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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**REPLY TO UNION PACIFIC RAILROAD COMPANY’S
RENEWED MOTION FOR PROTECTIVE ORDER**

Complainant the Omaha Public Power District (“OPPD”) hereby files its Reply in opposition to Defendant Union Pacific Railroad Company’s (“UP”) Renewed Motion for Protective Order (“Renewed Motion”) filed on October 11, 2022 in this proceeding. The Renewed Motion was filed contemporaneously with a Motion to Dismiss (“Motion”) OPPD’s Complaint, and the filing of the Motion is the sole grounds asserted for UP’s Renewed Motion. For all the reason set forth hereinbelow, the Renewed Motion should be denied.

I. BACKGROUND

OPPD’s Complaint was filed on July 22, 2022, and its First Requests for Admissions, Interrogatories, and Requests for Documents (“First Discovery Requests”) were served on UP the same day. UP responded on July 25, 2022 by serving on OPPD eight discovery requests seeking documents which UP described as “narrowly tailored jurisdictional discovery requests” seeking

information UP needed “to obtain support for a motion to dismiss.”¹ UP then filed its first Motion for Protective Order (“First Motion”) on August 1, 2022, which asked the Board to rule OPPD was not entitled to any discovery from UP on any issues in this case until (1) OPPD responded to UP’s eight “jurisdictional discovery requests;” (2) UP determined that the production was complete; (3) UP reviewed the information and materials provided by OPPD and decided whether to file a motion to dismiss the Complaint - which UP said could be within 20 days of its decision that OPPD had completed its production;² and (4) the Board ruled on any motion to dismiss that UP elected to file.

In its August 23, 2022 “Response” to OPPD’s reply to UP’s First Motion, UP indicated that it would begin searching for and producing documents if the Board ruled against UP on its First Motion.³ UP also stated that it was “willing to produce information responsive to the more limited subset of requests that OPPD identifies in its Reply (*i.e.*, Requests for Admission Nos. 1, 2, and 3; Interrogatories Nos. 1, 2, 3, and 4; and Requests for Documents Nos. 1, 2, 3, 4, 5, 6, 7 and 8, as well as the requests in OPPD’s second set of discovery requests), subject to the usual meet and confer process, as long as OPPD agrees to follow the same process with respect to UP’s initial set of eight discovery requests.”⁴ This “subset of requests” was specifically identified by OPPD as requests for information and documents pertaining to factual and legal arguments that OPPD anticipated UP would include in a motion to dismiss, in light of the prior litigation over the rate at issue, and correspondence between the parties that preceded the Complaint’s filing.⁵

Subsequent to obtaining clarification from the Board on the production of certain documents related to the BNSF Railway Company (“BNSF”) that were responsive to UP’s initial eight

¹ UP Motion for Protective Order at 1, 4.

² *Id.* at 4.

³ See UP’s Response to OPPD’s Reply, at 1.

⁴ *Id.*

⁵ Reply to UP Motion for Protective Order at 6-7.

documents requests, OPPD began producing documents responsive to UP's first discovery requests on November 10, 2022.

The Board, through the Director of the Office of Proceedings ("Director") rightly denied UP's First Motion on September 15, 2022, stating that "the Board's regulations do not provide for the automatic stay of discovery upon the filing of a motion."⁶ Even though its First Motion was denied, and despite representing to the Board and OPPD that it was willing to produce information in response to OPPD's discovery requests referenced above, UP has still to date produced zero documents to OPPD in this case.⁷ Consequently, UP's statement that "[d]iscovery has already been time consuming for both the parties and the Board,"⁸ must be taken with a large grain of salt. Indeed, OPPD is considering its options to force UP to participate in the discovery phase of this case, including filing additional motions to compel, and seeking the imposition of sanctions, if necessary.

II. ARGUMENT

A. UP's Motion to Dismiss Provides No Basis for Preventing OPPD from Seeking Discovery From UP in this Case

UP's sole ground for renewing its request for the Board to formally stay OPPD's discovery of information from UP – which would formalize UP's unilateral refusal to produce documents or information - is that UP elected to file its Motion, which it did without (1) waiting for OPPD's responses to UP's first discovery requests which UP represented were a necessary prerequisite to support such a motion, or (2) producing any information to OPPD related to the arguments and factual assertions UP indicated it would include - and indeed has now included - in its Motion.

⁶ Decision Served September 15, 2022 at 3.

⁷ On October 3, 2022 the Director issued a decision that compelled UP to produce information and documents in response to several interrogatories propounded by OPPD. UP has appealed that decision, and further discussions and production of information and documents in compliance with the Director's decision have been suspended pending a decision on the appeal.

⁸ Renewed Motion at 3.

UP's Renewed Motion must first be denied because it again seeks a protective order preventing only OPPD from seeking discovery from UP, stating "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."⁹ To date, however, UP has served two sets of discovery requests on OPPD totaling 57 Document Requests and 16 Interrogatories (most with multiple subparts). Several of the Interrogatories were the subject of a motion to compel filed by UP, which the Director granted on October 13, 2022. OPPD did not appeal that order and intends to comply with it, and OPPD continues to participate in the discovery phase of this case. UP's request that it be permitted to sit out the discovery phase while retaining the ability to hold OPPD's feet to the fire on production to UP should be rejected out of hand.

Second, as the Director correctly informed UP in response to its First Motion, there is nothing in the Board's rules that provide for the automatic stay of discovery upon the filing of a motion, including a motion to dismiss. UP has done nothing to overcome this hurdle. The crux of UP's position is that it believes its Motion to Dismiss "raises serious questions about the substantive soundness of OPPD's current complaint."¹⁰ UP makes this claim despite intentionally foregoing the opportunity to obtain discovery of factual information it needed to obtain support for a motion to dismiss. UP also makes strident assertions in its Renewed Motion about the alleged merits of the factual and legal assertions in its Motion despite withholding production to OPPD of information UP acknowledges is relevant to these exact claims - and UP stated in August it was willing to produce.

As stated in detail in the Reply to UP's Motion to Dismiss filed contemporaneously with this Reply to UP's Renewed Motion, UP has not come close to meeting the extremely high burden to obtain the extraordinary relief of dismissing OPPD's Complaint. As with UP's First Motion, the

⁹ *Id.* at 5 (emphasis added).

¹⁰ *Id.* at 3.

Renewed Motion simply does not raise “significant concerns about both the substantive and procedural soundness of the complaint and questions about the scope of this case.”¹¹

UP’s attempt to support its Renewed Motion with the same cases it cited in support of its First Motion is unavailing. All of the cases remain either distinguishable or inapplicable for the reasons explained in OPPD’s Reply to the First Motion.¹² UP’s reference to the Board’s suspension of discovery in the prior case involving the rate at issue in this case is also unavailing for two reasons. First, the Board properly allowed the discovery to proceed in that case while it considered UP’s motion to dismiss.¹³ Second, as OPPD has stated in its Complaint, its Reply to UP’s First Motion, and discusses in greater detail in its Reply to UP’s Motion to Dismiss, the sole grounds for dismissing the complaint in the prior proceeding – *i.e.*, that the challenged rate was part of a rail transportation contract - are not present in this case.

III. CONCLUSION

For all the reasons set forth in this Reply, UP’s Renewed Motion must be denied, the discovery phase of this case must be permitted to proceed, and the Board must admonish UP to

¹¹ Docket No. 40519, *Zoneskip, Inc. v. United Parcel Service, Inc. and United Parcel Service of America, Inc.* (served May 28, 1991) (1991 WL 89759 (I.C.C.) at *2. In *Zoneskip*, the complaint apparently had both procedural and substantive defects, but significantly, it also directly related to an ongoing proceeding before the Interstate Commerce Commission that potentially affected “the procedural disposition and/or resolution of the merits of this case.” *Id.* Similarly, in Docket No. 42105, *Dairyland Power Cooperative v. Union Pacific Railroad Company* (served April 29, 2008), the substance of the complaint (mileage-based fuel surcharges) related to a recent proceeding that related directly to the merits of the proceeding.

¹² OPPD Reply to First Motion at 2-3.

¹³ UP’s motion to dismiss was filed in Docket NOR 42006 on July 31, 1997, and the Board dismissed OPPD’s complaint on October 16, 1997.

participate in discovery in good faith and in compliance with applicable discovery orders and decisions.

Respectfully submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is cursive and fluid.

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CERTIFICATE OF SERVICE

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

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