

SERVICE DATE – DECEMBER 23, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42173

OMAHA PUBLIC POWER DISTRICT v. UNION PACIFIC RAILROAD COMPANY

Decided: December 23, 2022

On July 22, 2022, Omaha Public Power District (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 UP's "UP Reciprocal Switching Circular" (the Circular) for the transportation of unit trains¹ of coal in shipper-supplied railcars to OPPD's North Omaha Power Station in Omaha, Neb., from UP's interchange with BNSF Railway Company (BNSF) at BNSF's Gibson Yard located 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. UP filed an answer to the complaint on August 11, 2022.

On October 11, 2022, UP filed a motion to dismiss OPPD's complaint and a renewed motion for a protective order under 49 C.F.R. § 1114.21(c).² In its renewed motion for a protective order, UP argues that its motion to dismiss raises serious questions about the substantive soundness of OPPD's complaint,³ and that, in these circumstances, "the Board

¹ OPPD states that, in the context of the complaint, "unit train" means a train of between 135 and 152 shipper-provided aluminum railcars. (Compl. 1 n.1.)

² UP previously filed a motion for a protective order on August 1, 2022, which, by decision served September 15, 2022, was denied without prejudice as premature because the primary ground for the motion was the potential impact on the case of a motion to dismiss that UP had not yet filed. Omaha Pub. Power Dist. v. Union Pac. R.R., NOR 42173, slip op. at 2-3 (STB served Sept. 15, 2022).

³ In its motion to dismiss, UP argues that OPPD's complaint must be dismissed because (1) the Board lacks authority to regulate UP's "voluntary" reciprocal switching arrangement with BNSF; (2) OPPD lacks standing to challenge the reciprocal switching charge because it does not pay the charge, any injury is self-inflicted, and OPPD is not an intended beneficiary of the Circular; (3) the Board lacks jurisdiction over UP's reciprocal switching service because that service is covered by OPPD's contract with BNSF; and (4) UP lacks market dominance over the transportation to which the charge applies because BNSF can provide competitive service via reciprocal switching. (UP Mot. to Dismiss 6-21.) UP supplemented its motion to dismiss on November 29, 2022. UP's motion to dismiss will be addressed in a separate decision.

should stay further discovery in this matter until it addresses UP's motion."⁴ (UP Renewed Mot. 3.) According to UP, discovery has already been time-consuming for both parties and the Board, and the parties' costs will continue to grow. (*Id.*) UP argues that the Board and its predecessor, the Interstate Commerce Commission, have stayed discovery in similar circumstances in the past. (*Id.* at 3-4 (citing Zoneskip, Inc. v. United Parcel Serv., Inc., NOM 40519, slip op. at 2 (ICC served May 31, 1991); Dairyland Power Coop. v. Union Pac. R.R., NOR 42105, slip op. at 2 (STB served Apr. 29, 2008); DHX, Inc. v. Matson Navigation Co., WCC-105, slip op. at 2 (STB served June 6, 2002); Phila. Belt Line R.R. v. Consol. Rail Corp., FD 32802, slip op. at 2 (STB served Mar. 12, 1996)).)

OPPD replied to UP's renewed motion for a protective order on November 14, 2022, arguing that UP's motion to dismiss provides no basis for preventing OPPD from obtaining discovery from UP.⁵ (OPPD Reply 3, Nov. 14, 2022.) According to OPPD, UP's renewed motion should be denied because it seeks to prevent only OPPD from obtaining discovery from UP and because it does not raise significant concerns about the substantive and procedural soundness of the complaint and questions about the scope of the case. (*Id.* at 4-5.) OPPD also argues that the precedent cited by UP in support of its renewed motion is either distinguishable or inapplicable. (*Id.* at 5.)

Under 49 C.F.R. § 1114.21(c), upon motion by any party and for good cause shown, any order which justice requires may be entered to protect a party from, among other things, undue burden or expense. Discovery has been stayed where a motion to dismiss raised issues that may affect the scope of discovery. *See, e.g., Dairyland Power Coop.*, NOR 42105, slip op. at 2 (granting a protective order where a "motion to dismiss raise[d] issues that may affect both the procedural schedule in these matters and the scope of discovery"); *DHX*, WCC-105, slip op. at 2 (suspending the procedural schedule "[g]iven that a decision on the motion to dismiss may affect the scope of discovery"); *Zoneskip*, NOM 40519, slip op. at 2 (staying discovery and deferring further action in the proceeding pending resolution of a motion to dismiss that "may determine the appropriate scope of discovery"). *See also Phila. Belt Line*, FD 32802, slip op. at 2 (suspending the procedural schedule and all discovery until the Board ruled on a pending motion to dismiss).⁶

⁴ UP's renewed motion also requests that the Board "quash OPPD's discovery requests and stay any further discovery by OPPD pending the Board's resolution of UP's motion to dismiss." (UP Renewed Mot. 5.)

⁵ OPPD also filed a reply to OPPD's motion to dismiss on November 14, 2022, and a letter response to UP's supplement to its motion to dismiss on December 8, 2022.

⁶ OPPD's attempt to distinguish these cases is not persuasive. (*See* OPPD Reply 5, Nov. 14, 2022; OPPD Reply 2-4, Aug. 22, 2022). OPPD notes that none of the cases cited were rail rate reasonableness cases, (OPPD Reply 2-3, Aug. 22, 2022), but that fact is not dispositive, given that various types of Board proceedings involve significant discovery and procedural schedules. Moreover, while OPPD argues that, in *Philadelphia Belt Line* and *DHX*, the parties had already engaged in discovery before a motion to dismiss was filed and discovery stayed, (*id.* at 3), discovery was in progress in this case as well when UP filed its motion to dismiss and renewed motion. Finally, OPPD further asserts that the decisions in *Zoneskip* and *Dairyland*

Here, both parties indicate that extensive discovery has been propounded,⁷ and, according to UP, discovery is “far from complete,” (see UP Renewed Mot. 3). Because a decision on UP’s pending motion to dismiss may affect the scope of discovery in this proceeding, UP’s renewed motion for a protective order will be granted to protect the parties from the potential undue burden and expense that may arise should discovery proceed while the Board considers UP’s motion to dismiss. Accordingly, all further discovery in this proceeding will be stayed, and the procedural schedule will be suspended pending further order.

It is ordered:

1. UP’s renewed motion for a protective order is granted. All further discovery in this proceeding is stayed, and the procedural schedule is suspended pending further order.
2. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Power Cooperative were affected by other proceedings before the agency at that time, (*id.* at 3 n.7), and that the decision staying discovery in Zoneskip indicated both procedural and substantive defects in the complaint, (OPPD Reply 5 n.11, Nov. 14, 2022); however, the existence of related proceedings is not a prerequisite to staying discovery under the Board’s regulations, *see* 49 C.F.R. § 1114.21(c), nor do the regulations require that a complaint contain procedural and substantive defects in order to stay discovery, although these factors may be considered.

OPPD also attempts to distinguish the present case from Omaha Public Power District v. Union Pacific Railroad, NOR 42006 (STB served Aug. 25, 1997), where, in a proceeding involving the same parties, the Board suspended the deadline for completing discovery to consider a motion to dismiss (among other reasons). OPPD claims that the Board allowed discovery to proceed in the 1997 case while it considered UP’s motion to dismiss. (OPPD Reply 5, Nov. 14, 2022). To the contrary, discovery deadlines were suspended on August 25, 1997—just one week after OPPD filed its reply to UP’s motion to dismiss on August 18, 1997. Further, although OPPD argues that the substantive merits of the 1997 case are distinguishable, (OPPD Reply 5, Nov. 14, 2022), the merits of the instant case are not being addressed in this decision regarding a protective order.

⁷ UP states that OPPD has served over 164 discovery requests (not including subparts), (*see* UP Renewed Mot. 3), and OPPD states that UP has served 57 document requests and 16 interrogatories (most with multiple subparts), (*see* OPPD Reply 4, Nov. 14, 2022). Additionally, each party has filed a motion to compel discovery.