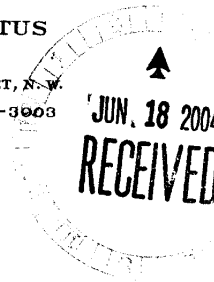


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June 18, 2004

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 18 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 Reply to Norfolk Southern Railway Company's Statement of Position Regarding Fuel Surcharge Reparations.

We also enclose an extra copy of the Reply. 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
An Attorney for
Carolina Power & Light Company

Enclosures

211368

BEFORE THE
SURFACE TRANSPORTATION BOARD

CAROLINA POWER & LIGHT
COMPANY,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY,

Defendant.

Docket No. 42072

ENTERED
Office of Proceedings

JUN 18 2004

Part of
Public Record

REPLY TO NORFOLK SOUTHERN RAILWAY COMPANY'S
STATEMENT OF POSITION
REGARDING FUEL SURCHARGE REPARATIONS

CAROLINA POWER & LIGHT COMPANY

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DATED: June 18, 2004

Attorneys for Complainant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**REPLY TO NORFOLK SOUTHERN RAILWAY COMPANY'S
STATEMENT OF POSITION
REGARDING FUEL SURCHARGE REPARATIONS**

Complainant Carolina Power & Light Company ("CP&L") hereby files this Reply to Norfolk Southern Railway Company's ("NS") June 4, 2004 Statement of Position Regarding Fuel Surcharge Reparations ("NS Statement"). In its Statement, NS seeks to excuse itself from the obligation to pay reparations to CP&L for past fuel surcharges that NS imposed upon the transportation services at issue in the Board's Decision in this proceeding served December 23, 2003 (the "Decision").

In its Decision, the Board prescribed the maximum amount that NS was permitted to charge CP&L for the subject transportation service during the relevant time periods. Relying on an unsupported claim that the collection of an additional charge

through a “rule” somehow renders that charge exempt from the prescribed legal maximum, NS boldly contends that it should be permitted to collect greater revenue from CP&L for the subject transportation service than the Decision allows.¹ NS’s Statement is completely without merit.

ARGUMENT

NS makes three principal arguments in support of its position: (1) CP&L’s Verified Complaint regarding the level of NS’s rates did not effectively challenge NS’s fuel surcharge “rule” because Title 49 makes a clear distinction between rates and rules; (2) in its Buffalo Rate Study proceeding, the Board based its conclusions solely on information regarding the carriers’ line-haul rates; and (3) fuel prices have increased recently. None of these arguments is even remotely sufficient to warrant a finding that NS should be entitled to retain CP&L’s fuel surcharge payments.

1. Both the Complaint and the Decision Encompassed the NS Fuel Surcharge

The parties are in agreement that CP&L’s Complaint challenged the level of rates applicable to NS’s transportation of coal from origins in West Virginia, Kentucky, and Virginia to CP&L’s generating facilities in North Carolina. See NS Statement at 2. The parties further agree that CP&L’s Complaint explicitly sought the establishment of “reasonable rates and other terms” applicable to this transportation. Id. at 5 n.5. The parties disagree, however, as to whether CP&L’s Complaint and the

¹ Although the immediate dispute before the Board involves the application of the fuel surcharge to the rates prescribed for the reparations period, the same issue exists for subsequent periods in which the NS fuel surcharge might be in effect.

Board's prescription of new maximum rates were sufficiently broad as to encompass NS's fuel surcharge.

There can be no legitimate dispute regarding the fact that CP&L's Complaint effectively challenged NS's entire transportation charges including the fuel surcharge. As CP&L explained in its June 4 Statement, CP&L's Complaint challenged NS's June 29, 2002 rate offer, which itself specifically incorporated NS's Conditions of Carriage tariff and the fuel surcharge set forth therein at Condition 55.1. See CP&L Statement at 4-5. Moreover, CP&L's Complaint explicitly covered:

. . . 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.

See Complaint at 8 (emphasis added). The fuel surcharge is a charge imposed upon the railroad transportation services that NS has provided in response to CP&L's request and therefore is subject to CP&L's Complaint.

In support of its contentions that CP&L did not challenge the surcharge and that the surcharge therefore must be presumed to be valid, NS argues that the governing statute draws a clear distinction between common carrier rates, on the one hand, and common carrier classifications, rules and practices, on the other. See NS Statement at 4 (citing 49 U.S.C. § 10704(a)(1)). Title 49, however, does not support the distinction that NS attempts to draw between line-haul rates and fuel surcharges. On the contrary, Title 49 expressly provides that the term "rate" means "a rate or charge for transportation . . .

.” See 49 U.S.C. § 10102(7) (emphasis added). As such, Title 49 explicitly includes a “charge” for transportation as part of the applicable “rate.” NS’s fuel surcharge is certainly a “charge” for transportation between the subject origins and destinations.

The fact that NS recently has developed a strong preference for identifying its fuel surcharge as a “rule” (using the phrase “fuel surcharge rule” thirty-two (32) times in a ten (10) page document despite identifying the surcharge only as a “condition” in its “Conditions of Carriage” publication)² does not alter the fact that the purpose of NS’s fuel surcharge is to collect additional revenue from CP&L for the same service that is the subject of the Board’s Decision. In this regard, it is significant to note that NS’s fuel surcharge is applied as a percentage additive to NS’s “Base Freight Charge(s).” See NS’s Exhibit B at “Condition 55.1 – Fuel Surcharge” (emphasis added). This format of application to the “Base” freight charges further confirms the inextricable relationship of the NS rates and NS fuel surcharge.

Moreover, a provision of Title 49 that NS cites in support of its argument (see NS Statement at 4) itself confirms 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[³]” See 49 U.S.C. § 10704(a)(1) (emphasis added). Notwithstanding

² See NS’s Conditions of Carriage #2-C document (which is set forth as Exhibit B to NS’s Statement). Therein, NS’s fuel surcharge (i.e., “Condition 55.1”) is never identified by NS as a “rule.” By contrast, NS’s language regarding “Non-Waiver,” which immediately follows the fuel surcharge on the same page of the NS publication, is explicitly identified as “Rule 60.”

³ As noted above, 49 U.S.C. § 10102(7) defines “rate” as used in the statute as “a rate or charge for transportation.” (Emphasis added).

NS's labored efforts in its Statement to twist vocabulary to suit its purposes, there can be no legitimate question that through the combination of the prescribed rates and its fuel surcharge, NS seeks to "charge" and "collect" an amount that is "different" from -- and greater than -- the maximum rate prescribed by the Board for the same transportation service that is the subject of the Decision.

There is a fundamental distinction between an NS charge for ancillary services and an NS fuel surcharge. The first category provides additional revenue to NS in exchange for additional services provided to the customer; the second category provides additional revenue to NS for the line haul service itself. There are no additional services associated with the NS fuel surcharge. CP&L is entitled to reparations based on the full amount it paid for the transportation services it received; i.e., the sum of the rates and the fuel surcharges.

2. The Buffalo Rate Study is
Irrelevant to the Present Inquiry

Although NS acknowledges that it has been unable to identify any Board precedent allowing a carrier to impose a fuel surcharge on a prescribed rate, it argues that the Board's Buffalo Rate Study proceeding implicitly supports such a result. See NS Statement at 5-7.

The Board's Buffalo Rate Study proceeding was intended to ascertain whether the acquisition by NS and CSX of portions of the Conrail system had resulted in any increase in rates (and thus any lessening of competition) in the Buffalo area. As described by the Board, "[w]e initiated our Buffalo Rate Study . . . to examine linehaul

and switching rates for rail movements into and out of the Buffalo area.” See Finance Docket No. 33388 (Sub-No. 90), CSX Corp., NS Corp. – Control and Operating Leases/Agreements – Conrail Inc. (STB served July 7, 2000) at 1. In commenting upon the records provided to it regarding Buffalo area pricing practices, the Board indicated that records which excluded fuel surcharge amounts were adequate because they would allow the Board to monitor any impact of the Conrail transaction upon the competitive balance in the area. Id. at 5 (“We agree that our Buffalo Rate Study is not intended to focus on whether the rapid and significant rise in diesel fuel prices, or any other adverse industry-wide cost trends, are eventually reflected in rail rates.”).

The Board’s simple observation that base rate levels were the focus of an inquiry into possible anticompetitive pricing has no relevance, however, with respect to whether NS has charged and collected more revenue than the Board allowed in its maximum rate prescription in this case. As such, the Buffalo Rate Study precedent is fully consistent with CP&L’s position.⁴

3. NS’s Claims of Reasonableness are Irrelevant

Finally, NS claims that the application of the fuel surcharge to the prescribed rates does not result in a “double-count” of fuel price increases, and NS attempts to justify its position through a series of observations regarding changes in fuel

⁴ NS’s reference to the fact that “[h]istorically, maximum reasonable rates prescribed by the ICC were deemed to be subject to general rate increases and zone-of-rate-freedom (sic) increases permitted under then-existing law” is also irrelevant. See NS Statement at 7 (citing Burlington Northern Inc. v. United States, 459 U.S. 131 (1982) and CSX Transp. v. United States, 867 F.2d 1439 (1989)). As NS itself admits, “the[] statutory provisions [which allowed for such increases] no longer exist . . .” Id.

prices. See Statement at 9. This effort is wholly irrelevant because NS is precluded as a matter of law from charging or collecting any amount for the subject transportation service that exceeds the rate level prescribed by the Board.

Even beyond this threshold legal defect, however, NS's claims regarding the burden associated with increased fuel prices are substantively wrong. As CP&L explained in its Statement of Position, and as NS concedes in its Statement, NS engages in fuel hedging activity that greatly minimizes its exposure to fuel price changes. See CP&L Statement at 11 n.4 (citing "NS saves millions in fuel purchases," http://www.utu.org/worksites/print_news.cfm?ArticleID=14370) (June 1, 2004) ("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.')); see also NS Statement at 9 n.7 ("NS' fuel hedging program helps to reduce the impact of diesel fuel price volatility in the short run . . .").

Moreover, the Board's rate prescription methodology already considers the impact of fuel cost changes in two respects; namely, through its indexing of operating costs and through the ongoing evaluation of NS's variable costs of service.

(a) The Indexing of SARR Operating Costs

First, the Decision already considers increases in fuel-related costs through its use of the RCAF-U index to forecast operating costs for the SARR. See Decision at

27-28.⁵ The RCAF-U index includes a significant fuel component, and as a result, the impact of fuel cost increases already is built into the DCF model that formed the basis of the Board's rate prescription.

If NS believes that the particular RCAF-U forecasts that the Board relied upon fail substantially to produce fuel costs (not fuel prices) for the SARR that are materially inaccurate, then NS will be free to file a petition to reopen the Decision for purposes of considering changed circumstances. See, e.g., Docket No. 41185, Arizona Public Service Co. and PacifiCorp v. The Burlington Northern and Santa Fe Ry. (STB served May 12, 2003) at 4 ("We will therefore grant BNSF's request to reopen the proceeding due to this substantially changed circumstance . . ."); Docket No. 41191, West Texas Utilities Co. v. The Burlington Northern and Santa Fe Ry. (Decision served May 29, 2003), at 4 ("WTU") ("If WTU wishes to have this proceeding reopened on new evidence or substantially changed circumstances, it may file an appropriate petition to reopen on that basis."); Docket No. 42051, Wisconsin Power and Light Co. v. Union Pacific R.R. (Decision served Sept. 13, 2001) at 33 ("[UP] may petition to reopen and adjust the rate prescription should these trends shift.").⁶

⁵ NS, of course, was the party that advocated the use of the RCAF-U index to forecast SARR operating costs.

⁶ Any re-examination of the correlation between one element of the RCAF-U forecasts that the Board relied upon in the Decision (i.e., the fuel price component of the RCAF-U) and actual experience also should consider all other elements of the RCAF-U and any other related operating statistics (such as the system average fuel consumption rates relied upon by the Board), as well. See Decision at 57. Only through such a comprehensive evaluation could the Board adequately determine whether the impact of changes in fuel prices was material or in fact had been offset by other cost reductions.

While the Board has observed that modest fluctuations between forecasts and actual experience will not provide a basis for reopening, reopening nevertheless is available as a remedy to address significant changes that involve long-term deviations from the forecasts on which a SAC decision was based. See Arizona Public Service Co. and PacifiCorp v. The Atchison, Topeka and Santa Fe Ry., 3 S.T.B. 70, 75 n.16 (1998) (“The significant changes we were referring to [in the 1997 APS Decision on which Santa Fe relies] involve important long-term shifts in traffic patterns, not short-term, year-to-year fluctuations that do not undermine our long-term projections. . . . We must consider not only the magnitude, but also the cause and duration of the discrepancies before deciding whether they warrant reopening and revision of the underlying SAC calculations.”); WTU at 4 n.8 (“Projections will inevitably prove inaccurate to some degree. [In order to warrant reopening], changes must be significant”); see also 49 C.F.R. § 1115.4 (“A petition to reopen must state in detail the respects in which the proceeding involves . . . substantially changed circumstances”) (emphasis added).

(b) The Ongoing Evaluation of Variable Costs

Second, if NS’s variable costs of service for the CP&L movements (including fuel costs) should rise to the point at which the jurisdictional threshold exceeds the stand-alone rate for a given time period, then NS will be permitted to collect rates at the jurisdictional threshold level. As matters currently stand, however, stand-alone rate levels serve as the operative cap on NS’s common carrier rates (with certain of those rate levels yielding R/VC ratios that are well above 300%) and provide a bountiful profit margin for NS.

As the foregoing discussion confirms, NS has ample protections available to it with respect to fuel cost increases. It is not necessary for the Board to force CP&L to pay charges greater than the prescribed maximum reasonable rate levels to protect NS against fluctuations in fuel prices.

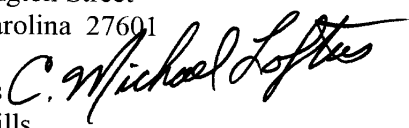
CONCLUSION

For the foregoing reasons, the Board should confirm that the fuel surcharge payments made by CP&L must be included in the determination of reparations and should order that NS pay to CP&L all such fuel surcharge amounts, along with interest in the appropriate amount.

Respectfully submitted,

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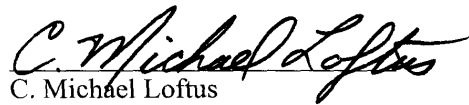
DATED: June 18, 2004

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that this 18th day of June, 2004, I have caused copies of the foregoing Reply to be served by hand on counsel for defendant Norfolk Southern Railway Company as follows:

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