

SERVICE DATE – OCTOBER 3, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42173

OMAHA PUBLIC POWER DISTRICT v. UNION PACIFIC RAILROAD COMPANY

Decided: October 3, 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 the “UP Reciprocal Switching Circular” for the transportation of unit trains¹ of coal in shipper-supplied rail cars to OPPD’s North Omaha Power Station in Omaha, Neb., from UP’s interchange with BNSF Railway Company (BNSF) at BNSF’s Gibson Yard in Omaha (Gibson Yard Interchange) and the return of the empty unit trains by UP to the Gibson Yard Interchange. (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.

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 had not yet filed.² (UP Mot. for Protective Ord. 3, 6-7.) OPPD replied to UP’s motion for a protective order on August 22, 2022, to which UP responded on August 23, 2022,³ and OPPD, in turn, responded by letter filed the same day.

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 replied to OPPD’s motion on September 12, 2022.

By decision served on September 15, 2022, UP’s motion for a protective order was denied without prejudice. In light of the denial of UP’s motion for protective order, OPPD and UP were directed to meet and confer on the discovery issues raised in OPPD’s motion to compel and inform the Board whether there were any outstanding issues that could not be resolved by

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

² UP filed an answer to the complaint on August 11, 2022.

³ UP states that it served its responses and objections to OPPD’s initial set of document requests on August 22, 2022. (UP Resp. 1.)

the parties. Omaha Pub. Power Dist. v. Union Pac. R.R., NOR 42173, slip op. at 2-3 (STB served Sept. 15, 2022). On September 19, 2022, OPPD, with the concurrence of UP, filed a response indicating that the parties continue to be in dispute over UP's responses and objections to Interrogatory Nos. 11, 12, 18, 20, and 21, but that they were amenable to a conference with Board staff to attempt to further narrow the issues.⁴ (OPPD Letter 2, Sept. 19, 2022.) Board staff convened a conference with the parties on September 26, 2022. At the conference, the parties agreed to continue to work to resolve their dispute with respect to Interrogatory No. 20, leaving Interrogatory Nos. 11, 12, 18, and 21 to be addressed in this decision.

In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., FD 35743, slip op. at 8 (STB served Sept. 23, 2014). Further, it "is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2). Under 49 C.F.R. § 1114.21(c), however, discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought. For the reasons discussed below, OPPD's motion will be granted in part.

Interrogatory Nos. 11 and 12. In Interrogatory No. 11, OPPD requests that UP state whether it has calculated its current cost of equity capital (COE) or current weighted average cost of capital (COC) during the period of January 1, 2019, through the present, and if so, identify:

(a) the COE and/or COC values that UP calculated and the periods (including future periods) for which the values were calculated; (b) the methodology, assumptions and inputs used to determine the values; (c) whether and how UP utilized the values that were calculated; and (d) any adjustments that UP made in calculating and/or utilizing the values.

(OPPD Mot. to Compel 5.) Interrogatory No. 12 requests that UP "describe [its] methodology and inputs for calculating [its] COE and COC for the time periods specified in response to the previous Interrogatory" and "describe any adjustments that were made to the COE and COC values in performing the calculations." (Id. at 6.) UP objected to both interrogatories on the basis that they seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. (Id. at 6; UP Reply 10.)

In its motion to compel, OPPD argues that the information sought is "clearly relevant" to the proceeding and would lead to the discovery of admissible evidence. (OPPD Mot. to Compel 6.) In support, OPPD references paragraph 23 of its complaint, in which OPPD alleges

⁴ On September 23, 2022, UP filed a first motion to compel, requesting that the Board order OPPD to answer interrogatories served August 11, 2022, and to respond to related requests for production of documents served on July 25, 2022, and August 11, 2022. UP's motion will be addressed separately.

that UP's charge is "excessive and unreasonable under the methodology for determining the reasonableness of reciprocal switch charges" proposed by the Board in Petition for Rulemaking to Adopt Revised Competitive Switching Rules, EP 711 (Sub-No. 1) (STB served July 27, 2016), which OPPD states is based on the SSW Compensation⁵ methodology the Board uses to set trackage rights compensation. (OPPD Mot. to Compel 6.) According to OPPD, the SSW Compensation methodology uses the incumbent railroad's COE and COC; therefore, UP should be directed to respond in full to Interrogatory Nos. 11 and 12. (*Id.*)

On reply, UP argues that the Board should deny OPPD's motion with respect to Interrogatory Nos. 11 and 12. (UP Reply 10-11.) First, UP argues that methodologies that might be used to prescribe switch fees are not relevant to the present case because OPPD is not seeking "forced" switching. (*Id.* at 11.) UP states that it voluntarily provides the switching at issue to BNSF and notes that OPPD's complaint neither mentions 49 U.S.C. § 11102 (the statutory provision governing the Board's authority to order reciprocal switching arrangements) nor states a claim for forced switching. (UP Reply 11.) Second, UP argues that the SSW Compensation methodology uses the COC for the railroad industry, not the incumbent railroad as OPPD claims. (*Id.*)

The information sought by OPPD in Interrogatory Nos. 11 and 12 is relevant to the subject matter of this proceeding. The Board's regulations provide for broad discovery,⁶ and the Board has indicated that railroad-developed COC estimates could be relevant in rate reasonableness cases with respect to revenue adequacy.⁷ See, e.g., Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 16-21 (STB served Jan. 11, 2018), updated (STB served Mar. 14, 2018) ("Although the Board might consider a rigorously developed internal COC to be probative evidence under certain circumstances, the evidence presented here is not so persuasive as to cause the Board to find [the defendant railroad] revenue adequate, particularly in light of the Board's annual revenue adequacy determinations and its findings regarding the other

⁵ See St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (SSW Compensation II) (1987), 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), 8 I.C.C.2d 213 (1991), *aff'd sub nom. Union Pac. Corp. v. ICC*, 978 F.2d 745 (D.C. Cir. 1992), *cert. denied*, 508 U.S. 951 (1993).

⁶ See Canadian Pac. Ry.—Control—Kan. City S., FD 36500, slip op. at 4 (STB served Aug. 2, 2021) (acknowledging authority to seek material relevant to subject matter of proceeding under 49 C.F.R. § 1114.21 and interpreting scope of relevance in discovery "[b]roadly"); Trailer Bridge, Inc. v. Sea Star Lines, LLC, WCC-104, slip op. at 8 (STB served Oct. 27, 2000) (reminding the parties that "discovery can be broad" under the Board's rules); CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc. (Decision ID No. 28294), FD 33388, slip op. at 2 n.9 (STB served Sept. 18, 1997) (referencing the "broad" relevancy standard applicable to discovery matters).

⁷ In its answer, UP admits that the Board has found UP revenue adequate under "the economically unsound methodology currently employed" in its annual determinations of railroad revenue adequacy for the years 2010–2020; however, 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 Answer 2.)

evidence proffered by [the complainant], as discussed below.”). Accordingly, UP is directed to respond to Interrogatory Nos. 11 and 12; however, to reduce the burden on UP, in lieu of a narrative response, UP will be required only to produce responsive documents to the extent UP has any and in the form they are customarily maintained by UP.⁸

Interrogatory Nos. 18 and 21. In Interrogatory No. 18, OPPD requests that UP “identify” and “describe in detail the substance of” any discussions since January 1, 2019, between representatives of UP and representatives of equity and debt analysts and rating agencies relating to “(a) UP’s Replacement Costs, their calculation or their use in financial planning or the setting of revenue goals; (b) UP’s ability to meet the Revenue Adequacy Criteria; and (c) UP’s success or lack of success in earning returns on invested capital equal to its COC or COE.” (OPPD Mot. to Compel 7.) OPPD further requests that UP “identify all documents that support [its] Answer or that relate to or memorialize any of the discussions.” (Id.) In Interrogatory No. 21, OPPD requests that UP “describe the purposes and objectives of UP stock repurchases or planned stock repurchases” since January 2019, including:

(a) why UP decided to make such repurchases or planned repurchases; (b) whether UP determined that shares that were or would be repurchased were worth more or less than, or the same as, the purchase price, and by what measure; (c) any comparisons of the return or benefits that UP obtained or produced, or expected to obtain or produce, on such repurchases or planned repurchases, both in general and relative to other potential uses of the funds used, or to be used, in the repurchases; (d) any return on assets, investment, capital, invested capital, and/or equity, or change in operating ratio, considered, achieved, and/or anticipated in conjunction with such repurchases or planned repurchases; and (e) whether and/or how such repurchases or planned repurchases increased or decreased, or were expected to increase or decrease, the value or price of UP stock or UP earnings per share.

(Id. at 9.)

UP objected to these interrogatories, arguing that they are overbroad and unduly burdensome and seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. (Id. at 7, 9; UP Reply 12, 14-15.) Additionally, UP objected to Interrogatory No. 18 on the basis that it is unduly burdensome in requiring UP to identify “all documents” that support its answer or that relate to or that memorialize its discussions. (OPPD Mot. to Compel 7.)

OPPD argues that the information requested in Interrogatory No. 18 will provide data needed for “forward-looking” maximum rate methodologies utilized by the Board, such as the

⁸ UP is correct that the SSW Compensation methodology uses the COC for the railroad industry, not the incumbent railroad. See SSW Compensation II, 4 I.C.C.2d at 682 (stating that “the pre-tax equivalent of the current cost of capital rate for the railroad industry should be used” to determine “the necessary rate of return”). That point, however, does not change the fact that the information sought by OPPD in Interrogatory Nos. 11 and 12 could be relevant with respect to the revenue adequacy constraint.

revenue adequacy constraint, which OPPD states it referenced in paragraph 22 of its complaint, and “to forecast revenue and volume changes over the time period called for in the model OPPD elects to use to demonstrate that the UP rate is unreasonable.” (*Id.*) With respect to Interrogatory No. 21, OPPD argues that discovery of UP’s past, current, and planned stock repurchases is “critical” because stock repurchases can have a downward impact on UP’s COC and COE. (*Id.* at 9.) OPPD further argues that the information will be “important for reviewing the reasonableness of the rate at issue under the revenue adequacy constraint” because it “would allow OPPD to present a more accurate view of the financial condition of UP.” (*Id.*)

On reply, UP asks the Board to deny OPPD’s motion with respect to Interrogatory Nos. 18 and 21. (UP Reply 13, 15.) UP argues that Interrogatory No. 18 amounts to a “fishing expedition” because “no maximum rate methodology requires as data ‘the substance of discussions’ between UP and nonparties regarding UP’s replacement costs, revenue adequacy, or returns.” (*Id.* at 12.) UP further argues that OPPD failed to explain how the requested information could be used to forecast revenue and volume changes. (*Id.* at 12-13.) According to UP, the information OPPD seeks in Interrogatory No. 18 can be obtained in ways less burdensome on UP, noting that Interrogatory No. 17 requests data directly related to replacement costs and that information related to UP’s ability to meet the Board’s revenue adequacy criteria is available in UP’s annual R-1 filings and in the agency’s revenue adequacy decisions. (*Id.* at 12.) UP also reiterates its argument that UP’s COC and COE are not relevant in this proceeding. (*Id.*)

With respect to Interrogatory No. 21, UP argues that, in addition to being irrelevant, the interrogatory would require UP to undertake a special study because UP would have to produce additional information describing the impact of each repurchase on the value of UP stock. (*Id.* at 14-15.) UP argues that, even if stock repurchases were relevant, OPPD has failed to explain why UP’s “purposes and objectives” for the stock repurchases could be relevant, would provide a more accurate view of the financial condition of UP, or would affect the analysis under any maximum rate reasonableness methodology. (*Id.* at 15.) UP further argues that the information sought by OPPD could be obtained from UP’s SEC filings and OPPD could itself calculate any impact on UP’s COC or COE. (*Id.*)

The information requested in Interrogatory Nos. 18 and 21 is relevant to the issue of revenue adequacy. As the Board has previously stated, “[i]n assessing whether a railroad is revenue adequate in any individual rate proceeding, . . . agency precedent establishes that evidence other than the annual determination may be introduced.” Consumers Energy, NOR 42142, slip op. at 5-6; see also Bituminous Coal—Hiawatha, Utah, to Moapa, Nev., 6 I.C.C.2d 1, 7 n.24, 9 (1989) (explaining that “any other competent and probative evidence relative to the carrier’s revenue adequacy may be submitted in individual rate reasonableness proceedings” but concluding that the shipper in that case had “failed to satisfactorily rebut the railroads’ prima facie showing that they have not achieved revenue adequacy”). “Under that precedent, the Board ‘accept[s] all competent and probative evidence relative to the carrier’s revenue adequacy,’ including financial data, when assessing revenue adequacy in rate reasonableness cases.” Consumers Energy, NOR 42142, slip op. at 6 (quoting R.R. Revenue Adequacy—1987 Determination, 4 I.C.C.2d 731, 734 (1988)). Accordingly, UP will be directed to respond to Interrogatory Nos. 18 and 21; however, to reduce the burden on UP and to narrow

the scope of the requests, in lieu of a narrative response, UP will be required only to produce responsive documents—to the extent it has any and in the form customarily maintained by UP—that are held by employees at or above an organizational level within UP likely to reflect significant consideration, and/or within appropriately specialized departments at UP. The custodians are to be negotiated by the parties, with due consideration to selections that are reasonably calculated to lead to the discovery of admissible evidence.

The parties will be directed to meet and confer to resolve the parameters of complying with this order by October 18, 2022, and to report back to the Board by that date any agreed-upon production deadlines.

It is ordered:

1. OPPD's motion to compel is granted in part as discussed in this decision.
2. The parties shall meet and confer, as described above, by October 18, 2022, and report to the Board by that date any agreed-upon production deadlines.
3. This decision is effective on its service date.

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