

BEFORE THE
SURFACE TRANSPORTATION BOARD

DUKE ENERGY CORPORATION,

Complainant,

v.

CSX TRANSPORTATION, INC.,

Defendant.



STB Docket No. 42070

210 598

DEFENDANT CSX TRANSPORTATION, INC.'S REPLY
TO COMPLAINANT'S PETITION FOR RECONSIDERATION

PUBLIC VERSION

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Peter J. Shudtz
CSX Corporation
1331 Pennsylvania Ave., N.W.
Suite 560
Washington, DC 20004
202-629-2600

Ellen M. Fitzsimmons
Paul R. Hitchcock
Gilbert L. Feltel, Jr.
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3100

R. Eden Martin
G. Paul Moates
Terence M. Hynes
Ronald S. Flagg
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel for Defendant CSX Transportation, Inc.

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DUKE ENERGY CORPORATION,	)	
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<i>Complainant,</i>	)	
v.	)	STB Docket No. 42070
	)	
CSX TRANSPORTATION, INC.,	)	
	)	
<i>Defendant.</i>	)	

CSX Transportation, Inc. (“CSXT”) submits this reply to the Petition for Reconsideration filed in the above-captioned proceeding on March 25, 2004 by Complainant Duke Energy Corporation (“Duke”) (the “Duke Petition”), and requests that the Duke Petition be denied in its entirety.

Duke complains that the Board should have saved Duke from itself by curing deficiencies in Duke's evidence, and by developing additional evidence and argument (supporting Duke's position) on the Board's own initiative. Duke Pet. at 3. But that is not the appropriate function of a neutral administrative agency in an adjudicatory proceeding. Even if an agency were inclined to consider such a paternalistic approach, agency resources would not allow it. As the Supreme Court explained in rejecting a similar claim that an agency should have considered arguments or evidence not raised (or only mentioned, but not developed) by a party:

Time and resources are simply too limited to hold that an [agency decision] fails because the agency failed to ferret out every possible alternative, regardless of how . . . unknown Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that “ought to be” considered and then, after failing to do more to bring the matter to the agency’s attention, seeking to have that agency determination vacated on the ground that the agency failed to consider [such] matters . . .

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551, 553-54 (1978). A basic premise of our adversary system is that each party – and certainly a sophisticated party like Duke – is responsible for the development and support of its own evidence. Duke has only itself to blame for the wholesale failures of proof, error-riddled and poorly supported analyses, and ill-advised tactical decisions that characterized its presentation in this case. Yet, Duke suggests that the Board should have shielded Duke from the requirements consequences of its actions, and resuscitated Duke’s case by stepping into Duke’s shoes to make assumptions and findings having no basis in the record. This is untenable. Duke – not the Board – had the burden of proving that the rates it challenged are unreasonable.¹

Duke’s SAC presentation and evidence were so fundamentally flawed that the Board could not have rendered a sound, rational decision based on that evidence, even if it uncritically accepted all of Duke’s stated assumptions and arguments. In particular, Duke’s operating plan was riddled with errors, contradictory assumptions and parameters that were utterly unrealistic. *See* CSXT Reply at I-7 to 8, Parts III-B, III-C; CSXT Br. at 2-3, 16-22, 26-32. The simple and dispositive bottom line is that Duke failed to meet its burden of proof on the essential elements of its case.

The near-exclusive focus of Duke’s Petition on the Board’s findings with respect to the operating plan cannot obscure the pervasive nature of Duke’s failures of proof, and the numerous other sufficient bases in the record to support the Board’s finding that the challenged rates are not unreasonable. Duke

¹ The only authority Duke cites for its argument that the Board should have undertaken to resurrect and prove Duke’s case – a single footnote in a concurring opinion regarding entirely different circumstances – does not support that argument. *See* Duke Pet. at 3. The holding of that case was that the ICC could not lift conditions on its approval of a merger without first reconsidering its previous finding that such conditions were essential to the public interest. *See Baltimore & Ohio R.R. v. United States*, 386 U.S. 372 (1967). The additional views expressed in a separate opinion of a single justice – which was not joined by any other member of the Court and is not binding on any federal agency or court – addressed in passing distinct hypothetical circumstances in which the parties’ evidence did not address the public interest, in which case the agency was authorized to gather additional information in order to make an informed determination of what best served the public interest. *See id.* at 429-30 (quoting an excerpt from a 1940 congressional committee report). This stands in contrast to Duke’s reconsideration claim, which is that the Board should have substituted its own “evidence” for the flawed evidence submitted by Duke, a private party who bears the burden of proof on those issues.

simplistically (and incorrectly) claims that the “outcome of [the] case turned on which version of SARR operating costs was correct.” Duke Pet. at 2. This is an unremarkable claim – if the Board were to adopt any party’s evidence in its entirety with respect to one of the three primary elements of a SAC case (road property investment, traffic and revenues, or operating costs), that party would, in all likelihood, prevail. Of course, the Board did no such thing with respect to operating costs or any other major element in this case – the *Decision* was far more careful and discriminating, adopting parts of one party’s evidence, and parts of the other party’s evidence, for each of those SAC components.² Although the *Decision* focused in particular on the flaws in Duke’s operating plan and cost calculations, there were myriad other independently sufficient bases in the record to reject Duke’s operating plan. *See, e.g.*, CSXT Reply Parts III-B, III-C; CSXT Br. at 18-32. If the Board had adopted in its entirety CSXT’s evidence with respect to any of these other major SAC elements, CSXT would have prevailed even if the Board had adopted Duke’s operating plan.

II. THE BOARD’S DECISION TO REJECT DUKE’S OPERATING PLAN IS SUPPORTED BY ESTABLISHED PRECEDENT AND THE RECORD EVIDENCE.

Duke claims that the Board rejected its supposedly “modern, efficient SARR operating plan” (Duke Pet. at 4) based upon “findings which abound with material error” (*id.* at 2). Specifically, Duke contends that the Board based its *Decision* on three alleged flaws in Duke’s operating plan: (1) train lengths that were too long to meet the “contractual requirements” of the ACW’s customers and the operating requirements of the residual CSXT; (2) Duke’s failure to build gathering yards on the ACW system; and (3) Duke’s plan to “require” ACW customers involuntarily to switch the sources of their coal purchases.” *Id.* at 4. Duke’s assertions are meritless and misconstrue the *Decision*. Duke attributes to the Board “findings” that the Board did not make, ignores the record evidence – including Duke’s own submissions – that supports the Board’s actual findings, and contradicts well-established precedent that a complainant may not unilaterally alter the service provided to the SARR’s customers.

² Indeed, CSXT believes the *Decision* incorrectly adopted Duke’s position with respect to other SAC issues. *See, e.g.*, CSXT Reconsideration Petition (March 25, 2004).

According to Duke, the *Decision* found the ACW's proposed train service plan inconsistent with the practices and preferences of shippers, receivers and the residual CSXT "solely on the basis of ... two CSXT claims" – *i.e.*, that the train sizes proposed by Duke were not consistent with the terms of shipper contracts, and that CSXT's network south of Spartanburg, SC is "designed to handle coal trains of 90-95 cars." Duke Pet. at 5 (emphasis added). Duke takes issue with CSXT's evidence on those points, and asserts that the Board committed error in "finding" that "SARR shippers cannot receive trains with more than 95 cars," and that Duke's proposed 115-car trains would be inconsistent with CSXT's operational "requirements." Duke Pet. at 6 (emphasis added).

Duke mischaracterizes the Board's findings with respect to the train size issue. The *Decision* contains no "finding" that the ACW's shippers "cannot receive" trains in excess of 95 cars, nor does it reject Duke's train service plan based on the terms of CSXT's coal contracts. Rather, the Board held – consistent with sound STB precedent – that "Duke carries the burden of demonstrating that its operating plan would meet the needs of the traffic group it selected" (*Decision* at 28), and that Duke cannot change the level of service provided by the ACW "unless it also presents evidence showing that the affected shippers, connecting carriers and receivers would not object." *Decision* at 25 (citing *McCarty Farms v. Burlington N. Inc.*, 2. S.T.B. 460, 476 (1997) ("*McCarty Farms*"); Docket No. 42022, *FMC Wyoming Corp. v. Union Pacific R.R.*, (Decision served May 12, 2000) ("*FMC*") at 38). Based upon the record evidence, the Board concluded that "Duke's operating plan for the ACW would increase the average train length without an adequate showing that the affected shippers, mines and connecting carrier would not object." *Decision* at 25 (emphasis added). In other words, the Board (correctly) held that Duke failed to satisfy its evidentiary burden with respect to the train service issue.

Moreover, based upon its careful analysis of Duke's own workpapers, the Board determined that Duke had achieved its all-unit train SARR by altering the size and frequency of peak week shipments originating at all but nine of the ACW's mine origins. *Id.* at 27, Table 2 and n.11. (This analysis belies Duke's assertion (Duke Pet. at 3) that the Board "failed to make full use of its expertise" in deciding this case.) The Board found "unworkable" Duke's proposal to "create" unit trains by combining cars that originated at different mines on particular days during the peak week. *Id.* at 25.

Duke acknowledges that it did, in fact, alter both the size of the trains operated, and the origins of the coal that moved, during the “peak week.” Duke Pet. at 9-10. However, Duke attempts to create the impression that the Board rejected its operating plan based on a “completely mistaken belief” that those modifications would force coal receivers to change the sources of their coal. Duke Pet. at 8-10. According to Duke, notwithstanding its admitted “jury-rigging” of peak week shipments to portray an all-unit train operation, “[o]ver the course of the year, every single customer served by the SARR [would] receive the exact amount of coal it purchased from the exact mine from which it was purchased.” Duke Pet. at 8. The ACW supposedly would achieve that objective by changing the “timing” of coal shipments between other origin-destination pairs in non-peak weeks (to offset the changes made during the peak week). *Id.* at 10.³ Duke’s new “timing hypothesis” is unavailing, for several reasons:

First, the “timing hypothesis” appears for the first time in Duke’s Petition. Nowhere in its evidence or brief did Duke ever suggest (as it now does) that the ACW would attempt to “true-up” the volumes of traffic moving between particular origins and destinations over the course of a year, by making countervailing changes to the ACW’s train sizes and coal origins in weeks prior or subsequent to the peak week, nor did it submit any evidence showing how that might be accomplished. Indeed, Duke’s evidence did not even disclose (much less explain) its manipulation of the ACW’s peak week train sizes and coal origins – those changes were buried in Duke’s workpapers. See Duke Op. Elec. WP “CSX sac trains.xls.” CSXT (and the Board staff) were required to ferret out those changes in order to “understand” Duke’s operating plan.

Second, Duke has not shown that it would be possible to adjust the “timing” of the ACW’s train operations in such a manner as to enable it to provide “trainload-only service.” Duke Pet. at 4. The traffic selected by Duke includes literally hundreds of small-volume shipments between particular

³ The reference to the record cited by Duke to support the claim that “it is very clear” that customers’ historical shipment patterns would balance out “over the course of the year” says nothing of the sort. Duke Pet. at 10 (citing Duke Reb. III-C-64). The cited page of Duke’s Rebuttal discusses Duke’s revised String Diagram Model analysis, and makes no reference whatsoever to the number of cars that the ACW would handle between particular origins and destinations during non-peak weeks.

origins and destinations. CSXT Reply WP “2001 Cars Data Calculations.xls.” In some instances, the selected movements do not generate a sufficient number of cars over the course of an entire year to fill even one train. For example, Duke selected a movement from the Ivel (KY) mine to Dublin, GA totaling only [REDACTED] carloads over the entire year. CSXT Reply WP “2001 Cars Data Calculations.xls,” “Train Size Data” worksheet, row 15594. Likewise, the “rerouted” movement between the Liberty (WV) mine and Graingers, NC (discussed by both Duke and CSXT in their Supplemental Evidence) generates less than [REDACTED] tons annually – barely enough for half of one trainload.⁴

Even where the annual volume between particular origin-destination pairs would be sufficient to fill one or more unit trains, the record evidence contradicts Duke’s hypothesis that the ACW could adjust the “timing” of its train service to allow exclusively for unit train operations, while meeting the needs of its customers. For example, the movement between the Patton (KY) mine and Fayetteville, NC discussed in the *Decision* (at 25) generated a total of [REDACTED] annual cars. As Exhibit 1 to this Reply shows, those [REDACTED] cars were handled by CSXT in [REDACTED] separate shipments of [REDACTED] cars, and were delivered to the receiver on a weekly basis. *See* CSXT Recon. Exh. 1 at 1. Similarly, the movement between Leatherwood (KY) mine and Raeford, NC selected by Duke consists of [REDACTED] cars that, in the real world, moved in [REDACTED] separate shipments of [REDACTED] cars distributed evenly throughout the course of the year. *See* CSXT Recon. Exh. 1 at 2. The size and timing of these shipments demonstrates a strong preference (if not absolute necessity) on the customers’ part to receive coal in small amounts on a regular basis – and thoroughly discredits Duke’s absurd contention that “[t]iming is not a factor in the transportation of coal” (Duke Pet. at 10). Yet, under Duke’s “timing hypothesis,” the ACW could require these customers to accept their coal in 100+ car trainloads. Such a radical alteration in customers’ documented shipment patterns is utterly inconsistent with *McCarty Farms* and other Board precedents.

Third, even if it were possible to rearrange an entire year’s traffic so that the ACW could operate only unit trains – and, as shown above, it would not be possible – such manipulation of real world train sizes and service frequency is not permitted, absent proof that affected customers and connecting

⁴ *See* CSXT Reply To Complainant’s Supplemental Evidence (filed January 12, 2004) at 6; CSXT Supp. Exh. 7, Line 81; Duke Reply Supplemental Evidence (filed January 12, 2004) at 6.

carriers would consent to those changes. *See, e.g., McCarty Farms* at 476; *FMC* at 38. Customers' real world shipment patterns are *prima facie* proof of their practices and preferences – if customers wanted to ship (or receive) their coal in the manner assumed by Duke, they would be doing so today. Duke proffered no evidence whatsoever that the ACW's customers (or CSXT) would agree to make major changes to their own business operations for the sole purpose of enabling the ACW to provide "trainload-only service" (Duke Pet. at 4). Therefore, the Board properly rejected Duke's operating plan, which is dependent upon changing existing service patterns for the vast majority of the ACW's customers.

Fourth, Duke's newly minted "timing hypothesis" is utterly inconsistent with the methodology that Duke used to calculate ACW operating statistics. Duke developed operating statistics for the "peak week" period from its String Diagram Program, and multiplied those statistics by 52, to estimate the ACW's annual operating statistics (and corresponding locomotive, car and crew requirements). *See* Duke WP "Exhibit_III-C-2.123," cells E16, F16, H16, J16, L16, N16, E18, F18, H18, J18, L18, N18, and footnotes 1 and 3. Duke's methodology – which necessarily assumes that "peak week" train operations are representative of operations in other weeks – is fundamentally at odds with its new claim that the timing of ACW service to, and the volumes shipped from, particular mine origins would vary constantly over the course of the year (as the ACW attempted to match total annual shipments from each mine with the volumes actually handled by CSXT in the real world). If one accepts Duke's "timing hypothesis," Duke's operating statistics – which are based upon the service pattern for the peak week only – are necessarily invalid.⁵

In any event, the Board's rejection of Duke's operating plan was not (as Duke erroneously contends) premised on a "finding" that shippers would, in fact, be required to obtain their coal from alternative sources. To the contrary, the *Decision* reflects the Board's uncertainty as to how the ACW proposed to transform disparate small shipments originating at multiple mines into homogeneous unit trains. That uncertainty resulted from Duke's failure to provide any evidence whatsoever reconciling its

⁵ By contrast, CSXT developed its ACW operating statistics by flowing the actual trains that the ACW would handle during each week of the year through the FTI spreadsheet. CSXT Reply III-C- 4 to 5.

modification of peak week shipments with the requirements of ACW shippers. In the absence of such evidence, the Board considered various possibilities with respect to Duke's intentions. *Decision* at 25. The Board correctly observed that the ACW could not realistically consolidate cars originating at different mine origins into trains at local gathering yards, because Duke elected not to construct such facilities. *Id.* The Board also noted that Duke's cycle time calculations did not account for the time that would be required to shuttle ACW trains between multiple mines to collect cars. *Id.* Since those options clearly were not feasible based upon the evidence submitted by Duke, the Board noted that "Duke may have assumed that the source of coal for shippers could be shifted." *Id.* (emphasis added). *See also Decision* at 26 (shipment patterns would be altered considerably "if the coal was meant to be re-sourced" by Duke). But the Board did not base its rejection of Duke's operating plan on a finding that such re-sourcing would, in fact, occur. Rather, as both Table 2 and the accompanying text of the *Decision* (at 26-28) clearly show, the Board held that Duke had improperly manipulated train sizes and coal origins in the peak week, without showing that customers would consent. Based upon that analysis of the ACW's peak week data – the only period for which Duke proffered any evidence regarding the ACW's proposed train sizes and service frequency – the Board correctly concluded that Duke's operating plan did not comport with customer requirements.

Duke also complains that the Board erred in rejecting its operating plan "because Duke's SARR configuration fails to provide for gathering facilities for assembling trains." Duke Pet. at 7. This assertion flatly mischaracterizes the Board's findings. As Duke itself acknowledges (*id.* at 7), the Board clearly understood that, under Duke's proposal, "after loading, each ACW train would operate as a single train from origin to destination." *Decision* at 24. The Board did not, as Duke asserts, reject Duke's operating plan "on account of" Duke's decision not to construct staging or gathering yards on the ACW's lines. Duke Pet. at 7. Rather, in attempting to ascertain how Duke intended to implement its plan to combine peak week shipments from multiple origins into a single train, the Board simply observed that gathering operations would not be possible because the ACW lacked facilities at which to conduct such operations. *Decision* at 25. The Board rejected Duke's operating plan because that plan

improperly altered service to most ACW customers – not because of the paucity of gathering facilities on the ACW’s lines.

Finally, Duke purports to demonstrate “mathematically” that the Board’s decision to reject its operating plan, and to accept CSXT’s plan, was “wrong.” Specifically, Duke repeats its discredited claim that the ACW operating costs, based on the *Decision* (supposedly 16.8 mills/ton mile), exceed CSXT’s real world operating costs (12.9 mills/ton mile, according to Duke). Duke Pet. at 3. Duke accuses CSXT of “obfuscation,” claiming that CSXT “misinformed” the Board about CSXT’s operating costs when it responded to a similar comparison by Duke at oral argument. *Id.* However, it is Duke – not CSXT – that attempts to mislead the Board with bogus cost comparisons.

Duke compares its estimates of CSXT’s costs for a single movement (between the Bluegrass #4 mine and Duke’s Cliffside plant) with the system average operating costs for the entire ACW system. It is hardly surprising that the single movement selected by Duke – which is 395 miles, or more than twice as long as the ACW’s average length of haul (176 miles) – might have lower operating costs than the average generated by all of the traffic Duke selected. Moreover, the operating costs attributed by Duke to CSXT’s real world operations are demonstrably incorrect. As CSXT showed at oral argument, CSXT’s actual system average operating costs were approximately 27.1 mills/ton mile (approximately 25 mills/ton mile if depreciation costs are not included) – or double the 12.9 mills/ton mile attributed to CSXT’s “real world” operations by Duke. *Compare* Oral Arg. Tr. at 72-73 with Duke Pet. at 3.⁶

Because Duke’s Petition accuses CSXT of “misinforming” the Board at oral argument, CSXT has recalculated its operating costs here, using several public sources. The results of those calculations (which are set forth in Exhibit 2 to this Reply) confirm CSXT’s statement at oral argument. Based on its Form R-1, CSXT’s real world operating costs (including depreciation costs) were approximately 27.18 mills/ton mile in 2000, 26.34 mills/ton mile in 2001 and 25.38 mills/ton mile in 2002. *See* CSXT

⁶ Another reason that Duke’s estimates of CSXT’s operating costs are so low is that – contrary to Duke’s representation – Duke’s estimate is based not upon CSXT’s actual “real world” costs, but rather on Duke’s own subjective estimate of what it thinks CSXT’s variable costs should or could be. *See* Duke Pet. at 3, n.5 (indicating that Duke’s calculation is based on the low estimate of CSXT’s variable costs that Duke used in its evidence). CSXT’s calculations, on the other hand, are based on actual data published by the Board and by the AAR.

Recon. Exh. 2. If non-equipment depreciation costs are excluded, CSXT's operating costs (based upon the R-1 data) in the years 2000, 2001 and 2002 were 25.85 mills/ton mile, 25.05 mills/ton mile and 23.99 mills/ton mile, respectively. *Id.*⁷ The operating costs for CSXT (in mills/ton mile) reported in the AAR *Analysis of Class I Railroads* (the "Greenbook") for these years are exactly the same (both with and without depreciation) as those calculated using the R-1 data. See CSXT Recon. Exh. 2. Thus, even accepting Duke's assertion that the ACW operating costs adopted in the *Decision* were approximately 16.8 mills per ton mile (Duke Pet. at 3), CSXT's true system average operating costs were 51% higher than the ACW's in 2002, 57% higher than the ACW's in 2001, and 73% higher than the ACW's in 2000. Thus, it is Duke – not CSXT – that misrepresents the relationship between the operating expenses attributed to the ACW by the *Decision* and CSXT's real world operating costs.

* * * * *

Board precedents firmly establish that a Complainant must present an operating plan that handles the selected traffic in a manner that is operationally feasible and takes into account the practices and preferences of customers and connecting carriers. The *Decision* correctly concluded that Duke's proposed operating plan was inconsistent with this "core SAC principle." *Decision* at 24. That finding alone provided ample grounds for the Board to reject Duke's "trainload-only" operating plan. Moreover, the record in this case – including Duke's own submissions – provides additional support for the Board's ruling. CSXT demonstrated beyond question that the String Diagram Model ("SDM") utilized by Duke to develop its capacity and operating evidence was fatally defective. See CSXT Br. 18-22 (and evidence cited therein). Duke itself acknowledged that it relied upon the SDM to "verify the ACW's capacity" (Duke Reb. III-C-3), and that critical elements of its operating plan "such as the number of road locomotives, railcars and train crew members required by the ACW [were] driven by the string program" and, therefore, "dependent on the string analysis" (Duke Reb. III-C-8, n.7 (emphasis added)). Thus, even if Duke had not improperly manipulated the level of service provided by the ACW

⁷ As the Board is aware, CSXT's Form R-1 for 2000 was subsequently amended. Using the amended R-1 data would increase CSXT's operating costs to 29.01 mills/ton mile including depreciation, or 27.68 when non-equipment depreciation is excluded. See CSXT Recon. Exh. 2.

to particular origins and destinations, its operating plan would have been doomed by its reliance on the discredited SDM. Moreover, the record evidence relating to other elements of the ACW's operating plan (e.g., mine loading operations, empty train inspections, yard operations, maintenance activities and the effect of random line and equipment failures) demonstrated, in each instance, that Duke's proposal was utterly unrealistic and infeasible. In short, the record provides overwhelming support for the Board's decision to reject Duke's operating plan.

III. THE BOARD'S ADOPTION OF CSXT'S OPERATING PLAN IS SUPPORTED BY THE RECORD EVIDENCE AND BOARD PRECEDENT.

Duke alleges that the Board committed error by adopting CSXT's proposed operating plan "without even reviewing or analyzing the [CSXT] plan." Duke Pet. at 11. Duke's Petition challenges CSXT's operating plan on two grounds. First, Duke asserts that CSXT's operating evidence should have been rejected, as a matter of law, because (according to Duke) it is "primarily the product of [CSXT's] RTC Computer Model." *Id.* Second, Duke contends that CSXT violated SAC principles by operating "mini-trains" and by supplying the ACW with more locomotives than it would need. *Id.* at 12-16. These criticisms of CSXT's operating plan are without merit, and the Board's decision to adopt that plan is supported by the record evidence.

As an initial matter, upon rejecting Duke's operating plan, the Board could have elected to dismiss Duke's Complaint outright for failure of proof. However, rather than dismiss Duke's Complaint, the Board – consistent with past practice (*see e.g.*, Docket No. 42056, *Texas Municipal Power Agency v. BNSF*, (Decision served March 24, 2003) ("*TMPA*") at 76, 80, n.134, 84) – adopted CSXT's proposal as the template for the ACW's operations. CSXT's operating plan reflects the specific characteristics of the traffic selected by Duke, including the size and frequency of shipments from particular mine origins to particular destinations that actually occurred in the real world. In developing ACW operating statistics, CSXT witness Plum flowed through his spreadsheet model the correct number (and size) of ACW trains as they would occur in each week throughout the peak year. Thus, unlike Duke's operating plan, CSXT's plan comports with the prevailing practices and preferences of the involved customers.

Duke's irresponsible allegation that the Board endorsed CSXT's operating plan "without even looking at it" (Duke Pet. at 12) is demonstrably false. The *Decision* contains an evaluation of the parties' evidence, and specific findings and conclusions, with respect to a number of operating plan (and related cost) issues. For example:

- The Board considered (and rejected) Duke's claim that the spare margin for road locomotives should not be applied to switching locomotives (*Decision* at 53);
- The Board considered a dispute between the parties regarding the type of cars required to handle the steel traffic selected by Duke, and adopted Duke's (rather than CSXT's) proposed car type for that traffic (*Decision* at 56);
- The Board considered the parties' respective positions regarding the appropriate spare margin for rail cars, and adopted CSXT's proposed spare margin of 10 percent (*Decision* at 56);
- The Board adopted Duke's (rather than CSXT's) estimate of locomotive maintenance expenses (*Decision* at 54);
- The Board considered the number of shifts per year that ACW T&E crews could work, and adopted Duke's estimate (270 shifts per year) rather than CSXT's estimate (250 shifts per year) (*Decision* at 56-57); and
- The Board considered the parties' respective estimates of the number of non-T&E personnel that the ACW would require and, in most instances, adopted Duke's (rather than CSXT's) estimates (*Decision* at 57-60).

These (and other) findings set forth in the *Decision* belie the notion that the Board adopted CSXT's operating evidence *in toto*, without any independent analysis of that evidence.

Duke's claim that the Board could not, "as a matter of law," adopt CSXT's operating plan, because that plan was "primarily" the product of the RTC Model utilized by CSXT witness Wheeler, is incorrect. As Duke itself acknowledged on Rebuttal, CSXT did not use the RTC Model to formulate its operating plan for the ACW. *See, e.g.* Duke Reb. III-C-17, n.17 ("CSXT relied only upon the average speed generated by the RTC Model"); III-C-25, n.27 ("The other [operating] statistics were developed outside the RTC Model"); III-C-25, n.29 ("It bears repeating that CSXT used the RTC model only to determine train cycle times. It did not use the model to develop any other parameters such as operating statistics for the ACW.") The elements of CSXT's operating plan were developed by witness Fliess,

based upon more than 30 years of experience on the CSXT system, his personal inspection of the mine origins and destination plants that the ACW proposed to serve, and information provided by CSXT field personnel. The RTC Model was used by CSXT only to test the capacity of Duke's proposed ACW track configuration (*see* CSXT Reply III-B-37 to 46), and to identify average ACW train speeds and the number of locomotives required to power ACW trains on the peak day. All other inputs used in developing the ACW's operating costs – including locomotive unit miles, freight car miles, train crew starts, crew taxi and overnight requirements, and gross ton miles – were developed by CSXT witness Plum, based on the operations defined by witness Fliess. *See* CSXT Reply III-C-4 to 5.

Duke's further contention (Duke Pet. at 11) that the Board could not lawfully accord weight to any evidence based upon the RTC Model, because the model was not submitted with CSXT's Reply Evidence, is also wrong. The *Decision's* findings with respect to the ACW's track configuration, locomotive requirements and other operating statistics are, in each case, based upon the "Supplemental Evidence" submitted by CSXT (at the Board's direction) on January 5, 2004 – not CSXT's Reply Evidence (which was largely superseded by its Supplemental filing).⁸ The workpapers submitted with CSXT's Supplemental Evidence included an executable copy of the RTC Model. *See* CSXT Supp. Computer WP 1. CSXT also obtained a copy of the RTC Model for Duke's use in evaluating, and responding to, CSXT's Supplemental Evidence.⁹ Thus, both Duke and the Board had the opportunity to utilize the RTC Model to test the revised ACW track, equipment and crew requirements set forth in CSXT's Supplemental Evidence. The fact that CSXT did not provide the RTC Model in connection with its Reply Evidence is irrelevant, since the *Decision* did not adopt any portion of CSXT's Reply that was developed with the model. In these circumstances, Duke's complaint regarding the availability of the RTC Model in connection with CSXT's Reply submission is moot.

⁸ *See, e.g.*, STB Decision WP "III F – Construction Total CSX – No Reroute.xls" and "Equipment Counts (Modified Off Jct) v3.xls."

⁹ Duke declined to accept the model offered to it by CSXT. *See* CSXT Supp. Exh. 9 (Letter from R. Rosenberg to T. Hynes dated January 5, 2004).

Duke also complains that CSXT's operating plan should have been rejected on the grounds that it "contravenes least-cost principles." Duke Pet. at 12. Duke offers two arguments in support of this contention:

First, Duke points out that CSXT's operating plan for the ACW included hundreds of "mini-trains" containing a small number of cars. *Id.* at 12 –13. Any purported inefficiency in the handling of that traffic under CSXT's operating plan is the direct result of Duke's decision to select thousands of cars of coal traffic that (in the real world) move in very small shipments. *See* CSXT Recon. Exh. 1. For the reasons discussed above, Duke's attempt to eliminate these "short" trains by fundamentally altering the level and frequency of service provided to the ACW's customers violated SAC principles. Moreover, in the absence of gathering yards throughout the ACW's mine service area – which Duke vociferously argued were not needed (Duke Reb. III-B-2 to 4, III-B-24) – the ACW could not handle these shipments as CSXT does today (*i.e.*, by moving them from the mine to a local gathering yard, and consolidating them into larger trains for shipment to points beyond). In these circumstances, CSXT was faced with a choice between constructing a network of gathering yards (at great expense to the ACW), or handling small shipments in the manner prescribed by Duke's operating plan – *i.e.*, directly from the mine to destination. As the *Decision* (at 28) observed:

[g]iven the subset of traffic Duke selected, CSXT concluded that it would be more reasonable, for purposes of addressing the faulty plan submitted by Duke, to maintain the basic framework of the operating plan proposed by Duke with the errors corrected than to replicate the more complicated gathering system CSXT actually uses in the region.

This alternative represented the least cost, most efficient solution to the problem caused by Duke's selection of a substantial volume of traffic that moves in small shipments, and its failure to provide the facilities necessary to serve that traffic in the customary manner. In any event, the "hundreds" of small trains identified in Duke's Petition (at 13) represent a trivial portion of the more than 11,000 trains that the ACW would operate in the base year. *See* STB electronic workpaper "STB-LUMs and Carmiles (CSX) v4 (Modified Off Jct) v3.xls," "LUMS & Carmiles" worksheet, cell H854.

Second, Duke contends that CSXT “egregiously overpower[ed] the SARR” by basing the ACW’s locomotive fleet on peak day requirements. Duke Pet. at 13-14. According to Duke, CSXT’s methodology is erroneous because it would leave the ACW with excess locomotive capacity during much of the year. However, as the Board has previously held, the fact that a SARR would have a substantial number of spare locomotive units in non-peak periods “is not a defect in the analysis, as [Duke] argues, but simply an inescapable consequence of the seasonality of the traffic and a carrier’s obligation to have sufficient locomotives to serve its customers during peak periods.” *TMPA* at 84 (emphasis added). See also *McCarty Farms*, 2 S.T.B. 460, 482 (“for the [SARR] to meet the service needs of shippers in peak periods, excess locomotives would be unavoidable at nonpeak times”). Duke’s further suggestion (Duke Pet. at 14-15) that CSXT’s locomotive estimate is overstated because interline trains moving on the ACW during the peak day would be powered, in part, by CSXT units under a locomotive sharing agreement, is unavailing. Even if CSXT and the ACW were to enter into such an arrangement, it is just as likely that interline trains moving across CSXT’s lines during the peak day would be powered, in part, by ACW locomotives. Finally, Duke reprises its argument that CSXT’s locomotive count is necessarily overstated because the resulting average utilization for ACW locomotives would be lower than CSXT’s systemwide locomotive utilization rate. Duke Pet. at 15-16. As CSXT has previously shown, such a result is not at all remarkable. CSXT’s systemwide average includes merchandise and intermodal trains operating in long-haul corridors over far less challenging terrain than the ACW’s service territory. The locomotive dwell time associated with loading and unloading operations at mines and destination facilities (during which locomotives generate few unit miles), and the lower speeds at which coal trains operate, make it a virtual certainty that locomotives used in the ACW’s coal operations would generate fewer LUMs per year than CSXT’s “system average.” See CSXT Br. 30-31; CSXT Reply III-C-10.

Duke has failed to demonstrate any material error in the Board’s findings with respect to CSXT’s proposed operating plan. The Board’s decision to adopt CSXT’s operating plan (rather than dismissing Duke’s Complaint outright) is supported by substantial record evidence and should be sustained.

IV. THE ALLEGED FAILURE TO ENFORCE A “CONDITION” OF THE CONRAIL TRANSACTION

Despite its prior insistence that any factor other than the elements of the SAC test is irrelevant to the Board’s analysis of this case, Duke now claims that the *Decision* constitutes a “failure to enforce” an alleged “condition” on the Board’s approval of an entirely separate control transaction. *Compare* Duke Pet. at 16-19 with Duke Reply I-2 to 5, II-B; Duke Br. at 3, 9. This claim is wrong for at least four reasons.

First, although the Board had no obligation to do so, the *Decision* did consider Duke’s Conrail-related claims, found them unsupported, and expressly rejected them, concluding:

[T]here is no evidence here to suggest that the rate increases imposed on Duke were necessitated by CSXT’s acquisition of Conrail. The Board cannot take remedial action solely on the basis of an unsupported allegation. In any event, the Board’s representations condition in Conrail was not, and could not have been, meant to freeze CSXT’s then-existing rates indefinitely, depriving the carrier of the ability to adjust its rates to changing market conditions. Therefore, Duke’s claim is rejected.

Decision at 9-10.

Second, a maximum rate reasonableness proceeding – whose sole purpose is to determine whether challenged rates for transportation of coal between specified origins and destinations are reasonable under the Board’s Constrained Market Pricing standards – is not the proper forum to raise objections about the implementation of a control transaction approved by the Board in a separate proceeding. *See* CSXT Reply at I-73 to I-77. The Board and its predecessor have consistently held that rate proceedings are not the appropriate forum for consideration of such unrelated matters. *See, e.g., Nat’l R.R. Passenger Corporation and Consolidated Rail Corp. – Application for an Order Fixing Just Compensation*, 10 I.C.C.2d 863 (1995) (refusing to consider, in rate proceeding, matters not directly related to rates at issue, because such consideration would unduly broaden scope of proceeding, significantly increase evidentiary burden on parties, and disrupt schedule); *Coal Rate Guidelines*, 1 I.C.C.2d 520, 536 (refusing to consider, in proceeding to establish rate reasonableness regulations, standards for determining cost of capital, stating “this proceeding is not the proper forum for conducting that debate.”).

Third, because the Board did not impose the “condition” that Duke alleges, it would not be possible for CSXT to violate such a (non-existent) condition. The *Conrail* decision contains no condition that purports to restrict CSXT’s post-consolidation pricing flexibility. Duke alleges that CSXT “represented” to the Board that it would not raise its rates to pay for the Conrail acquisition, but provides no citation to the Conrail proceeding record or any other evidence supporting that allegation. *See* Duke Pet. at 17 (referring to “assurances by CSXT that there would be no exploitation of captive shippers in the event of any missteps with the merger,” but citing no support for that claim). There is no evidence whatever that CSXT made any “assurance” of the sort Duke claims in the Conrail proceeding. Moreover, even if CSXT had disavowed any intention to use captive shippers’ rates to pay costs associated with the Conrail transaction (which it did not), there is no basis to conclude that such a hypothetical statement was encompassed by the Board’s general condition admonishing CSXT and NS to adhere to “representations” they had made in the Conrail proceeding. Because Duke has not established the existence of a condition along the lines it alleges, let alone the precise parameters and requirements of that alleged condition, it is impossible for Duke to prove that the challenged rates violate that non-existent, hypothetical condition.

Fourth, the proper application of SAC and the principles of the Coal Rate Guidelines embodied in the *Decision* precludes the sort of cost-shifting that Duke alleges. A primary purpose of SAC analysis, and the Guidelines in general, is to ensure that one customer does not “cross-subsidize” costs from which it derives no benefit. *See, e.g. Coal Rate Guidelines*, 1 I.C.C. at 520, 523-24, 528. Thus, if Duke’s rates were paying for CSXT expenditures (related to Conrail or otherwise) from which Duke obtains no benefit, the SAC analysis would eliminate such cross-subsidies. Thus, even assuming, *arguendo*, that there were some basis for Duke’s erroneous Conrail cross-subsidy allegation, there would be no need or justification to invoke the *Conrail* decision, because the SAC analysis would eliminate any such cross-subsidy. The *Decision*’s conclusion that the challenged rates are reasonable further reinforces the Board’s determination that Duke’s Conrail claims are baseless and erroneous.

V. DUKE'S "APPENDICES" REGARDING THE RCAF AND COST OF CAPITAL VIOLATE THE BOARD'S RULES AND ARE ENTIRELY WITHOUT SUPPORT IN THE RECORD.

At the end of its Petition, Duke purports to "adopt by reference" excerpts from a pleading that it filed in a completely different rate case. *See* Duke Pet. at 20. The Board should reject that material for several reasons.

First, Duke uses the "adopt by reference" artifice to circumvent the Board's limit on the length of reconsideration petitions. The Board's rules provide for a single reconsideration petition, which "must not exceed 20 pages in length." 49 C.F.R. § 1115.3(d). Duke's 21-page Petition alone strains the limits of the Board's rules. Recognizing this, Duke attempts to sidestep those limits by appending an additional 7 pages of text, which present two arguments made nowhere else in Duke's Petition, blithely asserting that the Board should consider those additional arguments "in the interests of administrative efficiency." Duke Pet. at 20, and Exhibits 1, 2. Submitting additional pages of argument – in violation of the Board's regulations – does nothing to advance the interests of efficient resolution of this case. Moreover, Duke previously filed a separate, 22-page "Error Petition," which was nothing more than a relabeled, unauthorized petition for reconsideration. *See* CSXT Reply to Duke Error Petition at 2 (April 5, 2004). In total, Duke has now filed nearly 50 pages of reconsideration argument – exceeding the maximum allowed by the Board's rules by approximately 150% – without even requesting leave to do so.

Second, the materials appended to Duke's Petition do not reference any evidence or argument presented in this case. *See* Duke Pet. at 20. The Board cannot make findings in this case based solely on evidence and argument presented in a case involving a different defendant, a different evidentiary record, materially different facts and circumstances and a different hypothetical stand-alone railroad. Because Duke fails to even reference – let alone make a persuasive argument based upon – the record in this case, it would be arbitrary, capricious, and contrary to law to change the *Decision's* findings concerning indexing of operating costs or cost of capital based on Duke's *pro forma* "adoption" of material that it submitted in an entirely separate proceeding.

Third, if the Board does consider Duke's RCAF-U and cost-of-capital arguments on the merits – which CSXT insists it should not – Duke offers no adequate reason to depart from the findings and conclusions of the *Decision* regarding those items. The record in this case is devoid of evidence showing that the SARR would achieve any specific, quantified productivity gains. Duke made no such showing in this case (or in its case against NS), and it makes no attempt to present such evidence in its Petition.¹⁰ The Board's consistent approach to indexing operating expenses has been to use the RCAF-U, unless more specific evidence is available. *See, e.g., TMPA v. BNSF*, STB Doc. No. 42056, Decision at 161 (rejecting complainant's request to use the RCAF-A on the basis that there was no evidence to show, and it was “unrealistic to assume, that projected industry-wide productivity adjustments would result primarily from the transportation of coal.”). Particularly where the SARR is assumed to be the least-cost, most-efficient feasible railroad from the outset, it would be erroneous to assume (without specific proof) that the SARR would enjoy the same level of productivity improvements as less-efficient, real world Class I railroads. Because the record contains no evidence of the specific productivity improvements – if any – the SARR might achieve in the future, the Board correctly adhered to its prior practice of applying the RCAF-U to escalate operating expenses. *See TMPA*, slip op at 161 (“In the absence of specific productivity improvements . . . that would affect the [SARR], we use the RCAF-U to index operating expenses for the [SARR].”).

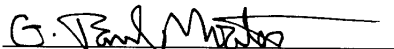
With respect to the cost of capital, Duke presents no reason to depart from the Board's settled practice of calculating the cost of debt for the period in which the SARR would be constructed, and refusing to adjust the cost of debt based on changes in interest rates after the close of the record (or after construction of the SARR would be completed). *See, e.g., McCarty Farms*, 2 STB 460, 523; *Coal Trading v. B & O R.R.*, 6 I.C.C.2d 361 (1989). In all events, this is not a plea for “reconsideration,” but rather an entirely new, and untimely, argument – Duke did not make an argument for a variable cost of capital in its evidence submitted prior to this Petition.

¹⁰ Because Duke's “adopted” RCAF and cost of capital arguments allege neither “new evidence or materially changed circumstances” or “material error” with respect to this proceeding, they fail to satisfy the standard for reconsideration. *See* 49 C.F.R. § 1115.3(b).

CONCLUSION

The Board should deny Duke's Petition, grant CSXT's Reconsideration Petition in its entirety, and confirm the *Decision*'s conclusion that the challenged rates are not unreasonable.

Respectfully submitted,



R. Eden Martin
G. Paul Moates
Terence M. Hynes
Ronald S. Flagg
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Peter J. Shudtz
CSX Corporation
1331 Pennsylvania Ave., N.W.
Suite 560
Washington, DC 20004
202-629-2600

Ellen M. Fitzsimmons
Paul R. Hitchcock
Gilbert L. Feltel, Jr.
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3100

Counsel for Defendant CSX Transportation, Inc.

Dated April 14, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of April, 2004, I served the foregoing
“Defendant CSX Transportation, Inc.’s Reply to Complainant’s Petition for Reconsideration” by
causing five (5) copies thereof to be delivered, via hand delivery, to:

William L. Slover
Robert D. Rosenberg
Christopher A. Mills
Andrew B. Kolesar III
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

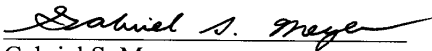
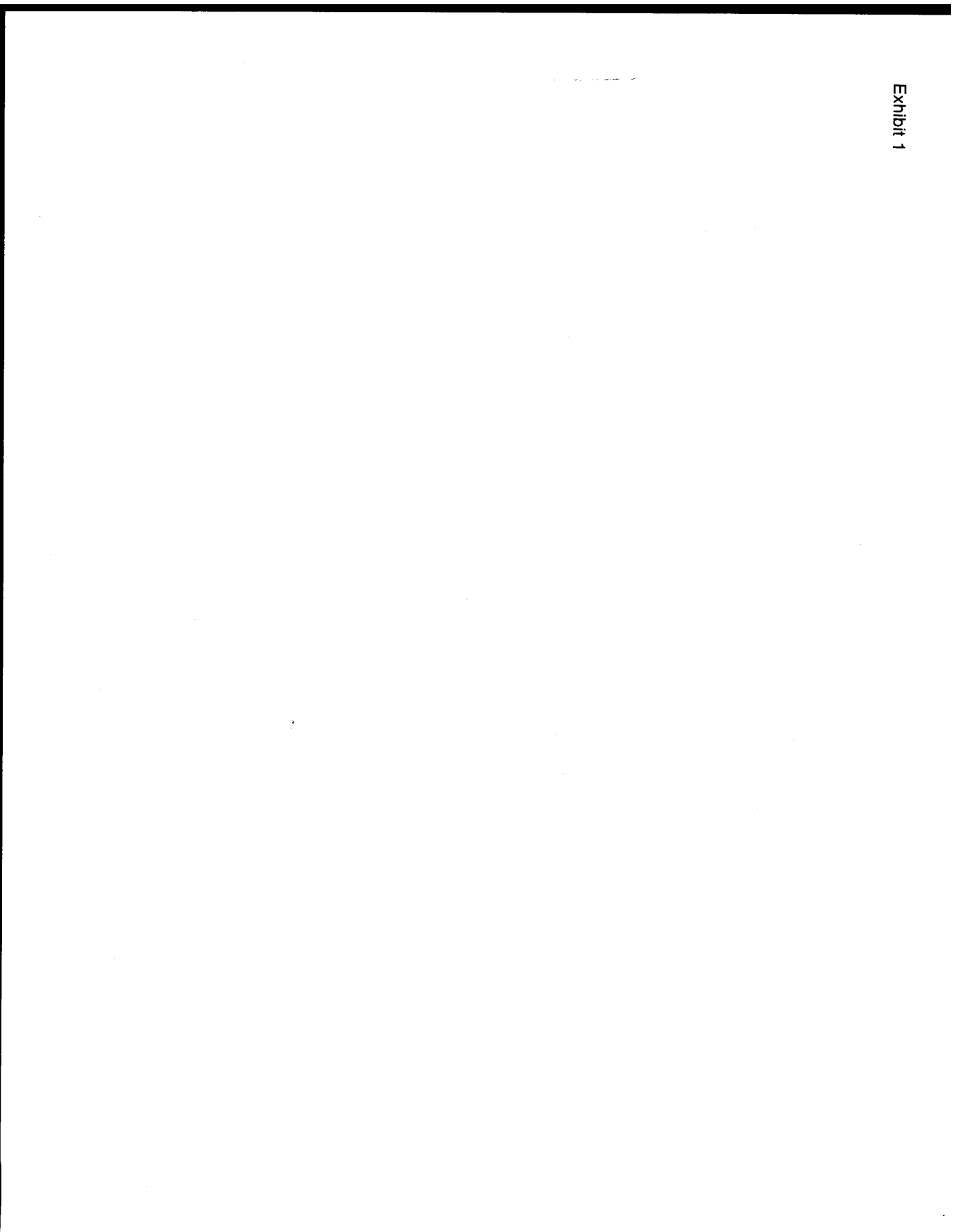
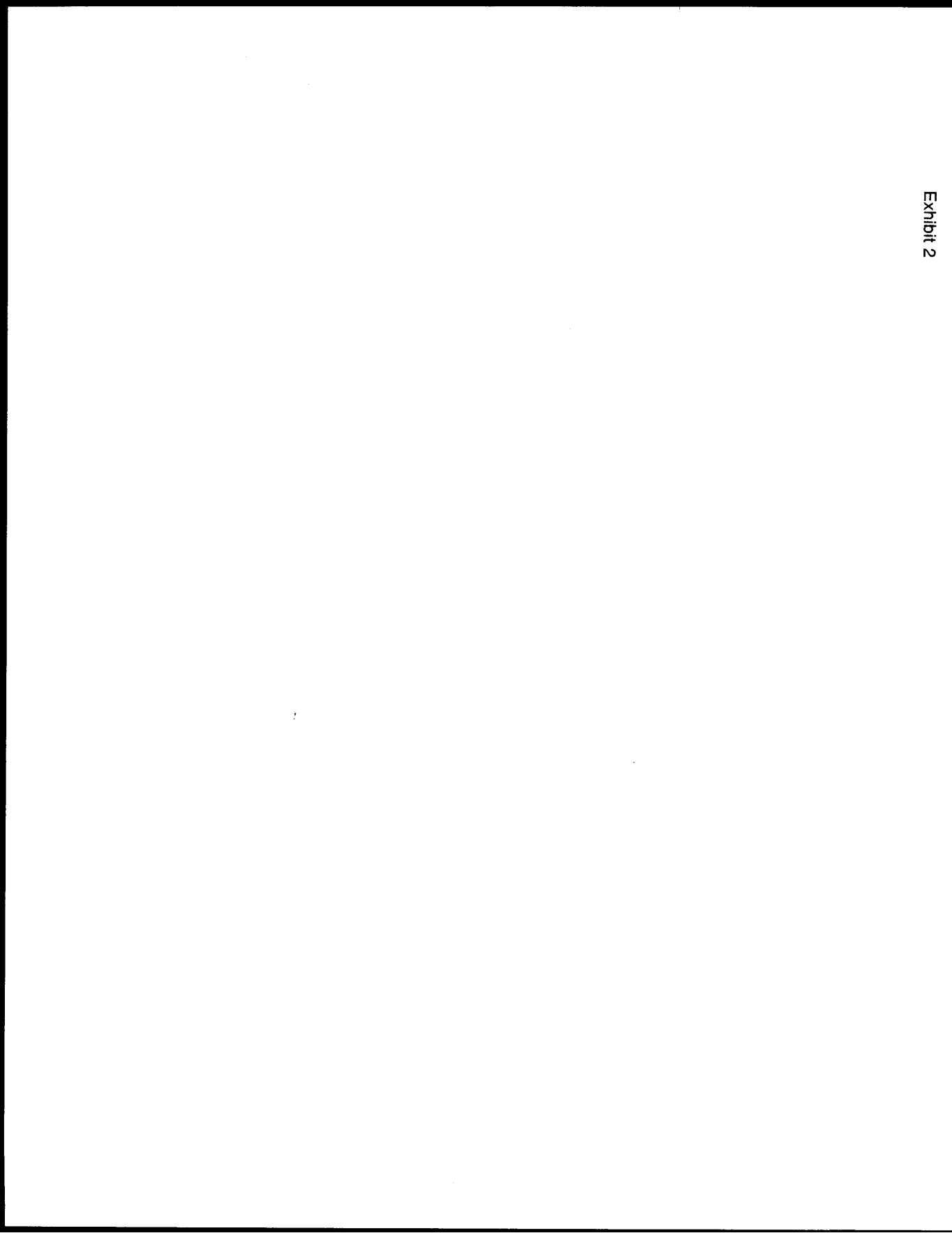

Gabriel S. Meyer

Exhibit 1



[illegible]

[illegible]



**CSXT Operating Expense per Ton Mile (mills)
(2000 - 2002)**

Exhibit 2
Page 1 of 4

Description	Year 2000			Year 2001			Year 2002	
	CSXT (AAR Green Book)	CSXT - R1 (Pre-amendment)	CSXT - R1 (amended 8/02)	CSXT (AAR Green Book)	CSXT - R1 (Pre-amendment)	CSXT - R1 (amended 8/02)	CSXT (AAR Green Book)	CSXT - R1
Operating Expenses per Ton Mile (mills) including depreciation	\$ 27.18	\$ 27.18	\$ 29.01	\$ 26.34	\$ 27.29	\$ 26.34	\$ 25.38	\$ 25.38
Operating Expenses per Ton Mile (mills) excluding depreciation	\$ 24.84	\$ 24.84	\$ 26.67	\$ 24.03	\$ 24.74	\$ 24.03	\$ 22.99	\$ 22.99
Operating Expenses per Ton Mile (mills) excluding depreciation except equipment	\$ 25.85	\$ 25.85	\$ 27.68	\$ 25.05	\$ 25.87	\$ 25.05	\$ 23.99	\$ 23.99

Operating Expense per Ton Mile (mills)
(2000)

Exhibit 2
Page 2 of 4

Total Operating Expense	CSXT (AAR Green Book)	CSXT - R1 (Pre-mendment)	CSXT - R1 (amended 8/02)	R1 Schedule/Line
Depreciation:	\$ 5,751,124	\$ 5,751,124	\$ 6,138,428	Sch. 410, line 620
Way and Structure	\$ 262,644	\$ 262,644	\$ 262,644	Sch. 410, lines 136, 137 & 138
Locomotive	\$ 107,075	\$ 107,075	\$ 107,075	Sch. 410, line 213
Freight Car	\$ 107,196	\$ 107,196	\$ 107,196	Sch. 410, line 232
Other Equipment	\$ 17,328	\$ 17,328	\$ 17,328	Sch. 410, line 317
Operating Expense less Depreciation	\$ 5,256,881	\$ 5,256,881	\$ 5,644,185	
Ton Miles	211,612,319	211,612,319	211,612,319	Sch. 755, line 108
Operating Expenses per Ton Mile (mills)				
including depreciation	\$ 27.18	\$ 27.18	\$ 29.01	
Operating Expenses per Ton Mile (mills)				
excluding depreciation	\$ 24.84	\$ 24.84	\$ 26.67	
Operating Expenses per Ton Mile (mills)				
excluding depreciation except equipment	\$ 25.85	\$ 25.85	\$ 27.68	

Operating Expense per Ton Mile (mills)

(2001)

Exhibit 2
Page 3 of 4

	CSXT (AAR Green Book)	CSXT - R1 (Pre-mendment)	CSXT - R1 (amended 8/02)	R1 Schedule/Line
Total Operating Expense	\$ 5,994,951	\$ 5,623,837	\$ 5,994,951	Sch. 410, line 620
Depreciation:				
Way and Structure	\$ 275,860	\$ 275,860	\$ 275,860	Sch. 410, lines 136, 137 & 138
Locomotive	\$ 113,833	\$ 113,833	\$ 113,833	Sch. 410, line 213
Freight Car	\$ 118,172	\$ 118,172	\$ 118,172	Sch. 410, line 232
Other Equipment	\$ 17,919	\$ 17,919	\$ 17,919	Sch. 410, line 317
Operating Expense less Depreciation	\$ 5,469,167	\$ 5,097,853	\$ 5,469,167	
Ton Miles	227,559,765	206,044,165	227,559,765	Sch. 755, line 108
Operating Expenses per Ton Mile (mills) including depreciation	\$ 26.34	\$ 27.29	\$ 26.34	
Operating Expenses per Ton Mile (mills) excluding depreciation	\$ 24.03	\$ 24.74	\$ 24.03	
Operating Expenses per Ton Mile (mills) excluding depreciation except equipment	\$ 25.05	\$ 25.87	\$ 25.05	

Operating Expense per Ton Mile (mills)
(2002)

Exhibit 2
Page 4 of 4

	CSXT - (AAR Green Book)	CSXT - R1	R1 Schedule/Line
Total Operating Expense	\$ 5,790,852	\$ 5,790,852	Sch. 410, line 620
Depreciation:			
Way and Structure	\$ 297,306	\$ 297,306	Sch. 410, lines 136, 137 & 138
Locomotive	\$ 118,679	\$ 118,679	Sch. 410, line 213
Freight Car	\$ 109,363	\$ 109,363	Sch. 410, line 232
Other Equipment	\$ 19,815	\$ 19,815	Sch. 410, line 317
Operating Expense less Depreciation	\$ 5,245,689	\$ 5,245,689	
Ton Miles	228,175,827	228,175,827	Sch. 755, line 108
Operating Expenses per Ton Mile (mills) including depreciation	\$ 25.38	\$ 25.38	
Operating Expenses per Ton Mile (mills) excluding depreciation	\$ 22.99	\$ 22.99	
Operating Expenses per Ton Mile (mills) excluding depreciation except equipment	\$ 23.99	\$ 23.99	