

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CSX TRANSPORTATION, INC.,)	
)	
)	
Plaintiff,)	
)	
v.)	Case No.: 04-611 (RWR)
)	
NATIONAL MEDIATION BOARD,)	
)	
)	
Defendant.)	
)	

**CSX TRANSPORTATION, INC.’S OPPOSITION TO
DEFENDANT’S MOTION FOR EXPEDITED CONSIDERATION
OF PARTIES’ CROSS MOTIONS FOR SUMMARY JUDGMENT**

I. Introduction

Plaintiff CSX Transportation, Inc. (“CSXT”) respectfully submits this Opposition to the National Mediation Board’s (“NMB”) Motion for Expedited Consideration of Parties’ Cross-Motions for Summary Judgment (“NMB’s Motion”). Obviously, CSXT desires a ruling from the Court; CSXT filed this lawsuit. However, CSXT opposes the NMB’s Motion, because NMB’s arguments for expedition are without merit, are based on erroneous and misleading information contained in the Fifth Declaration of Roland Watkins, and amount to an improper effort to shore up its opposition to CSXT’s Motion for Summary Judgment after briefing has been closed and with information outside of the administrative record upon which the NMB based its April 7, 2004 Order here under review.

NMB contends that expedition is necessary because of the alleged “intervening events” of a growing backlog of contracting out arbitration cases, an allegedly increasing financial burden on the NMB, harm to the Brotherhood of Maintenance of Way Employees (“BMWE”),

and harm to the relationship between CSXT and BMW. NMB also intimates that the crisis has been precipitated by CSXT's lawsuit.

It is ironic that the NMB is complaining about the Court's handling of its docket, when the crisis alleged by NMB was precipitated by the NMB's own unprecedented and illegal April 7, 2004 Order canceling arbitration boards (Public Law Boards or PLBs), which had been established by CSXT and BMW pursuant to Section 3, Second of the Railway Labor Act ("RLA"), 45 U.S.C. § 153, Second (second unnumbered paragraph). The resulting backlog of arbitration cases is of NMB's own making. NMB could end this artificial crisis by restoring the PLBs that it unlawfully abolished.

As for the claimed, ever-mounting financial burden from additional contracting out cases filed by BMW, the NMB's financial burden projections have always been grossly inflated. This is proven, e.g., by the NMB's own records of the recent cost of one PLB that the NMB did not cancel, PLB No. 6510. The charges of the NMB-appointed arbitrator on that PLB show that the per case cost to the NMB is more like \$700 per case than the \$2,325 figure that the NMB has been telling the Court.

That NMB's harm alleged as support for its motion is thin is shown by fact that it must also allege harm to BMW. But, NMB cannot speak for or rely upon supposed harm to BMW. After filing a facially deficient motion to intervene, which this Court denied without prejudice on October 18, 2004, BMW opted not to file a proper motion and intervene to protect any interests it may legitimately have. Moreover, BMW did not even allege any harm in its unsuccessful motion. The only harm publicly claimed by BMW was the harm caused by the NMB's actions under review of canceling PLBs and consolidating the arbitration cases. See Administrative Record ("AR") 0211-0215.

Finally, contrary to the NMB's arguments, a ruling by this Court one way or the other will not lessen the number of arbitration cases filed by BMW.

II. The NMB Precipitated Any Crisis

The NMB (and BMW), not CSXT, are the cause of the growing backlog of arbitration cases. It is within NMB's power to ameliorate this backlog.

As has been explained in the parties' prior pleadings, by an arbitration agreement dated March 21, 2002, CSXT and BMW originally agreed to establish eight PLBs, PLB Nos. 6508-6515, to hear sixty-one contracting out cases arising under the June 1, 1999 System Agreement. As the BMW continued to file more arbitration cases, CSXT and BMW agreed to establish an additional twenty-three PLBs to hear around eight to ten cases each. The first PLB, PLB No. 6508, issued its award on October 7, 2003. See Declaration of James H. Wilson at ¶ 8. This was the first PLB to address a major issue, common to all of the contracting out cases listed with these PLBs: did CSXT give up completely the right to contract out work covered by the scope rule in the then new June 1, 1999 System Agreement unless BMW consented, as BMW argued. The award written by the neutral member of PLB No. 6508, Arbitrator Douglas, held that CSXT retained the right to contract out, but that CSXT had a greater burden to justify the need to contract out than it did under predecessor agreements (the "Douglas Award"). As has been previously explained, and again in the Fifth Watkins Declaration at ¶ 8 n.1, the NMB paid Arbitrator Douglas \$18,600 for the work he did on PLB No. 6508, which was a greater amount than the NMB typically paid for arbitrations.

The parties settled the cases that they had listed with the second PLB, PLB No. 6509. Thus, there was no significant expense for the NMB. Nonetheless, the NMB apparently was concerned about the potential costs of the thirty-one PLBs that CSXT and BMW by then had

agreed to establish.¹ It was then that the NMB, over the objection of both CSXT and BMW, sua sponte cancelled all of their agreed-upon PLBs except two in its April 7, 2004 Order, which is the subject of this lawsuit. PLB No. 6510 was allowed to go forward, because a neutral had already been appointed to that Board and its hearing scheduled. The NMB also did not cancel PLB No. 6511, because it purported to consolidate into PLB No. 6511 the 290 cases that were to be heard by the thirty cancelled PLBs.

The NMB's budgetary concerns have always been greatly exaggerated. But, the NMB never needed to cancel all of the parties' PLBs. Allowing some PLBs to go forward would not have imposed a significant burden on the NMB's annual budget, because the parties' March 21, 2002 agreement specified that there would not be more than one PLB hearing a month or a maximum of twelve per year. Indeed, experience showed that fewer would be held in a year.

As "intervening events" unfolded, it was clear that the amount charged by Arbitrator Douglas was unique. These events show, as explained next in Part III, the NMB grossly overestimated the cost of the CSXT-BMW PLBs. The NMB's own records show that, in reality, the CSXT-BMW PLBs to date have cost the NMB a little less than \$9,000 a year on average rather than the several hundreds of thousands of dollars that the NMB has been projecting. In other words, the NMB acted precipitously and unnecessarily in canceling all of the parties' PLBs.

The NMB points to the new cases filed by the BMW with the National Railroad Adjustment Board ("NRAB") as one of the intervening events supporting its motion. Congress

¹ The mere agreement of a carrier and union to establish a PLB does not impose any financial cost on the NMB. The NMB only incurs cost responsibility after the parties to a PLB request the appointment of an arbitrator as the neutral member of the PLB and that neutral actually performs work in connection with that PLB. CSXT and BMW only requested the appointment of neutrals when they agreed to actually schedule a PLB hearing.

authorized PLBs as a more expeditious means for arbitrating disputes than the NRAB, which historically has been backlogged. See Watts v. Union Pac. R.R. Co., 786 F.2d 1240, 1242-43 (10th Cir. 1986). See also The Railway Labor Act at Fifty at 229-33 (1976); D. Leslie, The Railway Labor Act at 282-90 (1995). The irony here is that, by wiping out the parties' PLBs, and refusing to allow CSXT and BMW E to establish new PLBs to resolve any contracting out cases, BMW E has been forced to file new cases with the NRAB, adding to the NRAB's existing backlog of cases involving other railroads and unions.² This necessity resulted from the NMB's April 7 Order, not from CSXT's actions. In that regard, the NMB's contention, made both in its Memorandum and Watkins Fifth Declaration (¶ 7), that BMW E was forced to file new cases with the NRAB, because CSXT allegedly refused to waive the time limits in the CSXT-BMW E collective bargaining agreement for taking matters to arbitration, is false. As explained in the Declaration of James H. Wilson, the highest designated official in the CSXT Labor Relations Department for dealing with the BMW E, BMW E never asked for such waivers. CSXT would further note that Mr. Watkins never consulted CSXT to verify whatever information he was apparently supplied by the BMW E.³

In short, the NMB created any backlog, and the NMB can ameliorate it without imposing on this Court.

² While the NMB has effectively frozen the ability of CSXT and BMW E to establish or proceed with any PLBs arbitrating contracting out cases, the NMB continues to pay neutrals appointed to PLBs established by other carriers and BMW E and carriers and other unions to resolve contracting out disputes, apparently without bankrupting the NMB.

³ Mr. Watkins' statement also demonstrates a misunderstanding of the industry custom for holding arbitration cases in abeyance, as explained in the Wilson Declaration at ¶ 5.

III. The NMB Continues Grossly To Overstate the Financial Impact Of Paying For The Contracting Out Arbitrations

The NMB's Motion and the Watkins Fifth Declaration continue to rely upon grossly overstated claims about the "ever increasing" "financial burden on the NMB" resulting from its legal obligation to pay the arbitrators' fees for CSXT-BMWE contracting out arbitrations.

As CSXT has previously explained, there has never been any basis for the NMB's "Chicken Little" projections.⁴ The Fifth Watkins Declaration repeats that the NMB arrived at its projected arbitration cost of \$2,325 per case by dividing the total amount paid to Arbitrator Douglas, \$18,600, by the number eight, since PLB No. 6508 decided eight cases. Simple math: \$18,600 divided by 8 = \$2,325. Watkins Fifth Decl. at ¶ 8 n.1. Using this number, Mr. Watkins declares that the NMB would have to pay \$576,000 for the arbitration of the 290 cases its April 7 Order consolidated into PLB No. 6511; \$290,625 for the arbitration of the 125 new cases that BMW filed with the NRAB; and \$253,425 for the arbitration of the 109 additional cases that the BMW allegedly intends to file. Watkins Fifth Decl. at ¶¶ 4, 8.

The NMB's numbers have always been artificial and unrealistic, but the NMB's continued use of the \$2,325 figure is irresponsible. NMB relies on "intervening events" for its Motion. However, "intervening events," as reflected in the NMB's own reports from arbitrators, confirm that the \$2,325 figure was completely unrealistic.

After the NMB repeated its forecast of financial doom in its Motion to Expedite and Fifth Watkins Declaration, CSXT asked the NMB to provide it with the charges of Arbitrator Kenis and Arbitrator Goldstein for, respectively, PLB No. 6509 and 6510. The NMB provided the

⁴ See, e.g., CSXT's Memorandum in Support of its Motion for Summary Judgment at 34-37; CSXT's Opposition to NMB's Motion to Dismiss at 33; CSXT's Reply to NMB's Opposition to CSXT's Motion for Summary Judgment at 23-24.

“Neutral’s Report of Activity” that each Arbitrator had submitted for their work on these PLBs. Copies of the Reports of Arbitrator Kenis and Goldstein are attached as Exhibits 1 and 2 to CSXT’s Opposition. These Reports do not state in dollars the amount paid to the arbitrator. They state the days worked by the Arbitrator on each PLB. Although not stated on the NMB form, the NMB confirmed that it pays arbitrators a fixed rate of \$300 per day. See Exhibit No. 3.

Arbitrator Goldstein’s NMB Reports show that he submitted for a total of 26.5 days. This works out to a fee of \$7,950 for the seven awards he issued. Arbitrator Kenis’ Report showed that she submitted for one day. This works out to a fee of \$300. CSXT wrote back to the NMB asking that the NMB specify in dollars how much that it actually paid the two Arbitrators. The NMB refused to do so, but did confirm that they were paid on the basis of \$300 times the number of days shown on the NMB Reports. See Exhibit No. 3. It is understandable why the NMB cannot bring itself to state how much, in dollars, it paid Arbitrators Kenis and Goldstein. This is because these amounts totally puncture NMB’s inflated projections. According to those projections, the NMB would have paid Arbitrator Goldstein \$15,217 (7 cases x \$2,325). But, the NMB’s records show that he was actually paid only \$7,950.

So, rather than costing the NMB \$ 290,625 annually that the NMB has been telling the Court, the three PLBs that were not cancelled by the NMB cost the NMB a total of \$26,850.⁵ The costs of these three PLBs, moreover, have been spread over three years; Arbitrator Douglas was paid in 2003, Arbitrator Kenis in 2004, and Arbitrator Goldstein in 2005.

The amounts billed the NMB by Arbitrator Goldstein, moreover, show that payments for future arbitrations of contracting out cases can be expected to drop substantially, to as little as

⁵ The \$18,600 paid to Arbitrator Douglas, \$300 to Arbitrator Kenis, and \$7,950 to Arbitrator Goldstein equals \$26,850.

\$700 per case rather than NMB's figure of \$2,325. Of the \$7,950 charged by Arbitrator Goldstein, \$3,750 was for Case No. 1 decided by PLB No. 6510. The NMB Reports submitted for Case No. 1 total 12.5 days, which equates to \$3,750 (12.5 x \$300). Case No. 1 was more costly than the other six cases decided by him, because BMW reargued in Case No. 1 the issue common to all of the cases of whether, as BMW argued, CSXT completely bargained away the right to contract out work within the scope of the June 1, 1999 Agreement. As explained, Arbitrator Goldstein, after considering the parties' arguments, decided to follow the Douglas Award on this issue, the so-called "big" issue. Wilson Decl. at ¶ 9. Having lost the "big" issue twice, BMW hopefully is not going to continue to reargue it. Even if it were, future arbitrators would not need to spend much time on the issue given the rulings of Arbitrators Douglas and Goldstein.

The NMB Report Arbitrator Goldstein submitted for the other six cases for which he issued awards was for 14 days, which equates to \$4,200 (14 x \$300) or \$700 per case. The awards issued for these cases incorporated by reference the ruling in Case No. 1 on the "big" issue. The \$700 figure thus is a much more realistic bench mark for what future contracting out cases might cost the NMB.

Even though Mr. Watkins, who, as the NMB's Director of Arbitration, oversees payments to arbitrators, must have been aware of the Reports submitted by Arbitrator Goldstein for work on PLB No. 6510, he failed in his latest, Fifth Declaration to correct his figure of \$2,523 or try to explain away the much lower amounts charged by Arbitrator Goldstein.

The NMB's assertion that it is facing an "ever increasing" "financial burden" every time the BMW files a new case for arbitration with the NRAB or lists a case with a PLB is also just plain wrong. The NMB generally only pays an arbitrator after he or she has issued arbitration

awards in the cases they decide or the arbitration is otherwise concluded. Thousands of cases are filed with the NRAB or listed with a PLB every year in the railroad industry. Many are settled or withdrawn without ever being arbitrated. For example, the parties settled the cases listed on PLB No. 6509 before Arbitrator Kenis held a hearing. Similarly, as the “intervening event” of the Goldstein Awards show, the parties withdrew Case No. 7 listed with PLB No. 6510 without the necessity of an award. Wilson Decl. at ¶ 9.

Based on the foregoing, the Court should completely discount the claimed financial harm as a basis for granting the NMB’s motion.

IV. Neither The NMB Ordered Consolidation Of Cases Nor A Decision In This Litigation Will Resolve The Contracting Out Dispute

There is also no basis for the NMBs’ contention that the consolidation of arbitration cases in a single PLB will bring an end to the contracting out disputes by providing a “template” for the resolution of such disputes. NMB Memo at 4; Watkins Fifth Decl. at ¶ 9. This contention is without merit. As explained in the Wilson Declaration, the Douglas and Goldstein Awards already provide a “template” in that they have settled the fundamental issue of whether CSXT retained any right to contract out. They answer that in the affirmative and also establish the business necessity standard for when CSXT can justify contracting out work covered by the June 1, 1999 System Agreement, as well as the relative burdens of proof on both CSXT and BMW. However, these Awards also show, contrary to the uninformed allegations of the NMB, which has no familiarity whatsoever with the record in any of these contracting out cases, that each case turns on its own unique facts.⁶

⁶ As explained in prior briefing to the Court, CSXT, BMW, and Arbitrator Douglas have each expressly recognized that the contracting out cases are fact-specific and must be determined on a case-by-case basis. See AR 0210; AR 0146- AR 0147. For instance, BMW

In contrast, the NMB has yet to explain how the summary, one-page, non-precedential decisions mandated by its April 7 Order, and which, under the NMB's Order must be made by the neutral in only thirty days for as many as 290 cases, will provide any guidance to the parties on the contracting out dispute.

The NMB is also in error that its April 7 Order will resolve the contracting dispute, because, as the Fifth Watkins Declaration itself shows, the BMWWE will continue to file contracting out cases as long as CSXT continues to exercise its right to contract out. The contracting dispute will not be resolved until a body of arbitration precedents, premised upon the Douglas and Goldstein Awards, better defines the rights and obligations of the parties under the collective bargaining agreement, or the parties negotiate changes to that agreement. Wilson Decl. at ¶ 18.

V. Mr. Watkins' "Opinion" That The Pending Contracting Out Grievances Harm BMWWE And Are Detrimental To The CSXT-BMWWE Relationship Is Inappropriate And Misinformed

Based upon his frequent communications with BMWWE, Mr. Watkins reached the "opinion" that the pending contracting out grievances are "detrimental to the BMWWE" and adversely affect CSXT and BMWWE relationship. Watkins Decl. at ¶¶ 3, 7. Mr. Watkins' "opinion" is not relevant to the legal issues pending before the Court. Moreover, the NMB cannot attribute a position to BMWWE that is inconsistent with BMWWE's public position before the NMB. As explained in prior pleadings, BMWWE, like CSXT, has repeatedly argued to the

explained that "as a practical matter the cases in question can not be consolidated because they are fact driven cases that must be resolved on a case-by-case basis." AR 0212. Arbitrator Douglas stated that the cases must be decided "on a case-by-case basis." AR 0147. In addition, more recently, Arbitrator Goldstein similarly recognized that the contracting out cases are fact specific. He concluded that CSXT had to support its business justification in "each specific case." PLB No. 6510, Award No. 5 at 8 (attached as Exhibit No. 1 to Wilson Decl.).

NMB that the NMB did not have the legal authority under the RLA to cancel the CSXT-BMWE PLBs and force consolidation of contracting out cases into a single PLB. BMWWE has also argued to the NMB that the forced consolidation of its contracting out cases would be harmful to BMWWE, stating, e.g., that the cases “must be determined ‘on a case-by-case-basis,’” and that “there is no practical manner in which such cases can be consolidated.” AR 0211-0215. How can CSXT’s lawsuit be harmful to BMWWE when CSXT and BMWWE share the same legal position and both opposed the NMB’s sua sponte proposal to cancel their agreed upon PLBs?

Finally, and more importantly, as explained in the Wilson Declaration, Mr. Watkins misperceives the ongoing relationship between CSXT and BMWWE. The bargaining relationship between CSXT and its predecessor railroads and BMWWE spans more than fifty years. Any current tension in CSXT and BMWWE’s relationship due to the contracting out grievances arises from their disagreement over CSXT’s right to contract out under the June 1, 1999 System Agreement. Wilson Decl. at ¶ 18. The fact that 290 cases are pending does not add to that strain. The summary resolution of these cases under the NMB’s proposed extraordinary procedure would not eliminate this strain. If anything, it could add to it, by encouraging BMWWE to file even more claims than it already has. Indeed, given that BMWWE has continued to file claims and progress cases to arbitration in great numbers, even though Arbitrators Douglas and Goldstein held that CSXT has a right to contract out certain work, there is no reason to believe that a summary, non-precedential resolution of the pending cases would dissuade BMWWE from filing new claims, or CSXT from continuing to contract out under its interpretation of the agreement. Wilson Decl. at ¶ 6.

V. CONCLUSION

For all the foregoing reasons, CSXT respectfully requests that the NMB's Motion for Expedited Consideration be denied.

Respectfully Submitted,

By: /s/
Ronald M. Johnson – D.C. Bar #262311
David P. Callet – D.C. Bar #181990
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire Avenue
Washington, DC 20036
(202) 887-4000

ATTORNEYS FOR PLAINTIFF
CSX TRANSPORTATION, INC.

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