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March 15, 2002

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary

Surface Transportation Board
Case Control Unit

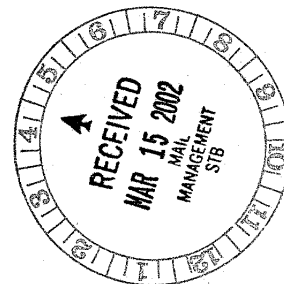
1925 K Street, N.W.

Washington, D. C. 20423

ENTERED
Office of the Secretary

MAR 18 2002

Part of
Public Record



Re: Docket No. 42072, Carolina Power & Light Company
v. Norfolk Southern Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten (10) copies of Complainant Carolina Power & Light Company's First Motion to Compel Production of Documents.

We have enclosed an additional copy of this filing. Please time and date stamp this extra copy and return it to the bearer of this letter.

Sincerely,

Peter A. Pfohl
An Attorney for Carolina Power
and Light Company

Enclosures

cc: Counsel for Defendant

204990

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of the Secretary

MAR 18 2002

Part of
Public Record

CAROLINA POWER & LIGHT COMPANY,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

STB Docket No. 42072

COMPLAINANT'S FIRST MOTION TO
COMPEL PRODUCTION OF DOCUMENTS

Pursuant to 49 C.F.R. § 1114.31, Complainant Carolina Power & Light Company ("CP&L") hereby moves for an order overruling Defendant Norfolk Southern Railway Company's ("NS") stated objections and compelling NS to produce documents in response to CP&L's Request for Production ("Request") Nos. 44 and 45. These requests, served on February 6, 2002, seek production of all NS transportation contracts -- and tariffs -- which govern shipments (made in the year 2001 or thereafter) that traverse a portion of the route used for the NS movements to CP&L's subject power plants or that move over all or any portion of NS's rail lines in the five states in which the stand-alone railroad ("SARR") being designed by CP&L for purposes of this case may be located. The Board routinely orders production of such materials in stand-alone cost cases.

BACKGROUND

On February 1, 2002, CP&L filed a Verified Complaint in this proceeding challenging the reasonableness of NS's quoted common carrier rates for transporting coal in unit train service from various origins in Virginia, West Virginia and Kentucky to CP&L's Roxboro and Mayo electrical generating facilities. The Complaint calls for an examination of the reasonableness of the rates at issue using the Board's Constrained Market Pricing ("CMP") methodology, specifically the stand-alone cost constraint.

On February 6, 2002, CP&L served its First Set of Interrogatories and Production of Documents on NS. CP&L's Request Nos. 44 and 45 are as follows:

Request for Production No. 44:

Please produce all transportation contracts, including amendments and supplements thereto (or letters of understanding with appendices or attachments), and all tariffs or other documents containing common carrier rate and service terms that you entered into, agreed to or provided which govern shipments of coal (coal being identified as STCC 112) that traverse or that will traverse any portion of the CP&L route(s) and that are handled by NS as originating, terminating, overhead or single-line carrier in any of the years 2001 and beyond.

Request for Production No. 45:

Please produce all transportation contracts, including amendments and supplements thereto (or letters of understanding with appendices or attachments), and all tariffs or other documents containing common carrier rate and service terms that you entered into, agreed to or provided which govern shipments of commodities other than coal and that are handled by NS as originating, terminating, overhead or single-line carrier over all or any portion of NS's Rail lines in the SARR States in any of the years 2001 and beyond.

These requests were intended to obtain information relevant to the traffic group for CP&L's SARR, and to provide information regarding the future traffic and revenue for that SARR.

In its January 28, 2002 Responses to CP&L's Requests, NS objected to producing any documents in response to Request Nos. 44 and 45. NS's full responses are as follows:

Response to Request for Production No. 44:

NS objects to this Request on the ground that it is overbroad and unduly burdensome. NS further objects to this Request on the ground that the requested transportation contracts are confidential and, in many if not most instances, contain provisions that expressly prohibit NS from disclosing the existence or terms of such contracts to third parties without the consent of the other contracting party, or which permit such disclosure or identification only when it is compelled by a court or government order. Subject to and without waiving its objections, NS states that it would not object to producing such contracts, subject to necessary and appropriate confidentiality designations, protections and restrictions, if the STB were to require such production in

this proceeding.

(Emphasis Added).

Response to Request for Production No. 45:

NS objects to this Request on the ground that it is grossly overbroad (involving thousands of contracts and tariffs, including many relating to traffic moving over portions of NS's system having no relation to CP&L's traffic), unduly burdensome, and (with respect to portions of the information requested) seeks information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. NS further objects to this Request on the ground that the requested transportation contracts are confidential and, in many if not most instances, contain provisions that expressly prohibit NS from disclosing the existence or terms of such contracts to third parties without the consent of the other contracting party, or which permit such identification or disclosure only when it is compelled by a court or government order. Subject to and without waiving its objections, NS states that it would not object to the production of a reasonable number of such contracts - subject to appropriate confidentiality restrictions and limitations -- if the STB were to require such production in this proceeding.¹

(Emphasis Added).

¹NS's response makes no reference to CP&L's request for production of public common-carrier tariff information. Of course, any confidentiality objection that might be raised by NS as to the production of such tariffs clearly would be unfounded. CP&L will be discussing this issue with NS separately, and it does not address this subject herein. CP&L reserves its right to address this issue in a future Motion to Compel, if necessary, should the parties not reach a resolution on this subject.

ARGUMENT

I. Legal Standard

The Board and its predecessor repeatedly have held that the records of defendant railroads in cases brought under the CMP model are subject to broad discovery. See, e.g., Coal Rate Guidelines, Nationwide, 5 I.C.C.2d 520, 548 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987) ("[w]e recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them"). The Board's Rules of Practice reinforce this policy, permitting "discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." See 49 C.F.R. Part 1114.21(a). It is also well-settled that the Board's discovery rules are to be liberally construed. See, e.g., Finance Docket No. 32821, Bar Ale, Inc. v. California Northern Railroad Co., Decision served March 15, 1996, at 2.

II. The Board Routinely Orders Production of Coal Transportation Contracts

In this case, the contract information sought by CP&L is reasonably calculated to lead to the discovery of admissible evidence, and therefore easily satisfies the Board's standard under Coal Rate Guidelines and the Rules of Practice. In that regard, the Board has consistently held that rail transportation

contracts to which the defendant carrier is a party are highly relevant to the determination of an appropriate SARR traffic group, and its associated volumes and revenues. See, e.g., Docket No. 42069, Duke Energy Corporation v. Norfolk Southern Railway Co., Decision served March 4, 2002 ("Duke"); Docket No. 42054, PPL Montana, LLC v. Burlington Northern and Santa Fe Ry. Co., Decision served November 9, 2000; Docket No. 41295, Pennsylvania Power & Light Company v. Consolidated Rail Corp., Decision served March 10, 1997; Docket No. 41989, Potomac Electric Power Company v. CSX Transportation, Inc., Decision served March 3, 1997.

NS has declined to produce any documents in response to Request Nos. 44 and 45, stating that the responsive contracts contain confidentiality provisions which prohibit their disclosure absent an order by a court or other government agency. The Board, however, has consistently found that the existence of a protective order will satisfy all confidentiality concerns of the nature raised by NS. Id.²

For example, in its very recent decision in Duke, supra, involving the same defendant, the Board granted a motion to compel the production of transportation contracts between NS and its coal shippers under circumstances nearly identical to

²Such a protective order now is in place in this case. See Order served March 12, 2002.

those presented here.³ After determining that the protective order governing the proceeding -- which is nearly identical to the protective order herein -- was adequate to fully protect the confidential information and the interests of third-party shippers -- the Board ordered production of the subject contracts. Id.

This Motion involves additional non-coal contracts as to which NS is a party, which subject was not at issue in Duke. (See Request No. 45). These contracts also are relevant to the determination of an appropriate SARR traffic group. As referenced supra, in NS's response to this Request, NS stated that it does not object to producing a "reasonable number of such contracts" should the Board order production of the subject contracts. CP&L is not opposed to working with NS to reach a mutually agreeable arrangement concerning the scope of production as to this Request,⁴ and it respectfully requests that the Board order production of the subject contracts.

³In Duke, NS requested that additional procedural conditions be imposed, including a condition that would allow shippers an opportunity to object to the production of their contracts. The Board correctly denied NS's requested conditions. Id. at 3. NS has not requested that the Board impose similar conditions herein.

⁴CP&L reserves its right to address this issue in a future Motion to Compel, if necessary, should the parties not reach a resolution on this subject.

CONCLUSION

For the foregoing reasons, CP&L moves that the Board overrule NS's objections and compel NS to promptly produce all documents that are responsive to CP&L's Request Nos. 44 and 45.

Respectfully submitted,

CAROLINA POWER & LIGHT COMPANY

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OF COUNSEL:

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Dated: March 15, 2002

Attorneys for Complainant

CERTIFICATE OF SERVICE

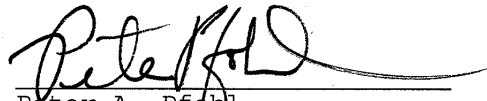
I hereby certify, that I have this 15th day of March, 2002 caused to be served copies of the foregoing Complainant's Motion to Compel on counsel for defendant Norfolk Southern Railway Company ("NS") as follows:

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