

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35504

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> This decision denies a request that the Board take enforcement action against Union Pacific Railroad Company (UP) based on the Board’s previous denial of UP’s petition for a declaratory order.

Decided: October 9, 2014

Union Pacific Railroad Company (UP) filed a petition on April 27, 2011, requesting that the Board issue a declaratory order finding that the indemnification provisions in UP’s tariff relating to transportation of Toxic-by-Inhalation Hazardous commodities (TIH) were reasonable. The Board instituted a proceeding on UP’s petition and requested public comment. By decision served on April 30, 2013 (April 30 Decision), the Board denied UP’s petition, holding that UP had not carried its burden of proof that it was entitled to the declaratory order it had sought.

Thereafter, UP revised the relevant tariff provisions in certain respects, and on August 27, 2013, the American Chemistry Council, the Chlorine Institute, the Fertilizer Institute, and the National Industrial Transportation League (the Interested Parties) filed a motion for a show cause order, asking the Board to order that UP demonstrate why its revised tariff, effective August 1, 2013, is reasonable under the April 30 Decision. The Interested Parties argue that UP’s revised tariff provisions suffer from the same deficiencies as the prior ones, which UP had not demonstrated to be reasonable. See Mot. to Show Cause 1. On September 16, 2013, UP filed a reply opposing the Interested Parties’ motion.

The Interested Parties argue that the Board should grant their motion without requiring a new proceeding and that the Board “has used ‘show cause’ orders in previous proceedings to enforce its decisions.” Mot. to Show Cause 5, citing R.R. Ventures, Inc.—Aban. Exemption—Between Youngstown, Ohio, & Darlington, Pa., AB 556 (Sub-No. 2X) (STB served Apr. 5, 2000); Cent. Kan. Ry.—Aban. Exemption—in Marion & McPherson Cntys., Kan., AB 406 (Sub-No. 6X) (STB served June 23, 2000). We find that those decisions are inapposite, and that the circumstances of this case do not support issuance of a show cause order.

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<sup>1</sup> 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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

The two decisions cited by Interested Parties are clearly distinguishable from this case. In each case, the Board used a show cause order to address allegations that a party was violating a prior Board decision that had issued a directive or imposed an obligation on a party.<sup>2</sup> Here, in contrast, the Interested Parties ask the Board to “enforce” a decision that declined to find UP’s tariff reasonable; but, by its language, the decision imposed no directive or obligation on UP regarding that tariff, so there is nothing to enforce.

The April 30 Decision commented on various aspects of the UP tariff and denied UP’s petition for a declaratory order; however, it did not mandate that UP change the tariff or direct UP as to how any subsequent indemnification provisions should be drafted. Moreover, the Board’s refusal to affirmatively find the tariff reasonable did not amount to a finding that the tariff was unreasonable; it was, rather, a determination that UP did not carry its burden of proof as to reasonableness.

The burden of proof in a declaratory order proceeding and the enforceability of a Board order are distinct issues. Just as UP had the burden of proving the reasonableness of its tariff provisions once it asked for declaratory relief, a shipper initiating an unreasonable rate or practice case has the burden of proving that the challenged rate or practice is unreasonable.<sup>3</sup> There is no Board directive here by which the Interested Parties could obtain the relief they seek without proving the UP tariff provisions unreasonable.

UP has modified the tariff in question. Whether that modification addresses the concerns raised by the Interested Parties is not an issue we decide here. If the Interested Parties seek a mandate with which UP must comply, they may file a complaint to demonstrate that UP’s current indemnification provisions should be disallowed as an unreasonable practice (or are otherwise contrary to law). Alternatively, upon notice from the Interested Parties, we would treat the motion for a show cause order as an unreasonable practice complaint and would institute a procedural schedule for the presentation of evidence and argument in which the Interested Parties would be the complainants. The Board requests that the Interested Parties provide such notice, if they choose to do so, by November 10, 2014.

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<sup>2</sup> In Railroad Ventures, the Board set the terms and conditions of a sale under 49 U.S.C. § 10904, requiring the rail carrier to sell certain assets to the prospective purchaser if the purchaser accepted the Board’s terms. When the Board learned that the rail carrier had instead transferred some of these assets to third parties, thereby subverting the Board’s terms and conditions ruling, the Board issued a show cause order requiring the carrier to explain why the third-party transfers were not voidable and why the assets should not be transferred according to the Board’s earlier order. In Central Kansas Railway, a party assumed certain obligations as a trail sponsor, as required by the Board under an interim trail use/rail banking certificate. Based on evidence suggesting that the party may not have been complying with these obligations, the Board issued a show cause order requiring the trail sponsor to show that it was meeting its responsibilities.

<sup>3</sup> See, e.g., N. Am. Freight Car Ass’n v. BNSF Ry., NOR 42060 (Sub-No. 1), slip op. at 5 (STB served Jan. 26, 2007).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The Interested Parties' motion for a show cause order is denied.
2. If the Interested Parties wish their motion for a show cause order to be treated as a complaint, they shall file a notice so stating by November 10, 2014.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.