

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42105

DAIRYLAND POWER COOPERATIVE

v.

UNION PACIFIC RAILROAD COMPANY

MOTION FOR PROTECTIVE ORDER

Decided: April 29, 2008

By complaint filed on March 5, 2008, Dairyland Power Cooperative (Dairyland), a not-for-profit generation and transmission utility based in La Crosse, WI, challenges the fuel surcharge payments collected from it by Union Pacific Railroad Company (UP) between January 2006 and February 2008 as an unreasonable practice under 49 U.S.C. 10702(2). Dairyland seeks the prescription of reasonable fuel surcharge practices and monetary damages. UP filed an answer on March 25, 2008.

On March 31, 2008, UP filed a motion to dismiss Dairyland's complaint, arguing that (1) Dairyland cannot invoke the Board's unreasonable practice jurisdiction to challenge the level of its fuel surcharge payments; and (2) the Board's decision in Rail Fuel Surcharges, STB Ex Parte No. 661 (STB served Jan. 26, 2007), precludes claims that UP's current mileage-based fuel surcharge program constitutes an unreasonable practice and precludes claims for damages allegedly resulting from UP's former rate-based program. Dairyland filed a reply in opposition to the motion to dismiss on April 11, 2008.

On April 2, 2008, Dairyland filed a report on the parties' conference to discuss procedural and discovery matters and a motion for a protective order. Dairyland requests that the Board adopt its submitted procedural schedule, which includes immediate discovery, and seeks a protective order to facilitate the potential exchange and use of commercially sensitive material in this case. On April 4, 2008, UP filed a response to Dairyland's report, asking the Board not to adopt a schedule before it rules on UP's motion to dismiss. On the same date, UP filed a motion for a protective order, asking the Board to quash Dairyland's discovery requests and stay all further discovery pending the Board's decision on its motion to dismiss. UP maintains that Dairyland's discovery requests are far-reaching and burdensome, and it argues that the Board's decision on the motion to dismiss could obviate the need for discovery or at least narrow the issues and lessen the need for discovery. On April 11, 2008, Dairyland filed a reply in opposition to UP's motion for a protective order.

UP's motion to dismiss raises issues that may affect both the procedural schedule in these matters and the scope of discovery. As a result, UP's motion for a protective order will be granted and action on Dairyland's request for a procedural schedule and a protective order will be held in abeyance, pending the Board's ruling on UP's motion to dismiss.

It is ordered:

1. UP's motion for a protective order is granted.
2. Action on Dairyland's request for a procedural schedule and a protective order will be held in abeyance, pending the Board's ruling on the motion to dismiss.
3. This decision is effective on its date of service.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan
Acting Secretary