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SERVICE DATE – NOVEMBER 2, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42127

INTERMOUNTAIN POWER AGENCY

v.

UNION PACIFIC RAILROAD COMPANY

Digest:<sup>1</sup> In this case, the issue before the Board is whether an unsuccessful complainant in a rate reasonableness case may subsequently file a second complaint seeking reparations for past movements under those same rates. While the shipper here has not shown that new evidence, changed circumstances or material error justify a second investigation under our standards, the railroad has not objected to the shipper filing a new complaint challenging the same rates with respect to future movements. Accordingly, the Board dismisses with prejudice that portion of the shipper's original complaint as it applies to past movements.

Decided: October 31, 2012

In its December 22, 2010 complaint initiating this proceeding, Intermountain Power Agency (IPA) challenges the reasonableness of rates established by Union Pacific Railroad Company (UP) for unit train coal transportation service to IPA's electric generating facilities at Lynndyl, Utah, for certain UP single-line service and one bottleneck segment.<sup>2</sup> IPA alleges that UP possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed pursuant to the Board's stand-alone cost (SAC) test. In accordance with the procedural schedule, IPA filed opening evidence on August 10, 2011, and UP filed reply evidence on November 10, 2011.

On December 8, 2011, IPA filed a petition to supplement the record, seeking leave to reduce the scope of its stand-alone railroad (SARR) by eliminating more than one-third of the

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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).

<sup>2</sup> The three movements concerned rail carriage of coal to IPA's electric generating facility, the Intermountain Generating Station (IGS) near Lynndyl, Utah: (1) from one Utah coal loadout (the Savage Coal Terminal); (2) from one Utah mine (the Skyline Mine); and (3) from one point of interchange with the Utah Railway Company (Provo, Utah). The third is also referred to as the "bottleneck" segment.

SARR submitted in its opening evidence, and to make other adjustments.<sup>3</sup> IPA asserted that its request to supplement was justified for a variety of reasons, among them the impact of a linking error in IPA's opening evidence, which UP had identified in its reply, regarding the calculation of Average Total Cost divisions on cross-over traffic. On December 28, 2011, UP filed a reply in opposition to IPA's petition. The Board denied IPA's petition to supplement the record on April 4, 2012 (April Decision).<sup>4</sup>

On May 2, 2012, IPA filed the subject motion for leave to withdraw its complaint and to dismiss the complaint without prejudice. IPA states that, in light of the April Decision denying its request to supplement the record, IPA no longer seeks relief under its December 2010 complaint. IPA states that it instead intends to file a new complaint challenging UP's rates from only one of the three UP origins involved in its pending complaint—i.e., UP's rates from Provo, Utah to IGS (the bottleneck segment).

In support of its motion to dismiss without prejudice, IPA asserts that: (1) withdrawal of the complaint is in line with Board and Supreme Court precedent; (2) the Board allows for the correction of technical or computational errors in complex matters; and (3) withdrawal of the complaint is appropriate under the standard set forth in Major Issues in Rail Rate Cases (Major Issues), EP 657 (Sub-No. 1) (STB served Oct. 30, 2006), aff'd sub nom. BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008).<sup>5</sup>

On May 22, 2012, UP filed a reply to IPA's motion. UP argues IPA's complaint should be dismissed with prejudice, reasoning that IPA has not satisfied the standard set forth in Major Issues, and that IPA is not entitled to a dismissal as a matter of right, as claimed by IPA. Alternatively, UP suggests that if the Board grants dismissal of the complaint without prejudice, dismissal should be conditioned upon reimbursement of costs and fees paid to outside counsel and consultants UP used to prepare the reply evidence.<sup>6</sup>

However, UP is seeking to dismiss with prejudice only that portion of IPA's complaint challenging the rates as they applied to past movements. UP has not objected to a new complaint

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<sup>3</sup> At that time, under the procedural schedule adopted by decision served July 6, 2011, IPA's rebuttal was due by January 3, 2012. To provide adequate opportunity to consider IPA's petition and any UP reply, the Board issued a decision on December 16, 2011, holding the procedural schedule in abeyance pending a decision on IPA's petition.

<sup>4</sup> Regarding the technical error, the Board stated that "the technical error correction (i.e., the "linking error" IPA refers to) is not grounds for the supplement that IPA now seeks. It is the duty of the complainant to make its best case on opening. The complainant cannot claim that a technical error, brought on by the complainant's own mistake, is grounds for it to modify a core part of its evidence after the defendant carrier has already filed a reply to that evidence." April Decision, slip op. at 3.

<sup>5</sup> IPA Mot. for Leave to Withdraw Compl. (Mot. to Withdraw) 8, 14-15, 29-30.

<sup>6</sup> UP Reply to Mot. to Withdraw 2-5.

that challenges these same rates as they apply to future movements.<sup>7</sup> UP states that “IPA can try to challenge UP’s rates going forward using a different SARR, but it should not be allowed to relitigate its right to reparations for the period before its unsuccessful complaint is dismissed.”<sup>8</sup> On May 30, 2012, IPA filed a second complaint challenging UP’s past and future rates for one of the three UP origins involved in the December 2010 complaint, despite the fact that the Board had not decided IPA’s pending motion to dismiss without prejudice, which is the subject matter of this decision. UP answered it on June 19, 2012. The parties have submitted a joint procedural schedule to govern the second proceeding, which was granted by decision served July 12, 2012. Intermountain Power Agency v. Union Pac. R.R., NOR 42136 (STB served July 12, 2012). On August 14, 2012, UP filed a motion to place that dispute into abeyance. In that pleading, UP observed that the Board had not yet ruled on this motion to dismiss and noted that the dispute between the parties is “the dismissal’s effect on the scope of reparations potentially available in this case.”<sup>9</sup> The Board will act on UP’s motion for abeyance in a separate decision in Docket No. NOR 42136.

### DISCUSSION AND CONCLUSIONS

There is no dispute between the parties with regard to whether IPA may file a new complaint challenging UP’s rates for future movements. According to UP, a decision dismissing IPA’s complaint at this stage of the case “should have the same effect as a final determination that the challenged rates are not unreasonable—that is, IPA could file a new case after this one is dismissed, but like any other unsuccessful litigant in a rate case, IPA could not relitigate the reasonableness of the rates charged in the period before dismissal.”<sup>10</sup> Because UP has not objected to a second investigation of these same rates *as to future movements*, we will address the only contested question before us: whether we should dismiss this complaint with or without prejudice, *as to movements that occurred before the effective date of this decision*.<sup>11</sup>

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<sup>7</sup> Id. at 2, 4-5.

<sup>8</sup> Id. at 4-5.

<sup>9</sup> UP Mot. to Hold Proceeding in Abeyance 3 n.2.

<sup>10</sup> UP Reply to Mot. to Withdraw 2.

<sup>11</sup> UP’s view of our precedent with regard to whether an unsuccessful complainant can immediately bring a new complaint challenging those same rates for future movements (without meeting the reopening standard) is one possible, albeit very narrow, interpretation. But in Major Issues, when the Board required unsuccessful complainants to meet the reopening standard when seeking to file new complaints, the Board did not differentiate between complaints challenging past movements and those challenging only future movements. Moreover, the Board indicated that it was returning to prior agency precedent, which precludes new complaints for future rate relief following an unsuccessful complaint. See, e.g., C.H. Dexter & Sons, Inc. v. N.Y., N.H. & Hartford R.R., 234 I.C.C. 597 (1939) (denying complainant’s motion to dismiss claims for future rate relief). As such, under the logic of Major Issues, dismissal with prejudice could be interpreted to mean that IPA could not bring a second challenge to these same rates for past or future movements, within the Board’s 10-year prescription period, unless it could demonstrate

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Our precedent does not entitle IPA to dismissal without prejudice as a matter of right at this stage in the proceeding.<sup>12</sup> A complainant “cannot, as a matter of right, withdraw its complaint whenever in its opinion its purpose would thus be better served.”<sup>13</sup> Instead, a losing litigant who seeks dismissal without prejudice so it can file a new complaint challenging the same rates, in this case as to past movements, must satisfy the 49 U.S.C. § 722(c) reopening standard. Major Issues, slip op. at 67. IPA has conceded that because of its litigation choices (i.e., how it designed the SARR), it cannot prevail unless offered a second chance to make a better case.

Therefore, we will treat IPA as we would any other losing litigant, with regard to its request to relitigate the reasonableness of rates for movements that occurred prior to the effective date of this decision. To bring another case challenging the same rates as to past movements, it must demonstrate the existence of material error, new evidence, or substantially changed circumstances. This standard was adopted by the Board “to protect the railroad from the threat of repetitive litigation by unsuccessful litigants who can demonstrate no more than a desire to make a better case.” Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 37 (STB served Feb. 27, 2006). The need for repose in rate investigations reflects “the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered . . . .” Astoria Fed. Sav. & Loan Ass’n v. Solomino, 501 U.S. 104, 107 (1991).

IPA has not met this standard. In its motion to withdraw, IPA claims circumstances have changed substantially. IPA attempts to compare its case to the situation of the complainant in West Texas Utilities Co. v. Burlington Northern & Santa Fe Railway, NOR 41191 (STB served

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( . . . continued)

changed circumstances, new evidence, or material error that would justify a second investigation. But given the absence of dispute between the parties in this case as to a new complaint for future movements, the Board will not decide the issue here.

<sup>12</sup> The parties debate whether a litigant in a federal civil proceeding would be entitled to dismissal without prejudice. We need not resolve the issue of proper disposal of the complaint under the Federal Rules of Civil Procedure as we are guided by our own precedent and rules. See Am. Trucking Ass’n v. United States, 627 F.2d 1313, 1320-21 (D.C. Cir. 1980) (recognizing that Congress granted the ICC the authority to “resolve subordinate questions of procedure . . . such as the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another’s proceedings, and similar questions.”).

<sup>13</sup> Dexter, 234 I.C.C. at 598. Accord Royster Guano Co. v. Atl. Coast Line R.R., 50 I.C.C. 34, 40 (1918); Seattle Traffic Ass’n v. Consol. Freightways, 301 I.C.C. 483, 486 (1957), partially rev’d on other grounds, 306 I.C.C. 87 (1959); Fed. Foundry Supply Co. v. Balt. & Ohio R.R., 206 I.C.C. 796, 796 (1935); Alexander King Stone Co. v. Chi., Indianapolis & Louisville Ry., 171 I.C.C. 47, 56 (1930); Federated Metals Corp. v. Pa. R.R., 144 I.C.C. 243, 244 (1928); Traugott Schmidt & Sons v. Mich. Cent. R.R., 23 I.C.C. 684 (1912).

Sept. 10, 2007).<sup>14</sup> The substantially changed circumstances in that case were due to errors made by the Board and circumstances outside either party's control. W. Tex. Utils., slip op. at 5-7. The changed circumstances IPA claims here are markedly different from the changed circumstances in West Texas Utilities. IPA is not seeking to correct errors made by the Board or alleviate circumstances outside its control. Rather, IPA is attempting to correct its own litigation mistake, which is not a changed circumstance that justifies repetitive investigation of the same rates.<sup>15</sup>

Accordingly, we will deny IPA's motion to dismiss without prejudice as to movements under the challenged rate that occurred prior to the effective date of this decision.<sup>16</sup> Instead, that part of this dispute is dismissed with prejudice. But as for the remainder of the complaint, we will grant that unopposed request for relief and dismiss without prejudice.<sup>17</sup>

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

It is ordered:

1. As to any movements under the challenged rates that occurred before the effective date of this decision, this proceeding is dismissed with prejudice.
2. As to the remainder of IPA's complaint, this proceeding is dismissed without prejudice.
3. This decision is effective on its date of service.

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

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<sup>14</sup> Mot. to Withdraw 29.

<sup>15</sup> The Board decisions cited by IPA regarding the correction of technical and computational errors are not controlling. The cases cited by IPA are not rate cases, and in Major Issues, slip op. at 67, which specifically governs rate cases, the Board stated that parties are not allowed to substantially alter the inputs into their analysis. It follows that a party cannot achieve the same objective by seeking leave to dismiss without prejudice at this stage in the proceeding based on its own technical and computational errors.

<sup>16</sup> As the Board is granting UP's request that the proceeding be dismissed with prejudice as to past movements, the Board will not consider UP's request for the costs and fees of its outside counsel and consultants.

<sup>17</sup> See Mot. to Withdraw 8-9 (noting agency practice of permitting the termination of a complaint where unopposed); UP Reply to Mot. to Withdraw 9 (acknowledging Board's willingness to terminate a case without prejudice where neither side objects).