

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
September 12, 2022
Part of
Public Record

OMAHA PUBLIC POWER DISTRICT,

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

NOR 42173

**UNION PACIFIC RAILROAD COMPANY'S
REPLY TO OPPD'S MOTION TO COMPEL**

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On July 22, 2022, Omaha Public Power District (OPPD) filed a complaint challenging the charge Union Pacific Railroad Company (UP) assesses BNSF Railway Company (BNSF) for switching service UP voluntarily provides on BNSF's behalf between the point where UP's tracks meet BNSF's tracks and OPPD's North Omaha Power Station in Omaha, Nebraska. That same day, OPPD served UP with a massive set of discovery requests: 138 document requests, 22 interrogatories, and 4 requests for admissions. UP promptly filed a motion seeking to suspend its obligation to respond until the Board addresses the viability of OPPD's complaint. As UP explained, OPPD previously filed a similar complaint that was dismissed on jurisdictional grounds, but only after the parties had engaged in several months of intensive, costly discovery. *See Omaha Pub. Power Dist. v. Union Pac. R.R.*, Docket No. 42006 (STB served Oct. 17, 1997). OPPD's motion to compel confirms history is repeating itself. The Board should not consider the motion unless it first determines the complaint is viable. If the Board considers the motion now, Board staff should convene a conference with the parties to attempt to narrow the issues, *see* 49 C.F.R. § 1114.31(a)(3), or simply deny the motion for the reasons discussed below.

A. UP's General Responses to OPPD's First Requests

UP's response to OPPD's first set of discovery requests states UP's intent not to begin the burdensome process of searching for and producing information and documents responsive to OPPD's 164 discovery requests before the Board rules on threshold issues presented in this case. The Board's dismissal of OPPD's prior complaint raises serious questions about the viability of OPPD's current complaint and the massive waste of UP, OPPD, and Board resources that would likely occur if discovery is not limited or paused.

OPPD is seeking to challenge a charge for movements of traffic that OPPD's own complaint alleges is covered by a rail transportation contract between OPPD and BNSF. *See* Compl. ¶ 6; 49 U.S.C. § 10709(c).¹ Additionally, UP assesses the charge to BNSF, not OPPD, and the charge applies to voluntary switching, not a regulated service. *See* 49 U.S.C. § 11102(c). The Board should suspend discovery relating to non-threshold issues, including its consideration of OPPD's motion, until it decides whether OPPD's complaint is viable.

UP is trying to strike an appropriate balance pending a Board ruling on its motion for a protective order. UP provided timely responses and objections to OPPD's 164 initial discovery requests. UP also conferred in good faith with OPPD regarding those responses and objections. When the parties could not resolve all their disagreements in the first conference, UP offered to work with OPPD, so OPPD could avoid filing a motion to compel before knowing whether its case could even proceed. UP suggested the parties' counsel confer to discuss the options under Board rules, including potentially consulting with the liaison appointed by the Board pursuant to

¹ *Cf. Ariz. Elec. Power Coop., Inc. v. BNSF Ry.*, NOR 42113 (STB served Apr. 23, 2009) (holding a portion of AEPCO's rate reasonableness case in abeyance pending court determination whether a contract covers the traffic at issue).

49 C.F.R. § 1111.1(b). Rather than accept UP’s invitation to cooperatively discuss methods of reducing discovery burdens, OPPD filed its motion to compel the day after the meet and confer.

As part of its effort to strike an appropriate balance, UP is also moving forward with discovery regarding threshold issues. Promptly after OPPD filed its complaint, UP served OPPD with eight narrowly-tailored discovery requests regarding threshold issues.² UP also agreed to produce information and documents responsive to 17 discovery requests that OPPD specifically identified as related to threshold issues.³ UP is proceeding with discovery, but the circumstances call for a phased approach that focuses first on the complaint’s viability.

B. Specific Interrogatories

1. Interrogatories Nos. 5, 9, and 10

OPPD’s Interrogatories Nos. 5 and 9 request information about UP facilities “located on UP lines in Nebraska.” OPPD’s Interrogatory No. 10 requests information about UP affiliates that provide “services to UP in Nebraska.” OPPD’s Interrogatories Nos. 5, 9, and 10 request information regarding UP facilities and affiliates in an overbroad geographic area. As a result, responding to the requests as written would be unduly burdensome and require production of information that is neither relevant nor reasonably calculated to lead to the discovery of

² UP subsequently served more extensive requests related to potential stand-alone cost issues with its Answer, as required by Board rules. *See* 49 C.F.R. § 1111.5(f). UP would not expect OPPD to produce information and documents responsive to its discovery requests unless UP is required to produce material responsive to OPPD’s non-threshold-related discovery requests.

³ *See* UP’s Response to OPPD’s Reply at 1 (Aug. 23, 2022). OPPD incorrectly states that UP “unilaterally chose[]” the requests to which it agreed to produce responsive information. Motion to Compel at 2. UP agreed to produce information responsive to the set of requests specifically identified by OPPD. *See* OPPD’s Reply to Union Pacific Railroad Company’s Motion for Protective Order at 7–8 (Aug. 22, 2022).

OPPD’s motion to compel does not involve any of the 17 requests that OPPD identified as related to threshold issues, so suspending consideration of OPPD’s motion would not affect OPPD’s ability to address threshold issues.

admissible evidence. Although UP objected to providing information relating to all of “Nebraska,” UP responded that it would produce information regarding facilities “in the vicinity of Omaha, Nebraska” and affiliates that provide services “in the vicinity of Omaha, Nebraska.”

UP’s objections are fully justified. OPPD’s complaint involves the charge for UP’s movements of coal over approximately 8.6 miles of UP track in Omaha, Nebraska. *See* Compl. ¶ 4. However, in many instances, OPPD’s discovery requests seek documents and information relating to UP facilities and operations across all of Nebraska. To place the scope of OPPD’s requests in perspective, the 8.6-miles route used by the issue traffic is less than 1% of the 1,005 route miles UP operates in Nebraska, *see* UP Annual Report R-1, Sch. 702 (2021). UP operates two yards in the vicinity of Omaha, but it operates 15 yards throughout Nebraska, including its massive Bailey Yard in North Platte, approximately 280 west of Omaha. In other words, OPPD is seeking discovery relating to nearly one thousand miles of UP lines and more than a dozen UP yards that are not used to handle the issue traffic.

Although OPPD’s motion presents the geographic issue in the context of Interrogatories Nos. 5, 9, and 10 (because OPPD’s motion addresses only interrogatories), UP’s responses to the interrogatories have significant implications for its responses to other OPPD discovery requests. Although Interrogatory No. 5 requests just the “location and name” of each “intermodal terminal, Automotive Distribution Center, bulk transfer facility, or yard” located on UP lines in Nebraska, OPPD’s Request for Production No. 98 requests much more extensive information for *each facility identified in response to Interrogatory No. 5*:

Request for Production No. 98: For each intermodal terminal, Automotive Distribution Center, bulk transfer or yard facility located on UP Lines in Nebraska (as identified in response to Interrogatory No. 5), please provide the following:

- a. Documents containing descriptions of the existing facilities;

- b. Documents showing the track layout, the length of each track and the ownership of each track;
- c. Copies of all agreements (including amendments and supplements) between UP and any other entity pertaining to services provided by such entity and charges incurred by UP for such services from 2019 to the present;
- d. Copies of all invoices, bills, etc. (including all supporting documents and data) received by UP for services provided from 2019 to the present;
- e. Document sufficient to show the services that UP or any other entity provides at each facility;
- f. Documents sufficient to show the components (e.g., land, track, specific buildings, loading or unloading facilities, etc.) that are owned and/or operated by UP or by any other entity. In the event that an entity other than UP owns and/or operates any identified facility, please produce documents sufficient to show any applicable lift or other charges incurred by UP for such services; and
- g. Documents sufficient to show the security procedures and measures employed and the entity responsible for providing and paying for security.

OPPD's Request for Production No. 99 requests even more detailed information for *each yard identified in response to Interrogatory No. 5*, including information about each industrial switch job working in each yard, and each local train that originates or terminates in each yard:

Request for Production No. 99: For each yard identified in Interrogatory No. 5, please produce documents sufficient to show:

- a. The type of yard, (i.e., electronically controlled hump yard or flat switch yard);
- b. The number of shifts operated at each yard, and the average number of cars handled over each yard per day;
- c. The yard layout, yard signaling, yard switching, and the yard connection to mainline track;
- d. The average number of hazardous material cars handled at each yard on a daily basis that by-pass the hump;

- e. The scheduled switch crew assignments on a daily basis (including the name or designation of each assignment) and the respective duties of each assignment (e.g., switching job, bowl job, hump job, industrial job, etc.);
- f. For each of the switch assignments identified in response to subpart e above, the typical number of switch crew members and the number and type of locomotives assigned to each switch service; and the typical number of hours worked by switch crews in performing their assigned tasks;
- g. For each individual industrial switch job identified in response to part (e), above:
 - i. The name or designation of each individual industrial switch job;
 - ii. The number of crew members assigned to each identified industrial switch job;
 - iii. Number and type of locomotives assigned to each identified industrial switch job;
 - iv. The industries served by each identified industrial switch job; and
 - v. The frequency of service of each identified industrial switch job.
- h. For each Local Train, that originates or terminates in each of the yards:
 - i. UP's train identification or designation of each Local Train;
 - ii. The number of crew members assigned to each identified Local Train;
 - iii. The number of loaded and empty cars assigned to each Local Train;
 - iv. The trailing length of each identified Local Train;
 - v. The trailing weight of each identified Local Train;
 - vi. The number and type of locomotives assigned to each Local Train;
 - vii. The route of service for each identified Local Train, and if the Local or Road Train is a turn crew or straight-away crew;
 - viii. The industries served by each identified Local Train; and
 - ix. The frequency of service of each Local Train.

OPPD's Request for Production No. 108 also requests additional information about crew assignments, train assignments, and daily operations of *each yard identified in response to Interrogatory No. 5*.

Request for Production No. 108: For each UP rail yard referred to in Interrogatory No. 5, please produce documents sufficient to identify switch crew assignments, hump crew assignments, Local Train assignments, the number of cars handled over each hump yard per day and the number of hazardous material cars handled at each hump yard per day which by-pass the hump operation at each yard.

Many other OPPD Requests for Production request information and documents regarding UP Lines in "Nebraska." These requests are not (yet) subject to an OPPD' motion to compel, but UP would incur similar burdens gathering the requested information for areas of Nebraska outside the vicinity of Omaha. *See, e.g.*, OPPD Request for Production No. 11 (maximum permissible gross weight on rail); No. 24 (GIS data) No. 26 (track charts and condensed profiles); No. 32 (RTC modeling); No. 56 (maintenance-of-way plan and staffing); Nos. 83 & 84 (fiber optic cable); No. 93 (electrical connections used to provide power to devices).

As OPPD confirms in its motion, its only justification for requesting such information regarding the entire state of Nebraska is that it wants the flexibility to consider a stand-alone cost railroad (SARR) that reaches far beyond the 8.6 miles of track used when UP provides switching service for OPPD's coal on behalf of BNSF. *See* Motion to Compel at 4-5. Complainants have considerable flexibility in designing a SARR, but such flexibility "is not unlimited." *Az. Elec. Power Coop., Inc. v. BNSF Ry.*, NOR 42058, slip op. at 5 (STB served Aug. 20, 2002); *see also Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142, slip op. 25 (STB served Jan. 11, 2018) ("[W]hile a complainant has considerable flexibility in designing and locating the SARR and grouping traffic to take advantage of the traffic densities, it does not have unbridled discretion." (quoting *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 573, 589 (2003))).

“Any SAC presentation must necessarily be grounded in, and bounded by, what is reasonable and appropriate to serve the purpose of the SAC test.” *AEPCO*, slip op. at 5. A SARR that includes hundreds of miles of track and extensive facilities that are not actually used by the defendant railroad to handle the issue traffic would not “serve the purposes of the SAC test,” because the Board’s analysis of the revenues and costs associated with serving the issue traffic would be overwhelmed by revenues and costs associated with serving vast quantities of traffic with little or no connection to the issue traffic. This raises the potential for significant cross-subsidies. Relatedly, the Board has specifically expressed concern about the distorting effects including large amounts of cross-over traffic in SAC cases. *Rate Regulation Reforms*, EP 715, slip op. at 6–8 (STB served July 18, 2013). The inclusion of vast quantities of cross-over traffic would be a predictable consequence of using a SARR that includes hundreds of miles of track not used by the defendant railroad to handle traffic moving under the challenged rate.

Even if OPPD could theoretically elect to build a SARR that stretched to the boundaries of Nebraska, it is not plausible that it would take on that task in this case, which is centered on Omaha. Moreover, there is no plausible reason in the context of developing the stand-alone cost for handling the issue traffic for OPPD to replicate the complex yard and local operations that occur far outside Omaha, in Bailey Yard and other locations across Nebraska. UP should not bear the burden of producing extensive information OPPD almost certainly would not use. Responding to Interrogatory No. 9 would require UP to provide written accounts of its car handling processes for at least a dozen yards that are not used to handle the issue traffic. Responding to Interrogatory No. 10 would require UP to produce financial information about UP affiliates that may not provide any service to the issue traffic. If OPPD genuinely wants to review statewide information, it should bear the costs of UP’s discovery efforts.

To be clear, UP is not taking the position that discovery must be confined to information addressing only “the vicinity of Omaha, Nebraska.” UP did not object to producing system-wide data typically used in SAC cases. UP also did not object to producing state-wide data when Omaha-only data might be insufficient. *See, e.g.*, Request for Production No. 73 (documents regarding rail uses on UP lines); No. 74 (documents regarding ballast or sub-ballast used on UP lines); No. 81 (documents regarding microwave communications). UP objected to producing state-wide data only when producing such data would be unduly burdensome and irrelevant to any SARR that would be “appropriate to serve the purpose of the SAC test.”

During the parties’ discovery conference, UP told OPPD that it had adopted the limiting concept of “in the vicinity of Omaha, Nebraska,” in part because OPPD itself used that phrase in several of its discovery requests. *See* Request for Production No. 27 (diagrams of all tracks “in the vicinity of Omaha, Nebraska”); No. 134 (documents regarding connecting NOPS to BNSF “in the vicinity of Omaha, Nebraska”). UP acknowledged the parties would have to agree on a more specific definition of the appropriate geographic scope to guide the discovery process. UP told OPPD it was considering potential approaches and invited further discussion on the topic. OPPD’s response was to move to compel. The Board should deny OPPD’s motion with respect to Interrogatories Nos. 5, 9, and 10.

2. Interrogatories Nos. 11 and 12

OPPD’s Interrogatories Nos. 11 and 12 request information about whether and how UP calculates its current cost of equity capital (COE) or current weighted average cost of capital (COC). UP objected to the two interrogatories because they seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. When OPPD questioned UP’s objections during the parties’ discovery conference, UP explained that any UP calculations were not relevant because the Board has established standard methodologies for

calculating COE and COC when those figures are used in regulatory proceedings. *See, e.g., Railroad Cost of Capital—2021*, EP 558 (Sub-No. 25) (STB served Aug. 2, 2022).

OPPD claims the requested information could be relevant in this proceeding because it could be used to calculate the reasonableness of reciprocal switching charges if the Board were to adopt a methodology for calculating forced switching fees based on the *SSW Compensation* methodology. *See* Motion to Compel at 6. OPPD is incorrect in its assertions for at least two reasons. *First*, OPPD is not seeking forced switching, so methodologies that might be used to prescribe switch fees is not relevant here. UP provides switching to BNSF voluntarily, and OPPD’s complaint does not mention 49 U.S.C. § 11102, much less state a claim for forced switching. *Second*, the *SSW Compensation* methodology does *not* use the landlord railroad’s cost of capital, contrary to OPPD’s claim. The Board’s precedents in *SSW Compensation* cases, beginning with the *SSW Compensation* case itself, provides for use of the cost of capital “for the railroad industry.” *St. Louis Southwestern Ry. Co. Compensation—Trackage Rights*, 4 I.C.C.2d 668, 682 (1987); *see also CSX Corp. et al.—Control—Conrail Inc. et al.*, 4 S.T.B. 75, 78 (1999) (“The interest rental component, which compensates the owner for the cost of capital in its investment, is developed by applying the railroad industry’s cost of capital to the value of the line”); *New England Cent. R.R.—Trackage Rights Order—Pan Am S. LLC.*, FD 35842 slip op. at 12 (STB served Oct. 31, 2017) (“The interest rental component compensates the landlord for the cost of capital in its investment; it is developed by applying the railroad industry’s cost of capital to the value of the line.”). Accordingly, the Board should deny OPPD’s motion with respect to Interrogatories Nos. 11 and 12.

3. Interrogatories Nos. 18, 19, 20, and 21

a) Interrogatory No. 18

OPPD's Interrogatory No. 18 asks UP to "identify" and "describe in detail the substance of all . . . discussions" since January 1, 2019, between UP and representatives of equity and debit analysts or rating agencies relating to UP's replacement costs, UP's ability to meet the Board's revenue adequacy criteria, and UP's ability to earn returns equal to its COC or COE. UP objected to this interrogatory because it is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. OPPD's interrogatory is a fishing expedition.

OPPD claims the interrogatory "will provide data needed in any forward-looking maximum rate methodology currently utilized by the Board or currently being evaluated by the Board." Motion to Compel at 7. However, no maximum rate methodology requires as data "the substance of discussions" between UP and nonparties regarding UP's replacement costs, revenue adequacy, or returns. Moreover, OPPD can obtain potentially relevant data in ways that would impose much lower discovery burdens on UP. Specifically, OPPD requests replacement cost data directly in Interrogatory No. 17, and it can obtain data on UP's ability to meet the Board's revenue adequacy criteria from agency's revenue adequacy decisions and UP's Annual Report R-1. Finally, as discussed in connection with Interrogatories Nos. 11 and 12, UP's COC and COE are not relevant in this proceeding.

OPPD also claims the information it requests in Interrogatory No. 18 "will provide[] information needed to forecast revenue and volume changes." Motion to Compel at 7. But OPPD does not even attempt to explain how it could use *any* information about replacement costs, revenue adequacy, or returns could be used to "forecast revenue and volume changes,"

much less how it could use “the substance of discussions” between UP and analysts or rating agencies to develop revenue or volume forecasts.

In sum, OPPD offers no reasonable justification for requiring UP to undertake the burdensome task of scouring records and memories regarding interactions with analysts and rating agencies since January 1, 2019, to identify and describe discussions about replacement costs, revenue adequacy, and returns. The Board should deny OPPD’s motion with respect to Interrogatory No. 18.

b) Interrogatory No. 19

OPPD’s Interrogatory No. 19 asks whether UP’s executive compensation considers UP’s COC, COE, and earnings in relation to replacement costs. UP objected because the OPPD’s use of the term “executive” is vague, the requested information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and UP executive compensation policies are described in UP SEC filings, which are readily available to OPPD.

OPPD claims its use of “executive” is not vague and the information is relevant to *SSW Compensation* calculations. Motion to Compel at 8. If OPPD defines “executive” to mean the executives whose compensation is addressed in UP SEC filings, OPPD can obtain the requested information in those filings—specifically, UP’s Proxy Statements. Moreover, as discussed in connection with Interrogatories Nos. 11 and 12, UP’s COC and COE are not relevant to *SSW Compensation* calculations. The Board should deny OPPD’s motion with respect to Interrogatory No. 19.

c) OPPD Interrogatory No. 20

OPPD’s Interrogatory No. 20 asks for information about any projections UP has made since January 1, 2019 regarding “future annual revenues, costs, earnings, profits, operating ratios, return on investment, return on capital and/or return on equity for any time period(s)

subsequent to December 31, 2020.” UP objected because the interrogatory is overbroad, is unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

OPPD provides only a generic defense of its overbroad, burdensome request: OPPD claims that the requested information “will assist OPPD to develop and work with the many different forecasts required by the SAC methodology,” and “will also be utilized in applying the *SSW Compensation* methodology.” Motion to Compel at 9. OPPD does not explain how any of the requested information would be used in applying *SSW Compensation*. UP presumes OPPD is referring to information regarding UP’s COC and COE. However, as discussed in connection with Interrogatories Nos. 11 and 12, such information is *not* relevant in applying *SSW Compensation*.

OPPD also does not explain how any of the requested information bears on “forecasts required by the SAC methodology.” UP agreed to produce its *traffic volume and revenue forecasts* in response to OPPD’s Request for Production No. 22. During the parties’ discovery conference, UP told OPPD it was not aware of any SAC case in which projections of the types OPPD requested in Interrogatory No. 20 had been used by the Board, and producing the requested information could be very burdensome, especially in light of its nonexistent or minimal relevance. UP invited OPPD to take advantage of the meet and confer process by explaining how the requested information might be relevant, if it wanted UP to reconsider its objections. OPPD declined to explain its asserted need for the information and filed its motion to compel. The Board should deny OPPD’s motion with respect to Interrogatory No. 20.

d) Interrogatory No. 21

OPPD’s Interrogatory No. 21 asks UP to “describe the purposes and objectives of UP stock repurchases . . . UP has made since January 1, 2019.” UP objected to this interrogatory

primarily because the purposes and objectives of its stock repurchases are not relevant to this proceeding. In addition, Interrogatory No. 21 asks UP to produce additional information that would require it to undertake a special study—*e.g.*, a “description” of the impact of each repurchase on “the value or price of UP stock.”

OPPD claims that UP stock repurchases might be relevant to UP’s COC or COE, or to the Revenue Adequacy Constraint. Motion to Compel at 9. However, even assuming UP’s stock repurchases could be relevant, OPPD never explains why UP’s “purposes and objectives” for the stock repurchases could be relevant. OPPD could readily obtain data regarding the repurchases themselves from UP’s SEC filings. OPPD could thus calculate for itself any supposed “impact on UP’s COC and COE”—though information about UP’s COC and COE is itself irrelevant, as discussed in connection with Interrogatories Nos. 11 and 12. As for OPPD’s claim that UP’s motivations are relevant to the Revenue Adequacy Constraint because “it would allow OPPD to present a more accurate view of the financial condition of UP,” Motion to Compel at 9, OPPD fails to explain how information regarding UP’s “purpose and objectives” would provide “a more accurate view” of UP’s financial condition than actual financial data, much less how such information would affect any analysis under any maximum rate reasonableness methodology. The Board should deny OPPD’s motion with respect to Interrogatory No. 21.

CONCLUSION

The Board should not consider OPPD's motion unless it first determines the complaint is viable. If the Board considers the motion now, Board staff should convene a conference with the parties to attempt to narrow the issues, or simply deny the motion for the reasons set forth above.

Respectfully submitted,

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September 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 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