

SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

AMERICA • ASIA PACIFIC • EUROPE

MJWARREN@SIDLEY.COM
+1 202 736 8996

244492
244493

October 10, 2017

ENTERED
Office of Proceedings
October 10, 2017
Part of
Public Record

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: STB Docket No. 42155; STB Docket No. 42156

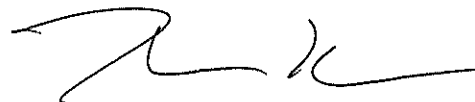
Dear Ms. Brown:

Enclosed for filing in the above-referenced proceedings is Defendant CSX Transportation, Inc.'s ("CSXT's") Reply to Motion to Stay Briefing to Allow for Discovery.

CSXT is simultaneously filing a Motion for Protective Order for both proceedings. CSXT has designated the enclosed filing Highly Confidential and requests that it be filed under seal pending the Board's decision on the Motion for Protective Order. CSXT is also filing a Public Version of the Reply to Motion to Stay Briefing to Allow for Discovery. Two of the Exhibits being filed include pricing information. Because pricing information is irrelevant to the matters at issue in these cases and highly commercially sensitive, that information is being redacted in both Highly Confidential and Public Versions of the filing.

If you have any questions, please contact the undersigned.

Sincerely,



Matthew J. Warren

BEFORE THE
SURFACE TRANSPORTATION BOARD

FORESIGHT COAL SALES, LLC,
SUGAR CAMP ENERGY, LLC,
WILLIAMSON ENERGY, LLC

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42155

CONSOLIDATION COAL COMPANY

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42156

REPLY TO MOTION TO STAY BRIEFING TO ALLOW FOR DISCOVERY

As CSX Transportation, Inc. (“CSXT”) explained in its Motion to Dismiss,¹ the Complaints in these actions exclusively concern transportation that was performed pursuant to rail transportation contracts, and thus the Board lacks jurisdiction over these complaints. Indeed, the Motion to Dismiss showed that Complainants themselves have claimed in state court litigation that the movements in question are governed by contract. But instead of filing a reply to CSXT’s Motion to Dismiss, Complainants filed a “Motion to Stay Briefing to Allow for Discovery”

¹ *Consolidation Coal Co. v. CSX Transp. Inc.*, STB Docket No. 42156, *Motion to Dismiss Complaint* (STB filed Aug. 31, 2017) (“Motion to Dismiss”).

just one day before their reply to the Motion to Dismiss was due.² Since no reply to CSXT's Motion to Dismiss has been filed within the time provided in 49 C.F.R. § 1104.13(a), CSXT's unopposed Motion is ripe for decision.

The Motion to Stay claims that the Board should delay ruling on CSXT's Motion to Dismiss to allow discovery on one issue: whether the traffic at issue was moved under rail transportation contracts. Tellingly, Complainants never assert that the movements at issue are within the Board's jurisdiction. Nor do Complainants deny that they themselves have alleged in civil litigation that the movements are all governed by contract. They instead claim that the Board should not determine the threshold issue of its jurisdiction without allowing for discovery. But discovery is only useful to shed light on factual issues that are disputed. Here, there is no serious question that the Board lacks jurisdiction over movements that Complainants have admitted are under transportation contracts.³

The Motion to Stay's claim that the Board only has "CSXT's bare assertion" that the traffic moves pursuant to a contract is not true. The Board also has the identical assertions made by Complainants in the state court litigation they filed relating to the same movements at issue here. Each of those complaints asserts that Complainants' customers have rail transportation contracts with CSXT.⁴

To remove any lingering doubt about what discovery might show, CSXT has included a Verified Statement from Russ Epting, Vice President of Coal Sales and Marketing for CSXT, and {{ }} exhibits that contain a preliminary page of each rail transportation contract pursuant to which CSXT transports coal from the mines included in the Complaints.⁵ CSXT chose to provide only the cover pages of those

² *Consolidation Coal Co. v. CSX Transp. Inc.*, STB Docket No. 42156, *Motion to Stay Briefing to Allow for Discovery* (STB filed Sept. 19, 2017) ("Motion to Stay").

³ See Motion to Dismiss at 4-6.

⁴ See Motion to Dismiss at 2-4. See also *id.* at Exhibits 1 and 2.

⁵ CSXT is filing the exhibits under seal, designating the exhibits as Highly Confidential, and is concurrently filing a Motion for Protective Order. The pricing information in the Highly Confidential versions of the exhibits is redacted because pricing is irrelevant to the issues in the case and is commercially sensitive.

contracts for two reasons. First, the terms of these contracts are both irrelevant and highly confidential. Second, CSXT's customers may not want the terms of these contracts provided to counsel for their coal supplier, even under a protective order.

Yet the nature of these agreements is apparent from the face of the contracts without any need to disclose the confidential terms. Each of the excerpted pages state plainly and simply that the agreements are rail transportation contracts pursuant to 49 U.S.C. § 10709. *See* Epting V.S. at ¶¶ 8-17. Mr. Epting confirms that no other customers receive traffic from Complainant's mines over CSXT lines and that each of these customers receives rail transportation pursuant to these contracts. *Id.* at ¶ 6. The Board can therefore decide these motions on the existing record without time-consuming and costly discovery.⁶

In sum, Complainants cannot have it both ways. They cannot bring state contract claims against CSXT and tell those judges that the transportation movements in question are all under contracts, and then tell the Board that it cannot conclude that the movements are under contract before allowing discovery into this undisputed issue. Only one issue needs to be determined by the Board in order to decide CSXT's Motion to Dismiss: whether the traffic at issue moves under contract. That question is decisively answered in the affirmative by Complainants' assertions in state court and the exhibits submitted herein.

⁶ *See, e.g., California High-Speed rail Authority—Construction Exemption—In Merced, Madera and Fresno Counties, Cal.*, STB Docket No. 35724, at 2 (STB served April 18, 2013) (“The record currently before the Board, along with other publicly available materials, provides sufficient information for the Board to conclude that it has jurisdiction...”); *Id.* at 3 (Vice Chair Begeman Concurring) (“I agree that sufficient information exists about the proposed California High-Speed Train System (HST) to conclude that the Board has jurisdiction over it, based largely on the publicly available information that I have been reviewing since the Petition and Motion to Dismiss were filed last month.”); *Savannah Port Terminal R.R., Inc.—Petition for Declaratory Order—Certain Rates and Practices As Applied to Capital Cargo, Inc.*, STB Docket No. 34920, at 2 (STB served May 30, 2008) (“The parties have submitted sufficient information with their filings to enable us to address the service and demurrage issues.”); *Central Puget Sound Regional Transit Authority—Acquisition Exemption—Certain Assets of City of Tacoma In Pierce County, Wash.*, STB Docket No. 35812, at 2 (STB served Oct. 27, 2014) (motion to dismiss granted on the basis of supplemental statement submitted to the Board).

Moreover, the Board is taking steps to expedite its processing of matters. This should be a routine case. The {{ }} customers who ship from these mines do so under § 10709 contracts, as proven by the first page of each contract. It is well established that STB “has primary authority to determine its own jurisdiction.” *Burlington N., Inc. v. Chicago & N.W. Trans. Co.*, 649 F.2d 556, 558 (8th Cir. 1981). And it is equally well established that the transportation service provided under § 10709 contracts cannot be challenged before the Board. *See* 49 U.S.C. § 10709(c)(1). The Board should not unnecessarily burden CSXT, its customers, the Board, its staff, and potentially an administrative law judge with discovery on a fact that the Complainants conceded in their state court litigation against CSXT.

* * *

For the foregoing reasons, the Board should deny the Motion to Stay and grant CSXT’s Motion to Dismiss.

Respectfully submitted,

/s/ Raymond A. Atkins

Peter J. Shudtz
John P. Patelli
David S. Prohofsky
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Raymond A. Atkins
Matthew J. Warren
Marc A. Korman
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to CSX Transportation, Inc.

Dated: October 10, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October 2017, I served a copy of the foregoing upon the following counsel for complainants Consolidation Coal Company; Foresight Coal Sales, LLC; Sugar Camp Energy, LLC and Williamson Energy, LLC via U.S. first-class mail or more expeditious means of delivery:

Bradley D. Hasler
Bingham Greenebaum Doll
2700 Market Tower
10 W. Market Street
Indianapolis, IN 46204
bhasler@bgdlegal.com



Marc A. Korman

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**FORESIGHT COAL SALES, LLC,
SUGAR CAMP ENERGY, LLC,
WILLIAMSON ENERGY, LLC**

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42155

CONSOLIDATION COAL COMPANY

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42156

**VERIFIED STATEMENT OF RUSS A. EPTING
CSX TRANSPORTATION, INC.**

1. My name is Russ A. Epting, and I am Vice President, Coal Sales and Marketing at CSX Transportation, Inc. (“CSXT”). I have held that position for six months. In this capacity, my responsibilities include all sales and marketing of rail transportation to the domestic and export coal markets. As part of these responsibilities, I am aware of whether coal traffic is moved pursuant to a tariff or rail transportation contract.

2. CSXT provides rail transportation to numerous coal load origins along its network.

3. CSXT provides rail transportation to the five mines referenced in Consolidation Coal Company’s STB complaint filed August 11, 2017 in Docket No. NOR

42156: the Monogelia County Mine, the Marion County Mine, the Marshall County Mine, the Ohio County Mine, and the Harrison County Mine.

4. CSXT also provides rail transportation to the two mines referenced in the STB complaint filed by Foresight Coal Sales, LLC, Sugar Camp Energy, LLC, and Williamson Energy, LLC. On August 11, 2017 in Docket No. NOR 42155: the MC#1 Mine and the Viking Mine.

5. {{

}}

6. All of the rail transportation that CSXT has provided originating from these mines since 2015 was conducted pursuant to transportation contracts with CSXT's customers for delivery to their plants or to export facilities.

7. A preliminary page of each of the contracts referenced in Paragraph 5 demonstrates that these agreements are contracts governed by 49 U.S.C. § 10709. These preliminary pages are attached hereto as Exhibits 1 through {{ }}.

8. {{

}}

9. {{

}}

10. {{

}}

11. {{

}}

12. {{

}}

13. {{

}}

14. {{

}}

15. {{

}}

16. {{

}}

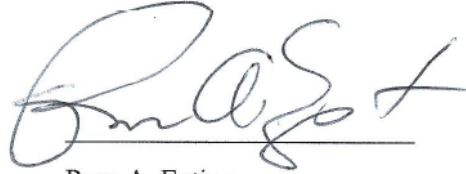
17. {{

}}

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 9th day of October, 2017.

A handwritten signature in black ink, appearing to read "Russ A. Epting", written over a horizontal line.

Russ A. Epting

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. NOR 42155

DOCKET NO. NOR 42156

**FORESIGHT COAL SALES, LLC, SUGAR CAMP ENERGY,
LLC AND WILLIAMSON ENERGY, LLC v. CSX
TRANSPORTATION, INC.**

**CONSOLIDATION COAL COMPANY v. CSX
TRANSPORTATION, INC.**

**REPLY TO MOTION TO STAY BRIEFING
TO ALLOW FOR DISCOVERY**

EXHIBITS

PUBLIC VERSION

**HIGHLY CONFIDENTIAL
EXHIBITS REDACTED**