

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41989

POTOMAC ELECTRIC POWER COMPANY v. CSX TRANSPORTATION, INC.

MOTION TO COMPEL DISCOVERY

Decided: February 26, 1997

Complainant, Potomac Electric Power Company (PEPCO), by motion filed February 13, 1997, seeks an order compelling defendant, CSX Transportation, Inc. (CSXT), to respond to its first request for the production of documents in connection with its filing of this complaint on January 3, 1997. The motion will be granted.

In the complaint, PEPCO charges that new common carrier rates adopted by CSXT to apply to coal moving in unit train service from origins and interchanges in Pennsylvania, West Virginia, and Maryland to PEPCO's electric generating facility in Dickerson, MD, exceed a maximum reasonable level and that CSXT possesses market dominance over the traffic.<sup>1</sup> PEPCO requests that maximum reasonable rates be prescribed and reparations be awarded. On January 23, 1997, CSXT filed its answer, along with a motion for partial dismissal,<sup>2</sup> and the parties filed a joint motion for a protective order, which was granted in a decision served on February 5, 1997.

In request No. 30 of the first request for the production of documents, served on January 9, 1997, PEPCO had requested that CSXT produce all of its coal transportation contracts (or letters of understanding with appendices or attachments) entered or agreed to with respect to shipments made (at least in part) after January 1, 1994, where CSXT was an originating, terminating, overhead, or single-line carrier.<sup>3</sup> In a letter dated February 7,

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<sup>1</sup> Additionally, PEPCO alleges that CSXT was requested but refused to establish single line common carrier rates applicable to coal moving by unit train from: (1) two specific origins in West Virginia; and (2) various points of interchange with Consolidated Rail Corporation (Conrail) in Pennsylvania. PEPCO requests that CSXT be ordered to establish reasonable common carrier rates, charges, rules, and regulations for these movements, as well.

<sup>2</sup> CSXT moved to dismiss the complaint to the extent it concerned unit train coal movements from Conrail interchange points in Pennsylvania to PEPCO's Dickerson plant.

<sup>3</sup> According to PEPCO, CSXT raised other objections to its first request for the production of documents, but it limited this motion to request No. 30, concerning rail transportation contracts for coal. PEPCO expressly reserved the right to file a motion to compel production for other documents that CSXT objected to producing if negotiations subsequently failed.

(continued...)

1997, and in its formal response served February 10, 1997,<sup>4</sup> CSXT stated that it does not object, in substance, to PEPCO's production request.<sup>5</sup> However, it noted that many, if not all, of the requested contracts contain confidentiality provisions that restrict third-party disclosure and/or require prior notice for authorized disclosure and that a large number of them also prohibit third party disclosure unless required under legal process. CSXT stated that it will produce the contract materials, subject to the access limitations in the February 5 protective order, once notice is sent to the affected shippers, as required by the contracts, and an affirmative Board order is issued to ensure full compliance with any applicable legal process requirements for third party disclosure.

The need for the requested coal transportation contracts is not challenged, and it is clear that they are necessary for PEPCO to develop its stand-alone traffic analysis. Accordingly, subject to the terms of the February 5 protective order, PEPCO'S motion to compel production of the requested coal transportation contracts, request No. 30 of the first request for production of documents, will be granted.

It is ordered:

1. The motion to compel discovery 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

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(...continued)

Complainant filed a second motion to compel on February 20, 1997. That motion will be addressed in a subsequent decision.

<sup>4</sup> PEPCO's motion contains CSXT's February 10 response which CSXT had designated as highly confidential. PEPCO honored that designation and filed its motion under seal. In a letter filed February 19, 1997, PEPCO withdrew the designation and request to file under seal as unnecessary. PEPCO submitted a letter from CSXT dated February 13, 1997, advising that it had intended to designate as highly confidential only the rail transportation contracts and not its response to the request for these documents.

<sup>5</sup> Consistent with the new procedures and timetable adopted in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1, 1996), PEPCO's original discovery request and CSXT's letter and formal response (except as appended to PEPCO's motion to compel) are not of record.