

SERVICE DATE – OCTOBER 13, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42173

OMAHA PUBLIC POWER DISTRICT v. UNION PACIFIC RAILROAD COMPANY

Decided: October 13, 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 railcars to OPPD’s North Omaha Power Station (NOPS) 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 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 and August 11, 2022. OPPD replied to UP’s motion on October 3, 2022.²

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, UP’s motion will be granted.

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 On October 6, 2022, UP filed an appeal of the October 3, 2022 order of the Director of the Office of Proceedings that granted in part a motion to compel filed by OPPD. On October 11, 2022, UP also filed a motion to dismiss and a renewed motion for a protective order. UP’s filings will be addressed separately.

Requests for Production Nos. 1 and 27. In Request for Production No. 1, UP requests that OPPD produce its contract with BNSF, (UP Mot. to Compel, Ex. A at 2), and in Request for Production No. 27, UP requests that OPPD produce “[a]ll documents relating to the competition or bidding between railroads that led to OPPD’s current contract with BNSF,” (id., Ex. C at 7). OPPD objected to Request for Production No. 1 on the grounds that its contract with BNSF requires the written agreement of BNSF before any terms or conditions of the contract can be disclosed to a third party. (Id., Ex. B at 4.) With respect to Request for Production No. 27, OPPD objected because the request is duplicative of other discovery requests.³ (Id., Ex. D at 12-13.) UP states that, in the parties’ meet and confer session, OPPD “acknowledged the request was not duplicative” and instead objected on the grounds that some responsive documents may include confidential information related to OPPD’s contract with BNSF. (Id. at 4.) According to UP, OPPD has provided BNSF with written notice and a reasonable opportunity to object, as required by section 8 of the protective order governing this proceeding,⁴ and is now required to produce documents responsive to both requests. (Id. at 3-5.) UP argues that OPPD’s confidentiality concerns can be addressed by designating the information “highly confidential.” (Id. at 4-5.)

³ In response to each request for production and interrogatory addressed in this decision, OPPD also raised general objections and objections to definitions. (See UP Mot. to Compel, Ex. B at 1-4; id., Ex. D at 1-4.)

⁴ By decision served August 9, 2022, OPPD’s second motion for protective order was granted, and the protective order and undertakings, as modified and included in the Appendix to that decision, were adopted. Section 8 of the protective order provides as follows:

Each party is ordered to produce to the other party rail transportation contracts or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the documents be produced in discovery, and (2) the parties agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provisions. Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 8 shall be treated as “HIGHLY CONFIDENTIAL” and/or “SSI” and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.

On reply, OPPD confirms that it notified BNSF of UP's discovery requests on August 8, 2022, and of its intention to produce the contract under a highly confidential designation. (OPPD Reply 1.) According to OPPD, BNSF responded on August 19, 2022, stating that it would agree only to the production of redacted versions of the contract and related information and documents. (Id. at 1-2.) OPPD states that it responded to BNSF by letter dated September 2, 2022, citing section 8 of the protective order and asking whether BNSF intended to object to the production, but BNSF has not responded. (Id. at 2.) OPPD states that it believes BNSF has been provided a reasonable opportunity to object to the production of the contract; however, with respect to Request for Production No. 27, OPPD states that a provision in the request for proposal prohibits it from disclosing information contained in the request for proposal or in proposals provided by bidders unless BNSF waives the restriction or the Board orders OPPD to "produce relevant, non-privileged information under a highly confidential designation." (OPPD Reply 2.)

The parties appear to agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provisions. OPPD has provided BNSF with the written notice and opportunity to object required by section 8 of the protective order governing this proceeding. Although BNSF initially indicated to OPPD that it would only consent to the production of a redacted version of the contract and related information, BNSF has not availed itself of the opportunity to object to production and seek a ruling from the Board, despite having been made aware of that procedure more than one month ago. In the absence of such an objection from BNSF, OPPD is directed to produce documents responsive to Requests for Production Nos. 1 and 27 under a highly confidential designation pursuant to section 8 of the protective order.

Interrogatory No. 3.⁵ In Interrogatory No. 3, UP requests certain information about coal shipped to OPPD's Nebraska City Power Station (NCPS) from 2018 through the present. (UP Mot. to Compel 6; id., Ex. C at 13.) OPPD objected to this interrogatory on the basis that it is overbroad and unduly burdensome, and seeks information that is not relevant, proportional to the needs of the case, or reasonably calculated to lead to the discovery of admissible evidence. (Id., Ex. D at 27-28.) OPPD also argues that the interrogatory is overbroad because it seeks information unrelated to NOPS and that the information requested concerning the years 2018 through 2021 is already in UP's records as UP was the rail carrier serving NCPS at that time. (Id., Ex. D at 28.) UP states that OPPD also raised confidentiality concerns in the parties' meet and confer session. (Id. at 6.)

In its motion to compel, UP argues that the requested information about coal movements to NCPS is relevant to the volume of traffic that would move on the stand-alone railroad (SARR) and would account for a large share of the SARR traffic should OPPD include that coal in the SARR traffic group. (UP Mot. to Compel 6.) UP also argues that the information requested related to rates and service terms would be relevant toward the issue of market dominance, "including whether UP's voluntary agreement to open NOPS to reciprocal switching or OPPD's

⁵ Because OPPD has withdrawn its objections to Interrogatory No. 2, the Board will not address the arguments raised in UP's motion to compel with respect to that interrogatory. (See OPPD Reply 2; see also UP Mot. to Compel 5-6.)

ability to bundle volumes of the two plants in the bidding process means UP lacks market dominance over the transportation to which the challenged charge applies.” (*Id.* at 6-7.) Additionally, to address OPPD’s objection concerning information already in UP’s possession, UP states that it has agreed to modify its request to exclude UP single-line traffic. (*Id.* at 6.)

On reply, OPPD reiterates its argument that information about coal shipments to NCPS is irrelevant to the case, which it argues is “about the reasonableness of the rate UP charges to transport coal from the Gibson Yard to [NOPS].” (OPPD Reply 2-3.) According to OPPD, this information and the contract negotiations related to it have no bearing on whether UP has market dominance over the line used to provide service to NOPS because, under Board precedent, the market dominance inquiry considers the transportation of the same commodity between the same points. (OPPD Reply 3.)

Though not unbridled, agency precedent permits a complainant “considerable flexibility in designing and locating the SARR and grouping traffic.” Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry. (TMPA), 6 S.T.B. 573, 589 (2003); Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 543-544 (1985) (declining to impose restrictions in advance on the design of a SARR or on the traffic that could potentially be included in a stand-alone traffic group), *aff’d sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). As UP notes, OPPD could include coal shipped to NCPS in the SARR traffic group, a possibility that OPPD does not address. The information requested in Interrogatory No. 3, therefore, is relevant to the issue of the SARR traffic and reasonably calculated to lead to the discovery of admissible evidence. Accordingly, OPPD is directed to produce information responsive to Interrogatory No. 3, as modified by the parties to exclude UP single-line traffic. OPPD’s confidentiality concerns can be addressed by producing the information under a highly confidential designation, as appropriate.

Interrogatory No. 4. Interrogatory No. 4 asks OPPD to “[i]dentify and describe all offers made to, solicited by, or considered by OPPD at any time for the transportation of coal to [NOPS], regardless of mode or carrier.” (UP Mot. to Compel, Ex. C at 2, 13.) OPPD objected to this request on the grounds that it is overbroad and unduly burdensome; seeks information that is not relevant, proportional to the needs of the case, or reasonably calculated to lead to the discovery of admissible evidence; and asks for information without any restriction on time and that is already in UP’s possession as UP was the rail carrier to NOPS and NCPS prior to 2021. (*Id.*, Ex. D at 28.) UP states that OPPD also raised confidentiality concerns in the parties’ meet and confer session. (*Id.* at 7.)

In its motion to compel, UP argues that the Board should reject OPPD’s relevance objection. (*Id.* at 8.) According to UP, the interrogatory “seeks information directly bearing on the existence or absence of effective competition from other rail carriers or other mode of transportation for the transportation to which the challenged charge applies.” (*Id.*) UP further argues that it addressed OPPD’s other objections by offering to narrow the time period of the request to “2007 to the present” and by stating that OPPD would not have to identify and describe information contained in documents exchanged between UP and OPPD. (*Id.* at 7-8.) Lastly, UP argues that OPPD could maintain the confidentiality of the requested information by producing the information under a highly confidential designation. (*Id.* at 7.)

OPPD, on reply, states that it has never transported coal to NOPS or NCPS by mode other than rail or by any carrier other than BNSF and UP. (OPPD Reply 4.) Accordingly, OPPD states that the only information responsive to Interrogatory No. 4 would be offers from BNSF and UP, and UP already possesses the information as it relates to UP. (*Id.*) OPPD argues, however, that “information from past bidding processes between BNSF and UP dating back to 2007” would not inform the Board’s market dominance determination. (*Id.*) OPPD further argues that UP has not justified the proposed time period of “2007 to the present” or the “heavy burden on OPPD to search its files for documents related to a bid process from nearly 16 years ago.” (*Id.*)

Information about offers made to, solicited by, or considered by OPPD for the transportation of coal to NOPS is relevant to the issue of market dominance. The Board’s market dominance inquiry seeks to determine whether there is “effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” 49 U.S.C. § 10707(a). As part of its analysis, the Board determines whether there are any feasible transportation alternatives that are sufficient to constrain the railroad’s rates for the issue traffic to competitive levels, considering both intramodal and intermodal competition. Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 286 (STB served Jan. 11, 2018), updated (STB served Mar. 14, 2018). The information requested in Interrogatory No. 4 relates directly to this analysis. Additionally, narrowing the time period to 2007 to the present is reasonable to address OPPD’s concern about the breadth of its search. Accordingly, OPPD is directed to produce responsive information for the period 2007 through the present, excluding any information contained in documents exchanged between UP and OPPD. OPPD’s confidentiality concerns can be addressed by producing information under a highly confidential designation, as appropriate.

Interrogatories 7, 8, and 9. In Interrogatory Nos. 7, 8 and 9, UP requests information regarding the costs of owning and maintaining freight cars for the years of 2018 to the present. (UP Mot. to Compel 8; *id.*, Ex. C at 14-15.) OPPD objected to these requests on the basis that they are overbroad and unduly burdensome and seek information that is not relevant or proportional to the needs of the case. (*Id.*, Ex. D at 30-31.) OPPD also objects on the basis that Interrogatory No. 7 is not reasonably calculated to lead to the discovery of admissible evidence and that Interrogatory Nos. 8 and 9 are not reasonably calculated to lead to the discovery of admissible evidence “bearing on the allegations contained in the [c]omplaint and the reasonableness of the rate OPPD has challenged.” (*Id.*) UP states that, in the parties’ meet and confer session, OPPD argued that the information was not relevant because UP does not pay car-related costs when it transports OPPD’s coal in OPPD’s freight cars. (*Id.* at 9.)

UP argues that car ownership and maintenance costs are relevant in stand-alone cost (SAC) cases because they are an element of SARR operating costs, and the SARR, like UP, will need to acquire and maintain some coal cars. (*Id.*) UP further argues that it could use OPPD’s lease rates and maintenance expenses as benchmarks against the freight car lease rates and maintenance expenses included by OPPD in its SARR for all car types. (*Id.*) UP notes that OPPD requested “essentially identical” information about UP-owned and leased freight cars used in providing OPPD service. (*Id.*)

On reply, OPPD reiterates that the SARR, like UP, would not incur any costs related to railcars when it provides coal transportation to OPPD because OPPD owns or leases the railcars it needs for rail service and supplies the cars to the railroads for free. (OPPD Reply 5.) OPPD argues that its discovery requests related to car ownership and maintenance costs are relevant, while UP's requests are not, because "traffic moving on an OPPD-designed SARR may move in railroad owned or leased cars, and to that extent amounts paid by the railroad for such cars will be a cost incurred by the SARR." (Id.)

In a SAC case, parties must develop detailed evidence to calculate operating expenses, which could include as direct operating expenses the costs of freight car ownership and maintenance. As a basis for their positions, parties could elect to develop ownership and maintenance costs evidence derived from one or both parties or from third parties. The information requested in Interrogatory Nos. 7, 8, and 9 regarding OPPD's freight car ownership and maintenance costs, therefore, is relevant to this proceeding and reasonably calculated to lead to the discovery of admissible evidence. Accordingly, OPPD is directed to produce information responsive to Interrogatory Nos. 7, 8, and 9.⁶

Interrogatory No. 12, 13, and 14. In Interrogatory Nos. 12, UP requests that OPPD "[s]tate, by non-coal generation source, the amount of power generated by OPPD from non-coal sources in each year since 2010 and projected to be generated in each year in the future for which OPPD has made projections, and the cost of such power." (UP Mot. to Compel, Ex. C at 15.) In Interrogatory No. 13, UP requests that OPPD "[e]xplain OPPD's current policies and procedures for determining whether and to what extent to generate or purchase electricity for use by its customers," and in Interrogatory No. 14, UP requests that OPPD "[e]xplain OPPD's current process for fuel supply planning." (Id.)

OPPD objected to these requests on the basis that they are overbroad and unduly burdensome and seek information that is not relevant, proportional to the needs of the case, or reasonably calculated to lead to the discovery of admissible evidence "bearing on the allegations contained in the Complaint and the reasonableness of the rate OPPD has challenged." (OPPD Reply 32-33.) UP states that, in the parties' meet and confer session, OPPD stated that it would respond to Interrogatory No. 12 "only to the extent it seeks information relevant to the issue of future coal volumes at NOPS." (UP Mot. to Compel 10-11.) UP further states that, with respect to Interrogatory Nos. 13 and 14, OPPD suggested at the meet and confer session that while its long-term decisionmaking might be relevant, its day-to-day decisionmaking would not be. (Id. at 11-12.)

UP argues that Interrogatory Nos. 12, 13, and 14 seek information about future coal consumption at NOPS, which relates to the projected traffic volume of the SARR. (Id. at 10-12.) According to UP, OPPD's plans for future coal consumption at NOPS are "highly uncertain."

⁶ Although OPPD does not indicate what particular burden it would face in responding to these interrogatories, the Board's regulations at 49 C.F.R. § 1114.26(b) provide that the production of a document is a sufficient answer to an interrogatory where the answer to the interrogatory may be derived or ascertained from the document.

(Id. at 9-11.) UP further argues that both OPPD’s long- and short-term decisionmaking would affect the volume of coal shipped to NOPS during the SAC analysis period. (Id. at 11-12.)

On reply, OPPD does not contest that information about future coal consumption at NOPS is relevant but argues that the information requested in Interrogatory No. 12 related to OPPD’s past generation of power from non-coal sources and the underlying cost conditions for those decisions is of “marginal relevance.” (OPPD Reply 5-6.) With respect to Interrogatory Nos. 13 and 14, OPPD does not object to producing information related to OPPD’s long-term decisionmaking, which it acknowledges would provide information on future coal supplies at NOPS. (Id. at 6.) However, it argues that the “marginal relevance” of information about “the day-to-day (and sometimes more frequent) decisions made by OPPD personnel concerning whether to generate or purchase of electricity” and OPPD’s “short term fuel supply planning for coal supply and coal transportation” does not justify the burden required to collect the information. (Id. at 6-7.)

The information sought in Interrogatory Nos. 13, 14, and 15 is relevant to the issue of future coal consumption at NOPS, and in turn, to the projected volume of traffic the SARR would handle. The Board’s regulations provide for broad discovery,⁷ and it is reasonable to conclude that the information requested in Interrogatory No. 12 related to OPPD’s past decisionmaking could be informative with respect to OPPD’s future coal consumption. Moreover, the information requested in Interrogatory No. 12 is likely kept in ordinary course of business. The scope of Interrogatory Nos. 13 and 14 is also reasonable; UP’s requests do not seek a description of each decision made by OPPD personnel but rather are limited to an explanation of OPPD’s current policies and procedures or processes.

It is ordered:

1. UP’s motion to compel is granted.
2. This decision is effective on its service date.

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

⁷ 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).