

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42006

OMAHA PUBLIC POWER DISTRICT
v.
UNION PACIFIC RAILROAD COMPANY

Decided: November 14, 2000

Alleging material error, complainant Omaha Public Power District (OPPD) has filed a petition under 49 CFR 1115.3 to vacate the Board's decision (Dismissal Decision) dismissing OPPD's complaint. We are denying the petition.

BACKGROUND

At the time the initial complaint was filed, OPPD shipped coal from mines in the Powder River Basin (PRB) in Wyoming to OPPD's North Omaha Power Station (NOPS) pursuant to a confidential rail transportation contract with The Burlington Northern and Santa Fe Railway Company (BNSF). BNSF's lines do not directly serve NOPS, which is located in North Omaha, NE, on a line of the Union Pacific Railroad Company (UP). Instead, UP physically handles the traffic between NOPS and an interchange point¹ with BNSF approximately 5 miles from NOPS.

In its complaint, OPPD alleged that UP's \$124 per-car charge for switching this traffic is unreasonably high.² OPPD sought both reparations and the prescription of a reasonable switching charge. UP moved to compel production of documents relating to the movement of coal to NOPS, including a complete copy of the BNSF-OPPD transportation contract. OPPD instead produced section 6.1.2 of the contract (redacted), which provided for partial absorption of the switching charge by BNSF.

UP moved to dismiss the complaint on the ground that the Board could not review the reasonableness of the switching charge because the entire transportation from origin (PRB) to

¹ We refer to this point as the "interchange" point for convenience. As noted in the Dismissal Decision, use of the label is not intended to carry any legal significance.

² OPPD asserted that the \$124 per-car charge generated revenues that are 744% of UP's variable costs of providing the switching service.

destination (NOPS) was covered by OPPD's contract with BNSF.³ Additionally, UP argued that OPPD may not challenge the reciprocal switching fee, because that fee was the responsibility of BNSF, not OPPD.

OPPD responded that the switching charge should not be viewed as a part of the contract between BNSF and OPPD because the switching charge was independently published without reference to the contract, was not determined by the contract, and existed independently of the contract. OPPD further asserted that the charge may be challenged because, under the contract with BNSF, OPPD had assumed responsibility for paying a portion of the switching charge, and upon the expiration of the contract, OPPD would bear UP's full charge, unless it could enter into a similar arrangement with BNSF.

In the Dismissal Decision, we concluded that UP's switching service was provided to BNSF, not OPPD, because it was BNSF's responsibility, under the contract, to move the coal from the mine to the plant. We found that OPPD's obligation to pay a portion of the switching charge arises from the contract as well. Because any payments that OPPD made for the switching service were a result of its contract with BNSF, over which we lack regulatory jurisdiction,⁴ we dismissed the complaint. OPPD filed a timely petition to vacate that decision, and UP replied.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.3(b), a discretionary appeal of an entire Board action will be granted only upon a showing that: (1) the prior action will be affected materially because of new evidence or changed circumstances; and/or (2) the prior action involves material error.

OPPD argues that it was material error in the Dismissal Decision to rely on UP's inferences about the scope of the entire contract, notwithstanding that the contract was not then in the record. OPPD contends that, inasmuch as its complaint had put the scope of the contract in issue, the Board should have reviewed the relevant portions of the contract before making a final ruling.⁵ Acknowledging that the question of the Board's jurisdiction can be resolved by

³ See Burlington Northern R.R. v. STB, 75 F.3d 685 (D.C. Cir. 1996). The expiration date of the contract and any provisions for renewal are confidential. However, the complaint was filed more than a year before the contract was scheduled to expire.

⁴ See 49 U.S.C. 10709(c)(1). Incorporation of tariff provisions into a contract does not alter this basic principle in any way. See H.B. Fuller Co. v. Southern Pacific Transportation Co., No. 41510 (STB served Aug. 22, 1997).

⁵ We note that the responsibility for providing an adequate record lies with the parties.
(continued...)

reviewing the contract, OPPD now offers into the record a copy of the entire contract, partially redacted for commercially sensitive material.⁶

The scope of BNSF's transportation obligation under the contract, as set forth in the contract's declarations, is to transport coal from various mines to NOPS. While OPPD relies on provisions of the contract relating to interchange, force majeure, and unloading to suggest that BNSF's obligations end at the interchange point, these provisions simply reflect the operational reality that the traffic is physically transported the final 5 miles to NOPS by UP. Furthermore, while acknowledging that BNSF is obligated to transport the coal from origin to destination, OPPD argues that the destination is the interchange point with UP. However, the contract expressly defines the destination as NOPS,⁷ and we find no instance in the contract where destination means the interchange point.⁸

⁵(...continued)

OPPD not only had sole access to the contract, but, as the party resisting the motion to dismiss, had the last word as well. It cannot complain about its own failure to rebut UP's allegations. See ZoneSkip, Inc. v. UPS, Inc. and UPS of America, Inc., 8 I.C.C.2d 645, 654 n.11 (1992). OPPD's reliance on Allen Freight Trailer Bridge, Inc., Common and Contract Carrier Application, No. MC-247354 (C) and (P), et al. (STB served Sept. 4, 1997), is misplaced. In that case, the Board did not request additional evidence, but sought supplemental briefing on whether an intervening statute had resolved the controversy.

⁶ Notwithstanding the partial redaction, OPPD has designated both the contract and any references to it in its petition as "highly confidential" under the protective order provided in a decision served July 18, 1997, and UP has honored this designation in its reply. Although many of the protected provisions appear to be "boilerplate," OPPD notes that BNSF has not consented to their disclosure, and we will not substitute our judgment in this regard. To the extent possible, we will honor the confidential nature of the contract and the parties' discussion thereof in our public discussion of the issues raised in the contract.

⁷ A disclaimer in the contractual definition of "destination," upon which OPPD relies, simply describes who will physically handle the traffic over the line haul and switching legs of the movement. It is perfectly consistent with the finding in the Dismissal Decision that, although BNSF holds out to provide the complete origin-to-destination service, the traffic is physically handled by UP between the interchange point and NOPS.

⁸ The provisions relating to transportation service, rates, rail car supply, and billing uniformly refer either to NOPS or to destination (as defined). OPPD suggests that, under the billing provision, it was free to make its own switching arrangements with UP, subject to an absorption credit from BNSF. Even if it could have done so, it did not.

Inasmuch as the Dismissal Decision contains no material error, OPPD's petition to reopen will be denied and the proceeding discontinued.

It is ordered:

1. The petition to reopen is denied and the proceeding discontinued.
2. This decision is effective December 15, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary