



Jill K. Mulligan
Senior General Attorney

BNSF Railway Company
P.O. Box 961039
Fort Worth, TX 76161-0039
2500 Lou Menk Drive
Fort Worth, TX 76131-2828
817-352-2353 Direct
817-352-2399 Fax
Jill.mulligan@bnsf.com

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Part of

Public Record

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. 38302S, U.S. Department of Energy and U.S. Department of Defense v. Baltimore & Ohio Railroad Company, et. al.

STB Docket No. 38376S, U.S. Department of Energy and U.S. Department of Defense v. Aberdeen & Rockfish Railroad Company, et. al.

Dear Ms. Brown:

Enclosed please find the Joint Reply of the U.S. Department of Energy, the U.S. Department of Defense, ("DOE/DOD") and the BNSF Railway Company ("BNSF") to the opening comments filed November 29, 2012, by Western Interstate Energy Board and by CSX Transportation, Inc. in the above captioned proceeding.

In addition, DOE/DOD and BNSF have discovered that a reference in the second and third line of Section 4.F of the Settlement Agreement, which appears on page 8, should read "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)." Also enclosed please find a replacement page reflecting the correct language.

Sincerely,

/s/ Jill K. Mulligan

Jill K. Mulligan

Cc: Stephen C. Skubel
Terrence A. Spann

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

Jill K. Mulligan
Richard E. Weicher
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, Texas 76131
(817) 352-2353

Stephen C. Skubel
Jane P. Schlaifer
U.S. DEPARTMENT OF ENERGY
1000 Independence Avenue, S.W.
Washington, D.C. 20585
(202) 586-5579

Terrance A. Spann
U.S. DEPARTMENT OF DEFENSE
9275 Gunston Road, Suite 1300
Fort Belvoir, VA 22060
(703) 693-1270

December 28, 2012

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Pursuant to the decision of the Surface Transportation Board (“STB” or “Board”) served October 15, 2012, the U.S. Department of Energy and the U.S. Department of Defense (“DOE/DOD” or the “Government”) and BNSF Railway Company (“BNSF”) herewith file their reply comments. In particular, DOE/DOD and BNSF reply here to the opening comments filed November 29, 2012, by Western Interstate Energy Board (“WIEB”) and November 30, 2012, by CSX Transportation, Inc. (“CSXT”).

WIEB is an organization of 12 western U.S. states and three Canadian provinces interested, among other things, in the safe transportation of spent nuclear fuel (“SNF”) and high-

level radioactive waste (“HLW”). In its comments, WIEB expresses concern that certain provisions of the Settlement Agreement between DOE/DOD and BNSF (“Agreement”) could be applied in ways that are inconsistent with “the national interest in the full use of dedicated trains for SNF/HLW train service.” WIEB Comments at 2. We address each of the provisions as to which WIEB has expressed concern below. At the outset, however, we wish to make three overarching points.

First, the Agreement has been carefully crafted by the parties to reflect the current safety and handling requirements and practices regarding these shipments, and provide for flexibility to address the evolution of those requirements and practices generally, as well as leave the parties able to address the unique circumstances of individual movements of SNF/HLW as they arise. The Agreement is a long-term agreement, with an initial 25-year term and 5 year extensions available to the parties. Railroad operational practices and requirements, DOE/DOD shipper priorities, and even public perceptions of SNF/HLW transportation risk, are apt to change. With respect to dedicated trains, DOE/DOD and BNSF wish to point out that the Agreement fully supports the use of dedicated trains for SNF/HLW shipments. Specifically, the Agreement provides in Section 13 for “special or dedicated trains” at the Government’s option (or if Government regulations require) at an agreed upon rate. Where the Government does not ask for dedicated train service, then the Agreement provides in Section 13 that the SNF/HLW traffic may move at regular train rates in regular trains. While dedicated trains may seem the best practice for DOE/DOD shipments today, in the long term some form of alternative freight service may provide for the safest, most secure, reliable, and publically accepted movement of SNF/HLW. The Agreement provides the flexibility to move SNF/HLW in either dedicated train or regular freight service. The Agreement fully supports the use of dedicated trains for

SNF/HLW shipments if the DOE/DOD shipper determines dedicated train service is appropriate. While WIEB may believe that SNF/HLW should always move in dedicated train service, the Government has the discretion under the Agreement to make that election on a case-by-case basis.

Second, the provisions which WIEB has cited as being of concern are not materially different from, and in most cases are identical to, corresponding provisions in the settlement agreement in these proceedings between DOE/DOD and Union Pacific Railroad (“UP”), which was approved by the STB in 2005. *See U.S. Dep’t of Energy v. Baltimore & Ohio Railroad Company*, Docket No. 38302S et al. (served Aug. 2, 2005) (“August 2005 Decision”). For example, the DOE/DOD settlement agreement with UP fully supported the use of dedicated trains for SNF/HLW shipments in the same manner that this Agreement does. UP and the Government have operated under that settlement agreement for over seven years, and none of the concerns expressed by WIEB have been an issue.

Third, the Agreement between DOE/DOD and BNSF is a *settlement* agreement. It resolves difficult and complex issues. The STB has a longstanding policy of encouraging the private resolution of disputes through voluntary negotiations. August 2005 Decision, slip op. at 5. The STB applied that policy in approving the DOE/DOD-UP agreement and it should apply that policy to approve the DOE/DOD-BNSF agreement. Like the DOE/DOD-UP agreement, the Agreement settles decades-old issues between Federal government shippers and a major Class I railroad regarding reasonable rates and service obligations for moving radioactive material shipments. The Agreement reflects Federal government shippers and the railroad moving from a somewhat uncertain and perhaps even at times contentious business arrangement for transporting radioactive materials to more of a collaborative business partnership. *That result is clearly in the*

national interest. In crafting the Agreement, DOE and DOD have been sensitive to ensuring that flexibility exists to address third party (such as WIEB) input regarding radioactive material transportation in order for the government shippers to honor commitments to external stakeholder partners aimed at enhancing public acceptance of radioactive material transportation. The Agreement provides a viable, robust, long-term process and framework to move radioactive material shipments safely, securely, and efficiently, under commercial terms negotiated and agreed to by the parties, with the flexibility to involve external stakeholders in shipment operations. The Agreement thus supports the shared commitment of the Shipper, Carrier, and External Stakeholder to moving radioactive material by rail safely, securely and efficiently. Moreover, WIEB has not demonstrated that any provision in the Agreement traverses any law or regulatory policy that could justify disapproval of the Agreement.

Turning to the WIEB's specific concerns, WIEB complains that certain provisions of the Agreement could be used to "thwart provision of dedicated train service as near as possible to origin sites." WIEB Comments at 4 (¶ 1). In support of that concern, WIEB cites Section 6.D of the Agreement, which provides for BNSF to confer with the Government Shipper on alternatives if BNSF does not believe that a proposed movement can be handled safely over the track or rail facilities on the proposed route, and provides for compensation for any additional costs BNSF incurs in carrying out an alternative. WIEB suggests that BNSF might not use "fully-substantiated" beliefs, in an effort "to thwart otherwise desirable train service or to charge excessive Extra Service costs." This Agreement is for a long term, and the provisions cited here by WEIB are intended to provide a process for addressing future circumstances that might arise and potentially make individual movements of SNF unsafe. DOE/DOD and BNSF are confident that if and when these instances arise, the parties will confer in good faith to identify

feasible alternatives for transportation. Ultimately, either party has recourse to address disputes that arise under the Agreement pursuant to Section 15, which requires the parties to use their best efforts to negotiate a resolution, and, failing that, provides for resolution of any dispute by ADR or STB proceedings.

WIEB also complains that Section 5.A of the Agreement provides that origins and destinations for covered movements “shall be established and normally used interchange points for hazardous materials.” WIEB Comments at 4 (¶1). This provision protects against BNSF being required to handle an SNF/HLW shipment at a location where BNSF has not established the proper authority, practices and clearances to handle such hazardous materials. WIEB suggests that any point where a train can be safely loaded should do. However, there are unique operating regulations and practices relating to the transportation of hazardous commodities. In the event that a shipment needs to move from/through/to a location requiring BNSF to establish the proper authority, clearances and other practices to handle hazardous materials, if feasible, any costs associated with BNSF’s effort to establish that location as a future interchange location would be susceptible to being negotiated as an Extra Service in accordance with Section 6.B. By utilizing established interchange points for hazardous materials in the first instance, the parties are able to ensure that the protocols and practices are in place to support the handling of such movements.

WIEB next complains that Section 4.B of the Agreement provides that “BNSF will control selection of routes internal to its system consistent with subparagraph 4F.” WIEB Comments at 4 (¶2). Section 4.B provides for BNSF to follow the requirements of AAR Circular OT-55-E or its replacements for handling hazardous materials—including a 50 mph speed limit and the necessity for wayside bearing detectors. WIEB suggests that this

discriminates in some way against movements of SNF/HLW, but it does not. These are the same requirements that apply under OT-55-E (now OT-55-G) to all “Key Trains” containing certain types of especially hazardous materials, including specifically SNF/HLW, and moving over “Key Routes.” Contrary to WIEB’s suggestion, nothing in Section 4.B permits BNSF to “deny or frustrate dedicated train service.” As WIEB itself points out, Section 4.I of the Agreement specifically requires BNSF to comply with all regulations and requirements of DOT, FRA and other government entities with authority over SNF/HLW and other hazardous materials movements. So long as BNSF complies with those requirements and OT-55-E or its replacements, it is reasonable and customary for the railroad to choose the appropriate internal route or routes for hazardous materials traffic.

WIEB further complains about BNSF’s commitment in Section 4.D of the Agreement to use “commercially-reasonable efforts in accordance with ordinary rail industry practice to prevent [Government-supplied] cars and empty casks from being subject to unusual delays,” suggesting that no delays at all should be tolerated. WIEB Comments at 5 (¶ 3). Further, WIEB complains about the provision in Section 12 that BNSF may insert additional buffer cars of dry freight to a train carrying SNF/HLW, because this may slow up a movement. However, as we noted at the outset, the Government has the ability to elect to have SNF shipments move in dedicated train service. If the Government chooses dedicated train service, then the Agreement provides in Section 13.D for such trains to be used in the exclusive service of the Government Shipper. If the Government chooses regular train service, then the Agreement permits BNSF to provide service in regular trains, so long as those trains meet the conditions for carriage of hazardous materials and other requirements spelled out in the Agreement. Moreover, the experience of DOD/DOE indicates that these are not realistic issues for these government

shipments. Movement of empty casks/cars, buffer cars and escort cars typically occur in regular freight service, often independent of the loaded movement; for example, an escort and buffer car used for a loaded cask shipment would typically be available for movement to the departure location of a future loaded cask shipment long before the first loaded cask is unloaded and ready to be moved to its next loading location. Stated simply, the turnaround time for escort cars and buffer cars is much quicker than for cask cars. Empty cask movements could move in dedicated train or regular train service, depending on a myriad of factors, the primary of which is the need date for the next loading. Programmatic/schedule requirements would likely drive the DOE/DOD shipper's determination as to whether to incur the additional cost of dedicated train service for these empty cask moves to save a few days in transit over the much less expensive regular freight service. And, typically, it is simply not necessary to incur the additional cost of dedicated train service for these independent escort car and buffer car moves to save a few days in transit over the much less expensive regular freight service.

Finally, WIEB complains that the provisions of Section 6.B for "Extra Services"—beyond what BNSF would otherwise perform without extra charge in providing common carrier service for hazardous materials, and beyond all of the services identified in other sections of the Agreement—is troublesome because it states that BNSF need not provide Extra Services if it would disrupt BNSF's normal operations. WIEB Comments at 4-5 (Sec. 4). WIEB suggests it is unclear how BNSF will decide that the dedicated train shipment disrupts its normal operations. *Id.* at 5. But dedicated train service is not the kind of "Extra Service" discussed in Section 6.B. As provided in Section 13.A, dedicated train service is available to Government Shippers if they choose it and pay a defined surcharge. In any event, Section 6.B expressly provides that "BNSF will not unreasonably withhold Extra Services requested by the Government Shipper."

For these reasons, WIEB's concerns are misplaced. They provide no grounds for the Board to alter the terms of the Agreement between DOE/DOD and BNSF.

CSXT has a different concern. CSXT requests that the STB reaffirm the decision it made in approving the DOE/DOD-UP settlement agreement that the Agreement applies only to parties to the settlement and that it has no precedential effect as to other carriers in future proceedings. CSXT Comments at 2 (citing August 2005 Decision at 6). As DOE/DOD and BNSF made clear in their joint motion filed September 4, 2012, DOE/DOD and BNSF agree with that position and do not oppose the STB reaffirming it. DOE/DOD-BNSF Joint Motion at 10.

DOE/DOD would also add that while it anticipates that any future agreement with CSXT prescribing rates and services and settling this matter would be presented to the STB for approval, that question is not ripe since there is currently no agreement between the government and CSXT. Moreover, DOE/DOD believes that the issue is not germane to, and should not delay, this proceeding regarding the Agreement between BNSF and the government, where both parties are seeking such approval.

Dated: December 28, 2012

Respectfully submitted,

/s/Jill K. Mulligan

Jill K. Mulligan

Richard E. Weicher

BNSF RAILWAY COMPANY

2500 Lou Menk Drive

Fort Worth, Texas 76131

(817) 352-2353

Counsel for BNSF Railway Company

/s/ Stephen C. Skubel

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

/s/ Terrance A. Spann

Terrance A. Spann

U.S. DEPARTMENT OF DEFENSE

9275 Gunston Road, Suite 1300

Fort Belvoir, VA 22060

(703) 693-1270

Counsel for U.S. Department of Defense

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2012, copies of the foregoing Reply Comments have been served by prepaid first-class mail on counsel for the major carrier parties of record and counsel for other parties participating in related proceedings by mailing copies to the following:

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

Montana Rail Link, Inc.
101 International Way
Missoula, MT 59808

Michael L Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004-2401

Paul Hitchcock
Associate General Counsel
CSX Transportation, Inc.
500 Water Street-J1 50
Jacksonville, FL 32202

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

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

George H. Kleinberger
P.O. Box 8002
Clifton Park, NY 12065

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

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

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

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

Gayla L. Thal
Danielle E. Bode
Union Pacific Railroad Company
1400 Douglas Road, Stop 1580
Omaha, NE 68179

Ronald E. Fittrow
500 Water Street
Jacksonville, FL 32202

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

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

David H. Coburn
Christopher G. Falcone .
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Terence M. Hynes
Sidley Austin Brown & Wood, LLP
1501 K Street, N.W.
Washington, D.C. 20005

Robert H. Wheeler
General Counsel
Wisconsin Chicago Link Ltd.
17641 Ashland Avenue
Homewood, IL 60430

Thomas J. Litwiler
Fletcher & Sipple LLC
29 North Wacker Drive
Suite 920
Chicago, IL 60606

Ken Niles
WIEB High Level Radioactive Waste
Committee
Western Interstate Energy Board
1600 Broadway
Suite 1700
Denver, CO 80202

/s/ Jill K. Mulligan

Jill K. Mulligan

regular train transit times and day of week schedules BNSF provides for shipments of similar size and weight.

E. Limitations. BNSF shall not be responsible under this Settlement Agreement for any non-rail transportation, storage, loading or unloading. BNSF 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 BNSF'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