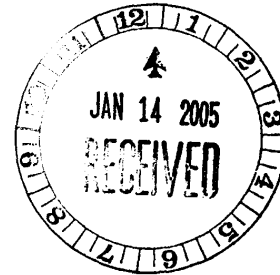




Department of Energy
Washington, DC 20585



January 14, 2005

BY HAND

ENTERED
Office of Proceedings

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423

JAN 14 2004

Part of
Public Record
213016

Re: STB Docket Nos. 38302S, 38376S 213016

Dear Secretary Williams:

Enclosed for filing in the above-captioned dockets are the original and ten copies of the Reply of the U.S. Department of Energy and the U.S. Department of Defense to the Comments of CSX Transportation, Inc. and Norfolk Southern Railway Co.

I am also forwarding an additional copy to be date-stamped and returned to our messenger for our files.

Thank you for your attention to this matter.

Sincerely,

Stephen C. Skubel

cc: Parties Listed on Certificate of Service



Printed with soy ink on recycled paper

BEFORE THE
SURFACE TRANSPORTATION BOARD

U.S. DEPARTMENT OF ENERGY)
and)
U.S. DEPARTMENT OF DEFENSE)
v.)
BALTIMORE & OHIO R. CO., ET AL.)

U.S. DEPARTMENT OF ENERGY)
and)
U.S. DEPARTMENT OF DEFENSE)
v.)
ABERDEEN & ROCKFISH R. CO., ET AL.)

ICC Docket No. 38302S



213015

ICC Docket No. 38376S

213016

REPLY OF THE U.S. DEPARTMENT OF ENERGY
AND THE U.S. DEPARTMENT OF DEFENSE
TO THE COMMENTS OF CSX TRANSPORTATION, INC
AND NORFOLK SOUTHERN RAILWAY CO.

The U.S. Department of Energy and the U.S. Department of Defense ("DOE/DOD" or the "Government") submit this Reply to the Comments of CSX Transportation, Inc. ("CSX") and the separate Comments of Norfolk Southern Railway Co. ("NS") on the Joint Motion of the U.S. Department of Energy, U.S Department of Defense, and Union Pacific Railroad Company ("UP") for Approval of Settlement Agreement and Prescription of Rate Methodology. Neither CSX nor NS, the only two parties offering comments, objects to the Settlement Agreement. They have expressed concerns only with respect to 1) the precedential effect of the Settlement Agreement in the future, and 2) the Government's request made outside the Settlement Agreement for ground rules regarding potential proceedings against non-settling carriers. The Government requests the Board to find and conclude their concerns have no merit.

The Board should at once note that no Western carrier or any Eastern carrier other than CSX and NS has filed any comments. The Government submits that it is reasonable to infer that

the Settlement Agreement as well as the supplemental ground rules appear acceptable to all carriers who have not filed any comments. It is equally important to note, as discussed in full below, that the two carriers that have objected to the Government's request for the establishment of procedural ground rules addressing the Government's burden of proof against any non-settling carriers are, by virtue of being Eastern carriers, in no position to take issue with the ground rules requested. Finally, it is important for the Board to note that although the ground rules have not been proposed as a condition of the Settlement Agreement, they will promote efficient administrative handling of the proceeding in the future and promote further settlements in this long pending proceeding.

1. The CSX and NS Concerns Regarding the
Future Effect of the Settlement Agreement
Present No Obstacle To Its Approval

CSX and NS have raised no specific issue nor requested any specific relief regarding the future effect of the Settlement Agreement. Instead, CSX and NS seem to want the Board to promise them that the terms of the Settlement Agreement will never be cited against their interests. As we have already set forth in the original filings at the Board, the Agreement submitted for Board approval directly affects only UP and the Government. The other defendant carriers are not subject to the terms of the settlement.

CSX worries that if the Board approves the Settlement Agreement, a "rule-making" may result under the Administrative Procedure Act, 5 U.S.C. §551 *et seq.* Such a result is not surprising since the A.P.A. specifically defines a "rule" to include the prescription for the future of rates and of cost, accounting or practices bearing on rates (5 U.S.C. §551(4)). However,

ratemaking does not rise to the level of *res judicata* or *stare decisis*.¹ If CSX or NS become non-settling carriers, they will have ample opportunity to explain in an appropriate proceeding how their circumstances differ from those of UP, or why their common carrier services do not or cannot measure up to the common carrier services of UP under the Settlement Agreement.

The details of the common carrier services to be provided by UP under the Settlement Agreement were carefully considered by the parties to the Agreement. Unlike UP, CSX and NS are subject to the Eastern Rate prescription² that establishes the maximum lawful rate basis on the commodities in issue moving on their systems. Certainly one of the subjects to be discussed with CSX and NS in future settlement negotiations will be the relevance of that prescription to the current and future needs of the Government for both common carrier and extra rail transportation services.

Neither CSX nor NS takes issue with the terms of the Settlement Agreement, which by its very terms does not directly affect their interests. The concerns that they have raised about future impact of the Settlement rest only on hypothetical and speculative assumptions that should not stand in the way of approval of the Agreement that, for all the reasons discussed in the Joint Motion and the parties' separate Memoranda, is in the best interests of all parties and the public.

¹ Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 445 (1930) (opinion by Mr. Justice Brandeis).

² Trainload Rates on Radioactive Materials, Eastern Railroads, 362 ICC 756 (1980), 364 ICC 981 (1981), aff'd sub nom. Consolidated Rail Corp. v. I.C.C., 646 F.2d 642 (D.C.Cir. 1981), cert. denied, 459 U.S. 1047 (1981).

2. The Government's Request for Ground Rules Should be Granted

CSX and NS object to the Government's request for ground rules that would allow it in the future to show the unlawfulness of only a non-settling carrier's charges without showing the unlawfulness of the entire through rate composed of the sum of the non-settling carrier's charges and the UP charges.

In its objections to the Government's request for the establishment of ground rules for future proceedings against remaining defendants, CSX has miscast the need for these ground rules as "merely for the convenience of the Government" and intended "to simplify implementation of the Settlement Agreement". See CSX Comments, page 11. Although the concept of shippers' convenience is not entirely foreign to the proper standards for railroad service,³ the requested ground rules do not at all rely on convenience insofar as CSX and NS are concerned; the ground rules apply to CSX and NS as a matter of law.

Both CSX and NS cite Sullivan⁴ for the broad proposition that a complaining shipper must in all cases challenge the through rate as unreasonable and may never challenge the separate factors making up that rate. Quite simply, however, the Sullivan rule is not as broad as requiring a challenge to a through rate in every instance. The fact that both CSX and NS are subject to the Eastern Rate prescription on the involved commodities removes the applicability of Sullivan as to them. The rationale for Sullivan is that the entire through rate must be considered in a reasonableness determination because the excess of one factor may be offset by a reduced factor

³ See, e.g., Practices of Carriers Affecting Operating Revenues or Expenses, 270 ICC 359, 367-68 (1948).

of a connecting line.⁵ Such an offset is not possible where carriers like CSX and NS that violate a rate prescription must make refund of the excess over the prescribed rate. They cannot as a matter of law attempt to offset that illegal excess by pointing to any part of any rate factors of connecting carriers.

A corollary to the foregoing limitation on the reach of Sullivan is that a prescribed rate factor that is part of a combination rate thereafter relaxes the focus of the agency on the through rate and emphasizes the reasonableness of the separate factors of the combination rate. As the ICC held some time ago,⁶

Unreasonableness is established by the showing...that one of the factors of the combination rates exceeded the maximum of reasonableness and that the other factors were prescribed reasonable maximum rates.

The reference to “prescribed reasonable maximum rates” is germane here because both CSX and NS, as noted above, are subject to the Eastern Rate⁷ prescription. Once the Settlement Agreement is approved, there will be no occasion for the Board to discuss the UP factor on through moves involving either CSX or NS. Any finding regarding the unreasonableness of the UP factor would have to be discarded, since under paragraph 23.B. of the Agreement the Government is foreclosed from collecting any reparations for transportation that occurred on the UP. Hence in future proceedings, if any involve CSX or NS, the Government’s burden will be to show only that their charges exceed the prescribed rate basis.

CSX and NS have been under an order since 1981 from the ICC, and now the Board, not

⁴ Great Northern Ry.Co. v. Sullivan, 294 U.S. 458 (1933).

⁵ Sullivan, 294 U.S. at 461-62; Salt River Project v. Atchison, T.& S.F.Ry.Co., 356 ICC 26, 34 (1977); Sterling Colo. Beef Co. v. Atchison T.& S.F.Ry.Co., 357 ICC 446, 454 (1977).

⁶ Armour & Co. v. Cincinnati N.O. & T.P. Ry. Co., 293 ICC 283, 285 (1954).

to charge the Government rates that yield more than 200.6 percent of variable costs. See Trainload Rates, 364 ICC at 984. The Government would seek to show in future proceedings, if either NS or CSX were non-settling carriers, that their past and in some cases their current rates exceed the prescribed basis,⁸ and that the Government is entitled to reparations.⁹

When the present proceeding was transferred from the ICC to this agency,¹⁰ the former Interstate Commerce Act, 49 USC 10704(a)(1), provided that when a rate is prescribed, “the affected carrier may not publish, charge, or collect a different rate.” The ICC Termination Act expressly continues this provision in effect. CSX has for years collected rates, including

⁷ Trainload Rates case, see footnote 2, *supra*.

⁸ Should the Government and CSX ever reach the point of litigating the dispute, it is likely the carriers would argue that the Eastern Rate prescription no longer provides adequate revenue. In this vein, it would seem, the carriers have already raised the need for heightened security in the wake of 9/11. Cf. NS Comments p 4, CSX Comments p. 10. However, it should be noted that the record leading to the Eastern Rate was compiled in a climate of heightened alert to security threats. The Government did not wait for a terrorist attack to adopt detailed security measures. As a result of the naval shipping of spent fuel for over the past 50 years (a program that for decades has also jointly involved DOE or its predecessors), spent fuel shipments are regularly escorted by Government personnel, undergo numerous car inspections, and benefit from a national emergency alert system already in place. Rather than being outmoded by 9/11, the Eastern Rate basis has been confirmed and reinforced by the events of 9/11. The safety and security standards put in place long ago as part of the national defense effort for moving spent fuel by rail support the view that the Settlement Agreement has merely begun to remove an element of excess profit from the Western rate factor.

⁹ Of course, safety and security concerns cut across all bulk hazardous material shipments, and ought to be reflected in the cost data reported to the STB, and at most ought to apply to spent fuel shipment in the same manner and extent as all other bulk hazardous material shipments. Considering the ruggedness of the shipping container and the measures taken independently by the Government to ensure the safety of spent fuel shipments, an argument could be made that spent fuel shipments have been and continue to be safer than bulk shipments of other hazardous materials. In addition, the Government provides the railroads hundreds of millions of dollars of free indemnity in the Price-Anderson Act; and, indeed the Eastern Rate basis was constructed expressly to include a premium to cover unresolved security issues (see 362 ICC at 775).

¹⁰ Under Section 204(b)(1) of the ICC Termination Act, the law in effect at the time of the

mandatory dedicated or special train charges, from the Government, albeit under protest, that render its charges far in excess of the prescribed Eastern Rate basis for common carrier service.¹¹ Under the rule in Armour & Co., the Government need only show the carriers exceeded the prescription; the entire through rate need not be addressed.

An exception to the Sullivan rule is not merely a “convenience” to the Government, as CSX and NS allege, but rather is required for all the remaining parties in the circumstances of the present proceeding as a matter of common sense. The Sullivan rule espoused by CSX and NS would impose a needless burden on the Board. In its Memorandum in Support of the Settlement Agreement, the Government showed that an exception to the Sullivan rule is clearly warranted here for the Board to avoid the administrative morass of having to develop the unlawfulness of a through rate, then having to back out the UP portion. From an administrative standpoint it makes no sense for the Government to perform the totally unnecessary task of proving the through rate unreasonable.

An exception to the Sullivan rule is also required here as a matter of equity. Alleging antitrust concerns,¹² the carriers have insisted on negotiating their rates on a carrier-by-carrier basis. There was no agreement by the railroads, therefore, to seek limited immunity under 49 U.S.C. §10706 to discuss settlement on an industry wide basis like the railroads obtained for their

transfer of functions from the ICC to this agency governs.

¹¹ The ICC held in a number of cases that mandatory dedicated or special train charges constitute an unreasonable practice and wasteful transportation in violation of the just and reasonable standard. Radioactive Materials, Special Train Service, Nationwide, 359 ICC 70, 92-95 (1978); Trainload Rates case, *supra*, 362 ICC at 773, 364 ICC at 984; U.S. Department of Energy v. Baltimore & O.Ry. Co., 364 ICC 951, 955 *et seq.*, petition for review dismissed *sub nom. Consolidated Rail Corp. v. ICC*, 685 F.2d 687 (D.C. Cir. 1982).

¹² Briefly mentioned in the Joint Motion of UP and the Government at pages 7-8.

own convenience in Association of Am.Railroads – Agreement, 3 STB 673, 3 STB 910 (1998). It would be highly inequitable if the Government were required to show the through rates were unreasonable when no opportunity was afforded the Government to negotiate through rates but only the separate rate factors of the participating carriers.

Thus, there are sound policy reasons for permitting a direct attack on the rate factors of the remaining defendants.

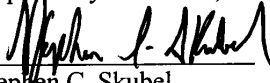
CSX and the NS are complaining about ground rules that will apply in any event to them; those who would be affected by the Board's adopting similar rules as to them have shown no concern whatsoever. The Board should follow the holding of the ICC that Sullivan does not apply to a separately established factor of a combination rate.¹³

CONCLUSION

The Board should approve the Settlement Agreement, prescribe the agreed rate methodology, and provide the parties to this proceeding the requested guidelines that will govern future proceedings involving non-settling carriers.

This the 14th day of January, 2005.

Respectfully submitted,

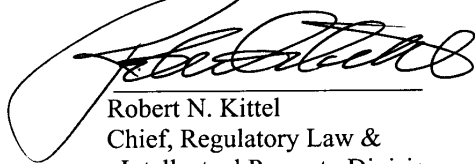


Stephen C. Skubel
Jane P. Schlaifer
U.S. Department of Energy

¹³ And see Metropolitan Edison case, noting that although a shipper may not rely on divisions as a standard of reasonableness, it may "challenge any separately published rate and obtain reparations." The ICC added that a shipper may also obtain a future prescription of the separate rate upon a showing that the rate is unreasonable, but that will not be necessary here. The rate in question is already a prescribed rate basis. Metropolitan Edison Co. v. Conrail, 5 ICC2d 385, 408 (1989).

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A handwritten signature in black ink, appearing to read "Robert N. Kittel", is written over a horizontal line.

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CERTIFICATE OF SERVICE

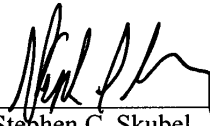
I, Stephen C. Skubel, hereby certify that on this 14th day of January, 2005, I served a copy of the foregoing document by prepaid first-class mail on the following:

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Richard A. Porach G.E. Neunschwander Pittsburgh & Lake Erie 49 Pius Street Pittsburgh, PA 15203	Richard E. Weicher Michael E. Roper The Burlington Northern and Santa Fe Railway Company 2500 Lou Menk Drive, 3rd Floor Fort Worth, TX 76131
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