

**SURFACE TRANSPORTATION BOARD
OPEN VOTING CONFERENCE
MARCH 21, 2003**

**Duke Energy Corporation v. Norfolk Southern Railway Company, STB Finance Docket
No. 42070**

Duke Energy Corporation v. CSX Transportation, Inc., STB Finance Docket No. 42069

**STATEMENT OF
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Good morning Chairman Nober and Commissioner Morgan.

The two decisions submitted for your consideration are not consolidated, but are presented together because they involve similar circumstances and similar issues regarding presentation of evidence in coal rate proceedings. Both decisions involve coal rate complaints in the Eastern United States involving Duke Energy Corporation (Duke) as complainant and involve requests for material to be stricken from the evidentiary record.

In Docket No. 42069, the railroad-defendant, Norfolk Southern Railway Company, filed two tables containing traffic data for the second half of 2002 simultaneously with its brief, notwithstanding language in the Board's December 13, 2002 decision stating that "new evidence is not permitted in briefs and will be subject to motions to strike and other sanctions." Duke seeks to have these tables stricken from the record, or, in the alternative, asks the Board to consider Duke's own new evidence on the same topic.

Briefs, properly employed, can focus the issues and assist the Board in analyzing the complex record in coal rate proceedings. But new evidence is prohibited in briefs because the evidentiary record must close at some point. Absent a clearly defined cut-off point that is

observed by all, one party or the other could always point to some new piece of data to bolster its arguments. Both parties have ample opportunities to make their case in their scheduled evidentiary submissions. If a party wishes to file new evidence, it must file a petition to do so and demonstrate that the information sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the proceeding.

In this case, Norfolk Southern did not follow that procedure. Instead, it attempted to include new evidence with its brief, contrary to the explicit instructions in the December 13, 2002 decision. The draft decision before you would strike the new evidence submitted by Norfolk Southern.

In Docket No. 42070, it is the railroad, CSX Transportation, Inc., that seeks to strike portions of the record. CSX challenges, as improper rebuttal, two modifications to Duke's proposed design of its stand-alone railroad. The first modification would change the location of a rail yard and, as a consequence, the eastern terminus of the stand-alone railroad from a point near Fayette, WV, to a site east of the Gauley River Bridge near Gauley, WV (Gauley yard), thereby eliminating an 8.3-mile segment of line between Gauley and Fayette and avoiding substantial investment costs. The second modification would relocate a rail tunnel in the vicinity of Hagans, VA (Smiley/Hagans tunnel), thereby avoiding the need for track to perform a switchback maneuver to ascend a steep grade at Hagans.

CSX charges that these changes constitute fundamentally different evidence. CSX also claims that allowing such evidence to be offered for the first time on rebuttal would deprive it of the opportunity to evaluate and respond to this evidence and to the possible ripple effects of these changes on numerous aspects of the SAC analysis (including construction costs, cycle times, car

and locomotive requirements, fuel consumption, labor costs, and other operating expenses). In reply, Duke argues that these are minor facility adjustments made in direct response to criticisms presented in CSX's reply evidence, and that they simply correct inadvertent errors that Duke made in its opening evidence.

The challenged evidence is new evidence and not a mere correction of an inadvertent error in an earlier submission. Duke has gone beyond simply seeking to support what it presented in its opening evidence or adopting evidence submitted by CSX; it would change the design of the stand-alone railroad. Fairness dictates that when new evidence is submitted, the other party should have a chance to respond to that evidence. The draft decision before you would strike the material. Therefore, if Duke wants this evidence considered, it too would need to file a petition to submit new evidence and show that the information sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the proceeding.

This concludes my statement. We would be happy to answer any questions you have.