

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
May 22, 2012
Part of Public Record

_____)
INTERMOUNTAIN POWER AGENCY,)
)
Complainant,)
)
v.)
)
UNION PACIFIC RAILROAD COMPANY,)
)
Defendant.)
_____)

Docket No. 42127

**UNION PACIFIC RAILROAD COMPANY'S REPLY TO
COMPLAINANT'S MOTION FOR LEAVE TO WITHDRAW COMPLAINT**

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INTRODUCTION

If the Board dismisses the complaint in this proceeding, the dismissal should be “with prejudice.” Union Pacific Railroad Company (“UP”) spent large amounts time and money to reply to the opening evidence of Intermountain Power Agency (“IPA”). UP’s reply shows that the challenged rates are not unreasonable when tested using the stand-alone railroad designed by IPA. 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 the dismissal. Board rules do not allow unsuccessful complainants in rate cases the option of a free “do-over.” The Board should not allow IPA to circumvent the rules by abandoning its case after it has reviewed UP’s reply evidence.

If the Board is inclined to give IPA a “do-over,” it should minimize the prejudice to UP by making that option available only on the condition that IPA reimburses UP for the costs and fees UP paid to its outside counsel and consultants to prepare its reply evidence.

BACKGROUND

IPA filed its complaint on December 22, 2010. In its complaint, IPA asked the Board to prescribe maximum reasonable rates for transportation of unit-train movements of coal to IPA’s Intermountain Generating Station (“IGS”) at Lynndyl, Utah, from one Utah mine (the Skyline Mine), one Utah coal loadout (the Savage Coal Terminal), and one point of interchange with Utah Railway Company (“URC”) in Provo, Utah.

In its opening evidence filed on August 10, 2011, IPA presented a stand-alone railroad (“SARR”) designed to transport coal from Skyline Mine, the Savage Coal Terminal, and the Provo interchange with URC to IGS. IPA took full advantage of the flexibility that a shipper enjoys in designing its hypothetical SARR and claimed that it created “a least-cost, optimally efficient alternative transporter” for the issue traffic. (IPA Opening Nar. at I-13.) It further claimed its evidence proved that the Board should prescribe maximum rates well below the challenged rates. (*Id.* at III-H-10 to III-H-16.)

UP filed its reply evidence on November 10, 2011. After performing a detailed review of IPA’s evidence, UP concluded that IPA had used flawed methods or assumptions in almost every step of its analysis, and that when those errors are corrected, none of the challenged rates proved to be unreasonable. (UP Reply Nar. at III.H-7, Table III.H.2.)

On December 8, 2011, shortly before IPA’s rebuttal evidence was due, IPA asked for a “do-over.” IPA told the Board that it wanted to file “supplemental evidence” to present a new SARR that would be used to challenge only UP’s rate from the Provo interchange with URC.

IPA justified its request by pointing to (i) UP arguments that the Board should not prescribe future rates from Skyline Mine or the Savage Coal Terminal, (ii) Board holdings resolving certain disputes in *Arizona Electric Power Cooperative v. BNSF Railway*, NOR 42113 (STB served Nov. 22, 2011), (iii) IPA errors in its calculations of SARR revenues from cross-over movements, and (iv) IPA's new desire to limit its challenge to UP's Provo rate.

The Board rejected IPA's petition in a decision served April 4, 2012 ("*April 4 Decision*"). It explained that a "complainant may not significantly modify the foundation of its case after it and the defendant carrier have put forward their initial evidence and arguments, an expensive and time consuming effort, merely because the complainant believes the modification to be in its best interest." *April 4 Decision* at 3. The Board gave IPA until May 4 to file its rebuttal evidence. *See id.* at 4.

Rather than file rebuttal evidence, IPA filed a second request for a "do-over." IPA now seeks a ruling that it may accomplish the same result the Board rejected in the *April 4 Decision* by dismissing its complaint in this proceeding and filing a new complaint. IPA acknowledges that it could not prevail based on the SARR it presented. (Motion at 3, 32.)

ARGUMENT

Board precedent precludes an unsuccessful litigant in a rate from filing a new complaint challenging the same common carrier rates it has previously challenged, unless the complainant can show material error, new evidence, or substantially changed circumstances. *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 69 (STB served Oct. 30, 2006). The Board should treat IPA as an unsuccessful litigant even if it withdraws its current complaint "voluntarily." UP expended substantial time and money defending its rates, which proved to be reasonable when tested using IPA's SARR. 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. *Traugott Schmidt & Sons v. Michigan Cent. R.R.*, 23 I.C.C. 684, 685 (1912).

Dismissal of IPA's complaint with prejudice would also be appropriate under IPA's proposed test for "demonstrated 'legal prejudice,'" a term drawn from the case law applying Rule 41(a)(2) of the Federal Rules of Civil Procedure. (Motion at 2.) UP would suffer "legal prejudice" because (i) IPA is seeking to withdraw its claims at a late stage of this proceeding after reviewing UP's evidence, (ii) UP exerted significant effort and expense to show that it is entitled to prevail based on the SARR designed by IPA, (iii) relitigation to address UP's Provo rate would involve duplicative expense, and (iv) IPA is seeking dismissal not to correct minor technical errors, but to modify the very foundation of its case.

Finally, IPA is incorrect when it claims that a dismissal with prejudice would preclude it from challenging UP's Provo rate "for an undetermined length of time." (Motion at 3.) IPA could file a new complaint against UP's Provo rate once its current complaint is dismissed – dismissal of the current complaint with prejudice would simply mean that IPA could not relitigate the reasonableness of the rate it paid during the period before the dismissal.

I. The Board should treat IPA like any other unsuccessful litigant in a rate case by refusing to allow a "do-over."

Under Board precedent, an unsuccessful litigant must show material error, new evidence, or substantially changed circumstances before it may file a new complaint challenging the same common carrier rates it had previously challenged. *Major Issues in Rail Rate Cases*, slip op. at 69; *see also* 49 U.S.C. § 722(c); *Traugott Schmidt & Sons*, 23 I.C.C. at 685 (holding that a rate complaint refiled a year and a half after the agency dismissed a shipper's complaint on the same movement "ought to be dismissed as a matter of course unless it appears that the Commission in

deciding the original case labored under some misapprehension of fact”). If IPA withdraws its complaint at this stage – that is, after UP completed its evidentiary submission – it should be subject to the same rules that would apply to any other unsuccessful litigant. Indeed, IPA acknowledges that it cannot prevail based on the SARR it presented. (Motion at 3, 32.)

IPA is no different than any other litigant that comes to regret strategic choices it made in designing its SARR. IPA chose to challenge UP’s rates from Skyline Mine and the Savage Coal Terminal, as well as UP’s Provo rate. IPA selected the traffic group and network configuration it believed would provide the strongest test of the challenged rates. When UP’s rates were tested using that SARR, they proved to be reasonable. IPA was surprised by the result because it had made errors in its calculations, but IPA’s errors do not undermine the validity of the result.¹

Board rules do not allow an unsuccessful litigant in a rate case an automatic “do-over.” A complainant, “having the responsibility to engineer a SARR and present it to the Board in the first instance, cannot seek to modify it simply because the Board finds that SARR unacceptable based on a reasonable application of [*Coal Rate Guidelines*]’ principles.” *PPL Montana, LLC v. STB*, 437 F.3d 1240, 1247 (D.C. Cir. 2006). A party in a rate case “assumes the risk” of its “strategic choice[s].” *PPL Montana, LLC v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 19, 20 (2003).

The Board’s approach to deciding whether an unsuccessful litigant may reopen a stand-alone cost (“SAC”) case readily applies to this proceeding, and it shows why IPA is not entitled to a “do-over.” “In deciding whether a litigant has justified the reopening of a SAC case, the Board balances concerns of fairness, accuracy and repose, taking into account the considerable time and expense required to adjudicate the reasonableness of a rate under the SAC test”

¹ In other words, IPA’s repeated assertions that UP’s rates are unreasonable are flatly contradicted by the SARR that IPA presented to the Board.

Major Issues in Rail Rate Cases, slip op. at 67.² The factors the Board considers all weigh strongly against giving IPA a second bite at the apple:

- *Fairness*: IPA had a fair opportunity to determine what rates it wanted to challenge and to design an appropriate SARR. The Board even gave IPA extra time to file opening evidence so IPA could factor in its final coal sourcing plans.³
- *Accuracy*: IPA does not claim that the Board’s analysis of the existing record would be inaccurate. To the contrary, IPA wants a “do-over” because it understands that using an accurate calculation of divisions from cross-over traffic would result in a determination that IPA failed to prove that the challenged rates are unreasonable.
- *Repose*: Concerns for repose and the burdensome nature of rate litigation weigh against allowing IPA a “do-over.” UP spent more than \$1 million on outside counsel and experts and substantial employee time to develop its reply to the opening evidence IPA submitted. UP is entitled to a final ruling with regard to the case IPA chose to submit and the repose that such a ruling would provide.

² IPA’s long discussion of the Board’s supposed “historic” approach to reopening rate cases, as reflected in *West Texas Utilities Co. v. Burlington Northern & Santa Fe Railway*, NOR 41191 (STB served Mar. 19, 2004) (“*WTU*”), does not support giving IPA a “do-over.” As IPA acknowledges, the D.C. Circuit vacated and remanded the Board’s *WTU* decision. *Burlington N. & Santa Fe Ry. v. STB*, 403 F.3d 771 (D.C. Cir. 2005). The Board responded by developing the approach set forth in *Major Issues*. Moreover, as the Board recognized in *Major Issues*, “prior agency precedent” in fact did limit “efforts by an unsuccessful complainant to relitigate the reasonableness of the rates for that traffic.” *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 37 (STB served Feb. 27, 2006) (citing *Traugott Schmidt & Sons*).

³ See *Intermountain Power Agency v. Union Pac. R.R.*, NOR 42127 (STB served July 6, 2011).

IPA asserts that the *Major Issues* standards for reopening should not apply “because there has been no merits determination in this case.” (Motion at 30.) However, IPA is choosing not to pursue this case to a final merits determination because it knows what the result will be.⁴ The Board’s concerns for “fairness, accuracy and repose” apply under these circumstances. *Major Issues in Rail Rate Cases*, slip op. at 67.

IPA also asserts that it meets the requirements for reopening under *Major Issues* because the “circumstances associated with IPA’s rate complaint have changed substantially.” (Motion at 30.) However, IPA’s acknowledgement that it cannot prevail using its original SARR does not constitute substantially changed circumstances for purposes of allowing reopening; if it did, then every unsuccessful complainant would be entitled to reopen its case to modify its SARR. The only “circumstance” that “changed” since IPA filed its evidence is that IPA has now recognized that its own SARR shows that the challenged rates are reasonable.⁵

Finally, IPA asserts that it should be allowed a “do-over” as a matter of “common sense.” (Motion at 32.) But, as a matter of common sense, IPA should be subject to the same reopening

⁴ IPA states: “[I]t is unquestionably true that a SARR configuration decision made on the basis of the best information available at the time has now created a circumstance in which IPA is precluded from presenting evidence in Docket No. 42127 that would demonstrate that UP’s Provo rates are excessive.” (Motion at 32.)

Of course, IPA was not and is not “precluded” from challenging UP’s Provo rate in this docket. IPA is challenging UP’s Provo rate, but the SARR that IPA presented establishes that the Provo rate is *not* excessive, and the Board has ruled that IPA may not modify its SARR in this proceeding.

⁵ By comparison, as IPA notes, when the Board applied its *Major Issues* standards to the *WTU* proceeding on remand, it decided to reopen the case based on the cumulative impact of changed circumstances that included: (i) an increase in coal traffic levels along BNSF’s Front Range route; (ii) major mergers of western railroads; (iii) proven inaccuracies in forecasts of inflation and the cost of capital; and (iv) changes to the Board’s approach to applying the discounted cash flow model. (Motion at 29, citing *West Tex. Utils. Co. v. Burlington N. & Santa Fe Ry.*, NOR 41191, slip op. at 5-7 (STB served Sept. 10, 2007).)

standard as any other unsuccessful litigant because UP incurred the expenses of submitting reply evidence that proves the challenged rates are reasonable when tested using IPA's SARR. The Board explained the common-sense reasons for restricting the ability of unsuccessful litigants to file new rate complaints when proposing the standard it ultimately adopted in *Major Issues*:

[B]y placing limits on a shipper's ability to file a new complaint, this proposal would protect railroads from the threat of repetitive litigation by unsuccessful litigants who can demonstrate no more than a desire to make a better case. The need for some 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"

Major Issues in Rail Rate Cases, Ex Parte No. 657 (Sub-No. 1), slip op. at 37 (STB served Feb. 27, 2006) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991)).

II. Application of the Board's general practices or federal rules for civil litigation would not result in dismissal of this case "without prejudice."

IPA argues that the Board should disregard the *Major Issues* reopening standard and instead apply more generalized Board practices or the rules that federal courts follow when a party seeks to dismiss a complaint voluntarily. However, neither approach would help IPA.

A. Board practices do not support dismissal of this case "without prejudice."

IPA misleadingly asserts that the Board routinely allows parties to withdraw pleadings or to dismiss cases "without prejudice." (Motion at 8-9.) The assertion is misleading because IPA fails to cite a single case in which the Board allowed a complainant to dismiss its case without prejudice *over the defendant's objection*. The Board's willingness to terminate cases without prejudice when neither party objects says nothing about the policies that apply in a case like this one. In fact, as IPA is forced to acknowledge, the Board *will* refuse to allow a party to withdraw its case when circumstances militate in favor of obtaining a final decision on the merits. (Motion at 8, citing *Trinidad Ry. – Abandonment Exemption*, AB-573X (STB served Dec. 12, 2001).) In this case, where UP has undertaken the expensive, time-consuming effort of responding to IPA's

evidence, the Board should issue a final decision on the merits, or create the same result by dismissing IPA's complaint "with prejudice," in the interest of fairness and repose.

IPA also asserts that the Board should be guided by its policies that allow parties "to correct technical and computational errors in SAC rate cases." (Motion at 14-15.) But IPA is not seeking merely to correct a technical or computational error in its calculation of cross-over revenues. As UP already showed in its reply evidence, correction of IPA's cross-over revenue calculation demonstrates that the challenged rates, including the Provo rate, pass the stand-alone cost test. That is why IPA now wants to "significantly modify the foundation of its case" by presenting a SARR that challenges only the Provo rate. *April 4 Decision* at 3. In short, IPA's discussion of the Board's approach to error correction is irrelevant. IPA's concern is not an uncorrected error; IPA's concern is that, when its error is corrected and UP's rates are tested using the SARR that IPA designed to produce the most favorable result possible, the rates pass the stand-alone cost test.

B. Federal rules for civil litigation support dismissing this case *with* prejudice.

IPA misleadingly asserts that dismissal without prejudice "is entirely consistent with authority from the United States Supreme Court." (Motion at 9.) This assertion is misleading because the case on which IPA relies, *Jones v. SEC*, 298 U.S. 1 (1936), pre-dates the adoption of Federal Rule of Civil Procedure 41(a)(2). Under Rule 41(a)(2), a plaintiff no longer has an absolute right to dismiss its complaint without prejudice. Instead, after the opposing party files an answer or a motion for summary judgment, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2).

IPA also mistakenly relies on *Cone v. West Virginia Pulp & Paper*, where the Supreme Court observed, in dicta, that Rule 41(a)(2) gives a court discretion to allow a plaintiff with an otherwise "meritorious claim" that is about to lose because of a "technical failure of proof" to

withdraw its complaint without prejudice. 330 U.S. 212, 217 & n.5 (1947).⁶ Here, there is no mere “technical failure of proof,” such as reliance on inadmissible hearsay to prove an element of a claim. IPA has not merely failed to “fill [a] crucial gap in the evidence.” *Id.* at 217. IPA has failed to provide *any* evidence that it has a meritorious claim: When IPA’s computational errors are corrected, IPA’s stand-alone evidence shows that UP’s rates pass the stand-alone cost test.

When applying Rule 41(a)(2) to situations comparable to those in this case – that is, where proceedings have reached an advanced stage – courts generally do not allow a plaintiff to dismiss its claims to avoid an adverse decision while providing an unconditional right to refile. *See, e.g., Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354 (10th Cir. 1996) (affirming denial of plaintiff’s request for dismissal made after defendant moved for summary judgment); *Pace v. Southern Express Co.*, 409 F.2d 331 (7th Cir. 1969) (same); *Williams v. Ford Motor Credit Co.*, 627 F.2d 158 (8th Cir. 1980) (overturning dismissal granted to the plaintiff after defendant filed a post-trial motion for judgment notwithstanding the verdict).⁷ Courts have explained that the plaintiff’s voluntary dismissal under such circumstances would prejudice the opposing party by

⁶ The actual issue in *Cone* was whether an appellate court that reverses a verdict in favor of a plaintiff could also direct entry of a judgment notwithstanding the verdict for the defendant, even though the defendant had not made a timely motion for such a judgment in the trial court. The Court concluded that the trial court should decide how to proceed on remand – *i.e.*, whether to direct a verdict for the defendant or order a new trial. The Court observed that one practical reason for requiring defendants to ask for a judgment notwithstanding the verdict is that, in the case of a plaintiff about to lose its case because of a failure of proof, the trial court could exercise discretion under Rule 41(a)(2) to dismiss the case without prejudice, “where the court believes ... there is nevertheless a meritorious claim.” *Id.*

⁷ IPA misreads Rule 41(a)(2) when it asserts that the rule contains a “default assumption” that a “voluntary dismissal is to be without prejudice.” (Motion at 11 n.4.) Rule 41(a)(2) simply prevents disputes over ambiguous orders by providing that dismissals under the rule will be without prejudice “[u]nless the order states otherwise.” Fed. R. Civ. P. 41(a)(2).

depriving it of the certainty of judgment and subjecting it to additional litigation costs. *Phillips USA*, 77 F.3d at 358; *Pace*, 409 F.2d at 334; *Williams*, 627 F.2d at 160.

IPA's proposal that the Board consider whether dismissal of its complaint would result in "legal prejudice to UP" (Motion at 2) is drawn from the case law applying Rule 41(a)(2), but IPA apparently fails to appreciate what constitutes "legal prejudice." "Legal prejudice" means more than the mere prospect of a second litigation, but the burden of being required to defend against a second litigation under the particular circumstances can constitute "legal prejudice." As shown by the cases IPA cites, the circumstances that courts consider include: the plaintiff's diligence in bringing the motion; the extent to which the suit has progressed; the duplicative expense of relitigation; the adequacy of plaintiff's explanation for the need to dismiss; and any "undue vexatiousness" on plaintiff's part. (Motion at 13, citing *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990)); *see also, e.g., Independence Fed. Sav. Bank v. Bender*, 230 F.R.D. 11, 13 (D.D.C. 2005) ("In determining whether a defendant would suffer legal prejudice by a voluntary dismissal . . . the Court must consider: (1) the defendant[s] effort and expense for preparation of trial; (2) excessive delay or lack of diligence on the plaintiff[s] part in prosecuting the action; (3) the adequacy of plaintiff[s] explanation of the need for dismissal; and (4) the stage of the litigation at the time the motion to dismiss is made . . ." (internal citation and quotation omitted)) (cited in Motion at 12); *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718-19 (6th Cir. 1994) ("In determining whether a defendant will suffer plain legal prejudice, a court should consider such factors as the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant. . . . At the point when the law clearly dictates a result

for the defendant, it is unfair to subject him to continued exposure to potential liability by dismissing the case without prejudice.”); *Hartford Accident & Indem. Co. v. Costa Lines Cargo Servs., Inc.*, 903 F.2d 352, 360 (5th Cir. 1990) (“Important in assessing prejudice is the stage at which the motion to dismiss is made. Where the plaintiff does not seek dismissal until a late stage and the defendants have exerted significant time and effort, the district court may, in its discretion, refuse to grant a voluntary dismissal.”).

UP would suffer “legal prejudice” from dismissal of IPA’s complaint:

- *Diligence*: IPA was not diligent in seeking relief. IPA did not discover its errors on its own – they were first brought to IPA’s attention by UP’s reply evidence. Even after learning of its errors, IPA waited until shortly before its rebuttal was due to ask the Board for an opportunity to submit “supplemental evidence.” After the Board denied IPA’s petition and set a new deadline for IPA’s rebuttal, IPA waited until nearly the last minute to seek dismissal.
- *Progression of the case*. IPA did not seek dismissal until after UP filed its reply, which means UP had already put forward almost all the effort and incurred almost all the expense associated with defense of a typical rate case. (Likewise, IPA already incurred most of the costs that complainants incur in a typical rate case by filing its opening evidence.) IPA acknowledges that “it is undoubtedly true that both parties already have made significant efforts and expenditures in this case.” (Motion at 14.)
- *Duplicative expense of relitigation*. Relitigation of this case would involve duplicative expenses. The parties would have to undertake new discovery and update prior productions because time has passed since IPA filed its complaint

and more current evidence is now available with regard to such critical issues as traffic volumes, traffic projections, and construction and operating costs. Moreover, IPA intends to make fundamental changes to its SARR, which means UP will have to re-analyze any new opening evidence and prepare entirely new reply evidence.

- *Adequacy of IPA's explanation.* IPA has explained that it wants to dismiss the case because it recognizes that it will lose, but it has shifted justifications over time. When IPA asked the Board to supplement its evidence, it pointed to several justifications, including legal arguments made by UP and recent decisions of the Board. Now, IPA focuses on its own errors in calculating cross-over revenues. However, missing from all of its explanations is any shred of evidence that an opportunity to file a new case would produce a different result.
- *Undue vexatiousness.* UP does not contend that IPA's revenue calculations were intentionally inaccurate, but IPA's shifting explanations and last-minute filings undermine IPA's claim that it "has proceeded with complete good faith in all respects in the instant matter, and has not engaged in any sort of improper delaying tactics." (Motion at 14.)

Finally, when courts do allow a plaintiff to dismiss a case at a late stage and grant leave to refile, they commonly require the plaintiff to pay the defendant's legal fees as a condition of the dismissal. *See, e.g., Shaw Grp., Inc. v. Picerne Inv. Corp.*, 235 F.R.D. 68, 70 n.3 (W.D. Pa. 2005); *Independence Fed. Sav. Bank*, 230 F.R.D. at 15; *cf. Taragan v. Eli Lilly & Co.*, 838 F.2d

1337, 1339-40 (D.C. Cir. 1988) (reversing district court's grant of an unconditional voluntary dismissal and remanding for a consideration of the propriety of requiring attorneys' fees as a condition of the dismissal). Accordingly, if the Board adopts the "legal prejudice" standard from federal cases, it should also adopt the related practice of requiring reimbursement of the defendant's legal expenses. In this case, the legal expenses that IPA should be required to reimburse would be the fees UP paid to outside counsel and expert witnesses to review IPA's opening evidence and prepare UP's reply evidence – that is, expenses that would be wasted if IPA gets a "do-over."

III. The Board can preclude IPA from relitigating its right to reparations for rates charged in the period before the dismissal.

IPA asserts that, even if the Board dismissed this case with prejudice, the Board could not preclude it from filing a new complaint seeking reparations dating back to the inception of UP's Provo rate. (Motion at 32-36.) IPA asserts that it could file such a complaint even if it had fully litigated this case and lost, and that its position is supported by cases discussing *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932). (*Id.*) However, IPA is wrong. When the Board concludes that a shipper failed to prove that a challenged rate is unreasonable, the shipper cannot get a second bite at the apple simply by filing a new complaint challenging the same rate.

The Board and the Interstate Commerce Commission have consistently regarded their decisions rejecting rate challenges as settled, unless there was a change in economic conditions, new facts were brought to their attention, or it was shown they had acted on a misapprehension of fact in the prior proceeding. *See, e.g., Ontario Iron Ore Co. v. New York Cent. & Hudson River R.R.*, 30 I.C.C. 566, 570 (1914) (when a prior decision held that rates on iron ore would be unreasonable only if they exceed \$1.60 per gross ton, a rate of \$1.60 would not be held

unreasonable because, “[u]nless changed conditions are shown which justify or require a different conclusion, that [prior decision] must control our disposition of this complaint”); *Jouannet v. Atlantic Coast Line R.R.*, 23 I.C.C. 392, 393 (1912) (in a challenge to a 45-cent rate on lettuce, “[i]n the absence of any showing of a change in conditions that would justify or require different conclusions” a prior decision holding that a 48-cent rate was not unreasonable “must control our disposition of this complaint”); *Traugott Schmidt & Sons*, 23 I.C.C. at 685 (“[W]hen a matter has been once fully considered and decided it must be regarded as settled unless it appears from new facts presented that the Commission was wrong.”). The Board’s rules limiting relitigation of unsuccessful rate challenges are not based on *Arizona Grocery*, which applies only when the Board has prescribed a specific rate. Rather, the Board and the Interstate Commerce Commission have relied on elementary principles of fairness to parties, administrative finality, and repose.⁸

The Board’s historic precedent regarding settled rate case decisions, which the Board acknowledged in the *WTU* litigation in the D.C. Circuit and reaffirmed in *Major Issues*, reflects the same concern for fairness, finality, and repose as the standards for reopening that the Board adopted in *Major Issues*.

⁸ The cases IPA cites on page 34 of its Motion in its discussion of *Arizona Grocery* do not contradict the Board’s historic approach of treating final rate case decisions as settled unless a complainant can justify reopening. In *Western Fuels*, the Board had made clear that it had not issued a final decision finding that the challenged rate was not unreasonable. See *Western Fuels Ass’n, Inc. v. BNSF Ry.*, NOR 42088, slip op. 8-9 (STB served Feb. 18, 2009). Similarly, in the *B.P. West Coast Products* case, the agency had made clear that the order a pipeline operator relied upon when filing the challenged tariff “did not finalize a maximum reasonable rate.” *B.P. West Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1304 (D.C. Cir. 2004). Finally, in *Halifax Coal & Wood Co. v. Atlantic & Yadkin Ry.*, 219 I.C.C. 594 (1936), the ICC discussed *Arizona Grocery* in dicta, but the basis for its decision was simply that the ICC had found the challenged rate to exceed a reasonable maximum in a prior decision (which explained that the carrier had not properly implemented a rate scale previously prescribed by the Commission). See *id.* at 597 (discussing *Consumer’s Coal Corp. v. Atlantic & Yadkin Ry.*, 213 I.C.C. 343, 346 (1935)).

In this case, if the Board were to dismiss IPA's complaint because it found the challenged rates not to be unreasonable, IPA could file a new complaint challenging only UP's Provo rate, but it could not seek reparations for its payments under the Provo rate prior to the dismissal of this case.

CONCLUSION

IPA had a fair chance to make its case. If the Board allows IPA to withdraw its claims, it should dismiss this case with prejudice. If the Board is instead inclined to give IPA a "do-over," it should reduce the prejudice to UP by making that option available only on the condition that IPA reimburses UP for the costs and fees UP paid to its outside counsel and consultants to prepare its reply evidence in the dismissed case.

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May 22, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2012, a true and correct copy of Union Pacific Railroad Company's Reply to Complainant's Motion for Leave to Withdraw Complaint was served by e-mail and first-class mail, postage prepaid, on:

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