

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42173

OMAHA PUBLIC POWER DISTRICT v. UNION PACIFIC RAILROAD COMPANY

Decided: September 15, 2022

On July 22, 2022, Omaha Public Power District (OPPD) filed a complaint pursuant to 49 U.S.C. §§ 11701 and 11704 challenging the reasonableness of a charge assessed by Union Pacific Railroad Company (UP) under UP’s “UP Reciprocal Switching Circular” for the transportation of unit trains¹ of coal in shipper-supplied railcars to OPPD’s North Omaha Power Station in Omaha, Neb., from UP’s interchange with BNSF Railway Company (BNSF) at BNSF’s Gibson Yard located in Omaha (Gibson Yard Interchange) and the return of the empty unit trains by UP to the Gibson Yard Interchange.² (Compl. 1.) OPPD alleges that the charge is a common carrier rate for transportation and asks the Board to determine that the alleged rate is unreasonable, prescribe a reasonable rate, and award reparations for past overcharges.³

On August 1, 2022, UP filed a motion for a protective order pursuant to 49 C.F.R. § 1114.21(c), asking the Board to quash discovery requests served by OPPD and stay any further discovery by OPPD until (i) OPPD produces documents responsive to “certain narrowly-tailored, jurisdictional discovery requests” served by UP and (ii) the Board rules on a motion to dismiss that UP has not yet filed. (UP Mot. for Protective Ord. 3, 6-7.) UP asserts that there are serious questions about the substantive soundness of OPPD’s current complaint given the Board’s dismissal of a “similar” complaint filed by OPPD in 1997 that challenged a charge assessed by UP for switching service. (*Id.* at 2, 5 (discussing Omaha Pub. Power Dist. v. Union Pac. R.R., NOR 42006 (STB served Oct. 17, 1997), pet. to reopen denied (STB served Nov. 15, 2000)).) Additionally, UP argues that the Board has stayed discovery in similar circumstances in the past. (UP Mot. for Protective Ord. 5 (citing Zoneskip, Inc. v. United Parcel Serv., Inc., NOM 40519, slip op. at 2 (ICC served May 31, 1991); Dairyland Power Coop. v. Union Pac. R.R., NOR 42105, slip op. at 2 (STB served Apr. 29, 2008); DHX, Inc. v. Matson Navigation Co.,

¹ OPPD states that, in the context of the complaint, “unit train” means a train of between 135 and 152 shipper-provided aluminum railcars. (Compl. 1 n.1.)

² Pursuant to 49 C.F.R. § 1111.1(a), OPPD filed a pre-filing notice on May 2, 2022.

³ Under 49 C.F.R. § 1111.2(f), upon filing of a complaint, the complainant in a stand-alone cost case is required to certify that it has served its initial discovery requests on the defendant. While OPPD did not provide the Board with a certification, OPPD does state that it served its first discovery requests on UP “at the same time” it filed its complaint with the Board. (OPPD Reply 1.)

WCC-105, slip op. at 2 (STB served June 6, 2002); Phila. Belt Line R.R. v. Consol. Rail Corp., FD 32802, slip op. at 2 (STB served Mar. 12, 1996)).⁴

OPPD replied to UP's motion for a protective order on August 22, 2022. In its reply, OPPD argues that UP's motion should be dismissed without prejudice or denied, or if the Board is considering limiting discovery, the Board should allow both parties—not just UP—to obtain discovery on certain threshold issues. (OPPD Reply 1, 8.) According to OPPD, UP's motion is premature because UP failed to serve its objections and responses to OPPD's discovery requests before it filed its motion with the Board, as required by § 1114.21(c). (OPPD Reply 2.) OPPD further argues that the precedent cited by UP does not support staying discovery by OPPD, noting that none of the cases involved staying discovery in rail rate reasonableness cases and that none stayed discovery only by the complainant while the defendant considered whether to file a motion to dismiss. (*Id.* at 2-3.) OPPD also disputes that there are “significant concerns about both the substantive and procedural soundness of the complaint and questions about the scope of this case” because “the grounds the Board relied upon for dismissal of OPPD's complaint in 1997 no longer exist,” (*id.* at 3-4); argues that UP should not be rewarded by staying discovery after “[doing] nothing to prepare for the discovery phase” since OPPD filed its pre-filing notice in May 2022, (*id.* at 4-6); and claims that permitting discovery only from UP would be patently unfair and inefficient, (*id.* at 6-8).

On August 23, 2022, UP filed a response to OPPD's reply, expressing support for the Board permitting both parties to obtain limited discovery on certain threshold issues, while suspending other discovery requests. (UP Resp. 1.)⁵ OPPD responded by letter filed August 23, 2022, disagreeing with UP's characterization of its reply and clarifying that it “in no way suggested or proposed that any discovery in this case should be suspended.” (OPPD Letter 1.)⁶

On September 1, 2022, OPPD filed a motion to compel discovery pursuant to 49 C.F.R. § 1114.31(a), requesting that the Board order UP to “fully respond” to several interrogatories. (OPPD Mot. to Compel 1.) UP filed a reply to OPPD's motion on September 12, 2022.

UP's motion for a protective order will be denied without prejudice. The primary ground for UP's protective order motion is the potential impact on the case of a motion to dismiss that UP has not yet filed. Under these circumstances, UP's motion for a protective order is premature.⁷ See Zoneskip, NOM 40519, slip op. at 2 (staying discovery and deferring further

⁴ UP filed an answer to the complaint on August 11, 2022.

⁵ UP's response also states that it served its responses and objections to OPPD's initial set of document requests on August 22, 2022. (UP Resp. 1.)

⁶ While the Board's regulations do not generally permit replies to replies, see 49 C.F.R. § 1104.13(c), UP's response to OPPD's reply and OPPD's August 23, 2022 letter will be accepted in the interest of a more complete record.

⁷ As discussed above, OPPD also argues that UP's motion was premature under 49 C.F.R. § 1114.21(c), which provides that a motion for a protective order “may only be sought after, or in conjunction with, an effort by any party to obtain relief under § 1114.24(a),

action in the proceeding until the agency decided the pending motion to dismiss); Dairyland Power Coop., NOR 42105, slip op. at 2 (granting a protective order where a “motion to dismiss raise[d] issues that may affect both the procedural schedule in these matters and the scope of discovery”); DHX, WCC-105, slip op. at 2 (suspending the procedural schedule “[g]iven that a decision on the motion to dismiss may affect the scope of discovery”); Phila. Belt Line, FD 32802, slip op. at 2 (suspending the procedural schedule and all discovery until the Board ruled on a pending motion to dismiss). UP states that it does not intend to begin searching for or producing information and documents responsive to OPPD’s discovery requests until the Board rules on the “threshold issues presented in this case,” (UP Reply 3; see also UP Resp. 1), but the Board’s regulations do not provide for the automatic stay of discovery upon the filing of a motion. In light of the denial of UP’s motion for a protective order, the parties are directed to meet and confer on the discovery issues raised in OPPD’s motion to compel and inform the Board by September 19, 2022, whether there are any outstanding issues that cannot be resolved by the parties.⁸

It is ordered:

1. UP’s response to OPPD’s reply and OPPD’s August 23, 2022 letter are accepted into the record.
2. UP’s motion for a protective order is denied without prejudice.
3. OPPD and UP are directed to meet and confer on the discovery issues raised in OPPD’s motion to compel and inform the Board by September 19, 2022, whether there are any outstanding issues that cannot be resolved by the parties.
4. This decision is effective on its service date.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

§ 1114.26(a), or § 1114.31.” UP filed its motion for a protective order on August 1, 2022, and served its written responses and objections three weeks later on August 22, 2022. (UP Resp. 1.) In light of the determination that UP’s motion for a protective order is premature given the lack of a motion to dismiss, this decision does not address whether § 1114.21(c) would provide an independent basis for resolving the motion.

⁸ The procedural schedule for motions to compel set forth in 49 C.F.R. § 1114.31(a), including the determination of whether to convene a conference with the parties, will continue after the parties inform the Board of any unresolved discovery issues.