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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**SOUTH MISSISSIPPI ELECTRIC POWER
ASSOCIATION**

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42128

**ENTERED
Office of Proceedings**

JAN 18 2011

**Part of
Public Record**

MOTION TO DISMISS

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.5 and other applicable law and authority, Defendant Norfolk Southern Railway Company (“NS”) respectfully submits this Motion to dismiss the unreasonable practices claim that Complainant South Mississippi Electric Power Association (“SMEPA”) appears to allege in Paragraph 19 of its Complaint. The bulk of SMEPA’s Complaint consists of claims that NS’s common carrier rates for the transportation of coal to SMEPA’s Morrow Generating Station are in excess of reasonable maximum levels.¹ In Paragraph 19, however, SMEPA vaguely asserts that unspecified NS service terms constitute unreasonable practices without either identifying those service terms or explaining why they would constitute unreasonable practices. SMEPA’s failure to provide even a minimal description of what practices it is challenging or why those practices are allegedly unreasonable falls far short of the threshold requirement that any claim raised in a complaint must “state briefly and in plain language the facts upon which it is based” and must “advise the

¹ While NS denies that any of its rates are unreasonable (as detailed in the Answer NS is filing today), NS is not moving to dismiss SMEPA’s rate reasonableness claims at this time.

Board and the defendant fully in what respects” the challenged practice is unlawful. 49 C.F.R. § 1111.1(a). Accordingly, this patently deficient claim must be dismissed.

The Interstate Commerce Act (“ICA”) requires any litigant filing a complaint with the Board alleging that a rail carrier has violated the ICA to “state the facts that are the subject of the violation.” 49 U.S.C. § 11701(b). Congress gave the Board the power to enforce this fundamental pleading requirement by authorizing the Board to “dismiss a complaint it determines does not state reasonable grounds for investigation and action.” *Id.* The statutory mandate that a complaint must provide a minimal description of the facts underlying the alleged unlawful conduct is reinforced by the Board’s rules governing complaints:

A formal complaint . . . should set forth briefly and in plain language the facts upon which it is based. It should include specific reference to pertinent statutory provisions and Board regulations and should advise the Board and the defendant fully in what respects these provisions or regulations have been violated. The complaint should contain a detailed statement of the relief requested.

49 C.F.R. § 1111.1(a). While a complainant need not plead every factual detail that might be relevant to its complaint, the statute and regulations require that a complaint provide some explanation of the facts underlying each of its claims and some description of why the complainant believes those facts constitute a violation of the ICA.

The unreasonable practices claim SMEPA included in its Complaint does not come close to meeting this standard. Paragraph 19 – the only paragraph of the Complaint that alleges that NS has engaged in unreasonable practices – states in its entirety that:

NRSQ 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 and/or

constitute unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746.

The vague and conclusory language of this claim does not either: (i) identify the service terms that SMEPA claims “do not meet SMEPA’s legitimate coal transportation needs” or (ii) allege or explain why or how such service terms would constitute unreasonable practices under the Board’s rules. Identification of the railroad practices that are the subject of an unreasonable practices claim is the most fundamental “fact[] upon which [such a claim] is based.” 49 C.F.R. § 1111.1(a). SMEPA’s failure to even name the service term(s) that it claims are unreasonable falls far short of the minimum requirements of Section 1111.1(a) and requires dismissal of SMEPA’s claim. Similarly, SMEPA’s conclusory assertion that these unidentified and unspecified NS practices are unreasonable because they do not meet SMEPA’s coal transportation needs certainly does not “fully” advise either NS or the Board as to why SMEPA claims such practices are unreasonable. *Id.*

Not only does the complaint fail to identify the allegedly unreasonable practice(s), it does not even allege that NS has actually engaged in such unspecified practices. Instead, it speculates that NS *may*, at some point in the future, engage in such hypothetical practices. *See* Complaint ¶ 19 (“reserv[ing] 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 and/or constitute unreasonable practices” (emphasis added)). Speculation about some hypothetical future event cannot form the basis of a cognizable unreasonable practices claim. The lack of an actual, ripe, and concrete existing claim or harm to SMEPA is a further reason to dismiss its inchoate unreasonable practices claim.

The Board does not often grant motions to dismiss, because it is rarely confronted with a complaint that fails to provide any description whatsoever of a claim. In this case,

however, SMEPA did not even bother to identify the practice that it claims is unreasonable, let alone plead the facts upon which its amorphous unreasonable practices claim is predicated. Both the ICA and the Board's regulations make clear that SMEPA cannot litigate a claim without pleading the essential facts underlying that claim, and SMEPA's deficient unreasonable practices claim should be dismissed.

For the foregoing reasons, the Board should dismiss the unreasonable practices claim set forth in SMEPA's Complaint.

Respectfully submitted,

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Dated: January 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2011, I caused a copy of the foregoing Motion to Dismiss to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

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