

Statement of Chairman Roger Nober
Duke v. CSXT Oral Argument
September 10, 2003

Good morning. Thank you all for being here.

As you know, today we will hear argument in a rail rate reasonableness case— Duke v. CSXT.

In this case, Duke requested that the Board hold an oral argument. It has been my policy to promote a more open process at the Board, and this argument in a major matter before the Board is another step in that direction. I'm sure other parties with rate reasonableness cases before the Board will be watching this argument closely. After seeing this argument, they will have to determine whether asking for such an argument in their case is a good idea.

The parties in this case have identified a number of issues that they would like to raise with the Board today. Likewise, I have some issues that I hope the parties will address.

I recognize that the stand-alone cost (SAC) method is the court approved method for determining the reasonableness of the challenged rate. SAC cases are complex matters with hundreds of pieces. Some pieces are large, like determining the appropriate operating plan, and others are small, like determining the cost of a single personal computer. Each piece leads to a conclusion about whether a challenged rate is reasonable, and if not, what the maximum reasonable rate should be.

The costs to build a hypothetical railroad are large as demonstrated by past rate cases in which the SAC method was used. And all those cases were in the mid-western United States. From my days working on highway projects, I know that it is cheaper to build a transportation project in the midwest than in the east. We will have to see whether the SAC analysis will work in the east given the high costs of construction there.

In this case, I am interested in whether the operating plan submitted by Duke would meet the needs of the customers it wants its hypothetical railroad to serve. While I understand that the shipper is entitled to submit an operating plan for its hypothetical railroad that is different from the way the incumbent railroad operates, railroads have worked for 150 years to find the most efficient ways to serve their customers. Although it may be possible to operate more efficient than they do, I think it is a difficult task and a high burden.

Similarly, I think it is unrealistic for a railroad to submit as its evidence an operating plan for the hypothetical railroad that is clearly less efficient than that railroad's own operations. After all, the premise of the SAC test is that the rate being charged is higher than would be charged by a hypothetical, efficient, new carrier.

I am also concerned about the equities here. I have reservations about whether a regulatory regime should permit a railroad to increase the rates it charges a single customer by as large a percentage as CSXT has done here. The difference between the contract rate that CSXT

charged Duke under a recently expired contract and the challenged rate in this case is over 50%. Although one might expect a tariff rate to be higher than a negotiated rate, we have to look at whether it is fair for the railroad's customer to bear such an increase essentially overnight.

Finally, I am particularly concerned about allegations that the railroad promised in the Conrail transaction not to raise rates for captive shippers. Yet here it is raising rates by a very large percentage on a captive shipper.

That said, I have an open mind on the issues in this case. They are difficult and complex. We must remember that in the end we are trying to determine whether a rail rate is reasonable.

I look forward to the parties' presentations today.