COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

MICHAEL L. ROSENTHAL
TEL 202.662.5448
FAX 202.778.5448
MROSENTHAL@COV.COM

September 15, 2004

SEP 15 2004
RECEIVED

BY HAND

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

212003 212004

Re: STB Docket Nos. 38302S, 38376S

Dear Secretary Williams:

Enclosed for filing in the above-captioned dockets are an original and ten copies of the Joint Motion of the U.S. Department of Energy, the U.S. Department of Defense, and Union Pacific Railroad Company for Approval of Settlement Agreement and Prescription of Rate Methodology.

We have not included a filing fee because this is a proceeding filed by a federal government agency. 49 C.F.R. § 1002.2(e)(1).

Please date-stamp the three enclosed extra copies of this filing and return them to our messenger.

Thank you for your attention.

Sincerely,

Michael L. Rosenthal

cc: Stephen C. Skubel, Esq.
Robert N. Kittel, Esq.
Parties listed on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

SEP 15 2004
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United States Department of Energy and United States Department of Defense v. Baltimore & Ohio Railroad Company, et al.	ICC Docket No. 38302S 212003
United States Department of Energy and United States Department of Defense v. Aberdeen & Rockfish Railroad Company, et al.	ICC Docket No. 38376S 212004

JOINT MOTION OF THE U.S. DEPARTMENT OF ENERGY,
U.S. DEPARTMENT OF DEFENSE,
AND UNION PACIFIC RAILROAD COMPANY
FOR APPROVAL OF SETTLEMENT AGREEMENT AND
PRESCRIPTION OF RATE METHODOLOGY

J. MICHAEL HEMMER
LOUISE A. RINN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-5000

CAROLYN F. CORWIN
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Counsel for Union Pacific Railroad Company

STEPHEN C. SKUBEL
JANE P. SCHLAIFER
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585
(202) 586-5579

Counsel for U.S. Department of Energy

ROBERT N. KITTEL
Chief, Regulatory Law &
Intellectual Property Division
U.S. Army Legal Services Division
901 N. Stuart Street, Suite 713
Arlington, VA 22203-1837
(703) 696-1640

Counsel for U.S. Department of Defense

September 15, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

United States Department of Energy and United States Department of Defense v. Baltimore & Ohio Railroad Company, et al.	ICC Docket No. 38302S
United States Department of Energy and United States Department of Defense v. Aberdeen & Rockfish Railroad Company, et al.	ICC Docket No. 38376S

JOINT MOTION OF THE U.S. DEPARTMENT OF ENERGY,
U.S. DEPARTMENT OF DEFENSE,
AND UNION PACIFIC RAILROAD COMPANY
FOR APPROVAL OF SETTLEMENT AGREEMENT AND
PRESCRIPTION OF RATE METHODOLOGY

The U.S. Department of Energy and the U.S. Department of Defense ("DOE/DOD," or the "Government"), and Union Pacific Railroad Company ("UP"), parties to the above-captioned proceedings, join in presenting this motion asking the Board to approve their Settlement Agreement attached hereto and to prescribe the rate methodology set forth therein.

This is a global settlement between the Government and UP, settling all matters in controversy between the parties. The Government and UP therefore join in asking the Board to dismiss UP as a party and extinguish UP's liability for any matters arising in connection with these proceedings.

The Government and UP have attached a full copy of their Settlement Agreement dated September 15, 2004, as Exhibit A. They have also attached the following:

1. Memorandum of the U.S. Department of Energy and U.S. Department of Defense in Support of the Joint Motion (Exhibit B).

2. Memorandum of Union Pacific Railroad Company in Support of the Joint Motion (Exhibit C).

3. Form of Order (Exhibit D).

4. Form of Federal Register Notice (Exhibit E).

The separate memoranda demonstrate that the once-opposed parties now support the Settlement Agreement and urge its approval.

The Government and UP stress that their settlement was reached between well-informed parties with expert advisers after over four years of negotiations. The settlement they have reached is for the sole purpose of resolving the issues between them in these proceedings, and it is not binding upon them in other proceedings in which they may be or become involved or for any other purposes.

A. Summary Of Action Requested From The Board

1. The Government and UP ask the Board to approve their Settlement Agreement without prejudice to the Government complaints and other actions insofar as they involve all other carriers in these proceedings.[1]

[1] The Government filed two complaints regarding the same commodities on March 27, 1981. The complaint in Docket No. 38302S, seeking reparations, was served on 21 major railroads. The complaint in Docket No. 38376S, seeking prescription of rates for the future, was served on local agents for the rail industry.

2. The Government and UP ask the Board to prescribe the rate methodology and the maximum revenue-to-variable cost ("R/VC") ratios to which they have agreed for the commodities and rail services that are the subject of the Settlement Agreement.

3. The Government and UP ask the Board to dismiss UP as a defendant in these proceedings,[2] and to take other steps which will be described herein to eliminate any requirement that UP participate further in these proceedings.

4. The Government and UP ask the Board to extinguish UP's liability for reparations in all matters arising out of these proceedings.

5. The Government asks the Board to establish ground rules for further proceedings as more fully set forth in its separate memorandum in support.

6. The Government otherwise asks the Board to retain jurisdiction and to continue to hold the remainder of these proceedings in abeyance pending further settlement negotiations.

B. Commodities Involved

These proceedings involve nationwide Government movements of:

- irradiated fuel elements known as spent fuel, including radioactive parts and constituents;
- empty return, shielded, containers or "casks";

[2] The Settlement Agreement calls for dismissal of UP as a party from both Docket Nos. 38302S and 38376S. UP should thus be dismissed as a party from the Government's pending motion to sever and consolidate tariff questions, filed Oct. 3, 1994, and the pending Petition of the Railroad Defendants to Dismiss the Complaints in Nos. 38302S and 38376S, filed on or about January 16, 1996. UP was also involved in a dispute with the General Services Administration that was related to the court appeal of these proceedings in 1986 that raised the issue whether there should be a credit against reparations. That matter has been resolved outside the Settlement Agreement.

- radioactive waste materials; and
- buffer cars and escort cars accompanying loaded movements.

Due to the heavy weights of the casks that are used to move the spent fuel (as much as 100 tons per container), the Government long ago agreed with the railroads that the loaded movement and the empty return movement should be costed and priced as separate movements. This form of costing and pricing continues in the Settlement Agreement.

The movements in issue in these proceedings are nationwide, except for excluded local movements originating and terminating in the East (former "Official Territory"). The Interstate Commerce Commission ("ICC") prescribed a local and proportional Eastern rate basis some years ago,[3] and that rate basis is not in issue.

C. Railroad Rates And Services At Issue

1. The railroad rates for regular common carrier freight train service for the commodities listed above are in issue in these proceedings. The parties to these proceedings have for many years disputed whether spent fuel can safely move in regular train service. That controversy, briefly described in the footnote,[4] was litigated in proceedings before the ICC, and it has not

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[3] I & S Docket No. 9205, Trainload Rates on Radioactive Materials, Eastern Railroads, 362 I.C.C. 756 (1980), 364 I.C.C. 981 (1981), sustained sub nom. Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir. 1981), cert. denied, 459 U.S. 1047 (1981).

[4] When the carriers operating in the South and West filed tariffs requiring spent fuel and radioactive waste shipments to move only in special trains, rather than in regular freight train service, the ICC disapproved. Radioactive Materials, Special Train Service, 359 I.C.C. 70 (1978). The ICC later awarded the Government reparations for the mandatory special train charges. U.S. Department of Energy v. Baltimore & O.R.Co., 364 I.C.C. 951 (1981), appeal dismissed sub nom. Consolidated RailCorp. v. I.C.C., 685 F.2d 687 (D.C.Cir. 1982). After the Government sought to enforce the reparations order in court, the parties settled, with the railroads paying the Government $8 million of reparations. Special or dedicated trains remain shipper options under the Settlement Agreement unless cars fail to meet certain future standards for head-end movement described in paragraph 13.C. of the Settlement Agreement.

been reopened in the settlement discussion. The parties fully accept those decisions of the ICC for the purposes of this Joint Motion.

In a motion filed October 3, 1994, the Government asked the ICC to sever the issues relating to the quantity of service, including the number of routes open for moving radioactive materials nationwide. The ICC had earlier found that the cancellation by the Southern and Western carriers of their participation in the Uniform Freight Classification ("UFC") on spent fuel without reestablishing other rates and service was in conflict with prior Commission decisions barring flagouts from the UFC.[5] The Settlement Agreement applies to transportation between all points on the UP system.

2. The parties' agreement addresses the elements of common carrier service required of UP in moving spent fuel. The Settlement Agreement specifically describes some of the elements of service that are included in the rate for basic service (*e.g.*, paras. 4 and 6.B.(1)). The Settlement Agreement rests on the common carrier obligations of UP, and at the same time it addresses and resolves issues relating to elements of needed services.

3. Also in issue is whether there are any special handling or other services required for nuclear commodities for which the carriers are entitled to separate and additional compensation above the line haul rates and charges. Ancillary services requested by the shipper would potentially become an issue in the absence of an agreement. The Settlement Agreement addresses and resolves the issue of rates for extra services in paragraph 6.B.

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[5] 10 I.C.C.2d 112, 149.

D. A Complex Proceeding Has Been Settled With Respect To A Major Defendant

1. The underlying complaints in Docket Nos. 38302S and 38376S were filed in 1981 under Section 229 of the Staggers Rail Act of 1980.[6] These are the last of the hundreds of complaints filed under that section.

2. The Government first began shipping spent fuel in shielded casks in the 1950's. In that period the shipments moved under quotations issued under former Section 22 of the Interstate Commerce Act (predecessor of 49 U.S.C. § 10721) as "chemicals" or other descriptions. In 1962 the Southern and Western railroads requested special permission from the ICC to file class rates, which remained in effect until 1988 and were in effect at the time of the filing of the present complaints.

3. The movements that have been actively litigated since 1981 have involved nationwide shipments of naval spent fuel, empty casks, and radioactive waste. The spent fuel shipments moved from any of the Eastern, Gulf, or Western naval ports to Idaho. The return empty casks could move to the ports and also between ports. Radioactive naval waste shipments have moved from the ports to storage centers in Idaho, South Carolina, and the State of Washington.

4. The shipping containers or "casks" for spent fuel and high level radioactive waste are built to contain the radioactivity and to withstand stringent impact, drop, and fire tests mandated by the U.S. Department of Transportation and the U.S. Nuclear Regulatory Commission. These massive casks constructed of lead and stainless steel themselves weigh considerably more than the load of spent fuel they are designed to hold. Such loads have moved by rail for over 45 years without any injury or fatality attributable to the radioactive nature of the commodity.

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[6] Section 229 was codified in a note to 49 U.S.C. § 10701a.

5. In 1986, the ICC ruled in Dockets 38302S and 38376S that high levels of the railroad rates and charges on spent fuel and empty casks amounted to an unreasonable practice. It prescribed new rates and charges and awarded the Government reparations.[7] The Court of Appeals for the District of Columbia Circuit overturned the decision and remanded for additional findings.[8]

6. On remand, the ICC reopened the proceeding with the DOE/DOD as the sole remaining complainants.[9] Much new evidence and argument was presented by the parties under an overall R/VC test and an inquiry into comparable commodities, including whether the commodities in issue were "recyclables" that were entitled to the specially reduced rates Congress had mandated at that time for such shipments. In 1994 the ICC ruled that some of the commodities were recyclables, but it directed the parties to present additional evidence.[10] In the ICC Termination Act of 1995, Congress repealed the special rates for recyclables. The carriers in 1996 filed a petition with this Board under the new statute to dismiss the Government's complaints. The petition is still pending and will be mooted at least as to UP by the Board's approving the Settlement Agreement.

E. Proceedings Have Been Held In Abeyance Pending Settlement Negotiations

1. The proceedings now before the Board have been held in abeyance pending settlement negotiations, which began as an industry-wide effort with all major railroads. It was found,

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[7] Commonwealth Edison v. Aberdeen & Rockfish R.R., 2 I.C.C.2d 642 (1986).

[8] Union Pacific R.R. v. I.C.C., 867 F.2d 646 (D.C. Cir. 1989). The Court concluded that the private utility shippers, originally joined as parties to the proceedings, had not shown market dominance necessary for ICC jurisdiction, and the ICC dismissed them as parties. See also n.11, infra.

[9] See n.11, infra.

[10] 10 I.C.C.2d 112.

however, as the parties entered into rate discussions, that antitrust concerns required them to undertake meaningful negotiations only on a carrier-by-carrier basis. Accordingly this has been done commencing with UP.

2. The Government chose UP as the first carrier with which to negotiate due to its central role as the destination carrier for most past and future shipments. It has been and continues as the sole destination carrier into the naval storage site at Scoville, Idaho.

3. The Government anticipates that the present settlement will serve as a model for subsequent settlements between the Government and the remaining defendants.

F. <u>Precis Of The Settlement Agreement</u>

1. The parties' goal in their negotiations was to achieve a long term, system-wide, agreement on all rate and service issues relating to spent fuel and related traffic now moving or likely to move in the future. The parties have succeeded in developing a comprehensive, long-term, settlement on the movement of naval, commercial, and foreign research reactor spent fuel, radioactive waste, and related traffic. The Settlement Agreement applies to currently moving traffic and to future traffic for which totally new rates may be needed (para. 5). That the Settlement Agreement was structured so that it would cover future movements to or from unanticipated geographic areas or in as-yet-unknown types of equipment became a factor in agreeing on appropriate rate levels.

2. The parties have reached agreement on a rate methodology based on maximum R/VC markups over UP's system-average variable costs computed under the Uniform Rail Costing System ("URCS") for common carrier service (para. 6). The rate methodology applies to movements anywhere on UP's system.

3. The parties have reached agreement on the need for reliable common carrier service. The Settlement Agreement specifically discusses some elements of the needed service in paragraph 4, without attempting to compute the cost of all future service.

4. The parties established rates for "Basic Services" at agreed markups over URCS variable costs, as described in paragraph 6.A. The rate methodology is set forth in detail in Attachment Nos. 1 and 2 to the Settlement Agreement.

5. The parties agreed that they will separately negotiate rates for "Extra Services," which are activities or services that UP would not otherwise perform without extra charge in providing common carrier service for hazardous materials, under guidelines described in paragraph 6.B. and the methodology of Attachment No. 3 to the Settlement Agreement. "Equitable compensation" is the governing standard between the parties under the Settlement Agreement to compensate UP for emergency responses (para. 6.C.). Specific security measures are set forth in paragraph 10 of the Settlement Agreement.

6. In the event of future disagreement regarding any aspect of the Settlement Agreement, paragraph 15 provides a detailed mechanism for Alternative Dispute Resolution. The parties preserved a role for the Board if disputes that arise cannot be resolved through the Alternative Dispute Resolution process. The parties may avail themselves of remedies in other forums only for disputes outside the exclusive or primary jurisdiction of the Board.

7. Under paragraph 25, the Settlement Agreement may be renegotiated if circumstances change in ways that render its continued performance "grossly inequitable" to either party and in a limited number of other circumstances. The parties' belief that the Settlement Agreement covers most eventualities is confirmed in this provision, which allows renegotiation only in limited circumstances.

8. The Settlement Agreement is between the Government, as a shipper, and one railroad, UP. No private shippers are parties to the proceedings in these dockets.[11] However, as the parties suggest more fully below, the public should be notified of the proposed settlement through publication of an appropriate notice of this Joint Motion and the filing of the Settlement Agreement in the Federal Register prior to the Board's reaching a decision thereon.

9. The parties respectfully refer the Board to their separate supporting memoranda giving both the Government's and UP's views on the settlement's reasonableness. They share the view, although perhaps for different reasons, that the Settlement Agreement is in both parties' interest, that it is in the public interest, and that it should be approved by this Board.

10. The Settlement Agreement does not purport to resolve any of the issues discussed above for any of the other defendants.

G. <u>The Board Has Jurisdiction To Approve The Settlement Agreement</u>

1. For purposes of this Joint Motion and the Settlement Agreement only, UP concedes that the Board has jurisdiction to approve the Settlement 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. This concession is in keeping with the holding in <u>Union Pacific R.R.</u> v. <u>I.C.C.</u>, <u>supra</u>, 867 F.2d at 649, that a concession of market dominance removes that issue from the proceedings.

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[11] All private shippers in the separately docketed proceedings (Docket Nos. 37891S, 37998S, 38004S), originally consolidated with the titled proceedings, were dismissed as parties to the consolidated proceeding following the decision of the Court of Appeals in 1989 that they had not shown market dominance. <u>See</u> 867 F.2d at 649-50. The railroads on that appeal conceded market dominance in the case of Government shipments. <u>Id</u>. at 649.

2. Settlement of railroad rate and service controversies that have been pending for long periods before this agency and the ICC, its predecessor agency, well serves the rail transportation policy of 49 U.S.C. § 10101. Consistent with Section 10101(1), the Settlement Agreement allows to the maximum extent possible for competition and demand for services to establish reasonable rates. It minimizes Federal regulatory control, consistent with Section 10101(2). It also promotes an efficient rail transportation system, ensures the development and continuation of a sound rail transportation system and fosters sound economic conditions in transportation. See 49 U.S.C. §§ 10101(3)-(5).

3. Similarly Board policy incorporates and expressly promotes the settlement of controversies between contesting parties. For example, in Press Release 01-8 dated March 1, 2001, then Chairman Morgan advised that the Board "strongly encouraged . . . private sector agreements that establish mechanisms for dispute resolution in lieu of the formal litigation process" and that the Board "encourages parties to work cooperatively with the Board and with one another to promote private-sector negotiations and to find creative resolutions to disputed issues" (pp. 1-2). Chairman Morgan pointed to the present proceedings as among those being held in abeyance to await completion of pending settlement negotiations (p. 11).

4. While some of the movements covered by the Settlement Agreement are and will be local movements on UP, the majority will be interline movements involving two or more participating carriers. The Board, like the ICC before it, has jurisdiction to entertain and approve settlement on less than the through rate and service. Baer Bros. Mercantile Co. v. D.& R.G.R.R., 233 U.S. 479 (1914). Although the Board normally entertains complaints relating to the through

rate,[12] it may retain jurisdiction over the remaining carriers and over the subject matter of rate reasonableness to decide issues relating to less than the through rate.[13]

5. The Settlement Agreement will be implemented by UP's tendering rate quotations to the Government pursuant to 49 U.S.C. § 10721 or its successor. Thus, no contract rates are involved here.[14] All the rates under the proposed methodology that the Board is asked to approve will be common carrier rates, which are fully subject to Board oversight for rate reasonableness.[15]

H. The Board Should Extinguish UP's Liability For Reparations

1. Extinguishment of UP's liability is an important element of the settlement. The Settlement Agreement is expressly contingent on the Board's extinguishing UP's liability for reparations on past shipments of Covered Movements in which it participated (para. 23).

2. Full and fair settlement has been reached on UP's liability for reparations on past shipments. This aspect of the Settlement Agreement is discussed in more detail in the parties' separate supporting memoranda. In sum, the parties agree that the Board, in approving the Settlement Agreement, should extinguish UP's liability for reparations on all past shipments both

[12] Even if the Board has no jurisdiction over a portion of a through rate charged by a foreign carrier, it possesses jurisdiction to require domestic railroads over which it does possess jurisdiction to remain jointly and severally accountable for any unlawfulness in the entire through rate. H.K. Porter Co. v. Central Vermont Railway, 366 U.S. 272 (1961); Canada Packers Ltd. v. Atchison, T.& S.F.R.Co., 385 U.S. 182 (1966). The shipper may waive its right to any portion of such reparations, a matter discussed in more detail in the Government's separate memorandum. See also para. I.2., infra.

[13] Ford Motor Co. v. I.C.C., 714 F.2d 1157, 1160-61 (D.C. Cir. 1983). The Board should also note that the rates prescribed by the ICC in I&S Docket No. 9205, cited in footnote 3, supra, were factors in through rates.

[14] No contract rate is involved in the issuance of tenders under Section 10721. Omaha Public Power District v. Burlington Northern, 3 I.C.C.2d 123, 133-34 (1986).

[15] See Union Pacific R.R. v. ICC, supra, 867 F.2d at 652.

insofar as the Government shipper is involved and insofar as any connecting carrier may seek contribution.

I. **The Government Separately Asks The Board To Establish That It May Challenge Non-Settling Carriers' Divisions (Or Proportional Rates), Rather Than The Entire Through Rate, Where Through Rates Involve UP.**

1. The Settlement Agreement provides that, in a proceeding against non-settling carriers to establish the unreasonableness of a through rate involving UP, the Government may challenge the entire rate, but the Government shall not question the UP local or proportional rate as a factor in a through rate (para. 14). It further provides that the Government will not seek to recover from any other defendant in these proceedings any portion of freight charges collected for transportation on UP (para. 23.B).

2. Those provisions reflect UP's and the Government's agreement that nothing in the Settlement Agreement should prejudice the Government's right of action against any remaining defendant. They reflect the parties' intent to preserve the Government's cause of action against non-settling carriers, and at the same time, to ensure that non-settling carriers will not be held liable for any unreasonableness of UP's freight charges on past shipments.

3. In its separate memorandum, the Government asks the Board to hold that, in challenges to through rates involving UP, it may establish a non-settling carrier's liability by showing the unreasonableness of that carrier's division or proportional rate, rather than the unreasonableness of the entire through rate. The Government foresees difficult administrative questions for the Board and increased costs that would arise in future proceedings if it must

challenge the entire through rate while adhering to the principle that it must not question UP's factor or recover for freight charges collected for transportation on UP.[16]

J. The Board Should Relieve UP Of Any Requirement To Participate Further As A Party In These Proceedings

The Settlement Agreement is contingent upon the Board's relieving UP of any further obligation to participate as a party in future, related, rate or reparation proceedings involving the Government or the remaining defendants (para. 14). The Government has agreed not to name UP as a party, although it reserves the right to request subpoenas for UP data and documents if it is required to prove, contrary to its request to the Board herein, the unreasonableness of through rates. The Board can expressly endorse this provision of the Settlement Agreement by, (i) expressly approving the non-participation clause of paragraph 14 of the Agreement, and (ii) ruling it will not entertain cross-complaints under 49 C.F.R. § 1111.4(c) against UP in proceedings involving DOE/DOD claims for reparations against connecting carriers.

K. The Board Should Prescribe The Agreed-Upon Rate Methodology

1. The parties ask the Board to prescribe the rate methodology described in the Settlement Agreement, specifically in paragraph 6 and Attachments 1, 2, and 3 to the Settlement Agreement, as well as in the rate update provisions of paragraph 7. By agreeing to an overall rate methodology, the parties ensure a long term solution to the issue of rates.

2. The requested prescription is consistent with the Eastern Rate prescription of I & S Docket 9205 for these commodities.[17] In that proceeding the ICC prescribed maximum R/VC's

[16] UP joins the Government in asking the Board to confirm that dismissing UP and extinguishing UP's liability for reparations will not prejudice the Government's right of action against any non-settling carriers and will not shift liability for what would have been UP's share of reparations to any non-settling carriers. As UP would not be a party to future proceedings (if any), UP takes no position on what the proper procedures should be for determining any non-settling carriers' liability or reparations.

on a commodity by commodity basis at various minimum weights as local and proportional rate factors applicable within the East, although most movements were through movements destined beyond the lines of the carriers covered by the prescription. Similarly here the settlement covers but one factor in what are most often through rates. The present settlement essentially broadens the Eastern Rate model to include radioactive shipments of varying weights in varying types of service and equipment with the object of providing for rates and service into the long-term future.

3. The flexibility provided in the service parameters and rate methodology are needed in view of the number and variety of the covered commodities, and the continuing evolution of the origins and destinations for these commodities nationwide. The parties anticipate that their agreement, for example, will cover the rate and service needs for the long-term movement of spent fuel from the numerous private reactor sites, where DOE will take title to the spent fuel prior to shipment and move the spent fuel to a permanent western repository or storage site at Yucca Mountain in Nevada.[18] The parties intend a long-term life of the Settlement Agreement, including the agreed service features, rate methodology, and update mechanism.

L. The Board Should Establish A Procedural Schedule To Allow Interested Parties To Comment On The Request For Approval Of The Settlement Agreement

The Government and UP believe that it would be appropriate under the circumstances to provide the public with notice and an opportunity to comment on their request for Board approval of their Settlement Agreement. Accordingly, we respectfully request that, as soon as reasonably possible, the Board publish a notice of the parties' request in the Federal Register. A

[17] For the citation to I&S Docket 9205, see footnote 3, supra.

[18] This expectation is discussed in more detail in the Government's separate memorandum in support of the Settlement Agreement.

suggested form of Notice is attached as Exhibit E. We suggest that comments on the parties' request (including any argument or evidence supporting or opposing approval of the Settlement Agreement) be due 45 days later, with the parties' rebuttal in support of their request (if any) due 30 days thereafter. The proposed schedule would provide interested persons a full and fair opportunity to comment on the parties' request.

The parties' request and the actions to be taken pursuant to a Board order approving the Settlement Agreement do not constitute a major Federal action within the meaning of the National Environmental Policy Act, 42 U.S.C. §§ 4332 *et seq.*, as defined by 40 C.F.R § 1508.18 and applied by the Board in 49 C.F.R § 1105.5. Nor does the requested action by the Board constitute a major regulatory action within the meaning of the Energy Policy and Conservation Act, 42 U.S.C. § 6362(b), or the Board's regulations in 49 C.F.R. part 1105.

CONCLUSION

On the basis of the foregoing Joint Motion, the attached Settlement Agreement, and the supporting memoranda, the Government and UP ask the Board to:

1. Publish notice in the attached form of notice of the filing of this Joint Motion in the Federal Register;

2. Establish the procedural schedule described above;

3. Adopt the attached Order approving the Settlement Agreement, and specifically,

(a) prescribing the rate methodology,

(b) dismissing UP from these proceedings,

(c) extinguishing UP's liability for reparations, and

(d) relieving UP from any further requirement to participate in these proceedings.

The Government also asks the Board to make the additional findings and conclusions that will establish ground rules for further proceedings as negotiations continue between the Government and the remaining carriers. UP takes no position on the merits of this request.

Respectfully submitted,

J. MICHAEL HEMMER
LOUISE A. RINN
Union Pacific Railroad Company
1400 Douglas Street
STOP 1580
Omaha, Nebraska 68179
(402) 544-5000

CAROLYN F. CORWIN
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Counsel for Union Pacific Railroad Company

STEPHEN C. SKUBEL
JANE P. SCHLAIFER
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585
(202) 586-5579

Counsel for U.S. Department of Energy

ROBERT N. KITTEL
Chief, Regulatory Law & Intellectual Property Division
U.S. Army Legal Services Division
901 N. Stuart Street, Suite 713
Arlington, VA 22203-1837
(703) 696-1640

Counsel for U.S. Department of Defense

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 15th day of September, 2004, I served a copy of the foregoing document and the exhibits referenced therein by prepaid first-class mail on the following:

Aberdeen & Rockfish R.R. Co.
P.O. Box 917
Aberdeen, NC 28315

Buffalo & Pittsburgh Railroad
c/o Genesse & Wyoming, Inc.
66 Field Point Road
Greenwich, CT 06830

Montana Rail Link, Inc.
P.O. Box 16390
101 International Way
Missoula, MT 59808

James R. Paschall
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

Richard A. Porach
Pittsburgh & Lake Erie
49 Pius Street
Pittsburgh, PA 15203

Richard E. Weicher
Michael E. Roper
The Burlington Northern and Santa Fe Railway Company
2500 Lou Menk Drive, 3rd Floor
Fort Worth, TX 76131

Paul Hitchcock
Associate General Counsel
CSX Transportation, Inc.
500 Water Street - J150
Jacksonville, FL 32202

Theodore K. Kalick
Canadian National Railway Company
601 Pennsylvania Avenue, N.W.
Suite 500 North Building
Washington, D.C. 20004

Chris Guzzi
Deborah Sedaris
Providence & Worcester Railroad Co.
75 Hammon Street
Worcester, MA 01610

Robert G. Culliford, Esq.
Guilford Transportation System
Iron Horse Park
North Billerica, MA 01862

Richard D. Robey, President
North Shore Railroad Company
356 Priestly Avenue
Northumberland, PA 17857

Tom Arnst, Esq.
RailTex
4040 Broadway
Suite 200
San Antonio, Texas 78209

D.J. Lewis
Director of Marketing
Tuscola & Saginaw Bay Railway Company
308 West Main Street
Matthews Building, Suite 303
Owosso, MI 48867

Paul Guthrie
Canadian Pacific Railway Company
401 9th Avenue, S.W.
Gulf Canada Square, Suite 500
Calgary, Alberta T2P 4 Z4 Canada

Deborah Crockett
GSA, Transportation Audit Division
1800 F Street, N.W.
Washington, D.C. 20405

Michael L. Rosenthal

EXHIBIT A

STB ORIGINAL

SETTLEMENT AGREEMENT

BETWEEN

U.S. DEPARTMENT OF DEFENSE
U.S. DEPARTMENT OF ENERGY

AND

UNION PACIFIC RAILROAD COMPANY

IN

DOCKET NO. 38302S, U.S. DEPARTMENT OF ENERGY AND U.S. DEPARTMENT OF DEFENSE V. BALTIMORE AND OHIO RAILROAD CO., ET AL.,

DOCKET NO. 38376S, U.S. DEPARTMENT OF ENERGY AND U.S. DEPARTMENT OF DEFENSE V. ABERDEEN AND ROCKFISH RAILROAD CO., ET AL.

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ATTACHMENTS

TABLE OF ABBREVIATIONS

AAR	Association of American Railroads
ADR	Alternative Dispute Resolution
CFR	Code of Federal Regulations
DOD	United States Department of Defense
DOE	United States Department of Energy
DOT	United States Department of Transportation
FRA	Federal Railroad Administration
GSA	General Services Administration
NRC	United States Nuclear Regulatory Commission
STB	United States Surface Transportation Board
UP	Union Pacific Railroad Company
URCS	Uniform Rail Costing System
USC	United States Code

SETTLEMENT AGREEMENT

The United States Department of Energy ("DOE") and the United States Department of Defense ("DOD") (collectively, "the Government") and Union Pacific Railroad Company ("UP"), parties to these proceedings, hereby agree to settle all claims of the Government against UP and its predecessor railroads and all issues between these parties remaining for decision in these proceedings in accordance with the terms and conditions set forth below.

1. DEFINITIONS.

A. Commodities. The parties intend by this Settlement Agreement to settle all rate, service, practice, and other issues in and related to these proceedings for all past and future movements over the lines of UP by or for the Government, including naval, utility, and all other shipments of the following commodities:

(1) nuclear reactor fuel elements, irradiated and requiring protective shielding, also known as spent fuel, as well as irradiated parts or constituents, in shielded containers or casks;

(2) empty shielded containers or casks for shipping or handling spent fuel or irradiated parts or constituents and having residual radioactivity;

(3) radioactive waste materials having no reclamation value and requiring either a) protective shielding or b) labeling, marking, or placarding; and

(4) escort and buffer cars used in connection with shipments of any of the commodities listed above.

B. Covered Movements. All such shipments referenced in subparagraph 1.A. will be referred to collectively in this Settlement Agreement as "Covered Movements."

C. Government Shipper. "Government Shipper" includes the Government or a Government-designated shipper or receiver.

2. BILLING AND INVOICING.

A. Bills of Lading. Under this Settlement Agreement UP will offer on a continuing basis to the Government, based on 49 USC 10721 or its successor, the transportation services further described herein. The Covered Movements to which the rates apply must be shipped by or for the Government on shipping papers referencing this Settlement Agreement and the order of the Surface Transportation Board approving this Settlement Agreement with the following legend:

> "Transportation under the tender and bill of lading is subject to a Settlement Agreement dated [to be inserted] between the Government and the Union Pacific Railroad Company and an order of the Surface Transportation Board in Dockets 38302S and 38376S served [date to be inserted] "

The Government Shipper will provide UP a bill of lading specifying the UP tender it is shipping under and the transportation and services requested. Shipping papers may include:

(1) Government-issued bills of lading;

(2) commercial bills of lading endorsed to show that such bills of lading are to be exchanged for Government-issued bills of lading at destination

or converted to Government-issued bills of lading after delivery to the consignee;

(3) commercial bills of lading showing that the Government is either the consignor or the consignee and endorsed with the further following legend: "Transportation under this tender is for the Government and the actual total transportation charges paid to the carrier(s) by the consignor or consignee are to be reimbursed by the Government;" or

(4) commercial bills of lading endorsed with the further following legend: "Transportation under this tender is for the Government and the transportation charges paid to the carrier(s) by the consignor or consignee are to be paid or reimbursed by the Government according to Contract No. [Insert Number]. This may be confirmed by contacting the agency at [Insert telephone number or E-mail address]."

B. Invoices. Regardless of the type of bill of lading used (as described in subparagraphs 2.A.(1), 2.A.(2), 2.A.(3) or 2.A.(4) above), the Government Shipper authorizes individual carrier invoicing for movements over through routes involving railroads other than UP. UP will issue a separate invoice for only its portion of the Covered Movement and collect payment for only its portion of the Covered Movement.

C. Government Representations. Except as provided in subparagraphs 3.A. and 6.E., the Government agrees and represents that if a Government Shipper ships Covered Movements via UP or accepts Covered Movements routed via UP it will do so subject to the terms of this Settlement Agreement. The Government further agrees and represents that the Government has the authority to enter into this Settlement

Agreement and to agree to the rates and terms provided under this Settlement Agreement for each of the types of bills of lading listed in subparagraph 2.A. above. The Government further represents that it has the authority to petition the STB to prescribe the rate levels and other terms provided in this Settlement Agreement. When the Government gives a Government Shipper responsibility for Covered Movements, it will require the Government Shipper to agree to be bound by the terms of this Settlement Agreement. UP retains all rights to obtain from the Government Shipper prompt and full payment for UP's services. If the Government Shipper is a federal entity, then UP will be paid in accordance with the Prompt Payment Act, 31 U.S.C. 3901 *et seq.*, and the payment of transportation statute, 31 U.S.C. 3726, or their successors. If the Government Shipper is a contractor designated by and/or shipping on behalf of the Government, then UP has the same rights for full and prompt payment as it has against any commercial shipper. UP may at its option require payment in advance from the Government Shipper when the Government Shipper is a contractor, unless that contractor acting as the Government Shipper has posted a payment bond adequate to ensure that UP will be paid for all services it provides.

D. UP Representations. UP will maintain its Scoville Branch ("Branch") between Blackfoot, Idaho, and the INEEL facility at Scoville to FRA Class 3 standards. UP may initiate abandonment proceedings only (1) if no shipments have moved over the Branch during the preceding continuous three-year period or (2) earlier if causes beyond UP's control render the Branch unserviceable at FRA Class 1 standards and the Government does not agree either to fund restoration by UP or to take title to the property upon payment of net liquidation value of the Branch to UP. This Settlement Agreement does not limit any Government right to oppose abandonment.

3. SCOPE OF SETTLEMENT AGREEMENT.

A. Other Agreements and Tenders. The Government and UP may agree to transportation of otherwise Covered Movements on terms and conditions different from those in this Settlement Agreement. Nothing in this Settlement Agreement supersedes the terms and conditions of previously issued tenders applicable to otherwise Covered Movements.

B. Conflicts with Tender Form. In the event of a conflict between the terms of this Settlement Agreement and the terms and conditions contained in the Government tender form, the terms of the Settlement Agreement shall govern in the absence of an agreement to the contrary.

4. SERVICE.

A. General. UP undertakes to provide transportation of Covered Movements, including all services normally provided without extra charge by common carriers by rail under 49 USC 11101(a), between all points on its system except as expressly altered or modified in this Settlement Agreement.

B. Routing and Diversion. When UP serves as originating or terminating carrier, pickup or delivery of a shipment shall occur at the Government Shipper's request on any day of the week on reasonable notice without payment of any surcharge for such pickup or delivery. The Government Shipper retains a shipper's normal rights to divert shipments as needed to different destinations and to route shipments by selecting carriers and normally used points of interchange, although not to select routes over UP lines between origin and the destination or interchange point on UP. UP will control selection of routes internal to its system consistent with subparagraph 4.F. below, but UP agrees to consult with the Government when unusual circumstances, such as public demonstrations or other governmental concerns, would make an alternative route preferable.

C. Car Placement and Handling. In making up a train, the escort car, buffer car(s) and loaded cask car(s) should be placed as a group in the train. This group must be placed in the clear of adjacent tracks and rail switch points while in a yard or siding. Escort cars will be used when required by regulation or, in the absence of such regulation, at the discretion of the Government. An escort car moving alone, or a group of cars that includes an escort car, must not be humped or cut off in motion with the engine detached.

D. Equipment Utilization. All cars supplied by the Government Shipper for Covered Movements shall be used in the exclusive service of the Government Shipper, and UP shall route all such cars and empty casks to the location designated by the Government Shipper. Recognizing that the Government Shipper needs to maintain efficient use of such cars and empty casks, UP will exert its best efforts to prevent such cars and empty casks from being subject to unusual delays. When regular train service is supplied, UP will exert its best efforts to use the next appropriate train and to provide transit times equivalent to the regular train transit times UP provides for shipments of similar size and weight.

E. Limitations. UP shall not be responsible under this Settlement Agreement for any non-rail transportation, storage, loading or unloading. UP is not required by this

Settlement Agreement to develop any new facilities, such as new rail lines, sidings, or transloading facilities, except as provided in subparagraph 6.D. below.

F. Practices. The rates agreed to herein include UP's handling and routing of Covered Movements, except for those commodities in subparagraph 1.A.(4) and except as agreed by the parties for commodities in subparagraphs 1.A.(2) and 1.A.(3), using the procedures and practices as outlined in AAR Circular OT-55-E or its replacements for other hazardous materials, which currently provide for:

(1) 50 MPH speed restriction

(2) Use of siding or auxiliary track as specified for a "Key Train"

(3) Emergency brake application response as specified for a "Key Train"

(4) Journal wayside detector report response as specified for a "Key Train"

(5) Wayside defective bearing detectors as specified for "Key Routes"

(6) Main track inspection by inspection cars as specified for "Key Routes"

(7) Meeting or passing track as specified for "Key Trains"

(8) Exercising maximum reasonable efforts to achieve coupling of Covered Movements at speeds not to exceed 4 MPH

(9) Covered Movements cut off in motion must be handled in not more than 2-car cuts except for movements involving an escort car, which shall be handled as described in subparagraph 4.C above. Cars cut off in

motion to be directly coupled to a Covered Movement car must be handled in not more than 2-car cuts.

G. Recovery and Cleanup Procedures. UP will maintain written procedures for recovery and cleanup in the event of an accident or incident. UP will provide a copy or description of its procedures to the Government within one month of the effective date of this Settlement Agreement. UP will rely heavily on Government technical assistance and participation in recovery and cleanup of any accident or incident. Although the Government is not obligated to commit Government employees to perform recovery and cleanup, the Government will arrange for experienced personnel to guide UP and its contractors.

H. Notice and Surveillance. UP will notify the Government Shipper noted in the shipping papers of any problems or accidents or any intention to delay a shipment for weather or other reasons affecting normal operations. UP will promptly notify the Government Shipper of the exact location at which the carrier intends to hold any shipment beyond normal operational delays. Government Shipper escorts accompanying shipments will maintain 24-hour surveillance of any parked shipment.

I. Regulations and Safety. UP will comply with all applicable regulations and requirements of the DOT, FRA, and any other governmental entity having authority to promulgate such regulations and requirements. These regulations include, but are not limited to, FRA rail safety regulations regarding track, equipment, and operating personnel (train crews). The Government will ensure that shipments handled under this Settlement Agreement are tendered in compliance with all applicable DOT, FRA, and NRC regulations. The parties agree that the Covered Movements must be transported safely. If either party becomes aware of substantial evidence not heretofore disclosed to the other party indicating that any aspect of the transportation of Covered Movements (including, but not limited to, equipment and operating practices) creates a material risk of an accident or mechanical failure, it must notify the other party immediately. The parties will meet promptly to determine how to respond to the evidence. If the parties cannot agree on a response, the parties will resolve their disagreement using the procedure set forth in paragraph 15 of this Settlement Agreement. During the pendency of the disagreement, UP or the Government may take actions to mitigate the potential risk. The costs of taking those actions will be allocated in accordance with the resolution of the dispute.

J. Indian Reservations. UP will not stage or hold trains transporting naval spent fuel on the Confederated Tribes of the Umatillas reservation in Oregon or the Shoshone Bannock Tribes, Fort Hall reservation in Idaho. UP will maintain normal movement of such trains through such reservations except for reasons of safety, security of the shipment, or mechanical failure of equipment. Spent fuel shipments will be limited to 35 mph on reservation lands of the Confederated Tribes of the Umatillas and the Shoshone Bannock Tribes.

5. RATE PROCESS.

A. Establishment. UP shall provide rates for the Covered Movements in the form of tenders or rate quotations under 49 USC 10721 or its successor from origins (including established and normally used interchange points for hazardous materials) to destinations (including established and normally used interchange points for hazardous materials) specified by the Government Shipper using the methodology of Attachment No. 1 hereto in the tender format specified by the Government.

B. Future Tenders. UP recognizes that shipments may vary in terms of origin, destination, interchange point, loaded or empty cask weight, and tare weight. UP will provide a tender or rate quotation based on the information supplied within 30 days of receiving a written request from the Government Shipper containing the origin and destination of a movement on UP and applicable weights.

6. RATES AND INDEMNIFICATION.

A. Basic Services. All tenders or rate quotations shall be based on the most current UP system average variable unit costs computed under URCS and the methodology set forth in Attachment No. 1 (hereinafter "Shipment Costs"). Rates for naval shipments to and from Scoville, Idaho, will be at a rate not exceeding 2.5 times Shipment Costs. Rates for all other Covered Movements shall not exceed 3.51 times Shipment Costs, except that rates for unoccupied escort cars and buffer cars not moving with casks shall not exceed 1.8 times Shipment Costs. (Naval spent fuel may be shipped from Scoville to any destination at a rate not to exceed 2.5 times Shipment Costs, but reshipment beyond that destination will be subject to a rate not to exceed 3.51 times Shipment Costs). The multipliers (2.5, 3.51 and 1.8) identified above are the "Applicable Markups" for each type of Covered Movement. Costs will be based on actual point-to-point mileage. UP intends to charge and the Government Shipper will pay charges at the maximum rate levels specified above, but UP may at any time serve notice of reduced rates to meet competition or for any other reason.

(1) Switching Charges. The Government Shipper shall be accorded full benefit of any reciprocal and interline switching agreements in force between UP and other carriers. If a connecting carrier independently requires UP to pay amounts for Covered Movements greater than the standard switching charges generally applicable to hazardous materials shipments under a reciprocal or interline switching agreement or imposes other fees or costs for the handling of a Covered Movement that are not generally applicable to hazardous materials shipments, the Government Shipper will reimburse UP for such additional amounts without further markup. UP will use its best efforts to notify the Government of any attempt by a reciprocal or interline switching carrier to require UP to pay such additional amounts, fees, or costs.

(2) URCS Substitute. In the event that the STB or its successors cease to update the URCS costing methodology, the parties will determine the most appropriate substitute costing methodology that most closely matches the economic structure of URCS methodology or, if unable to agree on a methodology, will renegotiate this Settlement Agreement pursuant to paragraph 25 to the extent necessary to resolve this matter. If a substitute costing methodology is utilized, the ratios to Shipment Costs set forth above and all other ratios to costs in this Settlement Agreement shall be recomputed using the substitute costing methodology for purposes of the subsequent adjustment to rates and other payments. The same procedures set forth in this paragraph will

apply if any substitute costing methodology adopted for use hereunder becomes unavailable.

B. Extra Services.

(1) Scope of Extra Services. The rates provided pursuant to subparagraph 6.A. of this Settlement Agreement cover only common carrier transportation services on UP lines that would be provided without extra charge for other shipments involving hazardous materials, taking into account the weights of Covered Movements and consistent with UP's obligations as a common carrier; provided, however, that UP agrees to treat all of the services identified in subparagraphs 4.C., 4.D., 4.F., 4.H., 4.J. and 10.B. as encompassed within UP's rate for Basic Services. If the Government Shipper asks UP to perform any other activity or service, other than Emergency Responses, in connection with Covered Movements that UP would not otherwise perform without extra charge in providing common carrier service for hazardous materials, such activities or services shall be considered "Extra Services." Such Extra Services shall be provided by UP as additional common carrier services or in all other respects ancillary services to UP's common carrier services. UP will offer such Extra Services, as may be required from time to time, in tenders or rate quotations published under 49 USC 10721 or its successor. Extra Services include, but are not limited to, additional costs of accommodating shipments exceeding Plate "F" dimensions. UP will not unreasonably withhold Extra Services requested by the Government

Shipper; provided, however, that UP will not be obligated to provide Extra Services that would disrupt normal operations, require it to provide beyond its own line of railroad either service or equipment (except as required for normal interchange), or require UP to perform non-transportation services, except for upgrading or rehabilitation of track or rail facilities as provided in subparagraph 6.D.

(2) Rates for Extra Services. UP shall be paid for Extra Services as follows:

(a) The Government Shipper and UP will negotiate the estimated variable cost of performing the Extra Service ("Extra Expense"). UP will then establish a rate for the Extra Service as the product of the Extra Expense multiplied by the Applicable Markup as provided in subparagraph 6.A. ("Extra Service Rate"), except as otherwise provided in subparagraphs 6.B.3. through 6.B.5.

(b) To facilitate the process for determining Extra Expense, the following will apply, unless otherwise specifically agreed by the Government and UP.

(i) Extra Expense for labor, other than for train operations, associated with providing Extra Services will be calculated by application of the methodology in Attachment 3.

(ii) Extra Expense for purchased services associated with providing Extra Services will be based on the expected invoiced cost of purchased service and the estimated expected overhead costs associated with arranging and paying for the purchased service.

(iii) Extra Expense for materials associated with providing Extra Services will be the estimated delivered cost, including taxes and shipping and handling, whether provided by UP or a third party, and the estimated expected overhead costs associated with providing the materials.

(c) Upon completion of any Extra Service UP shall provide to the Government Shipper information detailing actual costs incurred in the performance of the Extra Service. The requirement to provide cost-performance information will not be used by the Government Shipper as a basis for an adjustment to the Extra Service Rate for any Extra Services already performed.

(d) In the event that the Government Shipper and UP cannot agree on the amount of compensation for Extra Services, the matter may be resolved under paragraph 15 Dispute Resolution.

(3) Fees and Permits. The Government Shipper will pay all governmental permits, fees, or charges applicable to UP's transportation of Covered Movements and, to the extent they constitute Extra Services,

for any associated Extra Services. The Extra Service Rate shall be the product of UP's Extra Expense and a Markup of 1.8.

(4) Advance Requirements by Other Parties. The Government Shipper will pay UP for Extra Services requested in advance of a shipment by other governmental authorities, including local, state, federal, and tribal authorities, and by persons acting for them, including Government Shippers, to the extent they impose additional costs on Covered Movements and 50 percent or more of the shipments incurring the additional costs on the UP are Covered Movements. UP will use its best efforts to notify the Government of each such requirement to give the Government an opportunity to discuss the Extra Services with the other governmental authority or party to verify the need for the Extra Services. The Extra Service Rate shall be the product of UP's Extra Expense and a Markup of 1.8.

(5) Meetings. If the Government Shipper invites UP to meetings, exercises, hearings, or other gatherings in connection with Covered Movements, UP will notify the Government Shipper if it considers the requested participation to be Extra Services or voluntary participation by virtue of its interest in attending. If UP considers its participation Extra Services, the Government Shipper will then determine whether it wishes UP to participate. If the Government Shipper requests UP's participation, the Extra Service Rate will be the product of the Extra Expense and a Markup of 1.8. In the event UP chooses to participate by having certain

of its employees attend and the Government Shipper desires additional UP personnel to attend, the Government will compensate UP for the attendance of the additional personnel as Extra Services.

C. Emergency Responses. The Government Shipper will equitably compensate UP for responding to emergencies arising out of transportation of Covered Movements, including the security emergency responses described in subparagraph 10.C., but excluding recovery and cleanup costs actually indemnified pursuant to subparagraph 6.E; provided, however, that a Government Shipper will not be obligated to compensate UP in an amount greater than the Government would be obligated to compensate UP. The compensation will be determined considering UP's reasonable costs, including applicable overheads, and the Applicable Markup as provided in paragraph 6.A. In the event that the Government Shipper and UP cannot agree to equitable compensation, the matter will be resolved under paragraph 15.

D. Track and Facility Limitations. If UP believes that a proposed Covered Movement cannot be handled safely over the track or rail facilities on the proposed route or without damaging the track or facilities, UP will confer with the Government Shipper to identify alternatives for handling the movement. Alternatives may include, without limitation, other routes, other loading locations, special practices, speed restrictions, changing the number or type of cars in the movement, and upgrading the track or facilities. If UP believes it will incur additional operating costs in carrying out an alternative, it will identify such costs to the Government Shipper. If the Government Shipper chooses that alternative, such additional costs will be treated as Extra Services and UP will be compensated as provided in subparagraph 6.B.2. If UP believes an alternative requires UP to upgrade or rehabilitate its track or rail facilities beyond the level necessary for its then-current use in order to handle the Covered Movement, it will identify such costs to the Government. If the Government selects that alternative, the Government will reimburse UP for the agreed upgrading and rehabilitation costs, including overhead, without any markup. In the event the parties are unable to agree on the reimbursement, the matter will be settled under paragraph 15.

E. Indemnification. Transportation of Covered Movements as defined in subparagraphs 1.A.(1) through (3) of this Settlement Agreement is contingent upon the availability of protection under the Price Anderson Act or its successor for public liability arising from the nuclear hazards associated with the Covered Movements. The applicability of this Act will be documented in each bill of lading for a Covered Movement as defined in subparagraphs 1.A.(1) through (3) above. For the purposes of Price Anderson coverage, each bill of lading and not this Settlement Agreement shall constitute an indemnification agreement with UP and each such bill of lading shall be deemed to include such indemnification documentation. No markup will be paid on costs reimbursed under Price Anderson or its successor. With respect to costs that are not indemnified by Price Anderson, the Government will further pay the costs, without markup, of cleanup and recovery actions requested by the Government beyond those contained in the written procedure (see subparagraph 4.G.), including actions required by state, local or tribal authorities. In the event of a lapse in the Price Anderson Act or its successor, UP is not obligated to transport such Covered Movements pursuant to the terms and conditions of this Settlement Agreement until the Price Anderson Act is restored or a successor is enacted. UP will continue to transport the commodities described in subparagraphs 1.A(1) through (3) to the extent of its common carrier obligation, but the rates prescribed by the STB pursuant to this Settlement Agreement will not apply.

7. UPDATES.

UP shall update attachments No. 1, No. 2, and No. 3 at least annually. The updated attachments shall be effective January 1 and be released after the STB releases a new URCS and make-whole factors for the calendar year two years prior to the January 1 adjustment date. If any other data needed for the update are not available to make the calculation, the update shall be made within 30 days after the information becomes available. The updated attachments shall be used to generate tenders and rate quotations, as requested by the Government, and the updated rates shall be effective January 1, retroactively if necessary.

8. GOVERNMENT-SUPPLIED CARS.

A. Requirements. Future shipments of the Covered Movements shall be on cars supplied by the Government Shipper except for Government shipments of returned foreign research reactor fuel tendered in shipper-supplied containers and casks for movement on carrier-supplied cars. The Government Shipper will supply all escort cars and will endeavor to supply all buffer cars required for safe movement. Gross weight on rail of a loaded cask car shall not exceed 789,000 pounds, or, as currently limited by AAR Interchange Rules, 65,750 pounds per axle load for a double three axle truck arrangement and 6 ½ by 12 journal bearings. This specified axle loading limit and corresponding truck arrangement and journal size are subject to change pursuant to changes in the AAR Interchange Rules. All cars supplied by the Government Shipper shall be designed and maintained suitable for interchange service and will comply with AAR Construction Standards at the time built and AAR Interchange Rules in effect at the time of the movement.

B. New Cars. This Settlement Agreement encompasses transportation in freight cars that are not now in service, some of which have not yet been designed or built. Safe transportation of those cars may require operating, train placement, route, or other restrictions and may not be possible in regular train service. The parties will cooperate to define safe and practical designs for those cars and safe operating practices for transportation of the cars. The car design must be in accordance with then effective AAR Interchange Rules and AAR mechanical specifications published in M-1001 or their successors.

9. MILEAGE ALLOWANCES.

The rates provided under this Settlement Agreement assume that no mileage allowance or car hire will be paid by UP for any car. If UP must pay a mileage allowance or car hire for a car provided by the Government Shipper or at the Government Shipper's request, the payments will be reimbursed by the Government Shipper including a 1.8 markup.

10. SECURITY.

A. Coordination. The Government Shipper will maintain ongoing liaison with UP's police department. UP police will provide a 24-hour security emergency contact number. UP acknowledges that shipments of spent fuel require security precautions and therefore require Government Shipper escorts and may require extra security efforts by UP. The Government Shipper will advise UP's police department via facsimile message of a shipment's particulars, including the Government Shipper escorts accompanying the shipment, approximately one week prior to every shipment. UP's police department should share shipment information only with those other railroad personnel and with local and state law enforcement personnel with a "need-to-know" under NRC and railroad security procedures. Under NRC rules (10 CFR 73.21), information protection procedures employed by state and local police forces are deemed to meet NRC requirements for the protection of safeguards information.

B. Communication and Surveillance. UP will provide railroad radio frequencies for programming on radios supplied by the Government Shipper and carried by shipment escorts. The escorts will communicate with train crews only out of operational necessity or in the event of an emergency. Escorts accompanying shipments will maintain 24-hour surveillance of shipments. As provided in subparagraph 4.C., UP will handle and switch the escort vehicle with the container cars so that the escorts can maintain this surveillance.

C. Security Emergency Response. In the event of a security-threatening situation, Government Shipper escorts will request through the train crew, local railroad officials, or the 24-hour security number, that UP initiate a security emergency response to the situation. UP's security emergency response will use best efforts on UP property to:

(1) Ensure that the spent fuel railcars are not moved without proper authority;

(2) Minimize any malicious activity;

(3) Prevent any attempted theft or diversion;

Attachment No. 1. The surcharge is the difference between 1998 URCS costs per train-mile for a dedicated train and the costs per train-mile for a shipment of six loaded cask cars (plus buffer and escort cars) in a regular train based on UP's 1998 system average train characteristics. The cost per dedicated train mile is to be revised up or down annually by multiplying it by a ratio of the latest URCS costs divided by the 1998 URCS costs as shown in Attachment No. 2.

B. Determination of Regular and Dedicated Train Service. When the Government Shipper has not requested special or dedicated trains, UP reserves the right to move the Covered Movements i) in dedicated trains at regular train rates, ii) in regular trains at the rear end of trains; or iii) in regular trains if the parties develop mutually acceptable arrangements to separate casks from escort cars. For the purposes of this Settlement Agreement, the following are specific examples of operational conditions that would not by themselves result in dedicated train charges to the Government:

(1) Operation of the current fleet of DODX escort cabooses (DODX 900-905) prior to provision of cars that satisfy subparagraph C. below for movement in a group with the cask cars at any location in the train consist;

(2) Operation of freight cars with otherwise AAR-approved trucks that do not allow for wayside defective bearing detection; or

(3) AAR adoption of a performance standard requiring movement of spent nuclear fuel in dedicated trains as envisioned by AAR draft circular C-9149 dated May 23, 2000.

C. Notice of Regular Train Service. Unless the parties have agreed on procedures to separate loaded cask cars from escort cars within a train, UP may notify the Government five years in advance that it intends to move Covered Movements at the head end of regular trains on a regular basis. The Government Shipper will provide rail cars (including escort cars) that are structurally suitable for operation at the head end of regular trains. UP will then use regular train service on a regular basis. If the Government Shipper fails to provide suitable cars within five years of the notice, UP may provide and charge for dedicated train service in accordance with subparagraph 13.A.

D. Dedicated Train Service. Where the Government Shipper requests or is charged for special or dedicated trains, such trains shall be used in the exclusive service of the Government Shipper. A dedicated train shall move on UP within a transit time agreed to between UP and the Government Shipper.

14. REPARATION CLAIMS AND RATE CHALLENGES EXTINGUISHED.

In consideration of the settlement of the issues herein, UP will not pay reparations for any shipment subject to the complaints in the cases settled by this Settlement Agreement. The rates established pursuant to this Settlement Agreement will not be subject to challenge as unreasonable or otherwise unlawful under Title 49 of the United States Code or on any other basis, whether or not such basis for a challenge is in effect on the date of this Settlement Agreement or becomes available later. In a proceeding against other railroads to establish the unreasonableness of a through rate involving UP, the Government may challenge the entire rate. The Government shall not question the UP local or proportional rate as a factor in a through rate. The parties agree that UP will not be required to appear in rate proceedings initiated by DOE/DOD against other carriers involving Covered Movements. Nothing in this Settlement Agreement in any way prejudices the Government's right of action against any connecting carrier.

15. DISPUTE RESOLUTION.

A. Alternative Dispute Resolution. The parties recognize that methods for fair and efficient dispute resolution are essential to the successful implementation of this Settlement Agreement. To facilitate the prevention and early resolution of disputes, the parties agree to the following ADR provisions.

(1) Negotiation. The parties shall use their best efforts to informally resolve any dispute, claim, question, or disagreement (herein "Claim") by consulting and negotiating with each other in good faith, recognizing their mutual interests, and attempting to reach a just and equitable solution satisfactory to all parties.

(2) Referral to Neutral. If an agreement cannot be reached through informal negotiations, then such Claim shall be referred to a "neutral" with relevant expertise chosen by the parties. The parties will use their best efforts to select a qualified "neutral" acceptable to both parties. If they are unable to agree, they will ask the STB to designate a qualified "neutral." The "neutral" will consider the Claim under such procedures as he or she may establish. The neutral will serve on the parties a non-binding advisory opinion, but it will not be admissible in evidence in any

subsequent proceeding. The costs of the neutral will be equally divided between UP and the Government.

B. Petition with STB. If disputes arise that cannot be resolved through the ADR process, either party may (1) file a petition with the STB or its successor or (2) pursue whatever other remedies are available at law for disputes outside the exclusive or primary jurisdiction of the STB or any successor, within 60 days of service of the neutral's opinion from the ADR process. The parties agree that they will ask the STB, its successor agency, or any other forum to resolve any petition arising under this Settlement Agreement in a manner that carries out the intent and terms of this Settlement Agreement. The STB, its successor agency, or any other forum should construe the parties' obligations in a manner consistent with UP's common carrier obligations under applicable federal law except as expressly modified herein.

16. GENERAL SERVICES ADMINISTRATION.

Nothing in this Settlement Agreement shall be deemed to alter or supersede the authority reserved for the General Services Administration.

17. FORCE MAJEURE.

In the event any party is unable to meet its obligations under this Settlement Agreement as a result of acts of God, war, insurrection, strikes, accidents, significant risk of disruption or terrorist acts, or other like causes beyond its control, the obligations of the party affected by the force majeure condition shall be suspended for the duration of the condition; provided, however, that the affected party shall make all reasonable efforts to continue to meet its obligations for the duration of the force majeure condition; and provided, further, that the party declaring the force majeure shall promptly notify the other parties by wire, fax or e-mail of when the force majeure began, the nature of the force majeure condition, and when it has been terminated. The suspension of any obligations owing to force majeure shall not affect any rights accrued under this Settlement Agreement prior to the force majeure condition.

18. RELEASED RATES.

The lading and casks that move under this Settlement Agreement and the associated rate quotations or tenders are subject to a released valuation of 40 cents per pound.

19. SUCCESSORS AND ASSIGNS.

This Settlement Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors, assigns, agents, and contractors.

20. COOPERATION.

The parties agree to cooperate to present this Settlement Agreement to the STB for its approval within 10 days of the signing of the Settlement Agreement and to seek approval and adoption of the Settlement Agreement and dismissal of UP from the complaints with prejudice.

21. EFFECTIVE DATE.

The Settlement Agreement shall become effective upon the effective date of the approval of the agreement by the STB.

22. NOTICE.

All notices required by this Settlement Agreement to be served by any party shall be sent to the following:

To UP:	Union Pacific Railroad Company Union Pacific Center 1400 Douglas Street Omaha, Nebraska 68179 Attention: Vice President - Law Fax No.: (402) 501-0129 Attention: Business Director - Environmental Logistics Fax No.: (402) 501-0150
To DOE:	United States Department of Energy Office of the General Counsel 1000 Independence Avenue, SW Washington, DC 20585 Attention: Assistant General Counsel for Federal Litigation Fax No.: (202) 586-3274
To DOD:	Commander CODE NAVSEA 08U/ATTN: Director of Regulatory Affairs Naval Sea Systems Command 1240 Isaac Hull Avenue, SE Stop 8036 Washington Navy Yard, DC 20376-8036 Fax No.: (202) 781-6427

23. RELEASE.

A. STB Order. The intent of this Settlement Agreement is to extinguish all claims against UP and its predecessors under the complaints in these proceedings and to establish legally applicable rates for future Covered Movements that are not subject to challenge. This Settlement Agreement is contingent on adoption of the Settlement Agreement by the STB and issuance of an STB order extinguishing all liability of UP and its present and former subsidiaries for freight charges for Covered Movements and prescribing the rate methodology of Attachment Nos. 1, 2, and 3 hereto.

B. Release. Upon becoming effective, this Settlement Agreement shall release UP, including the former Missouri Pacific, Chicago & North Western, and Southern Pacific railroads, together with their subsidiaries, from any liability to the Government for all claims arising in these proceedings. The release of UP shall not operate to release any other party to these proceedings from liability, and the Government hereby fully preserves and intends to enforce its claims against all other carriers involved in these proceedings; provided, however, that the Government agrees that it will not seek to recover from any other defendant in these proceedings any portion of freight charges collected for transportation on UP or predecessor railroads released from liability for transportation over the released railroads; and provided, further, that in the event the Government recovers reparations from other rail carriers for freight charges collected for transportation on UP or predecessor railroads released from liability and those carriers in turn recover any or all of those reparations from UP, the Government will reimburse UP. Except as required by FRA and STB regulations, UP is not required to maintain documents pertaining to its transportation of Covered Movements prior to the effective date of this Settlement Agreement.

24. WAIVER.

The failure of any party to enforce any provision of this Settlement Agreement or to prosecute any default shall not be construed as a waiver of the provision nor bar prosecution of that default unless so indicated in writing.

25. RENEGOTIATION.

Recognizing that this Settlement Agreement is intended to apply for an unusually long span of time, the Government or UP may demand and obtain renegotiation of the Settlement Agreement if circumstances affecting this Settlement Agreement change in ways that render continued performance of the Settlement Agreement grossly inequitable to either party. If after execution of the Settlement Agreement, the Price Anderson Act is modified or a successor is enacted such that protection for UP is substantially reduced, or UP's cost of obtaining such indemnification is substantially increased, UP may at its option require renegotiation of the Settlement Agreement. If the STB or its successor ceases to update URCS and the parties cannot find an appropriate substitute for URCS, the Settlement Agreement will be renegotiated to adopt a replacement for URCS. The parties agree to renegotiate in good faith. If the parties are unable to reach agreement, they agree to resolve their disagreements by applying the procedures set forth in paragraph 15 above.

26. AVAILABILITY OF APPROPRIATED FUNDS LIMITATION.

Except for public liabilities indemnified under the Price Anderson Act or its successors, the Government's liability under subparagraphs 4.G., 6.B., 6.C., 6.D., and 6.E. of this Settlement Agreement is subject to the availability of appropriated funds at the time a contingency occurs; provided, however, that UP is not required to provide any service or facility for which the Government would otherwise be responsible under this Settlement Agreement but for which it is unable or unwilling to pay; and provided, further, that if transportation of a Covered Movement cannot occur legally or safely without such service or facility, UP shall not be required to provide such transportation until arrangements have been made for payment. Nothing in the Settlement Agreement shall be construed as implying the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

27. CAPTIONS.

All paragraph headings herein are inserted for convenience only and shall not affect any construction or interpretation of this Settlement Agreement.

28. INTEGRATION.

Except as provided in subparagraph 3.A., all prior understandings and agreements between the parties hereto are merged in this Settlement Agreement, which alone fully and completely expresses the parties' intent and understanding.

Executed this 15th day of September, 2004.

Lee Liberman Otis
General Counsel
U.S. Department of Energy

J. Michael Hemmer
Senior Vice-President, Law
General Counsel
Union Pacific Railroad Company

Robert N. Kittel
Chief, Regulatory Law & Intellectual
Property Division
U.S. Army Legal Services Agency
Counsel for
U.S. Department of Defense

Methodology for Determining Shipment Costs for Basic Services

Line	Description	Source/Calculation	Value
Determination of Parameters of Specific Covered Movement			
101a	Gross Weight on Rail - Car # 1	Covered Movement-specific parameter	180.00
101b	Gross Weight on Rail - Car # 2	Covered Movement-specific parameter	30.00
101c	Gross Weight on Rail - Car # 3	Covered Movement-specific parameter	30.00
101d	Gross Weight on Rail - Car # 4	Covered Movement-specific parameter	28.00
	etc.		
101	Shipment Total Gross Weight on Rail	Sum Ls. 101a - 101	268.00
102	Cars handled	Covered Movement-specific parameter	4
103	Number of Originations/Terminations	Covered Movement-specific parameter	1
104	Number of Interchanges	Covered Movement-specific parameter	1
105a	Shipment miles	Covered Movement-specific parameter	1,000
105b	Dedicated train miles	Covered Movement-specific parameter	1,000
Latest System-Average Factors			
106a	Switch minutes per car - terminal	Attachment No. 2 - Line 112	14.533
106b	Switch minutes per car - interchange	Attachment No. 2 - Line 113	4.640
106c	Switch minutes per mile - intermediate	Attachment No. 2 - Line 114	0.014
107	Trailing weight - regular train	Attachment No. 2 - Line 104	5,013.4
108	Average locomotives - regular train	Attachment No. 2 - Line 105	2.687
Factors for Specific Covered Movement			
109	Shipment Gross Ton Miles	L.101 x L.105a	268,000
110	Shipment Train Miles	(L.101/L.107) x L.105a	53.457
111	Shipment Locomotive Unit Miles	(L.101/L.107) x L.105a x L.108	143.638
112	Shipment Cars Originated or Terminated	L.102 x L.103	4
113	Shipment Switch Engine Minutes	L.102 x (L.103xL106a + L.104xL.106b + (L.105a-L.105b)xL.106c)	76.691
Latest Unit Cost Factors			
114	Cost per Gross Ton Mile	Attachment No. 2 - Line 106	0.00246587
115	Cost per Train Mile	Attachment No. 2 - Line 107	7.33833
116	Cost per Locomotive Unit Mile	Attachment No. 2 - Line 108	2.87010
117	Cost per car handled	Attachment No. 2 - Line 109	4.55014
118	Cost per car originated or terminated	Attachment No. 2 - Line 110	18.60243
119	Cost per switch engine minute	Attachment No. 2 - Line 111	5.81691
120	Cost per Dedicated Train Mile	Attachment No. 2 - Line 118	5.46200
Cost for Specific Covered Movement			
121	Gross Ton Mile Cost	L.109 x L.114	660.85
122	Train Mile Cost	L.110 x L.115	392.29
123	Locomotive Unit Mile Cost	L.111 x L.116	412.26
124	Cars Handled Cost	L.102 x L.117	18.20
125	Cars Originated or Terminated Cost	L.112 x L.118	74.41
126	Switch Engine Minute Cost	L.113 x L.119	446.10
127	Dedicated Train Mile Cost	L.105b x L.120	5,462.00
128	Total Shipment Cost	Sum Ls.121 through 127	7,466.11
Determination of Freight Charge			
129	Freight Charge - Category A	L.128 x 250%	18,665.28
130	Freight Charge - Category B	L.128 x 351%	26,206.05
131	Freight Charge - Category C	L.128 x 180%	13,439.00

Note: The Covered Movement-specific parameters are assumed for illustrative purposes only. The calculation of shipment cost for an actual Covered Movement will depend on the actual parameters, including number and weight of cars, distance on UP, number of interchanges, etc. The values for system-average factors and unit cost factors reflect 2002 URCS and 2002 make-whole factors and are applicable for movements in 2004 until superseded by subsequent URCS and subsequent make-whole factors as provided in paragraph 7.
Line 127 Dedicated Train Mile Cost shall be included in the calculation of the Freight Charge only if Paragraph 13 of the Settlement Agreement provides that a charge for dedicated train service applies.

Notes and Explanations

Freight Charge - Category A applies only to U. S. Navy Covered Movements to or from Scoville, ID except for those movements of buffer cars or escort cars described in Category C below.

Freight Charge - Category B applies to all other Covered Movements except for those movements of buffer cars or escort cars described in Category C below.

Freight Charge - Category C applies to buffer and/or escort cars moving alone when immediately preceded by a Category A or Category B move.

Covered Movement-specific parameter as a source refers to operating parameters or other items specific to the shipment being rated. The values shown in lines 101a through 105b, 121 through 127, and 129 through 131 of this attachment are for illustrative purposes only.

Determination of System-Average Factors and Unit Cost Factors

Latest Year = 2002

Line	Description	Source/Calculation	Value
Latest System-Average Factors (R-1)			
101a	Train miles - local (way)	**R-1, Sch. 755, Line 3, Col. (b)**	7,853,644
101b	Train miles - manifest (through)	**R-1, Sch. 755, Line 4, Col. (b)**	109,454,801
101	Train miles - regular trains	L.101a+L.101b	117,308,445
102a	Locomotive unit miles -local (way)	**R-1, Sch. 755, Line 9, Col. (b)**	18,722,621
102b	Locomotive unit miles -manifest (through)	**R-1, Sch. 755, Line 10, Col. (b)**	296,516,850
102	Locomotive unit miles - regular trains	L.102a+L.102b	315,239,471
103a	Gross ton miles - local (way)	**R-1, Sch. 755, Line 100, Col. (b)**	17,332,462
103b	Gross ton miles - manifest (through)	**R-1, Sch. 755, Line 101, Col. (b)**	570,778,077
103	Gross ton miles - regular trains	L.103a+L.103b	588,110,539
104	Trailing weight - regular train	L.103 / L.101	5,013.4
105	Average locomotives - regular train	L.102 / L.101	2.687
Latest Unit Cost Factors			
106a	Cost per gross ton mile - OE	**E1L101C1**	0.00110061
106b	Cost per gross ton mile - DL	**E1L101C2**	0.00055556
106c	Cost per gross ton mile - ROI	**E1L101C3**	0.00080970
106	Cost per gross ton mile - Total	L.106a + L.106b + L.106c	0.00246587
107a	Cost per train mile - other than crew - OE	**E1L103C1**	0.60260
107b	Cost per train mile - other than crew - DL	**E1L103C2**	0.00344
107c	Cost per train mile - other than crew - ROI	**E1L103C3**	0.00260
107d	Cost per train mile - crew	**E1L104C1**	6.72969
107	Cost per train mile - Total	L.107a + L.107b + L.107c + L.107d	7.33833
108a	Cost per locomotive unit mile - OE	**E1L105C1**	1.97741
108b	Cost per locomotive unit mile - DL	**E1L105C2**	0.55299
108c	Cost per locomotive unit mile - ROI	**E1L105C3**	0.33970
108	Cost per locomotive unit mile - Total	L.108a + L.108b + L.108c	2.87010
109a	Cost per car handled - OE	**E1L106C1**	4.55014
109b	Cost per car handled - DL	**E1L106C2**	-
109c	Cost per car handled - ROI	**E1L106C3**	-
109	Cost per car handled - Total	L.109a + L.109b + L.109c	4.55014
110a	Cost per car originated or terminated	**E1L109C1**	14.3195
110b	Make-whole adjustment	**STB factor**	4.28298
110	Cost per car originated or terminated	L.110a + L.110b	18.6024
111a	Cost per switch engine minute - OE	**E1L111C1**	3.74146
111b	Cost per switch engine minute - DL	**E1L111C2**	0.51306
111c	Cost per switch engine minute ROI	**E1L111C3**	1.56239
111	Cost per switch engine minute - Total	L.111a + L.111b + L.111c	5.81691
Latest System-Average Factors (STB)			
112a	Add-on per industry switch event	**STB factor**	45.17873
112b	Additional minutes	L.112a / L.111	7.767
112c	Average switch minutes - terminal	**E2L118C25**	6.76565
112	Revised switch minutes - terminal	L.112b + L.112c	14.533
113a	Add-on per car interchanged	**STB factor**	5.34508
113b	Additional minutes	L.113a / L.111	0.919
113c	Average switch minutes - interchange	**E2L118C26**	3.72111
113	Revised switch minutes - interchange	L.313b + L.313c	4.640
114a	Add-on per thousand car miles	**STB factor**	37.40150
114b	Additional minutes per mile	(L114a / L.111) / 1000	0.006
114c	Average switch minutes - intermediate	**E2L118C29**	1.69141
114d	Distance between intermediate switches	**E2L118C23**	200
114e	Average switch minutes per mile - intermediate	L.114c / L.114d	0.008
114	Revised switch minutes per mile - intermediate	L.114b + L.114e	0.014

Determination of Cost Per Dedicated Train Mile

Line	Description	Source/Calculation	Value
		Latest Year =	2002
Dedicated Train Surcharge Per Mile - 1998 Base			
115	Dedicated Train surcharge per mile (1998 base)	1998-based surcharge	6.4571
1998 URCS Unit Costs Used to Develop Dedicated Train Surcharge Per Mile - 1998 Base			
116a	Cost per train mile - other than crew - OE	**E1L103C1 - 1998**	0.84384
116b	Cost per train mile - other than crew - DL	**E1L103C2 - 1998**	0.00530
116c	Cost per train mile - other than crew - ROI	**E1L103C3 - 1998**	0.00133
116d	Cost per train mile - crew	**E1L104C1 - 1998**	8.60538
116e	Cost per locomotive unit mile - OE	**E1L105C1 - 1998**	1.73868
116f	Cost per locomotive unit mile - DL	**E1L105C2 - 1998**	0.47404
116g	Cost per locomotive unit mile - ROI	**E1L105C3 - 1998**	0.39969
116	Cost per mile - Total	Sum L.116a through L.116g	12.06826
Latest URCS Unit Costs			
117a	Cost per train mile - other than crew - OE	**E1L103C1- Current Year**	0.60260
117b	Cost per train mile - other than crew - DL	**E1L103C2 - Current Year**	0.00344
117c	Cost per train mile - other than crew - ROI	**E1L103C3- Current Year**	0.00260
117d	Cost per train mile - crew	**E1L104C1 - Current Year**	6.72969
117e	Cost per locomotive unit mile - OE	**E1L105C1 - Current Year**	1.97741
117f	Cost per locomotive unit mile - DL	**E1L105C2 - Current Year**	0.55299
117g	Cost per locomotive unit mile - ROI	**E1L105C3 - Current Year**	0.33970
117	Cost per mile - Total	Sum L.117a through L.117g	10.20843
Determination of Cost Per Dedicated Train Mile - Reflecting Latest URCS Unit Costs			
118	Cost per Dedicated Train Mile	L. 115 x L. 117 / L. 116	5.4620

Notes and Explanations

URCS (except for Line 116) and STB make-whole factors as updated annually by the STB. Values in Line 116a through 116g and resulting total will not be updated since they were used in the development of the 1998-based surcharge identified in Line 115.

R-1 values to be updated annually based on UP's R-1 report underlying STB's URCS.

Updated factors will be used effective the first of the year following release (e.g. 2002 URCS, 2002 R-1 and 2002 make-whole factors would have been used for rates effective January 1, 2004).

The Latest Year values shown are for illustrative purposes and will be updated annually as provided in paragraph 7.

Methodology For Determining Labor Charges for Extra Services

1	Maintenance of Way & Structures		
1a	Fringe Benefits - Running	**R-1, Sch 410, L. 112, C. (f)**	$63,601
1b	Fringe Benefits - Switching	**R-1, Sch 410, L. 113, C. (f)**	$14,203
1c	Fringe Benefits - Other	**R-1, Sch 410, L. 114, C. (f)**	$41,303
1d	Fringe Benefits - Total	L1a + L1b + L1c	$119,107
1e	Salary & Wages	**R-1, Sch 410, L. 151, C. (b)**	$268,487
1f	Fringe Benefit additive	L1d / L1e	44.4%
1g	Straight Time Hours	**Wage Form A, 300(4)**	20,211,183
1h	Overtime Hours	**Wage Form A, 300(5)**	2,815,707
1i	Total Hours worked	L1g + L1h	23,026,890
1j	Total Compensation (000)	**Wage Form A, 300(11)**	$570,201
1k	Comp. per hour incl fringe benefits	(L1j*1000/L1i)*(1+L1f)	$35.76
2	Maintenance of Equipment		
2a	Fringe Benefits - Locomotive	**R-1, Sch 410, L. 205, C. (f)**	$63,532
2b	Fringe Benefits - Freight Car	**R-1, Sch 410, L. 224, C. (f)**	$54,009
2c	Fringe Benefits - Other	**R-1, Sch 410, L. 309, C. (f)**	$840
2d	Fringe Benefits - Total	L2a + L2b + L2c	$118,381
2e	Salary & Wages	**R-1, Sch 410, L. 324, C. (b)**	$264,016
2f	Fringe Benefit additive	L2d / L2e	44.8%
2g	Straight Time Hours	**Wage Form A, 400(4)**	18,039,364
2h	Overtime Hours	**Wage Form A, 400(5)**	1,372,548
2i	Total Hours worked	L2g + L2h	19,411,912
2j	Total Compensation (000)	**Wage Form A, 400(11)**	$454,003
2k	Comp. per hour incl fringe benefits	(L2j*1000/L2i)*(1+L2f)	$33.87
3	Transportation		
3a	Fringe Benefits - Admin Support	**R-1, Sch 410, L. 522, C. (f)**	$58,318
3b	Salary & Wages - Admin Support	**R-1, Sch 410, L. 527, C. (b)**	$138,374
3c	Fringe Benefit additive	L3a / L3b	42.1%
3d	Straight Time Hours	**Wage Form A, 500(4)**	3,136,292
3e	Overtime Hours	**Wage Form A, 500(5)**	163,099
3f	Total Hours worked	L3d + L3e	3,299,391
3g	Total Compensation (000)	**Wage Form A, 500(11)**	$96,937
3h	Comp. per hour incl fringe benefits	(L3g*1000/L3f)*(1+L3c)	$41.75
4	Executive & Professional		
4a	Fringe Benefits	**R-1, Sch 410, L. 611, C. (f)**	$102,332
4b	Salary & Wages	**R-1, Sch 410, L. 619, C. (b)**	$269,604
4c	Fringe Benefit additive	L4a / L4b	38.0%
4d	Straight Time Hours	**Wage Form A, 100(4)**	7,490,184
4e	Straight Time Hours	**Wage Form A, 200(4)**	6,520,552
4f	Overtime Hours	**Wage Form A, 200(5)**	395,106
4g	Total Hours worked	L4d + L4e + L4f	14,405,842
4h	Total Compensation (000)	**Wage Form A, 100(11)**	$307,158
4i	Total Compensation (000)	**Wage Form A, 200(11)**	$192,213
4j	Total Compensation (000)	L4h + L4i	$499,371
4k	Comp. per hour incl fringe benefits	(L4j*1000/L4g)*(1+L4c)	$47.84

Note: 2002 R-1 and Wage Form A values are provided for illustrative purposes. R-1 and Wage Form A values utilized in Attachment 3 should be for the same year as the URCS and make-whole values contained in Attachments 1 and 2. Updating of the R-1 and Wage Form A values should be consistent with URCS updating procedures provided in paragraph 7.

EXHIBIT B

BEFORE THE
SURFACE TRANSPORTATION BOARD

United States Department of Energy and United States Department of Defense v. Baltimore & Ohio Railroad Company, et al.	)	ICC Docket No. 38302S
United States Department of Energy and United States Department of Defense v. Aberdeen & Rockfish Railroad Company, et al.	)	ICC Docket No. 38376S

MEMORANDUM OF THE U.S. DEPARTMENT OF ENERGY
AND THE U.S. DEPARTMENT OF DEFENSE
IN SUPPORT OF THE SETTLEMENT AGREEMENT
WITH UNION PACIFIC RAILROAD COMPANY

The U.S. Department of Energy and the U.S. Department of Defense ("DOE/DOD" or the "Government") support the Settlement Agreement with Union Pacific Railroad Company ("UP") in the above entitled proceedings and request the Board's approval and the other relief described in the Joint Motion of the parties. The Government sets forth in this Memorandum certain additional reasons for the Board's approval beyond those set forth in the Joint Motion, and requests certain supplemental findings in aid of the Settlement Agreement.

INTRODUCTION

These proceedings were filed in 1981 as complaints under Section 229 of the Staggers Act of 1980[1] giving shippers but six months to preserve their causes of action for unreasonable rates on past shipments. DOE and DOD have now reached a settlement with UP that would apply to all future shipments of the commodities covered by the parties' agreement. Those commodities include not only naval spent fuel, which comprises the shipments at issue in the proceeding, but all future DOE shipments of the covered commodities, including future shipments of commercial spent fuel to the Yucca Mountain site designated as the site for the nation's nuclear waste repository.[2]

The present Settlement Agreement builds upon the rates established pursuant to I.C.C. Docket No. 9205,[3] so that a reasonable national rate structure should yet emerge for these commodities. In that docket, the I.C.C. prescribed a rate methodology for naval and commercial spent fuel as a basis for charging local and interterritorial movements in the East. The parties to the Settlement Agreement have agreed on further relief that will have the very practical effect of providing an important Western link to the Eastern prescribed rate basis.

The Settlement Agreement, therefore, represents an effort on the part of the Government to settle the transportation requirements for future movements over UP of all varieties of spent fuel and related commodities whether or not encompassed in the original complaints. It is a

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[1] Section 229 was codified in a note to 49 U.S.C. §10701a.

[2] See Pub. L. 107-200, 116 Stat. 735 (2002), the Joint Resolution approving and designating Yucca Mountain as the site for the nation's nuclear waste repository. In a Record of Decision published in the Federal Register on April 8, 2004, DOE reported it planned to use mostly rail for future shipments of spent fuel and high-level radioactive waste to a repository at Yucca Mountain.

[3] Trainload Rates on Radioactive Materials, Eastern Railroads, 362 ICC 756 (1980), 364 ICC 981 (1981), sustained sub nom. Consolidated Rail Corp. v. I.C.C., 646 F.2d 642 (D.C. Cir. 1981), cert. denied, 459 U.S. 1047 (1981).

settlement the Government believes will greatly help to move the transportation requirements for these commodities away from further controversy and confrontation into the path of closer cooperation to fulfill the national goals of safe handling and storage of spent fuel, radioactive waste, and the related commodities.

I. Comprehensive Agreement

The Settlement Agreement results from years of negotiations between knowledgeable representatives of the Government and UP. A comprehensive settlement has resulted that covers all the projected programs of the Government for shipping spent fuel, radioactive waste, and related commodities. The agreement has been crafted to meet both the short term and the long term railroad rate and service needs of the Government regarding these commodities. It accomplishes this result by addressing long standing rate and service disputes between the Government and the major railroad handling nearly all the shipments of the commodities in issue in the West.

Besides settling past differences, the agreement is forward looking by attempting to anticipate problems that may arise in the future. The agreement, for example, will apply to future Government shipments of spent fuel that DOE will move from the nation's utilities to a storage repository upon taking title under the Nuclear Waste Policy Act, 42 U.S.C. § 10101 et seq. Under the agreement, UP offers system wide rates and service to all Government programs of shipping spent fuel, nuclear waste, and related commodities.

II. Agreement Provides Needed Flexibility to Meet Changed Circumstances

A significant feature of the agreement for all the parties is its flexibility to meet changed circumstances over the long term. Flexibility is important since the future timing of the spent fuel shipments to a western repository is not yet fully known.

The inherent flexibility of the agreement can be seen in a number of its provisions. New rates fitting changed conditions are to be provided by UP under 49 U.S.C. §10721 (or its successor) within 30 days of any request for rates. Lending to this flexibility are the provisions noted above making the rate methodology operate system-wide over UP, and UP's agreement to keep all routes open that are otherwise suitable for common carrier movements of any hazardous commodity.

The agreement distinguishes between the common carrier service that will be provided at the agreed base rates and "extra services" that the Government or local governmental authorities may request of a common carrier.[4] The agreement, therefore, positions the parties to meet any type of service contingency and Government need for rail transport as they may arise in the future.

There is an added element of flexibility in the Government's option that it has retained under the agreement to enter into individual, more narrow and tailored transportation contracts, if they are found to be needed or desirable. In the meantime, the Government may call upon UP to provide the needed service under the broader terms of the Settlement Agreement.

III. Common Carrier Service Assured

The rail industry and the Government have not always been in agreement on the railroads' obligation to provide common carrier service in the movement of spent fuel. In fact, an early I.C.C. case involving the Missouri-Kansas-Texas Railroad, which later became a subsidiary of UP, decided that this Western railroad was obligated to perform such common carrier service.[5] Such matters are now fully settled in the agreement with UP.

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[4] Railroads often provide common carrier accessorial services for which they separately bill the shipper. See, *e.g.*, Shenango, Inc. v. Pittsburgh, C. & U.Ry. Co., 5 ICC2d 995, 999 (1989).
[5] Radioactive Materials, Missouri-Kansas-Texas R.Co., 357 ICC 458 (1977). The M-K-T consolidation with UP occurred in 1988. See Union Pacific Corp. – Control – Mo-Ks-Tx-Co., 4 ICC2d 409 (1988).

The agreement permits the Government to request UP to provide common carrier service for the movement of spent fuel, nuclear waste, and related commodities in regular freight trains. Specific guidelines are agreed upon for the safe handling of these commodities in common carrier service, and a mechanism is established for UP's offering common carrier rates to the Government under 49 U.S.C. §10721 or its successor. UP, as noted above, is also obligated under the Agreement to provide Extra Services on an as needed basis as further common carrier or ancillary to common carrier services.

IV. UP is Committed to Provide Optional Dedicated Train Service at Reduced Rates

Although the design of the shipping casks in each case has enabled the railroads to successfully move the radioactive loads in regular train service, the Government reserves the right to request dedicated train service. In the past and currently, if the shipper desires special or dedicated train service to move spent fuel shipments, it is required to pay a high surcharge per mile over and above the rates and charges for regular train service. The agreement greatly reduces this burden by costing all dedicated train movements as if six loaded cask cars were involved in the movement (para. 13.A. and Attachments Nos. 1 and 2 to the Settlement Agreement). The markups applicable to regular train service then apply. Substantial reductions from the currently and historically applicable surcharges for dedicated train service will now apply to Government shipments under the agreement.[6]

V. Government's Reparations Claim Against UP Will Be Fully and Fairly Settled

The complaints filed in 1981 requested both future rates and reparations on past naval shipments. The claim period extended back to March of 1978. The Settlement Agreement

[6] For the practical effect of these sharply reduced rates on the overall reasonableness of the settlement terms, see Section VI, *infra*.

extinguishes the Government's potential claim for reparations against UP in its entirety, which the Government accepts as a fair and reasonable end result without waiving any claim it may have against other railroads for reparations in these proceedings. Most shipments of the involved commodities have and will continue to move over the lines of two or more carriers. Until settlements are reached with the connecting carriers, and unless the Board changes the Government's burden of proof,[7] those carriers will remain jointly and severally liable for any unlawfulness in the through rates apart from the UP haul.

Forgiveness of UP's reparations on past naval shipments is reasonable here for both general and specific reasons. The present agreement is comprehensive, covering both current and future shipping campaigns performed by or for the Government. By including all future Government shipments of radioactive waste and commercial or utility spent fuel, the Agreement assures the Government of reliable service at greatly reduced rates in each of its several programs relating to nuclear materials, *i.e.*, for shipments well beyond the relatively few remaining naval shipments that were the immediate focus of the evidence in these proceedings.

For example, as noted above, besides future naval shipments, the agreement covers future shipments of spent fuel that are projected to move under DOE auspices from any of the nation's electric utilities to the Yucca Mountain site designated as the nation's nuclear waste repository. See Pub. L. 107-200, 116 Stat. 735 (2002). The Agreement also provides the assurance of common carrier rates and service for future movements of foreign research reactor fuel to the storage site, and of nuclear waste moved by the Government from, for example, deactivated nuclear sites to storage facilities. Forgiveness of reparations is part of the totally fresh start that

[7] Discussed in Section VIII.1., *infra*.

the agreement provides the Government and UP in meeting the Government parties' future nuclear transport needs.

There is also the specific claim of UP that is now settled regarding the carrier's investment in its Scoville Branch in Idaho. UP's evidence showed that it had invested $3.5 million to upgrade a branch that was providing service essentially only to the Idaho National Engineering Laboratory, the DOE facility at Scoville, Idaho. In the course of litigation, should it continue, UP would seek to recover the value of this investment as part of increased rates on the few shipments moving to this facility. Forgiveness of reparations settles that matter as an issue between the parties.

In the meantime, the parties could also agree that, (a) UP's long experience with moving naval shipments of spent fuel from well known origins to Scoville, Idaho, and (b) the reduced dedicated train surcharge primarily benefiting commercial spent fuel shipments, would justify UP's authorizing a lesser markup of variable cost for the naval rates than for the commercial commodities.[8] These, too, were factors in the Government's decision to encourage compromise and promote settlement by forgiving UP's reparations on past shipments.

VI. A Markup Ratio of 3.51 While High Is Acceptable to the Government As Part of the Settlement Package

A markup of up to 3.51 percent of variable costs applies on most shipments under the Settlement Agreement. In the circumstances of the present case the Government believes such a markup, while high, is nevertheless acceptable and should be prescribed by the STB for those hauls over UP for which it applies under the Agreement.

[8] A markup of 3.51 governs the base rates on most shipments under the agreement. Some naval shipments will be moved at a markup of 2.5 of variable cost. The markup of 3.51 is discussed more fully in Section VI below.

We begin with the fact that Government shipments of spent fuel have borne rates in the past that are 1,000 to 1,500 percent of variable costs. The Court of Appeals held that rates at such an extraordinarily high level nevertheless could not be set aside as an unreasonable practice.[9] A markup of 3.51 percent provides a sharp reduction from historical rates.

Lending support to the agreed upon markup is the fact that the agreed rate methodology is based on a computation of UP's systemwide URCS variable costs. Even an update requires a recomputation of variable costs. This unique rate methodology gives the shipper the full benefit of UP's productivity. There is no sharing of productivity with the carrier, thereby giving the shipper the full benefit of the argument that might otherwise ensue if the matter were litigated before the Board.

The Agreement is comprehensive. It covers, for example, future shipments from as yet unsettled origins and destinations systemwide over the UP in cars not yet constructed.

Another factor in defense of a somewhat higher markup for shipments of commercial spent fuel is that the Government thereby avoids the risks attendant on any further litigation before the Board regarding these commodities. The Settlement Agreement totally avoids that risk by including all future shipments of commercial spent fuel, which indeed are expected to comprise the major group of future spent fuel shipments under the Agreement.

If these proceedings were litigated, they would also probably be decided under the standards set by the Board in its Non-Coal guidelines decision.[10] We note in this connection that in employing the Revenue Shortfall Allocation Method under the Non-Coal guidelines, if the

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9 Union Pacific Railroad v. I.C.C., 867 F.2d 646 (D.C. Cir. 1989).

10 Rate Guidelines – Non-Coal Proceedings 1 STB 1004 (1996). In such a case, no data or documents would be needed from UP. On the other hand, if the Government were required to file a full blown CMP/SAC case, involving through movements, then it may need to seek UP data and documents. See Sec. VIII.2. and 3., infra.

Board gave any weight to the recent four-year averages for UP with and without the efficiency adjustment, it would be looking at averages that consistently range higher than 300 percent.[11]

Finally, although not directly in issue in the litigation, the comprehensive settlement with UP, as noted earlier, will substantially reduce the rates for dedicated train service. Such rates today are typically a surcharge in the range of $60 or more per mile over the rates and charges for regular train service. Based on year 2002 costs, the agreed maximum rate for dedicated train service will vary between $13.66 and $19.17 per mile on Government shipments of spent fuel and related commodities. No other shipper to our knowledge enjoys such a sharply reduced rate for dedicated train service. The substantial reduction in the dedicated train rates offsets a portion of the high regular train rates that result from an otherwise high markup ratio.

The substantial reduction in the dedicated train surcharge, while important for future shipments of commercial spent fuel is less an advantage to the Government on shipments of naval spent fuel. Shipments of the latter rarely employ special or dedicated trains. Consequently, the agreed reduction in the dedicated train surcharge will help to offset the markup of 3.51 on the movements of commercial fuel while providing little or no further offset to the already reduced markup of 2.50 on shipments of naval fuel.

It should be clear from the above listing that several considerations have led to the Government's acceptance of the 3.51 markup. The Settlement Agreement is replete with numerous resolutions of outstanding or potential problems, each of which also provides support for the overall result. The agreed markups are part of the package.

At the same time, it should be clear that if the Government is ever called upon to litigate the issues settled by the present agreement, it reserves the right to show that a maximum

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[11] *E.g.*, Rate Guidelines – Non-Coal Proceedings, STB Ex Parte Docket No. 347 (Sub-No.2), decided May 17, 2004.

reasonable rate markup is less than 3.51 or even less than the somewhat lower markup of 2.5 that the parties have negotiated for some of the naval shipments moving over UP's lines. The I.C.C. prescribed revenue-to-variable cost percentages from 200.6 to 255.7 in Docket No. 9205 for spent fuel moving locally or interterritorially in the East.[12] A markup of 250 percent is on the high side of a reasonable range when judged by the standards of the Eastern rate prescription.[13]

We request the Board to prescribe the terms of the Settlement Agreement, including the agreed ratemaking methodology and markup ratios, on the grounds that they are acceptable to the parties and will further the goals of the national rail transportation policy. Under that policy, the Board is required "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" (49 U.S.C. §10101). The Government's agreement to accept a markup as high as 3.51 is fully consistent with that policy as part of a settlement package.

We ask the Board to accept the Government's agreement to the terms of this settlement as analogous to regulatory policies that have been historically acceptable for a finding of a just and reasonable rate. The I.C.C., predecessor of the STB, in 1980 adopted the policy that the agency would accord presumptive weight to shipper-carrier rate agreements, even though such

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[12] The I.C.C. found that a revenue–to-variable costs percentage of 255.7 on commercial spent fuel moving in G.E. cask cars and 213.8 in N.L.I. cask cars, would "cover all the costs of service and provide an adequate return" (362 ICC at 775, 364 ICC at 985). It prescribed a revenue-to-variable percentage of 200.6 for the heavier Government cask cars (364 I.C.C. at 984). In that case the agency was striving for an "average maximum reasonable rate for the territory" (*ibid.*).

[13] The Eastern rate prescription has withstood the test of time. Following the Union Pacific opinion of the Court of Appeals, the I.C.C. rejected the Eastern carriers' attempt to reopen that prescription, finding (1) the carriers had not shown the prescription to be "harmful to them in any way", (2) "we find no need to lift the prescription", and (3) the prescription "appears to have provided a fair and equitable solution to a difficult problem and seems to be working well." Trainload Rates on Radioactive Materials, Eastern Railroads, I.C.C. I&S Docket 9205, decision served January 16, 1991 (unreported).

agreements were not formal contract rates.[14] Under that policy, a shipper-carrier agreement on the rate would be a sufficient basis, if consistent with all other facts of record, for the agency to prescribe a maximum rate as between the consenting shipper and the consenting railroad.[15]

VII. STB Should Extinguish UP's Liability for Reparations While Preserving the Liability of the Connecting Carriers on Non-UP Hauls

The Government agrees with UP's position that in view of its willingness to settle all the issues in these proceedings and to meet all the Government's needs for future service on the involved naval and commercial commodities, its liability for reparations in connection with the movements involved in these proceedings should be released or "extinguished." This would mean, for example, that it could not in the future be held responsible to the Government for reparations on through movements in which it had participated, nor for any contribution to connecting carriers if they should be found liable for reparations on past shipments. A corollary to this ruling would be that UP would be excused from answering any cross complaint in actions by DOE or DOD seeking reparations against connecting carriers. In limited circumstances, UP may need to respond to subpoenas issued by this Board or a court. When UP is dismissed as a party, the Board will retain its authority to issue subpoenas for the production of data or documents. See Section VIII. 3., *infra*.

1. UP's Liability

The established rule of law is that a carrier's charging an unreasonable rate is a "tort" and all those carriers who participate in a through movement involving unreasonable through rates

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[14] Ex Parte 358-F, Change of Policy, Railroad Contract Rates, 45 Fed. Reg. 21719 (1980), also reproduced as Attachment A to the decision in Cleveland Cliffs Iron Co. v. Burlington Northern, Inc. 664 F.2d 568, 592 (6th Cir. 1981).

[15] Approved in Iowa Power and Light Co. v. Burlington Northern, Inc., 647 F.2d 796 (8th Cir. 1981), cert. denied, 458 U.S. 907 (1982); Burlington Northern, Inc. v. United States, 679 F. 2d 915 (D.C. Cir. 1982); and Cleveland Cliffs case, *supra*.

are "joint tortfeasors" who are jointly and severally liable for the damages to the shipper.[16] Under this rule, UP could be held legally responsible to connecting carriers for contribution on any reparations in the future on through movements in which it participated although it had agreed to settle with respect to its portion of the transportation.

We think the joint tortfeasor rule should not be applied to UP in the present case. First, as noted earlier, the rail transportation policy begins by stating that competition and demand should establish rail rates to the maximum extent possible. [17] The Board's policy of strongly encouraging private-sector dispute resolution [18] is fully consistent with the Congressional standard. Here the parties are in agreement that UP should be relieved from liability on past shipments. By extinguishing UP's liability and by retaining the joint and several liability of the remaining carriers without contribution from UP, the Board will both support the current settlement and encourage the remaining carriers to settle.

Second, the Government expressly waives the protection afforded it by the joint tortfeasor rule insofar as it involves UP's liability on the shipments in issue and agrees to undertake to show, if necessary and the Board allows, the unreasonableness of a portion of the entire through rate.[19] Under paragraph 14 of the Agreement, the Government may not question the UP local or proportional rate as a separate factor in the through rate. If the Government would attack a through rate, it would attack such a rate as a unit [20] whether the through rate was published as a single factor or as a combination of rate factors. Thus, at no time would the

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[16] Great Northern Ry. Co. v. Sullivan, 294 U.S. 458, 462-63 (1933), and cases cited.
[17] 49 U.S.C. §10101(1).

[18] STB Press Release No. 01-8, March 1, 2001, "Surface Transportation Board Summarizes Private Sector Dispute Resolution of Pending Proceedings."

[19] The Government's burden of proof in any subsequent proceedings against UP's connecting carriers is discussed more fully in Section VIII.2. of this Memorandum.

[20] See Louisville & N.R.R Co. v. Sloss-Sheffield Co., 269 U.S. 217, 233 (1925).

Government seek to attack the UP local or proportional rate following the Settlement, although the UP local or proportional might comprise a portion of a questioned through rate.

2. Liability of Connecting Carriers

Under 49 USC § 11704(b) [21] a railroad is liable for all damages sustained by a shipper as a result of its violation of the statute. Charging an unreasonable rate is a violation of the statute. At common law charging an unreasonable rate is a tort, as noted above, and each carrier that participates in an unreasonable through rate as a matter of law is jointly and severally liable for all the unlawfulness of the through rate.[22]

The Settlement Agreement with UP does not diminish the connecting carriers' continuing liability for the unlawfulness in the rates charged by them and UP on interterritorial movements. Under the Sullivan rule, each of the carriers participating in a through movement with UP continues to be liable for all unlawfulness of the past through rates. The dismissal of UP from the complaints in these proceedings is no bar to an award of full reparations on through movements from origin to destination as against any one of the remaining connecting carriers that participated in the through haul with UP and fails to settle.[23]

At the same time under subparagraph 23.B. the Government waives collection of any reparations from connecting carriers for transportation that occurred over UP. Such a waiver is fully within the right of any shipper, [24] and there is precedent for a shipper to make such a choice

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[21] Fomerly Section 8 of the Interstate Commerce Act, 49 U.S.C. §8.

[22] Sullivan case, note 16, *supra.*

[23] See Armour & Co. v. Baltimore & O.R. Co., 289 ICC 122, 123-24 (1953); Gaylord Container Corp. v. Atlanta & W.P. Co., 278 ICC 474 (1950); American Houses, Inc. v. Pennsylvania R. Co., 266 ICC 491, 492-93 (1946).

[24] A shipper may waive its right to reparations or damages for an unreasonable rate. Such a waiver does not impinge upon the Filed Rate Doctrine. Unlike an overcharge or undercharge, the imposition of an unreasonable rate relates to a private wrong for which the shipper may waive redress in whole or in part.

to promote settlement.[25] However, as the parties are careful to explain in subparagraph 23.B., "The release of UP shall not operate to release any other party to these proceedings from liability," *i.e.*, the remaining liability for unlawfulness in the transportation performed over the non-UP hauls.

Where carriers participate in through rates, the I.C.C., like the Court in Sullivan, applied the test of reasonableness to the rate or charge as a whole and not to the separate factors.[26] The agency did not concern itself with whether any one factor was higher than a reasonable level. The rationale of these cases was that a shipper cannot be allowed to attack one factor that may be high when it may also be offset by a low factor on another part of the through movement.[27] However, the foregoing rationale does not apply under the Settlement Agreement where UP's liability is fixed and discharged.

In the present case the parties confronted the issue of how to settle with one carrier participating in through rates. The intent of the parties was to allow UP to walk away from the proceeding without shifting liability for the alleged unreasonableness of UP's rates to non-settling carriers. The parties resolved this issue in subparagraph 23.B. by providing that "the freight charges collected for transportation on UP" would be exempt from future challenge.

Acker v. Alton R. Co., 213 ICC 162, 163 (1935); Hormel & Co. v. Chicago, M. & St. P. Ry. Co., 146 ICC 273, 281 (1928).

[25] For example, in Metropolitan Edison Co. v. Conrail, 5 ICC2d 385, 409-10 (1989), the shipper agreed with the settling carrier CSX that, if the shipper should later prevail on any joint rates with non-settling carriers, the shipper would assume, bear, and pay the reparations that would otherwise be due from CSX. See also Ford Motor Co. v. I.C.C., 714 F.2d 1157, 1166-67 (D.C. Cir. 1983), where the shipper agreed to forego an allowance granted by the settling carrier if the shipper should later obtain a reduction in the joint rate from the non-settling carrier.

[26] See, *e.g.*, Augusta Fruit & Produce Co. v. Atlantic, C.L.R.R., 188 ICC 707,709 (1932); Adams Lumber Co. v. A.C. & Y.Ry., 253 ICC 179, 182 (1942); Brown Produce Co. v. Atchison, T.& S.F.Ry.Co., 278 ICC 433, 436 (1950).

[27] See, *e.g.*, Gentile Bros. Co. v. Cincinnati, N. & O. T. P. Ry. Co., 216 ICC 571, 574 (1936) ("One factor of a through rate may be as much below the level of reasonableness as the other factor is above such level.").

If further litigation is required with a non-settling carrier, the Government will be limited under the Sullivan rule to showing the unlawfulness of the through rate. The Board under subparagraph 23.B. will then be required to back out the freight charges collected by UP for its portion of the movement and the associated costs of service. In most cases the adjustment will result in a reparation balance that will be equal to the unlawful freight charges collected by the non-settling carrier.[28]

For example, let us assume that UP charged $6.80 per cwt on a particular through movement and the non-settling carrier charged $4.50. UP's freight charges would constitute 60 percent of the total freight charges of $11.30 per cwt. If the Board found that a reasonable rate for the through movement was $1.70 per cwt, then pursuant to the Settlement Agreement it could further find that $1.02 was attributable to the UP haul (or 60 percent of $1.70) and the balance of 68 cents (or 40 percent of $1.70) attributable to the haul of the non-settling carrier. The Government in this example would be entitled to $3.82 per cwt (or $4.50 less 68 cents) of reparations from the non-settling carrier. A similar calculation would be required for each through movement that included UP and a non-settling carrier.

The Government suggests that it should not be limited to showing the alleged unreasonableness of the through rate, nor should the Board be burdened with computing freight charges collected by the non-settling carrier only indirectly though a subtraction from the through rate. Such obtuse procedure will impose an unnecessary burden on the Board. Besides the complexity of an indirect computation of the reparations from the non-settling carrier, the Board would also be confronted with having to satisfy itself that the record was adequate in each

[28] If there are two or more non-settling carriers, each such carrier will remain jointly and severally liable for unreasonableness in the freight charges collected by all the non-settling carriers.

case to perform the indirect computation. The Board would also need to address complex issues relating to the burden of going forward.[29]

Moreover, ratemaking by indirection would substantially raise the costs of litigation for all the remaining parties. It is not clear at this time just what form of proceeding, if any, will occur for the Government to pursue reparations against a non-settling carrier, but it is a reasonable conjecture that, if the Government were permitted to show the unlawfulness of the division or rate factor of the non-settling carrier directly, rather than indirectly, the cost of litigation could be reduced by as much as one half.

For the purpose of this settlement, therefore, the Government requests the Board to allow it the option to show the unreasonableness of the freight charges collected by individual non-settling carriers participating in through movements. The Board is asked to approve this procedure for the present proceeding without any commitment to adopt that procedure for any other proceeding.

The Board's authority to relieve the Government of the mandatory burden of showing the through rates in which UP participated to be unjust and unreasonable in future proceedings against connecting carriers is a matter to which we next turn.

[29] Arguably the burden of going forward shifts once the Government shows the illegality of a through rate. The non-settling railroad would be the proponent of a more limited liability than the law imposes, and as such a proponent would have the burden of going forward under 5 USC §556(d) of the Administrative Procedure Act. See Environmental Defense Fund v. E.P.A., 548 F.2d 998 (D.C.Cir. 1976), cert. denied, 431 U.S. 925 (1977); TJX Companies, Inc.- Petition for Declaratory Order, S.T.B. Docket No. 41192, 2002 STB LEXIS 554, served September 26, 2002. A party asserting an affirmative defense has the burden of going forward. Consolidation Coal Sales Co. v. Consolidated Rail Corp., S.T.B. Finance Docket No. 34169, 2002 STB LEXIS 131, served February 28, 2002; McGraw Edison Co. v. Alton & S.Ry.Co.. 2 ICC2d 102, 106 (1986); United States v. Time-DC, Inc., 349 ICC 531, 545-46 (1974); United States v. Western Gillette, Inc., 343 ICC 29, 36-37 (1972).

VIII. Board Should Avoid a Mandatory Through Basis of Ratemaking for Purposes of Approving the Settlement

It is clear that further negotiations will be needed with the other carriers, such as the Burlington Northern, CSX Corporation, and the Norfolk Southern, to fully settle these proceedings. If settlement negotiations fail with one or more of the carriers, the Government will be forced to litigate the matter before this Board. The Board should implement the agreement with reasonable ongoing procedures.

1 The Board Has Ample Authority to Adopt Reasonable Procedures Governing Its Proceedings

As noted above, under the Sullivan rule the shipper possesses the burden of showing the unlawfulness of the entire through rate, whether or not all participating carriers are named as party defendants.[30] The rule should not apply where it would only require the computation of the unlawful charges of a non-settling carrier indirectly, rather than directly, thereby imposing administrative burdens on the Board and great expense to the parties. The Board has broad administrative authority over its proceedings under 49 U.S.C. Sec. 721(a).

Moreover, there is direct precedent available to the Board for finding individual factors on through movements of spent fuel unjust and unreasonable, and for ordering reparations be paid on the basis of those unlawful factors. We here refer to the Trainload Rates case in which

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[30] The word "joint" in "joint tortfeasor rule" does not imply that the rule is limited only to single factor, joint rates. The Sullivan rule applies to any through movement whether the through rate is a joint rate or a combination rate. Besides the Sullivan opinion, see also Western Resources, Inc. v. Surface Transportation Board, 109 F.3d 762, 789 (D.C. Cir. 1997).

In some cases the rate charged the Government was described in a carrier's tariffs or Government tenders as at the same time both a local and proportional rate. A local rate, however, includes the costs of two terminals whereas a proportional includes the costs of but one terminal. Sullivan case, *supra*, 294 U.S. at 460. The former I.C.C. properly held such a dual purpose rate necessarily includes "double counting" when it serves as a proportional. Commonwealth Edison v. Aberdeen & R.R., 2 ICC2d 642, 669 note 38 (1986), rev'd on other grounds *sub nom.* Union Pacific R. v. I.C.C., 867 F.2d 646 (D.C. Cir. 1989).

the former I.C.C., this Board's predecessor, found the rates on spent fuel and empty casks moving within the East unjust and unreasonable and ordered reparations be paid on the movements between the Eastern points and the river crossings.[31]

In Metropolitan Edison Co. v. Conrail, 5 ICC2d 385 (1989), the I.C.C. held that a shipper may show the unreasonableness of a through rate composed of a combination of rate factors by attacking one factor, [32] but it must show the unreasonableness of an entire joint rate when the through rate is a single factor joint rate.[33] We would hope that the Board could now hold that a shipper may limit its request for reparations to the difference between the division of a joint rate and the reasonable rate level without having to show the entire through rate was unreasonable.

The Metropolitan Edison holding resulted from the I.C.C.'s rather narrow reading of the Tenth Circuit's decision in Sterling Beef. The combination rate that was dissected in Sterling Beef was a through rate. A combination through rate is treated as no less a unit than a joint through rate.[34] The Sullivan rule applies equally to joint and combination through rates. The I.C.C. held in Metropolitan Edison that a shipper pays the entire joint rate and not merely a division (5 ICC2d at 408); of course the shipper pays the entire through rate whether it is a joint rate or a combination rate.

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[31] I & S Docket No. 9205, Trainload Rates case cited in footnote 3, *supra*.

[32] Citing at pages 406-07, Sterling Colo. Beef Co. v. Atchison, T. & S.F. Ry. Co., 339 ICC 530 (1971), rev'd in part after remand in 357 ICC 446 (1977), District Court remand aff'd 599 F.2d 365 (10th Cir. 1979), reparations awarded, 362 ICC 568 (1980).

[33] Citing at 402-403, Louisville & N.R.R. Co. v. Sloss-Sheffield Co., 269 U.S. 217 (1925); and Great Northern Ry. v. Sullivan, 294 U.S. 458 (1935).

[34] See Sullivan case, 294 U.S. at 460. The former I.C.C. tariff publishing rules provided: "The lowest combination of rates via the route of movement is the legal rate if no one-factor rate is in effect. The combination shall be treated as a unit from origin to destination." (49 CFR 1312.14(i)(2) (1991)).

The I.C.C. in Metropolitan Edison seemed particularly concerned that railroad divisions had been fixed in an arbitrary fashion, not with respect to the reasonableness of rates, "but with regard to the relative positions of carriers within the various regions" and forming "a complicated mosaic," citing a 1980 Congressional study (at 408-09). Such a "mosaic" hardly exists today when there are but two major railroads operating east of the river crossings and two west of the crossings.

A case in point is Ford Motor where the Court of Appeals held that in encouraging the parties to settle a disputed rate, the I.C.C. might not adopt procedures relating to through rates that punish the shipper for settling.[35] In that case, the I.C.C. dismissed a complaint against a joint rate when the shipper joined only one of the two participating carriers and settled with the other. So here the Government's remaining causes of action against non-settling carriers should not be undermined by strict adherence in the future to procedures that are inconsistent with the settlement with UP.

In the international joint rate cases, the I.C.C. looked beyond the jurisdictional limitations presented by the geography of those disputes and entertained complaints against international joint rates into Canada when only the domestic carriers were before it.[36] This was done to apply rules and decisional criteria "liberally to ensure that justice is not denied" on the basis of "equitable principles."[37] Here the Board in some circumstances will be able to reach a just decision, if the issues were litigated, only by considering something less than the through rate.

[35] Ford Motor Co. v. I.C.C., *supra*, 714 F.2d at 1169; accord Union Pacific R. Co. v. Surface Transportation Board, 202 F.2d 337, 343 (D.C. Cir. 2000).

[36] For example, see Canada Packers, Ltd. v. Atchison, T. & S.F. Ry., 385 U.S. 182 (1966); and H.K. Porter Co. v. Central Vermont Ry., 366 U.S. 272 (1961).

[37] As described in the Ford Motor opinion, *supra*, 714 F.2d at 1169-70.

A departure from the through basis of ratemaking here would implement Congressional policy that now promotes market based rates and private settlement of disputes. Such a policy was not in effect when the Sullivan case held that the I.C.C. must decide the reasonableness of the entire through rate rather than a factor making up a portion of the through rate.[38]

Consequently, another case in point is the Board's FMC decision of 1997.[39] In that case the Board departed from the through basis of deciding the reasonableness of rates and ordered UP to file a rate that could be used in conjunction with an unregulated contract rate. In reviewing that decision, the Court of Appeals distinguished the Sullivan opinion. It noted that the Sullivan holding was based on the principle that "the shipper's only interest is that the charge shall be reasonable as a whole." The Court of Appeals added, in words that equally apply here, "This is no longer the case."[40]

The Court of Appeals noted that unless the Board had jurisdiction to deal with just the non-settling carrier's portion of the through transportation, the non-settling carrier could act to capture the benefit of the shipper's bargain with the settling carrier. A similar rationale supports the Board's authority to find unlawfulness of a through rate here by directly dealing with the non-settling carrier's rate factor or division of a joint rate.

In FMC the Congressional interest in preserving the shipper's right to enter into unregulated contract rates justified the Board's inference that Congress desired a departure from the through basis of deciding the reasonableness of rates.[41] Similarly in Central Power &

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[38] Great Northern Railway Co. v. Sullivan, 294 U.S. 458 (1935).

[39] FMC Wyoming Corp v. Union Pacific R. Co. 2 STB 766 (1997).

[40] Union Pacific R. Co. v. Surface Transportation Board, *supra*, 202 F.3d at 342.

[41] 202 F.3d. at 343.

Light,[42] the Board pointedly remarked that Sullivan "predated" the statutory language of 49 USC §10709(a)(1). In the present case the Congressional interest in market-driven rates that are reached through private negotiations reenacted in 1995[43] would justify a further exception to the mandatory through basis of deciding rate reasonableness issues.

2. Requested Ultimate Finding

The parties to the Settlement Agreement in their Joint Motion have requested the Board to enter Ultimate Findings and an Order, a copy of which is attached thereto. The Government requests that the following Ultimate Finding No. 5 should be included consistent with what we have set forth above:

> 5. The Government's burden of proof in further proceedings seeking reparations from a carrier other than the UP on through movements will be, a) to show the entire through rate is unreasonable, if it seeks reparations for the connecting carrier's portion of the through rate on the basis of the alleged unreasonableness of the entire through rate; and b) to show that the division or rate factor of the connecting carrier is unreasonable, if it seeks reparations on the basis of the alleged unreasonableness of the connecting carrier's portion of the through rate.

3. UP Production of Data and Documents

The Board should expressly reserve its authority to issue subpoenas against UP if needed in the future for the Government to make its case.[44] If one or more of the connecting carriers fails to settle, and if the Government is able to use the Simplified Rate Guidelines to present a future case, it is unlikely to need data or documents from UP to make its case. If it needs to pursue a CMP/SAC presentation, it may well need UP data and UP documents.

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[42] Central Power & Light Co v. Southern Pacific Transp. Co., 1 STB 1059, 1074-75 (1996).

[43] Exemplified in 49 USC § 10101(1) and in Board policy favoring settlements discussed earlier.

[44] At the same time, subparagraph 23.B. of the Settlement Agreement limits UP's burden of maintaining documents pertaining to its transportation of Covered Movements prior to the effective date of the Agreement.

Although a settling carrier is dismissed as a party to a rate case, the agency retains authority under its statute and rules of practice to issue subpoenas against a settling carrier. See 49 U.S.C. § 721 (c), and Metropolitan Edison Co. v. Conrail, 5 I.C.C. 2d 385 (1989). The I.C.C. held that such a dismissal did not prevent the shipper "from making its case," and noted that it was prepared to issue subpoenas for testimony and documents, if necessary, to ensure the shipper's ability to develop the evidence (5 ICC2d at 409, citing Ford Motor Co. v. I.C.C., *supra*, 714 F.2d at 1158).

CONCLUSION

For the foregoing reasons and those set forth in the Joint Motion, the Government requests the Board to approve the Settlement Agreement with UP and to make the additional findings and conclusions discussed above in this Memorandum.

This the 15th day of Sept., 2004

Respectfully submitted,

STEPHEN C. SKUBEL
JANE P. SCHLAIFER
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585
Tel. (202) 586-5579

Counsel for U.S. Department of Energy

ROBERT N. KITTEL
Chief, Regulatory Law &
Intellectual Property Division
U.S. Army Legal Services Division
901 N. Stuart Street, Suite 713
Arlington, VA 22203-1837
Tel. (703) 696-1640

Counsel for U.S. Department of Defense

EXHIBIT C

BEFORE THE
SURFACE TRANSPORTATION BOARD

United States Department of Energy and United States Department of Defense v. Baltimore & Ohio Railroad Company, et al.	)	ICC Docket No. 38302S
United States Department of Energy and United States Department of Defense v. Aberdeen & Rockfish Railroad Company, et al.	)	ICC Docket No. 38376S

UNION PACIFIC'S MEMORANDUM IN SUPPORT OF SETTLEMENT AGREEMENT

More than two decades ago, the U.S. Department of Energy and the Department of Defense (collectively, the "Government") filed two complaints against the nation's railroads. The first alleged that certain railroads had charged unreasonably high rates for four commodities: spent nuclear fuel in heavy casks, empty fuel casks, loading equipment, and radioactive waste. The second sought rate prescriptions for future movements of these commodities. The complaints encompassed "naval shipments" transported in connection with re-fueling nuclear-powered ships, "utility shipments" associated with the private nuclear power industry, and other shipments of the same commodities.[1]

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1 Under the Nuclear Waste Policy Act of 1983, the government takes title to utilities' spent nuclear fuel before it is shipped.

Now, after twenty years of litigation before the Interstate Commerce Commission ("Commission"), the Surface Transportation Board ("Board"), and the federal courts, Union Pacific Railroad Company ("Union Pacific") and the Government have achieved a resolution of their differences. They seek the Board's approval of a settlement agreement, request a rate prescription consistent with the parties' settlement, Board action to extinguish Union Pacific's liability for freight charges for shipments covered by the complaints in these proceedings, and dismissal of Union Pacific from the pending litigation.[2] As set forth below, this settlement is in the public interest, as well as the interests of both Union Pacific and the Government. Union Pacific therefore urges the Board to implement the settlement.

BACKGROUND

This is the last Section 229 case[3] and the Board's oldest proceeding. The complaints, filed in 1981, covered movements since March 1978. Thus, the complaints now span 26 years of shipments. They have been fully litigated twice without reaching a sustainable resolution. The settlement reflects the results of intense negotiations and numerous concessions by each party and provides a mutually beneficial resolution of the many complex issues involved in these proceedings. Board action is needed because the benefits of the parties' settlement cannot be achieved through a contract. Moreover, only the Board has jurisdiction to implement the parties' settlement by prescribing a rate methodology applicable to future movements and dismissing Union Pacific from the pending litigation.

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[2] The Government and Union Pacific have served copies of this Memorandum and the Settlement Agreement on all parties of record in ICC Docket No. 38302S and ICC Docket No. 38376S.

[3] Section 229 of the Staggers Rail Act of 1980 barred complaints concerning then-existing rates from being filed after March 31, 1981. Pub. L. No. 96-448, § 229; see U.S. Department of Energy v. Baltimore & Ohio R.R., 10 I.C.C.2d 112, 112 n.2 (1994).

A. Prior Litigation and the Settlement Process

After five years of discovery and litigation, the Commission found that the railroads possessed market dominance over all of the shipments at issue in the complaints and that the railroads' rates constituted unreasonable practices. See Commonwealth Edison Co. v. Aberdeen & Rockfish R.R., 2 I.C.C.2d 642, 651, 671 (1986). The railroads appealed, arguing in part that the Commission could not regulate rates as practices and that the record did not establish market dominance over utility shipments. The U.S. Court of Appeals for the District of Columbia Circuit agreed and remanded the case, instructing the Commission to evaluate rates for naval shipments under Constrained Market Pricing principles or explain why that methodology was inappropriate as applied to the shipments in dispute. See Union Pacific R.R. v. ICC, 867 F.2d 646 (D.C. Cir. 1989).[4]

On remand, however, the Government argued principally that the shipments were "recyclables" and that the rates should be governed by the statutory rate cap applicable to recyclables. See U.S. Department of Energy v. Baltimore & Ohio R.R., 10 I.C.C.2d 112, 124 (1994).[5] The Commission agreed that some of the commodities might be recyclables, and it directed the parties to identify recyclable shipments and file variable cost evidence so that it

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4 The railroads also argued that the Commission could not regulate the reasonableness of rates tendered to the Government under 49 U.S.C. § 10721 – so-called "section 22 rates." The D.C. Circuit disagreed, finding that Commission did have jurisdiction to regulate such rates. Union Pacific R.R. v. ICC, 867 F.2d at 652-53.

5 Under a provision of the Interstate Commerce Act in effect until 1995, the rate cap for recyclables was determined with reference to a revenue-to-variable-cost ratio of between approximately 1.4 and 1.6 prescribed annually by the Commission. See U.S. Department of Energy, 10 I.C.C.2d at 114 n.5.

could determine the appropriate reparations and rate prescriptions for those shipments. See id. at 153. The railroads petitioned for reconsideration.[6] The petition is pending.

A year later, in 1995, the Interstate Commerce Commission Termination Act repealed the recyclables rate cap and directed that all proceedings pending under that provision "shall be terminated." Pub. L. No. 104-88, § 204(b)(3)(A), 109 Stat. 80. The railroads then petitioned the Board to dismiss both complaints.[7] That petition is also pending.

In 1997, the railroads invited the Government to explore settlement. Discussions eventually moved forward within a framework offered by the Government. The parties initially hoped to reach a nationwide settlement covering all railroads that might carry spent fuel, and several regional and short line railroads joined The Burlington Northern and Santa Fe Railway, Norfolk Southern Railway, CSX, and Union Pacific in developing proposals for such a settlement.

The parties recognized, however, that antitrust concerns would prevent the competing carriers from arriving at a single, global settlement with the Government. With that recognition, the Government elected to begin individual negotiations with carriers. It started with Union Pacific, which has carried more spent fuel than any other railroad. Union Pacific serves Scoville, Idaho, where the Government stores naval spent fuel and, accordingly, it has been involved in handling virtually every past naval spent fuel shipment and most empty cask shipments. Following extensive negotiations, the Government and Union Pacific reached an agreement in principle in 2002. They have now finalized their agreement.

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6 See Petition of the Railroad Defendants for Partial Reconsideration and Clarification, filed July 8, 1994.

7 See Petition of the Railroad Defendants to Dismiss the Complaints, filed January 16, 1996.

The Government and Union Pacific devoted enormous resources to negotiating this settlement, constructively resolving dozens of difficult and complex issues. They believe that their settlement may facilitate settlement between the Government and other railroads. Neither the Government nor any other railroad is obligated to use the Union Pacific settlement as a pattern, but the settlement offers a path through many thorny issues.

B. The Settlement Agreement

The Settlement Agreement between the Government and Union Pacific is attached as Exhibit A to the parties' Joint Motion. This comprehensive settlement resolves the parties' disputes with respect to past movements and provides a detailed methodology for establishing rate and service terms for future movements of spent fuel and related commodities.

The Settlement Agreement establishes a rate methodology that can be applied to any potential route on Union Pacific. Union Pacific agrees to provide rates for a particular movement within 30 days of receiving a written request from the Government. See Agreement ¶ 5.B. The rate methodology is based on Union Pacific's system-average variable unit costs calculated using the Uniform Rail Costing System ("URCS"). See Agreement ¶ 6.A & Att. 1 & 2.[8] For basic services, Union Pacific will charge the Government a rate for naval shipments moving to and from Scoville, Idaho, not to exceed 250 percent of certain variable costs. It will charge a rate not to exceed 180 percent of certain variable costs for shipments of unoccupied escort cars and buffer cars moving without nuclear fuel casks. It will charge a rate for all other covered movements not to exceed 351 percent of certain variable costs. The settlement allows

8 The costing methodology is set out in detail in Attachment Nos. 1 and 2 to the Settlement Agreement. Attachment No. 1 explains the methodology for determining shipment costs for basic services. Attachment No. 2 explains the methodology for determining system-average factors and unit costs, and for developing indexed URCS costs for dedicated train service.

the Government the benefit of any switching agreement that Union Pacific enters into with other carriers. See id. ¶ 6.A(1).

The Settlement Agreement also provides flexibility for the Government to request different levels of service. It establishes a methodology for compensating Union Pacific for "extra services," which are services that the railroad would not otherwise perform without extra charge in providing common carrier service for hazardous materials. See id. ¶ 6.B. It also establishes a methodology for developing rates for movements for which the Government requests dedicated train service. The dedicated train rate is calculated in the same manner as rates for basic services in regular trains, but it includes an additional fixed amount per mile, reflecting a portion of the difference between Union Pacific's 1998 URCS costs per train-mile for a dedicated train and a regular train, indexed to current cost levels. See id. ¶ 13.A & Att. 1 & 2.

With respect to service, the Settlement Agreement defines Union Pacific's and the Government's obligations in regard to routing, car placement and handling, equipment utilization, and car supply. See id. ¶¶ 4.B-D, 8.A. It provides that Union Pacific will generally handle and route covered movements using the procedures and practices for other hazardous material as outlined in AAR Circular OT-55-E. See id. ¶ 4.F. It also addresses responsibility for security of spent fuel shipments, including the need for coordination between Union Pacific and the Government. See id. ¶ 10.

The Settlement Agreement is designed to minimize the likelihood of future disputes. As discussed above, it is flexible enough to accommodate any conceivable Government request to establish rates or provide additional services for a route over Union Pacific. See id. ¶¶ 6.A, B. It provides a procedure for the parties to follow if Union Pacific believes that spent fuel movements cannot be handled safely on the rail and track facilities on a proposed route. See id. ¶ 6.D. It addresses compensation for emergency response costs and the handling of any security emergencies. See id. ¶¶ 6.C & 10.C. The Settlement Agreement contemplates the possibility that future transportation may occur in new types of freight cars. See id. ¶ 8.B. It addresses Union Pacific's obligations to maintain the Scoville Branch and limits Union Pacific's right to initiate abandonment proceedings on that branch. See id. ¶ 2.D. It also establishes a mechanism for alternative dispute resolution. See id. ¶ 15.

The Settlement Agreement is a complex document, but the complexity reflects the extensive efforts by the Government and Union Pacific to address the issues in a comprehensive manner. The settlement the parties have reached not only resolves the parties' dispute in these proceedings, but also addresses the wide range of issues involved in the handling of spent nuclear fuels today and those that may arise in the future.

DISCUSSION

Litigating this dispute yet again is not in the interests of the Government, Union Pacific, or the Board. Numerous and complex disputes would require Board resolution, and there would likely be further appeals. The Settlement Agreement resolves those disputes and provides substantial benefits to both the Government and Union Pacific. The Settlement Agreement is tailored so that, if the Board approves the settlement, prescribes its rates, extinguishes Union Pacific's liability for shipments covered by the complaints in these proceedings, and dismisses Union Pacific from the pending litigation, the parties and the Board will avoid extensive and expensive rate litigation, both now and in the future. In addition, the parties will gain certainty about a broad range of operational and rate issues involved in the handling of spent nuclear fuels.

I. SETTLEMENT IS THE BEST WAY TO RESOLVE THE DISPUTES IN THESE PROCEEDINGS.

These cases have been pending for more than twenty years. Despite two rounds of litigation and intermediate appeals, the parties are no closer to a final administrative or judicial resolution than they were in 1981. Given the current status of this case, such a final resolution would require additional complex and expensive litigation, including extensive discovery. In that additional litigation, as in prior rounds of litigation, the parties would disagree about the regulatory framework for resolving these cases. They would dispute costs for the extra services that spent nuclear fuel trains require and the risks facing the carriers. They would disagree about whether the railroads have market dominance. They would face the burden of developing cost evidence for movements from a wide variety of origins over a wide variety of routes during a period of more than two decades. To illustrate the complexity of these cases, we review each of these topics in turn below.

A. Dispute Over the Reasonableness Standard

The parties disagree about whether this case should be litigated under full Stand-Alone Cost ("SAC") principles or the alternative methodology promulgated for smaller cases in Rate Guidelines – Non-Coal Proceedings, STB Ex Parte No. 347 (Sub-No. 2) (STB served Dec. 31, 1996). The Government believes that these cases could be litigated as small cases under Ex Parte No. 347 (Sub-No. 2), and it presented evidence under a similar standard in 1991. As the Board knows, however, the small-cases methodology was challenged before the D.C. Circuit, but the court found that the challenge was not ripe. Association of American Railroads v. Surface Transportation Board, 146 F.3d 942 (D.C. Cir. 1998). The Association of American Railroads argued in that case that each component of the Board's small-cases methodology relies on arbitrary averages that inevitably drive down rail rates in a manner that the D.C. Circuit considers unlawful. See Association of American Railroads' Opening Brief, January 2, 1998, at 11-14 (discussing Burlington Northern R.R. v. ICC, 985 F.2d 589 (D.C. Cir. 1993)). Were the Board to accept the Government's effort to litigate under the standard set forth in Ex Parte No. 347 (Sub-No. 2), the railroads would appeal. The railroads believe they have significant prospects of prevailing on this issue.

In Union Pacific's opinion, the Government's evidence in 1991 illustrated the frailty of the small-cases ratemaking approach, particularly as it would be applied in this proceeding. For example, the D.C. Circuit explained in 1998 that one of the three calculations used in the small-cases analysis, the "R/VC comp" standard, compares "the [revenue to variable costs (R/VC) ratio] of the challenged traffic to the average R/VC charged by other railroads for similar traffic." Association of American Railroads, 146 F.3d at 944. However, as Richard Kauders of Union Pacific pointed out in his verified statement submitted in these proceedings, Union Pacific believes that no other rail traffic can be considered remotely "similar" to a shipment of spent nuclear fuel with its associated risks, both real and perceived. See Verified Statement of Richard Kauders, filed July 8, 1991, at 10. The absence of reasonably comparable traffic demonstrates the unsoundness of applying this part of the small-cases methodology to this case. Cf. South-West R.R. Car Parts Co. v. Missouri Pacific R.R., ICC Docket No. 40073 (ICC served Dec. 31, 1994) at 4 (determining that "R/VC comp" standard could not be applied where there was no other traffic comparable to the traffic at issue).[9]

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[9] Moreover, even under the small-cases methodology, the parties and the Board would confront the substantial burden of developing separate R/VC calculations for numerous shipments that have moved over a variety of routes and under a wide variety of service conditions that would affect variable costs.

Union Pacific believes that these cases would ultimately be litigated under the rate-making standard defined in Coal Rate Guidelines and subsequent decisions. These cases would be the most complex SAC cases ever to come before the Board. The parties would have to develop a hypothetical rail network that serves Portsmouth, New Hampshire; Newport News, Virginia; Charleston, South Carolina; Port Chicago, California; Bremerton, Washington; and Scoville, Idaho, among other locations. To achieve desirable densities, the network would have to carry multiple commodities from multiple origins to multiple destinations. Neither the parties nor the Board should relish a rate proceeding on that scale.

B. Disputes Over Cost Elements

The parties have long disputed, and would continue to dispute, the extent to which the railroads incur unusual costs in handling the commodities at issue and whether URCS recognizes those costs. The parties have in the past disputed every extra cost element the railroads incur for moving spent nuclear fuels, including how much liability the railroads face for accidents or losses not covered by the Price Anderson Act, the cost of delays to non-nuclear shipments, extra switching costs, and extra security costs. See, e.g., Corrected Argument of the Railroad Defendants, filed July 10, 1991, at 51, 84-99; Verified Statement of J.R. Colvin, filed July 8, 1991, at 5; Verified Statement of Ronald W. Phillips, filed July 8, 1991, at 3-6; Verified Statement of Kenneth J. Ratcliff, filed July 8, 1991, at 12-23.

1. Liability Exposure

Spent nuclear fuel shipments involve unique risks. Although all parties strive to avoid incidents, any accident is potentially devastating. To date, there has never been a major incident involving a rail movement of spent nuclear fuels. See H.R. Rep. No. 105-290, pt. 1 at 30 (1997) ("Over the past 30 years, there have been over 2,500 shipments of spent nuclear fuel in the United States . . . In all of these instances, there has never been an accident involving these materials which resulted in the release of radioactivity."). But despite the railroads' excellent safety record, shipping nuclear waste always carries "the risk of potentially vast liability." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 64 (1978). Because of this potentially vast liability, the insurance industry historically refused to insure the railroads against all of the risks not covered by federal indemnification programs. As the Supreme Court noted, "the potential liability dwarf[s] the ability of [private parties] to absorb the risk." Duke Power, 438 U.S. at 64.

Congress provides partial indemnification for nuclear accidents. When representatives of the private power industry told Congress that they would withdraw from nuclear power production unless Congress helped limit their liability for nuclear catastrophes, Congress passed the Price Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957). That Act acknowledged that private parties cannot obtain market-based coverage for risks associated with nuclear fuels. Id.; see also David M. Rocchio, The Price Anderson Act, 14 B.C. Envt'l Aff. L. Rev. 521, 534 (1987) ("Due to this potential for tremendous liability, the small likelihood of an accident does not mitigate the private sector's inability to insure against the consequences of such an accident.").

However, the Price Anderson Act does not cover all risks the rail industry confronts when it transports spent fuel. If a spent fuel shipment derails without releasing radioactivity (which is indeed the most likely accident scenario), government liability is limited. The Price Anderson Act covers the costs of a precautionary evacuation, if ordered by authorized persons, but it covers none of the costs of a potentially lengthy interruption to mainline rail service or the many unusual actions the railroad and its employees could be required to take in responding to such an accident.

In June 2001, Union Pacific for the first time received a quote for a premium for insuring a single spent nuclear fuel movement for certain losses not covered by its existing insurance or the Price Anderson Act. The cost of this "gap coverage" was prohibitively high – much higher than the total amount Union Pacific charged for the shipment. Because this type of coverage had never before been available (and may no longer be available in light of the events of September 11, 2001), Union Pacific does not know with certainty what types of incidents would trigger coverage or how complete any coverage in fact would be. Even if it could obtain expensive private insurance, therefore, Union Pacific would face the possibility of both incomplete coverage for a nuclear accident and the need to engage in costly and uncertain insurance litigation. In short, disputes about Union Pacific's liability exposure would dominate any rate proceeding.

2. Costs of Extra Services and Safety Precautions

Numerous other costs would have to be litigated. For example, Union Pacific is not permitted to carry spent nuclear fuels faster than 50 m.p.h. See AAR Circular OT-55. It often carries these materials at lower speeds as a prudential matter.[10] The Government frequently tenders spent fuel for movement in manifest trains, which could otherwise travel at speeds of up to 70 miles per hour. See Ratcliff Verified Statement at 4. The result is that the entire manifest train is delayed by the speed restrictions on the spent nuclear fuel cars. For example, Union Pacific trains carrying one shipment of spent nuclear fuel suffered thirty-three hours of delay, first while waiting for the spent nuclear fuel shipment to arrive and then due in

[10] Also, Union Pacific may not move trains carrying spent nuclear fuels faster than 35 m.p.h. on the reservation lands of the Confederated Tribes of the Umatillas in Oregon and the Shoshone Bannock Tribes in Idaho due to Government agreements with those Tribes. See Agreement ¶ 4.J.

large part to the mandatory speed restrictions. See Argument and Evidence of the Railroad Defendants, filed July 8, 1991, at 93. This delay increased Union Pacific's costs and impaired Union Pacific's goodwill with its other customers. Id. at 92-96. The Government disputes whether spent fuel shipments cause delays to other rail traffic.

The Government denies that railroads incur extra switching costs for nuclear shipments. The railroads believe that they do incur substantial extra costs. The Government's bills of lading invoke the switching practices of OT-55 prohibiting the railroads from using hump yards to switch nuclear cask cars and require them to use less-efficient flat switching instead. Id. at 96. In addition, nuclear shipments must be attached to a locomotive during switching; they cannot be pushed by a locomotive and allowed to move independently. See id. at 96-97. Railroads must also ensure that buffer and escort cars accompanying the nuclear cask car remain with that car.[11] These extra handling requirements lengthen the time and logistical efforts required to switch a nuclear shipment as compared with an ordinary car.

In addition, the railroads have in the past provided extra security for nuclear shipments. Id. at 98-99. For example, Union Pacific has provided supplemental security at all terminals affected by spent fuel shipments, and railroads must provide extra security when anti-nuclear demonstrators interfere with shipments. Id. at 98. The Government disputes both the extent of these costs and whether the costs are attributable to spent fuel shipments.

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11 The current practice is for casks of spent nuclear fuels to move with a buffer car at the front of the cask cars, a buffer car behind the last cask car, and an escort car behind the last buffer car. Escort cars carry the security personnel that the Government requires.

Finally, the Government has often requested dedicated train service for the movement of spent nuclear fuels. There are disputes between the parties regarding the costs of providing additional services required as part of this special train service.

3. Costs of the Scoville Branch

Union Pacific owns and maintains the 37-mile Scoville Branch line in southeastern Idaho solely for the Government's spent fuel shipments. See Colvin Verified Statement at 22. In 1990, only four carloads of other traffic moved along the line. Id. Were it not for the spent fuel traffic, the line's extremely low traffic volume would likely prompt Union Pacific to abandon the line. Id. Union Pacific believes that the costs of owning and maintaining the Scoville Branch and its heavy-duty rail should therefore be allocated to the spent fuel shipments to and from Scoville, Idaho. The Government disputes this position and takes issue with Union Pacific's cost evidence.

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In sum, Union Pacific and the Government disagree about the reasonableness of including various cost elements in Union Pacific's rates charged for the issue traffic and dispute the proper methodology for calculating a reasonable rate. If this case continued in litigation, Union Pacific would contend, and would cite data to show, that the rates it charges are not above the maximum reasonable rates allowable for the Government's unique nuclear cargo, which entails non-quantifiable risks and requires special treatment. Union Pacific would continue to press its arguments vigorously before the Board and in court, if necessary.

In the interest of resolving this matter expeditiously, Union Pacific is prepared to concede that the ratios established by the Settlement Agreement are reasonable estimates for the purpose of determining the maximum reasonable rates for the naval and utility shipments in regular and dedicated train service. Union Pacific makes this concession solely in the interest of allowing the Board to accept the parties' Settlement Agreement. Should the Board reject the Settlement Agreement or if the parties otherwise fail to settle this matter, Union Pacific would not concede that the agreed-upon ratios properly define the maximum legal rates it may charge for the service at issue.

C. Disputes Over Market Dominance

Finally, Union Pacific would argue that it does not have market dominance with respect to any of the movements at issue, except for naval shipments to Scoville, Idaho.[12] An environmental impact study prepared by the U.S. Department of Energy in 1995 indicates that trucking is an option for transporting these commodities. See U.S. Department of Energy, Programmatic Spent Nuclear Fuel Management and Idaho National Engineering Laboratory Environmental Restoration and Waste Management Programs, Final Environmental Impact Statement, Vol. 2, Part A, at 27 (Summary) & Table 5.11-4 (April 1995) (comparing risk to workers of rail transportation with risk to workers of truck transportation, and comparing truck versus rail volumes). Union Pacific may prevail on its argument that the U.S. Department of Energy's voluntary choice to select casks suitable only for rail movement when it had the option of selecting casks that could move by truck extinguishes any claim of market dominance, in which case the complaints would be dismissed.[13]

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[12] The railroads have conceded in the past that they possess market dominance over naval shipments to Scoville, Idaho, and movements of the empty casks used for those shipments. See Union Pacific, 867 F.2d at 649.

[13] There have not yet been any utility shipments of spent nuclear fuels by rail. In its 1989 decision, the D.C. Circuit found that there was insufficient evidence to support the Commission's determination that railroads had market dominance over such shipments, but it left open the possibility that market dominance could be found at a future date. See Union Pacific R.R. v. ICC, 867 F.2d 646, 650 (D.C. Cir. 1989). This settlement would render unnecessary future litigation between the Government and Union Pacific involving utility shipments.

Union Pacific is prepared to concede, solely for the purpose of the Board's consideration of the Settlement Agreement in this matter, that it has market dominance with respect to both the naval and utility shipments. Union Pacific's concession of market dominance is strictly limited to these Board proceedings. As with its rate reasonableness concession, if the Board does not approve the Settlement Agreement or if the parties fail to conclude their settlement for any reason, Union Pacific would withdraw its concession of market dominance.

II. THE SETTLEMENT AGREEMENT BENEFITS BOTH THE GOVERNMENT AND UNION PACIFIC.

The Government and Union Pacific reached their settlement after years of intense negotiations. Each side made numerous concessions to arrive at an agreement that is, on the whole, mutually beneficial and ensures that important spent fuel shipments will continue for the foreseeable future.[14] Section A describes the benefits of the settlement to Union Pacific, Section B describes the benefits to the Government, as Union Pacific sees them, and Section C addresses the mutual benefits of the settlement.[15]

A. Benefits to Union Pacific

By its adoption of the Settlement Agreement, the Government agrees not to continue to seek reparations against Union Pacific for past shipments and releases the railroad from all future liability related to rates charged for covered movements under the terms of the settlement. See Agreement ¶¶ 14, 24. The Government also agrees to rate levels that, although

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[14] Union Pacific negotiated the settlement on its own behalf, not on behalf of all the railroad defendants. Because Union Pacific and the Government have resolved major substantive disputes common to most or all of the other railroads, however, the terms of their settlement could be adapted for settlements with other defendants and smooth the way for complete settlement of these cases.

[15] The Government will discuss the settlement from its own perspective in a separate filing.

much lower than those in effect today, provide compensation that Union Pacific considers acceptable in light of the novel characteristics and risks of transporting nuclear material and in light of the other benefits provided by the settlement. In the future, Union Pacific will not face claims that these rates are unreasonable.

The Settlement Agreement also addresses two other sources of uncertainty with respect to Government payments to Union Pacific. First, the Government agrees to predictable and reasonable methodologies for ensuring that Union Pacific is reimbursed for extra services the Government requests. See id. ¶ 6.B. Under the settlement, the parties determine the estimated variable costs of these extra services in advance. See id. The Government agrees to pay the estimated variable cost of each extra service plus the applicable markup for that type of shipment as contribution to fixed costs. See id. The detailed procedures, which are designed to address the wide range of extra services that might be requested and to comport with Government procurement policies, provide greater certainty and avoid the need for repeated negotiations and litigation.

Second, because the nature and timing of security emergencies cannot be predicted, the costs Union Pacific will incur for addressing such emergencies cannot be estimated in advance. The Settlement Agreement addresses this uncertainty by specifying how the parties will calculate equitable compensation for any costs Union Pacific incurs in responding to a security emergency. See id. ¶ 6.C. The compensation will take into account Union Pacific's reasonable actual costs, not including recovery and cleanup costs that are otherwise indemnified by the Government. See id. The negotiated Settlement Agreement incorporates a markup over cost, accommodating Union Pacific's need to earn a reasonable contribution to fixed costs.

Finally, the Settlement Agreement provides the Government a financial incentive to use dedicated trains for spent nuclear products. See id. ¶ 13. Union Pacific prefers to move spent fuel in dedicated trains for safety reasons and because this avoids the imposition on other railroad shippers of delays from the special handling that spent fuel requires.[16] The costs of moving spent fuel in dedicated trains are higher than the costs of moving it in regular train service, but the settlement provides the Government with a favorable rate, and thus an additional incentive to request dedicated train service.

B. Benefits to the Government

In exchange for settling its reparations claims against Union Pacific, the Government benefits from the Settlement Agreement in several important ways. First, once the Board approves the Settlement Agreement, the Government will receive substantially reduced rates for covered shipments without the expense of litigation. In light of the risks and difficulties that Union Pacific incurs when it transports nuclear shipments, Union Pacific believes that these rates are below those the Government could obtain through litigation. Second, the Government obtains attractive rates for its future programs to relocate spent utility fuel without the need to litigate the question of Union Pacific's market dominance.

Third, the Government will enjoy unprecedented flexibility for future spent fuel programs. The Government can apply the Settlement Agreement's rate methodology to any Union Pacific route. Union Pacific undertakes to provide the Government rate quotations within 30 days of a request. See Agreement ¶ 5. The Government will not need to negotiate its own

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16 In 1980, the ICC held that it was an unreasonable practice for the railroads to charge for dedicated trains when the shipper does not request dedicated trains. Trainload Rates on Radioactive Materials, Eastern R., 362 I.C.C. 756 (1980), 364 I.C.C. 981 (1981), aff'd sub nom., Consolidated Rail Corp. v. ICC, 646 F.2d 642 (D.C. Cir. 1981).

switching arrangements with carriers that have established switching agreements with Union Pacific. See id. ¶ 6.A(1). If the Government desires unusual services, it will know the cost in a timely manner. See id. ¶ 6.B. If the Government develops new cars to transport utility fuel, the settlement rates will accommodate the new equipment. See id. ¶ 8.B. Because the settlement anticipates future needs, the parties will not have to amend it every time routes change, or when new equipment is developed.

Fourth, the settlement gives the Government an attractive option to ship spent nuclear fuel in dedicated trains. The Government sometimes requests dedicated trains, particularly when new types of shipments garner public attention.[17] The charge for dedicated trains under the Settlement Agreement is extremely favorable compared to Union Pacific's charges for dedicated trains today. The rate methodology also allows the Government to obtain further savings when it moves multiple shipments by dedicated train, reflecting Union Pacific's ability to spread the cost of the special movement over several shipments.

C. Benefits to Both Parties

The Settlement Agreement contains many elements that benefit both parties. First, the settlement replaces the uncertainty and enormous expense of litigation, with the certainty of an agreed rate mechanism that contains a simple methodology for updating rates. As discussed above, if the case continued in litigation Union Pacific and the Government would dispute the appropriate costing methodology and how to allocate cost elements, including the extra services required by spent nuclear fuel trains and the liability risks presented by such

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[17] As noted above, from Union Pacific's perspective, dedicated train service is desirable. Such service avoids the operating challenges associated with placing spent fuel casks, buffer cars, and escort cars in regular trains in a manner that satisfies all constraints imposed by safety and train-handling concerns.

shipments. The large number of movements, the length of time over which they occurred, and the novelty of the issues involved would multiply the time and expense associated with litigation. The Board's approval of the Settlement Agreement will allow the parties instead to apply a mutually agreeable straightforward rate mechanism. The litigation cost savings will be substantial.

Second, the Settlement Agreement's alternative dispute resolution procedure should minimize the likelihood of future litigation. See Agreement ¶ 15. Should a dispute or claim arise, the parties will first engage in informal negotiations. If those negotiations fail, the parties will select a qualified, neutral mediator. If the parties cannot agree on a neutral, they will ask the Board to appoint one. If the parties cannot resolve their dispute through mediation, they can turn to the Board for an interpretation of the terms of the Settlement Agreement. In addition, the parties have agreed to mechanisms for renegotiating portions of the settlement if the Board ceases to update URCS costs, if Union Pacific's ability to obtain indemnification for accidents is substantially reduced or its costs of obtaining indemnification are substantially increased, or if other changes in circumstances render continued adherence to the settlement terms grossly inequitable to either party. See id. ¶¶ 6.A(2), 25. These provisions ensure that the settlement will continue to meet the future needs of both parties, thereby reducing the number of disputes that must be arbitrated or litigated.

Third, the parties have clarified how much additional security will be provided on these trains. See id. ¶¶ 10.A, B. The Government will continue to provide escort cars that will accompany nuclear shipments. In the event a situation demands additional security, the agreement details steps the Government will follow to request Union Pacific's initiation of a security emergency response. See id. ¶ 10.C. Clearly, it benefits the parties to clarify security procedures, but this provision of the agreement will prove beneficial to the public as well should an emergency arise.

Finally, the parties have agreed to a method for updating rates annually to reflect changes in Union Pacific's system-average unit costs. See id. ¶ 7. This allows the Government to take automatic and full advantage of lowered costs whenever Union Pacific's operations become more efficient. At the same time, it allows Union Pacific to recoup certain types of costs that fluctuate and that are not within Union Pacific's control, such as fuel costs.

III. THE BOARD SHOULD APPROVE AND IMPLEMENT THE SETTLEMENT AGREEMENT.

The parties jointly ask the Board to approve their Settlement Agreement, prescribe the rate levels the settlement establishes, extinguish Union Pacific's liability for reparations, and dismiss Union Pacific from the pending litigation. The settlement will dispose of this decades-long proceeding without further litigation between the parties and may facilitate settlement between the Government and remaining parties. Section A explains why typical contract procedures are inadequate to resolve this dispute. Section B explains that the Board should prescribe the agreed-upon rates as reasonable. Section C explains that approval will further the Board's policy of promoting private resolution of litigation. Finally, Section D explains that the Board may dismiss Union Pacific from the litigation without affecting the status of the other parties.

A. Contract Procedures Are Inadequate to Resolve This Dispute.

A conventional rail service contract pursuant to 49 U.S.C. § 10709 is not a viable method of settling this case. Government traffic typically moves pursuant to common carrier rates tendered under 49 U.S.C. § 10721. The Government requests common carrier rates for a reason. Government contracting procedures are complex and restrictive, often resulting in delays. The use of common carrier rates would allow for more flexible dealings between the Government and the railroads, more closely mirroring standard commercial practices. Were the parties required to use standard Government contracting, a new procurement action would have to be initiated for each movement or series of movements, which means that neither party would ever have the certainty that would be provided by a comprehensive settlement. According to the Government, under the current state of governing law and regulation, a contract structured for a series of shipments could run no more than five years, precluding a long-term settlement agreement. Further, such a contract would require separate rate negotiations for each shipment. The temporal limits and the requirement of renegotiating rates for each shipment would deprive the parties of the certainty essential to this settlement. They would preclude any assurance that future administrations will adhere to the settlement, a situation that creates concern for Union Pacific. They would not provide the certainty of rate prescription, ensuring that Union Pacific will be bound by rates over a long period of time, which is important to the Government.

Because traffic movements at issue in this case are likely to continue well into the future, the parties desire a solution that is long term, as well as efficient and cost-effective. Standard Government contracting does not allow for this. A Board prescription, which would bind both parties indefinitely, would address these concerns. The settlement specifically allows for renegotiation to address future developments and to reduce the need for Board involvement or litigation. Settlement and Board prescription of the agreed-upon rates avoid the disadvantages of the procurement process to the benefit of both parties.

In short, the parties recognized the unsuitability of the contract process for resolving their dispute. They have negotiated a global settlement agreement that (i) sets a clear method for determining applicable rates, (ii) offers flexibility to adapt to circumstances that are likely to change over time, and (iii) addresses the concerns of both parties in a balanced and mutually agreeable manner. However, to provide the long-term certainty the parties desire, they cannot rely on a contract alone; the Board's involvement is necessary.

B. The Board Can Approve the Settlement Agreement and Prescribe the Rate Levels as Maximum Reasonable Rates.

There is an adequate basis for the Board to approve the Settlement Agreement and prescribe the agreed-upon rate levels. The railroads have conceded in the past that they possess market dominance over naval shipments to Scoville, Idaho, and movements of the empty casks used for those shipments. See Union Pacific, 867 F.2d at 649. Accordingly, the Board has the authority to prescribe rates for the naval shipments. For purposes of this Settlement Agreement and this Board proceeding only, Union Pacific is willing to stipulate that it has market dominance over other covered shipments, including utility shipments. Union Pacific makes this stipulation in the spirit of settlement, because the stipulation allows the Board to prescribe the rate levels for those additional shipments as well.

The parties' discussions have led to a series of compromise rates that the Board may prescribe as reasonable. For non-naval shipments, Union Pacific is willing to concede for purposes of settlement that the amount of 351 percent of certain variable costs is a reasonable estimate of the maximum reasonable rate for regular train service, given the unusual nature of these shipments, their unquantifiable risks, and the existence of numerous disputes about the extent and cost of extra services provided by the railroads. The variable costs used for the markup will be computed using system-average unit costs, with only a few movement-specific adjustments. This higher percentage markup is appropriate because the use of system-average costs in the formula will tend to understate Union Pacific's actual costs for these heavy, slowmoving, irregular, risky shipments.[18] In addition, the percentage markup is within the range developed by the application of the Board's Revenue Shortfall Allocation Method, which measures the average markup above variable costs that would have to be paid on all of a railroad's shipments of traffic that are moving at rates above 180 percent of variable cost to earn adequate revenues as determined under 49 U.S.C. § 10704(a)(2). See Rate Guidelines – Non-Coal Proceedings, STB Ex. Parte No. 347 (Sub-No. 2) (STB served Apr. 21, 2003) at 2 (calculating Union Pacific's four-year average RSAM markup percentage as 262-379 percent); See Rate Guidelines – Non-Coal Proceedings, STB Ex. Parte No. 347 (Sub-No. 2) (STB served May 21, 2004) at 3 (calculating Union Pacific's four-year average RSAM markup percentage as 224-311 percent).

The 250 percent rate level for Navy shipments to Scoville is reasonable for similar reasons. Although it believes it could obtain a higher rate through litigation, Union Pacific is satisfied that, in the overall context of this settlement, the 250 percent level will cover its costs for the Navy shipments and will offset the increased liability exposure it faces for moving spent nuclear fuels.

C. The Board's Approval of This Agreement Will Further Its Policy Favoring Private Settlement of Rate Disputes.

In approving this settlement, the Board will affirm its policy favoring the negotiated settlement of disputes. The Board has stated repeatedly that it urges parties to Board proceedings to attempt to settle their disputes. See, e.g., Procedures to Expedite Resolution of Rail Rate Challenges to Be Considered Under the Stand-Alone Cost Methodology, STB Ex Parte

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18 The average level of system-wide costs incorporates much lower costs for some types of service, for example, efficient, low-variable-cost shipments such as trainload or unit-train coal shipments. See, e.g., PPL Montana, LLC v. Burlington Northern & Santa Fe Ry., STB Docket No. 42054 (STB served Nov. 9, 2000) at 2 n.4.

No. 638 (STB served Apr. 3, 2003) at 2 (imposing mandatory mediation requirement to "encourage full or partial settlement"); Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001) at 27 (noting that Board "continue[s] to encourage private-sector solutions"); id. at 52 (declining to mandate disclosure of settlement agreements because "this would undermine our policy of encouraging private settlement agreements").

The Board's endorsement of private dispute resolution extends to rate agreements. The Board has approved settlements related to rates in the past. Cf. Association of Am. R.R. & Short Line & Regional R.R. Ass'n – Agreement – Application Under 49 U.S.C. § 10706, STB Docket No. S5R 100 (STB served Dec. 11, 1998) at 1 (approving a settlement that consisted of a "series of bilateral commitments by each subscribing Class I carrier to each subscribing smaller railroad").[19] The Board has also praised parties who resolve rate disputes without Board intervention. See, e.g., General Procedures for Presenting Evidence in Stand-Alone Rate Cases, STB Ex Parte No. 347 (Sub-No. 3) (STB served Mar. 12, 2001) at 2 n.5 (describing Union Pacific's agreement with Northern States Power to forgo the presentation of SAC evidence and "encourag [ing] [such] negotiated settlement of disputes").

D. The Board May Dismiss Union Pacific From the Matter While Maintaining Jurisdiction Over These Proceedings.

Union Pacific seeks, and the Settlement Agreement provides, a full release from all past and future liability in the ongoing litigation in return for its agreeing to be bound by lower rates and dismissal from the litigation. The Government has concluded that it will not be prejudiced by Union Pacific's dismissal, as reflected in its willingness to permit Union Pacific's

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[19] The agreement the Board approved in that proceeding consisted of a set of individual "bilateral commitments" that related to rates, much like the agreement between Union Pacific and the Government here.

full withdrawal from the litigation.[20] The Government will not be prejudiced by the dismissal of Union Pacific from the litigation, since it may continue the litigation against the remaining defendants. In Ford Motor Co. v. ICC, 714 F.2d 1157 (D.C. Cir. 1983), the court held that the dismissal of a settling joint-defendant from a rate case did not deprive the agency of jurisdiction over the complaint. Id. at 1168-69. The court observed that, in cases involving international rates, the agency had made market dominance and rate reasonableness determinations even though it had no jurisdiction over the carrier handling the foreign portion of the movement. Id. at 1169-70. The D.C. Circuit held that, by the same logic, the Commission could determine the reasonableness of an entire joint rate even though one of the participants in the joint rate had settled the litigation as to itself. Id. at 1170.

Ford Motor involved a joint rate charged by two carriers. In this case, after the Board approves and implements the Settlement Agreement, Union Pacific will no longer be a party to the existing joint rates; it will bill and collect on a Rule 11 basis. See Agreement ¶ 2. Nevertheless, the principle in Ford Motor is equally applicable to these facts. After the Board dismisses Union Pacific from the litigation, it may proceed to "determine market dominance and the reasonableness of a joint rate, even though all participants are not before the [Board] as defendants." Ford Motor, 714 F.2d at 1169-70 (citing National Insulation Transportation Committee v. Aberdeen & Rockfish Railroad, 365 I.C.C. 624, 628 (1982)).

Other Board precedents plainly permit complainants in a rate case to settle with some defendants and proceed against the remaining defendants. See, e.g., Bituminous Coal –

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20 Union Pacific will remain subject to the Board's subpoena power. However, Union Pacific will be under no obligation to retain documents or other material related to these proceedings that it would not retain in the ordinary course of business. See Agreement ¶ 23.B.

Hiawatha, UT, to Moapa, NV, 10 I.C.C.2d 259, 260 n.2 (1994) (noting that two of the three named respondents had reached separate settlements with the petitioner); Shell Chemical Co. v. Boston & Maine Corp., STB Docket No. 41670 (STB served Sept. 2, 1997) (dismissing several respondent railroads due to settlements).

In short, the Board may dismiss Union Pacific from the pending litigation and proceed to decide the remaining issues before it. In keeping with the Board's policy favoring private settlement of disputes, the Board should grant the parties' request for such relief.

CONCLUSION

For the foregoing reasons, the Board should approve the Settlement Agreement, prescribe the rate methodology agreed to by the parties, declare that any Union Pacific reparations liability for shipments covered by the complaints in these proceedings is extinguished, and dismiss Union Pacific from these proceedings.

Respectfully submitted,

J. MICHAEL HEMMER
LOUISE A. RINN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Tel: (402) 544-5000

CAROLYN F. CORWIN
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Tel: (202) 662-6000
Fax: (202) 662-6291

Attorneys for Union Pacific Railroad Company

September 15, 2004

EXHIBIT D

PROPOSED ULTIMATE FINDINGS AND ORDER

[Following Background and Discussion, insert the following:]

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

ULTIMATE FINDINGS

The Settlement Agreement is in the public interest and will be approved.

The Board finds that a future rate charged or collected under a § 10721 rate quotation by UP for transportation services for the commodities covered by the Settlement Agreement that is higher than those agreed to in the Settlement Agreement will violate 49 U.S.C. §§ 10702, 10707. The Board finds that the agreed rate methodology of the Settlement Agreement will result in a reasonable maximum level of rates for the transportation services covered by the Settlement Agreement.

It is ordered:

1. Under 49 U.S.C. § 10704, the above described Settlement Agreement is approved.

2. The Board prescribes the rate methodology set forth in the Settlement Agreement.

3. UP is dismissed as a party to these proceedings, and UP will not be required to participate as a party in these or any related proceedings involving claims against connecting carriers.

4. UP's liability for reparations on shipments addressed in these proceedings, including UP's liability to connecting carriers for contribution, is extinguished.

5. [See Government's Memorandum seeking an additional order regarding future proceedings against other defendant carriers.]

6. This decision will be published in the Federal Register on _______________, 2004.

7. This decision shall continue in force until further decision of the Board.

By the Board, Chairman Nober, Vice-Chairman Mulvey, Commissioner Buttrey

Vernon A. Williams
Secretary

EXHIBIT E

PROPOSED NOTICE

SERVICE DATE - ________________, 2004

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DEPARTMENT OF TRANSPORTATION
Surface Transportation Board

[STB Docket Nos. 38302S, 38376S]
U.S. Department of Energy and U.S. Department of Defense v. Baltimore & Ohio Railroad Company, et al.

On September 15, 2004, the U.S. Department of Energy and the U.S. Department of Defense ("Government") filed a joint motion with Union Pacific Railroad Company ("UP") asking the Board to approve a Settlement Agreement relating to the above docketed proceedings. A copy of the Settlement Agreement is attached hereto and is being published herein for comment of interested persons.

The parties to the Settlement Agreement note that these dockets are the last of the complaint proceedings that were filed in numerous dockets with the Interstate Commerce Commission, this Board's predecessor agency, pursuant to the Staggers Rail Act of 1980. The present docketed complaints named all the major railroads operating throughout the nation. The proposed Settlement Agreement covers the rates and service of UP, the nation's largest railroad.

The parties to the Settlement Agreement stress its wide coverage of future Government shipments of all types of radioactive materials and related commodities. UP concedes market dominance over all commodities and shipments covered by the Agreement for the purposes of the joint motion.

The parties further stress the flexibility provided the Government under the Settlement Agreement for future service of the involved commodities; the greatly reduced rates from the current levels for both regular common carrier service and for dedicated train service; and the full settlement of outstanding reparations claims of the Government against UP. The parties request Board approval of the Settlement Agreement and the prescription of the agreed rate methodology for establishing future rates for the covered movements.

To accomplish the settlement, the parties request the Board to dismiss UP as a party to these proceedings, order that UP is relieved from any further requirement to participate as a party in any further proceedings connected with the subject complaints, and order that UP is released from liability for reparations or from paying contribution if any connecting carriers are held liable for reparations on past through movements.

The Government requests a Board order clarifying its burden of proof in any future proceedings against carriers other than UP for reparations on through movements. If the Government seeks full reparations against a connecting carrier for alleged unlawfulness of the entire through rate, it acknowledges its burden to show the unreasonableness of the entire through rate. However, if it seeks reparations against a connecting line for only the alleged unlawfulness of the rate for the service over the connecting line, it seeks a ruling that its burden is to show only the unlawfulness of the connecting carrier's division or rate factor.

All filings in response to the notice must refer to STB Docket Nos. 38302S and 38376S, and must be sent to: (1) Surface Transportation Board, 1925 K Street, N.W. Washington, D.C. 20423-0001; (2) Stephen C. Skubel, Room 6H087 (GC-32) U.S. Department of Energy, 1000 Independence Ave., S.W., Washington, D.C. 20585; (3) Michael Glennon, Naval Sea Systems Command, 1333 Isaac Hull Avenue, SE, Mail Stop 1150, Washington D.C.20376-1150; (4) Michael L. Rosenthal, Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20004; and (5) Louise A. Rinn, Union Pacific Railroad Company, 1400 Douglas St. STOP 1580, Omaha, NE 68179. Responses to this notice are due on or before 45 days from the publication of the notice. Replies to the responses by the parties to the Settlement Agreement are due 30 days thereafter.

Board decisions and notices are available on our website at "WWW.STB.DOT.GOV."

Decided: __________________, 2004.

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

Vernon A. Williams
Secretary