

SERVICE DATE - MAY 1, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42072

CAROLINA POWER & LIGHT COMPANY  
v.  
NORFOLK SOUTHERN RAILWAY COMPANY

MOTION TO COMPEL DISCOVERY

Decided: April 29, 2002

In a verified complaint filed and served on defendant Norfolk Southern Railway Company (NS) on February 1, 2002, Carolina Power & Light Company (CP&L) alleges that the rates and other terms for unit train coal transportation to be assessed by NS on complainant's movements of coal from various origins in West Virginia, Kentucky, and Virginia to CP&L's Roxboro electrical generating facility in Hyco, NC, and Mayo electrical generating facility in Mayo Creek, NC, will exceed a maximum reasonable level.<sup>1</sup> CP&L alleges that NS possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief.

In a decision served on March 12, 2002, the Board granted the parties' joint motion for a protective order.<sup>2</sup> The order included provisions governing the production of highly confidential material and stipulated that the protected exchange of material would not constitute an unauthorized disclosure, or result in criminal penalties, under 49 U.S.C. 11904.

On March 15, 2002, CP&L filed a motion to compel responses to its discovery Request Nos. 44 and 45 seeking production of all NS transportation contracts and tariffs<sup>3</sup> governing shipments (made in the year 2001 or thereafter) traversing a portion of the route used for the NS movements to CP&L's aforementioned electric generating facilities, or that move over any portion of NS's rail lines in the five states in which the stand-alone railroad (SARR) being designated by CP&L for purposes of this case may be located. The discovery requests are

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<sup>1</sup> The service was provided by NS under a rail transportation contract that expired on March 31, 2002. As of April 1, 2002, NS will transport coal to the Mayo and Roxboro generating stations using common carrier transportation rates per net ton for trainload shipments as outlined in a January 29, 2002 letter from NS to CP&L.

<sup>2</sup> The joint motion from CP&L and NS was filed on February 12, 2002.

<sup>3</sup> CP&L states that it does not seek to compel the production of tariffs in this motion.

identical, except that No. 44 refers to coal transportation contracts and No. 45 refers to non-coal transportation contracts. CP&L submits that the discovery requests were intended to obtain information relevant to the traffic group for its SARR, and to provide information regarding the future traffic and revenue for the SARR.

CP&L states that 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 Duke Energy Corporation v. Norfolk Southern Railway Company, STB Docket No. 42069 (STB served Mar. 4, 2002) (Duke v. NS). CP&L also argues that, while Request No. 45 pertains to production of non-coal transportation contracts and such contracts were not at issue in Duke v. NS, the contracts remain discoverable as documents relevant to the determination of an appropriate SARR traffic group. CP&L notes that NS has stated that it does not object to production of the documents identified under Request No. 44, and does not object to production of a “reasonable number of such contracts” designated under Request No. 45, should the Board order it.

In its reply to the motion to compel, filed on March 22, 2002, NS submits that the coal transportation contracts identified in Request No. 44 contain information potentially relevant to the stand-alone cost issues in this case. It states that it does not object to production of these documents upon issuance of a Board order compelling such production, and upon a designation of the documents as “Highly Confidential” under the terms outlined in the protective order of March 12, 2002. NS contends that it has identified the contracts that are responsive to CP&L’s request and has notified potentially affected customers.

Also in its reply, NS objects to production of the non-coal transportation contracts specified under Request No. 45 on the grounds that the request is overly broad and unduly burdensome. It challenges the relevance of the information contained in the documents, and questions whether the information is reasonably calculated to lead to the discovery of admissible evidence. However, NS states that it would not object to production of a reasonable number of such contracts once the parties have agreed upon the scope of the request, provided that production is compelled by Board order and the contracts are treated as “Highly Confidential” under the terms outlined in the protective order. NS contends that CP&L has agreed to a “Highly Confidential” designation for these documents.<sup>4</sup>

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<sup>4</sup> Two of the shippers whose contracts with NS are subject to production under CP&L’s request have written to the Board to express their concerns about confidentiality.

The protective order entered in this proceeding provides shippers with sufficient protection against competitive damage from the disclosure of transportation contracts.<sup>5</sup> It is well settled that a protective order ensures that confidential, proprietary, or commercially sensitive information will be used solely for the involved proceeding and not for other purposes. Any concerns of the shippers regarding disclosure of sensitive materials should be directed to the defendant, who, along with the complainant, can determine what level of confidentiality should be assigned to the material produced. See Duke v. NS, slip op. at 2, citing Pennsylvania Power & Light Company v. Consolidated Rail Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company, STB Docket No. 41295 (STB served Mar. 10, 1997).

Here, NS does not object to the production requests as long as there is a Board order compelling production and a designation of the contracts as “Highly Confidential” under the protective order and, in the case of the non-transportation contracts, a limitation on the number of contracts to be produced, which CP&L has agreed to work out with NS. In addition, the protective order for this proceeding resolves any concerns arising out of third-party confidentiality agreements contained in the contracts. Accordingly, CP&L’s motion to compel production of the requested rail transportation contracts, subject to the “Highly Confidential” provisions of the protective order issued in this proceeding on March 12, 2002, and to the scope of production agreed upon by both parties, will be granted.

It is ordered:

1. CP&L’s motion to compel discovery of rail transportation contracts is granted, as specified above.
2. This decision is effective on the date of service.

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<sup>5</sup> See Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056, slip op. at 2-3 (STB served Feb. 9, 2001), where the Board stated that, “[w]hile we understand the concerns raised by those shippers here, we are satisfied that the parties’ agreements regarding scope and the application of the ‘highly confidential’ provisions of the protective order are sufficient to protect the interests of third-party shippers.”

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary