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Associate Administrator for Disaster Assistance.

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SURFACE TRANSPORTATION BOARD

[Docket No. NOR 38302S; Docket No. NOR 38376S]

United States Department of Energy and United States Department of Defense v. Baltimore & Ohio Railroad Company, et al.; 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 October 20, 2016, the United States Department of Energy and the United States Department of Defense (the Government) and Norfolk Southern Railway Company (NSR) (collectively, Movants) filed a motion requesting approval of an agreement (NSR Settlement Agreement) that would settle these rate reasonableness disputes as between them only. The Board is adopting a procedural schedule for filing comments and replies addressing their proposed settlement agreement.

DATES: Comments are due by March 20, 2017. Reply comments are due by April 19, 2017.

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 Web site, at *http://www.stb.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 SW., Washington, DC 20423–0001. Copies of written comments and replies 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 Web site. In addition, send one copy of comments to each of the following: (1) Stephen C. Skubel, Room 6H–087, U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585; (2) Terrance A. Spann, U.S. Department of Defense, 9275 Gunston Road, Suite 1300, Fort Belvoir, VA 22060; and (3) Garret D. Urban, Norfolk Southern Railway Company, Three Commercial Place, Norfolk, VA 23510.

FOR FURTHER INFORMATION CONTACT: Nathaniel Bawcombe, (202) 245–0376. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at: 1–800–877–8339.

SUPPLEMENTARY 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, Public Law 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 (together, radioactive materials). In 1986, the Board's predecessor, the Interstate Commerce Commission (ICC), found that the Railroad Defendants were engaging in an unreasonable practice by 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 directed the Railroad Defendants to cancel 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 District of Columbia Circuit set aside and remanded the decision. *See Union Pac. 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 U.S. Dep't of Energy* v. *Balt. & Ohio R.R.,* 10 I.C.C.2d 112 (1994). While judicial review was pending, Congress enacted the ICC Termination Act of 1995, Public Law 104–88, 109 Stat. 803, which repealed § 10731 in its entirety and directed that all proceedings pending under the repealed statutory provision 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 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. *See id.*

In 2004, the Government and UP moved for approval under 49 U.S.C. 10704 of a settlement agreement they had negotiated to resolve these complaints as between them only. The Board approved that settlement agreement in 2005 and directed the Government to file quarterly status reports on the progress of settlement negotiations with other railroads. *See U.S. Dep't of Energy* v. *Aberdeen & Rockfish R.R.,* NOR 38302S, et al. (STB served Aug. 2, 2005). In 2012, BNSF Railway Company (BNSF) and the Government similarly moved for approval of a settlement agreement, and the Board approved that agreement in a decision served the next year. *See U.S. Dep't of Energy* v. *Aberdeen & Rockfish R.R.,* NOR 38302S, et al. (STB served Aug. 26, 2013) (*BNSF Settlement Decision*). The settlement agreements with UP and BNSF successfully resolved all rate-setting, shipping, and service determinations between those carriers and the Government.

Movants now jointly request that the Board approve the proposed NSR Settlement Agreement and prescribe the rate methodology set forth in it. They assert that the agreement achieves a long-term, system-wide settlement, as between NSR and the Government, of all rate and service issues related to spent fuel and related traffic now moving or likely to move in the future. Movants note that the UP and BNSF settlements have served as a model for the NSR Settlement Agreement.

In particular, the NSR Settlement Agreement:

(1) Has an unlimited term. This differs from the BNSF settlement but follows the UP settlement;

(2) applies broadly to the nationwide movement on NSR'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. With respect to those movements governed 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 Case*),[1] this

[1] In that proceeding, maximum R/VC ratios were prescribed on a commodity-by-commodity basis at

agreement (unlike the prior ones) incorporates a method of determining rates for dedicated trains which grants NSR an increment over the Eastern rate basis to equalize the cost of shipments nationwide;

(3) establishes that the movement of these radioactive materials constitutes common carrier service; addresses the elements of service required of NSR; adopts guidelines for safe handling and security; and obligates NSR to provide, as needed, ''extra services'' as described in the 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 in excess of 1.80, 2.50, or 3.51 times the shipment cost, depending on commodity type, equipment being utilized, and services being performed) of NSR's most current system-average variable unit costs computed under the Board's Uniform Railroad Costing System. The Government agrees to limit the application of the Eastern rate basis established in the *Eastern Case* to the former lines of those railroads specifically listed in the *Eastern Case;* and

(b) compensate NSR for ''extra services'' and dedicated train service, when requested by the Government, and procedures to calculate ''Equitable compensation'' for emergency-related costs that NSR may incur;

(5) adopts a procedure to update compensation for rates and ''extra services'' annually to reflect changes in NSR's system-average unit costs;

(6) extinguishes NSR'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 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.

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 NSR as a defendant in these proceedings, extinguish NSR's liability for reparations in all matters arising out of these proceedings, and relieve NSR from any further requirement to participate in these proceedings (except in response to a properly issued subpoena under the Board's rules); (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 NSR Settlement 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 at this time. Notice of the motion and proposed NSR Settlement Agreement will be published in the **Federal Register.** A procedural schedule will be adopted for the filing of comments on the proposed settlement agreement as well as to permit replies responsive to Movants' remaining requests. Comments are due by March 20, 2017. Reply comments are due by April 19, 2017. Comments should also address whether it is appropriate to close these dockets.[2]

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 its date of service.

Decided: January 31, 2017.

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

Marline Simeon,

Clearance Clerk.

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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 was affirmed in *Consolidated Rail Corp.* v. *ICC,* 646 F.2d 642 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 1047 (1981).

[2] In *BNSF Settlement Decision,* slip op. at 11–12, the Board (at CSX Transportation, Inc.'s request) held 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.'' Since then, the quarterly status reports filed by the Department of Energy refer only to negotiations with NSR. As such, it is not clear whether there are other remaining railroads with whom the Government is engaged in negotiations.

SURFACE TRANSPORTATION BOARD

[Docket No. AB 1251X]

Southwestern Railroad, Inc.—Discontinuance of Service Exemption—in Curry, Roosevelt, Chaves, and Eddy Counties, N.M.

On January 17, 2017, Southwestern Railroad, Inc. (SWRR), filed with the Board a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to discontinue common carrier rail service over approximately 227.6 miles of rail lines consisting of the following segments (the Lines): (1) The Carlsbad Subdivision between milepost 0.5 at Clovis, N.M., and milepost 183.0 at Carlsbad, N.M.; (2) the Carlsbad Yard; [1] (3) the Carlsbad Industrial Spur between milepost 0.0 at Carlsbad, N.M., and milepost 20.0 near Carlsbad, N.M.; and (4) the Loving Industrial Spur between milepost 0.0 at Carlsbad, N.M., and milepost 20.0 at Loving, N.M. The Lines are owned by BNSF Railway Company (BNSF).

SWRR states it acquired authority to lease and operate the BNSF-owned Lines in 2004.[2] According to SWRR, BNSF notified SWRR in 2016 that it wished to resume operations over the Carlsbad Division prior to the termination of the current lease. SWRR states that, after negotiations, SWRR and BNSF filed an amendment to the lease agreement that allowed BNSF to resume operations over the Lines on January 17, 2017.[3] SWRR explains that as of January 17, 2017, both SWRR and BNSF have a common carrier obligation to provide service over the Lines until such time that SWRR's discontinuance authority is granted. Additionally, SWRR states that, because shippers currently served by SWRR will also be served by BNSF during this discontinuance proceeding and will be served by BNSF after any SWRR discontinuance authority is granted, there will be no interruption of service and no shippers served by the Lines will be disadvantaged when and if SWRR ceases operations.

SWRR states that BNSF is the owner of the Lines, but based on information in SWRR's possession, the Lines do not contain federally granted rights-of-way.

[1] SWRR states that there are no mileposts associated with the approximately 5.1 miles of rail lines located in the Carlsbad Yard.

[2] *See Sw. R.R.—Lease & Operation Exemption—Burlington N. & Sanfe Fe Ry.,* FD 34533 (STB served Oct. 22, 2004). SWRR states that SWRR and BNSF have amended the lease agreement five times since its inception.

[3] *See Sw. R.R.—Lease & Operation Exemption—Burlington N. & Sante Fe Ry.,* FD 34533 (Sub-No. 1) (STB served Aug. 12, 2016).