

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

213019

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Public Record

United States Department of Energy
and
United States Department of Defense

v.

Aberdeen & Rockfish Railroad Company, et al.

ICC Docket No. 38376S

213020

UNION PACIFIC'S REPLY COMMENTS

The Board should grant the relief jointly requested by the U.S. Department of Energy and the U.S. Department of Defense (the "Government") and Union Pacific Railroad Company ("Union Pacific") in their Joint Motion for Approval of Settlement Agreement and Prescription of Rate Methodology, filed September 15, 2004. No commenter has even suggested that granting this relief would be inappropriate.

Specifically, the Government and Union Pacific jointly asked the Board to:

- (i) approve the Settlement Agreement;
- (ii) prescribe the rate methodology set forth in the Settlement Agreement;
- (iii) dismiss Union Pacific as a party to these proceedings and relieve it from any obligation to participate as a party in these or any related proceedings against connecting carriers; and

(iv) hold that Union Pacific's liability for reparations on shipments addressed in these proceedings, including Union Pacific's liability to connecting carriers for contribution, is extinguished.

Board action with respect to each of these requests is necessary for the Settlement Agreement to take effect. See Agreement ¶ 23.A. ("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.").

In their Joint Motion and in their separate memoranda in support of the Settlement Agreement, the Government and Union Pacific explained that the Board has jurisdiction to grant the relief jointly requested and that the Settlement Agreement is in the public interest. The Board provided the public with notice and an opportunity to comment. See 69 Fed. Reg. 64,629 (Nov. 5, 2004). Only two parties – CSX Transportation, Inc. ("CSX"), and Norfolk Southern Railway Company ("NSR") – filed comments, and neither opposes the Settlement Agreement or the relief jointly requested by the Government and Union Pacific. The Board should thus grant the relief requested in the Joint Motion.

A. The Government's And Union Pacific's Joint Request For Relief Is Unopposed.

The commenting parties raise two concerns related to the Settlement Agreement, one regarding the potential precedential effect of Board approval, the other regarding the Government's request that the Board establish "ground rules" for future proceedings. Neither concern presents any reason to withhold the relief jointly requested by the Government and Union Pacific.

1. The Settlement Agreement's terms and obligations apply only to Union Pacific and the Government.

The commenting parties ask the Board to make clear "that the rate and service terms and obligations set forth in the Settlement Agreement apply only to UP and the Government and that Board approval of them does not alter or impose any additional common carrier obligation on non-settling carriers beyond the common carrier obligations recognized under existing law." Comments of CSX at 4; see also Comments of NSR at 4 ("NSR does not believe that the terms of the Settlement Agreement between UP and the Government should be binding on NSR").

Union Pacific does not object to such a clarification. The Government and Union Pacific specifically asked the Board to approve the agreement "without prejudice" to "other actions insofar as they involve all other carriers in these proceedings." Joint Motion at 2. They explained in their Joint Motion that "[t]he Settlement Agreement does not purport to resolve any of the issues discussed above for any of the other defendants." Id. at 10. The Board's approval of the Settlement Agreement would only settle the case as between the Government and Union Pacific, prescribe maximum rates for Union Pacific's portion of the haul for any future shipments of the commodities at issue, dismiss Union Pacific from these proceedings, and extinguish Union Pacific's liability for reparations in connection with these proceedings. Board approval would also ensure that the Board will retain jurisdiction to resolve disputes that may arise under the Settlement Agreement. See Agreement ¶ 15.B.¹

¹ In its Comments, CSX observes that Board approval of private settlement agreements is appropriate when the Board "has continuing jurisdiction to ensure that the agreement is enforced." Comments of CSX at 6.

Union Pacific believes that the Settlement Agreement may help establish a framework for resolving the Government's claims against the remaining defendants, but it recognizes that some or all of the framework may be unacceptable to some or all of those carriers, and that the specific rate and service terms in the Settlement Agreement apply to Union Pacific only. It also recognizes that those carriers' common carrier obligations are defined by law and are not changed by anything in the Settlement Agreement.

Union Pacific believes it made clear that it does not intend the Board's approval of the Settlement Agreement to create binding effects or obligations on other carriers (except for effects directly associated with dismissing Union Pacific and extinguishing its liability for reparations in these proceedings). It does not object to the Board's emphasizing that point, so long as the Board makes equally clear that it is fully granting the relief jointly requested by the Government and Union Pacific.

2. The Settlement Agreement is not contingent on the Board's response to the Government's request that the Board establish "ground rules."

The commenting parties also express concern about the Government's request that the Board establish certain ground rules for future proceedings involving non-settling carriers. The Government addresses the commenting parties' concerns in a separate reply.² Union Pacific emphasizes that the Settlement Agreement is not contingent upon the Board's granting the Government's request. Thus, even if the Board defers or denies the Government's request, it should proceed to approve the Settlement Agreement, and thereby bring to a close a

² As it would not be a party to future proceedings (if any), Union Pacific takes no position on the proper procedures for determining any non-settling carrier's liability or reparations. See Joint Motion, p. 14 n.16.

significant portion of the pending proceedings, by granting the relief jointly requested by Union Pacific and the Government.

B. Granting The Relief Requested Jointly By The Government And Union Pacific Would Be In The Public Interest.

The commenting parties acknowledge that the Board has the authority to resolve this long-standing maximum rate complaint by approving the Settlement Agreement and granting the relief jointly requested by the Government and Union Pacific. See Comments of CSX at 5 & n.3; see also Ford Motor Co. v. ICC, 714 F.2d 1157, 1169-70 (D.C. Cir. 1983) (discussing the agency's flexibility to adopt procedures necessary to address settlements in rate cases).³ The Board should exercise that authority here, where the requested actions are so clearly in the public interest.

In their Joint Motion and their separate memoranda in support of the Settlement Agreement, the Government and Union Pacific described the broad public interest benefits associated with approving the Settlement Agreement and granting the other relief jointly requested by the Government and Union Pacific. The commenting parties do not dispute these benefits. As the Government and Union Pacific have explained, the Settlement Agreement resolves the Government's complaint in this complex proceeding with respect to a major defendant. It avoids expensive and protracted litigation between the Government and Union

³ CSX observes that settlements are typically accomplished through private agreements, but the parties have explained why contract procedures are inadequate to resolve this dispute. See UP Memorandum at 21-23. Moreover, as CSX notes, there is ample precedent for Board approval of private agreements in situations such as this one, in which the Board would maintain jurisdiction over the agreement. See Comments of CSX at 6 & n.5; see also, 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 UP's agreement with Northern States Power to forgo the presentation of SAC evidence and "encourag[ing] [such] negotiated settlement of disputes").

Pacific by relying on private initiative rather than regulatory authority. It provides a long-term, comprehensive set of procedures for addressing rate and service issues relating to spent fuel now moving or likely to move in the future on Union Pacific. It provides the flexibility needed to address issues that may arise in the future with respect to shipments of spent fuel on Union Pacific. Finally, it offers a potential framework for resolving claims against connecting carriers.

CONCLUSION

For the foregoing reasons, the Board should grant the relief jointly requested by the Government and Union Pacific.

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CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 14th day of January, 2005, I served a copy of the foregoing document by prepaid first-class mail on the following:

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