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SERVICE DATE – NOVEMBER 5, 2004

SURFACE TRANSPORTATION BOARD

DECISION

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 COMPANY, ET AL.

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Settlement Agreement; Issuance of Procedural Schedule.

SUMMARY: On September 15, 2004, the United States Department of Energy and the United States Department of Defense (the Government) joined by Union Pacific Railroad Company (UP) filed a motion requesting approval of an Agreement that would settle these rate reasonableness disputes as between the moving parties. The Surface Transportation Board (Board) is adopting a procedural schedule for filing comments and replies in support of, or opposition to, the proposed Settlement Agreement.

DATES: The effective date of this decision is November 5, 2004. Any parties of record or interested persons, including the United States Department of Justice and the United States Department of Transportation, may file with the Board written comments concerning the proposed Settlement Agreement by December 6, 2004. Replies by the parties to the proposed Settlement Agreement must be filed by December 20, 2004.

ADDRESSES: Any filing submitted in this proceeding must refer to Docket Nos. 38302S and 38376S and must be submitted **either** via the Board's e-filing format **or** in the traditional paper format. Any person using e-filing should comply with the instructions found on the Board's "www.stb.dot.gov"

website, at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an IBM-compatible floppy disk with any textual submission in any version of either Microsoft Word or WordPerfect) to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each filing in these proceedings must be sent to each of the following (any such copy may be sent by e-mail, but only if service by e-mail is acceptable to the recipient): (1) Stephen C. Skubel, Room 6H087 9GC-32) U.S. Department of Energy, 1000 Independence Ave., S.W., Washington, DC 20585; (2) Michael Glennon, Naval Sea Systems Command, 1333 Isaac Hull Ave, S.E., Mail Stop 1150, Washington, DC 20376-1150; (3) Michael L. Rosenthal, Covington & Burling, 1201 Pennsylvania Ave., N.W., Washington, DC 20004; and (4) Louise A. Rinn, Union Pacific Railroad Company, 1400 Douglas St. STOP 1580, Omaha, NE 68179.

PUBLIC INSPECTION: The motion, which includes the Settlement Agreement, is available for inspection in the Docket File Reading Room (Room 755) at the offices of the Surface Transportation Board, 1925 K Street, N.W., in Washington, DC or on the Board's website at "WWW.STB.DOT.GOV." Copies of the motion may be obtained from movants' representatives (Mr. Skubel or Mr. Glennon for the Government and Mr. Rosenthal or Ms. Rinn for UP) at the addresses listed above. The other filings in this proceeding will be available on the Board's website under "E-LIBRARY/Filings."

SERVICE OF DECISIONS, ORDERS, AND NOTICES: The Board will serve copies of its decisions, orders, and notices only on those persons designated on the official service list as a party of record, a member of the United States Congress, or a Governor. All other interested persons may secure copies of such decisions, orders, and notices via the Board's website under "E-LIBRARY/Decisions & Notices" or by arrangement with the Board's copy contractor, ASAP Document Solutions (mailing address: ASAP Document Solutions, Suite 103, 9332 Annapolis Rd., Lanham, MD 20706; e-mail address: asapdc@verizon.net; telephone number: 202-306-4004). ASAP Document Solutions will handle the collection of charges and the mailing and/or faxing of decisions, orders, and notices to persons who request this service.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1609. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1-800-877-8339.]

SUPPLEMENTAL INFORMATION: The Government and UP jointly request the Board's approval of an Agreement to settle these rate reasonableness complaints. The complaints, filed in March 1981 against 21 major railroads under former section 229 of the Staggers Rail Act of 1980, seek reparations and a rate prescription relating to the nationwide movement of radioactive naval spent fuel, other high level radioactive wastes, and the empty containers (casks) used for their movement. The railroad

defendants moved to dismiss the complaints in 1996, following the passage of the ICC Termination Act of 1995, and the proceedings have been held in abeyance for much of the time since then to permit settlement negotiations.

The Agreement applies broadly to the nationwide movement over UP of irradiated spent fuel, parts and constituents; empty casks; radioactive wastes; and buffer and escort cars. It is intended to serve as a model for settlements the Government will seek to negotiate with the remaining railroad defendants. The Government chose to negotiate with UP first because of the potential antitrust problems of negotiating with the railroad defendants as a group and in recognition of UP's central role as the destination carrier for most movements of these commodities.

The Agreement, which movants describe as flexible, comprehensive, long-term, and system wide:

(1) establishes that the movement of these commodities constitute common carrier service; adopts guidelines for their safe handling and for security; and obligates UP to provide on an as needed basis "extra services" as further, or ancillary to, common carrier services;

(2) adopts, and asks the Board to prescribe, a rate methodology to apply to all future movements of these commodities. The methodology adopts maximum revenue-to-variable cost markups (not to exceed to 1.80, 2.50, or 3.51 times the shipment cost, depending on commodity type) of UP's most current system average variable unit costs computed under the Board's Uniform Rail Costing System. Movants state that the proposed rate methodology is built on, and broadens, the rate prescription adopted in Trainload Rates on Radioactive Materials, East R., 364 I.C.C. 981 (1981), and that the combination of the proposed and existing prescription should result in a national rate structure;

(3) adopts, and asks the Board to prescribe rate methodologies to compensate UP both for "extra services" and dedicated train service when requested by the Government and procedures to calculate equitable compensation for emergency related costs that UP may incur;

(4) adopts a procedure to update rates annually to reflect changes in UP's system average unit costs;

(5) requests that UP be dismissed as a defendant in these proceedings, that UP's liability (and that of its predecessors and subsidiaries) for reparations with respect to past and future shipments be extinguished, that the liability of connecting carriers for reparations be preserved as to their portion of the charges assessed on through routes that include(d) UP, and that UP not be required to participate in rate proceedings initiated by the Government against remaining railroad defendants; and

(6) adopts alternative dispute resolution procedures with final recourse to the Board and mechanisms to renegotiate portions of the Agreement if specific circumstances change or if changed circumstances make further adherence to the terms of the Agreement “grossly inequitable” to either party.

The Government separately requests that in challenging through rates that involve UP, it be permitted to establish the liability of non-settling carriers for reparations by showing the unreasonableness of their divisions or proportional rates rather than the unreasonableness of the entire through rate to reduce the administrative burdens and the increased costs that would otherwise be incurred. Additionally, the Government requests that the Board retain jurisdiction over these proceedings and continue holding them in abeyance pending settlement negotiations with remaining railroad defendants.

In support of the motion, the Government and UP claim that the Agreement will result in great savings to the parties and the Board because it will resolve cases that are pending for more than 20 years, prevent future litigation, and facilitate settlements between the Government and remaining railroad defendants. Specifically, movants claim that the Agreement will satisfy all of the Government’s current and future needs for flexible and reliable common carrier service at rates that are substantially reduced from current levels and below what would likely have resulted from litigation and at the same time will release UP from past and future liability for reparations while guaranteeing it compensation that is acceptable in view of the unique characteristics of these commodities and the other benefits of the Agreement.

Movants point out that the Agreement is based on numerous compromises which balance the needs of the parties and resolve difficult and complex issues that would otherwise take years to litigate (e.g., common carrier obligation, market dominance, reasonableness standards, and such costing elements as liability exposure, costs for extra and dedicated train services, and safety precautions). They claim that the Agreement will bring certainty over a broad range of crucial operational and rate issues while providing flexibility (e.g., updating mechanisms, renegotiation provisions, and dispute resolution) over the long term to minimize the potential for future disputes and accommodate changing needs and technologies.

In the movants’ view, the Agreement: (1) is in the public interest because it shifts the transportation focus from controversy and confrontation to cooperation benefitting national goals for the safe handling and storage of these commodities; (2) is consistent with the national rail transportation policy which encourages reliance on competition and the demand for service to establish reasonable rates and seeks to minimize Federal regulatory authority, promote an efficient rail transportation system, and foster sound economic conditions in transportation; and (3) affirms the Board’s policy favoring the private settlement of disputes.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The parties to this proceeding and interested persons must comply with the procedural schedule and requirements outlined above.
2. This decision is effective on November 5, 2004.

Decided: November 1, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary