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SERVICE DATE – AUGUST 26, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 38302S

UNITED STATES DEPARTMENT OF ENERGY AND UNITED
STATES DEPARTMENT OF DEFENSE

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

Docket No. NOR 38376S

UNITED STATES DEPARTMENT OF ENERGY AND UNITED
STATES DEPARTMENT OF DEFENSE

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL.

Decided: August 19, 2013

Digest:¹ This decision approves the agreement negotiated between the United States Departments of Energy and Defense and BNSF Railway Company to settle these longstanding rate reasonableness complaints as between them only. At their request, the Board prescribes the rate and rate update methodology and the maximum revenue-to-variable cost ratios contained in the agreement. The decision also continues to hold these proceedings in abeyance with regard to the remaining railroad defendants to permit continued settlement negotiations.

On September 4, 2012, the United States Departments of Energy (DOE) and Defense (DOD) (the Government), and BNSF Railway Company (BNSF) (collectively, Movants) jointly filed a motion under 49 U.S.C. § 10704 seeking Board approval of a proposed agreement they negotiated (BNSF Agreement or Agreement) to settle the above-captioned rate reasonableness complaints as between them only and a prescription of the rate and rate update methodology and maximum revenue-to-variable cost (R/VC) ratios established in the Agreement. At Movants' request, notice of the BNSF Agreement was served and published in the Federal Register at 77 Fed. Reg. 62,601 on October 15, 2012. Although the Agreement is unopposed, the Western

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language in Decisions, EP 696 (STB served Sept. 2, 2010).

Interstate Energy Board (WIEB)² and CSX Transportation, Inc. (CSXT)³ filed comments, the Government and BNSF filed a joint reply, and WIEB filed a further comment.⁴ This decision grants Movants' joint motion, approves the Agreement, and prescribes the Agreement's rate and rate update methodology and maximum R/VC ratios.

BACKGROUND

Prior History. On March 27, 1981, the Government filed a rate reasonableness complaint in Docket No. NOR 38302S, against 21 major rail carriers (Railroad Defendants)⁵ under § 229 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. The Government challenged the reasonableness of rates in the West and the South for the transportation of spent nuclear fuel and other high level radioactive waste (SNF/HLW) materials, and the empty containers (casks) and buffer and escort cars used for their movement (collectively, radioactive materials). Simultaneously, in Docket No. NOR 38376S, the Government filed a rate reasonableness complaint against all of the Nation's rail carriers under § 229. The Government sought reparations plus interest from the Railroad Defendants in Docket No. NOR 38302S. In Docket

² WIEB states that it is an organization of 12 western states and 3 western Canadian provinces, which are associate members, and that it serves as the energy arm of the Western Governors' Association. According to WIEB, the organization's purpose is to facilitate cooperative state efforts to "enhance the economy of the West and contribute to the well-being of the region's people" through cooperative efforts among member states/provinces and with the federal government in the energy field. WIEB Comment at 1-2.

³ CSXT simultaneously filed a petition for leave to file its comment one day late. The petition is unopposed and will be granted.

⁴ Although replies to replies are not permitted under our rules, 49 C.F.R. § 1104.13(c), Movants have not objected. In the interest of a more complete record, we will accept WIEB's reply to Movants' joint reply.

⁵ Baltimore and Ohio Railroad Company, The Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees, Burlington Northern, Inc., Chesapeake and Ohio Railway Company, The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Chicago and Northwestern Transportation Co., Consolidated Rail Corporation, Delaware and Hudson Railroad Company, The Denver and Rio Grande Western Railroad Company, Louisville and Nashville Railroad Company, Missouri Pacific Railroad Company, Norfolk and Western Railway Company, Pittsburgh and Lake Erie Railroad Company, Providence and Worcester Company, Richmond, Fredricksburg and Potomac Railroad Company, St. Louis, San Francisco Railroad Company, Seaboard Coastline Railroad Company, Southern Pacific Transportation Company, Southern Railway System, Terminal Railroad Association of St. Louis, and Union Pacific Railroad Company.

No. NOR 38376S, the Government sought a prescription of maximum reasonable average R/VC ratios that would apply throughout the Nation to the Government's movement by rail of SNF/HLW materials and an order directing the Nation's rail carriers to translate these averages into reasonable single line and joint commodity rates that would apply to the Government's future movement of SNF/HLW materials. In 1986, the Board's predecessor, the Interstate Commerce Commission (ICC), found that the Railroad Defendants were engaging in an unreasonable practice, imposing substantial and unwarranted cost additives—above and beyond regular train service rates—in an effort to avoid transporting these radioactive materials. The ICC canceled the existing rates and cost additives, prescribed new rates, and awarded reparations. See Commonwealth Edison Co. v. Aberdeen & Rockfish R.R. (Commonwealth Edison), 2 I.C.C.2d 642 (1986).⁶

⁶ The rate complaints at issue here were consolidated in Commonwealth Edison. Prior to their filing, the ICC in Radioactive Materials, Mo.-Kan.-Tex. R.R. (Radioactive I), 357 I.C.C. 458 (1977), found that the refusal by Missouri-Kansas-Texas Railroad Company to transport radioactive materials violated its common carrier obligation, and it ordered the rail carrier to publish tariff rates for these commodities. Shortly thereafter, the ICC disapproved of tariffs filed by the Southern and Western rail carriers, requiring that radioactive materials be moved only at the rail carriers' convenience and only in special trains subject both to applicable rates and special train charges, see Radioactive Materials, Special Train Service (Radioactive II), 359 I.C.C. 70 (1978). The ICC subsequently awarded the Government reparations for the special train charges that had been collected. See U. S. Dep't of Energy v. Balt. & Ohio R.R. (Radioactive III), 364 I.C.C. 951 (1981), appeal dismissed sub nom. Consol. Rail Corp. v. ICC, 685 F.2d 687 (D.C. Cir. 1982). Also in 1978, the ICC found that the refusal by Eastern rail carriers to transport radioactive materials except under private contracts violated their common carrier obligation and ordered them to publish tariff rates for these commodities. See U. S. Energy Res. & Dev. Admin. v. Akron, Canton & Youngstown R.R., 359 I.C.C. 639 (1978), aff'd sub nom. Akron, Canton & Youngstown R.R. v. ICC, 611 F.2d 1162 (6th Cir. 1979), cert. denied, 449 U.S. 830 (1980).

The special train service at issue in Radioactive II and later cases was generally characterized by train service dedicated solely to the transportation of radioactive materials, moving in government approved casks placed on flat cars, accompanied sometimes by buffer cars placed on either side and by a caboose with personnel aboard to observe the shipment in transit. Special trains moved at restricted speeds and, when passed by another train, one of the trains was required to stop while the other passed at restricted speeds. Rail carriers charged substantially higher rates for special train service as opposed to regular train service. See Commonwealth Edison, 2 I.C.C.2d at 648.

That decision was remanded by the United States Court of Appeals for the D.C. Circuit in Union Pacific Railroad v. ICC (Union Pacific), 867 F.2d 646 (D.C. Cir. 1989).⁷ On remand, the ICC ruled that the movement of these radioactive materials for reprocessing was subject to the rate cap on recyclables set out in 49 U.S.C. § 10731(e) and directed the parties to file R/VC evidence to resolve the remaining reparations and rate prescription issues. See U. S. Dep't of Energy v. Balt. & Ohio R.R., 10 I.C.C.2d 112 (1994). While judicial review of that decision was pending, Congress enacted the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which repealed § 10731 in its entirety and directed that all proceedings pending under the repealed section be terminated.

The Railroad Defendants, on January 18, 1996, petitioned the Board to dismiss the complaints, and, in the following year, they invited the Government to explore the possibility of settling the complaints. The petition is still pending but has been held in abeyance to allow the parties to discuss a nationwide settlement covering all of the Railroad Defendants that might carry radioactive materials. After the parties concluded that there were potential antitrust problems with the Government and the Railroad Defendants negotiating together as a group, the Government chose to negotiate first with Union Pacific Railroad Company (UP), the destination carrier for most of the movements of radioactive materials that were to be covered by the nationwide settlement.

On September 15, 2004, the Government and UP jointly sought approval under 49 U.S.C. § 10704 of a settlement agreement (the UP Agreement) that they had negotiated to resolve these complaints as between them only. The Board, in a decision served on August 2, 2005 (UP Decision): (1) approved the UP Agreement; (2) dismissed UP as a party to these proceedings; (3) relieved UP of any obligation to participate further in these or related proceedings involving claims against connecting Railroad Defendants (except that UP remained obligated to respond to the Board's subpoena authority); (4) continued to hold these proceedings in abeyance with regard to the remaining Railroad Defendants; and (5) directed the Government to file quarterly reports on the progress of future settlement negotiations with the remaining Railroad Defendants.

The BNSF Agreement. Movants assert that the BNSF Agreement is substantially similar to the UP Agreement, which they claim has successfully resolved all rate-setting, shipping, and service determinations between UP and the Government, and has governed those parties'

⁷ The court discussed the distinction between "unreasonable practice" and "unreasonable rate" complaints, Union Pacific, 867 F.2d. at 648-49, and determined that in this case, "the so-called 'practice' is manifested exclusively in the level of rates that customers are charged." Id. at 649. The court then concluded that the ICC should have handled this as a rate reasonableness case, not an unreasonable practice case, and should have applied the constrained market pricing methodology adopted in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), or explained why the use of that methodology would have been inappropriate. See Union Pacific, 867 F.2d. at 653.

relationship since taking effect, without substantial issue. The BNSF Agreement, according to Movants, adopts the rate structure and principal terms of the UP Agreement while:

(1) streamlining unnecessarily redundant clauses and sample forms, and omitting clauses made irrelevant by the differences between the two rail carriers' areas of service; (2) clarifying or elaborating upon definitions and accepted practices; (3) revising clauses to account for advancements in technological communications and to reference an updated Uniform Railroad Costing System (URCS);⁸ and (4) making explicit that certain legal standards are applicable regardless of their inclusion in the Agreement (e.g., compliance with applicable safety rules, adherence to any modification of methodologies adopted by the Board, and BNSF's obligations in the event of a lapse in The Price-Anderson Nuclear Industries Indemnity Act, 42 U.S.C. § 2210 (Paragraph 6E) (Price Anderson Act).

The BNSF Agreement—which Movants describe as flexible, comprehensive, and long-term—applies on all of BNSF's rail lines and:

(1) provides for a 25-year term, commencing on the effective date of the Board decision approving the Agreement, continues in effect for additional 5-year periods, subject to a 1-year termination notice requirement, and provides for renegotiation at any time if changing circumstances render continued performance under the Agreement grossly inequitable for either party;

(2) applies broadly—beyond the commodities encompassed in the original complaints—to the nationwide movement on BNSF's rail lines of irradiated spent fuel, parts and constituents; spent nuclear fuel moving from a foreign country to the United States for disposal; empty casks; radioactive materials; and buffer and escort cars (collectively, the Covered Movements) and is structured to cover movements to or from unanticipated geographic areas or in as-yet-unknown types of equipment;

(3) establishes that the movement of these radioactive materials constitutes common carrier service, addresses the elements of service required of BNSF, adopts guidelines for safe handling and security, and obligates BNSF to provide, as needed, "extra services" as described in the Agreement, under rates and terms to be negotiated under the Agreement's guidelines;

(4) discusses the elements of "Basic Services," acknowledges that all rates will be common carrier rates fully subject to the Board's rate reasonableness jurisdiction, see Union Pacific, 867 F.2d at 652, and adopts a rate methodology:

⁸ URCS, the Board's general purpose costing system for all regulatory costing purposes, is used to determine a rail carrier's variable costs in a variety of regulatory proceedings. See Adoption of the Unif. R.R. Costing Sys. as a Gen. Purpose Costing Sys. for All Regulatory Costing Purposes, 5 I.C.C.2d 894 (1989).

(a) to apply to all current and future movements of radioactive materials moving in BNSF's system in common carrier service. The methodology adopts maximum R/VC markups (not to exceed 1.80, 2.50, or 3.51 times the shipment cost, depending on commodity type) over BNSF's most current system-average variable unit costs computed under URCS; and

(b) to compensate BNSF for "extra services" and special or dedicated train service, when requested by the Government, and procedures to calculate "equitable compensation" for emergency-related costs that BNSF may incur;⁹

(5) adopts a methodology to update basic and extra services rates and charges annually to reflect changes in BNSF's system-average unit costs;

(6) preserves the Government's claims against the remaining Railroad Defendants, announces the Government's intent to enforce those claims, and states that the Government:

(a) will not seek to recover from the remaining Railroad Defendants any portion of the disputed freight charges that were collected for transportation over BNSF and predecessor rail carriers released from liability for transportation over the released railroads; and

(b) will reimburse BNSF in the event the Government recovers reparations from the remaining Railroad Defendants for freight charges collected for transportation over BNSF and predecessor rail carriers released from liability and that these remaining Railroad Defendants in turn will recover any or all of those reparations from BNSF;

(7) extinguishes BNSF's liability and that of its predecessors and subsidiaries for reparations for all past shipments of covered movements in which it participated;

(8) relieves BNSF from any further requirement to participate in these proceedings, except in response to a properly issued subpoena under the Board's rules; and

(9) adopts Alternative Dispute Resolution procedures with final recourse to the Board and with mechanisms to renegotiate portions of the Agreement in a limited number of circumstances or if changed circumstances make further adherence to the terms of the Agreement "grossly inequitable" to either party.

⁹ Extra services are activities or services that BNSF would not otherwise perform without extra charge in common carrier service for radioactive materials. Dedicated train service, like special train service, refers to train service dedicated to one commodity (here radioactive materials). See supra note 6.

Movants state that the Agreement is to become effective on the effective date of the Board's decision granting approval and will be implemented by BNSF tendering rate quotations to the Government under 49 U.S.C. § 10721. Contract rates are not involved, they note, citing Omaha Pub. Power Dist. v. Burlington N. R.R., 3 I.C.C.2d 123, 133-134 (1986) (rate tenders under § 10721 do not involve contract rates). They point out that the requested prescription is consistent both with the ICC's prescription in Trainload Rates on Radioactive Materials, Eastern Railroads (Eastern Rate Prescription), 362 I.C.C. 756 (1980),¹⁰ and the Board's 2005 prescription made in connection with the approval of the UP Agreement. Like the Eastern Rate Prescription, they note that the BNSF Agreement covers only one factor in what are most often through rates. They also note that the BNSF Agreement broadens the Eastern rate model to include radioactive shipments of varying weights in varying types of service and equipment with the objective of providing for BNSF rates and service for the term of the Agreement and into the long-term future.

According to Movants, the Agreement: (1) "is between the Government, as a shipper, and one railroad, BNSF," Motion at 10; (2) "is for the sole purpose of resolving the issues between them in these proceedings and is not binding upon them in other proceedings in which they may be or become involved or for any other purposes," id. at 2; (3) "does not purport to resolve any [issues] for any of the other remaining defendants," id. at 10; and (4) as "with respect to the Government's settlement with UP . . . will be binding only between the Government and BNSF and will not have precedential effect regarding the reasonableness of other railroad parties' rates or their common carrier obligations." id.

Movants contend that the Agreement is in both their interests and in the public interest and that it is consistent with the Rail Transportation Policy, 49 U.S.C. § 10101, asserting that it: allows to the maximum extent possible for competition and the demand for service to establish reasonable rates, § 10101(1); minimizes Federal regulatory control, § 10101(2); promotes an efficient rail transportation system, § 10101(3); ensures the development and continuation of a sound rail transportation system, § 10101(4); and fosters sound economic

¹⁰ Movants state that the Agreement applies nationwide except for excluded local movements originating or terminating in the East, which are governed by the Eastern Rate Prescription. There, the ICC evaluated the evidence of record on safety, determined that mandatory special train service "is wasteful transportation and an unreasonable practice," Eastern Rate Prescription, 362 I.C.C. at 773, and prescribed maximum R/VC ratios on a commodity-by-commodity basis at various minimum weights as local and proportional rate factors. The prescription was applicable within the East, although most of the affected movements were through movements destined beyond the lines of the rail carriers covered by the prescription. See Eastern Rate Prescription, aff'd sub nom. Consol. Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir. 1981), cert. denied, 454 U.S. 1047 (1981), supplemented 364 I.C.C. 981 (1981), recon. denied (ICC served Jan. 16, 1991).

conditions in transportation, § 10101(5). They also point out that the Agreement affirms the Board's policy favoring the private settlement of disputes.

In addition, Movants assert that the "Agreement also serves the public interest by not prejudicing the Government's right of action against any remaining defendants," Motion at 13, and that the Government has agreed not to name BNSF as a party in any such action, although any right to request subpoenas for BNSF data and documents is reserved should it be required by the Government to prove the unreasonableness of rates not subject to the BNSF Agreement. In this regard, Movants point out that the majority of Covered Movements are interline movements involving two or more rail carriers, and citing Ford Motor Co. v. ICC, 714 F.2d 1157 (D.C. Cir. 1983) and UP Decision, slip op. at 5-6, they assert that the Board, like the ICC before it, has jurisdiction to approve settlements for rail carriers participating in through rates and services and may, "[i]n cases involving a challenge to a through rate . . . permit 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." Id. at 12.

For purposes of the joint motion, Movants state that they accept the ICC's prior decisions defining the common carrier obligation with respect to radioactive materials. See supra note 6. BNSF also concedes, for purposes of the joint motion and the Agreement only, "that the Board has jurisdiction to approve the Agreement and to prescribe rates that encompass naval, commercial, and foreign research reactor spent fuel, waste shipments, and other related shipments made by or for the Government." Motion at 11. This concession, BNSF asserts, "is in keeping with the holding in [UP Decision] that a concession of market dominance removes that issue from the proceedings." Id.

Movants request that the Board: (1) approve the Agreement; (2) prescribe the rate and rate update methodology and the maximum R/VC ratios that have been agreed to for the movement of radioactive materials and the rail services that are the subject of the Agreement; (3) dismiss BNSF as a defendant in these proceedings; (4) extinguish all of BNSF's liability and that of its predecessors and subsidiaries for all reparations on past shipments of Covered Movements in which they participated, both insofar as the Government is involved and insofar as any connecting rail carrier may seek contribution; (5) preserve the liability of connecting rail carriers for reparations as to their portion of the charges assessed on through routes that include(d) BNSF; and (6) relieve BNSF from any further requirement to participate in these rate proceedings, except that it will remain obligated to respond to a properly issued subpoena under the Board's rules. Movants also request that the Board expressly endorse the Agreement's non-participation clause, Paragraph 14, "Reparation Claims and Rate Challenges Extinguished," and rule that it "will not entertain cross-complaints under 49 C.F.R. § 1111.4(c) against BNSF in proceedings involving DOE/DOD claims for reparations against connecting carriers." Motion at 13.

Movants further request that BNSF be dismissed as a party from: (1) the Government's pending motion, filed on October 3, 1994, to sever issues relating to the quantity of service, including number of routes open for moving radioactive materials nationwide, and to consolidate tariff questions, Motion at 4; and (2) the Railroad Defendants' pending petition, filed on January 18, 1996, to dismiss the complaints in these proceedings, id. at 2. The Government also requests that the Board retain jurisdiction over these proceedings and continue to hold them in abeyance pending further settlement negotiations with the remaining Railroad Defendants. Id. at 3.

DISCUSSION AND CONCLUSIONS

The BNSF Agreement.

A comparison of the BNSF Agreement and the UP Agreement confirms that the latter was anticipated to “serve as a model for settlements the Government will seek to negotiate with the remaining railroad parties.” UP Decision at 3. Based on our review of the BNSF Agreement, we have determined that in most respects it is identical or virtually identical to the UP Agreement. Perhaps the most significant difference is that, in contrast to the UP Agreement, which has an unlimited term, the BNSF Agreement has a specific 25-year term and continues in effect for additional 5-year periods, subject to a 1-year termination notice requirement (Paragraph 25).¹¹

¹¹ The BNSF Agreement also differs from the UP Agreement to the extent that it: (1) elaborates on the definitions for “Covered Movements” and “Government Shipper” (Paragraphs 1B & C); (2) updates the technological provisions that apply to “Billing and Invoicing” (Paragraphs 2A & B) and to “Security” (Paragraph 10A); (3) clarifies that the Government is obligated to pay the applicable additional charges in BNSF’s Tariff 6100 if requests for pickup and delivery cannot be accommodated using BNSF’s regularly scheduled operations (Paragraph 4B); (4) requires that the Government provide shipping forecasts prior to the start of each calendar year and updates during the year (Paragraph 5C); (5) provides that charges for “Extra Services” are governed by Tariff 6100, and, if that tariff does not contain charges for requested Extra Services, provides a negotiation process to estimate the variable cost of performing the Extra Service and requires BNSF to establish a rate for the Extra Service (Paragraph 6B(2)); (6) makes explicit BNSF’s obligations in the event of a lapse in The Price-Anderson Act; and (7) updates the costing tables in the attachments.

With regard to the costing tables, Attachment No. 2 of the BNSF Agreement at 2 references 2005 URCS unit costs in some places and 2010 URCS unit costs in other places. We presume that the references to the URCS “E” Table in Attachment No. 2 should have been to 2010 URCS unit costs, not to 2005 URCS unit costs.

WIEB contends that certain provisions of the proposed Agreement “could be applied to thwart realization of the operational, safety, security, communications, planning, programmatic, and public preference advantages of dedicated trains recommended by the National Academies” in the 2006 study by the National Academies Committee on Transportation of Radioactive Waste (Committee), “Going the Distance?: The Safe Transport of Spent Nuclear Fuel and High-Level Radioactive Waste in the United States.”¹² The Committee, according to WIEB, strongly endorsed DOE’s decision to transport radioactive materials using dedicated trains, and “[t]he National Academies then formally recommended that ‘DOE should fully implement its dedicated train decision before commencing large-quantity shipment of spent nuclear fuel and high-level waste.’” WIEB Comment at 2 (emphasis omitted). WIEB asserts that “BNSF’s obligations under the Settlement Agreement should be clarified to ensure maximum cooperation with the federal government in achieving the national interest in full use of dedicated trains for SNF/HLW transport.” Id. at 6.

WIEB further contends that the UP Agreement cannot be of help in determining whether the requested clarifications are needed to ensure that the BNSF Agreement will achieve full use of dedicated train service. This, according to WIEB, is attributable to the fact that the provisions of the UP Agreement have not been tested because DOE has not asked UP to transport radioactive materials by dedicated train since the UP Agreement became effective in 2005. WIEB urges the Government to fully commit to dedicated train service and expresses the hope that the Government will be able to elect dedicated train service with confidence that, under the Agreement, it will receive full cooperation from BNSF and other rail carriers.

In Radioactive I, the ICC ruled that rail carriers may not refuse to transport as common carriers on the grounds that they are too hazardous if the shipments meet Department of Transportation (DOT) and Nuclear Regulatory Commission (NRC) safety standards, and that the agency has jurisdiction over rail carrier practices to the extent they exceed the safety standards set by DOT and NRC.¹³ Subsequently, in Radioactive II, Radioactive III, and Eastern Rate Prescription, the ICC concluded that it was an unreasonable practice for rail carriers to require that radioactive materials move only in special train service. Consistent with those decisions, the BNSF Agreement, like the UP Agreement before it, provides for common carrier transportation of radioactive materials using either regular train or dedicated train service. Unless Government

¹² WIEB Comment at 2 (emphasis omitted). The National Academies (National Academy of Science, National Academy of Engineering, Institute of Medicine, and National Research Council) serve as advisers to the Nation. They do not perform original research, but instead provide independent expert advice, particularly to Federal agencies, their primary financial sponsors.

¹³ DOT is authorized to formulate regulations for the safe transportation of radioactive materials by rail carrier under 18 U.S.C. § 834(b) and the Hazardous Materials Transportation Act of 1974, 49 U.S.C. § 1801-1812, and is required to consult with NRC before adopting such regulations.

regulations require the use of special or dedicated train service, the Agreement gives the Government full discretion to make that election on a case-by-case basis. If the Government does not ask for dedicated train service, the Agreement provides that radioactive materials will move in regular trains at regular train rates, and when dedicated train service is requested or required, the Agreement provides for that type of service and related options at the rates and procedures negotiated by Movants.

The Agreement thus resolves difficult and complex issues, ones that are decades-old, concerning rate and service obligations that apply to the Government's movement of radioactive materials over the lines of a major Class I rail carrier. It appears to satisfy fully Movants' basic needs as they apply to the movement of radioactive materials by rail, giving them the flexibility they seek, the ability to accommodate changing needs and technologies, and the opportunity to move to a more collaborative business partnership with respect to the transport of Covered Movements. Indeed, the Agreement appears to address the concerns expressed by WIEB. History has shown that it was the rail carriers that had sought to make dedicated train service mandatory for movement of radioactive materials. See supra note 6 and related text. Further, there is nothing in the record to support its contention that BNSF's obligations under the Agreement must be clarified to ensure maximum cooperation with the Government in achieving full use of dedicated trains for the transport of radioactive materials. The Agreement appears to support fully the use of dedicated trains for shipments of radioactive materials if DOE and/or DOD determine(s) that dedicated train service is required or appropriate. DOE and DOD are given complete discretion to request dedicated train service, and should terms of the Agreement be used to thwart those requests, the parties are reminded that the Agreement contains alternative dispute resolution procedures with final recourse to the Board and mechanisms for renegotiation.

CSXT points out that it was not privy to the negotiations that led to the Agreement, that it did not agree to the terms of the Agreement, and that the Agreement does not take into consideration its unique commercial and operational circumstances or those of the other remaining Railroad Defendants. Accordingly, CSXT states that it does not oppose the approval of the Agreement or BNSF's dismissal from these proceedings, provided that the Board clarifies that the Agreement's rate and service terms and obligations apply only to BNSF and the Government, and that the Board's approval does not alter or impose any additional common carrier obligation on non-settling rail carriers beyond the common carrier obligation recognized under existing law. CSXT also asserts that there should be no presumption that the BNSF Agreement will serve as a model for negotiations between it and the Government, and it requests that the Board make clear that: (1) future settlement agreements in this proceeding need not be submitted to the Board for approval; and (2) the approval of the BNSF Agreement does not signal a change in Board policy in this regard.

CSXT expressed similar concerns in connection with the UP Agreement. Like the assurances given by the Board in approving that Agreement, we assure CSXT and the remaining Railroad Defendants that our approval of the BNSF Agreement and our prescription of its rate and rate update methodologies and R/VC ratios are based on

Movants' stipulation and not on a finding of reasonableness under applicable Board standards. The terms and obligations of the BNSF Agreement and its prescribed rate and rate update methodologies and R/VC ratios will be binding only as between BNSF and the Government, will have no precedential effect as to the reasonableness of the rates or the common carrier obligations of non-consenting rail carrier parties in future proceedings or negotiations, and will not be considered a presumptive model for negotiations between CSXT and the Government. Also, we agree with CSXT that future settlement agreements in these proceedings need not be submitted to the Board for formal approval to the extent the signatories do not request, and their agreements are not contingent on, rate prescriptions.

Wherever possible, the Board's longstanding policy is to encourage the private resolution of disputes through voluntary negotiations between all interested parties. The BNSF Agreement is the result of arm's-length negotiations over an extended period of time. Under the circumstances, we see no reason to withhold our approval.

Consistent with Movants' requests, we are: (1) approving the proposed Agreement; (2) prescribing the Agreement's rate and rate update methodology and maximum R/VC ratios; (3) dismissing BNSF as a defendant in these proceedings; (4) extinguishing all of BNSF's liability and that of its predecessors and subsidiaries for all reparations on past shipments of Covered Movements in which they participated, both insofar as the Government is involved and insofar as any connecting rail carrier may seek contribution; (5) preserving the liability of connecting carriers for reparations as to their portion of the charges assessed on through routes that include(d) BNSF; and (6) relieving BNSF from any further requirement to participate in these proceedings, except in response to a properly issued subpoena under the Board's rules.

We are also endorsing the Agreement's non-participation clause, Paragraph 14, "Reparation Claims and Rate Challenges Extinguished." Thus, we will not entertain cross-complaints under 49 C.F.R. § 1111.4(c) against BNSF in proceedings involving DOE/DOD claims for reparations against connecting carriers. In addition, we are dismissing BNSF as a party from: (1) the Government's pending motion, filed on October 3, 1994, to sever issues relating to the quantity of service, including number of routes open for moving radioactive materials nationwide, and to consolidate tariff questions; and (2) the Railroad Defendants' pending petition, filed on January 18, 1996, to dismiss the complaints in these proceedings.

The Abeyance Request.

The Government requests that we retain jurisdiction over these proceedings and continue to hold them in abeyance pending settlement negotiations with the remaining Railroad Defendants. In view of the Board's policy of encouraging the private resolution of disputes, we will continue to hold these proceedings in abeyance and direct the Government to continue filing quarterly reports to keep the Board apprised of the status of negotiations.

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

It is ordered:

1. CSXT's petition for leave to file its comment one day late is granted.
2. WIEB's reply to Movants' joint reply is accepted into the record.
3. Movants' requests that BNSF be dismissed as a party from (a) the Government's pending motion to sever, filed on October 3, 1994, and (b) the Railroad Defendants' pending petition to dismiss, filed on January 18, 1996, are granted.
4. The BNSF Agreement is approved under 49 U.S.C. § 10704.
5. The rate and rate update methodology and the maximum R/VC ratios set forth in the Agreement are prescribed as the maximum reasonable rates as between the signatories.
6. BNSF's liability and that of its predecessors and subsidiaries for reparations on past shipments of Covered Movements in which they participated, both insofar as the Government is involved and insofar as any connecting rail carrier may seek contribution, is extinguished.
7. BNSF is dismissed as a party to these proceedings and relieved of any obligation to participate in them or in related proceedings involving claims against connecting rail carriers, except that BNSF will remain obligated to respond to a properly issued subpoena under the Board's rules.
8. These proceedings will continue to be held in abeyance. The Government is directed to continue filing quarterly reports on the progress of settlement negotiations with the remaining Railroad Defendants.
9. Notice will be published in the Federal Register simultaneously with service of this decision.
10. This decision is effective on September 25, 2013.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.