

SERVICE DATE – NOVEMBER 18, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42173

OMAHA PUBLIC POWER DISTRICT v. UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board denies an appeal of a decision of the Director of the Office of Proceedings that granted in part a motion to compel discovery.

Decided: November 18, 2022

On October 3, 2022, the Board served a decision of the Director of the Office of Proceedings (the Director) granting in part a motion filed by Omaha Public Power District (OPPD) to compel discovery. This decision denies an appeal of that ruling.

BACKGROUND

On July 22, 2022, 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 trains² of coal in shipper-supplied rail cars to OPPD’s North Omaha Power Station in Omaha, Neb., from UP’s interchange with BNSF Railway Company (BNSF) at BNSF’s Gibson Yard in Omaha (Gibson Yard Interchange), and for 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 1, 2022, OPPD filed a motion to compel discovery pursuant to 49 C.F.R. § 1114.31(a), requesting that the Board order UP to “fully respond” to several interrogatories. (OPPD Mot. to Compel 1.) UP replied to OPPD’s motion on September 12, 2022. By decision served September 15, 2022, OPPD and UP were directed to meet and confer on the discovery issues raised in OPPD’s motion and inform the Board whether there were any outstanding issues that could not be resolved by the parties. Omaha Pub. Power Dist. v. Union Pac. R.R. (Sept. 15

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² OPPD states that, in the context of the complaint, “unit train” means a train of between 135 and 152 shipper-provided aluminum rail cars. (Compl. 1 n.1.)

Decision), NOR 42173, slip op. at 3 (STB served Sept. 15, 2022).³ On September 19, 2022, OPPD, with the concurrence of UP, filed a response indicating that the parties continued to be in dispute over UP's responses and objections to Interrogatory Nos. 11, 12, 18, 20, and 21. (OPPD Resp. 1-2.) Board staff convened a conference with the parties on September 26, 2022, at which the parties agreed to continue to work to resolve their dispute with respect to Interrogatory No. 20, leaving Interrogatory Nos. 11, 12, 18, and 21 to be addressed by the Director pursuant to 49 C.F.R. § 1114.31(a)(4).

By decision served October 3, 2022, the Director granted in part OPPD's motion to compel. Omaha Pub. Power Dist. v. Union Pac. R.R. (Oct. 3 Decision), NOR 42173, slip op. at 6 (STB served Oct. 3, 2022). With respect to Interrogatory Nos. 11 and 12,⁴ the Director found that the information sought by OPPD was relevant to the subject matter of the proceeding, noting that the Board's regulations provide for broad discovery and that the Board has indicated that railroad-developed COC estimates could be relevant in rate reasonableness cases with respect to revenue adequacy. Id. at 3-4, 5-6 (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)). The Director further found that the information sought by OPPD in Interrogatory Nos. 18 and 21⁵ was relevant to the issue of revenue adequacy. Oct. 3 Decision, NOR 42173, slip op. at 5-6. In support of that finding, the Director referenced Board precedent stating that the Board accepts all competent and probative evidence related to a carrier's revenue adequacy when assessing revenue adequacy in rate reasonableness cases. Id. at 5 (quoting Consumers Energy, NOR 42142, slip op. at 6). To reduce the burden on UP, the Director permitted UP to respond to the four interrogatories by producing, in lieu of a narrative response, responsive documents (to the extent UP has any) in the form customarily maintained by UP. Oct. 3 Decision, NOR 42173, slip op. at 4-6. With respect to Interrogatory Nos. 18 and 21, the Director also narrowed the scope of the requests to responsive documents held by employees at or above an organizational level within UP likely to reflect significant consideration, and/or within appropriately specialized departments at UP. Id. at 5-6. The parties were directed to meet and confer by October 18, 2022, to resolve the parameters of complying with the order and to report back to the Board by that date any agreed-upon production deadlines. Id. at 6.

UP appealed the October 3 Decision on October 6, 2022, arguing that the decision "erroneously grants OPPD requests for discovery that would require UP to produce for inspection certain documents and other information 'not ordinarily available for public inspection.'" (UP Appeal 2 (citing 49 C.F.R. § 1115.9(a)(2)).) UP argues that the Director erred by requiring it to produce information that is, according to UP, not relevant to the subject matter

³ The September 15 Decision, NOR 42173, slip op. at 2-3, denied a motion for a protective order filed by UP that asked the Board to quash discovery requests served by OPPD and stay any further discovery by OPPD.

⁴ Each of these interrogatories concerns UP's current cost of equity capital (COE) or current weighted average cost of capital (COC).

⁵ Interrogatory No. 18 concerns discussions between UP and outside financial analysts generally regarding UP's returns on capital. Interrogatory No. 21 concerns UP stock repurchases.

of the proceeding. (*Id.* at 2, 5, 7.) UP states that the Director either acknowledged that the information was not relevant for the purpose OPPD requested it or failed to evaluate OPPD's stated justifications, and instead relied on theories of relevance not raised by OPPD. (*Id.* at 2, 4-8.) With respect to Interrogatory Nos. 11 and 12, UP also argues that the Director "ignored UP's argument that any COE or COC calculations UP may have performed were irrelevant in this proceeding because the Board has established standard methodologies for calculating COE and COC when those figures are used in regulatory proceedings." (*Id.* at 4-5.) With respect to Interrogatory Nos. 18 and 21, UP argues that the Director failed to explain how the requested information could be used to assess UP's revenue adequacy. (*Id.* at 7, 9.)

On October 12, 2022, OPPD filed its reply, arguing that the Director applied the correct legal standard and properly found that the information sought by OPPD is relevant to the proceeding. (OPPD Reply 3, Oct. 12, 2022.) With respect to Interrogatory Nos. 11 and 12, OPPD disputes UP's claim that the Director failed to "sufficiently evaluate, explain, or rely on a proposed theory of relevancy," noting that the October 3 Decision discusses the Board's discovery regulations and Consumers Energy precedent. (*Id.* at 3-4.) Additionally, OPPD states that it has conveyed in various instances that it "considers UP's revenue adequate status to be an important factor in this case" and argues that "stating one use of UP's COC and COE . . . does not preclude OPPD from using the same information [for] a revenue adequacy determination." (*Id.* at 4-5.) With respect to Interrogatory No. 18, OPPD argues that the Board has cited to meetings with financial analysts "in support of future stand-alone revenues" and that, because the revenue adequacy constraint is also forward-looking, the "information UP is disclosing to market analysts about its future returns and costs is extremely relevant." (*Id.* at 5-6 (citing FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 731 (2000)).) OPPD further argues that the Director was not required to explain how the information requested in Interrogatory No. 18 regarding meetings with financial analysts or in Interrogatory No. 21 regarding stock repurchases could be used in a revenue adequacy constraint demonstration, just that the information could be used by OPPD to develop its argument. (*Id.* at 6.) OPPD asserts that, in light of UP's indication that it intends to challenge the underlying principles of revenue adequacy, including as applied to UP in this proceeding, the Director appropriately adopted a broad view regarding discovery as to UP's revenue adequacy. (*Id.*)

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1115.9(a), a Board employee's ruling on discovery may be appealed on an interlocutory basis if it meets one of four enumerated circumstances, including that the ruling grants a request for the inspection of documents not ordinarily available for public inspection. Appeals must satisfy a threshold determination under 49 C.F.R. § 1115.9(a) before the Board will analyze the merits of the appeal under the standard outlined in 49 C.F.R. § 1115.1(c). Finch Paper LLC—Pet. for Declaratory Ord., FD 35981, slip op. at 2 (STB served Mar. 24, 2017). Under that standard, appeals are not favored and "will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 C.F.R. § 1115.1(c). Here, UP has satisfied the threshold determination under 49 C.F.R. § 1115.9, as the October 3 Decision would require UP to produce for inspection certain documents and information not ordinarily available for public inspection. However, for the reasons discussed below, the Board finds UP has failed to demonstrate a clear error of judgment

or manifest injustice that would result from the October 3 Decision. Accordingly, UP's appeal will be denied.

The Director applied the correct legal standard. As stated in the October 3 Decision, the Board's discovery regulations provide that "[p]arties may obtain 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). Although burdensome discovery requests for non-critical information may be denied under certain circumstances, 49 C.F.R. § 1114.21(c), requests that appear reasonably calculated to lead to the discovery of admissible evidence are permitted. 49 C.F.R. § 1114.21(a)(2).

Accordingly, when ruling on OPPD's motion to compel, the issue before the Director was whether the information sought was "relevant to the *subject matter involved in a proceeding*." See 49 C.F.R. § 1114.21(a)(1) (emphasis added). As the Director noted, the Board's regulations provide for broad discovery.⁶ OPPD alleges in its complaint that "UP's charge is excessive and unreasonable . . . under the Revenue Adequacy Constraint," (Compl. 6), and the Director found, based on Board precedent, that the information sought in Interrogatory Nos. 11, 12, 18, and 21 could be relevant to the issue of revenue adequacy. The Director did not "ignore" UP's argument that any COC or COE estimates developed by UP are irrelevant "because the Board has established standard methodologies for calculating COE and COC when those figures are used in regulatory proceedings," (UP Appeal 4-5), but rather addressed the point by reciting recent Board precedent indicating that railroad-developed COC estimates could be relevant in rate reasonableness cases with respect to revenue adequacy. Oct. 3 Decision, NOR 42173, slip op. at 3-4. UP has not contested the applicability of that precedent here.

Similarly, contrary to UP's assertion, the Director need not explain *how* the information sought in Interrogatory Nos. 18 and 21 could be used to assess UP's revenue adequacy. As the Director noted, under Board precedent, "relevance" means that the information "might be able to affect the outcome of a proceeding," and as the Director explained, Board precedent provides that evidence other than the annual revenue adequacy determination may be introduced. Oct. 3 Decision, NOR 42173, slip op. at 2, 5. The information sought by OPPD in Interrogatory Nos. 18 and 21 appears reasonably calculated to lead to the discovery of admissible evidence. See, e.g., FMC Wyo. Corp. v. Union Pac. R.R., 4 S.T.B. 699, 731 ("We believe that UP's own forecasts, made in the normal course of business, provide an acceptable basis for developing growth projections for the [stand-alone railroad]. . . . Indeed, as [the complainant] points out, UP has used the [long range plans] as a basis for discussion with security analysts.").

⁶ 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).

The Director also addressed UP's objections that the interrogatories were overbroad and unduly burdensome by narrowing the scope of the requests. The Director reduced the burden on UP by permitting UP to respond by producing responsive documents instead of a narrative response. See Oct. 3 Decision, NOR 42173, slip op. at 3-4, 5-6. With respect to Interrogatory Nos. 18 and 21, the Director further reduced the burden by limiting UP's search obligations to custodians at or above an organizational level within UP likely to reflect significant consideration, and/or within appropriately specialized departments at UP. See id. at 6.

For these reasons, the Board finds no clear error or manifest injustice in the October 3 Decision, and UP's appeal will be denied. The parties will be directed to meet and confer, if they have not done so already, by November 25, 2022, to resolve the parameters of complying with the October 3 Decision, and report back to the Board by that date any agreed-upon production deadlines.⁷

It is ordered:

1. UP's appeal of the October 3 Decision is denied.
2. The parties shall meet and confer, as described above, by November 25, 2022, and report to the Board by that date any agreed-upon production deadlines.
3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

⁷ By decision served October 21, 2022, the Director granted an unopposed motion for extension of time filed by OPPD, extending, among other things, the deadline for the completion of discovery in this proceeding from December 19, 2022, to January 9, 2023.