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PUBLIC VERSION

December 8, 2022

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: STB Docket NOR 42173, *Omaha Public Power District v. Union Pacific Railroad Company*

Dear Ms. Brown:

By this letter, complainant Omaha Public Power District (“OPPD”) briefly responds to the “Supplement to Motion to Dismiss” (“Supplement”) filed by defendant Union Pacific Railroad Company (“UP”) in this proceeding on November 29, 2022. In its Supplement, UP attempts to expand on arguments it made in its Motion to Dismiss that the rate challenged by OPPD’s Complaint is part of the rail transportation contract between BNSF Railway Company (“BNSF”) and OPPD.

As with its Motion to Dismiss, UP’s Supplement is unpersuasive because UP cannot overcome the unambiguous language of the contract. The contract establishes BNSF’s contractual obligation in transporting coal destined for burning at the North Omaha Power Station (“NOPS”) to be to deliver the coal to BNSF’s interchange with UP at the Gibson Yard, and further states {{ [REDACTED] }}.” UP instead repeats the arguments in its Motion to Dismiss that, despite the plain language of the contract (which reflects the undisputed intent of OPPD to have language in the contract to exclude the switch movement and preserve OPPD’s ability to challenge the reasonableness of UP’s charge), UP’s rate and its transportation service to NOPS are nevertheless still covered by the

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contract between BNSF and OPPD. OPPD has fully refuted these arguments in its Reply to UP's Motion to Dismiss.

OPPD notes that UP also has improperly raised a new legal argument in its Supplement. This new argument is that "as a matter of law, reciprocal switching is an arrangement between two carriers."¹ However, none of the three, decades-old (indeed, one is nearly a century old) cases support such a blanket statement. On the contrary, each case involved unique, fact specific arrangements between rail carriers that were very different from the facts of this case. These differences include, but are not limited to, that there are no statements or representations from BNSF anywhere that it considers UP to be BNSF's agent regarding service to NOPS.

Finally, as it did with its Motion to Dismiss, UP improperly includes in its Supplement other disputed factual allegations and arguments that are not appropriate when considering a motion to dismiss, under the applicable standards. This being said, OPPD notes that the letters between BNSF and OPPD attached to the Supplement provide no support for UP; rather, they supply clear factual affirmation of the allegation in OPPD's complaint 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."²

In conclusion, the Supplement provides no basis for dismissing OPPD's Complaint under the standards described and summarized in OPPD's Reply to UP's Motion to Dismiss.

Please do not hesitate to call me if you have any questions.

Sincerely,



Thomas W. Wilcox
Counsel for Omaha Public Power District

¹ Supplement at 5, note 6.

² Complaint at ¶10.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December 2022, I served a copy of the foregoing letter by electronic mail upon the following counsel for Union Pacific Railroad Company:

Michael Rosenthal
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/ss/ Thomas W. Wilcox
