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SERVICE DATE - LATE RELEASE OCTOBER 15, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33134

NORTH CAROLINA RAILROAD COMPANY—PETITION TO SET TRACKAGE
COMPENSATION AND OTHER TERMS AND CONDITIONS—NORFOLK SOUTHERN
RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND ATLANTIC
AND EAST CAROLINA RAILWAY COMPANY

Decided: October 14, 1999

In a motion to dismiss filed on September 2, 1999, petitioner North Carolina Railroad Company (NCRR) states that it has reached a voluntary settlement with respondents Norfolk Southern Railway Company, Norfolk & Western Railway Company, and Atlantic and East Carolina Railway Company (collectively, NS) over the matters at issue in this proceeding to set interim and permanent compensation for NS's use of NCRR's tracks.¹ Accordingly, NCRR requests that an order be entered dismissing its petition. NS filed a reply in support of the motion to dismiss on September 15, 1999. On September 22, 1999, the State of North Carolina (the State) also filed a reply in support of the motion to dismiss.

Intervener Walker F. Rucker filed a response in opposition to the motion to dismiss on September 14, 1999, in which he incorporates a preemptive motion that he filed on July 30, 1999.² In the July 30 motion, Mr. Rucker had assailed four specific provisions of the parties' Memorandum of Understanding (which ultimately formed the basis for the instant settlement agreement) and had sought an order permitting him and the State to participate in the negotiations that led to the

¹ Details of the dispute are contained in a prior decision served on May 29, 1997. Details of the settlement, which includes interim compensation, are contained in a Master Agreement attached to the motion to dismiss. The Master Agreement incorporates two trackage rights agreements that substitute for an expired lease agreement. The trackage rights agreements were exempted in Norfolk Southern Railway Company—Trackage Rights Exemption—Over North Carolina Railroad Company, STB Finance Docket No. 33788, and Atlantic and East Carolina Railway Company—Trackage Rights Exemption—Line of North Carolina Railroad Company Operated Under Trackage Rights by Norfolk Southern Railway Company, STB Finance Docket No. 33789 (STB served and published on Aug. 27, 1999, at 64 FR 46969).

² NCRR and NS replied jointly on August 10, 1999, to the July 30 motion, and Mr. Rucker filed a response on August 20, 1999.

voluntary settlement.³ NCRR and NS, in their August 10 joint reply, point out that intervenor Rucker's earlier request for the same relief was denied in a decision served May 3, 1999.⁴ In his August 20 response, intervenor Rucker argues that, absent participation by the State (and himself) in the negotiations, the Board must, as a matter of due process, review the final agreement for fairness. To the contrary, the Board has no statutory mandate to review the fairness of voluntary agreements, much less to entertain complaints in the nature of shareholder derivative suits.⁵ Accordingly, Mr. Rucker's July 30 motion, as supplemented in his subsequent replies, will be denied.

NCRR's motion to dismiss is reasonable and will be granted.

It is ordered:

1. Intervenor Rucker's motion to compel participation in negotiations is denied.
2. NCRR's motion to dismiss is granted. The petition to set trackage compensation and other terms and conditions is dismissed with prejudice, and the proceeding is discontinued.

³ Mr. Rucker, representing himself and others, was permitted to intervene in this administrative proceeding to set compensation based on his status as a minority shareholder of NCRR. See decision served May 29, 1997. The State subsequently bought out all the minority shareholders and is now the sole shareholder of NCRR. Mr. Rucker now seeks to "bootstrap" his intervenor status into an order permitting him to participate in the negotiations. He contends further (in his August 20 response) that the State as shareholder, and he as a citizen of the State, have an independent right to participate in the negotiations. However, the State is apparently satisfied with the resulting arrangement as evidenced by its support of the motion to dismiss.

⁴ Inasmuch as a final agreement had not yet been presented to the Board, no action was taken at that time regarding Mr. Rucker's status as an intervenor. NCRR and NS, in their August 10 reply, again challenge Mr. Rucker's continued standing. The challenge is moot in light of the ultimate disposition herein.

⁵ Only the trackage rights agreements incorporated in the settlement agreement are subject to Board jurisdiction under 49 U.S.C. 11323(a)(6), but under 49 CFR 1180.2(d)(7), the agreements are exempt from the statutory requirement of our prior approval and authorization. Even if the agreements were not exempt, the deficiencies alleged by Mr. Rucker do not appear to involve anticompetitive effects, absent which we must approve the agreements under 49 U.S.C. 11324(d).

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3. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary