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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OMAHA PUBLIC POWER DISTRICT,

Complainant,

V.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

NOR 42173

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ANSWER

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August 11, 2022

OMAHA PUBLIC POWER DISTRICT,
Complainant,
v.
UNION PACIFIC RAILROAD COMPANY,
Defendant.

Defendant Union Pacific Railroad Company (UP) respectfully submits this Answer to the Complaint filed by Complainant Omaha Public Power District (OPPD) in STB Docket No. NOR 42173 on July 22, 2022.

In response to the unnumbered paragraph on pages 1–2 of the Complaint, UP states that the unnumbered paragraph consists of a characterization of the Complaint, to which no response is required. To the extent a response is required, UP denies the allegations of the unnumbered paragraph.

1. UP admits the first sentence in Paragraph 1. UP also admits that it is subject to certain provisions of the Interstate Commerce Commission Termination Act of 1995 and, in certain circumstances, to the jurisdiction of the Surface Transportation Board (STB). UP also admits that it offers to perform switching service for loading or unloading on behalf of other

carriers on shipments having an immediately preceding or following line-haul movement via those other carriers to or from OPPD's North Omaha Power Station (NOPS) and certain other shipper facilities in Omaha, Nebraska, subject to the charges and general rules and regulations for such services in UP Reciprocal Switching Circular UP 8005 F (Circular). UP denies that its switching of NOPS traffic on behalf of BNSF involves an "interchange" as that term is normally used. UP denies the remaining allegations of Paragraph 1.

2. UP admits that the STB has found UP to be revenue adequate under the economically unsound methodology currently employed in the STB's annual determination of railroad revenue adequacy for the years 2010–2020. UP denies that it would be found to be revenue adequate using methodologies that are better aligned with Congress's purpose in enacting 49 U.S.C. § 10704(a). UP denies the remaining allegations of Paragraph 2.

3. UP denies the allegations in Paragraph 3 because it lacks knowledge or information sufficient to form a belief as to their truth.

4. UP admits that OPPD is challenging the charge UP assesses BNSF for switching service UP provides on behalf of BNSF in Omaha, Nebraska, to several industries identified in the Circular, including NOPS, and that, in the case of NOPS, UP's switching service involves loaded and unloaded coal unit trains. UP denies the remaining allegations of Paragraph 4.

5. Admitted.

6. UP denies the allegations in Paragraph 6 because it lacks knowledge or information sufficient to form a belief as to their truth.

7. UP admits that it provides switching service for OPPD's coal unit trains on behalf of BNSF, and that it assess BNSF a charge of \$295 per loaded car as reflected in the Circular,

which identifies the NOPS plant as “Omaha Public Power District.” UP denies the remaining allegations of Paragraph 7.

8. UP denies the allegations in Paragraph 8 because it lacks knowledge or information sufficient to form a belief as to their truth.

9. UP denies the allegations in Paragraph 9 because it lacks knowledge or information sufficient to form a belief as to their truth.

10. UP admits that it invoices BNSF, not OPPD, for charges incurred by BNSF when UP provides switching service for OPPD’s coal unit trains on behalf of BNSF between Gibson Yard and NOPS. UP denies the remaining allegations in Paragraph 10 because it lacks knowledge or information sufficient to form a belief as to their truth.

11. UP admits that it has declined OPPD’s requests to reduce its charge to BNSF for providing switching service for OPPD’s coal unit trains on behalf of BNSF. UP denies that the current charge in the Circular is not reasonable. UP denies the remaining allegations in Paragraph 11.

12. Admitted.

13. UP denies the allegation in the first sentence of Paragraph 13 because it lacks knowledge or information sufficient to form a belief as to its truth. With respect to the second sentence, UP admits that it is the only railroad with tracks connected to the NOPS plant tracks, but UP denies that it is the only railroad capable of providing service to NOPS. UP denies the allegations of the third sentence of Paragraph 13 because it lacks knowledge or information sufficient to form a belief as to their truth. UP denies the remaining allegations in Paragraph 13.

14. The first sentence of Paragraph 14 consists of a characterization of OPPD’s Complaint, to which no response is required. With respect to the second sentence, UP does not

dispute that the variable costs of providing service for the issue traffic, as calculated using URCS and the method adopted in STB Ex Parte No. 657 (Sub-No. 1), *Major Issues in Rail Rate Cases*, and the challenged charge appear to produce a revenue-to-variable cost ratio in excess of the 180% jurisdictional threshold. To the extent a further response is required, UP denies the remaining allegations of Paragraph 14.

15. UP denies that it possesses qualitative market dominance over coal transportation to NOPS. The remainder of Paragraph 15 states a legal argument to which no response is required. To the extent a response is required, UP denies the allegations in Paragraph 15.

16. UP denies that it possesses market dominance over coal transportation to NOPS and denies that the Complaint challenges a common carrier rate. The remainder of Paragraph 16 alleges facts that UP denies because it lacks knowledge or information sufficient to form a belief as to their truth and states legal arguments to which no response is required. To the extent a further response is required, UP denies the allegations in Paragraph 16.

17. Paragraph 17 states a legal conclusion to which no response is required. To the extent a response is required, UP denies the allegations in Paragraph 17.

18. Denied.

19. UP denies the challenged charge is paid by OPPD. The remainder of Paragraph 19 alleges facts that UP denies because it lacks knowledge or information sufficient to form a belief as to their truth and states legal arguments to which no response is required. To the extent a further response is required, UP denies the remaining allegations in Paragraph 19.

20. Paragraph 20 states a legal conclusion to which no response is required. To the extent a response is required, UP denies the allegations in Paragraph 20.

21. Paragraph 21 states a legal argument to which no response is required. To the extent a response is required, UP denies the allegations in Paragraph 21.

22. Paragraph 22 states a legal conclusion to which no response is required. To the extent a response is required, UP denies the allegations in Paragraph 22.

23. Paragraph 23 states a legal conclusion to which no response is required. To the extent a response is required, UP denies the allegations in Paragraph 23.

24. Paragraph 24 states a legal argument to which no response is required. To the extent a response is required, UP denies the allegations in Paragraph 24.

25. Paragraph 25 states a legal conclusion to which no response is required. To the extent a response is required, UP denies the allegations in Paragraph 25.

The unnumbered paragraph on page 7 of the Complaint states legal conclusions and requests for relief to which no response is required. To the extent a response is required, UP denies the allegations and denies that OPPD is entitled to any relief.

DEFENSES

1. The challenged charge runs only against railroads and is not assessed against OPPD. Therefore, OPPD cannot challenge the charge.

2. The STB has no jurisdiction over voluntary offerings by a carrier physically serving an industry to perform switching service for loading or unloading on behalf of another carrier on shipments having an immediately preceding or following line-haul movement via the other carrier.

3. The STB has no jurisdiction over the challenged charge because OPPD makes no allegation of anticompetitive conduct within the meaning of the STB's competitive access rules.

4. The STB has no jurisdiction over the challenged charge because the charge covers transportation UP provides BNSF when BNSF agrees to pay the challenged charge.

5. The STB lacks jurisdiction to consider the Complaint because UP lacks market dominance with respect to the traffic at issue.

6. Assuming, *arguendo*, that the challenged charge could be considered a rate assessed against OPPD, the traffic at issue moves pursuant to the terms of a contract between OPPD and a rail carrier. The STB therefore lacks jurisdiction to consider the reasonableness of any rate under which the traffic moves.

7. Assuming, *arguendo*, that the challenged charge could be considered a rate assessed against OPPD, the challenged charge is reasonable.

8. Assuming, *arguendo*, that the challenged charge may properly be found to be unreasonable, any remedy should not run against UP, because UP is not responsible for passing on to OPPD a portion of the challenged charge to BNSF, and OPPD has not paid the challenged charge to UP.

Respectfully submitted,

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August 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2022, I caused a copy of the foregoing document to be served by email on all parties of record in STB Docket No. NOR 42173.

/s/ Michael L. Rosenthal