

BEFORE THE
SURFACE TRANSPORTATION BOARD



220230

_____)
KANSAS CITY POWER & LIGHT COMPANY,)
)
Complainant,)
)
v.)
)
UNION PACIFIC RAILROAD COMPANY,)
)
Defendant.)
_____)

Docket No. 42095

ENTERED
Office of Proceedings

SEP 10 2007

Part of
Public Record

UNION PACIFIC'S REPLY IN OPPOSITION TO MOTION TO STRIKE

In its Opening Evidence, Kansas City Power & Light Company ("KCPL") argued that Union Pacific Railroad Company ("UP") committed an unreasonable practice by limiting the volume of coal that KCPL could tender under the challenged tariff. *See* KCPL Op. at I-24 to 27; *id.* IV-1 to 9. In its Reply Evidence, KCPL asked the Board to strike any reply offered by UP because UP had not addressed KCPL's arguments in its own Opening Evidence. *See* KCPL Reply I-16 to 17. The Board should deny KCPL's motion because UP cannot be faulted for failing to reply to arguments and evidence that had not yet been advanced by KCPL.

UP acted consistently with normal practice and procedure by not attempting to anticipate every claim KCPL might have made in its Opening Evidence. KCPL asserts that UP should have anticipated the volume-limitation claim because "it was placed on notice of KCPL's challenge." *Id.* at I-16. KCPL claims that it provided this "notice" to UP in its Paragraph 27 of its Complaint and in a letter to UP's counsel during discovery. *See id.* at I-16 n.22. However, KCPL did not mention its dissatisfaction with the volume limitation in its Complaint. Instead, it

“reserved the right to present evidence” regarding unspecified “unreasonable practices.”

Specifically, KCPL alleged in Paragraph 27 that:

“Circular 111 also includes service terms applicable to coal transportation to the Montrose Station which differ from those set forth in Contract UP-C-30239, and are inadequate to meet KCPL’s legitimate coal transportation needs. KCPL reserves the right to present evidence of the unlawfulness of these terms if, as applied to Montrose coal service, they result in unreasonable charges and/or constitute unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746.”

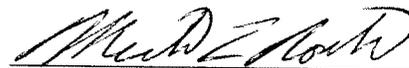
Moreover, KCPL thwarted UP’s efforts to understand the universe of potential claims during discovery. In response to a request by UP, KCPL refused to do more than state that “the unreasonable practice claims contemplated in Paragraph 27 of KCPL’s Complaint may include, but may not be limited to” eight different provisions of the challenged tariff, only one of which was the volume limitation. *See* Letter from Kelvin J. Dowd to Michael L. Rosenthal, Dec. 29, 2005, p. 9 (cited in KCPL Reply at I-16 n.22 and attached hereto as Exhibit A).¹ Especially after having thwarted UP’s efforts to understand what specific unreasonable practice claims it would raise, KCPL should not be rewarded by the rejection of the evidence and argument that UP filed at its first and only opportunity to respond to those claims.

Even if UP had known that KCPL intended to pursue an unreasonable practice claim involving the volume limitation, it is unreasonable for KCPL to claim that UP had to present all of its evidence and arguments in its Opening Evidence, before it even had an opportunity to see the arguments and evidence in KCPL’s Opening Evidence, so that KCPL could have the last word in its Reply.

¹ Ultimately, KCPL did not pursue any of the other claims on its list, and thus UP would have wasted a tremendous amount of time and resources had it tried to reply in advance to all of the claims KCPL conceivably might have made based on that “notice.”

KCPL's real complaint appears to be with the Board's decision to adopt a two-stage procedure rather than the three-stage procedure proposed by the parties. Had the Board adopted a three-stage procedure, KCPL would have had an opportunity for rebuttal. However, KCPL should have revealed its intent to pursue an unreasonable practice claim and raised any concerns about losing its rebuttal opportunity when the Board explained that it was adopting an expedited, two-stage procedure because the only issue remaining in the case was the calculation of variable costs. Instead, KCPL chose to remain silent, leaving the Board and UP under the misimpression that it had decided not to raise any unreasonable practice claims, and thus it relinquished any right to complain.

Respectfully submitted,



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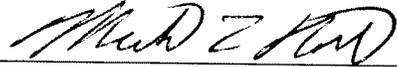
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Attorneys for Union Pacific Railroad Company

September 10, 2007

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 10th day of September, 2007, I caused a copy of Union Pacific's Reply in Opposition to Motion to Strike to be served by hand on Kelvin J. Dowd of Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, D.C. 20036.



Michael L. Rosenthal

EXHIBIT A

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December 29, 2005

VIA TELECOPIER AND FIRST CLASS MAIL

Michael L. Rosenthal, Esq.
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1201 Pennsylvania Avenue, N.W.
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Re: STB Docket No. 42095, Kansas City Power
& Light Company v. Union Pacific Railroad

Dear Mike:

This responds to your letter of December 23, 2005, concerning understandings and agreements reached during our December 14 meet-and-confer session. By this letter, we also provide further clarification of KCPL's positions regarding a number of the matters that we discussed, based on investigations conducted subsequent to our meeting.

The headings set out below basically correspond to those used in your letter, though we also address a few additional items which our notes reflect were left open on December 14 but which you did not address.

Issues Related to Both Parties' Discovery Requests

Discovery Cut-Off

We concur in your understanding of the meaning of our agreement to cut-off discovery as of December 31, 2005. We would add, however, that notwithstanding this cut-off date, both parties are free to propound additional and/or follow-up discovery requests at least until the end of the prescribed discovery period, currently scheduled for February 10, 2006.

Michael L. Rosenthal, Esq.
December 29, 2005
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resulting from the actions that are the subject of KCPL's Complaint, as the same may be developed as this case proceeds. As we stated at our meeting, all such evidence as may be presented by KCPL will be accompanied by supporting workpapers.

20. Basis for KCPL's Unreasonable Practice Claims (Interrogatory No. 22)

KCPL specifically reserves and reaffirms its initial objection to UP's Interrogatory No. 22. Subject to and notwithstanding the foregoing, the unreasonable practices that are contemplated in Paragraph 27 of KCPL's Complaint may include, but may not be limited to, the following:

- (i) UP's establishment of a maximum annual coal volume limitation in Item 4140 of Circular 111 that is inadequate to meet KCPL's expected coal transportation requirements for Montrose.
- (ii) UP's establishment of minimum carload and shipment weights which preclude KCPL's continued use of certain railcars which heretofore have been used in Montrose service.
- (iii) The terms of UP's "Request for Service" rules in General Rule Item 100 of Circular 111.
- (iv) The absence of adequate provisions in Item 4140 and/or Circular 111 that would require UP to provide substitute railcars for KCPL's use in the event that KCPL-supplied railcars are damaged or destroyed.
- (v) UP's purported reservation of a right to unilaterally change service terms applicable to coal transportation to Montrose without the agreement of and with little or no notice to KCPL.
- (vi) The imposition of a requirement that all coal shipments to Montrose be scheduled on a "ratable" monthly basis throughout each year.
- (vii) The absence of a meaningful service commitment on the part of UP.
- (viii) UP's purported reservation of a right, exercisable in its "sole judgment," to refuse to accept KCPL-supplied trainsets into service despite the requirement that KCPL supply a sufficient number of railcars to transport its scheduled tonnage.

Michael L. Rosenthal, Esq.
December 29, 2005
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We suggest a meeting or teleconference early next week, to advance discussion of the issues raised in your letter and this response, and otherwise work toward reaching agreement on the joint report that we are due to file with the Board on January 6.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kelvin J. Dowd', written in a cursive style.

Kelvin J. Dowd

KJD:jml

cc: Mr. David L. Laffere
William G. Riggins, Esq.
Louise A. Rinn, Esq.
Linda J. Morgan, Esq.