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SERVICE DATE – OCTOBER 15, 2012

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: October 10, 2012

AGENCY: Surface Transportation Board.

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

SUMMARY: On September 4, 2012, the United States Department of Energy and the United States Department of Defense (the Government) and BNSF Railway Company (BNSF) (collectively Movants), filed a motion requesting approval of an agreement that would settle these rate reasonableness disputes as between them only.<sup>1</sup> The Board is adopting a procedural schedule for filing comments and replies addressing their proposed settlement agreement.

DATES: Comments are due by November 29, 2012. Reply comments are due by December 31, 2012.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. 38302S, et al., 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments and replies

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<sup>1</sup> As detailed below, these proceedings involve disputes among a number of different entities, including other railroad carriers besides BNSF. This settlement applies only to the parties submitting the instant agreement and does not resolve these proceedings in their entirety.

will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website. In addition, send one copy of comments to each of the following: (1) Stephen C. Skubel, Room 6H087, U.S. Department of Energy, 1000 Independence Ave., S.W., Washington, DC 20585; (2) Terrance A. Spann, U.S. Department of Defense, 9275 Gunston Road, Suite 1300, Fort Belvoir, VA 22060; and (3) Jill K. Mulligan, BNSF Railway Company, 2500 Lou Menk Drive, AOB-3, Fort Worth, TX 76131.

FOR FURTHER INFORMATION CONTACT: Marc Lerner, (202) 245-0390. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1-800-877-8339.]

SUPPLEMENTAL INFORMATION: In March 1981, the Government filed these complaints against 21 major railroads (the Railroad Defendants) under section 229 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. The Government sought reparations and a rate prescription relating to the nationwide movement of spent nuclear fuel, other high level radioactive wastes, and the empty containers (casks) and buffer and escort cars used for their movement (radioactive 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 the 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., 2 I.C.C.2d 642 (1986). The United States Court of Appeals for the D.C. Circuit set aside and remanded the decision. See Union Pacific R.R. v. ICC, 867 F.2d 646 (D.C. Cir. 1989). 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 former 49 U.S.C. § 10731(e) and directed the parties to file revenue-to-variable cost (R/VC) evidence to resolve the remaining reparations and rate prescription issues. See United States Department of Energy v. Baltimore & Ohio R.R., 10 I.C.C.2d 112 (1994). While judicial review 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 petitioned the Board to dismiss the complaints in 1996, and, in 1997, they invited the Government to explore the possibility of settling the complaints. Discussions commenced on a nationwide settlement covering all of the Railroad Defendants that might carry radioactive materials. The Government subsequently chose to negotiate only 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, after the parties concluded that there were potential antitrust problems in negotiating with the Railroad Defendants as a group. On September 15, 2004, the Government and UP filed a motion seeking approval under 49 U.S.C. § 10704 of a settlement agreement (the UP Agreement) they had negotiated to resolve these complaints as between them only. The Board, in a decision served in these proceedings on August 2, 2005: (1) approved the UP Agreement; (2) dismissed UP as a party to these proceedings; (3) relieved UP of any obligation to participate 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; and (5) directed the Government to file quarterly reports on the progress of future settlement negotiations with the remaining Railroad Defendants.

Movants jointly request that the Board approve the proposed agreement they have negotiated (the BNSF Agreement) to settle these rate reasonableness complaints as between them only and that the requested approval be without prejudice to the Governments' complaints and other actions insofar as they apply to the remaining Railroad Defendants involved in these proceedings. The UP Agreement, according to Movants, served as a model for their Agreement.

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

(1) provides for a term of 25 years, commencing on the effective date of the Board's approval of the BNSF Agreement, and continues in effect for additional 5-year periods, subject to a 1-year termination notice requirement;

(2) applies broadly to the nationwide movement on BNSF's rail lines of irradiated spent fuel, parts, and constituents; spent fuel moving from foreign countries to the United States for disposal; empty casks; radioactive wastes; and buffer and escort cars. Excluded from the BNSF Agreement are local movements originating and terminating in the East, which are covered by the rate basis prescribed in Trainload Rates on Radioactive Materials, E. Railroads, 362 I.C.C. 756 (1980) and 364 I.C.C. 981 (1981) (Eastern Prescription);<sup>2</sup>

(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; obligates BNSF to provide, as needed, "extra services" as described in the BNSF Agreement, at the rates agreed upon;

(4) adopts a rate methodology to:

(a) apply to all future movements of these radioactive materials in common carrier service. The methodology adopts maximum R/VC markups (not to exceed to 1.80, 2.50, or 3.51 times the shipment cost, depending on commodity type) of BNSF'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 consistent with, but broadens, the rate prescription adopted in Eastern Prescription; and

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<sup>2</sup> Maximum R/VC ratios were prescribed on a commodity-by-commodity basis at various minimum weights as local and proportional rate factors. The prescription was applicable within the East, but primarily was to be used for through movements destined beyond the lines of the rail carriers covered by the prescription. The ICC's 1980 decision, 362 I.C.C. 756, was affirmed in Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir. 1981), cert. denied, 454 U.S. 1047 (1981).

(b) compensate BNSF for “extra services” and dedicated train service, when requested by the Government, and procedures to calculate “equitable compensation” for emergency related costs that BNSF may incur.

(5) adopts a procedure to update rates and “extra services” annually to reflect changes in BNSF’s system-average unit costs;

(6) extinguishes BNSF’s liability (and that of its predecessors and subsidiaries) for reparations in all matters arising out of these proceedings; and

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

Movants request that the Board: (1) prescribe the rate methodology and maximum R/VC ratios that have been agreed to for the radioactive materials and rail services that are the subject of the Agreement; (2) dismiss BNSF as a defendant in these proceedings, preserve the liability of connecting carriers for reparations as to their portion of the charges assessed on through routes that include(d) BNSF, and not require BNSF to participate in rate proceedings initiated by the Government against remaining Railroad Defendants (except that BNSF will remain obligated to respond to the Board’s subpoena authority); (3) retain jurisdiction over these proceedings and continue to hold them in abeyance pending further settlement negotiations; and (4) publish notice of their motion and the proposed BNSF Agreement in the Federal Register and adopt a procedural schedule for the filing of comments and replies.

The Board will grant Movants’ request in part. Notice of their motion and the proposed BNSF Agreement will be published in the Federal Register and a procedural schedule will be adopted for the filing of comments and replies responsive to Movant’s remaining requests.

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

It is ordered:

1. Movants’ request that notice of their motion and proposed agreement be published in the Federal Register is granted.

2. Movants and interested persons must comply with the procedural schedule and requirements outlined above.

3. This decision is effective on date of service.

Decided: October 10, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.