

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

INTERMOUNTAIN POWER AGENCY	)	232760
	)	
Complainant,	)	ENTERED
	)	Office of Proceedings
v.	)	August 14, 2012
	)	Docket No. 42136
UNION PACIFIC RAILROAD COMPANY,	)	Part of
	)	Public Record
Defendant.	)	
	)	

**MOTION TO HOLD PROCEEDING IN ABEYANCE**

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August 14, 2012

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SURFACE TRANSPORTATION BOARD**

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INTERMOUNTAIN POWER AGENCY )

Complainant, )

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UNION PACIFIC RAILROAD COMPANY, )

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Docket No. 42136

**MOTION TO HOLD PROCEEDING IN ABEYANCE**

Union Pacific Railroad Company (“UP”) hereby asks the Board to hold this proceeding in abeyance, pending the outcome of the Board’s rulemaking in *Rate Regulation Reforms*, EP 715 (STB served July 25, 2012). The parties’ and the Board’s interests in achieving a fair and efficient resolution of this case would be best served by suspending the procedural schedule so the parties’ evidentiary submissions can reflect any improvements to the Board’s stand-alone cost (“SAC”) test that are adopted in *Rate Regulation Reforms*.

The Board held pending SAC cases in abeyance when it instituted its prior reform effort. *Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1), slip op. at 2 (STB served Feb. 27, 2006). Holding this case in abeyance is particularly appropriate because the case is in an early stage – the parties are still engaging in discovery – and it would be wasteful for the parties to develop and submit their evidence based on rules that are in flux, and then repeat the process under improved rules.<sup>1</sup>

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<sup>1</sup> UP sought Complainant’s consent to hold this proceeding in abeyance, pending the outcome of *Rate Regulation Reforms*, but Complainant indicated that it intends to oppose this Motion.

## I. BACKGROUND

On May 30, 2012, Intermountain Power Agency (“IPA”) filed a Complaint challenging the reasonableness of UP’s rate for transporting coal in unit train service from Provo, Utah, to IPA’s electric generating facility at Lynndyl, Utah.<sup>2</sup> The case is still in the discovery phase. Discovery does not close until September 18, 2012. The timing of the evidentiary phase is uncertain. The earliest IPA will file opening evidence is December 17, 2012, but the parties recognized that the schedule could be modified if the Board does not issue a decision in NOR 42127 addressing the scope of reparations potentially available in this case sufficiently in advance of the due date for IPA’s opening evidence.<sup>3</sup>

On July 25, 2012, the Board proposed several changes to its rules for Full-SAC case that could affect the outcome of this case. The Board proposed (i) to limit the types of movements that could be used as cross-over traffic; (ii) to modify the Average Total Cost (“ATC”) method used to allocate revenues from cross-over traffic; and (iii) to change the interest rate used when calculating interest owed to shippers for rates found to be unreasonable. *See Rate Regulation Reforms* at 16-18. The Board recognized that any decision adopting new rules would have to address their application to pending cases: it said that it was not proposing to apply any new

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<sup>2</sup> IPA had previously challenged UP’s Provo rate, among other rates, in *Intermountain Power Agency v. Union Pacific R.R.*, NOR 42127. IPA moved to dismiss that case after UP filed its reply evidence. *See* Complainant’s Motion for Leave to Withdraw Complaint and Request for Dismissal of Proceeding, *Intermountain Power Agency v. Union Pac. R.R.*, NOR 42127 (filed May 2, 2012). However, a dispute between the parties regarding the dismissal’s effect on the scope of reparations potentially available in this case remains pending before the Board. *See* Union Pacific R.R.’s Reply to Complainant’s Motion for Leave to Withdraw Complaint, *Intermountain Power Agency v. Union Pac. R.R.*, NOR 42127 (filed May 22, 2012).

<sup>3</sup> *See* *Intermountain Power Agency v. Union Pac. R.R.*, NOR 42136 (STB served June 27, 2012) (order granting procedural schedule proposed in Report on the Parties’ Conference Pursuant to 49 C.F.R. § 1111.10(b)).

limitation on cross-over traffic to pending cases, but it did not purport to resolve the issue or address the application of its other proposed changes to pending cases. *See id.* at 17 n.11.

## II. ARGUMENT

The Board should hold this case in abeyance until it completes the rulemaking in *Rate Regulation Reforms*. The Board held pending rate cases in abeyance when it undertook a similar reform effort in *Major Issues*.<sup>4</sup> The Board ultimately concluded that application of its new rules to pending cases was appropriate because “the parties were well aware when they litigated the pending cases that [the] issues were in dispute” and because the rule changes were “designed in large part to improve the reliability of [the] SAC analysis.” *Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1), slip op. at 75-76 (STB served Oct. 30, 2006).

UP is not asking the Board to decide now whether it will apply any new rules in this case. The Board should address that issue in *Rate Regulation Reforms*, just as it did in *Major Issues*. But the Board should hold this case in abeyance so the parties are not forced to spend time and money to develop and submit their evidence when critical elements of the SAC test may change. The Board’s proposals regarding cross-over traffic are not minor technical adjustments that can readily be applied to existing evidence. If the Board places new limits on cross-over movements, a complainant might need to revisit its basic decisions regarding SARR configuration and traffic selection. In addition, changes to the method of allocating cross-over revenues, which might seem like a simple matter, can have a dramatic impact on a complainant’s SARR configuration and traffic selection, as well as on the ultimate results of the SAC analysis, as experience has

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<sup>4</sup> In *Major Issues*, the Board suspended the procedural schedule in *Kansas City Power & Light v. Union Pacific R.R.*, NOR 42095, explaining that suspension was appropriate because “the record has not yet begun to be developed.” *Major Issues*, slip op. at 2 (STB served Feb. 27, 2006). The Board also held *AEP Texas North Co. v. BNSF Ry.*, NOR 41191 (Sub-No. 1), and *Western Fuels Association, Inc. v. BNSF Ry.*, NOR 42088, in abeyance, even though those cases were much further along. *See id.*

shown. *See W. Fuels Ass'n v. BNSF Ry.*, NOR 42088, slip op. at 20 (STB served Sept. 10, 2007) (allowing complainants to submit a new evidentiary presentation after the Board adopted the ATC method used to allocate revenues from cross-over traffic).

Moreover, unless the Board holds this case in abeyance, the parties will likely engage in litigation over the same issues the Board is addressing in *Rate Regulation Reforms*, resulting in unnecessary duplication, waste, and confusion. The Board's approach to revenue allocation for cross-over traffic is in flux, and if this case proceeds on the current schedule, IPA and UP may use different approaches in their evidence, and there is no guarantee that either party would use the approach the Board ultimately adopts in *Rate Regulation Reforms*. Similarly, as the Board has observed, complainants' use of large amounts of carload and multi-carload cross-over traffic in recent cases has highlighted a need to address "the disconnect between the revenue allocation and the costs of providing service." *Rate Regulation Reforms* at 16. If this case proceeds on the current schedule, the Board will likely have to address limits on the use of cross-over traffic issues in this proceeding, as well as in *Rate Regulation Reforms*.<sup>5</sup>

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<sup>5</sup> UP disagrees with the Board's view that it would be unfair to IPA to apply in this case any new rules the Board adopts in *Rate Regulation Reforms* to limit use of cross-over traffic, especially if the Board holds this case in abeyance. *See Rate Regulation Reforms* at 17 n.11. Indeed, even if the Board does not hold this case in abeyance, application of new rules limiting the use of cross-over traffic would not prejudice IPA because (i) IPA should have been aware that this was a live issue, *see id.* at 16 n.10; (ii) the Board could craft new rules limiting the use of cross-over traffic in individual cases; *see Major Issues*, slip op. at 75 (STB served Oct. 27, 2007); and (iii) UP and the public would have a strong interest in the application of any new rules designed to improve the reliability and accuracy of the SAC analysis, and IPA has no legitimate interest in obtaining an unreliable, inaccurate outcome. UP would certainly appeal any decision not to apply meaningful improvements to the SAC process to this case.

In any event, as explained in the text, the Board cannot avoid addressing any cross-over issues that are presented by this case because UP can address them in this proceeding, if they are not resolved first in *Rate Regulation Reforms*.

This case in an early stage: discovery is not yet complete, and the parties are not close to submitting evidence. Holding this case in abeyance until the Board completes its rulemaking in *Rate Regulation Reforms* would serve the Board's and the parties' interests in achieving a fair and efficient resolution of this case.<sup>6</sup> UP shares the Board's and shippers' interests in resolving rail rate disputes efficiently and promptly. In this instance, concerns for avoiding undue delay and expense counsel in favor of holding this case in abeyance. Unless this proceeding case is held in abeyance, the Board and the parties will be faced with duplicative litigation, as well as the prospect that the parties will be required to develop and submit new evidence after the conclusion of *Rate Regulation Reforms*.

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<sup>6</sup> Because discovery is not complete, if this case is held in abeyance, the parties will have the opportunity to seek additional discovery, if they believe that additional discovery is necessary, once this proceeding resumes.

**III. CONCLUSION**

For the foregoing reasons, the Board should hold this case abeyance, pending the outcome of the Board's rulemaking in *Rate Regulation Reforms*.

Respectfully submitted,

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August 14, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of August, 2012, I caused a copy of this Motion to

Hold Proceeding in Abeyance to be served by hand on:

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