

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42006

OMAHA PUBLIC POWER DISTRICT  
v.  
UNION PACIFIC RAILROAD COMPANY

Decided: October 16, 1997

This proceeding involves a complaint filed by Omaha Public Power District (OPPD) challenging a charge assessed by Union Pacific Railroad Company (UP) for switching services provided between the point<sup>1</sup> at which UP's tracks meets the tracks of The Burlington Northern and Santa Fe Railway Company (BNSF) and OPPD's North Omaha Power Station (NOPS) in North Omaha, Nebraska. We grant UP's motion to dismiss the complaint.

BACKGROUND

OPPD currently ships its coal from the Powder River Basin in Wyoming to OPPD's NOPS facility pursuant to a confidential rail transportation contract with BNSF. BNSF's lines, however, do not directly serve the NOPS plant; rather, the plant is located on a line of the UP, which maintains an interchange with BNSF at a point approximately 5 miles from the plant. Therefore, although BNSF holds out to provide the complete origin-to-destination service, the traffic is physically handled by UP between the interchange point and OPPD's NOPS facility.

In a complaint initially filed on June 20, 1997, OPPD alleges that the \$124 per-car charge applied by UP for its switching service is unreasonably high.<sup>2</sup> In its motion to dismiss, filed on July 29, 1997, UP argues that we may not review the reasonableness of the switching charge because the entire transportation from origin (Powder River Basin) to destination (the NOPS facility) is covered by OPPD's contract with BNSF, which is not yet close to expiring.<sup>3</sup> Additionally, UP argues that OPPD may not challenge the reciprocal switching fee, because that fee is the responsibility of BNSF, not OPPD.<sup>4</sup>

In its reply, filed August 18, 1997, to UP's dismissal motion, OPPD argues that the switching charge should not be viewed as a part of the contract between BNSF and OPPD because the switching charge is independently published without reference to the contract, is not determined by the contract, and exists independently of the contract. OPPD further asserts that it may challenge the charge because, under its contract with BNSF, OPPD has assumed responsibility for paying a

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<sup>1</sup> In this decision, we will, for convenience, refer to this point as the "interchange" point, but our use of that label here is not intended to carry any legal significance.

<sup>2</sup> OPPD states that the \$124 per-car charge generates revenues that are 744% of UP's variable costs of providing the switching service.

<sup>3</sup> The exact duration of the contract is confidential; for purposes of this decision, it is sufficient to note that the contract will not expire for over 1 year.

<sup>4</sup> UP also argues that, to the extent that the fee is deemed to be charged to OPPD rather than BNSF, it is a part of a through rate that must be challenged, if at all, only in its entirety; and that switching fees may be challenged only through the Board's competitive access rules.

portion of the switching charge, and upon the expiration of the contract, OPPD will bear UP's full charge, unless it can enter into a similar arrangement with BNSF.<sup>5</sup>

## DISCUSSION AND CONCLUSIONS

In reviewing a motion to dismiss, we must construe the evidence in the light most favorable to the non-moving party (here, OPPD). Even construing the evidence in that manner wherever possible, however, we find that we must grant UP's motion and dismiss the complaint, on the ground that any payments that OPPD makes for the switching service are a result of its contract with BNSF, over which we lack jurisdiction.

OPPD argues that the case should not be dismissed because UP's switching charge was set and published independently of OPPD's contract with BNSF. That is, of course, true, but the switching service that UP provides is plainly a part of the transportation covered by the contract between BNSF and OPPD. Asserting a factual dispute, OPPD suggests that the contract applies only to service from the Powder River Basin to the interchange point. However, we see no such factual dispute: the service that BNSF holds out under its contract, portions of which have been produced on the record, clearly extends from the Powder River Basin origins all the way into OPPD's plant. Because it is BNSF's responsibility, under its holding out as reflected in the contract, to move the coal traffic from the mine to the plant, UP's switching service is clearly provided to BNSF, not OPPD.<sup>6</sup>

The fact that OPPD may have agreed to bear what has amounted to a small portion of UP's switching charge does not change the fact that OPPD looks to BNSF, not UP, for its rail service, and that service is defined by the contract. The contract explicitly refers to the switching service; it covers the switching charge; and the parties to the contract presumably negotiated how much of the charge each party would bear. Any obligation on OPPD's part to bear a small portion of the charge arises solely from the contract.<sup>7</sup> It is well established that, under 49 U.S.C. 10709(c)(1), transportation under a rail contract may not be challenged on the ground that it violates the Interstate Commerce Act, as amended by the ICC Termination Act of 1995. Incorporation of tariff provisions into a contract does not alter this basic principle in any way. H.B. Fuller Co. v. Southern Pac. Transp. Co., No. 41510 (STB served Aug. 22, 1997).

OPPD asserts that, even if its limited responsibility for the charge is currently governed by the contract, it will become fully responsible for the charge once the contract expires. In fact, the responsibility for paying for any service that UP may provide (and whether UP's switching charge would apply at all) will depend on what type of service OPPD uses, should the contract expire and

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<sup>5</sup> On August 13, 1997, shortly before it filed its reply to UP's motion to dismiss, OPPD filed an amended complaint. The amended complaint appears to be identical to the complaint filed earlier, except that, in the last paragraph, detailing the relief sought, OPPD has asked for unspecified reparations. OPPD claims that its request for reparations somehow gives vitality to its complaint (Reply at 6). However, OPPD concedes that it sought reparations only because of its concern that the Board might not issue a decision until after the contract expires. As the claim for reparations does not relate to any payments that OPPD has made to date, or will make so long as the contract is in effect, it has absolutely no bearing on whether the complaint should be dismissed.

<sup>6</sup> It is possible that OPPD's position is that the contract establishes how much of the switching charge BNSF will absorb, but that, because it does not assign a set amount to OPPD, OPPD's responsibility arises outside of the contract. If that is OPPD's position, it is incorrect. The contract determines the rights and responsibilities of both BNSF and OPPD. Moreover, because the contract assigns BNSF the responsibility for moving the traffic from the mine to the plant, BNSF, and not OPPD, is ultimately responsible to UP for payment of the switching charge.

<sup>7</sup> Notwithstanding its claim for reparations in its amended complaint, OPPD does not allege that it is currently injured by the switching charge. As we have noted, OPPD pays only a small portion of the charge, which it does not claim is too high. To the contrary, the complaint is clearly directed at the entire charge, and not solely at the small portion that OPPD actually pays.

not be renewed.<sup>8</sup> But even if it could be found that the expiration of the contract would subject OPPD to payment of the switch charge, this case could not go forward now because this contract is not yet close to expiration. It is clear that service subject to contract may not be challenged over a year before the contract expires. Burlington N.R.R. v. Surface Transp. Bd., 75 F.3d 685 (D.C. Cir. 1996).

Our decision here should not be viewed as limiting shippers' access to relief in "bottleneck" cases. In Central Power & Light Co. v. Southern Pac. Transp. Co., STB Docket No. 41242 (STB served Dec. 31, 1996; STB served Apr. 30, 1997), pets. for review pending, Nos. 97-1081, et al. (8th Cir. filed Jan. 9, 1997), we held that a shipper may separately challenge the rate for a bottleneck segment of a movement (a segment served by a single carrier) after obtaining a contract for the non-bottleneck segment. If OPPD obtains a contract with BNSF for the origin-to-interchange portion of the movement, then unless UP and OPPD agree otherwise, UP will be required to maintain a separate bottleneck-segment rate, which will be separately challengeable. As OPPD does not now have such an origin-to-interchange point contract with BNSF, however, a challenge to a UP bottleneck segment rate is not available at this time.

It is ordered:

1. The motion to dismiss is granted. The complaint filed on June 20, 1997, and the amended complaint filed on August 13, 1997, are dismissed.
2. This decision is effective November 16, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

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<sup>8</sup> If OPPD uses UP service from the origin to the plant, then the switching issue will be moot. If it uses BNSF contract service from the origin to the plant, then OPPD will not be responsible for the switching charge (unless it assumes responsibility through a contractual agreement). If OPPD uses BNSF common carriage service to the interchange point alone, then UP will be required to provide a rate to complete the transportation (which will be a typical "bottleneck" rate rather than a switching charge); whether UP's rate will be separately challengeable will depend on the type of common carriage rates that the carriers hold out. And if OPPD uses BNSF contract service to the interchange point, then, as discussed later, unless UP and OPPD agree otherwise, UP will have to provide a common carriage rate that will be separately challengeable.