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NOR 42173

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1

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

Union Pacific Railroad Company (UP) hereby renews its request that the Board enter a protective order pursuant to 49 C.F.R. § 1114.21(c)

On August 1, 2022, UP filed a motion for a protective order, asking the Board to quash certain discovery requests served by OPPD and stay further discovery until (i) OPPD produces documents responsive to UP's narrowly tailored jurisdictional discovery requests, and (ii) the Board rules on a motion to dismiss that UP intended to file after obtaining discovery from OPPD.

On September 15, 2022, the Board denied UP's motion without prejudice, because UP had not yet filed a motion to dismiss. *See Omaha Pub. Power Dist. v. Union Pac. R.R.*, NOR 42173 (STB served Sept. 15, 2022).

OPPD has not produced a single document responsive to UP's jurisdictional discovery requests in the past two-and-half months. Unwilling to wait any longer, UP filed a motion to dismiss based on information currently in its possession earlier today.

UP's motion to dismiss shows this proceeding must be dismissed for at least four reasons. First, the Board lacks authority to regulate UP's voluntary reciprocal switching arrangement with BNSF. Second, OPPD lacks standing to challenge the charge BNSF pays UP because it does not pay the charge and any injury it suffered is self-inflicted. Third, the Board lacks jurisdiction over UP's reciprocal switching service because it is part of the service covered by BNSF's contract with OPPD. Fourth, UP lacks market dominance over the transportation to which the charge applies because BNSF can provide competitive service via reciprocal switching.

UP's motion raises serious questions about the substantive soundness of OPPD's current complaint. In these circumstances, the Board should stay further discovery in this matter until it addresses UP's motion. Discovery has already been time consuming for both the parties and the Board. OPPD filed more than 164 discovery requests, not including subparts. UP filed its own discovery requests. Each party has already filed one motion to compel. Discovery is far from complete. The parties' costs will continue to grow.

The Board and its predecessor, the Interstate Commerce Commission, have stayed discovery in similar circumstances. In *Zoneskip, Inc. v. United Parcel Service of America, Inc.*, NOM. 40519, 1991 WL 89759, at *2 (ICC May 28, 1991), the Commission stayed discovery because UPS's motion to dismiss raised "significant concerns about both the substantive and

procedural soundness of the complaint and questions about the potential scope of this case.” The Commission also noted that its “action on the pending UPS motion to dismiss, regardless of [its] ultimate resolution of the matter, may determine the appropriate scope of discovery, if any.” *Id.* In *Dairyland Power Cooperative v. Union Pacific Railroad Co.*, NOR 42105, slip op. at 2 (STB served Apr. 29, 2008), the Board stayed discovery because UP’s motion to dismiss raised “issues that may affect both the procedural schedule in these matters and the scope of discovery.” Similarly, in *DXH, Inc. v. Matson Navigation Co.*, WCC-105, slip op. at 2 (STB served June 6, 2002), the Board suspended the procedural schedule in order to consider a pending motion to dismiss, “[g]iven that a decision on the motion to dismiss may affect the scope of discovery.” *See also, e.g., Phila. Belt Line R.R. v. Consol. Rail Corp.*, FD 32802, 1996 WL 104370, at *2 (STB served Mar. 12, 1996) (“Conrail’s procedural motion will be granted; the procedural schedule and all discovery will be suspended pending the Board’s ruling on the merits of Conrail’s motion to dismiss.”).

UP’s motion to dismiss shows OPPD’s complaint is subject to dismissal on several independent grounds. The Board should recognize the existence of serious questions about the substantive soundness of OPPD’s complaint and resolve those questions before the parties are required to continue engaging in the costly discovery process associated with rate cases.

The Board ordinarily does not delay the procedural schedule in stand-alone cost cases to consider motions to dismiss, but this is no ordinary stand-alone cost case. As UP observed in its original motion, this is the second time OPPD has tried to challenge UP’s charge to BNSF for reciprocal switching. The first time around, the Board eventually suspended the deadline for completing discovery, rather than address certain pending discovery motions, in light of UP’s motion to dismiss. *See Omaha Pub. Power Dist. v. Union Pac. R.R.*, Docket No. 42006 (STB

served Aug. 25, 1997). Unfortunately, by time the Board suspended the deadline, the parties had engaged in two months of intensive, costly discovery. There is still time to mitigate wasteful expenditure of resources here.

Under the circumstances, the Board should quash OPPD's discovery requests and stay any further discovery by OPPD pending the Board's resolution of UP's motion to dismiss.

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October 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 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