

SERVICE DATE - MARCH 10, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41295

PENNSYLVANIA POWER & LIGHT COMPANY
v.
CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION, INC.,
AND NORFOLK SOUTHERN RAILWAY COMPANY

MOTION TO COMPEL DISCOVERY

Decided: March 7, 1997

Complainant, Pennsylvania Power & Light Company (PP&L), by motion filed February 25, 1997, seeks an order compelling defendants, Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS), to furnish rail transportation contracts which are responsive to a discovery request by PP&L. The motion will be granted, subject to the terms of the Board's February 12, 1997 protective order in this proceeding.

In this complaint, PP&L challenges the reasonableness of defendants' coal rates to four of PP&L's generating stations in Pennsylvania. This proceeding is being handled under the Board's new regulations for processing rail rate reasonableness complaints see 49 CFR part 1111.¹ On January 15, 1997, the Board established a procedural schedule in this matter. At the parties' request and to facilitate the discovery process, the Board on February 12, 1997, entered a protective order to safeguard the confidentiality of information that may be produced during the course of this proceeding.

In the discovery process, defendants objected to PP&L's request for the production of rail transportation contracts on the ground that production of such contracts, outside the direction of the Board, would violate confidentiality clauses in agreements between the defendants and various of their customers.² As noted by PP&L in its motion, defendants stated that the requested contracts contain confidentiality provisions that restrict third-party disclosure and that a large number of them also prohibit third party disclosure unless required under legal process. Motion at 3.

¹ See Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1, 1996 and Nov. 15, 1996); published at 61 FR 52710 (Oct. 1, 1996), 61 FR 53996 (Oct. 16, 1996), 61 FR 57339 (Nov. 6, 1996) (postponing effective date), and 61 FR 58490 (Nov. 15, 1996).

² PP&L requested each defendant to "[i]dentify and provide copies of all transportation contracts (or letters of understanding with appendices or attachments) entered or agreed to by [the carrier] which govern shipments of coal (coal being defined as Standard Transportation Commodity Code (STCC) 112) handled by [carrier] as originating, terminating, overhead or single-line carrier."

PP&L argues that these documents, which contain both rates and future traffic volumes, are necessary for it to develop its stand-alone traffic analysis. PP&L adds that the Board's February 12 protective order is already in place to ensure that the defendants can designate the degree of confidentiality that is to be afforded the document according to the sensitive nature of the material. PP&L notes that all three defendants require a Board order compelling production to satisfy confidentiality commitments to their customers. Motion at 4-6.

NS, in reply, does not oppose the production of the rail transportation contracts. Despite NS's confidentiality concerns, it accedes to production of the requested contract materials if ordered by the Board. NS requires that any contract materials furnished to PP&L be designated as "Highly Confidential" information under the protective order served February 12.

CSXT, in reply, stated that it will produce the contract materials, subject to the access limitation (designated "Highly Confidential Information") in the February 12 protective order, once notice is sent to the affected shippers, as required by the contracts, and once an affirmative Board order is issued to ensure full compliance with any applicable legal process requirements for third party disclosure.

Conrail, in reply, indicated that some of the rail transportation contracts require Conrail to notify the shippers that disclosure is being sought, in order to provide them an opportunity to participate in the proceeding and to object to disclosure. Conrail did not raise an objection to the production of the rail transportation contracts.

Conrail and CSXT state that they have begun notifying potentially affected shippers of PP&L's request and of PP&L's intent to file the motion to compel disclosure. Both railroads request that the Board not rule on PP&L's motion prior to March 10, 1997, in order to provide affected shippers an opportunity to object to disclosure if they wish to do so.

As stated in our February 12 decision, and reiterated here, the protective order ensures that the parties' confidential, proprietary or commercially sensitive information will be used solely for this proceeding and not for other purposes. The Board's protective order already provides the parties control over the designation of the level of confidentiality of the contracts. Shippers who may have apprehensions regarding disclosure of their extremely sensitive materials can allay their fear by expressing their concern to the defendant, who in turn can, along with PP&L, determine what level of confidentiality should be assigned to the material produced.³ Thus, the Board need not wait until March 10, 1997, to rule on the motion.

The production of the rail transportation contracts is not challenged by defendants, and it is clear that information contained in them is necessary for PP&L to develop its stand-

³ This should satisfy the concerns of such shippers as Peabody COALSLES Company and Eastern Associated Coal Corp., which have no standing in this proceeding, but which, nonetheless, expressed their concerns regarding the disclosure of their highly sensitive materials.

alone traffic analysis. Accordingly, subject to the terms of the February 12 protective order, PP&L's motion to compel production of the requested rail transportation contracts, will be granted.

It is ordered:

1. PP&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.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary