

STB EX PARTE NO. 290 (SUB-NO. 2)¹

RAILROAD COST RECOVERY PROCEDURES

Decided December 29, 1999

The Board grants the request of Western Coal Traffic League (WCTL) to inspect all Rail Cost Adjustment Factor (RCAF) workpapers used in developing the RCAF. The American Association of Railroads (AAR) is ordered to make available for inspection the confidential RCAF workpapers under the condition that the proprietary workpapers are subject to a standard protective order and treated as "Highly Confidential."

BY THE BOARD:

BACKGROUND

Under the provisions of 49 U.S.C. 10708, the Board periodically issues the RCAF, which is an index reflecting changes in railroad costs. The RCAF data are developed by the AAR, and are reviewed by Board staff and audited by an independent accounting firm.²

In a filing transmitting to the Board its data for the fourth quarter 1999 RCAF, the AAR disclosed that the previous quarter's filing contained an error in the calculation of the weights for the Materials and Supplies component of the RCAF for the third quarter of 1999. The error, which was discovered by the AAR, was not of sufficient magnitude to alter the RCAF.

Nonetheless, in a letter dated September 13, 1999, WCTL asks the Board to direct the AAR to permit private parties to review the AAR's RCAF calculations. WCTL notes that shippers use the RCAF to periodically adjust many rail rates, and thus it asks that affected shippers be given the opportunity to review the accuracy of the underlying calculations. The AAR did not respond to WCTL's request.

¹ This decision embraces STB Ex Parte No. 290 (Sub-No. 5), *Quarterly Rail Cost Adjustment Factor*.

² The Board conducts regular staff reviews of the RCAF workpapers, and of the audits conducted by certified public accounting firms, whose audit plans are approved and monitored by Board staff.

DISCUSSION AND CONCLUSIONS

WCTL's request will be granted. Clearly, the accuracy of the RCAF is important, and although the data are already audited, mistakes are possible. Granting WCTL's request will enhance the accuracy of the data, and will also maintain shipper confidence in the RCAF process.

We recognize that, in 1990, our predecessor, the Interstate Commerce Commission (ICC), issued an order denying WCTL and its consultants access to the RCAF workpapers on the ground that the information is proprietary and commercially sensitive.³ However, as WCTL notes, in various proceedings, the Board has authorized disclosure of commercially sensitive information provided the parties agreed to be bound by appropriate protective orders. Our experience has been that the protective orders and confidentiality agreements entered in recent Board proceedings have been effective.⁴ We see no reason why the RCAF workpapers can not be similarly protected pursuant to an appropriate order. Therefore, we grant WCTL's request and order the AAR to make available for inspection the confidential RCAF workpapers under the condition that the proprietary workpapers are subject to a standard protective order and treated as "Highly Confidential."

It is ordered:

1. WCTL's request is granted.
2. AAR shall make available for inspection the confidential RCAF workpapers under the condition that the proprietary workpapers are subject to a standard protective order and treated as "Highly Confidential."
3. This decision is effective on January 5, 2000.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

³ *Railroad Cost Recovery Procedures*, Ex Parte No. 290 (Sub-No. 2) (ICC served September 21, 1990).

⁴ For example, we protect the very sensitive STB Carload Waybill Sample data using confidentiality agreements. Protective orders were also successfully used to protect commercially sensitive information in STB Finance Docket 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation*, and STB Docket No. 41989, *Potomac Electric Power Company v. CSX Transportation, Inc.*