

PUBLIC VERSION

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
November 14, 2022
Part of
Public Record

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

REPLY TO MOTION TO DISMISS

Complainant Omaha Public Power District (“OPPD”) hereby files its Reply to Defendant Union Pacific Railroad Company’s (“UP”) Motion to Dismiss (“Motion”) filed on October 11, 2022, in this proceeding. UP’s Motion falls far short of the standards for dismissal utilized by the Board and the courts. Moreover, UP has wrongly attempted to expand the scope of this complaint proceeding, and it has inappropriately and prematurely attempted to introduce contested evidentiary issues into this case. Finally, much of the factual assertions that UP wrongly makes at this stage of the proceeding are simply irrelevant to the narrow issue presented by OPPD’s complaint (“Complaint”): whether the charge UP has established to transport OPPD’s trains of coal from BNSF Railway’s (“BNSF”) Gibson Yard in Omaha, Nebraska to OPPD’s North Omaha Power Station (“NOPS”) is unlawful. OPPD’s Complaint states well-founded bases for relief, and the Board should deny UP’s Motion.

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I. INTRODUCTION

UP, after telling the Board that it would file a motion to dismiss the Complaint, but only after it sought and obtained discovery from OPPD on certain “jurisdictional issues,” inexplicably elected to “jump the gun” and file its Motion before receiving any of the information from OPPD. UP has filled that void with erroneous legal arguments, speculation, unsupported factual assertions, and improper evidentiary submissions on disputed facts. It has also included information with its Motion that has no relevance whatsoever to this case, whether in conjunction with trying to meet the high standards for a motion to dismiss or in the evidentiary phase of this case.

OPPD’s Complaint is limited to challenging the reasonableness of a rate UP has established for its transportation of OPPD’s coal trains on UP’s tracks from the Gibson Yard in Omaha to NOPS, a distance of around 8.6 miles. The Complaint does *not*, as UP claims in its Motion, “focus on the movement of coal by BNSF from the Powder River Basin in Wyoming to NOPS.”¹

II. APPLICABLE STANDARDS

Under 49 U.S.C. §11701(b) the Board may dismiss a formal complaint only if it “does not state reasonable grounds for investigation and action.”² The Board has interpreted this provision to require that a complaint may be dismissed “only when the Board finds that there is no basis upon which it could grant the relief sought.”³ Moreover, it is well-established at the Board that motions

¹ Motion at 4.

² 49 U.S.C. § 11701(b).

³ STB Docket No. NOR 42169, *Bell Oil Terminal, Inc. v BNSF Railway Company* at 2 (Served December 23, 2020) citing STB NOR 41687, *Grain Land Coop. v. Canadian Pac. Ltd.*, at 2-3 (STB served Dec. 8, 1999).

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to dismiss are generally disfavored.⁴ The Board has “stated frequently that motions to dismiss are disfavored and rarely granted.”⁵ When reviewing a motion to dismiss, the Board will view the alleged facts in the light most favorable to the complainant.⁶ The Board’s procedural rules generally follow the Federal Rules of Civil Procedure (“FRCP”). Cases interpreting FRCP Rule 12(b)(6) governing motions to dismiss establish that the four-corners of the Complaint are the sole consideration in evaluating whether the case should proceed.⁷ In other words, while UP may dispute the facts alleged in OPPD’s Complaint – as the vast bulk of UP’s Motion and proffered evidence does - those disputes are not material to evaluating whether OPPD’s Complaint states reasonable grounds for investigation and further action.

III. ARGUMENT

A. OPPD’s Complaint has Stated Reasonable Grounds for Investigation and Action

OPPD’s Complaint is straightforward. It alleges that a switch charge UP has established

⁴ STB Docket No. NOR 42159, *Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co.*, NOR 42159, at 4 (STB served July 25, 2018)(*Central Valley*).

⁵ STB Docket No. 42104, *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company* (STB served December 29, 2009) at 3, (citing *Dairyland Power Cooperative v. Union Pacific*, STB Docket No. 42105 (STB served July 29, 2008)).

⁶ *Central Valley at 4*, (citing *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 42142, slip op. at 1 (STB served June 15, 2015); *Montana v. BNSF Ry.*, NOR 42124, slip op. at 3 (STB served Feb. 16, 2011)).)); see also *Philadelphia Belt Line Railroad Company v. Consolidated Rail Corporation*, 1996 STB LEXIS 336 (I.C.C. June 12, 1996) (“[I]n addressing the motion to dismiss, we must look to see whether the allegations, *if true*, are adequate . . .” (emphasis added)); *Buffalo Crushed Stone, Inc. v. R.J. Corman Railroad Company/Allentown Lines, Inc.*, 1998 STB LEXIS 777, STB Docket No. 42048, 1998 WL 693308 (I.C.C. Sept. 28, 1998) (presuming the facts in the complaint to be true).

⁷ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is *plausible on its face*.’” (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).

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for the transportation of OPPD's coal trains by UP from the Gibson Yard to NOPS and back again, a distance of around 8.6 miles, is unreasonably high in violation of 49 U.S.C. §§10701(d)(1) and 10702.⁸ Under 49 U.S.C. §10102(7), a rail carrier "rate" that is subject to the Board's jurisdiction "means a rate or charge for transportation," which clearly encompasses UP's switch charge. OPPD has also alleged in its Complaint that it has paid 100% of the amounts invoiced by UP for its service to and from NOPS since January 1, 2021, and that UP has collected 100% of the rate.⁹ OPPD also alleges the rate it has challenged is not covered by any rail transportation contract or other agreement that would deprive the Board of jurisdiction.¹⁰

Under 49 U.S.C. §10707(c), "[w]hen the Board finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation." OPPD has properly alleged that UP has market dominance, specifically,

- (1) UP is the only railroad that can and does physically serve NOPS;¹¹
- (2) neither motor carriage nor water vessel transportation represents a practical and economically viable alternative to unit train rail service from Gibson Yard to NOPS;¹²
- (3) UP does not face effective competition for the movement from Gibson Yard to NOPS;¹³ and
- (4) the rate at issue is more than 375% of UP's variable cost of providing this service to OPPD.¹⁴

⁸ Complaint at ¶21.

⁹ *Id.* at ¶¶ 9 and 10.

¹⁰ *Id.* at ¶¶8 and 10.

¹¹ Complaint at ¶13.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at ¶¶14 and 15.

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Finally, OPPD alleges that the rate it is challenging exceeds the maximum reasonable levels permitted under 49 U.S.C. §§10701(d) and 10702.¹⁵ Under 49 U.S.C §10704(a)(1) “[w]hen the Board, after a full hearing, decides that a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board under this part . . . does or will violate this part, the Board may prescribe the maximum rate . . . to be followed.”

In summary, these allegations in the Complaint, all of which must be viewed in the light most favorable to OPPD, plainly and clearly state reasonable grounds for investigation and action to determine whether the challenged rate is reasonable in accordance with applicable law. The purported grounds for dismissing the complaint advanced by UP in its Motion fall far short of what is required to terminate this case at this very early stage of the proceeding.

B. UP’s Motion Provides No Valid Grounds for Dismissal of the Complaint

1. The Challenged Rate is Not Part of a Rail Transportation Contract

OPPD has unambiguously alleged that the rate it challenges is not part of a rail transportation contract. The Complaint states: “No provision of the rail transportation contract between OPPD and BNSF obligates OPPD to pay BNSF any portion of the rate charged by UP under the Circular for its movement of OPPD trains to and from the Gibson Yard Interchange and NOPS.”¹⁶ In past cases the Board has entertained motions to dismiss complaints filed by defendants who submit actual documentation that the challenged rate and transportation are in fact part of a contract, which deprives the Board of jurisdiction.¹⁷ UP’s Motion does not include any

¹⁵ *Id.* at ¶21.

¹⁶ Complaint at ¶8.

¹⁷ See Docket No. NOR 42155, *Foresight Coal Sales LLC, Sugar Camp Energy, LLC, Williamson Energy, LLC v. CSX Transportation, Inc.* and Docket No. NOR 42156, *Consolidated*

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such supporting evidence. And it could not because at the time of filing, OPPD had not yet served responsive documents to UP's first discovery requests. Had UP waited for such production as it previously informed OPPD and the Board was a prerequisite to filing a motion to dismiss, this part of the Motion would have been completely unnecessary.

This being said, because OPPD has produced a copy of its rail transportation contract with BNSF to UP's outside counsel, OPPD is attaching, as Exhibit A to this Reply, a full and complete version of the contract, which OPPD is submitting to the Board under seal to confirm – just as alleged in the Complaint - that the challenged rate is not covered by any contract. Specifically, Section 4 of the contract unambiguously states it applies:

{{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].}}

This distinction between deliveries to Gibson Yard and deliveries {{a [REDACTED]
[REDACTED]}} is carried forward in Section 22 of the contract, which {{[REDACTED]
[REDACTED].}}

Consequently, the contract clearly carves out the movement by UP to and from NOPS over its tracks as a {"[REDACTED]"}, which is between UP and OPPD because the transportation service is being provided for the benefit of OPPD.¹⁸

Coal Company v. CSX Transportation, Inc. (Where CSX responded to a complaint by submitting a verified statement with evidentiary support that the challenged rates were covered by a contract, which led to voluntary dismissal of the cases).

¹⁸ Complaint at ¶9.

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No provision of the agreement states that OPPD is obligated to reimburse BNSF for any payments made to UP of the switch charge, or any other amount paid to UP. The Complaint explains that “solely as an accommodation to OPPD because no provision of their rail transportation contract requires it, BNSF accepts UP’s invoices and OPPD reimburses BNSF for 100% of the amounts assessed by UP. This informal payment arrangement is solely due to UP’s refusal to accept direct payment of the rate from OPPD.”¹⁹ UP’s assertions to the contrary, *i.e.*, that there is a formal written agreement between BNSF and OPPD governing reimbursement of the switch charge, are belied by the actual language of the contract and the allegations in the Complaint. The attached Verified Statement of Mr. Gary D. Ruhl, OPPD’s Manager Programs, Energy Marketing and Trading (Ruhl V.S.), briefly provides additional clarification on this point.²⁰

The facts of this case and the contract at issue accordingly stand in sharp contrast to the contract underlying the previous case brought by OPPD in Docket No. 42006. There, the service BNSF held out to provide pursuant to the contract terms extended “from Powder River Basin origins all the way into OPPD’s plant.”²¹ Consequently, the Board concluded “[b]ecause it is BNSF’s responsibility, under its holding out as reflected in the contract to move coal from the mine to the plant, UP’s switching service is clearly provided to BNSF, not OPPD.”²² The Board also concluded that because the contract terms expressly assigned BNSF “the responsibility for moving the traffic from the mine to [NOPS],²³ BNSF, and not OPPD is ultimately responsible to UP for

¹⁹ *Id.* at ¶10.

²⁰ Ruhl V.S. at 3.

²¹ STB Docket No. 42006, *Omaha Public Power District v. Union Pacific Railroad Company* (STB served October 17, 1997)(“*OPPD I*”) at 2.

²² *Id.*

²³ See STB Docket No. 42006, *Omaha Public Power District v. Union Pacific Railroad Company, rehearing* (STB served November 15, 2000) at 3 (“the contract expressly defines the destination as NOPS”)

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payment of the switch charge.”²⁴ The current contract was drafted to address this issue by clarifying that BNSF’s contractual obligation is to deliver OPPD’s coal to BNSF’s interchange with UP at the Gibson Yard, for further delivery by UP to NOPS pursuant to its switch charge and tariff or another separate agreement. Also, as stated in the Complaint, unlike the prior contract, the current contract between BNSF and OPPD contains no agreement on the part of OPPD to pay any part of the switch charge to BNSF, which was another basis for the Board dismissing OPPD’s prior complaint.

Finally, UP attempts to fashion an argument supporting dismissal that UP’s switching operations are nevertheless covered by the contract because “UP is switching the traffic as BNSF’s agent.”²⁵ UP makes this argument even though (1) the contract covers the transportation of OPPD’s coal to the Gibson Yard; (2) UP is not a party to the contract; (3) UP established the switch rate at issue in this case, (4) UP is the only railroad that provides the transportation associated with this rate, and (5) BNSF has no ability to modify the rate or supervise UP’s operations over its rail line. UP’s Motion also presumes - with not a shred of proof - that BNSF concurs with UP’s characterization of their relationship. OPPD strongly disagrees with UP’s argument. However, whether UP’s is acting as BNSF’s agent is, at most, a disputed factual issue to be developed in the discovery and evidentiary phases, not in motion to dismiss.

In summary, UP’s argument that the Complaint must be dismissed because the challenged rate is part of the transportation contract between OPPD and BNSF is belied by the actual language of the contract. The other allegations made by UP about the possible existence of separate formal written agreement by OPPD to reimburse BNSF (there is none), and that UP’s switch movement

²⁴ *OPPD I* at 2 (note 6).

²⁵ Motion at 3.

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is part of the contract because UP is BNSF's agent (it is not), address factual claims by UP that are not properly raised in a motion to dismiss.

2. The Challenged Rate is a Rate that the Board has Jurisdiction to Review

The Complaint unambiguously challenges a "rate" subject to the Board's jurisdiction that was established by UP for its transportation of coal from the Gibson Yard to NOPS and back again. Rather than refute the truth of this allegation based on clear statutory language, UP embarks on a strained journey to argue that OPPD has not stated reasonable grounds for investigation of UP's switch charge because it not a rate to which the Board's rate reasonableness jurisdiction applies.

UP first makes the broad argument that a switch charge established by a railroad is not a "rate" that the Board has jurisdiction review under Title IV of 49 U.S.C.²⁶ According to UP, the Board has no authority to examine the reasonableness of any switch charge that is "voluntarily" established by a railroad, presumably meaning that it was not directed to do so by the Board.²⁷ This argument is contrary to the plain and unambiguous statutory language cited above that defines a "rate" for purposes of all provisions of 49 U.S.C. Title IV where the term is used as a "rate or charge for transportation." A switch charge is assessed for transportation by a rail carrier, and so by statute, it is a "rate." Thus, the unqualified reference to "rate" in 49 U.S.C. §§ 10701, 10707, 11101, 11704, 10702, and other provisions where the term is used necessarily refer to switch charges as well as line haul rail rates.

²⁶ Motion at 8, 10.

²⁷ "UP voluntarily opened OPPD's North Omaha Power Station (NOPS) and certain other Omaha-area customers to competitive rail service from BNSF Railway Company (BNSF), so long as BNSF pays the \$295 per car switch charge established in UP Reciprocal Switching Circular UP 8005 F."

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UP's argument – supported by no references to statutory language or precedent - that its switch charge is not a “common carrier rate” covered by §11101 is easily disposed of by the plain, unambiguous statutory language referenced above. Both the definition of “rate” in §10102(7) and the terms of §11101 clearly establish that line haul rates and switch charges both are rates that are utilized by a rail carrier to provide service as a common carrier subject to the Board's jurisdiction. UP also transports OPPD's coal trains to and from NOPS on tracks that are indisputably imbued with a common carrier obligation subject to the Board's jurisdiction. The terms and conditions of Tariff 8005 are all therefore subject to the Board's jurisdiction. These terms include the rate at issue in this case. UP's discussion about OPPD allegedly having to request a new line haul rate from UP in order to bring a formal challenge concerning UP's service to NOPS is both wrong and irrelevant. Under §11101(b) a rail carrier is directed to “provide to any person, on request, the carrier's rates and other service terms.” UP has already provided the applicable rate and service terms through publication of Tariff 8005.

Secondly, UP argues that its switch charge may not be the subject of a formal complaint case because “the Board's authority to regulate reciprocal switching is addressed §11102(c).”²⁸ UP is wrong. This statute is limited to situations where the Board is asked to “require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.”²⁹ The Complaint does not seek any relief under §11102(c) because OPPD is challenging the lawfulness of a charge for a switching arrangement that is already in place. Consequently, the entire discussion of §11102(c) in the Motion is irrelevant to this proceeding. More specifically,

²⁸ Motion at 7.

²⁹ 49 U.S.C. §11102(c).

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because OPPD is not asking for this relief, the remaining provisions of §11102(c) and the precedent UP cites in its Motion concerning the Board's authority over the compensation to be paid an incumbent railroad who is directed to enter into a reciprocal switching agreement are not relevant to the allegations contained in the Complaint.

Adopting UP's interpretation of §11102(c) to preclude any regulation of so-called "voluntary" switch charges (and presumably other rates a railroad established "voluntarily") would place an entire category of rates that railroads unilaterally insert into their tariffs beyond the Board's regulatory purview. This would be absurd and would enable UP and other rail carriers to establish rates for service they provide as common carriers that could not be challenged regardless of how high they were set. Under UP's logic, a carrier with an existing reciprocal switching arrangement could, in reaction to a bidding process by customer, tip the competition to itself by unilaterally increasing the switch charge rate added to its competitor's movement to an exorbitantly high level. And neither the rail shipper, the second carrier, nor the STB could do anything about it because the arrangement was "voluntary", *i.e.*, unilateral. This is clearly not the case, and the fact that UP did not take this action during OPPD's contract bidding process reflects a recognition by UP that such an action would have been subject to the Board's jurisdiction to prevent or regulate.

UP's argument that §11102(c) is the sole statutory provision that grants the Board authority over the lawfulness of switch charges, and such authority only exists where the Board directs reciprocal switching over a carrier's objection is obviously legally incorrect. The Board must decline UP's invitation to take such a narrow view of the Board's authority that would have such broad application to other switching arrangements nationwide.³⁰

³⁰ UP's Motion is also internally inconsistent on the "voluntary arrangement" argument. On the one hand, UP asserts that "UP's decision opening NOPS to reciprocal switching was

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3. UP's Market Dominance Claims are Wrong and Raise Disputed Factual Issues that Require Further Discovery and Evidence

UP also claims that the Complaint must be dismissed because UP disputes that it has market dominance over “the transportation to which [its] rate applies,”³¹ which the Complaint identifies as the transportation by UP over its tracks from the Gibson Yard to NOPS. The Complaint alleges that UP owns the tracks over which the service is provided, that there are no effective railroad or intramodal alternatives to UP, and that the rate is more than 375% of the variable cost of the associated service – far in excess of the 180% threshold established in §10707(d). This is all that is required to state a reasonable cause for investigation of the rate because the defendant has market dominance.

In its Motion UP attempts to inappropriately expand the market dominance inquiry in this proceeding beyond its movement to and from NOPS from the Gibson Yard to the entire movement of OPPD's coal from the Wyoming Powder River Basin to NOPS. This is far beyond the narrow scope presented by the Complaint and has nothing to do with the standard for dismissal. UP also argues that BNSF provides service in competition with UP even though UP is physically providing the actual rail service from Gibson Yard to NOPS pursuant to the challenged rate. These arguments are wrong, but more importantly, UP is prematurely raising disputed factual issues that bear on the Board's final determination of whether market dominance exists, something that is to be determined through discovery and the parties' evidentiary submissions. This determination will

voluntary.” However, UP later inconsistently claims that its actions are subject to unstated contractual agreements with BNSF in support of its flawed arguments that does not have standing because “it is not a party to the agreements between UP and BNSF that exist when BNSF accepts UP's offer of reciprocal switching service.” Motion at 18.

³¹ 49 U.S.C. §10707(a).

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examine whether there is effective competition to UP for the service UP provides over its tracks from Gibson Yard to NOPS by reviewing factors that include:

- (1) BNSF cannot offer its own competing rate for the same service over this track;
- (2) It is well established that trucking the volumes of coal burned at power stations such as NOPS cannot be an effective competitor to railroad transportation;
- (3) At no time during the bidding process UP describes in its Motion did UP lower the switch charge rate; and
- (4) Other fact-specific factors the Board takes into account when making market dominance determinations.

Because market dominance determinations in formal rate cases are inherently a fact-intensive determination, the Board has long held the position that this aspect of its jurisdiction is to be resolved during the evidentiary phase, not in response to a motion to dismiss. Tellingly, UP cites no cases in which the Board dismissed a rate complaint due to a finding lack of market dominance prior to any discovery or evidence. On the contrary, the Board has adhered to this position and denied motions to dismiss even when it has “considerable doubts as to complainants’ ability to demonstrate market dominance”³² in the evidentiary phase of the case. Here, OPPD has sufficiently alleged that market dominance is present, and the Complaint on its face states reasonable grounds for investigation and further action. The Board must accept these allegations as true for the purpose of UP’s Motion, thus defeating it on this point. UP’s disagreement with the factual allegations in the Complaint on this issue provide no grounds for dismissal of OPPD’s Complaint.

³² STB Docket No. 42102, *Sierra Pacific Power Company and Idaho Power Company v. Union Pacific Railroad Company* (STB served January 26, 1998) at 4-5.

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4. UP's Discussion and Proffered Evidence about Potential Contract Rates is Irrelevant to the Issues Presented by the Complaint

UP has improperly included with its Motion evidence that purports to describe certain details of the bidding process that culminated in the Contract between BNSF and OPPD. This includes verified statement testimony about a “final offer” that OPPD allegedly “extracted” from UP in June of 2020.³³ The inclusion of this information in UP's Motion is puzzling. In any event, it is factually inaccurate and utterly irrelevant because UP's two witnesses describe and analyze an offer from UP that was never part of the bidding process. As explained by Mr. Ruhl, who led the bidding process and respective contract negotiations with BNSF and UP, the so called “final offer” discussed in UP's Motion and discussed by its witnesses refers to an unsolicited “addendum” to UP's “best and final” offer that was improperly submitted to a member of OPPD's negotiating team nearly three weeks after the bidding process established by OPPD had officially closed. This unsolicited, amended “best and final” offer from UP was therefore not “extracted” from UP by OPPD, as UP falsely states. Nor was it included in the evaluation of the railroads' final bids. Indeed, as Mr. Ruhl explains, in order to maintain the integrity of the bidding process OPPD had established and conveyed to both railroads, the details of UP's untimely submission were not disclosed to him, other OPPD personnel involved in the negotiations, OPPD's counsel, or its outside rail transportation consultants.³⁴ UP's Motion and both its witnesses neglect to inform the Board that on June 26, 2020 OPPD informed UP that “the recent addendum to UP's best and final offer of May 28th, 2020, received by OPPD on June 15th 2020, will not be evaluated as part of the Union Pacific best and final offer as it was received after the clearly communicated deadline of

³³ Motion at 4, Verified Statement of Aaron Pfeifer, Verified Statement of Michael Baranowski.

³⁴ Ruhl V.S. at 2.

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May 28th, 2020.”³⁵ As such, UP’s discussion and purported expert analysis³⁶ of a belated, improper submission by UP that OPPD never even considered or evaluated is irrelevant and should be ignored.

5. OPPD Clearly has Standing to Challenge the Rate at Issue

Finally, UP seeks dismissal of the Complaint based on an allegation that OPPD lacks standing. The short answer to UP’s overall standing argument is that – like the rest of the Motion - it is based almost entirely on disputed factual claims and legal arguments that cannot be valid grounds for dismissal. For example, UP argues that OPPD does not have standing to obtain reparations from UP for payments OPPD has made in excess of the maximum reasonable rate for the service UP provides to NOPS because OPPD does not currently directly pay UP, even though it is undisputed that UP ultimately receives 100% of the rate from OPPD. But this arrangement does not deprive OPPD of standing. In the first place, UP’s argument is betrayed by the fact that UP has refused to accept direct payments of the switch charge from OPPD.³⁷ Faced with the “choice” between either informally routing the switch charge payments through BNSF—which BNSF in turn pays to UP—or not receive deliveries of coal desperately needed for the operation of its coal-fired power plant, OPPD was forced into the option of making sure it continued to receive coal deliveries while it pursued its remedies to challenge the reasonableness of the charge that it ultimately pays in full.

³⁵ Attachment A to Ruhl V.S.

³⁶ OPPD in no way concedes that the other factual assertions of Mr. Pfeifer and Mr. Baranowski, and the analysis and calculations included with Mr. Baranowski’s submission, are accurate or correct. In fact, both statements contain numerous factual and computational errors which OPPD will address should the offered information become part of the evidentiary phase of this case despite its complete lack of relevancy or application to the Board’s standards for dismissal.

³⁷ Complaint at ¶10.

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OPPD's standing to challenge the rate at issue and receive reparations, despite the fact that UP insists on BNSF paying initially, is also supported by precedent. Standing consists of three elements: (1) injury in fact, (2) causation, and (3) redressability.³⁸ In *McCarty Farms, Inc. v. Burlington N., Inc.*, wheat growers alleged BNSF's predecessor the Burlington Northern Railroad ("BN") charged unjust and unreasonable freight rates for shipment of wheat to grain elevator operators.³⁹ The wheat growers sought reparations for overcharges above a maximum reasonable level to be set by the Interstate Commerce Commission ("ICC"). Like UP in this case, BN argued that the farmers lacked standing because the "wheat growers were one or more commercial transactions removed from the transportation contracts."⁴⁰ It was the elevator operators—claimed BN—who paid the rate and were the party directly affected by it and who therefore had standing.⁴¹ The court rejected BN's arguments that the alleged damages of numerous wheat growers were too disparate and remote to confer standing merely because the rate had first been paid by the elevators.⁴² Ultimately, the court determined the growers had alleged they had sustained sufficient direct damages to have standing and held they should have the opportunity to prove that the unreasonable rates were passed on to them.⁴³ Notably, the court determined that the growers' claims of damages were not too remote because the unreasonable rates they paid could potentially be calculated from their business records.⁴⁴ The Board has recognized and followed the *McCarty Farms*' precedent, and it has expressly declined the requests of UP and other railroads to adopt a

³⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)

³⁹ 91 F.R.D. 486, 486 (D. Mont. 1981).

⁴⁰ *Id.* at 487.

⁴¹ *Id.*

⁴² *Id.* at 491-92.

⁴³ *Id.* at 492

⁴⁴ *Id.* at 491.

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hard and fast rule that parties who do not directly pay a rate may not seek reparations.⁴⁵ Thus the “settled law” on this subject is not as UP posits,⁴⁶ but rather is that any complainant potentially has standing to seek reparations even if the rate is initially paid by another party. In this case there is even less issue of remoteness to overcome than the court faced in *McCarty Farms*. OPPD is a single shipper who pays 100% of the rate that is charged by UP and initially paid by BNSF. Its injury in fact, causation and redressability are all plainly evident. OPPD clearly has alleged sufficient direct damage from an unreasonably high rate to have standing to seek redress against UP.

UP also argues that OPPD lacks standing because OPPD is not harmed by voluntarily paying the switch rate.⁴⁷ UP’s argument is analogous to the voluntary payment doctrine, which generally bars a party from recovering money voluntarily paid with full knowledge of the facts.⁴⁸ However, duress and coercion are exceptions to the doctrine.⁴⁹ In other words, “[a] plaintiff may defeat the doctrine by showing that the payment was not truly voluntary.”⁵⁰ Importantly, whether the exception applies “is generally a question of fact, to be judged in light of all the circumstances surrounding a given transaction.”⁵¹ Where the voluntariness of payment is not apparent on the face

⁴⁵ Docket No. EP 528 (Sub-No. 1), *Publication Requirements for Agricultural Products, et al* (served December 29, 2016) at 8 (citing *McCarty Farms*) and *see id.* at 6, footnote 7 (“NGFA and other parties also raise issues related to ‘whether parties who indirectly suffer from rate increases can receive reparations.’ (Hr’g Tr. 172:8-21, June 10, 2015.) UP, for its part, requested that, if the Board clarifies that indirect purchasers of rail transportation can file rate complaints, the Board also clarify that parties that did not pay the rate may not recover reparations. (UP Reply 38.) The Board is not addressing the issue of reparations in this decision.”

⁴⁶ Motion at 13.

⁴⁷ Motion at 15-16.

⁴⁸ *See, e.g., Affordable Cmty. of Mo. v. Fannie Mae*, 815 F.3d 1130, 1134 (8th Cir. 2016).

⁴⁹ *Id.*; *see also Spivey v. Adaptive Mktg. LLC*, 622 F.3d 816, 822 (7th Cir. 2010).

⁵⁰ *Shaw v. Marriott Int’l, Inc.*, 474 F. Supp. 2d 141, 151 (D.D.C. 2007) (internal quotation marks and citation omitted).

⁵¹ *Id.* (alteration accepted) (quoting *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663,

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of a complaint, dismissal is unwarranted.⁵² As discussed, OPPD is faced with a false “choice,” and UP’s duress and coercion does not strip OPPD of standing.

UP’s claim that its Circular establishes a relationship between UP and BNSF that is intended to benefit only BNSF is merely another disputed factual assertion that is not appropriate in a motion to dismiss. This is the opposite of OPPD’s view of the relationship that is asserted in paragraph 9 of the Complaint. The argument and verified statement testimony from UP’s witness Mr. Sanford about UP’s alleged views on the meaning of its tariff and its completely one-sided characterization of BNSF’s alleged understanding of their relationship are merely evidence on this disputed factual issue that UP has inappropriately and prematurely included in its Motion.⁵³

As mentioned previously, UP raises an additional factual issue by alleging in its Motion that there are “agreements between UP and BNSF that exist when BNSF accepts UP’s offer of reciprocal switching service.”⁵⁴ Whether such “agreements” actually exist, their terms, and their impact on OPPD’s claims are additional factual issues that will be developed through discovery and evidentiary submissions, and are therefore not applicable to the motion to dismiss standards.⁵⁵

669 n.1 (7th Cir. 2001)).

⁵² See *id.*

⁵³ That BNSF likely holds a contrary view to UP is evident from Section 4 of the contract quoted above, which clearly contemplates UP making final delivery to NOPS pursuant to its tariff as UP, not as BNSF’s agent.

⁵⁴ Motion at 18.

⁵⁵ The alleged existence of “agreements” between BNSF and UP as grounds for dismissal is a brazen one by UP. OPPD’s first discovery requests to UP were served on July 22, 2022 with OPPD’s Complaint. Requests for Documents Nos 5 and 6, respectively, asked UP to (1) “Please produce all agreements, contracts, or contract provisions between UP and BNSF dating from 2020 to the present applicable to the movement of coal received by UP from BNSF in Omaha and delivered by UP to NOPS”; and (2) “Please produce all agreements, contracts, or contract provisions between UP and BNSF related to UP’s provision of services pursuant to the terms of the Circular.” On August 23, 2022, UP informed the Board and OPPD that UP “was willing to produce information responsive to . . . Requests for Documents . . . 5 [and] 6” UP Response to OPPD’s Reply (to UP’s first motion for protective order) at 1. However, UP has never produced

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UP's arguments that OPPD lacks standing are also based on UP's statement that "if OPPD reimburses BNSF, it is solely the consequence of a contract between OPPD and BNSF – a contract that falls outside the Board's jurisdiction."⁵⁶ This is again merely another example of UP disputing the allegation in the Complaint that no such written contract to reimburse BNSF exists, a point that Mr. Ruhl has reinforced in his Verified Statement.⁵⁷

In summary, OPPD has standing to challenge the reasonableness of the rate UP has established and to obtain reparations for payments OPPD has made above the maximum reasonable level for the rate since January 1, 2021. However, even if the STB was to determine that the damages to OPPD were insufficiently direct to confer such standing, OPPD plainly has standing under 49 U.S.C. §11701(b), which states that "the Board may not dismiss a complaint made against a rail carrier providing transportation subject to the jurisdiction of the Board under this part because of the absence of direct damage to the complainant."

IV. CONCLUSION

For all the reasons set forth in this Reply, the Motion should be denied.

Respectfully submitted,



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any information in response to these requests. And yet, UP now seeks dismissal of OPPD's Complaint based in part on factual claims about the alleged existence of agreements between BNSF and UP. This highlights why UP's Motion is premature and must be dismissed.

⁵⁶ Motion at 13.

⁵⁷ Ruhl V.S. at 3.

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Attorneys for Omaha Public Power District

November 14, 2022

EXHIBIT A

[REDACTED]

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

VERIFIED STATEMENT OF GARY RUHL

My name is Gary D. Ruhl. I am the Manager Programs, Energy Marketing and Trading for Omaha Public Power District (“OPPD”). I have been employed at OPPD for 31 years, and my responsibilities have included overseeing the OPPD’s coal and rail transportation contracting processes. This Verified Statement responds to certain statements made in the October 11, 2022 Motion to Dismiss filed by the defendant Union Pacific Railroad Company (“UP”) in this case. Specifically, the Motion to Dismiss and the verified statements of Aaron Pfeifer and Michael Baranowski reference a “final rate offer” that UP says OPPD “extracted” from UP which UP states produced an “exceptionally low” revenue-to-variable cost percentage. Mr. Pfeifer states “UP offered its final proposal in Jun (sic) 2020,” and Mr. Baranowski’s verified statement offers an analysis of that offer and a calculation of UP’s variable cost of providing the service covered by the offer Mr. Pfeifer references. UP further states “BNSF’s final offer was presumably even lower than UP’s,” referring to the “final rate offer” from June 2020 referenced in its Motion to Dismiss. These factual assertions are wrong on numerous levels, the most notable of which is that the offer

they reference and analyze, respectfully, had no bearing on the contractual bidding process because it was submitted long after the bidding process OPPD implemented was officially over and was not considered or evaluated.

Specifically, in late 2019 OPPD developed a very regimented and fair process for its contract negotiations that culminated in its current contract with BNSF Railway Company (“BNSF”). That process involved several rounds of bid submissions by both railroads in 2020 which included a clearly communicated date of May 28, 2020 for each railroad to submit its “Best and Final Offer.” Both UP and BNSF complied with this deadline, and OPPD closed the process to evaluate their submissions and determine the winning bidder. However, nearly three weeks later, on June 15, 2020, UP submitted an unsolicited “addendum” to its “Best and Final Offer” to a member of OPPD’s contracting team. This offer was therefore not “extracted” by OPPD, as UP’s Motion to Dismiss states.

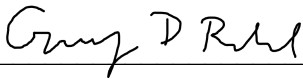
OPPD’s coal and rail transportation bidding processes were designed to be fair to both carriers and we committed to execute them both with integrity and consistency. For that reason, UP’s out-of-time “addendum” was not included in our evaluation of the two railroads’ respective best and final submissions. Indeed, the details of UP’s amended, non-conforming offer were not disclosed to me or other members of the OPPD negotiating team, our counsel, and outside railroad consulting experts. On June 26, 2020, UP was informed by the attached email that its unsolicited addendum would not be considered as part of its “Best and Final Offer” it had submitted on May 28, 2020. Consequently, any discussion of the details of the June 15, 2020 non-conforming addendum in UP’s Motion to Dismiss, to the extent the 2020 bidding process has any marginal relevance to this complaint case, has no meaning.

I also wish to address another inaccurate assertion contained in UP's Motion to Dismiss, which is that there is a written agreement between OPPD and BNSF that requires OPPD to reimburse BNSF for any payments BNSF makes to UP of the switch charge OPPD is challenging in this case. This is not true. Such an obligation is not contained in the rail transportation contract between BNSF and OPPD, and it is also not contained in a separate agreement. Rather, when UP refused OPPD's requests to be directly billed the charge UP is assessing to transport OPPD's coal trains to and from NOPS, BNSF and OPPD adopted an informal understanding that OPPD would reimburse BNSF for 100% of the charges it paid to UP pending resolution of this dispute. OPPD accounts for these separate payments as it does with the invoices it receives from BNSF for amounts owed under the rail transportation contract, and the invoices OPPD pays to buy the coal that BNSF and UP transport to NOPS. Specifically, OPPD's internal accounting system assigns a "contract number" that enables all payments related to rail service to NOPS by BNSF and UP to be tied to that facility, whether they are pursuant to the transportation contract between OPPD and BNSF or pursuant to the informal arrangement between BNSF and OPPD for the switch charges assessed by UP for its service to and from NOPS and Gibson Yard.

VERIFICATION

I, Gary D. Ruhl, Manager Programs, Energy Marketing and Trading for Omaha Public Power District (“OPPD”), state, under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to execute this Verified Statement.

Executed: November 14, 2022



Gary D. Ruhl

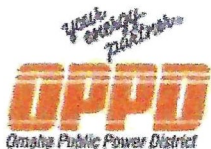
ATTACHMENT A

From: LARSON, NIKOLE L <nlarson@oppd.com>
Sent: Friday, June 26, 2020 3:02 PM
To: 'David Edmund Black'
Subject: RE: RFP 5680 UP June 15 addendum

Good afternoon David,

OPPD has communicated its commitment to the process for the competitive sourcing of Coal Transportation. The recent addendum to UP's best and final offer of May 28th, 2020, received by OPPD on June 15th 2020, will not be evaluated as part of the Union Pacific best and final offer as it was received after the clearly communicated deadline of May 28th, 2020. OPPD expects to respond with the results of the RFP analysis by the end of next week.

Sincerely,



Nikole Larson
Contract Specialist
Supply Chain Management Division
Omaha Public Power District
444 South 16th Street, 5E/EP1
Omaha, NE 68102-2247
Office: 531-226-2081
Cell: 402-619-6974
Fax: 402-636-3931
nlarson@oppd.com

From: David Edmund Black <DAVIDBLACK@UP.COM>
Sent: Monday, June 15, 2020 4:46 PM
To: LARSON, NIKOLE L <nlarson@oppd.com>
Cc: RFP <rfp@oppd.com>
Subject: RFP 5680 UP June 15 addendum

READ THIS FIRST! This is **NOT** an OPPD email.

Be very cautious of any links or attachments unless you recognize this sender - DAVIDBLACK@up.com and are expecting this email.

Please click the "Report it" button if you think this email is malicious.

Hello, Nikole -

Sharing the attached letter, if you could kindly confirm receipt.

Thank you!
- David

David Edmund Black

Director - Sales | Union Pacific Railroad

1400 Douglas Street, Stop 1360, Omaha, Nebraska 68179

O: 402-544-5662 | M: 832-381-4025 | davidblack@up.com



For fastest logistics assistance, please contact our Coal Operations Team (HDCcoal@up.com) or log into MyUPRR.com to utilize the expanding menu of features.

Coronavirus (COVID-19) Impact on Union Pacific: <https://www.up.com/aboutup/community/covid/index.htm> [up.com]

Note: I will be on furlough June 29-July 3, July 20-24, and August 17-21.

**

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**

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2022 I served the attached Reply to Motion to Dismiss by electronic mail on the following counsel for Union Pacific Railroad Company:

Michael Rosenthal
Covington Burling
mrosenthal@cov.com

/ss/ Thomas W. Wilcox
