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BEFORE THE
SURFACE TRANSPORTATION BOARD

_____	)	
OMAHA PUBLIC POWER DISTRICT,	)	
	)	
Complainant,	)	
	)	
v.	)	NOR 42173
	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendant.	)	
_____	)	

**UNION PACIFIC RAILROAD COMPANY'S
SUPPLEMENT TO MOTION TO DISMISS**

Union Pacific Railroad Company (UP) is filing this supplement to its motion to dismiss the complaint filed in this docket by Omaha Public Power District (OPPD) to address OPPD's rail transportation contract with BNSF Railway (BNSF). OPPD described the contract in the complaint, but produced a copy only after UP filed its motion.¹

In its motion, UP argued that the Board lacks jurisdiction over this case because, among other things, the switching service UP provides BNSF for OPPD trains moving to OPPD's North Omaha Power Station (NOPS) was covered by OPPD's contract with BNSF. Although OPPD alleged its contract with BNSF does not cover the movement of OPPD's trains between Gibson Yard and NOPS, *see* Complaint ¶ 6, UP explained the allegation could not be correct, because BNSF is invoking UP's reciprocal switching circular to complete its transportation of the trains

¹ To the extent this supplement replies to OPPD's reply to UP's motion to dismiss, UP asks the Board to accept this pleading in the interest of compiling a more complete record.

UP would have preferred to file its motion to dismiss after OPPD produced its contract with BNSF in response to UP's discovery requests served July 25, 2022. UP ultimately filed its motion on October 11, 2022, after waiting more than two and a half months for OPPD to produce the contract. OPPD produced the contract on November 10, 2022.

to NOPS, and the Circular only applies if BNSF is holding out to serve NOPS and using UP as its agent. *See* UP Motion at 3, 19–20.

OPPD's actual contract with BNSF {{{

_____}} In sum, BNSF is providing the transportation at issue under its contract with OPPD, and thus the transportation is outside the Board's jurisdiction. *See* 49 U.S.C. § 10709(c)(1); *cf. H.B. Fuller Company v. Southern Pacific*, 2 S.T.B. 550, 553 (1997) ("The fact that the parties may have chosen to incorporate tariff terms into their contract does not make transportation under the contract subject to regulation."); *Cross Oil Ref. & Mktg., Inc. v. Union Pac. R.R.*, FD 33582, slip op. at 3 (STB served Oct. 27, 1998) ("[R]ail contracts can incorporate tariff provisions and still be outside the Board's jurisdiction.").

² {{{

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Material within double braces ("{{{ }}") has been designated "Highly Confidential" under the Protective Order in this proceeding and has been redacted from the public version of this filing.

In its reply, OPPD tries to change the issue by claiming the contract does not require it to reimburse BNSF for any switch charges paid to UP. *See* OPPD Reply at 7 (“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.”). However, another document OPPD produced in discovery {{ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]}}

Regardless of whether OPPD actually agreed to reimburse BNSF,⁴ {{ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

³ {{ [REDACTED]
[REDACTED]}}

If OPPD is claiming it has no obligation to reimburse BNSF because compensation for UP’s reciprocal switching service is incorporated in the contract’s line-haul rate, that would further reinforce UP’s argument that the contract provides for transportation to NOPS and the Board therefore lacks jurisdiction.

If OPPD is claiming its payments to BNSF are entirely voluntary and not required under its contract, that would further reinforce UP’s argument that any injury to OPPD is self-inflicted and OPPD therefore lacks standing. *See* UP Motion at 15–17.

⁴ OPPD is hedging its bets. {{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]}}

⁵ {{ [REDACTED]
[REDACTED]
[REDACTED]}}

}}⁶

OPPD's Reply includes many factually and legally flawed arguments. UP is not addressing those arguments here to respect the Board's general prohibition against filing a reply to a reply. 49 C.F.R. § 1104.13(c). However, as a very basic matter, OPPD's assertion that "the four corners of the Complaint are the sole consideration in evaluating whether the case should proceed," OPPD Reply at 3, is wrong as a matter of law. The Board must review BNSF's rail transportation contract with OPPD to address its own jurisdiction (unless it dismisses the complaint on different grounds). *Cf. Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004) (documents appended to a motion to dismiss whose authenticity is not disputed "may be considered here because they are referred to in the complaint and are integral to [plaintiff's] claim"). Also, the Board should not accept "inferences . . . unsupported by the facts set out in the complaint" or "legal conclusions cast in the form of factual allegations." *Id.* at 963 (internal quotations omitted). Nor should it accept as true "the complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice." *Id.*

Finally, OPPD's reply mistakenly attributes to UP's motion a statement that written agreements are created whenever BNSF accepts UP's offer to provide reciprocal switching

⁶ Contrary to OPPD's claim, *see* OPPD Reply at 8, neither OPPD's nor BNSF's subjective belief regarding the relationship created by the Circular is ultimately relevant here. As a matter of law, reciprocal switching is an arrangement between two rail carriers: "Reciprocal, or connection-terminal, switching is the service performed by a rail carrier, as agent for a line-haul carrier" *Sioux City & N.O. Barge Lines, Inc. v. Chicago & N.W. Ry. Co.*, 303 I.C.C. 537, 542 (1958); *see also Missouri Pac. R.R. v. Reynolds-Davis Grocery Co.*, 268 U.S. 366, 369 (1925) (delivering line-haul carrier liable for the loss of goods while in the hands of destination switching carrier, because the switching carrier was "simply the agent" of the line-haul carrier "for the purpose of delivery"); *Ezee Flow Corp. v. Illinois Central R. Co.*, 287 I.C.C. 281, 284 (1952) (originating line-haul carrier "was responsible" for damages "as the initial carrier, the switching carrier having acted merely as its agent").

service. *See* OPPD Reply at 18 & n.55. UP never said that, and it is not true. Rather, UP's motion explained that UP's Circular constitutes an offer to BNSF to provide switching service, which BNSF can accept by notifying UP when it has traffic to move pursuant to the Circular, thus creating an agreement under which UP provides the service described in the Circular as BNSF's agent and BNSF pays the established charge. *See* UP Motion at 18–19 & Sanford V.S. ¶¶ 1–9.

Respectfully submitted,

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November 29, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2022, I caused a copy of the foregoing document to be served by email on all parties of record in STB Docket No. NOR 42173.

/s/ Michael L. Rosenthal

EXHIBITS 1–3

**REDACTED AS HIGHLY
CONFIDENTIAL**