

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN
KENDRA A. ERICSON

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

cml@sloverandloftus.com

June 4, 2004

211327

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

JUN - 4 2004

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 sixteen copies of Carolina Power & Light Company's Statement of Position Regarding Fuel Surcharge Reparations.

We also enclose an extra copy of the Statement of Position. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for
Carolina Power & Light Company

CML/jwp

Enclosures



BEFORE THE
SURFACE TRANSPORTATION BOARD

21227

CAROLINA POWER & LIGHT
COMPANY,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY,

Defendant.

Docket No. 42072

ENTERED
Office of Proceedings

JUN - 4 2004

Part of
Public Record

STATEMENT OF POSITION
REGARDING FUEL SURCHARGE REPARATIONS

CAROLINA POWER & LIGHT COMPANY

By: David T. Conley
Carolina Power & Light
Company
410 South Wilmington Street
Raleigh, North Carolina 27601

C. Michael Loftus
Christopher A. Mills
Frank J. Pergolizzi
Peter A. Pfohl
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

DATED: June 4, 2004

Attorneys for Complainant

CAROLINA POWER & LIGHT COMPANY,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42072
	)	
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
Defendant.	)	

Complainant Carolina Power & Light Company (“CP&L”) hereby files this Statement of Position Regarding Fuel Surcharge Reparations to be paid by Defendant Norfolk Southern Railway Company (“NS”) in accordance with the Board’s December 23, 2003 Decision (the “Decision”). Specifically, CP&L seeks an order from the Board ruling that the proper calculation of reparations in this case should include amounts that CP&L paid to NS as fuel surcharges upon the issue traffic during the reparations period. Between the date of its Complaint and January 22, 2004, when NS established prescribed rates in accordance with the Board’s Decision, CP&L paid somewhere in the vicinity of \$3 million in such fuel surcharges. Since January 22, 2004, NS has continued to charge CP&L for fuel surcharges, but CP&L has not paid them since

they are unlawful charges in excess of the maximum reasonable rates the Board has prescribed.

In discussions between the parties, NS has disputed CP&L's position regarding these fuel surcharge amounts. However, since the Board has prescribed the maximum reasonable rates that NS was permitted to charge for the subject transportation service during the relevant time periods, and since NS's fuel surcharge constitutes part of the amount that NS charged for the issue service that exceeded those maximum rates, NS must include the fuel surcharge payments in its reparations to CP&L.

BACKGROUND

Following unsuccessful discussions with NS in 2001 regarding a contract to govern ongoing coal transportation service, on January 9, 2002, CP&L formally requested that NS provide common carrier rates and service terms on NS coal transportation service between various origins in West Virginia, Kentucky, and Virginia and CP&L's Roxboro and Mayo Stations. In response, NS sent a letter to CP&L dated January, 29, 2002 that identified the NS rates and service terms that would be applicable to CP&L's service. The NS letter specifically incorporated NS's tariff entitled "NS Conditions of Carriage #2C."

NS Conditions of Carriage #2-C, which was issued on January 17, 2002, became effective on February 6, 2002 and included a fuel surcharge that NS has imposed on CP&L coal traffic:

In the event the price of West Texas Intermediate Crude Oil, as published in the Wall Street Journal, exceeds \$28.00 per barrel for thirty (30) consecutive business days, NS will apply

a fuel surcharge to the freight charge(s) contained in this authority in effect on the date the fuel surcharge is applied, herein after referred to as the "Base Freight Charge(s)". . . .

See Condition (55.1 "Fuel Surcharge").¹

In its February 1, 2002 Verified Complaint, CP&L challenged NS's January 29, 2002 rate offer, which was included as Exhibit B to CP&L's Complaint. CP&L explained that its "Verified Complaint covers any changes or adjustments in any of the assailed common carrier rates or charges, or changes in any service or other terms, that may be established by NS during the course of this proceeding (including new or replacement rates, charges, or other terms) for railroad transportation services in response to CP&L's request as described in Paragraph 7 of this Verified Complaint." Id. at 8.

CP&L's Complaint requested that the Board "find that the common carrier rates applicable to the transportation of CP&L's coal purchases between the named origin districts in West Virginia, Kentucky, and Virginia and the Roxboro and Mayo generating stations in North Carolina are unreasonably high; that the Board issue an order or orders pursuant to 49 U.S.C. §§ 10704(a)(1) and 11701(a) prescribing the maximum reasonable

¹ NS carried this fuel surcharge forward in its subsequent publications entitled Conditions of Carriage #2-D (issued August 4, 2003 and effective August 25, 2003), and Conditions of Carriage #2-E (issued January 23, 2004 and effective March 1, 2004), although the fuel surcharge appearing in #2-E includes certain threshold changes and additional detail regarding its manner of calculation. See NS Conditions of Carriage #2-D, Condition 55.2 ("In the event the price of West Texas Intermediate Crude Oil, as published in the Wall Street Journal, exceeds \$28.00 per barrel for thirty (30) consecutive business days, NS will apply a fuel surcharge to the freight charge(s) contained in this authority in effect on the date the fuel surcharge is applied, herein after referred to as the 'Base Freight Charge(s)'. . . ."); NS Conditions of Carriage #2-E, Condition 55.3 ("In the event the average monthly price of West Texas Intermediate Crude Oil exceeds \$23.00 per barrel calculated using the daily prices published in the Wall Street Journal, Norfolk Southern will assess a fuel surcharge on all linehaul freight charges . . .").

rates that Defendant may assess and collect from CP&L for the described transportation; that the Board award CP&L appropriate reparations for unlawful charges assessed by Defendant for transportation services provided on an after April 1, 2002” Id. at 8-9.

In the Decision, the Board found that NS’s rates for the subject coal transportation service exceeded reasonable maximums, prescribed maximum rate levels, and awarded CP&L reparations for past overpayments:

As shown in the following tables, the maximum reasonable rate for the traffic at issue is the higher of the SAC rate or the regulatory floor (the 180% R/VC rate). That rate -- to be determined by the parties in accordance with this decision -- is prescribed here for future shipments moving from the mines included in CP&L’s SAC analysis. Moreover, reparations are awarded for the unreasonable portion of the rate that CP&L has paid for movements from those mines occurring prior to the rate prescription taking effect, together with interest to be calculated in accordance with 49 CFR 1141.

See Decision at 34 (emphasis added).

ARGUMENT

1. The Nature of STB Ratemaking

The Board’s current SAC-based approach to rate prescriptions establishes a SAC rate for each of the twenty years of the relevant discounted cash flow (“DCF”) model. The Board’s approach also establishes procedures for calculating the jurisdictional threshold during each of those same twenty years. From these two rate thresholds, a prescribed rate can be determined (albeit only over time) for each of the twenty years of the DCF model. Consequently, there is no basis for a carrier to increase a rate prescription unilaterally to reflect cost increases occurring during time periods after

the date of the agency's decision (or after the close of the evidentiary record). Instead, the Board's multi-year prescription approach already considers and already reflects those cost changes.

In particular, when calculating SAC operating expenses (including SARR fuel costs), the Board develops a single year's costs for the SARR, then uses a cost indexing procedure to determine the costs that will be borne by the SARR in each of the other nineteen years of its life. In the instant case, over CP&L's objection, the Board accepted NS's argument that the RCAF-U should be used to index the SARR's operating expenses, including its fuel expenses. See Decision at 27-28.² That indexing approach, as the Board understood, generates significant SARR cost increases over the life of the model. Id. at 30 (i.e., the P&SH's operating expenses increase from \$203.6 million in 2003 to \$332.6 million in 2021). When coupled with the significant GDP/IPD-based increases in the NS tariff rates over that twenty-year period (which increases continuously raise annual prescribed rates even in the absence of operating cost changes), the sharp increase in SARR operating costs generates SAC rates that will nearly double before the end of twenty years. Id. at 34-35, Tables 3 and 4 (e.g., \$14.57 per ton in 2003 and \$27.17 per ton in 2021).

The Board's approach to rate prescription also necessarily considers variable cost factors (including NS's fuel costs) by setting the prescribed rate during any year at the higher of the stand-alone rate or the jurisdictional threshold. See Decision at

² The propriety of using the RCAF-U, rather than the RCAF-A, to index SARR operating costs, is one of the subjects addressed in CP&L's January 20, 2004 Petition for Reconsideration.

34. Because the Board only calculates variable costs for periods as to which actual cost data exists, the Board allows future jurisdictional threshold levels to be “determined by the parties based on the procedures set forth in Appendix E” of the Board’s Decision. Id. While the current SAC rate for the P&SH vastly exceeds the Board’s jurisdictional threshold in the instant case, the future of the Board’s rate prescription as to the CP&L traffic nevertheless will depend upon an annual comparison of the as-of-yet undetermined jurisdictional threshold levels and the specific SAC rates that the Board has calculated for each of the twenty years from 2Q02 through 1Q22. As such, NS can be certain that even under the Board’s multi-year rate prescription approach, and even if fuel costs increase significantly above present levels, NS will never be obligated to provide service at rates less than 180% of its variable costs.

To summarize, the Board’s approach to rate prescription allows for the calculation of a specific maximum reasonable rate for each DCF year that more than adequately insulates NS from the impact of cost increases. Specifically, in establishing procedures to permit the calculation of those prescribed rates, the Board: (i) uses an NS tariff rate as the starting point for its annual rate reduction calculation which itself reflects GDP/IPD-based increases over the course of the twenty years; (ii) indexes SARR operating expenses (including fuel expenses) for future time periods using the RCAF-U index; and (iii) constrains its rate prescription based on future changes in NS’s variable costs (including fuel costs). In light of these significant cost-based controls that are built into the Board’s multi-year rate prescription, it is evident that the Board’s approach already considers -- and in CP&L’s view, overstates -- the impact of cost changes on the

rates that CP&L must pay to NS. As such, there is no basis for the exemption of NS's fuel surcharge from the Board's maximum rate prescription. On the contrary, fuel-related dollars are accounted for by the Board's Decision and thus must be subject -- like all other NS costs -- to the maximum limit established by the Board.

2. The Impact of an STB Rate Prescription

Title 49 provides that "[w]hen a rate, classification, rule or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate" See 49 U.S.C. § 10704(a)(1). Here, NS has charged a rate that exceeds the level prescribed by the Board in the Decision, and NS therefore has "no right" to the proceeds of those charges. See Commercial Club of Omaha v. Anderson & Saline River Ry., 19 I.C.C. 419, 421 (1910) ("If the rate was unreasonable the carriers had no right to charge it and have no right to the proceeds of such charges above a reasonable rate.").

The fact that NS's transportation rate was composed of two separate components (i.e., the base rate component and the fuel surcharge component) does not impact the determination that the proceeds obtained by NS for the subject coal transportation service exceeded the prescribed maximum. It was the total level of NS's coal transportation charges -- as reflected in the entirety of NS's January 29, 2002 rate offering and as subsequently "change[d] or adjust[ed]" -- that CP&L challenged in its Complaint. See Complaint at 5, 8.

Absent a specific prohibition by the Board, NS is free to structure its common carrier rates in whatever manner it chooses. As such, there is no reason why NS

could not have elected -- as it did -- to establish a base common carrier rate that was subject to an additional fuel surcharge when oil prices reached a stated threshold. By structuring its rates in such a "compound" fashion, however, NS cannot be permitted to undermine the efficacy of the Board's prescription of maximum rates for the issue service. See, e.g., Safeway Stores, Inc. v. Atchison, Topeka & Santa Fe Ry., 258 I.C.C. 767, 768 (1944) ("In the prescription of rates that are the lawful maxima there should be no allowance for future voluntary increases.".)³ In fact, if the Board were to permit NS to exempt its fuel surcharge from the scope of the Board's rate prescription, then NS undoubtedly would regard itself as being at liberty in the future to impose other cost-related surcharges upon the CP&L traffic at levels that exceed the rates prescribed by the Board. Such a result, of course, would be wholly inconsistent with the Board's statutory duty to serve as the arbiter of maximum reasonable rates on captive traffic.

Significantly, the determination that CP&L seeks will not leave NS without protection in the event of future cost increases. As indicated supra, the Board determined in its Decision that NS is entitled to charge transportation rates that vastly exceed the variable cost-based jurisdictional threshold. If, however, future variable cost increases (such as fuel expense), drive the jurisdictional threshold above the SAC rate level, then

³ There is no separate, accessorial service to which the fuel surcharge applies (e.g., storage or demurrage) that somehow could be argued by NS to be beyond the scope of the Board's rate prescription. See, e.g., New Orleans Live Stock Exchange, Ltd. v. Louisville & Nashville R.R., 31 I.C.C. 609, 612 (1914) ("If the shipper or receiver demands an additional service, the carrier has a right to assess a reasonable charge therefor.").

the jurisdictional threshold will govern and NS will continue to be entitled to charge rates that allow it to recover both its costs and a generous profit.⁴

⁴ Notably, NS's imposition of significant fuels surcharges comes at the same time in which NS has seen a marked improvement in its coal revenues. See "Norfolk Southern Reports Record Revenues, Income From Railway Operations" set forth at http://www.nscorp.com/nscorp/application?origin=content.jsp&event=bea.portal.framework.internal.refresh&pageid=NS+News&contentId=english/nscorp/news/whats_new/whats_new/earn1q_04.html ("Coal revenues were up in the first quarter, increasing 12 percent to \$398 million in the first quarter of 2004 compared with the same period last year."). Moreover, it was reported on June 1, 2004 that despite the rising price of fuel, NS's fuel hedging activities have allowed NS to keep its fuel costs stable or even to reduce those costs. See "NS saves millions in fuel purchases," http://www.utu.org/worksite/print_news.cfm?ArticleID=14370 ("The market's gone up and we look like we're smart . . .," said Henry C. Wolf, Norfolk Southern's vice chairman and chief financial officer. "But we happened to make a decision that we wanted to reduce our exposure to the volatility of fuel prices." . . . "The savings last year were very substantial," Wolf said. . . . With prices even higher now than last year, the savings should be even greater.").

CONCLUSION

For the foregoing reasons, CP&L requests that the Board issue an order determining that the proper calculation of reparations in this case must include amounts that CP&L has paid to NS as fuel surcharges upon the issue traffic.

Respectfully submitted,
CAROLINA POWER & LIGHT COMPANY

By: David T. Conley
Carolina Power & Light
Company
410 South Wilmington Street
Raleigh, North Carolina 27601

C. Michael Loftus
Christopher A. Mills
Frank J. Pergolizzi
Peter A. Pfohl
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

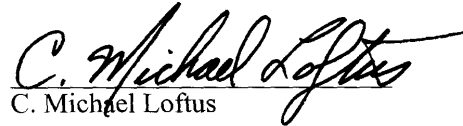
DATED: June 4, 2004

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that this 4th day of June, 2004, I have caused copies of the foregoing Statement to be served by hand on counsel for defendant Norfolk Southern Railway Company as follows:

G. Paul Moates, Esq.
Terence M. Hynes, Esq.
Paul A. Hemmersbaugh, Esq.
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005


C. Michael Loftus