP has also qualified its intentions to serve the next 30 days on the occurrence of “weather-related events.” Foster Farms does not question UP’s position that recent weather events have affected its operations and that its locomotives break down in cold weather. However, Foster Farms notes that all five trains were routed or are being routed to its facilities via UP’s tracks in Nevada despite the fact that severe weather was predicted there well in advance of the movements. Foster Farms has suggested to UP personnel on several occasions that it appeared UP could potentially mitigate the delays and other weather-related problems by utilizing its southern routes through the Tehachapi Mountains in California. UP stated it would consider this option but apparently has not pursued it. Foster Farms reiterates that UP should consider such alternative routings, especially when it has advance notice of impending severe weather conditions.

C. Alternative Service from BNSF Railway

Foster Farms submits that the events of the past few weeks concerning UP’s lack of service to Foster Farms’ facilities should leave no doubt that alternative access to service from BNSF in emergency service situations is necessary and appropriate. One unit train of corn holds approximately 12,000 tons of corn (120 tons per hopper car). In contrast, a typical commercial truck holds approximately 24.5 tons of corn. As such, the failure of UP to deliver one unit train requires Foster Farms to locate, acquire and ship the same amount of corn in around 400 trucks. And the consumption rate at Foster Farms’ three facilities requires a minimum of nine unit trains per month, so each train that does not show up must be replaced with around 400 additional

truckloads. Accordingly, replacement of unit trains that are not delivered by UP with other unit trains that are delivered by BNSF would be much more efficient, effective, and less costly than the current process of scrambling to find corn that can be trucked into the facilities.⁵ Indeed, had direct access to BNSF been available to Foster Farms in December when UP's service failures became acute, its second *ex parte* Petition might never have been filed.

The map attached to Foster Farms first Petition (attached again hereto for the Board's convenience and amended to show the location of the Delhi facility) shows how the systems of BNSF and UP are in close proximity to one another in this area of California.⁶ As explained in the Petition, during this and prior service failures by UP, Foster Farms has replaced corn that was not delivered by UP with corn that is transported in unit trains on BNSF to shipper facilities on its system⁷ where the corn is transloaded into trucks and transported 51 miles to Delhi from Stockton, and 27 miles to Traver from Fresno. BNSF's system also interchanges with UP at Stockton and Fresno, California, which are relatively close to Turlock and Traver, respectively. Foster Farms approached BNSF in June of 2022 about providing alternative service to these facilities via a reciprocal switching or terminal trackage rights arrangement prior to the submission of its first *ex parte* petition for an emergency service order.⁸ BNSF acknowledged that it could serve Foster Farms' facilities in this manner but declined to pursue providing alternative emergency service at that time for a variety of reasons.

Given all of the foregoing, and these serious circumstances in general, UP's response to the Board in its Status Update is surprisingly vague and incomplete. Despite the fact that switching

⁵ To say nothing of the environmental impacts and impacts on local roads from hundreds of commercial trucks.

⁶ The orange lines on the map denote BNSF's tracks.

⁷ Specifically, BNSF delivered the unit trains to Penny Newman Grain in Fresno and POC Grain in Stockton, both of which typically receive corn or other grain commodities from BNSF.

⁸ See first *Ex Parte* Petition at 5.

BNSF trains the short distances from Stockton and Fresno was actually considered as an emergency alternative in June 2022, UP completely ignores the Board’s specific directive that UP “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”⁹ Instead, UP (1) mentions the possibility that BNSF access would be via trackage rights on UP’s lines to provide alternative service over the same routes presently utilized by UP;¹⁰ and (2) (only in the verified statement of Mr. Moore) vaguely mentions that “BNSF could alternatively choose to haul trains over their own trackage via much longer, resource-intensive . . . Northern or Southern routes.”¹¹ There is no mention of access via switching at all in UP’s filing. Limiting its response in this manner is not only non-responsive to a key point raised by the Board, it is directly contrary to UP’s statement that it “is always willing to consider granting other railroads temporary access to customers affected by service disruptions”¹² Foster Farms submits that the Board should not allow UP to brush off the possibility of permitting BNSF trains to be switched into and out of Foster Farms’ facilities on an emergency basis. If UP is not willing to allow BNSF access via switching arrangements, then it should explain and justify why it is not willing to grant such access. Finally on the issue of BNSF access, while UP argues BNSF’s routings would be longer, more resource-intensive, and would take longer,¹³ Foster Farms responds that what matters in these emergency situations is that the train actually arrives. It does a rail shipper no good that a train which travels a shorter route, is less resource-intensive and has a projected shorter transit time than an alternative

⁹ December 30 Decision at 3 (emphasis added).

¹⁰ UP Status Update at 3.

¹¹ Verified Statement of Bradley S. Moore at 2.

¹² UP Status Update at 3.

¹³ Verified Statement of Bradley S. Moore at 2-3. UP also states that BNSF does not have crews that are certified to operate over Union Pacific’s Fresno Subdivision. This would appear to be a relatively small hurdle to overcome, and UP does not assert otherwise.

does not actually arrive until weeks after it is scheduled to arrive. Granting BNSF temporary access to move trainsets into Foster Farms facilities in circumstances like the ones that prompted this second *ex parte* Petition could very well provide relief to Foster Farms.

D. Conclusion

In conclusion, UP barely met its stated estimated delivery date for one of the five trains listed in its Reply to the Petition, and it failed to deliver any of the other four trains on the dates it represented. UP attributes these delays to weather events and the actions of Foster Farms, but the fact of the matter is that despite a directive from this Board to deliver the five trains on the schedule that UP itself established “to the greatest extent possible,” UP could not do so. While Foster Farms concedes that weather played a part, it also believes this failure is indicative of systemic problems within UP that will persist even though UP managed to eventually deliver four of the five December trains by January 4 and the emergency situation at Foster Farms has been alleviated for at least a week.

Foster Farms requests that the Board (1) continue to retain jurisdiction over this matter for the next six months, (2) direct UP to adhere to the schedule to deliver eight to nine additional trains in January outlined by Foster Farms; (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. If UP is not willing to provide such access, UP should provide an explanation as to why, so UP, Foster Farms, and BNSF, perhaps

with the assistance of this Board if necessary, can attempt to fashion a solution that is agreeable to all parties.

Respectfully submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is written in a cursive style with a small dot above the 'i' in Wilcox.

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Attorney for Foster Poultry Farms

January 4, 2022

ATTACHMENT 1



VERIFICATION

I, Phil Greene, Vice President of Foster Poultry Farms, declare under penalty of perjury that the facts set forth in the foregoing Reply to Union Pacific's Status Update are true and correct. Further, I certify that I am qualified and authorized to execute this verification on behalf of Foster Poultry Farms.

Executed: January 4, 2023



Phil Greene

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2023, I served a copy of the foregoing Reply to UP's Status Update by electronic mail upon the Chief Legal Officer for Union Pacific Railroad Company, as follows:

Craig Richardson, Esquire
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And by electronic make upon the following counsel for Union Pacific Railroad Company:

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