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December 20, 2004

The Honorable Vernon A. Williams
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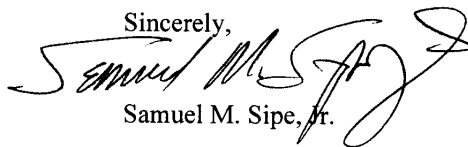
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Re: Docket No. 38302S, *United States Department of Energy and United States Department of Defense v. Baltimore & Ohio Railroad Company, et al.*; Docket No. 38376S, *United States Department of Energy and United States Department of Defense v. Aberdeen & Rockfish Railroad Co., et al.*
212818

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and ten copies of the Comments of CSX Transportation, Inc. on the Joint Motion of the U.S. Department of Energy, U.S. Department of Defense and Union Pacific Railroad Company for Approval of Settlement Agreement and Prescription of Rate Methodology.

An additional copy of this filing is also enclosed. Please indicate receipt and filing by date stamping the cover letter of this extra copy and returning it to the messenger who delivered this filing.

Sincerely,


Samuel M. Sipe, Jr.

cc: Joseph H. Dettmar, Office of Proceedings
Stephen C. Skubel
Michael Glennon
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Parties on Service List

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and
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and
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Aberdeen & Rockfish Railroad Company, et al.

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**COMMENTS OF CSX TRANSPORTATION, INC. ON
THE JOINT MOTION OF THE U.S. DEPARTMENT OF ENERGY,
U.S. DEPARTMENT OF DEFENSE AND UNION PACIFIC RAILROAD 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 Union Pacific Railroad Company (“UP”) 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 UP*. CSX does, however, oppose any attempt to impose the terms agreed upon between the Government and UP 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. Finally, CSX opposes the Government's separate request that it be allowed to challenge only the non-UP portion of through rates for movements covered under the Settlement Agreement. The Government's request is contrary to well-settled precedent and has no merit.

I. BACKGROUND

As noted in the Joint Motion and in the supporting memoranda of UP and the Government, these proceedings have been ongoing for more than two decades. Joint Motion at 6-8; UP Memorandum at 3-5. The Joint Motion for approval of a Settlement Agreement reached between UP and the Government filed on September 15, 2004 is the only significant development in these proceedings since the railroads petitioned the Board to dismiss the complaints in January 1996. That motion is still pending before the Board. Although the railroads invited the Government to explore settlement in 1997, there has been no activity in these proceedings involving CSX or its predecessors since 1996. CSX was not privy to the settlement negotiations that commenced in 1997 between UP and the Government and no one currently employed by CSX can recall *any* meaningful contact with the Government concerning these proceedings over these past seven years.¹ 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, UP and the Government ask the Board to (1) approve the Settlement Agreement without prejudice to the Government complaints and other actions insofar

¹ Government employees do refer to these proceedings from time to time when SNF transportation arrangements are being worked out, but not in the context of settlement discussions.

as they involve all other carriers in these proceedings; (2) prescribe the rate methodology and the maximum revenue-to-variable cost ratios to which UP and the Government have agreed for transportation by UP of the commodities and rail services that are the subject of the Settlement Agreement; (3) dismiss UP as a defendant in these proceedings and take steps to eliminate any requirement that UP participate further in these proceedings; and (4) extinguish UP's liability for reparations in all matters arising out of these proceedings. Joint Motion at 2-3. In addition, the Government asks the Board either to establish ground rules for further proceedings as set forth in its separate Memorandum² -- *i.e.*, to make special allowance for the Government to challenge only the non-settling carrier's portion of the challenged through rates with UP -- or to continue to hold these proceedings in abeyance pending further settlement negotiations. Joint Motion at 3; Govt. Memorandum at 16.

As discussed more fully in the sections below, CSX does not oppose Board approval of the Settlement Agreement or dismissal of UP 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 UP 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.

CSX strongly opposes the Government's request that it be granted a special privilege to ignore well-settled precedent and use the Board's approval of this Settlement Agreement as a vehicle for pursuing claims against only the non-settling carriers' portions of through rates with UP on both the issue traffic and future through movements involving UP. The law is well-settled

² Memorandum of the U.S. Department of Energy and the U.S. Department of Defense in Support of the Settlement Agreement with Union Pacific Railroad Company, filed September 15, 2004.

that a shipper may only challenge the through rate and the Government has established no basis for overturning that precedent.

II. CSX DOES NOT OPPOSE THE SETTLEMENT AGREEMENT AS IT APPLIES TO UP 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 continue to proceed 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 and to forego reparations from the settling carrier.³ Accordingly, CSX does not oppose the Settlement Agreement between UP 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.

However, the UP and Government request for formal Board approval of the Settlement Agreement and particularly prescription of the rate methodology set forth in the Agreement does give rise to some concerns and therefore requires clarification as to the implications of a Board grant of such request. Typically, in rail rate cases when a complainant enters into a settlement agreement with a defendant, the practice is simply to notify the Board of the settlement and to request that the Board accept the settlement and dismiss the proceeding.⁴ In the instant case, however, UP and the Government are asking the Board to go beyond simple acceptance of the

³ *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).

⁴ 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).

agreement and to formally approve it. The request for approval and prescription of the rate methodology is somewhat unusual, particularly in light of the fact that there has been no finding that the rates at issue are unreasonable under any accepted rate reasonableness standard.

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.⁵ 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. If UP and the Government seek approval of their agreement as a means of obtaining continuing Board jurisdiction to enforce the agreement *as between those parties*, CSX has no objection to such approval. However, the parties' request for formal approval (and for the legally binding rate prescription) should not be used as a vehicle to impose the Settlement Agreement's terms on any parties other than the signatories to the Settlement Agreement. In the instant case, UP and the Government were not authorized to enter into negotiations on behalf of or for the benefit of CSX or any other parties.

Appropriate steps must be taken in the course of approving the settlement to ensure that those privately-negotiated terms are not imposed on non-consenting parties. To do so would, in effect, constitute a rule-making under the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* Moreover, in view of the important policy issues surrounding transportation of highly radioactive materials, any effort to impose the terms of the UP/DOE Settlement Agreement on other railroads – even indirectly by treating the approval order as a binding precedent -- could

⁵ 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).

constitute a major federal action under the National Environmental Policy Act (NEPA), 41 U.S.C. § 4332 *et seq.* In refraining from opposing Board approval of the Settlement Agreement, CSX requests that the Board clearly state in any decision giving its formal approval to the Agreement that the Agreement applies only to transportation of covered movements between UP and the Government and that approval of the Settlement Agreement carries no implication that any particular provision would be legally required of any other railroad.

III. THE SETTLEMENT AGREEMENT SHOULD NOT BE INTERPRETED AS A FINDING OF REASONABLENESS OF THE RATES OR SERVICE TERMS THEREIN

For purposes of future challenges to through rates involving UP and another carrier, there should be no presumption by the Board that the UP portion of the rate established by the Settlement Agreement is “reasonable” as that term is used in 49 U.S.C. § 10701. The fact that UP and the Government have *stipulated* that the rate is “reasonable” as between those parties is not a finding of reasonableness under applicable STB standards. Moreover, despite UP’s stipulations of market dominance and the reasonableness of the rate methodology, connecting carriers involved in the UP movements have not made such stipulations and neither the carriers’ restraint from opposing the Settlement Agreement nor the Board’s approval of it should be deemed to constitute a finding as to market dominance over the movements, the unreasonableness of existing rates, or the reasonableness of the rate and service terms set forth in the Settlement Agreement. Even if the Settlement Agreement rates were to be prescribed by the Board under its maximum rate reasonableness authority, the fact that they are thus “lawful” rates does not mean that they are *per se* “the maximum reasonable rates.” Thus, the rate methodology set forth in the Agreement, even if prescribed by the Board for purposes of UP movements, should have no precedential effect on the Board’s determination of the reasonableness of the

through rates or of rates for CSX's or other carriers' portions of the through rates at issue in these and future proceedings.

Likewise, any particular service term that UP agreed to in this Settlement Agreement should not be found by the Board to constitute a *per se* "common carrier obligation." UP's willingness to provide certain special services for the Government beyond the ordinary common carrier obligation should not be used to transform such services into a common carrier obligation. Nor should failure or unwillingness of other carriers to provide such special services be deemed a violation of the common carrier obligation. For example, the Settlement Agreement requires UP to accept pickup and delivery on any day of the week (Section 4B), to transport security personnel in escort cars (Section 4C), and to provide special handling of cars over and above that required by law (Sections 4F and 6B). These provisions go beyond the common carrier obligation of freight railroads. While these commitments may be desirable to the parties, it does not follow that they constitute a common carrier obligation -- even if the parties choose to characterize the transportation as "common carriage." Even if in approving the Settlement Agreement, the Board makes no ruling on the issue of the railroads' common carrier obligation, there is always a danger that dicta in the decision will be cited as precedent when none was intended. Therefore, the Board should make clear that its approval is not intended to treat special services as common carrier obligations and should carefully frame its order to ensure that findings the Board does not intend to make are not attributed to it.

IV. 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 the Government desires -- and it may be tempting to assume -- that the Settlement Agreement between the UP and the Government will serve as a model for

negotiations with CSX or other carriers, 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 UP, they do not take into consideration CSX's unique commercial and operating 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 UP and the Government reflect the economic, operational and relationship considerations vis-a-vis UP and the Government but not necessarily those of other carriers. For example, UP's incentives for entering into the rate and operating provisions of the Settlement Agreement with the Government are substantially different from those of CSX. The volume of Government shipments that UP is expected to handle for DOE under the terms of the Settlement Agreement is substantially greater than that of CSX, giving UP a greater incentive to discount rates. Under such circumstances, the rate methodology agreed upon by UP and the Government may reflect adequate compensation for UP, but not necessarily for CSX. Any presumption that the rate methodology established for UP is appropriate for CSX without thorough analysis of CSX's particular financial situation could create substantial financial difficulties for CSX.

CSX's competitive situation also differs from that of UP. Unlike UP'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 to Yucca Mountain, Nevada. 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. Rates established for various CSX shipments of the covered commodities must reflect the economics of these competitive

options, as well as CSX's need for revenue adequacy, and its freedom to engage in differential pricing.

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 UP may reflect UP's operating characteristics for such movements, those operating characteristics do not apply universally to all carriers. CSX operations differ from UP in several aspects. Routes in the East will of necessity pass through more urban areas than routes through the West. Transportation of these highly dangerous materials may raise more public concerns about a nuclear incident in the East than in UP's service territory. The more rugged terrain of the eastern mountains traversed by certain CSX routes differs from the predominately open plains of the West. In addition, CSX routes pass through critical, sometimes congested, terminal areas, which raise different issues from those raised by operations in the West. As a result, the handling of SNF shipments in the East may require different handling than in the West.

The fact that CSX may handle fewer shipments of SNF than UP and over more diverse routes creates additional challenges for CSX. For example, CSX may be required to train a disproportionately high number of personnel across its system to handle sporadic shipments over diverse routes than would be necessary for UP to handle larger volumes over more regular, more clearly defined routes.

If CSX were to enter into settlement discussions with the Government, the negotiations would have to yield rates and service terms that appropriately reflect CSX's unique economic and operating circumstances. The Board's decision should avoid any characterization that could be construed as limiting the parties' flexibility in discussions.

V. THE GOVERNMENT'S SEPARATE REQUEST TO BE PERMITTED TO CHALLENGE ONLY NON-SETTLING CARRIERS' PORTIONS OF THROUGH RATES SHOULD BE DENIED

In its separate memorandum in support of the Settlement Agreement, the Government asks the Board to "allow it the option to show the unreasonableness of the freight charges collected by the individual non-settling carriers participating in through movements." Govt. Memorandum at 16. This request flies in the face of long-standing, well-settled precedent. In *Great Northern Ry. Co. v. Sullivan*, 294 U.S. 458 (1933), the Supreme Court established the rule that where there is a joint through rate, a shipper must challenge the through rate as unreasonable and may not challenge the separate factors that make up that rate. The ICC and the Board have repeatedly upheld that general principle. *Metropolitan Edison v. Conrail*, 5 I.C.C.2d 385 (1989), 1989 ICC Lexis 64, *46; *Central Power & Light Co. v. Southern Pacific Transp. Co.*, 1 S.T.B. 1059 (1996). 1996 STB Lexis 358, *16. The Government argues that the rule should not apply here because ignoring the rule would eliminate the "burden[] [of] computing freight charges collected by the non-settling carrier only indirectly through a subtraction from the through rate." Govt. Memorandum at 15. The Government asks the Board to violate a long-standing principle and to authorize a major departure from established law merely for the convenience of the Government. The Government rests its proposition on the lame suggestion that "Congressional interest in market-driven rates that are reached through private negotiations . . . would justify . . . exception to the mandatory through basis of deciding rate reasonableness issues." *Id.* at 21. Granting the Government's invitation to ignore existing precedent to simplify implementation of a Settlement Agreement in which affected parties have not participated and where no STB finding of reasonableness/unreasonableness has been made would be poor policy as well as inconsistent with governing law.

Moreover, the cases the Government cites to support its claim that the Board has authority to grant this request are inapposite. The cases cited all involve instances in which complainants were allowed to challenge only one portion of a through rate *because the Board or its predecessor had no jurisdiction over the other portion(s) of the through rate*. For example, in *FMC Wyoming Corp. v. Union Pacific*, 2 S.T.B. 766, 771-772 (1997), the Board had no jurisdiction over a contract rate that comprised part of the through rate and thus allowed challenge only to the common carrier portion of the rate. In the international cases, the ICC had no jurisdiction over the rates of foreign carriers not subject to Board jurisdiction. In sharp contrast to these cases, the Government here has specifically requested that the privately-negotiated rates be *approved and prescribed by the Board – i.e., that they specifically and deliberately be subjected to Board jurisdiction*. The rationale for the Government's request for an exception to the *Sullivan* rule is inconsistent with its request that the UP portion of the through rates be prescribed.⁶

Finally, there is no reason for the Board to reach the Government's request for an exception to the *Sullivan* rule as the Government and UP's stated intent to dismiss UP without shifting liability to non-settling carriers (Govt. Memorandum at 14) can be accomplished by the Government foregoing the collection of reparations from UP for its share of any future liability. There is no compelling need for the Board to go beyond that. Indeed, for the Board to grant a needless exception to a well-settled precedent merely for the convenience of the Government would be an abuse of discretion.

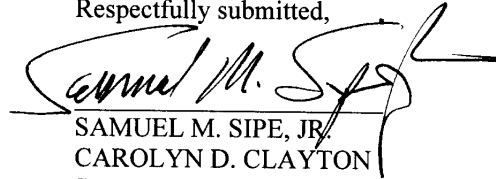
⁶ Nor is there any merit to the Government's argument that the separate publication and collection of the factors of the through rates with UP justify the exception. Most, if not all, of the SNF shipments will involve through rates with UP and will not be used other than as factors in such through rates. The shipper's interest is still in the reasonableness of the entire through rate.

VI. CONCLUSION

For the reasons stated above, CSX respectfully asks that, should the Board approve the Settlement Agreement between UP 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 reject out of hand as contrary to law the Government's separate request that it be granted an exception to the Supreme Court's well-settled *Sullivan* rule.

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December 20, 2004

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I hereby certify that I have this 20th day of December 2004 served a copy of the foregoing on:

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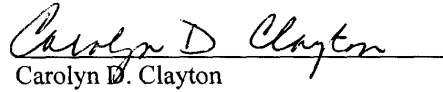
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