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SERVICE DATE – APRIL 21, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42128

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Digest:<sup>1</sup> This decision dismisses without prejudice the shipper's claim that certain railroad charges and practices may be unreasonable.

Decided: April 19, 2011

This decision grants a motion of Norfolk Southern Railway Company (NSR) to dismiss a portion of a complaint filed by the South Mississippi Electric Power Association (SMEPA) asserting that certain NSR tariffs, circulars, and publications may result in unreasonable charges and constitute unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746.

BACKGROUND

In a complaint filed on December 28, 2010, SMEPA challenges the reasonableness of certain rates, rules, and other terms established by NSR for the transportation of coal from NSR-served mine origins and origin groups in Kentucky, Virginia, West Virginia, Tennessee, and Alabama, and from NSR-served docks in Mobile, Ala., to SMEPA's R.D. Morrow, Sr. Generating Station, near Richburg, Miss. Additionally, SMEPA alleges that certain NSR tariffs, circulars, and publications might contain unreasonable charges and constitute unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746. SMEPA states:

NSRQ 65837 and the tariffs, circulars and publications referenced therein also include service terms which do not meet SMEPA's legitimate coal transportation needs, and constitute a departure from the established pattern of service provided by NS for coal deliveries to the Morrow Station, which reflected NS's clear understanding of SMEPA's reasonable transportation requirements. SMEPA reserves the right to present evidence of the unlawfulness of one or more of those terms if, as applied to coal service to SMEPA, they result in unreasonable charges

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

and/or constitute unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746.<sup>2</sup>

On January 18, 2011, NSR filed a motion to dismiss the claim contained in paragraph 19 of SMEPA's complaint. In its motion, NSR argues that SMEPA's claim fails to "state the facts that are the subject of the violation," as required by 49 U.S.C. § 11701(b), and that the complaint also fails to "set forth briefly and in plain language the facts upon which" the complaint is based, as required by 49 C.F.R. § 1111.1(a). NSR further argues that SMEPA neither specifies the service terms that do not meet its needs, nor explains why or how the terms constitute unreasonable charges and practices.

In its February 7, 2011 reply, SMEPA argues that the claim, when considered in a light most favorable to SMEPA, could make a prima facie case that NSR is engaging in an unreasonable practice.<sup>3</sup> Citing our prior ruling in Dairyland Power Cooperative v. Union Pacific Railroad, NOR 42105 (STB served July 29, 2008), SMEPA argues that to survive a motion to dismiss, a claim "need only provide sufficient grounds for further investigation."<sup>4</sup>

#### DISCUSSION AND CONCLUSIONS

In reviewing a motion to dismiss, the Board views all alleged facts in the light most favorable to the complainant. Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011). In accordance with 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.1(a), a complaint must, at a minimum, state reasonable grounds for an investigation and set forth the facts that are the subject of the violation.

While a complainant need not state a claim in exacting detail, here SMEPA has not provided sufficient facts or details in support of its unreasonable charges and practices claim. SMEPA does not identify any specific service terms or explain how or why those terms are unreasonable. Instead, SMEPA states that it "*reserves the right* to present evidence of the unlawfulness of one or more [service] terms *if*, as applied to coal service to SMEPA, they result in unreasonable charges and/or constitute unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746."<sup>5</sup> SMEPA's claim, therefore, does not allege that any of NSR's practices or charges are unreasonable or unlawful at this time, nor does it provide information suggesting that NSR's service terms will result in unreasonable charges or practices in the future. Rather, it is merely a placeholder for any future unspecified concerns SMEPA may develop.

In contrast, in Dairyland, complainant Dairyland Power Cooperative cited specific fuel surcharges contained in specified pricing documents, and explained why the subject terms

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<sup>2</sup> SMEPA's Compl. 8, ¶ 19.

<sup>3</sup> SMEPA's Reply 5.

<sup>4</sup> SMEPA's Reply 4.

<sup>5</sup> SMEPA's Compl. 8, ¶ 19 (emphasis added).

constituted unreasonable practices. Because the allegations set forth in Dairyland's complaint could be read to call into question the reasonableness of UP's fuel surcharge program, the Board held that it could not find that there were no reasonable grounds for investigation, and it therefore denied UP's motion to dismiss the complaint. Paragraph 19 of SMEPA's complaint does not contain this minimal level of detail.

As a result, SMEPA's claim of unreasonable charges and/or unreasonable practices does not meet the requirements of 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.1(a). Therefore, we will grant NSR's motion to dismiss, and dismiss without prejudice the claim contained in paragraph 19 of SMEPA's complaint. The remainder of SMEPA's complaint may proceed upon the procedural schedule established by the Board in its March 14, 2011 decision.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NSR's motion to dismiss is granted.
2. The claim contained in paragraph 19 of SMEPA's complaint is dismissed without prejudice.
3. This decision is effective on its service date.

By the Board, Chairman Elliott and Commissioner Mulvey.