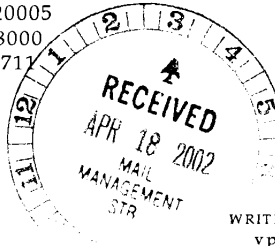


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April 18, 2002

By Hand Delivery

205207

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of the Secretary

APR 18 2002

**Part of
Public Record**

Re: STB Docket No. 42069, Duke Energy Corp. v. Norfolk Southern Railway Co.

Dear Mr. Williams:

Enclosed for filing on behalf of Defendant Norfolk Southern Railway Company ("NS") in the above-referenced proceeding are a signed original and ten copies of a Motion to Strike or, in the Alternative, to Make More Definite Duke's Unreasonable-Practices Claim. Also enclosed is a computer disk containing a copy of this submission in WordPerfect 9.0 format.

Please note that NS has requested *expedited handling and consideration* of the enclosed motion.

Please acknowledge receipt of these papers for filing by date-stamping the enclosed duplicate paper copy and returning it with our messenger. Thank you for your attention to this matter.

Very truly yours,

G. Paul Moates
Vincent F. Prada

Enclosures

cc: Counsel for Complainant (w/encls.)

EXPEDITED HANDLING AND CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

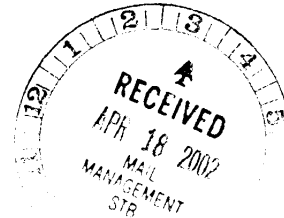
DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.



STB Docket No. 42069

**MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO MAKE
MORE DEFINITE DUKE'S UNREASONABLE-PRACTICES CLAIM**

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Counsel for Defendant Norfolk Southern Railway Company

DATED: April 18, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

STB Docket No. 42069

**MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO MAKE
MORE DEFINITE DUKE'S UNREASONABLE-PRACTICES CLAIM**

Pursuant to 49 C.F.R. §§ 1104.13(a) and 1111.5, Defendant Norfolk Southern Railway Company ("NS") hereby moves for an order striking or, in the alternative, directing Complainant Duke Energy Corporation ("Duke") to provide a more definite statement of the "unreasonable practices" claim alleged in the "Supplement-Amendment to the Verified Complaint of Duke Energy Corporation" filed on April 5, 2002 ("Amended Complaint"). NS further requests, for the reasons stated below, that the Board grant this motion *expedited consideration and decision*.

INTRODUCTION

Nearly four months after Duke commenced this maximum rate reasonableness complaint proceeding and approximately six weeks before the scheduled filing of opening evidence (currently due May 24, 2002), Duke filed an Amended Complaint that alleges -- for the first time -- that some *unspecified* terms of NS' common carrier rate schedules applicable to

Duke's coal shipments or some *unspecified* aspects of NS' transportation services to Duke constitute, in some *unspecified* respect, unlawful "unreasonable practices." Amended Complaint at 4. Nowhere in its original Complaint (filed December 19, 2001) did Duke allege an unreasonable-practices claim. And nowhere in its Amended Complaint does Duke even identify what "practices" of NS it claims are unreasonable or otherwise unlawful, or why.

NS recently made an informal request of Duke counsel to identify what NS "practices" Duke is claiming to be unreasonable. Duke counsel responded first by stating that Duke was challenging, as an "unreasonable practice," the provision in NS' common carrier rate schedule establishing a ten (as opposed to 20-day) notice period for assessment of fuel surcharges. NS looked into the matter and then advised Duke counsel that the schedule would be amended to provide for a 20-day notice. When NS asked Duke counsel whether this amendment would moot Duke's "unreasonable practices" claim, counsel responded by identifying another "practice" -- relating to the imposition of charges for train stoppages -- that Duke is claiming to be "unreasonable." This charge (and the relief Duke is seeking to remedy the claimed practice) are not articulated in Duke's pleadings, and Duke's informal advice leaves open the possibility that there may be other, and as yet unspecified, NS "practices" that Duke might claim are unreasonable.

By failing to identify in any respect the factual and legal basis for its unreasonable-practices claim, Duke's Amended Complaint is patently deficient under the Board's procedural rules. Duke's conclusory amendment does not apprise NS what provisions of its common carrier rate publication, or what aspects of its coal transportation services, Duke is challenging as an unlawful "unreasonable practice." For this reason, NS has no meaningful ability to prepare a

defense to Duke's unspecified claims. Moreover, the timing of Duke's Amended Complaint leaves NS no opportunity whatsoever to pursue Duke's claims in discovery which, under the procedural schedule previously adopted by the Board, was supposed to have concluded on March 4, 2002.¹

NS asked Duke to file another amended Complaint specifying the nature and basis of its "unreasonable practices" claim, but Duke declined. Accordingly, for the reasons explained more fully below, NS requests that the Board strike Duke's Amended Complaint insofar as it alleges an "unreasonable practices" claim going beyond the coal maximum-rate claims contained in its original Complaint. In the alternative, NS requests that the Board order Duke promptly to amend its pleadings to provide NS (and the Board) a more definite statement of the factual basis and legal grounds for its unreasonable-practices claim.²

BACKGROUND

On November 19, 2001, in response to a request by Duke made under 49 U.S.C. § 11101 and 49 C.F.R. § 1300, NS established a schedule of common carrier rates and associated service conditions for application to Duke's coal shipments between a variety of coal origins located in Virginia, West Virginia and Kentucky, on the one hand, and Duke's Allen, Belevs

¹ On March 4, 2002, NS filed a motion to compel discovery and, in connection with the motion, requested the Board to extend the discovery schedule. Since the filing of that motion, which is pending, the parties have worked to complete responses to previously served discovery requests, but have not attempted to serve new requests.

² The Board's procedural rules provide that averments in a complaint not denied by a defendant are deemed admitted. 49 C.F.R. § 1111.4(d). In light of this provision, and solely as a protective measure, NS is filing a separate Answer to the Amended Complaint ("Amended Answer") denying in all respects the claims of unlawfulness contained in the Amended Complaint even though Duke has not identified what "unreasonable practices" Duke alleges that NS committed.

Creek, Buck and Dan River electric generating plants located in North Carolina, on the other hand. *See* Verified Complaint of Duke Energy Corporation (filed Dec. 19, 2001) (“Complaint”), Exhibit A; Answer to Complaint (filed Jan. 8, 2002) (“Answer”), ¶ 6. These common carrier rates became effective on January 1, 2002, following the expiration on December 31, 2001 of a privately negotiated rail transportation contract that previously governed NS’ transportation of coal for Duke to the Allen, Belews Creek, Buck and Dan River plants. *Id.*

On December 19, 2001, Duke filed a “Verified Complaint” alleging that the common carrier rates established by NS in its November 19, 2001 letter are “unreasonably high in violation of 49 U.S.C. §§ 10701(d)(1) and 10702.” Complaint ¶ 10. Duke’s prayer for relief requested a Board order finding the challenged common carrier rates to be “unreasonably high,” prescribing “the maximum reasonable rates” that NS may collect from Duke and awarding reparations (with interest) to compensate Duke for its alleged payment of common carrier rates exceeding a maximum reasonable level. *Id.* at 6. Apart from its maximum rate-reasonableness claim, the Complaint alleged no other unlawful conduct or statutory violation by NS.

On January 8, 2002, NS filed an Answer to the Complaint (“Answer”), denying in all respects Duke’s allegations that the challenged rates exceed a maximum reasonable level.

On March 22, 2002, NS established and disclosed to Duke an amendment to the common carrier rate and service terms applicable to Duke’s coal shipments to the Allen, Belews Creek, Buck and Dan River plants. Entitled “Norfolk Southern Price Authority NSRQ 61880 Section 1A00” (“NSRQ-61880”), the amended common carrier rate schedule incorporated the identical rate levels and service terms contained in NS’ November 19, 2001 letter to Duke, but added a new provision establishing a methodology for quarterly adjustments of the rate levels

over time, beginning on April 1, 2002. *See* Amended Complaint, Exhibit B at 11-12. Other than the addition of this rate-adjustment provision, the new rate publication made no other changes in the rate and other service terms established in NS' November 19, 2001 letter to Duke. *Id.*, Exhibit B at 1.

On April 5, 2002, Duke filed what it styled as a "Supplement-Amendment" to its original Complaint in this case. The Amended Complaint recites Duke's receipt of NS' NSRQ-61880 publication (which Duke attached), and states that Duke "amends and supplements its Complaint of December 19, 2001 so as to include the schedule now denominated as NSRQ 61880." Amended Complaint at 4. Duke further alleged, without any supporting facts or citation of any statutes or regulations allegedly violated by NS, that "the rates, charges, and service terms set forth in NSRQ 61880 are unreasonable, unlawful, and/or constitute unreasonable practices." *Id.* Duke then prayed that its original Complaint "be supplemented and amended so as to challenge NSRQ 61880 on the grounds that the rates, charges, practices, and service terms set forth therein are unlawful and unreasonable." *Id.*

ARGUMENT

The Board's Rules of Practice authorize, under certain circumstances, the filing of an amended or supplemental complaint. 49 C.F.R. § 1111.2. Such amendments or supplements must conform to the requirements applicable to formal complaints, including the elementary requirement that the pleading provide the defendant adequate notice of the facts and law upon which the complainant's claim for relief is based. "A complaint must clearly identify its boundaries so that due process can be accorded defendant(s)." *Metropolitan Edison Co. v. Conrail*, 5 I.C.C.2d 385, 397 (1989). *See also* *McCarty Farms v. Burlington Northern Inc.*, 4 I.C.C.2d

262, 266 (1988) (amended complaint must “clearly advise both the Commission and defendant as to the expanded scope of the proceeding”).

The Board’s rules therefore set forth minimum notice pleading requirements that complaints must satisfy:

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 have been violated. The complaint should contain a detailed statement of the relief requested.

49 C.F.R. § 1111.1(a). If a complaint or amended complaint fails to meet these minimum pleading requirements, the claims are substantively defective and should be stricken, unless the deficiencies can be cured (without prejudice to the defendant) through the requirement of a more definite statement. 49 C.F.R. § 1111.5.

Duke’s Amended Complaint fails to satisfy -- indeed, it makes no attempt to satisfy -- these minimum notice pleading requirements. The Amended Complaint alleges, for the first time in this proceeding, a distinct “unreasonable practices” claim against NS. Amended Complaint at 4. The original Complaint was expressly limited to a claim of “unreasonably high” coal rates (Complaint ¶ 10 & page 6), and made no allegation of any unreasonable practices. The Amended Complaint introduces an unreasonable-practices claim but, apart from attaching copies of NS’ NSRQ-61880 publication (which merely amended the previously challenged common carrier rates to incorporate an escalation provision), provides no facts or legal authority identifying the alleged “unreasonable practices” or supporting the claim.

In response to Duke’s Amended Complaint, NS counsel informally inquired of Duke’s counsel what “practices” of NS were being challenged by Duke as unlawful. Duke

counsel initially stated that Duke's "unreasonable practices" claim challenged the provision in Duke's common carrier rates providing for ten-day (rather than 20-day) notice for fuel surcharges. NS looked into that allegation and then advised Duke counsel that the notice period would be changed to 20 days. NS anticipated that Duke would then agree to withdraw its unreasonable-practices claim, but Duke counsel responded by stating that Duke was also complaining about another "unreasonable practice": NS' alleged "practice" of assessing train-stoppage charges (under common carrier publications incorporated in the schedules applicable to Duke's coal shipments) even when a train-stoppage was not the fault of Duke. This claim also is not specified in Duke's pleadings, and Duke counsel have not ruled out the possibility that other, still unspecified, "practices" of NS might also be challenged as "unreasonable" by Duke in this proceeding.

If Duke's new unreasonable-practices claim is intended as mere verbiage adding nothing of substance to its original challenge to the maximum reasonableness of NS' common carrier coal rates, the new claim is patently deficient as a matter of law and should be stricken. Under settled law, allegations that railroad rates are excessive or unreasonably high do not state a valid free-standing claim of unreasonable practices. *See, e.g., Union Pacific Railroad Co. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989).³ If Duke's unreasonable-practices claim instead is intended as a challenge to some aspect of NS' services other than the level of the common carrier coal rates it

³ See also STB Docket No. WCC-105, *DHX, Inc. v. Matson Navigation Co.*, 2001 STB LEXIS 998, at *12 (served Dec. 21, 2001) ("parties may not use the unreasonable practice provisions of the statute to bolster a weak rate case"); *National Grain & Feed Ass'n v. Burlington Northern Railroad Co.*, 8 I.C.C.2d 421, 432 (1992) ("complainant simply cannot disguise a rate reasonableness challenge as a challenge to the mechanism used to establish the rate levels").

has published, the new claim is legally deficient because Duke has not adequately (or at all) identified the nature of the challenged practices or why they are unreasonable or otherwise unlawful.

Although Duke's counsel have discussed in general terms the nature of Duke's "unreasonable practices" claim, the Board's pleadings rules require that claims be asserted, and notice provided, in pleadings, not casual conversations among counsel. What is more, the manner in which counsel's informal advice was presented -- suggesting on one day that Duke was challenging the fuel surcharge notice provision and, when that was corrected, suggesting on the next day that there was something else Duke was complaining about -- only points up the need for Duke to be required to specify, in a formal pleading as required by the Board's rules, exactly what it is complaining about and why.

For these reasons, the Board should strike (or dismiss) Duke's Amended Complaint insofar as it asserts an independent unreasonable-practices claim. The Board's pleadings requirements are clear and well-known to Duke, and they are not difficult to satisfy. Neither NS nor the Board itself should be forced to speculate about the nature of a claim asserted, without any supporting facts or legal authority, nearly four months into this proceeding, at a time when discovery has formally concluded and opening evidentiary submissions are due in the near future. The purpose of the Board's pleadings rules is to ensure that defendants are apprised at the outset of a complaint proceeding of the nature of the claims against them, and the legal and factual basis for those claims. Duke's Amended Complaint fails to afford NS such minimal notice of the unreasonable-practices claim against it and, for that reason, the claim should be stricken.

Alternatively, and at a minimum, the Board should order Duke promptly to provide a more definite statement of the factual and legal basis of its claim of unreasonable practices. 49 C.F.R. § 1111.5. Duke should be compelled to supplement its pleadings by identifying, with some precision, the specific provisions of NS' challenged common carrier rate publications or the specific aspects of NS' transportation services that Duke claims constitute unreasonable practices.⁴ Duke should further be required to identify the statutory provisions or agency rules that it believes have been violated by NS' challenged practices, and describe the relief that it is seeking from the Board to remedy those alleged violations.⁵

In light of the procedural schedule currently in place, these matters must be resolved quickly. The authorized discovery period in this proceeding has already concluded (although there is a pending request by NS to extend discovery), and opening evidence by both parties is currently due in a matter of weeks (May 24, 2002). As a matter of procedural fairness and due process, NS must be afforded adequate notice of the legal claims against it so that it may

⁴ Cf., ICC Docket No. 41191, *West Texas Utilities Co. v. Burlington Northern Railroad Co.* (served Feb. 14, 1995) ("*WTU*") (declining in part to require more definite statement when, in response to defendant railroad's filing of tariff rates replacing class rates originally challenged in complaint, complaining shipper filed petition objecting to specific operating-related provisions of the railroad's tariffs). In contrast to the situation in *WTU*, Duke has not identified in any Board pleading any specific provision of NS' common carrier rate publications that Duke believes constitutes an unreasonable practice.

⁵ It would be pointless now for NS to attempt through discovery to seek from Duke a description of its unreasonable-practices claim and the basis for it. As an initial matter, the discovery period has formally concluded in this proceeding. Even Duke agrees that, until the Board extends the discovery cut-off, neither party may serve additional discovery requests. Duke Energy Corporation's Reply to Motion to Compel (dated Mar. 15, 2002), at 25. In addition, Duke has previously asserted blanket objections to all "contention" interrogatories served by NS, and requiring NS to serve such requests and then file a motion to compel discovery would only result in additional, needless delay in the resolution of the issue raised here.

prepare appropriate evidence defending itself.⁶ Accordingly, NS requests that the instant motion be accorded expedited consideration and decision. Specifically, NS requests that Duke be required to file an expedited reply to this motion and that the Board consider and decide it as promptly as possible following the receipt of Duke's reply.

CONCLUSION

For all of the foregoing reasons, the Board should strike Duke's Amended Complaint insofar as it asserts a claim of unlawful "unreasonable practices" or, in the alternative, order Duke to provide a more definite statement of its unreasonable-practices claim. In addition, the Board should grant this motion *expedited consideration and decision*.

Respectfully submitted,



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Counsel for Defendant Norfolk Southern Railway Company

DATED: April 18, 2002

⁶ If the Board declines to strike Duke's new unreasonable-practices claim, NS may require additional discovery from Duke in order to prepare an adequate defense to the claim. Until Duke has identified the NS practices that are claimed to be unreasonable, however, neither NS nor the Board can practicably assess the need for additional discovery or the scope of such discovery. NS reserves its right to seek additional discovery in light of any clarifying pleadings submitted by Duke.

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of April, 2002, I served the foregoing
“Motion to Strike or, in the Alternative, to Make More Definite Duke’s Unreasonable-Practices
Claim” by causing a copy thereof to be delivered, in the manner indicated, to each of the
following:

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