

SURFACE TRANSPORTATION BOARD GRANTS DISMISSAL OF "OMAHA PUBLIC POWER" COAL RATE COMPLAINT CONCERNING RAIL MOVEMENTS UNDER CONTRACT & THUS OUTSIDE BOARD'S JURISDICTION

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has granted a motion to dismiss a coal rate complaint that seeks prescription of a railroad rate for a portion of a service already governed by a transportation contract. The Board based its decision on its lack of legal authority over contracts, and on the fact that the complainant might be injured--if at all--only after the contract expires. The case involves a complaint filed by Omaha Public Power District (OPPD) challenging a charge that Union Pacific Railroad Company (UP) assesses The Burlington Northern and Santa Fe Railway Company (BNSF) for "switching" services. A railroad provides service to a location that it cannot physically enter (for example, because of track configuration) by using the switching services of another railroad having physical access to the service point. provided between UP's interchange point with BNSF and OPPD's North Omaha Power Station (NOPS) in North Omaha, Nebraska. OPPD currently ships its coal from the Powder River Basin in Wyoming to OPPD's NOPS facility under 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 UP, which maintains an interchange with BNSF at a point approximately five miles from the plant. Therefore, although BNSF offers a complete origin-to-destination service, the OPPD's coal shipments are physically handled by UP between the interchange point and OPPD's NOPS facility.

OPPD filed a complaint challenging UP's switching charge. OPPD acknowledged that it does not pay the bulk of the charge--pursuant to its contract, BNSF pays the substantial preponderance of that charge--but OPPD argued that it can challenge the charge because the charge was set by UP, which is not a party to the transportation contract between BNSF and OPPD. OPPD also argued that it can challenge the charge on the ground that it might have to pay the charge once the contract expires.

The Board granted UP's motion to dismiss the case, on the ground that any payments that OPPD makes for the switching service are a result of its contract with BNSF, over which the Board lacks jurisdiction. The Board recognized that UP's switching charge was set and published independently of OPPD's contract with BNSF, but it found that the switching service that UP provides on behalf of BNSF is a part of the transportation covered by the contract between BNSF and OPPD. The Board noted that because it is BNSF's responsibility, under its "holding out" (its offering of service to the public) 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.

The Board recognized OPPD's claim 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. The Board found that, 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 not

be renewed. But even if it could be found that the expiration of the contract would subject OPPD to payment of the switching charge, the Board found, this case could not go forward now because the contract is not yet close to expiring. Under the court's decision in Burlington N.R.R. v. Surface Transp. Bd., 75 F.3d 685 (D.C. Cir. 1996), service such as that to OPPD that is subject to contract may not be challenged over a year prior to the contract expiration, as OPPD is seeking to do.

The Board further stated that its 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), 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.

The Board's decision was issued today in STB NOR 42006, Omaha Public Power District v. Union Pacific Railroad Company.

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