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Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Docket No. NOR 42128, South Mississippi Electric
Power Association v. Norfolk Southern Railway Company

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding is Complainant South Mississippi Electric Power Association's Reply in Opposition to Defendant's Motion to Dismiss.

Thank you for your attention to this matter.

Sincerely,



Stephanie P. Lyons
An Attorney for Complainant

Enclosures

cc: Counsel for Defendant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

SOUTH MISSISSIPPI ELECTRIC POWER)
ASSOCIATION)
7037 US Highway 49)
Hattiesburg, Mississippi 39402,)

Complainant,)

v.)

Docket No. NOR 42128)

NORFOLK SOUTHERN RAILWAY)
COMPANY)
Three Commercial Place)
Norfolk, Virginia 23510-2191,)

Defendant.)

**COMPLAINANT'S REPLY IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS**

Complainant, South Mississippi Electric Power Association ("SMEPA") submits this Reply in Opposition to the Motion to Dismiss ("Motion") filed by Defendant, Norfolk Southern Railway Company ("NS") on January 18, 2011. In support hereof, SMEPA shows as follows:

BACKGROUND

In its Complaint, SMEPA seeks the prescription of just and reasonable rates, rules and other terms for coal transportation service from various, specified NS-served coal origins or transload points to SMEPA's R.D. Morrow, Sr. Generating Station ("Morrow"), located near Richburg, Mississippi.

As set forth in the Complaint, SMEPA and NS were parties to a coal transportation agreement, Contract C-9376, which expired on December 31, 2010. In anticipation of its need for coal transportation after expiration of the contract, SMEPA had attempted for over a year to negotiate with NS over new or extended contract terms and conditions to cover the subject service, but was unsuccessful. SMEPA therefore made a request to NS on October 8, 2010 for common carrier rates and service terms that would apply to the transportation of coal to the Morrow Station, beginning January 1, 2011. On December 10, 2010, NS provided SMEPA with common carrier rate quote NSRQ 65837, which contains rates and rules for coal transportation service to the Morrow Station, and incorporates other NS tariffs and publications setting forth additional rules, accessorial charges and other provisions applicable to NS coal service generally. As SMEPA asserted in its Complaint, the rates provided by NS in NSRQ 65837, as applied to SMEPA's coal traffic, exceed the maximum reasonable levels permitted under 49 U.S.C. §§ 10107(d)(1) and 10702, and therefore are unlawful.

SMEPA's Complaint also includes a count challenging the service terms imposed by NS:

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

Complaint, ¶ 19.

In its Motion, NS seeks to dismiss SMEPA's unreasonable practices claim, alleging that it is vague and fails to identify with specificity the service terms in question and the reasons why they would constitute unreasonable practices. Motion at 1. As set forth below, SMEPA has sufficiently pleaded its unreasonable practices claim, and NS's Motion to Dismiss should be denied.

ARGUMENT

To survive a motion to dismiss, a complainant need only plead sufficient facts to establish a *prima facie* case for relief; the Board may dismiss a complaint only if it "does not state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b); *Terminal Warehouse, Inc. v. CSX Transp., Inc.*, STB Docket No. 42086 (STB served May 12, 2004). In ruling on a motion to dismiss, "the factual allegations in a complaint must be construed in a light most favorable to the complainant." *AEP Texas North Co. v. BNSF Ry. Co.*, STB Docket No. 41191 (Sub-No. 1) (STB served Mar. 19, 2004) at 2. Moreover, the Board frequently has stated that motions to dismiss are "disfavored" and are "rarely granted." *Entergy Ark., Inc. v. Union Pac. R.R.*, STB Docket No. 42104 (STB served Dec. 30, 2009) at 3 ("*Entergy*"); *Dairyland Power Coop. v. Union Pac. R.R. Co.*, STB Docket No. 42105 (STB served July 29, 2008) at 4 ("*Dairyland*"); *Garden Spot & Northern Ltd. P'Ship and Indiana Hi-Rail Corp. – Purchase and Operate – Indiana R.R. Co. Line Between Newton and Browns, IL*, Finance Docket No. 31593 (ICC served Jan.

5, 1993) at 2 (“a motion to dismiss is a disfavored request and rarely granted in judicial and administrative proceedings”).

Where a claim states a reasonable basis for further Board consideration, a motion to dismiss that claim must be denied. *Dairyland, supra* at 4. To be sustained at this initial stage, the claim need not allege enough facts to establish a *clear* violation by the defendant; it need only provide sufficient grounds for further investigation. In *Dairyland*, for example, the complainant alleged that the fuel surcharges collected by Union Pacific Railroad Company under a mileage-based fuel surcharge program exceeded the incremental fuel cost increases UP had incurred in handling the complainant’s traffic. In denying a motion to dismiss grounded on an alleged failure to plead sufficient facts to prove liability, the Board explained that while the facts pleaded might not be enough in and of themselves to establish a statutory violation by UP, they provided a sufficient basis for further investigation. *Id.*; *See also Cargill, Inc. v. BNSF Ry. Co.*, STB Docket No. 42120 (STB served Jan. 4, 2011) at 4 (the Board found that Cargill’s claim that BNSF used its fuel surcharge to extract substantial profits and double-recover incremental fuel cost increases offered a “reasonable basis for further Board consideration,” and denied BNSF’s request to dismiss).

Similarly, a complainant is not required to state a claim with a high degree of specificity in order to defeat a motion to dismiss. *See Entergy, supra* at 2-3 . In *Entergy*, a utility sought prescription of a through route, but failed to specifically name the connecting carrier, the interchange points, and the origin/destination points. Defendant Missouri & Northern Arkansas Railroad (“MNA”) filed a motion to dismiss

and a motion to make the complaint more definite, arguing that Entergy was required to name the connecting carrier and the interchange points involved in the through route in order to properly plead its cause of action. In response, Entergy explained that it needed to conduct discovery before specifying the through routes that it sought to use. The Board denied MNA's motions, finding that "MNA has not shown that Entergy's complaint offers no reasonable basis for further Board consideration." *Id.* at 3. While the Board noted that Entergy eventually would be required to identify the through routes it sought in its opening evidence, including identification of the origin/destination pairs and the points of interchange, Entergy had met the basic threshold of demonstrating reasonable grounds for further investigation and action. *See also Government of the Territory of Guam v. Sea-Land Serv., Inc., American President Lines, Ltd., and Matson Navigation Co., Inc.*, STB Docket No. WCC-101 (STB served Nov. 15, 2001) at 4 (defendants argued complaint should be dismissed because it challenged all of defendant's rates in the aggregate, rather than a single, specific rate; Board stated there was no requirement to specify a rate at the complaint stage). *See also DHX, Inc. v. Matson Navigation Co., et al.*, STB Docket No. WCC-105 (STB served December 21, 2001) at 1 ("DHX will have to ...support with particularity its general claim that the carriers' practices are unlawful. But we cannot conclude at this point that DHX has not raised any claims that, if proven, could demonstrate a violation of the law.").

The allegations in Paragraph 19 of the Complaint, when considered in a light most favorable to SMEPA, could make a *prima facie* case that NS is engaging in an unreasonable practice in its application of NSRQ 65837 service terms to SMEPA's

traffic, and warrants further investigation. Pursuant to 49 U.S.C. § 10702(2), NS is required to establish reasonable “rules and practices on matters related to . . . transportation or service.” Part and parcel of this statutory duty is the requirement that the rules and practices in the instant matter meet SMEPA’s reasonable transportation needs. As the Complaint avers, NS’s awareness of SMEPA’s reasonable coal transportation needs and its ability to meet them can be inferred through the parties’ past contracts and dealings. If the evidence presented shows that NS’s service rules as applied to SMEPA are inadequate to fulfill SMEPA’s reasonable requirements, they may be found to constitute an unreasonable and unlawful practice. *See Grain Land Coop. v. Canadian Pac. Ltd. and Soo Line R.R. Co.*, STB Docket No. 41687 (STB served Dec. 8, 1999).

As the Board found in *Entergy, supra*, a complainant is permitted to plead a claim generally and provide further support for its allegations following the completion of discovery and the assembly of its opening evidence. *Entergy* at 3. Here, NS has been providing service to SMEPA under the terms of NSRQ 65837 for barely more than one month, and the Board has yet to set a date for the submission of SMEPA’s opening evidence. As SMEPA gains experience with application of the rules incorporated into NSRQ 65837 and otherwise conducts discovery, the factual predicates for determining which rules fall short of compliance with NS’ statutory obligations, and how they do, will be further developed. Those facts and related claims will be presented in detail in SMEPA’s opening evidence, to which NS will have a fair opportunity to reply. *See National Grain and Feed Ass’n v. Burlington Northern R.R. Co., et al.*, ICC Docket No.

40169 (ICC served May 23, 1990) at 4. At this early stage, however, the Board properly should provide SMEPA with a fair chance to make its case regarding the issues raised in its unreasonable practices claim. *See Grain Land, supra*, at 3 (because the factual allegations, when viewed in a light most favorable to complainant Grain Land, could show that Canadian Pacific engaged in an unreasonable practice in its car allocation policies, the Board stated it “must give Grain Land the opportunity to make its case as to the issues raised in [its unreasonable practices claim]”).

Under the circumstances, there is no basis to conclude at this point in the proceeding that SMEPA’s unreasonable practices claim could not under *any* circumstances provide a basis for further investigation and action. When viewed in a light most favorable to SMEPA, Paragraph 19 of the Complaint makes a *prima facie* case for an unreasonable practices claim under 49 U.S.C. § 10702 and 49 C.F.R. Part 1111.1(a).

CONCLUSION

For the reasons set forth herein, the Board should deny NS's Motion to
Dismiss.

Respectfully submitted,

**SOUTH MISSISSIPPI ELECTRIC
POWER ASSOCIATION**

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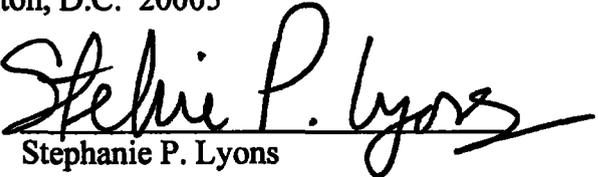
Dated: February 7, 2011

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of February, 2011, I caused a copy of the foregoing Reply in Opposition to Defendant's Motion to Dismiss to be served by first class mail and email on counsel for Defendant, as follows:

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