

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

305171

ENTERED
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August 22, 2022
Part of
Public Record

Omaha Public Power District

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Complainant,

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v.

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Docket No. NOR 42173

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Union Pacific Railroad Company

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Defendant

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**REPLY TO UNION PACIFIC RAILROAD COMPANY'S
MOTION FOR PROTECTIVE ORDER**

Complainant the Omaha Public Power District hereby files its Reply in opposition to Defendant Union Pacific Railroad Company's ("UP") Motion for Protective Order ("Motion") filed on August 1, 2022, in this proceeding. For all the reasons set forth hereinbelow, the Motion should be dismissed without prejudice, or denied, or the Board should allow *both* parties (not just UP) to obtain discovery of information and documents bearing on certain threshold legal issues.

I. BACKGROUND

On May 2, 2022, OPPD filed a Pre-filing Notice of Complaint in this Docket pursuant to 49 C.F.R. §1111.10(a). Eighty-eight days later, on July 22, 2022, OPPD filed its Complaint. At the same time, OPPD served its First Requests for Admissions, Interrogatories, and Requests for Documents ("First Discovery Requests") on UP. These discovery requests gave UP another 30 days to submit any objections and responses and to begin production of responsive materials to OPPD. Nevertheless, UP's Motion for Protective Order asks the Board to rule OPPD is not entitled to *any*

discovery from UP on *any* issues in this case until (1) OPPD responds to “UP’s discovery requests,” which refers to UP’s First Set of Discovery Requests to Complainant (“UP’s First Requests”),¹ (2) UP determines that OPPD’s production is complete, (3) UP reviews the information and materials provided by OPPD and decides whether to file a motion to dismiss the Complaint at a time of UP’s choosing, which UP says could be within 20 days of its decision that OPPD has completed its production,² and (4) the Board rules on any motion to dismiss that UP elects to file.

II. ARGUMENT

A. UP’s Motion is Premature

The Board should first reject the Motion because it is premature. Under 49 C.F.R. § 1114.21(c), on which the Motion is expressly based, “[a] protective order under this paragraph may only be sought after, or in conjunction with, an effort by any party to obtain relief under 1114.24(a), 1114.26(a) or 1114.31.” Here, OPPD served its discovery on UP on July 22, 2022. As of August 1, 2022, when UP filed the Motion UP had not yet provided any objections or responses to OPPD’s discovery pursuant to § 1114.26(a).³ The Motion is therefore premature on its face and should be rejected or dismissed without prejudice for UP to re-file after it has served its objections and responses to OPPD’s First Discovery Requests and the parties engage in further discussions over discovery and possibly reaching agreement on how to proceed without Board intervention.

B. Board Precedent Does Not Support Staying OPPD’s Discovery of Information From UP

The cases cited by UP in its Motion do not support it. In the first place, it is telling that none

¹ UP’s Motion states it is limited to UP’s First Requests, served on July 25, 2022. Motion at 4. UP served a more robust second set of discovery requests on OPPD on August 11, 2022, but OPPD presumes that these second requests are not part of the Motion.

² *Id.*

³ The other two provisions are inapplicable, since OPPD has not yet sought to depose any UP personnel, and OPPD has not yet filed a motion to compel production of any documents.

of the cases UP cites are instances where the Board stayed discovery in a rail rate reasonableness case at all, let alone stay the ability of the complainant to engage in any discovery from defendant while the defendant collected information and decided whether it wanted to file a motion to dismiss the complaint. Rather, UP cobbles together a variety of disparate proceedings that are not close to the facts of this proceeding. In *Philadelphia Belt Line RR Co. v. Consolidated Rail Corporation, et al*,⁴ for example, the defendant had already responded to discovery from the complainant before it filed a motion to dismiss and the Board decided to stay further discovery pending consideration of the motion.⁵ Similarly, in *DHX, Inc. v. Matson Navigation Co. and Sea Land Service, Inc.*,⁶ the parties had also engaged in discovery for nearly two months before one of the defendants filed a motion to dismiss and Secretary of the Board stayed further discovery to allow the Board to consider the motion and responsive pleadings.

Nor does the Motion raise “significant concerns about both the substantive and procedural soundness of the complaint and questions about the scope of this case.”⁷ The Motion raises no procedural issues warranting dismissal, because there are none. As for the Motion’s relationship to the substance and scope of the Complaint, in Docket No. 42006, *OPPD v. UP*, the Board ultimately dismissed OPPD’s complaint for the *sole* reason that OPPD and BNSF Railway’s (“BNSF”) predecessor in interest shared payment of the rate then-in effect for UP to switch trains to and from

⁴ STB Docket No. 32802 (Served March 12, 1996) (1996 WL 104370 (S.T.B.)).

⁵ *See, Id.* at 1 (“Conrail responded to PBL interrogatories . . .”).

⁶ STB Docket No. WCC-105 (Served June 6, 2022).

⁷ Docket No. 40519, *Zoneskip, Inc. v. United Parcel Service, Inc. and United Parcel Service of America, Inc.* (served May 28, 1991) (1991 WL 89759 (I.C.C.) at *2. In *Zoneskip*, the complaint apparently had both procedural and substantive defects, but significantly, it also directly related to an ongoing proceeding before the Interstate Commerce Commission that potentially affected “the procedural disposition and/or resolution of the merits of this case.” *Id.* Similarly, in Docket No. 42105, *Dairyland Power Cooperative v. Union Pacific Railroad Company* (served April 29, 2008), the substance of the unreasonable practice complaint (mileage-based fuel surcharges) related to a recent proceeding that related directly to the rail practice complained of.

OPPD's North Omaha Power Station ("NOPS").⁸ This being the case, the Board determined that the rate and service were part of the rail transportation contract then in effect and so it did not have jurisdiction over the reasonableness of the rate established by UP in its tariff. The Board did not address any other arguments for dismissal raised by UP, a fact UP acknowledges in its Motion.⁹ The current Complaint explains that the former arrangement is not in place, stating "[n]o provision of the rail transportation contract between OPPD and BNSF obligates OPPD to pay BNSF any portion of the rate charged by UP under the circular for the movement of OPPD trains to and from the Gibson Yard Interchange and NOPS."¹⁰ In addition, "UP has had full knowledge that OPPD has, since January 1, 2021 paid, and is paying, 100% of the rate"¹¹ Clearly, the grounds the Board relied upon for dismissal of OPPD's complaint in 1997 no longer exist. Because the circumstances leading to the Board's dismissal of the 1997 case are not applicable to this case, as shown by the face of the Complaint, it is highly unlikely UP's contemplated motion to dismiss on these grounds would prevail. There is therefore no justification for a determination that all discovery (that OPPD seeks from UP) must be stayed pending UP's discovery of the details of the new contract arrangement between BNSF and OPPD because "UP believes OPPD's new complaint should be dismissed on the same jurisdictional grounds as OPPD's prior complaint."¹²

C. UP Should Not be Rewarded for Doing Nothing Regarding Discovery in this Case after OPPD Filed its Pre-Filing Notice on May 2, 2022

UP's claims that its responses to UP's discovery requests should be stayed because to do so will cause UP to incur costs and burden ring hollow. UP has had ample notice and opportunity to prepare to participate in discovery in this proceeding per the Board's procedural rules. Specifically,

⁸ Docket No. 42006 (Served October 17, 1977) at 2.

⁹ Motion at 4, note 2.

¹⁰ Complaint at 4, paragraph 8.

¹¹ *Id.* at 4, paragraph 10.

¹² Motion at 4.

in response to an Act of Congress that directed the Board to modify its procedures so as to expedite railroad rate cases,¹³ the Board in 2017 promulgated regulations in *Expediting Rate Cases* intended to streamline the discovery and case processes.¹⁴ This is the first case in which the rules have been applied. As part of its efforts to speed up cases, the Board added a new “pre-complaint period” triggered by a pre-filing notice submitted 70 days before a complaint could be filed.¹⁵ According to the Board, in addition to allowing the parties to engage in mediation¹⁶ “[t]he pre-filing notice would put parties on notice as to what they likely will need to produce in discovery and enable parties to begin many activities that typically would occur only after a complaint is filed. In this respect, the pre-complaint period could shorten the rate case schedule by lessening the need to parties to request extensions of time once discovery begins.” The rules also require the complainant to file a proposed Protective Order with the pre-filing notice.¹⁷ In compliance with these regulations OPPD filed its Notice of Intent to File a Complaint and a Motion for Protective Order on May 2, 2022. As noted above, the Complaint was not filed until July 22, 2022, thereby providing UP with 88 days to prepare to respond to discovery requests from OPPD.¹⁸ However, UP’s Motion reveals it did nothing to prepare for the discovery phase of this case over this nearly three-month time period, because UP complains it must now “begin” incurring costs, and “begin searching for and producing documents

¹³ Section 11 of the STB Reauthorization Act, Pub. L. No. 114-110, 129 Stat. 2228 (2015) directed the Board to “initiate a process to assess procedures that are available to parties in litigation before courts to expedite such litigation and potential application of such procedures to rate cases.”

¹⁴ Docket No. EP 733, *Expediting Rate Cases* (final rules served November 30, 2017) (*Expediting Rate Cases*).

¹⁵ 49 C.F.R. § 1111.1(a).

¹⁶ As stated in the Complaint, UP and OPPD briefly engaged in mediation pursuant to the Board’s rules but it was not successful.

¹⁷ 49 C.F.R. §1104.14(c).

¹⁸ Indeed, UP has had 118 days to prepare for and participate in discovery because OPPD gave UP 30 days to respond to OPPD’s First Discovery Requests, twice the time allotted under the Board’s regulations.

and information”¹⁹ Nor did UP respond to the Motion for Protective Order when it was filed, instead waiting until July 29, 2022 (ignoring the 20 days allowed by the Board’s rules) to propose changes to the proposed order that forced the parties to submit a Second Motion for Protective Order to the Board, thereby negating the first motion. UP’s decision to thumb its nose at the letter and spirit of the Board’s *Expediting Rate Cases* rules in this first case in which they have been applied should not now be rewarded by staying discovery because UP says for it to begin preparing and participating now would be costly and burdensome. For the Board to do so would unfairly extend the procedural schedule in this case to the detriment of OPPD, which is precisely what the Board was trying to prevent in *Expediting Rate Cases* at the direction of Congress.

D. Permitting UP to Obtain Discovery from OPPD While Preventing OPPD from Obtaining No Discovery from UP Would be Patently Unfair and Inefficient

The Board should not stay any discovery in this case. However, if the Board is considering granting such relief, then OPPD submits that it would be wrong, unfair, and inefficient for the Board to prevent OPPD from obtaining *any* discovery from UP while UP is permitted to obtain discovery of OPPD in order to conduct a fishing expedition for support for a potential motion to dismiss the Complaint. While UP says on the one hand that its First Requests “focus narrowly on OPPD’s contract with BNSF and payment of the charge OPPD challenges in its complaint,” UP also says that it intends to present “all available arguments” it believes support dismissal.²⁰ These include some or all of the arguments raised by UP in Docket No. 42006 that were not considered by the Board.²¹ It is readily discernable from UP’s First Discovery Requests, Motion, and Answer that, in addition to trying to argue that the challenged rate is part of a rail transportation contract between BNSF Railway

¹⁹ See UP Motion at 4.

²⁰ See Motion at 4, “UP will present all available arguments in its motion to dismiss.”

²¹ Motion, Exhibit G.

(“BNSF”) and OPPD--which is not the case--UP intends to argue at least all or some of the following:

1. That even though UP owns the only railroad track between BNSF’s Gibson Yard and the North Omaha Power Station, UP does not have “qualitative market dominance” over the traffic at issue under 49 U.S.C. §10707.²²
2. OPPD does not have standing to challenge the rate at issue because it is part of an alleged agreement between BNSF and UP whereby BNSF accepts liability to UP for the rate, which agreement UP further alleges is “voluntary.”²³
3. OPPD’s remedies are allegedly against BNSF, not 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.”²⁴
4. OPPD allegedly does not have standing because the services UP provides under the challenged rate are “on behalf of BNSF” pursuant to the aforementioned alleged agreement, and not OPPD.²⁵
5. OPPD allegedly has no standing because UP claims the charge is initially paid by BNSF to UP even though OPPD ultimately pays 100% of the amount.

These potential arguments and claims do not come as a surprise to OPPD in light of the prior litigation and the discussions and correspondence between the parties that preceded the filing of the Complaint. Consequently, a number of OPPD’s First Discovery Requests to UP seek the production of information and documents from UP on these issues and potential claims.²⁶ These discovery requests include, but are not necessarily limited to, the following: Requests for Admission Nos. 1, 2, and 3; Interrogatories Nos. 1, 2, 3, and 4; and Request for Documents Nos. 1, 2, 3, 4, 5, 6, 7, and 8. OPPD notes that on August 18, 2002, it served two additional discovery requests on UP pertaining to its allegations concerning these potential legal claims.²⁷ If UP is permitted to seek responses to its

²² *Id.* at 2; Answer at 3, paragraphs 13, 15; *Id.* at 6, paragraph 5.

²³ *Id.* at 5, paragraphs 1, 2; *Id.* at 6, paragraph 4.

²⁴ *Id.* at 6, paragraph 8.

²⁵ *Id.* at 2, paragraphs 1, 4, 7, 10, 11.

²⁶ OPPD’s First Discovery Requests are Attachment 1 to UP’s Motion.

²⁷ A copy of OPPD’s Second Requests for Production of Documents is attached as Exhibit 1 to this Reply.

July 25, 2022 “jurisdictional discovery requests,”²⁸ to support a motion to dismiss that UP says will also “present all available arguments,” then OPPD is entitled to the comparable discovery it seeks from UP on these issues and arguments, and OPPD is entitled to utilize the material it has sought from UP in a response to any motion to dismiss UP might eventually file. Proceeding with all relevant discovery being sought on these issues at once would be more efficient than the case being further stayed while OPPD obtains discovery of relevant material from UP after it files its motion. Allowing the parties to proceed with discovery in the normal course will also save the Board from having to parse whether some piece of information is potentially relevant to UP’s possibly forthcoming motion to dismiss. The Board should reject UP’s attempt “to have its cake and eat it, too.” The blatantly one-sided and inefficient approach UP advocates must therefore be rejected for these reasons, as well.

III. CONCLUSION

For all the reasons set forth in this Reply, the Motion should be dismissed without prejudice or denied in its entirety, and all discovery should proceed in this case pursuant to the Board’s procedural rules. If the Board is considering limiting discovery at this stage of the case, both parties should be entitled to obtain discovery from the other party of information and documents pertaining to their respective claims and allegations on the threshold legal issues discussed in the Motion and this Reply.

Respectfully submitted,



Thomas W. Wilcox
Law Office of Thomas W. Wilcox, LLC
1629 K. Street NW, Suite 300
Washington, D.C. 20006
202-508-1065
tom@twilcoxlaw.com

²⁸ Motion at 4.

Stephen M. Bruckner
Robert W. Futhey
Fraser Stryker PC LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102
402.978.5225
sbruckner@fraserstryker.com

Attorneys for Omaha Public Power District

August 22, 2022

EXHIBIT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Omaha Public Power District	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42173
	)	
Union Pacific Railroad Company	)	
	)	
Defendant	)	
	)	

**COMPLAINANT’S SECOND REQUESTS
FOR PRODUCTION OF DOCUMENTS TO DEFENDANT**

Complainant Omaha Public Power District (“OPPD”), pursuant to 49 C.F.R. Part 1114.30, hereby submits its Second Requests for Production of Documents to Defendant Union Pacific Railroad Company (“UP”).

Copies of documents responsive to OPPD’s Second Requests for Production of Documents should be delivered to the Law Office of Thomas W. Wilcox, LLC, 1629 K. Street NW, Suite 300, Washington, D.C. 20006, within fifteen (15) days from the date hereof, unless otherwise agreed by the parties. OPPD is prepared to cooperate with Defendant to facilitate the expeditious production of documents with the minimum practical burden.

I. DEFINITIONS

The following defined terms are used herein:

1. “BNSF” means BNSF Railway Company.
2. “OPPD route(s)” means the railroad line segments over which UP moves or reasonably could move loaded and empty coal trains between Origin and Destination.

3. “OPPD train(s)” or “OPPD service” means the trains containing loaded or empty coal cars moving between Origin and Destination over the OPPD route(s).

4. “Challenged Rate” means the rate for common carrier rail transportation service that is the subject of OPPD’s Complaint in this proceeding including any such rate that may be established after the date hereof.

5. “UP Lines” means rail lines over which UP conducts train operations including both lines owned by UP and lines owned by other railroads or entities over which UP has trackage or operating rights, together with all branch lines and spur tracks that connect with these lines. Where information is requested for trains or traffic moving on UP Lines, the request includes information for trains/traffic moving between initial origin and final destination, regardless of whether the initial origin or final destination are located on the specified lines.

6. “UP” means Union Pacific Railroad Company, its present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessor, parent and/or holding companies, subsidiaries, or any of them, and all other persons acting (or who have acted) on its behalf.

7. “Defendant” means UP as defined in this section.

8. “Destination” means OPPD’s North Omaha Power Station (“NOPS”) located at Omaha, Nebraska.

9. “Document(s)” means all writings or visual displays of any kind, whether generated by hand or electronic means including without limitation, photographs, lists, memoranda, reports, notes, letters, electronic mail, phone logs, contracts, drafts, workpapers, computer print-outs, electronic data, telecopies, newsletters, notations, books, affidavits, statements (whether or not verified), speeches, summaries, opinions, studies, analyses,

evaluations, statistical records, proposals, treatments, outlines, any electronic or mechanical records or representations (including physical things such as, but not limited to, computer disks or drives), and all other materials of any tangible medium or expression, in UP's current or prior possession, custody or control. A draft or non-identical copy is a separate document within the meaning of this term.

10. "Identify," when referring to a document, means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and/or recipient(s).

11. "Identify," when referring to information, means to list or produce documents containing the specified information.

12. "Origin" means the interchange between UP and BNSF in the vicinity of Omaha, Nebraska at BNSF's Gibson Yard ("Gibson Yard Interchange") that is described in UP's "UP Reciprocal Switching Circular UP 8005 F" (the "Circular"), a copy of which is attached as Exhibit A to OPPD's Complaint.

13. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions or other legal entities, as the case may be.

14. "Possession, custody, or control" refers to and includes documents actually within the possession, custody or control of UP or any other person acting for or in concert with UP; and refers to and includes documents prepared by, obtained, or placed in the possession, custody, or control of any such person within the scope of his or her duties or relationship to UP; and further refers to and includes documents having been placed in the temporary possession, custody, or control of any third party by any of the foregoing or UP. Documents are deemed to be in the possession, custody, or control of UP if UP has the right to secure the document, or a copy

thereof, from another person or entity, whether public or private, having such actual physical possession, custody, or control thereof.

15. “Price” or “prices” mean the price per ton or other unit of measure, and whether it is f.o.b. or f.a.s. a railroad car, vessel, destination, port or other conveyance.

16. “Related,” “related to,” and “relating to” mean and include making a statement discussing, describing, referring to, reflecting, explaining, analyzing, or in any way pertaining to, in whole or in part, the subject matter of the Interrogatory or Request.

17. “STB” means the U.S. Surface Transportation Board.

18. “And,” “or,” and/or “each” shall be construed in the disjunctive or conjunctive as necessary in order to bring within the scope of each Interrogatory or Request all responsive information or documents which otherwise might be construed as outside the scope of the Interrogatory or Request. All use of the masculine gender shall be deemed to include the feminine.

II. INSTRUCTIONS

UP is requested to conform to the following instructions in responding to these Requests. Each paragraph shall operate and be construed independently. Unless otherwise indicated, no paragraph limits the scope of any other paragraph.

1. If the production of any responsive document is withheld under 49 C.F.R. § 1114.30(a)(1) on the basis of a claimed privilege or attorney work product, then for each such answer or document, provide the following information: its date, type (e.g., letter, meeting notes, memo, etc.), author (note if author is an attorney), addressee(s)/recipient(s) (note if addressee(s) or recipient(s) is an attorney), general subject matter, and basis for withholding the information. OPPD is willing to negotiate the scope of any privilege log requested in this instruction.

2. If the production of any responsive document is withheld on claimed grounds other than privilege or attorney work product, provide the information described in Instruction No. 2 and state with specificity the basis for such withholding.

3. Defendant is requested to supplement its production in the manner provided in 49 C.F.R. Part 1114.29.

4. All documents should be produced or made available for inspection in the form in which they are retained by UP in the usual course of business (*e.g.*, if the documents are in a file, the file containing the documents should be produced), unless otherwise agreed by OPPD and UP.

5. Please organize or number the documents produced in such a manner that OPPD readily may determine which documents are being produced in response to each specific Request for Production. If no document is produced in response to any specific Request, please so indicate in the response.

6. OPPD reserves the right to file supplemental or follow-up Interrogatories or Requests for Production, and pursue other discovery, as necessary or appropriate.

III. DOCUMENT PRODUCTION REQUESTS

Request for Production 6A

Please produce all documents, including all correspondence between UP and BNSF, dating from January 1, 2020 to the present supporting or relating to UP's allegations that it "assess (sic) BNSF a charge of \$295 as reflected in the Circular," and that UP "invoices BNSF, not OPPD, for charges incurred by BNSF when UP provides switching services for OPPD's coal unit trains"

Request for Production 7A

Please produce all invoices submitted to BNSF by UP for the “charge of \$295 as reflected in the Circular” between January 1, 2020 to the present and copies of all checks or other forms of payment made to UP by BNSF in response to such invoices.

Respectfully submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox".

Thomas W. Wilcox
Law Office of Thomas W. Wilcox, LLC
1629 K. Street NW, Suite 300
Washington, D.C. 20006
202-508-1065
tom@twilcoxlaw.com

Stephen M. Bruckner
Fraser Stryker PC LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102
402.978.5225
sbruckner@fraserstryker.com

Attorneys for Omaha Public Power District

August 18, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August 2022, I served a copy of the foregoing Reply to Defendant Union Pacific Railroad Company's ("UP") Motion for Protective Order by electronic mail upon the following counsel for Union Pacific Railroad Company:

Michael Rosenthal
Covington Burling
mrosenthal@cov.com

/ss/ Thomas W. Wilcox
