

SIDLEY AUSTIN BROWN & WOOD LLP

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO
SEATTLE

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

BEIJING
HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8252

WRITER'S E-MAIL ADDRESS
vprada@sidley.com

205043

March 22, 2002

By Messenger

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of the Secretary
MAR 26 2002
Part of
Public Record



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

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are a signed original and ten copies of Defendant's Reply to Complainant's First Motion to Compel Production of Documents. Also enclosed is a computer disk containing a copy of this filing in WordPerfect format.

Please acknowledge receipt of these papers for filing by date-stamping the enclosed duplicate paper copy and returning it with our messenger. Thank you for your attention to this matter.

Very truly yours,

Vincent F. Prada

G. Paul Moates
Vincent F. Prada

Enclosures

cc: Counsel of Record (w/encls.)

BEFORE THE
SURFACE TRANSPORTATION BOARD

CAROLINA POWER & LIGHT COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.



STB Docket No. 42072

**DEFENDANT'S REPLY TO COMPLAINANT'S FIRST
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Henry D. Light
George A. Aspatore
Jill K. Wainger
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2657

G. Paul Moates
Vincent F. Prada
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel for Defendant Norfolk Southern Railway Company

DATED: March 22, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

CAROLINA POWER & LIGHT COMPANY

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

STB Docket No. 42072

**DEFENDANT'S REPLY TO COMPLAINANT'S FIRST
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. § 1104.13(a), Defendant Norfolk Southern Railway Company ("NS") hereby replies to the First Motion to Compel Production of Documents, filed by Complainant Carolina Power & Light Company ("CP&L") on March 15, 2002. As explained below, NS does not oppose entry of an order compelling production of the confidential coal transportation contracts and a reasonable number of confidential non-coal transportation contracts requested by CP&L and will provide the requested documents upon entry of such an order by the Board.

CP&L seeks an order compelling NS to produce documents responsive to CP&L's Request for Production ("Request") Nos. 44 and 45. Request No. 44 seeks production of all transportation contracts between NS and any rail customer and tariffs governing shipments of coal traversing NS rail lines utilized by CP&L's coal shipments under the challenged common carrier rates. In its response served March 8, 2002, NS objected to CP&L's Request No. 44 on

the ground, among others, that the requested transportation contracts are confidential and generally prohibit non-consensual disclosure to third parties except when compelled by a court or government order.¹ NS recognized, of course, that the requested coal transportation contracts contain information potentially relevant to the stand-alone cost issues in this case. Accordingly, consistent with the procedure that has been followed in recent coal rate reasonableness cases,² NS stated in its discovery response that it would not object to production of the requested contracts under Request No. 44 if the Board entered an order compelling such production and any contracts produced in response to CP&L's request were treated as "Highly Confidential" under the terms of the parties' then-proposed Protective Order (which the Board subsequently entered on March 11, 2002). Since receiving CP&L's discovery requests in February, NS has identified the responsive coal transportation contracts and has given affected customers notice of CP&L's request for production.

Request No. 45 seeks production of all transportation contracts and tariffs containing common carrier rate and service terms governing shipments of commodities other than coal traversing NS rail lines in the SARR States. In its response served March 8, 2002, NS objected to CP&L's Request No. 45 on the ground that the requested transportation contracts are confidential and generally prohibit non-consensual disclosure to third parties except when

¹ Some of these rail transportation contracts also contain provisions requiring a party to notify the other party of any requested or compelled disclosure of the contract to third parties.

² See, e.g., STB Docket No. 42069, *Duke Energy Corp. v. Norfolk Southern Railway Co.* (served Mar. 4, 2002); STB Docket No. 42054, *PPL Montana, LLC v. Burlington Northern & Santa Fe Railway Co.* (served Nov. 9, 2000); STB Docket No. 41295, *Pennsylvania Power & Light Co. v. Consolidated Rail Corp.* (served March 10, 1997); STB Docket No. 41989, *Potomac Electric Power Corp. v. CSX Transportation, Inc.* (served March 3, 1997).

compelled by a court or government order. In addition, NS objected to this overly broad and unduly burdensome request seeking information that is neither relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving its objections, NS would not object to the production of a reasonable number of such contracts, identified by CP&L counsel and treated as "Highly Confidential" under the terms of the Protective Order, if the Board enters an order compelling such production.

For these reasons, as stated in the discovery response, NS does not oppose CP&L's request for an order compelling production of the requested coal transportation contracts under Request No. 44. Subject to, and without waiving its objections, NS is not opposed to producing a reasonable number of non-coal contracts to which NS is a party, provided that CP&L and NS come to an agreement about the scope of the production pursuant to Request No. 45. CP&L has acknowledged its willingness to treat as "Highly Confidential" under the Protective Order any contracts that are produced by NS.

CONCLUSION

For all of the foregoing reasons, NS does not object to the entry of an order compelling the production of coal transportation agreements and a reasonable number of non-coal transportation agreements responsive to CP&L's Request for Production Nos. 44 and 45, subject to the conditions set forth herein.

Respectfully submitted,



G. Paul Moates
Vincent F. Prada
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Henry D. Light
George A. Aspatore
Jill K. Wainger
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2657

Counsel for Defendant Norfolk Southern Railway Company

DATED: March 22, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of March, 2002, I served the foregoing
"Defendant's Reply to Complainant's First Motion to Compel Production of Documents" by
causing a copy thereof to be delivered, in the manner indicated, to each of the following:

C. Michael Loftus
Christopher A. Mills
Frank J. Pergolizzi
Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(*By Hand Delivery*)

David T. Conley
Carolina Power & Light Company
410 South Wilmington Street
Raleigh, North Carolina 27601
(*By Overnight Express Courier*)



Vincent F. Prada