

45836
EB

SERVICE DATE – JUNE 28, 2017

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.

Digest:¹ This decision approves the agreement negotiated between two government departments and Norfolk Southern Railway Company to settle these longstanding rate reasonableness complaints as between them only. At their request, the Board prescribes the rates, rate update methodologies, as amended herein, and the maximum revenue-to-variable cost ratios contained in the agreement.

Decided: June 26, 2017

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) jointly filed a motion seeking Board approval of a proposed settlement agreement (NSR Agreement or Agreement) that would resolve the above-captioned rate reasonableness disputes as between them only. Movants also seek a prescription of the rates and rate update methodologies and maximum revenue-to-variable cost (R/VC) ratios established for the commodities and services that are the subjects of the Agreement. At Movants' request, notice of the NSR Agreement was served on February 1, 2017, and published in the Federal Register (82 Fed. Reg. 9,478) on February 6, 2017. In the notice, the Board solicited comments on the Agreement. No comments were filed. As discussed more fully below, the Board will

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 Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

grant the motion, approve the Agreement, and prescribe the Agreement's rates and rate update methodologies and maximum R/VC ratios.

BACKGROUND

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. 96448, 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, Pub. L. No. 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.

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. (UP Decision), 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). The settlement agreements with UP and BNSF successfully resolved all rate-setting, shipping, and service disputes between those carriers and the Government.

Movants now jointly request that the Board approve their proposed NSR Agreement and prescribe the rate methodologies 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 Agreement.

In particular, the NSR 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, Eastern Railroads (Eastern Case), 362 I.C.C. 756 (1980) and 364 I.C.C. 981 (1981),² this agreement (unlike the prior ones) incorporates a method of setting rates for dedicated trains which grants NSR an increment over the Eastern Case 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 rate methodologies to:

(a) apply to all future movements of these radioactive materials in common carrier service. The methodologies adopt 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 (URCS). 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

² In that proceeding, 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 eastern United States 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).

(b) compensate NSR for “extra services” and dedicated train service, when requested by the Government, and establish 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 state that the Agreement adopts the rate structure and principal terms of the Government’s agreements with UP and BNSF, though improves upon those documents by streamlining redundant clauses and omitting clauses made irrelevant by differences between UP’s, BNSF’s, and NSR’s areas of service; clarifying or elaborating upon definitions and accepted practices; and making explicit certain legal standards applicable regardless of their inclusion in the Agreement. (Mot. at 8-9.) This Agreement also differs from those with UP and BNSF in that part of NSR’s routes are covered by the Eastern Case prescription. (Id. at 5.) The present settlement essentially broadens the Eastern Case model to include radioactive shipments of varying weights in varying types of service and equipment with the object of providing for NSR rates and services into the long-term future.

NSR 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.” (Mot. 15.) This concession, NSR asserts, “is in keeping with the holding in Union Pacific [Railroad] v. I.C.C., 867 F.2d at 646, that a concession of market dominance removes that issue from the proceedings.” (Mot. 15.)

Movants state that the Agreement will be implemented by NSR tendering rate quotations to the Government pursuant to 49 U.S.C. § 10721 or NSR’s successor. Thus, they assert that no contract rates are involved here. All the rates under the proposed methodologies that the Board is being asked to approve will be common carrier rates, which are fully subject to Board oversight for rate reasonableness. (Mot. 17.)

Movants also note that the Agreement does not purport to resolve any issues for the remaining defendants. (Mot. 15.) As the Board determined with respect to the Government’s settlements with UP and BNSF, the terms and obligations of the Government’s settlement with NSR will be binding only between the Government and NSR and will not have precedential effect regarding the reasonableness of other railroad parties’ rates or their common carrier obligations. (Mot. 15.)

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

Movants assert that the "Agreement also serves the public interest by not prejudicing the Government's right of action against any remaining defendants." (Mot. 17.) In this regard, Movants note that the majority of the movements under the Agreement are interline movements involving two or more rail carriers. 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." (Mot. 16.)

Movants request that the Board: (1) prescribe the rate methodologies and maximum R/VC ratios that have been agreed to for the radioactive materials and rail services that are the subject of the agreement; and (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). Furthermore, the Government requests that the Board retain jurisdiction over these proceedings and continue to hold them in abeyance pending further settlement negotiations.

DISCUSSION AND CONCLUSIONS

As the Movants note, the NSR Agreement is substantially similar to the UP Agreement or the subsequent agreement the agency approved involving BNSF. (See Mot. at 8.) Like those agreements, the NSR Agreement resolves difficult and complex issues, 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 transportation of traffic covered by the Agreement.

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

Consistent with Movants' requests, the Board: (1) approves the proposed Agreement; (2) prescribes the Agreement's rate update methodologies (as slightly amended here),³ maximum R/VC ratios, and rates; (3) dismisses NSR as a defendant in these proceedings; (4) extinguishes all of NSR's liability (including that of its predecessors and subsidiaries) for reparations; and (5) relieves NSR from any further requirement to participate in these proceedings, except in response to a properly issued subpoena under the Board's rules.

Finally, in the notice of the NSR Agreement, the Board solicited comment concerning whether it is appropriate to close these dockets given the uncertainty as to whether there are other remaining railroads with whom the Government is engaged in negotiations. No stakeholder commented on the matter, and therefore, the Board will keep these dockets open consistent with the Government's request that the proceedings continue to be held in abeyance pending further settlement negotiations.

It is ordered:

1. The Agreement is approved.
2. The rate update methodologies, as amended above, and rates set forth in the Agreement are prescribed as the maximum reasonable rates as between the signatories.
3. NSR's liability (including that of its predecessors and subsidiaries) for reparations is extinguished.
4. NSR is dismissed as a party to these proceedings and relieved from any further requirement to participate in these proceedings, except in response to a properly issued subpoena under the Board's rules.
5. Filings concerning the Board's amendments to the rate methodologies are due by July 10, 2017.
6. Notice will be published in the Federal Register.

³ In Attachment 1 to the Agreement, it appears that line 120 (row 47) uses a non-indexed figure for "dedicated train cost per mile" (7.2892 for the 2010 level instead of the correct 8.0558 for the 2014 level). The Board will make this adjustment. The Board will also revise the line labeling on rows 66 and 69 from 130a and 131a to 130b and 131b (Dedicated Train on Attachment 1). These changes will make these lines consistent with lines 129a and 129b. Finally, in Attachment 2 to the Agreement, it appears that the Movants have not used figures for lines 113a through 113c found in the URCS E-Tables. The Board will therefore use 8.47617, 1.569, and 4.35166 instead of 8.38392, 1.552, and 4.42317, respectively. However, if the amendments of the rate methodologies raise concerns, the Movants can object and seek clarification or an adjustment by July 10, 2017.

7. This decision is effective on July 28, 2017.

By the Board, Board Members Begeman, Elliott, and Miller.