

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

233429
233430
ENTERED
Office of Proceedings
November 30, 2012
Part of
Public Record

United States Department of Energy)
and)
United States Department of Defense,)
v.)
Baltimore & Ohio Railroad Company, et al.)
_____)

Docket No. NOR 38302S

United States Department of Energy)
and)
United States Department of Defense,)
v.)
Aberdeen & Rockfish Railroad Company, et al.)
_____)

Docket No. NOR 38376S

CSX TRANSPORTATION, INC.'S PETITION FOR LEAVE TO FILE ONE DAY LATE

PAUL R. HITCHCOCK
CSX Transportation, Inc.
500 Water Street - J150
Jacksonville, FL 32202
904-359-1192

DAVID H. COBURN
CHRISTOPHER G. FALCONE
Steptoe & Johnson, LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
202-429-8063

Attorneys for CSX Transportation, Inc.

November 30, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

United States Department of Energy)	
and)	
United States Department of Defense,)	
v.)	Docket No. NOR 38302S
)	
Baltimore & Ohio Railroad Company, et al.)	
)	

United States Department of Energy)	
and)	
United States Department of Defense,)	
v.)	Docket No. NOR 38376S
)	
Aberdeen & Rockfish Railroad Company, et al.)	
)	

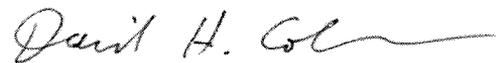
CSX TRANSPORTATION, INC.'S PETITION FOR LEAVE TO FILE ONE DAY LATE

CSX Transportation, Inc. ("CSX") hereby petitions the Surface Transportation Board ("Board") for leave to file one day late the attached comments in the above-referenced dockets. In a decision served October, 15 2012 in the above-referenced dockets, the Board set November 29, 2012 as the due date for comments on the proposed settlement agreement between the United States Department of Energy and the United States Department of Defense and BNSF Railway Company. Counsel for CSX intended to file comments on the proposed settlement on November 29 but needed some additional time to consult on the comments.

Allowing CSX to file the attached comments on the proposed settlement one day late will not prejudice any party to these proceedings. Further, if any party requests additional time to reply to CSX's comments, CSX will not object.

For the reasons stated above, CSX respectfully requests that the Board grant its petition for leave to file one day late.

Respectfully submitted,



PAUL R. HITCHCOCK
CSX Transportation, Inc.
500 Water Street - J150
Jacksonville, FL 32202
904-359-1192

DAVID H. COBURN
CHRISTOPHER G. FALCONE
Step toe & Johnson, LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
202-429-8063

Attorneys for CSX Transportation, Inc.

November 30, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

United States Department of Energy)	
and)	
United States Department of Defense,)	
v.)	Docket No. NOR 38302S
)	
Baltimore & Ohio Railroad Company, et al.)	
)	
United States Department of Energy)	
and)	
United States Department of Defense,)	
v.)	Docket No. NOR 38376S
)	
Aberdeen & Rockfish Railroad Company, et al.)	
)	

**COMMENTS OF CSX TRANSPORTATION, INC. ON
THE JOINT MOTION OF THE U.S. DEPARTMENT OF ENERGY,
U.S. DEPARTMENT OF DEFENSE AND BNSF RAILWAY COMPANY
FOR APPROVAL OF SETTLEMENT AGREEMENT AND PRESCRIPTION OF RATE
METHODOLOGY**

PAUL R. HITCHCOCK
CSX Transportation, Inc.
500 Water Street - J150
Jacksonville, FL 32202
904-359-1192

DAVID H. COBURN
CHRISTOPHER G. FALCONE
Steptoe & Johnson, LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
202-429-8063

Attorneys for CSX Transportation, Inc.

November 30, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

United States Department of Energy)	
and)	
United States Department of Defense,)	
v.)	Docket No. NOR 38302S
Baltimore & Ohio Railroad Company, et al.)	
United States Department of Energy)	
and)	
United States Department of Defense,)	
v.)	Docket No. NOR 38376S
Aberdeen & Rockfish Railroad Company, et al.)	
)	

**COMMENTS OF CSX TRANSPORTATION, INC. ON
THE JOINT MOTION OF THE U.S. DEPARTMENT OF ENERGY,
U.S. DEPARTMENT OF DEFENSE AND BNSF RAILWAY COMPANY
FOR APPROVAL OF SETTLEMENT AGREEMENT AND PRESCRIPTION OF RATE
METHODOLOGY**

CSX Transportation, Inc. (“CSX”), a defendant in the above-captioned proceedings, hereby submits its comments on the Joint Motion of the U.S. Department of Energy, U.S. Department of Defense (jointly the “Government”) and BNSF Railway Company (“BNSF”) for Approval of Settlement Agreement and Prescription of Rate Methodology.

CSX does not oppose approval of the Settlement Agreement *as it applies to transactions between the Government and BNSF*. CSX does, however, oppose any attempt to impose the terms agreed upon between the Government and BNSF on CSX or other defendant railroads or

the establishment of any presumption that the terms of such Settlement Agreement should be the model for reasonable rates and terms for transportation of Government shipments by CSX.

I. BACKGROUND

As noted in the Joint Motion of BNSF and the Government, these proceedings have been ongoing for more than three decades. Joint Motion at 5-7. In 2005, the Board approved a settlement agreement between Union Pacific Railroad (“UP”) and the Government, which has governed those parties’ relationship since the date it took effect. *United States Department of Energy and United States Department of Defense v. B&O Railroad Co., et al.*, Docket Nos. NOR 38302S and 38376S (STB served Aug. 2, 2005) (“*Aug. 2 Decision*”). In that decision, the Board held that “the terms and obligations of the Agreement and the prescribed rate and rate update methodologies will be binding only as between UP and the Government and will have no precedential effect as to the reasonableness of the rates or the common carrier obligations of non-consenting railroad parties in future proceedings or negotiations.” Any similarity between the UP-Government settlement and the BNSF-Government settlement is purely a voluntary decision by the involved parties. *See* Joint Motion at 7. CSX was not privy to the settlement negotiations between BNSF and the Government. CSX thus is neither a party to, nor a beneficiary of, the Settlement Agreement. The terms and conditions of the Settlement Agreement have no application to CSX.

In their Joint Motion, BNSF and the Government ask the Board to (1) approve the Settlement Agreement without prejudice to the Government complaints and other actions insofar as they involve all other carriers in these proceedings; (2) prescribe the rate methodology and the maximum revenue-to-variable cost ratios to which BNSF and the Government have agreed for transportation by BNSF of the commodities and rail services that are the subject of the

Settlement Agreement; (3) dismiss BNSF as a defendant in these proceedings and take steps to eliminate any requirement that BNSF participate further in these proceedings; and (4) extinguish BNSF's liability for reparations in all matters arising out of these proceedings. Joint Motion at 2-3.

As discussed more fully in the sections below, CSX does not oppose Board approval of the Settlement Agreement or dismissal of BNSF from these proceedings provided the Board's ruling on these issues makes clear that the rate and service terms and obligations set forth in the Settlement Agreement apply only to BNSF and the Government and that Board approval of them does not alter or impose any additional common carrier obligation on non-settling carriers beyond the common carrier obligation recognized under existing law.

II. CSX DOES NOT OPPOSE THE SETTLEMENT AGREEMENT AS IT APPLIES TO BNSF AND THE GOVERNMENT

Under existing law there is precedent for a complaining shipper in rail rate cases to settle with one defendant railroad and to proceed to litigate against non-settling defendants. The precedent also permits the dismissal of one party without jeopardizing the complainant's right to proceed against the remaining joint defendants.¹ Accordingly, CSX does not oppose the Settlement Agreement between BNSF and the Government to the extent that the agreement and the terms and obligations established through that agreement apply only to those named parties and not to CSX.

¹ *Ford Motor Company v. I.C.C.*, 714 F.2d 1157, 1169-70 (D.C. Cir. 1983); *Shell Chemical Co. et al. v. Boston & Maine Corporation, et al.*, Docket No. 41670 (served April 6, 1998) (dismissing certain defendant railroads and continuing against the others); *Aug. 2 Decision* at 5 (“{T}he Government may settle with, and forgo reparations from, UP and waive reparations from non-settling railroad parties for through transportation over UP without jeopardizing the Government's right to proceed against non-settling railroad parties.”).

Typically, in rail rate cases when a complainant enters into a settlement agreement with a defendant, the agreement is not submitted for STB approval. Rather, the practice is simply to notify the Board of the settlement and to request that the Board accept the settlement and dismiss the proceeding.² In the instant case, however, BNSF and the Government are asking the Board to go beyond simple acceptance of the agreement and to formally approve it.

The context in which private agreements between parties have been approved by the Board generally has been in merger cases where the settlements have been imposed as conditions to the merger.³ The approval of the Board in such instances carries with it the understanding that the Board has continuing jurisdiction to ensure that the agreement is enforced. CSX has no objection to such approval of this Settlement Agreement. At the same time, however, the Board should make clear that the terms of the approved Settlement Agreement are not to be imposed on any parties other than the signatories to the Settlement Agreement. Further, the Board should make it clear that all parties to all maximum rate case proceedings continue to be free to enter into purely private settlement arrangements; and that any approval of the BNSF-Government agreement in this proceeding does not signal a change in Board policy toward private resolution of maximum rate case proceedings.

² See e.g., *Shell Chemical Co. et al. v. Boston & Maine Corporation*, Docket No. 41670 (served March 11, 1999) (dismissing proceeding); *Farmco, Inc. v. Central Kansas Railway, LLC and Kansas Southwestern Railway LLC*, STB Docket No. 42043 (served Aug. 28, 2001); *GS Roofing Products Co. v. Arkansas Midland Railroad Company*, STB Docket No. 41230 (served March 19, 2002).

³ See e.g., *Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation ("UP/SP")*, 1 S.T.B. 233, 419-421 (1996); *CSX Corporation, et al. and Norfolk Southern Corporation, et al. -- Control and Operating Leases/Agreements -- Conrail, Inc. et al. ("CSX/NS/Conrail")*, 3 S.T.B. 196, 251, 388 (1998); *Canadian National Railway Company et al. -- Control -- Illinois Central Corporation, et al.*, STB Finance Docket No. 33556 (served May 25, 1999).

CSX also requests that the Board clearly state that future settlement agreements in this proceeding need not be submitted to the Board for formal approval. To require formal approval would be inconsistent with the Board's standard practice, as described above, of accepting settlement agreements without reviewing or formally approving them. Further, to require formal approval of future settlements in this proceeding would be to use the UP/Government settlement agreement and the current Settlement Agreement as precedent for the settlements of other parties. This would be contrary to the Board's statements in the *Aug. 2 Decision* and the requests of the settling parties in the present case, which both indicate that settlement agreements in this proceeding should have no precedential value with respect to non-settling parties. *See Aug. 2 Decision* at 6; Joint Motion at 10.

III. THERE SHOULD BE NO PRESUMPTION BY THE BOARD OR THE GOVERNMENT THAT THE SETTLEMENT AGREEMENT IS THE MODEL FOR SETTLEMENTS WITH CSX OR OTHER CARRIERS

Although it might be tempting to assume that the Settlement Agreement between the BNSF and the Government will serve as a model for negotiations with CSX, there should be no presumption to that effect. CSX was not privy to the negotiations. It did not agree to the terms of this privately-negotiated settlement and consequently, while the terms may reflect benefits to BNSF, they do not take into consideration CSX's unique circumstances. Thus such terms cannot and should not be imposed on CSX or even be presumed to be applicable to CSX's situation.

The rate and service terms agreed upon by BNSF and the Government reflect the economic, operational and broader relationship considerations vis-a-vis BNSF and the Government; but not necessarily those of other carriers. BNSF's incentives for entering into the rate and operating provisions of the Settlement Agreement with the Government may well be unique to BNSF. The rate methodology agreed upon by BNSF and the Government may reflect

acceptable arrangements for BNSF in light of all understandings between the Government and BNSF, but not necessarily for CSX. There can be absolutely no presumption that the rate methodology and other arrangements established for BNSF might be appropriate for another railroad.

CSX's competitive situation also differs from that of BNSF. Unlike BNSF's stipulated market dominance over the Government movements, many spent nuclear fuel (SNF) shipments on CSX originate at ports, and there are clearly many ports of entry into the United States. Ultimately, policy considerations may dictate western ports of entry for shorter moves through fewer population centers to locations such as Yucca Mountain, Nevada or some other location that the Government may ultimately select as a permanent SNF storage site. In addition, SNF shipments over the distances in the eastern part of the country might prove more readily and securely transportable by truck than by rail. Evolving federal policies may inform, or even control, future transportation options.

CSX rates and service terms for SNF movements must also reflect the carrier's unique operating characteristics. While the rate and service terms agreed to by BNSF may reflect BNSF's operating characteristics for such movements, those operating characteristics do not apply universally to all carriers. As the Board is well aware, rail transportation characteristics in the West differ in very significant ways from those prevailing in the East.

The Government has expressed interest in settlement discussions with other remaining parties. Any such discussions will be far more likely to be fruitful if the parties feel that each is free to propose alternatives that it finds acceptable than if one party enters into such discussions with a preconceived notion about a "standard" outcome. The Board's decision should thus avoid any characterization that could be construed as limiting the parties' flexibility in discussions. To

do otherwise would be inconsistent with the Board's *Aug. 2 Decision* and the requests of the settling parties in the present case, which indicate that settlement agreements in this proceeding have no precedential value with respect to non-settling parties. *See Aug. 2 Decision* at 6; Joint Motion at 10.

IV. CONCLUSION

For the reasons stated above, CSX respectfully asks that, should the Board approve the Settlement Agreement between BNSF and the Government, the decision granting such approval specify that the Settlement Agreement applies only to the parties to the settlement and that it has no precedential effect as to all other carriers in future proceedings or in future negotiations between the Government and other carriers. In addition, the Board should make clear that future settlement agreements in this proceeding need not be submitted to the Board for formal approval.

Respectfully submitted,



PAUL R. HITCHCOCK
CSX Transportation, Inc.
500 Water Street - J150
Jacksonville, FL 32202
904-359-1192

DAVID H. COBURN
CHRISTOPHER G. FALCONE
Steptoe & Johnson, LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
202-429-8063

Attorneys for CSX Transportation, Inc.

November 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing CSX Transportation, Inc.'s Petition for Leave to File One Day Late and Comments of CSX Transportation, Inc. on the Joint Motion of the U.S. Department of Energy, U.S. Department of Defense and BNSF Railway Company for Approval of Settlement Agreement and Prescription of Rate Methodology have been served this 30th day of November, 2012 via first-class mail, postage prepaid, upon all parties of record in Docket Nos. NOR 38302S and NOR 38376S.



Keith Decker