

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

**REPLY TO UNION PACIFIC RAILROAD COMPANY’S
APPEAL OF DIRECTOR’S RULING**

Pursuant to 49 C.F.R. §1244.9(d)(4)(iii), the Complainant Omaha Public Power District (“OPPD”) files its Reply in opposition to the Appeal of Director’s Ruling (“Appeal”) filed by Defendant Union Pacific Railroad Company (“UP”) on October 6, 2022, in this proceeding. For all the reason set forth hereinbelow, the Appeal should be denied.

I. BACKGROUND

On September 1, 2022, OPPD filed a Motion to Compel pursuant to 49 C.F.R. §1114.31(a). The Motion asked for an order directing UP to fully respond to several Interrogatories¹ served on UP on June 22, 2022. The Board denied UP’s motion for a protective order on September 15, 2022.

¹ Under 49 C.F.R. §1114.31(a), motions to compel responses to written interrogatories must be filed “within 10 days after the expiration of the period allowed for submissions of answers to interrogatories.” This regulation by its terms does not apply the 10-day period to motions to compel responses to document requests. In the rulemaking proceeding that produced the current version of the Board’s discovery rules, the Board was asked to clarify whether the 10-day period also applied to document requests, but it declined to do so. Docket No. EP 733, *Expediting Rate Cases* (served November 17, 2017) at 8-9. Consequently, OPPD’s motion was limited to interrogatories and OPPD reserves the right to subsequently file a separate motion covering its document requests if UP and OPPD are unable to resolve any disputes that arise without Board intervention.

As directed, OPPD and UP met and conferred on the discovery issues raised in OPPD's motion to compel. On October 3, 2022, the Director of the Office of Proceedings served an Order ("October 3 Order") that addressed the remaining disputes with respect to interrogatory Nos. 11, 12, 18, and 21. The October 3 Order granted OPPD's Motion to Compel in part. UP appealed the October 3 Order.

II. ARGUMENT

Under 49 C.F.R. § 1011.6(b), "[a]ppeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." UP's Appeal does not come close to approaching the level of exceptional circumstances, and accordingly the Director's decision should be affirmed.

UP contends in its Appeal that compliance with the October 3 Order would "require UP to produce for inspection certain documents and other information 'not ordinarily available for public inspection.'" See UP Appeal 2 (citing 49 C.F.R. §1115.9(a)(2)). To prevail under §1115.1(c), UP must meet the high burden of showing that the Director's relevancy findings constituted a clear error of judgment or would result in manifest injustice. In ruling on discovery appeals, the Board accords the Director broad discretion to act within the scope of her authority. See CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc., FD 33388, slip op. at 3 & 5 (STB served Feb. 23, 1998). Therefore, UP is required to do more than show that the Director could have reached a different outcome regarding the discovery requested. Finch Paper LLC - Petition for Declaratory Ord., FD 35981, 2017 WL 1104829, at *3 (Mar. 23, 2017).

UP cannot meet this heightened standard on appeal, as the Director made no clear error of judgment. Further, UP has not demonstrated a manifest injustice flowing from the October 3 Order. UP just does not like the result, and so it extrapolates that the Director's decision is wrong.

Because UP's Appeal fully lacks merit, the Board should deny it and affirm the Director's decision.

A. The Director Applied the Correct Legal Standard

The October 3 Order described correctly the applicable legal standard to govern a party's discovery requests. The Board's discovery regulations are broad. As noted, 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).

The October 3 Order balanced the relevance of the information sought by OPPD against the burden of producing that information. In doing so, the Director even reduced the burden on UP by limiting the required information to be produced. The Director properly determined that the information sought by OPPD is relevant to this proceeding. UP's primary argument is the Director found the information OPPD seeks relevant to the action, just not for the revenue adequacy relevancy reasons OPPD set forth in its motion to compel. UP fails to recognize that information can be relevant to a proceeding based on alternative grounds of relevancy. The importance of relevancy to the proceeding outweighs whether the Director adopted OPPD's basis for relevancy or not. It is within the Director's discretion to affirm the relevance and necessity of discovery requests.

B. Interrogatory Nos. 11 & 12

In attempting to meet the demanding clear error/manifest injustice standard, UP argues that the Director's decision did not sufficiently evaluate, explain, or rely on a proposed theory of

relevancy. However, the Director did explain the Board's regulations supporting broad discovery and that railroad developed cost of capital estimates could be relevant in rate reasonableness cases with respect to revenue adequacy. See October 3 Order at 3 (citing 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)).

As an initial matter, UP misconstrues the use of an incumbent railroad's cost of equity ("COE") and cost of capital ("COC") in this case. Regarding the potential use of an incumbent railroad's COE and COC in a case in 2022 utilizing the modified version of the SSW Methodology proposed by the Board in EP No. 711 (Sub – No. 1)(Served July 27, 2016), it is important to note that when SSW methodology was first utilized by the Interstate Commerce Commission ("ICC") all railroads were revenue inadequate. It was therefore logical for the ICC to only use the overall railroad industry COC. The ICC reasoned that using the incumbent's COC and rate of return in developing the appropriate compensation would trap the railroad in perpetual revenue inadequacy because it would never generate sufficient revenue. St. Louis Sw. Ry.—Trackage Rts. over Mo. Pac. R.R.—Kan. City to St. Louis, 4 ICC 2d 668, 682 (1987). But this is not the case today with UP, because the STB has determined for many years that UP is revenue adequate. Because UP's COE and COC are lower than the railroad industry COE and COC, using the railroad industry's COE and COC would lead to a windfall for UP if it were to calculate its revenue under the SSW methodology using the railroad industry COE and COC. Accordingly, as the Director recognized, UP's COE and COC for the requested time periods are relevant. UP is free to argue whether any OPPD calculations using UP's COE and COC in a maximum reasonable rate presentation are probative and acceptable, but the information is clearly relevant for discovery purposes.

UP also argues that OPPD is not entitled to information relating to UP's calculations of its

current COE and current weighted average COC because OPPD did not explicitly seek the information for revenue adequacy purposes in these interrogatories. This is incorrect. OPPD has made it clear in its Complaint and discovery requests, and it has done so in each of the parties' "meet and confer" discussions, and in discussions between the parties and STB staff, that OPPD considers UP's revenue adequate status to be an important factor in this case. OPPD need not repeat its desire for discoverable evidence on that overarching issue in each and every discovery request. Moreover, OPPD is entitled to choose the methodologies available to it under the Board's rules and precedent to test the reasonableness of the rate challenged in this case., including the Revenue Adequacy Constraint. Therefore, stating one use of UP's COC and COE to include calculating a reasonable switching rate using a version of the SSW methodology does not preclude OPPD from using the same information a revenue adequacy determination.

Based on what was presented in OPPD's requests and its motion, the Director reasonably concluded that the information sought in Interrogatory Nos. 11 and 12 is relevant. UP may not agree with the Director's explanation of the relevancy of the requested documents. However, mere disagreement is not clear error or manifest unjustness. Accordingly, the Director's determination should be affirmed as to Interrogatory Nos. 11 and 12.

C. Interrogatory Nos. 18 & 21

Applying the proper balancing test of relevancy and burden, the Director concluded that UP could be subjected to the reasonably tailored interrogatory requests for information relevant to this proceeding. The Director examined the information sought by OPPD in Interrogatory Nos. 18 and 21 and concluded the requested information "is relevant to the issue of revenue adequacy." October 3 Order at 5.

UP asserts that OPPD's request for information from meetings with the financial

community was invalid because there was not a showing that the information could be used to calculate forward looking rates or revenue adequacy. UP fails to consider precedent, in which the Board explicitly cites to UP's meetings with Wall Street analysts in support of future stand-alone revenues. FMC Wyoming Corp. et al. v. Union Pacific, 4 STB 699, 731 (2000). The Board's Revenue Adequacy Constraint is also a forward-looking exercise, and therefore information UP is disclosing to market analysts about its future returns and costs is extremely relevant.

UP's argument that the Director did not explain how the requested information on meetings with financial analysts and stock repurchases could be used in an adequacy constraint demonstration is not pertinent as to how OPPD might use the information. The Board rejected the shipper's revenue adequacy information in Consumers Energy Co. v. CSX Transp., Inc., mentioning that the shipper did not overcome its burden with the information it had at hand. 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). The Board's decision indicated that additional information is necessary to overcome the information hurdle to prove revenue adequacy. Id. Thus, it is not the Director's position to say how the information will be used, just that it could be used by OPPD to develop its argument based upon UP's own actions.

UP has also pled in its Answer and stated to OPPD's counsel and to STB staff during the conference it convened to discuss OPPD's motion to compel that UP intends to make a broader challenge to the underlying principles of revenue adequacy adopted by the Board and as applied to UP in response to a presentation by OPPD that the rate at issue is unreasonable when tested by the Revenue Adequacy Constraint. See UP's Answer, at 2 ¶ 2 (Aug. 11, 2022). In light of UP's stated intentions, OPPD believes it is entirely appropriate for the Director and the Board to take the broadest possible view regarding discovery of information related to UP's revenue adequate state.

Great deference is given to the Director's findings and such exercise of judgment shall not be lightly set aside. Accordingly, the Director's decision should be upheld, and UP's appeal denied.

III. CONCLUSION

For the foregoing reasons, OPPD supports the October 3 Order directing UP to respond to Interrogatory Nos. 11, 12, 18, and 21. The Board should reject the Appeal because UP has failed to demonstrate a clear error of judgment or that a manifest injustice results from the Director's decision.

Respectfully submitted,

/ss/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
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

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October 2022, I served a copy of the foregoing Reply to Union Pacific Railroad Company's Appeal of Director's Ruling by electronic mail upon the following counsel for Union Pacific Railroad Company:

Michael Rosenthal
Covington Burling
mrosenthal@cov.com

/ss/ Thomas W. Wilcox
